

Compulsory ADR: a commercial litigation perspective

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"It is no longer enough for judges to think that their role begins and ends with hearing the evidence, the legal argument and delivering judgment. We are not just there to referee a fight, we are there to break it up." – Sir Geoffrey Vos, Master of the Rolls.

That [recent](#) pronouncement by the Head of Civil Justice captures his vision for a civil justice system in which the potential for out-of-court resolution is placed at the heart of the system and is in no sense an "alternative" to it. (While this has recently prompted [a move away from ADR](#) as an umbrella term, I will continue to use it here for consistency.)

That vision has been endorsed as government policy and there are a number of recent developments in this regard (summarised in my [earlier post](#)). However, a fundamental issue that inevitably arises in any such discussions is the extent to which parties should be compelled to engage in ADR, either at the discretion of judges on a case-by-case basis or as a standard procedural step.

Debate around compulsory ADR has naturally tended to focus on high volume / lower value claim types, where the time and costs involved in litigating can quickly become disproportionate to the dispute. Less attention has been paid to how compulsion would operate in more complex and large-scale commercial claims. However, it is important that the particular features of such claims be specifically considered in this context.

The momentum toward compulsory ADR: a recap

In 2021, at the request of the Master of the Rolls, the Civil Justice Council (CJC) issued a detailed [report](#), examining the lawfulness and desirability of the courts compelling civil litigants to engage in ADR. Its conclusion [endorsed compulsory ADR](#) in principle but noted that more work is necessary to determine the types of claim and the situations where it might be appropriate. The Master of the Rolls welcomed the report's conclusions.

That was shortly followed by the Ministry of Justice issuing a Call for Evidence to inform future policy regarding ADR in civil disputes, including seeking views on compulsory ADR. A report summarising the responses to that document has recently been [published](#) (MoJ Report).

Separately, in a recent consultation on possible changes to the civil pre-action protocols, a different CJC working group proposed [controversial changes](#) (apparently extending to most commercial claims) which arguably would introduce a new pre-action mandatory ADR requirement.

Horses for courses

In a [previous post](#) in the context of the 2018 CJC review, I commented on the difficulty in discussing the use of ADR in the civil courts from a system-wide perspective. The civil justice system covers an extremely broad spectrum of disputes, and the factors that influence whether and when ADR will be appropriate (let alone whether it should be compelled) differ markedly between different types of claims. Those factors go not only to the effectiveness of the ADR process and the prospects of settlement, but also to other important issues around procedural fairness and justice.

That is starkly illustrated by the divergent opinions commonly expressed in response to ADR reviews that span the entire civil disputes landscape. For example, the recent MoJ Report reported that some of the key concerns regarding compulsory ADR related to its impact in situations where there is a power imbalance between the parties, and particularly where there are vulnerable party safeguarding concerns. Those issues, while perhaps crucial in some areas of the system, are obviously not amongst the key factors determinative of whether compulsory ADR is appropriate in the Business and Property Courts.

Although the various policy discussions around ADR in recent years have routinely included some nod to the fact that "one size does not fit all", they have

for the most part remained at a system-wide level. It seems clear that if real progress is to be made in optimising the use of ADR in civil disputes, this will only be achieved through addressing the issue by reference to particular categories of claims. The debate around compulsory [mediation](#) is one of the issues where this is especially important.

Mediation in the English commercial courts

A solution without a problem?

Broadly speaking, parties in the Business and Property Courts tend to be familiar with the concept of ADR (primarily mediation) and generally motivated to engage in it where appropriate. That has been recognised in various reviews over recent years (including Lord Justice Briggs' 2016 [Civil Courts Structure Review](#) and a prior ADR review [by the CJC in 2018](#)), which have consistently found that uptake of mediation at the higher value end of the disputes spectrum is generally satisfactory and that the primary focus of reforms should be on low to mid value claims. The recent MoJ Report again confirms this. Although a high proportion of respondents highlighted a lack of party awareness of ADR as a key consideration, "...parties in commercial disputes (with the exception of small businesses) were viewed as having a confident understanding of (ADR)".

In practice, by far the majority of substantial commercial cases in the English courts are mediated at least once. Many complex claims undergo two or even more mediations – either under an agreed process tackling different aspects of the case in stages, or in recognition that there may need to be multiple 'bites' at a dispute before full resolution can be achieved.

A question of timing

In commercial claims, the discussion around mediation is less likely to be around *whether* to mediate than *when* to do so, and what information/preparation will be required.

Identifying the appropriate stage(s) at which to mediate a commercial claim is a key issue and often not straightforward. As with any case, the timing involves balancing (i) the obvious potential benefits of early mediation (particularly as to costs and maintaining relationships where relevant) against (ii) the need for the parties to have sufficient information to feel comfortable making settlement

decisions. Sophisticated users of mediation recognise that those decisions do not need to be fully informed decisions. Waiting until all the issues have been fully explored through disclosure and witness statements may obviously detract from many of the advantages of mediating. However, each party must feel that it has a sufficient understanding of the issues to justify a settlement decision that will often involve very large sums and have other significant ramifications. In many cases, the decision will need to be justifiable not only within a party's own organisation but also for the purposes of dealings with stakeholders such as insurers, funders, shareholders, auditors and regulators.

In the context of commercial claims, the debate regarding compulsory ADR to some extent comes down to the question of who is best placed to conduct the above balancing exercise and assess whether mediation is reasonably possible at any particular stage: the case management judge (either of their own initiative or pursuant to a standard procedural step), or the parties and their representatives?

Particularly in complex cases, there will be numerous case-specific factors, contingencies and underlying interests that will feed into the above balancing exercise, and the most suitable time(s) to mediate will differ between cases. Any blanket procedural rule mandating mediation at a set stage of the process would therefore clearly be inappropriate in this area of the system.

Some of those factors and contingencies will be known to the judge to some extent, such as the nature of the pleaded issues and the extent to which documentary evidence and lay and expert witness statements are likely to be important. However, the judge will not be privy to many of the factors that will influence whether both parties are able to assess sufficiently their legal positions and wider interests. For example, the judge will not be aware of the extent to which a party (especially a defendant) has been able to ascertain the relevant facts from its internal organisational enquiries and document searches, or of course the impact of any gaps in the party's knowledge on the legal advice its lawyers have been able to provide. It is the parties and their lawyers who are in possession of most of the relevant information and, as a rule, they will be best placed to make the assessment of whether and when mediation can reasonably be attempted (although, as noted below, there is a role for the court in ensuring that such considered assessments happen).

Proportionality

The CJC's endorsement of compulsory ADR was subject to the caveat that it could only be justified where the obligation imposed on the parties was proportionate to the dispute. While proportionality will involve considering the delay and costs involved in mediating (which can be substantial in complex disputes), it must surely also take into account other potential disadvantages to the parties if the mediation does not resolve the dispute.

Compelling parties to mediate substantial disputes at a stage when they are not prepared to do so could jeopardise the overall prospects of settlement if the ineffective process drives the parties further apart and discourages further discussions at what would have been a more suitable stage. That may be a particular risk in multi-party or other complex mediation processes that demand substantial investment of preparation and attendance time by a large number of participants, including sometimes very senior personnel.

Such concerns around premature mediation obviously apply particularly to suggestions of a pre-action ADR obligation. In the majority of large commercial disputes, the parties and their lawyers will have carefully considered the potential for an out-of-court resolution (via a formal ADR process or otherwise) before proceedings are commenced. That is not only in order to comply with pre-action protocols but because it is usually in their interests to do so given the acceleration of costs triggered by commencement. However, given the complexity of the factual and legal issues typical of such cases, and the interests at stake, it may be difficult for both parties to have sufficient to feel comfortable in settling at that stage.

In some cases, of course, commercial parties will have previously contractually committed to mediate any dispute arising from their dealings before litigating. That may be because the types of disputes likely to arise are not expected to require extensive factual or legal investigation. Also, in circumstances where parties have deliberately chosen to prioritise early settlement by committing themselves in this way, the level of information and confidence they will require in order to reach a settlement may well be less. However, that is a very different scenario to one where parties have been compelled to mediate at that early stage.

Scope for improvement

The above is not to suggest that there is no scope for improvement in the use of ADR (particularly mediation) in the English commercial courts.

The courts are used by a range of parties, with differing levels of experience around litigation and mediation. A substantial number are from foreign jurisdictions where mediation is less well established. There are inevitably some parties who, even with appropriate legal advice, are reluctant to mediate. More commonly, even where parties are in principle open to it, they and their representatives may not place a high priority on actively engaging with their opponents and the court to explore opportunities to mediate as early as reasonably possible.

Although it is the parties and their lawyers who are usually best placed to determine the most suitable time(s) to mediate, there is an important role to be played by case management judges in actively prompting them to undertake that assessment. Where necessary, that should include challenging the parties' positions, and identifying and setting directions for any preparatory steps considered necessary. Importantly, the issue should be revisited by the judge throughout the proceedings where appropriate, rather than suggesting mediation once and then letting the case run.

It is of course important that such active case management not stray into seeking to lift the veil of confidentiality and without prejudice. However it is perfectly possible for the court to ask what the parties have been doing to identify opportunities for mediation and why they have or have not taken certain steps, so as to shed light on whether the parties have considered the matter sufficiently and focus minds on any necessary preparatory steps.

While some judges in the commercial courts do undertake that role to some extent, it is by no means consistent and it is fair to say that there is scope for more proactive judicial intervention of this kind. This view too finds support in the recent MoJ Report. It notes that "many respondents felt that the courts and judiciary could do significantly more to endorse and encourage parties to engage with (ADR)", not just through costs sanctions but "through softer incentives such as improved and more visible guidance".

There are good grounds to hope for some improvement in this regard given that the Master

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of the Rolls' exhortation to the judiciary to "break up the fight" included a specific direction that "every judge looking at a case ought to be considering what preliminary issue needs to be resolved in order to set an appropriate stage for consensual resolution."

Such increased judicial engagement, combined with the existing threat of sanctions, would be a more tailored and effective way to optimise the role of mediation in the commercial courts than the blunt instrument of compulsion, which could be counterproductive to that aim.

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