



FACULTY OF ADVOCATES

Consultation on Implementing The Singapore Convention on Mediation

The Faculty of Advocates (“the Faculty”) is the independent referral Bar in Scotland. The Faculty is pleased to have the opportunity to respond to this consultation. The Faculty would comment on the questions listed as follows:

Question 1: Do you have any views on the proposed registration model for mediated settlement agreements under the Singapore Convention in a) England and Wales; b) Scotland; and/or c) Northern Ireland?

In principle, the Faculty does not have any objection to the proposed registration model for mediated settlement agreements under the Singapore Convention (“the Convention”) in Scotland.

However, in the Faculty’s view, registration should not be the only means by which such a mediated settlement agreement can be relied upon or invoked. A party should be able to raise the mediated settlement agreement in any proceedings where the settlement agreement is put in issue before the court.

In particular, insofar as the issue of contractual bar is concerned, in the Faculty’s opinion, a party ought to be able to rely on an agreement reached at mediation regardless of

whether the agreement can be brought within the boundaries of the Convention. It is the Faculty's view that there should be a reservation that a party can plead a mediated agreement in defence notwithstanding that it may be enforced through the Convention.

The Faculty does not pass any views on the proposed registration model for mediated settlement agreements under the Convention in England & Wales or Northern Ireland.

Question 2: Do you have any views on the proposal that the relevant court should have discretion to direct that an application be served on the respondent for the opportunity to make representations before a registration decision is made?

The Faculty considers that it would be logical for the registration of settlement agreements under the Convention to mirror the procedure for registration of New York Convention Awards under Part IX of Chapter 62 of the Rules of the Court of Session. This would entail registration of the Agreement if it meets the relevant criteria followed by service on the other party, with a right for the receiving party to apply for refusal of registration.

Question 3: With regards to invoking a mediated settlement agreement in other legal proceedings, do you have any views on proposals that a party should be required to register a mediated settlement agreement before it can be presented in other legal proceedings in a) England and Wales; b) Scotland; and/or c) Northern Ireland?

The Faculty does not consider it to be necessary for there to be a need to register a mediated settlement agreement before it can be presented and relied on in legal proceedings. Reference is made to Answer 1.

Question 4: There are two possible routes to challenge of a registration decision

(i) 'set aside' in all cases or;

- (ii) a hybrid system with 'set aside' available where the registration decision was made *ex parte* and appeal where the registration decision was made following a hearing involving both parties.

Which of these options do you think is the most appropriate route to challenge any Singapore Convention registration decision in a) England and Wales; b) Scotland; c) Northern Ireland? If relevant, we would welcome any examples from your experience of the current processes for challenging orders allowing enforcement of arbitral awards.

The Faculty considers that registration should mirror registration of New York Convention Arbitral Awards as set out in Part IX of Chapter 62 of the Rules of the Court of Session. The other party should have the opportunity to apply for the registration to be set aside. After an *inter partes* hearing for the setting aside of a registration, the unsuccessful party should have a right to appeal the outcome to an appellate court. In Scotland it is suggested that the Inner House of the Court of Session should be the final court of appeal and no recourse to the UK Supreme Court should be available.

In terms of how a challenge might be brought, guidance can be drawn from Rule 62.60 of the Rules of the Court of Session 1994. Whilst guidance might be drawn from the aforementioned rule, ultimately the mechanics of challenging the registration of a decision would be a matter for the Scottish Civil Justice Council.

Question 5: Do you have any views on the proposal that the implementing legislation should not define or gloss any of the terms used in the Convention, but that such interpretations should be left to the courts to develop?

In the Faculty's view, such interpretations should be left to the courts to develop.

Question 6: Do you have any views on the proposals for the grounds for refusing relief under the Convention or any comments on the other Article 5 grounds for refusing relief in a) England and Wales; b) Scotland; and/or c) Northern Ireland?

Insofar as Scotland is concerned, the Faculty would not propose to derogate from what is in the Convention in this regard.

Question 7: Do you have any views on the proposal that a mediated settlement agreement registered, and therefore made enforceable under the Convention, should not be automatically enforceable in another part of the UK, but only where it has been registered by the court in that other part?

The Faculty agrees with this proposal.

Question 8: Do you agree that no legislative action is required to ensure that a mediated settlement agreement reached in one part of the UK can be enforced in another part of the UK?

The Faculty agrees that no legislative action is required to ensure that a mediated settlement agreement reached in one part of the UK can be enforced in another part of the UK.

Question 9: Do you have any views as to whether implementation of the Singapore Convention should be extended to include Scotland and Northern Ireland as part of a UK-wide statutory instrument laid in Westminster or through an alternative approach in either or both of these jurisdictions?

The Faculty agrees that implementation of the Convention should be extended to include Scotland and Northern Ireland as part of a UK-wide statutory instrument laid through Westminster. However, in terms of how such a statutory instrument is to be operated, that is ultimately a matter for the rules of court in each jurisdiction.

Question 10: Do you have any views on whether a statutory instrument should tailor implementation in any specific ways for Scotland and Northern Ireland?

The Faculty does not have any views on this as it would ultimately be for the rules of court in each jurisdiction.

Question 11: Do you have any additional comments on the implementation of the Singapore Convention in the UK?

In the Faculty's view, consideration has to be given to whether a registered Convention settlement agreement is equivalent to a decree.

For example, Party A and Party B are in dispute over sums due in terms of a construction contract. The parties resolve their dispute at mediation, and subsequently (i) enter into a mediated agreement that is Convention compliant, and (ii) that agreement is registered. In terms of said agreement, Party B agrees to pay Party A £x in settlement of the dispute. Following payment of the settlement sum by Party B to Party A, Party B seeks relief against Party C under section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 or at common law. In light of that, the question is this: can the registered Convention agreement be treated as the equivalent of a decree permitting Party B to seek relief from Party C?