IMPLICATIONS OF THE GENERAL SCHEME OF THE MEDIATION BILL 2012 FOR THE LEGAL PROFESSIONS IN IRELAND

William Aylmer,

CEDR Ireland Mediator Practice Group

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1 Developments to date

The use of mediation to resolve civil and commercial disputes has enjoyed a period of significant development in Ireland since late 2000. These developments may be seen under five broad headings.

1.1 Mediation training

Solicitors, barristers and other professionals interested in litigation practice initiated renewed collaboration from late 2000 intended to promote the use of mediation and to increase awareness of the process among the legal and other professions and generally among business users of the civil justice system and dispute resolution services. Some of the earliest collaborations led to the training and accreditation of lawyers and others as mediators and as advocates or representatives of parties in mediation, by established training and accreditation bodies such as CEDR, MII, ADR Group, some Third Level institutions and others.

As a solicitor in practice since 1994, I took some mediation advocacy training with CEDR in October 2000 as my introduction to mediation. I subsequently started my mediator skills training with Geoffrey Corry under an MII accredited programme. I completed the CEDR Mediator Skills Training and was accredited by CEDR in July 2003.

As a solicitor in contentious litigation practice primarily, my experience of the CEDR mediator skills training programme brought into clear focus for me the different approach to dispute resolution that mediation represents, so different in fact to litigation that I failed my accreditation assessment at first pass and had to re-sit the assessment.

1.2 Judicial case management

Perhaps the most important and significant contribution to the development of mediation practice in civil and commercial disputes has been made by members of the judiciary. Mr Justice Peter Kelly deserves special recognition for his incorporation of a power to adjourn proceedings to allow mediation to be explored, into the rules of court for the Commercial List of the High Court,

introduced in January 2004 and for his active support for the mediation alternative and encouragement of parties before him to consider it.

There have been many other instances of judicial support for the mediation alternative since then, whether by speaking on the subject at seminars and conferences, encouraging parties in court to explore the use of mediation or actively managing court lists in a way designed to facilitate mediation.

1.3 Law Reform Commission

The work of the Law Reform Commission on alternative dispute resolution; mediation and conciliation has been most important. The Commission published its Consultation Paper on ADR in 2008 and its Report and draft Bill in November 2010, the publication of which has led directly to the recent publication of the proposed legislation.

1.4 Statutory developments

Referral to mediation of certain disputes is provided for in a number of Acts since 2000, including for example for the resolution of complaints against medical practitioners by s. 62 of the Medical Practitioners Act, 2007.

1.5 Growth in awareness & demand

Much of the growth in civil and commercial mediation may be attributable to the growing awareness of the process among the population generally and among business users in particular. Events such as the recommendation by Ms Justice Maureen Harding Clark during the trial of the high profile dispute between neighbours, Kenny v Charlton, subsequently settled following mediation, have enormous impact in generating awareness of the process and its potential for resolving disputes in private and for a fraction of the cost of litigation.

Development has also been driven by an increasing demand for mediation by clients of lawyers who may have business interests in other jurisdictions like the USA and UK where mediation is more widely used.

2 Stated aims

Stated aims of the proposed legislation are:

- to integrate mediation into the civil justice system as a mainstream alternative to litigation.
- to encourage citizens to regard mediation as preferable to litigation and to use the process in civil disputes generally;
- to ensure that mediation remains a voluntary process;
- to reinforce the confidentiality of mediation;
- to introduce a statutory duty on lawyers to inform clients of the mediation option in all cases before issuing proceedings;
- to introduce a statutory basis for all courts to invite parties to consider mediation.

Each of these aims has implications for the legal professions, in our conduct of both contentious and non-contentious business.

Some may be more important than others but it may be useful to consider their implications from the perspectives of:

- mediation as a voluntary process
- lawyers' understanding of mediation
- new statutory duties on lawyers and
- opportunities for lawyers.

It is clear from the General Scheme that voluntariness as a fundamental principle of mediation will be recognised and reinforced by the legislation. This is consistent with the recommendations of the Law Reform Commission.

One reason why lawyers are uncomfortable with or even sceptical of mediation is precisely because it is a voluntary process. The ideas that mediation is not binding and that parties may withdraw at any time are new in our civil justice system. Lawyers are trained to advise and represent their clients in litigation or arbitration, in which parties are obliged to participate and which impose strict rules on them.

The use of mediation will grow because clients will increasingly demand the service. As individuals and business become more familiar with mediation as a viable and even preferable alternative to litigation and arbitration, they will increasingly opt to refer their disputes to mediation.

The challenge for the legal professions will be to service that increasing demand. To meet the challenge, lawyers will need to become more sensitive to clients' needs and wishes. They will need to regard resolution of disputes as the primary objective.

3 Education and understanding

Another challenge for lawyers in servicing clients' increasing demand for mediation will be to have a fuller understanding of the process and how it works. Mediation, like litigation and arbitration is contentious. It may even be adversarial at times but as essential difference is that mediation seeks to explore and reconcile the parties' competing interests, including commercial and personal interests while litigation and arbitration are concerned with parties' competing rights and obligations.

The approach to mediation is therefore different to that in the traditional adversarial models. Lawyers are familiar with the positional bargaining that is played out in traditional settlement negotiations that resolve the vast majority or civil proceedings that are issued. But positional bargaining is only one of the many alternative ways of achieving settlement and resolution through mediation. The early exploration of parties' interests that mediation facilitates is what makes mediation so effective and successful in achieving settlement of the most intractable disputes. It is also what provides the possibility of repairing and often restoring damaged personal and commercial relationships that is seldom enjoyed after litigation or traditional settlement negotiations.

There is also a challenge in the proposed legislation for the education of lawyers. If lawyers are to be fully equipped to satisfy clients' demand for alternatives to litigation, the curriculums of all programmes leading to vocational qualification, from third level through post-qualification continuing professional development will have to provide what is required.

4 Statutory duties

The proposed new duties on solicitors and barristers to inform and advise their clients about mediation before proceedings are issued on their behalf and for clients and their lawyers to co-sign statements that these duties have been discharged are bound to have an impact on the legal professions and on the practice of law in contentious business if they are enacted as proposed.

5 Opportunities

The proposed legislation will inevitably generate new practice opportunities for lawyers. There will be an obvious need for legal advice on the merits of complaints or claims and their defence or

opposition at a much earlier stage than we may be accustomed to in contentious litigation where substantive advice on the merits is often delivered to clients late in the litigation process. Clients opting to refer their disputes to mediation will demand high quality legal advice on the merits of their respective positions well in advance of any mediation meetings, to allow them make informed decisions on their negotiation strategies. There will be opportunities for lawyers to assist their clients in developing their negotiation strategies for mediation. There will be the obvious opportunity for lawyers to represent their clients in mediation where parties prefer not to conduct negotiations directly. Lawyers will have a role in testing their clients' expectations of the mediation process and checking the reality of anticipated outcomes and whether they are real or aspirational. Lawyers will of course have a valuable role in assisting their clients in mediation to ensure that agreements are drafted so as to reflect what has been agreed at mediation.

Conclusion

The Joint Oireachtas Committee on Justice is expected to publish its response to the Minister and report on its public consultation on the proposed legislation on 21 June 2012. We will await their deliberations and conclusions with interest and indeed the final publication of the Bill in due course.