Mandatory mediation: Crossing the Rubicon

There has been a significant growth in mediation over the last twenty plus years, led by the introduction of the Woolf reforms and judge-led financial sanctions for an unreasonable failure to mediate. The judiciary and the government both now want to bring mediation firmly into the core of dispute resolution. As the Master of the Rolls, Sir Geoffrey Vos commented on the Civil Justice Paper in 2021 *"As I have said before, ADR should no longer be viewed as "alternative" but as an integral part of the dispute resolution process: that process should focus on "resolution" rather than "dispute".*

Up until now, the focus has been on encouraging early mediation by education and opportunity. Parties to small claims have been offered free mediation appointments, and in the family courts, a divorcing spouse seeking financial relief or certain relief relating to children has been required to attend a family Mediation Information and Assessment Meeting ("MIAM") before issuing proceedings, unless one of the statutory exemptions applies. The government has also been trialling a mediation voucher scheme to facilitate access to mediation.

However, the take up rate has not been as high as hoped. In only 21% of small claims do the parties agree to attend a mediation session. The low take-up rate may be because parties to cases in the small claims track are likely to be litigants in person and lack legal advice as to the merits and efficacy of mediation or because they may feel they will be perceived as lacking confidence in their cases if they agree to mediate. Further, since there is no cost-shifting in the small claims court, the stick of costs sanctions as an incentive to mediate is not available.

Going beyond the various attempts at encouraging mediation by education and opportunity, the government has now crossed the Rubicon towards mandatory early mediation in small claims and in family disputes.

The initial proposal for civil claims is that, unless the court grants an exemption, all parties to a defended small claim will be required to attend a free mediation appointment with HMCTS before the claim can proceed to a hearing.

The well-established purpose of the small claims track is to provide a proportionate means of dealing with low value claims, and a requirement to attend a one-hour mediation which may save parties considerable time and money may be regarded as a proportionate and proper element of a publicly provided, streamlined means of dispute resolution. Whilst there is the possibility that the mediation will not result in a negotiated settlement, there is the potential for the parties to save themselves, and the court service, a great deal of time, money and angst in the longer run.

However, there could be real benefits to making mediation mandatory in higher value claims as well, and the Ministry of Justice is already planning to develop regulations with a view to extending the requirement beyond small claims to all county court claims. External mediators would be used for claims outside the small claims track. Making mediation mandatory should remove the possible fear that agreement to mediate might be seen as a weakness and for all claimants, there can be real value in receiving a smaller amount than the sum claimed sooner; for all parties, it is stressful and distracting to be locked in dispute. An evaluation at an early stage of proceedings may not be as fine-tuned as a determination at trial, but that does

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not make it unjust, particularly as it is not binding. Litigation which is too costly or prolonged can be unjust.

The government's recent proposals in relation to family cases suggest that proposals for higher value civil claims may follow fairly swiftly. On 23 March, the Ministry of Justice announced proposals to make mediation mandatory in all suitable family cases. This would exclude cases which were urgent or involved domestic violence or child protection. The proposals include the possible introduction of a new power for judges to order parents to make a reasonable attempt to mediate with potential financial penalties if they act unreasonably and harm a child's wellbeing by prolonging court proceedings.

The Ministry of Justice's announcement about making mediation mandatory in family law cases highlighted the individual benefits, particularly to children involved, of a quicker resolution of disputes, and the societal benefits of reduced costs and the relief of pressure in the family courts so that Judges could deal with urgent and serious cases with greater speed. Whilst these issues may be particularly pertinent for cases involving children, they apply to some extent to all litigation.

It is notable that, as shown by the views expressed at the recent Paris Arbitration Week, sophisticated commercial clients favour mediation. Increasingly they are incorporating mediation clauses and other forms of dispute avoidance and dispute resolution mechanisms into their contracts. They recognise that, in many situations, engaging in hostile litigation may make it difficult to move forwards with a counterparty, and having to wait years for a judicial determination may result in something of a pyrrhic victory.

Whilst some have expressed concerns about the proposals for compulsory mediation reducing access to justice, the parties will not be required to settle, only to engage with a qualified neutral to explore resolution. Whether they settle and if so, on what terms, remains wholly within their control, as is the case with existing provision in the Family Procedure Rules and Civil Procedure Rules for mandated alternative dispute resolution.

For example, unless there are exceptional reasons, the second hearing in applications for financial remedies for children is a Financial Dispute Resolution hearing ("FDR") at which the parties will explore settlement. Practice Direction 9A states that the courts expect parties to make offers and proposals and properly to consider offers received and Rule 9.27A require them to make open offers within 21 days of an unsuccessful FDR, but the parties cannot be forced to settle.

The Commercial Court and Chancery Guides meanwhile provide for Early Neutral Evaluations ("ENE's") and a court may order an ENE even if one or more party does not consent (*Lomax v Lomax* [2019] EWCA Civ 1467), but such evaluations are non-binding. The Chancery Guide also provides for Chancery FDRs but, in contrast to FDRs in the Family Division, the Guide provides that they will not be ordered without the parties' consent.

It may be that the Business and Property Courts move towards adopting mandatory FDR's in certain types of cases, but that should not be to the exclusion of introducing mandatory mediation early on in the litigation process. It will always be necessary for parties to have access to an affordable and reasonably expeditious trial as a fall back, to ensure that they are not forced into an unreasonable settlement, but mandatory early mediation in all, or almost all, civil proceedings, may be the most effective way of shifting mindsets away from dispute towards resolution, facilitating negotiations before costs and entrenched emotions make settlement too difficult, minimising damage to commercial and personal relationships and delivering remedies when they are needed.

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