
THE IRISH MEDIATION ACT 2017: MUCH DONE, MORE TO DO

AONGHUS CHEEVERS

School of Law and Government, Dublin City University

Abstract

The Irish Mediation Act 2017 was intended to cement the place of mediation in the civil justice system. A key part of the Act is the regulation of mediation. The Act contains a series of regulatory measures affecting how mediation is practised and organized as a profession. This article shows how the Act has achieved one of these regulatory goals (the regulation of the practice of mediation), while failing to achieve the second (the organization of mediation as a profession). Drawing a comparison with other jurisdictions, the article shows how the failure to fully implement some of the provisions of the Mediation Act 2017 has stymied the development of mediation in Ireland.

Keywords: Ireland, Singapore, England and Wales, mediation, mediation regulation, mediator standards, mediator code of practice, Mediation Council, voluntarism, mediation principles

[A] INTRODUCTION

The Irish Mediation Act 2017 was introduced not only in order to make mediation a more important part of the civil justice system but also to regulate the practice of mediation in Ireland (Mediation Act 2017). Containing provisions governing how mediation is practised and regulated, the statute governs mediation at a micro and macro level. This article discusses how the effects of these different regulatory actions have differed.

On one side of the coin, the time since the enactment of the statute has increased the visibility of mediation, with judges recommending that parties should consider or use mediation in a range of cases. In a recent case involving the Dáil Public Accounts Committee, for example, Kelly J

(the President of the High Court) recommended that the Committee should consider whether the dispute was suitable for mediation (Carolan 2020; RTE 2020). Mediation has also been regulated to a greater extent than ever before, particularly in the case of the process itself and the actions of mediators within the process.

Nevertheless, it can be argued, as this article does, that the enactment of the statute has not achieved all the effects that the drafters hoped for. Although mediation appears to have become more visible, and although some of the aims of the statute have been achieved—in that the actual practice of mediation has been regulated—the wider regulation of mediation as a profession has not been as successful. This article examines these aspects of this process and argues that the failure to attend to these regulatory issues has stymied the effectiveness of the legislation.

The article proceeds in three substantive parts. The first section (B) outlines the regulatory efforts in the Mediation Act 2017 that are focused on the process itself. These efforts, related to how mediation happens in a case, have largely been successful. This part discusses these provisions and their effect. The next section (C) moves on to discuss the parts of the Act that are intended to regulate the mediation profession and the wider practice of mediation. Three different topics are examined: the development of a Mediator Code of Practice; the establishment of a Mediation Council; and the courts' power to invite parties to use mediation under section 16(1) of the Mediation Act. This section shows how the implementation of these three provisions has been constrained, limiting the effectiveness of the Mediation Act. The final substantive part of the article (D) draws some comparison to Singapore, which also enacted a Mediation Act in 2017. The comparison with that jurisdiction shows how the implementation of the Irish statute is deficient.

[B] MEDIATION ACT 2017: MUCH DONE

Procedural Regulation: Mediation as Part of a Dispute Resolution Process

The Mediation Act contains a series of provisions designed to make the use of mediation more widespread and to provide a framework for the practice of mediation in civil disputes. Section 16 allows a court, either by itself, or after a party request, to invite the parties to attempt to mediate their dispute. Such an invitation comes with consequences. If a court feels that a party has acted unreasonably, following an invitation, a costs

penalty may be imposed on the recalcitrant party (Mediation Act 2017, section 21). An invitation can also change the role of a mediator. Section 17 requires a mediator to prepare a report which outlines the circumstances of the mediation (whether it happened, what was agreed etc.). At present the exact scope of this report remains unclear, although this author has previously argued that a pre-prepared reporting form should be developed by the courts service (Cheevers 2018b). As presently constituted, the report requires a mediator to judge the parties and their engagement with the mediation process, changing their role and affecting their neutral stance.

The Act underlines the importance of mediation in provisions which require solicitors to adapt their practice. Under section 14, solicitors need to discuss the possibility of using mediation with their clients. The same section requires the practitioners to provide their clients with details of mediation providers. Like section 16, these requirements also come with consequences. Before they can institute proceedings, solicitors need to ensure that the originating documents are 'accompanie[d] by a statutory declaration ... evidencing ... that the solicitor has performed the obligations imposed on him or her under subsection (1)' (Mediation Act 2017, section 14(3)). Section 15 will impose similar obligations on barristers when they are allowed to institute proceedings in the future.

The place of mediation in civil proceedings is further enhanced through a series of procedural rules regulating the use of mediation. Section 19(1) allows a court to adjourn proceedings for mediation to take place. An adjournment can be granted if an agreement to mediate has been signed and a party tries to institute proceedings related to the dispute. A court will grant an adjournment provided it is satisfied that there are insufficient reasons that mediation cannot take place and the applicant is ready, and willing, to comply with the agreement to mediate (Mediation Act 2017, section 19(2)). Under section 18, the Statute of Limitations is stayed when mediation is attempted for the period between the signing of an agreement to mediate and 39 days after a mediation settlement is reached or the mediation is terminated.

The costs associated with mediation are outlined in section 20. This ensures that the costs of the process are shared between the parties equally, unless the court orders otherwise. Nevertheless, regardless of whether the costs are divided, they should 'be reasonable and proportionate to importance and the complexity of the issues at stake and to the amount of work carried out by the mediator' (Mediation Act 2017, section 20(2)). An aspect of these costs is outlined in section 21. This

section allows a court to consider any unreasonable party conduct in refusing to engage with, or attempt, mediation (following a section 16(1) invitation) when making a decision on a costs award, an aspect of the Act which is discussed later in this article.

These provisions outline how mediation will be interwoven into the Irish civil dispute system, particularly in court proceedings (Smith 2017). Outlining how mediation fits, though, is only one part of the Act's purpose. In addition to these procedural provisions the Act also contains sections which regulate how mediation is practised on an individual, case-by-case basis.

Mediation Process Characteristics

The provisions that regulate mediation on an individual basis operate on two levels. The first level of requirements sets out what mediation is and how it operates. These requirements are backed by a second level of provisions that aim to develop an overall governance framework for mediation in Ireland. Reflecting the central argument of this article, the implementation of these individual and wider policy-focused regulatory approaches is markedly different. The first set of provisions, concerning the practice of mediation as an individual process, is discussed in the paragraphs which follow. The second set of regulatory provisions, focused on the wider mediation field, is discussed in the next section.

The ideas of what mediation is, and how it is practised, as commonly shared among Irish practitioners (*Annual Review of Irish Law* 2017; Sammon 2017a; Sammon 2017b; Cheevers 2018a; Cheevers 2018b; Cheevers 2019), are underlined in the Act.¹ Voluntarism is firmly protected in section 6(2), which states that: 'Participation in mediation shall be voluntary at all times.' Voluntarism is reinforced in section 6(3) and section 6(4) which allow parties to withdraw from mediation if they so choose and to be accompanied by a person of their choosing or a legal advisor. Voluntarism, though, is not without limits. Quite apart from the matter of a court inviting parties to attempt mediation (under section 16(1)), the parties using mediation and the mediator are under an obligation to 'make every reasonable effort to conclude the mediation in an expeditious manner which is likely to minimize costs' (Mediation Act 2017, section 8(2)(c)).

¹ However, it should be noted that although a common view of how mediation should be practised exists, not all the commentary around mediation has been positive. See Sammon 2017a where the author identifies some of the problems arising from the use of mediation including, for example, the effect of the use of ADR processes on human rights (notably the right of access to court contained in Article 6 ECHR) and the fact that the use of ADR processes and settlement meant that the value of public dispute resolution, in courts, was diminished.

Section 10 protects the confidentiality of ‘all communications (including oral statements) and all records and notes relating to mediation’. Confidentiality can be breached in certain instances including where communication is needed to ensure that an agreement is enforced, to protect a party who might be the subject of psychological or physical violence, or where communication is obliged by law. A final exception to the rules governing confidentiality are the mediator reports referenced earlier in this article. These reports need to be prepared after the parties are invited to use mediation by the court (under section 16(1)) and are attempting to re-enter litigation. The Act outlines the contents of such a report but keeps this description to a minimum. If a mediation took place, the mediator needs to outline whether an agreement was reached and include a statement of the terms of the agreement (Mediation Act 2017, section 17(1)(b)). If a mediation did not occur, the mediator needs to let the court know why mediation did not take place (Mediation Act 2017, section 17(1)(a)). In either case, the requirements could impact the confidentiality of the mediation process.

Mediator neutrality is a key part of the legislation and is protected in section 8(1). This section insists that mediators must determine if a conflict of interest exists and inform the parties and withdraw from the mediation if it does. Section 8(2) imposes an additional obligation that the mediator is impartial and acts with ‘integrity’, while being fair to both parties. Like the other principles, neutrality is not absolute. A mediator can, following a request of the parties, ‘make proposals to resolve the dispute’ (Mediation Act 2017, section 8(4)). Again, the requirement to make a report under section 22 could, arguably, impact the mediator’s neutrality if this report is framed as a judgment of the parties, rather than a simple description of what happened in the mediation process (Cheevers 2018b).

These provisions have helped ‘to promote mediation as a viable, effective and efficient alternative to court proceedings’ (Mediation Bill 2017: Second Stage, 2 March 2017). In the courts, judges have been suggesting that parties might want to consider mediating their cases. In the case referred to earlier, this suggestion was made to representatives of the Dáil Public Accounts Committee. The imposition of standards and the setting of expectations about what parties can anticipate in mediation regarding neutrality, voluntarism and confidentiality is also welcome. Nevertheless, despite these beneficial effects of the legislation, some lacunas still remain. Such gaps are arguably hindering the wider effectiveness of mediation in Ireland.

[C] MEDIATION ACT 2017: MORE TO DO

In addition to regulating the practice of mediation on an individual level and putting in place a procedural framework for mediation in the courts, the Act also contains a series of provisions to strengthen the wider regulation of mediation and to make mediation a more effective part of court proceedings. The first of these provisions allows for the development, or approval, of a mediator code of practice. The second outlines the manner in which a Mediation Council, of both mediators and public representatives, will help to regulate the practice of mediation in Ireland. The final rules outline how courts can invite parties to attempt mediation. Unlike the provisions (discussed in section B) which have been introduced and implemented, the rules discussed in this section remain a work in progress.

This part of the article shows how the failure to address these issues limits the effectiveness of the Act. The section starts by outlining how mediator accreditation and regulation have been a debated issue throughout the world, before outlining how Irish accreditation and regulation is handled under the Mediation Act. The final part of the section draws a comparison between Ireland and England & Wales. That jurisdiction has implemented similar rules around courts inviting parties to use mediation. The application of the rules in the two jurisdictions, though, has been different.

A Mediator Code of Practice

Mediator accreditation as a wider discussion

The accreditation of mediators and the implementation of mediator standards has been widely examined, with the advantages and disadvantages of regulation being highlighted. Alexander discusses how developing and imposing mediation regulations can make it more difficult to maintain ‘the flexible and democratic nature of the mediation process’ (2013: 146). This occurs when the imposition of legal norms and rules affects the flexibility, efficiency and openness of the mediation process and the mediation profession. Nussbaum (2016) discusses how the use of mediation in legislation regulates disputants in two ways. Firstly, the imposition of mandatory mediation in certain cases impacts disputant procedural choice. Rules which tell people ‘how to mediate’ also impact upon how people use mediation (Nussbaum 2016: 381). These provisions include rules that govern who can and cannot participate in mediation, that incentivize settlement, and that contain good-faith requirements

governing party conduct and engagement with the process (Nussbaum 2016: 384-85).

Press (2000) identified different stages in mediation regulatory processes (institutionalization, regulation/codification, legalization, innovation, internationalization and co-ordination). Each of these stages raises its own questions. Institutionalization, regulation and legalization all raise issues about the proper role of the state in the regulation of an informal practice, like mediation, with regulation requiring the state to strike a balance 'between the need to balance consumer protection with concerns about over-regulating a developing and diverse practice' (Carrol 2002: 191).

Boon & Ors (2007) outlined the reasons that mediation regulation might and might not be appropriate. Most of the factors in support of regulation concern public confidence in mediation and public expectations of the process. When the Law Reform Commission (LRC) evaluated the need for the regulation of Irish mediation (discussed in the next section) this was one the factors it considered. For Boon & Ors (2007) a key concern with any regulatory system was whether parties were expected to bear the costs of a court case if they have a complaint against their mediator. The arguments against regulating mediation focused on a variety of concerns, including the argument that regulation would hinder the development of a flexible process (see, for example, the discussion in Alexander 2013).

The next objection is that standards limit the development of a mediation market and bring it, instead, 'closer to the rule bound justice system to which it is supposedly alternative' (Boon & Ors 2007: 35). Universally applicable standards are also said to lead to homogenization, with some practitioners unable, or unwilling, to meet the educational standards that professional accreditation might require. Other objections state that greater regulation is unwarranted, since the number of complaints is low and that regulation would increase mediator expenses, leading to increased costs for clients.

Cole & Ors (2014), when considering mediation regulation generally, raised at least six questions that should concern legislators or policy-makers before they enact mediation legislation. These questions concern a range of issues including: how the law will interact with the confidentiality of mediation; whether the people using mediation will be aware of the legislation (and whether they are likely to be aware of its effect); and what the unintended consequences of the law might be. Other considerations include: deciding if the law is actually necessary; whether

it risks muddying ‘the lines between adjudication and mediation’; and whether the law will clash with long-held practices (Cole & Ors 2014: 36).²

The question, then, of whether mediation and mediators should be regulated, and if so how, is one with a wider relevance. The question is also not an easy one to answer. On the one hand, the need to effectively protect mediation clients, especially if mediation is used in a court process, is clear. These people need to be assured that the service they are using and the practitioners providing that service meet identifiable standards. On the other hand, Alexander’s (2013) criticisms also hold water. An overt focus on mediation could impact the flexibility associated with the process. In Ireland, the LRC addressed some of these issues in 2010 when it assessed how mediation could operate, with some of its recommendations being implemented in the Mediation Act (LRC 2010).

Accreditation and regulation in Ireland

The first obligation dealing with accreditation and standard-setting allows the Minister for Justice and Equality to develop or approve a code of practice for mediators (Mediation Act 2017, section 9(1)). Section 9(2) lists the type of information that the code can contain and includes mediator continuing professional development (CPD) requirements, the ethical standards applicable to mediators, and the rights of parties if they wish to complain about their mediation. The use of this approach follows the recommendations of the LRC (2008; 2010). That organization recommended that mediators should self-regulate, with professional organizations accrediting ‘only those practitioners meeting the levels of training established by the professional body’ (LRC 2010: 80). The Commission, however, also recognized that the need for minimum standards required the Minister for Justice and Equality to develop universally applicable practice standards, with the aid of a specialist committee, established for the purpose.

The LRC noted that a universally applicable code would have three effects: enhanced mediator knowledge, skill and ethics; higher quality practice overall; and ‘the protection of the needs of consumers of mediation ... and the provision of accountability where they are not met’ (LRC 2010: 180). Daly (2010) raised similar topics, noting that the

² When they assessed the need for regulation in England and Wales, de Oliveira and Beckwith also showed how the need for regulation depended on different factors. They noted that: ‘As mediation derives of parties’ freedom to contract, they should also be free to determine the steps taken through mediation. A mediator is a facilitator who will help parties reach an agreement, if the process becomes too bureaucratic, parties might feel that it is not functional.’ (de Oliveira and Beckwith 2016: 353). Nevertheless, they still highlighted how at least one sector (family disputes) could benefit from more regulation to increase consumer confidence in the process.

legitimacy of mediation (and alternative dispute resolution (ADR) more generally) depended on effective accreditation. In this context, accreditation helps to inform the public about the profession's presence and the services that are on offer and provides an assurance that certain minimum standards will be met in the provision of those services. As she noted: 'Professions are by definition service industries.' (Daly 2010: 50)

Accreditation, however, does not necessarily need to be a public act and can take many forms. Although the Commission felt that accreditation and standard-setting were necessary, as already discussed, it also felt that these acts could best be carried out by the imposition of standards by mediation organizations. The recommendation that these accrediting actions should be backed by a universally applicable code of practice was also limited. Even while favouring a universally applicable code of practice, the Commission stressed that the code should not be 'over cumbersome or prescriptive' (LRC 2010: 181). This recommendation was made in the interests of protecting the flexibility which is inherent in mediation.

Supporting accreditation, while at the same time highlighting how it can affect the mediation process, reflects the wider discussion of mediation regulation and accreditation (addressed in the previous section). At heart, however, the issues raised around regulation come down to a question of how best to use mediation, protecting its strengths (including, informality, voluntary participation and the opportunity to discuss a dispute in the fullest possible terms), while effectively protecting the parties using the process (especially in a state-backed civil justice system). In addition, the embedding of mediation as part of the formal justice system sees 'public' expectations becom[ing] attached to what has hitherto been thought of in terms of a private activity' (Whitehouse 2017: 3).³ Fiss (1984; 2009), in addition, criticized the settlement paradigm that he saw as undermining the work of civil courts in the United States. Part of the thinking behind the Fiss criticism lay in the informal and confidential nature of settlement discussion, which limited the precedential potential of a court ruling. Mediation, even the best mediation, struggles, unfortunately, to overcome this criticism.⁴

³ The need for regulation has been questioned by others, however. Reece (1998) notes that the imposition of standards could limit entry to the mediation profession and make mediation more formal. Nevertheless, she also notes that, even in 1998, the professionalization of mediation was already happening since 'many mediators, including all of the entrepreneurial ones, were members of existing professions' (Reece 1998: 45).

⁴ Although arguments have been made in support of Fiss. See, for instance, Weinstein (2010). Luban argues that the Fiss criticism should be reworked from being against settlement *per se* to being 'against the wrong settlements' (Luban 1995: 2665).

As part of the civil justice system, mediation raises questions about how best to regulate the process and the people practising the process. In the Irish context, some of the questions raised by Boon, Cole and their fellow authors have been considered. The mere fact that Ireland has a Mediation Act shows that regulation is happening. The question that arises, however, is why this regulatory exercise has not been fully completed. Any worries that a code of practice will impact the flexibility of mediation might be overcome by the requirement that the development or approval of the code is a collaborative process, as the LRC recommended. As discussed in the next section, a function of the Mediation Council is the development of a code of practice. Section 9(3) also requires the Minister to publicize their intention to approve or develop a code of practice on the Department of Justice and Equality's website and, at the very least, one daily Irish newspaper, with people being free to inspect the proposed code and to comment on its contents. In this respect, any code should represent regulations which reflect the 'pluralistic thinking' which Alexander referenced (Alexander 2013: 147).

In terms of the development of mediation, it could be argued that mediation is reaching the stage where it is now established as part of civil justice in Ireland. Although mediation practitioners come from diverse backgrounds, already most mediators have some form of accreditation. A codified provision could simply make this accreditation requirement a necessity. Any discussion of such a requirement would need to happen in concert with a more wide-ranging discussion of mediator expenses and the value of mediation. For many mediators, in Ireland and elsewhere, mediation is something of a voluntary pursuit. The imposition of standards could encourage greater professionalization of mediation practice and, hence, increase the fees payable to mediators.

In some ways, the Mediation Act seems to show how professionalization might evolve. Alexander identified five 'primary regulatory forms associated with mediation' (Alexander 2013: 147):

- ◇ market regulation;
- ◇ industry-based regulation (e.g. Mediators' Institute of Ireland (MII) Code of Ethics Practice);
- ◇ framework legal instruments (e.g. EU Directive on Mediation);
- ◇ model laws (e.g. Model Law on International Commercial Conciliation 2002); and

- ◇ domestic legislation (e.g. Mediation Act 2017 (Ireland), Mediation Act 2017 (Singapore)).⁵

The LRC, as noted above, has also characterized mediation regulation in Ireland as an amalgam of acts carried out by public and private bodies. As currently constituted, then, Irish practice is a mixture of these various approaches, with the majority of the regulation that is occurring happening in the private sector through private organizations (such as the MII) or using market forces.

Although the Act applies generally in civil cases, section 3(2) limits the Act's application, including where mediation is required under another statute or under a contract made by the parties. This is one form of market regulation, since mediation remains a creature of contract and parties are free (as shown in section 3(2)) to contractually agree to mediate their dispute on terms that suit their needs. Market regulation also appears where mediators are required to provide disputants with details of their qualifications, CPD training etc. This, in effect, uses a market-based approach to professionalize mediation practitioners, since those mediators with more, and better, qualifications will likely receive more appointments. Where this leaves mediators who do not have the time, or money, to burnish their credentials remains unclear.

Still, without the development or approval of a state-backed, overall code of practice, the duties of mediators and the expectations of the clients using mediators remain indistinct. Even if a mediator practises under an existing code (such as that of the MII), what does this actually mean? A client who is unhappy with a service can complain to that organization, which may punish its member, but this does not mean that the mediator may not continue to practise. This is in contrast to other professions, such as solicitors and doctors, with regulatory bodies with teeth. The Solicitors Disciplinary Tribunal often hears complaints and punishes guilty parties. In October 2019, for example, a solicitor was struck off the register after being found guilty of professional misconduct (Carolan 2019).

As things currently stand, even if such a finding were made against a mediator, a similar result would not be possible. The failure to develop and approve a code of practice, and to require mediators to sign up to the code,

⁵ In an earlier article, Alexander (2008) discussed four regulatory approaches to market regulation, self-regulation, formal frameworks and formal legislation. She argued for 'a multi-layered approach to regulation in mediation—a combination of market-based legislative and self-regulation with strong responsive and reflexive review mechanisms in place. In a dynamic and developing professional field, participative regulatory processes with the ability to review and adapt the mediation mix to changing circumstances are vital.' (Alexander 2008: 23) The regulatory framework of the Mediation Act starts to put such a dynamic framework in place. Whether the correct balance has been struck could also be questioned, however, as it is in this article.

means that mediation in Eire today remains a largely unregulated profession. Although this might be a good thing for mediators and other stakeholders who want to maintain ‘the flexible and democratic nature of the mediation process’, the question remains whether it is the most appropriate way to make mediation an effective part of the civil justice process and to protect effectively the parties using mediation (Alexander 2013: 146).

THE MEDIATION COUNCIL

Another section that could assist the wider regulation of mediation is section 12. This allows the Minister for Justice and Equality to establish the Mediation Council of Ireland, referred to above in the previous section. This body is intended to report to the Minister for Justice and Equality each year, with the report (in line with other statutory bodies) being laid before the Houses of the Oireachtas (Irish Parliament) (Mediation Act 2017, section 13). The Council may also provide the Minister with additional reports relating to ‘any matter concerning the policies and activities of the Council’ (Mediation Act 2017, section 13(2)(a)).

The Council’s functions extend beyond reporting on how mediation is used to cover the regulation of the mediation profession. The Council is charged with some of the functions of mediation regulation that the LRC (2010) considered, which include the development and maintenance of ‘standards in the provision of mediation, including the establishment of a system of continuing professional development training’ (Mediation Act 2017, Schedule). In addition, it is obliged to maintain a register of mediators who have subscribed to any code of practice which the Minister develops or approves, as well as advising the Minister about the contents of the code and supervising the code’s implementation.

The Council is both independent in its functions and make-up of representatives, consisting of mediators and the wider public. Membership of the body is divided between six individuals who are public-interest members and five mediators or members ‘representative of bodies promoting mediation services or representing the interests of mediators’ (Mediation Act 2017, schedule). Importantly, the Act notes that the public-interest members should be persons ‘who are independent of the interests of mediators’ (Mediation Act 2017, schedule).

The Council represents an important addition to the Irish mediation landscape and should ensure that all the relevant interests are taken on board during the development of a code of practice. In this case, relevant interests not only include mediators and mediation organizations, but the people who use the mediation process. Considering this, the failure to

appoint a Mediation Council is surprising. Despite widespread support for, and the continued and expanded use of mediation, the failure to appoint the Council raises questions about whether government support for the process is simply smoke and mirrors: providing support in public, but being unwilling, or unable, to support the process in a concrete manner. This question also arises when one considers some of the cases in which parties have suggested mediation. In cases such as the *Atlantic Fisheries* decisions (discussed below in the next section), it was government or public bodies rather than private individuals who refused to use mediation.

In addition, the failure to appoint, or even to nominate, a Council has stymied the usefulness of mediation. Although the Act has been in force for a couple of years, it is unclear if the disputing process has necessarily changed in the majority of cases. Mediation remains very much an alternative, rather than the primary approach that is envisaged in the Act. This, coupled with the failure to develop and maintain a register of mediators who have subscribed to a code of conduct, or even to develop or approve a code, means that clients are still reliant on their legal advisor when deciding on a mediator appointment. As already noted, this also means that the regulation of the mediation profession remains a private undertaking, where clients cannot be sure what effect their complaints against mediator misconduct or incompetence will have.

COSTS PUNISHMENTS AND UNREASONABLE BEHAVIOUR?

The final impediment to the wider use of mediation and the effectiveness of some of the provisions in the Mediation Act are the rules concerning court invitations to use mediation under section 16(1). These rules bear a close resemblance to similar provisions in England and Wales. In that jurisdiction, the amendment of the Civil Procedure Rules (CPR) helped courts to begin to develop an understanding of how mediation should be used in civil proceedings. CPR rule 44(4) allows a court to consider party conduct, who won the case, and any settlement attempts made by the parties, when deciding whether to award costs to one of the parties. Under CPR rule 44(5), 'party conduct' includes not only the parties' actions during proceedings, but also before proceedings and any failure to follow relevant pre-action protocols.

Paragraph 8 of the Pre-action Conduct and Protocols Practice Direction requires litigants to 'consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings'. This requirement is backed by an additional obligation to provide evidence that the parties have considered an ADR process if the

court requests (Pre-action Conduct and Protocols Practice Direction, para 11). In *Halsey v Milton Keynes NHS Trust*,⁶ Dyson J, for the Court of Appeal, outlined a number of factors that courts could use to assess the reasonableness of a refusal.

The judge started by noting that, since the imposition of a costs penalty meant departing from the general rule of costs following the event, the burden of proving that a party's behaviour was unreasonable falls on the party making the claim. In assessing the claim, relevant factors include:

... the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success. We shall consider these in turn. We wish to emphasise that in many cases no single factor will be decisive, and that these factors should not be regarded as an exhaustive check-list.⁷

The *Halsey* decision led to a divergence in courts in England & Wales, between keeping mediation a voluntary process, on the one hand, and, on the other, compelling the parties to consider mediation, with the imposition of costs penalties following unreasonable behaviour. This has resulted in an ADR jurisprudence which is 'inconsistent, contradictory and confusing' (Ahmed and Arslan 2019: 2). This situation is underlined in two recent cases. In *Thakkar v Pattel*⁸ in the Court of Appeal, Jackson LJ imposed a costs sanction on a defendant who had failed to engage with the claimant's invitation to participate in mediation. In *Gore v Naheed*,⁹ however, decided only four months after *Thakker*, Patten LJ reached the opposite conclusion, refusing to punish a defendant for failing to engage in mediation.

In *Lomax v Lomax*,¹⁰ the Court of Appeal was asked to consider whether the *Halsey* criteria, that a party could not be compelled to use mediation, should be extended to an early neutral evaluation (ENE) process in an inheritance proceeding. This proceeding was governed by CPR rule 3.1(2)(m), which allows a court to either make an order or ask the parties to enter an ENE process, 'for the purpose of managing the case and furthering the overriding objective' (CPR rule 3.1(2)(m)).

⁶ [2004] EWCA Civ 576.

⁷ Ibid para 16.

⁸ [2017] EWCA Civ 117.

⁹ [2017] EWCA Civ 369.

¹⁰ [2019] EWCA Civ 1467.

The claimants in *Lomax* argued that the parties' consent was not required under CPR rule 3.1(2)(m). The defendants, however, argued that an application of the *Halsey* principles meant the court could not order the parties to use an ENE process. This argument was backed by an insistence that the *Halsey* principle was underpinned by the various CPR rules which showed that compulsion would limit the parties' rights of access to court, and 'the authors of the various Court Guides considered that consent is required before an ENE can be ordered' (Ahmed and Arslan 2019: 6). The Court of Appeal sided with the claimants, with Moylan LJ stressing that, if party consent was needed, this could easily have been shown in the wording of the rule. This was not, however, the case.

The *Lomax* decision further cemented the role of the ADR process in English civil disputing. The decision also reflects an ongoing process which has been taking place in England & Wales. In the *Chancery Modernisation Review* (Briggs 2013), for example, Briggs LJ argued that courts needed to recognize that litigation was unlikely to resolve most disputes. This recognition meant that courts needed to manage disputes using a wider range of procedural options. This would see courts playing 'a more active role in the encouragement, facilitation and management of dispute resolution in the widest sense, including ADR as part of that process, rather than merely focusing on preparation for trial' (Ahmed and Arslan 2020: 16).

In *PGF II SA v OMFS Co 1 Ltd*,¹¹ Briggs LJ ruled that refusing to engage with an invitation to attempt ADR could constitute an unreasonable refusal. This has since been reflected in the Pre-action Conduct and Protocols Practice Direction, with paragraph 11 noting that: 'A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable.' Although *Halsey* left the question of whether parties could be compelled to use mediation (or another ADR process) in the air, the courts have moved to bring about an expectation that parties will at least attempt to settle their dispute with an ADR process if necessary. Even when Moylan LJ dodged the question of whether the issue of compulsion in mediation was correctly decided in *Halsey*, the court in *Lomax* still supported the ENE process in the case.

In Ireland, on the other hand, such an understanding of how mediation and other ADR procedures can be used has not occurred. The courts are still grappling with whether, and how, to use mediation. As yet, no court has invited the parties before it to attempt mediation (as allowed under section 16(1)) or punished an unreasonable refusal to attempt mediation

¹¹ [2019] EWCA Civ 1288.

(as allowed under section 21). In *Atlantic Shellfish v County Council of Cork*,¹² Irvine J, for the Court of Appeal, outlined how a court should approach the question of whether to invite a party to attempt mediation. The interesting part of this approach is that the decision continues to rest with the parties themselves, rather than the court. This is shown by the judge's statement that:

To my mind the court could not be satisfied that it would be 'appropriate' to make an order unless it was first satisfied that the issues in dispute between the parties were amenable to the type of ADR proposed.¹³

Only if a court is satisfied that mediation could be successful or that the parties' dispute is capable of being resolved in mediation will the court consider the other factors that 'might weigh in favour or against the granting of the relief sought' (Irvine J).¹⁴ These factors include: the purpose of the application (whether it is actually a *bona fide* attempt to settle the dispute, or merely a mechanism to maintain a costs claim); the actions of the parties until the making of the application; the potential savings from the ADR process; and the likelihood that the process could bring the parties closer together.

As things currently stand, the need to identify if a case is capable of being resolved with the proposed ADR process places too much power in the hands of disputants (particularly those disputants who do not want to use mediation or another ADR procedure). In the *Atlantic Shellfish* cases, some of the public defendants argued that the case raised novel issues of law which needed to be resolved by a court. Irvine J stated that:

I do not believe it is unreasonable for the party against whom complex legal claims have been made, and which may have ramifications that extend well beyond the confines of the proceedings and their parties, to maintain their entitlement to have those issues resolved by the court.¹⁵

Similarly, in *Grant v Minister for Communications*,¹⁶ Costello J followed this line of reasoning when he held that the dispute was unsuitable for mediation and, thus, refused an Order 56A application. More recently in *Danske Bank v SC*,¹⁷ Gilligan J agreed with O'Connor J's refusal to grant a plaintiff's Order 56A application. Gilligan J referred to a number of

¹² [2015] IECA 283.

¹³ *Ibid* para 33.

¹⁴ *Ibid*.

¹⁵ *Ibid* para 43.

¹⁶ [2016] IEHC 328.

¹⁷ [2018] IECA 117.

factors that the trial judge had considered, including whether the proposed ADR process could resolve the dispute, whether the application was *bona fide*, and whether the party making the invitation ‘knows that an invitation from the Court will for good reason be refused’.¹⁸ The actions of the parties throughout the litigation led the judge to conclude that mediation would likely not work and that an order should not be made.

These cases show two things. First, as already argued, the question of whether mediation, or another ADR process, is likely to be successful privileges those parties who argue that mediation should not be used. As long as they can raise an objection that the court accepts the refusal will be upheld. Although this approach starts in the same place as England & Wales (unreasonableness being punished), the application of the rules means that the parties end in a different space. Unlike England & Wales, the Irish courts appear to be more willing to side with a party who is arguing against mediation, as opposed to a party who is arguing for the process. Focusing on party conduct before the making of an Order 56A application sees mediation as an addition to the legal system, which might aid settlement, rather than something different that might provide advantages that litigation cannot provide.

Secondly, the application of the rules has limited the use of mediation. Instead of the Mediation Act leading to a new way of doing disputes, it simply becomes an addition to the old way of disputing. This is shown most forcefully, perhaps, in the way the government has handled Order 56A applications. If the government supports mediation, on the one hand, yet refuses to engage with the process when involved in a case, does this hinder mediation? This remains an issue, as the earlier reference to the Dáil Public Accounts Committee case shows.

[D] WHERE DOES ALL THIS LEAVE US?

In the same year that Ireland enacted the Mediation Act, Singapore also ratified and put into effect its own Mediation Act. Much like the Irish legislation, this statute defines mediation and sets out the contours of mediation in Singapore. Both statutes share some common characteristics. In the Singapore Act, much like the Irish equivalent, no overarching code of conduct has been imposed on mediators. Anderson (2017) highlights how Hong Kong (which passed a Mediation Ordinance in 2012) also adopted an approach where mediation codes of practice are set by organizations and not the government. In Singapore, the Singapore

¹⁸ Ibid para 35.

International Mediation Institute carries out this function. As Anderson noted: ‘This body currently administers a four-tiered mediation credentialing scheme.’ (Anderson 2017: 278)

Like Ireland, then, Singapore has decided that the mediation profession should be regulated. The difference between the two jurisdictions is that Singapore has followed through on these regulatory commitments. The nomination of one certification body ensures that the mediators who conduct mediation meet the required standard and that the clients who use mediation know that this is the case. The regulatory process is strengthened by the requirement that a ‘mediation is administered by a designated mediation service provider or conducted by a certified mediator’ before the agreement can be recorded as an order of the court (Singapore Mediation Act 2017, section 12(3)). For clients, especially those from outside the jurisdiction, these requirements build trust in the mediation process. At the same time, the attractiveness of Singapore-based mediation is enhanced because clients can also make use of ‘an expedited enforcement mechanism for their settlement terms’, providing their mediator is properly certified (Anderson 2017: 286).

The fact that Singapore, unlike Ireland, has developed and implemented a framework to regulate mediation is no accident. Already, the country has developed ‘an elaborate commercial mediation ecosystem’ (Chua 2019: 204). Importantly, this ecosystem is underpinned by government support (McFadden 2019). The Singapore International Mediation Institute, for instance, was established as a non-profit with support from the Ministry of Law and the National University of Singapore. Like the proposed Irish Mediation Council, the Institute is made up of representatives of mediators and the users of mediation. Unlike the proposed Mediation Council, however, the Institute is actually operational.

The implementation of a recognizable public and private framework has another effect on mediation in Singapore. Arbitration is generally seen as an effective mechanism for resolving international disputes. Mediation less so. This may be changing, though. In the Singapore Act, the Act’s provisions support the development of mediation as a viable alternative not only for domestic disputants but also for disputants from another jurisdiction. Section 6(1) states that the Act applies to any mediation, occurring under a mediation agreement between parties, which ‘is wholly or partly conducted in Singapore’ or a mediation in which the agreement states that the Mediation Act, or another Act of Singapore will apply. The recent signing of the United Nations Convention on International Settlement Agreements Resulting from Mediation (or Singapore

Convention) might reinforce this trend in the coming years (Schnabel 2019). Singapore, unlike Ireland, appears aware of these changes and seems to be preparing for them.

Even though both Ireland and Singapore have recognized that mediation could and, perhaps, should be regulated, the jurisdictions have approached this task in different ways. Ireland remains wedded to the idea that regulation is best carried out by private mediation organizations. As the earlier discussion showed, though, this method could limit the effectiveness of the regulations for the people using the process. When the LRC considered how mediation should be regulated, a phrase it regularly employed was ‘at this stage in the development of mediation and conciliation’ (LRC 2010: 184). The earlier discussions of the LRC’s recommendations were framed by this statement. The question now is whether the development of mediation is still at the same stage, or whether mediation’s development has progressed to a point where universal standards are appropriate, with a body appointed to oversee the formulation and implementation of these standards? In this author’s opinion, it has.

[E] CONCLUSION

The use and effectiveness of mediation in Ireland has increased in recent years. As stated earlier, courts are beginning to suggest that the parties consider whether mediation could be used to resolve their disputes. Simply because things are better, though, does not mean that they could not be made better still. As yet, no party has been invited officially to use mediation, or punished because they have refused to use mediation. In the discussion of the approach adopted in England & Wales, the *Halsey* question was raised. Ireland appears to have put aside that question of whether courts should, or can, order parties to use mediation, in favour of an approach in which mediation is, and must remain, voluntary. It is argued that this places too much power in those parties who do not want to use mediation.

It also remains the case that mediation is still misunderstood, that people might not know what mediation is, and, even if they do, they do not fully understand what the process entails. Part of the purpose of the Mediation Council is to overcome these obstacles by publicizing information about mediation and, through regulation, making the process more professional. As long as the Council remains unappointed, this task is left to a disparate range of stakeholders, who might not necessarily be singing from the same hymn sheet. The appointment of a Council and the

subsequent development of a universally applicable code of practice will help mediation to be seen as a profession, rather than a practice that a range of people simply carry out. By taking on board the opinions and suggestions of various stakeholders, mediators, lawyers, judges, civil society and litigants, the Council could help to develop a code that reflects the needs of the people practising and using mediation, which effectively protects disputants who have complaints and also protects the added value that mediation can provide.

References

- Ahmed, M & FN Arslan (2019) 'Compelling Parties to Judicial Early Neutral Evaluation but a Missed Opportunity for Mediation: *Lomax v Lomax* [2019] EWCA Civ 1467' 39(1) *Civil Justice Quarterly* 1-11.
- Alexander, N (2008) 'Mediation and the Art of Regulation' 8(1) *Queensland University of Technology Law Review* 1-23.
- Alexander, N (2013) 'Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulatory Reform' in K J Hopt & F Steffek (eds) *Mediation: Principles and Regulation in Comparative Perspective* Oxford: Oxford University Press.
- Anderson, D Q (2017) 'A Coming of Age for Mediation in Singapore? Mediation Act 2016' 29 *Singapore Academy of Law Journal* 275-93.
- Annual Review of Irish Law* (2017) 'Mediation Act 2017' 1(1) *Annual Review of Irish Law* 459-72.
- Boon, A, R Earle & A Whyte (2007) 'Regulating Mediators?' 10(1) *Legal Ethics* 26-50.
- Briggs, Lord Justice (2013) *Chancery Modernisation Review: Final Report* London: Courts and Tribunals Judiciary.
- Carolan, M (2019) 'Solicitor to be Struck off over Professional Misconduct' *Irish Times*, 14 October 2019.
- Carolan, M (2020) 'Dáil Urged to Reconsider Refusal to Mediator Angela Kerins Claim' *Irish Times*, 20 January 2020.
- Carrol, R (2002) 'Trends in Mediation Legislation: "All for One and One for All" or "One at All"?' 30 *University of Western Australia Law Review* 167-207.
- Cheevers, A (2018a), 'Voluntarism and the Need for a Civil Justice Reform Project in Ireland' 37(1) *Civil Justice Quarterly* 98-123.
- Cheevers, A (2018b) 'Confidentiality Protections and Mediator Reporting Requirements under the Irish Mediation Act 2017: A Comparative Perspective' 13(2) *Journal of Comparative Law* 99-119.

- Cheevers, A (2019) 'Neutrality in Irish Mediation, One Concept, Different Meanings' *Conflict Resolution Quarterly* 1-20.
- Chua, E (2019) 'The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution' 9 *Asian Journal of International Law* 195-205.
- Cole, S R, C A McEwen, N H Rogers, J R Coben & P N Thompson (2014) 'Where Mediation is Concerned, Sometimes "There Ought not to be a Law"' 20(2) *Dispute Resolution Magazine* 34-38.
- Daly, C C (2010) 'Accreditation: Mediation's Path to Professionalism' 4 *American Journal of Mediation* 39-54.
- de Oliveira, L V P & C Beckwith (2016) 'Is There a Need to Regulate Mediation? The English and Welsh Experience' 42(2) *Commonwealth Law Bulletin* 327-54.
- Fiss, O (1984) 'Against Settlement' 93 *Yale Law Journal* 1073-90.
- Fiss, O (2009) 'The History of an Idea' 78 *Fordham Law Review* 1273-80.
- Law Reform Commission (2008) *Alternative Dispute Resolution* (Consultation Paper LRC CP 50-2008) Dublin: Law Reform Commission.
- Law Reform Commission (2010) *Alternative Dispute Resolution Mediation and Conciliation* (Report LRC 98-2010) Dublin: Law Reform Commission.
- Luban, D (1995) 'Settlements and the Erosion of the Public Realm' 83 *Georgetown Law Journal* 2619-62.
- McFadden, D (2019) 'The Growing Importance of Regional Mediation Centres in Asia' in C Titi & K Fach Gomez (eds) *Mediation in International Commercial and Investment Disputes* Oxford: Oxford University Press.
- Nussbaum, L (2016) 'Mediation as Regulation: Expanding State Governance over Private Disputes' 2016(2) *Utah Law Review* 361-415.
- Press, S (2000) 'International Trends in Dispute Resolution: A US Perspective' 3(2) *ADR Bulletin* 21-26.
- Reece, C (1998) 'The Quandary of Setting Standards for Mediators: Where are We Headed' 23(2) *Queen's Law Journal* 441-74.
- RTE (2020) 'High Court President Urges Dáil to Enter Mediation with Angela Kerins' *RTÉ News* 20 January
- Sammon, G (2017a) 'Mediation in Ireland: Policy Problems' 57 *Irish Jurist* 175-86.
- Sammon, G (2017b) 'The Mediation Act 2017' 58 *Irish Jurist* 106-20.

- Schnabel, T (2019) 'The Singapore Convention on Mediation: A Framework for the Cross Border Recognition and Enforcement of Mediated Settlements' 19(1) *Pepperdine Dispute Resolution Law Journal* 1-60.
- Smith, W M (2017) 'The Mediation Act' 22(6) *Bar Review* 160-63.
- Weinstein, J B, (2010) 'Comments on Owen M Fiss, Against Settlement' 78 *Fordham Law Review* 1265-72.
- Whitehouse, P (2017) 'Regulating Civil Mediation in England and Wales: Towards a "Win-Win" Approach' 2(1) *Mediation Theory and Practice* 68-83.

Legislation Cited

- EU Directive on Mediation 2008
- Mediation Act 2017, Number 27 of 2017 (Ireland)
- Mediation Act 2017 (Singapore)
- Model Law on International Commercial Conciliation 2002

Cases Cited

- Atlantic Shellfish v County Council of Cork* [2015] IECA 283
- Atlantic Shellfish & Hugh Jones v County Council of Cork and Others* [2015] IEHC 570
- Danske Bank v SC* [2018] IECA 117
- Gore v Naheed* [2017] EWCA Civ 369
- Grant v Minister for Communications* [2016] IEHC 328
- Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576
- Lomax v Lomax as Executor of the Estate of Alan Joseph Lomax (Deceased)* [2019] EWCA Civ 1467
- PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288
- Thakkar v Pattel* [2017] EWCA Civ 117
- Mediation Ordinance 2012 (Hong Kong)