RESPONSE OF THE CIVIL MEDIATION COUNCIL

TO THE INVITATION OF THE MINISTRY OF JUSTICE ('MoJ') TO COMMENT ON CERTAIN DOCUMENTS RELATING TO THE 'SINGAPORE CONVENTION' TO BE DISCUSSED BY UNICTRAL IN JULY 2021

29 JUNE 2021

1. The Civil Mediation Council ('the CMC') has been invited at short notice to offer observations on the following three documents recently made available to the MoJ for consideration and which will be discussed at a meeting of UNCITRAL between 5-7 July 2021:

1. Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) - https://undocs.org/en/A/CN.9/1073.

2. International Commercial mediation: Draft UNCITRAL Mediation Rules - https://undocs.org/en/A/CN.9/1074.

3. International Commercial Mediation: Draft UNCITRAL Notes on Mediation - https://undocs.org/en/A/CN.9/1075.

2. The CMC understands that the MoJ has only very recently been informed of the UNCITRAL meeting and the subject to be discussed and so has been unable to invite observations from interested parties to be considered over a longer period. Although the CMC has been asked for its "informed opinion on these papers, including any comments or concerns [it] might have", inevitably the opportunity for a detailed reflection on these documents has not been available and neither has the opportunity for a wider consultation of its membership. However, it has been felt that the CMC should offer such observations as it can and this paper has been produced by its senior Officers.

3. Although the CMC's ambit is primarily the mediation community within England and Wales, its membership includes many mediators who work in international commercial mediation (with which the Singapore Convention is concerned) and, accordingly, it considers it should contribute to any discussions there may be about whether the UK should adopt the Convention. Equally, any legitimate encouragement to the use of mediation, whether domestically or internationally, should be encouraged and supported by the CMC. Furthermore, as a body that endeavours to ensure consistent professional standards across the mediation community, the CMC has a particular interest in aspects of Article 19 of the Model Law[1] (see paragraphs 16-24 below).

[1] Article 5 of the Convention.

4. In the consultation exercise conducted by the MoJ in 2019, the CMC supported the adoption of the Convention by the UK - https://civilmediation.org/latest-news/the-singapore-convention/. The CMC reaffirms that view for the purposes of any further consideration of the question of whether the UK should adopt the Convention. It understands that the MoJ intends "a wider and more detailed consultation" on that issue before long.

5. The three papers identified above appear to be draft texts reviewed by a Working Group of UNCITRAL with a view to "[facilitating] a speedy adoption of those texts" at the forthcoming meeting. It is not clear to the CMC the extent to which possible modifications of the draft texts can be discussed.

6. The texts are detailed, the text numbered 1 above running to 47 pages of closely typed text. It has not been possible to subject it (or indeed the other papers) to a detailed textual analysis and the following observations are necessarily high level.

7. However, it is, as the MoJ has observed, reasonably clear that the texts appear to be "in line with the Convention and Model Law". That is certainly to be expected given the detailed consideration that went into the formulation of the Convention and the Model Law, both of which were promulgated in 2019. Indeed, the three papers are quite repetitive and repeat substantial parts of the Convention and the Model Law. (A model law is a legislative text that is recommended to States for incorporation into their national legislation and, as the Draft Guide makes clear, when "incorporating the text of the model legislation into its legal system, a State may modify or leave out some of its provisions.")

8. The Draft Guide is helpfully described in this way:

> "In preparing and adopting model legislative provisions on mediation and settlement agreements, UNCITRAL was mindful that such provisions should be accompanied by background and explanatory information as an effective tool to assist States in modernizing their legislation and in considering which provisions of the Model Law, if any, might have to be varied to accommodate particular national circumstances. Primarily directed to executive branches of Governments and legislators preparing the necessary legislative revisions, this Guide should also provide useful insight to other users of the text, including commercial parties, practitioners, academics and judges."

9. Since the UK has not yet adopted the Convention, it is difficult to comment on whether there are any parts of the Model Law that should be modified or omitted, but it is to be noted that the guidance suggests that "States that have adopted the Singapore Convention on Mediation should consider not departing from section 3 of the Model Law, as the provisions of that section mirror the text of the Convention"[2]. So far as the CMC can judge at this stage, there is nothing in Section 3 that would require alteration or deletion, although, as indicated above, there is one particular area of concern relating to the interpretation of Article 19 to which reference is made in paragraphs 16-24 below.

10. One of the specific matters which the CMC suggests should be welcomed is the emphasis given to what should be the wide interpretation given to the term "commercial" so as to cover "matters arising from all relationships of a commercial nature, whether contractual or not." A narrow, legalistic interpretation would undermine the objectives of the Convention.

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[2] Articles 16, 17, 18, 19 and 20 of the Model Law replicate Articles 1, 3, 4, 5 and 6 of the Convention.

11. It is also recorded that "[experience] in some jurisdictions suggests that the Model Law would also be useful to foster the non-judicial settlement of disputes in multiparty situations, especially those where interests and issues are complex and multilateral rather than bilateral." That also is a welcome aspect.

12. The only expression used throughout the three documents that jars somewhat is the expression "mediation proceedings". Few mediators would look on a mediation as constituting "proceedings". That word sits happily in the expressions "court proceedings" or "arbitral proceedings", but much less so in the context of mediation. Mediation is a "process" and is described as such in many other places in the three texts. Some consistency of expression might be thought appropriate.

13. The comments in the Draft Guide about Article 11 of the Convention (General prohibition on the use of information obtained in mediation for the purposes of other proceedings) is welcome. It says that Article 11 "is designed to encourage frank and candid discussions in mediation by prohibiting the use of information listed in paragraph 1 in any later proceedings."

14. The CMC notes that Article 9 of the Model Law reads as follows:

> "When the mediator receives information concerning the dispute from a party, the mediator may disclose the substance of that information to any other party to the mediation. However, when a party gives any information to the mediator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the mediation."

However, Article 5.3 of the Mediation Rules states as follows:

> "When the mediator receives information concerning the dispute from a party, the mediator shall keep such information confidential, unless that party indicates that the information is not subject to the condition that it should be kept confidential, or expresses its consent to the disclosure of such information to another party to the mediation. Article 6 – Confidentiality Unless otherwise agreed by the parties."

The CMC believes that Article 5.3 of the Mediation Rules more accurately reflects the approach adopted by most mediators, namely, to treat information as confidential unless the party providing the information confirms that it is not. Whether there is a tension between the two provisions is a matter that may need addressing by UNCITRAL.

15. The CMC welcomes the time limit of 30 days for a party to respond as provided in Article 5.2 of the Model Law:

> "If a party that invited another party to mediate does not receive an acceptance of the invitation within 30 days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to mediate."

16. There is one feature of the Draft Guide which helpfully clarifies the way in which the courts of the enforcing State are to approach the task if called upon to do so. Article 19 of the Model Law (replicating Article 5 of the Convention) provides that "the competent authority of [the enforcing State] may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof" of various matters (emphasis added). Paragraph 146 of the Draft Guide says this:

> "The list of defences in article 19 is exhaustive, as indicated by the word "only" in the chapeau of paragraph (1) and the word "also" in the chapeau of paragraph (2). The competent authority has the discretion to refuse to grant relief, as indicated by the use of the word "may" in both paragraphs."

17. In the jurisdiction of England and Wales the word "may" almost invariably connotes the existence of a discretion. It is to be noted that this approach is taken into the Model Law and, if adopted, should be applied in jurisdictions other than England and Wales. This consistency of approach is potentially helpful if the usual approach to the New York Convention (on the enforcement of arbitral awards) is adopted, namely, of construing narrowly the grounds for refusing relief under the Convention.

18. Whilst, of course, by the time that a party to a mediated settlement may be seeking relief in relation to the agreement reached, the mediator's role will usually be over, the defences available do include the following, as articulated in Article 19.1, if they can be established:

> "(e) 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; or
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> (f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement."

19. For the purposes of this commentary, the CMC considers it very unlikely that the circumstances of subparagraph (f) will ever truly arise in practice: it would be highly unusual for parties who have agreed to a mediation of an international commercial dispute will all have overlooked disclosure of some apparent conflict or that the mediator(s) engaged will have done so. Subparagraph (e) is more troubling from the point of view of the mediator. This is because there is scope for an unscrupulous party (or indeed simply a party who fails to understand fully the dynamics of a mediation) to put forward false or unwarranted criticisms of a mediator in an endeavour to establish a reason for not being required to comply with the agreement freely entered into at the mediation.

20. It is, of course, necessary for the party resisting relief to establish that whatever breach is relied upon caused the entry into the settlement agreement by the party seeking to avoid the grant of relief to the other party. Unless the "enforcing authority" takes an early, robust view of allegations that appear to have no intrinsic merit, the mediator may be drawn in the meantime into an unwelcome and time-consuming investigation of what occurred at the mediation.

21. The expression "standards applicable to the mediator or the mediation" was a compromise proposal within the Working Group[3] and was said "to allow the competent authority to determine the standards applicable, which could take different forms such as the law governing conciliation and codes of conduct, including those developed by professional associations." This is very vague[4] and it was said by the Working Group "that the text accompanying the [Convention] would provide an illustrative list of examples of such standards." No such list appears in any of the texts the subject of

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3 See, e.g., Foskett on Compromise, 9th ed., para.36-59.

4 *ibid*.

the present consultation exercise and the CMC is unaware of any list anywhere else. Indeed, it now appears that no such list will be produced. The Draft Guide says this about sub-paragraph (e):

> "159. Paragraph (1)(e) allows a party to rely on the serious misconduct of the mediator as a defence. The breach by the mediator of standards applicable to the mediator or the mediation has to be "serious" and should be such that without it, a party would not have entered into the settlement agreement …. The scope of subparagraph (e) is therefore limited to instances where the mediator's misconduct had a direct impact on the settlement agreement. This ground serves to underscore the importance of compliance with due process in the mediation.
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> 160. The phrase of "applicable standards" in paragraph (1)(e) is used to encompass various standards on conduct …. Such standards could include, for example, those determined by the parties, or those prescribed by a code of ethical standards set by the mediator's registering authority, where it exists in the relevant jurisdiction. The standards for qualification or ethical conduct for mediators are not defined in the Model Law."

22. The suggestion that "this ground serves to underscore the importance of compliance with due process in the mediation" is itself somewhat vague and raises the question of what constitutes "due process in the mediation". It is assumed that this refers to Article 7 of the Model Law which "in conducting the proceedings" requires "the mediator [to] seek to maintain fair treatment of the parties". This is also a somewhat nebulous requirement, but the Draft Guide says this:

> "The reference to "fair treatment" is to be understood as covering also the notion that mediators should seek to maintain equality of treatment when dealing with the various parties. However, such equality of treatment does not mean that equal time should necessarily be devoted to separate meetings with each party. The mediator may explain to the parties in advance that there may be time discrepancies, both real and imagined, which should not be construed as other than the fact that the mediator is taking time to explore all issues, interests and possibilities for settlement."

23. The emphasis of the foregoing seems to be upon "due process", a concept that sits more comfortably in the context of court or arbitral proceedings. As anyone familiar with mediation will know, it is an inherently flexible process, something emphasised in the third text identified above (UNCITRAL Draft Notes on Mediation). Those Draft Notes on Mediation contain a narrative about mediation as a process with which few with knowledge of mediation would quarrel. The status of the Notes is not entirely clear, but the following is said:

> "The Notes seek to assist parties in better understanding mediation including the wide and flexible range of possible outcomes. The parties and the mediator may use or refer to the Notes at their discretion and to the extent they see fit and need not adopt or provide reasons for not adopting any particular element of the Notes. The Notes do not impose any legal requirements binding upon the parties or the mediator and are not suitable to be used as mediation rules."

24. In the CMC's view, if there is not to be any further definition or elucidation of "standards applicable to the mediator or the mediation" in the guidance, it would be sensible to permit the

"competent authority" in the "Enforcing State" to have regard to the terms of the Note when considering whether the grounds for resisting relief set out in paragraph (1)(e) are established.

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