REFLECTIONS ON SINGAPORE CONVENTION ON MEDIATION WITHIN THE SHADOW OF COVID -19 PANDEMIC[1]

Abstract

This article aims to seek evaluations of Singapore Convention on Mediation in terms of either Continental or Anglo Saxon Law approach in aglobal mannerbased on that belief which brings significant reflections and impacts for signatories' States' business life and applicants when it came into force intherelevant Statesdue to its promises to provide an essential impact on international dispute resolution practices related to trade and investment flows.Within this framework,Convention will give an opportunity to usecapacity for binding and enforceability and functional procedure for enforcement of mediated settlement agreements to market players, thereby, sustainability of commercial life in mentioned States will gain expected momentum in nearfuture.

On December20, 2018, The United Nations General Assembly adopted the"*Singapore Convention on Mediation*" (Convention)preparedby Working Group II of theUnited Nations Commission on International Trade Law (UNCITRAL) after adoption of"*Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation*" (amending the *Model Law on International Commercial Conciliation, 2002)* and final draft of the Convention by UNCITRAL on June 25, 2018.Signing ceremony for the

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I have been working banking and finance sector for 26 years. My focus areas are mainly finance, banking, commercial, insolvency, mediation and arbitration laws. I have been Turkish President of Women Interest Group of IBA since 1998. I was former President of National Committee of Turkey and Counselor to the President. Moreover,I was former Web Director and current Vice President of UIA Banking and Financial Services Law Committee and former Secretary of UIA Mediation and Conflict Prevention Committee. I organized UIA "*Seminar on Mediation and Arbitration*" in İstanbul(2007) and UIA "*Seminar on Mediation: How to Change Lawyers M*indset" in Ankara (2015). My article with the same title was published in "*UIA Juriste International*" on Jan. 2015. I have been giving lectures regarding general mediation, commercial mediation in many Law Faculties in Turkey and giving legal opinions related to legislation workings concerning both first and second mediation draft laws and others. I am a member of ADR-ODR Group and time to time served as a judge and coach for the INADR Law School Mediation Tournament in differentcountries. I have been accredited mediator since 2014 and accredited meditation trainer by EC since 2016 in Turkey and I had been giving many important contributions regarding EC Project is titled "Access to Justice Improvement ADR Facilities in Turkey" and the Project of British Embassy for preparing new mediators' trainees modules and new mediation legislations in Turkey during the my counseling activities for Turkish Ministry of Justice between Sept.2016-Sept.2017.I worked for the publication of two books titled "Preparing for Mediation-A Guide for Consumers" and "Effective Mediation Advocacy-A Guide For Practitioners" written by Andrew Goodman as co-editor and proofreader and the book titled Family Mediation written by Lisa Parkinson as a chief editor on behalf of TMOJ. I participated "Symposium on International Diplomatic Mediation" organized by Turkish Ministry of Foreign Affairs in TurkeyJune,2017 and I presented my paper regarding ethnic mediationoriented on Syrian refugee problems in UIA Annual Congress in Toronto in 2017. I organized "Seminar on the Reflections and its impacts of Singapore Convention on Mediation" hosted by Turkish Ministry of Justice with kindly cooperation of UNCITRAL on Dec. 5-6,2019 in İstanbul/TURKEY.

Convention washeld on August 7, 2019 in Singapore and included 46 signatories'States[2] such as principallySingapore, China, India, Kazakhstan, Malaysia, Maldives, South Korea, United States of America, Uruguay and Venezuela, Turkey except EU countries. This Convention will come into force onSeptember12, 2020 with the ratification by at least threeUN member Statesnamed Singapore, Fiji and Qatar.

I-What the Convention promises?

Convention promises to allow anessential impact on international dispute resolution practices related to trade and investment flows.This Convention provides for the enforcement of settlement agreements, the requirements for reliance on settlement agreements and the grounds for refusing to grant relief. Moreover, Convention reduces the risk of refusal to enforce such agreements, strengthens, predictability and certainty in the use of mediation and encourages resolution of cross border disputes in a non-confrontational, cost effective and efficient manner in line with the United Nations Sustainable Development Goals, more specifically SDG 16 on access to justice[3].Legal framework established by the Convention is therefore acceptable to the States with different legal cultures, traditions and different levels of development. It has same capacity for binding and enforceability and functionalprocedure for enforcement of mediated settlement agreements in a similar manner to the "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards" in respect of arbitral awards.This is the first international treaty which allows private mediated settlement agreements[4] with a legal status comparable to foreign arbitral awards under the 2005 Hague Convention on Choice of Court Agreements and the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters.

II- Why the general scope of Convention should be preferable after ink dried?

Pursuant to general scope of Convention, itapplies to an agreement resulting from international commercial mediation disputes and settled in writing by the parties at the end of mediation process. Thatsettlement agreementrequires at least two parties,titled as "an international" at the time of conclusion in that whose places of business locatein different states or whose places of business is different from either based on whichsubstantial part of obligations has performedin one of the Statesor which subject matter is the most closelyconnected with one of them.Nevertheless, if the party has more than one place of business, relevant place of business is considered in which has the closest relationship to the dispute resolved by the settlement agreement depending on having regard to the circumstances known to, or contemplated by, the parties at the time of conclusion of agreement.If a party does not have a place of business, reference is to be made to the party's habitual residence.

From the point of view term of "commercial", "*UNCITRALModel Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation*" drafted alongside the Convention provides commentary related to footnote 1. It says that;"The term "commercial" should be given a wide interpretation that's while as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services, distribution agreement; commercial representation or agency, factoring; leasing; construction

[2]See. https://www.un.org/en/member-states/
[3]**ALEXANDER/CHONG**, "The Singapore Convention on Mediation", Wolters Kluwer 2019, foreword. p. xi.
[4]It means private contractual agreements.

of works;consulting,engineering; licensing, investment; financing, banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial business cooperation and carriage of goods or passengers by air, sea, rail or road". Convention does not apply to settlement agreements in concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes,relating to family, inheritance or employment law.

Pursuant togeneral principles, it says that each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.At that point, there is a burden of proof for parties to invoke the settlement agreement has already resolved conflicts based on their claims.

Considering the requirements for reliance on settlement agreements,there are two significant requirements for settlement agreements both signed by the parties and resulted from mediation as an evidence. With regard to the competent authority of the party to the Convention where relief is sought, considers (i)mediator's signature on the settlement agreement, (ii) a document signed by the mediator was carried out, (iii) an attestation by the institution that administered the mediation; or in the absence of (i), (ii) or (iii), any other evidence acceptable. At that point, using electronic communication method is the mostprominent one. In terms of electronic signature method, "Explanatory Note" of the UNCITRAL Secretariat on the "United Nations Convention on the Use of Electronic Communications in International Contracts" makes it clear that the technical and commercial factors considered in determining thereliability of electronic signature's method are as follows:(a) the sophistication of the equipment used by each of the parties; (b) the nature of their trade activity; (c) the frequency at which commercial transactions take place between parties; (d) the kind and size of transaction; (e) the function of signature requirements in given statutory and regulatory environment; (f) the capability of communication systems; (g) compliance with authentication procedures set forth by intermediaries; (h) the range of authentication procedures made available by an intermediary; (i) compliance with trade customs and practice; (j) existence of insurance coverage mechanisms against unauthorized communications; (k) the importance and the value of the information contained in the electronic communication; (l) availability of alternative methods of identification and the cost of implementation; (n) the degree of acceptance or non-acceptance of the method of identification in the relevant industry or field both at the time the method was agreed upon and the time when the electronic communication was communicated; and (n) any other relevant factor."

Concerning grounds for refusing to grant relief,more highlighting grounds for clarifying ambiguities among others are as follows:
The competent authority of the party to the Conventionmay refuse to grant relief at the request of the party against whom the relief is sought,in case of that party only ensures to the competent authority proof that:

(i) A party to the settlement agreement was under some incapacity,
(ii) The obligations in the settlement agreement;either have been performed, orare not clear or comprehensible,
(iii) Granting relief would be contrary to the terms of the settlement agreement,
(iv) 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;

(v) The competent authority of the Party to the Convention where relief is sought may also refuse to grant relief if it finds that: granting relief would be contrary to the public policy of that Party."

(i) Incapacity of one of the parties in the International Mediated Settlement Agreement

Enforcement of an "International Mediated Settlement Agreement" (IMSA), may be refused by the relevant court of a State, if a party to the IMSA was affected by some incapacity at the point of its conclusion. When parties participate in the conclusion of the IMSA are as minors, natural persons with intellectual disabilities or deficits, or legal persons not validly represented, refusal for granting relief will be considered under above reason.At that point, «validation principle», set up by Born in the international commercial arbitration context may be inspiring mediation context. When we return to the mediation context, we can see that engenders a pro-enforcement bias in respect toIMSA based on granting relief for enforcement under Singapore Convention. On the other hand, the competent authority may administer "renvoi" to decide if parties indeed have capacity when concluding an IMSA at the end of a mediation sessions.

(ii) Obligations in the Settlement Agreement are not 'clear or comprehensible

A competent authority may refuse to enforce an IMSA if it is not capable of being enforced due to it is not clear or comprehensible. As Schnabel clarifies[5]: "If the competent authority can determine whether the mediated settlement provides for an obligation, and can adequately frame its order providing relief, then this ground for refusal does not apply; the exception is meant only to protect competent authorities from being forced to act in situations in which they truly do not know what relief to provide". If a competent authority, after applying the appropriate contractual construction techniques is unable to resolve the apparent ambiguity, it may consequently refuse to enforce the IMSA. When we adapt widen interpretation, competent court may consider if the IMSA would have been upheld under any of the possible applicable laws, it may be subject to, beyond just its proper governing law, when the above questioning came on its agenda to refuse enforcement.

(iii) Granting relief would be contrary to the terms of the settlement agreement

A competent authority may refuse to enforce an IMSA, if granting relief would be directly inconsistent with the terms of the settlement agreement. This ground may apply where the obligations in a mediated settlement agreement would be conditional or reciprocal, or where parties' non-performance could be justified for a variety of reasons anticipated by the IMSA.[6]

(iv) Mediator Conduct Related Grounds for Refusal

In respect ofeliminating ambiguities for the phrases of "serious breach", "justifiable doubts","material impact" and "undue influence", more focusing phrases are as follows:
For the phrase of "serious breach" which means that minor breaches or questionable conductwould not suffice.
For reference to the phrase "justifiable doubts", compliance with the Article 6(5) of the UNCITRAL Model Law on Mediation which imposes an obligation on a mediator to disclose 'any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. From the view of commentary of Schnabel, that "justifiable doubts" is "not affected by whether the party in question subjectively doubt the mediator's independence and impartiality"[7]. Moreover, "situations that mightraise to mediator's impartiality or independence which might include a mediator's personal or business relationship with one of

[5]**SCHNABEL,** "The Singapore Convention on Mediation: Framework for the Cross Border Recognition and Enforcement of Mediated Settlements", 19 Pep. Disp.Resol. L.J 1 (2019) p.48.
[6]See.https://uncitral.un.org/ "Report on Working Group II on the Work of its Sixty -Eight Session" A/CN.9/934 (2018), at para 57.
[7]İbis p.42.

the parties, a mediator's financial or other interest in the outcome of the mediation, and the mediator or a member of his or her firm having acted in any capacity other than mediator for one of the parties[8]".Mentioned situations may be considered within the content of justifiable doubts.

Interpretation of the term "material impact" has been subject of jurisprudence in a variety context in literature. With respect to the English case of *Decura IM Investments LLP v. UBS AG*[9], High Court held that "material means substantial or significant within the factual matrix of the case".

A concept of "undue influence" indicates to how a transaction may be set aside if it is obtained by the influence exerted by one person on another, such that the transaction cannot fairly be treated the expression of that person's free will.

From the point of view to determine "proper standards", this term discusses with the respect for party autonomy, if the choice of the parties is made bona fide and complies with the laws of the jurisdiction regulating private law agreements, the proper standard would be so determined. "However, there are sample situations leaves where the choice of standard fails in literature:

(1) If the parties made the choice mala fides,

(2) If the parties made a choice that is not legal under the governing law, for instance:

(a) Where multiple choices of standards, have been elected to apply simultaneously,

(b) Where the chosen standard has latent ambiguities or is intrinsically inadequate, or

(c) Where there is a lack of clarity as to which standard has chosen,

(3) If the parties choose a standard that does not exist; or,

(4) If the parties fail to make any choice at all in their mediation agreement."[10]

(v) Grounds for Refusal based on Public Policy

Pursuant to Article 5(2)(a), a competent authority may refuse to enforce an IMSA that is contrary to the public policy of the State based on granting relief. The domestic public policy of the state must considerin a manner that is consistent, insofar as possible, with the objectives of the Convention and the public policies and interests of other States. Consequently, the competent authority should only under highly exceptional circumstances refuse to enforce IMSAs by reason of public policy, for it is settled that in the realm of private international law, the public policy exception functions as an escape mechanism.[11]

When we return to the commentary of this term, «national security» seems as a valid public policy concern[12], nevertheless if the IMSA procured by (or in furtherance of) corruption and bribery should be refused enforcement for being contrary to public policy within the framework of broader sense of this term.[13]

III- What the COVID-19 Pandemic brings to the economy and commercial Life around the world? From this point of view will the Convention be rescuer or not for all signatory States?

While continuing COVID-19 Pandemic, all countries in the world are trying to protect well-balance among monetary policy, boosting businesses, reinforcing social protection and supporting health care sector. At that point, countries from not only emerging markets but

[8]Article 2.1 of "European Code of Conduct for Mediators"

[9]See. [2015] EWHC 171.

[10]Cf. **TİONG Min Yen**, "The Effective Reach of Choice of Law Agreements", Singapore Academy of Law Journal, 20 SAcLJ 723(2008), para.3. See**. ALEXANDER/ CHONG**, "The Singapore Convention on Mediation", Wolters Kluwer 2019, p.137.

[11]**SCHNABEL,** "The Singapore Convention on Mediation: Framework for the Cross Border Recognition and Enforcement of Mediated Settlements", 19 Pep. Disp.Resol. L.J 1 (2019)at p.54.

[12]See. https://uncitral.un.org/ "Report on Working Group II on the Work of its Sixty -Eight Session. A/CN.9/934 para.59-66, A/CN.9/WG.II /LXVII/CRP.1/Add.2. No.13.

[13]See. **BORN,** "International Commercial Arbitration" (2 nd Ed.) Wolters Kluwer 2014, p.3673-3674

also others prepare and announce recovery economic and business plan to all concerns. Within the framework above mentioned discussions, bear in mind that*Convention provides a risk management system accessible in terms of its flexibility and affordability to cross borderbusiness actors whether they are international corporations, publicly listed corporations, traditional incorporated limited entities, sole traders or start-ups*[14] *or crowfundings for the needs of users. In addition to it helps to develop policy and build application mechanism and frameworks, compliance with to effective supervision and corporate governance principles, andhence, moves to mediated settlement agreements in the global manner rapidly for fostering liaison between ecosystem on international dispute resolution and mediation.*

In order to ensure sustainability of commercial life in every State, I do believe that Convention will give an opportunity to use stimulated procedure to commercial partiesforenforcementof IMSA in the signatories'States after Sept.12,2020.

[14]İbis p.1.