Kluwer Mediation Blog

Singapore Convention Series: Refusal Grounds In The UN Convention On International Settlement Agreements Resulting From Mediation

Ming Liao (Tahota Law Firm) · Sunday, April 12th, 2020

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") makes a huge contribution to the success of international arbitration by providing tools for global enforcement of arbitral awards. To that end, international mediation has been underused because of the lack of necessary international enforcement mechanisms of mediated settlement agreements. The UN Convention on International Settlement Agreements Resulting from Mediation ("the Singapore Convention" or "the Convention"), which had been passed by the United Nations Commission on International Trade Law (UNCITRAL) in 2019, is expected to change the situation. On the one hand, the Singapore Convention applies as an instrument to facilitate international trade and to promote mediation as an alternative method of resolving disputes. On the other hand, the enforcement refusal grounds in the Singapore Convention will impact the promotion environment, as they serve as safety valves in ensuring the Singapore Convention's implementation.

Enforcement Refusal Grounds in the Singapore Convention

Article 5 of the Singapore Convention lists grounds for refusing to grant relief as:
(1) party's incapacity (Art 5(1)(a));
(2) the settlement agreement being null and void, inoperative or incapable of being performed (Art 5(1)(b)(i)), not binding, or not final (Art 5(1)(b)(ii)), or subsequently modified (Art 5(1)(b)(iii));
(3) the obligations in the settlement agreement having been performed (Art 5(1)(c)(i)), or being not clear or comprehensible (Art 5(1)(c)(ii));
(4) granting relief being contrary to the settlement agreement (Art 5(1)(d));
(5) serious breach by the mediator (Art 5(1)(e));
(6) the mediator's failure to disclose circumstances that raise justifiable doubts on impartiality or independence (Art 5(1)(f));
(7) granting relief being contrary to the public policy of the State where the enforcement is sought (Art 5(2)(a)); and,
(8) the disputing matter being not capable of settlement by mediation under the law of the State where the enforcement is sought (Art 5(2)(b)).

Apart from the grounds listed in Article 5, a party resisting relief can also demonstrate that other requirements of the Convention have not been met (e.g. the dispute is not commercial), but no explicit grounds for refusal are needed for those issues because including such grounds explicitly

would merely have duplicated the rest of the Convention.

Analysis and application outlook of the refusal grounds in the Singapore Convention

The above grounds for refusal may be grouped into four main categories: contract-like defences (Article 5(1)(a)-(d)), mediator-misconduct defences (Article 5(1) (e)-(f)), subject matter not capable of settlement by mediation (Article 5(2) (b)), and public policy (Article 5(2)(a)).

Most of the grounds have been drawn from Article V of the New York Convention with appropriate modifications to suit the context of mediation. For example, Articles 5(1)(a) through (c) are similar to Article V(1)(a) and (e) of the New York Convention, which deals with incapacity to enter into an arbitration agreement or other invalidity of the arbitration agreement, as well as when an arbitral award has not yet become binding on the parties or has been set aside or suspended. Article 5(2) of the Singapore Convention mirrors Article V(2) of the New York Convention, which allows refusal of enforcement if the "subject matter of the difference is not capable of settlement by arbitration under the law of [the country where recognition and enforcement is sought]" and where recognition or enforcement "would be contrary to the public policy of that country".

Article 5(1)(d)-(f) have no equivalents in the New York Convention because they are unique to the mediation context. For example, mediated settlement agreements imitate contracts in that they are based on party consent and mutual agreement. So when claiming relief under the Convention is contrary to the terms of a mediated settlement agreement, Article 5(1)(d) could be relied upon for refusal.

Article 5(1)(e) and (f) relate to a serious breach of mediation standards and failure to disclose circumstances without which the party would not have entered into the settlement. These grounds stem from the unique function that mediators play. An earlier draft of these defences by UNCITRAL Working Group II referenced the mediator's failure to "maintain fair treatment of the parties" or to disclose circumstances "likely to give rise to justifiable doubts as to its impartiality or independence." But this provoked divergent views among the members of the Working Group. The differences between mediation and arbitration were highlighted, including the practice of having private communication with one party in mediation that had no counterpart in arbitration as well as the limited number of procedural rules governing the mediation process. These features together with the confidentiality of mediation meant that it would be difficult to assess whether the parties were treated fairly. The fact that mediators have no power to request anything from the parties and that mediation is a voluntary process from which parties are free to withdraw at any time also prompted some views that it was rare for the mediator to make disclosures as to circumstances that may affect the mediator's impartiality or independence. The final provision reflects a compromise on the issue in two ways. First, it limits the scope of the defences to instances where the mediator's misconduct or failure to disclose had a direct impact on the settlement agreement in that the "party would not have entered into the settlement agreement". Second, its language highlights the exceptional circumstances that can be raised by using adjectives such as "serious" and "material". Although it remains to be seen what type of conduct would cross the line, the words used in the defences are sufficient to establish that the threshold should be high.

The implementation of enforcement refusal grounds which have no equivalent counterparts in New York Convention are worth observation, especially regarding Articles 5(1)(e) and (f). Impartiality and independence requirements also exist on arbitrators, as an intrinsic requirement from natural

justice. But there are no alike articles in New York Convention directly regulating arbitrators' breach of standards. In practice, if there exists a serious breach of arbitrators' standards, such as bribery or corruption, the party against whom enforcement is sought may resort to public policy grounds for remedy. Keeping the public policy grounds in Article 5(2)(a) of the Singapore Convention opens another door for challenging the enforcement from the reason of mediators' standards.

In distinguishing the Singapore Convention's refusal grounds from those of New York Convention, the "seat" difference in international arbitration and mediation also needs to be mentioned. Enforcement of arbitration awards relies on the nationality of the "seat" or place of arbitration under the New York Convention. The seat notably determines where relief can be sought under its terms. The New York Convention also recognizes the possibility of the annulment of awards under the law of the seat. Mediated settlement agreements have no nationality under the Singapore Convention. The concept of a seat of mediation was considered and rejected by the UNCITRAL Working Group II in part to avoid giving legal importance to one jurisdiction among several that the mediated settlement agreement may impact. By decoupling mediation proceedings from the law of the seat, the Convention frees mediated settlements from the legal requirements of any given place of mediation. The absence of any provision for annulment in the Convention avoids a double control on mediated settlement agreements, with challenges possible in annulment and enforcement proceedings, that some argue has harmed the development of international arbitration. Lack of seat concept in international mediation and Singapore Convention makes refusal grounds less exposed to judicial review from two courts to one.

On the question of what substantial law will govern the enforcement refusal defences, the Singapore Convention offers no article in addressing it. It is the negotiating parties' assumption that the enforcing authority or the court seized with the matter would usually apply the conflict-of-law rules at the place of enforcement and where relevant, consideration of the parties' choice of law in the settlement agreement.

Conclusion

The refusal grounds for enforcement in the Singapore Convention, especially Articles 5(1)(e) and (f), which have no counterpart in the New York Convention, deserve special consideration from mediators, as a breach of standards has been introduced as an independent reason for challenging a mediation's outcome. Meanwhile, refusal grounds may be a last resort for enforcing parties, especially the defending party. It is anticipated that the refusal grounds may be a hotly discussed topic for the Singapore Convention.

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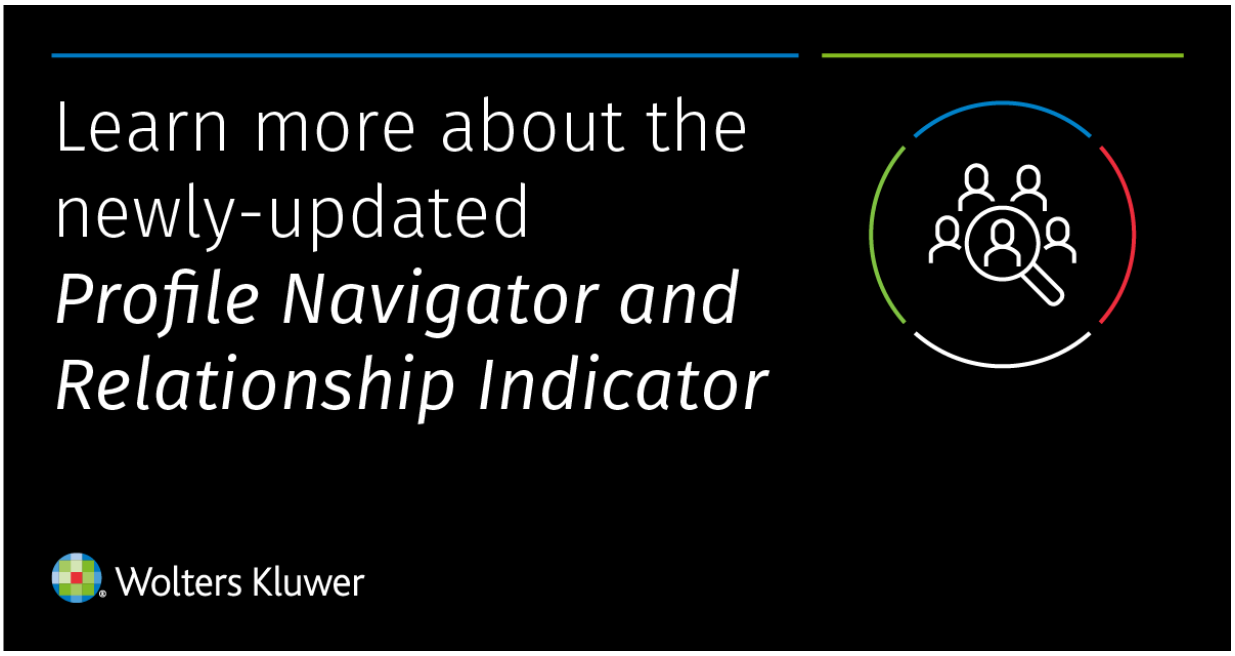

This entry was posted on Sunday, April 12th, 2020 at 9:00 am and is filed under Dispute Resolution, Enforcement, Future of mediation, International Law, International Mediation, Singapore Convention on Mediation
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