Make mediation a prerequisite to civil litigation.
Apply Buckminster's Law[1]

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Buckminster's Law derives from the futurist and inventor, R. Buckminster Fuller,[4] who dedicated his life to "*making the world work*". His principle:

"You never change things by fighting against the existing reality.
To change something, build a new model that makes the old model obsolete."

Litigation is costly in terms of money, risk, energy, stress and time. Some judicial systems encourage mediation, for example through training, professional obligations on lawyers, and cost sanctions for failure to mediate in good faith. Some work, most do not. Owing to strong process resistance in many jurisdictions, mediation remains a "*less frequently used alternative*[5]" to litigation. We have not yet succeeded in establishing a properly balanced relationship between mediation and litigation. If this were achieved, mediation would be attempted much more often[6].

Officials of UNICEF, one of the largest UN agencies, recently publicly announced that mediation should be the natural first step to resolve disputes. However, the reality is that opportunities to mediate are effectively denied to millions of litigants. We need to find *a new model that renders the old one obsolete*.

This is that *new model*:

1. Adopt a "twin-track" public policy[7]: Access to mediation + competent mediators

This involves integrating mediation into judicial systems by removing barriers to access while simultaneously balancing demand and supply simply and pragmatically:

Stimulate demand by requiring all civil litigation to be preceded by a formal step in which a professional mediator will help litigants to understand and, if they choose, to access mediation. There would be no compulsion to proceed to a mediation. Adapting to jurisdictional needs and circumstances, this step can range from an informational,

[1] First publication in July 2020 on mediate.com. 6th Key-Government: Make Mediation a Prerequisite to Civil Litigation | Manon Schonewille, Adi Gavrila, Leonardo d'Urso (https://www.mediate.com/articles/gavrila-key6-civil.cfm).

consultative, regulatory or introductory meeting, to a full first mediation session with an easy opt-out.

and

Build the supply side by taking steps to ensure high-quality mediation services through professional standards, including minimum requirements for training and accreditation of mediators, of lawyers in representing clients[8], and of judges in referring cases.

2. Take a step-by-step approach, piloting and monitoring progress and results

Creating the demand can be achieved in stages. There are substantial advantages to be gained by introducing the mediation step for certain types of cases and extending it as and when the supply of a quality-assured mediation infrastructure increases.

A formal right to understand and access mediation sounds obvious, simple and low cost – and it is all those things. Yet, curiously, only very few jurisdictions extend such a systematic procedural right to litigants. In countries where that happens, such as Italy and Turkey, a high percentage of newly-informed litigants opt to try mediation. The number of mediations vastly increases, user satisfaction and settlement rates are high, and the number of lawsuits correspondingly nosedives.[9] This results in substantial savings to judicial budgets.

Adapting the mediation information step to the individual needs and circumstances of different justice systems is vital. The mediation process step may initially be more suited to certain categories of cases than to others. This allows experience and data to be gathered and analyzed and to involve stakeholders before extending the scheme.

3. Insist professional mediators implement the model

One model does not fit all needs. But there are two common success factors.

First, all litigants, and their legal representatives, are required to meet together, whether physically or using online mediation tools, with the professional mediator and make an informed decision.

And second, regardless of whether the mediation step is merely an information meeting about mediation, or leads seamlessly to a first mediation session, that meeting needs to be led by a professional mediator. Mediation and its implications for a specific case is something parties to a dispute need to fully understand before they are likely to appreciate and accept its value. Only an experienced mediator can effectively demonstrate and communicate that understanding and answer in-depth questions. Experience has shown that where mediation information sessions are conducted by case managers, administrators and others who are not experienced mediators or not acting in a mediation setting, the prospects of parties opting to mediate can be greatly reduced[10].

4. Ensure adequate public investment

The prospective savings to judicial budgets achieved by resolving many cases at a preliminary stage are so large that the modest costs of the first mediation step can be viewed as an investment generating a substantial return. Those modest costs can be further reduced by a schedule of litigant contributions based on ability to pay, or fixed low fees, or both. In

countries where judicial systems are under such great strain that even the initial investment is untenable, alternatives could be developed, for example mediator pro bono schemes and INGO grants. Online mediation can also be very helpful in this respect.

It should be possible to convince Ministries and Departments of Justice that the cost of providing Court services far exceeds that of a first mediation step and that, given the high statistical probability of the parties resolving their dispute, the mediation sessions would substantially reduce the judicial budget. Some relevant comparative statistics is available. It is known, for example, that: mediation saves time and cost to litigants[11], as well as administrative and Court costs[12], and that mediation increases litigant satisfaction rates[13]. Yet in many jurisdictions around the world, mediation is currently used to resolve less than 1% of cases before the Courts[14].

Applying Buckminster's Law does not imply any compulsion or pressure on litigants to mediate. Mandatory mediation is an oxymoron and is not applicable under the Buckminster's Law model, whose only requirement is to give litigants, via an automatic pre-litigation process step, the opportunity to understand mediation and to make an informed choice by attending a first, accessible, and easy to organize session with a professional mediator.

Conclusion

Litigants have a right to access mediation if they wish. That right needs to be granted to them by a required process step that educates them about mediation so that they understand how and why it works and what value it can deliver for them. Allowing litigants to proceed to Court without extending them that right is inexcusable. It would also reduce judicial budgets, increase the efficiency of the Court system for those cases that are unsuitable for mediation, and lead to speedier, more satisfying justice for all.

Applying Buckminster's Law to the world's litigation systems leads to a new legal model that adds value, works well, improves efficiency, saves costs, reduces risks and makes sense.

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[4] For more on Buckminster Fuller, click here.

[5] See, for example, ZAM/ACB *Onderzoek naar kansen en belemmeringen voor zakelijke mediation onder advocaten, bedrijven en rechters in Nederland*. ZAM/ACB Study of opportunities and impediments in commercial mediation in the Netherlands. Utrecht University december 2018. Marc Simon Thomas, Marina de Kort-de Wolde, Eva Schutte, Manon Schonewille. For an English summary, click here. and Ior Italy's required initial mediation session: see: Bridging the gap between mandatory and voluntary mediation. Leonardo d'Urso. Alternatives VOL. 36 NO. 4 APRIL 2018 and PricewaterhouseCoopers and the European University Viadrina Frankfurt/Oder, *Commercial Dispute Resolution: A Comparative Study of Resolution Procedures in Germany*, 2005.

[6] The absence of evidence of such a balanced relationship was a core finding of a Briefing to the European Parliament's Committee on Legal Affairs (JURI) in November 2018. For the full Briefing, click here.

[7] For a detailed summary of the twin-track approach, please click here.

[8] i.e. mediation advocacy training

[9] See for example Italy's required initial mediation session: *Bridging the gap between mandatory and voluntary mediation*. Leonardo d'Urso. Alternatives VOL. 36 NO. 4 APRIL 2018.

[10] In the Netherlands, all courts have implemented a referral system to mediation and have a mediation officer who provides information and helps parties arrange a mediation if they wish so. This officer also keeps a list of official court mediators. In spite of this, the number of court-referred mediations is limited. Based on the 2018 Annual Report of the Council of the Judiciary in total 3.686 cases were referred by judges to mediation (although not all actually took place because several parties opted out). The majority were family law matters (1.911) and criminal cases (1.472), meaning that only 303 of the more than 1.5 million court cases were referred to mediation for all other dispute categories combined.

[11] See for example: *The Cost of Non-ADR: Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation*, June 2010. ADR Center accessible here.
and J.T. McLaughlin, based on: Alexander, N. (2009), *International Comparative Mediation: Legal Perspectives* 337.

[12] See, for example: Timothy K. Kuhner, *Court-Connected Mediation Compared: The Cases of Argentina and the United States*; ILSA Journal of Int & ComparativeLaw [Vol. 11:519], p. 519-553. Machteld Pel, *Referral to Mediation* (2008)

[13] See for example: *The Cost of Non ADR: Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation*, June 2010. ADR Center and ZAM/ACB survey.

[14] Click here for the 2014 study: *Rebooting the Mediation Directive*.