LECTURE TO EXECUTIVE LLM STUDENTS

‘THE SINGAPORE MEDIATION CONVENTION’

I was given a completely free rein in deciding on the topic for this very brief talk.

Since there is a distinctly international dimension to the company here tonight and an equally international flavour to aspects of the Executive LLM upon which you have all embarked, I thought I should choose something with international implications.

The subject is very topical because the Convention about which I should like to speak is to be signed in Singapore on 7 August. Its long title is ‘The United Nations Convention on International Settlement Agreements Resulting from Mediation’, but is likely to be known as ‘The Singapore Mediation Convention’ or simply ‘The Singapore Convention’. It will come into effect six months after it has been ratified by at least three UN member states.

After several years’ negotiation between various member States and other international organisations, The United Nations Commission on International Trade Law (‘UNCITRAL’ for short) approved the final draft of the Convention and its associated model law in June last year and the text was adopted by the General Assembly in December.

You have the text in front of you, but before talking about its terms, let me put the Convention into context.

Disputes between companies or other legal entities which have their places of business in different countries are usually called 'cross-border' disputes. Almost invariably they arise out of commercial contracts. Those contracts usually contain an arbitration clause that stipulates that any dispute arising under or in connection with the contract to be decided by arbitrators in a location other than the local jurisdiction of either party. They will normally choose a "seat of arbitration" away from either of those jurisdictions and they will have agreed the law to be applied to the dispute.

Quite often, of course, such is dispute is resolved by way of direct negotiation between the parties or their lawyers, perhaps with the assistance of a mediator, either before formal arbitration proceedings get under way or, if they do get under way, before the arbitral tribunal is called upon to make a binding decision following a contested hearing. This is as much the case in international disputes as it is in disputes arising in the domestic jurisdiction.

A recent survey carried out by the International Institute for Conflict Prevention and Resolution, based in the US, and the Centre for Effective Dispute Resolution, based in the UK, published on 4 April, suggests that direct negotiation remains the largely preferred option to resolve cross-border disputes, with arbitration and mediation further down the list of preferences, arbitration beating mediation by quite some distance. I will come back to that in a moment.

Experience is that where parties have agreed a resolution of such a dispute, each generally abides by the obligations created by the settlement agreement. However, there are cases where it is necessary for one party to seek enforcement of an obligation, often one to pay money though it can embrace other types of obligation, and the issue arises as to how enforcement is secured.

As in most domestic jurisdictions throughout the world, a settlement can either remain in the realms of contract where, if enforcement is required, contractual remedies must be pursued or it can be embodied in a court order or arbitral award where the remedy for non-fulfilment of an obligation will be through enforcement of the court order or arbitral award.

That is the context for what follows.

It does not require much imagination, does it, to appreciate that the enforcement by purely contractual means of a settlement of a dispute between companies from two different countries can raise all sorts of conflict of laws issues? There are then the practical issues of fresh proceedings in the appropriate jurisdiction. The Singapore Convention is designed to smooth over those difficulties.

Before we look in more detail at the terms of the Singapore Convention, it is important to note that in addition to certain specific exclusions (see Article 1, paragraph 2), it does <u>not</u> apply to a settlement of an international commercial dispute that –

(i) was not achieved through mediation, namely, "with the assistance of a third person or persons" who lack "the authority to impose a solution upon the parties to the dispute" (see Article 2, paragraph 3); or

(ii) where the agreement has been embodied in a court order or arbitral award or otherwise concluded during the course of court proceedings (see Article 1, para graph 3).

This means that an agreement reached between the parties, perhaps as a result of direct negotiations between their lawyers, and thus without the intervention of a mediator, will not be covered by the Convention. Equally, an agreement that is otherwise enforceable by a court order or arbitral award, even if reached with the assistance of a mediator, will not be covered.

The purpose of the Convention appears to put the intervention of a mediator at the centre of the issue of enforceability.

UNCITRAL has said this about the purpose of the Convention:

> "The Convention is an instrument for the facilitation of international trade and the promotion of mediation as an alternative and effective method of resolving trade disputes. Being a binding international instrument, it is expected to bring certainty and stability to the international framework on mediation …."

That is the objective of the Convention and a number of commentators have said that it heralds "a bright new dawn for cross-border dispute resolution", is "Good News for Businesses" and that it represents "A Game-changer". Others are more circumspect. Let us consider why. Will it be as successful in its objective as has the New York Convention in relation to the enforcement of arbitral awards? The Singapore Convention largely mirrors that Convention.

The framework established by the Convention in Article 3, paragraph 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."

So each State that signs up to the Convention will be required to enforce a settlement agreement that complies with the conditions in the Convention in accordance with its own procedural rules if asked by a party to do so. So far, so good. In England and Wales, for example, a party relying on an agreement covered by the Convention would presumably apply for summary judgment in order to obtain expeditiously an enforceable court order.

In order to comply with the Convention, the formalities of Article 4 have to be observed. There is a requirement that the mediator, or his/her appointing institution, must attest to the fact of the agreement.

I have seen suggestions that some mediators will regard this obligation as undermining the confidentiality obligation that they undertake to the parties, but I think it unlikely that this will be a problem in the long-term. It will not be in the interests of the international mediation community to be difficult about providing formal evidence of this kind.

Leaving that issue to one side, there are certain grounds set out in Article 5 which would provide the "competent party of the Party to the Convention" (essentially, the courts of the State asked to enforce the agreement) with a discretion to refuse the relief sought.

There is not time to go through them all, but can I highlight the following as potential areas of difficulty?

1. An agreement that is "not binding, or is not final" may be exempt from enforcement. Quite often the parties to a mediated settlement will agree to "park" certain issues and agree to discuss them further or agree a mechanism by which they are to be resolved. Will an agreement incorporating such an arrangement be exempt from enforcement?

2. What about an agreement where it is suggested that the obligations are "not clear or comprehensible"? By which legal standards is that issue to be determined if raised by the party resisting enforcement?

3. Then there are the two areas where the conduct of the mediator might be relied upon: the Convention provides an exception where "there was a serious breach by the mediator of mediator standards" or where there was "a failure by the mediator to disclose to the parties

circumstances that raise justifiable doubts about the mediator's impartiality or independence." It does not require any sophisticated legal analysis to raise the question of what constitutes "mediator standards" and what matters might raise "justifiable doubts about the mediator's impartiality or independence" and by whose criteria are they to be judged. I have said in another lecture recently that these are "wriggle factors" one can see being deployed, probably on spurious grounds, to prevent or delay enforcement by a party that has changed its mind about compliance. If a court in the enforcing State feels obliged to examine issues such as these, one can see delays occurring.

4. Finally, there is the same "public policy" exception as is provided for in the New York Convention: see Article 5, paragraph 2(a). For example, a settlement agreement which concerns monetary interest is unlikely to be enforced in countries where Sharia law, which prohibits interest, is the governing law. That is fairly clear, but attitudes, for example, to money-laundering may vary across jurisdictions and there may be some uncertainties there.

The purpose of this talk is merely to introduce you to the Singapore Convention and not to suggest that it is a worthless piece of paper. I am very much in favour of the objectives that underlie it, but there are going to be some tests as to its efficacy over the next year or so.

It is going to be interesting to see which countries sign up to it and how the courts of those countries respond to the kind of challenge that one can see being mounted by a party that has either changed its mind about

compliance or that never intended to comply in the first place. If that party has assets in the State where compliance is sought to be enforced, it is to be hoped that those courts will take a robust view about specious arguments advanced by that party.

To use the very English expression, the jury will be going out on that issue in the next year or so.