



Reflections on Commercial Mediation in Scotland

By

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1. INTRODUCTION

In Scotland, the progress of commercial mediation has been different from that experienced in many other jurisdictions. It is sometimes assumed that the reforms inspired by Lord Woolf have influenced the whole of the United Kingdom, but that is not so. Scotland, with its traditionally separate legal system, remained largely unaffected by the changes which have led to the new civil procedure rules in England and Wales. It might be argued that a reason for this relative inactivity is that the problems of cost and delay apparently at one time endemic to the litigation process in England and Wales have not been so marked north of the border.

When the then Lord Chancellor's Department issued its pledge to use ADR some years ago, that impetus did not extend to Scotland. The remit of the Department of Constitutional Affairs does not cross the border and innovations such as mediation weeks have not had any significant impact on Scotland. Until recently, there has been relatively little overt judicial encouragement. *Halsey*¹ has probably not yet been cited in any court case.

Dr Bryan Clark has described the system of mediation in commercial matters in Scotland as "purely voluntary".² Nevertheless, there is real growth in the use of mediation in commercial, professional and organisational disputes. This article explores why that might be so and identifies some of the changes which are now occurring in Scotland.

2. RECENT DEVELOPMENTS

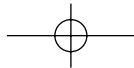
Precise numbers for mediations conducted in the commercial field are difficult to quantify. Clark suggests that mediation's development has remained somewhat stagnant in the commercial dispute field in Scotland and in particular that it has fallen behind the comparable growth seen in England and Wales. However, statistics from the leading commercial mediation provider, Core Mediation (a division of the Core Solutions Group), may give a good indication of progress.³ Core Mediation was launched in 2001 and probably conducts the majority of commercial mediations in Scotland. Core's figures show significant annual increases, with a fairly dramatic rise in 2005, when the total exceeded all previous years put together. This growth has continued into 2006 with the number of mediations conducted being broadly on a par with leading English-based organisations such as CEDR if an appropriate uplift is applied for comparison purposes.

Some recent examples of mediation in Scotland include partnership level differences in law firms, senior management problems in the hotel industry, complaints about customer service in the financial services sector, joint venture partnering in the construction industry, environmental pollution, property development and boundary issues, biotechnology and research contracts, landlord and tenant differences, post-divorce property matters, issues about victimisation, harassment and racial discrimination in employment, intellectual property rights in a bespoke computerised system, commission payments on major commercial

¹ *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576.

² Bryan Clark, Senior Lecturer in Law, and Charles Dawson, Research Assistant, of the Law School, University of Strathclyde, "ADR and Scottish Commercial Litigators: a Study of Attitudes and Experience", unpublished, see article on the research findings in (2006) 51 J.L.S.S. 22–23; for more details contact the authors at bryan.clark@strath.ac.uk.

³ Core Solutions Group Ltd is a limited company based in Scotland (www.core-solutions.com).



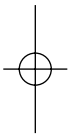
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transactions, banking and auditing errors, an application for planning permission in a sensitive environmental setting, breach of distributorship agreements and personal injury claims.

Significant users include insurers and leading banks. An increasing number of board room and management issues (13 per cent of the total) are being mediated in order to prevent escalation. Many claims of alleged professional negligence (23 per cent of the total, involving solicitors, surveyors, engineers, architects and others) are resolved using mediation, while engaging mediators in disputes involving senior professionals in the health sector and other service industries has enabled long running difficulties to be addressed. Some of the most challenging disputes arise in the employment area and mediators are frequently invited to assist in these (accounting for 27 per cent of matters mediated) in order to avoid the pain and cost of a tribunal. Commercial contractual disputes account for nearly one-third of mediations and property and construction over one-fifth. The split between the private and public sectors is roughly 70:30.⁴

Matters coming to mediation are often not at the stage of litigation. An interesting development in Scotland is the growing awareness of mediation as a tool for managing differences at an early stage and before the matter escalates to a messy dispute. Lawyers see this opportunity for clients too and increasingly recommend mediation at an early stage. Indeed, there is indication of interest in the use of mediation in project management and deal-making, as the commercial and public sectors begin to recognise the potential benefits of using a facilitator in less contentious settings. That said, many mediations are convened when matters are well along the road of litigation, some at the Scottish equivalent of the trial stage or later, when the real and projected costs of court action are obvious to all.

The overall "success" rate appears to be constant at above 80 per cent, regardless of the stage in the dispute at which mediation is used, although one always fears misinterpretation of figures based on "success". Sophisticated users of mediation will regard a significant narrowing of issues, and an opportunity to express and hear each side's viewpoint, to be a valuable exercise even if resolution is not then, or even later, achieved. Most mediations are resolved in a day, some take two; some require innovative design and a series of meetings over time.



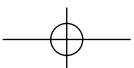
3. SOME REASONS FOR GROWTH

What has caused such an uptake in spite of the absence of the kind of court and legislative encouragement which is familiar elsewhere? It is arguable that mediation has had to stand on its own feet, demonstrate its own worth and rely on customers who elect wholly of their own volition to use it rather than having it directly or indirectly imposed by a third party. This has injected a note of market reality. Mediation has had to prove its value. Users seem to be impressed by the provision of an excellent process that demonstrably brings benefits to those using it, at a price which compares well with the cost of alternative courses of action.⁵ This is vouched for by the number of repeat users, including lawyers and insurers and at least one major financial institution.

Core's statistics show that many of the solicitors who use mediation are doing so frequently, with a wide spread of usage across the major law firms, right through to one-partner businesses. Advocates (Scottish barristers) have been involved in approximately 10 per cent of mediations. Expertise is growing through real experience and also training. Geographically, mediation has taken place across the length and breadth of the country, with

⁴ All figures are approximate and are based on Core Mediation's records of matters mediated by it. Clearly, there is some overlap between the categories.

⁵ Clark's research supports this view: a reduction in legal costs and speedier resolution were always or often relevant to around 80 per cent of his respondents' clients, with nearly two-thirds pointing also to the potential of reaching creative settlements. He comments that: "Aside from any positive attributes of mediation *per se*, the unsatisfactory nature of traditional dispute resolution from the lawyer's viewpoint may be a driving factor for the adoption of alternatives."



the main focus understandably being in the commercial centres of Edinburgh, Glasgow and Aberdeen.

The research by Clark has confirmed a high level of satisfaction among lawyers who use commercial mediation and a greater awareness than was perhaps previously perceived. He has found that nearly two-thirds of those respondents who have experienced mediation have used it again; that mediation is used in a wide range of disputes, with settlement rates approaching 80 per cent—and higher if “partial” settlement is included⁶; and that many lawyers see mediation as a new business opportunity in whose growth they seek to have a prominent role.

Clark notes that these favourable responses, coupled with high settlement rates, “suggest real success in those commercial mediations that have taken place in Scotland” and that, taken at face value, they cast doubt on the idea that Scottish commercial lawyers are seeking to stifle mediation on the grounds of a potential reduction in income. Indeed, it is arguable that these lawyers are using mediation to supplement the culture of negotiation (traditionally strong in Scotland) and to compliment litigation where necessary.

Interestingly, in a recent review of legal services in Scotland in *The Scotsman* newspaper,⁷ the feature on civil litigation focussed exclusively on the benefits of mediation. Mediation has featured regularly in legal and some business press in recent years, helping to build awareness. In a relatively small business and legal community, word of mouth is also an effective resource.

Clark’s study indicates that virtually all ADR practice relates to mediation and that the majority of respondents have adopted a policy or practice of considering ADR. Many of the large Scottish commercial firms advertise mediation specialists and over one-half of respondents had attended external training courses or had received accreditation as mediators.⁸ Clark’s analysis indicates that there is a strong link between training and the practice of mediation. Respondents who had received training were much more likely both to suggest mediation to their clients and to represent clients in mediations than non-trained respondents.

With considerable interest being shown by more recently qualified lawyers in modern approaches to dispute management and resolution, we seem to be experiencing a cultural shift within the Scottish legal profession in the direction of mediation. Nevertheless, research and anecdotal evidence indicate that, in commercial matters, clients exercise a strong prerogative over whether or not to use mediation—and on its success. This may be one reason to look to the courts for some encouragement now that mediation has been validated as a process.

4. THE ROLE OF THE COURTS

Some encouragement has already come from the courts. Judges in commercial actions in Scotland’s supreme court, the Court of Session, have begun to suggest mediation. This has been stimulated by the introduction in 2005 of a court practice note for commercial actions which encourages early action to resolve matters:

“11.—(1) Before a commercial action is commenced it is important that, save in exceptional cases, the matters in dispute should have been discussed and focused in pre-litigation communications between the prospective parties’ legal advisers. This is because the commercial action procedure is intended for cases in which there is a real dispute between the parties which requires to be resolved by judicial decision, rather than other means; and because the procedure functions best if issues have been investigated and ventilated prior to the raising of the action . . .”

⁶ Matching the anecdotal evidence from mediation providers.

⁷ *The Scotsman*, October 25, 2006.

⁸ Many firms have also undertaken in-house mediation training.



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“Both parties may wish to consider whether all or some of the dispute may be amenable to some form of alternative dispute resolution.”⁹

This procedural innovation has had an impact in the past year, it is generally agreed, on the culture of litigation in commercial cases which are before the nominated commercial judges in the Court of Session. They have taken a more pro-active approach to disclosure, early settlement and, where appropriate, mediation. A number of complex, high value cases before commercial judges have been resolved using mediation.

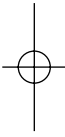
The court in Scotland in which the majority of litigation is conducted is the Sheriff Court. For a number of years, Edinburgh Sheriff Court operated a *pro bono* in-court mediation scheme along with the Citizens Advice Bureau, in which relatively small claims were addressed. That approach has now been extended to the Sheriff Courts in Glasgow and Aberdeen, both significant commercial centres, where the Scottish Executive has supported more substantial pilot schemes in these courts, operated by Court Mediation Services, a subsidiary of recently formed Catalyst Mediation.¹⁰

This may also encourage greater use of an existing court rule in commercial actions in the Sheriff Court, which has been used only rarely so far¹¹:

“40.12. (1) At the Case Management Conference in a commercial action the sheriff shall seek to secure the expeditious resolution of the action.”

The orders he or she may make include:

“(m) any order which the sheriff thinks will result in the speedy resolution of the action (including the use of alternative dispute resolution) . . .”



This rule is likely to be augmented or even replaced by a new general court rule under which sheriffs will be permitted to encourage parties to consider referral to mediation or another form of dispute resolution, with a possible sanction in expenses for unreasonably failing to do so. Proposals are presently being consulted upon.¹² If this rule is introduced, it is almost certain that a similar rule will be introduced in the Court of Session.

In a recent Court of Session Inner House (appeal court) decision, involving a neighbourhood dispute between a property developer and a homeowners association, the court observed:

“We hope that we have said enough to reinforce our observations in court, that this is a dispute which ought to be resolved. It cannot be in the interests of the neighbourhood that it be prolonged, and we would encourage a resolution by compromise, perhaps with the assistance of a mediator.”¹³

The prevailing judicial mood seems to be changing and it will be interesting to see whether and how Scottish judges will follow the reasoning of the Court of Appeal in England in cases such as *Halsey*. At a conference supported by the Scottish branch of the Chartered Institute in June 2006, the then senior commercial judge, Lord Clarke, commented on the pressure for change coming from initiatives by the Scottish Executive, the EU draft directive and the perceived benefits of changes to the English rules of court. He observed that the Scottish

⁹ Rules of the Court of Session: www.scotcourts.gov.uk.

¹⁰ See the Scottish Executive website: www.scotland.gov.uk.

¹¹ Sheriff Court Ordinary Cause Rules: www.scotcourts.gov.uk/library/rules/ordinarycause/index.asp

¹² Sheriff Court Rules Council, Consultation on The Sheriff Court and Alternative Dispute Resolution: www.scotcourts.gov.uk.

¹³ *Candleberry Ltd v West End Homeowners Association* [2006] C.S.I.H. 28.

judges were persuaded that the time had come to give explicit and substantial recognition to the role of ADR in the court process. The extent to which the courts could and should facilitate mediation and how they would address delay or refusal to utilise it remained open for discussion. For the judiciary, quality control would be important and Lord Clarke commented on the need for a Scottish equivalent of the Civil Mediation Council. This judicial need for comfort that mediators are of a sufficiently high standard highlights the issues about regulation which Amanda Bucklow and others have commented upon.¹⁴

5. THE SCOTTISH EXECUTIVE

Some of the encouragement for these changes is undoubtedly coming from the Scottish Executive, the devolved government for Scotland. Procurement guidelines now emphasise the importance of non-adversarial processes. Recent legislation has incorporated references to mediation. Initiatives in the planning and housing fields may raise mediation's profile. A widespread review of the civil justice system as a whole in Scotland is in the offing. This follows upon a report prepared by an advisory group on civil justice appointed by the Scottish Consumer Council, funded by the Nuffield Foundation, which was supportive of mediation, although its recommendations were disappointing, focusing on other aspects instead.¹⁵

There are signs that the Scottish Executive may be preparing to take a similar view to the DCA in supporting non-court alternatives for problem-solving, with recognition of the prominent place of mediation. However, the Scottish political mood is not likely to permit much focus by government on the commercial marketplace and future developments in this field are more likely to be stimulated by the providers, the users and the commercial judges. Ultimately, mediation will be used if it demonstrably works for those who can benefit from it—the parties with disputes needing effective and speedy resolution.

6. SOME FURTHER THOUGHTS

Language Sometimes, it seems that we are seriously handicapped by our use of language. The expression ADR is still frequently used but is apt to confuse. It is used synonymously with mediation and also to describe a basket of options *including* mediation. It hints at a subsidiary role to the courts for mediation. However, as the EU proposals for a draft directive made clear, mediation should be viewed as a form of dispute resolution in its own right.

I suggest that we consign the expression ADR to the recycling bin. The word “mediation” itself can be unhelpful, with limiting connotations and misperceptions as to its meaning. We operate in a world of “disputes”, “conflicts”, “justice” and even “problems”. All of these restrict a general understanding of the widespread application of tools and techniques which offer opportunities to manage effectively all sorts of differences and to find solutions in a wide range of contentious and non-contentious settings.

Education In Scotland, legal education and training have tended to focus on the adversarial system, legal rules and remedies. It is arguable that modern legal training should place much more emphasis on developing skills of analysis and problem solving which maximise the prospects of lawyers assisting clients to find consensual outcomes wherever possible, without resorting to adversarial approaches unless absolutely necessary.

The value of pre-litigation negotiation needs to be emphasised and taught with an understanding that, in many disputes, straightforward negotiation can break down, become difficult or be time-consuming. Research shows that many people in dispute prefer the

¹⁴ Above pp.40–48; and “The Law of Unintended Consequences, or Repeated Patterns?” (2006) 72 *Arbitration* 348–351.

¹⁵ Scottish Consumer Council, final report of the Civil Justice Advisory Group: www.scotconsumer.org.uk; see Tony Allen's commentary on the CEDR website: www.cedr.co.uk.




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involvement of an independent person albeit not in an adversarial context.¹⁶ Encouraging this understanding in legal education and training would greatly enhance appreciation of the place and role of mediation. The professional bodies in Scotland, the Law Society of Scotland and the Faculty of Advocates, have a role to play in encouraging their members to recommend and use mediation when appropriate and, arguably, to enshrine that encouragement in new professional guidance.

Mediation training Hitherto, the standard model for credible training as a commercial mediator in the United Kingdom is to undertake anything from three to five to eight days of intensive practical training and assessment. Thereafter, perhaps with some observation of mediation in practice, the accredited mediator may set up in business. One wonders whether this will remain acceptable? As the users of mediation become more sophisticated and as the demands and possibilities of mediation expand, as new techniques for handling difficult situations are better appreciated and as rudimentary training seems less and less adequate, will we need to introduce longer and more rigorous courses? Are 40 hours really sufficient to learn what it takes to engage in the role of impartial facilitator of complex commercial disputes? Should those who issue certificates of competence at least insist upon follow up training after a period (say, one year?) to reinforce and develop the basic skills?

Leadership In mediation, the remarkable changes of the past 10 years have been attributable to a group of far-seeing individuals who have encouraged, cajoled and inspired others to follow. Machiavelli once observed (in *The Prince*):

“There is nothing more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things.”



However, as Tony Willis points out¹⁷ (and Bernard Mayer in his book, *Beyond Neutrality*¹⁸), there is so much more for mediators and conflict resolvers to do if we are to achieve really significant impact on local disputes and many of the world's larger problems.

There is a notion that those who are pioneers in any movement are not best suited to lead the next stage of development. One question may be whether or not a new generation of leaders is needed at this stage, to cement mediation's progress and to take it to a new level of delivery, acceptability and use. These leaders may not be visionaries like the pioneers, but pragmatists who are able to market, package and present mediation as a mainstream activity which truly establishes it in the firmament of modern problem-solving. They may be individuals who are able to engage credibly at the highest levels and in the most challenging of situations while bringing the techniques and skills of excellent mediation to bear.

Standards Whatever the future, there is no substitute for excellence, and that means high standards from the very first inquiry right through to the last point of contact after the mediation process has concluded. In Scotland, we attribute high success rates in commercial mediation to extensive preparation before the mediation day; indeed, we view the process as a continuum in which preparation by advisers and participants in advance of face-to-face meetings is critical to success. Often, legal advisers will meet with the mediator to scope out the issues and begin the collaborative process well in advance of the more formal sessions with the clients. Creative approaches to the way in which meetings are conducted and their duration mean that the conventional formula of one long day with a result achieved only after everyone has been worn down to submission is more of an exception than the rule.

¹⁶ See Professor Carrie Menkel-Meadow, Professor of Law and Director, Georgetown-Hewlett Program in Conflict Resolution and Legal Problem Solving, “Institutions of Civil Justice: A Paper prepared for the Scottish Consumer Council Seminar on Civil Justice, December 15, 2004”: www.scotconsumer.org.uk.

¹⁷ “Mediation: Big Bang, Steady State or Black Hole?” (2006) 72 *Arbitration* 339–347.

¹⁸ *Beyond Neutrality: Confronting the Crisis in Conflict Resolution* (Jossey-Bass, San Francisco, 2004).

7. CONCLUSION

We might conclude that one advantage of the Scottish experience has been the need to continue to be genuinely innovative in order to attract custom. Continued innovation (or, in the style of Scottish Presbyterianism, *semper reformandum*) is probably the best way for mediation to continue to offer its undoubted benefits and to make a really significant contribution to the issues of the day.