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New rules to facilitate the use of ADR in resolving international commercial disputes

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International commercial ADR

New rules to facilitate the use of ADR in resolving international commercial disputes

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This article examines the latest initiatives of the International Chamber of Commerce (ICC) and the United Nations Commission on International Trade Law (UNCITRAL) to facilitate the use of ADR in the resolution of international commercial disputes.[1] The initiatives are aimed at enhancing uniformity and predictability of approach to ADR clauses and settlements reached in ADR proceedings. By way of introduction, the article reviews the status of mediation agreements[2] and mediated settlements, absent a system that supports the use of ADR.

Need for international intervention

Until relatively recently there has been no international framework of rules supportive of ADR. In the absence of such a framework, the status of agreements to mediate and of mediated settlements has been uncertain.

Agreements to mediate

In the absence of any international instruments obliging courts to enforce mediation agreements, the issue of enforceability of agreements to mediate is determined on a case by case basis in national courts. The approach of national courts varies.[3] Courts in some jurisdictions have been prepared to uphold the enforceability of agreements to mediate providing the agreements:

- specify 'the procedures to be followed by the parties in setting up and undertaking the mediation',[4] which 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;[5]
- are 'clear and certain in their own right' or make it 'possible to derive certainty from extrinsic documents expressly referred to in the clauses';[6]
- are complete and comprehensive (in the sense of setting out the procedural rules and the rights and obligations of the parties in the process); and
- uphold the principle against ousting the jurisdiction of the courts, by making mediation a condition precedent to commencement of litigation (in *Scott v Avery* form).[7]

In upholding the enforceability of agreements to mediate, courts have accepted a number of premises. First, nothing about mediation requires that the parties be willing or eager to settle. A mediator may bring about settlement between parties who did not initially wish to negotiate or agree. Second, compliance (and conversely, non-compliance) with a mediation agreement can be ascertained

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if the parties have clearly specified the procedures to be followed in setting up and undertaking the mediation and if they have established concrete requirements for compliance with the agreement. Third, courts have accepted that in appropriate cases parties can be held to their agreement to mediate. When parties agree to enter into mediation, they commit themselves to participation in a process from which agreement may come. Therefore, they can be obliged to comply with the stipulated procedural requirements.

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.

This is not to say that mediation and arbitration are on an equal footing. 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 exercise coercive powers through the imposition of cost penalties in an award. Mediation depends on the continued consent and co-operation of the parties. Given the opportunity, a skillful mediator may be able to bring about the necessary consent and co-operation.

Mediated settlements

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

- 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 arbitration or litigation; or
- there is provision for 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.[8] At the present time, this is possible only in very limited circumstances.

In neither instance is there a direct right of enforcement across national boundaries.

Yet there is no theoretical reason for the absence of legal machinery to enforce mediated settlements. If a settlement agreement is reached in mediation, the parties may consent to be bound by its terms and held to those terms. There is no reason for treating an agreed outcome any differently from an imposed one.

Mediation, like arbitration, cannot stand on its own at the international level.[9] 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:

- 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; and
- recognise and enforce the terms of a mediated settlement, except on limited grounds (allowing for the possibility of court review in appropriate circumstances).

The ICC and UNCITRAL have recently promulgated new 'rules' in an effort to establish a suitable international legal system that gives recognition and effect to ADR clauses and settlements reached in ADR proceedings. These efforts are aimed at promoting legal certainty, predictability and consistency in the use of ADR processes in the resolution of international commercial disputes.

The ICC ADR clauses and Rules

The ICC recently extended its dispute resolution services to include a range of ADR procedures. ADR is defined to mean 'amicable dispute resolution' and includes 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).[10]

To facilitate the use of ADR, the ICC has published four 'suggested' ADR clauses for inclusion in contracts[11] and has established a set of procedural rules (the ICC ADR Rules, effective as of 1 July 2001)[12] to govern the ADR proceedings. The four suggested ADR clauses are described below by reference to the caption provided by the ICC.[13]

The clauses are as follows.

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'[14] 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 proceedings under the ICC ADR Rules'.[15] 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'[16] but they 'retain the right not to do so after their discussion'.[17] 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 the 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'[18] 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 process. 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).[19]
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 … [20]

Under the third and fourth clauses, 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. 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 art 4 deals with the costs of the proceedings.

Article 5, which provides for the conduct of the ADR procedure, is the centrepiece of the Rules. 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.[21] If they are unable to agree on a settlement process, mediation is to be used.[22] If the parties follow the ICC guide, they should 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'.[23] By virtue of art 5(5), each party agrees to co-operate in good faith with the neutral in the conduct of the proceedings.

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

1. The signing of a settlement agreement.
2. A written notification to the neutral by one or more parties, at any time after the discussion referred to in art 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 art 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, '[t]he obligation to participate in the first discussion stems from the agreement of the parties to submit their dispute to the Rules'.[24]
3. A written notification by the neutral that the proceedings will not, in the neutral's opinion, resolve the dispute.
4. The expiration of any time limit agreed upon by the parties for the ADR proceedings, so that the proceedings terminate at a fixed time.

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

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 art 5 of those Rules, it appears that the parties have agreed to mediation failing agreement upon another process. However, art 6 allows a party easy access out of the arrangement. Article 6(b) 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 art 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.

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 if 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'.[25] 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.[26]

UNCITRAL Model Law on International Commercial Conciliation

UNCITRAL promulgated a set of conciliation rules in 1980[27] (its arbitration rules had been established in 1976[28] and its Model Law on International Commercial Arbitration became effective in 1985[29]). Absent until recently has been a Model Law on conciliation to complement the Conciliation Rules. In June 2002 UNCITRAL finally adopted a Model Law on International Commercial Conciliation (the Model Law)[30] and a Draft Guide to Enactment and Use of the Model Law (the Draft Guide).[31]

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(3) defines 'conciliation' for the purpose of the Model 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 persons ('the conciliator') 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'.[32]

Article 1(7) gives the parties freedom to 'agree to exclude the applicability of this Law', while art 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.

Article 1(8) provides that the Model 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 judicial or arbitral proceedings, attempts to facilitate a settlement'[33] and in other areas of exclusion specified by enacting states.[34]

Despite the last mentioned restrictions, the provisions are potentially wide reaching in their application, allowing parties to domestic matters to opt in to 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 art 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 5 makes provision for the number of conciliators (there is to be one conciliator, unless otherwise agreed by the parties) and provides mechanisms for appointment of conciliators.

Article 6 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'.[35] Failing agreement, conciliation is to be conducted in such a manner as the conciliator considers appropriate.[36] The conciliator may make proposals for a settlement of the dispute,[37] a provision that may end up excluding some models of mediation from UNCITRAL's scheme.

The circumstances in which the conciliation proceedings are terminated are set out in art 11. Conciliation may be terminated by:

(1) the conclusion of a settlement agreement;
(2) a declaration of the conciliator (after consultation with the parties) where he or she concludes that further efforts are no longer justified;
(3) a declaration of the parties to the conciliator; or
(4) declaration by either one of the parties to the other party or parties and the conciliator 'to the effect that the conciliation proceedings are terminated'.[38]

Article 11 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. A party may unilaterally terminate the proceedings at the time of their commencement (or shortly thereafter) by giving a declaration (which need not be in writing) to that effect to the other party or parties and the conciliator. Under the 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'.

Article 13 is the strongest provision in UNCITRAL's scheme. It provides that:

> Where the parties have agreed to conciliate *and* 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, except to the extent necessary for a party, in its opinion, 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 [emphasis added].

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'.[39] 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'.[40]

Unfortunately, the Model Law is silent on exactly what action or inaction might constitute violation of the agreement.

The exception contained in art 13 appears to weaken the overall effect of the provision. There was some concern that this exception might be used to defeat the intention expressed in the first part of art 13.[41] The Working Group envisages that initiation of arbitral or court proceedings 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'.[42]

The last article of the Model Law, art 14, deals with enforceability of a settlement agreement reached in conciliation. The Working Group considered four variants of this article[43] reflecting what it referred to as the range of different legislative solutions and views taken on the matter of enforceability.[44] Three of the variants (Variants B, C and D) have now been abandoned. The abandoned variants are the more interesting ones, and are discussed in turn below.

Variant B provided that if the parties reached agreement, that agreement was binding and enforceable as a contract.[45] 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'.[46] This provision would have added nothing to the current state of the law in Australia.

Variant C provided that 'If the parties reach agreement on a settlement of the dispute, they may appoint an arbitral tribunal ... and request the

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arbitral tribunal to record the settlement in the form of an arbitral award on agreed terms'.[47] This variant offered 'a basic procedural framework as to how a settlement agreement [might] become expressed in the form of an arbitral award'.[48] 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'.[49] The draft provision offered no indication as to the procedure by which such an arbitral award was to be produced[50] and no guidance as to the meaning of the term 'enforceable as an arbitral award'.[51] If the Working Group had pursued this option, these aspects of the provision would have required further consideration.

The Commission has now adopted a modified version of Variant A, the variant that reflects 'the smallest common denominator between the various legal systems'.[52] This is contained in art 14, which provides that:

> If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable … [the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement].

Several objections were expressed as to the form of art 14.[53] It was objected to on the grounds that it did not:

- create 'any certainty as to the level of enforceability of the agreement';[54]
- add to the substance of existing law in the many countries where settlement agreements are readily recognised as contracts; or
- '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.[55]

It is unfortunate that Variants C and D have been abandoned. In its present form the 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).[56]

Combined effect of the ICC ADR clauses and Rules and the Model Law

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 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.[57] 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, art 13 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 Model Law provides that the conciliation is to be conducted 'in such a manner as the conciliator considers appropriate'.[58] 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.

Under both the Model Law and the ICC ADR Rules, a party may unilaterally terminate the proceedings upon 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.[59]

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'.[60] UNCITRAL's Model Law (art 14) also affirms the principle that a settlement agreement is enforceable; but unfortunately it does not provide the unified solution to enforceability that was hoped for.[61]

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'.[62] And although it may not yet have closed all the gaps, UNCITRAL is working 'to improve the possibilities of making settlement agreements binding and enforceable'[63] and it is open to the possibilities of expedited enforcement of such agreements.

Conclusion

On a global scale, the initiatives of ICC and UNCITRAL are tentative and piecemeal. The ICC ADR Rules will only affect those parties who deliberately and consciously choose them, and UNCITRAL's 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. ●

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Endnotes

1. Also see Wolski B 'Recent developments in international commercial dispute resolution: expanding the options' (2001) 13 Bond LR 245.

2. For the sake of convenience, the article focuses on and uses the terminology of mediation, arguably the most common ADR process.

3. 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* (1995) 36 NSWLR 709. These and other relevant decisions are discussed by Boulle L and Nesic M *Mediation: Principles, Process, Practice* Butterworths Sydney 2001 at pp 473–74 and Mead P 'Enforceability of ADR clauses' (1997) 16 *The Arbitrator* 34 at 36–41. For a recent discussion of the requirements for enforceability of agreements to mediate see *Aiton v Transfield* (1999) 153 FLR 236. For a general discussion of enforcability see Boulle L *Mediation: Principles, Process, Practice* Butterworths Sydney 1996 at pp 262–75 and Boulle and Nesic at pp 469–86.

4. Boulle and Nesic, above note 3, at p 479.

5. Boulle and Nesic, above note 3, at pp 473 and 479.

6. Boulle and Nesic, above note 3, at p 479.

7. (1856) 25 LJ Ex 308; 10 ER 1121.

8. See for example provisions in the the rules of the Family Court of Australia relating to family mediations.

9. Contrary to popular belief, 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,

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treaties, national laws and arbitration rules which supports it: see, for instance, arts II and V of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention); 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; and arts 8 and 36 of the UNCITRAL Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985 (the Model Law on Arbitration).

10. 'Introduction' to the ICC ADR Dispute Resolution Services, available at <www.iccwbo.org/index_adr.asp>.

11. The ICC has cautioned that the parties and their counsel should evaluate the enforceability of its suggested clauses under the law applicable to the contract. See 'Suggested clauses' at above note 10.

12. 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. See 'Rules' at above note 10.

13. See 'Suggested clauses' at above note 10. The clauses should be read in conjunction with the Guide to ICC ADR, available at <www. iccwbo.org /drs/english/adr/guide.asp>. The Guide provides an explanation of the Rules and of the various settlement processes that can be used pursuant to the Rules.

14. Guide to ICC ADR, above note 13 at Part 3.

15. 'Suggested clauses', above note 10.

16. Guide to ICC ADR, above note 13 at Part 3.

17. Guide to ICC ADR, above note 13 at Part 3.

18. 'Suggested clauses', above note 10.

19. Guide to ICC ADR, above note 13 at Part 3.

20. 'Suggested clauses', above note 10.

21. The parties may choose any ADR process they consider appropriate including mediation, mini-trial, neutral evaluation or a combination of such processes: the Guide to ICC ADR, above note 13.

22. Article 5(2) at Part 2, art 5 'Rules' at above note 10.

23. Guide to ICC ADR, above note 13 at Part 2, art 5(5).

24. Guide to ICC ADR, above note 13 at Part 2, art 6(6).

25. Guide to ICC ADR, above note 13. It may also result in a non-binding opinion or evaluation, depending on the process chosen.

26. Above note 10.

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

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

29. Above note 9. '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 at para 9.

30. Adopted by the Commission on 24 June 2002 (as it appears in annex I to the Report of the United Nations Commission on International Trade Law on its 35th session, held in New York on 17–28 June 2002). See General Assembly, Official Records, 57th session, Supplement No 17 (A/57/17). Also see the report of the UNCITRAL Working Group on Arbitration and Conciliation at its 35th session, held at Vienna in November 2001, set out in United Nations

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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').

31. The Draft Guide is contained in United Nations Document No A/CN.9/514.

32. Model Law art 1(3).

33. Model Law art 1(9).

34. Model Law art 1(9). For example, a state might exclude collective bargaining relationships between employers and employees.

35. Model Law art 6(1).

36. Model Law art 6(2).

37. Model Law art 6(4).

38. Model Law art 11(d).

39. United Nations Document No A/CN.9/WG.II/WP.115 at para 43.

40. Above note 31 at para 75.

41. Above note 39 at paras 42–43.

42. Above note 39 at para 76.

43. These are set out in above note 31 at draft art 17, paras 45–49.

44. Above note 39 at para 45. Also see above note 31 at paras 77–81 for a discussion of the different solutions regarding enforceability of settlement agreements.

45. Above note 39 at draft art 17 [Variant B].

46. Above note 39 at para 47.

47. Above note 39 at draft art 17 [Variant C].

48. Above note 39 at para 48.

49. Above note 39 at draft art 17 [Variant D].

50. Above note 39 at para 49.

51. As above.

52. Above note 31 at para 81. For the original wording of Variant A, see draft art 17, above note 39.

53. United Nations Document No A/CN.9/506 at para 44.

54. Above note 53.

55. Above note 53.

56. Model Law art 35(2).

57. UNCITRAL's 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.

58. Article 6(2).

59. Boulle and Nesic, above note 3 at p 477.

60. Guide to ICC ADR, above note 13 at 9.

61. Above note 39 at para 46.

62. Above note 39 at para 43.

63. Above note 53 at para 149.

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