

# Kluwer Mediation Blog

## Mediation Act 2017

Rafal Morek (DWF LLP) · Sunday, February 19th, 2017

Last week the long-awaited [Irish Mediation Bill](#) was finally published. Its purpose is to introduce a coherent comprehensive regulatory framework for mediation in Ireland. For a number of reasons it is interesting also for international readers.

The hitherto mediation regulations in Ireland were criticized not only by experts but also by the local judiciary. In the *Ryan v Walls Construction Ltd* [2015] IECA 214 the Court of Appeal bashed on the former reforms which failed to properly introduce ADR to the justice system in Ireland, as “piecemeal and patchy with little to demonstrate any coherent policy or plan supporting them”.

As Nadja Alexander and Sabine Walsh acutely observed on this blog in August 2016 in their [Regulatory Robustness Rating in Practice](#): “Ireland is an excellent example of a jurisdiction where regulation of mediation is having to catch up with practice. A variety of factors including the impact of the economic crisis and a gradual but fundamental change in dispute resolution culture have contributed to the increased use of mediation in a range of different forms of disputes. The courts, in particular, have played a significant role in this development, enthusiastically using what few regulatory powers they have to divert cases into mediation and generally creating an environment conducive to mediation. These developments have all taken place in the absence of a coherent comprehensive regulatory framework for mediation, or perhaps in the shadow of the promised reforms which have been pending for a number of years now.”

The readers of this blog may also know well from [posts of Sabine Walsh](#) (who has the best insight in all matters related to the mediation in Ireland) that the path to the Mediation Bill 2017 was rugged. From the “high hopes” for a comprehensive piece of legislation on mediation, to disappointment and frustration when the legislative process was slowed down and troubled on more than few occasions. Being a common law country, in the absence of legislation, the regulatory role was played by the judges (see Sabine’s post on [who is regulating mediation in Ireland](#)), who handed down some interesting judgments on mediation such as *Atlantic Shellfish Limited v Cork County Council* [2015] IECA 283 or *Fitzpatrick v Board of Management of St Mary’s Touraneena National School* [2013] IESC 62.

While the new legislation and its future impact on mediation practice is certainly to be discussed on this blog by members of the local mediation community, I would like to make just a few comments from the position of an outsider. They will focus on two issues only. Both seem to represent the current trends in international regulations of mediation. They related to a lawyer’s duty to advise on mediation and Parties’ obligation to consider mediation along with respective

cost issues.

### **Counsel's duty to advise on mediation**

The Mediation Bill includes a whole section (Part 3) on “Obligations of practicing solicitors and barristers as regards mediation”. First and foremost, a lawyer’s duty to advise on mediation is re-framed as a statutory obligation, not just an ethical one resulting from the rules of professional conduct (which has been a prevailing policy for a long time, see e.g. Marshall J. Breger’s article in [Georgetown Journal of Legal Ethics](#)). For the first time in Ireland, solicitors and barristers will have a statutory duty to advise clients to consider using mediation as a means of resolving their dispute. The duty is extended also to in-house solicitors providing legal services. The obligation includes advising:

- the client generally to consider mediation as a means of resolving the dispute;
- on mediation services, including details of qualified mediators;
- on the advantages and benefits of mediation;
- on the confidentiality of the process; and
- the enforceability of mediation settlements.

If a client decides not to mediate, the solicitor must make statutory declaration evidencing (if such be the case) that the solicitor has performed the obligations imposed on him or her, i.e. advised their client to consider mediation. There is a sanction related to this obligation: if such declaration is not made, the Court will adjourn any proceedings issued until such times as it is provided (section 14(2) and (3)).

Similar (yet certainly not identical) regulations are known, inter alia, in German and Polish laws, where respectively Section 253 (3) ZPO and Article 187 § 1 point 3 KPC require that the statement of claims (German: *Klageschrift*, Polish: *Pozew*) has to inform the judge on the parties’ efforts to resolve the dispute in mediation before bringing the action in court and whether there are any reasons excluding mediation. In Italy, Decree no. 28/2010 introduced a similar duty reinforced by the possibility for the client to void the client-lawyer contract in case of non-compliance.

This trend may be further developed in future regulations of mediation.

### **Parties’ obligation to consider mediation**

Further to the statutory duty of solicitors and barristers to advise on mediation, the Mediation Bill obliges also parties to a dispute to seriously consider mediation as a route to resolution. It also imposes related costs sanctions. According to its section 21, a court may, where it considers it just, have regard to

- (a) any unreasonable refusal or failure by a party to the proceedings to consider using mediation, and
- (b) any unreasonable refusal or failure by a party to the proceedings to attend mediation, following an invitation to do so by a court, under section 16(1).

The court’s powers to apply cost sanctions in individual cases appears to correspond with the potential cost savings for the entire justice system which are associated with enactment of the Mediation Bill (see the [the Mediators’ Institute of Ireland’s estimates](#)).

Except for the above, mediation remains fully voluntary at all times (section 6(2)). Parties may withdraw from mediation at any time (section 6(4)). Any agreement is voluntary and both its terms and the extent to which it may be binding is up to the parties (section 11).

In one of the first released [comments after the enactment of the Mediation Bill](#), the Mediators' Institute of Ireland hailed its publication "but identified challenges in implementation". Indeed, some key elements of the mediation regulatory system such as:

- continuing professional development training requirements for mediators;
- procedures to be followed by mediators in the conduct of a mediation;
- confidentiality of a mediation;
- fees and costs of a mediation;

are to not included in the Bill, which merely empowers the Minister to regulate them in the Code of practice (section 9).

It will be interesting to see how this detailed regulation is tailored to supplement to Mediation Act 2017, and further how they together influence on future mediation practice in Ireland.

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