Kluwer Mediation Blog

A Heart-Felt Plea To The UNCITRAL Drafters

Bill Marsh (Editor) (Bill Marsh Mediator) · Thursday, March 17th, 2016

Cogniscenti (and readers of Ema Vidak-Gojkovic's blog The UNCITRAL Convention on Enforcement of Conciliated Settlement Agreements – An Idea Whose Time Has Come?) will know that talks are ongoing in an attempt to see if it is possible to find a common system for the direct enforceability of agreements concluded in mediation.

This is a laudable aim and an important issue. The argument goes that such a system will enhance the reputation and attractiveness of mediation, especially in jurisdictions where it is less popular and where the perceived unenforceability of outcomes is regarded as a problem, and especially in an international context.

Edna Sussman addresses this in an article, including reference to the survey findings of Professor Staci Strong: "An overwhelming majority of respondents, 74%, indicated that they thought an international instrument concerning the enforcement of settlement agreements arising out of an international commercial mediation or conciliation akin to the UN convention would encourage mediation and conciliation and 18 percent saying maybe. Only 14% felt that enforcement of a settlement agreement in their home jurisdiction would be easy when the settlement agreement arose out of an international commercial mediation or conciliation seated in another country, considerably more difficult than the survey reported for the enforcement of a mediated settlement agreement in a domestic dispute. 93% said they would be more likely to use mediation and 87% thought it would be easier to come to conciliation in the first place if such a mechanism were in place."

The question is ***how*** to achieve this. Not being directly involved in the current talks myself, I can only go on hearsay. I probably should know better than to do that, but this has got under my skin and I can't resist it. One proposal I hear emerging from the talks concerns the role played by the mediator in enforcement. My understanding is that, as part of the process of according enforceable status to an agreement reached in mediation, the mediator might be required to certify in a boiler plate clause that he/she was satisfied that the parties wanted the settlement and wanted it to be enforced.

May I plead with the UNCITRAL drafters not to go down this route. My reasons are:

1. A mediator's certification should add nothing to the reality of the situation. If the parties sign a settlement agreement they must be taken:
a. to have understood and agreed it, and
b. to wish it to have whatever enforceability they have negotiated it to have.

If they do not, then that is frankly a much bigger problem and one on which they should look to their lawyers.

2. The proposal runs the risk of drawing the mediator into any dispute over enforcement. That in turn could open up the whole mediation process to scrutiny and compromise confidentiality. Indeed, it would require evidence of what the mediator and the parties/lawyers said and did at the time of "certification", whether the mediator took proper steps to ascertain the parties views, and so on.

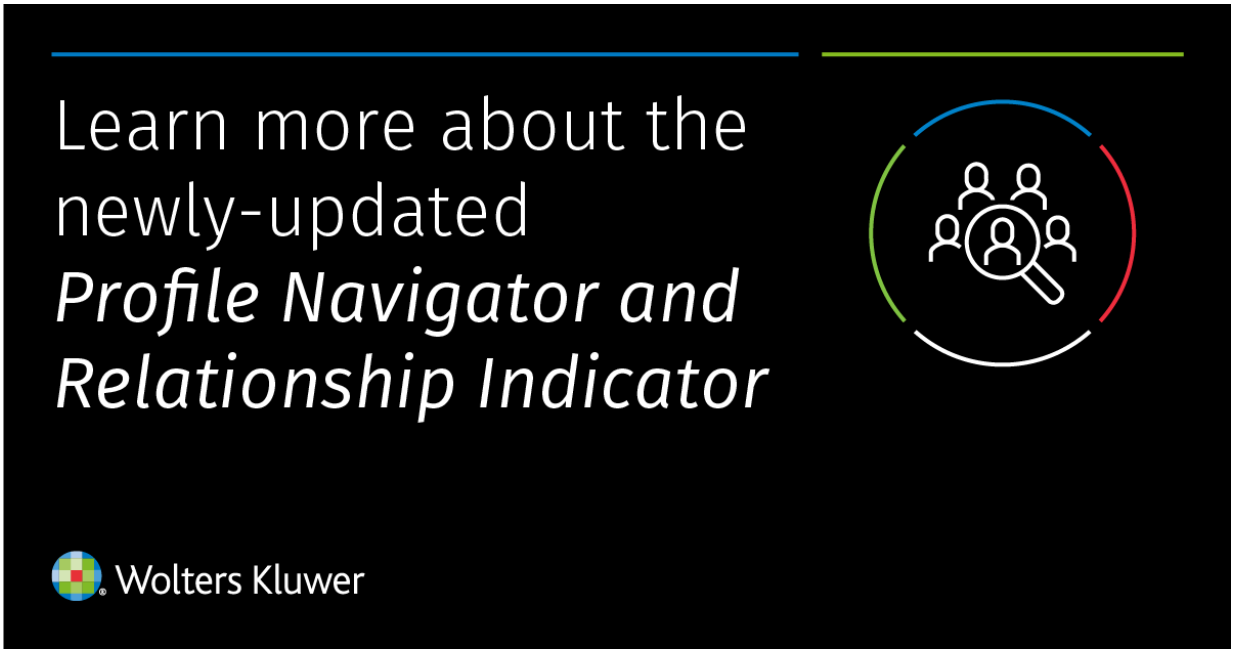
3. A system of certification by mediators is easily open to abuse. Any party wishing cynically to renege on a deal it has done will assert that (eg) the mediator did not properly explain the question of enforceability, did not properly ascertain their understanding, etc. Such an attempt also exposes the mediator to the threat of suit from the complaining party.

4. Most fundamentally, it runs contrary to the whole notion of party autonomy and responsibility. Mediators are not there to "make it all better" for parties, but to enable them to do a deal for all aspects of which *they* take responsibility. Leaving aside the practicalities of certification, for mediators to certify the understanding of the parties would be a very significant conceptual departure from what we do. In no other part of the mediation process can the actions of a mediator (eg in certifying something) alter the substantive legal rights and obligations of the parties. That is the whole premise on which mediators engage and are engaged. This proposal would fundamentally alter that, and in doing so change the nature of a mediator's role.

Any international enforcement mechanism which is found (and this blog is not arguing against that) must not depend on any kind of approval/certification by the mediator for its enforceability.

Incidentally, we tried to solve this in the 1999-2002 talks that lead to the publication of the UNCITRAL Model Law on International Commercial Conciliation, in which I had the privilege of representing the UK Government. The issue did not arise until very late on, so a pragmatic view was taken not to allow this highly complex question to derail publication of the Model Law. Good luck to those involved this time around!

Finally, my personal experience has been that where parties have wished to enhance the international enforceability of an agreement reached in mediation, they have (once the deal is agreed) asked me to accept an appointment as arbitrator in the same dispute and issue a consent award in the terms of the agreement reached. I hear from other mediators that they have had a similar experience. I would welcome comments on that, and other approaches.



This entry was posted on Thursday, March 17th, 2016 at 7:04 pm and is filed under Accreditation, ADR, ADR Agreements, Appointment of Mediators, Commercial Mediation, Conciliation, Confidentiality, cross-border mediation, Enforcement, Growth of the Field (Challenges, New Sectors, etc.), harmonisation of mediation law, International Law, International Mediation, Legal Issues, Legal Practice, Legislation, mediated settlement agreement, Mediation Outcomes, Mediation Reforms (Legislation, etc.), New York Convention, UN and International Organizations, UNCITRAL, UNCITRAL Model Law
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.