Just another layer of cost?

By William Aylmer

Readers will recall my piece in the Winter 2011 edition entitled 'Talk is Cheap', in which I reported Minister Shatter's statement in the Dáil last October that a Mediation Bill was at an advanced stage of preparation and was expected to be published this year.

Having secured Government approval, the Minister published the General Scheme or Heads of the Mediation Bill 2012 on 1 March last, with a statement in which he said:

> *"The General Scheme builds on the recommendations of the Law Reform Commission in their 'Report on Alternative Dispute Resolution – Mediation and Conciliation'. The Mediation Bill will give effect to the undertaking in the Programme of the Government for National Recovery (2011 – 2016), to encourage and facilitate the use of mediation to resolve civil, commercial and family disputes.*
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> *The general objective of the Bill is to promote mediation as a viable, effective and efficient alternative to court proceedings, thereby reducing legal costs, speeding up the resolution of disputes and relieving the stress involved in court proceedings. I am anxious to ensure that individuals and companies engaged in a dispute regard resolution of their dispute through mediation as preferable to court litigation.*
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> *This Bill is not intended to replace existing systems for resolving disputes outside of the courts system such as those operated by the Employment Appeals Tribunal and Labour Court in the employment field and the Residential Tenancies Board in relation to landlord and tenant disputes. Instead, the Bill seeks to integrate mediation into the civil justice system as a mainstream alternative to court proceedings."*

The Minister highlighted the key elements of the proposed legislation as follows:

- *the imposition of a statutory requirement on solicitors and barristers to inform their clients about the possibility of using mediation as an alternative means of resolving disputes prior to commencing court proceedings;*
- *a requirement that all communications between parties as they try to resolve a dispute using mediation, shall be confidential;*
- *it will remain for the parties themselves to decide whether to engage in mediation and, indeed, to decide on the terms of any agreement arising from the mediation;*
- *the provision of a statutory basis for the courts to invite parties to consider the mediation option and to adjourn court proceedings for the duration of the process.*

The Minister asked the Joint Óireachtas Committee on Justice, Defence and Equality to consider the proposed legislation and report to him before 1 June 2012. The Joint Óireachtas Committee subsequently invited submissions from interested parties, including

the DSBA, and sat in public session on 9 and 23 May last to discuss submissions in more detail and address questions to interested parties.

While the Bill has yet to be published, the key messages in the Ministerial statements and proposed legislation are that it is intended:

- 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;
- to integrate mediation into the civil justice system as a mainstream alternative to litigation.

There are mixed views among legal practitioners, in Ireland as throughout the EU, on the value of mediation generally and on the proposed legislation in particular. Indeed, the mediators' profession in Ireland is concerned about some of the proposals in the General Scheme, including the proposal in Head 6(4) that a mediator be required to give reasons to the parties where he proposes to withdraw from a mediation process. The concern there is that such provision would undermine the fundamental principle of confidentiality in mediation and would seriously damage efforts to promote Ireland as a venue for mediation of cross-border commercial disputes. While concerns over the detail may be addressed when the Bill is published in due course and passes through the Óireachtas, it is clear that this legislation will have a significant impact on contentious legal practice in Ireland into the future.

One view often expressed by colleagues is that referring disputes to mediation involves another layer of cost for the parties. I have heard this view expressed many times by many colleagues since I was first introduced to mediation at a meeting of solicitors hosted by Her Honour Judge Petria McDonnell, on 28 September 2000 when she was still a Partner at McCann FitzGerald, to consider extending an invitation to CEDR to run a mediation advocacy training course for solicitors in Dublin. The training course was hosted shortly thereafter and that meeting of solicitors led directly to the establishment of ICMA, the Irish Commercial Mediation Association.

This view necessarily gives rise to the question, 'Does mediation involve another layer of cost for the parties?' It is not possible to give a simple answer to this question, particularly in a short piece such as this but I believe it is a very important question, worthy of detailed analysis and debate among legal practitioners because it is at the root of what may be a fundamental misunderstanding of the mediation process, how it works to resolve disputes, particularly those that have traditionally led to civil and commercial litigation in Ireland and of the flexibility of outcomes that can be achieved and benefits that can accrue to parties through mediation.

To analyse the view that referring disputes to mediation involves another layer of cost for the parties, it is necessary to consider the perspective of the person who expresses the view or asks the question, 'Does mediation involve another layer of cost for me / my client / the parties?' Is the perspective that of a party for whom a dispute has arisen or is it that of his legal advisers? It could of course be the perspective of either or both but it seems to presume that the dispute will not be resolved or is unlikely to be resolved through mediation and that some other process must inevitably follow mediation to achieve resolution. The view seems to presume that at best, mediation, being voluntary, is just another step along the road to trial; and an inconvenient and unwelcome one at that.

Clearly, the costs associated with mediation, being the mediator's fees, the venue expenses and any solicitor-client costs arising from accelerated legal advice or assistance in preparation for mediation, will not have amounted to 'another layer' if settlement is achieved through mediation. And the sooner a dispute is resolved after it has first arisen, whether through mediation or otherwise, then clearly the costs associated with that dispute and its resolution, including legal costs, will be minimised.

Mediation enjoys a high success rate and works well when parties appoint a competent mediator and enter mediation properly prepared, in good faith and with a real intention of engaging with the other party or parties and the mediator to achieve a resolution that serves the parties' interests. A party who understands this, particularly one who has had direct personal experience of successful mediation, is unlikely to view the mediation option as an inconvenient or unwelcome step on the road to trial or as an option that will involve him in an unnecessary additional layer of cost. He is more likely to view mediation as a way

to achieve resolution more quickly and cost-effectively than by the traditional alternative routes and with potential additional unforeseen advantages, including maintained or restored personal or commercial relationships, seldom enjoyed by parties following litigation or arbitration.

Of course it would be naive in the extreme for a party or his legal advisers to assume that mediation will successfully resolve every dispute. There are some disputes for which mediation is clearly inappropriate or unsuitable and for which a judicial or arbitral determination is necessary. There will always be individuals and corporations for whom the direct engagement required for the mediation process to work is beyond their capacity or comfort zone, no matter how well-intentioned they may be or how accomplished the mediator they appoint. But if we consider that somewhere in excess of 90% of all civil proceedings settle without judicial or arbitral determination, the question then becomes, 'Is this dispute capable of being settled and if so, which method of settling the dispute is going to produce the best outcome for me / my client?'

Some would ask, 'What can a mediator bring that I / my client won't get if we settle this the old-fashioned way? Can I not settle this with the other party directly / I have settled hundreds of cases with my colleagues on the other side? Don't I know Joe Bloggs well and can we not settle this over coffee next week?' But a further question then arises, 'What is the old-fashioned way?' No mediator will argue with the proposition that the best way to resolve disputes is of course for parties themselves to sit down together, without third party assistance to strike a deal as early as possible after the dispute has arisen. But we all know this is an extremely rare occurrence, particularly those of us who make a living from contentious legal or mediation practice. The more likely scenario is that a settlement meeting will happen, not between the parties but between opposing solicitors or counsel and more often than not after pleadings are closed, discovery is made, trial briefs have issued and a trial date fixed.

It may be useful indeed for parties and their legal advisers to compare going to mediation with discovery, which may be viewed by most as essential to an informed view of a dispute, even though it involves a further, often very significant layer of costs. Mediation, done well,

requires a discipline like that of discovery, which forces parties to review their options and risks strategically.

The EU Parliament's Policy Department on Citizens' Rights and Constitutional Affairs published a Note on 15 April 2011 entitled, '*Quantifying the cost of not using mediation – a data analysis*'[1], following a study to examine the actual costs and time that mediation saves, the purpose of which was to answer the question, 'What is the cost of not using a 'mediation then court' procedure in Europe?' The study found, inter alia, that mediation is a cost and time-effective dispute resolution mechanism, at almost every level of success rate.

Mediation brings a host of benefits to the parties that simply do not flow from the old-fashioned direct negotiation route, at or near the trial of an action. Mediation brings parties together. It allows them to focus on their mutual interests in achieving a resolution. It allows parties to craft their own settlement, thereby giving them ownership and control of their dispute and its resolution. It creates the potential to rescue and repair damaged personal and/or commercial relationships. It saves time, stress and money. It provides parties with the means to have and resolve their dispute in a private, confidential process.

The answer to these questions for legal practitioners may only become clear once we are first satisfied that our clients truly understand the mediation process and the benefits that can flow to them from a resolution they have achieved themselves through mediation. The challenges for us as legal practitioners then are to fully understand the mediation process and then how our clients prefer to proceed having fully understood and weighed the alternatives.

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[1] IPOL-JURI_NT(2011)453180 PAR00