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Singapore Convention Series: A Call For A Broad Interpretation Of The Singapore Mediation Convention In The Context Of Investor-State Disputes

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The success of international arbitration, among others, is owed to the New York Convention, which provided tools for global enforcement of arbitral awards. To that end, international mediation has been underused often because of the lack of necessary international enforcement mechanisms of mediated settlement agreements. The Singapore Convention on Enforcement of Mediated Settlement Agreements (***Singapore Convention***), which will be open for signature on 1 August 2019, has been introduced to fill this gap.

When the United Nations Commission on International Trade Law (UNCITRAL) approved the Singapore Convention on 26 June 2018, an expectation of something unprecedented was aroused in the mediation community. The level of enthusiasm was undoubtedly at its peak. But the enthusiasm may tone down due to inquiries concerning the applicability of the Singapore Convention to investor-state disputes. This note proposes ways to address these concerns.

Whether settlement agreements of investor-state disputes are covered under the Singapore Convention largely depends on the definition of "commercial." Much like the New York Convention, the Singapore Convention does not define what constitutes "commercial." The text of the Singapore Convention only excludes disputes arising from transactions in which parties engage for personal, family, or household purposes or those relating to family, inheritance or employment law (Art. 1.2 (a)–(b)). The UNCITRAL Working Group II discussions shed some light on this issue.

Early on, the Working Group considered whether to explicitly limit the scope of the Singapore Convention to "commercial agreements between businesses only" (A/CN.9/WG.II/WP.188, at 3). But this suggestion did not find support among the delegates. It was also proposed to use the definition of "commercial" found in the draft Hague Principles of Choice of Law in International Commercial Contracts or the UNCITRAL Model Law on International Commercial Arbitration (A/CN.9/WG.II/WP.188, at 3). The Working Group, however, decided not to define the term "commercial."

The UNCITRAL Working Group II disfavored a proposal to exclude from its scope settlement agreements involving government entities based on the explanation that government entities too engage in commercial activities (A/CN.9/861, ¶¶44, 46; A/CN.9/WG.II/WP.195, ¶¶19–21). It was

also noted that government entities should not be automatically excluded from the Singapore Convention because such exclusion "would deprive those entities of the opportunity to enforce such agreements against their commercial partners" (*Id.*; *see also* A/CN.9/WG.II/WP.195, ¶¶19–21; A/CN.9/WG.II/WP.198, ¶24; A/CN.9/867, ¶111; A/CN.9/896, ¶62; A/CN.9/WG.II/WP.200, ¶21; A/CN.9/WG.II/WP.205, ¶28). It was suggested that States that intended to exclude settlement agreements involving government entities could address this issue through a reservation or a declaration. To that end, Article 8 was introduced, which allows States to exclude settlement agreements to which the State is a party, or to which a government agency or person acting on behalf of a government agency is a party.

The UNCITRAL Working Group II consistently noted that the Singapore Convention is limited to "settlement agreements which are commercial in nature" irrespective of whether the parties are commercial entities (A/CN.9/WG.II/WP.195, ¶14; A/CN.9/867, ¶¶100, 102–105, 109–110; A/CN.9/896, ¶¶146, 152; A/CN.9/WG.II/WP.202, ¶6(ii); A/CN.9/WG.II/WP.200, ¶28). In this context, the Working Group discussed whether the Singapore Convention might apply to the "liability of a State for its acts or omissions in the exercise of its authority (*Acta jure imperii*)" (A/CN.9/867, ¶¶113–114; A/CN.9/WG.II/WP.198, ¶24). The Working Group "confirmed its understanding that the Convention would not have any impact or interfere with the public international law aspects of state liability or state immunity," thus reinforcing the foundation that the Singapore Convention would only address "commercial disputes" (A/CN.9/896, ¶¶61, 146; A/CN.9/WG.II/WP.200, ¶28).

By contrast, the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (***Model Law***), which was approved along with the Singapore Convention, appears to interpret the term "commercial" more broadly to encompass, among others, investor-state disputes. In particular, UNCITRAL replaced the word "mediation" in the heading of section 2 of the Model Law with the words "International commercial mediation," noting that "such modification would not have any implication as to the applicability of the Model Law to various fields where mediation was used, including investor-State dispute settlement" (A/73/17, ¶50).

It appears that the International Centre for Settlement of Investment Disputes (ICSID) assumes that the "[Singapore] Convention will apply to settlements reached in the context of investment disputes" (*see* ¶1318, Annex E: (Additional Facility) Mediation Rules). Although ICSID provides no explanation for this proposition it should be viewed as a positive sign toward a broader acceptance of the Singapore Convention in the context of investor-state disputes.

Similarly, during a recent meeting of the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), the UNCITRAL Secretariat explained Article 8 in the context of allowing States "to tailor [the] application [of the Convention] in a flexible manner, including in the context of investor-State dispute settlement" (A/CN.9/WG.III/WP.160, ¶54).

It bears noting that investor-state disputes typically arise on the basis of an investment treaty or free trade agreement (75% of all ICSID cases), an investment contract (16% of all ICSID cases), or investment legislation (9% of all ICSID cases). Investment disputes may also arise by virtue of an umbrella clause in a treaty. (An umbrella clause provides a possibility to transform a contractual breach by a State into a treaty breach.) Absent reservations by States under Article 8 of the Singapore Convention discussed above, the commercial aspects of these disputes would be certainly covered under the Singapore Convention. To that end, an early resolution of commercial

disputes between States and investors would be encouraged to prevent the emergence of an investment dispute. But as explained above, the *status quo* of the scope of the Singapore Convention includes gray areas, particularly, whether it would cover *all* or *a limited scope* of investment disputes (disputes that do not derive from the "public international law aspects of state liability or state immunity").

Indeed, pro-mediation States would be expected to go beyond the *status quo*. It is inconceivable that a convention that aims at "contribut[ing] to the development of harmonious international economic relations" and recognizes that mediation "produc[es] savings in the administration of justice by States" could potentially omit the most controversial disputes—investor-state disputes—that affect businesses and their shareholders, industry sectors, government institutions, administration of justice, and the lives of ordinary taxpayers.

At first sight, it may seem that States may not be encouraged to create effective enforcement tools for investors because States are almost invariably defendants in investor-state disputes. But there are a number of good reasons why States should consider doing so: *first*, the availability of such enforcement mechanisms would ***incentivize*** investors to mediate investor-state disputes with even greater confidence; *second*, without a global enforcement mechanism, States and investors may be artificially forced to document their settlement in a ***consent arbitral award*** thus wasting costs and time to achieve a goal that may be achieved in a more efficient way; and *third*, although an investor-state claim may often commence as a one-sided process, a settlement of such claim is a ***two-way street*** that includes rights and obligations for both parties, thus allowing States to equally benefit from such enforcement tools.

Pro-mediation States have an opportunity to go beyond the conventional approach of joining the Singapore Convention in its default setting. To ensure consistency, they may adopt implementing legislation that would clearly define the scope of the Singapore Convention in their territories and encompass, among others, a broad range of investor-state disputes. Without clarifying legislation, the burden to define the term "commercial," thus the applicability of the Singapore Convention to the specific settlement agreement at hand, would be placed on the competent authority of a particular State (territorial unit). In light of *travaux préparatoires* of the Singapore Convention, this would not necessarily warrant a broad interpretation of the term "commercial."

States that have less experience in mediation may question the need for clarifying the scope of the Singapore Convention with the view to ensure its application to a broad range of disputes. To recall, the Singapore Convention lists the main benefits of mediation, namely, that mediation: (i) "contribute[s] to the development of harmonious international economic relations," (ii) "reduc[es] the instances where a dispute leads to the termination of a commercial relationship," (iii) "facilitate[es] the administration of international transactions," and (iv) "produc[es] savings in the administration of justice by States." These benefits provide ample reasons for States to reconsider the *status quo* and clarify the scope of the Singapore Convention through implementing legislation. To that end, it is hoped that States would elevate the Singapore Convention to a new level thereby making it a truly universal instrument for the enforcement of mediated settlement agreements, both in the context of commercial and investor-state disputes.

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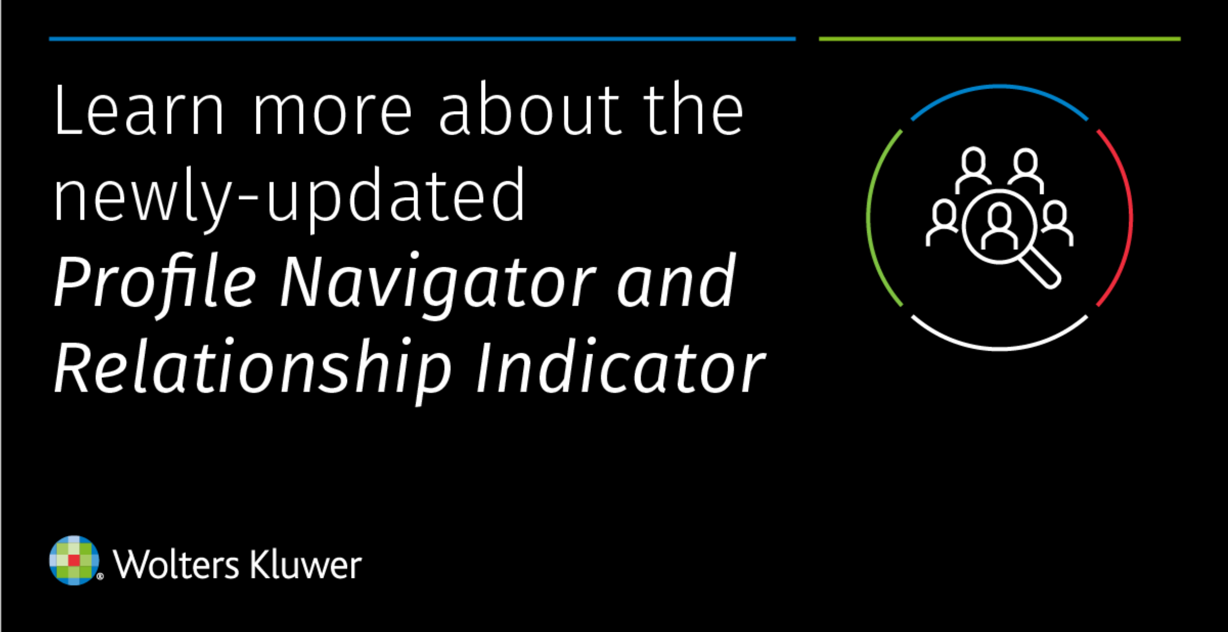

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