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Civil and commercial mediation – a Scottish perspective

I am not sure that there is necessarily a Scottish perspective nor that there should be one.

Why would we differ? Well, perhaps we do have a different vantage point and can offer some insights from our own journey. Hopefully, these will not seem to be too parochial!

Let me start by asking what we mean by ‘mediation’. We face the perennial issue of language. What is ‘mediation’? Where does it start and where does it stop? As Peter Adler of the Keystone Center in Colorado has observed, ‘...mediation isn’t one thing. Some call it facilitation. Others call it consensus-building, collaboration or peacemaking.’¹ He describes its ‘protean malleability’. The term mediation can obscure more than it reveals, he says. So, any discussion about ‘mediation’ needs to acknowledge that we may not know exactly what we are talking about.

Turning to Scotland, I’d like to mention by way of context what I perceive to be the increasing confidence and competence displayed by the Scottish Government, which has shown a real interest in collaborative governance, born out of its electoral position as a minority administration. Often, it needs to achieve consensus in order to make decisions. Ministers have been keen to encourage, empower and enable, articulating what they think needs to be done and saying, in effect, over to you to get on with it. This has generated a positive response, not least in the legal profession which now feels more valued by politicians than for some years. Overall, I sense a movement towards what some would describe as a new way of doing politics, where interest-based deliberations are more to the fore.

This, I suggest, has implications for the difficult conversations which lie ahead regarding the UK constitution. I sense a genuine willingness to deliberate constructively. While on the surface I have no doubt that there will continue to be some grandstanding, underneath it would be a mistake to underestimate the competence of a number of those in the Scottish Government

whose approach will have a critical impact on the future of the United Kingdom. The use of ‘mediation’ techniques and skills will be vital in these deliberations if they are to be mature and imaginative. I believe that it is important for us to be aware of these trends and for us to enhance our engagement with and support for decision-makers, politicians and other leaders.

These trends may go hand in hand with the recovery of traditional Scottish values such as trust, prudence and modesty in the post-banking crash era.

I would point to a number of other factors in viewing the future in Scotland with optimism. The visit of William Ury to Edinburgh in June is capturing the imagination of many. He will participate in various events, public and private, as we seek to enhance understanding and awareness of interest-based policy-making and negotiation. We hope that our own competence will also be enhanced and that the use of third-siders and mediators will be better understood, not as ends in themselves but as tools to achieve many objectives, including sustainable economic development.²

In this context, the Scottish Government’s recent publication of a ‘Users Guide to Mediation’ in the planning system points the way to a more expansive use of the mediation process. This initiative has the support of the CBI and leading developers, among others. We see developments such as these taking place outside the narrower confines of the justice system, outside a legal and judicial environment, making and taking broader opportunities to use the skills and techniques of mediation.

It is useful to also note the Scottish Government’s interest in Scotland as an international centre for dispute resolution, whether physical or virtual. In addition we have a new arbitration bill, modernising the law in that area. The focus on arbitration and international disputes will, I sense, bring spin-off benefits for mediation with our flexible and transportable skills. Certainly, government ministers make frequent reference to mediation in conferences and other public

events. As elsewhere, we have yet to see that translate into significant involvement in the really big issues in Scotland but that may come sooner than we think.

Of particular significance may be our ongoing review of the civil courts system in Scotland, led by the Lord Justice Clerk, Lord Gill. We await the final report. Indications are that it may be more radical than the reforms in England under Lord Woolf. Lord Gill has described the Scottish court system as Victorian in delivery and has suggested that it is simply not fit for purpose in the 21st century. Interestingly he has expressed concern about the impact of this on Scotland's economic development.

How this will impact on mediation, we shall have to wait and see. However, the bulk of claims in Scotland are fairly small so the focus of Lord Gill's review may inevitably be on that area. I pause for a moment to ask: how relevant is the court review to the growth of mediation in Scotland? I ask because mediation has tended to grow without much judicial encouragement in our jurisdiction. Users have a deep sense that mediation works. Perhaps that has been useful. No doubt there is a balance to be struck. More profoundly though, what is the relevance of physical courts as we move towards greater use of online transactions and online dispute resolution systems? That well known visionary, Richard Susskind, who recently authored *The End of Lawyers?* points us to a future where the majority of disputes about transactions may be dealt with using online procedures.

I turn now to mention the Scottish Mediation Register. Established in the past two years, the Register is available to all mediators in Scotland. It follows a simplified approach, with certain minimum benchmark criteria covering adequate training, initial mentoring or co-mediation, CPD and practice support, adherence to a code of conduct, a system for handling concerns and complaints and indemnity insurance. It is self-certifying and web-based. Its purpose is to provide information and to encourage the development of higher standards.

This is not a quality assurance scheme but a useful resource offering reassurance about minimum standards. There is no doubt that the public and private sectors have differing needs and the uptake has been rather variable. But, in bringing diverse communities together, it has been relatively successful and is a tribute to the process of consultation and consensus-building led by the Scottish Mediation

Network's outgoing executive director, Ewan Malcolm. The register may also represent an appreciation that there is only so much that we can do to regulate; its existence may, however, be enough to address relevant concerns.

This takes me back to what we mean by 'mediation' and to explore its potential. It covers so much. The field is very diverse. The future may not be dispute resolution but conflict management, conflict avoidance and, in the words of Bernard Mayer, 'conflict engagement'. What does that mean for quality? For standards? For regulation? Can one size fit all? Or do we need different horses for different courses? Should we seek to regulate at all?

I am concerned that we are applying traditional mechanisms to something which is inherently very different in shape, form and potential. Einstein warned us about using the same thinking to address an issue as caused us to get into difficulty in the first place. So, should we seek to enable mediation to grow organically and in an unstructured way, outside the legal and institutional setting which seems to be its context in so many places? The recent book by Brafman and Beckstrom *The Spider and the Starfish* reminds us that, in contemporary business models, old-fashioned command and control is being superseded by spontaneity and improvisation. Should we encourage uniformity and institutionalisation or diversity and variety?

Are we a 'profession' or 'field' at all? The distinguished academic, Carrie Menkel-Meadow of Georgetown University in Washington DC has referred to our work as a 'calling'. What would this mean for us? Should we simply encourage as many third-siders as possible in as many places as possible in as many ways as possible?

There seems to be a proliferation of bodies working on standards, regulation and accreditation. I accept that competence is very important (and would question whether the standard 40 hours of training can ever be sufficient) but I do wonder about the relevance and effectiveness of these bodies. Is this a healthy development? What do they mean for users?

My greater concern is that preoccupation with certification and standardisation can be inward-looking, that we become in Adler's phrase 'little self-contained universes' and that overmuch navel-gazing could become a trap which distracts us from the real challenge. According to Susskind, there are hundreds of thousands of unresolved disputes in England each year. There is

a huge need for our skills as mediators locally, nationally and internationally. Might undue focus on formality, uniformity or institutions cause us to miss these opportunities and fail to meet this challenge, using up our limited time and energy in relatively unproductive activity?

Turning now to value, values and pricing, senior American judge Wayne Brazil in his excellent address to the ABA Dispute Resolution conference in New York in April 2009, commented on 'an abundance of ADR for the wealthy' and spoke of his concerns about the 'distortion of the ADR movement by the power of money'. This may have a resonance in our political world these days. These remarks do prompt some questions:

- How do we value our added value?
- What of the thousands who cannot afford to take their dispute to a good mediator, far less to a court?
- How many of us are over-pricing?
- What of those working pro bono or for next to nothing?
- What is our motivation?
- What are our values?
- Where or what is our movement's soul (to paraphrase Wayne Brazil)?

These questions, it seems to me, are as important as questions about competence and quality. According to Adler, the social critic, Eric Hoffer, has commented that: 'Every great cause begins as a movement, becomes a business and eventually degenerates into a racket'. We need to avoid that in mediation. Our cause is too important.

Finally, I think there may be an elephant in our room. That being the extent to which mediators and mediation organisations are good models for what we believe in and

proclaim. I confess to numerous failures myself. In our own deliberations about important issues, how do we fare? How many disputes within the mediation community – and there are many, quite naturally – are handled using mediators? Do we act collaboratively or competitively? We may have much to learn – and then to contribute – in our own understanding of how we ourselves act and react in difficult situations.

Ultimately these are all, I think, issues of leadership. They are about adopting mediation techniques in how we conduct ourselves and how we empower and enable others to see how things can be done differently, acting not as commanders and controllers but, in Adler's words, as 'catalytic converters'.

There are no easy answers. Nor could there be. There are competing values, motivations, objectives and interests. It is important to acknowledge these. After all, paradox and ambiguity lie at the heart of the world we inhabit and recognise.

On the other hand, one thing is clear: the big issues facing us all on this vulnerable planet are immense. Mediation, however we define it, has much to offer in helping people address them. This should be mediation's moment. Indeed, it has to be. But will it be?

Notes

- * John Sturrock, QC is the founder and Chief Executive of the Core Solutions Group, a provider of commercial mediation and training services based in Edinburgh and himself a leading mediator. This article is a transcription of an address John gave to the Third Civil Mediation Council National Conference in London in May of this year.
- 1 Peter Adler, *The End of Mediation* 2009, available from the author
- 2 Since the address, William Ury did pay a successful visit to Edinburgh, engaging policy makers, politicians, business leaders and professionals.