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SINGAPORE CONVENTION ON MEDIATION

An Analysis of the Singapore Convention on Mediation

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The United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention" or the "Convention") came into force on 12 September 2020 and has been signed by 53 Countries as of 1 September 2020 including Nigeria. It has been called the "New York Convention" for mediation as it aims to provide for enforcement of Mediated Settlement Agreements, in a similar manner as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards successfully did for Arbitration. Nigeria, although a signatory, has not yet ratified the Convention. However, there are calls for the convention to be incorporated in the Arbitration and Conciliation Amendment Bill currently before the National Assembly in a similar manner as the incorporation of the New York Convention in the current Arbitration and Conciliation Act. This Article is intended to give an analysis of the Convention in its current form in order to ascertain its possible effects in the field of mediation.

Mediation

Mediation is generally defined as the process for resolving disputes with the assistance of a neutral third party who assists parties privately and collectively to identify the issues in dispute, reach settlement of the dispute and mutually accept the settlement. Under the Singapore Convention, mediation is 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 or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.*"[2]

This differentiates mediation from other alternative forms of dispute resolution, such as arbitration. In mediation, a mediator would only assist the parties reach a mutually agreeable solution. In arbitration, however, although a third party (the "arbitrator") presides over the proceedings, the arbitrator imposes a decision (an award) on the parties. This usually leads to a party opting to set aside the award if dissatisfied. Ordinarily, this should make mediation preferable to arbitration. However, the key feature of arbitration - the enforceability of the Award- would appear to make arbitration preferable to mediation. Awards can be recognised and enforced as if they were a judgment of a court, locally under the Arbitration and Conciliation Act in Nigeria and internationally under the New York Convention.

Issues with enforceability

Mediated Settlement Agreements can be enforced as a contract. This would mean where one party fails to perform its obligations under the Mediated Settlement Agreement, the other party may sue for breach of contract. However, this defeats the purpose of the mediation in the first place as parties would have ordinarily wanted their dispute to be settled outside the courtroom.

Also, where a dispute is already pending in court, and the parties resort to mediation to settle their dispute, the resulting settlement agreement may then be adopted as the Court's judgment (consent judgment).
The Singapore Convention was borne out of a need to ensure the universal enforceability of Mediated Settlement Agreements. We shall in the paragraphs that follow, discuss the key areas of the Singapore Convention that strengthen the enforceability of Mediated Settlement Agreements

Analysis of the convention

Applicability

The Convention does not apply to all mediated settlement agreements. It applies to only International Mediated Settlement Agreements (IMSA) agreed by the parties therein "to resolve a commercial dispute". A commercial dispute is not defined under the Convention, however, under Nigerian Law, we may refer to the Arbitration and Conciliation Act for guidance. The Act, which mirrors a similar definition under the UNCITRAL Model Law on International Commercial Arbitration,[3] defines Commercial as "all relationships of a commercial nature including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, constructing, engineering licensing, investment, financing, banking, insurance, exploitation, agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail, or road". A Mediated Settlement Agreement would be construed as international if at least two parties to the settlement agreement have their places of business in different States or the State in which the parties to the Settlement Agreement have their places of business is different from either the State in which a substantial part of the obligations under the Settlement Agreement is performed, or the State with which the subject matter of the Settlement Agreement is most closely connected.[4] If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the Settlement Agreement. If a party does not have a place of business, reference is to be made to the party's habitual residence.[5]
The Convention does not apply to IMSAs that were concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes; that relate to family, inheritance or employment law, or IMSAs that have been approved by a court or concluded in the course of proceedings before a court and are enforceable as a judgment in the State of that court and IMSAs that have been recorded and are enforceable as an Award.[6]

Furthermore, the said IMSA must be in writing (meaning its content is recorded in any form) for the Singapore Convention to be applicable.[7]

Requirements for enforcing an International Mediated Settlement Agreement

A party to an IMSA, when seeking to enforce same, must provide the said IMSA, duly signed by the parties as well as evidence that the IMSA indeed resulted from mediation, which may include the mediator's signature on the IMSA, a document signed by the mediator indicating that the mediation was carried out or an attestation by the institution that administered the mediation.[8] This list is however not exhaustive and any evidence that can prove that the IMSA indeed resulted from mediation would be sufficient.

[3]See the footnote to Article 1(1) of the UNCITRAL Model Law on International Commercial Arbitration
[4]See Article 1(1) of the Singapore Convention.
[5]See Article 2(1) of the Singapore Convention.
[6]See Article 1(2) & (3) of the Singapore Convention.
[7]See Article 2(2) of the Singapore Convention.

Refusing Enforcement

Similar to the New York Convention, a State may however refuse to enforce an IMSA only on certain limited grounds. These grounds are very similar to the grounds for refusing to recognise and enforce an award under the New York Convention. They are as follows:

- A party to the settlement agreement was under some incapacity;[9]

The capacity to contract is a fundamental element of forming a valid contract. Where one party lacks the capacity to contract, a valid agreement cannot be formed.[10] This provision is rooted in the fundamental nature of a Mediated Settlement Agreement, that is that the parties must both agree to its terms. Failing which, the entire document is vitiated.

- The settlement agreement sought to be relied upon is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, under the law deemed applicable to the agreement, or is not binding, or is not final, according to its terms or has been subsequently modified;[11]

Where parties have varied or modified a contract existing between them, the old contract becomes extinguished and the parties operate under the terms of the new contract. The general principle of law is that the court would not give effect to an agreement that is void, inoperative or declared illegal.[13]

- The obligations in the settlement agreement have already been performed; or are not clear or comprehensible or enforcing the agreement would be contrary to its terms;[14]

This provision is founded on the general principle of law that a court would not make an order that is vague, incomprehensible, or incapable of being carried out.[15]

- There was a serious breach by the mediator of standard applicable to the mediator or the mediation without which breach a party would not have entered into the settlement agreement;[16]

The Convention does not spell out the standards which are applicable to a mediator. The intention of this provision is to prevent any misconduct by the mediator, that would have altered a party's position in agreeing to the settlement agreement. However, on what may constitute such a breach or misconduct, for guidance, we must rely on what the courts have stated constitutes acts of misconduct for arbitrators. The courts have given a few examples of what could constitute misconduct by an arbitrator, some of which may be applicable to a mediator. These include, where the mediator has been bribed or corrupted, where the mediator accepts the hospitality of one of the parties, being hospitality offered with the intention of influencing his decisions, where the mediator has breached the rules of natural justice or if the mediator acquires an interest in the subject matter of the agreement, or is otherwise an interested party.[17]

- 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.

In the case Gillies (AP) v. Secretary of State for Work and Pensions (Scotland) [2006] UKHL 2, the UK House of Lords explained that "impartiality is not the same as independence, although the two are closely linked. Impartiality is the tribunal's approach to deciding the cases before it. Independence is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal members but also inthe perception of the public." Similar to the rules of arbitration, a mediator must be independent and impartial and also must promptly disclose any circumstances that raise justifiable doubts as to his independence and impartiality.

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[8]See Article 4(1) of the Singapore Convention.
[9]See Article 5(1)(a) of the Singapore Convention
[10]**Metibaiye v. Narelli Intl Ltd.(2009) 16 NWLR (Pt. 1167) 326 at 347, para A**
[11]See Article 5(1)(b) of the Singapore Convention
[12]**Rabiu v. Zara (2018) LPELR-46556(CA)**
[13]**First Bank v. Pan Bisbilder (1990) 2 NWLR (Pt. 134) 64**
[14]See Article 5(1)(c) of the Singapore Convention
[15]**Uchiv v. Sabo (2016) 16 NWLR (Pt. 1538) 264**
[16]See Article 5(1)(e) of the Singapore Convention
[17]**T.E.S.T. Inc. v. Chevron (2017) 11 NWLR (Pt. 1576) 187**

However, a failure to make such a disclosure would not automatically invalidate the Mediated Settlement Agreement unless, such failure had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

- Enforcing would be contrary to public policy or the subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

This provision is similar to the requirement for a dispute to be arbitrable before it can be settled by arbitration. In terms of mediation, the Supreme Court of India has highlighted a few examples of disputes that are incapable of settlement by mediation. These include, disputes which involve interest of the public or interest of several persons who are not parties to the agreement, election disputes as to public offices, special cases which involve protection of courts, for instance, claims against minors, deities and the mentally challenged.[19] In Nigeria, disputes that involve the allegation of a crime have been held to be capable of being determined only by a Court of law. [20]

As regards the issue of public policy, the Nigerian Supreme Court has stated in the case of Okonkwo v. Okagbue (1994) 9 NWLR (Pt. 368) 301[21] that *"[t]he phrase "public policy" means the ideas which for the time being prevail in a community as to the conditions necessary to ensure its welfare, so that anything is treated as against public policy if it is generally regarded as injurious to the public interest. However, public policy is not fixed and stable. It must therefore, fluctuate with the circumstances of the time. Thus, new heads of public policy come into being and old heads undergo modification*." Therefore, the question as to whether enforcing a mediated settlement agreement would be against public policy, would depend on the facts and circumstances of the case.

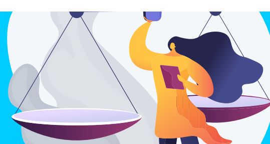
Suggestions

It may be necessary for the Nigerian legislature to also provide for enforcement of Mediated Settlement Agreements that are not international in nature. Such an introduction would need to be applicable throughout Nigeria. A certain procedure currently exists under the Lagos State Multidoor Court Law which provides that *"any Settlement Agreement or Memorandum of Understanding duly signed by the disputing parties, shall upon being filed at the LMDC, be presented to an ADR Judge or any other Judge as directed by the Chief Judge, for Enforcement as Consent Judgment of the High Court of Justice, Lagos State."*[22] Such an introduction would need to be applicable throughout Nigeria.

It is also necessary for the legislature to publish some sort of minimum standards for mediators, in order to provide some certainty and uniformity in the standards required of mediators and prevent ambiguity where an IMSA's enforcement is being challenged on the grounds of the mediator's breach of the said Standards.

Conclusion

By all indications, the Singapore Convention seems to be a welcome development in the field of alternative dispute resolution and is likely to be to mediation as the New York Convention is to arbitration.



[18]**See Article 5(1)(f) of the Singapore Convention**
[19]**Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd. & Ors., (2010) 8 SCC 2**
[20]Mekwunye v Lotus Capital Limited (2018) LPELR – 45546 (CA)
[21]relying on the dictum of Jordan, F.J in the Australian case of **Re Jacob Morris (deceased). 1943) NSWSR 352, 355**
[22] See Section 15(5) of the Lagos State Multidoor Court House Law 2007