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ARTICLE

"I promise not to promise" - international mediation and measures to safeguard against Guerrilla tactics

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In conjunction with the activities that took place around the Singapore Convention Week this year, Withers KhattarWong hosted an event "Mediation and Arbitration in the ASEAN region" featuring our arbitration specialist Partner Shaun Leong, FCIArb alongside the Deputy Chief Executive Officer of the Singapore International Mediation Centre, and experienced leading practitioners from the ASEAN region.

The Singapore Convention on Mediation (formally known as the United Nations Convention on International Settlement Agreements Resulting from Mediation) entered into force on 12 September 2020. The Singapore Convention marked a critical milestone in the

development of mediation as alternative dispute resolution for commercial disputes.

Prior to the Singapore Convention, the practice of mediation had been gaining traction over the years as a confidential, cost-efficient, flexible and conciliatory method of settling commercial disputes out of court and out of the public eye. Nevertheless, before the Singapore Convention, there remained some hesitation for its utility in international or cross-border disputes given that there was no harmonised framework amongst the various global jurisdictions for the invocation and enforcement of settlement agreements. Parties worried about whether a settlement could truly be said to be "full and final" if multiple jurisdictions might impose different requirements for reliance on a settlement agreement or recognise different grounds to challenge a settlement agreement.

This was the very obstacle that the Singapore Convention sought to address. It seeks to provide a single unified framework for the invocation and enforcement of settlement agreements, to give parties certainty regarding their legal position and confidence in being able to avail themselves of the benefits of having a settlement agreement. The spirit of the Singapore Convention is no doubt to be lauded.

Nevertheless, in the international chess play of cross border disputes, one can expect savvy players to deploy tactical means in an attempt to unravel a compromise legitimately made. This article focuses on the guerrilla tactics that could be used and the strategic issues that may arise in challenging the international enforcement of a settlement agreement.

Reference to mediator's conduct in the grounds for refusing to grant relief

The grounds for refusing to grant relief are enumerated in Article 5 of the Singapore Convention. These grounds may be broadly grouped into three categories – (i) grounds relating to the parties to the settlement agreement; (ii) grounds relating to the settlement agreement; and (iii) grounds relating to the conduct of the mediator.

The grounds relating to the conduct of the mediator are in Article 1(5)(e)-(f) of the Singapore Convention, which provides as follow:

5(1) The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:
(e) There 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
(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

Article 5(1) of the Singapore Convention is structured so as to require "*proof*" of the grounds relied upon to be "*furnish[ed] to the competent authority*". This is to be expected – requiring proof of allegations is a natural and integral part of the legal process. However, where the grounds relied upon relate to the conduct of the mediator in the course of the mediation process, this potentially opens the floodgates for parties to adduce evidence of the substantive discussions that took place within the boundaries of mediation, which would usually otherwise have been tightly guarded behind confidentiality and without prejudice protections. The concerns are particularly pertinent where, depending on the local laws and rules of the enforcement jurisdiction, such challenges are conducted in open court proceedings or may otherwise not be strictly confidential and be potentially accessible by non-parties such as business rivals.

In fact, since the very function of the mediator is to facilitate and guide parties through the mediation process, it is likely that any determination by competent authorities regarding the grounds relating to the conduct of the mediator would require close scrutiny of the entire mediation process – potentially including substantive discussions by parties, so that the competent authority may adjudge whether the mediator's directing and handling of such discussions may have amounted to misconduct falling within the scope of the Singapore Convention. Moreover, in order to obtain the relevant evidence, the mediator as well as parties themselves may be potentially be subpoenaed to testify on the matters disclosed during mediation.

This is potentially catastrophic for a number of reasons. First, this directly undercuts the strictly confidential and without prejudice nature of mediation, which is one of its key advantages and appeal as alternative dispute resolution.

Second, unscrupulous parties may potentially wield the threat of invoking these grounds (thereby exposing confidential information to the court and the public) to force other parties into renegotiation of terms. This is of especial concern in cases involving particularly sensitive information or highly confidential documents.

Parties deploying guerrilla tactics could base their challenges on grounds that are arguably open to interpretation, especially when read with the laws of the local enforcement jurisdiction. For instance, in relation to Article 1(5)(e), the Singapore Convention does not define the "*standards*" which may be "*applicable to the mediator or the mediation*". This is understandably so, given that the myriad of different mediations taking place across various jurisdictions which may have varying applicable standards. A party seeking to escape from a compromise legitimately made may, quite creatively, argue that the mediator failed to adhere to the standards prescribed under a system of law and/or rules from the jurisdiction which has the closest connection with the dispute mediated (as opposed to the neutral place of the mediation), or that of the enforcement jurisdiction where the settlement agreement is sought to be enforced. There is also scope for interpretation, on whether any breach of the standards ought to be deemed "*serious*" enough to form a basis to refuse to enforce the settlement agreement.

Steps to safeguard the mediation process

It is therefore important to ensure that sufficient safeguards and legal protections are put in place around the mediation process itself, to ensure that confidentiality and without prejudice privilege may not be easily displaced.

In this respect, it may be prudent for the mediator and parties to prepare and sign a *mediation protocol* or *agreement to mediate* prior to the actual substantive mediation discussion, and have that contractual document set out parties' legal rights and obligations regarding the process of mediation.

Some terms that should be considered include:

(a) Express waiver of parties' right to call the mediator as a witness, or an undertaking by parties not to make any application to call the mediator as a witness nor require the mediator to produce in evidence any records or notes relating to the mediation, in any jurisdiction;

(b) Express waiver of parties' right to challenge the enforcement of the settlement agreement on the grounds in the Singapore Convention relating to mediator's conduct (i.e. Article 1(5)(e)-(f) of the Singapore Convention), or in the alternative clear definitions and delineations of the standards applicable to the mediator and the mediation and the type of breach that would entitle a party to challenge the enforcement of the settlement agreement on the grounds in the Singapore Convention relating to mediator's conduct; and

(c) Confidentiality and non-disclosure provisions regarding any matters disclosed in the course of the mediation.

Such terms should be agreed upon by parties prior to the actual substantive mediation discussion and encapsulated in a separate contractual agreement from any settlement agreement. This is because the scope of the Singapore Convention is limited solely to settlement agreements resulting from mediation. Therefore, while settlement agreements (and any terms contained therein) may be challenged on the ground set out in Article 5 of the Singapore Convention, the agreement to mediate or mediation protocol may not be challenged on the same grounds and the terms set out in therein should not be affected by any challenge to the settlement agreement.

Despite the fact that terms within the settlement agreement may be subject to challenges under Article 5 of the Singapore Convention, it may also be prudent to include certain terms (if agreed between parties) to clearly set out parties' understanding and state of mind at the time of the settlement. Such terms may include:

(a) Parties' confirmation that the settlement agreement is fair and was not entered into under any fraud, duress, coercion or undue influence of one party on another, or by the mediator's conduct;

(b) Parties' confirmation that they have not been induced to agree to the settlement agreement by reason of any representation or promise from any of the other parties or the mediator, apart from what is expressly set out in the settlement agreement; and

(c) Parties' confirmation that they have not entered into the settlement agreement in reliance on any representation or promise from any of the other parties or the mediator, apart from what is expressly set out in the settlement agreement.

Last but perhaps most importantly, parties should seriously consider having their mediation be administered by mediation institutions. Leading mediation institutions, with their refined procedures to supervise the entire mediation process from the start to the end, and their mechanisms to facilitate industry best practices, go a long way in mitigating the risks of guerrilla tactics designed to derail either the mediation process or the settlements that may arise from such mediations. Such institutions would also be expected to have their own panels of distinguished and experienced mediators to choose from, on top of well- defined standards for empanelment and rules to deal with any potential conflict of interests that a proposed mediator may have with a matter. Significantly, the institution's ethical code of conduct for its panel of mediators sets an objective criteria for which mediator behaviour and standards can be measured against, providing much certainty and thereby significantly mitigating the prospect of any subsequent challenges.

All in all, mediation institutions play the important role of a vanguard to preserve the integrity of the mediation and consequently that of any settlement arising out of the mediation. There is now perhaps an important opportunity for leading international mediation institutions across jurisdictions to work together to develop a unified set of standards that governs the entire mediation process, which could over time act as a complementary international *lex mediatio*, if one could put it that way, to the Singapore Convention.

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