# PROMOTING ADR BY COERCION- IS IT THE RIGHT APPROACH?

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## INTRODUCTION

The rising cost and increased complexity of traditional litigation is well known and documented. In light of this over the last thirty years there has been a substantial movement to promote alternate forms of dispute resolution or ADR. In the future ADR will take a place alongside the regular court systems in order to make access to justice more robust and efficient. The words of Frank Sander ring true when he stated that selecting a way to solve a dispute was not just a matter of private importance but one of public importance.

The question that this paper will try to tackle is that given ADR's efficiency and benefits is it legitimate for court systems to impose ADR on people. I shall examine this question first through the lenses of the right to approach courts which every citizen should enjoy. Further I will look in the EU mediation paradox and examine whether mandatory ADR provides a viable solution and towards the end I will look at approaches of how to implement mandatory ADR.

## LEGAL CHALLENGES

Article 6 of the European Convention on Human Rights (ECHR) provides that every individual "is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." This right forms the bedrock of all other subsequent rights as only through access to a court can individuals enforce other rights.

Coercive ADR involves amongst other things mandatory mediation as well as heavy sanctions for non-compliance with orders to participate in ADR. Coercive ADR forces people away from the courts in order to resolve their disputes. What must be noted however is that parties can often have real reasons for not wanting to be involved in ADR. The costs of ADR are often disproportionate to the size of the claims a regular mediation will be above 120 Euros per hour and very often in small personal injury cases where the amount being sought is not too large the cost might not be

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worth it. Other reasons for not wanting to peruse mediation can be found in a paper which examined 214 cases of automatic referral mediation and interviewed all those who opted out of the program reasons for opting out were broadly:

1. Intransigence – too far apart and unwilling to move, Parties often only reach the court at the time at which there relationship has broken down to a great extent and very often mediations are not good enough to repair these relations and force a compromise

2. As a matter of strategy and practise it is very common in the world of litigation to not consider the other parties claim seriously. Consequently parties don't see the need to settle at the time of mediation. This in the eyes of the parties makes the whole process redundant.

3. Sometimes cases were referred to mediation to early, in personal injury cases this manifested itself in the form of lawyers negotiating without having a complete picture of the costs of their client. As only with the passage of time can there be a true and realistic picture of both short-term and long-term medical costs. This made several parties not want to even attempt mediation

4. The last major reason why lawyers and parties both declined mediation was that it was there intent to settle any way so they could not justify the additional cost of mediation.

Forcing people to jump through hurdles and restricting their path toward justice is the very anti thesis of article 6. The British courts have found in the Halsey v. Milton Keys NHS trust that while a court can strongly encourage the use of mediation it is a violation of article 6 for them to order mediation.

The decision and the broader premise as a whole of mandatory mediation violating article 6 of the ECHR is in my opinion unfounded. The argument is that even when parties are forced into mediation, the court cannot force a result or a successful mediation. Consequently the access to the courts often times is not denied but only delayed. I would go on to argue that the sojourn from litigation has further benefits like improving the understanding of ones case as well as being exposed to the case of the opposing party, which can allow you to modify your stand. It also very crucially allows people who need courts assistance better access to the courts by reducing the number of cases on roll. What is needed is a new look at ADR and in particular mediation, rather

than seeing it as an alternative to the court it should be as ancillary to the whole process. People are compelled to go to court and in the same vein they can be compelled to mediate .

**HOW WELL DOES IT ACTUALLY WORK**

ADR and in particular mediation works effectively on the notion of consent parties find a solution because they want to and since the solution is mutually amicable they both comply with it. This being the case what requires analysis is whether or not a forced ADR process can lead to a favourable result.

The first argument I would like to make in this regard is one that relates to 'litigation-goggles'. Parties in litigation often dehumanize the contending party and see them only through lawyers and notices what forced mediation brings to the table is a chance for either side to be exposed to the human side of the conflict. The empathy and understanding can facilitate a resolution of the dispute.

The second argument I would like to make is with regard to mediation institutions. A natural consequence of mandatory mediation is the blossoming of mediation centres because of the increase in demand of mediation services. In Italy itself after mediation was made mandatory 806 centres were opened within four years . The ubiquity of these centres foster public trust and provides legitimacy to all ADR processes. As a result people who would have approached the court might decide to approach the mediation centre first which in turn frees up the dockets of the court.

The third argument I would like to field is one which speaks to the efficiency of the process itself, it remains true that when parties object to the mediation process it becomes harder for a conclusion to be reached but it also equally true that in certain cases despite initial objections to mediation the parties have been able to successfully mediate and resolve their disputes. This is because while parties may have legitimate reservations about the problem, a lot of times simply not wanting to appear weak or having no faith in the process is the reason why parties reject mediation.

The results in Italy during March 2011- October 2012 during the time all civil disputes had to mandatorily be put through mediation were promising where of the 220,000 cases mediated close to half of them were settled . These numbers are evidence of the effectiveness of ADR .This

compared to any other jurisdiction where there was completely voluntary mediation is a major achievement.

The big challenge in the world of ADR is to convince people that it is a legitimate option. This is also in my opinion the cause of the EU mediation paradox which is that despite the obvious benefits of mediation it has still not found wide spread popularity. People approach the courts largely as a last resort very few individuals are ever comfortable in coming to the courts. Consequently two things happen the first is that mediation to them seems redundant because they have attempted some sort of rudimentary negotiation which has failed so they cannot see the value in trying mediation again. The second phenomena is that they place a massive amount of trust in their lawyer, most people would not attempt mediation if there lawyer tells them it's not worth the effort. Unfortunately tend to have a vested interest in parties not going for mediation; this is evidenced majorly by the strike of lawyers in Italy . Protests resulted in a constitutional challenge of the mandatory mediation directive which 15 justices of the Italian Supreme court found against and struck down.

In a paper commissioned by the European Parliament committee of legal affairs titled "quantification of the cost of not using mediation" produced some startling results. It found that if all cases were referred to mediation the success rate would only have to be around 24% for it to reduce litigation costs for both governments and parties. The break even for reduction in time spent was 19%. This is because of the small amount of time spent on each failed mediation is much lower than the massive amount of time saved in each successful mediation . These figures were calculated for across the EU.

**MODELS AND METHODS**

The final topic I would like to tackle through this paper is discussing the different type of ways in which we can make ADR more coercive.

There are in general two ways of doing this the first is the pre-litigation method where the intent is that each dispute or certain types of disputes will go for mediation before appearing before a judge the hope is that disputes or certain disputes will benefit from an interest based collaborative solution. The other method is where the judge after screening the dispute can make a recommendation for parties to take part in mediation.

In my opinion the second variety of coercive ADR is the superior variety at the time being. The judge making the recommendation of ADR is an extremely powerful tool. No one would attempt to de-rail mediation or to not engage in it in good faith if they have to justify reasons for failure in front of a judge. Further it gives a sheen of legitimacy to the whole process as parties feel they are being given there day in court. It also maintains the status quo of lawyers as they will be retained prior to trial and will remain till the conclusion of the trial as such.

The second method as has been proposed in order 56A in the Rules of the superior court is the best introduction to mandatory ADR. It takes into account the usual objections from the stakeholders in the situation and goes a long way in cultivating a culture for ADR. Ultimately that is the most important step at this stage to make both lawyers and litigants open to the idea of mediation as a part and parcel of the universal dispute resolution method.

## CONCLUSION

There are numerous complexities in evaluating the correct way to promote ADR and this is due to the nature of disputes itself. It is tough to categorize in certain terms the different types of disputes and the ways in which the parties to those disputes feel. This makes it especially tricky to come up with a one size fits all solution to ADR. What is apparent is that with increasing amounts of litigation and disputes as individuals get more conscious of their rights there needs to be a way to accommodate those who need judicial help the most. ADR in its most distilled provides just that a way to clear dockets without reducing the quality of justice served. Coercive ADR as I have examined in this paper is not at odds with the universal right to a fair trial. It also has several distinct benefits and proven advantages as I examined in the second part and finally there is a method to do it while taking into account the interests of all the related parties as I examine in my third part. Possibly and hopefully at the end of a couple of years coercive ADR will be a part and parcel of going to the court.