Bar Council response to the "Consultation on the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation")" consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice consultation paper[1] entitled "Consultation on the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation")" dated February 2022.

2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. It is our view that there are considerable potential advantages to the UK's accession to the Singapore Convention and several actual disadvantages if the UK does not. Since the Woolf Reforms in the late 1990s gave the boost to mediation, the Bar ADR Committee was formed by the late Philip Naughton QC and Michel

[1] https://www.gov.uk/government/consultations/the-singapore-convention-on-mediation

Kallipetis QC, and has succeeded in demonstrating that the Bar has an integral part to play in the development of mediation. Some of the leading mediators in the UK are members of the English Bar. Failure to adopt and ratify the Convention, may well fuel a suspicion that the UK does not support the international commercial community's desire to ensure that mediation is an effective (and often more desirable) dispute resolution mechanism, which could only be disadvantageous to the members of the Bar practising in international commercial disputes. It is difficult to see why we would not support the adoption and ratification of the Convention.

Question 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)?

5. Yes

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

6. It will enhance the perception that the UK is one, if not the leading, centre for international commercial mediation. Jurisdictions which are seeking to establish this reputation for themselves, Singapore, Hong Kong, and China were among the first countries to sign the Convention and to ratify it.

7. For individual international commercial mediators, the absence of the UK as a Party would in due course be interpreted as 'isolationist' in a world where international commerce and concomitant international commercial dispute resolution is increasingly embracing mediation as the preferred choice on grounds of cost, speed, saving of management time and ability to choose solutions not available from a court or arbitration.

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

8. In practice, we expect that initially it will have very little impact. However, over time, if the Convention builds on its remarkable initial adoption worldwide (but is not adopted in the UK), the concern which UNCITRAL identified and caused the creation of Working Group II and the creation of the Convention, will suggest to the international commercial community that the UK does not have an effective enforcement mechanism for mediated international commercial disputes settlement agreements. Given that the UK is still regarded as one of the foremost international arbitration centres in the world it would be absurd for UK not to do everything possible to create the same reputation for mediation. The New York Convention on

Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") is recognised universally as a powerful mechanism for the enforcement of arbitral awards, and the Singapore Convention has been drafted to achieve the same perception for mediated settlement agreements. It would facilitate the recognition of UK mediators as among the best internationally.

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

9. The legal costs and time expended in litigation and arbitration are already considered a bar to choosing either as a desirable dispute resolution mechanism save for the highest value disputes. However, mediation is recognised as a valuable additional resource available to disputants, even if they have elected the more formal routes for dispute resolution.

Question 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)?

10. We can only comment on England and Wales and consider that the impact will be as per the answer to Q4 above.

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

11. Apart from another form of regulation, which some regard as anathema, it is difficult to see what disadvantages to the UK might result from adopting the Convention. We can only see positives.

Question 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?

12. None as far as we can see. The broad definition of mediation in the Conventions' text is not a concern because it is designed to distinguish the process from other alternative dispute resolution mechanisms like litigation, arbitration, adjudication and early neutral evaluation where the parties submit their dispute to a third party ultimately for a decision.

Question 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"?

13. No. All agreements arising out of civil and commercial mediations are reduced to writing and the standard form of agreements to mediate contain provisions which specify that the process is non-binding in law unless and until any agreement is reduced to writing and signed by all parties. In any event, it is the norm for concluded mediated settlement agreements to be recorded in a Tomlin Order or other form of court order if proceedings have commenced, or in a deed or in an exchange of letters between the parties' representatives. It is quite usual where agreements are made 'in principle' and subject to the conclusion of a formal document for such agreements to be made 'without prejudice and subject to contract' which would avoid any attempt to enforce an informal agreement under the Convention.

Question 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?

14. See the Answer to Question 8 and reference to an exchange of letters between the parties' legal representatives which invariably refer to the mediation at which the settlement agreement was reached. As already stated, the mediator will require the Parties to sign a standard form of Mediation Agreement, which then would fulfil the requirements of Article 1(b)(ii).

Question 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.)

15. Most UK mediators accept the European Code of Conduct for Mediators which sets out the basic and universally accepted standards with which mediators agree to comply. In addition, given the provisions of Article 4, all UK civil and commercial mediators require the Parties to sign a written mediation agreement which governs their own and the mediator's role and conduct during the mediation. The applicable standards envisaged during the Working Group II deliberations on the topic of enforcement of settlement agreements were the universally accepted principles of independence, neutrality and competence to mediate the particular dispute.

Question 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?

16. All obligations contained in settlement agreements, such as obligations to execute documents, transfer assets, make payment of money, observe any particular

provisions regarding confidentiality, are routinely enforced by the Courts pursuant to a Tomlin Order or other form of consent orders, therefore no additional powers would need to be granted to the Competent Authority (i.e. the courts). Similarly, where a settlement agreement is not recorded in a consent order, a party can enforce the obligations in such agreement by applying to the court, which will then be able to make any form of order needed.

Question 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?

17. As to (a), we see no problem with this provision.

18. As to (b), again we see no problem with this. English law upholds the freedom of contract and thus the parties are free to agree that their UK mediated settlement agreement could be enforced pursuant to the Convention in any jurisdiction which is a party to the Convention.

Question 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?

19. Our view is against both types of reservations. The essence of a good international convention is clarity and certainty, which prevents any opportunity for one party going back on its word and seeking to advance arguments that circumvent the agreement reached. We propose that the Convention applies universally in much the same way as the New York Convention applicable to arbitrations.

Question 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?

20. No, because experienced practitioners (in the commercial sphere at least) will always provide for enforcement in the agreement itself.

Question 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?

21. No: as the Parties themselves and their representatives will normally ensure that there is agreement between them as to the applicable law and the relevant jurisdiction to govern enforcement of the Settlement Agreement

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

22. Probably none in practice as the Convention is applicable to international commercial disputes. However, the absence of the UK as a signatory may well prejudice those UK mediators who conduct international commercial mediations if it is used as an argument that UK mediators are not competent to assist the Parties on the issue of enforcement.

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

23. No, save that it might prejudice those mediators' practice in those parts of the UK which did not implement the Convention

Question 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?

24. There would need to be drafted additional CPR Rules to provide for the enforcement of such settlements, similar to the provisions for the enforcement of arbitral awards under the New York Convention in CPR 62.

Question 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?

25. The real benefit would be a recognition that mediation is not simply assisted without prejudice negotiations and thus at risk from the challenges adumbrated by the Court of Appeal in ***Unilever Plc v Proctor & Gamble Co [2000] FSR 344 and [2000] WLR 2436*** and the only challenges to enforcement would be those under Article 5 of the Convention. This would remove the perceived concern in some jurisdictions that the confidentiality of international commercial mediations is at risk because of the approach of the courts in England and Wales.

Question 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)?

26. High Court in England and Wales (the appropriate equivalent in Scotland and Northern Ireland).

Question 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?

27. Yes. See answer to question 18 above. There would need to be drafted additional CPR Rules to provide for the enforcement of mediation settlement agreements, similar to the provisions for the enforcement of arbitral awards under the New York Convention in CPR 62.

Question 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?

28. We agree that the Government should not use the Model Law provisions.

Question 23: What other comments, if any, do you have?

29. The sooner the UK government signs and ratifies the Convention, the better. It would benefit the UK legal system and cement its position as one of the key international centres for dispute resolution.

Bar Council[2]
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