A good deal for all?

Andrea De Biase predicts the UK will ratify the Singapore Convention

IN BRIEF

▶ Ratifying the Singapore Convention could be a boon for cross-border mediation, providing more reliable enforcement powers.

2022 is shaping up to be an exciting year for mediation. This year has already seen the ICC Dispute Resolution Services publish record figures for the ICC International Centre for ADR (registering 80 new requests for its services) and the UK Ministry of Justice publish a consultation paper in February on the Singapore Convention on Mediation, calling for views from interested parties on whether the UK should become party to the Convention and implement it in UK domestic law. The Convention is widely regarded as the missing piece in the international dispute resolution enforcement framework. The consultation closed on 1 April.

The United Nations General Assembly adopted the Singapore Convention on 20 December 2018, and the UK is yet to become a signatory. The Convention is a significant recent development in the area of mediation. There are currently 55 signatories (18 of which are Commonwealth nations, including Australia, India and Singapore). It provides for a uniform framework for the effective recognition and enforcement of mediated settlement agreements across borders—it allows parties to enforce a written mediated settlement agreement that is international in nature by direct application to a 'competent authority' (usually a court) of a party (country) to the Convention.

The Convention shares a number of important similarities to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, save that it, of course, pertains to mediation:

- Article 3(1) of the Singapore Convention provides that '[e]ach 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'.
- Article 5 lists a restricted number of defences to enforcement, including where: (i) 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; (ii) the subject matter of the dispute is not capable of settlement by mediation under the law of the country where recognition or enforcement is sought; and (iii) granting the relief sought would be contrary to the public policy of the State party in question.

The UK consultation paper raises a number of interesting issues and questions for consideration and discussion, including with respect to (i) above. The relevant question posed is whether 'a lack of regulation and the potential differences in conduct and standards among parties to the Convention could present any particular challenges to the application of the Convention in the UK?' In this respect, the paper notes that UNCITRAL, through its Working Group, has started working on further guidance and rules covering various aspects of international commercial mediation, including conduct and standards.

Another thought-provoking issue highlighted in the consultation paper is the fact the Singapore Convention will not apply to certain settlement agreements, being those reached during the course of court proceedings or arbitration (see Art 1, paras 3(a) & (b)). The issue presented for contemplation on this front is whether 'legal practitioners consider that there could still be confusion or uncertainty about when the Singapore Convention may apply? ie could a disputing party seek to invoke the Convention if, during the course of arbitral proceedings, a mediation resolves the matter at hand without an arbitral award being handed down?'

Settling down

While the above topics are certainly ripe for debate, the consultation paper naturally raises many factors that undoubtedly support the UK becoming a signatory to the Convention, including the following:

- 'It may reduce frustration amongst mediators, who conduct numerous successful cross-border mediations without enforcement issues arising, but nonetheless face the reality that parties are reluctant to mediate due to worries over enforcement across different jurisdictions.'
- 'The Convention will provide reassurance that a mediated outcome will have the same protection that international arbitral awards have, under the New York Convention 1958 on arbitration, namely that they will be readily enforceable in different jurisdictions.'
- 'Evidence suggests that arbitration is no longer a quicker and more efficient alternative to litigation in commercial cases. Mediation has increased in popularity, as it can take place before and during the course of arbitration proceedings.'

Interested parties, including practitioners, academics and businesses, were invited to send their responses to the consultation paper by 1 April 2022, and the UK government is now deciding whether to commence the necessary process to sign, ratify and implement the Singapore Convention into UK domestic law. If ratification occurs, this will mean that parties will not be reliant on the UK common law of breach of contract to enforce mediation agreements, having access to a more certain and potentially expedited process of enforcement. Even if ratification should not occur, it will still be possible for a settlement agreement to be signed in the UK and then enforced under the Convention in another jurisdiction, if that country is a party.

It is difficult to anticipate how the Singapore Convention could be a disbenefit to the UK international dispute resolution landscape. Most roads point to its implementation, with favourable stakeholder support recorded following the Ministry of Justice's focused, limited and informal consultation process in pre-Covid September 2019. This stance likely has crystalised in the community in the post-Covid era, where certainty is craved more than ever in the international disputes arena.

Accordingly, only time will tell how commonly the Convention will be invoked in practice, and whether courts in various jurisdictions will interpret it consistently to achieve the Convention's objects of confidence and certainty. At bottom, this author is confident the Convention is a positive step for cross-border mediation—it can only help to absolve doubts held by hesitant parties with respect to enforcement concerns. NLJ

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