

Mandatory mediation : an oxymoron?

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Mandatory mediation

- In England and Wales, there is currently a debate about whether some form of ADR should be made compulsory in some or all civil and family claims. In other Commonwealth jurisdictions, that decision has been made (see Ontario for an example)
- The Civil Justice Council has recently published a report called “Mandatory mediation” which explores whether it would be a:
 - (a) Legal and
 - (b) DesirableFor such a system to be introduced.

Is it legal?

- The short answer is yes: there has been debate in England and Wales following the case of Halsey [2004] 1 WLR 3002 where the Court intimated that compulsory mediation would not necessarily be compatible with Article 6 of the European Convention on Human Rights (which is enshrined in UK domestic legislation under the HRA 1998).
- The view of the working group is that it is not disproportionate nor unfair in the civil justice system to compel ADR if a judicial process has started, or before it is permitted to start (and ECJ and ECHR jurisprudence supports this) providing it is :
 - Proportionate
 - Able to be accessed by all parties on an equal footing
 - Fair and does not cause extra costs or excessive delay.

Is it desirable?

- It already happens in practice
- MIAM (family justice)
- ACAS (employment cases)
- FDR (financial remedies)
- RTA small claims protocol
- Ebay dispute resolution system .
- Ad hoc in other civil cases and cases involving those lacking mental capacity relating to their Property and Affairs.

Why is it desirable?

- Adjudication by a court should be a measure of last, rather than first resort.
- Resolutions reached by agreement are more likely to occur and not require enforcement action.
- It enables the parties to understand the motivations, and to seek to determine their “interests”. That is often not the same as the legal claim that they have.
- Enables a place for both parties to express how they feel (feelings are important and central even in the most hard nosed of commercial cases).
- It enables a settlement to be reached that can involve non legal solutions and “re-set” a relationship
- It saves time and money.
- Designed to solve problems: builds consensus and collaboration.

What would need to be in place?

- Legal education of the public as to its advantages
- Training of the judiciary - if it could become part of the “judicial” toolbox
- Access to legal advice to both parties
- In some cases, lawyers present at any mediation
- A guarantee of proportionality in any “fee paid” mediations .
- Equal playing field for both parties in the conduct of any ADR
- Effective sanctions if it does not take place .

Thank you for listening

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