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### The regulatory robustness rating in practice: Part 3

Nadja ALEXANDER

*Singapore Management University*, [nadjaa@smu.edu.sg](mailto:nadjaa@smu.edu.sg)

Sabine WALSH

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# The Regulatory Robustness Rating in Practice: Part 3

Kluwer Mediation Blog

August 25, 2016

[Nadja Alexander \(Editor\)](#) ([Singapore International Dispute Resolution Academy](#)) and [Sabine Walsh](#) ([Sabine Walsh Mediation](#))

*Please refer to this post as: Nadja Alexander (Editor) and Sabine Walsh, 'The Regulatory Robustness Rating in Practice: Part 3', Kluwer Mediation Blog, August 25 2016, <http://mediationblog.kluwerarbitration.com/2016/08/25/regulatory-robustness-rating-practice-part-3/>*

Yes, here it is. The final part of the Regulatory Robustness Rating (RRR) trilogy. For those of you who are just picking up the RRR topic for the first time, you might like to check out [Part 1](#) and [Part 2](#) first.



You will recall that the aim of the Rating System is to offer an indication of the regulatory robustness of a jurisdiction in relation to cross-border mediation. It is not an indicator of the popularity of mediation or the amount of practice in a jurisdiction. The RRR takes the perspective of mediation users, i.e. what is likely to be important for parties and their legal advisers in assessing the how mediation is regulated in a given country.

In this post, Part 3, I will focus on apply the RRR System with the help of fellow blogger, Sabine Walsh. We will apply the System to Ireland. In other words, we will examine the regulatory robustness of cross-border mediation in Ireland.

You will recall from Part 2, that there are 12 criteria to consider. For each criterion in awarded a star rating of up to five stars. However because not all criteria are equal from a user's perspective, they are weighted. Each criterion has a weighting of either one, two or three with three indicating that the criterion usually holds greater importance from a user perspective.

Before we get to the actual Regulatory Robustness Rating, let's start with a few comments about cross-border mediation in Ireland.

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 RRR highlights the strength of areas such as mediation infrastructure and services, the relationship of the courts with mediation services and the court's positive attitude to mediation. Regulatory areas desiring high levels of flexibility such as insider-insider confidentiality also score highly on the star scores. However in terms of transparency and clarity of content of mediation laws, we see a different story. The laws on insider-outsider and insider court confidentiality suffer from a lack of certainty and predictability. While the long awaited Mediation Bill, if it is enacted, will certainly increase the regulatory robustness rating of Ireland's framework, it will be interesting to see whether it has the same impact on boosting the use of mediation as the change in culture, and the tireless efforts of numerous bodies and institutions to raise awareness of mediation have.

The RRR for Ireland is set out in the table below. You will notice that there are four columns. The first column identifies the criterion. The second column describes the application of the criterion in the given jurisdiction. This is a very brief and basic description that enables the RRR to be presented in a tabular form so that readers can benefit from an overview of the jurisdiction's regulatory framework. The third column shows the star rating (from 1 to 5) and also indicates the weighting given to the criterion. The fourth and final column multiplies the star score and the weighting to come up with the RRR for that criterion. This way readers can see how the various calculations have been made. Should the situation arise where users place particular importance on a certain criterion and less on others, they are able to adjust the weighting to suit their needs and this will give them an ultimate rating that better reflects their needs and interests.

You will note that there is no single final score. There is a good reason for this. If you conducted the RRR analysis with say four countries and gave each an ultimate rating, then less attention would be paid to the individual criteria. Further, the RRR would turn into a competition and countries would be ranked by their overall score only. The RRR is not a competition. It's a tool for analysis and it's important to look at the individual criteria and the star scores and weightings allocated to each one. Then if you are still interested in finding out more about that country, you have a framework for doing so, and you know what to look for.

So let's take a look at Ireland.

Criterion	Jurisdictional description	Star score and weighting	RRR
1. Congruence of domestic and international legal frameworks	Lack of specific legal frameworks for international and domestic mediation. Existing frameworks are piecemeal and contain potentially contradictory elements.	★★ Weighting: 1	2
2. Transparency and	The law applicable to mediation is	★★	3

<p><b>clarity of content of mediation laws in relation to:</b></p> <ul style="list-style-type: none"> <li>• <b>how mediation is triggered</b></li> <li>• <b>the internal process of mediation</b></li> <li>• <b>standards and qualifications for mediators</b></li> <li>• <b>rights and obligations of participants in mediation</b></li> </ul>	<p>identifiable or accessible in some of the four listed content areas. It is however underdeveloped and difficult to access in others and there is substantial potential for confusion.</p>	<p>Weighting: 2</p>	
<p><b>3. Mediation infrastructure and services: quality and access</b></p>	<p>Well developed and good quality mediation services and infrastructure.</p> <p>Transparent mediation/QA standards exist the main mediation bodies which also have a complaints and disciplinary process.</p>	<p>★★★★</p> <p>Weighting: 3</p>	<p>12</p>

	<p>Mediation services are mainly offered independently and there is some integration with existing dispute resolution structures such as state dispute resolution bodies.</p> <p>Mediation services are easily accessible.</p>		
<p><b>4. Access to internationally recognised and skilled local and foreign mediators</b></p>	<p>There is a nationally recognised pool and some other pools or pools primarily of local mediators, who are both appropriately qualified and skilled.</p> <p>These mediators are permitted to work across most mediation services in the jurisdiction.</p> <p>There is some uncertainty about how foreign mediators can join, though it is likely they can</p>	<p>★★★★</p> <p>Weighting: 2</p>	7

	can.		
	<p>Users have recourse to complaints and disciplinary processes.</p> <p>It is easy users to access the local pool; it takes more effort and usually some word-of-mouth recommendations to access foreign mediators.</p>		
<b>5. Enforceability of mediation and MDR (multi-tiered dispute resolution) clauses</b>	<p>The general law of contract seems to support the enforceability of mediation and MDR clauses. Jurisprudence is still emerging but the general attitude of the courts would appear to show support for the enforceability of such clauses.</p>	<p>★★★★</p> <p>Weighting: 3</p>	11.5
<b>6. Certain, predictable regulation of:</b> <b>i. insider/outsider confidentiality with</b>	<p><u>Insider/ outsider confidentiality</u></p> <p>Limited formal mandatory regulation of insider/outsider confidentiality exists but not</p>	<p>★★★</p> <p>Weighting: 2</p>	6



confidentiality with  
some flexibility  
ii. insider/court  
confidentiality

in relation to all mediation participants. Where formal regulation does not apply, the general law applies to interpret such obligations in mediation agreements. In general the approaches taken in different regulatory instruments are aligned in terms of content leading to some predictability on this issue. Courts generally recognise insider/outsider confidentiality.

#### Insider/ court confidentiality

Little formal regulation exists mainly in relation to mediators, and where it does contains some contradictory elements. Mediation agreements contain provisions in this regard which are subject to general law and likely to be recognised by the courts. The regulatory situation leaves room for inconsistency and variations in interpretation however. Where formal regulation does not apply, the general law applies to interpret mediation agreements.

7. Responsive

Insider/insider confidentiality related to the



4.5

<b>informed self-regulation of insider/insider confidentiality</b>	<p>internal conduct of mediation and is subject to party autonomy. This permits parties to tailor this form of confidentiality to meet their needs. Some regulation exists in soft form but is default in nature (information is confidential unless agreed otherwise) and can be varied by agreement. It is the practice that mediation agreements expressly provide for insider/insider confidentiality on a case by case basis.</p>	<p>Weighting: 1</p>	
<b>8. Enforceability of MSAs and iMSAs</b>	<p>There is a limited range of legal forms for MSAs / iMSAs. Criteria applicable for the recognition and enforcement of MSAs / iMSAs depend on the legal form chosen and vary in terms of clarity and transparency.</p> <p>When documented in the appropriate legal form, MSAs / iMSAs are generally recognised by the law and are generally enforceable in the courts.</p>	<p>★★★ Weighting: 3</p>	<p>9</p>



	<p>The scope for challenges to the enforcement of MSAs / iMSAs depends on the legal form adopted. The lack of cases before the courts means some uncertainty around how courts may deal with the enforceability question.</p>		
<p><b>9. Impact of commencement of mediation on litigation limitation periods</b></p>	<p>Commencement of mediation may suspend litigation limitation periods, however different rules apply depending on which law applies and some action may be needed from the parties to ensure this. There is inconsistency in regulation on this issue.</p>	<p>★★★ Weighting: 1</p>	<p>3</p>
<p><b>10. Relationship of courts to mediation</b></p>	<p>Courts are largely supportive of mediation and have access to some formal effective and transparent referral processes to mediation.</p> <p>Informal or ad hoc referral procedures to divert cases into mediation exist also and</p>	<p>★★★★ Weighting: 2</p>	<p>8</p>

	both these and formal processes are used enthusiastically by the courts.		
<b>11. Regulatory incentives for legal advisers to engage in mediation</b>	Few incentives for legal advisers to inform clients about and recommend mediation exist, mainly in sector specific contexts and some in soft form, but there is increasing evidence of legal advisers recommending mediation to their clients nonetheless.	★★★ Weighting: 1	2.5
<b>12. Attitude of courts to mediation</b>	<p>Courts considered pro-mediation. Many courts have demonstrated through jurisprudence that they recognise and are prepared to enforce mediation agreements MSAs and other mediation protocols and processes that comply with the regulatory requirements.</p> <p>Policy makers have yet to address weaknesses in regulation exposed by the courts.</p> <p>Increasingly courts and judges will refer to mediation in public communications in a way which indicates their support for the process.</p>	★★★★ Weighting: 3	12

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Remember the RRR System offers an indication not a comprehensive analysis. It gives users a helpful starting point for finding and analysing the law applicable to cross-border mediation in any jurisdiction.

For example, if you are a lawyer looking to identify suitable laws for your mediation clause, you might use the RRR System to identify three jurisdictions with high regulatory robustness ratings. The RRR System should not be the only indicator in making an informed choice about the governing law and jurisdiction. But it might provide a starting point for you to do some further research to look more closely at these jurisdictions for the purposes of identifying governing law and jurisdiction for your mediation clause.