

**Independent  
Mediators**

# Compulsory ADR.

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## Compulsory ADR.

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Last week the CJC published a report on Compulsory ADR. The report was commissioned to look at the issues in relation to Compulsory ADR. It states that, *'it is not made in the context of any specific proposals for the introduction or extension of compulsory ADR but in order to inform possible future reform and development in this area'*.

I have read the report, the CMC response to it and various industry commentary with interest. The term "compulsory mediation" for many brings a shudder to the spine as mediation is viewed as a voluntary process where parties attend with a genuine desire to resolve their dispute. As Lord Dyson said in the course of the judgment in *Halsey v Milton Keynes*, *'the court's role is to encourage, not to compel'*. Many fear that compelling parties to attend could mean mediation becomes a box ticking exercise. However, the fact that mediation is being spoken about in the context of this report and at this level should be welcomed as evidence that it is no longer regarded as an alternative form of dispute resolution, but simply dispute resolution.

Compulsory mediation, good or bad? It is all in a question and how you frame it. Ask me that question and I would say bad. Ask me whether I think mediation embedded into the litigation journey as a step on the road, part of the process, is good or bad the answer may be different. Like any professional working in the mediation sector, I can see both sides!

**If you have not done so yet you can read the CJC report here. - [Click here](#)  
And the CMC response here. - [Click here](#)**

**The report addresses two questions:**

- 1 Can the parties to a civil dispute be compelled to participate in an ADR process?  
(The "legality" question)
- 2 If the answer is yes, how, in what circumstances, in what kind of case and at what stage should such a requirement be imposed? (The "desirability" question)

**In the Executive Summary of the report the responses to the two key questions:**

- 1 The legality question: we have concluded that parties can lawfully be compelled to participate in ADR.
- 2 The desirability question: we think we have identified conditions in which compulsion to participate in ADR could be a desirable and effective development. In doing so we recognise that the compulsory ADR processes which are already part of the civil justice system in England and Wales at a number of points are successful and are accepted.

Not all matters are right for mediation. A compulsion to mediate something which seems unseizable may cause resentment and frustration with the process. However, there is an element of compulsion already. The threat of cost sanctions for an unreasonable refusal to mediate may mean some are attending mediation not because they want to but because they feel compelled to. May it not be better to shift the emphasis from the negative, providing reasons not to mediate, to the positive and emphasising why parties should mediate. Emphasising possible cost savings, time savings, reaching a commercial settlement on mutually acceptable terms and the preservation of commercial relationships. It may also waylay any fears that proposing mediation may be perceived as a lack of confidence in the strength of a case.

The report states that the factors requiring consideration whenever compulsion is being considered will include:

- the cost and time burden on the parties;
- whether the process is particularly suitable in certain specialist areas of civil justice;
- the importance of confidence in the ADR provider (and the role of regulation where the provider is private);
- whether the parties engaged in the ADR need access to legal advice and whether they have it;
- the stage(s) of proceedings at which ADR may be required; and
- whether the terms of the obligation to participate are sufficiently clear to the parties to encourage compliance and permit enforcement.

There are many elements to consider. I do not propose to attempt to consider them all here! The report was an initial review and should be regarded as such. Using the journalists five W's (and one H!) some initial thoughts below:

### **WHO**

Who will be consulted when examining how to introduce this?

Are there enough suitably qualified, experienced, insured mediators to fulfil demand? If the quality of the mediators is lacking, then this will obviously prove detrimental to mediation as a whole.

Who will initiate this, lawyers to parties, judges?

Will judges mediate?

### **WHAT**

What will this be used for, in other words the types of disputes – neighbour, boundary, commercial claims, probate, etc?

What mechanisms will be in place for feedback and monitoring?

What will be the sanctions for non-compliance?

### **WHEN**

When in the process should the notion of compulsory mediation be introduced?

The report suggests a procedural rule which requires parties to attempt ADR at a certain point or points, and/or empowers the court to make an order to that effect.

We are often asked when the best time is to mediate. That sweet spot when there is enough information available on the dispute and costs incurred are still reasonable. From our own records at Independent Mediators, the timing of mediations falls into the following categories:

Pre issue – 45%,

Post-issue and pre-disclosure – 40%

Post disclosure – 15%

**When will this be implemented?**

## **WHERE**

Will this be introduced in the court? Via online information?

## **WHY**

Why do we need compulsory ADR?

Is the encouragement already in place not sufficient, such as costs sanctions?

## **HOW**

Could this be via an information session with the judge? With party's solicitors? With a pack provided by the court which details mediation, what it is, how it works, pros and cons. Parties need to sign to say have been shown this and understand it.

Greater education and access to information about the process.

The commercial sector could learn from the processes currently in place in the other sectors and jurisdictions. Jurisdictions where parties can be compelled to use ADR already for example, Italy, Greece, Ontario, and several in the US.

As with anything a test market will need to be carried out as for the disclosure pilot. Look at what has gone before and use the best parts of them, MIAM, ACAS, etc.

How would parties be compelled? The threat of costs sanctions already exists would it mean if ADR is not attempted then the case could not proceed to court? Would this risk a breach of article 6 of the Human Rights Act? The sanctions must be proportionate.

## **CONCLUSION**

The references in the report to ADR happening at '*no expense of time or money to the parties*' are concerning but perhaps this refers to the initial information provision rather than the mediation itself. Are parties going to be invested in a process in which they have not invested time or money? You would not go to a car showroom and say, '*I would like to buy a car that has had no money or time spent on constructing it please,*' and expect it to be safe and reliable. You get what you pay for, and a regulated, professional body cannot be available for little or no cost. To be as effective as possible time needs to be spent on proper preparation and the process. The potential costs savings of not proceeding to court can be substantial. CEDR's Ninth Annual Mediation Audit published in 2021 estimated £4.6billion saved by parties engaging in mediation.

Like with most things there is not a one size fits all solution. We have different courts for a reason – Small Claims, County Court, High Court, Family Court, Supreme Court, because claim values, complexity, subject matter differ greatly and specialists in those areas are required. It may be that there are different approaches to compulsory ADR depending on the court in which the matter is listed to reflect these differences. However, the principle of considering mediation as part of the litigation journey as opposed to an 'alternative' to it must be a good thing.

A well-functioning civil justice system should offer a choice of dispute resolution methods so accessible to all. I welcome the report and the aim to integrate mediation into the justice system as a dispute resolution mechanism, and not just the "poor relation" of an alternative dispute resolution mechanism.

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