Is mandatory mediation the future?

Introduction

Mediation – a structured, interactive process whereby an impartial third party assists disputing parties to resolve their conflict through specialised communication and negotiation techniques (Wikipedia, 2021) – has a staggeringly high rate of success. It is commonly claimed that at least four out of five mediations lead to settlement at or shortly following mediation and in recent years the figure has been put as high as one in ten (CEDR, 2020, p16). Such impressive results, combined with backlogs in the court system exacerbated no doubt by the Covid-19 pandemic, and years of budgetary cuts brought about by policies of austerity (Law Society, 2020) have unsurprisingly led many to question whether mediation might play a more central role in dispute resolution in the future (Slingo, 2021).

Since mediation is essentially voluntary in nature, 'mandatory mediation' might appear to be something of a contradiction in terms. Any form of compulsion requiring parties to mediate seems to be at odds with the concept of parties freely choosing to come together, and embark upon their own journey to settlement. Like Plutarch's thought experiment (Plutarch, 75), is it still really mediation if you take away the voluntariness of engaging in the process in the first place? When you replace the entire deck of Theseus' ship, is it not a different thing you have created? And how can mediation ever be said to be mandatory if parties are free to leave the mediation at any point after it has commenced?

What is meant by 'mandatory mediation' and how far any compulsion can be legitimately employed in a society that upholds the right to a fair trial, are issues this brief essay intends to explore. It will contemplate whether an obligatory process is likely to be introduced in England and Wales, what it might look like and what its implications are on the right to a fair trial, including the need for access to justice, and affordable justice.

It will do that: first, by considering the current approach of the justice system to mediation in England and Wales and how the same compares to other jurisdictions; second by considering what 'mandatory mediation' means; and third by identifying the main arguments in favour and against mandatory mediation and critically analysing them within a framework of what might be considered acceptable to the common law and human rights law and their conceptions of a right to a fair trial and access to justice.

The current regime

Generally speaking, unless parties have already made some prior contractual commitment, litigants are not specifically required to mediate. They are subject to a general duty to consider whether their dispute can be settled by alternative dispute resolution (ADR), which of course includes mediation by virtue of rule 1.4 of the Civil Procedure Rules (CPR). And importantly, that duty is policed by the imposition of costs sanctions whereby unreasonable refusal to engage in ADR including mediation can justify an order for costs being made against an unwilling party (see *PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288, [2014] 1 WLR 1386* per Briggs LJ*;* and also *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195). However, a failure to mediate does not have any automatic adverse consequences. It is merely one thing relevant to conduct that can be addressed by the Court when making a costs order as a part of a wider balancing exercise (see *Gore v Naheed* [2017] EWCA Civ 369, [2017] 3 Costs LR 509 per Patten LJ).

The closest the civil justice system comes to positively requiring mediation in England and Wales is in the context of family law and employment disputes. In family proceedings, the Children and Families Act 2014 made it compulsory for separating couples to go through

a Mediation Information and Assessment Meeting (MIAM) before a hearing in the Court. Such assessment however is not itself a mediation. Nevertheless a form of ADR called Early Neutral Evaluation (ENE) has been introduced by rule 3.1(2)(m) CPR and become increasingly commonplace. Whilst not obligatory, the Courts can and routinely do require ENEs, especially in certain types of family proceedings such as inheritance claims. Such process whilst very similar to mediation is not identical. It involves the evaluation of the merits of a case, whereas mediations can be merely 'facilitative' and need not involve any assessment of merits. It is of note that ENEs are also a process foist upon the parties, rather than being voluntarily engaged in – a predicament which the Court of Appeal has held to be lawful in the case of *Lomax v Lomax* [2019] EWCA Civ 1467 where one party objected to engaging in any ENE.

In the employment context the Advisory Conciliation and Arbitration Service (ACAS) is also becoming increasingly mainstream. Employment tribunals are required by rule 3 of the Employment Tribunals Rules of Procedure to 'encourage the use by the parties of the services of ACAS, judicial or other mediation...'

Consequently, whilst it cannot be said that mediation is 'mandatory' in England and Wales, it is positively encouraged. In the light of the *Lomax* decision it can also be said that the path to making mediation mandatory has now been opened up. In contrast to England and Wales, other jurisdictions have already embarked a long way down that particular path. Several European countries including Italy, Germany Turkey, and Portugal have all made inroads into making mediation mandatory. Australia, Canada, and some of the states of the USA, have also introduced some form or other of presumptive ADR. A comparative study of those different systems is beyond the scope of this short essay, but it is important to note that each has its own system of referring cases which might be designed with a view to filtering out inappropriate cases or ensuring access to justice remains open for cases requiring judicial input.

The results of such mainstreaming are also widely reported as being positive in easing access to justice, and delivering resolution more affordably. In Australia, for example, where mediation has been mainstreamed with all courts empowered to refer cases to mediation, in 2018 most cases were in fact referred to mediation and most cases in fact settled avoiding the expense of litigation (Federal Court of Australia, 2019). In New York, the system of referring all civil and commercial disputes to mediation before litigation was widely considered likely to avoid, not incur additional, costs (Clark, 2019). And in Germany it was reported that the presumptive form of mediation introduced in 2000 had delivered significant costs savings (Macduff, 2016, chapter 12).

What is 'mandatory mediation'?

It is clear that even jurisdictions which automatically require mediation only require parties to engage in the process of mediation and they do not require parties to accept whatever can be negotiated during that process. Indeed, it would be unlawful to compel parties to accept some form of agreement in any way which had the effect of overbearing their will. Such duress and coercion would offend against common law conceptions of party autonomy, free will and the freedom of contract.

Provided a party is free to leave a mediation and the process does not otherwise involve any illegitimate coercion, it is difficult to see how their contractual freedoms might be offended. Whether requiring mediation might offend against a party's right to a fair trial and their access to justice are also considerations beyond the remit of this short essay which call for further enquiry, but the short answer to such inquiry is invariably likely to be the same: it depends. What level of compulsion is applied, how its adverse effects are mitigated against,

whether it applies indiscriminately or has exceptions, and whether there are failsafe measures built into the system, are all parameters of the mandatory procedure that might be calibrated, or recalibrated by intelligent design and trial and error.

A process that merely requires parties to see if they are willing to settle need not infringe against their rights to a fair trial, depending how that procedure is administered (see the Opinion of AG Kokett in *Rosalba Alassini v Telecom Italia SpS* C-317/08 [2010] 3 CMLR 17 ECJ, which is consistent with *Lomax*, which considered Italy's requirement for automatic mediation referrals in telecoms disputes not to infringe against a party's right to a fair trial). There are a range of options for setting up any system of mandatory mediation and for administering it in a way which encourages and does not undermine access to justice. At one end of the spectrum, the courts might srongly promote mediation, perhaps through judicial policy and the greater use of costs sanctions as in England and Wales, or perhaps by even subsidising the cost of mediation as in California (Winestone, 2015). At the other end of the spectrum, it might be an outright precondition to litigating certain types of disputes that parties attempt mediation before litigating, as is the case with telecom disputes in Italy case and civil and commercial disputes in New York (Clark, 2019). Between the two extremes, there is plenty of middle ground rife for creativity and tinkering with systems design. Courts might for example, as in the case of Australia, have powers to refer disputes to mediation, and be expected to exercise them in most cases unless cases are considered inappropriate, perhaps with certain categories of recognised exceptions, and subject to judicial discretion.

There will of course be cases where the parties may have good reason for refusing to mediate. They may require an order of the Court which has greater effect than their own agreement. They may require a decision on a new point of law, or a matter of public importance which needs to be resolved definitively. Alternatively, it may simply be indignant in certain circumstances to expect parties to mediate. It is not difficult to imagine, for example, an innocent party to a contract that has already compromised his claim accepting less than his contractual entitlements at a previous mediation being indignant when expected again to mediate his dispute against and to consider accepting anything less than his full entitlement..

For the purposes of this essay, it will be assumed that any system requiring 'mandatory mediation' is a requirement to engage in the process of mediation according to some procedure which itself is capable of being designed, and subsequently recalibrated, with a view to mitigating against the injustice of requiring mediation where it might otherwise be pointless or unfair to do so.

Critical analysis

The case in favour of mandatory mediation largely speaks for itself. Proponents regularly point to high success rates, reduced overall costs, speed, savings for the court and legal services (and thus other court users), and the benefits of endogeneity whereby confidentiality and relationships can be preserved, the trauma of trial avoided, and resolution arrived at by the parties themselves in ways which are unrestricted and creative, and not imposed externally with usually binary and limited outcomes.

The main arguments against mediation were summarised by the Civil Justice Council ADR Working group as being: tainting the voluntary ethos of mediation, posing potentially additional costs which would have to be paid for by the parties or the state, posing additional cost consequences would be disproportionate to smaller claims, risking mediation becoming a perfunctory box-ticking exercise by adopting a one size fits all approach which would be inappropriate for low value claims and in circumstances where bad faith is impossible to police against, there being article 6 issues about access and the fairness of requiring

mediation which is not a transparent, accountable system akin to open justice (Jackson, 2009, Vol.1, p.42, paras 2.2 and 2.4).

It is interesting to note that most of these objections, with the exception of the first concern, tend to pre-suppose that whatever system is introduced to bring about mandatory mediation would not be capable of being calibrated in a way to eliminate or minimise the concerns raised. The first concern - namely tainting the voluntary ethos of mediation - was touched upon in the introduction. Provided a party's rights to leave a mediation are rigorously upheld, it is difficult to see how the nature and utility of the process would be undermined by requiring parties to engage in it. Theseus' ship is still Theseus' ship even though the rotten parts of the deck and hull are replaced.

The concern about additional costs appears to be contrary to the impressive settlement success rates of mediation (CEDR, 2020, p16). It also seems to be contrary to the experience of other jurisdictions which have introduced presumptive mediation and found the same to achieve cost-savings, such as Australia (Federal Court of Australia, 2019), New York (Clark, 2019) and Germany (Macduff, 2016, chapter 12). The concern about additional costs might also be accommodated within the system's design, perhaps by screening out the lowest cost cases, or having exceptions to automatic referral in cases where the parties have reasonable grounds to believe it would be pointless or unduly offensive to their feelings to mediate.

As for the concern about there being scope for abuse, that might also be alleviated by the system's design, perhaps as in Canada which introduced a code of conduct for mediators (Wakely, 2017) by greater regulation. As with the first concern - the importance of upholding a party's right to leave - the need for impartiality, confidentiality, and protection from exploitation by bad faith actors are paramount considerations for mediation. The integrity of any system of presumptive mediation is bound to depend upon its ability to police against abuses in this regard, and these considerations are good reason for encouraging greater self-regulation by the industry or indeed some form of external regulatory oversight.

The biggest obstacle to mandatory mediation thus appears not to be fair trial concerns but rather one of creativity, and public backing. Designing and implementing a new system represents a step into the unknown and requires courage and experimentation. As has been demonstrated in this short essay however, the considerable advantages of mediation warrant such creativity and experimentation and no doubt as public perception is enhanced by experience, familiarity and education, confidence in mandatory mediation can grow in the future.

Conclusion

Properly analysed, each of the arguments raised against mandatory mediation appears capable of being legislated for. The concerns can be accommodated within the design of any mandatory mediation system. Given mediation's staggering success rates, it is difficult to see why we would not embark further down the path to mainstreaming mediation within the resolution of disputes more generally. Whilst that journey will involve trial and error, there is no reason to suppose the rights to a fair trial and access to affordable justice cannot be upheld within a system of mandatory mediation administered no doubt by reference to and with resort to the courts. Time will tell whether making mediation more compulsory diminishes its impressive success rates, but if it is done properly, mandatory mediation is unlikely to detract from the voluntary nature of mediation, enabling parties to determinate their own fates.

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