NEW ROUTES TO RESOLUTION EMERGE

by PERRY GOURLEY

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SIGNIFICANT changes are afoot in the Scottish courts which could have a major impact on the way businesses deal with disputes.

From later this year the Court Reform (Scotland) Act 2014 will herald a raft of new civil court measures including higher financial thresholds for claims raised in sheriff courts and changes to the ability to recover fees.

While it is early days, many in the legal sector believe the changes could mean alternatives to court action – such as arbitration and mediation – are more attractive in some cases but could also lead to a rise in the number of disputes heading to court.

According to Graeme MacLeod, partner at law firm **CMS**, the reforms should make it more attractive for Scottish businesses to pursue litigation given they are designed to reduce delays and costs involved.

"A key aspect of the reforms that should prove beneficial for smaller businesses is the transfer of cases to the sheriff courts which tend to be a less costly option for litigation," he says. "Previously, claims for more than £5,000 could be raised in the Court of Session in Edinburgh but under the new act disputes involving sums less than £100,000 will be raised in the sheriff court, where they may be heard by sheriffs with specialist commercial experience."

An online disputes system would reduce the time it takes to resolve disputes and accordingly reduce the costs for all involved

John MacKenzie, Shepherd & Wedderburn (below)

Vikki Melville, a partner at **Simpson & Marwick** who specialises in road traffic and employers' liability claims, says the establishment of a personal injury court as part of the reforms would mark the start of a "quite fundamental change in how lower value cases in particular are handled".

"It has been long overdue as we had to move away from a situation of very low value cases being heard in our highest court."

But Melville says it is important sufficient resources are allocated to enable the sheriff court to deal effectively with the significant increase in workload. "We don't want to go backwards in terms of the length of time it takes to deal with cases as that would go against the government's intention of these reforms increasing access to justice."

Carolyn Morgan, a partner in the dispute resolution team at **Harper**

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Macleod, believes the jury is still out on how the court reforms will impact on litigation trends. "We may see a huge increase in sheriff court cases and the costs for raising an action, which would have previously been raised in the Court of Session, becoming more affordable," she says.

But Morgan says the legal profession may be nervous to raise cases until the full effect of the new reforms is understood.

If the changes do lead to more cases being brought before the courts it could lead to a reverse in the decline which has been seen in new civil actions raised in recent years.

Latest figures show a drop in the raising of both Court of Session and sheriff court actions across Scotland by 41 per cent in five years. The total number of civil claims going through the courts has been decreasing since the 1990s and fell below 100,000 cases for the first time in 2010.

While the reasons for this drop are not entirely clear, David Armstrong, head of litigation at **Brodies**, says the most likely explanation is individuals and businesses are finding alternative methods of resolving their differences. "In a market where reputational risk, confidentiality, flexibility of process, speed of resolution and cost control play increasingly significant roles in their approach to business and decision making, alternative dispute resolution (ADR) is becoming increasingly popular with commercial clients."

ADR – including negotiation, mediation and arbitration – can offer many advantages over the court process including a much quicker outcome.

"Being a more consensual approach, ADR enables parties to cut through the peripheral issues, and hone in on what really matters in the dispute," adds Armstrong.

"What seems clear is ADR is not going to go away. In a post-recessionary economic environment clients are more mindful of costs, and will wish to have a process which is confidential, efficient and speedy in producing a result."

Mediation has grown in popularity both for commercial and family issues, although John Sturrock, founder of mediation group **Core Solutions**, says the essentially private nature of the process means it is difficult to quantify just how much. But he concedes the use of mediation in Scotland has not yet grown as it has in other countries where much greater emphasis is placed on encouraging mediation through the courts.

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E-Ming Fong, McClure Naismith (above)

"In Scotland, it has been observed that the courts in particular have, generally, been reluctant to recommend or encourage the use of mediation," he says.

But Sturrock argues mediation fits very well with a general cultural shift in business of problem solving and early prevention of issues. "I think there is a sea-change under way throughout the commercial and professional world towards a much more collaborative approach that means there is significant scope for more use of mediation."

Stuart Macfarlane, partner at **Weightmans** who conducted one of the first commercial ADRs in Scotland, says when he has been involved in mediation which works well, he wonders why courts are needed at all. "Parties are content; their commercial relationship might survive; they might even have a drink together in the bar afterwards.

"Then the next mediation just doesn't work – for whatever reason – and I think just as well, in a civilised society, we have a court system to resolve disputes when all else fails."

He also highlights the difference in approach from the courts outside of Scotland to mediation. "South of the border the courts themselves seem to push it as a potential way of resolving disputes – something the parties should at least try before taking up precious state resources by litigating in the courts.

"In fact the English courts may look poorly on a party who point blank refuses to try mediation. There is not the same push in Scotland. In many of the mediations I have been involved in there is at least one party from south of the border who has tried mediation before and is prepared to try it up here."

Michelle Adam, an associate at **Thorntons**, says where other attempts to resolve disputes have failed and parties look to head to court, funding is a major concern for clients. "But there are various options available to ease this, including 'no win, no fee' arrangements and 'after the event' insurance cover," she says.

John MacKenzie, partner at **Shepherd & Wedderburn**, believes the creation of an online disputes system for low-value civil court cases could significantly reduce costs and represents an opportunity to revolutionise the justice process. Plans are currently under way for a pilot scheme – similar to that used by eBay to resolve disputes among users of its platform – in England and Wales where judges would deal with cases online or via telephone.

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the costs for all involved. The legal process can, at times, be considered a hindrance in commercial situations. Such a model would, in fact, turn it into a tool of economic growth, attracting investors and retaining home grown companies, rather than a hindrance," he says.

E-Ming Fong, a partner in **McClure Naismith's** commercial dispute resolution team, argues more focus should be placed by businesses on dispute prevention given the cost of conflict. It has been estimated that disputes cost UK business over £30bn a year and result in the loss of 370 million working days.

"Commercial disputes can be horribly expensive. At best they can punch a hole in your company finances; at worst they can destroy a business and the livelihoods of the owners and employees," she says.

Fong says taking a structured and systematic approach to dispute prevention can help avoid problems arising in the first place. Having a written contract in place, for example, means the terms of a commercial agreement are easier to prove in the event of a dispute.

"Make sure you know as much as possible about the party on the other side of the deal. The pre-contract due diligence is just as important as the commercial terms," she advises.

Sarah Stuart, partner at **Ledingham Chalmers**, says the main reason disputes occur is because not enough attention is paid to the analysis of risk at the outset of a contract. "It is surprising, and concerning, how many small to medium – and sometimes large – sized companies turn to the internet for a business contract rather than a lawyer. These contracts are often not fit for purpose and if they become the focus of a dispute the lack of consideration to the suitability of a contract could cost a business and its people dearly.

We may see a huge increase in sheriff court cases, and the costs for raising an action becoming more affordable

Carolyn Morgan, Harper Macleod (above)

"If the original contract is sound and both parties are prepared to approach dispute resolution practically and commercially, a dispute could be resolved in only a few months but, far too often, this takes much longer."

According to Neil Smith, partner in the dispute resolution team at **Burness Paull**, the fall in oil price has led to many in the oil and gas sector in particular currently going through the small print on contracts.

"With pressure from the operators on the service sector and contractors to cut costs, everyone is scrutinising their existing contracts very carefully," he says. "Exclusions, indemnities and other commercial terms at the time of entering contracts are seeing increased scrutiny by contract teams."

Smith says the operation of mature fields and assets may also create tension between oil companies. "Reluctance to commit capex linked to the oil price slump but also marginal returns may trigger dispute resolution or expert determination clauses within agreements," he says.

Core's Sturrock says as well as helping resolve disputes, mediation is increasingly being used to help facilitate better business relationships to prevent issues developing in the first place. "We have been asked to get involved at the early stages of businesses establishing joint or collaborative ventures, to help firms finalise contracts or to nip potential shareholder issues in the bud."

According to Harper Macleod's Morgan, clients now have many options at their disposal in resolving disputes. "The increasing diversity of cases in business means alternative dispute resolution should not be considered as an after-thought," she says.

"All methods should be considered together to give the most effective outcome for clients. It is an increasingly competitive legal market we are beginning to see which is no longer afraid of change." ■

DISPUTE RESOLUTION MSc

EARLIER this year Scotland became home to the world's first MSc in dispute resolution.

The qualification was launched by **Queen Margaret University** (QMU) in January to reflect a growing focus being placed on the issue by companies keen to improve the way they deal with complaints from customers.

Course leader Chris Gill, from the university's Consumer Insight Centre, says: "There is clearly work to be done to improve standards across the complaint handling industry and the provision of professional education is only one piece in an undoubtedly complex puzzle.

"We feel it's now the right time to speed up efforts to develop professionalism in the complaints sector.

"Ultimately, good complaint handling provides better public services and fair consumer markets. It's a crucial activity which affects the everyday lives of consumers and citizens."

Gill says research on complaint management has shown clear evidence good practice in resolving disputes not only helps businesses retain customers but also provides opportunities for transforming business practices. ■

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