The Race towards a New York Convention for Cross-border Mediated Settlement Agreements: the Fable of the Tortoise and the Hare Revisited

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1. The focus of much of the international academic literature and, as a result, the policy discussions on this issue is the race towards designing and drafting an NYC4M. While the idea seems at first glance like a race, it is actually a decision proposal that has the power to transform the face of cross-border dispute resolution, in a way that suggests we should take a more reflective breath before hurling into the stopping arms of lobbying for, and drafting, an NYC4M. As the fable of the tortoise and the hare demonstrates, the more haste, the less speed. Slow is the new fast. Indeed, the fable of the tortoise and the hare suggests that

- may have undesirable consequences for cross-border mediation practice;
- may not be evidence-based;
- may have negative consequences for the integrity of the mediation process.

2. Currently an increasingly strong narrative in the policy and academic discourse on cross-border mediation assumes the need for an international convention to establish a uniform recognition and enforcement regime for cross-border MAs. The International Mediation Institute and the European Parliament have recently sponsored a joint Task Force to pursue an NYC4M.

3. The NYC4M narrative may not consider significant variables and issues relevant to the nature of cross-border mediation practice in a cross-cultural and on-demand 'bankruptcy' of existing legal uncertainty as it is being transformed into enforceability and recognition issues through the establishment of a uniform recognition and enforcement regime for cross-border MAs.

4. In the absence of a framework within which to place and test arguments and hypotheses on cross-border MAs and their enforceability and recognition, there follows this average:

- the focus of much of the international academic literature and, as a result, the policy discussions on this point will become increasingly narrow, choice limiting and dominated by the race towards designing and drafting an NYC4M;
- policies and laws dealing with cross-border MAs may be concluded on the basis of statements in the academic literature.

5. Significant funding has already been committed to the development of mediation at international, regional and national levels, for example through UNCITRAL, the European Parliament, the World Bank Group, United Nations agencies and numerous national governments and other bodies. It is likely that the development of cross-border mediation will continue to be lavishly funded and other resources will continue to be committed to cross-border mediation. The significant investment in cross-border mediation indicates the interest in the development of mediation practice internationally, and the high hopes for its ability to improve the quality and efficacy of cross-border dispute resolution. Hence, major shifts will have taken place in the academic environment and relevant stakeholders for cross-border MAs and the development of what is likely to be an extensive recognition and enforcement regime for cross-border MAs.

6. It is time to re-direct the current policy and academic discussions away from a focus on a New York Convention for Mediation by offering a multi-disciplinary framework for analyzing, developing and evaluating alternative dispute resolution (ADR) in its many forms. This paper will look at the legal, political and financial assumptions underlying the current race towards an international legal convention to establish an expedited enforcement regime for MAs, the actual assumptions are made about mediation definitions, standards, models, processes, practices, benefits and the nature of mediated settlement.

7. The potential impact of these assumptions on the development of cross-border mediation:

- how these assumptions currently forming the discourse around a need for an international convention on the recognition and enforcement of cross-border MAs by breaking the discourse in the following ways:

a. making the assumptions visible for academic, policy makers, mediators, lawyers, judges and other stakeholders;

b. introducing new legal, financial and process options into the framework, e.g. cultural heritage and other considerations;

c. including the legal, financial and process options into the framework, e.g. cultural heritage and other considerations;

d. describing these relevant empirical data exists from a range of disciplines and their need for further empirical data in certain areas;

8. Drawing from item 8b, applying concrete lessons that might be translatable from fields such as international commercial arbitration and online consumer mediation:

a. developing principles for an international framework for examining and analysing cross-border MAs, enforceability issues.