

Kluwer Mediation Blog

Effective mediation promotion – use of mediation by public institutions

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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 investors and states, but to any dispute where a public institution is a party that eventually reaches litigation with high financial costs, even and in situations where it is evident that the solution will be negative. Why? Because the legislation is such that the negotiation and conclusion of agreements are more associated with the idea of corruption rather than with risk management and creative, 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. There seems to be something missing.

Adoption of the legal framework for mediation

Many countries have created a legal framework for mediation to ensure the quality of mediation services and 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, but this is not the main topic of this post (obviously, the comments are good -come on this topic as well).

The main reasons stated by policymakers in adopting mediation legislation are promoting a culture of dialogue, decongesting the role of courts, and shifting the focus from the number of cases resolved to the quality of solutions adopted. In general, the potential benefits of mediation are appreciated by the public sector, as related 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.

The reasons why mediation is not on the “menu” of public disputes

However, if we look closely, it seems 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 conditions for accession had to be met. Meanwhile, it is challenging to identify situations where the public sector uses mediation. There is not an explicit, coherent, and favourable public policy.

The reduced use of mediation by the public sector may also discourage citizens and the private sector. But what are the reasons why mediation is not among the preferred dispute resolution methods by central and local public institutions in many countries? A discussion of these reasons would help understand how 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 \(CPI\)](#) has a low value, as is the case of Romania compared with the other Member States of the European Union, without a favourable legal framework and an express mandate from the institution it represents, the civil servant will avoid at all costs the participation in “closed door” discussions to eliminate the risk of being accused of acts of corruption. Often, to avoid taking responsibility for deciding on using mediation, the civil servant prefers 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 that, again, in the absence of a coherent and favourable 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 taxpayer, as this process carries court taxes and other litigation costs.

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 do not include a mediation clause in public contracts. Often, the amicable settlement clause in these contracts is mostly a theoretical possibility. As an example of good practice, we mention here the opt-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 lay the necessary foundations for encouraging the use of mediation, primarily by the public sector, which, through its attitude, will send a powerful signal to citizens and the private sector. Finally, effective mediation promotion will occur when governments significantly improve the conditions for mediating disputes to which public institutions are parties.


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The graphic features a black background with white text and a circular icon. The icon depicts a group of five stylized human figures, with a magnifying glass positioned over the central figure. The background is accented with horizontal lines in blue and green.

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