Kluwer Mediation Blog

Something Wicked This Way Comes – Mediators' Duties in Ireland's New Mediation Bill

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* *The views expressed here are entirely my own!*

Nine years after its conception by the Law Reform Commission, a draft Mediation Law, the Mediation Bill 2017, was officially presented to the Irish parliament by the Minister for Justice this week and the debate on its provisions was thereby initiated. Rafal Morek has outlined what is contained in the Bill and the general approach it takes to regulating mediation, so I want to focus on one of the provisions that, potentially, will have the most significant impact on Irish mediators.

The Bill does a good job of outlining various obligations for mediators, in relation to fees, conflict of interest, confidentiality, and what information they must give to parties to mediation before it commences. These are welcome, as they set out basic standards of practice and ethics and will assist parties in knowing what to expect from a professional mediator. Most are what one would expect from a competent mediator in any event. No so with the obligations that mediators can be subject to in cases of court referral to mediation.

Under section 16 of the Bill, a court can "*invite the parties to the proceedings to consider mediation as a means of attempting to resolve the dispute*", either of its own initiative or on application by one of the parties. The court can also give parties information on the benefits of mediation and make various orders facilitating the process. Section 17 sets out a number of reporting obligations on a mediator in a case following such a court invitation. Under this section the mediator shall submit a report to the court stating:
– Where the mediation didn't take place why it didn't;
– Where it did take place whether or not an agreement was reached and if so, what the terms of such agreement or partial agreement were and what matters remain outstanding and, most significantly,
– "*if no mediation settlement has been reached, a statement as to whether, in the mediator's opinion, the parties engaged fully in the mediation.*"

Many of the practicing mediators among you may already be shaking your heads in disbelief but it is worth exploring in a little more detail what, exactly, the problem with this provision is.

First, and most obvious, is the issue of confidentiality which is also enshrined in the Bill, at section 10, and also applies vis a vis the court. Just how confidential will a process be if a mediator has to report whether a party engaged fully or not? Then comes the question of what "engaged fully"

actually means. The Bill does not give any guidance in this regard. Does turning up but not saying anything constitute engagement? What if a party withdraws (which they can do under section 6(4))? Are they fully engaged if they are telling their stories but do not make proposals for settlement?

Next, what if a party disagrees with the mediator's opinion. Will the mediator be called to justify his or her opinion in court? If so who will carry the costs of this? What will happen to confidentiality if the mediation has to be opened to the court to defend a mediator's report? How will a mediator prove his or her opinion was correct and how would a party prove it wasn't?

Then there is the issue of voluntariness. Is a party really engaging voluntarily if they attend mediation pursuant to a court invitation knowing that the mediator will be obliged to report to the court on their engagement? A distinction is often made between coercion inTO mediation and coercion in mediation, but this approach would appear, to me, to be a little bit of both. It is worth pointing out also that mediation is defined in the bill as a "facilitative, voluntary process" and section 6(2) provides that "participation in mediation shall be voluntary at all times". On careful analysis, it could be argued that this section and that on reporting are not entirely compatible.

The real sting however, comes in the tail, in trying to establish what the consequences of not engaging fully in the process might be. Section 21 sets out some factors to be considered by the courts in awarding costs in respect of proceedings in which an invitation to mediation was made by the court. It sets out that 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."

No guidance is give as to how to assess whether such refusal or failure is unreasonable, so one might wonder whether the courts would default to the guidelines set out in the UK's Halsley v Milton Keynes and similar jurisprudence.

This section does not make reference to the requirement to "engage fully" in section 17, but it would not be too great a leap to wonder whether a failure to engage fully might bring such a cost award against a party. In any event, the judge will have complete discretion when awarding costs in such a case and could make a costs award based on a mediator's report even without recourse to a specific provision of the Bill.

This potential holds the most danger, both for the party and for the mediator. At the risk of being accused of alarmism, a party might feel they must attend mediation or perhaps even agree to a settlement against their better judgment for fear of being fixed with the costs of any ensuing litigation, therefore compromising the cornerstone of the voluntariness of mediation fundamentally. A mediator may have to make a report being aware of this, breaching their code of practice, as would be the case for many mediators, and then may find themselves having to defend a claim for professional negligence arising out of a report a client may disagree with and have suffered the negative financial consequences of. In as litigious a country as Ireland, our professional indemnity insurers would, no doubt, take a dim view of this also.

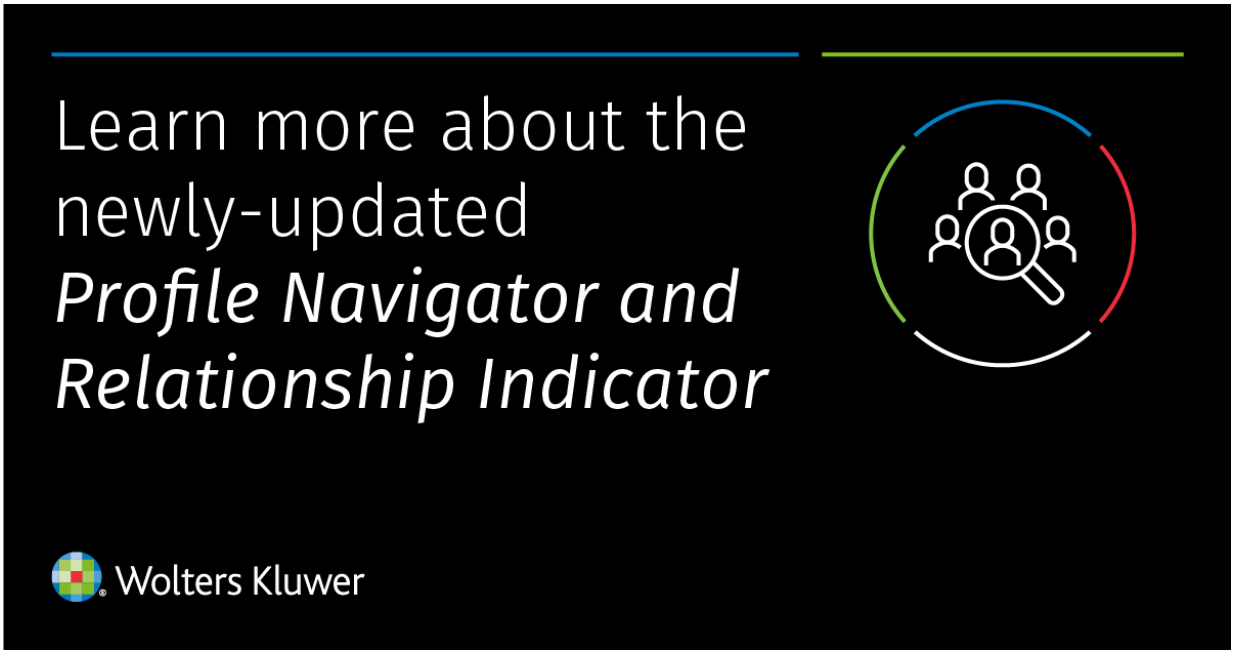
Why, then, has this provision been included? Recent case law on applications to court for a mediation referral might give some insight. I blogged on these in January 2016. In these cases the court found that the request for an invitation to the other side to mediation was not made in good

faith and was with the intention of delay proceedings, or to position a party favourably in regard to costs. It may be that there is a fear that mediation might be used as a delay tactic or fishing expedition, if the court cannot establish whether there was full engagement or not. It is worth noting however that the 2012 Draft General Scheme of a Mediation Bill, which was the forerunner of this Bill, also included reporting requirements but confined these to whether mediation took place or not and whether agreement was reached. Why then the desire to evaluate engagement and include costs penalties for refusal to mediate. Is the UK's Halsley line of jurisprudence influencing Irish lawmakers? We don't know.

What this leaves is a dilemma for mediators and their professional associations, to whom they are turning for guidance. It leaves us with more questions than answers. What sanctions will be applied for example if a mediator refuses to issue such a report? What if they do issue one and find themselves the subject of a complaint that they have breached their code of practice? There can be no doubt that use will be made of the power for judges to invite parties to go to mediation, the Irish judiciary are embracing the mediation option enthusiastically, as well they should. But it is easy to forget the essentially voluntary and confidential nature of the process in an effort to divert cases out of the courthouse into the mediation room.

For now, I imagine there will be some lobbying for amendment before the Bill becomes law. If this provision does come into force, we must consider how best to face these very real challenges in our practice.

But just for those who think I'm being unduly negative, check back next month for a discussion of the positive, innovative and beneficial aspects of the Bill!



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