Kluwer Mediation Blog

Et Voila! Ireland's Mediation Act 2017

Sabine Walsh (Sabine Walsh Mediation) · Monday, November 6th, 2017

Finally, after many twists and turns, lobbying, and a not insignificant amount of blogging on my part, Ireland's new Mediation Act, 2017 was signed into law by the President on 2nd October 2017. For those unfamiliar with my rantings and ravings (other than the learned discussions of my colleagues) over the years, a little background: This legislation, the aim of which is to (among other things) "facilitate the settlement of civil disputes by mediation, to specify the principles applicable to mediation, to specify arrangements for mediation as an
alternative to the institution of civil proceedings or to the continuation of civil
proceedings that have been instituted" (long title) has been in development for many years. It was developed after a Law Reform Commission Report in 2010 recommended that the State enact legislation on mediation.

A draft scheme of the Act was published in 2012, and a consultation process followed, resulting in a report from the Joint Committee on Justice and Equality. Unfortunately, and despite extensive lobbying by the mediation and dispute resolution community, little progress was made until the draft of the final Act was published in February 2017. A variety of amendments followed in both houses of parliament, the Oireachtas and the Seanad. The mediation community collectively breathed a sigh of relief when the Act was finally signed into law on 2nd October 2017. It is due to be commenced shortly. A full exposition of the provisions of the Act (and their potential implications) would use up the collective word count of all contributors to this blog, so I will focus on a few key features – for now…

The Act approaches the regulation of mediation from a number of different angles – it provides a regulatory framework for the practice of mediation, addressing key aspects of the process such as confidentiality, voluntariness, limitation periods and the enforceability of mediated agreements. It puts new obligations on solicitors and barristers to advise clients to consider using mediation, where appropriate, and gives judges the power to invite parties to use mediation when cases come before them. It also takes a similar approach to UK caselaw and imposes cost penalties for unreasonable refusal to consider engaging in mediation.

As regards the mediator's profession, the Act contains a number of provisions – which will require separate commencement by Ministerial Order – that will have an impact on the profession. The first of these are provisions permitting the Minister to "prepare and publish" or "approve" a code or codes of practice "to set standards for the conduct of mediation" (s. 9). This code, or these codes, may address a number of aspects of mediation practice including ethical conduct, mediation procedures and fees. There is no provision for them to set training standards, but it (or they) may

include requirements for continuing professional development for mediators.

Section 12 permits the Minister to recognise a body as the Mediation Council of Ireland, a new professional body the aim of which is to serve a number of functions, including to raise awareness of mediation, to develop and maintain standards in relation to mediation, to prepare codes of practice, to maintain a register of mediators and to assist the government in preparing a scheme of mediation information sessions for family disputes. This latter provision will also require the Minister to take further action in establishing a scheme of such information sessions for family disputes, including separating couples and succession and inheritance disputes.

The Act contains some provisions that could be controversial, or prove challenging in implementation. The full extent of these will only become clear as the Act is applied, and, possible, litigated. One question mark that is immediately raised is around its scope. The scope of the Act is largely defined by its exceptions. Exceptions, in this case, means the types of disputes to which is does not apply which includes, among others, revenue disputes and disputes which fall within the ambit of existing dispute resolution mechanisms such as the Workplace Relations Commission. The previous framing of the scope of the Act was by reference to "civil proceedings" but this was amended at Committee Stage of parliament as the aim of the Act is to divert disputes out of civil proceedings rather than only apply when proceedings have issued. The definition of "dispute" does not assist either as it is defined only as "includes a complaint." It might be anticipated therefore that some discussion, or indeed litigation may result in relation to what types of dispute the Act applies to.

Mediators are concerned about the reporting provisions in section 17 of the Act. This provision applies when a judge has invited the parties to consider using mediation. After such an invitation, the mediator must make a report back to the court stating whether the mediation has taken place, if not why not, and where it has, whether it resulted in a settlement or not and the content of that settlement. When read in conjunction with the provision on possible cost penalties for refusal to mediate, the implications of a mediator's report are brought into sharp focus. This version of section 17 is however vastly preferably to the previous one, which I addressed in a blog earlier this year. The controversial obligation for the mediator to report on whether the parties "engaged fully" in the mediation was fortunately removed after successful lobbying.

Section 8(4), coming at the end of a section on the role of the mediator, envisages a role for the mediator that can be interpreted as a move away from the purely facilitative model. At the request of the parties, the mediator may "make proposals to resolve the dispute", although it remains up to the parties to decide whether to accept the proposal. This has the potential to raise questions on the level of subject matter expertise mediators may have to have, and what may happen if a mediator proposal is accepted and then proves unworkable or otherwise problematic.

The burning question remains, and is likely to remain for some time, as to what impact the Act will have on the uptake and practice of mediation. I've never been any good at predicting the future, but since that hasn't stopped me in the past why should it now?

I would like to think that actually, the time lag in implementing the Mediation Act has been of benefit. It means that the legal profession and the judiciary, in whose collective hands it will be to use the Act for its purpose – to divert cases out of court into mediation – are better informed about and much more open to the mediation process than they ever were before. My experience of the legal profession recently is one of a pragmatic approach to mediation, recognising it has its place

and that the lawyer has a place within it, in many instances.

I also think that the process regulations will provide a welcome framework for mediators and their clients, giving legal weight and legitimacy to rules such as confidentiality and voluntariness, and drawing a line in the sand in that regard.

Overall, the Act is likely, in my view, to legitimise and endorse mediation as a mainstream dispute resolution option. It takes mediation out of the "alternative" space, and making it a viable option for many who may have dismissed it as being "out there" or not having enough teeth in the past.

The greatest potential for friction I would be is around those aspects of the Act which deal with professional regulation, which are not yet in place. Professional regulation is a vexed issue at the best of times, and the debates around self- versus independent regulation, training standards and codes of conduct are not unique to mediators. It will be essential that we mediators get our act together – and act together – now to live up to the challenge of regulation so that user of mediation, and the professionals being asked to refer cases to mediation, can have trust in the professionalism and standard of mediation being practiced.

This would all of course be easier if the government had put even a few euro towards the Act, and the creation of the Mediation Council in particular, but it hasn't. Thus, it is left to the mediation profession not just to set up and manage, but also to fund any professional regulation. Time will tell how and whether this can work but in the mean time we shall get on with the day to day business of mediation, knowing that a regulatory framework now exists, and the government has put its desire to promote collaborative dispute resolution into action. That has to be a good thing.

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