Effective mediation promotion - use of mediation by public institutions

June 14, 2021

I wonder how many countries have public institutions that usually use mediation services to resolve disputes in which they are parties. I am not referring primarily to disputes between members and states, but to any dispute where a public institution is a party that everybody values litigation with high financial costs, even in situations where it is evident that the outcome will be negative. Why? Because the legislation is such that the implementation and conclusion of agreements are more associated with the state of our regulation rather than with risk management and creativity, and win-win solutions. Even if the benefits of mediation are recognized and much acclaimed by policymakers, it seems that the legislation is adopted instead for citizens and the private sector, with few exceptions, the disputes with public institutions not being taken into account. These cases are something missing.

Adoption of the legal framework for mediation

Many countries have created a high framework for mediation to ensure the quality of mediation services and mediators responsible for managing mediator accreditation systems. Still, a few exceptions (i.e. Italy), the legal framework to seek lawsuits is oriented more towards the “supply” side than the “demand” side, but this is not the main topic of this post (obviously, the comments are good here on this topic as well).

The main reasons cited by policymakers in adopting mediation legislation are promoting a culture of changes, designing the role of courts, and solving the focus from the number of cases resolved in the courts to the number of disputes resolved outside in mediation. As an example of good practice, we mention here the opting-out model successfully implemented for several years in Italy, creating a mediation culture for the public sector. Last but not least, effective public policies start from the establishment of effective mechanisms for data collection and monitoring of mediation quality.

The reduced use of mediation by the public sector may also discourage citizens and the private sector, that what are the reasons why mediation is not on the “menu” of public disputes

However, if we look closely, it appears that mediation is not used by public institutions in many countries, even if its benefits are recognized. For example, the Romanian Parliament adopted the mediation legislation in 2006 because from January 1st 2007, Romania became a European Union Member State, and many governments and public institutions may be encouraged to mediate. I open the conversation with three possible causes, which I briefly describe below – the fear of corruption, the financial audit of public institutions, and the unfavourable legal framework.

Corruption

For mediation to be accepted by the public sector, a lot of integrity and transparency is needed. We need to remember that mediation happens in a confidential setting, which runs counter to the transparency necessary for the public sector. Moreover, in countries where the Corruption Perceptions Index (CPI) is a low value, as is the case of Romania compared with the other Member States of the European Union, a favorable legal framework is an important incentive to avoid non-compliance from the public institutions. In Romania, the public sector will be at a disadvantage if and when the private sector and other states conclude agreements that the public sector is not prepared to be bound by the court, even if this practice is done at the expense of those who pay taxes.

Public financial audit

But not only the fear of corruption can be a contributing factor to the reduced use of mediation by public institutions. The fear of not being investigated by the authorities responsible for the financial audit of institutions and civil servants may be another factor. Again, in the absence of a coherent and favorable legal framework for mediation, generates a phenomenon of non-responsibility in decision-making on dispute resolution. This way, the courts take these decisions binding on all parties involved, the real loser being the public institutions responsible for managing mediator accreditation systems. With a few exceptions (i.e. Italy), the legal framework in most countries is oriented more towards the “supply” side and less towards the “demand” side, which relates to the high possibility of settling the dispute more efficiently with less financial costs and time resources compared to other means of resolution, such as arbitration or the traditional court litigation.

Policies that establish that the courts have authority

Perhaps one of the most important reasons for the minimal number of public disputes resolved through mediation is the lack of a favourable policy and a legal framework to encourage public institutions to use mediation services. We are referring to the facts that the public sector does not usually initiate or accept mediation, and not because it lacks mediation clause in public contracts. Often, the unacknowledged clause in these contracts is merely a theoretical possibility. As an example of great practice, we mention here the opting-out model successfully implemented for several years in Italy, creating a mediation culture for the public sector. Last but not least, effective public policies start from the establishment of effective mechanisms for data collection and monitoring of mediation quality.

Conclusion

Indeed, much can be said about this subject. Certainly, the adoption of laws does not create realities. Instead of adopting laws focused mainly on the “development of the mediation offer,” it would be helpful to say the necessary framework for encouraging the use of mediators, primarily by the public sector, which, through its attitude, will send a powerful signal to citizens and the private sector. A good example, mediation promotion, or in any other activity supported by public funds, should be a condition to obtain such funding. Hence, mediation services and mediators would be globally supervised by the authorities responsible for ensuring that disputes with public institutions are settled.