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An implied ground for refusal to enforce iMSAs under the Singapore convention on mediation: The effect of Article 6

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An implied ground for refusal to enforce iMSAs under the Singapore Convention on Mediation: the effect of Article 6?

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This post is part of a series on the UN Convention on Mediated Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation). In previous posts we have outlined the conventional view that Article 5 of the Singapore Convention establishes exhaustively all the possible exceptions to the enforcement of iMSAs that have otherwise have complied with the requirements set out under Article 4. In this post we question this initial position and ask whether there is an implied ground for refusal to enforce iMSAs under the Singapore Convention made available through an application of Article 6.

First let's recall the grounds for refusal of iMSAs found in the Singapore Convention.
The grounds for refusal may be grouped into four main categories:

1. Contract-like defences (Article 5(1) (a)—(d))
2. Mediator-misconduct defences (Article 5(1) (e)—(f))
3. Subject matter not capable of settlement by mediation (Article 5(2) (b))
4. Public policy (Article 5(2) (a)).

Now, let's consider the following situation. You may recall the hypothetical case of Mia and Maha from a previous post. Let's continue the hypothetical by assuming that Germany and Australia have ratified the Singapore Convention without declaring any reservations (Article 8). Imagine that Mia (whom you may recall runs a graphic design sole proprietorship in Germany) and Maha Pty Ltd ('Maha', a company registered in New South Wales, Australia) have agreed through an iMSA to settle a breach of contract issue involving rights to an IP licence after a marathon 20-hour mediation session. The parties also agreed in express terms that the Singapore Convention on Mediation would apply to the enforcement of their iMSA, although this would appear not to have been necessary –strictly speaking.

The representative of Maha at mediation, Maximus, was empowered by the board of Maha to offer a settlement of a sum of money below AUD $1 million. Unfortunately, Maximus, who left his eyeglasses on the flight en route to the mediation, misread the instructions from Maha, and offered Mia a settlement sum of AUD $5 million, believing by mistake that he was empowered to arrive at a settlement sum below AUD $10 million. Mia agrees to the offer and both parties sign an iMSA to conclude the mediation. Immediately after, Maximus retires, closes his legal practice and disappears into the Caribbean Islands, never to be heard from again. The directors of Maha realise too late that the settlement sum they had offered to pay via Maximus was in excess of the authorised AUD $1 million. Mia takes the iMSA to Germany and New South Wales for enforcement. However, Maha applies to challenge the enforceability of the iMSA in both jurisdictions on grounds that its representative, Maximus, had no authority to offer the agreed sum of money in the settlement (Article 5(1)).

Now, where a party seeks to challenge the enforceability of an iMSA in one jurisdiction (e.g., Germany), the courts of the other signatory States (e.g., Australia) may, according to Article 6, adjourn enforcement proceedings in their jurisdiction. Let's assume that the court in New South Wales does adjourn the proceedings before it …

This type of situation is envisaged by Article 6 of the Singapore Convention, which specifically addresses parallel enforcement proceedings: "If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security."

So article 6 expressly refers to adjournment and security. The actual decision whether to adjourn or to proceed with the hearing will be governed by private international law rules and the procedural rules of the receiving court. Yet the practical effect of Article 6 (beyond adjournment and/or security) is not clear from a plain reading of its terms. We need to think about what an adjourning court may do, should a challenge lodged in another jurisdiction succeed, for example should Maha's defence based on Article 5(1) succeed with the result that the iMSA is declared unenforceable.

We could look to Article VI of the New York Convention for guidance: it is similarly worded and was the basis for Article 6 of the Singapore Convention. Article VI of the New York Convention facilitates the application of Article V(1)(e) of the New York Convention, which stipulates that a court may refuse recognition and enforcement of a foreign arbitral award if it "has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country". In other words if Mia and Maha were dealing with an arbitral award, Maha will first apply to set aside the arbitral award at the seat of the arbitration, before proceeding to the jurisdictions where Mia has applied to enforce the award (i.e., New South Wales and Germany) to apply for an adjournment of enforcement proceedings. If the setting aside application in the courts at the seat is successful, the adjourning courts would refuse to recognise or enforce the foreign arbitral award on the basis of Article V(1)(e).

Unlike the New York Convention, the Singapore Convention does not make provisions for what the court may do once a challenge to the enforcement of an iMSA in a parallel proceeding succeeds.

So the interesting question becomes: can we read Article 6 in a way that creates an implied ground for refusal of enforcement of iMSAs outside the scope of Article 5? Effectively this would be an implied defence founded upon fact that the iMSA sought to be enforced has already been refused enforcement by the courts of another signatory State.

Such an implied defence would need to be restricted to iMSAs that have been refused enforcement because of succeeding defences which stem from private law vitiating factors (e.g., incapacity of parties, terms which are null and void, inoperative and incapable of performance etc.) and mediator misconduct.

It should be emphasised that the proposed implied defence would not apply to iMSAs refused enforcement on public policy grounds or because its subject matter may not be susceptible to mediation. This is because the legal test administered to adjudicate whether these grounds for refusal are available are likely to be peculiar to the domestic laws in each signatory State. It may be possible for an iMSA to be enforceable in one State, but for the courts of another to refuse enforcement on public policy grounds.

In summary therefore, an implied ground for refusal of enforcement could be read into Article 6 of the Singapore Convention. This may be buttressed upon trite private international law principles of recognition of foreign judgments (i.e., particularly of a court judgment that determines finally and conclusively if an iMSA may be refused enforcement in that jurisdiction). Referring to the illustration of the dispute between Mia and Maha above, when Mia proceeds to enforce the iMSA in Germany and New South Wales, Maha may choose to first submit an Article 5 defence in either the German or New South Wales court, according to whichever jurisdiction it is advised by its lawyers to better yield a successful defence. If it chooses to first submit an Article 5 defence in Germany, Maha would then subsequently apply for the enforcement application to be adjourned in New South Wales. Should an implied ground for refusal of enforcement could be read into Article 6 of the Singapore Convention, it is possible that the adjourning New South Wales court would be required to recognise the German State court's judgment ruling on the issue i.e. that the iMSA is not enforceable on the basis of a successful Article 5(1) defence. Although in some jurisdictions (e.g Thailand and Indonesia), courts do not recognise foreign court judgments and require parties to sue afresh in relation to the discrete issues adjudged under their private international law, it is certainly arguable that the courts of signatory States to the Singapore Convention are – nonetheless – bound by their Convention obligations to recognise a *particular* judgment of the court which first determines if an iMSA may be refused enforcement.

We invite comments and discussion on the ideas presented in this posting on the possibility of an implied ground of refusal in Article 6 of the Singapore Convention.