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Nudging cross-border mediation forward

Nadja Alexander (Editor) (Singapore International Dispute Resolution Academy)/April 14, 2014

How do you get people to eat more fruit and less junk food?

How do you get more people to agree to donate their organs?

How do you get more people to engage in cross-border mediation?

I'll come back to food and organs shortly. Let's stay with mediation for a minute.

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. International arbitration remains the process of choice.

At mediation conferences and other get-togethers, mediators and other ADR advocates ask themselves, why?

Some say it's the lack of an **international legal framework for enforcement of mediated settlements**; they say that mediation needs its own New York Convention (as arbitration has). Others suggest that blended processes such as **arb-med-arb** are the answer. Here mediated settlements take the form of an arbitral consent award, so that arguably the New York Convention will apply and therefore enforcement concerns will be alleviated.

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 would make sense to ask **users of mediation** what they need and what would make mediation more attractive. There are numerous international user surveys available, many of which are summarised in the report of the **Singapore Working Group on International Commercial Mediation**. To a large extent they reinforce the previous suggestions — that enforceability of mediated settlements is important to users, as is confidentiality and competent mediators, and that international users are open to using mediation in an arbitration context.

So far so good.

But how will this information change people's behaviour? While it's true that there is no New York Convention for Mediation (yet), blended processes such as med-arb and arb-med-arb have long existed in many parts of the world. While it's

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.

You see, there is one thing that the users in these surveys have in common — they are human. What do we know about ourselves as human beings? For starters, 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.

I've been reading a book called **NUDGE** by Richard Thaler and Cass Sunstein. NUDGE draws on the emerging sciences of being human — behavioural economics, neuroscience, neuro-economics, and behavioural psychology. The authors explain that we are not — as traditional economics would have us believe — rational actors. We are imperfect human beings who act irrationally but in a **predictably irrational** way.

That means that don't always do what's good for us. But if we are given a NUDGE, it can make the world of difference to our choices. Nudging is a way to help people make good decisions. It does not involve using rational arguments to persuade people (e.g. mediation information sessions that explain why mediation is good for you), coercion (e.g. using financial or other sanctions to ensure participation in mediation) and bans (e.g. no litigating or arbitrating until you have mediated).

Neuroscientists tell us that people don't like being told what to do. There is a button in our brain (I call it the injustice button — of course it's not really a button, but you know what i mean) that starts buzzing when we think something is unfair — for instance, 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). The buzzing goes off in the same area of the brain that is activated when we feel pain. Ouch! Now, some people are going to resent being told what to do, and for that reason alone, will refuse to play ball. In Hong Kong, for example, Practice Direction 31 requires parties to mediate before trial in all cases where it is reasonable to do so. With a pro-mediation judiciary, that means in virtually all cases. Most lawyers seem to encourage their clients to comply with the requirement reasonably well. However, it is well-known that a minority of lawyers pay lip service to the requirement, treat it as a another step towards litigation, and participate in very short mediations with no intention of settling. While this is only a minority, it negatively impacts on the development of mediation by giving users poor experiences of the process.

NUDGEs use the science of being human to gently push people in a certain direction while still allowing people to choose.

The authors call this “choice architecture”. Insofar as we can indirectly influence choice, we are choice architects: governments, mediation service providers, mediation accreditation institutes, mediators, mediation advocates, academics — all of us. We cannot not influence. Therefore let us be aware of how we do influence.

Back to our questions at the start of this posting.

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 decreased consumption of junk food by 25%.

How do you get more people to agree to donate their organs? Here Thaler and Sunstein report on research showing the power of human inertia and how much we hate ticking forms. In Germany the relevant form asks people to tick if they wish to be an organ donor. 12% of people tick the box. In Austria, the same form asks people to tick the box if they do not want to donate. 1% of people tick the box. So 99% of people agree to be organ donors. Amazing, isn't it?

So, how can we use the principles of NUDGE to get more people to engage in cross-border mediation? Let me start the conversation with a few simple ideas.

First, as we have seen, inertia is a strong force. People like the path of least resistance. So opt-out of mediation provisions are going to be much more effective than opt-in provisions. They still give people as much choice as opt-in provisions but don't require them to “tick the box”. We saw this 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%). See Rosenberg and Folberg (1994).

For cross-border mediation, international mediation service providers might think about offering one standard dispute resolution clause with opt-out provisions.

Mediation service providers might also work with international corporates and government departments to develop mediation and ADR policies featuring opt-out provisions rather than mandatory provisions or opt-in provisions.

Can bar associations and law societies nudge lawyers to include provisions in their standard client agreements with mediate first clauses that include opt-out provisions? It's hard to find an argument not to include the clause if you have the power to opt out.

Apart from being stricken by inertia, we human beings are overwhelmed by choice. Too much choice will lead to procrastination. So don't give clients the whole ADR menu and ask them to choose. That's not being user friendly.

As soon as we have to choose among three things with more than one criteria to compare them, we tend to get lost. Remember the well-known Economist advertisement? For an annual subscription to the Economist, you could choose from:

1. The Economist.com online subscription for \$59.00
2. Print subscription for \$125.00
3. Print and web subscription for \$125.00

With these choices, most people will pick 3) because they compare it to 2) and seem to forget about 1). If you take away choice 3) and people are left to choose between 1) and 2), many more people will choose 1). This is choice architecture in action!

So if what about offering:

- 1) Arbitration: \$ 10 000 per arbitrator per day
- 2) Mediation: \$ 10 000 per mediator per day
- 3) Arbitration with mediation: \$ 10 000 per mediator/arbitrator per day.

Okay, maybe it needs some refinement. But let's start thinking about how to use the science of human decision-making to help people manage complex choices. Nudging can play a role in shaping both marketing and policy along with other incentives.