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DISSERTATION

“Compulsory mediation: A contradiction?”

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1. Introduction

Civil justice systems around the world are facing serious problems as costs and delays associated with courts and the litigation process have significantly impacted citizens' access to justice¹. Litigation is a protracted, expensive and exhausting process. Many believe that mediation as an alternative dispute resolution procedure can play an important role in civil justice reform.

First the United States from the early 80'e and then Australia and U.K have started to use mediation in order to resolve the above issues.

Over the last two decades, the European Union (EU) has intentionally promoted mediation and other forms of ADR to advance access to justice and has done so with a high degree of intensity². Its prominence as an access to justice vehicle in the EU was enhanced by a Mediation Directive³ issued in 2008 by the European Parliament and the Council. The Directive required Member States to implement structures to support mediation of cross-border commercial disputes in the EU by May 2011⁴.

Mediation is a cost and time-efficient dispute resolution process, generating outcomes agreeable to both parties. This is rarely achieved with litigation. In recognition of the virtues of mediation, some jurisdictions have introduced compulsory mediation schemes in an effort to promote settlement and relieve the

1) See Jacqueline Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?* Jacqueline Nolan-Haley, Fordham University School of Law, February 2012, p.982. See also generally Annette Marfording, *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, 23 U. New S. Wales L.J. 384 (2000) In Central and Eastern Europe, deficiencies in legal aid assistance have threatened to undermine the rule of law and democratic government. See also European Forum on Access to Justice, *Access to Justice in Central and Eastern Europe: Forum Report (2002)*, (referring to mediation on several occasions).

2) See, e.g., Giuseppe De Palo & Linda Constabile, *Promotion of International Commercial Arbitration and Other Alternative Dispute Resolution Techniques in Ten Southern Mediterranean Countries*, 7 *Cardozo J. Conflict Resol.* 303, 304 (2006) (discussing the European Commission's 2001 pilot project to promote international commercial arbitration and mediation in the southern Mediterranean countries).

3) Directive 2008/52/EC, of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, P 2, 2008 O.J. (L 136) 3

4) Denmark was excluded from the Mediation Directive.

burden on the courts. Differences between civil and common law systems might impact on a state's approach to compulsory mediation.⁵

External factors, such as membership to regional or international organizations also impact on a state's legal framework. As will be seen, these factors are particularly relevant in the European context with the focus on facilitating free trade within the European Economic Area and the application of the *European Convention on Human Rights* ('ECHR').⁶

Finally, domestic factors are significant. These include the time it takes for cases to reach trial, the cost of litigation, the prevailing legal culture and political climate, and the attitudes of the legal profession, judiciary and general public.⁷

Compulsory mediation appears to be a glaring contradiction. Formality is eschewed within mediation because this mode of dispute resolution emphasizes self-determination, collaboration and creative ways of resolving a dispute, as well as addressing each party's underlying concerns. Any attempts to impose a formal and involuntary process on a party may potentially undermine the *raison d'être* of mediation. In view of this danger, there must be compelling reasons to introduce mandatory mediation.⁸

One good reason could be to make use of compulsory mediation as a temporary expedient because individuals do not use mediation voluntarily and therefore should be given the opportunity to experience the benefits of mediation.⁹

Mandatory mediation is accepted globally, from the US, through Italy, Romania and UK, to Australia and New Zealand.

5) See Nadja Alexander, 'Global Trends in Mediation: Riding the Third Wave', (Kluwer Law International, 2nd ed, 2006) 1, 7.

6) Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

7) See Melissa Hanks, Perspectives on mandatory mediation, UNSW Law Journal, volume 35(3), 2012 p.929

8) See Lon L. Fuller, Mediation: Its Forms and Functions, 44 S. Cal. L. Rev. 305, 308 (1971); see also James Coben & Peter Thompson, Disputing Irony: A Systematic Look at Litigation about Mediation, 11 Harv. Negot. L. Rev. 43 (2006).

9) See Sander, Allen & Hensler, Judicial (Mis)use of ADR? A Debate, Article, ADR Symposium, summer, 1996, 27 U. Tol. L. Rev. 885, at 886. In Sander, Another View of Mandatory Mediation, Professor Sander repeats the point that compulsory mediation is a kind of temporary expedient a la affirmative action.

However, a significant stumbling block to its growth has been policy debates over the meaning of the access to justice provisions of Article 6 of the European Convention on Human Rights (ECHR)¹⁰. Critics question whether compulsory mediation is a legitimate process in light of these provisions¹¹.

Purist mediators and litigators have an intelligible aversion to compulsion: a cornerstone of mediation is that it is a voluntary consensual process. They argue that mandatory mediation would: 1) create another costly procedure; 2) unfairly impede the public's right of free access to the courts; 3) achieve statistically lower success rates. The central ideology of mediation is voluntariness. Tampering with this principle could easily be misinterpreted as a denial to access real justice¹².

Even where the judiciaries are not entirely convinced of compulsory mediation, they are virtually unanimous in agreeing that there must be "robust encouragement" to mediate. Compulsory mediation is a controversial concept. Although it is an effective tool that can provide great benefits for disputants and the court system, the idea of an involuntary process creates a contradiction with the same nature of mediation.

2. The nature of Mediation and the contradictions of compulsory mediation

2.1 Essential Principles of mediation

Mediation is typically described as 'facilitated negotiation'¹³ between the parties to a dispute. It is a private negotiation process in which the disputing parties are assisted by a neutral third-party—the mediator. Mediation is a voluntary collaborative process where individuals who have a conflict with one another identify issues, develop options, consider alternatives, and develop a consensual agreement.

10) Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]

11) See, e.g., *Halsey v. Milton Keynes Gen. Hosp.*, [2004] EWCA (Civ) 576, [2004] W.L.R. 3002, [13] (Eng.).

12) See *Compulsory Mediation*, Article by Paul Randolph, January 2013, *Mediate.com*

13) See Stephen Ware, *Principles of Alternative Dispute Resolution* (2nd ed. 2007) 265

If we examine mediation definitions describing the key elements of mediation we will see that they all have the following elements in common:

- 1) The voluntary aspect of mediation. It is the very nature of mediation to engage the parties in a voluntary process of finding an amicable resolution to their dispute. 'Voluntariness' is a basic and undisputed principle of mediation commonly used in mediation definitions.
- 2) Neutrality. The terms 'neutral' and 'neutrality' commonly appear in definitions of mediation. Neutrality has been identified as a foundational concept in mediation.
- 3) The private nature of mediation. The process of mediation is always private and confidential.

Can the above elements coexist with the concept of compulsory mediation?

2.2 Negative aspects and the contradictions of compulsory mediation

Considerable criticism has been leveled against the movement towards compulsory mediation. The fundamental argument against compulsory mediation is that mediation is, by definition, a voluntary process. Compulsory mediation impinges upon the parties' self-determination and voluntariness, thus undermining the very essence of mediation. Coercion into the mediation process therefore seems inconsistent with the fundamental tenets of the consensual mediation process.

The apparent paradox of compulsory mediation has sparked diverse opinions on whether coercion *into* mediation may realistically be distinguished from coercion *within* mediation.¹⁴

Mediation studies have shown that disputants are most satisfied with the mediation process when it is non-coercive and attentive to parties' interests.¹⁵

14) These terms are referred to also as front-end consent or entry-level consent, which is required for participation in the mediation process, and back-end or outcome consent that is required for an authentic agreement. (see Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 *Fordham L. Rev.* 1247 (2009))

Critics of compulsory mediation are of the opinion that there cannot possibly be a neat demarcation or even a semantic difference between coercion *into* and *within* mediation.¹⁶

However, other observers, share the opinion that mandatory mediation is not a contradiction because there can be a clear distinction between coercion within the mediation process and coercion into mediation.¹⁷

An individual may be told to attempt the process of mediation, but that is not tantamount to forcing him to settle in the mediation. Coercion in compulsory mediation only “relates to requiring that parties try to reach an agreement to resolve their dispute.”¹⁸The individual is not being denied access to court because mandatory mediation is not being ordered in lieu of going to court. Instead, the parties’ access to court is only delayed; the parties have the liberty to pursue litigation once again if mediation fails.¹⁹

As such, there is no obligation on mediators to reach an agreement and the parties are entitled to end the process at any time. In order to avoid any intrusion into the voluntary nature of the mediation process, it seems preferable that compulsory schemes only operate to remove the aspect of voluntariness into the process and that parties retain their freedom within the process.²⁰

Furthermore, there may be limited utility in comparing compulsory and voluntary mediation, since it is highly plausible that parties who voluntarily enter into mediation are more amenable to reach a settlement.²¹

Nevertheless, all the above concerns about the level of coercion within the mediation process may not be totally unwarranted. From the moment that

15) See Guthrie C. & J. Levin, A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute, 13. Ohio St. J. on Disp. Resol. 885, 892-93 (1998).

16) See, eg, Dorcas Quek, ‘Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program’ (2010) 11 Cardozo Journal of Conflict Resolution , p.485.

17) See Frank E. A. Sander, Another View of Mandatory Mediation, DISP. RESOL. MAG., Winter 2007, at 16.; See also George Nicolau, Community Mediation: Progress and Problems, in Massachusetts Association of Mediation Programs (1986).

18) See Stephen G. Bullock & Linda Rose Gallagher, Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana, 57 La. L. Rev. 885, 948 (1997).

19) See David S. Winston, Participation Standards in Mandatory Mediation Statutes: “You Can Lead a Horse to Water. . .”, 11 Ohio St. J. on Disp. Resol. 187, 190-92 (1996); See also Campbell C. Hutchinson, The Case for Mandatory Mediation, 42 Loy. L. Rev. 85, 91 (1996).

20) See supra note 16 ,at p.486

21) *Id.* At 486

mediation is often closely linked to the entire court process, parties could easily associate coercion from the judge (or the law) with a reduction in the level of autonomy that they may exercise within the mediation process. In short, there could be a very faint distinction between coercion to *enter* mediation and coercion *within* mediation.²²

Voluntariness is multi-dimensional. It may consist of four discrete elements: disputants may choose the law according to which their dispute is to be settled; they may choose the neutral third party who will help to settle the dispute; they may participate in the dispute resolution process voluntarily; and they may voluntarily agree to the resolution²³.

The first of these elements, choosing the law, applies only to norm-based processes (i.e. adjudication and arbitration). The other three elements may all be compromised to a greater or lesser degree in compulsory mediation.

The first is the choice of the mediator. This is not necessarily a negative issue because even if a dispute is mediated by a mediator assigned by the State, without the input of the disputants, this does not mean that the mediator will not be neutral and efficient.

The second is the most significant one. The disputants' participation in the mediation process is involuntary. Parties who are forced to mediate are unlikely to approach the process with a positive attitude²⁴. On the other hand, there is evidence indicating that parties who are forced to mediate usually participate effectively.

*"There is ... a substantial body of opinion - albeit not unanimous - that some persons who do not agree to mediation, or who express a reluctance to do so, nevertheless participate in the process often leading to a successful resolution of the dispute."*²⁵

Further, studies demonstrate that, if given the choice, disputants will normally choose to opt out of mediation; however, there are high rates of settlement for both voluntary and compulsory mediation when it is engaged in early on in the process.²⁶

22) *Id.* At 487

23) See Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: The University of Chicago Press, 1981), pp. 2-6.

24) See, Paul Venus, 'Court directed compulsory mediation - attendance or participation?' *Australasian Dispute Resolution Journal* 29. (2004) 15

25) Chief Justice James J Spigelman, 'Address delivered to the LEADR Dinner', See, Supreme Court of NSW, Practice Note SC Gen 6 — Mediation, 10 March 2010.

The parties to mediation and their representatives are required to make themselves available for mediation within the time frames set out by the law, to participate fully and in good faith in the mediation process, and to exchange all relevant documents. Failure to comply with the foregoing could result in a mediator reporting that the mediation did not take place, or the parties having to reapply for mediation instead of being able to move forward to the next step of arbitration or a court proceeding.²⁷ Legislation can resolve this issue by providing sanctions against parties who do not participate in good faith. For example, In England, the courts have made adverse costs orders against parties who have 'unreasonably' refused to mediate.²⁸ The English courts have also made it clear that where a party takes an unreasonable position or conducts himself unreasonably during mediation, he may be liable for costs.²⁹

A voluntary agreement is the final of the three elements.

It is generally acknowledged that there must be no coercion to settle. With compulsory mediation we order the parties to negotiate. Ordering people to negotiate "fully and in good faith" quickly degenerates into ordering them to settle. We cannot tidily extricate these two practices from one another: the rejection of a settlement offer is easily construed as a failure to make a bona fide attempt to reach agreement.

Good faith bargaining requirements can also be interpreted as a measure of pressure to parties to settle.³⁰ Some parties who are referred to mediation may fear that if they do not settle, there will not be a favorable outcome from the judge.

If the law provides for a time frame by which the parties must settle things get even worse. The imposition of a date by which settlement must occur creates even more pressure on the parties to settle.

26) See Pablo Cortes, 'Can I Afford Not to Mediate? Mandatory Online Mediation for European Consumers: Legal Constraints and Policy Issues' (2009) 35 Rutgers Computer & Technology Law Journal, 18-19.

27) See Fleischmann, Elana, and Naomi Bussin. "The Institutionalization of Alternative Dispute Resolution: A Case Study of the Ontario Insurance Commission". Canadian Insurance Law Review 6 (1 996): p.280

28) See, eg, Halsey [2004] 4 All ER 920; *Dunnett v Railtrack plc* [2002] 2 All ER 850.

29) See *Earl of Malmesbury v Strutt & Parker* [2008] EWHC (QB) 424; *Merelie v Newcastle Primary Health Care Trust* [2006] EWHC (QB) 1433, cited in Nolan-Haley, 'Mediation Exceptionality', 1262.

30) See Andreas Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 Ohio St. J. on Disp. Resol. (1992).p, 287, 304

Another objection to compulsory mediation is that processes are not neutral.

Some aspect of mediation may serve the interests of one party over the other.

In divorce mediation, for example, this situation exists when there is a history of domestic abuse. The abusive party benefits from a process which assumes the parties have equal bargaining power, which provides limited protection for the former partner, and which does not consider who is in the wrong.³¹

Governments now commonly exempt people from mandatory mediation when domestic abuse has occurred.

Finally, there are critics concerning the private nature of mediation and confidentiality.

Some people object to compulsory mediation because it is conducted privately.

The purpose of adjudication is not merely to settle conflicts, but to explicate and give force to public values. Whenever a dispute is settled privately a court is deprived of the opportunity to perform this function³². Confidentiality may also be compromised, particularly when rules requiring good faith bargaining allow the mediator to report on what happens during mediation.³³

2.3 Article 6 of the European Convention on Human Rights (ECHR)

Over the last years, a major policy debate has emerged over the merits of compulsory mediation regimes. The debate examines whether compulsory mediation violates the access to justice provisions of Article 6 of the ECHR.

Article 6(1) provides that:

“in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial ...”

31) See Gagnon, Andree G. "Ending Mandatory Divorce Mediation for Battered Women". Harvard Women's Law Journal 15 (1992): pp. 274-77.

32) See Owen M. Fiss, "Against Settlement", Yale Law Journal 93 (1984), p. 1085.

33) See, e.g., In re A. T. Reynolds & Sons, Inc., 452 B.R. 374, 383 (S.D.N.Y. 2011) (rejecting the bankruptcy court's forceful ruling in favor of requiring meaningful participation in mandatory mediation as an infringement upon confidentiality, and instead holding that "confidentiality considerations preclude a court from inquiring into the level of a party's participation in mandatory court-ordered mediation").

The debate started in England, where compulsory mediation has been a highly contested issue since the case of *Dunnett v. Railtrack*.³⁴ *Dunnett* is the first English case where the court's enthusiasm for mediation was transformed into a more intense support for the process³⁵. The *Dunnett* court held that successful parties, who had refused to mediate, could be prevented from receiving costs that they would otherwise be awarded. The *Dunnett* case created substantial commentary questioning the legitimacy of compulsory mediation. Could courts require parties to participate in mediation? If not, could they impose cost sanctions against successful litigants who had refused to mediate?³⁶

The cases of *Halsey v. Milton Keynes General NHS Trust* and *Steel v. Joy* answered these remaining questions. In these conjoined cases, the Court of Appeal held that it should not require truly unwilling parties to mediate their cases because compulsory referral would violate a litigant's fundamental rights to have access to the courts and thereby violate Article 6 of the ECHR.³⁷ The court held that even if it had the power to require parties to engage in the mediation process, it would be difficult to identify situations in which the exercise of this power would be appropriate.³⁸ The court reasoned that compulsory referral "would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process."³⁹

Because of these potentially negative consequences of compulsory mediation, the court found that while compelling parties to engage in ADR would be unacceptable, it was the court's role to encourage mediation options. Furthermore, this encouragement could be "robust."⁴⁰ Thus, the *Halsey* court held that parties, even successful ones, who unreasonably withhold consent to mediate, could be liable for costs.⁴¹

The court offered a non-exhaustive list of factors to determine if a party's refusal to participate in mediation was reasonable:

34) See *Dunnett v. Railtrack*, [2002] EWCA (Civ) 303, [2002] W.L.R. 2434 (Eng.).

35) See Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 *Fordham L. Rev.* p. 1258 (2009)

36) See *id.* At 1259-61

37) See *Halsey v. Milton Keynes Gen. Hosp.*, [2004] EWCA (Civ) 576, [2004] W.L.R. 3002 [9] (Eng.).

38) See *supra* note 35, at 1259 (citing *Halsey*, [2004] EWCA (Civ) 576,[9]).

39) See *Halsey*, [2004] EWCA (Civ) 576, [10].

40) See *supra* note 35, at 1259 (citing *Halsey*, [2004] EWCA (Civ) 576,[11]).

41) See *Halsey*, [2004] EWCA (Civ) 576, [13].

- (a) the nature of the dispute;
- (b) the merits of the case;
- (c) the extent to which other settlement methods have been attempted;
- (d) whether the costs of the ADR would be disproportionately high;
- (e) whether any delay in setting up and attending the ADR would have been prejudicial; and
- (f) whether the ADR had a reasonable prospect of success.⁴²

The above list which penalizes parties who are deemed to have unreasonably refused to mediate, has been extended to refusals to negotiate, delays in agreeing to mediate, taking unreasonable positions in mediation, and even to a party's unreasonable conduct in demanding an apology as a prerequisite to mediation.⁴³

Many courts have imposed costs for unreasonable refusals to negotiate or mediate.

The debate over compulsory mediation continues in England.

Critics are concerned with the exercise of covert power during the course of mediation and the influence of this power over settlement agreements.⁴⁴

This has not stopped England from introducing compulsory mediation for divorce cases.⁴⁵

More recently, the European Court of Justice (ECJ) has weighed in on the compulsory mediation debate in a case involving Italian consumer telecom disputes.

In *Rosalba Alassini v. Telecom Italia SpA*,⁴⁶ the court held that the compulsory mediation scheme imposed by Italian law did not amount to a breach of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.⁴⁷

42) *Id.* At [16]

43) See Nolan-Haley, *Mediation Exceptionality*, supra note 35, at 1261-62

44) See Hazel Genn, *The Hamlyn Lectures 2008: Judging Civil Justice* 124 (Cambridge Univ. Press, 2010).

45) See Ben Letham, *Family Law: Divorcing Couples Face Mandatory Mediation*, FindLaw UK The Solicitor Blog (Feb. 23, 2011)

46) *Joined Cases C-317/108 & C-320/08, Alassini v. Telecom Italia SpA*

47) *Joined Cases C-317/108 & C-320/08, Alassini v. Telecom Italia SpA*, 2010 E.C.R. 134; accord Steven Friel & Christian Toms, *The EU Mediation Directive-Legal and Political Support for ADR in Europe*, 2 *Bloomberg L. Rep. - Alternative Disp. Resol.* 1, 2 (2011), (noting also that the Italian laws on ADR already complied with other EU Directives that aim to strike a balance between encouraging mediation and access to judicial proceedings); see also Tomaso Galletto & Richard L. Mattiaccio, *Mediation in Italy: A Bridge Too Far?*, 66 *Disp. Resol. J.* 78, 86 (2011) (explaining that the *Joined Cases* decision held that the compulsory mediation does not violate EU principles "if the compulsory scheme meets certain conditions and it is intended to be more effective than a purely voluntary scheme in reducing docket congestion").

This case involved a preliminary ruling regarding provisions of the Universal Services Directive.⁴⁸ One of the procedural issues considered by the court was whether certain provisions of the Universal Service Directive requiring Member States to ensure transparent and simple procedures for dispute resolution were violated by an Italian law requiring an out of court dispute resolution procedure before the case would be allowed to proceed to court.⁴⁹

The court opined that none of the Directive's provisions limited the power of Member States to establish mandatory out of court procedures to settle consumers' telecom disputes with providers.

The ECJ found that mandatory out-of-court proceedings are not contrary to European law so long as they do not result in a binding decision, do not cause a substantial delay in litigating, do not oust the court's jurisdiction due to limitation periods and are not excessively costly.⁵⁰

The mandatory Italian out of court mediation scheme was pursuing "legitimate objectives in the general interest".⁵¹

*Dokter v Minister van Landbouw, Natuur en Voedselkwaliteit*⁵² decision further jurisprudentially supports this position:

"... fundamental rights ...do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute ... a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed."

Thus, enforced mediation does not appear to breach fundamental human rights *per se* and the ECJ ruling provides authority that compulsory mediation in domestic legislation is not precluded by EU law.

48) Joined Cases C-317/108 to C-320/08, *Alassini v. Telecom Italia SpA*, 2010 E.C.R. 134, P 68; see also Council Directive 2002/22, 2002 O.J. (L 108) 51 (EU).

49) Joined Cases C-317/108 & C-320/08, *Alassini v. Telecom Italia SpA*, 2010 E.C.R. 134, P 68.

50) See Giovanni De Berti, ECJ Finds Italian Rules on Mandatory Mediation Consistent with EU Law, International Law Office: <http://www.internationallawoffice.com/Newsletters>>. (29 April 2010)

51) See Julian Sidoli del Ceno, *The Problem of Compulsory Mediation: Proportionality, Procedural Justice and Human rights*, (citing Advocate General Kokott, RICS COBRA Conference, 10-12 September 2013, New Delhi, India)

52) See *Dokter v Minister van Landbouw, Natuur en Voedselkwaliteit* [2006] EC I-5431

2.4 The benefits of compulsory mediation

A successful mediation can save money, time and the stress of litigation. A successful mediation leads all Parties to a *win-win* situation. It can salvage business and personal relationships that would have otherwise been irreversibly damaged. These potential benefits outweigh the extra cost and time spent even when the mediation is not successful.

Parties endorse mediation because of the opportunities to participate in the process, to tell their side of the story and to contribute in determining the outcome of the dispute.⁵³ Attorneys have found that mediation has improved communication between the parties and the attorneys.⁵⁴ Furthermore, a majority of studies shows that mediated cases have a higher rate of settlement than cases that did not undergo mediation.⁵⁵

The main advantage to compulsory mediation is that it gets more people to the mediation table than voluntary mediation. Voluntary mediation is 'underutilized'.

Many voluntary mediation programs were actively promoted for disputes around the world from the 80's until today. However most of the times citizens and their lawyers chose to ignore them.

In England's Central London County Court system in which mediation occurred only with the parties' consent, only 160 mediations took place out of the 4,500 cases in which mediation was offered.⁵⁶

In contrast, after England introduced the Civil Procedure Rules, which empowered the courts to encourage the use of ADR (with cost sanctions), the number of commercial disputes referred for mediation increased by 141 percent.⁵⁷

Some Lawyers won't try mediation because it is a new, unfamiliar process, which costs money. Others because mediation requires fewer hours and therefore pays them less money. Many believe that mediation gives them less control and a

53) See Roselle L. Wissler, Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research, 17 Ohio St. J. on Disp. Resol. , 690 (2002)

54) *Id.* at 692.

55) *Id.* at 694; See also Craig A. McEwen, Toward a Program-Based ADR Research Agenda, 15 Negot. J. 325, 331-33 (1999).

56) See The Lord Chancellor Dep't, Alternative Dispute Resolution: A Discussion Paper, Annex B (Nov. 1999)

57) See The Lord Chancellor Dep't, Emerging Findings: An Early Evaluation of Civil Justice Reforms, para. 4.12 (Mar. 2001)

diminished role. They often believe that, if they suggest mediation, the opposite side will take this as a sign of a weak case. Compulsory mediation creates a safe environment where neither party has to suggest it, and both start on an equal level. Many attorneys who initially felt that way are now strong supporters of mediation. These attorneys may never have tried mediation unless it was compulsory by law. People too automatically think of adjudication first. Peoples initial response when they have a dispute is: "I'll go to court" or " I'll see my lawyer," rather than "I'll visit my local mediation center." One of Greeks' favorite expressions is:"I will sue you!" If people automatically think of adjudication first, and lawyers do nothing to encourage them to consider mediation as an option, voluntary mediation programs will continue to be underutilized.

This is, in my view, the strongest argument in favor of compulsory mediation.

Where the parties' reticence towards mediation is due to unfamiliarity with or ignorance of the process, compulsory mediation may be instrumental in helping them overcome their prejudices or lack of understanding. Studies show that parties who have entered mediation reluctantly still benefited from the process even though their participation was not voluntary.⁵⁸ It has been observed that parties probably get "swept along by mediation's power and forget how they got there initially."⁵⁹ The need to increase awareness and the usage of mediation services are probably the most compelling reasons for introducing compulsory mediation.

Compulsory mediation may have an educative value and can change people's perception and their approach to conflict resolution.

It is needed even as a temporary expedient because individuals do not use mediation voluntarily and therefore should be given the opportunity to experience the benefits of mediation.⁶⁰ It can be used as a short-term measure utilized in jurisdictions where mediation is relatively less well-developed.

Compulsory mediation is also more cost-effective than voluntary mediation because

58) See Jessica Pearson & Nancy Thoennes, *Divorce Mediation: An Overview of Research Results*, 19 Colum. J. L. & Soc. Probs. 451 (1985); James A. Wall & Lawrence F. Schiller, *Judicial Involvement in Pre-Trial Settlement: A Judge is Not a Bump on a Log*, 6 Am. J. Trial Advoc. 27 (1982); Craig McEwen & Thomas Milburn, *Explaining a Paradox of Mediation*, 9 Negot. J. 23 (1993).

59) See Frank E. A. Sander, *Another View of Mandatory Mediation*, *Disp. Resol. Mag.*, Winter 2007.

60) See supra note 9, at 886.

administrative costs are spread over a larger number of cases.⁶¹

It is also advantageous for research purposes. In theory, mediation minimizes costs, reduces court backlogs, and preserves relationships, but it has been difficult to prove or disprove these results empirically. If participants of the research are all volunteers for mediation the sample is biased:

"The obvious risk is that those disputants who were willing to mediate were particularly susceptible to a mediatory approach, and that if mediation were compulsory. . . its apparent advantages would disappear."⁶²

Finally, "access to justice" is the last strong argument in favor of compulsory mediation.

The idea of access to justice encompasses multiple meanings, all focused on empowering individuals to exercise their rights in the civil justice system. Under customary international law, access to justice refers generally to an individual's right to seek a remedy before an impartial court of law or tribunal.⁶³

The idea of access to justice is also part of a worldwide law reform movement described more than thirty-two years ago by Cappelletti and Garth in their international study of access to justice.⁶⁴

These authors identified what they labeled as three "waves" of reform: (1) making legal aid accessible to the poor; (2) developing procedural devices that would allow a single lawsuit to resolve multiple claims; and (3) promoting systemic reform of the legal system through ADR.⁶⁵

Today, ADR is a strong wave of reform in the United States and throughout the world.⁶⁶

61) See Fleischmann, Elana, and Naomi Bussin. "The Institutionalization of Alternative Dispute Resolution: A Case Study of the Ontario Insurance Commission". *Canadian Insurance Law Review* 6 (1996): p274.

62) See Goldberg, Stephen, Eric Green and Frank Sander. "ADR Problems and Prospects: Looking To the Future". *Judicature* 69 (Feb.-Mar., 1986): p294

63) See Francesco Francioni, *The Rights of Access to Justice under Customary International Law*, in *Access to Justice as a Human Right* 1, 1-5 (2007).

64) See Mauro Cappelletti & Bryant Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report*, in *1 Access to Justice* (1978).

65) See *id.* at 54-84; see also Mauro Cappelletti, *Alternative Dispute Resolution Processes Within the Framework of the World-Wide Access-to-Justice-Movement*, 56 *Mod. L. Rev.* 282 (1993).

66) See "Mediation Provides Meaningful Access to Justice," Says ABA President Robinson, *ABANow.org* (Oct. 17, 2011).

Access to justice has been a longstanding priority for European states too.⁶⁷

Much of Europe's embrace of mediation has been under the banner of the third ADR wave, as the European Parliament has included within the concept of access to justice "access to adequate dispute resolution processes for individuals and businesses."⁶⁸ Civil justice systems in Europe are facing serious problems as costs and delays associated with courts and the litigation process have significantly impacted citizens' access to justice⁶⁹. In Italy alone, there is a reported backlog of almost six million civil cases in the court system.⁷⁰

For States such as Italy where delays in civil litigation are endemic, compulsory mediation schemes have the potential to assist in ensuring that disputants are able to access appropriate dispute resolution mechanisms within a reasonable time by reducing the caseload of courts while retaining parties' rights to have recourse to the courts if no settlement is reached. As a result of systemic problems in accessing justice, the alternative dispute resolution (ADR) movement has experienced a steadily growing presence in both civil and common law jurisdictions.⁷¹

3. Schemes and Practice of compulsory mediation around the world

3.1 Schemes of compulsory mediation

It is important to interpret "compulsory mediation".

Compulsory mediation can generally be broken into three categories.

First, some compulsory mediation schemes provide for automatic and compulsory referral of certain matters to mediation.

67) See generally Jacqueline Nolan-Haley, *Evolving Paths to Justice: Asserting the EU Directive on Mediation*, Proceedings of the Sixth Annual Conference on International Arbitration and Mediation (forthcoming 2012)

68) See Resolution of September 13, 2011 on the Implementation of the Directive on Mediation in the Members States, Its Impact on Mediation and Its Takeup by the Courts, Eur. Parl. Doc. P7_TA(2011)0361, P 17

69) See *supra* note 1

70) See M. Henry Martuscello II, *The State of the ADR Movement in Italy: The Advancement of Mediation in the Shadows of the Stagnation of Arbitration*, 24 N.Y. Int'l L. Rev. 49, 49 (2011) (noting the backlog of cases in Italy to be 5 million in 2011, which is expected to grow to 6.5 million by 2012).

71) See *Id.* at 51.

Such schemes are generally legislative (referred as “categorical”)⁷² and often require parties to undertake mediation as a prerequisite to commencing proceedings. The New South Wales (NSW) farm debt recovery mediation scheme is an example,⁷³ as is the recently introduced compulsory mediation scheme in Italy.⁷⁴ Such legislations should always contain an opt-out provision, allowing parties to argue a case for exemption.⁷⁵ Opt out schemes allow parties to opt out either because certain criteria are not met or one or more parties do not consent to mediation. Examples include the family law mediation scheme in Australia⁷⁶ and the recently introduced pilot scheme in the English Court of Appeal.

A second type of compulsory mediation is often referred to as court-referred mediation (discretionary’).⁷⁷ It gives judges the power to refer parties to mediation with or without the parties’ consent on a case-by-case basis. Such an approach is widely available to courts in Canada, USA and Australia.⁷⁸ However, it has been slower to take hold in Europe.⁷⁹

Third, some compulsory mediation schemes can be defined as “quasi-compulsory”. In these schemes, although alternative dispute resolution (‘ADR’) is not mandated, it is effectively compelled through the potential for adverse costs orders if not undertaken prior to commencing proceedings.⁸⁰ The English *CPR* and the recently enacted *Civil Dispute Resolution Act 2011* (Cth)⁸¹ are examples of such schemes.

Both permit costs sanctions against parties who do not reasonably attempt to settle

72) See Frank E A Sander, ‘Another View of Mandatory Mediation’ (2007) 13(2) *Dispute Resolution Magazine* 16, 16.

73) See *Farm Debt Recovery Act 1994 (NSW)*.

74) See Legislative Decree on Mediation Aimed at Conciliation of Civil and Commercial Disputes (28/2010); see Giovanni De Berti, *New Procedures for Mandatory Mediation*, International Law Office: <http://www.internationallawoffice.com/Newsletters>>. (7 April 2011)

75) See Sander, above n 72, at 16.

76) Introduced by sch 4 of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), s 60I(7) of the *Family Law Act 1975* (Cth) provides for mediation or ‘family dispute resolution’ as a prerequisite to the court hearing a parenting matter. Exceptions are provided for in *Family Law Act 1975* (Cth) s 60I(9)(b), including cases of family violence or child abuse.

77) See Sander, above n 72, 16.

78) See, eg, *Civil Procedure Act 2005* (NSW) pt 4; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 50.07; *Uniform Civil Procedure Rules 1999* (Qld) r 319. See also Magdalena McIntosh, ‘A Step Forward - Mandatory Mediations’ (2003) 14 *Australasian Dispute Resolution Journal* 280.

79) See *Civil Procedure Rules 1998* (UK) SI 1998/3132, rr 1.4, 26.4 (‘CPR’). See also Dame Hazel Genn et al, *Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure* (Ministry of Justice Research Series, 2007) 2.

80) See Melissa Hanks, *Perspectives on mandatory mediation*, *UNSW Law Journal*, volume 35(3), (2012), p.931

81) See *Civil Dispute Resolution Act 2011* (Cth) s 2. See also *Civil Procedure Act 2005* (NSW) pt 2A.

the dispute. Although mediation in such cases is not categorically mandated, the possibility of adverse costs orders is a strong factor in favor of attempting ADR and as such, these schemes ought to be considered in this analysis.⁸²

3.2 America & Australia

One of the major mediation debates in the United States for over twenty-five years has been whether mediation, which is essentially a voluntary process, should be made compulsory.⁸³ Proponents of mandatory regimes have argued that diversion to mediation is a sensible move, particularly when considering the desirability of reducing the dockets of overcrowded courts.⁸⁴ As we saw above, to honor the understanding of mediation as a voluntary process, proponents have adopted Professor Frank Sander's theory that there is a difference between requiring parties to enter into a mediation process and requiring them to reach an agreement in mediation.⁸⁵ Another justification for developing compulsory regimes is the need to remedy the low usage problem caused by unfavorable views of mediation, which are shared by potential users as we saw above.⁸⁶

In an effort to promote and legitimize compulsory mediation, the Law and Public Policy Committee of the Society of Professionals in Dispute Resolution (SPIDR) issued a report in 1990 stating that "mandatory participation in non-binding dispute resolution processes often is appropriate."⁸⁷

Federal legislation soon followed. The Civil Justice Reform Act of 1990⁸⁸ and its progeny in the United States made compulsory mediation part of the ADR landscape, and courts upheld its legitimacy.⁸⁹

82) See supra note 80, at 932

83) See Nadja Alexander, *Global Trends in Mediation: Riding the Third Wave*, in *Global Trends in Mediation* 1, 25., Kluwer Law International 2d ed., (2006).

84) See, e.g., Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 *Willamette L. Rev.* 565 (1997).

85) See *Dispute Resolution*, by Goldberg, Sander, Rogers, & Cole, p.490 (1985).

86) See Wissler, supra note 84, at 565.

87) SPIDR, *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts*, Report 1, reprinted in Stephen P. Goldberg et al., *Dispute Resolution: Negotiation, Mediation and Other Processes* 402-03 (5th ed., 2007). In 2001 SPIDR joined two other organizations to form the Association for Conflict Resolution (ACR).

88) 28 U.S.C. § 471-82 (2006).

89) See, e.g., *In re Atlantic Pipe Corp.*, 304 F.3d 136, 147 (1st Cir. 2002) (holding that the court has the inherent power to order parties to engage in mandatory mediation).

After mediation was implemented as an antidote for the ineffectiveness of the justice system, compulsory mediation programs were adopted in numerous contexts, particularly for custody and divorce disputes.⁹⁰

Today in the United States and in Canada, compulsory mediation appears to be widely accepted, with the US state courts being able to refer cases to the US Federal Mediation service (FMCS) for compulsory mediation, and in Ontario, Canada, compulsory mediation is provided for in their court rules (Ontario Court Rules for the Ontario Superior Court of Justice (Rule 24.1)).

Ontario has one of the most extensive “categorical” referral schemes.

In 1999, Ontario introduced compulsory mediation for civil, non-family actions, with a provision for the parties to opt-out of filing a motion. The parties in all these cases have to undergo mediation within ninety days after the filing of the first defense. The parties in standard cases may consent to an extension of sixty days, but all other extensions have to be obtained through formal court orders.⁹¹ It is noteworthy that this scheme was hailed as a resounding success just twenty-three months after its inception.⁹² The parties and lawyers expressed overall satisfaction with the mandatory mediation process.⁹³ The success is primarily attributable to one factor: the latitude given to the parties to obtain extension of time to mediate. Exemption from the scheme does not seem to be easily obtained; the parties have to file a motion before a case management master or judge, and no particular criteria for exemption are stipulated in the related legislation.⁹⁴ However, the parties frequently made use of their right to obtain extensions of time. Evidently, Ontario’s program, while achieving the overarching goal of increasing the number of mediations, “tempered” the mandatory effect of the scheme by giving parties the option to either opt out for cause or to obtain more time to undergo mediation.⁹⁵ These are certainly essential features for any categorical referral scheme to be well-received by

90) Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 *Fam. & Conciliation Cts. Rev.* 335, 337 (1999).

91) See, Dorcas Quek, ‘supranote 16 ,p500

92) See Robert G. Hann & Carl Baar, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report - The First 23 Months* ,p.80 (2001)

93) *Id.* at 97. Eighty percent of the lawyers in Ottawa and fifty-nine percent of the lawyers in Toronto expressed satisfaction with the overall mandatory mediation experience, while eighty- two percent and sixty-five percent of the litigants in the respective states expressed satisfaction.

94) See, Dorcas Quek, ‘supranote 16 ,p501

95) *Id.* At 501

litigants and attorneys.⁹⁶

Florida is leading the way in the United States with its comprehensive court-connected ADR program.⁹⁷ It has been estimated that more than 100,000 cases are diverted from court process to mediation each year.⁹⁸

In 1987, as ADR was becoming prominent, judges were given the authority to refer any civil cases to mediation or arbitration “if the judge determines the action to be of such a nature that mediation could be of benefit to the litigants or the court.”⁹⁹

Under the Florida Rules of Civil Procedure, the first mediation session must take place within sixty days of the court referral. Parties are able to request that mediation be dispensed with by filing a motion within fifteen days of referral.¹⁰⁰

Florida’s director of court ADR services has noted that mandatory mediation orders are heavily litigated in Florida despite the obligation for parties to pay the mediators’ fees.¹⁰¹ Further, the number of applications for exclusion from mandatory mediation has been relatively low.¹⁰²

The success of this “discretionary” referral regime is principally attributable to a few factors:¹⁰³

1) *The parties have the freedom to choose their mediators.*

One noteworthy feature of Florida’s court-annexed mediation programs is the liberty given to the parties to mutually agree on a mediator. Since 1990, the parties were given the option to choose any court-certified mediator or any other mediator whom

96) *Id.* at 501

97) See Bruce A. Blitman, *Mediation in Florida: The Newly Emerging Case Law*, Fla. B. J., Oct. 1996, at 44; J. Sue Richardson, *Review of Florida Legislation; Comment: Mediation: The Florida Legislature Grants Judicial Immunity to Court-Appointed Mediators*, 17 Fla. St. U. L. Rev. 623 (1990) (“Florida is leading the way in the establishment of alternative dispute resolution procedures.”)

98) See Sharon Press, *Florida’s Court-Connected State Mediation Program*, in *Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs* 57 (Ed Bergman & John Bickerman eds., 1998).

99) Fla. R. Civ. P. 1.710(b). See also Florida’s Court-Connected ADR History, in *Florida Mediation & Arbitration Programs, A Compendium* 94 (Earnestine Reshard ed., 19th ed. 2005-2006)

100) See, Dorcas Quek, ‘supranote 16 ,p505

101) See Sharon Press, *Institutionalization: Savior or Saboteur of Mediation*, 24 Fla. St. U. L. Rev. 903, 907-08 (1997). Ms. Press has since confirmed that the volume of litigation on mandatory mediation remains low. Interview with Sharon Press, Director, Dispute Resolution Institute, Hamline University School of Law (Feb. 2009)

102) According to Ms. Sharon Press, motions for exclusions under Florida Rules on Civil Procedure rule are rarely filed. *Id.*

103) See, Dorcas Quek, ‘supranote 16 ,at 506,507(citing Dorcas Querk explaining the three fundamental reasons for the success of Florida’s “discretionary” scheme)

they deemed to be sufficiently qualified.¹⁰⁴ This is a prudent move to soften the blow of the mandatory mediation regime.

2) *Dissatisfied parties have recourse to a mediator grievance system.*

The Florida Rules for Certified and Court-Appointed Mediators introduced a code of conduct for all mediators, which is enforceable through the right of litigants to file grievance complaints.¹⁰⁵ Although this grievance system is not totally free from criticism, it is likely to be instrumental in tempering the “coercive” element of the mandatory mediation program by giving the parties the avenue to express their objections.¹⁰⁶ It is notable that the number of grievances filed compared to the large number of mediations has not been particularly high in Florida, which seems indicative that the level of dissatisfaction with the mandatory mediation scheme is not great.¹⁰⁷

3) *Clear requirements on the obligation to mediate.*

Finally, Florida has also introduced relatively clear criteria on when the obligation to mediate is fulfilled.¹⁰⁸ The main requirement is for parties to appear at the mediation session, and appearance is met when the following persons are physically present:

- 1) the party or its representative having full authority to settle without further consultation;
- 2) the party’s counsel of record, if any; or
- 3) A representative of the insurance carrier for any insured party who is not such carrier’s outside counsel and who has full authority to settle.

In summary, Florida’s experience offers an apt illustration of how a court-mandated mediation program can be comprehensively institutionalized.

In Australia there has also been compulsory mediation for many years, especially in Victoria and Queensland.

Australia has experience of a number of successful mandatory mediation schemes.

104) Fla. R. Civ. P. 1.720; Press, *supra* note 101, at 911.

105) The formal and systematic procedure, set out in Rule 10.810 of the Rules involves referring a complaint to a complaint committee for it to make a facial sufficiency determination, and thereafter to send a report to the mediator for his or her response. A hearing panel may deal with the complaint where it is not resolved at the complaint committee level. See Fla. R. Certified & Ct. App’ed Mediators 10.810

106) See *supra*, note 101, at 913

107) According to statistics supplied by Ms. Sharon Press, as of December 2008, only 115 complaints have been filed since the grievance procedure came into place in 1992

108) Fla. R. Civ. P. 1.720.

These range from discretionary schemes to categorical legislative schemes which require mediation as a prerequisite to bringing a court action.

Examples of categorical schemes in NSW include the *Farm Debt Mediation Act 1994* (NSW), *Retail Leases Act 1994* (NSW), *Legal Profession Act 2004* (NSW) and *Strata Schemes Management Act 1996* (NSW).¹⁰⁹ Victoria has a similar legislative scheme applying to retail tenancy disputes.¹¹⁰ At a federal level, legislation mandates mediation in family law proceedings except where there are certain factors making mediation unsuitable, in which case parties are permitted to opt out.¹¹¹

There is a great level of support for mediation in Australia by the judiciary, legislature and legal profession and regardless of whether compulsory schemes are permanent or only temporary expedients; they are a positive step in encouraging more efficient access to civil justice.

3.3 Europe & UK

The EU's endorsement of mediation in civil and commercial disputes evolved over several years through a series of projects.¹¹² First, in 1993, a Green Paper regarding consumer access to justice and settlement of consumer disputes promoted mediation.¹¹³ In 2002, the European Commission issued a Green Paper identifying ADR as a "political priority" for all EU institutions.¹¹⁴ The purpose of the Paper was to inform the public about the use of ADR as a means of increasing access to justice in cross-border disputes.¹¹⁵ In 2004 the European Commission issued a Code of Conduct for Mediators.¹¹⁶

It has the objective of ensuring 'a high quality of mediation services offered

109) See Tania Sourdin, 'Mediation in Australia: Impacts on Litigation', in Nadja Alexander (ed), *Global Trends in Mediation*, (Kluwer Law International, 2006) 37, 62.

110) *Retail Leases Act 2003* (Vic), s 87.

111) See Sourdin, *supra*note 109, 58-9; See also Nicola Berkovic, 'Family Law Blitz to Hit Backlog', *The Australian* (online) 24 May 2012

112) See Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* 72 (Kluwer Law International 2009).

113) Commission Green Paper on Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market, at 52, COM (1993) 576 final (Nov. 16, 1993).

114) Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, at 5, COM (2002) 196 final (Apr. 19, 2002).

115) *Id.*

116) EC, *European Code of Conduct for Mediators* (2004)

throughout the Community'.¹¹⁷

Following the release of the Green Paper, the EC adopted *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters*. The Directive applies only to cross-border civil and commercial disputes and excludes any matters 'on which the parties are not free to decide themselves under the relevant applicable law' with reference to employment and family law.¹¹⁸ The Directive specifically states that 'nothing should prevent Member States from applying such provisions also to internal mediation processes', thus leaving it open for states to extend the provisions to local disputes.¹¹⁹

In a 2011 implementation report, the European Parliament noted that a number of member states have implemented national legislation that goes further than the terms of the Directive.¹²⁰ This report also reaffirms the objectives of ensuring that citizens have access to reliable and predictable ADR services and 'ensuring a balanced relationship between mediation and judicial proceedings'.¹²¹

The Directive gives States the authority to implement compulsory mediation schemes:

- Article 3 states that 'Mediation' means a structured process ... whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. It continues, providing that the 'process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State'.¹²²

- Article 5(2) states that the Directive is 'without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions ... provided that such legislation does not prevent the parties from exercising their right

117) Director General of Justice, Freedom and Security Jonathan Faull, 'Introduction' (Speech delivered at Conference on Self-Regulation of Mediation: A European Code of Conduct, Brussels, 2 July 2004)

118) Mediation Directive, Preamble [10]

119) *Id.*

120) See Arlene McCarthy, 'Report on the Implementation of the Directive on Mediation in the Member States, its Impact on Mediation and its Take-Up by the Courts' (Report, No 2011/2026 (INI), EC Committee on Legal Affairs, 15 July 2011) [4]

121) *Id.*

122) Mediation Directive, art 3.

of access to the judicial system'.¹²³

From both articles 3 and 5(2) we can conclude that the EC accepts the validity of compulsory mediation schemes. This essentially suggests that the EC sees such schemes as consistent with article 6 of the ECHR so long as parties have eventual recourse to the court system.

Italy was the first European state that reacted expeditiously and with decision to the Mediation Directive. Italy adopted a mediation regime that extended far beyond the Directive's mandate and incorporated mediation into domestic law as well as cross-border disputes.¹²⁴ Italy has been plagued by substantial backlogs in the court system with an average delay of three and a half years before a civil case reaches trial.¹²⁵ If a litigant wishes to appeal a civil case, they can expect to be waiting around ten years for a final judgment.¹²⁶ This situation has had adverse consequences for the Italian government which, by 2000, had paid out over €600 million to individuals who brought claims that Italy had violated article 6 of the *ECHR*.¹²⁷

Effective March 20, 2011, mediation became a condition precedent for litigation involving an extensive range of civil and commercial disputes in Italy.¹²⁸ The new law was a vigorous and almost coercive form of compulsory mediation that had all the markings of an arbitration process.¹²⁹ It operated in the following manner:

If parties go to court without attempting to mediate, the law requires that the court stay the proceedings for not longer than four months so that mediation can be attempted.¹³⁰ It permitted a mediator, in the event that no settlement is reached, to propose a solution to the dispute which must then be either rejected with reasons, or accepted by the parties; this applies even if the parties do not require the mediator to issue a proposal, and even if one of the parties does not appear. The traditional role of a mediator is to act as a neutral third party and thus, this approach

123) Mediation Directive, art 5(2).

124) See Vanessa O'Connell, Mandatory Mediation in Italy? Mamma Mia!, Wall Street J. L. Blog (Mar. 14, 2011)

125) See Giuseppe De Palo and Penelope Harley, 'Mediation in Italy: Exploring the Contradictions', 21 Negotiation Journal 469, 470. (2005)

126) See Giuseppe De Palo, Paola Bernadini and Luigi Cominelli, 'Mediation in Italy: the Legislative Debate and the Future' (2003) 6(3) ADR Bulletin 51, 51.

127) See supra note 125, at 471

128) See Tomaso Galletto & Richard L. Mattiaccio, Mediation in Italy: A Bridge Too Far?, 66 Disp. Resol. J. 78, 86 (2011) (explaining that mediation became law through the passage of Law 69).

129) *Id.* at 83-87. Decree No. 28 implements the new mediation law.

130) *Id.* at 82

raises questions as to whether such a system can be classed as mediation at all.¹³¹

While the parties are free to accept or reject the mediator's proposal, rejecting the proposal could trigger cost consequences. To the extent that the court's subsequent judgment "completely corresponds" with the mediator's proposal, the court may award costs against the party who declined to accept the mediator's proposal. As critics have observed, confidentiality is obviously compromised when this occurs.¹³²

Whether Italy's adoption of mandatory mediation was a decision made on the merits, or prompted by the Mediation Directive, or was a decision based on the volume of cases that weigh down the Italian justice system, is unclear. However, with its backlog of 5.4 million civil cases, the Italian justice system was clearly in need of reform.¹³³

The mandatory provisions caused an upsurge in requests for mediation, totaling more than 90,000 between March 2011 and March 2012.

In 2012 the Decree was held to be unconstitutional. However, in June 2013 this ruling was reversed, and Italy once more has compulsory mediation. To avoid compulsory mediation being deemed "unconstitutional" again in the future, changes have been made to the Decree, one being that litigants can withdraw from the mediation process in the early stages, thus participation is compulsory, but can be ended earlier than was allowed previously.¹³⁴

The courts in Romania have also adopted a form of compulsory mediation. The Romanian Civil Procedure Code was amended in 2010 to introduce an article requiring mandatory "conciliation" of all civil cases before proceedings can be issued. In this context conciliation includes negotiations with or without the assistance of a third party neutral. This new scheme in Romania worryingly resembles an older one in Greece set forth by Greek Civil Procedure Code in 1995,

131) Although there are different styles of mediation including evaluative mediation in which the mediation may offer advice as to the parties' positions and possible outcomes, the process implemented in Italy appears more similar to 'med-arb', a process where an unsuccessful mediation is followed by arbitration. (See supra note 80, Melissa Hanks, Perspectives on mandatory mediation, at 949)

132) See supra note 126 (discussing the controversial aspects of the mediation law, including concerns about confidentiality).

133) See Galletto & Mattiaccio, supra note 47, (noting that "nearly six million pending civil cases in a nation of 60.7 million people would appear to make a compelling case for mediation").

134) See Iain Drummond, Should mediation be mandatory, Article, Shepherd & Wedderburn LLP, United Kingdom, October 1 2013

Article 214A. We will see below how this scheme turned out to be a complete failure in Greece.

Some countries have implemented quasi-mandatory mediation. Slovenia has an Alternative Legal Dispute Resolution Act which provided that all Slovenian courts must offer mediation to parties from June 2010. The Act introduced a quasi-compulsory procedure with an opt-out. Similarly, since 2007 the Dutch courts have also had the power to refer parties to mediate appropriate disputes, by letter or during a court hearing.¹³⁵

Having looked at European-wide initiatives in favor of compulsory mediation and the implementation of the Directive in Italy, it is interesting to consider attitudes towards compulsory mediation in England. As a common law country England provides an interesting point of comparison.¹³⁶

The introduction of the Civil Procedure Rules (*CPR*) which came into force in 1999 has a strong emphasis on pre-action procedures and in particular, they place an onus on courts to encourage settlement where appropriate.¹³⁷ The *CPR* introduced a quasi-compulsory system of ADR, although the parties maintain significant discretion with regards to determining the appropriateness of out-of-court procedures for their dispute.¹³⁸

Since the introduction of the *CPR*, litigation in the English High Court and County Courts has reduced by 80 per cent and 25 per cent respectively.¹³⁹ Between July 2007 and 2009, the number of mediations conducted by members of the Civil Mediation Council increased by 181 per cent.¹⁴⁰ Although the *CPR* encourages ADR procedures in general, the English courts have shown support for mediation in their enforcement of the pre-action requirements. For example, as we saw above, in *Dunnett v Railtrack plc*, the court made a costs order against the successful party for

135) *Id.*

136) See Perspectives on mandatory mediation, Melissa Hanks, *UNSW Law Journal*, volume 35(3) at 940 (2012)

137) *CPR* r 1.4(2). see also Miryana Nestic, 'Mediation - On the Rise in the United Kingdom?' 13(2) *Bond Law Review* 20,21(2001)

138) See *supra* note 136, at 940

139) See Michael Legg and Dorne Boniface, 'Pre-action protocols in Australia', 20 *Journal of Judicial Administration* at 42. (2010)

140) See Lord Jackson, *Review of Civil Litigation and Costs: Final Report* ch 36, [2.3] (Ministry of Justice, 2009)

refusing to mediate.¹⁴¹ The court's power to make a costs order based on an unreasonable refusal to mediate was confirmed by the English Court of Appeal in *Halsey*¹⁴² which is still the leading case on court powers regarding mediation.

However, the decision in *Halsey* created an impediment to the progression of discretionary mandatory mediation in England.¹⁴³ As we saw above, the Court of Appeal in *Halsey* held that courts do not have the power to order parties to mediate against their will as this would constitute a breach of article 6 of the *ECHR*.

Despite the fact that discretionary referral of unwilling parties to mediation has been rejected in England, there have been a handful of categorical schemes, initiated by both the courts and legislature that have attempted to promote mediation in civil matters. Between 1996 and 2002, various English courts established voluntary mediation schemes.¹⁴⁴

However, despite high settlement rates and satisfaction with the process, there was a slow uptake of mediation, which ultimately led the government to attempt a compulsory mediation scheme.¹⁴⁵

The Automatic Referral to Mediation ('ARM') pilot scheme, which was implemented by the Department of Constitutional Affairs, ran from 2004 to 2005 as part of the London County Court.¹⁴⁶ This scheme was a failure and highlighted the hesitation of disputants to accept mandatory mediation. According to an evaluation conducted 10 months after the pilot, only 22 per cent of the 1232 cases referred to mediation had a mediation appointment booked.¹⁴⁷ Some commentators have blamed the legal profession, and particularly 'intransigence by solicitors'.¹⁴⁸ For a scheme such as this to be successful, it requires the support of lawyers and judges; yet recent research suggests that some legal practitioners in England are unclear about the process of

141) See supra note 34

142) See supra note 37

143) See Pablo Cortes, 'Can I Afford Not to Mediate? Mandatory Online Mediation for European Consumers: Legal Constraints and Policy Issues', 35 Rutgers Computer & Technology Law Journal 1, 15. (2009)

144) See supra note 136 at 943

145) See Hazel Genn, *Mediation in Action: Resolving Court Disputes without Trial* (Calouste Gulbenkian Foundation, 1999) (In the London County Court voluntary scheme, about 62 per cent of cases settled at mediation and a further 18 per cent settled before trial. Moreover, 85 per cent of respondents reported satisfaction with the process)

146) See supra note 136, at 943

147) *Id.*

148) See Miryana Nestic, 'Mediation - On the Rise in the United Kingdom?' 13(2) Bond Law Review, 33(2001)

mediation.¹⁴⁹

Notwithstanding the failure of the ARM scheme, the Court of Appeal announced a one-year automatic referral to mediation pilot program. The categorical referral scheme commenced on 2 April 2012 and applies to all personal injury and contract claims worth up to £100,000. Such claims are automatically referred to mediation unless specifically exempted by a judge, however parties are not obligated to participate and can terminate the mediation at any time without reason.¹⁵⁰

In 2011, England introduced legislation to implement the Directive in the context of cross-border disputes.¹⁵¹ The legislation does not go any further than the terms required by the Directive and it is yet to be seen whether the legislature will seek to extend the application of those provisions.

England has willingly embraced the use of quasi-compulsory ADR and continued to trial categorical referral schemes. However, the bar to discretionary referral to mediation by courts evidences a continued resistance to mandatory mediation on the part of the judiciary and the strong influence that article 6 of the ECHR has on English jurisprudence.¹⁵²

3.4 Greece

In December 2010, with the passage of Law 3898/2010, the Greek Parliament enacted a law on mediation ('the Mediation Act') that applies to both domestic and cross-border disputes.¹⁵³ This law is the fruit of intensive consultations that began in early 2008 in response to the Mediation Directive as well as to the devastating delays in the administration of justice for which Greece has been condemned over 200 times by the ECHR.¹⁵⁴

Although Greece is facing the same problems with Italy with a substantial backlog in the court system and with enormous delays before a civil case reaches trial, it did

149) See Varda Bondy and Linda Malcahy, *Mediation and Judicial Review: An Empirical Research Study* (The Public Law Project, 2009) 25-6.

150) Judiciary of England and Wales, 'New Pilot To Show Mediation Can Work For the Court of Appeal' (News Release, 30 March 2012)

151) *The Cross-Border Mediation (EU Directive) Regulations 2011 (UK) SI 2011/1133.*

152) See *supra* note 136 ,at 944

153) *Official Gazette of the Hellenic Republic, VolumeA, no211, 16 December 2010, 4393.*

154) See *EU Mediation Law and Practice*, Edited by Giuseppe De Palo and Mary B. Trevor, Oxford University Press , Chapter 12, Apostolos Anthimos ,at 148

not choose to follow the same path. The Greek approach to mediation is to have a system providing a framework for various forms of mediation, but on a strictly voluntary basis.¹⁵⁵

In addition in 2011, shortly after the Mediation Act, and coordinated with it, came a new law on rationalizing and improving the delivery of civil justice, which made a number of amendments to the Code of Civil Procedure (CCP) but did not cover mediation with the excuse of the existence of “the Mediation Act”.¹⁵⁶

Mandatory out-of-court dispute resolution was introduced through a CCP amendment in 1995¹⁵⁷ but came into force only after September 2000, with admittedly poor results.¹⁵⁸ Even before the Mediation Act, a (rather peculiar) sort of collaborative mediation was possible under the process set forth by CCP, Article 214A, but nobody tried to make use of it.¹⁵⁹ Pursuant to the new wording of CCP, Article 214A, out-of-court dispute resolution is no longer mandatory, but it is now available for all first-instance cases.

During the reading of the draft law for mediation at the committee stage, and in the bill presented to the Greek Parliament,¹⁶⁰ some deputies suggested that mandatory mechanisms should be included in the Mediation Act. The final version of the act, however, contains no provision that requires parties or attorneys to consider or pursue mediation as an option.

The issue of granting incentives or raising counter incentives has been discussed with regard to CCP, Article 214A,¹⁶¹ which addresses out-of-court dispute resolution. Currently, there is no mandatory mechanism for that law, either. However, as sad as it may sound, this omission might end up being the perfect recipe for another failure

155) See Article 3(1) and Article 2 of the Mediation Act.

156) See *supra* note 154. At 149

157) Law no 2298/1995. A new provision (Art 214A) was specifically introduced into the CCP, whose scope was limited to cases under the subject matter jurisdiction of the courts of first instance.

158) See Apostolos Anthimos, ‘The contribution of Article 214A Code of Civil Procedure to out-of-court dispute resolution in civil matters’ (2009) 63 *Armenopoulos* 1811 (in Greek).

159) Pursuant to CCP, Art 214A(4), the parties could jointly appoint a third person with the aim of being assisted in resolving their dispute, see Anthimos 2009, 1825 *et seq.* More than ten years have passed since the law was enacted, and not a single case of its use has been reported. This is reason enough for its deletion. See also Law 3994/2011, Art 19.

160) See the proposal of Deputy Polatidis, Minutes of the Greek Parliament, Session of 9 December 2010, 2362.

161) See in this respect Anthimos 2009, 1830 (in Greek).

in the Greek ADR sector.¹⁶²

To make things even worse, in 2012, Law 4055/2012 added a new article to the CCP. Article 214B¹⁶³ introduces a new scheme of voluntary mediation, the “Judicial Mediation” for Private Law disputes where First Instance Court Judges are assuming the role of the mediator. The reasoning of Greek legislators was that “Judicial Mediation” further support and complements the Mediation Act.

In a moment that all Europe is searching ways to extenuate the burden of civil cases in the court system and to promote access to justice, Greece is charging judges with additional tasks. Judges without any mediation training and with different mentality (exactly the opposite of mediation) are asked to mediate. Inevitably, there was an immediate negative reaction by the Court Judges Association that led to a complete failure of this scheme so far.

Almost four years after the passage of Law 3898/2010 and mediation in Greece is still completely underutilized. With the exception of the Mediation Act, no other measures have been issued by the government to promote and support mediation¹⁶⁴ and the introduction of “Judicial Mediation” further undermines the entire venture. In my opinion, this failure will continue as long as mediation in Greece will remain voluntary.

It is common sense to citizens, lawyers, magistrates, and politicians that the Greek civil justice machinery is suffering from a lack of promptness and efficiency.¹⁶⁵

The existence of the Mediation Act alone is not enough. Generations of jurists and litigants have been nurtured to accept a trial as the only way out of a dispute. This attitude has been reinforced by the poor support provided to any forms of ADR by the Greek legal order.¹⁶⁶

In a country where the delivery of justice is in critical condition with an immediate need of a reform, Italy’s example seems to be the only viable solution.

162) See supra note 154 , at 153

163) See Article7, Law 4055/2012 introducing “Judicial Mediation”.

164) With the exceptions of Presidential Degree N.123/2011 and Ministerial decision N.109088/2011 witch regulated some technicalities and other unresolved matters of the Mediation Act regarding the training of mediators in Greece.

165 See supra note 154 At 158

166) As Nikas 2005, 127, no 26 (in Greek), pointedly mentions: ‘in a country where litigants are coming to the courts by sharpening their swords, it is of course anything else but odd that any conciliation initiatives are degraded as a disturbing luxury’ See supra note 151 ,at 161

4. Conclusion

The 'Amygdala' is a part of our brain that controls our "automatic" emotional responses. It is accountable for our value-guided behavior and initial emotional response to decisions. In the initial decision-making process, basic rewards and aversive stimuli are processed by the Amygdala and relayed to the nucleus accumbens. It is only after this initial appraisal is complete that the insula and prefrontal cortex will finalize a decision based on cost of the potential reward¹⁶⁷. From an evolutionary perspective, it governed the "fight or flight"¹⁶⁸ reflex, associated with fear of attack. The Amygdala reacts to the threat of attack by initiating a reaction within the brain which overrides the neo-cortex (the "rational" thinking part) and physically precludes any reliance upon intelligence or application of reasoning.

As a species, we are not programmed to compromise; we are programmed to win because winning means survival. We have an innate aggression, which, when we are in dispute, transforms itself from a mere instinct to "survive" into an acute need to crush the opposition.¹⁶⁹ It is for this reason that parties in dispute find themselves unable to approach the matter rationally—particularly in the initial stages of the dispute, when the emotions are raw, self esteem has suffered a battering, and the parties are driven by feelings of anger, frustration, humiliation, and betrayal. It is at this stage that the lure of litigation is at its most powerful, offering everything a litigant yearns for: complete vindication, outright success, public defeat and humiliation of the other side, and vast sums of money!¹⁷⁰

Mediation cannot compete with such promises, especially in Greece where our Amygdala is working overhours and so little wonder that litigation is the disputant's preferred choice of a resolution process.

So, what can we do in order to change this perception?

167) See Knutson, B; Rick, Prelec, Lowewenstein (2007). "Neural predictors of purchases". Neuron 53.

168) See Cannon, Walter (1932). *Wisdom of the Body*. United States: W.W. Norton & Company.

169) See Compulsory Mediation, Article by Paul Randolph, January 2013, Mediate.com

170) *Id.*

We saw that one of the basic elements of mediation is that it is “voluntary” but if we examine the numbers of all the good things that are voluntary in Greece but also all around the world we will see how primitive we still are as a species. Many will argue that it is a matter of education, that there are still too many who remain ignorant about mediation and its benefits, and who merely need to be informed. However, as we saw above, with few exceptions little happened after almost 30 years of education campaigns all around the world. We saw the progress of mediation in countries that mediation is voluntary and in countries that mediation was compulsory even for a short limit of time and the numbers speak for themselves.

Compulsory mediation should be introduced to the people with the same way that Ioannis Kapodistrias introduced the cultivation of the potato to the Greeks almost 200 years ago.

Count Ioannis Antonios Kapodistrias, (Greek: Κόμης Ιωάννης Αντώνιος Καποδίστριας) was a Greek Foreign Minister of the Russian Empire and one of the most distinguished politicians and diplomats of Europe. After a long career in European politics and diplomacy he was elected as the first head of state of independent Greece (1827–33) and he is considered the founder of the Modern Greek State, and the founder of Greek independence¹⁷¹

The way Kapodistrias introduced the cultivation of the potato in Greece remains famously anecdotal today. Having ordered a shipment of potatoes, at first he ordered that they be offered to anyone interested. However the potatoes were met with indifference by the population and the whole scheme seemed to be failing. Therefore Kapodistrias, knowing of the contemporary Greek attitudes, ordered that the whole shipment of potatoes be unloaded in public display on the docks of Nafplion, and placed with severe-looking guards guarding it. Soon, rumours circulated that for the potatoes to be so well guarded they had to be of great importance. People would gather to look at the so-important potatoes and soon some tried to steal them. The guards had been ordered in advance to turn a blind eye to such behaviour, and soon the potatoes had all been "stolen" and Kapodistrias'

171) From Encyclopædia Britannica Online: <http://www.britannica.com/eb/article-9044651>

plan to introduce them to Greece had succeeded¹⁷². Nowadays in Greece everybody eats potatoes...

The metaphor of the cultivation of the potato with the cultivation of mediation could show us that there are many ways to educate people but only when education is somehow compulsory can work.

Statistics show that mediation works. It is cheap, quick, is easy to use, it saves time, cost and energy and almost always leaves the parties with a satisfactory feeling. We saw that civil justice systems around the world are facing serious problems associated with courts and the litigation process. Protracted litigation can be one of the most destructive elements in society: it destroys businesses, breaks up marriages, and damages health. There is therefore an urgent social need to dissuade people from unnecessarily entering into prolonged disputes.¹⁷³

One of Voltaire's famous quotes was: *"I was never ruined but twice: once when I lost a lawsuit, and once when I won one."*

Governments around the world should aim of making mediation and other forms of alternative dispute resolution the mainstream dispute resolution process, and litigation the alternative. If persuasion through commercial logic cannot achieve this, then some form of compulsion is likely to be the obvious and most effective answer. Compulsory mediation, at least as a temporary measure can have a truly educative value, can resolve problems concerning access to civil justice and maybe hopefully can contribute to the evolution of our society by avoiding litigation.

Because the sad truth is that we are still primitive in so many ways.

172) See Thomopoulos, E. , The History of Greece. Greenwood: p. 71. (2011)

173) See supra note 169

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