



IS THE ENFORCEABILITY OF MEDIATED SETTLEMENTS HOLDING BACK THE FUTURE OF COMMERCIAL DISPUTE RESOLUTION?

The early voting data from the first 10 Global Pound Conference (GPC) series events has revealed that both the User and Advisor stakeholder groups share a view that the future of commercial dispute resolution would be assisted if there was in place legislation to improve the enforcement of mediated settlements. Users are parties to disputes: the clients, and Advisors are typically private practice lawyers.

This poses an interesting question. If you were to ask experienced participants in mediation, whether the Users, the Advisors representing them or the mediators themselves (Non-Adjudicative Providers in GPC stakeholder terms), it is possible that few if any of them would be able to identify a single example of a settlement reached at a mediation not being honoured by the parties to that bargain. It is intrinsic in the nature of an agreement reached by consensus in negotiation, rather than being imposed by a court or arbitral tribunal, that the parties to that bargain tend to stick to it.

The recent Hong Kong GPC event followed precisely this pattern. The 200 delegates were broadly supportive of legislation to support enforcement of mediated settlements yet in discussions among the experienced panellists, there was no experience of mediated settlements not being honoured.

Yet the absence of practical problems (at least publically) has not deterred a long-standing effort to explore and formalise the relationship between informal justice and the courts. Indeed there has been an initiative convened by UNCITRAL to develop a Convention on Enforcement of Conciliated Settlement Agreements. This would be the mediation equivalent to the New York Convention on the enforcement of arbitral awards and put conciliated (mediated) settlement agreements on the same footing so as to provide legal certainty on enforcement. Over the last two years the proposal has been debated in an UNCITRAL Working Group, including in New

York in February 2017. It has not been all plain sailing and a range of views on the need for a Convention is understood to exist.

Perhaps the real point of the exercise is this: if mediated settlements could be enforced in the same way as arbitration awards under the New York Convention, that would assist in evidencing the status and value of mediation to sceptics. One might ask whether that was really necessary – surely by now the value and legitimacy of mediation is well understood? However, the experience of in house counsel in international disputes is that there still remains much variability in understanding, experience and willingness to use mediation. So if a Convention were in place perhaps that will assist further to embed the process in the arena of international dispute resolution options.

Whatever the direction of travel at UNCITRAL, the delegates attending GPC events scheduled before the end of the series on 6 July 2017 in London have the opportunity to say something on this topic. Is a Convention needed to change attitudes to the use of mediation in international commercial disputes? Is a Convention needed to address a substantive issue with settlements not being honoured? Or will a Convention just support a change of mindset and promote the acceptance and usage of mediation?

Make time to attend a GPC event in a city near you and add your voice to the debate and body of data to help shape the future of commercial dispute resolution.

“The GPC Series is an exciting and unique opportunity for all stakeholders in the dispute resolution community to shape the way we do things in the future”



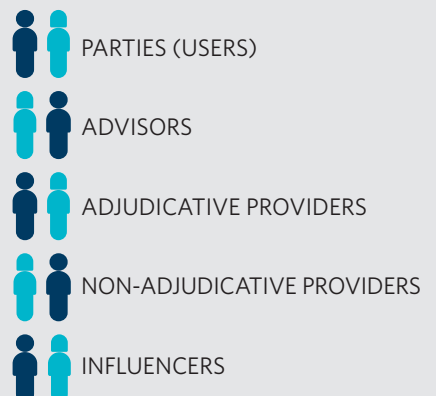
ALEXANDER ODDY
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SMITH FREEHILLS



20 CORE QUESTIONS

WILL GATHER ACTIONABLE DATA

3,000 PARTICIPANTS EXPECTED



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