Kluwer Mediation Blog

Mediation in Scotland: some practical questions and a nudge in the right direction

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Scotland is a practical nation. The list of its inventions includes penicillin, anaesthetics, steam engines, tarmac roads and even the decimal point (see http://www.magicdragon.com/Wallace/thingscot.html#Ta). Like the rest of the UK its culture was in part forged by the 'practical man' of the Industrial Revolution, rejecting grand theory in favour of trial and error. Its lawyers, too, are pragmatists. Those of us who teach them are often warned not to focus on 'boring' theory but rather on good old practical solutions. I propose one below.

For alternative forms of dispute resolution like mediation this has been a mixed blessing. While some have been speaking warmly of its benefits in public, in reality there is still very low-takeup, with mediation used in fewer than 1% of civil cases. It is tempting to ascribe this to conservatism, but I see the hand of pragmatism. A common response by lawyers to the suggestion of mediation is this: 'I'm really committed to mediation, but I can't see it working in this case.' Behind this is, I believe, an understandable scepticism about adversaries reaching agreement just by talking.

All of this may be about to change, however. A conference taking place in Edinburgh (Scotland's capital) this week has the remarkable title 'Embedding ADR in the Civil Justice System.' Organised by the Law Society of Scotland and the Scottish Mediation Network, the conference brings together a fascinating mix of policymakers, lawyers, judiciary, academics and advice agencies. Keynote addresses are provided by government minister, Roseanna Cunningham, senior judge, Lady Paton, and leading US scholar, Professor John lande.

Equally remarkable is the list of questions the conference sets out to tackle. Finally Scottish pragmatism seems to be focused on asking the right questions – the sort of questions any civil justice system needs to address if it is to make the most of mediation. The list is rather too thorough but here is a sample:
Is ADR an effective means of controlling time and costs in civil disputes?
How does ADR complement and support other elements of the justice system?
What accessibility issues are raised or addressed by using ADR?

And from the perspective of the judiciary:
Can ADR work without compulsion or sanction?
Can ADR support fair procedures, practices, and outcomes in the court system?
Does ADR need solicitors and courts?

Underpinning all of this seems to have been a change of attitude on the part of the Scottish Government. In 2010, following the publication of the Civil Courts Review (the 'Gill Review', after its author, Lord Gill) I wrote of my fear that, in contrast to post-Woolf England & Wales, we would remain the *'Scotland of dispute resolution, where litigation trumps all'* (Charlie Irvine, 'The Sound of One Hand Clapping: Gill Review's Faint Praise for Mediation' *Edinburgh Law Review, Vol. 14, 85-92*). And yet last year the Scottish Government launched its 'Making Justice Work' programme, setting out its strategic goals for the civil justice system, including:
'To develop mechanisms which will support and empower citizens to avoid or resolve informally disputes and problems wherever possible, and to ensure they have access to appropriate and proportionate advice, and to a full range of methods of dispute resolution, including courts and tribunals where necessary, and appropriate alternatives.'

Taking its lead from these high-sounding words, next week's conference adds more of the right questions (with perhaps the hint of a Scottish stereotype in the persistent emphasis on costs) :
How can introducing ADR into the justice system reduce the overall cost to the system of resolving disputes, in particular, reduced court costs?
How does ADR result in quicker dispute resolution and less court time?
What makes ADR more affordable for the user?
How should it be funded, and how can costs be controlled and shared?
How does embedding the option of ADR in the dispute resolution process result in a better overall experience for the user?
Particularly significant are these deeper questions:
How does incorporating ADR into the justice system produce fairer outcomes for users?
How does the option of ADR lead to improved perceptions and increased confidence of the justice system as a whole?

This last is perhaps the most important of all. We mediators do not seek to undermine the justice system. Far from it, our experience teaches us that businesses and individuals, given the right environment, are quite capable of devising just outcomes to their disputes. Good mediation enhances the credibility of the whole justice system (see Nancy Welsh, 'Making Deals in Court Connected Mediation: What's Justice Got to do With It?' *Washington University Law Quarterly, 2001, Vol.79, 787-861*).

And what will be the result of all these good questions? Some jurisdictions, such as Italy, are counting the cost of moving too quickly to a system of mandatory mediation (see Guiseppe de Palo and Lauren Keller, 'The Italian Mediation Explosion: Lessons in Realpolitik' *Negotiation Journal, April 2012, 181-199*). I favour a more subtle move, espoused by Daniel Watkins ('A *Nudge* to Mediate: How Adjustments in Choice Architecture Can Lead to Better Dispute Resolution Decisions.' *American Journal of Mediation, 2010, Vol.4, 1–22*). Watkins draws on the ideas popularised in 'Nudge: Improving Decisions About Health, Wealth, and Happiness' (by Cass Sunstein and Richard Thaler) to suggest that simple alterations in the way that choices are framed can overcome well-documented biases and 'nudge' people towards socially desirable decisions. A well-publicised example concerns organ donation. In a 2003 experiment participants were asked to imagine a law requiring them either to *opt-in* or *opt-out* of organ donation. Of the group who needed to opt in to the scheme, 42% chose to become organ donors: where they had to opt out, the proportion was 82% (Watkins, 2010, p.20). In neither case was organ donation made mandatory.

And so with mediation. In Scotland, where we are almost starting with a clean slate, we have the opportunity to make mediation, not *mandatory* but *default*. If it is the default option, we overcome

the status quo bias without robbing people of choice: those who do not wish to mediate may simply opt out. But for a great number of disputes where mediation looks likely to provide a speedy, inexpensive and humane resolution, an opt-out scheme will work with the grain of human nature to ensure it is not neglected.

This strikes me as supremely practical. It's all about asking the right question at the right time, and this could very well be the week when we do.

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