SINGAPORE CONVENTION DEFENCES BASED ON MEDIATOR'S MISCONDUCT: ARTICLES 5.1(e) & (f)

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I. Introduction

At the February 2019 ICC Mediation Competition in Paris, Damien Cote from Canada and David Lewis from New York moderated a "debate" on the Singapore Convention.[1] One of the panellists launched into a full-scale attack on the Convention, in which he dismissed it on the basis that the "whole document resembled the New York Convention and was redolent of arbitration rather than mediation." The speaker focused on Article 5 and the Grounds for Refusing Relief, and he was particularly critical of Articles 5.1(e) and (f). He expressed his view that these articles were apposite to the setting aside of an arbitral award and therefore had no relevance to mediation and ought not to be a basis for a challenge to a consensual settlement of an international commercial dispute.

At first blush, a cursory reading of the Convention might justify his observation. It was apparent to the experienced mediators who attended the Vienna and New York Working Group II discussions that many of the delegates did not appear familiar with mediation in practice and were approaching this project as if a mediator were akin to an arbitrator. This explains why a great deal of time was spent discussing "traffic lights" disqualifications, bias, undue influence, and all the fascinating issues with which the arbitration world has become obsessed in recent years! However, if that panellist had considered the wording of the Convention, he may well have appreciated that those drafting the Articles which prompted his attack had chosen their words with care, and the panellist may have realised that his initial judgment was hasty and uninformed.

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1 *See* G.A. Res. 73/198, U.N. Doc. A/Res/73/198, annex, United Nations Convention on International Settlement Agreements Resulting from Mediation (Jan. 11, 2019) [hereinafter Singapore Convention].

The earlier Articles of the Convention are for others to deal with and in any event had been mostly decided in the earlier sessions before this author attended the Working Group's meeting in Vienna in September 2016. This paper will deal solely with Articles 5.1(e) and (f) on mediator behaviour which provide for Grounds for Refusing to Grant Relief, a section that I have personal knowledge of how it came together.

II. Discussion

There was a fairly robust discussion in Vienna over whether any mediator protections ought to be in the Convention. The experienced mediators present pointed out that the Working Group was dealing with international commercial mediations where the disputants were invariably represented by teams of lawyers and experts so that there was no need for the special protections given to individuals facing a large commercial organisation. Furthermore, once the delegates understood that the mediator's role was not to render a decision and that the parties themselves decided how they wished to resolve their differences, some delegates thought that there was no need to provide the familiar safeguards for protecting a party from an overbearing judge or arbitrator.

Fuelling this particular debate was the explanation from the experienced mediators among the delegates that large commercial entities and their legal teams invariably made sure that the settlement agreement provided for: 1) A mechanism for fulfilling the parties' respective obligations; 2) safeguards for transferring any real or incorporeal property as part of the settlement with guarantees, escrow accounts, or other mechanisms to avoid the possibility of further litigation to enforce the settlement; and 3) an agreed jurisdiction, law, and dispute resolution process in the event of any breakdown or non-fulfilment of the settlement terms.

The Vienna meeting ended with a grudging realisation that in some quarters safeguards, even though not needed, may be required if the Convention or Model Law was going to be approved.

The next meeting in February 2017 began for me with a sobering stroll past N.Y.C.'s Trump Tower. The agenda included the issues which ultimately became enshrined in Articles 4 and 5. There was a wide range of views about the right of a party to resist attempts to enforce a Settlement Agreement. Experienced mediators warned against pandering to "Settlors Remorse." There

was a strongly argued suggestion that a Party seeking to set aside a mediated settlement agreement should be able to reopen *all* the issues in the mediation and advance all defences that would have been available had the dispute gone to court. On Wednesday of that week the issues surrounding the wording of Articles 4, 5.1(c),(e), and (f) were the subject of fierce debate. Then came the snowstorm . . . .

New York pretty much closed down along with the U.N. for the day. Allan Stitt, one of the Canadian Government's representatives, and a Distinguished Fellow of the International Academy of Mediators, persuaded a colleague to open his offices for as many delegates as could be contacted. We all gathered together in the main boardroom and sitting round the table continued the discussions. What had been a confrontational negotiation became a mediation! Sustained by New York deli sandwiches and other local delicacies, thoughtfully provided by the Chair of the Secretariat, we worked until the late afternoon and thrashed out the compromise wording for Article 4 and the wording for Article 5.1(e) and (f) on the Grounds for Refusing to Grant Relief. The potentially contentious provisions of Article 4.1(b) on the need for some form of mediator certification are examined in another chapter by Allan Stitt.[2] This one will deal with Article 5.1(e) and (f).

The Report of the Working Group II on the progress in Vienna in September 2016 summarises the conflicting views on the question of relieving a party from its obligations on the basis of misbehaviour or non-disclosure by the mediator. Many of the arguments advanced reflected the approach adopted internationally in respect of arbitral awards where allegations of impropriety or bias by the arbitrator called the validity of an award into question. In Vienna it was decided to leave the question open to the next session in New York, in February 2017.

At the end of the Wednesday afternoon session in New York, I, as the IAM representative, put forward a draft for both (e) and (f) which highlighted the essential differences between arbitration and mediation, which some of the arguments being advanced had failed to recognise. The mediation community appreciates the fundamental distinction between an arbitrator *deciding* the issues between disputants and a mediator *facilitating* the disputants to achieve *their* consensual solution. Whereas bias, improper behaviour, or a non-disclosed personal interest might affect an arbitra-

[2] *See* SING. REF. BK., Allan J. Stitt, *The Singapore Convention: When has a Mediation Taken Place (Article 4)?*, 20 CARDOZO J. CONFLICT RESOL. 1173 (2019).

tor's decision to the detriment of one party, such behaviour by a mediator can only be relevant if it vitiates a party's consent to a settlement. Bearing in mind that the Convention is expressly designed for international commercial disputes, in which the parties are invariably represented by lawyers and experts, parties wishing to resile from the agreement on the grounds that they were forced to consent by the mediator should seek redress against their lawyer. Their lawyer is there to protect their interests, guide their decisions, and ensure that their consent to the settlement was informed and genuine.

However, some delegates were under instructions from their respective governments to ensure that any defences against enforcement included protection for individuals who are disadvantaged by an unfair, biased, or misbehaving mediator. Some accommodation had to be reached.

Gradually, sustained by the New York classic delicacies while the snowstorm raged outside, the following principles were established by all present: 1) Any alleged breach or failure had to be material; *and* 2) materiality was to be judged objectively; *and* 3) the party seeking relief had the burden of establishing that such breach or failure vitiated their consent to the settlement agreement from which they were seeking to resile.

III. ARTICLE 5.1(e) BACKGROUND

Article 5.1(e) states: "There was a serious breach by the mediator of standards . . . without which breach that party would not have entered into the . . . agreement."

A. *Standards*

Every mediator who engages in international commercial mediation subscribes to a Code of Conduct or a Code of Ethics which is likely identified in the Mediation Agreement under which the parties and the mediator have agreed to operate. Several codes were recognized, and there are currently discussions to try and establish a uniform Code of Conduct for mediators. However, this is not without difficulty given the different approaches by some countries to defining the style of mediation, diverse constraints placed upon mediators, and cultural variations that exist, let alone the

fact that mediation as a flexible process needs to adapted to the needs of the parties. Until an acceptable universal Code of Conduct or Ethics is established, mediators performing under the Singapore Convention should identify the applicable Code of Conduct or Ethics in their mediation agreements.

B. *Serious Breach*

The agreement on the adjective was after much discussion where views ranged from such tests as "any breach," "egregious breach," "material breach," and "unacceptable breach." The adjective was needed to introduce an objective assessment of the gravity of the alleged breach in order to avoid claims that are fanciful, immaterial, and subjective.

C. *Vitiation of Consent*

". . . [W]ithout which breach that party would not have entered into the settlement agreement." These words encapsulate the essential feature that the burden of causation is on the party seeking to resile from a Settlement Agreement.

The requirements of Article 5.1(e) are cumulative. If a party can surmount the first two hurdles on standards and serious breach, the party still must prove that in spite of being represented and presumably advised by his lawyers and experts, the behaviour of the mediator caused him to consent to a settlement against his will. Given that the Convention only applies to international commercial disputes, the prospects of an international party successfully convincing a tribunal that a mediator's behaviour brought about their unwilling consent will be extremely rare!

IV. Article 5.1(f) Background

Article 5.1(f) states: " . . . [F]ailure . . . to disclose . . . circumstances that raise justifiable doubts as to the mediator's impartiality or independence." "Justifiable" introduces an objective assessment for the relevant tribunal to apply and places the burden of satisfying that test on the party seeking to resile from a settlement agreement. Once again, the discussions had ranged from such tests

as "any doubt," "serious doubt," and "significant doubt," to "unequivocal doubt." "Justifiable" is a clever adjective because it imports the concept of a judicial determination and rules out arguments based on a subjective assessment by the party seeking to raise it.

" . . . [S]uch failure to disclose had a material impact or undue influence on a party": The second hurdle that the resiling party needs to overcome is to prove to the tribunal that the failure to disclose had a material impact or undue influence on him. "Material" requires a sufficient element of judicial determination to elevate the complained effect above the trivial. "Undue influence" is a well-established legal concept to ensure an objective judicial conclusion.

" . . . [W]ithout which failure that party would not have entered into the settlement agreement": As with Article 5.1(e), the cumulative effect of the requirements of Article 5.1(f) imposes a further hurdle to overcome by the party seeking relief. The party needs to prove that the failure to disclose vitiated his consent to the settlement agreement. As with Article 5.1(e), given that the Convention only applies to international commercial disputes, the prospect of an international party successfully convincing a tribunal that a mediator's failure to make a relevant disclosure resulted in both his lack of impartiality or independence and resulted in unwilling consent will be rare! One can imagine that a court might conclude that the consent was not informed and grant relief only where it is satisfied that the conduct complained of amounted to undue influence or which had a material impact upon the parties and presumably also the minds of their legal and professional advisers.

The initial scepticism of many experienced mediators might be assuaged once the key words and safeguards against abuse in Articles 5.1(e) and (f) are properly understood. Certainly, the implications of these two sections should be recognised by lawyers representing parties in a mediation. Most experienced mediation advocates already know to rebuff any attempt by an officious mediator to browbeat their client, undermine their clients' reliance upon their advisers' counsel, and employ other ways to induce consent. Experienced mediation advocates will, as a matter of course, satisfy themselves that their client understands the terms of any settlement and that any consent is informed and genuine. If enforcement of the settlement agreement is governed by the Singapore Convention, these sound lawyer responsibilities will be all the

more important, and will need attention by lawyers for *all* the parties in order to minimise the possibility of challenges under either Articles 5.1(e) and (f).

V. Confidentiality

A key feature of mediation of course is the confidential nature of the process that parties rely on in order to promote candour in their discussions with the mediator and other parties. Different jurisdictions throughout the world have established their own rules for the conduct of commercial mediations and virtually all the rules afford a degree of confidentiality/privilege. There are however wide differences which have a bearing upon applications seeking relief under Article 5 of the Singapore Convention. How is a party going to establish for example the behaviour of a mediator which the party complains is a serious breach of acceptable standards? Establishing the applicable standards does not involve any examination of what transpired in the mediation, but an examination of the alleged breach will. How is a party in California, for instance, going to be able to describe what happened in support of his application given the strict provisions of the California Evidence Code?

There is a difference between the approach of the common law jurisdictions and the civil law ones; and even the common law jurisdictions do not have a universal approach towards mediation confidentiality. The common law countries, with which I am more familiar, are divided in their approach. There are two distinct views: some jurisdictions consider that mediation is "no more than assisted without prejudice negotiations" while others consider that mediation has an entirely separate privilege of its own. In the former case, the courts have regarded meditation privilege/confidentiality as subject to all the usual challenges with which we are familiar. In the latter case of a separate mediation doctrine, some jurisdictions regard the mediation privilege as absolute and will not admit any evidence of what transpired in a mediation, while others that recognize the privilege permit the courts to admit evidence "in the interests of justice."

This dichotomy in approach is troubling, not least because in England and Wales, different courts have adopted different approaches. I wonder sometimes whether judges really understand the mediation process at all! In the U.K., as in other jurisdictions, judges receive mediation training, but, as with all skills, there is no

substitute for actual experience. As my great friend and mentor Allan Stitt puts it: "in theory there is no difference in practice, but in practice there always is!"

This is not the place for a treatise on mediation privilege, but if the Singapore Convention is going to be useful, at some point the question of mediation privilege/confidentiality will need to be addressed especially for when a party is seeking to rely upon mediator's conduct to establish a defence under Article 5. Given the increasingly wide-spread use of mediation, the judicial encouragement to mediate rather than litigate, and the statements in the Preamble of the Singapore Convention, it is important that the question of mediation confidentiality/privilege be reviewed. Some form of consensus in the common law countries, if not all jurisdictions, need to be achieved in order for Article 5 to become practically operational.

A few examples from English jurisdiction will serve to demonstrate the probable approach by the English Courts if the U.K. Government decides to adopt the Convention. From 2007, there were a series of cases in which parties sought successfully to introduce evidence of what had been done or said in mediation in support of a variety of applications. Some sought to establish that an agreement had been reached other than in the form prescribed in the mediation agreement to which the parties had subscribed. Others sought to set aside an agreement on the grounds of an alleged impropriety. And, in one bizarre case, a party supported a claim for the recovery of costs of a mediation on the grounds of the other party's unreasonable behaviour in the mediation. The trend has been to follow the "assisted without prejudice negotiations" line and admit the evidence either where the parties have themselves waived their privilege, or where the court has been persuaded that the evidence was admissible under one of the exceptions adumbrated by Walker, L.J. in *Unilever PLC v. Procter & Gamble*.[3]

Of the exceptions listed by Walker, L.J., the only one which might be appropriate for the purposes of relief under the Singapore Convention is "Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety.' However, the court would only allow the

[3] Unilever PLC v. Procter & Gamble Co. [2000] 1 WLR 2436 (Eng. & Wales).

exception to be applied in the clearest cases of abuse of a privileged situation."[4] In *Forster*, the behaviour was alleged blackmail.

There have been other cases in which the court has been asked to waive privilege on the grounds of unambiguous impropriety. Of relevance to the issue of the Convention is the decision of Ramsey, J. in *Farm Assist Limited (in Liquidation) v. The Secretary of State for Environment, Food and Rural Affairs (No. 2)*[5] where a party applied to set aside the settlement agreement on the grounds that it was entered into under economic duress, and other complaints including oppression. Apart from the highly unusual procedural circumstances surrounding the application itself, the bizarre nature of the complaint is highlighted by the fact that at the mediation (some six years previously!) both parties were represented by Queens Counsel, solicitors, and each had experts to advise them. The issue before the court was an application by Farm Assist for a witness summons requiring the mediator to give evidence about what had occurred in the mediation. Anathema to most jurisdictions, but Ramsey decided that it was in the interests of justice to allow the witness summons to stand. The irony is that the parties resolved their dispute before the matter came back to court, but the Judge was persuaded to hand down his judgment nonetheless.

The decision was roundly criticised in mediation circles and required a convoluted procedural change to the Civil Procedure Rules.[6] In *Ferster v. Ferster*,[7] the Court of Appeal upheld the decision of Mrs. Justice Rose to allow one party to put in evidence in his shareholder's unfair prejudice petition an e-mail sent to the mediator by the other party for onward transmission to him, which in the Judge's opinion amounted to a blackmail threat. Even though normally such a communication was protected by mediation privilege, the Judge thought its contents "fell within the 'unambiguous impropriety' exception to that privilege."[8] It seems therefore that if the U.K. Government decides to adopt the Singapore Convention, there will be no confidentiality obstacles to applying Article 5.

But in other jurisdictions, the result might be different. The decision of the California Supreme Court in *Cassel v. Superior Court*[9] approving the decision in Wimsatt v. *Superior Court*

[4] Forster v. Friedland C.A. (Civil Division), Transcript No. 205 of 1993 (Eng. & Wales).

[5] Farm Assist Ltd. (in liquidation) v. The Secretary of State for Environment, Food and Rural Affairs (No. 2) [2007] EWHC (TCC) 2870 (Eng. & Wales).

[6] Civil Procedure (Amendment) Rules 2011 (Eng. & Wales).

[7] Ferster v. Ferster [2016] EWCA (Civ) 717 (Eng. & Wales).

[8] *Id.* at para. 4 (Lord Justice Floyd).

[9] Cassel v. Superior Court, 119 Cal. Rptr. 3d 437 (2009).

*(*Kausch*)*[10] and, albeit reluctantly, made this remarkable statement: "when clients, such as [the malpractice plaintiff in that case], participate in mediation they are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel."

With Chin, J. observing:

> But I am not completely satisfied that the Legislature has fully considered whether attorneys should be shielded from accountability in this way. There may be better ways to balance the competing interests than simply providing that an attorney's statements during mediation may never be disclosed. For example, it may be appropriate to provide that communications during mediation may be used in a malpractice action between an attorney and a client to the extent they are relevant to that action, but they may not be used by anyone for any other purpose. Such a provision might sufficiently protect other participants in the mediation and also make attorneys accountable for their actions. But this court cannot so hold in the guise of interpreting statutes that contain no such provision. As the majority notes, the Legislature remains free to reconsider this question. It may well wish to do so. This case does not present the question of what happens if every participant in the mediation except the attorney waives confidentiality. Could the attorney even then prevent disclosure so as to be immune from a malpractice action? I can imagine no valid policy reason for the Legislature to shield attorneys even in that situation. I doubt greatly that one of the Legislature's purposes in mandating confidentiality was to permit attorneys to commit malpractice without accountability. Interpreting the statute to require confidentiality even when everyone but the attorney has waived it might well result in absurd consequences that the Legislature did not intend. That question will have to await another case. But the Legislature might also want to consider this point.

These opinions suggest that if the Singapore Convention is adopted by the U.S., California (in the U.S.) will need to revise the Evidence Code. An attempt to introduce a change to remove the privilege of client/attorney mediation communication in an action for malpractice, breach of fiduciary duty, or State Bar disciplinary action was talked out.[11]

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[10] Wimsatt v. Superior Court (Kausch), 152 Cal. App. 4th 395 (2007).

[11] Assembly Bill No. 2025 was introduced by Assembly Member Wagner on February 23, 2012.

In Canada, the Supreme Court in *Union Carbide Canada Inc. and Dow Chemical v. Bombardier Inc. et al.*[12] adopted the same approach as the English Court of Appeal in *Unilever PLC v. Procter & Gamble* towards mediation privilege. Although that case was concerned with a dispute involving an oral agreement reached in mediation, it is probable that the Canadian courts would also have no qualms about waiving mediation privilege when dealing with applications for relief under Article 5.1(e) and (f). Other common law jurisdictions have adopted a similar judicial approach, and therefore is unlikely to have any difficulty waiving privilege.

On the face of it there is a potential difficulty for Europe in that the provisions of Article 6 of the ADR Directive, which provide for the confidentiality of mediation, will need to be reconciled with Article 5.1(e) and (f) of the Convention.

Due to these varying approaches to privilege/confidentiality, the ability to prove claims not only under Article 5.1(e) and (f) but the entire Article 5 will vary across jurisdictions.

VI. Conclusion

While the terms of Article 5.1(e) and (f) at first blush might produce in the minds of international commercial mediators a similar alarming reaction as the ICC panellist expressed, a considered understanding of the hurdles over which any applicant has to jump should calm the nerves. After fully understanding the two sections and the privilege/confidentiality obstacles, mediators ought to realise that the sections provide adequate safeguards against abuse by parties and as long as mediators perform professionally—independently, fairly, courteously, and neutrally with all parties—they have little to fear!

[12] Union Carbide Canada Inc. v. Bombardier Inc., 2014 SCC 35, [2014] 1 S.C.R. 800 (Can.).