Kluwer Mediation Blog

Singapore Case Note: What happens when a party to an MSA has a change of heart?

Nadja Alexander (Editor), Shou Yu Chong (Singapore International Dispute Resolution Academy) · Wednesday, October 17th, 2018

Hot off the press, the case of Chan Gek Yong v Violet Netto (practising as L F Violet Netto) and another and another matter [2018] SGHC 208 ('Violet Netto') decided by the Singapore High Court provides us with clues as to the Court's general attitude towards mediation and mediated settlement agreements ('MSAs'). It is useful to reflect on the Singapore Court's attitude towards mediation in light of the introduction of the Singapore Mediation Act (No. 1 of 2017) – which has been in effect since 1 November 2017 – and the emergence of the draft Singapore Convention on Mediation, which is expected to be adopted by the UN General Assembly later this year with a signing ceremony expected in August 2019.

There are many aspects of Violet Netto which could be explored. In this post, we focus on the Singapore High Court's treatment of allegations made by one party that the mediators pressured her to sign off on the MSA.

What happened?

In September 2012, Mdm Chan– who represented herself throughout the entire legal process – instituted two civil lawsuits against her lawyers, referred to as Violet Netto, who had advised her in a conveyancing transaction, alleging that they had been professionally negligent and breached their duty of care owed to her vis-a-vis that transaction. Four years later in September 2016, Mdm Chan and Violet Netto agreed to mediation at the Singapore Mediation Centre ('SMC') conducted by two SMC-appointed co-mediators. The parties reached a mediated settlement agreement (MSA) at the end of the one-day mediation session: in return for discontinuing the lawsuits, Violet Netto agreed to pay Mdm Chan a sum of S$150,000 in instalments over the course of seventeen months, and the specific terms were drafted and endorsed by signature of all parties.

Just one week after signing the MSA, Mdm Chan appeared to have a change of heart. She informed the High Court at a pre-trial conference that she intended to proceed with her pending civil suits against Violet Netto, seemingly ignoring her obligations under the MSA. Despite this, Violet Netto began issuing the cheques needed to fulfill their payment obligations under the terms of the MSA. At the same time Violet Netto filed counter suits to strike out Mdm Chan's pending civil suits.

How did the Court decide?

The High Court struck out Mdm Chan's pending civil suits by administering its strike out powers under O 18 r 19(1)(d) of the Singapore Rules of Court (Cap 322, R 5, 2014 Rev Ed). Justice Tan Siong Thye formed the view that Mdm Chan had abused the Court's process by seeking to continue with litigation although she had reached an agreement to settle the same dispute with her former lawyers, Violet Netto.

Of interest to mediators is the Court 's thorough examination of whether the MSA was validly concluded. Here Justice Tan considered if the extent to which there was evidence to suggest that Mdm Chan signed the MSA whilst:
• incapacitated;
• under duress; or
• not fully comprehending its terms.

Not only did Justice Tan find that the MSA was valid, His Honour found that Mdm Chan had reneged on her obligations because she simply was dissatisfied with the instalment arrangements (see [88] of the judgment).

Undue pressure by the co-mediators?

Having had a change of heart because she was displeased with the instalment arrangements, Mdm Chan sought to argue in Court that the MSA she signed was invalid for a large platter of reasons (see [15] – [18]). One of her noteworthy contentions was that she felt pressured by the SMC-appointed mediators. As reported in the judgment, Mdm Chan alleged that the co-mediators "persuaded and urged her to accept the amount offered by the defendants as it was almost the end of the one-day mediation session. The mediators further said that if the mediation failed, [they] would have to go back to Court for trial." The reported judgment further states that Mdm Chan maintained that she "understood this to mean that she would have to incur further costs to continue the [pending suits]. She also stated that there was no time for her to consider the Settlement Agreement before signing it" (at [52]).

Mediators reading this will immediately recognize the standard mediator intervention of reality testing and ensuring mediating parties are aware of the (costs) implications of pursuing alternatives to settlement such as going to trial.

After considering all the arguments and evidence, Justice Tan opined that there was "no reason for anyone to feel pressured by [the mediators' actions]" (at [57]). As the mediators were merely conveying words of advice founded upon facts and logical consequences of Mdm Chan's ultimate decision to agree or disagree with the negotiated terms, it demands a tremendous stretch of imagination to interpret those words as one of undue pressure.

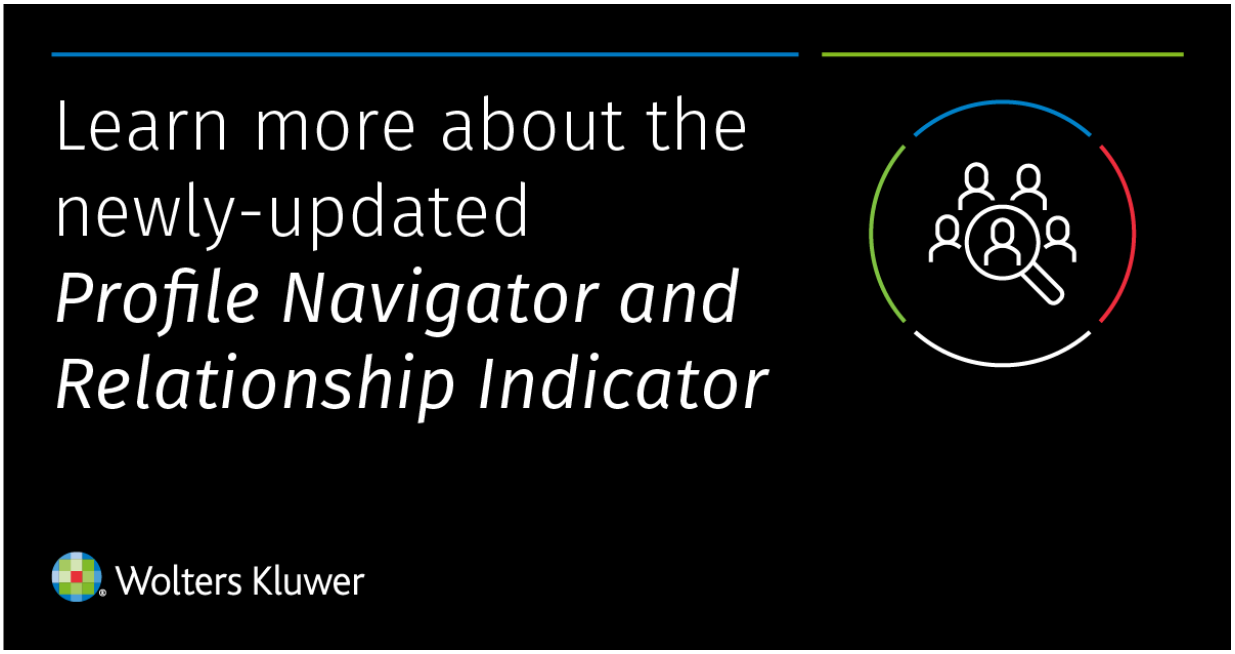
Secondly, Justice Tan ruled that no undue pressure had been applied on Mdm Chan by the mediators, though she alleged that she was pressed to endorse the MSA "as it was already late in the day [and hence] she had no time to consider the [terms of the] Settlement Agreement" (at [58]). It appears to be the Court's view that circumstantial time pressures should not invalidate MSAs. His Honour opined that Mdm Chan could simply have requested for more time if she needed it to consider the terms of the MSA before she endorsed it with her signature. There was also no actual pressure by the mediators, as she admitted that they had not forced her to endorse the MSA against her volition.

What can we learn from the Violet Netto case?

As mediators, lawyers and others interested in mediation, what can we take away from this case? Here are some of our reflections.

1. *Prima facie* MSAs are to be honoured.
2. It is an abuse of process to litigate issues which have already been validly concluded by way of an MSA.
3. Parties need to take reasonable care to read and ensure they understand an MSA before signing it. Remember that Mdm Chan was unrepresented in this case.
4. Where parties are legally represented in mediation, lawyers should explain the meaning of the MSA's terms to their clients and explain the consequence of breach of the MSA. Although not directly addressed in the judgment, this point is consistent with the tenor of the court's reasoning and would be consistent with case law in Australia and other jurisdictions.
5. Evidence of shift in a party's position (here Mdm Chan) after the signing of the MSA is, of itself, not evidence of undue influence, intimidation or the like.
6. For mediators: reality testing by mediators is an indispensable part of the mediation process. At the same time, and as a matter of best practice, mediators are encouraged to be sensitive to the conflict dynamics between parties as they shift throughout the mediation and to be on high alert for signs of potential discomfort or dissatisfaction by a party. For example, in relation to unrepresented parties, mediators may consider including in the mediation agreement a clause recommending that parties obtain professional advice and additionally remind parties of this option during the mediation, perhaps at the start of the mediation and again before sign off on an MSA. It may also be helpful for mediators to reflect on how they frame their reality testing to ensure they make clear that their role is to assist the parties to assess the consequences of both reaching a (particular) settlement and also pursuing an alternative strategy outside the mediation room – highlighting that the choice is always theirs. Yes, there is nothing new in these suggestions. But when disgruntled mediation parties seek to challenge the validity of an MSA by blaming the mediator, it's good to go back to basics and make sure we are getting that right.

In our next post, we will focus on another aspect of the Violet Netto case, namely issues related to a party's ability to understand what they are signing.



This entry was posted on Wednesday, October 17th, 2018 at 2:39 pm and is filed under ADR, Court Procedure and Litigation, Developing the Field, Dispute Resolution, Enforcement of a Mediation Clause, Lawyers, lawyers in mediation, Legal Issues, mediated settlement agreement, Mediation Practice, Reflective Practice, Set Aside a Mediated Agreement, Settlement Agreements, Singapore, Uncategorized
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