

The co-optation of the techniques and language of Alternative Dispute Resolution: A critical assessment of developments in the UK

Introduction:

Alternative Dispute Resolution (ADR) is a consensual process where the parties agree to come to a solution, which means that autonomy is a central characteristic of this category of dispute resolution processes¹. Tidwell identifies that “mediation is predicated upon mediation’s flexibility informality and consensuality opening up the full dimension of the problem facing the parties. Parties come to mediation because it is flexible and thus convenient. Mediation is used because it is not adversarial, but rather seeks to satisfy the needs of the presenting parties”². The very nature of mediation and other ADR processes is that it is based upon a consensual process, which is outside of the judicial system³. The problem with co-optation is that it is judicialising ADR processes through avenues such as mandatory mediation or adjunctive adjudication processes⁴. The implication of this is that there is a framework in place that is no longer consensual in nature; rather, it is merely an extension of the coercive power of the judicial system. In the UK, there is arguably a system of co-optation through Civil Procedure Rules (CPR) and Family Procedure Rules (FPR), because instead of promoting consensual mediation and ADR processes they are coercing individuals to comply with an obligation to engage in ADR prior to entering the courts. Thus, this paper is going to examine the content of the CPR and FPR to determine whether there is a process of cooptation is occurring within English law.

The Nature of ADR Processes:

Prior to engaging with the CPR and FPR, it is necessary to identify the key characteristics of ADR. The primary characteristic of ADR is consensuality (i.e. the parties have to agree to engage in the ADR process)⁵. For example, within mediation it is envisaged that there will be a transformative process, in order to ensure that the parties come to a workable solution that maintains an ongoing relationship⁶. However, mediation has been identified as an effective and flexible system that can reduce the pressure on national court systems⁷. The result of this is that national legislatures are developing rules that “promote” or “require” an ADR process to be engaged with, which can be identified as a form of coercion. There are arguments that the promise of empowerment and independence do not exist within ADR, because there is generally some form of coercive third party (i.e. mediator, adjudicator, legal counsel)⁸. This means that

¹ Tidwell, A Conflict Resolved: A Critical assessment of Conflict Resolution (Continuum, 1998), 157

² Ibid, 157

³ Rozdeiczer, L ADR Manual. The World Bank Group (IFC, 2006) 1

⁴ Katz, LV “Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?” (1993) Journal of Dispute Resolution 1, 2

⁵ Goriely, T, Moorhead, R and Abrams, P More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour (2002) Law Society and Civil Justice Council Research Paper 43, 2

⁶ McEldowney, J Family Mediation in a Time of Change (FMC Review Final Report, 2012), 1

⁷ Goriely, T, Moorhead, R and Abrams, P More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour (2002) Law Society and Civil Justice Council Research Paper 43, 2

⁸ Spencer, D ‘Exploding the Empowerment Myth of Alternative Dispute Resolution’ (1996) Commercial Dispute Resolution 3(13), 15

there will be little difference if there was a required mediation process, because it debunks the myth of a truly consensual process⁹.

The problem that arises is that there is a fundamental failure to fully consider the actual nature of mediation and other ADR processes when it is treated as a coercive process, because there is a more complex nature than just the choice to use ADR (i.e. when the parties are engaged in the ADR process there is a right for them to determine how the process is conducted and whether an amicable solution is present or enforcement of an award¹⁰). These factors highlight that ADR is a transformative process, which requires consensuality at different levels. Thus, it is necessary to ensure that there is a framework in place that enables the transformative nature of ADR to be promoted.

Baruch Busch and Folger identify that

“Transformative mediators allow and trust people to find their own way through the conflict – and even more important—find themselves and each other, discovering and revealing the strength and understanding within themselves”¹¹.

To create this understanding there cannot be a judicial based process, because this increases the level of coercion and undermines the purpose of ADR¹². The question that arises is whether promotion of mediation or ADR can be treated as coercion¹³. The concept of co-optation can be more closely related to a mandatory process, but are the CPR and FPR in English law just as coercive when they attempt to “persuade” individuals to engage with an ADR process.

Persuading individuals to engage in ADR processes through the judicial process can be deemed as co-optation, because the choice of the individual to engage in ADR will be undermined if there is some form of legal sanction if s/he fails to do so¹⁴. The trend to judicialisation of ADR processes has been identified by Ryan. As Ryan argues the compelling of ADR through “the increasing judicialization of ADR represents its co-optation. However, in the context of judicially mandated ADR, the state's involvement argues strongly for - if not compels - prioritizing the protection of constitutional rights”¹⁵. The important factor highlighted is that if there is co-optation then there has to be increased safeguards put into place (i.e. constitutional/human rights associated with due process). With the increased protections then the co-optation will be minimalized, although inevitably present¹⁶. Therefore, this paper will now turn to an examination of the potential co-optation of ADR processes and then move onto

⁹ Ibid, 15

¹⁰ Excluding Arbitration, because award enforcement is subject to national and international law principles.

¹¹ Baruch Bush, RA & Folger, JP *The Promise of Mediation: The Transformative Approach to Mediation* (Revised Ed, Josey-Bass, 2004), 83

¹² Mironi, M ‘Mediation v. Case Settlement: The Unsettling Relations between Courts and Mediation’ (2014) *Harvard Negotiation Law Review* 19(173), 177

¹³ Abel, R.L., *The contradictions of informal justice*. In: R.L. Abel, ed., *The Politics of Informal Justice*. Volume 1. *The American Experience*. (Academic Press, 1982), pp. 267-320, 268

¹⁴ Coy, P. and Hedeem, T. ‘A Stage Model of Social Movement Co-optation: Community Mediation in the United States’ (2005) *The Sociological Quarterly* 46(405), 410

¹⁵ Ryan, E, "ADR, the Judiciary and Justice: Coming to Terms with the Alternatives" (2000) *Harvard Law Review* 1851, 1871

¹⁶ Ibid, 1872

whether there are sufficient protections in place to prevent unfair coercion (i.e. human rights/constitutional processes). The focus of this discussion will be mediation, because it is the form of ADR where judicialisation is occurring in the UK.

The Promotion of Mediation:

It has been identified that mediation is a transformative process, which is why it has been the focus of the CPR and FPR. For example, in family law mediation has been seen as the most effective process to engage in an amenable process between the parties¹⁷. The *Norgrove Report*¹⁸ states:

“Our aim is a supportive, clear process for private law cases that promotes joint parental responsibility at all stages, provides information, manages expectations and that helps people to understand the costs they face. The emphasis throughout should be on enabling people to resolve their disputes safely outside court whenever possible”¹⁹.

The implication is that if there is a family dispute where there are children then there has to be an ongoing relationship²⁰. The use of the mediator and additional facilitators is important to ensure that the voice of the children is respected within the ADR process, which can be lost within the judicial framework²¹. The rationale is that through mediation there can be a better framework developed to create an ongoing amicable process, as opposed to the judicial system that is adversarial in nature²². Thus, the ADR process (especially mediation) is seen as a better framework to protect vulnerable persons (as long as there is a specially trained mediator)²³.

Mediation is not only promoted in the family sphere. Rather, EU Mediation Directive (Directive 2008 /52/EC) provides mediation should be used to settle cross border civil disputes²⁴. Nonetheless, this system has been criticised as being quasi-mandatory, which means that it can undermine the consensuality of the mediation process²⁵. The text of the Mediation Directive does not use absolutist language, which can be seen in the text of Article 4(1):

“Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well

¹⁷ Norgrove Report (Family Justice Review) November 2011, para 4.69

¹⁸ Ibid, para 4.69

¹⁹ ibid para 4.69

²⁰ Cashmore, J & Parkinson, P “Children’s and Parent’s Perceptions on Children’s Participation in Decision Making after Parental Separation and Divorce” (2008) Family Court Review 46(91) , 92

²¹ McEldowney, J Family Mediation in a Time of Change (FMC Review Final Report, 2012), 3.

²² Ibid. 3

²³ Ibid. 38

²⁴ Cornes, D “Mediation Privilege and the EU Mediation Directive: An Opportunity” (2008) Arbitration 74(4), 395

²⁵ Ibid, 395

as other effective quality control mechanisms concerning the provision of mediation service”²⁶.

The obligation of the state is the promotion of mediation and not the enforcement of mediation. As Article 4(1) provides, there must be promotion of quality and appropriate mediation processes to enable an efficient and cost effective regime²⁷.

Quality and Appropriate Mediation:

The fact that the Mediation Directive indicates that there has to be a quality process highlights that mediation should only be required/promoted when it is appropriate to the circumstances of the dispute²⁸. The question is whether this balance is being promoted within English law because the *Norgrove Report* states:

“It should become the norm that where parents need additional support to resolve disputes they would first attempt mediation or another dispute resolution service”²⁹.

The inference is that there is a framework in place that is promoting mediation, but in such a way that there is a high degree of coercion (i.e. supporting the argument of cooptation). However, this would be incorrect to assume because the English Family Procedures Rules 2010 (FPR 2010) both support the principles that if mediation or ADR processes are engaged then the parties have to agree (and no sanctions will be imposed for reasonable rejection)³⁰.

Rule 3.2 of the FPR 2010 requires that the courts examine whether the ADR process is more appropriate than use of judicial processes. This is supported by Rule 3.3 FPR 2010, which requires the courts to consider whether: (i) dispute resolution is appropriate in the given context³¹; (ii) there has been fair and proper information given in regards to the ADR process³²; and (iii) the parties agree³³. Within the family law context there has to be examination of the context in detail, because if there is domestic abuse or a vulnerable child then there will be enhanced harm to the child³⁴ (or the party that has been subjected to domestic violence).

Article 4(2) of the Mediation Directive identifies that “Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties”. This principle highlights that it is necessary for there to be quality mediation, which is paramount to ensure that there is not promotion of a process

²⁶ Article 4(1) Mediation Directive

²⁷ *ibid*, 38

²⁸ Greatbatch, D & Dingwall, R “The Marginalization of Domestic Violence in Divorce Mediation” (1999) *International Journal of Law Policy and the Family* 13(174), 176

²⁹ *Norgrove Report (Family Justice Review)* November 2011, para 115

³⁰ Blake S, J Browne, & S Sime, *The Jackson ADR Handbook* (Oxford University Press, 2013), 13.02

³¹ Rule 3.3.1 FPR 2010

³² Rule 3.3.1.a FPR 2010

³³ Rule 3.3.1.b FPR 2010

³⁴ McEldowney, J *Family Mediation in a Time of Change (FMC Review Final Report, 2012)*, 38

that may undermine justice because the circumstances belie any chance of consensuality due to the power relations that are involved. It is paramount to ensure that mediation retains the central characteristic of a “peace-seeking, transformative conflict resolving and human problem solving”³⁵ process. Nonetheless, there is an argument that if co-optation is to be the norm then it should not matter whether the parties agree or not.

The Commercial Realm:

The interaction between court promoted ADR and the judicial process is more developed within the area of commercial law, because there is a greater deal of complexity due to the interaction between promoted ADR and chosen ADR. There are some areas where it has been recognised that there has to be specialist training (such as housing law) due to the presence of a weaker party (i.e. the tenant and landlord; consumer and vendor)³⁶. The power imbalance may create a situation where any co-opted mediation would be unfair. In *Halsey v Milton Keynes NHS*³⁷ and *Dunnett v Railtrack*³⁸ such power imbalances were examined within the context of ADR processes. In the *Dunnett Case* the parties were a private individual and Railtrack where the former was willing to mediate, but the latter party did not, Railtrack won the case and made a claim for costs, the courts refused because Railtrack unreasonably refused to mediate (a better option in the case). The implication is that the judiciary can promote mediation through sanctions for failing to engage in the process, even if it is in contradiction of the consensuality of the mediation process³⁹.

Halsey v Milton Keynes NHS also concerned a private individual and a large organisation (i.e. part of the NHS) where the large organisation refused to mediate. The private individual lost who tried to avoid costs based upon *Dunnett v Railtrack*, but in this case the court refused, because there was not unreasonable refusal. The implication is that there is still a measure of choice within the mediation process, which means that there is minimized co-optation (i.e. the FPR/CPR prefer mediation, but there will be no sanctions when reasonably refused). Thus, this counters the argument that mediation or ADR will be mandated. One route that may be taken is to have legal professionals consider whether it is relevant. As Dyson LJ in *Burchell v Bullard*⁴⁰ held:

“All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR”.

³⁵ G Genn H., *Judging Civil Justice* (CUP 2010) , 81

³⁶ Arden, A “A Plea for a Housing Mediation Service” (2013) *Journal of Housing Law* 57, 57

³⁷ *Halsey v Milton Keynes NHS* [2004] EWCA 3006 Civ 576

³⁸ *Dunnett v Railtrack* [2002] EWCA Civ 302

³⁹ Fisher, R., Patton, B. and Ury, W *Getting to Yes: Negotiating Agreements without giving in*, (Random House, 1991), 23

⁴⁰ *Burchell v Bullard* [2005] EWCA Civ 358

This means that if the legal professional can provide evidence in the given circumstances that the mediation would be inappropriate then the courts will not impose cost sanctions. In other words, the courts have to assess the suitability of the mediation /ADR process to the particular dispute⁴¹. The main factor that the court will determine is whether in the given circumstances there is a chance of success⁴². Nonetheless, there is a presumption that when there are commercial parties with equal power that some form of mediation has been engaged with before using litigation⁴³.

Why Cooptation in the Commercial Realm:

The rationale for supporting judicial and legislative recommendations of using mediation and ADR processes is that it offers a more efficient and cost effective system for the parties (and the courts are not clogged up with cases that could have been resolved otherwise)⁴⁴. The reason for mediation and ADR processes being promoted in the commercial realm has been clearly espoused in *Aird v Prime Meridian Ltd*⁴⁵ where it was held that mediation is “a form of neutrally assisted negotiation”⁴⁶. In this form of negotiation there is greater independence for the parties, because the process “need not necessarily be based on the underlying legal rights or obligations of the parties. Instead, the parties, with the assistance of the mediator, can reach a solution which is tailored to their real needs and interests”⁴⁷. The inference is that mediation (and ADR processes) will be more capable of supporting the interests of the parties and coming to an amicable solution than objective and abstract judicial determination. Thus, this gives rise to the principle of co-optation within the CPR.

The primary reason for co-optation is to enable the courts to deal with cases justly⁴⁸, which is best achieved through limiting the burden of cases that reach the judicial system. This is supported by r. 1.1(2) CPR 1998, which provides that alternative processes should be used when practical. The determination of practicality is based upon (a) equality; (b) saving expense; (c) proportionality in respect to the value of the claim, the importance of the case, complexity of the issues; and the financial position of each party; (d) assurance that the case is “dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases”⁴⁹. These factors will be examined by the courts, in order to promote mediation/ADR. However, it cannot force such processes on the parties. Rather, it may merely indicate that there may

⁴¹ *Faidi & Anor v Elliot Corporation* [2012] EWCA Civ 287

⁴² *PGF II SA v OMFS* [2013] EWCA Civ 1288

⁴³ *Charlton v Kenny* [2010] EWCA Civ 873

⁴⁴ Lord Justice Jackson Review of Civil Litigation Costs Final Report (TSO, 2011) para 4.11

⁴⁵ *Aird v Prime Meridian Ltd* [2006] EWCA Civ. 1866

⁴⁶ *ibid* at 5

⁴⁷ *ibid* at 5

⁴⁸ r. 1.1(1) CPR 1998

⁴⁹ r. 1.1(2) CPR 1998

be negative cost implications for the failure to consider a more appropriate alternative to the judicial process⁵⁰.

The Limits of Cooptation in the Common Law:

There is a fundamental right for the parties to choose how they will access justice, in order to resolve a dispute⁵¹. This is supported by the case of *Weissfisch v Julius*⁵² where it was held that it is not possible for the courts to mandate ADR. Rather, it can only assess whether that have been any “efforts made, if any, before and during the Proceedings an order to try and resolve the dispute”⁵³ to determine whether there should be negative cost implications. A mere refusal will not give rise to negative cost implications; rather the court has to determine whether the refusal is reasonable or not⁵⁴. The application of negative cost implications is not considered to be a breach of consensuality or due process, because it is not an additional sanction; rather, it is a discretionary determination of how court costs will be divided⁵⁵.

*Hickman v Blake Laphorn and Another*⁵⁶ held that

“A party cannot be ordered to submit to mediation as that would be contrary to Article 6 of the European Convention on Human Rights [and]... A party's reasonable belief that he has a strong case is relevant to the reasonableness of his refusal”⁵⁷.

The application of this case confirms the principle of consensuality where mandating mediation or ADR would be a breach of human rights (i.e. the process would be deemed unconstitutional because there is a lack of due process). Nonetheless, this does not prevent the promotion of ADR, which can include negative cost implications for wasting the court's time. One could argue that this is a case of mandated ADR; however, as long as the party shows that the decision not to engage in an ADR process is reasonable there will be no cost sanctions. Therefore, the main factor that the English CPR rules have developed is balance, in order to promote more individuals (when appropriate) to engage with ADR processes. This is still a form of co-optation, but there are safeguards and limits to protect the parties that are engaging in the process.

⁵⁰ Practice Direction Protocols CPR 1998 r. 4.7

⁵¹ Quek, D, "Mandatory Mediation: An Oxymoron?" (2010) 11(479) *Cardozo J Conflict Resol*, 479, 482.

⁵² *Weissfisch v Julius* [2006] EWCA Civ 218

⁵³ *Dunnet v. Railtrack plc (in administration)* [2002] EWCA Civ 303

⁵⁴ *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576

⁵⁵ *Charlton v Kenny* [2010] EWCA Civ 873

⁵⁶ *Hickman v Blake Laphorn and Another* [2006] EWHC 12 (QB)

⁵⁷ *Ibid* at 18

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