

The Mediators' Institute of Ireland

President's Speech

4 November 2011

Good afternoon. You are all very welcome to the 13th Annual Conference of the MII.

Standards The MII is the professional association for Mediators in Ireland and we have members North and South. We are unique in these islands in that we are the professional association for all types of Mediator. We do not limit entry by involvement or interest in a particular type of mediation – commercial, workplace, separating couples etc.

As I will demonstrate later, cases can be multi-issue and often do not fall neatly between what we Mediators decide should be the dividing lines. The professional organisation needs to be able to accommodate members from across the spectrum of mediation and to provide a standardised level of training, assessment, continuing education and Code of Ethics and Practice that can apply to all Mediators in the organisation. We also need to be cognisant of emerging forms of mediation that are gaining traction – for example on-line mediation, telephone mediation and time-limited mediation.

The philosophy of the MII is that Mediators should first and foremost be Mediators – generalists. Each mediation should be mapped with neutral eyes and not through the prism of a particular model. There is no Mediator from whom you can't learn something – whether a trainee Mediator or a highly experienced one. What is important is that you mix and share experiences with Mediators who practice in different areas and types of disputes. If we only talk to “people like us” we become narrow and blinkered in our views – to the detriment of our practice, to mediation and, most importantly, to the parties.

Let me give you an example of what I mean – Coman case...

The MII is not against professional development – nothing could be further from the truth. Indeed the annualised Continuing Professional Development requires not only

annual attendance at relevant courses but also requires minimum practice hours and minimum reflective practice hours. The MII encourages its members to upskill in areas in which they practice and provides CPD courses to enable them to do so. We encourage reflective practice and the establishment of Sharing and Learning groups. Again it is important that there is a mix of types and experience of Mediator in these groups – so the attendees shouldn't all be from one organisation, from one training group or doing one type of work as the learning will be much more limited than in a diverse and mixed group.

A group of mediation bodies has been established in these islands and we are reviewing how professional bodies should move forwards. I am delighted to say that it is acknowledged that the MII is in advance of the other bodies both in terms of its approach outlined above but also in terms of the professionalism of the organisation, its structures and its governance. We have made our documents available to other bodies and encouraged them to take from them what they wish and if they believe they can improve on them to let us know. We must however not become complacent and this next year will see us reviewing both our By Laws and our Code of Ethics and Practice. This will be done through a consultative process with our members to ensure all viewpoints are heard.

It is interesting to note that there is a steady increase in complaints being made to us by members of the public about Mediators. This reinforces our view that there has to be an outlet for complaints which only a professional body can provide. The MII has an independent regulatory system for dealing with complaints and disciplinary matters so that we are not sitting in judgment of ourselves. As we have seen with other professional organisations, self-regulation can leave a lot to be desired.

Legal Landscape

The legal landscape of mediation is changing rapidly. The European Directive governing civil and commercial cross border-mediations was introduced to Ireland in May this year – it was enacted almost word for word in line with the Directive – no doubt to leave room for the much more detailed piece of legislation that will be introduced arising from the Law Reform Commission's Report. Ms Justice Catherine McGuinness will be addressing this topic in her keynote address in a few minutes so I won't dwell on it, but suffice to say it is incumbent on all Mediators to be aware of

the legal and statutory framework in which they operate. At this point in time, the legal provisions in force differ depending on whether the dispute you are mediating comes under the Regulation or not.

A worrying development is the fact that whereas confidentiality of mediation is now enshrined in the Regulations (and hopefully in the new mediation legislation) except for a couple of clear exceptions, in the Multi-Unit Developments Act there are provisions whereby a Mediator may be asked to report on a mediation to the Court and their report may affect the level of costs awarded in a particular case. This is a really worrying development as it flies in the face of one of the fundamentals of mediation and of policy in relation to mediation. We must be on the look out for such anomalies so that they can be corrected in subsequent legislation.

Cost of Disputes

Last year I reported that in 2009 civil and commercial cases covered by the Courts Service cost the parties in or around 1.2 billion Euro – I calculated that figure from statistics from the 2009 Annual Report of the Courts Service. The formula I used was taking costs claimed by the winning party x 2 to get the costs of the cases that went to court and then multiplying this up to take account of the fact that 90% of cases settle before Court. Using the same formula on the statistics from the Courts Service Annual Report for 2010, the figure of costs claimed in 2010 can reliably be estimated at 1.3 billion Euro. ie an increase on last year.

In the High Court 27,215 cases were issued in 2010 (last year it was 27,465) and in the Circuit Court the number for 2010 was 43,587 (last year it was 44,266). Clearly the mediation message is not getting through and we need to ask some hard questions as to why.

In 2010 the European Parliament's Committee on Legal affairs commissioned a report entitled "Quantifying the cost of not using mediation – a data analysis". The authors were Guisepppe De Palo, President ADR Centre, Ashley Feasley ADR Centre, and Flavia Orecchini ADR Centre and they reported in April 2011.

They say that there is a mediation paradox – there is a well documented high success rate in specific cases where the disputants engaged in mediation but these

successes are extremely limited in number. The paradox is that despite the fact that the use of mediation yields highly successful results, mediation is rarely used in a systematic way by disputants or lawyers. De Palo and Orecchini suggest that, given this continuing pattern, there should be an extensive publicity campaign to broaden the public's awareness about the values of mediation. They further say that filling the void in public knowledge about the cost and time saving benefits was an important motivation to them in carrying out their study.

The study surveyed legal experts in 26 member states of the EU to establish the cost of not using a two-step dispute approach – mediation first and then court if mediation is unsuccessful – and comparing this to a one-step approach: ie. going straight to court.

Using data from the World Bank *Doing Business Report 2009* – the time it takes to resolve a claim through litigation in Lithuania is 275 days, while the longest of the EU countries was Slovenia with 1290 days. In Ireland the equivalent figure is 515 days. Time is recorded in calendar days, beginning from the moment the plaintiff files the lawsuit in court until enforcement of the judgment.

The equivalent cost figures show Luxembourg as being the cheapest at 9.7%, the most expensive being Czech Republic at 33%. Ireland's equivalent figure for cost was 26.9%. These percentages are costs recorded as a percentage of the claim. So the costs in Ireland in running a court case is 26.9% of the amount of the claim.

The study then calculated the breakeven point for two countries, Belgium and Italy – what they were trying to establish was when did the two-step and one-step approach break even in terms of time and cost.

They found that, in terms of time in Belgium, if the mediations were successful in more than 9% of cases there was a saving of time spent in resolving the dispute. The higher the success rate of the mediation the greater the time saving. In Italy the breaking point on time was only 4%, so if more than 4% of mediations were successful there was a time saving in dispute resolution. The more successful the % of mediations the greater the time savings.

Turning then to the costs in Belgium the Report states that the breakeven point is at 44%. So if there is a higher than 44% success rate in the mediations there will be

cost savings of a mediation two-step approach over a one-step litigation approach. The equivalent figures for Italy are 28% - so if more than 28% of mediations are successful then there are cost savings.

I have no doubt that all Mediators have known this in a very general way but it is good to have the more scientific approach to “prove” it. Of course the items here measured were time and cost. The other costs associated with dispute resolution – management time, other advisors, stress, ongoing relationships and quality of outcome would also benefit from a greater use of mediation.

The MII has been involved in raising the public profile of mediation and of encouraging stakeholders, dispute gatekeepers and the public to try mediation - we are making slow progress but we are hopeful with the mediation legislation there will be a change of attitude. Indeed if the State as party to between 40 – 50 % of civil litigation was to adopt an alternative dispute resolution pledge or commitment, it would make a marked difference to the dispute resolution landscape. We hope to work with Government in this regard.

Thank You

I would like to take this opportunity to thank Council and all committee members who have worked so hard during the last year – it is absolutely amazing the amount the MII achieves as an organisation which is, in the main, a voluntary body. Thank you too to Deirdre Conway – Deirdre is our part-time administrator and does more in that time than many of us would do in a day.

And finally to all members and attendees at the conference – I hope you have a really useful and informative couple of days and that you also take the time to network with other Mediators.

Thank you.

Karen Erwin

President MII