

Alternative Dispute Resolution in Europe

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Introductions

- **Emma Ries**
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 - London Collaborative Committee
- **Rachael Kelsey**
 - Family lawyer, mediator and collaborative lawyer in Edinburgh
 - Past chair Family Law Association

MAIN ADR MODELS IN FAMILY LAW IN UK

MODEL	COUPLE PRESENT	LEGAL ADVICE GIVEN	OTHER PROFESSIONALS INVOLVED	LEGALLY BINDING AGREEMENT	KEEP SAME LAWYERS IF GO TO COURT
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MEDIATION	YES	NO	sometimes	No**	YES
COLLABOR-ATIVE	YESo	YES	sometimes	YES	NO
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Introductions

- **Mediators**
- **Collaborative lawyers**
- **Arbitrators**
- **Lawyers**
- **Judges**
- **Others**

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- **Mediation**
- **Collaborative Law**
- **Arbitration**
- **Other models of ADR**
- **The future of ADR**

ADR in Europe

- **Development of ADR in individual countries eg E&W**
 - 1970s in court conciliation
 - 1980s mediation and organisations eg SFLA and FMA
 - 1990s legislation
 - Family Law Act 1996 – info meetings never happened
 - Access to Justice Act 1999 – compulsory referral legal aid
 - 2000 – encouragement of mediation but not compulsory also rise of mediation and collaborative law

ADR in Europe

- **European Council states:**
 - **1999: the principal of Access to Justice is fundamental to EC's objective of developing an area of freedom, security and justice and free movement of people (Tampere meeting)**
 - **2000: basic principals for ADR for civil and commercial law are an essential step towards simplifying and improving access to justice**

ADR in Europe

- **European Commission**
 - 2002 Green paper on ADR civil (including family) and commercial law
 - 2004 launches European Code of Conduct for mediators
 - 2004 proposal for Mediation Directive
- **Mediation Directive**
 - 2008 Directive (2008/52/EC of 21 May 2008)
 - 2011 member states to implement

ADR methods: mediation

Mediation in Scotland:

- practical process and use in family law
- legislative context
- challenges and opportunities arising from the mediation directive- Directive 2008/52/EC

ADR methods: mediation- practical process

- Two decades of experience in Scotland
- Developed legislative framework and happy co-existence with domestic common law
- Different mediation models developed and available
- Lawyer and other professional mediators co-existence and co-operation

ADR methods: mediation- practical process

- **Lawyer mediators:**

- (i) CALM- comprehensive accredited lawyer mediators**

- Around 60 CALM mediators in Scotland
 - Accredited by Law Society of Scotland
 - Rigorous training for experienced and peer recommended lawyers only
 - Annual continuing professional development requirements and bi-annual re-accreditation
 - Strict code of practice

ADR methods: mediation- practical process

- Code of practice provides, amongst other things, for:
 - No interaction with parties individually- ‘the mediator...must not communicate with one party without communicating in similar terms with the other save for purely formal discussions in general terms to set up the mediation or arrange mediation appointments.’
 - Process is ‘without prejudice’- ‘any statements and negotiations made during mediation cannot be founded on in any court action save with both parties consent’
 - Legal information can be provided but no legal advice
 - Can be flexible and possible for children to be involved in process
 - Private paying or state funded, depending on parties circumstances
 - Unrepresented parties

ADR methods: mediation- practical process

- **Lawyer mediators (cont):**

- (ii) Independent mediators:**

- Some are also CALM mediators
 - Some have family law background
 - Different models used
 - Representation possible
 - Directive mediation
 - Confidential communications between mediator and individual parties possible- ‘caucusing’

ADR methods: mediation- practical process

- **Non- lawyer mediators:**

- Thriving mediation practice across Scotland provided by FMS- Family Mediation Scotland
- Predominantly child related issues but also AIM- all issues mediation
- Work and train with CALM mediators- co-mediations undertaken
- Charitable status and Government funding
- Experienced in involving children in mediation
- Other linked services- eg. children's groups and contact centres

ADR methods: mediation- legislative context

- **Civil Evidence (Family Mediation) Scotland Act 1995**
 - Information as to what occurred during family mediation is inadmissible in civil proceedings (without agreement of parties)
 - Approved mediation organisations only
 - Exceptions allow fact of mediation to be admitted and fact of no agreement having been reached to be admitted
 - Mediator cannot be called as witness
 - Documents, eg valuations, produced are admissible

ADR methods: mediation- legislative context

- **Procedural rules:**
 - **OCR 1993 (Sheriff Court)**
 - **Rule 49.23 (Court of Session)**

both allow 'at any stage of the action' in child cases for there to be referral to family mediation

ADR methods: mediation- practical process

- English perspective
- Other UK wide organisations, including Reunite

ADR methods: mediation- challenges and opportunities

- **Challenges:**

- incompatibility of EU's encouragement of mediation and view of its benefits with EU legislation in family law which encourage a 'race to court' and discourage ADR methods
- Council Regulation (EC) 2201/2003 Brussels II bis
- Council Regulation (EC) 44/2001 Brussels 1

ADR methods: mediation- challenges and opportunities

- **Opportunities:**

- development of mediation following Directive 2008/52/EC- on certain aspects of mediation in civil and commercial matters
- encouragement that ‘mediation should not be regarded as a poorer alternative to judicial proceedings’
- encouragement to ensure quality mediation available (Art 4), to train mediators (Art 4) and to make information available about mediation to the public (Art 9)

ADR methods: mediation- challenges and opportunities

- **Opportunities:**

- Implementation being worked on by Scottish Government
- Enforceability provisions (Art 6) not likely to be problematic in Scotland given norm of 'Minute of Agreement'
- Confidentiality provisions (Art 7) again not likely to be problematic in Scotland given terms and conditions of mediation and background of privacy of contract
- Art 8 prescription and time limits will require our domestic law to be looked at as time limits exist for actions by former cohabitants (have in Scotland, unlike England)

Collaborative Law - origins

- **Origins of the process**
 - 1990s in Minnesota, US attorney, Stu Webb
 - International Academy of Collaborative Professionals
 - 2003 UK group and PODs
 - 2004 Resolution
 - 2005 Resolution's first ADR conference (joining mediators and collaborative lawyers)

RESOLUTION – www.resolution.org.uk

- National organisation of over 5000 lawyers who believe in a constructive, non-confrontational approach to family law matters (set up 1982)
- campaigns for improvements to the family justice system
- supports development of family lawyers through training, good practice guides, accreditation for family lawyers, collaborative lawyers and mediators
- Code of Practice

RESOLUTION – code of practice

- **Code of Practice**
 - adopted by the Law Society as recommended good practice for all family lawyers
 - requires lawyers to deal with each other in a civilised way and to encourage their clients to put their differences aside and reach fair agreements

Resolution - code of practice

- Conduct matters in a constructive and non-confrontational way
- *Avoid use of inflammatory language both written and spoken*
- Retain professional objectivity and respect for everyone involved
- *Take into account the long term consequences of actions and communications as well as the short term implications*
- Encourage clients to put the best interests of the children first
- Emphasise to clients the importance of being open and honest in all dealings
- Make clients aware of the benefits of behaving in a civilised way
- Keep financial and children issues separate
- Ensure that consideration is given to balancing the benefits of any steps against the likely costs – financial or emotional
- *Inform clients of the options e.g. counseling, family therapy, round table negotiations, mediation, collaborative law and court proceedings*
- Abide by the Resolution Guides to Good Practice

Collaborative Law - developments

- **England and Wales – 4 years**
 - 25% of Resolution's 5000 members trained
 - Other professionals trained
 - Judicial support: fast track/specialist judges
 - Research: Resolution/ government pilot scheme?
 - Wider recognition: Madonna

Collaborative law - developments

- **Europe**
 - 9 countries eg 300 plus in France
 - European Family Law ADR conferences, Austria 2007 and Ireland 2008
- **International**
 - 17 countries
 - IACP conferences, New Orleans 2008
 - Hollywood: Juno

Practice of Collaborative Law

- **Couple each instruct trained collaborative lawyers**
- **Issues resolved in 4 way face to face meetings**
- **Agenda set by couple but lawyers manage, facilitate, advise and support**
- **Clients encouraged to use other professionals (see below)**
- **Legal advice but team approach to reach settlement**
- **Focus on process rather than just outcome**

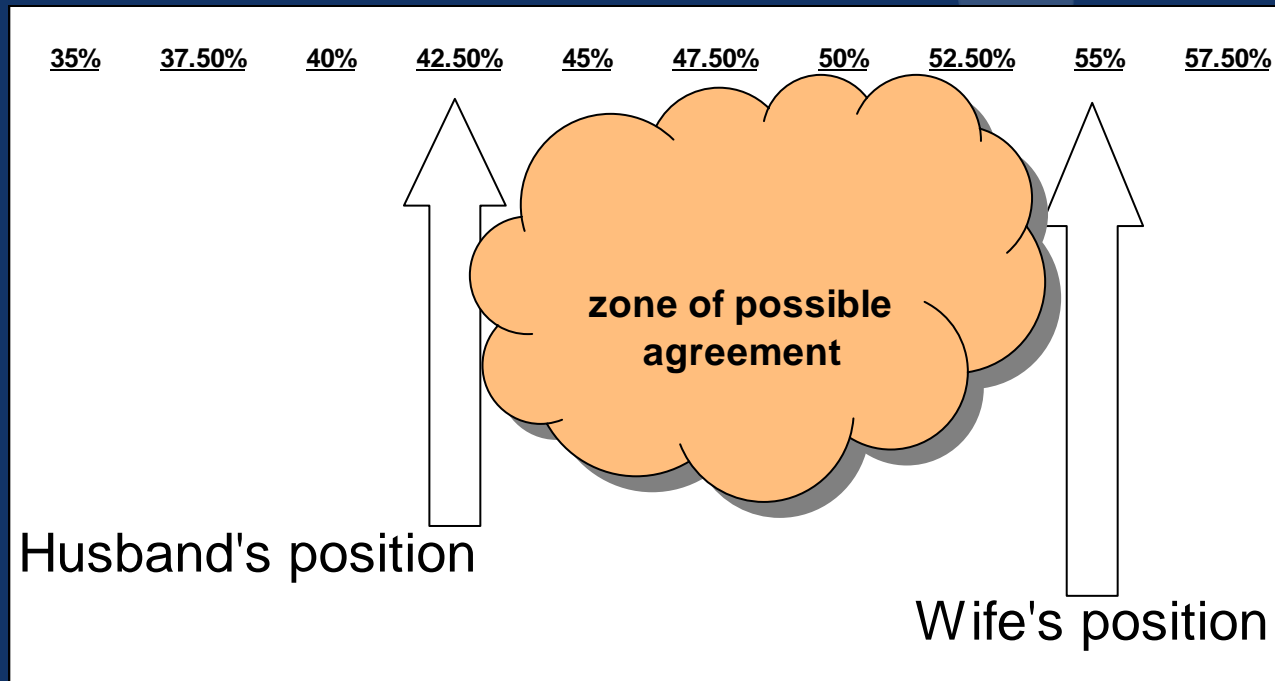
Practice of Collaborative Law

- **All four sign participation agreement**
- **Sets out intentions**
- **Negotiation in good faith and interest based**
- **Lawyers disqualified from going to court (but can file divorce and settlement in court)**

The Court process – why change?

- Does it deliver what the clients expect?
- Do the clients' positions reflect their individual interests and needs?
- Do lawyers properly take on board the impact upon the clients of Court proceedings?
- How will the separating couple communicate after?
- But the Court is there to step in when required collaborative law is only one of the options available. Will not be for all

Zone of possible agreement



Interests not positions

- **French Wife, Russian Husband living in London. Wife wants to return to France with child. Husband against this. Financial issues too.**
- **Court process – look at strongest legal position**
 - **Wife stay in London as better financial outcome likely, with separate court process seeking husband's consent to child moving abroad**
 - **Husband preventing child and mother moving abroad and big issue over his financial wealth (particularly offshore), her ability to work here and her share.**

Interests not positions

- **Collaborative model – look at their interests:**
 - **Continued relationship for both with child (Husband particularly anxious about this as he works long hours and travels abroad for his job)**
 - **Wife wants some independence (support from family in France will allow her to return to work, but unlikely in London)**

Use of other professionals in Collaborative law

- **Family consultants**
- **From the start – ‘on the wings’**
- **Support one party or both parties**
- **Voicing the needs of the child**
- **Help communicate with their ex, during process and in the future**
- **Help articulate what individual wants**
- **Provide some limited therapeutic input**

Use of other professionals in Collaborative law

- **Other experts e.g.**
 - **Financial advisors**
 - **Accountants**
 - **Valuers**
 - **Mediators**

ADR methods: Arbitration

- **Still at nascent stage in Scotland in family cases but very long history of arbitration generally going back to the 19th century**
- **Scottish Arbitration Code for use in domestic and international arbitration available since 1990s**
- **Law Society of Scotland Arbitration scheme in existence for over 20 years**
- **Bespoke family Law Arbitration project in the pipeline- watch this space! Capitalises on desire to select judge, maintain privacy and contract out of court timetables**

ADR methods: other models

- **Lawyer negotiation**

- joint meetings the norm- ‘collaborative lite’ (without the downsides!)
- Flexible, focussed and economic
- less problematic for us, possibly with our tradition of privacy of contract- parties have always been able to contract out of our legislative framework in relation to financial issues arising from marriage (eg. long tradition of pre and post nups) and separation (norm is contract delaing with finances and no financial orders from court).

ADR methods: other models

- **Family group conferencing**
 - Child cases
 - Non-legal professionals involved- Children1st charity in Scotland
 - Co-ordinator, but primarily family (and friends)
- **Other models?**

International ADR Practice Issues

- **Wider use:**
 - **International cases (Reunite/collaborative)**
 - **obtain joint advice from foreign lawyer**
 - **pre marital and cohabitation agreements**
- **Difficulties: (International Protocol being drafted)**
 - **Brussels II and I and divorce race**
 - **issue first and then stay proceedings?**
 - **Agreement not to issue?**

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The present (and future) of ADR in Europe

- What else are you doing? or are you doing it differently?
- How does it work?
- Is there potential for wider application?
- What are the challenges you are or have faced?

Alternative dispute resolution in Europe

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