

## Mediation: The high road

In Scotland, commercial mediation has progressed in quite a different way from many other jurisdictions. While it is often assumed that the Lord Woolf-inspired reforms affected the whole of the UK, Scotland, with its separate legal system, remained largely unaffected by the changes which led to the new Civil Procedure Rules in England. The jurisdiction of the Department of Constitutional Affairs to promote mediation weeks or major mediation schemes does not extend to Scotland. Until recently, there had been relatively little overt judicial encouragement. And yet, mediation is being used increasingly in commercial and organisational disputes.

Figures for mediations conducted in the commercial field are difficult to quantify. However, figures from commercial mediation provider, Core Mediation (a division of the Core Solutions Group), may give the best indication of progress. Core Mediation was launched in 2001 and its panel conducts the majority of commercial mediations in Scotland. Core's figures show significant annual increases and a dramatic rise in 2005, with a total exceeding all previous years put together. This trend continued in 2006. These mediations involve a wide range of disputes, including boardroom, new technology, property ventures, workplace and management issues, professional and financial services, environmental pollution, planning applications, intellectual property, information technology, construction, distributorship agreements, professional negligence and personal injury.



What has caused such an uptake in Scotland in the absence of the kind of court and legislative encouragement which is familiar elsewhere? It is arguable that mediation has had to prove its value. Commercial users are 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 the alternatives. Mediation has had to stand on its own feet and rely on customers who elect wholly of their own volition to use it, rather than because a judge says that they should. This has injected a note of market reality. Forward-looking lawyers have recommended its use to their clients because it is good for business. Some clients, including insurers, are keen to use it.

Recently, some encouragement has 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 helped by the introduction in 2005 of a court practice note for commercial actions which encourages early action to resolve matters:

"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..."

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

The court in Scotland in which the majority of litigation is conducted is the Sheriff Court. For a number of years, Edinburgh Sheriff Court has operated a pro bono mediation scheme in which relatively small claims are addressed. That approach has been extended to the Sheriff Courts in Glasgow and Aberdeen, both significant commercial centres, where the Scottish Executive has supported more substantial schemes in these courts, operated by Court Mediation Services, a subsidiary of the recently-established Catalyst Mediation. This is likely to be augmented by the introduction in the next few months of a new court rule

under which sheriffs will be permitted to encourage parties to consider mediation, with a sanction in expenses for unreasonably failing to do so. If this rule is introduced, it is almost certain that a similar rule will be introduced in the Court of Session.

Some of the support for these changes is coming from the Scottish Executive, the devolved government for Scotland. Procurement guidelines now emphasise the importance of non-adversarial processes. Recent legislation in the planning and housing fields will raise the profile of mediation. A widespread review of the civil justice system as a whole in Scotland is in the offing.

It will be interesting to see whether and how Scottish judges follow the reasoning of the Court of Appeal in English cases such as Halsey. Leading law firms and major business organisations are now more actively promoting mediation than ever before and are gaining expertise through training and real experience. Recently published research by Dr Bryan Clark at the University of Strathclyde shows widespread satisfaction among Scottish solicitors who have used commercial mediation.

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 ended. We might conclude that one advantage of the Scottish experience in commercial mediation has been that those using and promoting it have had to be more innovative and bold than elsewhere, in order to demonstrate its undoubted value.

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