

# The concepts of alternative dispute resolution law essay



**ASSIGN  
BUSTER**

The coursework question is related with the concept of Alternative dispute resolution. This coursework question is also linked with relationship between ADR, CPR 1998 and EU Directive regarding the matter of Mediation. The comment of Lord Rodger of Earlsferry is a significant part of this coursework. In my coursework I will chronologically discuss the History of ADR, its relationship with Civil Procedure Rules (thereafter CPR), Its implementation in the Courts, Judges attitude on various cases and its impact on European Court of Human Rights (thereafter ECHR) especially in the Art-6. Present situation in legal area and possible probabilities in the future.

Alternative dispute resolution (thereafter ADR) is a way of trying to melt civil dispute. The concept of ADR arose mainly from a negative cause such as, dissatisfaction with the delays, costs and inadequacies of litigation process. It is the process of resolving disputes in place of litigation. “ The most common classification is to describe ADR as a structured dispute resolution process with third party intervention which does not impose a legally binding outcome on the parties.”[1] It is one kind of facilitated settlement, which is confidential and without prejudice. So the materials of the process need not usually be disclosed to a court[2].

“ The simplest forms of ADR to understand are mediation and conciliation. Some important providers of ADR include arbitration within the ambit of ADR since it is an alternative to litigation in the courts. Others would exclude arbitration on the basis that it is a legal process, the outcome of which is binding. Parties to a dispute have always been able to refer their dispute to arbitration which is a far older and more formal means of dispute resolution than either mediation or conciliation.”[3]

<https://assignbuster.com/the-concepts-of-alternative-dispute-resolution-law-essay/>

In the 1970s the concept of modern development of ADR established in the United States because of high cost and long delays of litigating business disputes. ADR was playing an increasingly useful part in the commercial area to dissolve some disadvantages of highly expensive and strict adversarial system.

In late 1990s the civil justice system in England and Wales go through a massive revolution. Especially Lord Woolf creates a significant impact regarding the matter of ADR in his enormous report, Access to Justice. His view implemented in a amazingly short time by the civil procedure rules 1998 and the Access to justice Act 1999. These changes introduce a new dimension in the culture of litigation.

There are different types of ADR used in commercial disputes such as, Arbitration, Conciliation, Mediation, Ombudsmen etc. Arbitration, Conciliation and Mediation is the most famous procedure from all of them.

Arbitration has the force of law and generally an arbitrator's decision called an award which can be enforced in the courts just as a judgment of the court.[4]Section 1 of Arbitration Act 1996 introduced some specific rules and regulations regarding this process such as impartial tribunal, un-necessary delay and expenses.[5]Conciliation is quite parallel with the concept of mediation. In that process conciliators offer in return not to try the case but this is rarely taken up. The process is mandatory in Switzerland.

Mediation is the most famous and accepted method of ADR in England and Wales. It is quick, non-binding, without prejudice and confidential. In that process a mediator acts as a “ go-between” to dissolve the dispute and <https://assignbuster.com/the-concepts-of-alternative-dispute-resolution-law-essay/>

wants to make a settlement. The mediator must be a neutral party. “

Mediation is about much more than just assisted without prejudice negotiations but confidentiality and privilege are the very cornerstones of the success of mediation. Parties to mediation need to be sure that what they say in mediation and documents produced for the mediation will not become public knowledge or become evidence in proceedings, whether litigation, arbitration or adjudication.”[6]There are varieties of reason to choosing mediation over other ways of dispute resolution such as;

A less expensive route to follow for dissolves the dispute.

It offers a confidential process.

It offers multiple and flexible possibilities for resolving a dispute

This process consists of a mutual endeavour.

It takes place with the aid of a mediator who is a neutral third party.

If we analyse the whole process of ADR then we will find that the most significant criteria of this process is the term “ Confidentiality”. This term significantly increase the parties’ interest regarding the matter of ADR. “ Confidentiality is integral to the relationship between the mediator and the parties are one of the four fundamental and universal characteristics of mediation. It is the cornerstone of the relationship of trust and that must exist between the mediator and the parties. It is crucial to the voluntariness of participation of the parties and to the impartiality of the mediator. The parties must not feel that they might be disadvantaged by any disclosure that may be used in legal proceedings or in any other way”[7]In the <https://assignbuster.com/the-concepts-of-alternative-dispute-resolution-law-essay/>

coursework Question the statement is relates with the matter of mediation. Now i will discuss about mediation and its relationship with CPR 1998, cases and judgement of the courts and the impact of EU Directive.

There was no defined overriding objective for civil justice when ADR orders were devised by the commercial court judges. “ CPR pt 1 has now identified ADR as one of the courts tools of active case management available to achieve that objective.”[8]Lord Woolf provides significant impact on ADR especially on mediation on his reforms proposal. His aim was given prominent status in the courts new case management powers. Especially in , CPR 1. 4

There are some important rules incorporated in the CPR1998 regarding the matter of Mediation or other form of dispute resolution such as, r-1. 1(2), 1. 3, 1. 4, 3. 1(2)(m), 26. 4(1), 44 etc

Rules-1. 1(2) provides that mater must be dealing with justly manner if it is practicable. There are some element has to be consider in this part such as, parties must be in equal footing, saving expenses, matters must be dealings proportionately, matter must be deal with expeditiously and fairly.[9]Rules-1. 3 provides that parties are required to help the court to further the overriding objective. It also provides general duty of the parties.[10]Rules-1. 4 provides about courts duty towards the parties where stated that court must further the overriding objective by actively managing cases which includes encouraging the parties to co-operate each other, identify the issues in early stage, helping the parties to settle the whole or part of case. [11]Rules 3. 1(2)(m) stated about general powers of management of the

courts where court can take any step to uphold and furthering the overriding objective.[12] Rules-26. 4(1) stated that parties can request for stayed. Court can grant their request if they think appropriate.[13] Rules-44 provides general rules about the costs of the procedure such as; cost are payable by one party to another, amount of those cost, when to be paid etc. In r-44. 3(2) (a) where stated that unsuccessful party will be ordered to pay the costs of the successful party but court can make different order.[14]

The significant impact of CPR 1998 regarding the matter of dispute resolution could be found in some cases. In the case of *Dyson & Field exors of Lawrence Twohey dee'd vs Leeds City Council*, [15] Ward LJ stated that matter relates with overriding objective of the CPR and courts duty to manage cases according to rule 1. 4 of CPR. He also stated court should encourage the parties. In the case of *R vs Plymouth City Council* [16], where Lord Woolf has given more emphasize on CPR and he also suggested that mediation should get the priority over the litigation. So we can say that modern CPR rules create a significant impact on the matter of dispute resolution.

Judges always give emphasize on the matter of ADR in order to save the cost and time. Courts also began to give warnings and issue advice at the conclusion of cases that parties should seriously consider ADR or run the risk of costs penalty. Now i will discuss some relevant cases and judgement which will provide the legal approaches regarding the matter of mediation

In the case of *Dyson & Field vs Leeds city Council* [17], Lord Woolf was a member of the CA. The matter was related with mediation where Ward LJ

said that court should encourage the parties to use ADR to dissolve their matter and it also should be sooner rather than later. There is another important case which is *Cowl vs Plymouth City Council*[18], Lord Woolf has given a lead judgement regarding commercial court ADR order. He delivered powerful comment on both parties failure to use an available ADR process and the delay and cost of violently contested of judicial review proceedings. He also stated that if the parties don't go for the mediation then it would be wastage of public money.

There are case *Hurst vs Leeming*[19], where Lightman J. Stated that alternative dispute resolution is at the heart of today's civil justice system although mediation is not in law mandatory but its a significant and attractive aspect of civil justice system. There is another landmark case *Dunnett vs Railtrack*[20], case regarding the matter of penalty impose for not taking mediation. Mrs Dennett lost her horse because contractors can't padlock the gate. She sued for compensation but lost in the county court because her lawyer wrongly framed the case. She appealed in person and she gets the permission to appeal. Schiemann LJ suggested for mediation but the Realtrack rejected this offer despite the fact that CA offered a free mediation scheme. CA expressed regret about this. They considered whether Realtrack had made Pt 36 offers. Mrs Dennett was unsuccessful. Then Railtrack asked for their costs but CA made a separate judgement on this cost issue. CA held that Railtrack couldn't recover their cost because they had refused to participate in ADR.

So judgement of Railtrack case gets lots of controversy because the party faced adverse cost consequences, even they win the trial. Despite this case <https://assignbuster.com/the-concepts-of-alternative-dispute-resolution-law-essay/>

mediation is not mandatory or nor it should be because part of the mediation process is that the parties should want to come voluntarily in the process. If mediation becomes mandatory then there is a great chance to lose it significant aspect.

In the recent case cost sanction issue raised once again in *Halsey v Milton; Steel v Joy* (joint Appeal)[21], in this case the actual fact was if any party ignoring to mediate the dispute which was requested by an inter-party then cost sanctions should be imposed or not. “Dyson L. J held the court cannot require a party to proceed to mediation against his will as this would contravene art. 6 of the European Convention on Human Rights. The court did however; confirm that costs consequences could follow from unreasonable failures to mediate.”[22]But it was not clear whether the court take this point because this point was submitted in the last minute.

On 21 May 2008, the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters was adopted. Article 1 state the aim of the directive is “to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.” Article: 3 of the EU directive provide the definition of mediation as 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 on their dispute with the assistance of a mediator.” Article: 5 of the EU directive provide discretionary power to courts to invite the parties to use mediation to settle their dispute. Article: 6 of the EU directive states that a written mediation settlement may be declare enforceable if all <https://assignbuster.com/the-concepts-of-alternative-dispute-resolution-law-essay/>



the parties agree to the process. Article: 7 of the EU directive provide reasonable support regarding the matter of “ guaranteeing the Confidentiality of the mediation process.

The Directives basically suggested the state parties to make the laws to encourage the parties to do mediation by the court, not by compulsion. The directive states, the directive applies to civil and commercial matters, and is intended to promote mediation, and ensure a “ sound relationship between mediation and judicial proceedings.”[23]EU Parliament and council agreed the Directive to encourage the use of mediation because it’s a quicker procedure to a civil litigation and cost effective for cross-border commercial disputes.

According to the coursework question now this essay will justify the statement which is provided by Lord Rodger of Earlsferry regarding the matter of mediation.

“ Obliging parties to engage in some form of mediation whether as a pre-condition to going to court or as a result of compulsion by the court, seems to be...rather contrary to the spirit of the guarantee in Article 6 of the European convention for the protection human Rights”[24]

In that above statement he has given more emphasize on present situation of mediation and its application on the Art 6 of ECHR. According to that statement present mediation procedure is quite contrary with the concept of “ Right to a fair trial”. ECHR adopted into English Law from 2 October 2000 as a result of the HRA 1998. Art 6 of ECHR is quite interlinking with ADR. Now

the main issue is whether the present procedure of mediation is violating the Art 6 of ECHR or not.

The statement of Lord Rodger of Earlsferry is not quite relevant with the present situation of mediation. There are present some reason behind this. Mediation is not a mandatory procedure in our legal system but it has got a special significant aspect after the Woolf reforms 1998.

Mediation agreement often specifically state that, " The referral of the dispute to mediation does not affect any rights that may exist under Art 6 of ECHR. If the dispute is not settled by the mediation, the parties' rights to a fair trial remain unaffected." It is true that EU court encourages parties to settle disputes extra-judicially because it will save cost, time, delay etc. In the matter of mediation court can intervene in the process to protect the right to trial such as; if there is any undue pressure upon a party into a non-judicial process. In the case of Deweer v Belgium[25], the matter related with the debate about whether mandating mediation is permissible or not. Deweer could avoid such proceedings by paying a friendly settlement. He chooses settlement but reserved his right to challenge the proceedings. Then he initiated a challenge regarding the matter of Art 6 of ECHR. " Deweer held to have waived his right to go to court only by reason of restraint which vitiated his consent to paying the friendly settlement." [26]

In process of mediation, no one is restrained to settle. Participation is entirely voluntary; any hidden matter of the parties or procedure can't later be discussed before a trial or elsewhere because of confidentiality. No one ever enters the process on the basis that they must settle or if they don't

that then can't seek remedy from public court. Mediation is not like the status as arbitration because it totally depends on the parties will. In *McVicar vs UK*[27], EU court has held that Art 6 is not infringed by restraint court access to vexatious litigants, bankrupts, mental patients.

In CPR1998 there is lots of provision which should be maintained by the parties before going to any public trial. Before proceeding parties must fulfil some pre-action protocols and practice direction then party must pay court fees at several stages. Parties also need to fulfil other procedural requirement such as; allocation questionnaires, statement of case, disclosure and evidence. In *R vs Lord Chancellor ex parte witham*[28]. The matter regarded breach of Art 6 because of withdrawal of court fees exemption scheme for those on income support. So if anyone doesn't follow those procedures regarding CPR they will be liable and they may get punishment or imprisonment. So it seems that these CPR requirement doing breaches Art 6 because parties have to maintain some rules and provision against their wish and will. Now if these are not breach of Art 6 then why ordering of mediation would be breach of Art 6. In *Golder v UK*[29], it was held that ADR approved in CPR Pt1, where stated a mediation is not breach of such requirements. In *Deweer*[30] case also confirmed that this dispute process is not breach of Art 6 rights.

Its clear from the *Halsey*[31] case that mediation must always be voluntary under English Law. Court or judge to order mediation would be a possible breach of Art 6(1) of European convention. If we analyse all of the cases then two significant points would be come out. They are,

Forced by a judge into ADR

Strongly encouraged towards ADR

First approach is likely to violate Art 6, as Halsey confirms. But the second approach is not clear, is immune from challenge under the convention as Jack J said summarising in Halsey, 'the fear of costs sanctions may be used to remove unmerited settlements'[32]. To distinct between Voluntary and Coerced ADR in this background is hard to draw with certainty. Jack J suggested in *Carleton v Strutt & Parker*[33]" A litigant who is landed with an unfavourable costs order for failing to agree to ADR goes to mediation at the courts suggestion but is afterwards stigmatised as failing to participate in good faith, could reasonably claim that this outcome operates as obstruct or fetter on the right of access to the court, contrary to Art 6, and that their apparent consent to ADR was no waiver of their fundamental rights now directly enforceable in English Law under the HRA 1998"[34].

The evidence supporting the use of mandatory mediation is mixed. Central London County Court saw a enormous increase in mediations following Dunnett case, but the settlement rate also consistency declined during that period[35].

If judges apply too much pressure, the overriding objectives of the CPR may not be achieved its goal to lower the settlement rates with wasted cost and time but some pressure is needed to ensure that parties should consider mediation as an option but this pressure is less needed than it once was because the legal profession involved in construction litigation now knows the benefits of mediation. Although many countries those have strong  
<https://assignbuster.com/the-concepts-of-alternative-dispute-resolution-law-essay/>

conscious about human rights and constitutional rights introduce conciliation or settlement conference chaired by judges in their legal system. This can be called Courts mandate mediation. So by this process they want to put mediation within court process which would be more acceptable regarding the matter of conventional rights.

In the Halsey case CA held that court cannot proceed a mediation process against the parties will which would be contrary to the Art 6 of ECHR but in the case of *Shirayama Shokusan Co. Ltd v Danovo Ltd*[36], court issued a mediation order even though one party was unwilling. CPR r. 1. 4(2)(e) emphasised to encourage the parties to use alternative dispute resolution. Sir Anthony Clarke[37]states that “ Court has the power to order compulsory mediation and he also said that Halsey decision was a obiter so there was a chance for the judges to make compulsory mediation order.” He also suggested that courts have a jurisdiction to order mediation process under the CPR. Sir Gavin Lightman also expressed his view on behalf of the mediation process.

Sir Anthony Colman[38]states that there is a close relationship between the court and mediation. He also states that mediation process is not mandatory. Lord Philips[39]states that in adversarial litigation there are lots of complications such as; solicitor fees, court fees, defendant is faced with a huge bill for the claimants’ cost and insurance, delay and complex procedure, disproportionate cost etc. According to him ADR is quite reasonable and flexible procedure because it does not have any additional difficulties. He also states that court order to the parties for mediation is not infringe Art 6 of ECHR.

<https://assignbuster.com/the-concepts-of-alternative-dispute-resolution-law-essay/>

Lord Philips, Sir Anthony Colman and Sir Gavin Lightman are the supporter of mediation process because litigation process has lots of disadvantages and mediation process has flexible, time saving, cost saving and confidential process which is reasonable for the parties as well as for the society.

Although EU directives contain some provision where state that court must encourage the parties to use mediation process to settle their disputes.

Some cases like Cowl, Dunnett and Halsey cases where maximum of the judges held that parties should use mediation voluntarily rather than mandatory and court always encourage the parties to take this procedure.

Although in some cases there was some controversy but different judges has given their views regarding this matter and maximum of them supported the procedure of existing mediation procedure. So at last it can be said that the present procedure of mediation is not obliging the parties but encourages them to further overriding objective of the court.