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Nudging users towards cross-border mediation: Is it really about harmonised enforcement regulation?

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NUDGING USERS TOWARDS CROSS-BORDER MEDIATION: IS IT REALLY ABOUT HARMONISED ENFORCEMENT REGULATION?

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ABSTRACT

In this paper Nadja Alexander challenges her audience to think in different ways about creating the shift needed to make cross-border mediation practice a reality rather than rhetoric.

Within Asia, Hong Kong, Singapore and other centres are positioning themselves as regional leaders in cross-border mediation. Statistically though, there is not an enormous amount of cross-border mediation going on. Despite the apparent advantages of mediation and the international regulatory activity outlined above, cross-border commercial mediation practice has been slow to develop. At dispute resolution conferences and other get-togethers, mediators and other ADR advocates ask themselves, "Why"?

While there is little empirical data to suggest why this is the case, numerous writers offer explanations along the following lines. Users are said to remain cautious about mediation's effectiveness in the absence of a mature and comprehensive international legal framework to regulate the rights and obligations of mediation participants such as those relating to the enforceability of MSAs. In particular, diversity of enforcement mechanisms for cross-border MSAs is seen as a major obstacle to the development of global mediation practice.

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But here is the real question: to what extent will legal and policy initiatives to address issues such as confidentiality, competency and enforceability change people's behaviour? For example, would a "New York Convention" for mediated settlement agreements (currently a popular idea) be enough to motivate parties and lawyers to use mediation as their dispute resolution process of choice?

Insights from behavioural economics and related fields suggest that the answer is "maybe" and more likely "no". Behavioural economists postulate that people are not rational actors and will not necessarily change behaviour to use cross-border mediation, even if their "rational" concerns were to be addressed, for example through a "New York Convention" for mediated settlement agreements.

However, the good news is that people — including dispute resolution users — are "predictability irrational" (Ariely 2010). Therefore there is much that policy makers, dispute resolution organisations, mediators and arbitrators can do in terms of designing dispute resolution choices (choice architecture) to "nudge" (Thaler and Sunstein 2009) users in the direction of mediation for cross-border matters.

This paper explores how each and every one of us can apply the principles of choice architecture to "nudge" dispute resolution users to really make the behavioural shift to cross-border mediation practice.

KEYWORDS: *cross-border mediation, opt-out provisions, behavioural economics, choice architecture, mediated settlement agreements*

> The story is told of a traveller making his way on a long journey across the desert.
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> As he plodded on his camel steadily through the dry heat, he came upon an oasis. Approaching the desert spring, the traveller was surprised to find three brothers weeping profusely.
>
> Through conversation with the mourning brothers, the traveller discovered their father had recently passed away. The source of the tears was the brother's inability to satisfy their fathers' last wish.
>
> The father had given strict instructions that the inheritance of his estate be divided in such a way that the oldest received one half, the second received one third, and the youngest received one ninth of the father's estate.
>
> The brothers had successfully divided the rest of their father's property, but were unable to do so with the camels. The father had left them 17 camels, and, try as they may, the brothers could not distribute the camels according to father's wishes.
>
> The traveler considered the dilemma but confessed that he did not know what to do. However, he insisted they receive his camel as a gift. After much conversation and many attempts at refusal, the brothers relented to the travellers' demands and received the kindness of his gift.
>
> With 18 camels, the brothers were able to properly divide the inheritance and satisfy their father's wishes. The older brother received one half of the herd and took his 9 camels. The second brother received one third of the herd and took his 6 camels. The youngest brother received one ninth of the herd and took his 2 camels.
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> Surprisingly, 9 camels plus 6 camels plus 2 camels equals 17 camels. With the inheritance properly distributed, the traveller was able to take his camel and continue on his journey.[1]

This timeless story has travelled through centuries, capturing the imagination and curiosity of many. What does the story mean? What does the 18th camel symbolise?

For mediators and other conflict interveners, the 18th camel may represent our ability to think creatively and search for solutions outside the box. The story invites us to stretch our thinking to encompass fresh insights in dispute resolution conversations. Similarly, this paper invites all of us

[1] Eric von Atzigen, *The Story of the 18th Camel*, MONDAY MORNING REVIEW (July 12, 2010), http://mondaymorningreview.wordpress.com/2010/07/12/the-story-of-the-18th-camel/. Adapted from MALBA TAHAN, THE MAN WHO COUNTED: A COLLECTION OF MATHEMATICAL ADVENTURES (Leslie Clark & Alastair Reid trans.) (1938).

involved in cross-border dispute resolution to ask challenging questions about the field and open our minds to new ideas to grow it. There might not be answers, at least not yet. There are, however, excellent questions. As the Austrian poet, Rilke, mused, "Have patience with everything that remains unsolved in your heart. Try to love the questions themselves . . . Do not now look for the answers . . . At present you need to live the question." [2]

Let us begin then with asking and 'living' three seemingly unrelated questions.

1. How do you get people to eat more fruit and less junk food?
2. How do you get more people to agree to donate their organs?
3. How do you get more people to engage in cross-border mediation?

We will return subsequently to food and organs. Let us dwell, for a moment, on mediation.

Within Asia, Hong Kong, Singapore and other centres are positioning themselves as regional leaders in cross-border mediation. Statistically though, there is not an enormous amount of cross-border mediation going on. Despite the apparent advantages of mediation and the international regulatory activity outlined above, cross-border commercial mediation practice has been slow to develop. For example, a 2010 survey of European Union (EU) corporations and lawyers indicates that 75% of mediations in relation to filed cases are successful and result in dispute resolution costs savings. However, only 0.5% of filed cases go to mediation, despite the fact that the costs of disputing consume an appreciable portion of these corporations' budgets. [3] International arbitration remains the process of choice.[4] At dispute resolution conferences and other get-togethers, mediators and other ADR advocates ask themselves, "Why"?

While there is little empirical data to suggest why this is the case, numerous writers offer explanations along the following lines. Users are said to remain cautious about mediation's effectiveness in the absence of a mature and comprehensive international legal framework to regulate the rights and obligations of mediation participants such as those relating to the enforceability of MSAs. In particular, diversity of enforcement mechanisms

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[2] RAINER MARIA RILKE, LETTERS TO A YOUNG POET (2011).

[3] *See* GIUSEPPE DE PALO ET AL., 'REBOOTING' THE MEDIATION DIRECTIVE: ASSESSING THE LIMITED IMPACT OF ITS IMPLEMENTATION AND PROPOSING MEASURES TO INCREASE THE NUMBER OF MEDIATIONS IN THE EU (2010). In relation to domestic mediation practice see the following two studies: On the varied but increasing use of domestic mediation by inhouse corporate counsel in the United States, *see* Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, 19 HARV. NEGOT. L. REV. 1 (2013); on the use of domestic mediation by inhouse corporate counsel in France, *see* FIDAL-AMERICAN ARBITRATION ASSOCIATION/ICDR, DISPUTE-WISE BUSINESS MANAGEMENT: BEST CORPORATE PRACTICES IN CONFLICT MANAGEMENT FROM FRANCE (June 2013).

[4] *See* Gerry Lagerberg & Loukas Mistelis, *International Arbitration: Corporate Attitudes and Practices* (2008), http://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf.

for cross-border MSAs is seen as a major obstacle to the development of global mediation practice.[5]

Some commentators suggest that mediation needs its own New York Convention (as international commercial arbitration has).[6] Others recommend the increased use of hybrid processes such as arb-med-arb. Here mediated settlements take the form of an arbitral consent award, so that arguably the New York Convention would apply thus alleviating enforcement concerns.[7]

Yet others talk about the quality of mediators and the need for a large and reliable international pool of professional mediators before cross-border mediation becomes as ubiquitous as cross-border arbitration.

Of course, it might be useful to ask users of mediation what they need and what would make mediation more attractive to them. There are numerous international user surveys available, many of which are summarised in the recently released Singapore International Commercial Mediation Report.[8] To a large extent the user surveys reinforce the previous suggestions — that enforceability of mediated settlements, robust confidentiality protection, and a pool of competent mediators are important to users. Users also indicated that mediation should be actively promoted by arbitration institutes.[9]

But here is the real question: to what extent will legal and policy initiatives to address issues such as confidentiality, competency and enforceability change people's behaviour? While it is true that there is no

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[5] *See* Chang-Fa Lo, *Desirability of A New International Legal Framework For Cross-Border Enforcement Of Certain Mediated Settlement Agreements*, 7(1) CONTEMP. ASIA ARB. J. 119, 121 (2014); Bobette Wolski, *Enforcing Mediated Settlement Agreements (MSAs): Critical Questions And Directions For Future Research*, 7(1) CONTEMP. ASIA ARB. J. 87, 89 (2014); Edna Sussman, *The New York Convention through a Mediation Prism*, 15 No. 4 DISP. RESOL. MAG. 10, 11 (2009); Geoff Sharp, The Handbrake on Global Mediation *present at* AMA Conference (Hong Kong, 2014).

[6] New York Convention refers to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. In a survey conducted by Bühring-Uhle regarding the perceived advantages of arbitration for continental European and US lawyers, the existence of an enforcement mechanism was praised and rated as one of arbitration's strong advantages: CHRISTIAN BÜHRING-UHLE ET AL., ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS, 108-09 (2d ed. 2006); Christian Bühring-Uhle et al., *The Arbitrator as Mediator: Some Recent Empirical Insights*, 20 J. INT'L ARB. 81-88 (2003). *See also* Lagerberg & Mistelis, *supra* note 4.

[7] *See* Sussman, *supra* note 5; Bobette Wolski, *Arb-Med-Arb (and MSAs): A Whole Which Is Less Than, Not Greater Than, The Sum Of Its Parts?*, 6(2) CONTEMP. ASIA ARB. J. 249 (2013). On the institutional plans for arb-med-arb in Singapore, *see* SINGAPORE MINISTRY OF LAW, COMMERCIAL DISPUTE RESOLUTION SERVICES IN SINGAPORE SET TO GROW (2013).

[8] *See* SINGAPORE MINISTRY OF LAW, *supra* note 7.

[9] *See* the following user surveys: Stipanowich & Lamare, *supra* note 3 ; FIDAL-AMERICAN ARBITRATION ASSOCIATION/ICDR, *supra* note 3; INTERNATIONAL MEDIATION INSTITUTE, IMI ADR USERS SURVEY MARCH 24, 2013 (2013), https://imimediation.org/cache/downloads/5pm4uddkuacc0sw40cck0cscs/IMI%20ADR%20Users%20Survey%20March%2024,%202013%20-%20full%20results.pdf (This was an analysis of interviews conducted with French corporate in-house counsel regarding their attitudes to dispute management and ADR.); SINGAPORE MINISTRY OF LAW, *supra* note 7, at ¶¶ 12, 15.

"New York Convention for mediation" as yet, hybrid dispute resolution processes offering access to potential benefits of the New York Convention for such as med-arb and arb-med-arb have long existed in many parts of the world. While it is fair to say that that an international mediation profession is in its early stages, there are many excellent international mediators with thriving practices. In many countries, confidentiality is increasingly regulated in a uniform way by national statutes, thereby offering legal certainty about the scope of confidentiality and related matters in mediation.

As trite as it may seem, there is one significant factor that the users in these surveys share — they are human beings. Behavioural scientists have demonstrated that human beings are not the rational actors that traditional economics would have us believe; human beings are not *homo economicus*.[10] As human beings we don't always mean what we say, and, no matter how optimistic and confident we are, we don't always do what we say we will do. Human beings do not always make decisions to maximise a calculable gain, whether they are choosing a car or a cross-border dispute resolution process.

Therefore, while (potential) mediation users may indicate that the mediation process would be more attractive for them with an international enforceability regime in place, this attitude does not necessarily translate to usage of cross-border mediation even if the desired regulatory measures are in place. This is not to say that regulatory measures are not desirable and useful. There are many reasons why a "New York convention for mediation" would be highly desirable and these have been canvassed by others.[11] The focus of this paper, however, is on how to encourage the use of mediation by cross-border disputants.

Smits highlights some insights from behavioural psychology that are useful for exploring the effectiveness of harmonisation initiatives in relation to laws on the enforceability of cross-border MSAs.[12] The first is the status quo principle, which states that parties are likely to stay with the status quo, that is, with norms with which they are familiar, rather than with new provisions that are unfamiliar, even if these provisions maximise benefits to them. Moreover, where it is difficult to calculate the costs and benefits of a new alternative, parties tend to simplify their thinking and behave in a risk averse manner, generally staying with the dispute resolution pathways they usually use.

Thus, rather than to opt for a new harmonised or uniform system, parties are more likely to choose:

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[10] *See* Russell B. Korobkin & Thomas S. Ulen, *Law And Behavioral Science: Removing The Rationality Assumption From Law And Economics*, 88 CAL. L. REV.1051 (2000); BEHAVIOURAL LAW AND ECONOMICS 3-5, 137-39 (Cass R. Sunstein ed., 2000); DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (1st ed., 2008).

[11] *See supra* note 5.

[12] JAN SMITS, MAASTRICHT FACULTY OF LAW WORKING PAPER 2005/9, at 24 (2005).

1. existing mediation or arbitration rules; and
2. a legal system with which they are familiar.

In the absence of familiar mediation rules and past cases to aid decision-making parties, the aversion to newness and change suggests that parties may be reluctant to engage in cross-border mediation at all. In this context, Thaler and Sunstein make the following observation: "It is particularly hard for people to make good decisions when they have trouble translating the choices they make into the experiences they will have."[13] Empirical research cited previously on the low use of inter-European mediation further supports this view;[14] it indicates that a lack of awareness about the law of mediation generally and an absence of corporate alternative dispute resolution (ADR) policies negatively affect parties' decisions to engage in mediation with foreign partners. Where parties are familiar with arbitration, the status quo principle suggests they would rather continue with arbitration even if it might not be the rationally better choice for them.

Furthermore, parties are not only likely to be risk averse as described above; behavioural psychology suggests that they are likely to be loss averse and will do even more *to avoid loss* than to make a gain. For this reason contracting parties may be unwilling to spend the money (and take a certain cost loss) to obtain legal advice on how to draft their contract to include new provisions relating to mediation or to inform themselves about the applicable mediation provisions and instead prefer to wait until a dispute arises.

Accordingly, self-reported user data from surveys and interviews may not be as reliable a predictor of what will change cross-border disputant behaviour as hoped. As indicated previously, while a harmonised enforceability regime for cross-border MSAs might be desirable for a host of well-examined reasons,[15] behavioural sciences research suggests that it will not overcome disputants' risk and loss aversion tendencies. These findings might go some way to explain the extremely low usage of mediation in the European Union, despite existing data demonstrating mediation's significant quantifiable benefits.[16]

While this may seem like a heavy cloud of doom over the future of cross-border mediation, there is a silver lining. Although human beings may be irrational, we are, in Dan Ariely's famous words, "predictably irrational".[17] In other words, there are patterns to our non-rational behaviour. Where there are patterns of behaviour, there are corresponding opportunities to influence

[13] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 83 (2009).
[14] *See* GIUSEPPE DE PALO ET AL., *supra* note 3.
[15] *See supra* note 5.
[16] See GIUSEPPE DE PALO ET AL., *supra* note 3.
[17] ARIELY, *supra* note 10.

them. This is where the concept and principles of "choice architecture" become relevant.[18]

Choice architecture draws upon two ideas. The first idea is that people like to have choice as it provides a feeling being in control. The second idea is that when we offer others a choice, we frame that choice, and in doing so, influence the ultimate outcome. The corollary of this second principle is that by offering choice we cannot *not* influence others' choices.

If we accept that influence is inevitable, choice architecture suggests we can and should usefully and ethically influence others' choices with intentional design rather than leaving it to unintentional and uninformed design. In this way we become choice architects: governments, mediation service providers, mediation accreditation institutes, mediators, mediation advocates, academics — all of us.

Researchers Thaler and Sunstein refer to this type of influence as "nudging".[19] *Nudge* and it is the title of their best-selling book, the principles of which have been applied by the UK and other national governments in policymaking contexts. Following the argumentation of the authors, "nudging" disputants towards cross-border mediation would not involve using rational arguments to persuade people (e.g. offering mediation information sessions that explain why mediation is good for you), coercion (e.g. using financial or other sanctions to ensure participation in mediation) or bans (e.g. no litigating or arbitrating until you have mediated).

Scientists have demonstrated through different research methods that humans are prepared to reject perceived unfairness even at substantial cost. This is based in our biology: a decade of studies using brain imaging shows that human neural activity, particularly in the insula cortex region, is actived when we perceive unfairness in social interactions.[20] So, for example, our brains might be triggered for perceived unfairness when someone is making decisions for us, telling us what to do (e.g. mandating mediation) or telling us what not to do (e.g. don't litigate) or when financial sanctions are imposed when we would prefer not to mediate.

Let us take an example from Hong Kong. In Hong Kong, Practice Direction (PD) 31 requires parties to mediate before trial in cases where it is reasonable to do so. With a pro-mediation judiciary, that means in virtually all cases. Most lawyers encourage their clients positively to comply with the requirement. However, it is known that a minority of lawyers resist PD 31. They pay lip service to the requirement, treat it as an unwanted step towards litigation, and participate in deliberately short mediations with no intention

[18] THALER & SUNSTEIN, *supra* note 13, at 12.
[19] *See id.*
[20] Nicholas Wright & Karim Sadjadpour, *The Neuroscience Guide to Negotiations With Iran*, THE ATLANTIC NEWSPAPER (Jan. 16, 2014), http://www.theatlantic.com/international/archive/2014/01/the-neuroscience-guide-to-negotiations-with-iran/282963/.

of settling. Despite the fact that these lawyers remains a minority, their activity negatively impacts on the development of mediation by giving users poor experiences.

Let us now return to the three questions at the start of this paper.

How do you get people to eat more fruit and less junk food? Thaler and Sunstein report on research showing that the simple action of putting fruit on shelves at eye level in a cafeteria increased fruit consumption by 25%. Moving junk food away from the shelves at eye level has been shown to decrease consumption of junk food by 25%.[21] Here the choice architecture of the cafeteria environment influences or 'nudges' a significant number of people to change their food preference.

How do you get more people to agree to donate their organs? This research highlights the power of human inertia and how much we dislike ticking forms.[22] In Germany the relevant form at the Department of Transport asks people to tick a box if they wish to be an organ donor. 12% of people tick the box. Just over the border, in Austria, the same form asks people to tick the box if they do *not* want to donate. Here only 1% of people tick the box. So 99% of people agree to be organ donors. This is a powerful statistic that demonstrates the consequences of mindless choice architecture and establishes the principle that we cannot *not* influence when we offer others a choice.

So, how can we use the principles of choice architecture to encourage disputants to engage in cross-border mediation? Here are two simple ideas to get the conversation going.

A. Opt-Out Provisions

As we have seen, inertia is a strong force. People like the path of least resistance. So opt-out mediation provisions are going to be much more effective that opt-in provisions. Opt-out provisions give people as much choice as opt-in provisions; they just don't require people to actively "tick the box". We saw this principle in action in the United States in the 1990s, where court programmes allowing lawyers to opt-out of ADR saw 80% of lawyers stay with ADR. Where court programmes had opt-in provisions, hardly anyone opted for ADR (less than 20%).[23]

Today in cross-border dispute resolution, most arbitration rules make provision for mediation windows to be opened during the arbitration procedure. The majority of these, however, are opt-in rules, i.e. they permit

[21] THALER & SUNSTEIN, *supra* note 13, at 1-12.
[22] ARIELY, *supra* note 10, at 184-192.
[23] *See* Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: an Empirical Analysis*, 46 STAN. L. REV. 1487 (1994).

parties to elect to incorporate mediation. Not surprisingly, the uptake has been *under*whelming.

In the words of Lord Woolf,

> Remarkably, while I would have expected mediation to have a more prominent role in arbitration than in other areas of litigation, in fact from my unscientific observation the opposite is true . . . . I have over the years found among the arbitration industry a remarkable reluctance about promoting mediation. I find the reasons advanced for this worryingly unsatisfactory. If this is due in any way to supposed self-interest, this is a mistake. Parties to commercial arbitration, as in litigation, are increasingly jaundiced as to the rising costs. If increased use of mediation reduces the average cost of arbitration, this would increase its popularity.[24]

An exception to this trend is offered by the American Arbitration Association's (AAA) new *Commercial Arbitration Rules and Mediation Procedures*, which make mediation a process step that the parties need to opt-out of, rather than a choice they would have to opt into. New Rule 9 provides:

> In all cases where a claim or counterclaim exceeds $75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm the completion of any mediation or any decision to opt out of this rule to the AAA. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

Rule 9 seems to be consistent with research indicating that users desire arbitration providers to "actively encourage" the use of "mediation to settle

[24] Lord Woolf, Annual Mediation Lecture *present at* the Singapore Management University: Mediation: The Way Forward (Oct. 10, 2013).

their dispute." [25] Reflecting on this research, Michael Leathes comments that what most users want is "something between mediation being a mandatory step and active encouragement to mediate".[26] Thaler and Sunstein would say that users want to be nudged. As Leathes explains, AAA's nudge is to replace the implicit opt-in with an express opt-out.

There is another feature of the AAA's opt-out provision that lends it extra "nudge" quality, namely its use of the status quo principle outlined previously. As arbitration represents the status quo for cross-border dispute resolution and users are familiar with arbitration, the AAA provision effectively pick users up where they are comfortable. It is within the familiar terrain of arbitration procedures that the new mediation opt-out is found.

Could this be the beginning of an international trend? It is hard to find an argument not to include the mediation clause, especially if users have the power to opt out.

B. Make It Easy — Do Away With the ADR Menu

Apart from being stricken by inertia, human beings are overwhelmed by choice. Too much choice will lead to procrastination and inaction. Being user friendly does not necessarily mean offering clients the whole ADR menu and asking them to select a process.

As soon as human beings have to choose among three things with more than one criterion to compare them, we tend to get lost. Ariely reminds us of the well-known advertisement in The Economist magazine.[27] For an annual subscription to The Economist, you could choose from:

1. The Economist.com online subscription for $59.00;
2. The Economist print subscription for $125.00;
3. The Economist print and web subscription for $125.00.

With these choices, most readers selected option 3. They compared it to option 2 (to which option 3 is certainly superior) and no readers selected option 2; very few selected option 1. These choices were replicated in various experiments with the same results. It would appear therefore that option 2 is a choice that no one wants to have. In subsequent experiments option 2 was removed and people were left to choose between options 1 and 3. Here

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[25] As reported in Michael Leathes, *The Dispute Resolution Dilemma: Opt-In or Opt-Out?*, KLUWER MEDIATION BLOG (May 18, 2014), http://kluwermediationblog.com/2014/05/18/the-dispute-resolution-dilemma-opt-in-or-opt-out/: The International Mediation Institute, the Corporate Counsel International Arbitration Group and the Conflict Management Round Table of German Business surveyed in-house dispute resolution counsel, General Counsel and some senior management in over 70 multinational corporations. One of the propositions put to those surveyed was: "Parties to an arbitration proceeding should be actively encouraged by the Arbitration Provider to use mediation to settle their dispute." A total of 74% of responders agreed with this statement, 22% were ambivalent and only 4% disagreed.

[26] *Id*.

[27] *See* ARIELY, *supra* note 10.

something surprising occurred. Significantly more people chose option 1 when there were only two options compared to when there were three options from which to choose. The existence of a third option (in this case option 2) which no one seemed to want, directly influenced choice as between the other two options (options 1 and 3). This is choice architecture in action.

Might it be possible for dispute resolution services providers to apply these principles to encourage the use of mediation in cross-border disputes? Consider, for example, the following dispute resolution fee schedule:

1. Arbitration: $10,000 per arbitrator per day;
2. Mediation: $10,000 per mediator per day;
3. Arbitration and mediation: $10,000 per mediator/arbitrator per day.

Certainly, this suggestion needs some refinement. But let us start thinking about how to use the science of human decision-making to help people manage complex choices around dispute resolution.

CONCLUSION

Enforceability of cross-border MSAs continues to be a real issue to be addressed. However a regulatory regime for the recognition and enforceability of cross-border MSAs is unlikely to change user behaviour on its own. It needs to be supplemented with some serious nudging through choice architecture. Behavioural science offers cross-disciplinary insights that can harness human inertia and choice dilemmas to nudge lawyers and parties into using cross-border mediation more frequently. The principles of choice architecture can be applied in the shaping of government and institutional mediation policies and incentives to nudge cross-border mediation usage in a positive direction.

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