



Law Society
of Scotland

Law Society of Scotland Response

United Nations Convention on International
Settlement Agreements Resulting from Mediation
(New York 2018)

March 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to consider and respond to the Government consultation: United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) The Committee has the following comments to put forward for consideration.

Comments

1. Do you consider that this is the right time for the UK to become a Party to the Convention (i.e. to sign and ratify as set out in 2.10 above)?

Our Comment

There are a variety of views about whether this is the right time to sign and ratify the Convention. Some commentators contend that because the Convention has entered into force and (at 5th April 2022) has 55 signatories of which 8 are parties to the Convention, there should be no delay in the UK signing up to the convention.

However, others have reservations about the instrument and its potential unintended consequences. Academic criticism includes that the convention may create “unnecessary juridification of the process and lawyer domination therein that may paradoxically lead to *greater* enforcement problems with mediated outcomes, and militate against some key, qualitative key benefits of the process.” See Professor Bryan Clark and Professor Tania Sourdin: *The Singapore Convention: A solution in Search of a Problem?* <https://nilq.qub.ac.uk/index.php/nilq/article/view/558>

On balance we are in favour of the UK acceding to the Convention.

2. What impact do you think becoming Party to the Convention will have for UK mediation and mediators?

Our Comment

It is unlikely to make a material difference to UK mediation and mediators who already participate in the global marketplace for mediation services to a greater extent than many other jurisdictions. However, it may afford the opportunity to modernise the law relating to mediation in some respects and could highlight the use of mediation in a positive way.

Acceding to the Singapore Convention will help to persuade international clients and lawyers in jurisdictions outside the UK that the UK jurisdictions continue to be involved in dispute resolution and that the UK wishes to ensure that its law in this area is as up to date as possible.

3. What impact do you consider the Singapore Convention would have on the UK mediation sector and particularly on the enforceability of settlement agreements?

Our Comment

We take the view that accession could provide more publicity for international commercial mediation and could have an impact on the enforceability of settlement agreements although that is likely to be of minor significance as enforceability is generally not an issue for mediation settlement agreements.

Mediation settlement agreements are already readily enforceable in the UK jurisdictions in the same way as any other contract. If improved enforcement procedure were implemented alongside accession, parties could have a quicker and more cost-effective route to enforcement of international mediation settlement agreements (IMSA). IMSAs can be directly enforced in the competent authority of a Party state, in accordance with its rules of procedure and under the conditions laid down in the Convention. (Art 3(1) SCM). If parallel changes are made to domestic enforcement arrangements that could have an impact in that area.

The impact could be mitigated by other provisions of the Convention. Where a dispute arises relating to a matter which has already been resolved by the settlement agreement, the agreement can be invoked to prove that the matter has been resolved. (Art 3(2) SCM).

Commentators have pointed out the limitations of the Convention which could prevent it from have the widest impact. For example, the exclusions from the scope of the Convention in Article 1.2 and 1.3 mean that the Convention does not apply to settlement agreements concluded (a) to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes; or (b) relating to family, inheritance or employment law. Furthermore, the Convention does not apply to settlement agreements: (i) that have been approved by a court or concluded in the course of proceedings before a court; and (ii) that are enforceable as a judgment in the State of that court; or that have been recorded and are enforceable as an arbitral award.

These exclusions, focus or limit the impact of the Convention dependent on one's perspective.

4. What impact do you think becoming Party to the Convention might have on other forms of dispute resolution?

Our Comment

It is difficult to speculate what impact accession may have on other forms of dispute resolution. Theoretically it might reduce the number of cases which are commenced in the courts or go to arbitration by making mediation more attractive to parties to an international dispute.

5. What legal impact will becoming Party to the Convention have in your jurisdiction (i.e. in

England and Wales, in Scotland or in Northern Ireland)?

Our Comment

Article 4 of the Convention is potentially significant. It allows a direct route to enforcement of a contract, without first obtaining a judgment or arbitral award. This process could prove to be useful in complex international mediations.

Direct enforcement of a contract is not a novel concept in Scotland. If a deed contains a clause where the parties consent to 'registration for preservation and execution' in the Books of Council and Session and is so registered, the extract (official copy) from the Registers of Scotland will contain a warrant that grants authority for lawful execution. This is the equivalent to a decree from the Court of Session and can be used as the basis for summary diligence in certain scenarios.

New court procedures will be necessary for those parties who do not adopt registration for preservation and execution. The overall impact in Scotland is likely to be small.

6. What might be the downsides of the UK becoming Party to the Convention?

Our Comment

Some commentators are concerned that making mediation settlement agreements directly enforceable elevates what is essentially a private contract to a status which aligns it with a court decree or arbitral award. However, as explained above we do not agree that direct enforceability is a downside.

In light of these sorts of complexities and the initial uncertainty created by introduction of a new enforcement procedure, it is possible that commercially and legally sophisticated parties may wish to opt out of the Convention when entering settlement agreements to which it might apply.

However, again, we do not see this as a barrier to becoming a party to the Convention and it may simply take some time for a settled position on enforcement to be reached.

7. Are there any specific provisions which cause concern or that may adversely affect the mediation sector in the UK? For example, the broad definition of mediation in the Convention's text?

Our Comment

The Civil Evidence (Family Mediation) (Scotland) Act 1995 already applies to family mediation in Scotland. Mediation under the Convention is necessarily different. There is an issue as to whether if the UK implements the Convention analogous provisions to those in the 1995 Act should be included in the implementing legislation.

The Convention defines "Mediation" in Article 2.3. 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.”.

Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters defined “mediation” and “mediator” in the following terms:

“Mediation’ means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.

The Directive also defined “Mediator” in the following terms:

“Mediator’ means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

Comparing these definitions unveils a number of similarities, that mediation is a “process”, where the parties “attempt to reach” an “amicable settlement” or an “agreement on the settlement” of the dispute with the “assistance of a mediator” who cannot impose any solution.

Although the Convention is a shorter definition of mediation it reflects the components of the Directive which was implemented into the law applying in the UK whilst the UK was a member of the EU for example: [The Cross-Border Mediation \(Scotland\) Regulations 2011 \(legislation.gov.uk\)](#) which were revoked by [The Civil and Family Justice \(EU Exit\) \(Scotland\) \(Amendment etc.\) Regulations 2020 \(legislation.gov.uk\)](#).

It should therefore not be outwith the scope of understanding of those who have engaged in mediation prior to IP completion day. We suggest that the definition must be clearly expressed in the implementing legislation. This could be done by setting out that a mediation has taken place with the assistance provided by the third party.

8. The Convention states that a settlement agreement must be concluded “in writing” and that this requirement will be met if it is recorded ‘in any form’. Do you envisage any difficulties for the enforcement of settlement agreements under the Convention given the broad definition of “in writing”?

Our Comment

Article 2.2 provides that “A settlement agreement is “in writing” if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.”. This is a broad

definition of writing. The Requirements of Writing (Scotland) Act 1995 [Requirements of Writing \(Scotland\) Act 1995 \(legislation.gov.uk\)](#) requires written documents for certain types of transaction. Importing the requirement that a settlement agreement is “in writing” recorded in any form would need to comply with that legislation and the [Legal Writings \(Counterparts and Delivery\) \(Scotland\) Act 2015 \(legislation.gov.uk\)](#).

Subject to these issues, we see no problem with this provision in the Convention.

9. What types of “other” evidence should a Competent Authority consider as acceptable evidence of settlement agreements in the absence of the proof specified in Article 4.1.b (i)-(iii) of the Convention?

Our Comment

We suggest that “other evidence” could include an affidavit signed before a Notary Public. A film or video duly attested could also form evidence that the mediation had taken place and could constitute evidence of the agreement. Whatever specific provisions are included, the Court’s discretion to admit evidence should be recognised.

10. Article 5.1(e) of the Convention states that enforcement may be refused if “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”. Do you have any comments on which ‘standards’ may be applicable? (Please also see the linked Question 16 below.)

Our Comment

We note that Article 5.1 (e) and (f) provide that enforcement can be refused if there is either a ‘serious breach of mediator standards’ or ‘a failure by the mediator to disclose to parties circumstances that raise justifiable doubts as to the mediator’s impartiality or independence’.

These provisions may highlight the need for unregulated mediator standards. However, they draw focus to the fact that some mediators (for example those who are barristers, advocate or solicitors) are already subject to existing standards.

The standards expected of a mediator are different. It will be important to make sure that protection of the parties from a failure to adhere to high standards is paramount whoever is the mediator.

A concern would be the approach needed to investigate the alleged breach of standards and whether that would in fact have had a causal link to any decision made by a party. The scope for satellite litigation is clearly possible.

11. The Convention provides that each Contracting Party to the Convention shall enforce a settlement agreement. What types of provision is usually included in settlement agreements that may need to be enforced? I.e. will the Competent Authority need particular powers to cover these provisions?

Our Comment

In the interests of clarity there may need to be specific provisions relating to the settlement agreements under the Convention.

12. What are your views on the provisions of the Convention meaning that

- a) If the UK were to become Party to the Convention, it would be expected to enforce settlement agreements of both contracting and non-contracting parties?*
- b) If the UK were not to become Party to the Convention, UK mediated settlement agreements could still be enforced in a country which is a Party to the Convention?*

Our Comment

If the UK accedes, there should be no problem in enforcing mediation settlements involving parties from non-contracting states. If the UK does not accede, parties should have the option to enforce UK mediated settlements under the Convention in Scotland and the other UK jurisdictions.

13. The Government will consider whether the UK should make either reservation under Article 8 should it ratify the Convention, namely:

- a) "it shall not apply this convention to settlement agreements to which it is a party or to which any governmental agencies or any person acting on behalf of a governmental agency is a party"; and/or*
 - b) "It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention"*
- What are your views on this?*

Our Comment

There is no reason to exclude governmental agencies or where any person acting on behalf of a governmental agency is a party

We take the view that the Convention should only apply to those settlement agreements where parties have agreed to the Convention applying.

14. Do legal practitioners consider that there could still be confusion or uncertainty about when the Singapore Convention may apply? I.e., 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?

Our Comment

There will need to be procedures in rules of court to provide clarity on when the enforcement procedure can be applied for.

15. Do you consider that a lack of regulation and the potential differences in conduct and standards amongst Parties to the Convention could present any particular challenges to the application of the Convention in the UK?

Our Comment

No. The provisions of the Convention at Article 5(1)(e) and (f) referred to above and (2)(a) which provides: *The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that: (a) Granting relief would be contrary to the public policy of that Party* will provide guidance to the Court when dealing with conduct and standards differ amongst parties.

16. What impact do you consider the Singapore Convention would have on the UK mediation sector and particularly on the enforceability of settlement agreements?

Our Comment

See our answers above. There might be an increase in the use of mediation and an expansion of mediation services though that is unlikely to be significant in Scotland.

17. Would you foresee any intra-UK considerations if the Singapore Convention was to be implemented in only certain parts of the UK?

Our Comment

Yes, If the UK accedes to the Convention, as a matter of law, this presents no complication – but on a practical level it should be implemented throughout the UK by each of the legislatures since partial implementation could result in an asymmetry of provision of mediation services.

18. In relation to paragraph 6.11 (above) how do you consider that the provisions for enforcement under the Convention would apply in your jurisdiction?

Our Comment

We have no comment to make.

19. What are your opinions on the practical benefits of the Singapore Convention providing for direct enforceability or in respect of the benefits of the wider grounds than in the existing common law?

Our Comment

Direct enforceability is a useful method to ensure that IMSAs can be swiftly enforced but see our response to Question 5.

20. Who do you consider to be the appropriate Competent Authority for a Party to the Convention to lodge an application or claim with, in order to enforce a mediated settlement agreement (e.g. the County Court, High Court, Court of Session)?

Our Comment

We consider that the High Court in England, Wales and Northern Ireland and the Court of Session in Scotland would be the most appropriate Competent Authorities.

21. Would the implementation of the Convention require any procedural changes to the Court systems of England and Wales, Northern Ireland or Scotland, to enable its effect operation?

Our Comment

Yes – in Scotland these would be legislated upon by an Act of Sederunt.

22. As mediation practice and legislation are well established in the UK, the government does not intend to use the Model Law provisions to implement the Singapore Convention. Do you have any views on this or on whether the UK should in fact apply the Model Law instead of ratifying the Convention?

Our Comment

If the Government decide to implement the Convention, we have an open mind on the use of the Model Law. There has been precedent for adoption of the UNCITRAL model Law on Arbitration (which applied to Scotland alone) in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.



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