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## Recent Developments in International Commercial Dispute Resolution: Expanding the Options

Bobette Wolski\*

\*Bond University, [bwolski@bond.edu.au](mailto:bwolski@bond.edu.au)

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# Recent Developments in International Commercial Dispute Resolution: Expanding the Options

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## Abstract

Several international organisations, including the International Chamber of Commerce (ICC) and the United Nations Commission on International Trade Law (UNCITRAL), are now taking steps (albeit small and tentative ones) to establish an infrastructure of laws, rules and procedures which recognises ADR clauses and settlements reached in ADR [alternative dispute resolution] proceedings. These efforts are aimed at promoting certainty and consistency in the use of ADR processes and, ultimately, at expanding the options available to parties for the resolution of international commercial disputes. This article examines the latest initiatives of the ICC (namely the ICC ADR Rules) and UNCITRAL (namely the Draft UNCITRAL Model Law on International Commercial Conciliation) to facilitate the use of ADR options such as mediation and conciliation.

**KEYWORDS:** alternative dispute resolution, international commerce, International Chamber of Commerce, ICC, United Nations Commission on International Trade Law, UNCITRAL

## RECENT DEVELOPMENTS IN INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION: EXPANDING THE OPTIONS

*By Bobette Wolski\**

### Introduction

Until recently, arbitration was the most widely used and accepted means of resolving international commercial disputes.<sup>1</sup> This is not to say that arbitration was the preferred method of dispute resolution, just that the parties to international commercial disputes had 'no other realistic choice'.<sup>2</sup> Arbitration prevailed by default.

Judicial proceedings are rarely an option for the parties to an international commercial dispute. There is no international court in which private individuals have standing and conversely no international court that has compulsory jurisdiction over them.<sup>3</sup> Resort to a municipal legal system poses uncertainty and unpredictability of outcome, for at least one of the parties, because there is no uniformity of jurisdictional rules, substantive law, principles of conflict law, and evidentiary and procedural rules in municipal courts.

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\* Associate Professor of Law, Bond University; Solicitor of the Supreme Court of Queensland.

1 M F Hoellering, 'Alternative Dispute Resolution and International Trade' in M F Hoellering *et al* (eds), *Arbitration and the Law* (1987) 110 and more recently, Guy Spooner and Amanda Moseley, 'Arbitration in Asia' (June 2001) *Corporate Counsel Asia Pacific* 27. See International Trade Law Section of the Attorney-General's Legal Practice, *International Commercial Dispute Resolution Handbook* (1997) 2 for a definition of the term 'international dispute'. The term 'international commercial arbitration' is the subject of specific definition in many instruments, for example, the *International Arbitration Act 1974* (Cth) s 4.

2 Ronald Bernstein, *Handbook on Arbitration Practice* (1987) 335.

3 Only states may submit a dispute to the International Court of Justice for its determination (and absent a special agreement, there is no legal obligation on them to do so unless continuance of the dispute is likely to threaten international peace and security): see art 34 of the Statute of the International Court of Justice. Generally see Richard B Bilder, 'An Overview of International Dispute Settlement' (1986) 1 *Emory Journal of International Dispute Resolution* 1, 7-8.

Arbitration offers a neutral alternative to litigation in a foreign forum. It affords the parties a substantial degree of control over applicable law and procedure and an opportunity to agree upon procedural rules with which each is equally familiar. Most importantly, agreements to arbitrate and arbitral awards are recognised and enforceable in most of the major trading nations of the world because there exists a comprehensive legal framework of conventions and treaties, national laws, and arbitration rules that requires such recognition and enforcement.

ADR processes<sup>4</sup> such as mediation and conciliation likewise offer parties the opportunity to settle disputes in a neutral forum. Unlike arbitration, these processes also offer the parties the opportunity to settle disputes in an informal and non-adversarial setting and on mutually acceptable terms. Up until now, however, ADR clauses<sup>5</sup> and ADR settlements have not been widely recognised and enforced. This situation may be about to change. Several international organisations, including the International Chamber of Commerce (ICC) and the United Nations Commission on International Trade Law (UNCITRAL), are now taking steps (albeit small and tentative ones) to establish an infrastructure of laws, rules and procedures which recognises ADR clauses and settlements reached in ADR proceedings. These efforts are aimed at promoting certainty and consistency in the use of ADR processes and, ultimately, at expanding the options available to parties for the resolution of international commercial disputes.<sup>6</sup>

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- 4 For the purpose of this article 'ADR' refers to those dispute resolution processes that involve a third party intervenor with no authoritative decision-making power whose function is to assist the parties to reach a consensual resolution of their dispute. It includes mediation and conciliation, but not arbitration.
  - 5 An ADR clause is a contractual clause that commits the parties to use of a particular dispute resolution process or processes in the event that a dispute arises between them. Such a clause provides general guidelines as to the type of process to be used and should be distinguished from the more specific procedural rules that govern each process. Parties may adopt a model ADR clause and relevant pre-established procedural rules of a chosen institution (such as those of the International Chamber of Commerce or the International Centre for Settlement of Investment Disputes) or they may adopt those of the United Nations Commission on International Trade Law which can be used in either ad hoc or administered proceedings. Alternatively, parties may adopt a model clause and design their own procedural rules; or they may custom design their own clause and procedural rules. Generally, as to the nature and purpose of ADR clauses, see Hilary Astor and Christine M Chinkin, *Dispute Resolution in Australia* (1992) 193-210. See Laurence Boule and Miryana Nestic, *Mediation: Principles, Process, Practice* (2001) 468-9 on mediation clauses.
  - 6 This is not to underrate the efforts by organisations such as the China International and Economic Trade Arbitration Commission (CIETAC), which has emphasised and given support to ADR processes such as conciliation since its inception in 1988. Generally, see Greg Vickery, 'International Commercial Arbitration in China' (1994) 5 *Australian Dispute Resolution Journal* 75, 76 and 84.

This article examines the latest initiatives of the ICC (namely the ICC ADR Rules) and UNCITRAL (namely the Draft UNCITRAL Model Law on International Commercial Conciliation) to facilitate the use of ADR options such as mediation and conciliation. By way of introduction, the article considers the threshold questions of whether or not there is a need for a system that supports the use of ADR options and, if the need exists, whether or not there are any obstacles (theoretical or otherwise) to the creation of such a system. Of necessity, this involves a review of some of the process characteristics of arbitration and ADR processes. For the sake of convenience, the article focuses on and uses the terminology of mediation, arguably the most common ADR process.<sup>7</sup> In this article, mediation is defined as a process of facilitated negotiation in which an independent third party (the mediator) undertakes a range of activities to assist parties in dispute to reach an agreement.<sup>8</sup> The activities undertaken by mediators fall short of imposing a binding decision upon the parties. This definition is wide enough to include conciliation, which has been chosen by UNCITRAL as the pivotal term in its latest work on ADR.<sup>9</sup> Arbitration differs from mediation and conciliation in a number of important respects. For present purposes, it is defined as a process of private adjudication in which an independent third party appointed by the parties to a dispute is empowered to impose a binding decision upon them.

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7 International Chamber of Commerce, ADR Dispute Resolution Services, Guide to ICC ADR, Overview of the Rules, 2, available at <<http://www.iccwbo.org/drs/english/adr/guide.asp>>.

8 Adapted from Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (2nd ed, 1996) 15.

9 There are fine distinctions between the processes of mediation and conciliation. A conciliator may express a view as to the merits of each party's position and recommend terms of settlement. The process is normally brought to an end on the rejection by the parties of the conciliator's proposal. It is widely (though not universally) accepted that a mediator should not express a view as to the merits of each party's position. It seems clear that, if a mediator does offer a proposal and that proposal is not accepted, the process does not terminate on the parties' rejection of the proposal. The process continues in search of a proposal that is acceptable: see V H Umbright, *Multilateral Mediation: Practical Experiences and Lessons* (1989) 27; Philip Naughton, 'Alternative Forms of Dispute Resolution - Their Strengths and Weaknesses' (1990) 56 *Arbitration* 76, 77; M Scott Donahey, 'Mediation and Conciliation in the Asia/Pacific Region: Sites, Centres and Practices' in David A Doyle (ed), *Doyle's Dispute Resolution Practice: Asia, Pacific* (1991) 85,081-85,082; and Patrick O'Connor, 'Alternative Dispute Resolution: Panacea or Placebo?' (1992) 58 *Arbitration* 107, 111-112. All commentators agree that the two processes have much in common, so much so that 'in practice such distinctions tend to be blurred': J G Merrills, *International Dispute Settlement* (2nd ed, 1991) 27, 59.

## The Need for International Intervention

### The Status of Agreements to Arbitrate, Arbitral Proceedings and Arbitral Awards

Neither arbitration agreements nor arbitral awards are intrinsically enforceable. Arbitration is effective as a dispute resolution process only because there is a comprehensive legal system of bilateral and multilateral conventions and treaties and national laws and arbitration rules which supports it.<sup>10</sup> If it were not for this system, 'arbitration in the sense that it leads to a "binding" award could not exist'.<sup>11</sup>

Numerous conventions, treaties, international instruments<sup>12</sup> and national laws ensure the enforceability of agreements to arbitrate by requiring national courts of accepting countries to refer to arbitration disputes that are the subject matter of a valid arbitration agreement.<sup>13</sup> National courts are bound to stay court proceedings brought in breach of an agreement to arbitrate on the application of the party against whom such proceedings have been commenced and so, indirectly, to compel a party to comply with the arbitration agreement.<sup>14</sup>

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10 As at 1985, this framework consisted of not less than 100 conventions, uniform laws, enactments, agreements and arbitration rules: 'Extrajudicial Dispute Settlement' (1985) in Cheng Chia-jui (ed), *Clive M. Schmitthoff's Select Essays on International Trade Law* (1988) 652. While this information is no longer current, it gives a clear picture of the comprehensiveness of the system that exists to support arbitration.

11 J Martin H Hunter, 'Judicial Assistance for the Arbitrator' in Julian D M Lew (ed), *Contemporary Problems in International Arbitration* (1987) 204. Also see Mauro M Rubino-Sammartano, *International Arbitration Law* (1990) 241.

12 For example, art II of the 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('New York Convention') and art 8 of the *UNCITRAL Model Law on International Commercial Arbitration* (adopted by the United Nations Commission on International Trade Law on 21 June 1985) (hereafter the *Model Law on Arbitration*). Also see art 26 of the *Washington Convention*, which resulted in the establishment of the International Centre for the Settlement of Investment Disputes (ICSID). Generally, see Richard Garnett, 'Enforcing International Arbitration Agreements in Australia' (1995) 2 *Commercial Dispute Resolution Journal* 88 and Geoffrey Gibson, *The Arbitrator's Companion* (2001) 14-17.

13 As to the requirements for a valid arbitration agreement, see Julian D M Lew, 'Arbitration Agreements: Form and Character' in Petar Sarcevic (ed), *Essays on International Commercial Arbitration* (1989) 51-63; and Michael Pryles, 'Drafting Arbitration Agreements' (1993) 67 *Australian Law Journal* 503.

14 In the case of Australian courts, see s 53 of the *Uniform Commercial Arbitration Acts* and s 7 of the *International Arbitration Act 1974* (Cth) which adopts art II of the *New York Convention*. There is authority to support the proposition that Australian courts have an inherent power to stay proceedings in these circumstances (an important power if an agreement does not fall within the statutory framework), see Australian Law Reform Commission (hereafter ALRC), *Legal Risk in International Transactions* (1996), Report No. 80, Ch 11, para 11.37.

The national laws of some countries (including those of Australia) allow arbitrators to take various actions in response to default by a party, in particular, to proceed on an *ex parte* basis,<sup>15</sup> and to make orders for the interim protection of property.<sup>16</sup> The first of these powers entitles an arbitrator to make an award in default of appearance and means that arbitration need not be suspended or postponed in the absence of one of the parties.<sup>17</sup>

Arbitrators also have some power to give directions and to make orders in regard to the conduct of proceedings, for example, orders for a party to discover documents. However, they generally lack the power to enforce such orders.<sup>18</sup> In some circumstances, they may be able to enlist the coercive powers of national courts to fulfil their objectives,<sup>19</sup> although courts are also limited in the action they can take.<sup>20</sup> However, arbitrators are not without indirect coercive powers - it appears that parties usually comply with interlocutory orders and directions given by arbitrators as failure to do so may adversely affect the final decision and lead to cost penalties.<sup>21</sup>

There is also an effective enforcement regime of multilateral and bilateral conventions and treaties that guarantees the recognition and enforcement of arbitral awards, regardless of their place of origin, in most of the major trading nations of the world. Such conventions and treaties oblige the municipal courts of contracting states to recognise and enforce arbitral awards. Principal amongst these conventions is the 1958 *New York Convention*, which restricts the grounds on which countries may refuse

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15 For example, the *Model Law on Arbitration* art 25.

16 For example, the *Model Law on Arbitration* art 17.

17 Also see r 42 of the ICSID Arbitration Rules, which allows the Tribunal, at the request of a non-defaulting party, to deal with questions submitted to it and to render an award if a party fails to appear or to present its case.

18 Rubino-Sammartano, above n 11, 241. Also see Nicholas W A Goddard, 'Arbitration or Litigation? A Comparison' (1991) 57 *Arbitration* 265, 266.

19 Court assistance is also available in ad hoc arbitrations when problems arise over the appointment, confirmation, challenge and replacement of arbitrators: see arts 11, 13, 14 and 36(1)(a)(iv) of the *Model Law on Arbitration* and art VI(d) of the *New York Convention*. Court intervention is generally excluded in the case of institutional arbitrations with the functions of appointment, confirmation, challenge and replacement of arbitrators being delegated to the institutional body: see for example art 7 of the ICC Rules of Arbitration which reserves such functions to the ICC International Court of Arbitration.

20 Interlocutory orders and directions are not included in the reference to an 'arbitral award' in the *New York Convention* and consequently, are not enforceable. On the position in Australia, see Okezie Chukwumerije, 'Enforcement of Foreign Awards in Australia: The Implications of Resort Condominiums' (1994) 5 *Australian Dispute Resolution Journal* 237, 242-3. Also see ALRC, Report No. 80, above n 14, paras 11.65-11.70.

21 Chukwumerije, above n 20, 243.

enforcement of arbitral awards.<sup>22</sup> The *UNCITRAL Model Law on Arbitration* incorporates similar grounds.<sup>23</sup> The procedure for recognition and enforcement of an arbitral award is generally simple, requiring production of the original or a certified copy of the award together with the arbitration agreement.<sup>24</sup> It is the general ease of enforcement of arbitral awards that is credited as the principal advantage of arbitration and the reason for its widespread use.<sup>25</sup> As it happens, the parties usually implement arbitral awards without recourse to the courts,<sup>26</sup> but the fact that there exists a direct and easy means of enforcement, in the event of non-compliance, creates a powerful incentive for compliance. It also gives arbitration an element of certainty that is absent from other dispute resolution processes.

### **The Status of Agreements to Mediate, Mediation Proceedings and Mediated Settlements**

There are no international instruments that oblige national courts to enforce agreements to mediate and none that guarantee enforceability of mediated settlements.

At the present time, in the absence of any international instruments obliging courts to enforce mediation agreements, the issue of enforceability of agreements to mediate is being determined on a case by case basis in national courts.<sup>27</sup> The municipal courts in

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22 *New York Convention* art V.

23 *Model Law on Arbitration* art 36. For a discussion on the operation of the enforcement provisions of the *New York Convention* and the *Model Law on Arbitration*, see ALRC, Report No. 80, above n 14, paras 11.38-11.47.

24 *Model Law on Arbitration* art 35(2). In the case of an ICSID arbitration, the *Washington Convention* also ensures a direct right of enforcement in any contracting state of awards made in proceedings between contracting states and nationals of other contracting states. However, ICSID has not entirely cured impediments to enforcement of awards made against states: see M Sornarajah, *International Commercial Arbitration* (1990) 7.

25 Spooner and Moseley, above n 1, 27 and Chukwumerije, above n 20, 237.

26 Most awards are complied with voluntarily by the parties: see Petar Sarcevic, 'The Setting Aside and Enforcement of Arbitral Awards under the UNCITRAL Model Law' in Sarcevic (ed), above n 13, 191 where the author notes that compliance rates of 94% have been reported for ICC awards and similar rates have been claimed for other institutional awards. Also see Spooner and Moseley, above n 1, 27; Chukwumerije, above n 20, 237; and John Levingston, 'The Development of Arbitration and Mediation as Alternative Dispute Resolution Procedures for Resolving Maritime Disputes in Australia' (1995) 6 *Australian Dispute Resolution Journal* 127, 129.

27 For discussion of the various decisions in Australia, the United Kingdom and the United States and the conclusions which can be drawn from them, see David Spencer, 'Uncertainty and Incompleteness in Dispute Resolution Clauses' (1995) 2 *Commercial Dispute Resolution Journal* 23; David Forrester, 'The Format of a Dispute Resolution Clause' (1996-1997) 3 *Commercial Dispute Resolution Journal* 259; Patrick Mead, 'Enforceability of ADR clauses' (1997) 16 *The Arbitrator* 34, 36-41; and Boule and

some jurisdictions have been prepared to uphold the enforceability of agreements to mediate providing the agreements:<sup>28</sup>

1. Specify 'the procedures to be followed by the parties in setting up and undertaking the mediation'.<sup>29</sup> This may be done either in the mediation agreement itself or alternatively, the parties may incorporate by reference the specific procedural rules for mediation of a nominated organisation.<sup>30</sup>
2. Are 'clear and certain in their own right', or it is 'possible to derive certainty from extrinsic documents expressly referred to in the clauses'.<sup>31</sup>
3. Are complete and comprehensive (in the sense of setting out the procedural rules and the rights and obligations of the parties in the process).
4. Uphold the principle against ousting the jurisdiction of the courts. Agreements to mediate must not purport to make mediation a final and exclusive alternative to court proceedings but rather provide that the parties should first submit their dispute to mediation before they institute court proceedings (effectively making mediation a condition precedent to commencement of litigation, in *Scott v Avery* form).<sup>32</sup>

However, the approach of national courts on the issue of enforceability of mediation agreements varies; and in some jurisdictions, there is little authority on point.<sup>33</sup>

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Nesic, above n 5, 469-86. For more detailed discussion on the position in the United States, see APEC Committee on Trade and Investment Dispute Mediation Experts Group, *International Commercial Disputes: A Guide to Arbitration and Dispute Resolution in APEC Member Economies* (1997) 18-10.

28 See generally Laurence Boule, *Mediation: Principles, Process, Practice* (1996) 262-75 and Boule and Nesic, above n 5, 469-86.

29 Boule and Nesic, above n 5, 479.

30 Ibid 473 and 479.

31 Ibid 479.

32 (1856) 25 LJ Ex 308; 10 ER 1121. The *Scott v Avery* style clause was developed in relation to arbitration. At common law, the courts required an arbitration clause to be in *Scott v Avery* form in order to be enforceable. Such a clause provided that the parties would first refer specified disputes to arbitration before commencing court proceedings. 'Nowadays, courts have statutory powers to stay proceedings brought in breach of an arbitration clause': Boule and Nesic, above n 5, 477. See the discussion above n 14 and Boule, above n 28, 267-8.

33 Even courts within a particular jurisdiction may adopt different approaches on the issue. Compare for example the decisions of Australian courts in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 and *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*, Supreme Court of New South Wales, Giles J, 55093/94, 28 March 1995, unreported. These and other relevant decisions are discussed by Boule and Nesic, above n 5, 473-4 and Mead, above n 27, 36-41. For a recent

Consequently, parties to international disputes are subjected to an unacceptable degree of uncertainty and lack of uniformity as regards the enforceability of their agreements to mediate.

Mediators exercise very limited powers in relation to the conduct of mediation proceedings. It is usual for parties to a mediation to execute a mediation agreement whereby they undertake 'to co-operate with the mediator in the conduct of the mediation' and 'to use their best endeavours to comply with reasonable requests made by the mediator to promote the efficient resolution of the dispute'.<sup>34</sup> However, mediators cannot take default measures against a party who fails to comply with a request. The only coercive power that mediators can exercise is to threaten to withdraw from the proceedings.

Agreements reached in mediation of international commercial disputes are generally considered to be unenforceable.<sup>35</sup> They may be enforced indirectly in some municipal courts where:

1. The agreement reached involves the formation of legal rights and obligations and complies in all respects with the relevant law of contract. In this instance, the agreement can be enforced as any other contract, that is, by resort to some other form of dispute resolution, such as arbitration or litigation. The parties are effectively back where they started. As mentioned at the outset, litigation is not an attractive option. 'Enforcement of the contract may require court proceedings in numerous jurisdictions'.<sup>36</sup>
2. Municipal laws may allow mediated agreements to be made the subject of a court consent order or decree, in which case they are enforceable as any other order or decree of the court within which they are registered.<sup>37</sup> At the present time, this is possible only in very limited circumstances.

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discussion of the requirements for enforceability of agreements to mediate, see *Aiton v Transfield* [1999] NSWSC 996. In other jurisdictions, for example, the United Kingdom, there are few court decisions that 'shed light on this issue': Boule and Nestic, above n 5, 469. Also see Damien Cremean, 'Agreements to Negotiate in Good Faith' (1996-97) 3 *Commercial Dispute Resolution Journal* 61 and the authorities cited therein.

- 34 See for example the terms of the Agreement to Mediate developed by the Law Institute of Victoria, Australia which appears in Boule, above n 28, 277-9.
- 35 A mediated settlement is not recognised by the *New York Convention* as an award for the purposes of enforcement: Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (1986) 26.
- 36 Handbook of the International Trade Law Section of the Attorney-General's Legal Practice, above n 1, 31.
- 37 See for example the Rules of the Family Court of Australia.

In neither instance is there a direct right of enforcement across national boundaries. The route to enforcement, if enforcement is required, is circuitous, complicated and expensive.

In the absence of a reliable system of enforcement, fulfillment of the terms of a mediated settlement is dependent upon voluntary performance by the parties. As it happens, high compliance rates are also claimed for mediated settlements.<sup>38</sup> However, compliance is even more likely to occur if there is a system in place to enforce settlement agreements. Such a system is desirable, not because parties would need to resort to it frequently, but because it would be available if it was needed and would reinforce the parties' confidence in the mediation process.

Mediation, like arbitration, cannot stand on its own at the international level. In order to operate efficiently and reliably, it also needs a framework of international conventions and treaties and appropriate national laws by which national courts are directed to:

1. Enforce compliance with an agreement to mediate where it meets the prerequisites for enforceability listed above (and is valid in all other respects) by staying litigation or arbitration proceedings brought in breach of the agreement on the application of the party against whom such proceedings have been brought;<sup>39</sup>
2. Recognise and enforce the terms of a mediated settlement, except on limited grounds (allowing for the possibility of court review in appropriate circumstances).

International instruments such as the *New York Convention* and the *UNCITRAL Model Law on Arbitration* serve a dual purpose. In addition to providing for the recognition and enforcement of arbitral awards, they provide and at the same time limit the

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38 Mediated outcomes may be more 'legitimate and psychologically binding' than authoritative outcomes and consequently more likely to be complied with: see Craig A McEwen and Richard J Maiman, 'The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance' (1986) 20 *Law and Society Review* 439, 444; and Richard B Bilder, 'Some Limitations of Adjudication as an International Dispute Settlement Technique' (1982) 23 *Virginia Journal of International Law* 1, 28.

39 Australian courts have accepted in principle the appropriateness of granting a stay of court proceedings where a party has failed to comply with an agreement to mediate. See for example *AWA Limited v Daniels* (1992) ASCR 463; *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 and *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*, Supreme Court of New South Wales, Giles J, 55093/94, 28 March 1995, unreported. See generally Boule, above n 28, 262-75; and Boule and Nestic, above n 5, 469-86.

grounds upon which municipal courts may review the arbitration agreement,<sup>40</sup> the arbitral process itself,<sup>41</sup> and the award.<sup>42</sup> At the present time, there are no formal uniform or definitive grounds of court review of agreements to mediate, mediation proceedings or mediated settlements. Establishment of a system of court review would be desirable in the case of mediation. Provision of grounds of review is necessary so that a 'wronged' party has access to the court to obtain appropriate relief. Limitation of the grounds of review is necessary so that parties can predict the likely degree of finality of a settlement.

### Obstacles to Creation of a Mediation System?

There is no theoretical basis for the absence of legal machinery to enforce agreements to mediate and mediated settlements at the international level.

Arbitration and mediation are alike in some respects. They are both consensual processes. Neither can take place, at least on an international scale, without the consent of the parties.

When parties agree to submit a dispute to arbitration,<sup>43</sup> they consent to take part in the proceedings and to be bound by the decision of the arbitrator. Once consent is given, it cannot be unilaterally withdrawn.<sup>44</sup> Continuance of the arbitration does not depend upon the continued cooperation of the parties; nor does execution of an arbitral award depend upon the cooperation of the party against whom it is made. The existence of legal machinery to enforce the agreement to arbitrate, to enable the arbitration to be taken through to its conclusion and to enforce execution of the award is therefore not

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40 For example, an arbitration agreement may be reviewed where it is not valid under the law to which the parties have subjected it (art V1(a) of the *New York Convention*) or where the subject matter of the arbitration is not capable of settlement by arbitration under the law of the country where recognition and enforcement is sought (art V2(a) of the *New York Convention*).

41 For example, recognition and enforcement of an award can be refused if the tribunal is improperly constituted, the procedure is not in accordance with the agreement of the parties, the parties are not given proper notice of the proceedings or of any hearing, or the parties have not had a full opportunity to present their case: arts V1(b) and V1(d) of the *New York Convention*.

42 For example, recognition may be refused where it would be contrary to the public policy of the country where recognition and enforcement is sought. See art V2(b) of the *New York Convention* and art 36 of the *UNCITRAL Model Law on Arbitration*. In relation to the public policy exception in Australia, see Chukwumerije, above n 20, 245-7 and the decision of *Resort Condominiums International Inc v Bolwell* (1993) 118 ALR 655.

43 Arbitration agreements may take the form of a 'submission to arbitration' (which contemplates the settlement of an existing dispute) or an 'arbitration clause' (which provides for arbitration of a dispute should one arise in the future).

44 Redfern and Hunter, above n 35, 4.

only necessary, it is also justified. The Australian Law Reform Commission recently emphasised this point when it noted that:

Arbitration requires a legal infrastructure in which to function. The arbitral process is intended to lead to a binding determination of a dispute. If it is to be binding, the law must support (among other things) the agreement to arbitrate, the arbitral procedures, the determination of substantive liabilities and crucially, the enforcement of the arbitral award.<sup>45</sup>

When parties agree to enter into mediation,<sup>46</sup> they consent to take part in negotiations facilitated by a mediator with a view to reaching agreement. Although they make no commitment that an agreement will be reached, they commit themselves to participation in a process from which agreement may come. There may come a point when negotiations fail and the parties are justified in terminating the process without prejudice to their other dispute resolution options, but until that point is reached, parties can be held to their agreement to participate in the mediation process. If a settlement agreement is reached, the parties may consent to be bound by its terms. There is no reason in these circumstances why they cannot be held to the terms of the agreement. There is no reason for treating an agreed outcome any differently from an imposed one.

There are two features of mediation that set it apart from arbitration and which are sometimes relied upon as reasons for not enforcing mediation agreements. As has been noted above, mediation depends on the continued consent and cooperation of the parties. It has been argued that it is futile to force unwilling parties to participate in mediation as consent and cooperation are unlikely to be forthcoming in these circumstances. (No such argument can be raised in the case of arbitration.) This argument is based on misconceived notions about mediation and it fails to take into account the mediator's role in the process. Nothing about mediation requires that the parties be willing or eager to settle - the process rests on the assumption that the parties are unwilling to settle. A skillful mediator may counter factors such as hostility, poor communication, high emotions and lack of trust and induce cooperation and motivation to settle between parties who did not initially wish to negotiate or to agree.<sup>47</sup>

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45 ALRC, Report No. 80, above n 14, para 11.29.

46 As is the case with arbitration (see note 43 above), an agreement to mediate may be entered into before a dispute actually arises or after a dispute has occurred.

47 Motivation to settle can also spring from other factors such as costly stalemate or time pressures. Generally, see *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 per Giles at 206. Also see Katz, 'Enforcing an ADR Clause: Are Good Intentions All You Have?' (1988) 26 *American Business Law Journal* 575 quoted in Stephen B Goldberg, Frank E A Sander and Nancy H Rogers, *Dispute Resolution: Negotiation, Mediation and Other Processes* (2nd ed, 1992) 444; and Melinda Shirley, 'Breach of an ADR Clause - A Wrong Without Remedy?' (1991) 2 *Australian Dispute Resolution Journal* 117, 118.

Of course, there is no way to force an unwilling party physically to attend mediation and to participate in specified procedural steps. The same applies in the case of arbitration. Courts can only enforce compliance with a mediation agreement indirectly, in much the same manner as they presently enforce arbitration agreements, that is, by ordering a stay of proceedings commenced in breach of the agreement. But at this point, it must be conceded that there is a difference between arbitration and mediation. The difference is that the costs associated with non-compliance with an arbitration agreement will always be greater than those associated with non-compliance with a mediation agreement.

An arbitrator can start, continue and conclude the proceedings in the absence of a party, bringing the arbitration to an end with an arbitral award. A mediator cannot commence or continue the proceedings in the absence of one of the parties; nor can a mediator flex his or her muscles through the imposition of cost penalties in an award. Mediation does depend on the continued consent and cooperation of the parties<sup>48</sup> and it is always open to one or both of the parties to fail to attend the proceedings at all or to terminate the proceedings once they have 'complied' with necessary procedural steps. A party might simply go through the motions in mediation without making any real attempt to settle the dispute,<sup>49</sup> although a skilled mediator may be able to bring about a change in attitude.

The second commonly cited reason for not enforcing mediation agreements is that it may be difficult to establish compliance with an agreement because mediation is an intrinsically flexible process and one that may take a diversity of forms. If courts are to enforce compliance with an agreement to mediate, they must be able to determine what amounts to compliance (and conversely, non-compliance) with the agreement. This problem does not arise in the case of arbitration because it is well defined and widely understood and it is relatively easy to establish compliance (and non-compliance) with an arbitration agreement.<sup>50</sup> For example, parties to an arbitration are required to communicate their written statement of claim or statement of defence to the arbitrator and the other party, provide further written statements and supporting documentation as requested by the arbitrator, attend at pre-hearing conferences, and appear before the tribunal to present their case.

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48 The various institutional rules for conciliation 'reflect the fact that conciliation depends upon the consent of both parties, and that this consent must be maintained': Handbook of the International Trade Law Section of the Attorney-General's Legal Practice, above n 1, 30. Specifically, see UNCITRAL's Conciliation Rules arts 2, 15(c) and (d); and r 30(3) of ICSID's Conciliation Rules.

49 Provisions requiring 'good faith' participation do not necessarily overcome these problems, see Boule and Nesic, above n 5, 485 and 479.

50 Ibid 470.

The problem of ascertaining whether or not there has been compliance with a mediation agreement can be overcome if the parties clearly specify the procedures to be followed in setting up and undertaking the mediation and if they establish some concrete requirements for compliance with the agreement. Requirements for compliance might include matters such as attending the mediation meeting, following the procedural directions of the mediator, and remaining at the mediation until the mediator determines that there is no prospect of continued fruitful discussion and settlement.<sup>51</sup> These requirements can be incorporated in the mediation agreement itself or by reference to the procedural rules of a nominated institution. Boulle and Nestic conclude that if an agreement is appropriately drafted, 'there is no reason in principle why courts or other agencies cannot, in an appropriate case, determine whether a party has complied with his obligations under the mediation clause'.<sup>52</sup>

Some steps (albeit baby ones) have recently been taken by members of the international community to build a suitable legal system to support mediation and other ADR processes. These initiatives are examined in the next part of the article. Before leaving the question of whether or not there is a need for a system to facilitate the use of mediation, it is appropriate to consider whether or not parties would use such a system if it were built (in other words, 'If we build it, will they come?'). Well, apparently they have already. There is evidence that many parties prefer non-adversarial dispute resolution processes.<sup>53</sup> The initiatives about to be discussed have not been taken in the hope of attracting parties to mediation (although they may well have that effect) but rather in response to the increasing use of mediation.

## Some Recent Developments to Facilitate the Use of ADR

### The ICC ADR Rules

The International Chamber of Commerce (ICC) is probably the most frequently used international arbitration institution.<sup>54</sup> It recently extended its dispute resolution

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51 Ibid 483.

52 Ibid. Also see Mead, above n 27, 46.

53 Asian-Pacific countries (and their people) in particular have a historical and cultural preference for resolving disputes in a non-litigious, non-adversarial manner: see the Guide published by the Committee on Trade and Investment Dispute Mediation Experts Group, above n 27, i-ii. This preference for non-adversarial processes is also reflected in the ICC experience which shows relatively few requests for arbitration with the ICC from the Asian-Pacific region: see ALRC, Report No. 80, above n 14, para 11.9. Research indicates that large numbers of parties in the Asian-Pacific region take advantage of conciliation when it is offered: Charmian Wang, 'Arbitrating Business Disputes in Beijing - An Examination Focusing on CIETAC's New Arbitration Rules' (1994) 1 *Commercial Dispute Resolution Journal* 39, 48. Also see Vickery, above n 6. National states are also reluctant to commit to judicial settlement and arbitration: Merrills, above n 9, 106.

54 ALRC, Report No. 80, above n 14, para 11.5.

services to include a range of ADR procedures. It did so on the basis that 'Amicable settlement is a desirable solution for business disputes and differences'.<sup>55</sup> The ICC defined ADR to mean 'amicable dispute resolution' and included within its ambit those processes 'where the decision reached by or in collaboration with the neutral is not binding upon the parties, *unless they agree otherwise*' (emphasis added).<sup>56</sup>

To facilitate the use of ADR, the ICC published four 'suggested' ADR clauses for inclusion in contracts<sup>57</sup> and it established a set of procedural rules (the ICC ADR Rules) to govern the ADR proceedings. The Rules, which became effective as of 1 July 2001,<sup>58</sup> purport to offer 'a framework for the amicable settlement of commercial disputes with the assistance of a neutral'.<sup>59</sup>

The four suggested ADR clauses are described below by reference to the caption provided by the ICC.<sup>60</sup> They are set out in order of the extent to which the parties' obligations increase.

The clauses are:

1. 'Optional ADR': this clause provides that the parties may seek to settle the dispute in accordance with the ICC ADR Rules, without prejudice to any other proceedings. The clause simply provides for the possibility of ICC ADR, without any obligation on the parties. The clause is, quite intentionally, unenforceable. 'It is designed to encourage submission to ICC ADR and to provide a basis for one party to propose ICC ADR to the other',<sup>61</sup> without any loss of face.
2. 'Obligation to consider ADR': the second clause provides that 'the parties agree in the first instance to discuss and consider submitting the matter to settlement

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55 Preamble to the ICC ADR Rules, available at [http://www.iccwbo.org/index\\_adr.asp](http://www.iccwbo.org/index_adr.asp), 4.

56 Introduction to the ICC ADR Dispute Resolution Services, available at [http://www.iccwbo.org/index\\_adr.asp](http://www.iccwbo.org/index_adr.asp), 1.

57 The ICC has cautioned that the enforceability of its suggested clauses under the law applicable to the contract should be evaluated by the parties and their counsel. See Suggested ICC ADR clauses, available at [http://www.iccwbo.org/index\\_adr.asp](http://www.iccwbo.org/index_adr.asp), 1.

58 The ADR Rules replace the 1988 Rules of Optional Conciliation and join the ICC Rules of Arbitration, the Rules of Expertise, and the Docdex Rules as components of ICC's dispute resolution services.

59 Introduction to the ICC ADR Dispute Resolution Services, above n 56, 1.

60 Suggested ICC ADR clauses, above n 57, 1-2. The clauses should be read in conjunction with the Guide to ICC ADR, above n 7. The Guide provides an explanation of the Rules and of the various settlement processes that can be used pursuant to the Rules. Under the ICC framework, a mediator is not requested to provide an opinion as to the merits of the dispute: Guide to ICC ADR, above n 7, 7.

61 Guide to ICC ADR, above n 7, 11.

proceedings under the ICC ADR Rules'.<sup>62</sup> According to the Guide which accompanies the Rules and clauses, parties adopting this clause are obligated to 'discuss the possibility of commencing ICC ADR proceedings',<sup>63</sup> but they 'retain the right not to do so after their discussion'.<sup>64</sup> It is highly unlikely that this clause would be enforceable. There is no agreement between the parties at this stage to submit to ADR and the ADR Rules have not been activated. The 'discussion' provided for in this clause is unassisted and unstructured. It is unclear what is expected of the parties and consequently it would be extremely difficult to ascertain whether or not the parties had complied with the clause.

3. 'Obligation to submit dispute to ADR with an automatic expiration mechanism': under this clause, 'the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules'<sup>65</sup> but if the dispute has not been settled within 45 days from the date of filing the Request for ADR (or such other period as agreed), the parties are no longer obligated to continue the ICC ADR. The ICC Guide notes that the parties are expected to apply this clause in good faith. The clause does not provide for another procedure to follow an unsuccessful ICC ADR, although the parties are free to agree to submit to arbitration (or any other procedure).<sup>66</sup>
4. 'Obligation to submit dispute to ADR, followed by ICC arbitration as required': this clause is in similar terms to the third clause, except that it allows for arbitration to follow unsuccessful ADR proceedings. Specifically, the clause provides that:

In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, such dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce.<sup>67</sup>

Under the third and fourth clause, the parties agree to submit their dispute to ICC ADR governed by the ICC ADR Rules. These procedural rules are discussed below.

Article 1 provides that the Rules may be used for all business disputes, in domestic as well as international contexts. They may be used for the settlement of disputes or simple disagreements (for example, over the interpretation of a contractual

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62 Suggested ICC ADR clauses, above n 57, 1-2.

63 Guide to ICC ADR, above n 7, 11.

64 Ibid.

65 Suggested ICC ADR clauses, above n 57, 2.

66 Guide to ICC ADR, above n 7, 11.

67 Suggested ICC ADR clauses, above n 57, 2.

provision).<sup>68</sup> The Rules may be modified by agreement of all the parties, subject to ICC approval.

Article 2 provides for the commencement of ADR proceedings. Under the ICC framework, agreement to submit to the Rules is a prerequisite to commencement of proceedings. Parties may agree to submit a matter to ADR by prior agreement or upon a request submitted by one party and accepted by the other.

Article 3 provides for appointment of the third party neutral (appointment may be made by the parties or by the ICC) and article 4 deal with the costs of the proceedings.

Article 5, which provides for the conduct of the ADR procedure, is the centre-piece of the Rules. It is in similar terms to a 'convening clause'.<sup>69</sup> Article 5(1) provides that 'The Neutral and the parties shall promptly discuss, and seek to reach agreement upon, the settlement technique to be used, and shall discuss the specific ADR procedure to be followed'. The parties may choose the settlement process that they consider most appropriate to their situation.<sup>70</sup> If they follow the ICC Guide, they should also consider specific procedural matters such as the timetable, arrangements for exchange of documents, production of memoranda, identification of those who will take part in the proceedings, details of the meeting between the parties and the neutral, and 'other means to ensure the smooth execution of the procedure'.<sup>71</sup>

Article 5(2) provides that 'In the absence of an agreement of the parties on the settlement technique to be used, mediation shall be used'. Mediation was chosen as the fallback process because it is considered to be the most common ADR process.<sup>72</sup> By virtue of article 5(5), each party agrees to cooperate in good faith with the neutral in the conduct of the proceedings.

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68 Preamble to the ICC ADR Rules, above n 55 and the Guide to ICC ADR, above n 7, 3.

69 A convening clause (a term coined by Slaikeu and Hasson) provides that an independent third person or organisation is to convene a meeting between the parties (usually after direct negotiations have broken down) to assist them to evaluate and choose an appropriate dispute resolution process, and if necessary, to select a service provider. The clause may provide that, in the absence of an agreement between the parties, the third party is to choose an appropriate process: Karl A Slaikeu and Ralph H Hasson, 'Not Necessarily Mediation: The Use of Convening Clauses in Dispute Systems Design' (1992) 8 *Negotiation Journal* 331 and Karl A Slaikeu and Ralph H Hasson, *Controlling the Costs of Conflict: How to Design a System for Your Organization* (1998) 60-62.

70 The parties may choose any ADR process they consider appropriate including mediation, mini-trial, or neutral evaluation or a combination of such processes: the Guide to ICC ADR, above n 7, 7.

71 Ibid 8.

72 Ibid 2.

Article 6 sets out the events that terminate the ADR proceedings. Termination occurs on the earlier of a number of possible events, including:

- a. The signing of a settlement agreement.
- b. A written notification to the neutral by one or more parties, at any time after the discussion referred to in article 5(1) has occurred, of a decision no longer to pursue the ADR proceedings. Where the parties have agreed to submit to ICC ADR, this article seeks to impose upon them the obligation to participate in the first discussion, and to evaluate the potential of ICC ADR proceedings with assistance from the neutral. According to the ICC Guide, 'The obligation to participate in the first discussion stems from the agreement of the parties to submit their dispute to the Rules'.<sup>73</sup>
- c. A written notification by the neutral that the proceedings will not, in the neutral's opinion, resolve the dispute.
- d. The expiration of any time limit agreed upon by the parties for the ADR proceedings, so that the proceedings terminate at a fixed time.

Article 7 deals with a number of general matters including confidentiality (the proceedings and outcome are confidential unless prohibited by applicable law), and the capacity of the neutral to act in later proceedings involving the same matter.

There are several possible obstacles to enforceability of the ICC ADR clauses. These are:

1. The first and second ADR clauses place no specific obligation on the parties.
2. The third and fourth clauses trigger operation of the ADR Rules. Under article 5 of those rules, it appears that the parties have agreed to mediation failing agreement upon another process. However, article 6 allows a party easy access out of the arrangement. It provides that a party may unilaterally terminate the proceedings by giving written notification to the neutral 'at any time after the discussion referred to in Article 5(1) has occurred'. Although this discussion is to be facilitated by the neutral, the Rules are silent on what is required of the parties. A party may satisfy the obligation imposed by article 5 by doing very little. Alternatively, should a party decide not to participate in the discussion at all, they can delay proceedings until expiration of any time limit agreed upon by the parties, at which time the proceedings terminate, that is – that party can frustrate the proceedings by delay.

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73 Ibid 9.

3. The ADR Rules are not, in themselves, complete. Although the Rules require the parties to discuss and consider a range of procedural matters, they do not actually prescribe any specific procedural rules. Consequently the parties have not, either in the ADR clause or in the Rules, agreed upon the specific procedure to be followed in setting up and undertaking the mediation or established any concrete requirements for compliance with the ADR clause. These provisions will not overcome problems relating to compliance, nor meet the need for contractual certainty and completeness.
4. The ADR procedure is not made a condition precedent to commencement of arbitration or litigation in any of the clauses. Clause 4, which is the most comprehensive, may force a party to go to arbitration, but it is unlikely to force them to submit to ADR first. On the positive side, none of the clauses attempt to oust the jurisdiction of the courts.

The Rules do not seek to add to or modify the law with respect to the enforceability of ADR settlements. The Guide merely re-states the current law in noting that, 'The proceedings can lead to a settlement agreement between the parties which ends their dispute and is binding upon them in accordance with the law that applies to that agreement'.<sup>74</sup> At least, the ICC recognises the capacity of the parties to enter into a binding settlement agreement, a fact that is reflected in its definition of ADR.<sup>75</sup>

#### **Draft UNCITRAL Model Law on International Commercial Conciliation**

UNCITRAL promulgated a set of conciliation rules in 1980<sup>76</sup> (its arbitration rules had been established in 1976<sup>77</sup> and its Model Law on International Commercial Arbitration, which established an internationally agreed legal framework for the conduct of international commercial arbitrations, became effective in 1985).<sup>78</sup> Absent from this regulative regime has been a Model Law on conciliation, to complement the Conciliation Rules. UNCITRAL is in the process of remedying this. It recently approved a Draft Model Law on International Commercial Conciliation (hereafter, the draft Model Law),<sup>79</sup> and a Draft Guide to Enactment of the UNCITRAL Model Law on

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74 Ibid 2. It may also result in a non-binding opinion or evaluation, depending on the process chosen.

75 Introduction to the ICC ADR Dispute Resolution Services, above n 56.

76 UNCITRAL Conciliation Rules (adopted by the United Nations General Assembly on 4 December 1980 by Resolution 35/52).

77 UNCITRAL Arbitration Rules (adopted by UNCITRAL on 28 April 1976 and the United Nations General Assembly on 15 December 1976).

78 Above n 12. 'A model law is a legislative text that is recommended to States for incorporation into their national law': United Nations Document No. A/CN.9/WG.II/WP.116, para 9.

79 Approved by the UNCITRAL Working Group on Arbitration and Conciliation at its thirty-fifth session, held at Vienna in November 2001 and set out in United Nations

International Commercial Conciliation (hereafter the Draft Guide).<sup>80</sup> At the time of writing this article, both instruments are being circulated to member States and observers for comment and will be presented to the Commission for review, revision and adoption as its next session to be held in New York in June 2002.<sup>81</sup>

UNCITRAL recognises that the absence of uniformity and consistency has an adverse impact upon the attractiveness and effectiveness of particular dispute resolution options. Its latest endeavours are aimed at enhancing legal certainty and predictability in the use of conciliation and arbitration and, in the case of conciliation was prompted by increased use of conciliation in various parts of the world and the desire to establish 'internationally harmonised legal solutions designed to facilitate conciliation'.<sup>82</sup> The draft Model Law and Draft Guide address a range of issues 'where court decisions [have] left the legal situation uncertain or unsatisfactory',<sup>83</sup> including those of enforceability of agreements to conciliate and the enforceability of settlement agreements reached in conciliation. The main provisions of the Model Law are discussed below.

Article 1(1) provides that the Model Law applies to international commercial conciliation, although States may enact the Model Law to apply to domestic conciliation as well. Article 1(2) defines 'conciliation' for the purpose of the Law to mean

A process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person, or a panel of persons, to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship.

The conciliator 'does not have the authority to impose upon the parties a solution to the dispute'.<sup>84</sup>

Article 1(6) gives the parties freedom to 'agree to exclude the applicability of this Law', while article 3 allows the parties to agree to exclude or vary any of the provisions (with limited exceptions), giving explicit recognition to the principle of party autonomy.

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Document No. A/CN.9/506. Also see United Nations Document No. A/CN.9/WG.II/WP.115 for an earlier draft of the Model Law (titled Model legislative provisions on international commercial conciliation).

80 The Draft Guide is contained in United Nations Document No. A/CN.9/WG.II/WP.116. Also see A/CN.9/506, Part II, paras 145-161 which sets out further suggestions with respect to the Draft Guide.

81 United Nations Document No. A/CN.9/506, para 13.

82 United Nations Document No. A/CN.9/WG.II/WP.116, para 8.

83 United Nations Document No. A/CN.9/506, para 3.

84 Draft Model Law art 1(2).

Article 1(7) provides that the Law applies

Irrespective of the basis upon which the conciliation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

It does not, however, apply to 'Cases where a judge or an arbitrator, in the course of a court or arbitral proceeding, attempts to facilitate a settlement'<sup>85</sup> and in other areas of exclusion specified by enacting States.<sup>86</sup>

Despite the last-mentioned restrictions, the provisions are potentially wide-reaching in their application, allowing parties to domestic matters to opt into the legislative regime set forth in the model provisions, and applying to instances of mandatory conciliation imposed by legislation.

The consensual nature of conciliation is emphasised by article 4(2) which addresses situations where there has been no prior agreement to conciliate. One party may initiate conciliation but if this is the case, the other party must accept that initiative. Article 4(2) provides that 'If a party that invited another party to conciliate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent... the party may elect to treat this as a rejection of the invitation to conciliate'.<sup>87</sup>

Articles 5 and 6 make provision for the number of conciliators (there is to be one conciliator, unless the parties agree that there shall be a panel) and provide mechanisms for appointment of conciliators.

Article 7 deals with the conduct of conciliation. It provides that the parties may 'agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted'. Failing agreement, conciliation is to be conducted in such manner as the conciliator considers appropriate.<sup>88</sup> The conciliator may make proposals for a settlement of the dispute,<sup>89</sup> a provision that may end up excluding some models of mediation from UNCITRAL's scheme.

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85 Draft Model Law art 1(8).

86 Draft Model Law art 1(8). For example, a State might exclude collective bargaining relationships between employers and employees.

87 Art 2 of UNCITRAL's Conciliation Rules is in similar terms, reflecting the fact that conciliation depends on the consent of both parties.

88 Draft Model Law art 7(2).

89 Draft Model Law art 7(4). Also see arts 7 and 13 of UNCITRAL's Conciliation Rules under which conciliators are authorised to formulate terms of a possible settlement.

Article 8 authorises joint and separate meetings between the conciliator and each of the parties, unless otherwise agreed by the parties, while article 9 makes provision for confidentiality of communications made to the conciliator. All communications can be disclosed by the conciliator unless they are made to the conciliator subject to 'a specific condition' that they are to be kept confidential. Articles 10 and 11 protect the confidentiality of information relating to the conciliation proceedings and disclosures and proposals made at the conciliation.

Article 12 sets out the circumstances in which the conciliation proceedings are terminated. Conciliation may be terminated by:

- a. The conclusion of a settlement agreement.
- b. A written declaration of the conciliator (after consultation with the parties) where he or she concludes that further efforts are no longer justified.
- c. A written declaration of the parties to the conciliator, or
- d. A written declaration by either one of the parties to the other party and the conciliator 'to the effect that the conciliation proceedings are terminated'.<sup>90</sup>

Article 12 is intended to reflect the principle that consent must be maintained for conciliation proceedings to be continued. Unfortunately, it means that UNCITRAL's scheme suffers the same weakness as the ICC's ADR Rules. Proceedings may be terminated unilaterally by either party giving a written declaration to that effect to the other party and the conciliator at the time of commencement of the proceedings (or shortly thereafter). Under the draft Model Law, there is no obligation on the parties actually to engage in the proceedings in any way. In this respect, ICC sought to go one step further than UNCITRAL by requiring parties who agreed to submit to the ADR Rules to 'participate in the first discussion'. In the author's view, the approach taken by ICC is the better one. Once a party has agreed to submit a matter to conciliation, it ought to be obliged to do something by way of participation.

Article 14(1) is the strongest provision in UNCITRAL's scheme. It provides that:

Where the parties have agreed to conciliate *and* (emphasis added) have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with.

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90 Draft Model Law art 12(d). This is similar to arts 15(c) and 15(d) of UNCITRAL's Conciliation Rules.

This article reflects the Working Group's view 'that agreements to conciliate should be binding on the parties, in particular where the parties had expressly agreed not to initiate adversary proceedings until they had tried to settle their disputes by conciliation'.<sup>91</sup> The provision gives courts and arbitral tribunals explicit power to 'give effect' to an agreement to conciliate where the agreement is in *Scott v Avery* form (where the parties have agreed to conciliate as a necessary step or condition precedent to commencement of arbitration and/or litigation). According to the Working Group responsible for its formulation, the provision not only enables the court or arbitral tribunal to give effect to the parties' agreement, it *obliges* them to do so, by barring 'litigation or an arbitration from proceeding if that would be in violation of the agreement of the parties'.<sup>92</sup> Unfortunately, the Model Law is silent on exactly what action or inaction might constitute violation of the agreement.

The next paragraph in article 14 appears to weaken the effect of article 14(1). Article 14(2) provides that:

A party may nevertheless initiate arbitral or judicial proceedings where, in its sole discretion, it considers such proceedings necessary to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings.

There is some concern that this provision might be used to defeat the intention expressed in article 14(1).<sup>93</sup> The Working Group envisages that initiation of arbitral or court proceedings under article 14(2) would be required in only limited circumstances such as where it is necessary 'to seek interim measures of protection or to avoid the expiration of the limitation period'.<sup>94</sup>

The last article of the draft Model Law, article 15, deals with enforceability of a settlement agreement reached in conciliation. The Working Group considered four variants of this article<sup>95</sup> reflecting what it referred to as the range of different legislative solutions and views taken on the matter of enforceability.<sup>96</sup> For the time being, it appears that the Working Group has settled on Variant A, and abandoned Variants B, C and D, although discussions are ongoing. The last three variants (that is, Variants B, C and D) are discussed in turn below.

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91 United Nations Document No. A/CN.9/WG.II/WP.115, para 43.

92 United Nations Document No. A/CN.9/WG.II/WP.116, para 65.

93 United Nations Document No. A/CN.9/WG.II/WP.115, paras 42-43.

94 United Nations Document No. A/CN.9/WG.II/WP.116, para 64.

95 These are set out in United Nations Document No. A/CN.9/WG.II/WP.115, draft art 17, paras 45-49.

96 Ibid para 45.

Variant B provided that if the parties reached agreement, that agreement was binding and enforceable as a contract.<sup>97</sup> The Working Group noted that this variant ‘reflects the widely shared view that, in determining its enforceability, a settlement agreement should be dealt with as a contract’.<sup>98</sup> This provision would have added nothing to the current state of the law (and is in fact already part of UNCITRAL’s Conciliation Rules).<sup>99</sup>

Variant C provided that ‘If the parties reach agreement on a settlement of the dispute, they may appoint an arbitral tribunal...and request the arbitral tribunal to record the settlement in the form of an arbitral award on agreed terms’.<sup>100</sup> This variant, which is based on article 30 of the UNCITRAL Model Law on Arbitration, offered ‘a basic procedural framework as to how a settlement agreement [might] become expressed in the form of an arbitral award’.<sup>101</sup> Presumably, once expressed in the form of an award, the settlement would have been enforceable as any other award.

Variant D allowed the parties a more direct route to enforceability, providing that, if the parties reached a settlement and signed a settlement agreement, the agreement ‘is binding and enforceable as an arbitral award’. The draft provision offered no indication as to the procedure through which such an arbitral award was to be produced<sup>102</sup> and no guidance as to the meaning of the term ‘enforceable as an arbitral award’.<sup>103</sup> If the Working Group had pursued this option, these aspects of the provision would have required further consideration.

The Working Group has adopted Variant A, contained in article 15.<sup>104</sup> The article provides that:

If the parties reach and sign an agreement settling a dispute, that settlement agreement is binding and enforceable...[*the enacting State inserts a description of the*

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97 Ibid, draft art 17 [Variant B].

98 Ibid para 47. The Working Group has deliberately not requested that the agreement be in writing so as not to interfere with existing contract law requirements for formation of a contract.

99 UNCITRAL’s Conciliation Rules make provision for the parties to sign a written settlement agreement. Once the agreement is signed, the parties are bound by it in the manner of a contract: art 13(2).

100 United Nations Document No. A/CN.9/WG.II/WP.115, draft art 17 [Variant C].

101 Ibid para 49.

102 Ibid.

103 Ibid.

104 Variant A (contained in draft art 17) originally provided that ‘If the parties reach agreement on a settlement of the dispute and the parties and the conciliator ...have signed the settlement agreement, that agreement is binding and enforceable [*the enacting State inserts provisions specifying provisions for the enforceability of such agreements*]’: United Nations Document No. A/CN.9/WG.II/WP.115. In its present form, Variant A places no obligation (and burden) on the conciliator to sign the agreement.

*method of enforcing settlement agreements or refers to provisions governing such enforcement].*

Several objections were expressed as to the form of article 15.<sup>105</sup> It was objected to on the grounds that it did not:

1. Create 'any certainty as to the level of enforceability of the agreement'.<sup>106</sup>
2. Add to the substance of existing law in the many countries where settlement agreements are readily recognized as contracts.
3. 'Provide a unified solution as to how such settlement agreements might become "enforceable"', since it leaves the matter to the law of each enacting State.<sup>107</sup>

It is unfortunate that Variants C and D have been abandoned. In its present form, the draft Model Law does not unify the approach of national courts to conciliation (as the Model Law for Arbitration does) and it is a long way from providing a simple procedure for recognition and enforcement of settlement agreements (as the Model Law for Arbitration does for arbitral awards).<sup>108</sup>

Ultimately, in choosing Variant A, the Working Group has placed more importance on flexibility, than on uniformity. It is of the view that Variant A constitutes *a useful first step* towards establishing uniformity and one that might facilitate an exchange of information on existing requirements for enforceability.<sup>109</sup>

The Working Group has not yet come to a final conclusion on the matter of enforceability of settlement agreements or as to the precise wording of article 15. Discussions are continuing. The Working Group will take into account any comments made in relation to the draft instruments and look to examples of solutions in national laws that provide 'for expedited enforcement of settlement agreements'.<sup>110</sup>

### **The Combined Effect of the ICC ADR Clauses and Rules and UNCITRAL's Draft Model Law on Conciliation**

The three different instruments so far examined (two from the ICC and one from UNCITRAL) have been considered in isolation. In practice, they may operate together. Parties must agree to use ADR through an appropriate ADR clause (or they may enter into an appropriate agreement after a dispute has arisen) and they must

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105 United Nations Document No. A/CN.9/506, para 44.

106 Ibid.

107 Ibid.

108 *Model Law on Arbitration* art 35(2).

109 United Nations Document No. A/CN.9/506, para 45.

110 Ibid para 48.

incorporate specific procedural rules to govern the chosen dispute resolution process or processes. Their arrangements, constituted by the ADR clause or agreement and procedural rules, operate within the context of applicable national laws. The national laws can and will change if the Model Law is adopted.<sup>111</sup> The combined effect of the three instruments is now considered, with a view to ascertaining if they impact on the issue of enforceability of agreements to conciliate (and mediate) and on the issue of enforceability of settlement agreements.

Although the Model Law appears to provide a platform for the enforcement of agreements to use ADR, it will only assist the parties (assuming now that it is adopted into the national laws of the relevant country) if the ADR clause is stated in *Scott v Avery* form. If it is stated in *Scott v Avery* form, article 14(1) gives courts and arbitral tribunals explicit power to 'give effect' to the agreement of the parties, most likely, by ordering a stay of any proceedings commenced in breach of the agreement. If an agreement to mediate or conciliate is not drafted in *Scott v Avery* form, UNCITRAL's provisions will be of little assistance. Since none of the ICC's ADR clauses make ADR a condition precedent to commencement of litigation (or arbitration), none of them would be supported by the Model Law.

In Australia, the ADR clause must still satisfy the first three prerequisites for enforceability mentioned in the first part of this article (that is, in addition to upholding the principle against ousting the jurisdiction of the courts). It must specify the procedure to be followed in setting up and undertaking the ADR procedure, it must be clear and certain in its own right or by reference to some extrinsic document, and it must be complete and comprehensive. The Model Law does not, of itself, seek to provide procedural certainty (and it says nothing about what constitutes compliance or non-compliance with an agreement to conciliate). The parties need to incorporate more specific procedural rules. They may incorporate UNCITRAL's own Conciliation Rules (which have not been considered here), or the rules of another institution such as those of the ICC. Unfortunately, the ICC ADR Rules do not appear to provide sufficient procedural specificity and certainty to enable a court or arbitral tribunal to ascertain whether or not a party has complied with them. In short, they may be unenforceable. In the event that the parties are unable to agree on a set of procedural rules, the draft Model Law provides that the conciliation 'is to be conducted in such manner as the conciliator considers appropriate'.<sup>112</sup> For the same reasons (lack of specificity, certainty and completeness), this provision is problematic. Without procedural specificity and certainty, courts and arbitral tribunals have no benchmarks by which to determine the compliance issue.

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111 UNCITRAL's draft Model Law on Conciliation will have no effect whatsoever unless it is adopted into the national laws of relevant countries. Signatory countries must put in place domestic arrangements to enable enforcement of the provisions in their country.

112 Art 7(2).

Under both the draft Model Law and the ICC ADR Rules, a party may unilaterally terminate the proceedings upon written notification to the appropriate parties or they may simply frustrate the proceedings by delay, notwithstanding their prior agreement to enter into those proceedings (and although the agreement is stated in *Scott v Avery* form). As mentioned previously, the ICC Rules take a slightly stronger approach requiring the parties to 'discuss' certain matters before termination, but the Rules do not elaborate sufficiently on what is required of the parties to meet this obligation. Commentators agree that an ADR process is not enforceable where the occurrence of the process is at the option of one party or if escalation within the ADR procedure is at the option of either party, which appears to be the case here.<sup>113</sup>

On the matter of enforcement of settlement agreements, the ICC Rules are silent. The ICC Guide reaffirms that 'Such an agreement is binding upon the parties in accordance with applicable law, which may be chosen by the parties in the agreement'.<sup>114</sup> UNCITRAL's draft Model Law (article 15) also affirms 'the principle that the settlement agreement is enforceable'<sup>115</sup> but unfortunately it does not attempt 'to provide a unified solution as to how such settlement agreements might become "enforceable"'.<sup>116</sup>

At first glance, all this may seem disappointing. There is, however, reason to be optimistic. The ICC ADR Rules recognise that if parties have agreed to use ADR, they can be held to their agreement and compelled to participate in some preliminary procedural step (such as in an initial discussion facilitated by the neutral). UNCITRAL has explicitly recognised that 'agreements to conciliate should be binding on the parties, in particular where the parties had expressly agreed not to initiate adversary proceedings until they had tried to settle their disputes by conciliation'.<sup>117</sup> And although it may not yet have it right, UNCITRAL is working 'to improve the possibilities of making settlement agreements binding and enforceable'<sup>118</sup> and it is open to the possibilities of expedited enforcement of such agreements. Much remains to be done. If UNCITRAL moves forward to establish a harmonised statutory provision on enforceability of conciliated agreements, it will be necessary to establish some systematic means of registering these agreements. However, administrative structures to facilitate this process are already in place, namely the major arbitral institutions such as the ICC and ICSID that have already shown a willingness to administer procedures such as mediation and conciliation. It will also be necessary to consider and establish recognised and uniform grounds of court review of such agreements, as is presently the case with arbitral awards.

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113 Boulle and Nestic, above n 5, 477.

114 Guide to ICC ADR, above n 7, 9.

115 United Nations Document No. A/CN.9/WG.II/WP.115, draft art 17, para 46.

116 Ibid.

117 Ibid, draft art 15(2), para 43.

118 United Nations Document No. A/CN.9/506, Part II (Draft Guide to Enactment of the UNCITRAL Model Law), para 149.

## Conclusion

Getting it right is a long process. It has taken many decades to establish the present arbitration system and it is to be expected that it will take some time to establish a system that effectively supports and facilitates the use of ADR. At the moment, the initiatives of the ICC and UNCITRAL are best described as tentative baby steps. They are the first steps towards creation of an international system that gives recognition and effect to ADR clauses and settlement agreements; the first steps towards expanding the range of dispute resolution options available to the parties to international commercial disputes.

On a global scale, the initiatives of ICC and UNCITRAL are piecemeal. The ICC ADR Rules will only affect those parties who deliberately and consciously choose them and UNCITRAL's draft Model Law on Conciliation will only bring about change if it is adopted into the national laws of major trading nations. Even then, the effectiveness of these initiatives has yet to be tested and evaluated. The initiatives of these organisations are significant, not so much because of what they achieve, but because of what they seek to achieve. They signify that the international community is aware of the need for a system that supports the use of ADR options and they evidence willingness on the part of key players in the international community to create such a system.

Whatever steps are taken, there will be some limitations associated with a system which seeks to support ADR options like mediation. There is no system that will ever be able to guarantee a solution through mediation. The essence of mediation is that the parties have the ability to accept or reject any particular outcome and that must remain intact. Arbitration on the other hand will continue to guarantee a solution every time. Parties may take this into account, and make mediation a process of first resort, with arbitration to follow as a backup in the event that agreement is not reached.<sup>119</sup>

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119 Many current dispute resolution clauses adopt a systems approach to dispute resolution, that is, they provide a multi-tiered system of dispute resolution processes (such as mediation or conciliation followed, if the dispute remains unresolved, by arbitration). Clause 4 of the Suggested ICC ADR clauses takes this form. Also see sample clauses provided in the Guide published by the Committee on Trade and Investment Dispute Mediation Experts Group, above n 27, 8-9; and the Handbook of the International Trade Law Section of the Attorney-General's Legal Practice, above n 1, Ch 3.