Kluwer Mediation Blog

Don’t rush

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There is a lot of talk nowadays about the apparent failure of mediation to live up to its potential. Reports published on paper and online, presented before institutions or at various conferences, point to the relatively low number of mediation cases compared to the number of lawsuits filling the logs of the courts and then draw the inevitable conclusion that mediation has missed the opportunity of (be)coming mainstream. Future of mediation is bleak, say a lot of experts, at least as much as there will be no measures taken to mandate the use of mediation prior to filling a lawsuit. Constraining people to choose mediation (or, at minimum, attend a first session in good faith – only God knows how „good faith”can be measured in an objective way!) is quickly becoming a rallying flag for many mediators that are progressing thinking for better mediation policies.

Our esteemed collegues correlate apparently low number of mediation cases to the principle of voluntary use and see the solution by reversing this principle. Simply put, their thesis can be summarized like this: if voluntary use of mediation results in low number of mediation cases, than it is only logical that mandating people to use mediation will increase the number of mediation cases. They point to the examples from some countries that have introduced various forms of mandatory use of mediation and, consequently, the number of mediation cases have increased substantialy. No reason to wait any longer, they say, the numbers show mandatory measures a success, therefore we should all press the legislators in all countries to introduce them as the only safe and sure way to make mediation function at the level of its true potential.

This article may be of interest for many, including mediators, users, educators and policy makers, as it shows how statistics and numbers can become deceiving in a goal setting context and how can ”false” goals burry fundamentals and create disastrous effects on the long term. It also argues for patience in implementation of mediation and invites to caution when using numbers to design policies that can affect the lives of millions.

Our article depicts the Romanian experience of mandatory measures, in this case the requirement of parties to attend a mediation information session prior to filing a lawsuit, and their (un)intended consequences. Some may question the wisdom of drawing a general conclusion from just one particular situation, and we do agree with them. Our aim is not to prove mandatory measures as an inept strategy for promoting the use of mediation, but only to, again, invite caution when numbers look good, yet should be accompanied by many other perspectives in the attempt to make mediation work for all..

START: New legislation – Information sessions regarding mediation benefits

In July 2013, according to new developments of the mediation legislation field in Romania (Law no. 115/2012), the Claimant was required to prove that, before going to court, s/he has attended an information session with a mediator regarding mediation advantages. The requirement applied to a number of fields of law like family, commercial, civil and, to a limited extent, criminal cases. The evidence of attending such a session was to be made in the form of a certificate released by the mediator who provided the information session. According to the law, for their professional activity related to the information sessions regarding mediation benefits, the mediators couldn't ask for fees.

This development created a boost of optimism in the Romanian mediation community. At the time, a little over four thousand mediators were authorized by the Romanian Mediation Council to deliver mediation services in Romania. The community was about to double in size to almost ten thousand mediators by June 2014. One can see that a group of this size can be very effective in lobbying for better legislation.

A new piece of legislation (Governmental Emergency Ordinance no. 90/2012), with effect starting August 2013, created the sanction of case inadmissibility if the Claimant failed to participate at the information sessions regarding mediation benefits. As a result, many mediators begun to have cases, the lawyers and their clients started to use mediators and the judiciary was supporting this new way of filtering lawsuits. Without any doubt, the Romanian mediators started to become a daily presence in the people's lives. Out of over three million lawsuits in Romania, every year, estimates were showing that parties from 1,5 million cases were about to consider mediation in order to settle their cases every year.

This was all very promising, as the whole thing was addressing the goals set by the EU Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters – a facilitated access to alternative dispute resolution, promotion of the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

However, the coin has another side and the process had risks attached.

GO: Implementation

In principle, a program that aims to raise the education level of the collective mind is worth the effort. Moreover, when education is about change and new paths, in addition to the default education process, the educators have to deal with people's routine, habits and uncertainty that come with change. In this context, when sanctions are used as means to get change about, the opposite effect can come about.

This was what happened in Romania, starting August 2013. In addition to some cases where it worked very good, the process of mandatory information sessions regarding mediation benefits became formal and created real barriers for most cases. Because it was mandatory, it was not about the need of making informed decisions regarding using mediation, it was mostly for the purpose of getting the certificate from the mediator that allowed people to access the court.

Although it was supposed to be free of charge according to the law, the process involved burning of resources by mediators as letters had to be sent to the Defendants, meeting had to be organized

in the office of the mediators and papers had to be released. Some mediators didn't charge fees but most mediators found solutions to go around such a legal obligation created to make this accessible, but unfair for the mediator profession.

Therefore, in most cases, the Claimant and sometimes their lawyers would submit the request for mediation; the mediator would invite the Defendant to his/her office at a certain day; the Defendant would not answer or accept the invitation; the mediator would inform the Claimant regarding mediation benefits and release the precious certificate.

Unfortunately, both the Romanian Ministry of Justice and the Mediation Council didn't have a monitoring mechanism in place, prepared in order to create statistics that could have been of great value. So the whole system worked blindly.

Many complaints appeared along the way about the effectiveness of the system, about mediators that would solely aim for financial advantages in exchange for certificates, about lawyers that were also mediators and would act as mediators for their own clients and their adversaries, about parties that would reproach to the judge that he/she said that it will be free of charge and it wasn't, about judges that would start to ignore the whole system, and so on. Except for mediators, all of the others started to be united by one concern – how to get around the system in the most effective way.

The mediators were mediating a lot less cases than the ones going through the stage of information sessions, therefore, the most vicious impact started to get shape. People started to confuse mediation with the activities related to the preliminary stage of information sessions. Even worse, since they had to go through this stage, regardless of the information received from the mediators, they started to detach more and more from their self-determination.

At some point, more confusion came about. In order to have the mediator's monopoly put out, according to the Law no. 214/2013, the carrying out of the information procedure on advantages of mediation could be also performed by the judge, prosecutor, legal adviser, lawyer, notary, in which case it could be attested in writing. This led to a new, complex debate regarding the finesse of the law, the lengths of the rights created, the interpretation of the words used in the legal documents and about other things, any other than the fundamental discussion of stimulating people to freely choose to access mediation services for their own personal reasons.

STOP: The Romanian Constitutional Court's Decision

It was just a matter of time until somebody would say that, although full of virtues, mediation became a barrier of time, money and other resources in the people's attempt to access the courts. A petition to the Romanian Constitutional Court was filled and according to the Decision no.266 of May 7th 2014, the Romanian Constitutional Court found that both the Claimant's obligation to attend the information session regarding mediation benefits and the sanction of case inadmissibility are not constitutional.

From the Court's decision, we quote: "[…] Mandatory participation in learning about the advantages of mediation is a limited access to justice because it is a filter for the exercise of this constitutional right, and through the application of legal proceedings' inadmissibility, this right is not just restricted, but even prohibited.
23. Since there may be situations where natural or legal persons want to resolve their conflict exclusively in the court, the Court notes that the legal regulation criticized not allowed them to

assess for themselves whether or not they need this information. Free access to justice is the faculty of the individual to apply to a court to defend their rights or legitimate interests capitalization. Any limitation of this right, however small it is, must be duly justified, analyzing to what extent the disadvantages due to it not somehow outweigh the possible benefits. Both the Constitutional Court and the European Court of Human Rights state that "mere legal consecration, even at the highest, constitutionally level, is not likely to ensure its real effectiveness, as long as in practice the exercise of this right faces obstacle. Access to justice must be ensured, therefore, effectively and efficiently"
24. Accordingly, the Court considers that the preliminary mandatory procedure of information on the advantages of mediation appears to be a disincentive to obtaining citizen's rights in the courts of law. Furthermore, a procedure consisting in information on the existence of a law appears undoubtedly as a violation of the right of access to justice, which puts undue burden on litigants, especially since the procedure is limited to a duty to inform, and no actual attempt to resolve the conflict through mediation, so the parties briefing before the mediator has a formal character.
25. In the context of retained above, the Court finds that the obligation imposed on the parties, natural or legal persons, to participate in the briefing on the advantages of mediation, otherwise inadmissible the application for summons is an unconstitutional measure, the contrary to Article 21 of the Constitution."

Free Fall: Mediation No More

The image of an apocalypse is close to the way the market for mediation services looks like in Romania in January 2015. The only spasms we see now are internal, the ones from a limited list of topics of interest for the profession.

There are almost no requests for mediation services and the Constitutional Court's Decision was projected and "directed" in general public's eye as "mediation is not constitutional". Although Romania has an eighty hours standard for basic mediation training since 2007, the whole experience reopened the discussion about the quality of mediators and of mediation services.

The biggest challenge for us now, is to draw lessons from this experiment because is very easy for one to mix up the substantial side with personal interests and values. Here's a tentative list.

The goal of any act of parliament should aim for better understanding, respect and acceptance. The number of cases should improve consequently, as a result of the understanding, respect and acceptance.

The mandatory components of the legal frameworks of mediation come with high risks that are to be carefully assessed beforehand. Although numbers may rise, the practice is artificially sustained and if nothing else motivates the parties to ask for mediation services, they will completely forget about mediation if the mandatory components are revoked.

Any policy may work just fine in some places and not that fine in other places. We are different culturally. Therefore, institutions should take into consideration the cultural component as fundamental in assessing the effects of any possible rule.

The ongoing discussion about what needs to be done to advance mediation activities towards a higher level of understanding, acceptance, respect and use should include a strategic approach, with respect to collaboration, culture, stakeholders' interests and principles of mediation. Numbers are always useful, but shouldn't be relied upon solely, especially when sound, solid statistics in

mediation are still a thing of the future. More, mediation should be promoted with the needs of the people in mind, not as an argument for decreasing courts backlogs or taking a burden from the ever-thinner government budget.

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