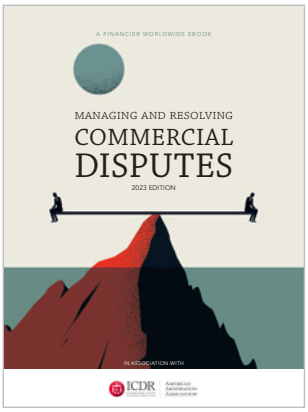

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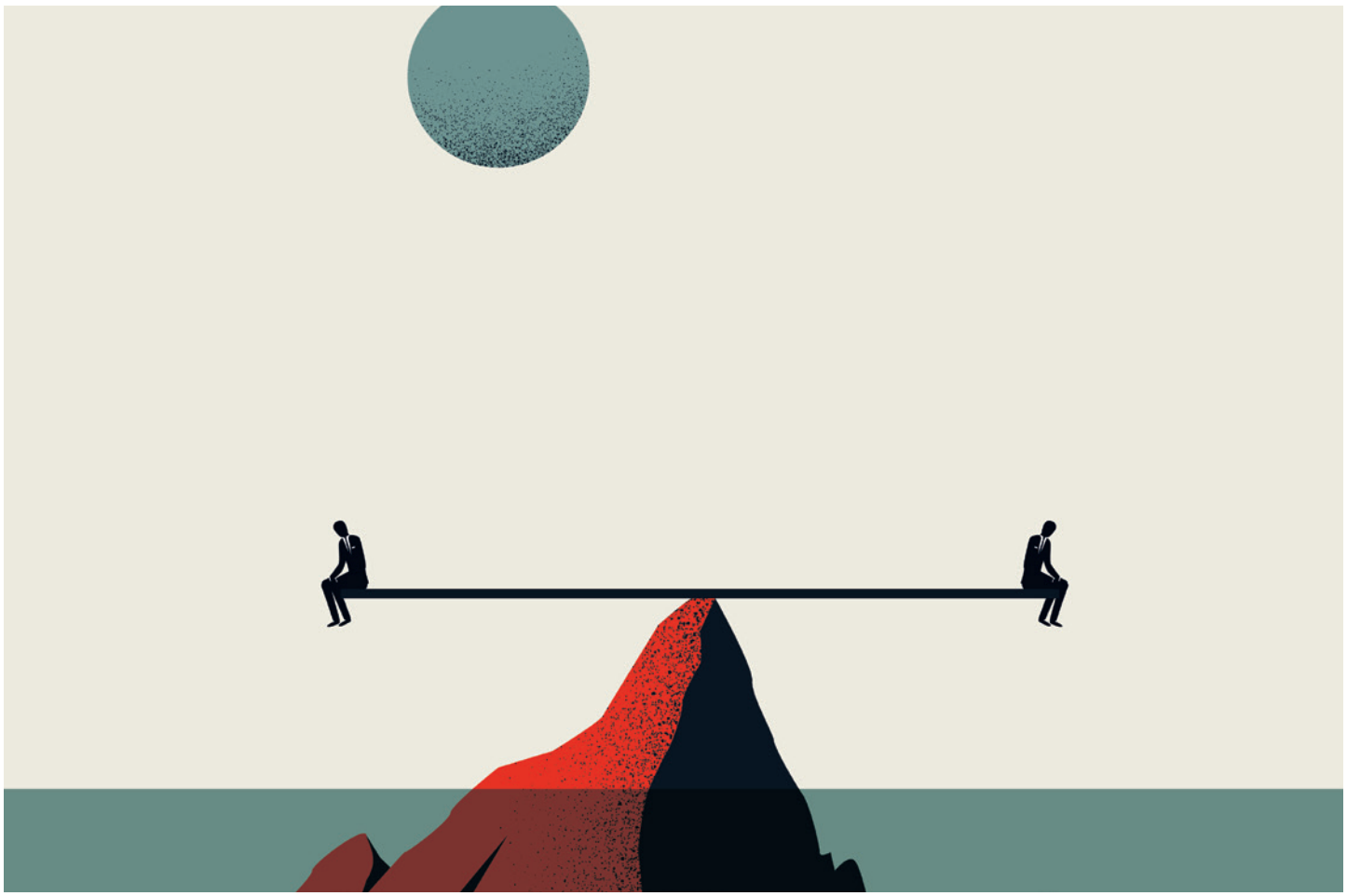
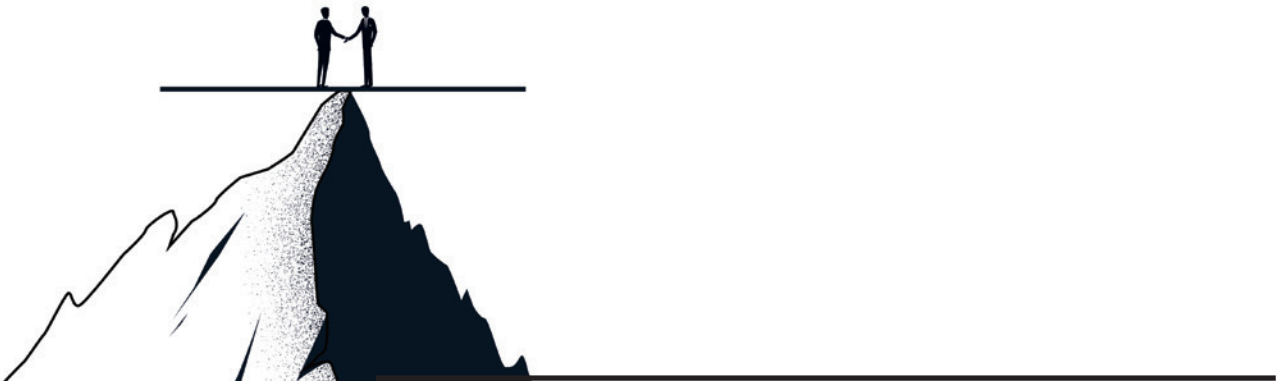
BY NICHOLAS COUSINO AND STACEY CHRISTIE





THE UK'S ADOPTION OF THE SINGAPORE CONVENTION ON MEDIATION

BY NICHOLAS COUSINO AND STACEY CHRISTIE

OVER THE YEARS, THE UK HAS developed specialised forums for resolving disputes. Modern examples of such forums are the London Court of International Arbitration (LCIA), which has a history going as far back as 1891, and the Technology and Construction Court (TCC), as it became known in 1998, which continues the 'official referees' business and heard cases as far back as 1873. More recently, under the Housing Grants, Construction and Regeneration Act 1996, the UK has enshrined a party's right to adjudicate as a fast-track dispute resolution process.

Outside of these processes, alternative dispute resolution

(ADR) offers a wide range of approaches that parties may use to settle their disputes, usually with the assistance of a third party. ADR is generally described as being a private process, imposing lower costs than litigation or arbitration, and providing parties with greater autonomy in the settlement process. For example, one of the key advantages of mediation is that it offers flexibility in its remedies – the deal struck between the parties – and offers continued opportunities for the parties to work together.

More formal dispute resolution processes, such as arbitration or statutory adjudication, utilise specific enforceability mechanisms, when compared to informal ADR approaches. Arbitration under the LCIA is enforceable under statutes that are framed on the New York Convention or the United Nations Commission on International Trade Law (UNCITRAL) Model Law, and statutory adjudication is enforceable through the courts.

A concern, therefore, with informal ADR methods, such as mediation resulting in a documented settlement agreement, is that they can give rise to enforceability difficulties, particularly when dealing with cross-border situations. For example, such difficulties can arise where the parties or assets operate outside

the jurisdiction in which enforcement, through a contractual route, is sought.

This chapter provides insights into mediation as a form of ADR, the adoption of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention) in the UK in the context of mediated settlements, and what this means for dispute resolution for domestic and cross-border disputes in the UK.

USE OF MEDIATION IN THE UK

The Singapore Convention defines mediation 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."

In effect, disputing parties may request that a third-party mediator (often subject matter experts or legal professionals) facilitate communication and negotiation between the disputing parties, with the objective of the parties reaching an amicable agreement on the matters in dispute. Mediation is different

from other forms of dispute resolution, for example arbitration or litigation, because of its reliance on the parties to reach an agreement themselves. This contrasts with other forms of dispute resolution which rely on someone, often an arbitrator or a judge, to make a decision for them, which the parties are obliged to comply with.

The use of mediation in the UK has seen a sharp uptick in recent decades. According to the Centre for Effective Dispute Resolution's (CEDR) Tenth Mediation Audit, the use of mediation has grown from around 2000 cases per annum in 2003, to over 17,000 cases in 2022. To put this in perspective, the number of claims heard by the TCC from 2020-21 was just over 520. The CEDR's report also states that the overall success rate of mediation had an aggregate settlement rate of 92 percent in 2022, up from 89 percent in 2018. The number of mediated settlements made on the day of mediation is 72 percent.

Mediation has repeatedly been shown to be a time and cost-effective option to resolve disputes, provided that the parties are open-minded and willing to move from their starting positions. However, mediation is not always the right form of dispute resolution, and it is recommended that the parties con-

sider different dynamics when determining if mediation is the right approach for their situation. For example, if the expectation is that the opposing party is fixed in its position and view and is unlikely to compromise, then the mediation may not be successful. Sometimes the expectation of another party's position may be wrong. Similarly, the subject matter of a dispute may be complex or so great in scale that other forums would be better suited. However, the mediation process itself does not eliminate the parties' option for formal dispute resolution should the mediation be unsuccessful.

Parties may appoint an independent expert or expert adviser to assist with complex or technical matters which may be difficult for the commercial negotiators to agree upon. When experts attend a mediation between the parties it can be effective in helping the parties and mediator understand key facts and issues which may influence the outcome. In some cases, party-appointed experts may participate in a process commonly referred to as 'joint expert meetings', with the objective of identifying the key issues and setting out their respective positions on them. The joint expert meetings can be effective in narrowing certain facts or issues which remain in dispute and indeed,

in reaching agreed positions.

One concern of mediation is the uncertainty of enforceability of the outcome, in contrast with arbitral awards or decisions of a court. Traditionally, in the UK, proceedings are commenced to enforce mediated settlement agreements through a contractual route. With the emergence of the Singapore Convention, concerns of enforceability issues for cross-border mediated settlements are addressed in those jurisdictions that have ratified, acceded to, approved or accepted the Convention without reservations and, where necessary, adopted it into domestic legislation.

THE SINGAPORE CONVENTION

The Singapore Convention provides a process whereby a party seeking to rely upon a mediated settlement agreement that is not being acted upon by the disputing party can enforce the agreement. The Convention was negotiated at UNCITRAL and adopted by the UN General Assembly in December 2018. The Convention's signing ceremony was held in Singapore in August 2019 with it coming into force in September 2020.

At present, mediated settlement agreements have the

same status as any other type of contract and are enforced in the same way as any other agreement; that is, by instigating court proceedings in an attempt to force compliance. Where parties are operating in cross-border situations, this can mean trying to pursue formal settlements across different jurisdictions, which invariably means more costs and uncertainty of outcome. The purpose of the Convention is to provide an international framework to enable parties to enforce cross-border commercial settlements through the courts of signatory countries in a similar way to the New York Convention for arbitral awards.

The UK joins the other 55 countries that have signed the Convention so far, including Australia, Brazil, China, India, Saudi Arabia, Singapore and the US. The signing of the Convention does not automatically mean that the Convention finds its place in the laws of the UK; the relevant governments must ratify the Convention by passing implementing legislation and amending court rules, as necessary. The Convention will come into force six months after the UK deposits its instruments of ratification with the UN. While the signing of the Convention is a positive step for the UK, there is more work to be done to implement the purpose and process of the Convention within the laws of the UK.

The UK has determined that the Convention will apply to mediated agreements involving government or state parties and that it will automatically apply to any commercial cross-border mediated settlement. The UK has decided that parties to a mediation agreement may opt-out of the Convention by expressly excluding it within the agreement. While such an opt-out request might be justifiable in some circumstances, a request to draft such an opt-out clause in a mediated settlement agreement might create an element of mistrust between the parties when negotiating the settlement and beg the question as to why that party wants to opt-out of a Convention designed to make it easier to enforce such an agreement.

The UK government's announcement should be seen as a positive step in reaffirming its position as a leading centre for international dispute resolution and demonstrates the UK's commitment to remain an international leader. In its announcement, the UK government stated that it is "the right time for the United Kingdom to become a Party to the Singapore Convention on Mediation, as a clear signal to our international partners that the United Kingdom is committed to maintaining and strengthening its position as a centre for dispute resolution and

to promote the United Kingdom's flourishing legal and mediation sectors".

So, while this is a moment to celebrate the UK's decision to sign the Singapore Convention, it is important to remind parties that the period before the Convention's enforcement policies form part of the legal systems in the UK, and that parties to a contract will be able to opt-out of the Convention.

WHAT THIS MEANS FOR THE UK

The signing of the Singapore Convention will strengthen the UK's position as an international dispute resolution centre. It signals to the global markets the UK's commitment to mediation and maintaining the UK's position as a centre for international dispute resolution. That said, ratification of the Singapore Convention will only take place once all the necessary implementing legislation and rules have been put in place.

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