IRELAND

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1. CONCEPT, ORIGIN AND EVOLUTION

Ireland was established in 1922, prior to which it had been part of the United Kingdom of Great Britain and Ireland. While Ireland is a constitutional republic, the legal foundation of which is Bunreacht na hÉireann or the Constitution of Ireland, adopted on 1 July 1937, Ireland is a common law jurisdiction and as such, our civil justice system has grown and developed from that of England and Wales and is based on the adversarial system in which the courts adjudicate upon and determine disputes having regard to the law, derived from the Constitution, EU and national legislation, Common Law and ECJ precedent and having heard the evidence and the parties' competing propositions and preferring one of them on the balance of probabilities to arrive at a determination.

While every Irish citizen has a fundamental constitutional right of access to the courts[1], it is understood that somewhere in excess of 90% of all civil actions commenced in the courts are resolved by agreement between the parties, without any judicial determination. It may be that historically, most settlements are not reached until a late stage in court proceedings however.

There are a number of reasons for this but it is primarily due to the nature of our civil justice system and the way it has developed. Most civil and commercial disputes that arise do not involve novel issues or points of law that absolutely require judicial determination and are therefore amenable to resolution by agreement. If this was not the case, either we would have many more courts and judges or disputes would remain unresolved for much longer than it currently takes for them to progress through the courts to final conclusion.

Another important reason is because the system and the judiciary have always facilitated and encouraged parties in litigation to settle their disputes whenever possible. This historical facilitation by the courts of settlement, in Ireland as in other common law jurisdictions, is underpinned by the principle of privilege attaching to without prejudice communications between parties in litigation. In essence, the principle ensures that any communication between the parties during the currency of the litigation, whether written or oral, which is designed or intended to bring about a settlement, will be protected by privilege so that the courts will not permit a party to rely on any such communication to gain an advantage in the litigation or otherwise.

As a direct consequence of the privilege attaching to without prejudice communications between litigants and the judicial support and encouragement for settlement of civil and commercial disputes, the practice of law in contentious business in Ireland is such that lawyers may encourage their clients to explore the possibility of settlement at various stages in litigation, even after a trial has commenced.

Other factors influencing the historically high rate of settlement of civil and commercial proceedings include limited judicial resources with resultant delays in getting cases to trial and the high cost of litigation.

It is in this context that the concept, origin and evolution of mediation in Ireland must be seen.

1.1. CONCEPT AND ORIGIN OF MEDIATION

[1] Article 40.3 Constitution of Ireland.

The concept of mediation of civil and commercial disputes in Ireland is not new. Solicitors acting for separating spouses for example, before seeking judicial separation have been required by statute[2] since 1989 to discuss with their client the possibility of engaging in mediation to help effect a separation on an agreed basis and to provide contact details of persons or organisations qualified to provide mediation services. However, there is currently no legislative foundation for mediation practice or regulation in Ireland.

To the extent that mediation, like direct negotiation for example, is another process by which disputes and/or court proceedings may be settled by agreement between the parties without judicial determination, it is a process that was always likely to be embraced by all branches of government, even if it is currently unfamiliar to the majority of citizens as a process for resolving civil and commercial disputes generally. And so it has transpired that the Government, the Óireachtas and the Judiciary have shown a willingness and determination to promote and encourage the use of mediation.

On 1 March 2012, Alan Shatter TD, Minister for Justice, Equality and Defence published the General Scheme of the Mediation Bill 2012[3] in which he proposed the following statutory definition of mediation:

> *' "mediation" means a facilitative and confidential process in which a mediator assists parties to a dispute to attempt by themselves, on a voluntary basis, to reach a mutually acceptable and voluntary agreement to resolve their dispute.'*

A footnote to this proposed definition acknowledged that a number of alternative definitions for "mediation" are available including that contained in EU Directive 2008/52/EC. The concept of mediation in Ireland, while it is yet to be defined in legislation, is consistent with that concept as understood throughout the EU and beyond.

The Mediation Bill 2012, when enacted, will for the first time provide a primary legislative basis for mediation practice and regulation in Ireland. The Bill has been proposed in response to a number of initiatives including the Law Reform Commission Report on Alternative Dispute Resolution: Mediation and Conciliation[4], published in November 2010 following a public consultation process and paper, the Law Reform Commission Consultation Paper on Alternative Dispute Resolution[5], which made 108 detailed recommendation regarding alternative dispute resolution and was itself published with a draft Bill on mediation and conciliation, the Programme for Government 2011[6] of the current Fine Gael / Labour coalition Government which states that:

> *'We will encourage and facilitate use of mediation to resolve commercial, civil and family disputes in order to speed up resolution of disputes, reduce legal costs and ameliorate the stress of contested court proceedings.'*

, the Report of the Special Group (An Bord Snip Nua) on Public Service Numbers and Expenditure Programmes[7] published in July 2009 which proposed that:

> *'In order to eliminate the unnecessary legal costs burden arising from litigation arising between State bodies, the Group proposes that any State body which wishes to resolve a legal dispute with another State body should be required to inform the relevant Minister. All such cases should be resolved by mediation or arbitration as the Minister decides. The relevant Department should also notify the Department of the costs and legal issues involved.'*

, the introduction of the Commercial List of the High Court in January 2004, the procedural rules of which (Order 63A of the Rules of the Superior Courts)[8] allowed the Court to adjourn high-value commercial proceedings to allow parties to explore mediation or other forms of alternative dispute resolution and the coming into force on 16 November 2010 of Order 56A of the Rules of the Superior Courts[9] which allowed the Court in all other types of civil proceedings before it, to adjourn the proceedings and invite parties to use an ADR process to settle or where the parties consent, refer the proceedings to such process.

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[2] Judicial Separation and Family Law Reform Act, 1989, Number 6 of 1989.
[3] <http://www.justice.ie/en/JELR/Pages/PR12000041>.
[4] [LRC 98-2010].
[5] [LRC CP 50-2008].
[6] <http://www.taoiseach.gov.ie/eng/Publications/Publications_2011/Programme_for_Government_2011.pdf>.
[7] <http://per.gov.ie/wp-content/uploads/Bord_Snip_Nua_Volume_I.pdf>.
[8] <http://www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/71b5764f57d3440980256f340064227a?OpenDocument>.
[9] <http://www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/279c5df5030a5e5f802577ca003d47d1?OpenDocument>.

1.2. EVOLUTION OF MEDIATION

The use of mediation for civil and commercial dispute resolution has in any event been growing in Ireland since around 2000 on an *ad hoc* basis, reflecting the growing importance and prevalence of the process in other jurisdictions, principally the US and UK, which have always been our most important trading partners. Private sector initiatives, including by MII, the Mediators' Institute of Ireland[10] and by ICMA, the Irish Commercial Mediation Association[11] have also made significant contributions to the growth in awareness and understanding of mediation, to the education, training, and accreditation of mediators and to the adoption by commercial counterparties of dispute resolution clauses into their commercial agreements. Moreover, members of the judiciary had begun to voice their support and encouragement for mediation even before the introduction of Order 56A referred to above.

A good example of Irish judicial support for mediation is seen in the case of *Charlton v Kenny*[12] concerning a long-standing dispute between residential neighbours in Dublin over a small strip of land adjacent to their homes. The plaintiffs were a solicitor and his wife and the defendants a national radio and television presenter and his wife. During the first days of the trial of the action, the parties' lawyers outlined the evidence that was to be given, including conflicting versions of various exchanges alleged to have taken place between the parties. On the fourth day of the trial, the trial judge Ms Justice Maureen Harding Clark intervened saying:

> *'I have no doubt you are very well thought of in your respective professions throughout the length and breadth of the country. I would urge you to think long and hard before things are said that cannot be taken back. You both live in very attractive houses in a very idyllic setting and you have to go back and live there. It won't be idyllic when the case is over so please think carefully before evidence is given and I am in a position having to say I prefer one party's evidence over the other's. If this was a Commercial Court of family law case, a judge would be required to inquire whether the parties had tried mediation.'*

The parties considered what the Judge had urged and requested an adjournment for mediation. The case settled following 10 hours of mediation over a weekend.

Another recent example of judicial intervention arose in proceedings transferred into the Commercial List of the High Court on 26 March 2012[13]. It was reported that two brothers who own a clothing company were urged by Mr Justice Peter Kelly to use mediation to settle a dispute between them over the running of the company. The Court urged the brothers not to allow a court battle to distract them from their business, which had a turnover of €30 million per annum, 350 employees and 100 more jobs in the pipeline. The judge made the comments when agreeing to admit the proceedings into the Commercial Court. One brother had claimed he could no longer trust the other to honour the terms of a 1997 restructuring agreement and he sought orders under section 205 of the Companies Act 1963 bringing an end to "acts of oppression" against him by either cancelling or varying various transactions. The Court adjourned the proceedings and urged the brothers to make serious efforts in the interim to resolve the dispute.

2. GOVERNING RULES AND LEGAL SOURCES OF MEDIATION

As we have outlined above, there is no primary legislative basis for mediation in Ireland. Civil and commercial disputes may be referred to mediation by agreement between the parties in dispute arising from a formal dispute resolution provision in a commercial or other agreement, from an *ad hoc* agreement to refer a dispute to mediation after the dispute has arisen or following a suggestion or invitation by a court or third party to the parties to refer their dispute to mediation. Mediation may also arise as a result of a mediation scheme or mechanism provided for in legislation governing the regulation of a profession, such as the medical profession[14] or a private mediation scheme provided for in a particular industry sector such as engineering and construction[15]. In this respect there is no formal court-annexed mediation scheme in Ireland and all mediations are conducted out-of-court.

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[10] <http://www.themii.ie/index.jsp>.
[11] <http://www.icma.ie/>.
[12] The High Court Record No. 2006/4266P.
[13] Six Mile Investments [Unlimited] & Ors -V- Companies Acts 1963 to 2001 No. 2012/63 COS.
[14] Section 61 of the Medical Practitioners Act, 2007 dealing with referral of complaints against medical practitioners.
[15] <http://www.engineersireland.ie/EngineersIreland/media/SiteMedia/services/employment-services/Mediation-Explained.pdf>.

On 16 May 2011, the Family Mediation Service[16] was launched in Dublin on a 12-month pilot basis in the Dublin Metropolitan District Family Court to advise parties in general terms as to the purpose of mediation and its advantages in the family law setting. It concentrates on cases involving the welfare of children.

It is anticipates however that as mediation develops further in Ireland, court-annexed mediation schemes may be introduced over time.

2.1. GOVERNING RULES

We may say therefore that mediation in Ireland is governed by the law of contract and by the fundamental principles of voluntariness, confidentiality, privilege attaching to without prejudice communications occurring during or in contemplation of litigation, self-determination, neutrality, impartiality and enforceability. The practice of mediation is also governed by the self-regulation of the mediation profession and practicing mediators and by their adoption of and compliance with codes of conduct or ethics for mediators.

2.1.1. Law of Contract

The starting point for all mediations in Ireland is the agreement between the parties and the mediator to refer a dispute to mediation and the manner in which the mediation process is to be conducted. The agreement to mediate may arise from a pre-existing dispute resolution clause in a commercial or other agreement or from an *ad hoc* agreement to mediate after a dispute has arisen. It is clear that the High Court is prepared to enforce a dispute resolution clause in a commercial agreement[17].

2.1.2. Voluntariness

The Law Reform Commission has made clear from the outset in its Report that mediation is a voluntary process and that parties in disputes may not be required to mediate, not least because of the fundamental constitutional right of access to the courts. Indeed the Commission has recommended that legislation be enacted to ensure that the parties and the mediator may withdraw from mediation at any time without giving reasons. These recommendations are proposed to be carried through by the Minister in the General Scheme of the Mediation Bill 2012, save that the Minister has proposed that for 'policy' reasons, the mediator should be required to give reasons to the parties before being permitted to withdraw.

Further limitations on the voluntariness principle are the proposed power of the courts to be enshrined in primary legislation to invite the parties in litigation to attend a mediation information session and to draw adverse inferences when awarding costs at the conclusion of subsequent litigation against a party who failed to attend such information session when so directed or who unreasonably refused an offer of mediation, provided the court is of the opinion that mediation had a reasonable prospect of successfully resolving the dispute.

2.1.3. Confidentiality

It is proposed in the General Scheme of the Mediation Bill 2012 that the confidentiality of mediation communications will be enshrined in primary legislation. The measure proposes to implement the Law Reform Commission's recommendations that a form of confidentiality should apply to communications made during mediation and is consistent with the common law privilege attaching to communications designed or intended to bring about settlement of court proceedings referred to above. It is also consistent with the practice of mediation to date in Ireland where mediation communications have been treated as confidential and where mediation agreements entered into between parties and the mediator prior to the commencement of mediation have provided for the confidentiality of mediation communications.

The draft legislation proposes to exclude communications from the protection of confidentiality in the following circumstances:

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[16] <http://www.courts.ie/courts.ie/library3.nsf/16c93c36d3635d5180256e3f003a4580/3a8061a30c8f0f46802578ee003e24f9?OpenDocument>.

[17] Health Services Executive –v- Keogh [2009] IEHC 419.

- Where disclosure is necessary to enforce a mediation agreement;
- Where disclosure is necessary to prevent injury;
- Where disclosure is required by law;
- Where mediation communication is used to attempt to commit a crime, to commit a crime, to conceal a crime or to threaten a party to mediation.
- Where disclosure is required to prove or defend a claim of negligence or misconduct of the mediator or in a disciplinary procedure.

It is also proposed to exclude evidence introduced in a mediation which is otherwise subject to discovery in civil proceedings.

The draft legislation stops short of proposing that a statutory privilege be attached to mediation communications.

2.1.4. Self-determination and enforceability

The draft legislation on mediation further proposes that parties to mediation shall themselves determine if and when an agreement has been reached between them to settle their dispute and if so, to determine whether that agreement is to be enforceable between them. Subject to the above, it is proposed that an agreement in writing signed by the parties and the mediator shall have effect as a contract between the parties, except where it is expressly stated to have no legal force until incorporated into a formal legal contract to be prepared subsequently and signed by the parties.

This proposal is intended to give effect to the Law Reform Commission's recommendation that only the parties should have the power to determine whether an agreement has been reached and the manner in which it becomes enforceable and is consistent with the principle of self-determination which underpins issues of capacity to contract, authority to bind, informed consent, the necessity or desire for legal advice during mediation and ultimately, the parties' retention of control of the outcome of mediation, which in litigation and arbitration is delegated to a court or arbitrator.

The proposed power to determine whether and how a settlement agreement is to be enforceable will ensure firstly that a settlement agreement cannot be enforced against a party unless he has intended and consented to be so bound. More important however is that it will ensure that the role of the courts, invested will full original jurisdiction to determine disputes under the Constitution will not be displaced. It will also cater for circumstances in which a court order may be required such as in cases of personal injury of minors.

The proposed legislation therefore will not provide for mediated agreements to be enforceable per se. An order of the court will be required to enforce a mediated agreement which has not been complied with.

2.1.5. Neutrality and impartiality

The General Scheme of the Mediation Bill 2012 further proposes at Head 7 that a mediator shall, before commencing a mediation, make such enquiry as is reasonable in the circumstances to determine whether there is any actual or potential conflict of interest which will arise in or during the mediation process. If a conflict arises during the process the mediator will be required to inform the parties and to disqualify himself unless the parties request him to continue the mediation. It proposes that the mediator shall act with impartiality towards the parties and serve all the parties equally.

2.2. IMPLEMENTATION OF THE EU MEDIATION DIRECTIVE 2008/52/EC

The Directive was transposed into Irish national law by European Communities (Mediation) Regulations 2011[18] and came into effect on 18 May 2011. The Regulations apply to cross-border civil and commercial disputes only and have not been extended to Irish domestic disputes.

[18] S.I. 209/2011.

The Regulations provide that a court may adjourn court proceedings to facilitate access to mediation and may invite the parties to use mediation to settle or determine the dispute or, where the parties consent, it may refer the proceedings to mediation.

A mediator in a cross-border dispute cannot be compelled to give evidence in any subsequent court or arbitration proceedings in relation to any matter arising out of the mediation, except where it is contrary to public policy or it is necessary in order to implement or enforce an agreement reached through mediation. However, the parties to the mediation may consent in writing to the mediator giving evidence in court or arbitration proceedings relating to a matter arising out of the mediation.

Following mediation, the parties may enter into an agreement and with the consent of the other parties, may apply to the court concerned for an Order making the agreement enforceable against the parties.

The Regulations ensure that any prescribed limitation period will not expire during the mediation so as to prevent the parties seeking a remedy through the courts or arbitration. The Regulations provide that in calculating the period of time for the purposes of any limitation period specified by the Statute of Limitations 1957 or the Statute of Limitations (Amendment) Act 1991, the period starting on the day on which the dispute was referred to mediation and ending on the day which is 30 days after the mediation process was concluded, shall be disregarded. A mediator is required to inform the parties in writing of the date on which mediation concludes.

3. THE MEDIATION PROCESS

The General Scheme of the Mediation Bill, 2012 makes proposals for the mediation conditions under Head 6, including in relation to the agreement to mediate, mediation procedure and costs.

3.1. AGREEMENT TO MEDIATE

The proposed legislation provides that parties may engage in mediation on their own initiative prior to or at any time following the commencement of legal proceedings. It requires the parties and the mediator to agree the terms under which the mediation will take place, including information concerning the qualifications of the mediator, the code of practice, if any, to which the mediator adheres, the confidentiality of mediation and the fees and costs of the mediation.

3.2. MEDIATION PROCEDURE

The draft legislation proposes a legal professional duty on solicitors and barristers to provide certain minimum information on mediation before issuing court proceedings on behalf of a client and to sign a statement with their client confirming that such information has been provided, to be filed with the court when first making application in relation to the proceedings.

The proposed legislation provides that a party may withdraw from the mediation at any time without giving reasons, consistent with the principle of voluntariness described above. As we have seen, it is proposed that the mediator may also withdraw at any time, provided that for 'policy' reasons, which are not specified in the draft legislation, he first gives reasons. The proposal that the mediator be required to give reasons is contrary to the recommendation of the Law Reform Commission and to the code of ethics of the Mediators' Institute of Ireland. It is anticipated that this proposed provision will be challenged before the legislation is enacted.

The General Scheme of the Bill proposes that once a dispute has been referred to mediation, the parties and the mediator shall, having regard to the nature of the dispute, seek to complete the mediation process as quickly as possible.

The draft legislation also proposes that one or more non-party participants may be present and may assist a party during the mediation process.

3.3. COSTS

Head 16 of the draft legislation deals with fees and costs and provides that, unless otherwise agreed or ordered by a court, the parties shall pay the mediator and shall share the fees and costs of the mediation equally.

The proposals require that the fees and costs of the mediation be identified in advance and paid over to the mediator or held by a third party until conclusion and thereafter paid to the mediator. The fees and costs of the mediation are to be reasonable and proportionate to the importance and complexity of the issues and the work done by the mediator. The mediator's fee may not be contingent on the outcome of the mediation. There is no provision for legal aid in the proposed legislation.

4. CONCLUSION

The continuing challenge for mediation in Ireland is education of potential users of the process, especially the business community and their professional advisers. The process is fortunate to have attracted and earned the support of government and especially of the judiciary and the executive arms. The enactment of the proposed primary legislation, probably in 2012, will support the future development of mediation in Ireland and will help to ensure that standards are maintained and improved in the practice of mediation.