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The Ideal Global Mediator Standard – Minimum, Aspirational, Or Neither?

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The introduction of the Singapore Convention on Mediation (SCM) last year has intensified the long-standing debate on professional mediator standards. A previous blog post called for China to streamline its legislation on commercial mediation, and another spoke of the prospects of proliferating and harmonizing standards in the Middle East. The idea of a global mediator standard has also been raised. In this post, I explore the key themes in the discourse on global mediator standards in the context of cross-border commercial mediation. Specifically, I look at whether it may be useful to have an opt-in, soft law instrument prescribing standards of mediator conduct.

Global standards can come in many shapes and forms. They can prescribe aspirational standards, minimum standards, or a mixture of both. Yet another approach that mediator standards can take is to prescribe purely procedural standards of mediator conduct. An example of this lies in the International Mediation Institute's (IMI) proposed Code of Disclosure, which does not prescribe any substantive standards of conduct, but requires the mediator to follow a framework to inform parties of how the mediation will be conducted. Let's consider these different ideas in turn, starting with the aspirational standard.

An aspirational standard may help mediators to navigate difficult scenarios and ethical dilemmas when mediating cross-border disputes. Mediators are often required to answer tough questions on how to conduct the mediation fairly, and such questions can become even more difficult if the parties are used to different styles of mediation. An example of an ethical dilemma has been raised by Professor Michelle LeBaron, concerning a mediation between a social worker and a mother whose daughter had been removed from home. The social worker would only return the child if the mother could show that she would cultivate a sufficiently secure and supportive home environment. In private sessions, the mother told the mediator how she would fulfil this condition. But in joint sessions, she appeared to be unable to express herself. Adding to the complexity of this case, the mediator and the mother belonged to the same minority ethno-cultural group, whereas the social worker belonged to a dominant ethno-cultural group, which may (or may not) have affected the power dynamics in the mediation. Such a situation could present a real ethical dilemma. If the mediator stepped in to express what the mother had just told him, he might alleviate the power disparities, and bridge the divide, between the parties. However, his intervention might compromise his neutrality and the confidentiality of the process.

An aspirational standard may be useful in facilitating a mediator's weighing of the competing principles in a case like this. Mediators could use the standards to distil the core principles of

mediation that are common to all mediation styles, and identify any hierarchy amongst these principles. They could then balance these principles against one another to devise an appropriate solution to the dilemmas they may face.

A minimum standard may fulfil a different purpose: improving consistency in the law on the SCM, in particular Article 5(1)(*e*) thereof. Article 5(1)(*e*) creates a defence to the enforcement of settlements where a party entered into the settlement because the mediator committed a serious breach of the applicable standards. This broadly-worded provision leaves various issues ambiguous, which, taken together with the diversity in mediation practice, may reduce consistency in its application in the different courts. This is illustrated by *Vitakis-Valchine v Valchine* 793 So.2d 1094 (2001), where, in a divorce matter, the mediator had allegedly told the wife that, amongst other things: the judge would order her frozen embryos destroyed; she was not entitled to her husband's federal pensions; he would inform the trial judge that the settlement failed because of her; and she could protest any provision in the settlement at the final hearing. The mediator also allegedly rushed the parties when they were drafting their settlement agreement. While it is unclear whether the Florida District Court of Appeal found as a fact that the mediator committed these acts, the Florida Mediator Qualifications Board Hearing Panel found clear violations of the Florida Rules for Certified and Court Appointed Mediators and reprimanded the mediator accordingly. Some might agree that the mediator's conduct amounted to a substantial violation of those Rules, which emphasise a mediator's duty to protect parties' right of self-determination. Yet, others may take the opposing view, as did the trial court, demonstrating the palpable risk of different enforcement outcomes.

This problem can potentially be addressed through a minimum standard, which could, for instance, prescribe a set of fundamental rules, breaches of which would typically fall within Article 5(1)(*e*). Such an approach may reduce ambiguities as to whether a breach is "serious", thereby facilitating clarity and consistency in the law and reducing the risk of unnecessary litigation on the enforcement of the settlement.

The above discussion also shows that the minimum and aspirational standards may be geared towards different objectives. But is it possible for a global standard to achieve both the purposes of guiding mediators through ethical dilemmas and fostering clarity in the law? A mixed standard may be the answer here: it could couch rules of mediator conduct in a combination of minimum and aspirational standards. For example, drawing from the Code of Practice for Mediators of the Shanghai Economic, Trade and Commercial Mediation Centre, the standard could prescribe in aspirational terms that the mediator "shall fully respect the autonomy of the parties in the mediation procedures and mediation results" (Article 1 of the Code). It could then elaborate that at the minimum, the mediator "shall not force the parties to reach a settlement" (Article 9 of the Code). Such a standard can potentially achieve both of the objectives introduced in this post.

However, the problem facing any substantive standard, regardless of how it is framed, is that different people may interpret and apply the same standards of conduct very differently. This may arise not just from language discrepancies and differences in domestic legal orders – the chief contributors to interpretive divergences in most harmonisation efforts – but also from the vastly divergent understandings of what mediation entails.

Yet, if we overcome the interpretive divergences, a new problem arises: a lack of diversity in mediation practice. If cross-border disputants rely on the global standard by default, mediation practice could converge over time. While this would alleviate the problems described above, it is

also likely to impede the flexibility of the mediation process, making it difficult for mediation to remain as efficient as it is today. These concerns are pressing, because they pertain to two key features that currently make cross-border mediation appealing: flexibility of process; and speed. These two features were viewed as “absolutely crucial” or “important” factors influencing 80% of users’ choice of mediation, as revealed in a 2020 survey by the Singapore International Dispute Resolution Academy. It is best to preserve these highly-desired features of mediation, and having a global standard may be counterproductive to this.

Further, all of this assumes that it is even possible to arrive at a global consensus on the rules contained in the global standard. In reality, this consensus may be difficult to reach, because different mediation styles emphasise different values. To illustrate, during the drafting of the Uniform Mediation Act 2001 in the US, some mediators relentlessly advocated to legislate the requirement that the mediator be impartial, arguing that the failure to do so would fundamentally distort the mediation process. Others argued against this, saying that some mediation styles did not call for impartiality. Eventually, a compromise was reached by giving states the autonomy to choose whether to incorporate the provision on impartiality. In a global context, the differences in mediation styles are likely to be even wider and more nuanced. If every hotly-contested provision was made optional, the compulsory provisions might become too few and far between to be meaningful.

At the same time, the compromise adopted in the US reveals an important lesson – that a uniform, one-size-fits-all standard may not always be appropriate. Instead, it may be better to allow parties to decide for themselves what rules should apply to their mediation. This is precisely the approach that the IMI’s proposed Code of Disclosure takes. The Code allows parties to concretely set out their expectations of the mediation process and negotiate on how the mediation is to be conducted before mediation commences. These negotiations may be time-consuming, and could turn into yet another source of tension between the parties. However, these negotiations may also foster efficiency in the long run by nipping potential sources of conflict in the bud and ensuring that the mediation process is optimised to parties’ needs. Ultimately, such an approach not only preserves the diversity in mediation practice, but also best concords with one of the fundamental goals of mediation– to facilitate a settlement that achieves a win-win for all.

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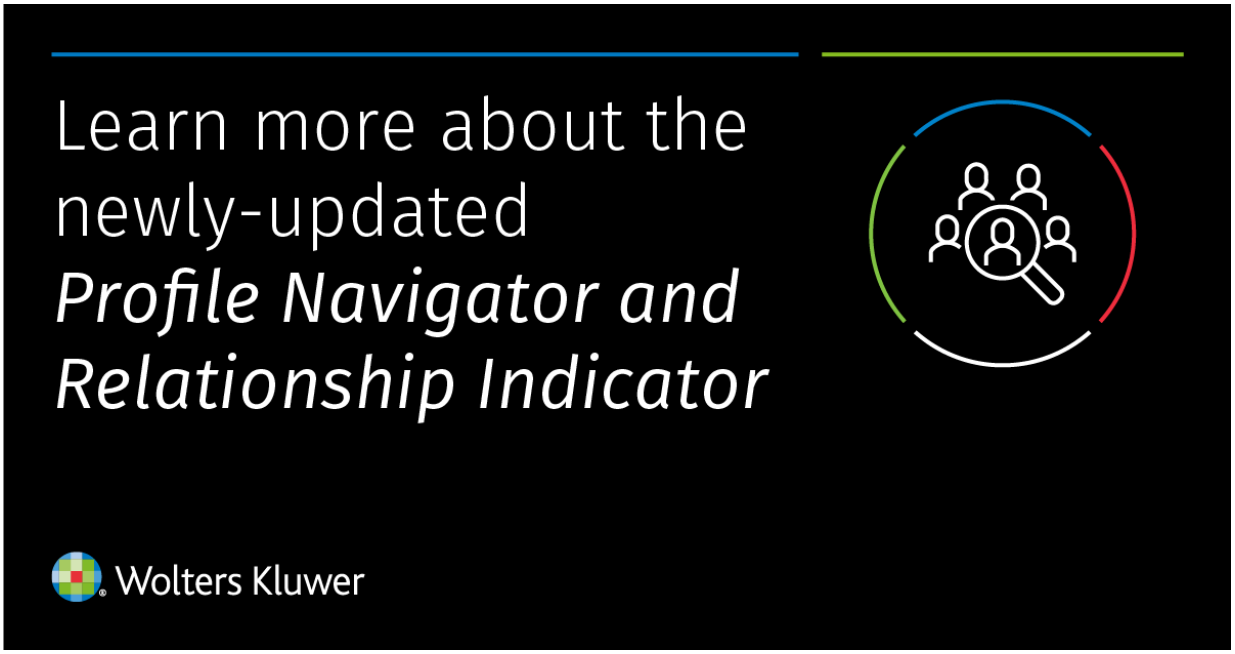

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