

***Meeting challenges posed by modern international  
commercial litigation<sup>1</sup>***

**The Honourable Justice P A Bergin**

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- 1 The reputation of a Commercial Court will depend not only on the integrity of its judiciary and the just and efficient determination of cases, but also on the quality of its mechanisms for the resolution of disputes other than at trial, sometimes referred to as “alternate” or “additional” dispute resolution. These mechanisms are to be found in the legislation or Rules of Court of each of the delegate nations at this Conference.<sup>2</sup> Some have mediation services annexed to the Court. Some have a policy of referring matters to private mediation conducted by accredited mediators within the jurisdiction. Others have a policy or practice of referring matters to particular Mediation Institutes or Centres that have been established within the relevant jurisdiction.
- 2 The focus of these remarks is on the challenges that international commercial litigation poses for the use and further development of these mechanisms for commercial courts.
- 3 Globalisation of trade and commerce does not create an homogenous global community. Although the facilitation of international trade and commerce may be easier by reason of harmonised rules of trade, some of the individuals and corporations taking part in that trade and commerce have different histories and different cultures. It has been observed that the “influence of culture is pervasive. It affects how we think, speak and act. It is unseen and silent, and therefore easy to overlook. But we disregard it at our peril”.<sup>3</sup>

- 4 There is an increasing focus in the literature upon the challenges of cultural differences in international commercial dispute resolution.<sup>4</sup> Indeed Roger Fisher and William Ury's best seller "Getting to Yes" has been labelled culturally insensitive, with the focus now on "Getting to Si, Ja, Oui, Hai and Da".<sup>5</sup> There has also been debate about whether the so-called "Western" interest-based approach to mediation is appropriate for "an Asian audience".<sup>6</sup> These are significant matters for consideration, not only by Commercial Courts in setting up and/or maintaining court annexed mediation services that are sensitive to these cultural differences, but also by the parties when deciding on the identity of the person or persons to mediate the specific dispute.
  
- 5 However, there is a more problematic and significant challenge in the use of mediation for the resolution of international commercial disputes. Mediation of such disputes is not a new phenomenon. Indeed it was often the preferred mechanism for resolving such disputes in the first half of the 20<sup>th</sup> Century. However in the latter half of the Century arbitration became a more popular mechanism to determine international commercial disputes.<sup>7</sup> It has been suggested that the best explanation for the rise in popularity of arbitration was its "critical role in supporting the globalisation of trade". The attributes of "neutrality of the forum, confidentiality, the specialist competence of the tribunal and the ease of enforcement across borders" have been described as "key advantages" of arbitration over "court-based forms of dispute resolution".<sup>8</sup>
  
- 6 These key advantages (but for one) may be translated into the world of mediation of international commercial disputes. Mediators must be impartial or neutral. The mediation process is confidential. The rise of international accreditation of mediators in the specialist field of international commercial disputes means that there is a body of people with specialist competence in this area.

- 7 Mediation has the greater advantage of comparative quickness and cheapness over arbitration. However, the one exception to which I have referred is the enforcement of the mediated outcome. In this regard arbitration is considered to have the advantage over mediation. However the international commercial (and legal) community is astute to this advantage and is seeking to address it.
- 8 The landscape in which international commercial disputes are resolved has changed markedly over the last decade. The developments in each of the jurisdictions of the delegate nations show commitment and support for the mediation of disputes, including international commercial disputes. Mediation Institutes and Centres have been established in a number of jurisdictions and some have worked together to establish international mediation bodies, including the International Mediation Institute.<sup>9</sup> These developments have facilitated a more coordinated approach in dealing with the challenges that have been and are presented in the mediation of cross-border or international commercial disputes.
- 9 Article 1(4) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation (2002) (the Mediation Model Law) defines disputes as “international” if:
- (a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or
  - (b) The State in which the parties have their places of business is different from either:
    - (i) the State in which a substantial part of the obligations of the commercial relationship is to be performed; or
    - (ii) the State with which the subject matter of the dispute is most closely connected<sup>10</sup>
- 10 The Mediation Model Law does not define “commercial”, but suggests that the word should be given a “wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not”.<sup>11</sup> The same definitions are included in the UNCITRAL Model Law on

International Commercial Arbitration adopted in 1985 to assist with and promote the uniform interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”).<sup>12</sup> Similar definitions are found within the Rules of Court of some of the delegate nations.

- 11 In 2013 Lord Woolf of Barnes observed that “parties to commercial arbitration, as in litigation, are increasingly jaundiced as to the rising costs”.<sup>13</sup> In its 7-Year Anniversary Review 2007-2014, the International Mediation Institute made a comparison between mediation on the one hand and litigation and arbitration on the other and published its analysis in a tabular form which is extracted as a schedule to these remarks. That comparison suggests that mediation is less costly, much faster and has the capacity for the parties to maintain or restore their relationship and/or to find solutions outside the dispute.<sup>14</sup> Even if one may have a different view about the conclusions in some of the categories in this analysis, its force is irresistible. It supports the approach of requiring parties who have commenced litigation to attempt mediation prior to going to trial. Previously this may have been a matter of some controversy. However this is no longer the case, having regard to the fact that all of the delegate nations have put in place processes for the referral to mediation of disputes that are the subject of international commercial litigation within their respective jurisdictions.
- 12 However, international commercial parties want greater certainty that if they reach a settlement at mediation, enforcement will be effective and not too costly.
- 13 The UNCITRAL Working Group II (Arbitration and Conciliation) (the Working Group) met in New York in February 2015 to consider a proposal for a multilateral Convention on the enforceability of international commercial settlement agreements reached through mediation.<sup>15</sup> The impetus for such a Convention was said to be the growth in international commercial mediation as an alternative to arbitration as a result of the increasing cost and delay involved in arbitration of international commercial disputes. It has been

suggested that the Convention was conceived as a mediation equivalent of the New York Convention to put mediated settlement agreements on the same footing as arbitral awards.<sup>16</sup>

- 14 The Working Group met again in September 2015 in Vienna. The four major topics of discussion over the five days of dialogue were: (1) the form of settlement agreements; (2) agreements to submit a dispute to mediation; (3) recognition and enforcement of settlement agreements, including defences to enforcement; and (4) the possible form the instrument should take.<sup>17</sup> The consensus reached at the meeting was that any Convention or Instrument would only apply to international commercial settlement agreements that arise from the mediation process, rather than from ordinary contracts negotiated by the parties.<sup>18</sup> It was also agreed that it would not exclude settlement agreements involving government entities, allowing individual States to exclude them through separate processes.<sup>19</sup> It appears that there was a preference for direct enforcement without a review procedure in the originating State.<sup>20</sup> However, there was no consensus as to whether the Convention or Instrument should address recognition of settlement agreements in addition to enforcement procedures.<sup>21</sup> There was agreement in relation to some of the defences to resist enforcement of mediated settlement agreements including fraud, public policy and where the subject matter of the dispute is not capable of being mediated.<sup>22</sup>
- 15 The proposal was considered again at the Working Group meeting in New York in February 2016, with discussions about terminology such as “international” and “commercial”, the form a settlement agreement should take, and, once again, the defences to enforcement.<sup>23</sup>
- 16 The proposal was considered most recently in the Working Group session in Vienna, between 12 and 23 September 2016. There were two categories of defences to enforcement proposed for consideration; the first based on a request by the party against whom the mediated settlement agreement is sought to be invoked; and the second on a finding by the competent authority considering the application for recognition or enforcement.

- 17 In the first category, the proposed defences for consideration were: (1) if a party was under “some incapacity”; (2) that the settlement agreement is not binding on the parties; or is not a final resolution; or has been subsequently modified; or contains additional or reciprocal obligations; (3) that enforcement would be contrary to the terms and conditions of the agreement; or if the obligations had been performed; or application for enforcement would be in breach of the applicant party’s obligations under the agreement; (4) that the agreement was null and void, inoperative or incapable of being enforced; and (5) that the mediator failed to maintain fair treatment of the parties or failed to disclose circumstances likely to give rise to justifiable doubts in respect of the mediator’s impartiality or independence.
- 18 The complexities of these defences were discussed at the recent meeting. In respect of the last-mentioned defence, the distinction was drawn between the established rules of procedural fairness in arbitration and the limited number of procedural rules in mediation for assessing “fair treatment”. It was also noted that in mediation, compared to arbitration, there were no means to challenge the process or the conduct of the mediator, particularly if any misconduct or unfair treatment was not known to the parties. Ultimately it was suggested that the scope of this defence should be limited to instances of exceptional circumstances where the mediator’s “severe misconduct” had a “material impact or undue influence” on a party without which that party would not have entered into the settlement agreement.<sup>24</sup> This will be discussed further at the Working Group’s next meeting in New York in February 2017.
- 19 In the second category, it was proposed that enforcement could be refused if the competent authority finds that: (1) the subject matter of the settlement agreement is not capable of settlement by mediation under the law of the relevant State; and (2) the enforcement of the settlement agreement would be contrary to the public policy of the State.<sup>25</sup>
- 20 One observer at the 2015 Vienna meeting made two points that may be regarded as worthy of note. The first was that there should be no greater demands in respect of the enforcement of mediated settlements than were

imposed on arbitration in the New York Convention. It was suggested that this “simple system” has worked for arbitration and it is difficult to see why mediation, in which the parties themselves agree to the outcome as opposed to the tribunal imposing an award, would require more robust and enumerated enforcement defences. However, the New York Convention did provide grounds for refusing enforcement of arbitral awards that, although expressed differently, may not present as less onerous than those in the proposed Convention.<sup>26</sup> The second and may I suggest, more important point that was made, is the need to provide those in international trade and commerce with legal certainty in a reliable international framework for the enforcement of mediated settlements. The sentiments expressed by the observer included the following<sup>27</sup>:

For mediation to be as equally viable as arbitration, however, it should be put on the same footing in terms of uniform enforceability. A Convention harmonising the enforcement mechanisms would represent a significant leap forward in this direction.

In 1958, UNCITRAL gave the international commercial world one of the most successful conventions in the history of the UN – the New York Convention.

Today, almost 60 years later, UNCITRAL is again invited to give the international business community what it needs – an even faster, cheaper and reliable mechanism to resolve disputes.

- 21 There is precedent for the proposed Convention in the Mediation Directive of the European Union.<sup>28</sup> Recital 20 of that Directive provides that the “content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States”.<sup>29</sup>
  
- 22 Although discussion of the UNCITRAL Convention or Instrument in respect of the enforcement of settlement agreements reached at mediations of international commercial disputes has been under way for some years, consensus may seem elusive. However, it will be remembered that consensus on the New York Convention took some years. The International Chamber of Commerce produced a draft Convention in 1953. The UN Economic and Social Council established a committee on 6 April 1954 to

consider it. The Committee met from 1 to 15 March 1955 and made amendments to the draft. The final text emerged from a UN Conference on International Commercial Arbitration that took place from 20 May to 10 June 1958.

- 23 A draft Bill presently under consideration in Singapore includes a provision that would enable parties who have not commenced litigation, but who have reached a settlement agreement of their dispute at mediation, to apply to the court to record their mediated settlement agreement “as an order of the court”. There are certain pre-requisites to be satisfied before the agreement may be recorded including that the mediation at which the agreement was reached was conducted by a designated mediation service or by a certified practitioner and that the agreement is in writing and signed by all the parties. It is also proposed that the court may refuse to record the agreement as an order of the court if: (a) it is void or voidable on various grounds including incapacity, fraud, misrepresentation, duress, coercion and mistake; (b) the subject matter of the agreement is not capable of settlement; (c) any of the terms are not capable of enforcement; and (d) the making of the order would be contrary to public policy.<sup>30</sup>
- 24 There are some complexities to the enforcement of settlement agreements resulting from the mediation of international commercial disputes. Some delegate nations (Japan,<sup>31</sup> Malaysia,<sup>32</sup> New Caledonia,<sup>33</sup> People’s Republic of China,<sup>34</sup> Singapore<sup>35</sup>) have provisions for the court to “record” the settlement agreement or the terms of the settlement agreement as an “order of the court” a “consent order”, a “consent judgment” or “judgment of the court”; or to “approve” a settlement agreement reached in respect of proceedings before the court.
- 25 In Australia, the court does not “record” the agreement but rather makes orders to give effect to a settlement agreement.<sup>36</sup> In India, a court “records” the agreement and may “pass a decree in accordance therewith”.<sup>37</sup>

- 26 In Hong Kong and New Zealand, settlement agreements are only enforceable as contracts. This mechanism of enforcement requires the aggrieved party to institute proceedings in a domestic court if the other party fails to comply with its obligations under the agreement.<sup>38</sup> In 2010 the Hong Kong Department of Justice considered it would not be appropriate to introduce legislation governing the enforceability of settlement agreements because of the complexity of providing for grounds for rescission or termination (e.g. due to undue influence, misrepresentation, and the like).<sup>39</sup>
- 27 Multi-party and multi-contract transactions are becoming increasingly prevalent and it has been suggested that international commercial disputes are “often more complex with more participants than their domestic counterparts”.<sup>40</sup> The complexities include choice of law, cross-border regulatory issues, jurisdictional matters, and the extra-territorial application of evidentiary or other privileges. These complexities exist within the litigation and would have to be decided by the court. It does not seem to me that these are impediments to the resolution of the disputes at mediation, with an appropriately qualified mediator. However, settlement agreements resulting from mediation of these international commercial disputes may be quite complex with cascading and detailed obligations for performance.
- 28 It is one thing to settle international commercial disputes at mediation and record the outcome in a mediated settlement agreement. It is quite another thing to have the court: (a) record that agreement as an order or consent order; or (b) record that agreement as a judgment or consent judgment of the court; or (c) approve the agreement; or (d) make orders giving effect to the agreement.
- 29 The concise recording of the settlement agreement as a “consent judgment” or “consent order” of the court may very much depend on the manner in which the settlement agreement is expressed. Where a court is to make an order giving effect to the mediated settlement agreement, there is another step in the process that international parties must contemplate at the time of reaching their agreement. The agreement must be in a form that is capable of being

recorded as an order or judgment of the court. To ensure certainty it may be very important to incorporate all the terms of the settlement within the consent order, ensuring that there are no “external terms” that may require enforcement by separate action, as opposed to the “automatic” enforcement of the consent order. <sup>41</sup>

30 If court-annexed or court-referred mediation of international commercial disputes is to provide certainty to international parties it will be necessary, as a first step, for the delegate nations to provide easy access to their legislation and Rules of Court to enable those representing these parties to advise upon the capacity to enforce their mediated settlement agreements in particular jurisdictions. However, I suggest there is a greater challenge for the delegate nations in respect of this aspect of international commercial litigation. It is to engender confidence in their international commercial litigants that the cross-border enforcement of any settlement reached at a court-annexed, court-referred or private mediation of their dispute can be achieved effectively and efficiently.

31 As the international commercial community has sought through its delegates at the UN Working Group to reach consensus on the manner in which settlement agreements of international commercial disputes reached at mediation may be enforced, it would be a significant step for the courts of the delegate nations at this Conference to establish a mechanism by which they may work together for the purpose of reaching at least harmonisation of the rules and a memorandum of understanding for enforcement of mediated settlements across their respective jurisdictions and, in due course, perhaps a cross-border code for such enforcement.

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## **SCHEDULE 1**

### **Summary of structures for referral of international commercial disputes to mediation in jurisdictions of delegate nations**

#### **Australia**

- 1 In the NSW Supreme Court, parties to proceedings entered in the Commercial List are required to file a statement as to whether they have attempted to mediate and whether they are willing to proceed to mediation at an appropriate time: Practice Note SC Eq 3.<sup>42</sup> The Court may order that the dispute or part thereof be referred to mediation, either with or without the consent of the parties: *Civil Procedure Act 2005* (NSW) s 26.<sup>43</sup> Court-referred mediation is regulated by Part 20 of the *Uniform Civil Procedure Rules 2005* (NSW).<sup>44</sup> The court may make orders to give effect to a mediation agreement, and documents prepared in relation to a mediation session and discussions at the session are otherwise inadmissible: *Civil Procedure Act 2005* (NSW) ss 29 and 30 (see also *Evidence Act 1995* (NSW) s 131).
  
- 2 Parties who commence proceedings in the Federal Court must demonstrate that they have taken “genuine steps” to resolve their dispute: *Civil Dispute Resolution Act 2011* (Cth).<sup>45</sup> Interim Practice Note NCF 1 (2015) provides that the Court will encourage and facilitate alternative dispute resolution, usually through Court-annexed mediation.<sup>46</sup> The Court may order that the dispute or parts thereof be referred to mediation, a step which does not require the parties’ consent: *Federal Court of Australia Act 1976* (Cth) s 53A.<sup>47</sup> The *Federal Court Rules 2011* (Cth) regulate referrals to mediation, including the appointment of a mediator and conduct and termination of the mediation.<sup>48</sup> Parties who reach agreement at mediation may file consent orders in accordance with the agreement: *Federal Court Rules* r 28.25. Evidence of settlement negotiations may not be adduced in court proceedings: *Evidence Act 1995* (Cth) s 131.<sup>49</sup>

- 3 The peak body for private mediation in Australia is the “Resolution Institute” (formed by the merger of the Institute of Arbitrators & Mediators Australia (IAMA) and Lawyers Engaged in Alternative Dispute Resolution (LEADR) in 2015). The Resolution Institute’s “Mediation Rules” provide that mediation should be confidential and define the scope of the roles of the mediator and parties.

### **Hong Kong SAR**

- 4 The Hong Kong High Court Practice Direction 31, which came into effect in 2010 as part of the “Civil Justice Reform”, provides that legally represented parties in civil proceedings must file a Mediation Certificate indicating whether the party is willing to attempt mediation and, if not, the reasons why mediation is thought to be undesirable.<sup>50</sup> Costs may be ordered against a party that unreasonably refuses to participate in mediation (see e.g. *Wu Yim Kwong Kindwind v Manhood Development Ltd* [2015] 4 HKC 598 – the uncooperative attitude of the other party is not a reasonable excuse).
- 5 In 2010, the Working Group of the Secretary for Justice released the “Hong Kong Mediation Code” which is intended to be adopted by mediation service providers. The Code defines the role of the mediator as assisting the parties to isolate the issues in dispute, develop options for the resolution of those issues, and explore the usefulness of these options.<sup>51</sup> The “Mediation Ordinance” (2013) confirms that mediations are confidential and that penalties for unqualified persons acting as a solicitor or barrister do not apply in respect of mediations.<sup>52</sup>
- 6 Key providers of commercial mediation services include the Hong Kong Mediation Council (set up in 1994 as a division of the Hong Kong International Arbitration Centre) and the Hong Kong Mediation Centre (established 1999). The Hong Kong Mediation Centre’s “Mediation Rules” provide that mediation communications are confidential in accordance with the Mediation Ordinance.<sup>53</sup>

- 7 In December 2015, the Hong Kong Mediation Centre and the China Chamber of International Commerce Mediation Center launched their “Joint Mediation Center” to support resolution of cross-border commercial disputes.<sup>54</sup>
- 8 The Hong Kong Mediation Centre is also part of the Asian Mediation Association (other members include the China Chamber of International Commerce Mediation Center, Delhi Mediation Centre, Indian Institute of Arbitration and Mediation, Japan Commercial Arbitration Association, Malaysian Mediation Centre, Singapore Mediation Centre, etc.). Members of the Asian Mediation Association have signed a Memorandum of Understanding and aim to facilitate cross-border and cross-cultural commercial disputes.<sup>55</sup>

### **India**

- 9 At the end of 2015, the *Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act 2015* was passed with the view to fast tracking commercial claims over a specified value in order to increase investor confidence in India.<sup>56</sup> The legislation does not specifically provide for referral to ADR. However, s 89 of the *Code of Civil Procedure* (inserted in 1999 with effect from 2002) provides for referral to arbitration, conciliation, mediation or judicial settlement “including settlement through Lok Adalat”.<sup>57</sup>
- 10 In *Afcons Infrastructure Ltd v Cherian Varkey Construction Co. (P) Ltd* (2010) 8 SCC 24, the Supreme Court of India provided guidance as to which disputes would generally be suitable for ADR, classifying commercial disputes as generally suitable for ADR. The Court also indicated that, where the Court considers that the dispute is capable of being settled through ADR processes, “reference to ADR process is a must”.
- 11 High Courts in India including the Bombay High Court, Delhi High Court and High Court of Punjab and Haryana have issued rules to regulate mediation under s 89: Mediation and Conciliation Rules 2004 (Delhi High Court); Alternative Dispute Resolution & Mediation Rules 2006 (Bombay High Court);

Mediation and Conciliation Rules (High Court of Punjab and Haryana).<sup>58</sup> The Rules of the Delhi High Court deal with confidentiality and provide that the panel of mediators put forward by the Court should be comprised of retired judges, and legal practitioners or other professionals of at least fifteen years standing (although the parties may agree upon a mediator who is not from the panel). The Rules also identify the mediator's role as to facilitate a resolution by assisting the parties to identify issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options. The Rules of the Bombay High Court and High Court of Punjab and Haryana define the mediator's role in a similar manner.

- 12 Various institutions have been established to promote ADR in commercial disputes, including the Indian Institute of Arbitration and Mediation (IIAM) and Delhi Mediation Centre. The IIAM's panel of international mediators includes mediators from Australia, China, Hong Kong, India, Malaysia, New Zealand, Singapore and other nations. Rule 9 of the IIAM "Mediation Rules" (2009) provides that mediation communications are confidential and nothing disclosed in mediation constitutes waiver of privilege.<sup>59</sup>
- 13 Settlement agreements reached through mediation are enforceable as contracts although parties may apply under O. 23 r. 3 of the *Code of Civil Procedure* for the Court to record the agreement and "pass a decree in accordance therewith".

### **Japan**

- 14 The *Code of Civil Procedure* (1996) permits a judge in civil proceedings to "attempt to arrange a settlement or have an authorised judge or commissioned judge attempt to arrange a settlement". Where a settlement is entered by the court, it has "the same effect as a final and binding judgment".<sup>60</sup>
- 15 The *Civil Conciliation Act* (1951) also empowers a court to conduct conciliation, either by a "conciliation committee" or a judge alone. "Conciliation commissioners" are government employees. The conciliation committee may

“determine terms of conciliation that are appropriate” in respect of commercial disputes if there is no likelihood of agreement between the parties or the agreement reached is inappropriate and the parties indicate in writing that they would obey the terms to be decided (art 31). Where an agreement is entered by the court, it “shall have the same effect as a judicial settlement” (art 16).<sup>61</sup>

- 16 The *Act on Promotion of Use of Alternative Dispute Resolution* (2004) regulates private mediation and provides that civil proceedings may, at the joint request of the parties, be suspended for up to four months to enable a “certificated dispute resolution procedure” to be carried out.<sup>62</sup>
- 17 In 2009, the Japan Commercial Arbitration Association introduced the “International Commercial Mediation Rules” for private mediation conducted by the Association, which provide that mediation is confidential, but do not outline the role of the mediator.<sup>63</sup>

### **Macau SAR**

- 18 Article 428 of the Civil Procedure Code provides for conciliation in civil proceedings, which is chaired by the judge.<sup>64</sup>
- 19 The World Trade Center Macau Arbitration Center provides private mediation services. The panel consists of mediators located in either Macau or Hong Kong. In 2002, the Center entered into an agreement with the China Chamber of International Commerce for the establishment of a joint China-Macau Conciliation Center. In 2006, the Center entered into an agreement with the Hong Kong Mediation Centre to promote the use of mediation in their respective regions and co-operation in matters including training, conducting conferences and seminars and information exchange.<sup>65</sup>

### **Malaysia**

- 20 Practice Direction No 4 of 2016 issued by the Chief Justice of Malaysia provides that the courts may give directions to parties to facilitate settlement

of a dispute by way of mediation at the pre-trial stage in respect of certain disputes, including commercial claims.<sup>66</sup> The parties may either select judge-led mediation, mediation by the Kuala Lumpur Regional Centre for Arbitration (KLRC), or mediation by a third party agreed to by both parties. The Practice Direction confirms that mediation sessions are strictly confidential. Judge-led mediation is not conducted by the judge hearing the case unless the parties agree.

- 21 The *Mediation Act 2012* regulates the appointment of a mediator and the process of mediation.<sup>67</sup> Section 14 provides that a settlement agreement is binding on the parties, and s 15 confirms that mediation communications are confidential unless the party who made the communication consents, disclosure is required by law, or disclosure is required for the purposes of implementing or enforcing the settlement agreement. Section 9 provides that the mediator may determine the manner in which the mediation is to be conducted, and may suggest options for the settlement of the dispute.
- 22 The KLRC Mediation Rules define the role of the mediator generally, providing that the mediator may conduct the mediation “in such manner as the mediator considers appropriate”.<sup>68</sup> The KLRC mediation panel is diverse, with mediators from Singapore, Hong Kong, India, China, Australia, New Zealand and other nations.
- 23 Private mediation is also available through the Malaysian Mediation Centre which was set up by the Bar Council in 1999.

#### **New Caledonia**

- 24 Article 131 of the Code of Civil Procedure provides that a judge in civil proceedings may, with the consent of the parties, appoint a third party (either an individual or association) to mediate the dispute.<sup>69</sup>

## **New Zealand**

- 25 Rule 7.79 of the High Court Rules provides that a judge may, with the consent of the parties, convene a settlement conference or refer the parties to mediation or other ADR.<sup>70</sup> Commercial mediation in New Zealand has been the subject of recent research which found reluctance towards mediation and recommended more active encouragement of commercial mediation by courts.<sup>71</sup>
- 26 In relation to international commercial disputes, the New Zealand International Arbitration Centre provides private arbitration and mediation services. The panel includes “internationally based” mediators. The Centre has adopted a “Mediation Protocol”.<sup>72</sup>
- 27 Settlement negotiations are privileged: s 57 *Evidence Act 2006*<sup>73</sup> (although that provision has been subject to different interpretations and legislative change has been proposed).<sup>74</sup>
- 28 Enforcement of mediation agreements is generally a matter of contract law: see *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67; leave to appeal granted ([2016] NZSC 70).

## **People’s Republic of China**

- 29 Article 122 of the *Civil Procedure Law* (2012) provides that “wherever appropriate, mediation shall be adopted for civil disputes ... unless the parties thereto refuse”.<sup>75</sup> The court may either attempt mediation itself or refer the parties to another organisation: Supreme People’s Court, “Several Opinions of the SPC on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation”, 2009. Where an agreement is reached by judicial mediation, an agreement is drawn up under Art 97 and that is binding. Under Arts 194-5, the parties may also submit an application for judicial confirmation of a mediation agreement, and such confirmation renders the agreement enforceable.

- 30 Concerns have been raised as to lack of confidentiality of mediation proceedings.<sup>76</sup> In 2007, the Supreme People’s Court in its “Several Opinions on Further Displaying the Positive Roles of Litigation Mediation in the Building of a Socialist Harmonious Society” stated that participants in mediation must keep all information confidential.<sup>77</sup> In 2009, the Court further proclaimed that mediators may not give evidence, and the parties may not use evidence of mediation proceedings in court.<sup>78</sup>
- 31 The China Chamber of International Commerce Mediation Centre, established in 1987, provides private commercial mediation in accordance with its Mediation Rules. The Rules provide that mediators may adopt “the method to conduct mediation of the disputes that they deem beneficial for the parties to reach a settlement”.<sup>79</sup>
- 32 In 2011, the Centre established the “Commercial Disputes Mediation Linking Mechanism” with the Xicheng District People’s Court of Beijing, which aims to promote cooperation between judicial and private mediation.<sup>80</sup>

### **Singapore**

- 33 The Singapore International Commercial Court Practice Directions provide that prior to the first Case Management Conference, the parties must indicate their willingness to proceed with mediation or any other form of ADR.<sup>81</sup>
- 34 Disputes may be referred, with the consent of the parties, to the Singapore International Mediation Centre (SIMC) which was launched in November 2014.<sup>82</sup> The panel at the SIMC includes mediators from Australia, Hong Kong, India, New Zealand and other nations.<sup>83</sup> The SIMC Mediation Rules provide that mediation is confidential, but do not attempt to outline the respective roles of the mediator and parties.<sup>84</sup> Alternatively, the parties may select an alternative ADR service provider.
- 35 If the parties are unwilling to attempt mediation or any other form of ADR, the judge may “direct that the issue of mediation or any other form of ADR be reconsidered at the next Case Management Conference or at a specified

stage in the proceedings”<sup>85</sup> (by contrast, the State Courts Practice Directions Part VI provides that in the State Courts, there is a “presumption” of ADR). The Rules of the Court provide that a party’s conduct in respect of mediation may be taken into account in the Court’s exercise of its discretion as to costs.<sup>86</sup>

## **SCHEDULE 2**

### **International Commercial Disputes**

#### **Mediation Compared to Litigation and Arbitration<sup>1</sup>**

<b>Value Criteria</b>	<b>Mediation</b>	<b>Litigation/Arbitration</b>
Cost	Very low	Very high
Time	Very fast	Very slow
Who decides?	The Parties	Judge or Arbitrator
Likelihood of destroyed relationships	Low	Very high
Scope to tactical manoeuvring	Low	Very high
Who controls?	The Parties themselves	The Parties' Lawyers
Rules of evidence	None	Very many
Horizon Focus	On the future	On the past
Negotiation form	Collaborative	Antagonistic
Communication	Intensive + positive	Limited + defensive
Ability to satisfy everyone	Very high	Virtually zero
Outcome	Win/Win	Win/Lose
Capacity to find solutions outside the dispute	Unlimited	None
Stress factor	Tensions released	Highly stressful

<sup>1</sup> International Mediation Institute, Anniversary Review 2007-2014: <https://imimediation.org/7-year-anniversary-review-for-imi>

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<sup>1</sup> I am grateful for the assistance provided in the preparation of these remarks by the Researcher to the Judges of the Equity Division of the Supreme Court of NSW, Ms Sarah Pitney.

<sup>2</sup> See Schedule 1

<sup>3</sup> Professor Koh (Singapore Ambassador-at-Large) in Foreword to J Lee and T Hwee Hwee, *An Asian Perspective on Mediation* (Academy Publishing, 2009) vii.

<sup>4</sup> See, e.g., J Barkai, "Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-Cultural Negotiation and Dispute Resolution" (2008) 8(3) *Pepperdine Dispute Resolution Law Journal* 403; S Ali, "Reconciling global harmonization and cultural diversity in the context of international commercial arbitration in East Asia" in *Resolving Disputes in the Asia-Pacific Region* (Routledge, 2011); A Stallard, "Joining the Culture Club: Examining Cultural Context when implementing International Dispute Resolution" (2002) 17 *Ohio State Journal on Dispute Resolution* 463 at 470; E Birch, "Practical and Cultural Aspects of International Mediation" in A Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Martinus Nijhoff Publishers, 2014) 465; D Peters, "Can We Talk? Overcoming Barriers to Mediating Private Transborder Commercial Disputes in the Americas" (2008) 41(5) *Vanderbilt Journal of Transnational Law* 1251; A Sagartz, "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court" (1998) 13 *Ohio State Journal on Dispute Resolution* 675. Compare J Barkett and J Paulsson, "The Myth of Culture Clash in International Commercial Arbitration" (2010) 5(1) *Florida International University Law Review* 1.

<sup>5</sup> E Meyer, "Getting to Si, Ja, Oui, Hai and Da" (2015) *Harvard Business Review* 74; Professor Barkai, "What's a Cross-Cultural Mediator to do? A Low-Context Solution for a High-Context Problem" (2008) 10 *Cardozo Journal of Conflict Resolution* 43 at 50, 81. Barkai argues that the text "is infused with key American values such as individuality, equality and self-determination...".

<sup>6</sup> J Lee and T Hwee Hwee, *An Asian Perspective on Mediation* (Academy Publishing, 2009) ch 2.

<sup>7</sup> S Strong, "Beyond International Commercial Arbitration? The Promise of International Commercial Mediation" (2014) 45 *Washington University Journal of Law & Policy* 11 at 12 (fn 6-7).

<sup>8</sup> S Menon, "International Arbitration: The Coming of a New Age for Asia (and Elsewhere)", speech presented at ICCA Congress 2012, 11 June 2012.

<sup>9</sup> <https://imimediation.org/>

<sup>10</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2002Model\\_conciliation.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html)

<sup>11</sup> See Article 1 footnote 2.

<sup>12</sup> See Article 1(3) and footnote 2:

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html)

<sup>13</sup> Lord Woolf, "Mediation: The Way Forward", Singapore Mediation Lecture, 10 October 2013.

<sup>14</sup> Schedule 2; International Mediation Institute, Anniversary Review 2007-2014:

<https://imimediation.org/7-year-anniversary-review-for-imi>

<sup>15</sup> A/CN.9/832 - Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session: [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).

<sup>16</sup> E Sussman, "The New York Convention through a mediation prism" (2009) 15(4) *Dispute Resolution Magazine* 10.

<sup>17</sup> A/CN.9/861 - Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session: [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).

<sup>18</sup> A/CN.9/861 - Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session at [19]: [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).

<sup>19</sup> A/CN.9/861 - Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session at [46]: [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).

<sup>20</sup> A/CN.9/861 - Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session at [84]: [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).

<sup>21</sup> A/CN.9/861 - Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session at [72]: [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).

<sup>22</sup> A/CN.9/861 - Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session at [88]: [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).

<sup>23</sup> A/CN.9/867 - Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session: [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).

<sup>24</sup> A/CN.9/896 - Draft Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session: [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).

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- <sup>25</sup> A/CN.9/WG.II/WP.198 - Settlement of commercial disputes: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation at [34]-[42]: [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).
- <sup>26</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) Art V
- <sup>27</sup> E Vidak-Gojkovic, "The UNCITRAL Convention on Enforcement of Conciliated Settlement Agreements - An Idea Whose Time Has Come?" <http://kluwermediationblog.com/2015/10/21/the-uncitral-convention-on-enforcement-of-conciliated-settlement-agreements-an-idea-whose-time-has-come/>.
- <sup>28</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32008L0052>
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- <sup>30</sup> *Mediation Bill 2016* s 12.
- <sup>31</sup> *Code of Civil Procedure* (1996) Art 267; *Civil Conciliation Act* (1951) Art 16.
- <sup>32</sup> *Mediation Act 2012* s 14.
- <sup>33</sup> *Code of Civil Procedure* Art 131-12
- <sup>34</sup> *Civil Procedure Law* Arts 97, 194-5
- <sup>35</sup> Singapore International Commercial Court, Practice Direction 77(12).
- <sup>36</sup> *Civil Procedure Act 2005* (NSW) s 29; *Federal Court Rules 2011* (Cth) r 28.25.
- <sup>37</sup> *Code of Civil Procedure* O. 23 r. 3.
- <sup>38</sup> B Wolski, "Enforcing mediated settlement agreements (MSAs): Critical questions and directions for future research" (2014) 7(1) *Contemporary Asia Arbitration Journal* 87 at 94.
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- <sup>40</sup> S Strong, "Beyond International Commercial Arbitration? The Promise of International Commercial Mediation" (2014) 45 *Washington University Journal of Law & Policy* 11 at 18-9.
- <sup>41</sup> *Woo Koon Chee v Scandinavian Boiler Service (Asia) Pte Ltd and Others* [2010] SGCA 35; *Fanirata Pty Ltd (as trustee) v Logan City Council*; *Hogan v Logan City Council* [2014] QPELR 539; [2014] QPEC 25.
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- <sup>43</sup> <http://www.legislation.nsw.gov.au/#/view/act/2005/28/full>
- <sup>44</sup> <http://www.legislation.nsw.gov.au/#/view/regulation/2005/418>
- <sup>45</sup> <https://www.legislation.gov.au/Details/C2015C00419>
- <sup>46</sup> <http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/ncf1>
- <sup>47</sup> <https://www.legislation.gov.au/Details/C2016C00683>
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- <sup>68</sup> [http://klrca.org/rules/mediation/#KLRCMEDIATIONRULES\(Revised2013\)](http://klrca.org/rules/mediation/#KLRCMEDIATIONRULES(Revised2013))
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- <sup>70</sup> <http://www.legislation.govt.nz/act/public/1908/0089/latest/DLM147653.html>
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