

What Does it Take to Try Mediation?

Kluwer Mediation Blog
May 30, 2020

Sophie Tkemaladze (Resolve / New Vision University)

Please refer to this post as: Sophie Tkemaladze, "What Does it Take to Try Mediation?", Kluwer Mediation Blog, May 30 2020, <http://mediationblog.kluwerarbitration.com/2020/05/30/what-does-it-take-to-try-mediation/>

Crises by the name COVID19 has caused disruption in many areas of life, which could and often is the source of tensions and disputes. It was therefore natural throughout this period to be hearing calls and hopes for cooperation as well as calls for embracing mediation. Indeed, if there is wrong time to play the blame-game and litigate - it is now. It is in this spirit that I and my like-minded colleagues launched a project supporting COVID19-affected businesses prevent, manage and resolve their disputes.

The idea sparked when, couple days after all the beauty salons closed down, I got a call from a friend (who runs spa business) asking for legal advice on her entitlements and courses of action under the rent agreement. The concern was not so much what to do now, but how would things look like when COVID19 is over? Given the tensed relationships with the owner, she wanted to know whether she was entitled to renegotiate the terms and be exempt from the burden of paying the rent during the shutdown. In the weeks that followed many law firms published legal notes on force-majeure and many spoke on TVs and webinars explaining rights and obligations of the parties in such "changed circumstances" be it in the context of employment, rent, construction, transshipment or other types of legal relationships.

The natural thought for us - mediators - was: these should be negotiated between the parties; and engagement of a skilled neutral (mediator/facilitator) can help make these negotiations productive. Not because we see this as opportunity for us to have cases to mediate; for me and my mediator friends and colleagues mediation (fortunately and unfortunately) is what we do out of passion without much (sometimes any) financial return. The idea was driven solely out of the belief that engaging in legal disputes in these circumstances will not only not help, but it will harm finances and, even more importantly, the relationships, and that giving a try to mediation is, if nothing else, smart.

Swiftly, together with my partner at Resolve and my colleague at Georgian International Arbitration Center (GIAC) we developed a concept offering the services of skilled facilitators/mediators to COVID19 affected businesses, who would want to either renegotiate their contracts, or, if already in dispute, try and resolve them in mediation. The dilemma was: how to get businesses try something new (facilitation/mediation) in these difficult times particularly if they had to bear extra cost for that. We therefore approached EU/UNDP joint project in Georgia which saw the project's value in mitigating the impact of COVID19 for businesses, and agreed to subsidize the costs by paying 1 day fee of a mediator/facilitator in any one case (until the budget limit was reached). In addition, GIAC lifted all administrative fees for its mediation services within the framework of this COVID19 project. This way, there was no financial burden/obstacle whatsoever for potential beneficiaries to give mediation a try.

Who would not want to take advantage of this opportunity, right? Indeed, most frequent feedback from people who learned what the project offered was: "Wow, do you have enough skilled neutrals?", "You will be overflowed with cases!", "Everyone will want to use it - how many can the project handle?" Well, after a month of its launch I can confidently lift all those concerns since no single case has been filed within the project yet.

This gives some food for thought - why are there 0 applications? Is it that everyone is smoothly cooperating? Is it that they are managing the situation on their own? And/or is it that they do not know about this opportunity? Or do not know enough? And/or something else?

We neither aim at nor anticipate massive referrals. The goal of the project is not to have many cases; the goal was and is - to provide assistance if and where it is needed. But to know whether the project is serving its goal we need to analyze the situation and think of the answers to the questions above. Below I share my thoughts and observations on the same:

- I would like to think that COVID19 has impacted the society in a way that people are becoming less adversarial and competitive, and more cooperative to overcome this common challenge. That might be the case to certain extent... hopefully. But I do hear, especially now that the measures are being gradually lifted, of situations where parties are resorting to defensive and rights-based approaches. I therefore am not ready, at this stage, to accept the probability that there is no need for the project.
- Information sharing on social media and through email lists is not enough. I recently spoke at a webinar, all participants of which were informed about the project by email when the project was launched. Nevertheless, when I mentioned the project "in live" stream, an array of questions came, which go beyond what the brochure or video provide. I realized (what should have been obvious otherwise as well!) that mediation is a new concept and users want to know beyond what the paper says it is; they want to hear first hand HOW it works. We are now planning more small-group webinars/meetings/Q&A sessions with representatives of different sectors.
- There were about four occasions when a certain company would approach to learn more about the project, was interested in the opportunity, but has not applied yet. The discussions with those companies showed that the challenge they saw was in persuading/offering the process to the other side. Skepticism, ego issues, and fear of appearing weak tend to be hindering willingness to try, even when no other objective barrier exists.
- Of course lawyers may play key role in informing and advising clients of this opportunity; for the purposes of this project we are not considering taking special measures since a lot of work is already being done (beyond this project) to raise awareness (and goodwill) of bar members towards mediation; overall, if there is one group which knows "what we are talking about when we are talking about mediation and this project" - are external lawyers. Instead, we will take efforts to target in-house counsel, but again, to give them a deeper level understanding of how the process works.
- Nothing is nearly as effective as one's own experience of mediation, and then - the word of mouth (of personal experiences). Our practice within the court-annexed mediation shows that parties and counsel who have tried mediation, come back, and/or advise others to try it. The challenge is that there are not many such companies and lawyers yet who know - first hand - what value it may have. Hence, we need a bit of patience and first handful of cases. I am sure that in a society small as Georgia, it will not take long till the word spreads out (from users themselves) that mediation is worth a try.
- Finally, COVID19 measures are only now being lifted and businesses are just starting to go back to operation; it is likely that the questions of how to handle the losses, risks and obligations will start surfacing now. Hence, it might be that this is just the right time to make the project opportunity available.

Reflecting on the status quo of the project at this still early point of life gives time and opportunity to work out other interventions to ensure that the project opportunities are utilized. I will be happy to hear other thoughts and experiences on what can we do to enhance the chance that those who might benefit from neutral's engagement give it a try. On my side, I will report later this year to what extent these observations were valid, what worked and what did not.