



Civil Justice Council response to consultation by the Ministry of Justice on whether the UK should sign and ratify the Singapore Convention on Mediation 2018

March 2022

Q1: 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)?

Yes. This is a non-reciprocal international convention under which the United Kingdom (or any relevant constituent part) would be agreeing that its courts should enforce settlement agreements between international parties reached in mediations held anywhere in the world. We agree that if this receives substantial support internationally (and a number of major jurisdictions have begun the process by signing the Convention) then it will enhance the use of ADR internationally. We think ratification would signal the United Kingdom's commitment to ADR and, indirectly, enhance the international profile and presence of the United Kingdom's ADR community.

Q2: What impact do you think becoming Party to the Convention will have for UK mediation and mediators?

Ratification is not actually or directly about mediations held in the United Kingdom. Arguments that ratification "secures London's place as a centre of ADR" somewhat miss the point. This Convention is about enforcement. It would affect parties with assets in the United Kingdom against whom enforcement will be possible. Mediations held in the UK will not be directly affected by a UK ratification. Conversely even if we do not ratify the Convention a mediated settlement reached here will be enforceable in the overseas jurisdictions which have ratified.

Q3: What impact do you consider the Singapore Convention would have on the UK mediation sector and particularly on the enforceability of settlement agreements?

It will have no direct effect on the enforceability of settlements reached in UK mediations. They are enforceable here anyway. Their enforceability overseas will simply depend on whether the overseas jurisdiction is a signatory. But it has been suggested that although the Convention is not actually reciprocal a foreign court might look more kindly on a settlement mediated in a country Party to the Convention.

Q4: What impact do you think becoming Party to the Convention might have on other forms of dispute resolution?

It has been portrayed as levelling up mediation and arbitration. We think this is fallacious. Mediation and arbitration are different processes and not alternatives to each other. Mediation's brand will arguably be enhanced in a soft sense.

Q5: 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)?

It will be easier to achieve a legal remedy here on the back of a settlement mediated overseas.

Q6: What might be the downsides of the UK becoming Party to the Convention?

There could be some satellite litigation about what constitutes a mediation and the provisions in respect of mediator misconduct and conflict of interest.

Q7: 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?

On balance no. The fact that the courts may have to resolve the limits of some of these sections is not a reason not to ratify.

Q8: 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"?

No. See previous answer.

Q9: 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? Singapore Convention on Mediation Consultation Paper 27

Presumably the court could consider sworn testimony led by the enforcing party establishing that the agreement was reached at a mediation.

Q10: 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?

Most mediators publicly state that they adhere to a particular code of conduct. We think a court will have no difficulty identifying a breach of either a particular set of rules or, if there are none, general standards of good faith, fairness and confidentiality. The causation requirement is more unpredictable and may to prove very difficult to satisfy.

Q11: 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?

We do not think the Convention requires any particular measures that are not already capable of being called up when enforcing domestic settlement agreements.

Q12: 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?

This follows from the non-reciprocal nature of the Convention. It does not seem to us objectionable.

Q13: 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?

Question (a): This is clearly a matter for the government. Does it wish to accord these enforcement capabilities to mediated settlements which it reaches overseas? May it wish itself to enforce obligations owed to it under overseas settlements against assets here?

Question (b): We support the opt-out approach and believe that the United Kingdom should not apply the reservation made available to it in Article 8 paragraph 1(b). In other words, we believe the default setting should be that the enforcement regime applies to a settlement unless the parties agree in that settlement that it should not do so. If there is no reservation then where a UK court is asked to enforce a settlement agreement it will not require that agreement to have expressly opted into the enforcement regime.

Surely the expectation of all parties to a valid settlement agreement should be that they will comply and perform the obligations they have accepted. They must and do expect that if they do not comply some form of mandatory enforcement will be employed by the other party.

In the United Kingdom where litigation is ongoing a mediated settlement is routinely enshrined in what is called a Tomlin Order, a consent judgment of the court which incorporates the settlement terms. When there is no ongoing litigation that option is not available but the parties are well aware that a judgment enforcing the settlement could be rapidly and summarily obtained. Parties are not required to and do not “opt into” any of those arrangements. It is therefore hard to see why an opt-in would be appropriate for international settlements such as those contemplated here.

Q14: 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?

Yes, they could. This does not seem to us to be a problem. The intention of the Convention is that if there is a mediated settlement there would not need to be an award by the Arbitrators.

Q15: Do you consider that a lack of regulation and the potential differences in conduct and standards amongst Parties to the Convention present any particular challenges to the application of the Convention in the UK?

This is a realistic objection. But we have lived with the New York Convention for many years now and the same objection applies to arbitration. In fact, it could be said to be more powerful in the context of arbitration because the equally unregulated arbitrators are actually reaching binding decisions rather than simply seeking consensus.

Q16: What impact do you consider the Singapore Convention would have on the UK mediation sector and particularly on the enforceability of settlement agreements?

See answer to Q1.

Q17: Would you foresee any intra-UK considerations if the Singapore Convention was to be implemented in only certain parts of the UK?

We think not.

Q18: In relation to paragraph 6.11 (above) how do you consider that the provisions for enforcement under the Convention would apply in your jurisdiction?

We suspect that the pre-Convention and the Convention approaches to enforcing or not enforcing agreements of this kind (as discussed in 6.11 and 6.12) would in fact differ remarkably little.

Q19: 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?

It is not universally accepted by any means that concerns about ability to enforce is holding ADR back significantly. But there seems no reason why the beneficiaries of overseas settlements should not be assisted in realising those benefits.

Q20: 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)?

In England and Wales, in international cases the High Court.

Q21: Would the implementation of the Convention require any procedural changes to the Court system of England and Wales, Northern Ireland or Scotland to enable its effect operation?

We think not.

Q22: 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?

We agree with government's present view.

Q23: What other comments, if any, do you have?

None.