

Community and Commercial Mediation: A Comparison

Introduction

Historically, community mediation has played a significant role in dispute resolution and social cohesion in a number of cultures. Most tribal societies use mediation in various guises, often entrenched by ritual and linked to social order.

The use of mediation to resolve commercial disputes is a relatively new notion, which has only become “mainstream” in the UK since the early 1990s. Community and commercial mediation are very different in some ways, but in both cases the process is a voluntary, confidential and flexible means of enabling parties to reach agreement over a dispute, facilitated by a third party neutral. This paper looks at some of the aspects which distinguish community and commercial mediation.

Preparation

In community mediation the neutral has very little background to the case or parties before the mediation itself. Typically, the meetings will be set up by the service provider and the mediator simply brings an open mind to the first meetings.

In commercial mediation, the neutral will generally have had contact over the phone with the parties’ advisers, the parties themselves and possibly any experts or consultants and will have gone through the principles of mediation as well as a first overview of each party’s case. Mediation agreements are sent to the parties in advance and the parties will pay (generally split equally) the mediation fee on or before the day. The parties will exchange “position statements” with each other and the neutral, and invariably will send the neutral a voluminous bundle of evidence backing their legal arguments.

In community mediation the aim is, more often than not, to restore harmony where communication has broken down and changes are required of parties’ behaviour. In commercial mediation, the parties will be heading for Court if a commercial settlement of the legal arguments cannot be reached on the day. Positions are entrenched by the parties’ advisers, who sometimes appear closer wedded to their clients’ positions than the parties themselves.

The parties

In community mediation a party may appear with a friend or member of family who are also affected by the dispute, or some other resource such as a victim support officer or translator. In commercial mediation a party may well mean: the Managing Director, the member(s) of staff involved on the operations side of the events leading up to the dispute, legal advisers (and sometimes Counsel) and an array of other experts. In cases involving insurance, the insurers may be present as well as their advisers. In many cases, crowd control alone can add time and complication to the day.

Although different in nature, it is notable that both community and commercial mediation generate a huge amount of emotion in all concerned. People become attached to disputes and their personal investment of time and resource – and line management skills – will all combine to fix parties to their positions. It can be very difficult in commercial mediations to disentangle the emotions which have crystallised over the dispute and affect relationships within one party’s side. Often these require “mediations within the mediation” and more often than not the neutral is alone in dealing with these pressures (as opposed to the co-mediation model of community mediation).

In many cases there will be more cultural diversity issues to deal with in community mediation, and more legal argument in commercial mediation, but the interpersonal dynamics are much the same.

The issue of authority is perhaps more acutely felt in commercial mediation, as the parties cannot reach settlement if any one party does not have unfettered authority to settle on their company’s behalf.

The process

Community mediation is pretty fluid, typically involving one private meeting with each party followed by a joint meeting. There are variations on this theme, of course, with shuttle mediation or home visits for instance, but largely, the process is driven by the parties' ability to empathise with one another at which point movement can be generated.

In commercial mediation the process is more formalised and the neutral is very much responsible for structuring the day with authority in order to maximise the opportunity for reaching settlement. For instance, the neutral will usually think carefully about seating plans for the joint meeting (parties closest to the neutral, facing one another), will manage time carefully (with the knowledge that most mediations settle in the small hours of the next day) and will constantly look for opportunities to get the parties to make some concession to create movement. This will include much creative thinking around setting up small meetings of different interests, using tools such as flipcharts and brainstorming, seeking ways to move out of deadlock and managing the flow of information strategically, always mindful of confidentiality.

In both types of mediation the neutral brings people skills to bear to get the parties to shift from positional to principled negotiation. Obstacles in community mediation would typically be: feelings of victimisation or despair which cloud the issues to hand. In commercial mediation it can simply be the level of legal fees (sometimes larger than the claimed amount) which provides a barrier to settlement. In either case the neutral's role is to gently unpick the emotions to address the underlying needs and interests of the parties.

The outcome

Community mediation will not result in a binding, legal agreement. The process should, in and of itself, bring about some cathartic change to the parties who are better able to perceive the affect of their behaviour on the other side. Any "agreement" reached is a good faith code of behaviour going forward, a record of promises made but which cannot be used against the other. Even so, some individuals will have real reticence to put anything down in writing, fearing they will be reducing their own freedom.

Commercial mediation, if successful, results in a formal settlement agreement which may be endorsed by the Court (Tomlin Order) and gives rise to rights and obligations between the parties. If litigation is afoot the agreement will generally include provision to cease any proceedings. Each dispute will generate a different settlement agreement and there is no limit to how creative the parties can be in resolving issues to hand. The sort of outcomes one may expect include: formal apology, payments of money, new contractual relationships and sometimes matters apparently outside of the area of dispute altogether but which the parties were able to bring to the table to "increase the size of the pie".

One very important feature of commercial mediation is the way in which the Courts will now punish parties who unreasonably fail to give mediation a chance, in the costs award element of the judgment (*Cf. Dunnett v. Railtrack; Halsey* Court of Appeal cases).

Conclusion

Commercial mediation, if successful (which it is 80% of the time), does generate legal rights and obligations. Community mediation generates a code of behaviour rather than legal rights but both types of mediation affect the lives of the individuals concerned and their emotional well being. Living in dispute is toxic but can be addictive. For people to shed their dispute will require courage, imagination and a willingness to take charge of one's destiny which parties in either type of mediation can find both liberating and enlightening.

Commercial and community mediation differ in the types of dispute they handle but at their core both provide individuals with the opportunity to take charge of their destiny – and for this reason it so often results in lasting success.

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