To order or not to order compulsory ADR: there is no question

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1. Earlier this month the Civil Justice Council published a report entitled '*Compulsory ADR*' ("the Report"). The report considered two questions:

   a. firstly, can parties to a civil dispute be compelled to participate in an alternative dispute resolution ("ADR") process? ("the legality question"); and

   b. secondly, if so, how, in what circumstances, in what kinds or case and at what stage should a requirement be imposed? ("the desirability question").

2. In summary, the authors[1] of the report ("the Authors") found with respect to:

   a. the legality question, parties can lawfully be compelled to participate in ADR; and

   b. the desirability question, there are conditions in which compulsory ADR may be desirable and effective development (see paragraph 7 of the Report).

3. The legality question and the desirability question has hitherto generated much commentary amongst academics[2] and discussion within the case law. In *Halsey v Milton Keynes* [2004] 1 WLR 3002 Lord Dyson considered that the imposition of mediation on parties unwilling to refer their disputes to a mediator would "*impose an unacceptable obstruction on their right of access to the court. The court in Strasbourg has said in relation to article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to "particularly careful review" to ensure that the claimant is not subject to "constraint": see Deweer v Belgium (1980) 2 EHRR 439, para 49. If that is the approach of the European Court of Human Rights to an agreement to arbitrate, it seems to us likely that compulsion of ADR would be regarded as*

[1] Lady Justice Asplin DBE, William Wood QC, Professor Andrew Higgins and Mr Justice Trower.
[2] See for example, Ronán Feehily,*Creeping Compulsion to mediate, the Constitution and the Convention* (NILQ 69(2): 127 – 146) and Shirley Shipman, *Compulsory Mediation: The Elephant in the Room* (CJW 2011 30(2), 163 – 191).

an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6".

4. As such it was "*difficult to conceive circumstances in which it would be appropriate"* to use the power to order unwilling parties to refer their disputes to mediation (*Halsey v Milton Keynes* [2004] 1 WLR 3002).

The Legality Question

5. The Report highlights on the one hand that following *Halsey* the Court of Appeal has adopted different views on the status of this decision (see paragraph 27). Last year, for example, in *McParland v Whitehead* [20020] Bus LR 699, Sir Geoffrey Vos questioned whether the court might require parties to engage in mediation notwithstanding the *Halsey* decision (see paragraph 36 of the Report).

6. On the other hand, the Report notes litigants are already somewhat subjected to compulsory ADR (see paragraph 53 of the Report). For example, by way of Early Neutral Evaluation hearings; Financial Dispute Resolution appointments; ACAS Early Conciliation and Mediation Information and Assessment Meetings.

7. Subsequent European jurisprudence that the Report analyses, has perhaps provided a more definitive answer to the legality question post-*Halsey*. For example, in *Rosalba Alassini* [2010] 3 C.M.L.R 17 Italy made a preliminary reference to the Court of Justice on account of legislation which made legal action conditional upon a prior attempt to achieve an out-of-court settlement (see paragraph 37 of the Report). A telephone company contended that customers who brought breach of contract proceedings and sought damages under the EU Universal Service Directive were prevented from bringing proceedings where the customers had not attempted mediation. The court found that Italian legislation was a proportionate restriction on the right to a fair trial in view of the legitimate cost and time saving aims (see paragraph 39).

8. Further in *Menini v Banco Popolare Societa Cooperativ* [2018] C.M.L.R 15, the Report refers to the clarification provided concerning the necessary provisions associated with a scheme which provides access to the courts conditional on attempting ADR (see paragraph 40 of the Report):

   "60. … the ADR procedure must be accessible online and offline to both parties, irrespective of where they are.

61. Accordingly, the requirement for a mediation procedure as a condition for the admissibility of proceedings before the courts may prove compatible with the principle of effective judicial protection, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs—or gives rise to very low costs—for the parties, and only if electronic means are not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires..."

9. As to the present state of the law, the Report concludes that it would be helpful if the legislature or appellate court could address the legality question (see paragraph 56). Nevertheless, it appears common ground that the Strasbourg authority cited in *Halsey* was not authority for the proposition that "*compelling parties to engage in ADR will necessarily violate Article 6*" (see paragraph 57). The Authors suggest:

   "*any form of ADR which is not disproportionately onerous and does not foreclose the parties' effective access to the court will be compatible with the parties' Article 6 rights. If there is no obligation on the parties to settle and they remain free to choose between settlement and continuing the litigation then there is not, in the words of Moylan LJ in Lomax, "an unacceptable constraint" on the right of access to the court"* (see paragraph 58 of the Report).

10. As such forms of ADR which are disproportionality expensive; time intensive or otherwise burdensome would constitute an obstruction to justice and breach Article 6 (see paragraph 59 of the Report). The Authors also endorsed the use of sanctions to enforce participation in ADR (see paragraphs 61 – 67 of the Report).

11. In view of recent case law and the Report, *Halsey* is likely to represent a high-water mark for parties who seek to litigate exclusively through the courts without recourse to ADR. This is a significant development for the courts and litigants alike.

12. As the authors of this piece have considered previously ('ADR Litigation and Cost Consequences'), since *Halsey* rather than necessarily engage with the Legality Question, the courts have focused on the use of ADR at the conclusion of a case and considered on a number of occasions whether a party had acted unreasonably in refusing ADR. Recent case law demonstrated a trend whereby the courts closely examined the actions of the parties in relation to offers of ADR. There was on occasion a willingness to impose serious

cost consequences where it was demonstrated that a party had unreasonably refused to engage in an ADR process.

13. Yet as the Report notes, there is a tension between "*treating an order to mediate as a breach of Article 6 but then giving the court power when dealing with costs to penalise a party financially for unreasonably failing to mediate"* (see paragraph 57). If a set of procedural rules were introduced to require ADR (in appropriate circumstances, see above and below), this may well help to rationalise the present approach to costs consequences arising from unreasonable refusals to engage with an ADR processes.

The Desirability Question

14. The Report does not seek to answer the Desirability Question through factors or requirements if ADR did become compulsory (see paragraph 90 of the Report). Instead, the Report discusses various issues associated with participation in ADR. For example, it will be necessary to consider:

    a. if an ADR process is a "*disproportionate burden*" on a litigant's time or resources. If it is, then it should not be compulsory (see paragraph 93 of the Report).

    b. which specialist jurisdictions may be suited to orders requiring the parties to engage with ADR (see paragraph 99 of the Report);

    c. who is appropriate to act as neutral person (see paragraph 100 of the Report);

    d. whether both litigants have access to legal advice (see paragraph 104 of the Report); and

    e. when in the life cycle of a case ADR is required (see paragraph 106 of the Report).

15. The Report concludes that "*introducing further compulsory elements of ADR will be both legal and potentially an extremely positive development"* (see paragraph 118 of the Report). Though the Report makes no detailed proposals for reform, the specific observations made concerning when compulsory mediation is unlikely to be controversial; judicial involvement in ADR processes and compulsory mediation are helpful (see paragraph 118, 1 – 3 of the Report).

16. In view of the growing numbers of ways in which the courts already require litigants to participate in ADR (see paragraphs 53 – 54), it will be interesting to observe whether the higher courts re-visit the Legality and Desirability Questions following the Report, or whether the intervention of the legislature is required. The Report constitutes a clear and reasoned invitation to both to act.

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