Kluwer Mediation Blog

And finally… some plain English from Scotland

Charlie Irvine (University of Strathclyde) · Saturday, September 10th, 2016

A few months ago I painted a not-terribly-flattering picture of Scottish justice as experienced by small claimants – (Oiling the Wheels of the Justice System). Seen through the eyes of a mediator (and ex-lawyer) the language, practices and architecture seem calculated to confuse those most in need of assistance and clarity like unrepresented parties and small businesses.

Well, it's time to eat my words. In a jurisdiction where the wheels of reform grind slowly (the review that led to these changes reported in 2009) the new "Simple Procedure" rules seem to have come from nowhere. They are clear, straightforward and comprehensible (if rather long) – see Act of Sederunt (Simple Procedure) 2016. They also make repeated reference to alternative dispute resolution. I don't yet know how Scotland fares on Nadja Alexander's Regulatory Robustness Rating (RRP) but I'd guess these rules will bump it up a few points.

There's a lot more in the rules than ADR. Indeed, it's salutary to see how we view things through the prism of our own perspective: law firms reviewing the rules tend to highlight the amended terminology (of which more below) and the headline on the Scottish Courts and Tribunal Service website is the move to online processing. While I saw the new powers to refer parties to ADR as a significant change, a law school colleague damped my enthusiasm, saying "the door to mediation

has been opened slightly wider".

Some headlines:
– Simple procedure applies to almost all cases up to a value of £5,000 (€5,900) (exceptions include personal injury and aliment claims)
– The traditional Scottish term "Pursuer" is replaced by "Claimant"; "Defender" becomes "Respondent"
– The even quainter term "sist" is replaced by the plain English "pause" (where a case needs to be put on hold for a period).

In terms of the process, the most substantial change is that sheriffs (Scotland's mid-level judges) now consider the written claim and response in private. This is significant. Currently all parties to a small claim have to appear in person at a "procedural hearing". This practice causes a great deal of confusion, with many people, perhaps a majority, believing that they are coming to the final hearing that will dispose of their case. Mediators often find themselves speaking to baffled and frustrated litigants who have waited an hour or more for a two minute appearance at which the sheriff orders them to return 8 weeks later for the actual hearing.

ADR is given prominence throughout the Simple Procedure. It begins with five principles, the fourth of which is:
"Parties are to be encouraged to settle their disputes by negotiation or alternative dispute resolution, and should be able to do so throughout the progress of a case."
Under Sheriff's responsibilities, it states: *"The sheriff must encourage cases to be resolved by negotiation or alternative dispute resolution, where possible."*
When it comes to parties' responsibilities, *"Parties must consider throughout the progress of a case whether their dispute could be resolved by negotiation or alternative dispute resolution."*
Then, under Sheriff's powers, we have: *"The sheriff may do anything or give any order considered necessary to encourage negotiation or alternative dispute resolution between the parties."*
Of the five orders a sheriff may make on first reading the claim the first is: *"refer parties to alternative dispute resolution."*
If the sheriff decides to arrange the much more sensibly titled "case management discussion", its second purpose is to *"discuss negotiation and alternative dispute resolution with the parties."*
And even if the case proceeds to a hearing, *"The sheriff may refer parties to alternative dispute resolution at a hearing."*

While some jurisdictions may regard these provisions as obvious, their significance in Scotland can't be overstated. Just seven years ago the Scottish Civil Courts Review made clear that judicial encouragement for ADR should be limited to the provision of information and some limited case management (Scottish Civil Courts Review, 2009, pp. 171-173). The 2011 Taylor Review of Expenses and Funding of Civil Litigation in Scotland makes no mention of ADR at all. This has not been fertile soil for non-family mediation. A couple of years ago some of my enthusiastic students suggested to another lecturer (a lawyer) that a particular case seemed ideal for mediation. He responded with *"I'm not going to tell my clients to hug a tree."*

So it is all the more fascinating that the new Scottish Civil Justice Council has chosen to build encouragement for ADR into the new rules. The rules, however, are just a first step. Some ticklish questions remain:
– Who will provide mediation, or any other form of ADR, for claims of under £5,000?
– How much will they charge?

– How will the quality of mediation be assured?
– What about larger cases? If mediation is useful for smaller matters, why not all the way up the value chain?

I recently visited the Provincial Court Civil Mediation Program in Calgary, Alberta. There, the small claims track includes all cases up to a value of $50,000 Canadian (€34,000). The credibility of the mediation program is underlined by its well-appointed offices within the court and its coordinator's role as the first person to screen cases. Only when she declares a matter unsuitable for mediation does it come before a judge.

Of course every country and every jurisdiction is different, with its own traditions and blind spots. Those who administer our justice system need to go further than plain English and good intentions if they are to provide our citizens with a genuine choice in dispute resolution. However, for now I am buoyed up by Scotland's new rules with their clarity and emphasis on practical, affordable resolution. Whoever has drafted them deserves praise.

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This entry was posted on Saturday, September 10th, 2016 at 9:36 pm and is filed under ADR, Developing the Field, Domestic Courts, Growth of the Field (Challenges, New Sectors, etc.), Legislation, Mediation Reforms (Legislation, etc.), Mediation Schemes (In Courts, etc.), National Mediation Laws, Scotland
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