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Mediation in the UK: Singapore Convention on Mediation and Compulsory ADR?

By Charlotte Mullis

The Singapore Convention on Mediation, or to give it its full name the United Nations Convention on International Settlement Agreements Resulting from Mediation, (the "Singapore Convention" or the "Convention"),[1] is new and currently relatively unknown but the hope is that it will soon become as renowned and important to dispute resolution as its elder sister, the New York Convention.[2] Of course, the New York Convention and its importance to arbitration awards needs no introduction and the intention is that similarly the Singapore Convention, which was modelled on the New York Convention, will facilitate international trade in the same way by giving commercial parties confidence that where they choose to settle disputes through mediation, those settlements can be easily enforced across borders using one set of rules.

Introducing the Convention in the UK

While the Singapore Convention came into force in September 2022, it was not until 3 May 2023 that the UK signed the Singapore Convention. This followed the UK government's consultation on the Convention in March 2023.[3] The implementation of the Singapore Convention in the UK will require legislation to be passed, including changes to procedural rules. The Chair of the Justice Select Committee, Lord Bellamy KC, has stated that the UK government will work to ratify the Convention in 2024 and it will come into force here six months after the UK has deposited its instrument of ratification.

The UK's decision to sign makes it the 56th state to sign the Convention. However, only 11 States have so far ratified the Convention,[4] so it is likely that the UK's impeding ratification will be an important step for the deemed success of the Convention and hopefully both encourage more countries to follow suit and cement the UK, and in particular London, as the leading hub for dispute resolution.

Current position

Before the Singapore Convention, and in countries which have not yet ratified the Convention, settlement agreements do not possess any special status. Should one party fail to abide by the agreement, the other party must issue a claim for breach of contract (either through further court proceedings or arbitration) and obtain a judgment / award, which then would have to be enforced in the usual way. Under the Convention, parties will be

[1] Convention Website - https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements

[2] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)

[3] https://www.gov.uk/government/consultations/the-singapore-convention-on-mediation/outcome/government-response-to-the-consultation-on-the-united-nations-convention-on-international-settlement-agreements-resulting-from-mediation-new-york-20

[4] Singapore, Fiji, Qatar, Saudi Arabia, Belarus, Ecuador, Honduras, Turkey, Georgia, Kazakhstan and Uruguay (will enter into force in Uruguay on 28 September 2023).

able to apply directly to the courts of participating states, which have also ratified the Convention, to enforce settlement agreements resulting from mediation. UNCITRAL, which has developed the Singapore Convention, hopes that it will make settlements resulting from mediation much easier to enforce, akin to the New York Convention for arbitral awards, thereby promoting mediation as a mechanism for international dispute resolution.

Which Settlement Agreements are covered?

Article 1 of the Convention sets out that the Convention applies to international mediated written settlement agreements covering commercial disputes.

- **Agreement:** The settlement agreement in question must be concluded after the Convention has entered into force (i.e. been ratified) in the State concerned. It is not sufficient for the State concerned to be a signatory to the Convention. Article 1 also expressly excludes from its scope settlement agreements that have been recorded and are enforceable as arbitral awards, as well as agreements that have been approved by a court or concluded in the course of court proceedings and "are enforceable as a judgment in the State of that court".

- **Commercial Dispute:** Whilst there is no definition of "commercial dispute" in the Convention, Article 1 lists certain exclusions from the scope of the Convention, namely settlement agreements concluded by a consumer for personal, family or household purposes or relating to family, inheritance or employment law. Signatory States also have the option to declare that the Convention will not apply to public contracts involving the government or any of its agencies. Belarus and Iran have made this declaration.

- **Mediation:** Under the Convention, "mediation" is broadly defined as "a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person (the mediator) lacking the authority to impose a solution upon the parties to the dispute." Under this broad definition, "mediation" could potentially include settlement agreements obtained following other processes, such as conciliation, expert determination or even dispute resolution boards.

- **International:** The Convention specifies that a dispute will be international in nature where at least two parties to the settlement agreement have their paces of business in different states; or where the state in which the parties have their places of business is different to either (i) the state in which the substantial part of the obligations under the settlement agreement is performed or (ii) the state with which the subject matter of the settlement agreement is most closely connected.

Safeguards:

The Convention defines in Article 5 the grounds upon which a court may refuse to grant relief at the request of the disputing party against whom it is invoked. These grounds fall into three categories broadly following the approach taken in the New York Convention: (i) an issue with the disputing parties; (ii) an issue with the settlement agreement or (iii) an issue with the mediation procedure (including the mediator). The grounds are as follows:

1. A party to the settlement agreement was under some incapacity;

2. The settlement agreement is null and void or inoperative or incapable of being performed under the law to which the parties are subject to, not binding or final or has been subsequently modified;
3. The obligations in the settlement agreement have been performed or are not clearly comprehensible;
4. Granting relief would be contrary to the terms of the settlement agreement;
5. 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;**
6. There was a failure by the mediator to disclose the parties' circumstances that raise **justifiable doubt** as 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 includes two additional grounds upon which the court may, on its own motion, refuse to grant relief. Those grounds relate to public policy and whether the subject matter of the dispute can be settled by mediation.

Issues with the mediation procedure and mediator

Grounds 5 and 6 set out above, relating to mediators, were the most controversial during the drafting of the Convention, but in reality, are unlikely to be used in practice. According to a recent speech by Michel Kallipetis KC[5], all parties involved in the negotiations recognised that if the grounds were going to mean anything, they could only relate to an alleged behaviour by the mediator which invalidates the consent of the party wishing to set aside the settlement and could not be used to provide a way to set aside a mediated settlement agreement. These grounds were amended (to include the words highlighted above) to provide a safeguard to protect parties who believed that the mediator had somehow interfered with their consent to settlement. They also provide reassurance to mediators, who recognised that parties to mediations will (in most circumstances) be represented by lawyers who would prevent their client from being misled by the mediator and thereby conclude an agreement to which they did not properly consent.

Other developments

In light of this, 2024 will likely be an important year for mediation in the UK. In addition to the planned ratification of the Singapore Convention, another potentially significant development is the appeal in *James Churchill v Merthyr Tydfil County Borough Council.*[6] Whilst the subject matter of the case seems trivial (the complaint is that the council allowed Japanese knotweed to enter Mr Churchill's garden), the principle being debated is one of great importance to the dispute resolution community. Permission was granted to bring the appeal to decide whether a claimant is obliged to engage in ADR before bringing proceedings. The appeal was due to be heard in June 2023 but has been delayed until November 2023 after the Civil Mediation Council, CIArb and the Centre for Effective Dispute Resolution joined forces and were granted the right to intervene in the case. If successful, the appeal will set aside *Halsey v Milton Keynes General NHS Trust*[7], where the court found that it was a breach

[5] "The UK's intention to ratify and sign the Singapore Convention on Mediation – an inevitable reality" by Michel Kallipetis KC at Chartered Institute of Arbitrators ("CIArb").

[6] unreported 12 May 2022

[7] [2004] 1 WLR 3002

of the right to a fair trial[8] to compel parties to mediate. The outcome therefore has the potential to significantly change the face of ADR in the UK.

Postscript

The appeal in James Churchill v Merthyr Tydfil County Borough Council was granted by the Court of Appeal on 29 November 2023. The Court of Appeal found that a court can lawfully stay proceedings or order the parties to engage in ADR (subject to certain restrictions). My colleague Fiona Cain ***commented on this judgment in an article for The Times: Japanese Knotweed Case Boosts Mediation*** *and together with Fiona, I have co-authored a piece for the Solicitors Journal which will be published in their February 2024 digital magazine and will be available on my profile shortly.*

[8] Article 6 of the European Convention on Human Rights.