THE UK GOVERNMENT HAS ANNOUNCED THAT IT WILL BECOME A SIGNATORY TO THE SINGAPORE CONVENTION, BUT WHY IS THIS NECESSARY AND WHAT WILL IT ACHIEVE?

The United Nations Convention on International Settlement Agreements Resulting from Mediation
https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf

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What is the Convention?

The Singapore Convention was adopted by the UN in December 2018, opened for signatures in August 2019 and was in force by September 2020. In order to engage the Convention States need to sign and then ratify, accept or approve it (see Article 11).

The intention is that It enables a party which has mediated an international commercial dispute to enforce a cross-border settlement agreement in any country that is a Party to the Convention without needing to commence an action for breach of contract. It can be seen as a sister to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Why is it needed?

It may not be immediately apparent that mediation (a voluntary and consensual process) requires the same support as arbitration (which can impose an award on an unwilling and uncooperative party to a contract containing an arbitration clause). In general, where parties have taken part in a mediation and reached an agreed settlement, they honour it. If they didn't intend to abide by its terms, why would a party execute a settlement agreement? I am not aware of any settlement agreement in any of my mediations that was not honoured. Buyers' remorse does not seem common. Quite the opposite, in fact.

It is likely that the benefits of the Conventions will be welcomed, not by those who willingly engage in mediation and know the benefits, but by those who are inexperienced or mistrustful of the process.

In UK domestic construction and engineering disputes, mediation has become embedded in the dispute resolution landscape. The market is mature and recognises the benefits of mediation in enabling the parties to eliminate the risks and costs of arbitrating or litigating, and shaping their own early compromise. The support of the courts by way of encouragement of mediation and adverse costs orders against those who unreasonably fail to mediate has helped to make mediation a welcome first port of call for many UK disputants.

The international arena is different. In many jurisdictions mediation is still relatively new. It may be that fear of unenforceability might dissuade disputants from embarking voluntarily on a mediation with parties half a world away, whose jurisdictions and customs are very different. Moreover, there is an increasing trend for multi-tiered dispute resolution clauses in construction and engineering contracts that include mediation as a voluntary or, sometimes mandatory, step on the way to arbitration. In my experience the latter are the disputes in which trust tends to be at its lowest. I have lost count of the number of times that each party to a contract-mandated international dispute has told me in our private pre-mediation videoconferences that, whilst they attend in good faith, they believe the other party is only box-ticking and has no intention to seek a settlement.

Contract-mandated mediation will bring the parties to the table but the absence of trust may prevent them from engaging with an open mind. It may feel pointless to them. I cannot be the only mediator to have experienced that sinking feeling when a mediation comes to an abrupt halt after the first offer, when things seemed to have been going so well. In hindsight it can be seen that the terminating party was really only going through the motions and was waiting until the point at which nobody could deny that they had engaged in mediation.

The positive message of the Convention in reinforcing mediation, and the knowledge that any resulting compromise can be relied on in bringing enforceable finality to the dispute, may free parties up to really engage with the process rather than ticking the box by turning up.

The UK Government's position

The UK Government has now sent a strong positive message of support for mediation and UK mediators by its decision

on 2 March to become a signatory to the Convention and put in place the necessary legislative and regulatory provisions, following a public consultation in February 2022. In a statement published by the Parliamentary Under Secretary of State for Justice (Lord Christopher Bellamy KC) it was recorded that:

> "The majority of the responses were in favour of the UK joining the Convention. In practical terms, many respondents noted that joining the Convention will mean that where it might be necessary to enforce a mediated agreement, having a direct route for enforcement would be preferable to the current practice of having to enforce by way of a breach of contract or following a court order. Respondents also generally agreed that becoming party would signal the UK's commitment to mediation, further enhance the UK's status as an attractive international dispute resolution hub, promote the UK legal sector and increase the credibility of UK-based mediators.
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> "For these reasons, the Government has concluded that it is the right time for the UK to become a party to the Convention to provide for recognition and enforcement of international commercial mediation settlement agreements throughout the UK. This decision will be a clear signal to our international partners that the UK is committed to maintaining and strengthening its position as a centre for dispute resolution and to promote the UK's flourishing legal and mediation sectors".

The Convention was already in force and as at March 2023 it had 55 signatories, 10 of whom had ratified. The UK notified its willingness to sign the Convention without invoking either of the available reservations available under Article 8.1, which enable a Party (i.e. a State) to declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

It remains to be see to what extent other States may invoke one or other of the reservations. If reservation (b) is invoked, parties will need to opt in (probably in the settlement agreement itself) if they wish the Convention to apply.

When and to what does the Convention apply?

The Convention applies to enforcement of mediation settlement agreements by the competent authority (usually a court) of a State (including a regional economic integration organisation that is constituted by sovereign States – see Article 12) that has signed and ratified, accepted or approved it. The Convention refers to such bodies as States or Parties, whilst those who have entered into the settlement agreement are parties.

It applies to settlement agreements that are in writing and signed following a commercial and international mediation. Article 4 sets out the proof of this which is to be provided for enforcement purposes, which may include signature of the settlement agreement by the mediator or a document signed by the mediator indicating that the mediation took place.

The dispute must have been international. Article 1 provides that:

> "This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:
>
> (a) At least two parties to the settlement agreement have their places of business in different States; or
>
> (b) The State in which the parties to the settlement agreement have their places of business is different from either:
>
> (i) The State in which a 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."

It will be interesting to see whether challenges will be made where only one party has a place of business different from (b)(i) or (ii).

The dispute must be commercial, not personal, family, employment or inheritance (Article 2).

It arguably does not apply to conciliation, or any other process in which the mediator has power to make a settlement proposal that becomes binding if neither party objects, as the Convention requires that the mediator must lack the authority to impose a solution upon the parties (Article 2.3).

The Convention does not apply where the settlement can be already be enforced. Article 3 excludes:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Enforcement

The Convention can be used as a shield as well as a sword. Where the Convention applies, Article 3 provides that:

1. 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.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

If a party applies to the competent authority, then as long as the subject matter is capable of settlement by mediation and enforcement is not contrary to public policy, the settlement agreement will be enforced unless one of the criteria in Article 5.1 is satisfied:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

(ii) Is not binding, or is not final, according to its terms;

or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

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

(e) 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; or

(f) 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.

It is apparent from (d) that the parties to a settlement can opt out of the Convention but that opt-out will need to be expressed in the settlement agreement. It will not suffice to put the opt-out in the mediation agreement.

Whilst (e) and (f) may strike fear into the hearts of mediators, the bar is set high by the causative test that the breach or non-disclosure affected the complaining party's decision to enter into the settlement agreement. It is notable that the breach and non-disclosure only make the settlement unenforceable under the Convention. No remedy against the mediator is provided.

What next?

It will be difficult to judge whether the Convention leads to more international commercial mediations taking place, or more settlements in those mediations. The growing popularity and familiarity of mediation means that there is likely to be increased take-up even without the Convention.

If there are settlement agreements that are not honoured and they come before the courts pursuant to the Convention, it is reasonable to expect that lawyers acting for parties resisting enforcement will leave no stone unturned. Just as with applications to stay proceedings because contract-mandated mediation has not taken place, expect ingenuity and argument.

On the whole, however, the decisions of States to become Parties is bound to be seen as a positive step, bathing mediation in the warm glow of approval and demonstrating governmental support for the still-young mediation profession in the signatory States and the benefits that mediation brings to business. Mediation is growing up.