



Compulsory Mediation: a suitable filter for large civil cases or unnecessary cost?

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Last Tuesday, almost a year to the day since the launch of a consultation paper on the issue last year, the UK's Ministry of Justice (the "MoJ") announced its commitment to implement compulsory mediation for civil claims valued up to £10,000 issued under Part 7 of the Civil Procedure Rules. After a defence is filed and a case is allocated to the court's small claims track, the parties will be notified that mediation will be the next step in the court process. If a party fails to attend their scheduled mediation appointment, a judge will be able to apply a "suitable sanction at their discretion", including a costs sanction in the attending party's favour or strike out.¹

In its press release, the MoJ indicated that 80% of these small claims would be covered by the initiative which offers the parties in such claims a free, hour-long telephone session with a professional mediator provided by HM Courts and Tribunals Service ("HMCTS"). The motivations for the initiative are obvious; the MoJ concludes that it has the potential to free up 5,000 sitting days per year by providing the parties involved in small value disputes with an opportunity to resolve disputes out of court using a government funded mediator.²

There are also tangible benefits for claims valued over £10,000. Relieving the stress on the courts' overburdened capacity by encouraging settlement at mediation enables court resource to be spent on larger, more complex cases. If the initiative is successful in achieving this, it will be welcomed by a system which, for many years, has been criticised for not providing timely access to justice, particularly in respect of large scale, complex litigation.

The MoJ described the news as "*the first step in the government's journey towards simplifying processes for civil cases, a commitment that will see a reduction in lengthy, stressful, and often unnecessary, country court cases.*" The next steps in this journey will no doubt intrigue civil litigators, given the Ministry's indication that it aims to "*integrate mediation within the resolution of higher value claims in the County Court: within both the fast-track (£10,000-25,000) and multi-track (over £25,000)*".³

It is unclear what compulsory mediation might look like for larger value claims. However, it is currently contemplated that parties involved in large claims would be referred to external mediators rather than those employed by HMCTS.⁴ The MoJ acknowledged comments made during the consultation process that the success of mediation is often contingent on the parties trusting their mediator and is conscious of the need to ensure that parties are satisfied with the quality of external mediators receiving referrals.⁵

Mediation has a number of benefits, chief amongst which is the facilitation of an early resolution to a dispute thereby avoiding a potentially lengthy litigation process and the resultant costs and lost management time. Despite the readily apparent benefits, the MoJ can expect to be tested by critics of compulsory mediation. Mediation clearly has value and Humphries Kerstetter has substantial experience of resolving cases successfully through its use. However, it works best when both parties want to seek a resolution. If this "will to resolve" is absent from one or both parties, then the best the parties can hope for by being compelled into compulsory mediation is to narrow the issues in dispute. Even that might not be obtainable in substantial litigation between large corporates with deep pockets where every issue is hard fought. Where this is the case, compulsory mediation will only serve as a distraction and unnecessarily increase costs. If there is simply no prospect of such a mediation facilitating a resolution, should the parties be forced to bear this cost?

In addition, parties involved in the largest civil claims are commonly represented by experienced litigators who are, most likely, best equipped to know whether their client will benefit from a mediation given their experience and the depth of knowledge they possess in respect of their client. Where the parties have been advised, and can agree, that mediation is inappropriate, it would seem to go against the overriding objective of the Civil Procedure Rules to deal with cases justly and at proportionate cost if a judge was to compel the parties to attempt mediation regardless.⁶

¹ Ministry of Justice, *Increasing the use of mediation in the civil justice system* (CP 897, 2023) para 12.

² [New justice reforms to free up vital court capacity - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/new-justice-reforms-to-free-up-vital-court-capacity)

³ Ministry of Justice, *Increasing the use of mediation in the civil justice system* (CP 897, 2023) para 13.

⁴ *Ibid.*

⁵ Ministry of Justice, *Increasing the use of mediation in the civil justice system* (CP 897, 2023) para 16.

⁶ Civil Procedure Rules 1998, r 1.1(1).

A balance therefore needs to be struck between, on the one hand, imposing mediation upon all parties as an automatic filter through which larger civil claims must pass whilst on the other, acknowledging the futility of compelling parties to participate in a mediation where there is simply no will on the part of the parties to explore a mediated settlement. This path might be navigable by the court maintaining an element of discretion when directing mediation in larger cases or, alternatively, through an exceptions process which can be initiated upon the parties' application (and which is not provided for in the current small claims proposal).

The MoJ will be forced to grapple with these issues before it decides to adopt mediation as a tool to filter the constant flow of larger cases before the country's courts. The extent to which it decides to do so could well be contingent on the success of the small claims' initiative. Even if the MoJ falls short of widespread compulsory mediation it seems further reform to at least encourage more mediation is imminent across England's civil courts which will no doubt delight the country's mediators.



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