

# Kluwer Mediation Blog

## Mediating Inter-Governmental Relations in the UK

John Sturrock (Core Solutions Group) · Friday, January 28th, 2022

Effective inter-governmental relations among the constituent parts of the United Kingdom are essential in an era of increased devolution of powers, post-Brexit allocation of responsibility and contested narratives about the future of the (uncodified) UK constitution.

### Background

One of the rather depressing aspects of the constitutional impasse in the UK is that inter-governmental relations (IGR) between the UK and Scottish (and indeed the Welsh) Governments have appeared to worsen in recent years. This has been exacerbated in the post-Brexit era with the passing of the UK Government's Internal Market Act, an attempt to address funding and distribution of powers hitherto affected by EU regulation, which has been perceived as a "power grab" by the devolved governments. This has been further exacerbated by perceptions of high-handedness by the present Westminster administration with its "muscular unionist" approach and difficulties in the implementation of the Northern Ireland Protocol.

There was a time just a few years ago (and I was fortunate to have some minor involvement) when there were active steps to create a more congenial atmosphere for IGR in the UK. But the Joint Ministerial Council and other informal bodies seemed to become less and less effective and to be viewed increasingly as an opportunity for political positions to be staked out. That said, the Covid pandemic and the challenge of climate change (with the hosting in Glasgow of COP26) has necessitated a degree of serious cooperation in these and other areas in the past two years.

### IGR Review 2022

However, just recently, a new approach has emerged. Following a [review of IGR](#), new structures have been set out. These, it is said, will "provide for ambitious and effective working, to support ... COVID recovery, tackle the climate change crisis and inequalities, and deliver sustainable growth."

The new arrangements are "*built on principles of mutual respect and trust, respecting the reserved powers of the UK Government and Parliament and the devolved competences of the Scottish Government, Welsh Government, Northern Ireland Executive and their legislatures. The new system will provide a positive basis for productive relations, facilitating dialogue where views are aligned and resolution mechanisms where they are not.*"

To those of us involved in conflict prevention, management and resolution, this all seems like good

stuff and we can note especially the reference to “facilitating dialogue” and “resolution mechanisms” for situations where views are not aligned. The scene is set for language which all mediators will recognise and appreciate. I explore this further in this post.

### **The Details**

More detailed principles for intergovernmental relations and collaborative working are set out as follows, again with themes which resonate strongly:

- “a. Maintaining positive and constructive relations, based on mutual respect for the responsibilities of the governments and their shared role in the governance of the UK;*
- b. Building and maintaining trust, based on effective communication;*
- c. Sharing information and respecting confidentiality;*
- d. Promoting understanding of, and accountability for, their intergovernmental activity;*
- e. Resolving disputes according to a clear and agreed process.”*

The review goes on to reaffirm “our collective commitment to work more effectively together through new machinery” and that on “matters of mutual interest, the governments will seek to proceed by consensus, including ensuring the earliest possible resolution of issues.” Among other provisions, intergovernmental machinery should “ *b. facilitate effective collaboration and regular engagement in the context of increased interaction between devolved and reserved competence in our new relationship with the EU and other global partners; c. promote dispute avoidance by ensuring there are effective communication and governance structures at all levels, from working-level officials to ministers;*”

Expanding on communication, the following is set out: “... *The governments have committed to effective and timely communication with each other, particularly where one government’s work may potentially have some bearing on the responsibilities of another...*”

Under the rubric of dispute resolution and avoidance, all governments “*are committed to promoting collaboration and the avoidance of disagreements...The resolution process ... should be seen as part of a much wider system of active IGR, and as a process of last resort.*” Again, this all resonates with mediators and an approach where emphasis is placed on prevention and early management of disputes.

### **Mediation arrives!**

Finally, the breakthrough. One of the functions of a newly established IGR Secretariat is: “*Facilitating the process of dispute resolution. This will include assessing whether the appropriate steps have been followed to resolve a disagreement and decide whether it should be escalated as a dispute through the formal process. Where appropriate, it will appoint a third-party to provide third-party advice or conduct mediation ..., subject to the agreement of all parties to pursue these options*” and later: “*If required, an independent mediator will be appointed, as agreed by the parties to the dispute, on the recommendation of the Secretariat. The timescales for the mediation process will be agreed by the parties.*”

This latter provision arises under the heading of “Third-party involvement to resolve dispute”, which also provides separately for the “appointment of third-parties to provide advice.” There follows some rather confusing text about the need for subject matter expertise (which must be “specific” and/or “extensive”) and it will be interesting to see if this is applied to the appointment of a mediator as well as to a third party adviser. Many mediators would argue that, when

knowledgeable specialists are engaged by the parties, what you need is a really skilled and experienced mediator, rather than a subject matter expert. The key now is likely to be helping to ensure that there is a really clear understanding of how mediation works and what mediators can add.

## Commentary

In the past, reference to an arbitrator or other adjudicative function might have been chosen for dispute resolution. Overall, therefore, this feels like a major step forward, not only in UK IGR, but in recognition of the opportunities offered by mediation to help manage disputes and resolve political differences. This seems both sensible and realistic as it preserves the disputing parties' autonomy to make decisions about whether or not to accept any proposed solution rather than having one imposed.

As we know so well, unless essential, ceding control to a third-party decision-maker, and seeking a definitive determination whether in arbitration or in litigation, can exacerbate and exaggerate differences and divisiveness, as well as being costly and time-consuming, while lacking scope for subtlety and flexibility. Enforcement measures for any decision can become an issue. In political matters, these points seem to have even greater force.

I might observe that the proposed use of mediation could have gone further in this review. In theory, differentiating between disagreements and disputes is a convenient way to manage escalation. It is likely that mediation would be viewed by many as only necessary or appropriate at the "dispute" stage. However, it need not be limited in that way. Mediation can of course be utilised prior to a more formal dispute stage, where it can play a role in reducing risk and achieving better understanding. The IGR Secretariat may in fact play such a role informally.

Had the review gone further, it might have included this wording:

*"Notwithstanding the provisions above, the parties may agree at any stage to request the appointment of a mediator to assist them to resolve any difference, disagreement or dispute among them. The IGR Secretariat will facilitate such an appointment."*

Interestingly, such a view is consistent with [UK Cabinet Office advice](#) on responsible contractual behaviour in the performance and enforcement of contracts, issued in 2020 following the start of the coronavirus pandemic: *"the Government would strongly encourage parties to seek to resolve any emerging contractual issues responsibly – through negotiation, mediation or other alternative or fast-track dispute resolution – before these escalate into formal intractable disputes."*

## The Future?

Going even further, of course, there could now be a role for mediation in future discussions about how to address the constitutional issues which seem likely to continue to dominate UK politics in coming years, and the pathway to be followed, including the terms on which any referendums would proceed

In an stimulating contribution to the early conversations about negotiating Brexit, Horst Eidenmuller wrote this: *"Experience tells us that creating or at least preserving value in extremely complex multi-party negotiations will be much more likely if mediators guide the parties' negotiations"* including negotiations *"with a (strong) political or public element."* (in *Negotiating*

---

Brexit by Armour and Eidenmuller, 2017, CH Hart, Beck, Nomos, page 117).

The subsequent experience of Brexit negotiations suggests that conventional “positional bargaining” and “value-claiming” approaches to unassisted negotiations continue to result in less than satisfactory outcomes with a tendency towards zero-sum, or lose-lose, results.

Overall, it has been noted (in [Intergovernmental Relations in the UK: Time for a Radical Overhaul?](#) by Nicola McEwan and others) that *“This major crisis [the coronavirus pandemic] has thrown into sharp relief the importance of productive working relationships between all levels of government, and has also reminded politicians and publics of some of the profound, shared interests that continue to exist within the UK—and would do so whatever the constitutional arrangements between these territories.*

“Finding ways to work together more effectively is not just desirable within the current constitutional framework. Even in the event of Scottish independence, or Irish reunification, various kinds of cooperation will still be necessary, by virtue of geography and the continued interdependence of the economies and societies that coexist on these islands.”

In UK political discourse, mediation’s day may now be coming.

---

*To make sure you do not miss out on regular updates from the Kluwer Mediation Blog, please [subscribe here](#).*

### **Profile Navigator and Relationship Indicator**

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

# Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



This entry was posted on Friday, January 28th, 2022 at 3:41 pm and is filed under [Appointment of Mediators](#), [Cooperation](#), [cross-border mediation](#), [Decision making](#), [Developing the Field](#), [Dispute Resolution](#), [Future of mediation](#), [Governments/Public Sector](#), [International Conciliation](#), [International Mediation](#), [Negotiation](#), [peace negotiations](#), [Promoting Mediation](#), [Public Policy](#), [Scotland](#), [Uncategorized](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.