

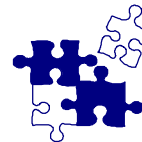
Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?

- a) Encourage - yes. Clients we have worked with have incurred substantial legal costs prior to trying mediation. In all the commercial mediations we have undertaken, legal fees have been greater than the amount in dispute. If the Court had encouraged mediation at an earlier stage in the litigation process, these disputes could well have been settled more quickly and in a more cost-effective manner than was the case. (One particular dispute which had been ongoing for more than 18 months was settled in an hour at mediation.)
- b) Require – no. One of the key aspects of mediation is that parties come together willingly to try to resolve the dispute between them. In our experience, if a party feels he or she has been forced into the mediation there is rarely an outcome with which both parties are partially or completely satisfied.
- However, we suggest that lawyers should be answerable to the Court if they have not properly advised their clients about the benefits of mediation, and that this form of ADR is open to them if they choose.
- c) Facilitate – yes.
The Court could allow parties who had tried mediation but without reaching agreement on all issues, to have priority in the calendar over those who hadn't chosen ADR.

If so, how should this be done and at what point or points in the progress of a dispute?

- (a) See responses above
- (b) Mediation should be encouraged at any time during the court process. It should be seen as an option to either try to resolve the dispute in full, or to resolve particular aspects of it. For example, we have been able to assist parties at mediation to sort out complex

accounting issues thus saving a possible 3 – 4 days of expert evidence being heard in court.



Are there particular kinds of disputes in which the use of mediation or other methods of dispute resolution is not appropriate and in which a judicial determination is essential? Please specify.

- (a) In essence, every dispute may benefit from mediation at some stage. Even if a case involves points of law which need to be determined by a Court, mediation could be used to resolve other issues.
- (b) It would be inappropriate for interdicts or if there has been actual or threats of physical violence by one party to the other.

What form should mediation or other methods of dispute resolution take and how should this be funded?

- a) In-Court mediation services for Small Claims and Summary Cause actions should be rolled out to be available at all Sheriff courts. These should be funded by government as part of the Scottish Courts budget and be free to the parties.
- b) In larger Sheriffdoms, in-court services could be offered in other types of actions, with parties paying a commercial rate to paid mediators. A proportion of the income could go back into supporting the free service for Small Claims/Summary Cause.
- c) In addition or alternatively to (b), parties could be directed to the Scottish Mediation Register to make their own choice. If agreement cannot be reached about who should undertake the mediation, then a streamlined Court process could be available so a Judge or Sheriff can choose the mediator. The parties would pay the commercial mediator's fee in whatever proportion is agreed (or if no agreement, then 50/50.)