

## **Mediation – where’s the magic?**

By Fergus Armstrong

The mediation option for resolution of disputes in Ireland has moved, it seems, from the category of alternative remedy into mainstream legal practice. In England and Scotland, its use has grown considerably as a result of the potential for cost sanctions where a mediation proposal falls on deaf ears. Mr Justice Kelly has, since the foundation of the Irish Commercial Court (whose rules make explicit provision for the use of mediation), actively encouraged resort to mediation in many cases. Not only are parties frequently invited by that Court to consider the mediation alternative but they frequently sign up in anticipation of such an invitation. And this notwithstanding that required time for getting to trial has been greatly foreshortened as a result of case management procedures.

Mediation is, of its nature, and at its most successful, a voluntary process. However support for its use either from judges or rules of court helps overcome what might be called the ‘wimp factor’, namely the concern that a proposal for mediation may be interpreted as a sign of weakness by an opponent.

Aside from ‘high end’ cases suitable for the Commercial Court, however, it is noticeable that mediation is now happening in instances where the values at stake are modest, precisely because, it seems, it is thought to represent an economical way of reaching resolution in such cases as well.

These developments have occasioned some questioning, one might even say disquiet, in both branches of the profession. There is concern that a significant shift to mediation might undermine practice economics, sideline existing skill sets, and, at the end of the day, offer no material improvement on established methods of serving clients in conflict situations.

There is also uncertainty as to how traditional legal roles may be affected by the use of mediation. In the field of marital breakdown, for instance, where mediation is already well established in Ireland, the process often takes place before lawyers come on the scene, being then invited to document the outcome. Models for mediation in commercial cases almost invariably envisage the active participation of lawyers, yet there are concerns as to how patterns of practice, and levels of representation, may be affected.

In this article I want to explore the question of what precisely is the value of mediation over and above the typical bilateral settlement negotiations conducted between lawyers?

The case for the tried and tested settlement routines is simply put: The great majority of lawsuits get settled without going to trial. This is because lawyers are skilled negotiators. They are able to marshal the elements, the legal strengths and weaknesses of a client’s case. They belong to a profession whose members understand each other and are able to get results. They bring that about only after the facts and law of the matter have been rigorously

examined. Justice is done, to the best of the ability of mortals to achieve that. Why add an additional layer of complexity? Mediators have to be paid, judges come free. And if the mediation doesn't work, so a case has to be fought, the clients will have borne the costs of the mediation as well as the risk of costs of the hearing.

I think it must be acknowledged that many of the arguments put forward in favour of mediation are really referable to the hazards associated with court determination (publicity, high cost and unpredictability of outcome), yet everyday settlement negotiations, no less than the mediation process, will also have the aim of sparing clients from those exposures. Thus while it is true to say that the arrival of the mediation day focuses minds, the same may be said for the moment of truth when the trial date arrives and the case (as lawyers might perceive it) is ripe for settlement. If the criticism is that lawyers are prone to deferring the opening of settlement talks until arrival at the steps of the court, they do have the possibility, ahead of the hearing day, to organise a formal settlement conference where parties and their lawyers lay aside time to attempt to reach agreement.

Moreover it is not true to say that only mediation allows the introduction of imaginative elements of consideration extraneous to the case to allow a 'win-win' for both parties. Well-briefed negotiators are always awake to such possibilities. A similar comment can be made about one of the standard mediator skills, that of 'reframing' antagonistic expressions of position taken by a party in language that may be more conducive to settlement. Doing this is second nature to lawyers in negotiation.

Let it be accepted, then, that legal representatives who understand their business, who know the strengths and weaknesses of their case, have at their disposal very considerable competencies in the forging of settlements by direct negotiation.

It seems also right to recognise that many of the skills taught in mediation training are by no means particular to that process, but are generally to be recommended as 'principled, or interest-based negotiation' and joint problem solving, as opposed to old style 'positional bargaining'. Borrowing from the language of the mediation manual used by the CEDR organisation, the latter may shortly be described thus

- each side takes its 'best' (most extreme) position
- a period of justification of this extreme position follows
- discussions take place where the parties haggle, threaten, bully, cry or lie in an effort to extract movement from the other side
- concessions are exchanged
- settlement is usually achieved somewhere in the middle of the bargaining range, depending partly on the balance of power between the parties

In so far as mediation training contributes to the spread of a different approach to negotiation, this can be seen as conforming to overall trends in the direction of a less adversarial approach to negotiation. Such a model is

also to be seen in the emergence of the collaborative law movement which has gained some currency in Ireland in the family law area. A trend away from traditional confrontational approaches to disputes does not *per se* mean that the use of a third party mediator is to be preferred as the natural settlement method.

It becomes right, then, to look critically at what is unique about the mediation process. Doing so will help in exercising choice as to when it is appropriate to bring a case to mediation.

### **Proximity of warring parties**

It might be thought that this question is readily answered by pointing to what is regarded as the essential feature of the mediation process, namely the facility that it allows for confidential sharing with the mediator of the history of the case and the different facets of a party's position; to include disclosure of areas of vulnerability. Although this is done on the basis that nothing is to be revealed to the opposite party without express authorisation, the confidential receipt of such information from both sides can help the mediator to guide the parties towards settlement.

While this feature of mediation is certainly a distinctive one, I prefer to come at the question of wherein lies the particular magic of mediation from a broader perspective. My vantage point, for gaining this perspective, is a feature of the litigation process that many would regard as its 'Golden Rule', namely, that once hostilities are declared, there should be no direct contact with one's client by the opposite side concerning the matter in dispute. The concern, as every practitioner knows, is that an unguarded remark or admission by one side or the other may cause grave prejudice to a client's case and quite possibly derail the litigation. And hell hath no fury that compares with that of the lawyer whose client has been approached by the opposition.

In this scheme of things, the tradition that urges reconciliation, that says, 'do not let the sun set on your anger' finds no place. The message is 'you will be hearing from my lawyers'. 'See you in court!' The language of litigation, the language of pleadings, is a language of judgement, assertion of right and wrong, entrenchment of positions.

Mediation is, by contrast, directed towards bringing disputants into connection and communication with each other, inviting them to take part in a joint effort to solve their problem. The fact that engagement of this kind is inherently dangerous (relations may get worse rather than better), is what justifies the introduction of a third party facilitator to manage the process. Such a person can judge when it is useful for the parties to be brought face to face, when communications should be done through the mediator and when groups of lawyers or other experts are to be invited to collaborate in working on particular aspects the problem. I therefore prefer to see the 'shuttle diplomacy' aspect of mediation as part and parcel of the effort to establish or re-establish connection between parties, whereas the standard process of litigation will tend to promote continuing separation until the clash of arms on the trial date

or until a settlement is hammered out without any emphasis on restoration of relations.

Let us look at the question of 'damaging' admissions. How often one hears, in situations of human conflict, sentiments such as: 'if only they would acknowledge their behaviour, would admit what they have done to me...' The legal system however does not accommodate such exposure of one's flanks. Mediation, by contrast, provides a space in which acknowledgements can be offered directly from one party to another, in a without prejudice setting. While it is certainly the case that parties will properly be guarded as to how and at what point admissions are made, nonetheless the context is one in which risks can be taken in order to move the process forward. Time and again, one sees in mediation, how under the protection of confidentiality, acknowledgements made by one party to another of shortcomings in their own conduct can have a transformative effect. An apology frequently evokes a reciprocal response. I have seen cases where expressions of regret, made in submissions prior to commencement of the mediation, have totally altered the dynamics of the conflict. By the same token, emotions of hurt and anger lose something of their force where scope is given for their expression.

Left brain legal logic seldom encompasses more than half the story.

The prospects of success in any negotiation are greatly enhanced where there is trust between the parties. The litigation process, it must be said, works on a basis of zero trust. Apart from the objective, in mediation, of restoring some measure of communication, the set-up of the mediation day, stage managed by the mediator, brings a sense of occasion that encourages a 'now or never' mood when bargaining gets under way.

### **Suits that fit**

Against this background, how are we to define those situations for which mediation is particularly adapted? Clearly, it can suit commercial disputes, where clients are prepared to take ownership of their problems and use the negotiating skills that business people normally have in plenty to work out accommodations, with lawyers on hand. This approach is obviously especially suited for cases where there has been an ongoing relationship which it might be sought to restore. More generally, however, the process will respond to a risk analysis that says that whatever may be the risks of direct engagement and bearing one's soul to a degree, the hazards associated with litigation and the possibility that non-facilitated negotiation will not work, are of a higher order. A legal case may turn on a nicety. Judges are tied by precedent, yet there is little certainty as to outcome. Vast exercises in discovery open the possibility that an expensively developed case will fall victim to an evidential banana skin. A sophisticated client, experienced in business, will often prefer to carve his own deal, with legal help, than risk a win-lose gamble on the legal issues.

In situations outside of the business context, where there is a marked power imbalance, mediation may, arguably, be less suitable. Yet in many such

cases, for example in the field of medical negligence or abuse, the fact that mediation provides a forum where emotional upset can be expressed in a controlled environment will greatly enhance the prospects of being able to move on, to achieve closure and settlement.

It has to be acknowledged that the legal process, while it produces results, is not of its nature directed to reconciliation between parties. Litigation lawyers, counsel on their feet, are trained to fight. We become attached to our specialisations, as 'corporate lawyers, conveyancers, litigators. We become expert in work categories that repeat in our experience. 'To the man with a hammer in his hand, everything looks like a nail'. A solicitor who practised in London forty years ago told me that in his professional circle the issue of proceedings was regarded as an acknowledgement of failure by the legal advisers. Not so today.

Yet most lawyers seek to settle rather than try cases where that looks to be possible. A difficulty with lawyer-to-lawyer efforts in this regard, is that if a negotiating round fails, it can be more difficult to lead parties, or one of them, to compromise subsequently. The last offer by one side becomes the floor for the other. Interposing a third party, before serious negotiations take place, can significantly increase the prospects of success in many cases.

I put forward for consideration the following proposition, that aside from cases where there is an important point of law to be determined, or a legal authority seeks to enforce a public law, the only situation where a party ought not at least consider the use of mediation is where it is plain that the opposite party is determined to fight!

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