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What went wrong with mediation?

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Presenting recently the results of the study on 'Rebooting' the Mediation Directive, Giuseppe de Palo talked about the "European Union mediation paradox" – the existence of a "highly acclaimed, efficient, effective process that very few people use", in his own words – and the need of "rebooting" the implementation of mediation process in the EU in the light of the limited effects of current legislation upon the number of civil cases mediated.

The same situation can be seen on the other side of the Atlantic, in the US, where a number of prominent experts have pointed to the fact that, after almost half a century of mediation programs implemented by courts, organizations and policy-makers, mediation is still a marginally method of dispute resolution, in spite of its obvious advantages.

Also, recently, Michael Leathes has published an article on mediate.com, calling for a new, global Pound Conference to re-ignite the advancement of mediation in the world, a process perceived as "stalling". All in all, it seems, from all of these comments and analysis, that mediation has not become the success it was supposed to be. The promise has not come true, if the number of mediated cases (compared to the number of lawsuits filled) is taken as an indicator of mediation success. So, what went wrong with mediation?

The key to this question lies with the relationship between mediation, promoters of mediation (mediators, courts, policy-makers, governmental and non-governmental organizations, private companies etc.) and potential users of mediation (further on called users, for the ease of writing). It seems that the promoters somehow failed to convince the users to pay full attention to mediation and take full advantage of its potential. We all know now the mantra of cost-saving, time-effective, confidential and user-friendly process arguments in support of mediation. The question is: why it hasn't worked, despite of these arguments? It would be really insulting to suppose users can't understand the obvious advantages the mediation brings. So, if we can't blame the users of being so ignorant not to understand the uses of mediation, where can be located the causes of the limited impact of mediation?

In search of an answer to this question, we think attention should be concentrated at least on four major areas where the causes of "mediation paradox" might be located: 1. implementation policies; 2. mediation marketing; 3. mediators' behavior and practice and 4. mediation regulations. Let's take them in consideration one by one.

1. Implementation policies. From the very beginning, in the 1960s and 1970s, mediation was promoted as the best answer to over-crowded courts and expensive lawsuits. Fears that the courts would be overwhelmed by lawsuits (especially following the 1964 Civil Rights Act) played in the hands of ADR programs' promoters and gave them a solid argument for kick-starting court programs meant to ease their caseload and de-congest their dockets. Mediation has been one of these programs' components and it was implemented in a variety of ways, all promoted as experimental and most of them funded generously by private and public organizations.

Introducing mediation as a way to ease the load of courts has backfired. If over-crowded and congested courts were the main reason for reform, then why not just simply train and hire more judges and add more rooms to the courthouses in order to deal with the greater number of lawsuits filled? Why introducing untested, unconventional ways, as mediation and other ADR methods, to this aim? Wouldn't it be easier and of greater use to just follow the well-known paths – justice as known by the general public – to get the things done, by simply increasing the number of judges to deal with the extra-load? Of course, doing this would cost money, but funding experiments like arbitration and mediation also meant spending money, so the answer is not there. The argument in support of ADR programs had to be found in a different place.

In fact, those programs were implemented because it has been assumed by promoters of ADR methods that people also want a more non-adversarial, non-competitive, less-damaging venue of solving their disputes; that people want less costly, more time-effective ways of settling their disputes. A number of excellent studies on users' satisfaction with mediation were run and published, as an argument supporting these assumptions. Mediation and ADR in general were also consistent with the major cultural trends and ideologies of the 1960s and 1970s, of revolt against the establishment and empowerment of the people. ADR was part of the counter-culture, was part of a new way of understanding the relationship between people and government.

But the limited use of mediation proved the assumptions wrong. Experimental programs survived as long as they were funded – when funding dried out, programs died quietly for lack of sustainable numbers of users. Studies have shown that satisfaction with mediation is not consistently greater when compared to satisfaction with courts. They have also shown that people don't necessarily shun confrontation and competition, especially when they firmly believe they were right.

People appeared reluctant to use methods of dispute resolution other than the regular litigation and they seemed impervious to arguments in favor of mediation, arbitration and the lot. Progress of mediation has stalled and new ideas were in need to get it re-started. These led to a renewed effort of the mediation advocates who switched the tone from persuasion to coercion – the idea of mandatory use of mediation has been born. As most of the supporters of mandatory mediation are mediators themselves, they can easily be suspected of conflict of interest and self-serving argumentation. Seeing that people remained reluctant to use it on a grand scale, promoters of mediation argued powerfully in favor of forcing people to get to mediation by administrative/regulatory dispositions. The idea gained momentum and it is still in force all around the Western world – Mr. de Palo himself advocating in his presentation for mandatory measures to get mediation going.

This idea met resistance from at least two directions: first, mandatory mediation is a sort of an oxymoron – nobody can force people to negotiate if they don't want; second, it instilled a lot of suspicion where before it had been just expectative. It looked as courts, policy-makers and

mediators (especially judges playing mediators or becoming mediators after retiring) have made an unholy alliance to force people into using a service they haven't particularly liked or found useful.

Implementing mediation has been based on a set of self-serving assumptions made by mediation advocates, as a response to a conjuncture (perceived overwhelmed courts) and it has evolved from persuasion to coercion, with the idea of mandatory mediation (in various forms) at the core of the current strategies. This evolution is the direct result of a linear thinking that associates number of cases mediated with success of mediation and use effects to prove causes, as in saying that mediation is a success wherever mandatory use was required (giving Italy or certain US states like Florida as examples of sort), success shown by the great increase in numbers of mediated cases (!).

In favor of introducing mandatory measures have been brought arguments comparing use of mediation with use of safety belts or protecting helmets, specifically that no one used safety belts or protecting helmets before they were made mandatory, despite their benefits being well-known to every driver of cyclist respectively. This kind of argument is questionable from the onset, comparing things that are not comparable: while there is no alternative to the use of safety belts or helmets other that the negation of it (meaning not using them), there is a clear alternative to mediation, meaning litigation – a tested, well regulated method, where the rights of the parties are thoroughly protected and their power balanced properly, forbidding the powerful to take advantage of the weaker. While there are obvious benefits to fastening the safety belt or wearing a helmet and no alternative to them, there are no absolute advantages of mediation over litigation, but a case-by-case balance that tells mediation is better suited for some and litigation for others.

All these point to an essential failure of the implementation policies, the failure of consulting the users in designing the whole process. Mostly, the implementation policies were based on arguments brought forward by mediators and organization interested in mediation; general public and more specific categories of users weren't systematically consulted. It is emblematic that most studies concerning the benefits of mediation are done by consulting mediators, not users – even the thorough study done by the team led by Mr. de Palo asked mediators to identify measures necessary to make mediation successful (no wonder most recommended mandatory mediation or related measures like mandatory information sessions!). Maybe in the future, those really concerned with making mediation a mainstream method of dispute resolution, on equal footing with classic litigation in courts, will pay more attention to the needs of the users instead of those of the mediators, courts or policy-makers.

2. Marketing mediation. This is directly related to implementation policies and locates the limited success of mediation in the failure of taking in consideration the needs of the users when advertising its benefits. Promoting mediation as a way to ease the load of courts has been a critical marketing mistake (and it continues to be used in Europe, at least). What do the parties of a dispute care about this issues? Are they supposed to use mediation for the sake of poor judges, overwhelmed by workload? Or are they supposed to be good citizens and pay for the resolution of their own dispute, in order to save public expenditure? As taxpayers in a democratic society, is their right to unrestrained access to justice, which is sustained by their own money – they have already pay for justice with their tax-money! Sending them to mediation because courts are overwhelmed is not exactly the wisest argument in favor of mediation and it is particularly damaging for the courts and policy-makers.

Promoting mediation as cost-effective is also risky. It sends the message that mediation is a cheaper alternative to "serious" justice, therefore a service designed for those who cannot afford

the costs of litigation (proper justice) or whose cases are of no importance for the courts or society. The first argument relegates mediation to a status of inferior quality (cheaper, in a consumer society, tends to be associated not with less expensive or affordable, but with inferior quality – it has a pejorative connotation promoters of mediation seems not to be aware of); the second do a serious de-service to courts and policy-makers by sending the society a signal that there is discrimination in the administration of justice – it fails to understand that for parties involved in a dispute, their dispute IS important.

Also about the costs of litigation versus costs of mediation: when people really feel entitled to something or want something badly, costs are of no particular concern. Take Apple with its iPhone 5. The overall cost of production of one iPhone 5 is, depending of performance, between $198 and $218. Yet people pay between $649 and $849 for it (without contract). The difference is Apple's and distributors' profit. Are people not aware about this numbers? Or they don't care? Or they consider Apple entitled to do so? Or is Apple marketing so good? Maybe a bit of all, but the important lesson for mediation advocates is that, if people really want something, they are ready to pay the price for that. So, instead of trying to force mediation down the throats of users, maybe mediation advocates should start building strategies to make mediation wanted by people, make it desired, making it *profitable* instead of *cheap*. The help of professional marketing experts should not be shunned.

3. Mediators' behavior and practice. The fact that, after five decades of implementation and promotion, mediators still can't agree on a universal definition of their trade (some don't even acknowledge the need for such definition, not to mention universal agreement) is not very helpful for users and for mediation itself. Promoting something that can't be defined is a nonsense. Being capable of offering the same explanation of the process across the whole world should only strengthen mediation, making the process more intelligible and more predictable for users.

Regularly, mediators (especially those who do a lot of writing on the field) tend to define mediation as they practice it and they are reluctant to acknowledge as mediation, practices they do not agree with. This is most valid in the case of mediators adhering to a specific "school", "style" or "model", being it evaluative, facilitative or transformative. For the sake of their own beliefs in a strict set of principles regarding the essence and the practice of mediation, mediators are ready to forget that their main purpose is to serve others, not themselves. Choice of methods and techniques of mediation should be done according to users' needs and the particularities of the case, not according to the mediator's own ideological or philosophical preferences. Sometimes, the relationship is more important than the issues, sometimes the other way around, or they are equally important. It is up to users to decide.

The lack of a common definition of mediation, together with the fanatical adherence to a dogma and the refuse of embracing the whole range of mediation concepts and technoques (not to mention practicing them – training of mediators is also confined to the specific set of principles and techniques promoted by the respective schools, which is totally detrimental to a comprehensive understanding of the process) clearly put off the users which expect a predictable process in exchange for their money and time. The fact that a lot of mediators approach each case exclusively according to their style and model do not always add value to users. It makes mediation not user-friendly, but mediator-friendly. No wonder users refuse to oblige.

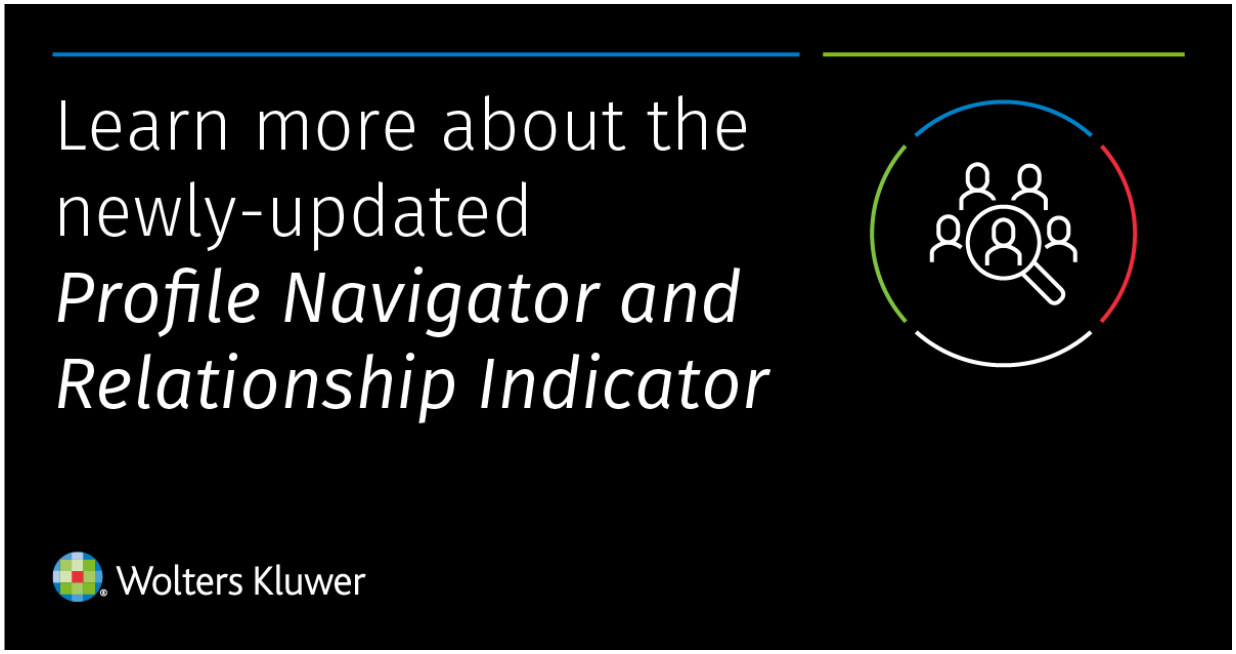
4. Mediation regulation. Those mentioned above at point 3 have a direct impact upon regulation of mediation. Being incapable of agreeing on a common definition (which means also a common

understanding of what constitutes mediation and what does not) and being split in schools which, in some cases, even go to the extreme of denying each others recognition, represent powerful obstacles toward a proper regulation of mediation – some even totally deny the need for any regulation. Not having a universally accepted Code of Conduct, a common statute of the profession (some even deny mediation is a profession or the need to turn it into one), a unified structure that can represent their interests in the dialogues with other professions or with the policy-makers, all of these are reasons enough for the limited success of mediation.

More than that, the lack of all the above leaves the task of regulating mediation to policy-makers, courts and private organizations (and they do this according to their own ends, which in some cases means nullifying precisely those characteristics of mediation that made it attractive from the onset) instead of this being the main task of mediators and their associations. Even now, mediators expect the courts or the policy-makers to set up criteria for training and certification, to design codes of conduct and rules of procedures, to manage national accreditation schemes, to define liabilities and structure ways for clients to find redress in case of mediator's misconduct.

Avoiding to built up a thorough regulation regarding all the aspects concerning mediation (training, certification, rules, codes of conduct, venues of redress and disciplinary measures) not only leaves this task to others interested in mediation (e.g. courts, policy-makers, legal profession) but also fail to make mediators an equal partner in this dialogue and decision-making process. Refusing to talk about regulation does not nullify the need for it, just puts mediators out of the regulation dialogue. It also keeps them in a dependent position.

We totally agree with Mr. de Palo that mediation in the EU is of very limited success (and the US is not doing systematically better), although we diverge in our assessment of the sources of and the remedies for this situation. We also agree with Mr. Leathes that a global Pound Conference would be indeed very useful, but only if mediators are ready to face the reality, to overcome their own prejudices and doctrinal preferences and to acknowledge that the age of romance in mediation has passed and a more pragmatic approach will be necessary to make mediation the success it ought to be. And that users have to be placed at the core of any mediation debate and strategy. A global Pound Conference should invite as key speakers not only mediators or judges or policy-makers, but also users. At some point during the process, mediators and the like should be in the audience, taking notes.



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