Kluwer Mediation Blog

A False 'Prince Charming' Keeps 'Sleeping Beauty' in a Coma: On Voluntary Mediation Being the True Oxymoron of Dispute Resolution Policy

Giuseppe De Palo (ADR Center) · Tuesday, April 15th, 2014

The recent publication of a study conducted for the European Parliament on Mediation, "Rebooting the Mediation Directive," has contributed to the ongoing debate about effective mediation policy. I am the coordinator of that Study, whose results were based on 816 questionnaires completed by respondents from the 28 member states of the EU.

The Study determined that mediation in the EU is still the "Sleeping Beauty" I first heard about when I decided to enter this field 20 years ago. Despite many decades of stagnation, renewed enthusiasm and repeated efforts to revive her, the consensus seems to be that our princess is more than just asleep. The Study concluded that unless "elements of mandatory mediation" are introduced by law, Sleeping Beauty will not wake up, at least in the EU.

In a thought-provoking article, "What Went Wrong With Mediation", my long-time friend and colleague Adi Gavrila discussed, amongst other things, this Study. In this article, I would like to correct Adi's errors on some material aspects of the study and address other arguments he makes. My discussion will hopefully explain the title for my article, which I devote to all those who are placing their hopes on a false Prince Charming.

"What Went Wrong" is correct that promoting mediation solely by endorsing it as an alternative to overcrowded courts and expensive lawsuits is the wrong approach. Certainly though, mediation has been proven, repeatedly, to save time and money (the Study shows that close to €20 billion per year could be saved if mediation were always used, even with only a 50% success rate.) However, the article's contention that "introducing mediation as a way to ease the load of courts has backfired" seems unproven, especially if one considers the following: systems where lots of mediations take place (normally because of "mandatory elements" in the regulatory framework) see no increase in problems, or are even seeing improvement, while in systems where mediations are not happening people debate whether mandatory elements should be introduced.

While easing the strain on overcrowded and overburdened courts is clearly one of many valid reasons to promote mediation, it is not the only reason. Readers need not be told about the many benefits an increased use of mediations would bring. Still, if the issue here is one of "marketing mediation", as my colleague Adi points out, one should promote the message that is the most likely to prompt politicians to act, especially in a time of economic downturn, given the lack of spontaneous embrace of mediation by its users.

The argument I find most unconvincing in “What Went Wrong” is that “increasing the number of judges to deal with the extra load” would be the best solution. This seems to overlook that, as economists state, “justice is a superior good”, i.e., the richer a society gets, the more it demands. From this point of view, an increase in the number of disputes is a good sign, as it signals that a given society is richer. Even if one were to add more judges (assuming that the economy was the opposite of what it is nowadays), there likely would be even more disputes. An analogy I find useful to explain this concept comes from traffic. Increased traffic is a drag, but it normally means increasing business. The issue, then, is not to hope that there would be fewer cars on the street (or, fewer disputes), but to govern traffic, incentivizing certain avenues and de-incentivizing others. If one just adds more streets or parking spaces, more cars will hit the road.

I also disagree where, in reference to the Study, my colleague states that supporters of mandatory mediation are self-interested mediators. First of all, a large number of respondents were not mediators. Second, several respondents were against mandatory mediation and even those who favored it noted the potential push-back mandatory mediation could confront. Third, and most importantly, the Study does not support mandatory mediation. Rather, the Study maintains that “mandatory elements” are necessary for the success of mediation in the EU and, notably, that the best system (both in terms of performance and support from respondents) is one of mandatory mediation with the possibility of opt-out at the first meeting with the mediator. The Study suggested a “smarter” form of the increasingly common mandatory mediation information meetings, which are simply proving to be of little effectiveness.

The article goes on to say that “mandatory mediation is a sort of oxymoron – nobody can force people to negotiate.” Here my disagreement could not be greater, as a matter of both law and practice. First, laws requiring litigants to exhaust pre-litigation processes have existed in the US for over 100 years, and passed Supreme Court scrutiny. The European Court of Justice also held that mandatory mediation is consistent with EU law so long as it serves a general purpose and does not make access to the judicial system too burdensome. Second, as a matter of practice, what is a more legally intolerable obligation to negotiate: being “forced” by law to sit down and talk with a mediator (with the possibility of opting out at little or no cost), or being “de facto” obliged to settle right way to avoid spending a fortune in legal fees, and waiting for years, as happens in countries where fewer than 5% of the civil disputes get to trial? Third, and most fundamentally, requiring people to think about the possible benefits of negotiating is different from requiring them to negotiate.

My colleague argues that policymakers and mediators “have made an unholy alliance to force people into using a service they haven’t particularly liked or found useful.” I have no evidence of this plot, but certainly that is not the mediation model the Study recommends: if parties do not find mediation useful, or they do not like it, they are free to opt-out and seek recourse through the court system. But at least they have to give the process serious consideration by showing up. Is that too much to ask of citizens who do not want to pay extra taxes and, at the same time, want access to a better dispute resolution system?

I have been using the seat belt or helmet law example for quite some time now, to explain why it is naïve to keep blaming “lack of culture” for the limited use of mediation. Based on the definition of justice as a superior good and on the well-known “fight or flight” animal response to an attack, I argue that the human being’s initial, natural response to a legal conflict is not mediation, but litigation–despite the fact that, overall, often the better approach, is an amicable process. My point is the following: people know that wearing a seat belt or a helmet is good for them (and society);

still, we have laws compelling that behavior. A “culture of safe driving” alone won’t do it.

Similarly, human beings suffer from well documented biases that would lead the majority of them not to insure their vehicles, even if that is an economically irrational choice. Adi says that my analogy compares things that are not comparable, because people have the choice to litigate or not, but not that of buying insurance (or wearing a helmet on motorbike) or not. I think it is plain that people do have a clear choice in both cases, and it is actually very similar: taking the risk of losing in court, or that of being caught by the police.

To explain this to those still sitting tiredly on the old adage “you can lead a horse to the river, but you cannot make it drink” (i.e., you can force people to consider mediation, but not to settle), please allow me to resort to the example I used presenting the Study before the European Parliament: “lead millions of horses (i.e., all your civil disputes, or categories of them) to the river, calculate the benefits resulting from those that drink and the losses from those that did not, and then decide what’s best for the majority”. And don’t forget, at least in the Study recommendation, all horses are free to turn away (‘opt out’) once they are at the river!

I would add another piece on the Study, which is the recommendation on experimenting with “mandatory mediation with opt-out” by not introducing it full scale right way. This approach is already being used in diverse locations, such as Italy (four year trial) and the Manhattan Commercial Court of New York State (18 month trial).

Another argument in “What Went Wrong” is that mediation is not being used enough because mediators have failed to market it correctly. My colleague states that “taxpayers in a democratic society, [have a] right to unrestrained access to justice.” I disagree. First, access to justice is not unrestrained, nor is it fully sustained by the litigants’ own money as is claimed. In Adi Gavrila’s country Romania, for instance, according to the 2014 CEPEJ report, the state only receives 13% of court costs from litigants, compared to 30% for the EU as a whole. The remaining 87% of the costs are born by those who do not litigate. Would Romanian citizens prefer an increase of about 800% of fees, so as to pay in full for the service they get, or would they rather try a (smart) form of mitigated mandatory mediation? In addition to that, would Romanian lawyers be more opposed to this particular form of mediation, or to almost tripling the current court fees, so as to reach the EU average?

Adi next states “that, if people really want something, they are ready to pay the price for that.” The very high premium, over actual production costs, that consumers pay for certain consumer products is his example. This statement seems to assume that human beings are perfectly rational resource “optimizers”. Behavioral economics and neuroscience have shown us that this isn’t the case at all. Translated into the field of mediation, if people don’t really want mediation and they were in fact perfectly rational, as Adi assumes, why would people “forced” to mediate settle one out of 2 cases (as is the case in Italy today)? Or why in the US would similar foreclosure mediations programs register 25% take-up, when the system is “opt-in”, and over 70% when it is opt-out?

All that said, my answer to the question of “What Went Wrong with Mediation” is straightforward, and that is, mediators who claim that the “mediation romance” is over, but, jaded by the failure of their romantic vision, wish to keep the princess asleep rather than wake her. They are unwilling, or incapable, to accept the reality that efforts such as the ‘Rebooting’ and other studies have been presenting for a number of decades now: the voluntary approach is a false Prince Charming, as far

as dispute resolution policy is concerned. People are not enchanted by the vision of mediation, and the princess must be awoken by other, real-world means. Smart forms of mandatory mediation—a more flexible approach than most recognize—increase the number of mediations. Rejecting that reality, and wishing that a more idealistic approach would work, is the fairy-tale, idealistic vision that has kept us in the situation we confront today for too long.

Adi and I discussed this at length by now, and we do fully agree on something. Sleeping Beauty needs her magic kiss, and the mediation world needs a tournament of all its best knights, that is, discussing new ideas, no matter how diverse. Let's make the newly proposed Global Pound Conference the place where all those knights work together to wake the princess up … there will be plenty of mediators there to settle the issue of who should then marry her.

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