The Singapore Convention—A Word of Caution for Mediators

By Jeremy M. Goodman

When international parties arbitrate their disputes, they can take comfort that the arbitral award will be enforceable almost worldwide. Thanks to the New York Convention[1] and its 161 state parties–as well as similar conventions and the voluntary co-operation of non-party states–enforcement of international arbitral awards is very likely. Unfortunately, mediated agreements between international parties have not enjoyed the same certainty of enforcement.

JEREMY M. GOODMAN regularly serves as a neutral mediator and arbitrator of complex disputes worldwide. He also serves as an expert witness in matters affecting financial institutions and other creditors. Jeremy is presently the Compliance Officer and General Counsel of a ninety-year-old financial institution. In his former private practice, he acted as a transaction, regulatory, and trial attorney focused on complex issues related to financial institutions and other creditors Jeremy is presently completing his LL.M. in International Commercial Arbitration at the prestigious Straus Institute for Dispute Resolution at the Pepperdine University Caruso School of Law. Jeremy is honored to be included as a panelist on the American Arbitration Association National Rosters of Commercial and Consumer Arbitrators, as well as other noted national and international panels.

At their core, mediated agreements are just contracts. When a dispute arises about the enforcement of a mediated agreement between international parties, the parties are often left to litigate or arbitrate the matter and then seek enforcement of the resulting judgment or award. This can cause substantial years-long delays–effectively meaning the initial mediation was little more than a useless delay. This problem has presented a significant impediment to the widespread adoption of mediation as a method of dispute resolution between international parties.

To resolve this problem, the United Nations Commission on International Trade Law ("UNICTRAL") just last year finalized the draft of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention"). The United Nations General Assembly adopted the Singapore Convention, and a signing ceremony was completed on August 7, 2019, where it was ratified by various state parties.[2]

It is hoped that the Singapore Convention will have the same effect on international mediation as the New York Convention had on international arbitration. It may well do just that. However, several of its provisions have raised concerns in the international mediation community. At the very least, the Singapore Convention will require careful contemplation about the effectiveness and application of the current ethical and contractual principles under which most mediators operate.

Mediators should be aware that mediated agreements may not be enforced under the Singapore Convention if it can be shown that the mediator seriously breached the "standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement." Of course, this provision is not particularly instructive to mediators because it does nothing to define what constitutes a serious breach or what standards are applicable to the mediator or the mediation. Of course, this is troubling where the identified standards governing mediation are not uniform from one country to another–if they even exist.

Arbitrators have long known that their international arbitral awards are subject to attack based on their evident partiality, based on their misconduct, or based on exceeding their powers. As a result, a losing party in an international arbitration frequently undertakes a "deep dive" to try and find anything about the arbitrator that might justify such a claim. International arbitrators have come to expect such scrutiny which enjoys the benefit of 20/20 hindsight.

It is unclear if the Singapore Convention will create a similar scrutiny of mediators as losing parties hope to avoid enforcement based on mediator "misconduct." Most mediators will likely be comfortable knowing that mediated agreements might be found to be unenforceable under the Singapore Convention in the event of mediator fraud. Clearly that would be a serious breach of any known standard of mediator conduct. But, are mediators ready for private investigators combing through their pre-mediation conflict disclosures? Are they ready for a losing party's attempt to have them testify about how they conducted the mediation and what was said in different ex-parte caucuses?

It remains to be seen if, and to what extent, the Singapore Convention will shake up the international mediation landscape. At a minimum, though, international mediators should pay careful attention to the Singapore Convention and the expectations of international parties to mediation. Mediators should ensure that their mediation engagement agreements capture these expectations.

Mediators should ensure that their mediation engagement agreements carefully identify exactly what standards will govern their conduct and that there are no additional standards applicable to the mediator or the mediation that are among the parties' expectations but not disclosed to the mediator or other parties. ADR

ENDNOTES

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, United Nations Treaty Collection, vol. 330, No. 4739, p. 3, available from treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en (last visited January 8, 2020).

[2] Available from treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-4&chapter=22&clang=_en (last visited January 8, 2020).