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One Continent, Many Methods

The view from England

Overview

I titled this 'the view from England' because Scotland is a different jurisdiction and I'm not sure where Northern Ireland fits in! United Kingdom does not seem to be the appropriate term!

Mediation has been in England since 1990, so more than twenty years, but it was not until 1999, with the introduction of the Civil Procedure Rules (the Woolf Reforms) that it became 'respectable' and probably another ten years before it became an accepted part of the dispute resolution culture. Now it is expected and the decision is 'when' to use it rather than 'if'.

There are three main strands of mediation practice in England – Neighbourhood (Community), Family (Matrimonial), and Commercial. The first is voluntary and most towns have a community mediation facility. In London most districts have that facility. Community mediation covers everything from boundary disputes to noisy neighbours but also includes peer mediation in schools, victim/offender mediation and some workplace disputes.

Family mediation is about division of possessions and access to children for couples who are separating. Recently the Government have introduced a requirement that separating couples have a consultation with a Mediator, to be told about mediation, before considering the courts.

The third area of mediation – my area – is civil and commercial disputes. This is mainly business disputes but can include boundary disputes, contested wills, medical negligence, sports, personal injury and workplace mediations.

Alongside these three main strands are others such as environmental mediations, planning and religious disputes.

And, of course, there is a strong movement towards Restorative Justice, mainly for cost-saving reasons, but it has gained credibility in recent years and there are some exciting restorative schemes in England, particularly involving young offenders.

So there are not many parts of life in England that do not have the availability of mediation, yet everywhere ignorance is the main barrier to its use – the inevitable consequence of being a confidential process (and perhaps of the vested interest of certain professions).

The state of Commercial Mediation

It is generally assumed that there were around 6000 commercial mediations in England in 2010. These included court and other schemes but excluded the court-based schemes for small claims (which are generally carried out by telephone). Unfortunately there is very little statistical information available on the extent of commercial mediations in England but it is undoubtedly true that most mainstream mediations are carried out by a handful of mediators and that there are many trained and accredited mediators who are inactive. Most commercial Mediators have a 'real' job and mediate as a 'bolt-on', perhaps ten or twelve times a year.

There are perhaps twenty or so full time commercial Mediators in the England, ninety percent being ex-lawyers. Indeed non-lawyer Mediators are rare, despite being the more logical choice for mediating business disputes; after all, everyone accepts that the legal arguments fall away in the first few hours of a mediation and the focus turns to a commercial negotiation, so non-lawyer Mediators should be preferred. The fact that we are not is largely due to the fact that it is the lawyers who choose the Mediator.

Despite the surplus of trained Mediators for the number of cases going to mediation, we are still training new Mediators. There are at least ten training organisations each offering two or more courses each year. The best ones are five or six days long (so around forty hours plus assessment) and have assessment by an independent panel. The worst are two days long and have little or no assessment. But, at the moment, all can produce 'accredited' commercial Mediators; whether or not they are effective Mediators is another matter. The fact is that good Mediators may only need two days training and bad Mediators may still be bad after six days training. The key should be in the assessment criteria but we do not yet have accepted national standards, which would ensure that assessments were equal and relevant.

Regulation

There has been much discussion about forming a member-body for Mediators; preferably covering all strands of mediation. Such a body exists in Ireland, setting standards and regulating its members. In England the Civil Mediation Council, a body made up of Mediators, Mediator providers, academics, trainers and the Ministry of Justice, has recently expressed its intention to become the member body for the UK. There is no certainty that it will be accepted as such by commercial Mediators, let alone other strands which have their own member body, but at present it is the only likely contender.

One of the dangers with the regulation of any profession is that it sets minimum standards. It encourages mediocrity rather than excellence. Hence the Civil Mediation Council once decided that 24 hours training (which could include assessment) was sufficient to produce effective commercial Mediators. This level is now about to be increased to 32 hours but, it seems to me, this is still meaningless. As mentioned above, the standard should be in the assessment standards, not in the hours of training. In addition, I believe that a regulating body should be identifying aspirational standards, not minimum. We should be identifying, and aiming for, excellence.

The process

The mediation process has changed very little in the past twenty years. It is usual for the Mediator to have contact with the lawyers before the mediation day (and/or with the parties in the case of workplace mediations) and for the mediation itself to be a single (long) day, most often held in one of the lawyer's offices. On the day, the Mediator will have a private meeting with each side, the Mediation Agreement will be signed and the process and roles on the day will be outlined. There will then be an open meeting where everyone meets together and the issues will be explored. This meeting may well take a couple of hours before the parties go back to their rooms. The Mediator will then shuttle between the rooms, sometimes putting lawyers or parties or experts together in working groups. There may well be further open meetings before the parties eventually agree the settlement. The lawyers will then write up the settlement for signature by the parties, which is then enforceable in court. If court action has already commenced the settlement will be confirmed by the court as a consent order.

Co-Mediation is common in Neighbourhood mediation but rare in Commercial mediation even though it is ideal for multi-party cases.

The Courts

Mediation is now firmly part of the legal process in England. The Civil Procedure Rules in 1999 stated that the courts should be 'the last resort' although the current Master of the Rolls has rather challenged that intention. England being a Common Law jurisdiction, our legal system is based upon precedent. I suspect there is a fear that if cases generally go to mediation, and 80-90% settle, the Master of the Rolls fears that English law will stagnate. Of course, that may be the view from the legal position, but few disputing parties want their case to become a precedent. The most common statement by parties in my mediations when asked the question "what do you need to be able to achieve a settlement today?" will respond "I just want to put an end to the misery". I hasten to explain that they are referring to the court process, not the mediation.

There are two court-based schemes that are established in England. One is for minor claims (say up to €6,000) using a salaried Mediator and is free. Most cases are dealt with by telephone, although face-to-face is available. The second court scheme deals with cases up to around €60,000 and uses CMC accredited Mediator providers. The parties have to pay a small fee for the service. The mediations usually take place in the court buildings and are limited to three (sometimes four) hours. This used to be administered through the National Mediation Helpline but I am informed that this has recently been abandoned.

Challenges

Mediation is not compulsory in England (unless required by contract), although many courts give firm 'nudges' in it's direction. Indeed, the court has powers to penalise parties who do not consider mediation, or who abuse the process. It must be difficult for a judge to decide if a party has abused the process and I can forsee a situation where a judge requires a Mediator to report to the court about whether a party has mediated in good faith, or not. At the moment, confidentiality being paramount, Mediators will only confirm if, and when, a mediation took place, and that the parties took part.

Inevitably, there have been challenges to mediation confidentiality in the courts and we are bound to see more as the use of mediation becomes more sophisticated and users develop tactics to gain advantage. Recently a Mediator was summoned as a witness in a case about one party alleging undue pressure to settle by the other party (which was a government department). She pointed to a clause in her Mediation Agreement that stated the Mediator may not be called as a witness but the court decided that this did not apply as it was a different dispute. She then pointed out that she was a party to the Mediation Agreement and, whilst the other two signatories had waived the confidentiality provision, she had not. Again, for the same reasons, the court did not accept this and decided that she could be called as a

witness. She pointed out that she had destroyed all notes and had no detailed memory of the case as several years had passed since the mediation. The parties still decided to call her. She then agreed subject to the parties paying her fees as a partner of a large London-based law firm – and they withdrew their summons for her to appear!

Mediation is still young in England but more and more challenges are likely in the future. It is good, and sensible, that the courts have respected, and reinforced, the confidentiality of mediation – so far!

Conclusion

I speak as a non-lawyer Mediator of commercial disputes who has been around a long time (nearly twenty years) and who has a happy balance of mediations and the training of Mediators in England and overseas. I am lucky for I was in at the beginning and so my name is known. It is so much harder for the people that I train, who are coming into an emerging profession which is desperate for work experience. Even after twenty years, ignorance is huge and so we still need to spread the word, particularly to businesses, as they are the ones that gain most. We have the Mediators ready and willing to help parties settle their disputes; they just need the opportunities.

David Richbell

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