

## A whole tool kit for the resolution of tricky disputes

JOHN STURROCK

A GROUP of senior lawyers from Scotland, England and Ireland, joined by representatives of the accountancy and medical professions and the business world, met over supper in Edinburgh last week to hear a presentation by the recently retired legal counsel of a multinational manufacturing company.

In his talk, he explored the many approaches he has used to achieve solutions to disputes. He emphasised the importance of the global shift from "rights-based" solutions to those that are "interest-based". In other words, while those in dispute may rely on contractual or statutory remedies and entitlements, these often will not coincide with a party's real interests, whether these be commercial, professional, personal, monetary or reputational. Finding ways to identify and realise those interests is what skilful negotiators need to do.

Our speaker outlined a series of means to achieve what he described as "non-binding" (in the sense that no result is imposed) interest-based solutions, including:

- **Unilateral Concession:** in some ways, this is the most challenging. It involves being prepared to offer something to your opposite number without seeking or expecting anything in return. An example was the assignation of intellectual property rights to a company that needed them to protect its brand. The longer term outcome is, however, almost always a reciprocal response prompted by the gesture.
- **Confidential Listening:** it was fascinating to hear our speaker emphasise the importance of really listening to an opponent's concerns as a way to unlock opportunities and solutions.
- **Collaborative Dialogue:** many are familiar with collaborative law in a family setting but the concept extends well beyond that area. Advisers commit to achieving resolution without resort to litigation or other adjudication, failing which they will withdraw from acting further. This provides a context for non-adversarial problem-solving.
- **Neutral Evaluation:** the engagement of a third party to help with the process of identifying strengths and weaknesses, risks and likely outcomes so that each party can re-evaluate its position.
- **Case Management:** not of the judicial sort but using an third party to help manage preparations for negotiations or other processes, identifying priorities and issues and helping to map out strategy and the identification of targets.
- **Negotiation Coach:** works with a party to devise strategies to maximise the success of discussions.
- **Executive Tribunal or Senior Executive Appraisal Mediation:** this involves senior managers or executives who represent the disputing parties sitting as a team and listening together to presentations on the issues by their junior staff. They can be joined by a chairman who may act as mediator between them when they withdraw to decide for themselves what should happen.

- Facilitative or Evaluative Mediation: the parties may decide on the role they wish a third-party neutral person to play: either as enabler of dialogue and facilitator of negotiations or as evaluator of parties' positions, offering a view as to the likely or desirable outcome.
- Med-Arb: a combination of mediation and arbitration, where the absence of a negotiated settlement triggers an arbitration process, involving a second, independent neutral person.
- Arb-Med: found, for example, in Australia in workers' compensation cases. An arbiter seals a decision in an envelope and parties have a set period to negotiate with a mediator. Apparently, the existence of the envelope usually triggers resolution at the mediation stage.

And then there was "Baseball Arbitration"... but that, being a binding "rights-based" solution, is for another time. The point is there are many ways to help resolve difficult problems for clients aside from traditional positional negotiation, binding arbitration or court-based litigation. Are we using them?