

LITIGATION COMMITTEE response to the Ministry of Justice's consultation on increasing the use of mediation in the civil justice system, dated July 2022

The City of London Law Society ("CLLS") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response has been prepared by the CLLS Litigation Committee.

Introductory Comments

1. The main focus of the consultation appears to be on the proposed introduction of compulsory mediation in the small claims track of the County Court. In light of the type of litigation conducted by members of the Committee, we do not express a view on the suitability of compulsory mediation in the context of small claims, but we note that the consultation also refers to the potential to expand the requirement to mediate to higher-value and more complex cases. It is not clear whether this would be limited to cases in the County Court or whether it is also intended to expand this to cases in the High Court, including the Business and Property Courts, where most of the cases conducted by members of the Committee are determined.
2. Members of the Committee frequently use mediation to settle their cases. Sometimes mediations successfully resolve a dispute on the day itself; at other times a resolution is not reached on the day, but it forms an important part (often the initial stage) of a process that culminates in a settlement. The overall success rate for mediations in our experience is good, and it is a valuable option for the settlement of commercial disputes. However, it is not always the best option, and sometimes other methods (for example, direct without prejudice negotiations between the parties' advisers) are better in the circumstances of a particular case. One of the most important factors in the success of a mediation is its timing in the dispute. Sometimes parties are willing at the

beginning of a dispute to compromise in order to achieve a settlement; but in other cases they are not willing to do so until much later in the case, and sometimes not at all.

3. Accordingly, we consider that the introduction of compulsory mediation in larger cases involving commercial parties would be inappropriate. Such parties tend to be sophisticated users of legal services, who are well aware of the options open to them to resolve their disputes, including mediation, and as such are able to identify disputes which are suitable for resolution by mediation and make the appropriate arrangements. By definition, mediation is a consensual process and, if the parties' attendance at mediation were to be made mandatory, it is difficult to see how their active participation and constructive engagement in such a mediation can be enforced. In circumstances where a dispute is not appropriate for mediation, or is not yet ripe for resolution in such a manner, compelling commercial parties to attend mediation is likely to represent a waste of time and legal costs; and in some cases it may make it more difficult for one party to persuade another to attend a further mediation at a later stage in the case when it is more likely to be successful. Unlike the proposal for the small claims track of compulsory mediations lasting an hour, mediations of commercial disputes frequently last a day or more and so the potential for wasted costs is significant.
4. The following is a response to the questions raised by the consultation that are relevant to the type of litigation conducted by members of the Committee, namely questions 14 and 15.
5. ***Q14. In the context of introducing automatic referral to mediation in civil cases beyond small claims, are there any risks if the government does not intervene in the accreditation or regulation of civil mediators?***

For the reasons set out above, we are opposed to the extension of automatic referral to mediation in commercial cases in the [High Court/Business and Property Courts]. However, provided that the parties retain the ability to agree the identity of the mediator between them (rather than having a mediator appointed by the Court), the members of the Committee see little need for government intervention in the accreditation or regulation of civil mediators. Our experience is that there is a good supply of suitable mediators (who are usually but not always senior solicitors, barristers, arbitrators or former judges), who charge market rates for their time. Commercial parties advised by experienced law firms will be well-placed to choose a mediator who has sufficient experience and expertise to conduct a mediation effectively. We recognise, however, that different factors might apply to mediators who are selected by the court and provided to the parties free of charge and on a compulsory basis.

6. ***Q15. Some mediators will also be working as legal practitioners, or other professionals and therefore subject to regulation by the relevant approved regulator e.g. solicitors offering mediation will already be regulated by the Solicitors Regulatory Authority. Should mediators who are already working as legal practitioners or other regulated professionals be exempt from some or any additional regulatory or accreditation requirements for their mediation activities?***

As noted, the Committee do not consider it is necessary for individuals providing mediation services for commercial disputes to be subject to additional accreditation or regulation. However, if this is introduced, then it would make sense for legal practitioners and other regulated professionals to be exempt from some or all of those requirements due to their existing professional obligations and regulated status.

If the Ministry of Justice have any comments please contact the Chair of the Litigation Committee, Gavin Foggo, at gfoggo@foxwilliams.com.

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**THE CITY OF LONDON LAW SOCIETY
LITIGATION COMMITTEE**

Individuals and firms represented on this Committee are as follows:

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