NUDGING USERS TOWARDS CROSS-BORDER MEDIATION: IS IT REALLY ABOUT HARMONISED ENFORCEMENT REGULATION?

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ABSTRACT

In this paper Nadja Alexander challenges her audience to think in different ways about creating the shift needed to make cross-border mediation practice a reality rather than rhetoric.

Within Asia, Hong Kong, Singapore and other centres are positioning themselves as regional leaders in cross-border mediation. Statistically though, there is not an enormous amount of cross-border mediation going on. Despite the apparent advantages of mediation and the international regulatory activity outlined above, cross-border commercial mediation practice has been slow to develop. At dispute resolution conferences and other get-togethers, mediators and other ADR advocates ask themselves, "Why"?

While there is little empirical data to suggest why this is the case, numerous writers offer explanations along the following lines. Users are said to remain cautious about mediation's effectiveness in the absence of a mature and comprehensive international legal framework to regulate the rights and obligations of mediation participants such as those relating to the enforceability of MSAs. In particular, diversity of enforcement mechanisms for cross-border MSAs is seen as a major obstacle to the development of global mediation practice.

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But here is the real question: to what extent will legal and policy initiatives to address issues such as confidentiality, competency and enforceability change people's behaviour? For example, would a "New York Convention" for mediated settlement agreements (currently a popular idea) be enough to motivate parties and lawyers to use mediation as their dispute resolution process of choice?

Insights from behavioural economics and related fields suggest that the answer is "maybe" and more likely "no". Behavioural economists postulate that people are not rational actors and will not necessarily change behaviour to use cross-border mediation, even if their "rational" concerns were to be addressed, for example through a "New York Convention" for mediated settlement agreements.

However, the good news is that people — including dispute resolution users — are "predictability irrational" (Ariely 2010). Therefore there is much that policy makers, dispute resolution organisations, mediators and arbitrators can do in terms of designing dispute resolution choices (choice architecture) to "nudge" (Thaler and Sunstein 2009) users in the direction of mediation for cross-border matters.

This paper explores how each and every one of us can apply the principles of choice architecture to "nudge" dispute resolution users to really make the behavioural shift to cross-border mediation practice.

KEYWORDS: *cross-border mediation, opt-out provisions, behavioural economics, choice architecture, mediated settlement agreements*