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Concerns on the New Singapore Convention (http://www.businessconflictmanagement.com/blog/2018/10/concerns-on-the-new-singapore-convention/)

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October 9, 2018

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The United Nations Commission on International Trade Law (UNCITRAL) has announced agreement on a "United Nations Agreement on International Settlement Agreements Resulting from Mediation (http://www.uncitral.org /pdf/english/commissionsessions/51st-session /Annex_I.pdf)." Informally named the "Singapore Convention," the instrument has been hailed as a long-sought mechanism to give cross-border disputants the confidence that, if they engage in mediation of international commercial disputes, any resulting agreement will be enforceable by its terms. The rational stated in the Preamble to the Convention is "that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious economic relations."

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A review of the provisions of the proposed Convention reveal, however, many aspects that are inconsistent with fundamental attributes of commercial mediation as practiced in Western jurisdictions, including the United States and the United Kingdom. Moreover, the Convention's clear reliance on the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) exposes fundamental confusion in the distinction between enforcing a contract and enforcing an award.

1. *Concerns of Mediator Attestation to the Settlement Agreement*

It is the intention of the drafters that this treatment of "enforcement" be granted only as to "agreement[s] resulting from mediation." The question then arises how to verify that an agreement presented to the court of a country that is a party to the Convention is one that resulted from mediation. Article 4.1(b) sets forth four possible ways that the party seeking enforcement may prove that it is such an agreement. Two of them contemplate that the mediator attest to that fact by signing either the settlement agreement or another document "indicating that the mediation was carried out."

Many mediators conscientiously refuse to sign a settlement agreement. Most American mediators follow the practice that, consistent with their mediation agreements providing that they not be subpoenaed as a witness, they neither draft nor execute any written memorial that may be interpreted as witnesses its execution or – even worse – including them as a party to the rights and obligations set forth therein.

Additionally, many mediators decline to comment on whether a mediation was carried out, and among what parties, in the exercise of their obligation of confidentiality. My own mediation agreement, by which parties engage my services, provides in part: "The Mediator will maintain in strict confidence all information arising out of or in connection with this mediation regardless of the form that information might take." I understand this to embrace the fact that a particular party engaged in a mediation with another particular party on a particular date concerning a particular issue. Although I sometimes refer to a mediation (for example, in the course of my teaching or training), I never reveal the names of the parties and often disguise the information by, for example, changing the date, gender, or

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substantive issue involved. (See Standard V(A)(3) of the Model Standards of Conduct for Mediators (https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.pdf) (2005)). To my knowledge, this is common practice in both the UK and the United States. To not only permit but, in some cases, to require a mediator to reveal that information is inconsistent with both contractual and statutory provisions that are broadly recognized.

2. *Concerns of Refusal to Enforce Grounded on Mediator Conduct*

Article 5 sets forth grounds upon which a court in a subscribing State may refuse to enforce a settlement agreement arising from mediation. Article 5.1(e) provides that an authority may refuse to grant the relief sought against a party to an agreement if that party furnishes proof that "[t]here was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement."

This provision can be interpreted as a map for counsel to relieve its client of its obligations under a settlement agreement, by focusing on the conduct of the mediator. Even the most superficial review of the body of case law in the United States arising from FAA Section 10(a)(3) – authorizing the vacatur of arbitral awards for arbitral "misbehavior", frequently arbitral failure to provide timely and sufficient disclosure – leads one to shudder at the mini-trials to which this provision is likely to arise. What standards are applicable to this mediator and this mediation? What conduct of the mediator constituted violation of those standards? What witness to the alleged conduct is competent to testify as to the alleged violation? Shall the mediator be called to explain why the contested conduct does not constitute a violation of the applicable standards?

And what of the deeply entrenched principles – subsisting (in my jurisdiction of New Jersey) in statute, court rule and private contract — that no party will subpoena the mediator to testify in any proceeding; that mediation communications are confidential; and that such communications are also privileged and may not be introduced in any proceeding? Shall we have contested motion practice on whether proffered evidence of mediator misbehavior shall be admitted before the trier of fact in an action to deny "enforcement" of the settlement agreement?

3. Holistic Concerns Regarding "Enforcement" of Mediated

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Settlement Agreements Generally

There is also the more holistic concerns about the entire idea that an agreement arising from mediation is "enforceable." Arbitrations result in awards – drafted by tribunals with authority – imposing obligations on the "losing" party that can certainly be enforced by their terms. By contrast, settlements (whether mediated or not) result in agreements, with mutual obligations whose authority derives from the parties' consent, and often they are incapable on their face of being merely "enforced."

Take, for example, a cross-border mediated settlement in which one party agrees to supply the counterparty with such quantity of material as the counterparty "may reasonably require," and to do so in a "commercially reasonable" period of time after notice. The counterparty now complains that it did not receive the material when it was needed, and seeks to "enforce" the agreement. What notice was given, by whom and to whom? Was the amount required reasonable? And was the time period "commercially reasonable"?

Or, as another example, by way of compromise in the course of a negotiation, a arty agrees to supply a store with chocolate cake at a lower price, and also to supply cakes that are "ethically sourced." It turns out that, unknown to anyone, the ingredients of the cakes were not ethically sourced and the store seeks to "enforce" the mediated settlement agreement, by holding the defrauded supplier strictly liable for its "breach" of the settlement agreement. Under commercial practices, the Convention on the International Sale of Goods, or other standards, is the supplier in breach? And is it a fundamental breach? And does the agreement support lost profits? Exemplary damages?

In both these cases, an arbitration tribunal may interpret the contract, resulting in an award that is enforceable by means of the New York Convention. But may a court "enforce" the settlement agreement on its terms by means of the Singapore Convention?

2 Comments

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January 7, 2019 at 6:57 am (http://www.businessconflictmanagement.com /blog/2018/10/concerns-on-the-new-singapore-convention/#comment-1184)

Thanks Peter! Great article.
Hug!

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