Kluwer Mediation Blog

Integrating Mediation – We've a long way to go…

Sabine Walsh (Sabine Walsh Mediation) · Thursday, July 5th, 2012

Looking back over my previous blog posts it strikes me that I've been throwing the term integration around a fair bit in the context of dispute resolution and mediation, in particular. The term "alternative dispute resolution" has always sat somewhat uneasily with me. While it is of course a correct description, as the procedures it offers are alternative to traditional litigation, I have always had the suspicion that, in a similar way to alternative medicine, it relegates mediation and similar processes to the sidelines, as something to try only if you are adverse to mainstream procedures or if everything else as failed. In order for mediation to be accepted as a realistic option for dispute resolution and, ideally, as the first port of call, it will have to become better integrated not only into the legal systems within which it exists, but into the psyche of legislators, judges and in particular consumers.

Unfortunately in Ireland, despite some significant steps forward which have been taken in recent times, there is still little evidence of mediation being truly integrated into the legal system, or indeed the consciousness of those at the front line of dispute management. A close friend, a former solicitor and mediator, who was recently appointed a Circuit Court Judge, remarked to me that he felt that at least 60% of the cases coming before him would be suitable for mediation, yet neither the lawyers nor the parties involved had even considered the option when he asked them. With clogged up court lists and endless waiting times, particularly outside the capital, this seems like a wasted opportunity.

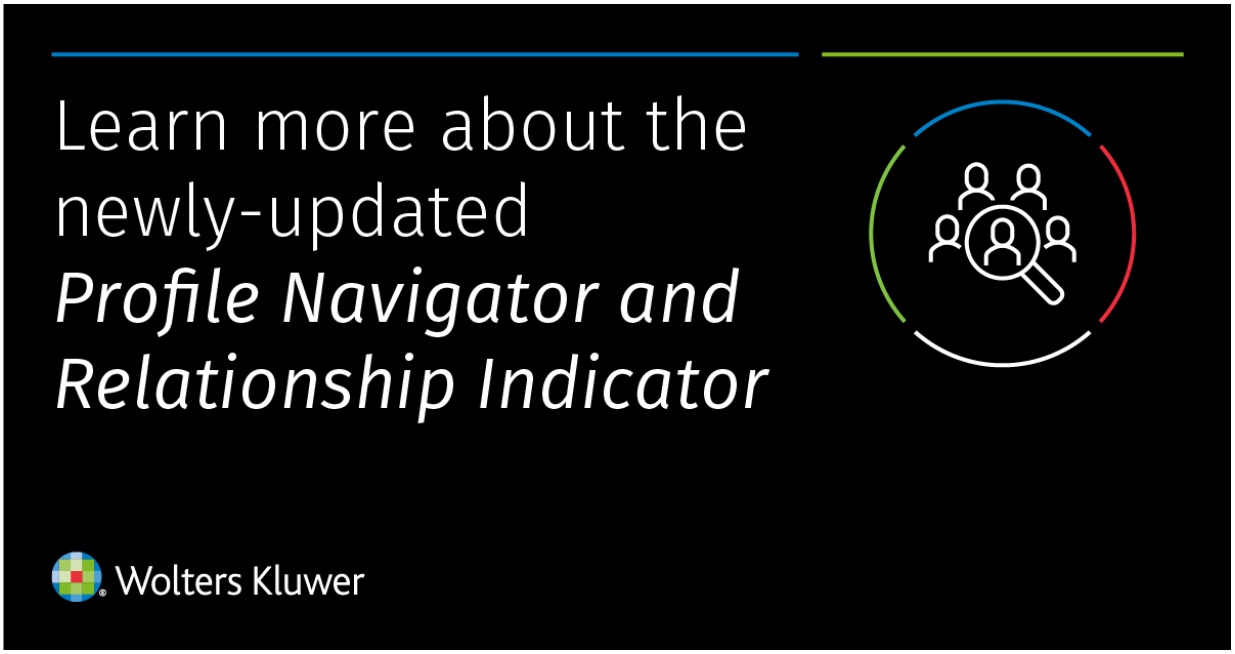
In a case which opened at the Commercial Court the day before yesterday between property magnates Treasury Holdings and NAMA, the National Asset Management Agency, Treasury Holdings had sought to engage a mediator to engage in negotiations with the state agency and potential overseas investors "in order to secure the best deal for NAMA and the tax payer". (The Irish Times, 15 June 2012). In what is likely to be a lengthy and enormously expensive case, the company made a statement stressing that it felt that mediation would lead to "a vastly superior outcome for all than the alternative route of litigation". NAMA did not however engage with this proposal and the case now goes ahead, which could result in yet another substantial legal bill for the State. Whatever one might surmise about the motivations behind the proposal, it is a shame the opportunity to at least consider mediation in so high profile a case was missed.

A further example of the fact that mediation is still out on the fringes, from the point of view of the State, is the proposed major reform of the ridiculously complex, disjointed and cumbersome employment rights dispute resolution system in this country. (For more information on this project see www.workplacerelations.ie – publications – workplace reform). At present there are more than

30 pieces of legislation relating to employment law in existence, at least 6 websites, more than 35 different complaint forms and a waiting time for redress of anything up to 80 weeks. In an effort to address this quagmire, it is aimed to condense the current bodies into an integrated (there's that word again!) two tier structure and to put the emphasis on early resolution of disputes. So far so good. This early resolution service is a voluntary service and began operating in May 2012 on a pilot basis initially. A trained "case resolution officer" will assist the parties in resolving the dispute. There is not much information available on how exactly it will operate other than the fact that telephone and e mail communication will be used and meetings with all the parties will take place only in exceptional circumstances. While in all likelihood these early resolution services may end up being a form of mediation, or at least its staff might use some mediation skills, why not use this opportunity and put in place a proper first instance mediation service? It would appear curious that in workplace dispute resolution, of all areas, mediation does not form part of the reform package, in the context where the benefits of workplace mediation are widely publicised and proven, and in circumstances where the same legislature has an extensive Mediation Bill sitting in front of it waiting to be passed.

The fact that the government can be working on Mediation legislation at the same time as missing opportunities to actually engage in, or promote mediation in specific contexts shows why that awful phrase "a lack of joined-up thinking" is used so much in this jurisdiction. It also shows how mediation is still not seen as a robust, legitimate form of dispute resolution that should be given due consideration in suitable contexts.

While the draft Mediation Bill is a giant step in the right direction, we still have a long way to go before mediation can really live up to its full potential of resolving disputes in a cost effective, efficient and positive way. How to achieve this? Education, education, education. If we keep telling the legislators, the judges, the law reformers, and the general public about mediation and how it can be used, the message will eventually get through. We need solid research and statistics (thank you Bill, June 27th!) and, particularly important for a small country like Ireland, role models and examples from other jurisdictions. And on an individual level, anyone working in mediation has to keep talking about it and has to learn to tolerate the eye-rolling and yawns that often ensue from people close to us. Eventually, the message will get through.



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