Speech delivered to the Chartered Institute of Arbitrators (Scottish Branch) Annual Dinner at the Radisson Blu Hotel, Edinburgh on 24 February 2023 by Calum H.S. MacNeill KC FCIArb

My Lord, My Lady, Ladies and Gentlemen,

Needless to say, it’s a great honour to have been invited by Torquil to address the 2023 Scottish Chartered Institute Annual Dinner.

When I, with some trepidation as to whether I could meet this challenge, told Torquil I would try, the Branch posted the announcement of the annual dinner on LinkedIn and that included that the Chair’s guest speaker was going to be me.

It's LinkedIn, right, so one has to do the humble brag? You know when people want everyone to know they’re doing something but don’t want just to come out with it. The posts that start, “Looking forward to …”, “Delighted to be …” I went for, “Honoured to …” have been invited to be the guest speaker. Then I decided to lay on the false modesty with a trowel and added, “But don’t let that put you off, it’ll still be a great evening, as it always is.”

The friend of most of us here, John Nicolson, was kind enough to comment with the following words (and I quote, verbatim): “You will be fine.” Clearly I gained much-needed encouragement from his kind words. I’ll be coming back to them at the end.

Ideally, one needs a topic. Torquil’s invitation read, “The subject would be very much up to you, though of course … with an Arbitration/ADR slant.” That led me to land on what I wanted to say.

Language (English anyway) is evolving and developing all the time. But it is easy to feel than in recent times, these changes have been accelerating at a dizzying pace.

In December last year, Stanford University, the elite private university in California, published a list of some (by my count) 224 words and phrases which it decreed should no longer be used in official communications. It was produced by the Elimination of Harmful Language Initiative, which describes itself as a multi-year, multi-phase project to address harmful language in IT in Stanford.

The objections to commonly-used terms come under several categories. The headings are inconsistently adjectives, nouns and others and I’ll just read them as they appear: ableist, ageism, colonialism, culturally appropriative, gender-based, imprecise language, institutionalised racism, person-first, violent and the catch-all “additional considerations”.

The advice makes interesting and slightly uneasy reading, especially to the British English user. The terms crazy and insane to mean surprising or wild are criticised as being ableist language that trivialises the experiences of people living with mental health conditions. But later, “on the war path” is described as unacceptable due to cultural appropriation of a term that referred to the route taken by indigenous people toward a battle with an enemy. (The enemy curiously unspecified.) So what do they say we should say instead of that? The suggestion is “mad”, which to the British ear is worse than mentally ill, which is also banned.

Other surprising objectionable terms include “he”, “she”, “American”, “people of colour”, “victim”, “survivor”, (those last two put our criminal justice system in the dock), “seminal” (gender-based, in case you’re wondering) and even “preferred pronouns” (as gender identity is not a matter of preference).

Finally, the term “trigger warning” is discouraged as it may cause the reader anxiety about what is to come. The paper itself, however, on the first page has in bold type “Content Warning: This website contains language that is offensive or harmful. Please engage with this website at your own pace.”!

In January, Associated Press news agency updated its house style book, recommending that general and dehumanising “the” labels i.e. descriptions commencing with the word “the” should be avoided. Examples provided included “the poor”, “the disabled” and, to the consternation of some, “the French”. The writer Sarah Haider suggested as an alternative to “the French”, “people suffering from Frenchness”. Even the French Embassy in the United States tried to join in the fun, but what they said wasn’t very funny. Typical of the French.

And then only this month, the writer Anna Taylor saw fit to issue a guide called “Evolving from violent language” with a list of phrases that she thought should be avoided due to their violent undertones. One can see that perhaps in “jump the gun” (even though I’m pretty sure that the gun there is a starting pistol rather than one used as a firearm) and “roll with the punches”. But the violence in “deadline” is maybe not so obvious and the violence in “that’s not a bad idea” (as opposed to “that’s a good idea”) is obscure to me at least.

Of course, these pronouncements reliably and predictably provoke a response from (let’s just say) *The Daily Mail* and the like-minded of fuming about political correctness gone mad, wokeness and, indeed now, the “ultra-woke”.

But are these changes all bad? Returning to the Stanford list, for example, many, if not all of us would be surprised to read some of the words that they felt had to be included in a guide issued at the end of 2022, implying that they were still in regular use. Who here, at least in respectable company or when not deliberately trying to cause offence would use terms such as spaz, retard, cripple, or half-breed? Yet they were all included as if it had to be articulated why these terms are unacceptable.

Many terms have fallen into disuse, either because they are considered offensive, or maybe because they are just inaccurate or outdated.

Which, you will be relieved to hear, brings me to my point. We are here as a community whose professional raison d’être is to help people resolve their disputes, as advantage-ously as possible, in one way or another. Either consensually (negotiation or mediation) or by subjecting those we advise to an imposed solution (expert determination, arbitration or litigation), or an imposed solution in the interim (adjudication). In the modern era, the dispute resolution professional has a suite of implements at their disposal. These are all now respectable, well-developed, widely practised means of resolving disputes, so why is it that we refer to all of them apart from litigation, as “alternative”?

Sure, there are some things a court can do that only it can do. It can divorce you, it can free you for adoption, it can declare you dead. But in the commercial field there are precious few things it can do that can’t be done by agreement, and there are plenty of things it can’t do that can be achieved by other means, as any mediator will tell you.

The court is always there as the manifestation of the state in the event than an arbitral award, an adjudicator’s decision or an agreement reached at a mediation needs to be enforced. But in cases like that, is it not the court that is the alternative to the parties’ first preference?

I’m not knocking the court. Far from it. It would ill-behove me, as someone who has been practicing in the courts and tribunals for as long as I have, and who holds the court and the judges in such high esteem for the work they do. But it is a reality, appreciated by the court itself, that for most people and businesses litigation is a last resort, only to be embarked on when, at the very least, discussions / negotiations have been tried and failed.

The term ADR belongs to a time before non-court options were as developed and viable as they are now. When I started out, firms of solicitors had a “Court Department”. A suggestion of mediation was widely regarded as equivalent to running up the white flag. Arbitration was a speciality not for the faint-hearted or those without plenty of time on their hands to wait for an outcome. Adjudication had not been invented.

But court departments have long-since been re-named, usually as the dispute resolution department or something similar to reflect the changing landscape of conflict management and the expectations of clients.

And yet, ADR seems still to be ingrained in our language. Torquil’s invitation, where this all started, referred to “an Arbitration / ADR slant”. Having hit on this topic for this speech, I was a bit perturbed to read the Inaugural Message of the incoming global President of CIArb, John S. Brassie which committed to “Harnessing the power of ADR” and “Embedding ADR to enhance access to justice”.

I’ve got a bit of a mountain to climb here! The Commercial Court Practice Note (No 1 of 2017) refers to alternative dispute resolution, as does the Faculty Dispute Resolution Service website. The term is ubiquitous.

But let’s take a look at the CIArb’s Royal Charter and By-Laws. The 2013 version stated that the Object of the Institute is to promote and facilitate worldwide the determination of disputes by arbitration and alternative means of private dispute resolution other than resolution by the court (collectively called “private dispute resolution”).

The changes to the Objects, just approved, have removed the word “alternative” completely so that now they refer to “all forms of private dispute resolution”. So the King is on my side!

So here’s my call to you tonight. Let’s add ADR to the list of cancelled phrases as being outdated and anachronistically litigation-centric. Let’s start referring to private dispute resolution, not only to reflect the Objects of the Chartered Institute, but to refer to the myriad means of resolving our and our clients’ disputes that don’t involve publicly-funded courts and tribunals and that are not conducted in public.

In the end, John Nicolson on LinkedIn, after my sarcastic reaction to the underwhelming, “You will be fine” added a more enthusiastic reaction: “I am more than sure you will smash it!” Oh dear, John. Why the violent language? It really has to stop.