RESPONSE BY DENTONS UK AND MIDDLE EAST LLP

TO CONSULTATION ON PROPOSED MEDIATION (SCOTLAND) BILL

We welcome the opportunity to contribute to the consultation on the Mediation (Scotland) Bill proposed by Margaret Mitchell MSP.

In summary, we are supportive of the aim of increasing the use of mediation services by parties to litigation in Scotland. However, we do not consider a mandatory approach to be the appropriate way to do so for the reasons set out in this response.

Our comments are informed by our substantial experience of advising clients on commercial disputes. We express no views on the types proceedings where other consultees are better placed to respond, such as family disputes and personal injury litigation.

The proposed mandatory approach

The range of cases before the Scottish courts varies enormously. Some cases concern issues which are suitable for mediation; others do not. The types of action which are unlikely to be suitable for mediation due to the nature of the remedy sought is, in our view, a lot more extensive than the list of proposed exclusions in the consultation paper. Some other examples of unsuitable cases are: urgent applications for protective remedies eg. applications for interim interdict, applications for interim diligence, and applications for "section 1 orders" in terms of The Administration of Justice (Scotland) Act 1972; applications for directions from the court in insolvency situations; actions of decree conform for the registration of foreign judgments; director disqualification applications; and petitions for restoration of a company to the Register of Companies. This list illustrates that a significant number of court actions do not involve one party demanding that another party provides something (such as payment or delivery of an item) that can be negotiated in a mediation. The position is more complex than that. Sometimes an order from the court is required. There will be many more examples of unsuitable cases across the spectrum of work before the Scottish courts and it is unlikely to be possible to capture an exhaustive list.

We are also of the view that, in cases where the nature of the remedy sought is such that mediation does have the potential to be relevant, the "one size fits all" approach of requiring a mandatory initial meeting between parties with a duty mediator is not appropriate. We provide 2 examples to illustrate this point:

Firstly, the mandatory approach is unlikely to add value in complex commercial disputes where parties will be discussing mediation with their solicitors, counsel and experts in order to identify the suitability of the dispute for mediation and, if suitable, the optimal timing of a mediation. For example, sometimes mediation will not be appropriate at the outset of a dispute because it would have better prospects of reaching a successful resolution after the parties' experts have reported and met. Parties' representatives need to have these discussions with their clients in order to be prepared to address the court on suitability of disputes for mediation as part of the active case management process in Court of Session Commercial Actions (as required by Practice Note 1 of 2017). It does not seem appropriate in those circumstances to require parties to also attend a "mediation information session". In addition, litigating parties in commercial disputes are often based outside of Scotland. To require parties to make a trip to a Scottish court to receive such information will make the Scottish courts a less attractive place to litigate complex disputes, and that is against the background of the need to promote Scotland as a forum of choice for parties involved in complex commercial disputes. Improved use of mediation has the potential to help promote the service provided by the Scottish courts, but only if mediation does not impose unnecessary costs or an administrative burden on litigants.

Secondly, the mandatory approach would create difficulties for debt recovery work. A significant proportion of cases in the Scottish courts are brought by organisations with a volume customer base (such as utility companies, local authorities and housing associations) to recover payments due to them that are not disputed yet remain unpaid. There is no dispute to be mediated. There is already a court administered process to allow "time to pay". The proposal in the consultation that the mandatory scheme could be extended by regulation to require attendance at a compulsory mediation meeting *before* being able to commence litigation would amplify the concerns the proposals raise for businesses that pursue a large volume of debt recovery work.

At both of these points on the spectrum the mandatory approach may amount to unnecessary legal expense and wasted time for businesses across the country. In cases where mediation is not appropriate, clients will have to turn up and wait at court for a box-ticking exercise. We recognise that there will be a significant proportion of cases where the mandatory initial meeting will add value and encourage parties to mediate. Our view is that there will also be a significant proportion of cases where it will not. Therefore, on balance, we would not be in favour of adding the proposed mandatory meeting into the litigation process for all cases (subject only to the proposed listed exemptions), which clients already find costly and time-consuming.

Addressing the Aims

In our experience, the fundamental source of success in mediation is the parties' genuine desire to participate in order to find a resolution, or at least their willingness to attempt to do so. That success comes in large part from the entirely voluntary nature of mediation. We would be concerned that factors contributing to success will be lost if we move towards a situation where mediation is compulsory or compelled. A party who is forced into mediation, and who takes a completely intransigent stance at the mediation, will not only make the process entirely ineffective but could further polarise the parties' position and make resolution, other than by judicial determination, even less likely.

In our view, the aims of the proposed Bill could be addressed in better ways than the proposed compulsory process. It is important to normalise a discussion about the potential benefits of mediation at an early stage of the litigation in order to improve the rate of uptake. This should be done in the context of the circumstances of each dispute. Sheriffs and Senators of the College of Justice are well placed to identify cases where insufficient consideration is being given to mediation. An increase in the uptake of mediation services could be achieved by tasking those deciding cases with the role of enquiring of the parties at the outset of the litigation what consideration has been given to mediation and to sist the case pending further exploration if thought appropriate.

Encouraging parties to consider mediation can only ever be part of the answer. The other important part is service provision. In our view, the best way to incentivise parties to pursue early settlement of an action is through the provision of a high standard of service offered by all Scottish courts. The current provision appears to achieve high rates of successful settlement for those who can access it. However, provision is disparate across the country and focused on low value claims and family disputes.

Improving service provision requires investment from the public purse/ Scottish Court Service. It should be acknowledged that early settlement provides a significant saving for the Scottish Court Service. We discount sentences in criminal cases for exactly that reason – by pleading guilty early there is a saving of the cost of a trial. A lengthy proof in a civil dispute could potentially be avoided by a single day mediation. Therefore consideration should be given to providing the services of mediators at no cost to parties in a wide range of civil disputes (beyond the current schemes) or perhaps at low cost in higher value claims.

If complex commercial cases are to be resolved at mediation rather than judicially, we need to provide a service that is as good as, or better than, the service currently provided by the judiciary. It will require mediators who are of a similar calibre to and have the experience of members of the judiciary. We should be creative and ambitious in our approach – for example, some members of the judiciary could be trained as mediators and, with parties' consent, cases could be appointed to a "mediation roll" instead of the "ordinary roll".

In summary, having a widely available, high quality service that has no cost or a low cost to users is key; rather than "bolting-on" a compulsory step to the current court service provision.

Dentons UK and Middle East LLP

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