Pre-trail mediation?

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Compulsion or voluntariness?

- In general, there is predominant international respect for the principle of voluntariness of mediation.
- Continued voluntary participation within a confidential mediation process ***once commenced*** is a fundamental and non-negotiable tenet of mediation. But this does not mean that requiring parties *to* ***engage in mediation to attempt settlement*** in the first place, or sanctioning their failure to do so, necessarily subverts its principles or reduces its effectiveness.

Arguments **for** mandatory mediation

- ADR is capable of conferring huge benefits on disputants and on the civil justice system. Litigation should be the last resort.
- The statistics show that the "voluntary" take up of mediation is disappointingly slow and small.
- It is impossible to tell in advance which cases will actually settle and which will not.
- There is no convincing staistical evidence that mediation is less successful when compulsory. Experience suggests that parties who are compelled to attend mediations unwillingly often do engage in the process and settle their disputes.
- Sometimes parties are quietly relieved when they are externally compelled to use mediation and do not have to propose it, which might lead an opponent to see as a weaknesses in their case.

Arguments **against** mandatory mediation

- There is a risk it might not work, either because the parties are simply intransigent or because they do not know enough about it, and are therefore unlikely to engage in the process.
- There is a concern that pushing more disputes into ADR undermines the value of the adjudicative system, which is the foundation on which the effectiveness any form of ADR ultimately relies.
- The process has to be paid for by the parties or the state. Those costs will in many cases be wasted. Furthermore, the cost may well be disproportionate if this measure is targeting the low and middle value dispute.
- The likely consequence of making mediation mandatory is to produce "box-ticking".
- Mandating mediation may be a breach of the parties' Art. 6 human right of access to the court.

Types of compulsion

The “compulsion” can involve different forms in very different types of disputes.

The EU Parliament’s Briefing Note "Achieving a Balanced Relationship between Mediation and Judicial Proceedings“ disstinguishes four distinct models:

- Full voluntary mediation: the parties can engage a mediator to facilitate the resolution of a dispute.
- Voluntary mediation with incentives and sanctions: the parties are encouraged to have recourse to mediation, thus fostering the practice. This model requires a mediation law in place. This option, or variations of it, is sometimes referred to as the "opt-in" option.
- Required initial mediation session: the parties are required to attend an initial meeting with a mediator, free or at a moderate fee, to establish the suitability of mediation. This model, too, requires a mediation legal framework. This option, or variations of it, is sometimes referred to as the "opt-out" option.
- Full mandatory mediation: the parties must attend and pay for a full mediation procedure as a prerequisite to going to court. The mandatory aspect applies to attending the full procedure, while the decision to reach a settlement is always voluntary.

https://op.europa.eu/en/publication-detail/-/publication/5369bfbc-b2db-11e6-9e3c-01aa75ed71a1/language-en

According to the Civil Justice Council Interim Report (2017), compulsion can take one of three different forms:

- A requirement that the parties in all cases (or in all cases of a particular type or subject-matter) engage in or attempt ADR as pre-condition of access to the court.
- A requirement that the parties have in all cases (or all cases of a particular type or subject-matter) engaged in or attempted ADR at some later stage such as the case management hearing.
- A power in the court to require unwilling parties in a particular case to engage in ADR on an *ad hoc* basis in the course of case management.

https://www.judiciary.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf

Can parties lawfully be forced to participate in mediation without their consent?

- CJEU:
- *"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..."

Menini v Banco Popolare Società Cooperativ

Italian experience

There are three main ways for recourse to mediation in Italy:

- *Recourse by voluntary agreement of the parties or by a contract clause:* For any legal dispute, parties are always able to agree to go to an accredited mediation provider under the rules of the law. Litigants can benefit from fiscal advantages and tax credits for the mediation fees. If lawyers assist the parties and sign the mediation agreement, it will automatically become an enforceable document. When a commercial contract or a statute includes a mediation clause, parties must attempt to mediate before they can arbitrate or file a dispute in court.
- *Recourse ordered by a judge for any pending case in any trial court:* If ordered to mediation, the parties must file a request to mediate within 15 days with a mediation provider. A judge is able to refer a case to mediation at any time before the closing arguments, or if a hearing is not expected, before oral discussion of the pleadings. In these cases, mediation is a pre-condition for going back to court.

- *Recourse by voluntary agreement during a "required initial mediation session."* In limited civil and commercial matters including joint real estate ownership; real estate generally; division of assets; inheritances; family business agreements; real property leases including rental apartments, business, and commercial; bailments; medical malpractice liability; damages from libel, and damages from insurance, banking and financial contracts, the Italian mediation model requires the plaintiff to first file a mediation request with a provider and attend an initial mediation session before recourse to the courts may be granted. The initial mediation session must be held within 30 days of the filing and in the presence of an accredited mediator and a lawyer. At this stage, an administrative filing fee is requested—40 Euros for claims below a value of 250,000 Euros, and 80 Euros above this value. There is no obligation to pay more, unless the parties decide to voluntarily proceed with the full mediation procedure. If one party does not attend this initial session, the judge will sanction that party in subsequent judicial proceedings. If during the initial session, one party decides not to proceed with mediation, then the party has fulfilled the mediation requirement and is able to "opt-out" and file the case in a court. There is no obligation to pay any additional fees. If the parties decide to proceed with mediation, the fees are determined by the case value and the process should last no more than 90 days.

Statistics

- In 2017, 90 % of mediations, that is about 180,000 (out of 200.000), were initiated via required initial mediation session. When the parties voluntarily agreed to initiate the full process during the initial meeting, the average success rate was almost 50 %. If the number of these mediations is divided by the 140.000 yearly incoming civil and commercial cases in matters, in which the first meeting is mandatory, the ratio is more than 100 %. This means that, at least in this category, the number of mediations exceeded the number of incoming cases. Additionally, a substantial decrease has been recorded as regards the number of cases filed in court since 2013.

Policy issues to be considered

In the course of future reforms policymakers will have to address several critical questions when they consider putting greater pressure on parties to participate in mediation:

- Is the form of mediation proposed or required too burdensome or disproportionate in terms of cost or time?
- In what types of cases should parties be required to attempt mediation?
- Who should be the mediators?

- At what stage of proceedings should parties be required to attempt mediation?
- Type of compulsion
- Sustainability
- Accessibility