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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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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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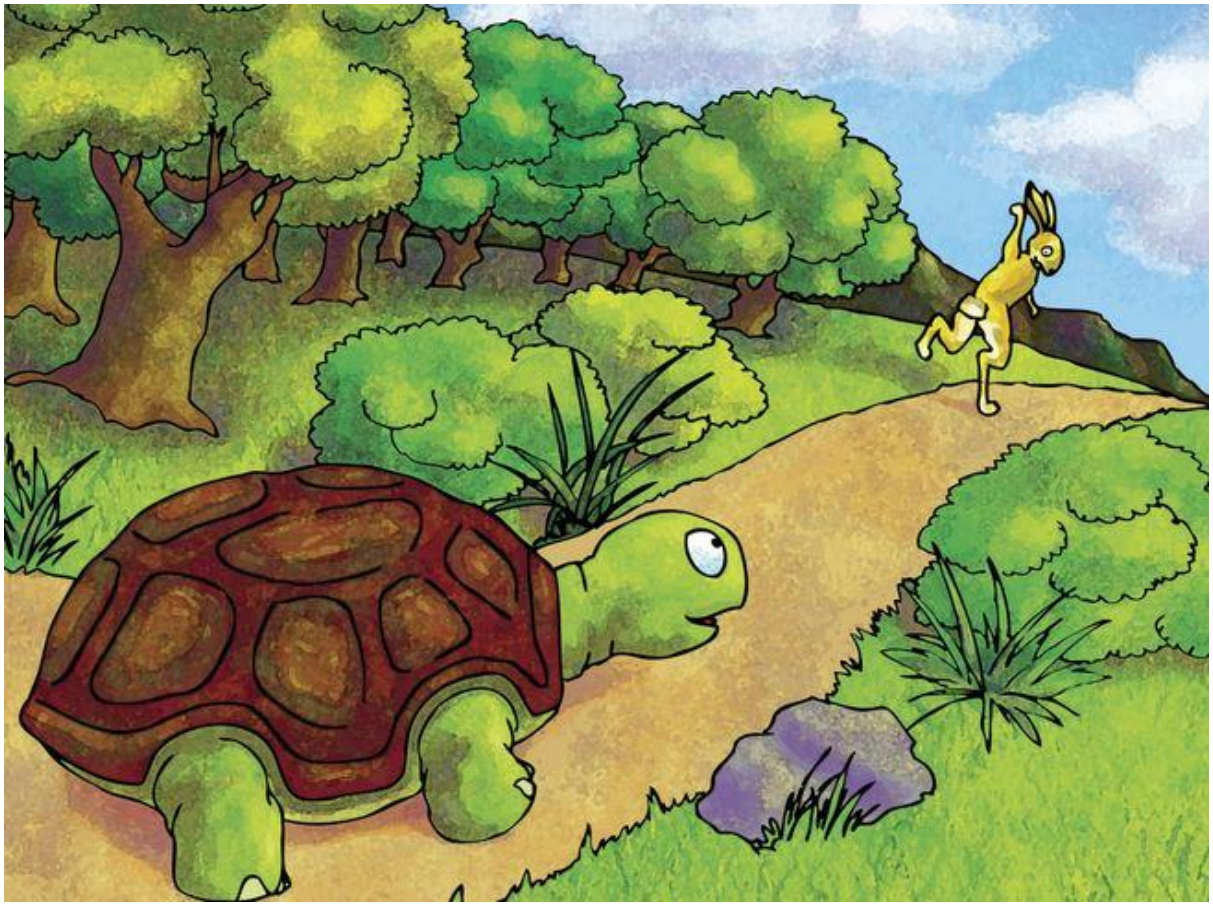

In his recent posting for the **Kluwer Arbitration Blog**, Michael McIlwrath picks up on what I affectionately refer to as the NYC4M (New York Convention for Mediation) theme, that is the debate about whether an international convention for the enforcement and recognition of cross-border mediated settlement agreements would assist the development of, and promote the use of, cross-border mediation. It's a theme that **Geoff Sharp** of this Blog has also pursued. Moreover, the International Mediation Institute and the International Bar Association have recently announced a joint Taskforce to pursue an NYC4M.

While the idea seems at first glance like a no-brainer, an obviously attractive proposal that has the power to transform the face of cross-border dispute resolution, allow me to suggest that we should take a long reflective breath before hurtling into the dizzying arena 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.
So here are some slow thoughts to offer the increasingly fast-paced discussions on NYC4M.

1. There is a need for a robust framework to understand, examine and analyse cross-border mediated settlement agreements (MSAs), in particular issues related to their enforceability and recognition.
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 expedited enforcement mechanisms for cross-border MSAs, in the same way as cross-border arbitration has the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) — the 'NYC for Mediation' or NYC4M narrative.
3. The NYC4M narrative may not consider significant variables and issues relevant to the nature of cross-border mediation practice in its race towards a largely pre-determined 'solution' to address legal uncertainties associated with the enforceability and recognition of cross-border MSAs.
4. In the absence of a framework within which to place and test arguments and hypotheses on cross-border MSAs and their enforceability and recognition, the following risks emerge:
a) 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.
b) Policies and laws dealing with MSAs may be concluded on the basis of statements in the academic literature that:
• are not evidence-based;
• may have negative consequences for the integrity of the mediation process;
• may have undesirable consequences for cross-border mediation practice.
c) Available resources such as existing infrastructure, relevant enforcement mechanisms in existing cross-border legal instruments may be under-utilised or not utilised at all.
d) Valuable options in the form of mechanisms to support the enforcement and recognitions of cross-border MSAs may be overlooked.
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, international development organisations

such as the World Bank Group and numerous national governments and other bodies. It is likely that funding 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. Choices made now about how to address enforceability and recognition issues for cross-border MSAs will have a direct and significant impact on mediation practice throughout the world for a long time to come. Accordingly these choices need to be made on an informed basis after consideration of the available evidence and arguments from a range of disciplinary perspectives.

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 widening, deepening and anchoring the academic and policy debates on this issue. Specifically, let's think about:

a) the legal-political and theoretical assumptions underpinning the drive towards an international legal convention to establish an expedited enforcement regime for MSAs. For example, what assumptions are made about mediation definitions, objectives, models, processes, practices, benefits and the nature of mediated outcomes?

b) the (potential) impact of these assumptions on the development of cross-border mediation.

c) how to challenge the assumptions currently framing the discussion around a need for an international convention on the recognition and enforcement of cross-border MSAs by broadening the discussion in the following ways:

i. making the assumptions visible for academics, policy-makers, mediators, lawyers, judges and other stakeholders;

ii. introducing non-legal theoretical perspectives into the framework, e.g. cultural, historical and behavioural-scientific;

iii. identifying where relevant empirical data exists from a range of disciplines and the need for further empirical data in certain areas;

iv. drawing from items ii) and iii), applying concrete lessons that might be transferable from fields such as international commercial arbitration and online consumer mediation.

d) developing principles for an international framework for examining and analysing cross-border MSA enforceability issues.