RESPONSE OF THE CIVIL MEDIATION COUNCIL

TO THE CONSULTATION ON THE UNITED NATIONS CONVENTION ON INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION ('THE SINGAPORE CONVENTION')

16th September 2019

1. Do you consider that there is a need for the UK to apply the Singapore Convention and, if so, why?

Response

Yes. The reasons can be summarised as follows:

(a) Cross-border disputes between commercial parties are usually referred (by agreement) to arbitration in a neutral jurisdiction for resolution by arbitrators following a contested hearing if not previously resolved by negotiation between the parties. One of the perceived advantages of arbitration is that it is a quicker and more efficient process than ordinary litigation. However, there is evidence that this is no longer so and, accordingly, commercial parties are looking for alternative ways to speed up the resolution of a dispute. Mediation in this context has become increasingly popular and can take place either before or during the currency of arbitration proceedings.

(b) Any negotiated settlement, whether achieved through the intervention of a mediator or simply as a result of direct negotiation, is simply a contract: it does not have the added legal status of an agreed court order or an agreed arbitral award each of which ordinarily has a well-established enforcement process in jurisdictions other than the jurisdiction where the order or award is made. Whilst experience shows that agreed settlements are usually honoured, there are cases where obligations are not performed. Being able to enforce a contractual term (for example, for payment of a sum of money) elsewhere than where the agreement was made can be important, particularly where the defaulting party has assets in a jurisdiction different from where the agreement was made. So far as agreed arbitral awards are concerned, 160 countries have adopted the New York Convention 1958 which generally enables direct enforcement of an arbitral award in such jurisdictions provided its conditions are met. This is generally regarded as a successful Convention, the UK has adopted it and the courts of England and Wales are accustomed to implementing it.

(c) Whilst some Conventions that provide for enforcement of settlement agreements do exist (e.g. EU Mediation Directive), there is currently no equivalent to the New York Convention. The Singapore Convention is designed to remedy that deficiency. Whilst there are some legitimate concerns about some aspects of the Convention (particularly in relation to the "defences" set out in

Article 5), these are matters that (as with the New York Convention) will be addressed by the domestic courts of the enforcing State. It is to be hoped that these courts will adopt a broadly "pro-enforcement" attitude (as generally occurs in relation to the New York Convention) and will take a robust stance in respect of spurious attempts to avoid complying with such an agreement. It is thought likely that the courts of England and Wales would do so if the Convention was adopted by the UK.

(d) It is already possible for a mediated settlement agreement to be embodied in an agreed arbitral award if, for example, an Arbitration-Mediation-Arbitration procedure (often called 'Arb-Med-Arb') is available (as it is, for example, in Singapore itself) and utilised by the parties. In such a situation the New York Convention may be deployed for enforcement purposes. However, the procedure is not universally available and the availability of a summary procedure for enforcement of such an agreement in a commercial dispute would be generally welcomed by the commercial community.

(e) If the jurisdiction of England and Wales wishes to retain its worldwide reputation for being at the centre of the commercial dispute resolution business, it is important that it is seen to endorse the Singapore Convention. Some major jurisdictions (e.g., the US, China and India) have already signed the Convention and it is anticipated that formal adoption will take place in due course. The UK should not be seen to lag behind: it will not do its first-class reputation as a jurisdiction where international commercial disputes are resolved to be seen as not supporting a process designed to facilitate the enforcement of mediated settlements of disputes of that nature.

(f) It has been Government policy since at least the Civil Justice Reforms promoted by Lord Woolf over 20 years ago to encourage the use of ADR (most particularly, mediation) in order to resolve disputes without recourse to litigation. This is the position within the domestic jurisdiction of England and Wales. It would be inconsistent not to support, or be seen to support, a similar approach to the resolution of disputes arising internationally.

2. Do you have any concerns about the UK becoming a Party to the Convention? If so, what are they?

Response

No. There will inevitably be a degree of "settling down" in relation to the parameters set by the Convention (and its associated Model Law), but this will be a matter for the courts of England and Wales (primarily the Commercial Court) to work through and it will not be substantially different from the work already undertaken by those courts in respect of the New York Convention. It will need to be understood that mediation is a different process from arbitration and that not every feature of the New York Convention is applicable to the process or should be interpreted in the same way for the purposes of the Singapore Convention.

3. Is it a problem, as described above, that there is no specific provision in relation to a settlement agreement that conflicts with a judgment and that such matters have to be decided on the basis of public policy?

Response

We do not think so. In the first place, Article 1(3) provides that the Convention does not apply to a mediated settlement that has "been approved by a court or concluded in the course of proceedings before a court", is "enforceable as a judgment in the State of that court" or has "been recorded and [is] enforceable as an arbitral award". This effectively means that a settlement agreement that is embodied in one of the ways set out in that Article is outside the purview of the Convention and falls to be enforced by other means. There is no discretion for the competent authority to exercise in that situation: it simply does not arise. Second, the question posed is what a competent authority does when faced with an application for relief in respect of a settlement agreement that runs counter to a judgment given (presumably by a court or an arbitral tribunal) on the same subject-matter of dispute between the same parties. It is extremely difficult to see how in practice this problem could arise. If the parties have fought the issue and a judgment or award is made, it is difficult to envisage the circumstances in which a settlement agreement between the same parties will be made covering the same subject-matter. The judgment or award will have resolved the matter. If one party seeks to ignore the judgment or award, the other party will usually take appropriate steps to enforce the award or judgment. If there is some subsequent agreement between the parties which in some way modifies the outcome of the proceedings between them, then that agreement would represent the basis of the relationship between them and, if achieved through mediation, could fall to be enforced under the Convention provided that the new agreement was not itself made the subject of an agreed award or judgment. If there are other circumstances (which, as things stand, are difficult to envisage) in which the suggested issue may arise, the competent authority will need to recall that (a) the grant of relief under the Convention is discretionary (confirmed by the use of the word "may") and (b) there is the long stop "public policy" provision.

4. What, if any, reservations should the UK make if it was to ratify and apply the Convention?

Response

We do not consider that any reservation should be made under Article 8. So far as Article 8(1)(a) is concerned, it would, in our view, look wrong for the Government to ratify or otherwise adopt the Convention and yet exempt itself from its provisions. If, however, other States make reservations under this part of Article 8, it would be legitimate for the UK Government to adopt a similar line. So far as Article 8(1)(b) is concerned, it is, in our view, better to make no reservation along these lines because it means that parties who do not wish their settlement agreement to be subject to the Convention must expressly opt out of its effect in the settlement agreement. The presumption ought to be that all parties agree to its use if necessary.

5. What other comments, if any, do you have?

Response

None other than to repeat that, in our view, the UK should be seen to support a Convention designed to facilitate mediation in international commercial disputes (a) because there is no reason not to do so, (b) it does so in "domestic" disputes and (c) it emphasises the UK's role as a dispute resolution centre of choice for many parties from outside its jurisdiction. Any difficulties of interpretation or application will be ironed out over time.

About the CMC

The Civil Mediation Council (CMC) is a charity which aims to promote the resolution of conflicts and disputes by encouraging the use of mediation and other dispute resolution techniques and methods and to advance the education of the public in matters related to this.

Please direct any queries about this response to secretariat@civilmediation.org.