

UIA's 26th World Forum of Mediation Centres

Considerations for the debate during the round-table planned on the 9th of March 2019
"Mediation seen upon economical and marketing concepts: demand and product/service"

Introduction:

1. Joseph Grynbaum (a US mediator) once said: *"an ounce of mediation is worth a pound of arbitration and a ton of litigation!"*; that may be a good argument to make the public understand why mediation is a good alternative to classical judicial justice, either public or arbitral as arbitration's logic is close to that of litigation.

The fact that mediation only recently developed in Europe makes the issue regarding communication and marketing around it very new.

A way to "sell" mediation – which has an enormous potential while people seem to be still reluctant to go through it instead of going before a judge or an arbitrator – might be to present it via economical concepts.

2. From an economical perspective, mediation is a service/product proposed on the market of dispute resolution, where it competes with both litigation and arbitration. As a product, it has to be sold to consumers. It is hence subjected to economical and marketing concepts.

3. From the above observations arises the issue of demand.

Indeed, to decide what is the best way to sell mediation, the structure of the demand must be well understood. Especially, mediators must grab how consumers are making choices, i.e.: why they prefer litigation and arbitration to mediation and how they could choose the latter instead.

According to classic Economics, individuals seek for welfare maximisation, which mainly means they want to increase their wealth.

Applied to law, it means that individuals will choose the option which gives them the most satisfying solution, i.e. the solution with the highest probability to answer their rational expectation (holding the defendant liable, or not being hold liable, obtaining a fair compensation for the suffering of a damage...).

People thus choose to fill a claim if they consider they are more likely to win the trial, the question arising here being what winning truly means.

4. Considering the demand structure, what are the best arguments to make mediation more visible and perceived as a desirable product, bearing in mind the fact that resorting to a judge is the instinctive/reflex that people are subjected to?

Thus, the marketing mediation should include a very strong cultural aspect, i.e. people's perception of Justice and why they choose to place their trust into a person – either a judge or an arbitrator – with the power to take a restrictive decision to solve their dispute.

Taking into account rational choices process: a failure?

5. Marketing strategy already tried to brand mediation by offering rational considerations to consumers. It has been some years now that mediation actors organise their discourses into two main arguments, i.e.: the advantages of the mediation vs the failures of the judicial system.

6. The advantages of mediation arguments give numerous data related to the rapidity of mediation process, but also its price, cheaper than traditional justice, and its discretion, while the failures of the judicial system mostly focus on the length of the litigation process, the very expensive cost of it, the randomness of the judge's decision because of legal instability and more generally accessibility problems.

The demonstration of the numerous advantages attached to mediation, in comparison to the disadvantages and failures caused by traditional justice, should have convinced consumers to resort to mediation for a long time by now, but it obviously did not.

Why?

Probably because the sole binary presentation of those rational aspects of mediation against litigation fails to consider dispute resolution as a whole, i.e. by not including its cultural aspects and the beliefs put by the individuals in traditional justice and its very mechanisms.

It urges to change not only the perception of mediation but also our representation of what justice is about and of what one can expect from it, and accordingly adapt the discourse promoting mediation.

The value of Judge's figure in society – A short semiotics analysis of the Justice

7. In French language, the word "Justice" is understood in a dual way, i.e.: (i) the institution, the process by which a judge settles a dispute; (ii) the idea of fairness (the restoration of equity by the revenge taken by the victim of a damage).

The study of the very numerous paintings where Justice is represented allegorically shows, for example, how it is historically and rather universally linked to the idea of what is “right”, “fair” and “legitimate” (entitled in the symbolic of balances and closed or covered eyes).

Conflict and fighting are also strongly linked to the idea of Justice (use of a gladius sword).

Finally, Justice is the authority which can legitimately solve and judge a conflict (in French language, the word “*trancher*” also refers to the symbol of the sword, or that of a hand resting on legal texts).

The choice to represent justice as a woman also refers to both the reassuring and trustworthy figure of a mother – mater – and her educational role.

8. Those allegories are still very present in the imaging of Justice and helps understanding what the consumers’ expectations are. In people’s mind, Justice is branded as the tool which offers legitimate “revenge”, the tool through which hatred can be safely expressed.

By engaging in the mission of judging, Justice is hence responsible for social peace.

9. Justice consequently constitutes not only a reflex in people’s mind when a problem occurs but also implies a winner and a loser, and a recognition of such status by a superior authority.

In other words, the idea of Justice bears a somehow archaic understanding of the conflict, where the loss of the other disputant contributes to the maximisation of the winner’s welfare.

10. To contrast with this perception of justice, mediation is branded as a win/win solution.

This discourse is obviously not well adapted at all to the common perception of what is legitimate to expect from Justice (a winner and a loser).

This helps understanding why a win/win solution is hard to sell to disputants.

One can give as many numbers of success as possible, mediation branding will not be heard as long as it does not “speak”/“ring a bell” in people’s mind.

Branding mediation – Ideas

11. Mediation market should certainly pay more attention to people’s common representation of justice in order to adopt a more appropriate and meaningful discourse.

According to this representation, what people are seeking in priority when resorting to justice services is certainly neutrality.

Indeed, this concept holds the idea of resorting to a third-person and find the most appropriate solution – i.e. fair and legitimate – to a conflict.

12. Focusing on those characteristics of justice representation, it should then be easier to structure discourse consistent with the consumers' expectations.

Indeed, mediation is a procedure (or a process) involving a third-neutral-part: the mediator, who helps the disputants to find the most appropriate solution to their conflict.

In addition, as mediation is a choice made by the disputant, its outcome is closer to the disputants' expectations, which maximises their welfare.

In comparison, resorting to a Judge brings more uncertainty to the outcome of dispute resolution. As the solution given by a judge is not negotiated it is necessarily stricter.

13. Branding mediation obviously involves working on the perception of conflict, and to consider it with a non-strictly judicial look.

Indeed, taking a closer look at it, mediation bears a specific perception of conflict, as an opportunity to explore and let silenced wishes out; the recurrent use of the concept of win/win solution questions what mediation is about and, more precisely, what the conflict really is and how it could be used in an efficient way for the parties.

In other words, the marketing of mediation could probably go along with the marketing of conflict.

Indeed, as mediation uses the potentiality of the conflict to develop further wishes and relations between the disputants, it somehow makes conflict profitable, where litigation empties it of all its essence to completely erase it, as if conflict was a taboo or dangerous.

14. Building the marketing discourses around the notion of conflict may constitute an efficient way to increase the visibility of mediation; it would not try to model mediation on litigation – which definitely does not constitute a good strategy – making people think that mediation is only a derivate of justice.

15. Why not playing cards on the table and choose a strategy where all particularities of mediation are strengthened and enlightened to sell it for what it is: not only an alternative to litigation but also and above all an innovative solution to solve conflicts and, beyond that, allowing the appropriation of one's conflicts to explore all its hidden potentialities.

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