

Mediation Services Matter in Scotland

Kluwer Mediation Blog

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This blog synthesises some remarks I have made recently to policy-makers in Scotland.

As I reflect on things, there are a lot of issues in the civil justice system in my country which remain of interest and concern. Not least, the number of ordinary folk caught up in the court system, paying a lot of money and spending time and energy trying to achieve a sensible outcome. The number of times I, as a mediator, see cases which have been unresolved for months or years being sorted out in a day of mediation causes me a lot of food for thought. More than that, though, the number of occasions when the amount of the legal and other fees incurred exceed the value of the money settlement is significant. And the fact that the "sunk costs" in legal and other expenses often act as a barrier to speedy resolution (and perhaps even to using mediation services at all) is a real shame.

Although the use of mediation services is firmly established now in commercial matters in Scotland, I firmly believe that a significantly greater number of the cases in our civil courts (most of which settle anyway eventually) could be resolved much earlier through the use of mediation. Indeed, the words I hear most often from the parties/clients themselves, when finally they are able to discuss things face to face, are along these lines: "Why didn't we have this conversation a year ago?"

I don't blame the lawyers for this at all. In a sense, they are doing their job within the system. And many of them are more enlightened than they were, say 15 years ago. But we have a systemic challenge. It's not just about reforming the civil justice system, it's rather appreciating that most/many civil disputes are about underlying issues, or about relationship/communication deficits (even in hard-nosed business), which the traditional adversarial set up is not designed to address.

Nor is it just about saving cost, though I believe that millions of pounds could be saved in the system by a new approach. It's more about releasing the creative energy that is suppressed by ongoing unresolved conflict. Re-channel that energy into productive business and other relationships. Not only will that enhance communities, but it will turn opportunity cost into opportunity gain - time and money spent building new things rather than knocking down the opponent or scrapping over old things. We need that in Scotland. And, no doubt, elsewhere too.

Indeed, assuming that Scotland leaves the EU as part of Brexit, there could be a number of initiatives to enhance the Scottish economy. Even if we don't, we still need to generate new business to replace what is lost. One area is dispute resolution. Commercial activity will always generate disputes. Nowadays, businesses want to be able to resolve disputes quickly and effectively. Encouraging mediation services is one way to do this.

People often say that, as a mediator, I am arguing from a position of special interest. Frankly, now being hundreds of mediations into my career as a mediator, I am past that stage. I just want to draw on the empirical evidence from my mediation experience. The Scottish justice system seems to have fallen behind others in this regard. However (as Charlie Irvine noted in a recent Kluwer blog), the new Simple Procedure rules just announced are a great development for those cases, I think, up to £5k - we need to extend that culture to all civil litigation in Scotland to send a clear signal that Scotland recognises modern commercial needs, regardless of value.

The International Academy of Mediators is holding its annual international conference in Edinburgh in May 2018. As its only Scottish Fellow, I have the privilege and honour of hosting and chairing that event. When deciding whether to come here, the IAM asked me how attuned Scotland is to mediation. I had to say that the civil courts have been notably behind their counterparts in many parts of the world. However, the new culture in our courts heralds change. We can regain some of the leadership here, I am sure. So, I hope that, in May 2018, we might be able to celebrate Scotland's renewed leadership in this field.
