CHAPTER - 4
STATUS AND EFFICACY OF ‘CONCILIATION’ IN ENFORCEMENT OF SETTLEMENT AGREEMENT

After discussing efficacy of adjudicatory method of arbitration in the previous chapter, the researcher would now examine efficacy of a method of ADR which is sought after i.e. Conciliation. As already mentioned in chapter 2, internationally followed concept of ‘Conciliation’ under UNCITRAL encompasses all forms of ADR without explicitly stating so. The conciliation includes all methods of settling the dispute in non adjudication manner with the help of third neutral party called by whatever name.

4.1 HISTORICAL EVOLUTION OF CONCILIATION

The origin of commercial arbitration dates back to 13th century England, when merchants sat as judges in “piepowder courts” and on tribunals of guilds and trading companies. The first truly international commercial arbitration system began operating in 1923, when the International Chamber of Commerce (ICC) established its International Court of Arbitration. Modern global interdependence makes international conflict resolution increasingly urgent. To deal with economic and legal aspects of globalization or internationalization, dispute resolution techniques are used to seek peace, ensure stability, and promote reconciliation and coexistence in a diverse world with conflicting values and objectives.

The resolution of international (“transnational”) commercial disputes requires careful appraisal of the underlying business transactions from which a given dispute arises. Particular attention must be paid to several attendants problems-political, economic, jurisprudential, and cultural-that are seldom encountered in the resolution of domestic commercial disputes. While drafting the agreement, an important component should be dispute resolution clause that reflects the parties’ explicit intention to anticipate future disputes and resolve them in a manner conducive to preserving the business relationship.

388 Supra Note 14, at 1337, 1344.
Until recently, litigation and arbitration represented the only resolution techniques. The last decade however has witnessed an expansion of the available techniques, which manifests growing business confidence in the practice of resolving disputes through the use of voluntary, non-binding processes such as negotiation, mediation, conciliation, and the mini trial, etc. Adversarial adjudicative techniques, such as arbitration and litigation, remain important; but executive management has begun to inquire into the efficacy of those techniques, in the light of growing experience in the resolution of domestic disputes. In the United States business interest continue to expand dramatically their use of domestic dispute resolution techniques (ADR). This expansion has several critical implications for the resolution of international business disputes. First, business relies far less upon the courts and lawyers. Second, business executives are increasingly determined to manage and control the dispute resolution process. Third, there is a growing reliance upon negotiation, mediation, and conciliation dispute resolution techniques, in lieu of traditional litigation and even arbitration. And finally, there is greater awareness of the need to include an appropriate dispute resolution clause in the underlying commercial agreement.  

Mediation is no longer the stepchild of international dispute resolution practice scholars and practitioners recognize its enormous potential as a confidential, cost saving, time saving, relationship enhancing process that gives control over disputes to the affected parties and often results in greater levels of satisfaction than litigation. As the number of mediations increases, there is an inevitable increase in the litigation that arises out of mediation. Professor Coben conducted a review of cases involving mediation in the United States in an article published in 2006. He found over 1200 cases in which substantive issues related to mediation were litigated and resulted in reported decision. Many of those cases dealt with the enforcement of a settlement agreement achieved through mediation (“an MSA”).

The developments in international and regional organizations, laws and protocols reflect the growing interest in mediation at international level. The organizations such

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390 Supra Note 2, at 15.
as the Commercial Arbitration and Mediation Centre of the America (CAMCA), the
IICPR International Institute for Conflict Prevention & Resolution, and the
International Chamber of Commerce (ICC), to mention the few, are the organizations
that offer rules and procedures to resolve the private commercial disputes through
mediation. The World Trade Organization’s (WTO) dispute settlement system offers
mediation as one method of resolving the trade disputes between members. And a
primary example of legislation is the Model Law on International Commercial
Conciliation that was developed by the United Nations Commission on International
Trade and Law (UNCITRAL) in the year 2002.

A “law of ADR” is in the process of being formed on a domestic scale, and so far this
process has taken shape only in those countries where ADR procedures have begun to
play a role in practice. The world wide increased use of conciliation as well as the
need for harmonized solutions in a number of issues involving the conciliation
procedure motioned UNCITRAL to prepare its most recent model legislation on the
topic. It is believed that there is no need of law on enforcement as it is mainly
dependent on the voluntary participation by the party. Some states have made
legislations on conciliation due to demands of practice.

International lawmakers are showing a growing interest in mediation. Mediation or
conciliation, offers an attractive option of self determination to parties involved in
international business disputes by allowing them to craft and accept their own
agreement.

In a perfect world no enforcement mechanism is required for mediation because
voluntary agreement yields voluntary compliance. In the world of international
business, imperfect circumstances affect the performance of mediation agreements.
For instance, human rights abuses could make investors balk, the commodity in
question could be subject to embargo, or the currency designated for payment could
suffer devaluation. Moreover, recent attempts to standardize the international
enforcement of mediation agreements have failed, leaving enforcement dependent on

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393 Supra Note 12, at 223.
varied national policies. As a result mediating a settlement in good faith does not immunize it from potential future challenges to compliance.394

While mediation is seen as benefit to the parties, there is concern that a summary enforcement mechanism would undercut mediation’s value of voluntariness and self determination.395 As a result of the procedural and theoretical issues surrounding the establishment of an overreaching enforcement mechanism for MSA’s, no such mechanism has been developed to govern international mediations.396

Successful ADR proceedings (in the sense that a settlement agreement is reached), paradoxically may create more problems than does their failure.397 A settlement agreement is a contract to which normal rules apply; the usual rules for its validity must be respected, as must any relevant rules of public policy or other mandatory provisions of law, in particular those relating to the requirement that the parties had the right and capacity to settle the matters in dispute.398

Although disputes between businesses engaged in transborder collaborations are inevitable, efficient and fair resolution of these conflicts, regrettably, is not. There are no international conventions relating to ADR. Adjudication remains the primary dispute resolution choice, despite the escalating costs of arbitration and litigation. In addition settlements negotiated during litigation are influenced by predictions of potential outcomes and are typically suboptimal because they fail to realize all gains actually available in these disputes.399

As a response to the challenges implicit in the conflicts that emerge among domestic laws, international legal groups and intergovernmental organizations continue to work towards the harmonization and unification of law initiatives through international conventions, treaties, regulations, directives, model laws and rules and declaration.400

394 Supra Note 17, at 1385, 1387.
395 Supra Note 392.
396 Ibid.
398 Ibid.
399 Supra Note 84, at 1251 & 1262.
400 Supra Note 303, at 71.
These legal instruments constitute an increasingly significant source of international mediation law.\footnote{Ibid.} International conventions are binding on signatory states; however they are not necessarily effective domestically unless and until they are incorporated into the domestic law of the relevant state. A monist approach to this issue takes the view that both international and domestic laws are naturally integrated. Therefore once the country has signed an international agreement, the terms of the agreement are automatically binding and effective at domestic level.\footnote{Ibid.} The Supreme Court of India has accepted this approach in *Vishaka’s* case.\footnote{Vishaka v. State of Rajsthan, 1997 DGLS(Soft.) 1037.} In contrast dualist approach followed by many Commonwealth countries such as United Kingdom, and Australia, views international and domestic legal systems as distinct.\footnote{Supra Note 303, at 71.} For international laws to have effect in dualist jurisdiction, they must be implemented through legislation passed by domestic legislature.\footnote{Ibid.} Directives are legislative acts of the European Union, which require member-states to achieve a particular result without dictating the means of achieving it.\footnote{Ibid, at 73.}

The United Nations was originally created as a means to advance higher global standards of living, social progress, and economic development. UNCITRAL, too, was established to promote those same objectives. As an extensive of these efforts, the General Assembly adopted the UNCITRAL Rules on International Commercial Conciliation on December 4, 1980. The rules are directed at potential or actual parties to a dispute. The Rules are meant to govern “the conduct of conciliation” intended to resolve a dispute or disputes between the parties. The Conciliation Rules were first adopted because the supporters of the Resolution recognizes the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations.\footnote{William K Slate II, Seth H Lieberman, Joseph R Weiner, Marko Micanovic, UNCITRAL (United nations Commission on International Trade Law): Its workings in International Arbitration and a New Model Conciliation Law, 6 CARDOZO J. CONFLICT RESOL. 73, 95 2004.} With the increased use of international commercial conciliation came the prevailing view that it would be worth-while to prepare uniform legislative rules, in addition to the existence of such Rules, to support this increased
conciliation use. As efficient and instructive as the Rules were, they might have left a void for dispute resolution institutions and disputing parties. In an effort to fill in these gaps when the parties mutually desired to conciliate but had not agreed on a set of conciliation rules, the conciliation process might benefit from the establishment of non-mandatory legislative provisions. The UNICITRAL has adopted Model Law on the commercial conciliation in the year 2002 which is directed against the states.

4.2 EXPLORING EFFICACY OF ENFORCEMENT OF SETTLEMENT AGREEMENT IN ‘CONCILIATION’ IN COMPARATIVE CONTEXT

Only legislation could achieve the level of predictability and certainty necessary to facilitate enforcement of settlement agreements resulting from conciliation. The enforceability of mediation agreements varies according to the legal status of the mediated outcome and the extent to which it is recognized by local courts. The Slovakian Law on Mediation recognizes different legal forms for mediated settlements. It provides that mediated settlements must be in writing in order to be binding on the parties. The party may apply for execution of the settlement agreement if it is in the form of a notarial deed and has been ‘approved as conciliation before a court [or] arbitration body’. In the Netherlands, mediated settlements are statutorily accommodated by the legal mechanism of the declaratory settlement deed (Vaststellingsovereenkomst). In France and Austria, the relevant laws on mediation in civil matters are silent on the legal form of mediated settlements, implicitly acknowledging parties autonomy to choose one of a number of legal forms to enforce agreements resulting from mediation. In many jurisdictions, particularly those in the common law tradition, legislative provisions relating to the legal status and enforceability of mediated settlements frequently take the form of sector-specific regulations and are not uniform throughout the jurisdiction.

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408 Ibid.
409 Ibid, at 96.
410 Ibid.
411 Ibid.
412 Ibid.
413 Supra Note 303, at 51.
414 Ibid, at 303.
415 Ibid, at 303-304.
416 Ibid, at 304.
certain US states, for example, the status of mediated agreements may depend on whether or not the mediations took place under the aegis of a court or tribunal.\footnote{416}{Ibid.}

This variability across jurisdictions, and consequent legal uncertainty, is viewed by many as a major limitation of international mediation.\footnote{417}{Ibid.} It is felt desirable to have a mechanism for enforcing agreements reached in mediation.\footnote{418}{Supra Note 190, at 576.} The primary international forum for attempts to resolve recognition and enforcement problems has been the Hague Conference on Private International Law, which sponsored negotiations of a convention on international jurisdiction and recognition of judgments.\footnote{419}{Ibid.} Those negotiations produced a draft in 2001 but at that point the parties reached a stalemate on multiple issues.\footnote{420}{Ibid, at 577.} The project has now been reduced in scale with new, more limited goal of drafting a less ambitious international convention that would make choice–of-court agreements effective in the international business context.\footnote{421}{Ibid, at 578.} The lack of adequate enforcement machinery remains a major problem in international adjudication.\footnote{422}{Ibid, at 578.} There are no comparable special enforcement mechanisms for agreements parties reach in mediation.\footnote{423}{Ibid.} The main shortcomings of mediation in the international domain relate to its lack of finality and its uncertainty in relation to enforceability issues.\footnote{424}{Ibid, at 581.} As enforcement often takes the form of separate time consuming contract litigation, an expedited method could contribute to mediation’s attractiveness as a reliable, speedy, and relatively low cost process.\footnote{425}{Supra Note 190, at 581-82.}

The Uniform Mediation Act (UMA) enacted in United States is a major milestone in the development of procedures to make mediation more effective within, and as a complement to, litigation. In USA, when a mediated case was originally filed in state court, settlement enforcement can take a number of paths.\footnote{426}{Supra Note 190, at 581-82.} In Louisiana, a party may file a motion to enforce a settlement rather than a new suit, while Texas requires a separate suit to enforce mediated agreements. In some states, settlement

\footnotesize{\begin{itemize}
  \item \footnote{416}{Ibid.}
  \item \footnote{417}{Ibid.}
  \item \footnote{418}{Supra Note 190, at 576.}
  \item \footnote{419}{Ibid, at 577.}
  \item \footnote{420}{Ibid, at 578.}
  \item \footnote{421}{Ibid, at 578.}
  \item \footnote{422}{Ibid.}
  \item \footnote{423}{Ibid, at 581.}
  \item \footnote{424}{Supra Note 303, at 1.}
  \item \footnote{425}{Supra Note 190, at 581-82.}
  \item \footnote{426}{Ibid, at 582.}
\end{itemize}
enforcement is eased if the agreement is approved by the court, while in others approval is necessary to enforce certain agreements.\footnote{Ibid, at 583.}

In order to harmonise such diversities in increasingly developing globalised commercial environment, the UNCITRAL recognizes the importance of creating a Model Law to establish a suggested pattern for lawmakers in national governments to consider adopting as part of their domestic legislation on the subject matter.\footnote{Supra Note 403, at 96.} A model law is a legislative text that is recommended to States for incorporation into their national law, as opposed to the Conciliation Rules that were intended to act as an aid to individual conciliating parties and the dispute resolution administrative bodies.\footnote{Ibid, at 96.}

A model law has no legal force until enacted as a law of a nation state.\footnote{Supra Note 298, at 73-74.} Model Law on Conciliation enacted by the United Nations Commission on International trade Law (UNCITRAL) provides a model for the regulation of conciliation in international commercial matters.

UNCITRAL issued its Model Law on International Commercial Conciliation, 2002 because of the increased use of conciliation in dispute settlement practice in various parts of the world, including regions where until two decades ago it was not commonly used.\footnote{Supra Note 407, at 96-97.}

The drafters of the Model law were aware that there are inherent differences between parties from different countries. In recognition of this, the provisions of the Model Law of International Commercial Conciliation are designed to accommodate differences and leave the parties and conciliators free to carry out the conciliatory process in an appropriate manner. Essentially, the provisions of model law seek to strike a balance between protecting the integrity of the conciliation process, for example, by ensuring that the parties expectations regarding the confidentiality of the
mediation process are met, and providing maximum flexibility by preserving party autonomy.\footnote{Ibid. at 98.}

UNCITRAL attempted to remedy this varied assortment of enforcement measures by developing a model law on conciliation. Given the diversity of approaches, the drafting committee for UNCITRAL searched for the lowest common denominator. The drafters recognized that the enforcement of conciliation agreements varied greatly by legal system and often relied on adjudication with myriad domestic procedure technicalities and contract law conceptions. The drafters noted that many practitioners advocated for an arbitral award like process. Practitioners suggested that expedited enforcement would encourage the use of conciliation by avoiding court actions to enforce settlements, which could take years to reach a judgment. Despite noting these current opinions, the drafters failed to find sufficient commonality to distill a uniform model law under their lowest common denominator approach. The drafters eventually abandoned their efforts and delegated the development of enforcement procedures to the individual adopting nation-states.\footnote{Supra Note 17, at 1385, 1387.} However, meeting the practitioner’s demand, Article 14 of the Model Law was enacted which states “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”. This is in response to the call for either an expedited enforcement regime, or treatment similar to that for an arbitral award for the purpose of enforcement. Without there being a clear provisions for the enforcement of settlement agreements, a law on international commercial conciliation would be incomplete and the parties would be left in uncertainty as to how to execute the settlement agreement. The Model Law on Conciliation does not refer to the topic of the recognition and enforcement of foreign settlement agreements.\footnote{Supra Note 378, at 346.}

The European Parliament and the Council of the European Union adopted a Directive of Certain Aspects of Mediation in Civil and Commercial Matters (the “EU
Directives”) on May 21, 2008. The EU Mediation Directives\textsuperscript{435} recognized that mediation can provide a cost effective and quick extra judicial resolution of disputes in civil and commercial matters through process tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and more likely to preserve an amicable and sustainable relationship between the parties. The said EU directives recognised importance of enforcement; it directs Member States to ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should be possible for a member State to refuse to make an agreement enforceable if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement.

Article 6 of the EU directives\textsuperscript{436} directs its member state to ensure that the written agreement resulting from mediation be made enforceable.\textsuperscript{437}

Compared with the UNCITRAL Model Law in which operational methods and legislative discretion are left in the hands of the State legislatures, the EU Directive is more like a law than a directive in that members of the EU must adopt the procedures and are required to develop the legal mechanisms according to the Directive to improve the enforceability of mediation settlement agreements. In practice, “[a] few European jurisdictions have a procedure for signing and notarizing a settlement agreement that is then enforceable in summary proceedings.”\textsuperscript{438}

\textsuperscript{437} “Enforceability of agreement resulting from mediation
1. Member State shall ensure that it is possible for the parties or for one of them with the explicit consent of the others to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for enforceability.
2. The content of the agreement may be enforceable by the court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.
3. ............
4. ...........................................

The question arises whether domestic dispute resolution principals can be applied to transnational business. The answer an emphatic “yes” can be found by examining the nature of the underlying transnational transaction, the evolving international political and economic change, and, perhaps most importantly, the expectations of the parties involved in such transnational business opportunities. Although disputes between businesses engaged in transborder collaborations are inevitable, efficient and fair resolution of these conflicts, regrettably, is not. While there have been significant improvements in making the mediation process more efficient, less progress has been made in the establishment of an internationally recognized framework for Alternative Dispute Resolution.

Efficient methods to resolve transborder disagreements contribute substantially to the growth and success of international trade. Workable systems of transborder dispute resolution are required for resolving private problems and protecting commercial legal rights. The limited non violent dispute resolution menu of avoidance, consensual agreements, and letting outsiders decide through adjudication, litigation, or arbitration has produced an odd result where transborder commercial disputes are frequently resolved through arbitration, while litigation and mediation are seldom used.

The absence of judicial power to mandate mediation leaves the choice of a dispute resolution process in transborder commercial disputes to affirmative decisions by disputants. These decisions may be made prior to initiation of the dispute through dispute resolution contract clauses in documents creating transborder transactions. Disputants face substantial cognitive, cultural, and sometimes conflicting economic interest based barriers when they choose an appropriate process to resolve transborder commercial disputes.

In spite of voluntariness, the execution or enforcement of the settlement agreement remains uncertain since the settlement agreement is different from an arbitral award or a court judgment which has compulsory enforceability. If one party acts in bad faith by capitalizing on the mediation settlement agreement as a contract without

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435 Supra Note 2, at 16.
440 Supra Note 84, at 1251 & 1261.
441 Ibid.
442 Ibid, at 1251 & 1262.
compulsory enforceability, the intervention of the court is unavoidable when the committing party seeks contract fulfillment. Everything goes back to the starting point. A settlement agreement without effective and complete execution or enforcement is deemed a waste of time and energy as “Parties want money, not a piece of paper.”

4.3 EFFICACY BEYOND UNCITRAL
Apart from the UNCITRAL Model Law on Commercial Conciliation, intended to serve as a point of reference for states enacting mediation legislation, a number of model rules for international mediation procedures exist. These are standard provisions to be incorporated into an agreement by way of reference, and therefore of a purely contractual nature. In the absence of adequate international treaties and national statutes that deal with the recognition of agreements reached in “foreign” mediation, alternative procedures are subject to the full range of legal problems arising out of the multiplicity of legal systems that affect international trade. Disputes subject to international commercial mediation may require enforcement in multiple nations. International businesses may have assets in offices or subsidiaries spread throughout the world that could be pledged to reach a settlement. If a party to mediation agreement commits default, the location of assets becomes vitally important. The practical difficulty of enforcing a legal settlement agreement across multiple legal and governmental jurisdictions suggest the dilemma and risk of enforcing mediation settlement agreements in an international setting where one party repudiates the agreement, and enforcement involves foreign legal courts. International enforcement is more onerous than in a domestic mediation case, though not insurmountable. Due to UNCITRAL’s failure to develop a model law system to enforce the mediated settlement agreements internationally, court judgments in this regard face hurdles outside their jurisdiction of origin. So far, no consensus in the form of an international treaty or a convention has been reached with respect to the recognition and enforcement of mediation settlement agreements. Some nations have entered into bilateral enforcement treaties or regional conventions. Nations differ

443 Supra Note 438, at 489, 491.
444 Supra Note 12, at 223, 224.
445 Supra Note 17, at 1385, 1392.
446 Supra Note 438, at 489, 492.
447 Ibid.
in their procedures for enforcing mediation settlement agreements and some may refuse to recognize the procedure of the nation of origin. The resulting uncertainty in enforcing mediation agreements contributes to underutilization of the mediation in international commercial disputes. 448

4.3.1 Different Approaches By Various Countries On Enforcement Of Settlement Agreement

In the national legislation of some countries, parties who have settled a dispute through conciliation are empowered to appoint an arbitrator specifically to issue an award based on the settlement agreement of the parties. Such legislation and practice were reported, for example, in Hungary and the Republic of Korea. In China, where conciliation may be conducted by an arbitral tribunal, legislation provides that if conciliation leads to a settlement agreement, the arbitral tribunal shall make a written conciliation statement or make an arbitration award in accordance with the settlement agreement. A written conciliation statement and a written arbitration award shall have equal legal validity and effect.

In some jurisdictions, the status of an agreement reached following conciliation depends on whether or not the conciliation took place within the court system and legal proceeding in relation to the dispute are on foot. For example, under Australian legislation, agreements reached in conciliation held outside the sphere of court-annexed conciliation schemes cannot be registered with the court unless court proceedings are on foot, whereas, in court-annexed conciliation schemes, a court may make orders in accordance with the settlement agreement and the orders have legal force and are enforceable as such.

Some legal systems provide for enforcement in a summary fashion if the parties and their counsel signed the settlement agreement and it contained a statement that the parties may seek summary enforcement of the agreement. Also, settlements might be the subject of expedited enforcement if, for example, the settlement agreement was notarized or formalized by a judge. For example, in Bermuda, legislation provides that if the parties to an arbitration agreement which provides for the appointment of a

448 Supra Note 17, at 1385, 1392.
conciliator reach agreement in settlement of their differences and sign an agreement containing the terms of settlement, the settlement agreement shall, for the purposes of its enforcement, be treated as an award on an arbitration agreement and may, by leave of the court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the agreement. Similarly, in India, a settlement agreement that has been signed by the parties is final and binding on the parties and persons claiming under them respectively and shall have the same status and effect as if it is an arbitral award. The other condition being it should be authenticated by the conciliator. In Germany, the Zivilprozentordnung (Code of Civil Procedure) expressly takes account of the practice that amicable settlement of a dispute is often reached during the arbitration procedure by providing that the tribunal shall record the settlement in the form of an arbitral award on agreed terms, if requested by the parties, and such an award shall have the same effect as any other award on the merits of the case.

However, in some jurisdictions the enforceability of a settlement agreement reached during conciliation proceedings will only apply if the settlement agreement was reached between the parties to an arbitration or arbitration agreement. For example, in the Hong Kong Special Administrative Region of China, where conciliation proceedings succeed and the parties make written settlement agreement (whether prior to or during arbitration proceedings), such agreement may be enforced by the Court of First Instance as if it were an award, provided that the settlement agreement has been made by the parties to an arbitration agreement. This provision is supported by Order 73, rule 10 of the Rules of the High Court, which applies the procedure for enforcing the arbitral awards to the enforcement of settlement agreements so that summary application may be made to the court and judgment may be entered in terms of the agreement.449

Thus as noted above, nations differ in their procedures for enforcing mediation settlement agreements and some may refuse to recognize the procedure of nation of origin. For example, the United States might refuse to recognize a summary enforcement award issued in India because India does not allow judges to initially

review the fairness of awards. China might refuse to recognize an award on agreed terms from Hungary, because the mediation in Hungary preceded arbitration rather than interrupting the arbitral proceedings.\footnote{Supra Note 17, at 1385, 1392.}

China is said to be birth place of conciliation and thus the Chinese tradition of conciliation is referred to as “the Oriental Experience”. In contrast to worldwide issues such as improving the mediation process and confidentiality, China has a peculiar deficiency in the area of enforcement, despite the passion in this booming emerging economy for using mediation as the optional alternative dispute resolution mechanism.

4.4 EXPLORING ENFORCEABILITY OF SETTLEMENT AGREEMENT IN CONCILIATION (ADR) BY COMPLEMENTARY TECHNIQUE

Arbitral Awards are generally enforceable throughout the world under the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards, other treaties, or international or domestic law.\footnote{Ibid.} To what extent are the results of a successful ADR enforceable? This is an important question because an unenforceable result may have limited value.\footnote{Supra Note 95, at 392.}

The avenues for enforcement of Mediation Settlement Agreements (MSAs) are not as robust as they should be if we were to maximize the utility of this dispute resolution tool. Parties can, of course, attempt to enforce the MSA under the contract law principles subject to the usual contract defenses.\footnote{Peter M. Wolrich, ADR UNDER THE ICC ADR RULES, in ADR IN BUSINESS PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES 384 (Vol. II, Arnold Ingen- Housz ed., Kluwer International, 2011).} MSAs can be entered as a judgment in some jurisdictions. For example, the EU Mediation Directives expressly contemplates such court action in providing that member States ‘shall ensure that it is possible for the parties, or one of them with the explicit consent of the others, to request that the content of the written agreement be made enforceable by a court or
other competent authority in a judgment or decision or in an authentic instrument in accordance with law of the member State where the request is made.\footnote{Ibid.}

The opinions of the scholars are divided on the issue of summary or expedited enforcement of mediated settlement agreements. There are important values at stake on each side, and any enforcement procedure, including the status quo, compromises some of those values.\footnote{Supra Note 190, at 586.} The summary enforcement could support the growth of mediation. From the point of view of many international transactional lawyers, finality is the crux of the matter. “What’s the point of mediation if one has to go and litigate to get the agreement enforced?”\footnote{Ibid, at 586-87.} For these and other lawyers standardizing and streamlining the enforcement process would remove a practical barrier and encourage mediation.\footnote{Ibid, at 587.} Summary enforcement could also make it easier to maintain the confidentiality of mediation communications by reducing the need for evidence pertaining to the validity of agreements in contract actions.\footnote{Ibid.} Ironically, while enforcement mechanism involving courts would further integrate mediation and adjudication, it would also disentangle mediated agreements from contract litigation.\footnote{Ibid.}

Many forms of summary enforcement would by pass any consideration of contract defenses and thus eliminate the application of those standards in court.\footnote{Ibid.} This would enable sophisticated parties to take advantage of weak or uninformed parties and in this way threaten mediation’s core principle of party self determination.\footnote{Ibid.} If this happens, summary enforcement procedures applied in the adjudication system could produce results that are antithetical to mediation values.\footnote{Ibid.}

Enforcing mediated settlement agreements could raise the question about the role of the court. Basically arbitration and litigation are adjudicated upon the statutory rules. Both these processes are parallel. However mediation is not based on statutory
provisions. Self determination allows the parties to consider needs and interests that do not have currency in the world of legally-cognizable categories.\textsuperscript{463} The parties arriving at settlement may ignore the legal doctrines. Thus if arbitration like enforcement procedures are applied to mediated agreements between parties who have stepped outside the “shadow of the law”, there may be stark questions about the appropriate enforcement role of the courts.\textsuperscript{464}

If a law suit is filed before the mediation has commenced, it is possible in many jurisdictions to have the court enter the settlement agreement as a consent decree and incorporate it into the dismissal order.\textsuperscript{465}

Even if there is no court proceeding, in some jurisdictions the courts are available to enter a judgment on the MSA.\textsuperscript{466} For example, in the United States the Colorado International Dispute Resolution Act was enacted to further the policy of encouraging parties to international transactions to resolve dispute, when appropriate, through arbitration, mediation or conciliation.\textsuperscript{467} To foster that goal, the statute provides that a settlement agreement reduced to writing and signed by the parties may be presented to the court as a stipulation and, if approved, shall be enforceable as an order of the court.\textsuperscript{468}

However such court action is not available in all jurisdictions, and historically court judgments and decrees have not been accorded the deference shown to arbitral awards that are recognized and enforced in the more than 140 countries that are signatory to the New York Convention.\textsuperscript{469} Thus even if a judgment or court decree can be obtained, the difficulties of enforcing a foreign judgment in an international matter often presents significant obstacles to enforcement and renders the judgment of diminished utility.\textsuperscript{470} This difficulty could be obviated if the MSA could be entered as

\textsuperscript{463} Ibid.
\textsuperscript{464} Ibid.
\textsuperscript{465} Ibid.
\textsuperscript{466} Supra Note 95, at 392.
\textsuperscript{467} Ibid, at 392.
\textsuperscript{468} Ibid.
\textsuperscript{469} Ibid, at 393.
\textsuperscript{470} Ibid.
an arbitral award and recognized under the established enforcement mechanisms of the New York Convention.\textsuperscript{471}

The awards given by arbitrators on agreed terms after appointment of an arbitrator are governed under New York convention and enforceable. Whether the same result holds if the arbitrator is appointed after settlement of the dispute as a result of mediation.\textsuperscript{472}

Some jurisdictions expressly provide for the entry of an arbitration awards to record an agreement reached in mediation. For example, Article 12 of the rules of the Mediation Institute of the Stockholm Chamber of Commerce provides: Upon reaching a settlement agreement the parties may, subject to the approval of the Mediator, agree to appoint the Mediator as an Arbitrator and request him to confirm the settlement agreement in an arbitral award.\textsuperscript{473}

Some states in the United States have made similar remedies available for international disputes.\textsuperscript{474}

Although the enactment of such provision would seem to be a useful avenue for MSA enforcement, such an appointment after dispute is settled may be difficult to effect in many jurisdictions because under local law there must be a dispute at the time arbitrator is appointed.\textsuperscript{475}

Basically three approaches are employed in different jurisdictions to enforce MSA: enforcement as a contract, enforcement as a judgment, enforcement as an arbitral award.\textsuperscript{476}

4.4.1 Enforcement as a Contract

Few scholars have explicitly analyzed using alternatives to contract principles for the enforcement of mediated agreements. Robert P. Burns urged the use of contract law to

\textsuperscript{471} Ibid.
\textsuperscript{472} Ibid, at 396.
\textsuperscript{473} Ibid, at 394.
\textsuperscript{474} Ibid, at 392.
\textsuperscript{475} Ibid, at 394.
\textsuperscript{476} Supra Note 392.
enforce settlement agreements, citing its flexibility to protect mediation values.\textsuperscript{477} Some scholars have proposed modifying contract law outright in order to safeguard mediation’s values in a litigation setting. Nancy A. Welsh advocated several special rules for enforcing mediated agreements, including an expanded coercion defense and a cooling-off period that would allow rescission immediately following a mediation.\textsuperscript{478} In many jurisdictions including the United States, England and many other jurisdictions around the world, the principal method for enforcing an MSA is as a contract, an unsatisfactory result since that enforcement mechanism leaves the party precisely where it started in most cases, with a contract which it is trying to enforce.\textsuperscript{479} MSA is treated as a contract, and being contract all defenses available to avoid contract are also available to the parties and litigated in courts. The defenses may be challenging binding nature, oral agreements, duress and coercion, incompetence or incapacity, lack of authority, fraud, mistake etc. It may be noted that enforcement as a contract can lead to considerable additional expense and significantly prolong the dispute resolution process. It may raise serious questions about confidentiality of the mediation process.\textsuperscript{480}

### 4.4.2 Enforcement as a Judgment

If a law suit is filed before mediation has commenced, it is possible in many jurisdictions to have the court enter the settlement agreement as a consent decree and incorporate it into the dismissal order.\textsuperscript{481} As pointed out above the EU Mediation Policy Directives expressly contemplates such court action by providing that “the content of the agreement may be enforceable by the court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.”\textsuperscript{482}

Even if there is no court proceeding, in some jurisdictions the courts are available to enter a judgment on the MSA. For example, in the United States the Colorado International Dispute Resolution Act was enacted to further the policy of encouraging

\textsuperscript{477} Supra Note 190, at 584.
\textsuperscript{478} Ibid, at 585.
\textsuperscript{479} Supra Note 392. See Also Supra Note 190, at 583.
\textsuperscript{480} Supra Note 392.
\textsuperscript{481} Ibid.
parties to international transactions to resolve disputes, when appropriate, through
arbitration, mediation, or conciliation. To foster that goal statute provides:

“[i]f the parties involved in a dispute reach a full or partial agreement…..If reduced
to writing and signed by the parties, the agreement may be presented to the court by
any party or their attorneys, if any, as a stipulation and ,if approved by the court, shall
be enforceable as an order of the court.”

Though a judgment is obtained, the difficulties of enforcing foreign judgment in an
international matter often presents significant obstacles to enforcement and renders
the judgment of diminished utility.

Enforcement of the judgment rendered by a court of another country poses formidable
challenges in international litigation. The primary international forum to resolve
recognition and enforcement problems has been the Hague Conference on Private
International Law, which sponsored negotiations of a convention on international
jurisdiction and recognition of judgments. A draft was prepared in the year 2001,
however thereafter it reached stalemate position as the parties differed on multiple
issues.

Even the judgment obtained in another country poses difficulties in enforcing the
same in India. The judgment of other country would be enforceable in India on the
basis of reciprocity. The judgment passed even by the highest court of the other
country shall not be enforced unless it falls within the ambit of section 44 A of the
Code of Civil Procedure, 1908. According to Section 44 A of code of Civil Procedure,
1908 a certified copy of a decree passed by any superior Courts of any reciprocating
territory can be executed in India. Reciprocating Territory is explained as to mean a
country or territory outside India which the Central Government may by notification
in the official gazette declare to be reciprocating territory and superior court with
reference to such territory means such Courts as may be specified in the said
notification.

483 Supra Note 392.
484 Ibid.
Thus it is clear that if the parties have obtained judgment of the court on the basis of their settlement, if it is required to be executed outside territory of the country of that court, the said judgment shall not be enforceable unless that country is reciprocating country of the country where it is sought to be enforced and the court is the Court recognized by the government of the enforcing country.

4.4.3 Enforcement as an Arbitral Award

It is argued that the difficulty of enforcement of settlement agreement in international conciliation can be overcome by passing of an arbitral award on agreed terms. This is with a view to take advantage of the fact that once it is an arbitral award, then it can be enforced under New York Convention. Some jurisdictions provide for the entry of an arbitration award to record an agreement reached in mediation. For example, the Arbitration Rules of Korean Commercial Arbitration Board provides “If the conciliation succeeds in settling the dispute, the conciliator shall be regarded as the arbitrator appointed under the agreement of the parties; and the result of the conciliation shall be treated in the same manner as such award as to be given and rendered upon settlement by compromise under the provision of Article 53, and shall have the same effect as an award.”

Rules of the Mediation Institute of the Stockholm Chamber of Commerce, provides that “Upon reaching a settlement agreement the parties may, subject to the approval of the Mediator, agree to appoint the Mediator as an Arbitrator and request him to confirm the settlement agreement in an arbitral award.”

For international disputes some states of United States have made remedies available for enforcement of settlement agreement. California Code of Civil Procedure provides “If the conciliation succeeds in settling the dispute, and the result of the conciliation is reduced to writing and signed by the conciliator or conciliators and the parties or their representatives, the written agreement shall be treated as an arbitral award rendered by an arbitral tribunal duly constituted in and pursuant to the laws of this state, and shall have the same force and effect as a final award in arbitration.”

485 Article 18(3).
486 Article 12.
487 Title 9.3, Arbitration and Conciliation of International Commercial Disputes,1297.401.
Though it is so provided in many jurisdictions such an appointment after settlement of dispute cannot be effected because under their law dispute must be in existence when the arbitrator is appointed.

Section 6 (1) of English Arbitration Act provides that “In part I of the Act, an “arbitration agreement” means “an agreement to submit to arbitration present or future disputes (whether contractual or not)”. Once the dispute is over and settled there is no present or future dispute and an arbitrator cannot be appointed to record settlement in an award. Any consent award issued by an arbitrator appointed after the settlement would be nullity and incapable of enforcement.\textsuperscript{488}

Article 1 (1) of New York Convention provides that the Convention applies to the recognition and enforcement of awards ‘arising out of differences between persons’. The language of New York Convention does not have the precise temporal element of such local arbitration rules as set forth in the definitions of an arbitration agreement found in English or New York law that require a ‘present or future’ dispute; or a ‘controversy thereafter arising or existing’. The reference to a ‘difference’ in Article 1(1) of the New York Convention does not specify when that ‘difference’ had to exist in time in relation to the time of the appointment of the arbitrator.\textsuperscript{489} Thus, the Convention language does not seem to expressly bar recognition of an award rendered by an arbitrator appointed after resolution of the dispute.\textsuperscript{490} Nor would enforcement seem to otherwise barred by other provisions of Convention.\textsuperscript{491} It could be argued that even if the law of the country where enforcement is sought would not permit the entry of an award by an arbitrator appointed after resolution of the dispute, such a legal difference ought not to rise to the level of being contrary to such fundamental public policy of any country as would preclude enforcement of such an award under the public policy exception of Article V (2) (b) of the Convention.\textsuperscript{492} Some advocates pointed out that the terms “differences” is used three times in the first two articles of the New York Convention. A successful mediation resolves all the differences. If

\textsuperscript{488} Supra Note 392.
\textsuperscript{489} Supra Note 95 at 396.
\textsuperscript{490} Ibid.
\textsuperscript{491} Ibid.
\textsuperscript{492} Ibid.
parties agree to arbitrate after mediation agreement is reached, this is not a valid agreement to resolve the differences.\textsuperscript{493}

As there is no ‘present or future dispute’ or ‘controversy thereafter arising or existing’ once the dispute is settled in mediation, such provision may be construed to mean that it is not possible to have an arbitrator appointed to record the settlement in an award.\textsuperscript{494} Thus it could be argued that any arbitral award issued by an arbitrator appointed after the settlement would be a nullity and incapable of enforcement under the laws of those jurisdictions.\textsuperscript{495} It is however possible to circumvent this problem by specifying in the MSA that it is governed by the law of a jurisdiction that permits the appointment of an arbitrator after the settlement is achieved.\textsuperscript{496}

The Article V (1) (e) of the New York convention provides for refusal of enforcement of an award where the party requesting refusal proves that “the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.” The binding was the most discussed topic at the New York convention. The award is binding when it is rendered in arbitration or procedures ‘akin to arbitration’. Procedures akin to arbitration follow a general arbitral framework, but lack of recognition as formal arbitration in their country of origin. In Italy, parties may select formal arbitration (\textit{arbitrato rituale}), or informal arbitration (\textit{aritrato irrituale}). While an award from \textit{arbitrato rituale} has the effect of a court judgment, an award from the \textit{aritrato irrituale} only has contractual force and must be enforced through an Italian court order. The Italian Supreme Court interpreted ‘binding’ to include binding contract. This interpretation subsequently was challenged in Hamburg, where the highest German Court interpreted binding to mean no longer subject to ordinary means of appeal on the merits. According to \textit{aritrato irrituale} awards should not be enforced because they are subject to review on merits under the contract doctrine. After German opinion consensus formed that procedures akin to arbitration are not enforceable under New York Convention. \textsuperscript{497}

\textsuperscript{493} \textit{Supra} Note 17, at 1402.  
\textsuperscript{494} \textit{Supra} Note 95, at 394.  
\textsuperscript{495} \textit{Ibid}.  
\textsuperscript{496} \textit{Ibid}, at 395.  
\textsuperscript{497} \textit{Supra} Note 17, at 1395.
Brette L. Steele opines applying arbitration standards to mediation is an imperfect fit, which creates multiple potential challenges under the New York Convention. The imperfect fit between arbitration and standards and mediation is evident where parties to mediation do not have a pre-existing arbitration agreement. Under New York Convention a valid arbitration clause to resolve differences is required for enforcing an arbitral award. Mediations may face procedural challenge under New York Convention if there is no written arbitration agreement between parties.

This difficulty could be avoided by appointing the arbitrator before the mediation is commenced and having the mediation conducted as an ‘Arb-Med’ either by the appointed arbitrator with carefully worded document executed by the parties consenting to such process or by separately appointed mediator. However it runs the risk in the event mediation fails the party shall have no alternative than to compulsorily agree for arbitration. In the considered opinion of the researcher this procedure may amount to a fraud on statute.

In some states in United States for enforcement of mediated agreements, require formalities, such as a writing, mediator or attorney signatures, or a statement that the parties intend the settlement to be enforceable, which become enforcement hurdles.498

Increasing attention is being directed to the meaning of the New York Convention as it relates to the issuance of an arbitration award based on an MSA.499 The difference of opinion as to the applicability of the Convention to MSAs suggests that the Convention is at least ambiguous.500 Questions such as whether there is a principled basis on which to distinguish between an agreed award, which is widely accepted as enforceable, and an award rendered by an arbitrator appointed following a mediated settlement must be explored.501 Whether there is need to preserve contract based defenses to ensure self-determination in agreements between parties of unequal bargaining power should be reviewed.502

498 Supra Note 190, at 584.
499 Supra Note 95, at 381, 397.
500 Ibid.
501 Ibid.
502 Ibid.
The Model law on Conciliation has not considered the circumstances upon existence of which settlement agreement would be set aside. The Commission noted in this context that “[the grounds for setting aside a settlement agreement were not unified under Model Law] and that was a matter for each jurisdiction to address under its own law.”

Edna Sussman suggests that UNCITRAL recommendations are one available mechanism for clarifying the meaning to be given to the New York Convention’s language.\(^{(503)}\) It is clear from UNCITRAL Model law on International Commercial Arbitration of 1985 that such awards are expressly recognized. It provides that “If during the arbitral proceedings, the parties settle the dispute, the Arbitral Tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the Arbitral tribunal, record the settlement in the form of an arbitral Award on agreed terms”. It is also provided that such an arbitral award has the same status and effect as any other award on the merits of the case.\(^{(504)}\) UNCITRAL recommendations could clarify the applicability of the Convention to international arbitration awards entered into with consent of both parties as a result of mediation by an arbitrator appointed after the conclusion of the mediation.\(^{(505)}\)

LCIA Arbitration Rules provides that “In the event of settlement of the parties dispute, the Arbitral Tribunal may render an award recording the settlement if the parties so request in writing (“Consent Award”), provided always that such award contains an express statement that it is an award made by the parties’ consent.  

Most would agree that such agreed awards rendered by an arbitrator appointed before settlement of the dispute are governed by the New York Convention and enforceable under the Convention. Whether same result obtains if the arbitrator is appointed after settlement of the dispute as a result of mediation, is less certain. As pointed out above it may not pose difficulty in the jurisdictions\(^{(507)}\) where such procedure is recognized.

\(^{(503)}\) Ibid.  
\(^{(505)}\) Supra Note 95, at 381, 397.  
\(^{(506)}\) Art. 26.8.  
\(^{(507)}\) Korea, California, Stockholm.
Analyzing provisions of New York Convention Edna Sussan\textsuperscript{508} argues that New York Convention does not have the precise temporal element of local rules as the English Arbitration Act, that require a ‘present or future’ dispute. The reference to a “difference” does not specify when that ‘difference’ has to exist in time in relation to the time of the appointment of the arbitrator.\textsuperscript{509}

Ellen E. Deason stated she is unconvinced that mediation necessarily needs to offer the finality associated with arbitration. She feared that incorporating such finality through summary enforcement procedures might stretch the capabilities of mediation in much the same way that extending arbitration to disputes based on statutory rights has stretched arbitration beyond its comfort zone. She suggested that the procedures for summary enforcement could be developed that would not impair the characteristic attributes of mediation.\textsuperscript{510} However she cautioned that any development of summary enforcement procedures for mediated agreements would pose a new set of challenges for these values that should be assessed with care.\textsuperscript{511} Seeking to strengthen mediation by truncating the process of adjudicatory enforcement to a summary procedure could erode characteristics that help make mediation and adjudication valuable and effective.\textsuperscript{512}

4.5 CONCLUSIONS

Thus from all this discussion it is clear that there is no uniformity of law regarding the recognition of the international commercial settlement agreement arrived in ADR. Some countries need the settlement agreement to be confirmed by the court, some need it to be notarized while some require it to be authenticated by the conciliator. Even the attempt by the UNCITRAL to achieve unaniformity has failed. There is no uniform law/convention in the international sphere. Thus there is uncertainty that the settlement agreement executed between disputing parties in the ADR in one country shall be recognized and enforced in the other country. In this respect the efficacy of ADR in enforcement of settlement agreement lags behind the arbitration.

\textsuperscript{508} Supra Note 392.
\textsuperscript{509} Ibid.
\textsuperscript{510} Supra Note 190, at 592.
\textsuperscript{511} Ibid.
\textsuperscript{512} Ibid.
The researcher will critically evaluate the two approaches of ADR/Conciliation and Arbitration in Indian context while incorporating data from empirical survey amongst stake holders in the next chapter.