

## Enforceability of the Mediation Outcome

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The mediation outcome needs to be considered on its classification, reality and enforceability. Doing so will make mediation even more attractive as a dispute resolution method and its outcome more durable. This paper focuses on the reality of the mediation outcome and the consequences of its repudiation. After an analysis of the mediator's role, the legal classification of the outcome, and the options for the enforcement of that outcome, the outcome was classified as an agreement, and the role of the mediator as a contract facilitator. In addition to that, some difficulties were identified regarding enforcement. These difficulties were attributed to the lack of recognition of mediation as an enforceable outcome similar to the arbitration award and to the same extent. Two recommendations have been made, one of which is that national systems should enact legislation regulating the mediation process and its outcome as a real dispute resolution process and give it proper enforceability recognition. The other recommendation is that international lobbies should urge the United Nations to adopt a similar convention to 'The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards': the 'New York Convention 1958'. This would be :a convention to provide for the international recognition of the mediation outcome as a mobile enforceable judgment.

### 1. Enforceability of the Mediation Outcome

The use of Alternative Dispute Resolution (ADR) processes, notwithstanding their nature, has become a very popular tool for solving problems in every field of our lives. Recently it has become common to see a restorative justice practice<sup>1</sup> in almost all legal systems, which means the ADR exists even in criminal matters. Furthermore, the wide spread of ADR culture, makes people, even laymen, aware of the art of how to negotiate effectively by concentrating on their interests rather than on their positions.<sup>2</sup> So, the pathway to long lasting solutions becomes comprehensively understood. However, sometimes it is conceivable to come across 'agreement breakdown' in spite of the fact that that agreement has been reached in a facilitated mediation in which the parties have negotiated on the grounds of their interests. Breakdown of agreements might be attributable to a number of reasons, for example, the dramatic change in circumstances of one party. It is out of the scope of this paper to discuss these reasons but the core of it is going to be to reflect on how to prevent the breakdown of agreements that were reached in facilitated mediation processes.

Dispute resolution processes may result in one of three possible outcomes. The outcome might be an agreement (as in negotiation), a compromise (as in conciliation) or a judgment (as in an arbitration or court proceedings). The mediation outcome is not a judgment or a compromise but an agreement in which no party has to concede to another,

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<sup>1</sup> **Restorative Justice** 'is an approach to justice where offenders are encouraged to take responsibility for their actions and 'to repair the harm they've done- by apologizing, returning stolen money, or (for example) doing community service'. *Restorative Justice* (19 November 2010) Wikipedia  
<[http://en.wikipedia.org/wiki/Restorative\\_justice](http://en.wikipedia.org/wiki/Restorative_justice)>.

<sup>2</sup> Negotiation styles are two: first, positional negotiation, in which parties are focusing on their positions and dealing with negotiation as 'win-lose,' in which any gains by the opponent are losses by the home team. Positional negotiation is essentially adversarial. Positional negotiation sometimes is known as a competitive negotiation or compromisory negotiation. Secondly, principled negotiation is an interest-based approach to negotiation that focuses primarily on conflict management and conflict resolution. Principled negotiation uses an integrative approach to finding a mutually shared outcome. Roger Fisher, William Ury and Bruce Patton, *Getting to Yes (Negotiating an agreement without giving in)*, (Random House, 2<sup>nd</sup> ed, 1991), 4-8.

to giving in or to compromise his or her rights in any sense.<sup>3</sup> However, the agreement has to satisfy the interests of all parties; otherwise it will not be the best solution for the dispute between them.<sup>4</sup> So what is the actual role of the mediator? Is he/she a contract facilitator? What is the highest 'aspiration ceiling' of the parties and a mediator out of the mediation process? Is it 'to reach an agreement' at the end of the mediation process? How could the 'mediation outcome' be enforced if one party repudiates its obligations? Does the party seeking enforcement for such an agreement, have more options than those available to any other contractor? If the legal position of a party in mediation is the same as the legal position of a party in any other contract, what strengths and weaknesses may that position have, and how could these be enhanced if ever needed?

So, the purpose of this paper is to answer these questions through analysis of the mediator's role and by describing its impact, if any, upon the features of the mediation process and its outcome. Accordingly, the paper will discuss the role of the mediator in all phases of the mediation process, the effect of mediation outcomes, and the enforceability of mediation outcomes as follows:

- The mediator's role in the mediation process.
- The effect of the mediation outcome.
- The enforceability of the mediation outcome.

## 2. The Role of Mediator

The role of mediator is as a contract facilitator, so this role involves different tasks according to the phase of the mediation process that is being performed.<sup>5</sup> To clarify this aspect, mention has to be made of the mediator's role in each phase of the four phases of mediation, as follows:

### 2.1 The Pre-mediation Phase

This is the most crucial phase of any mediation process, in which a skillful mediator can establish a strong base for a successful mediation process. Thus the mediator has to consider and deal with many issues at this stage in order to proceed firmly in the process. These issues are: the suitability of the dispute to mediation, the capacity of the parties, and the representation of the parties. To clarify the role of mediator in this phase, consideration has to be given to each of the three issues mentioned above.

First of all, in this stage the mediator has to check the suitability of the dispute to mediation. Some subjects cannot be mediated. For example, criminal matters<sup>6</sup> like murder, larceny, blackmail or contempt of court are not suitable for mediation. They have to be resolved in the courts. The suitability of the dispute to mediation could be affected by other factors like cultural differences, gender, or the number of parties involved in the dispute. So conventional mediation is sometimes not suitable and a special form of mediation needs to be set up in order to solve the dispute such as co-mediation, shuttle mediation or hybrid mediation.

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<sup>3</sup> David Spencer, *Essential Dispute Resolution*, (Cavendish Australia, 2<sup>nd</sup> ed, 2005), 45-83.

<sup>4</sup> Principled negotiations have four elements, first, mutual trust has to be established between the parties. Secondly, the negotiator has to create or maintain a positive relationship with the parties. Thirdly, negotiators have to discover shared interests (goals or objectives) that will work as common ground between the parties. The negotiator must identify the zone of the possible agreement between the parties. Fisher et al, above n 2, 4-8.

<sup>5</sup> Tania Sourdin, *Alternative Dispute Resolution* (Lawbook Co, 3<sup>rd</sup> ed, 2008), 57, 134-167.

<sup>6</sup> Except restorative justice issues above mentioned.

The second thing the mediator needs to consider is the capacity of parties to participate in the mediation process. That is because the outcome of mediation is going to be an agreement: ‘a contract’<sup>7</sup> so the mediator has to check that both parties have the capacity to enter into a contract. This matter is not a problem in regard to individuals because many of their capacities can be presumed and need not be checked beforehand, but when the parties or some of them are corporate bodies, the mediator has to confirm that the prospective outcome would be lawful and in accord with the corporations’ memoranda of incorporation. Otherwise, the mediation process will be a waste of time and a futile task.

The last thing that needs to be checked by the mediator at this stage is the representation of the parties, if any. Representatives of parties have to be entitled to represent properly according to the law. Furthermore, representatives have to disclose the extent of their authority so as to make clear from the beginning the kind of agreement a representative can sign and what kind they cannot. Also, such a check may enable the mediator to make it clear to parties the sort of agreement they can ultimately reach.

To sum up, the mediator has to check the suitability of the dispute for mediation, the capacity of parties and the representation of parties in mediation sessions and to what extent they are authorized to enter a contract.

## 2.2 The First Joint Session

The purpose of this stage is to enable the parties to understand the issues of disagreement between them and to identify the interests underpinning those issues. Mediators normally rely upon parties’ good faith<sup>8</sup>, so they would not expect that the final agreement might be affected by any of the normal contract’s deficits such as misrepresentation, factual mistakes, undue influence, or duress. Nonetheless, they exert every possible effort to eliminate such negative factors from happening in the course of the mediation process. A skillful mediator in this stage normally makes sure that the following things are properly fulfilled.

First, the mediator has to make sure that all parties understand the meaning and purpose of the mediation process. This will remind parties of their obligation to participate in ‘good faith’ and put some sort of limitations to their ambitions.

Secondly, the mediator has to facilitate a thorough discussion between the parties in turn, to enable them to understand each other’s point of view and try to engage them in that discussion by asking them to try to understand the other side’s perspective, summarize what they have said, ask them open ended questions and reframe their expressions. That will nurture transparency in the process and eliminate all factors of power imbalance between the parties. Also, the mediator, by summarizing what has been said, will help the parties listen to their demands which will enable them to reconsider any unrealistic expectations and refine emotional issues.

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<sup>7</sup> Notice has to be taken of cultural differences, because in exceptional cases, as in Aboriginal culture, this conclusion may be undesirable (see: Robyn Carroll, ‘Developments in Mediation Legislation’ (2002) 5(5) *Alternate Dispute Resolution Bulletin*, 78 ).

<sup>8</sup> What is meant by ‘good faith’ is still a controversial issue and because it does not represent the core of this paper, I found it appropriate to state the lexical definition of it which is: ‘propriety or honest.’ ‘in banking and finance, Good Faith is based on the distinction between the a person who is honestly blundering and careless, and a person who has a suspicion that something is wrong but refrains from asking questions . the latter conduct amounts to bad faith or dishonesty : *Jones v Gordon* (1877 ) LR 2 App Cas 616. Peter Butt (ed), *Concise Australian Legal Dictionary* (LexisNexis Butterworths Australia, 3<sup>rd</sup> ed, 2004), 190.

The third duty of the mediator in this phase is to ask the parties to try to agree about issues of disagreement. This will train the parties and educate them about the possibility of reaching an agreement. On the other hand, formulating a list of disagreement issues will actually work as an agenda for direct discussion between the parties at the end of the first joint session.

The last task for the mediator in the first joint session is to facilitate a direct and thorough discussion between the parties about each of the agenda topics that they have already agreed to. The mediator has to instruct the parties that they have to discuss only past and present issues about that agenda. Any discussion about future issues would be a discussion of an option, so the mediator has to write that option on his note sheet to be discussed in the next phase. The mediator has to be aware that in not considering future issues as an option, future issues may still represent the core of the party's interest. So more likely in this phase, parties will start discussing directly, not through the mediator, and exploring their actual interests.

By the end of this discussion, each party and the mediator will have an understanding of each other's case and will have identified their own interests and the interests of the other party. Accordingly, each party by now will be able to make an informed offer that will satisfy his/her own interests. Furthermore, each party will be able to appraise the extent to which their offer is going to be acceptable to the other party. The mediator will now be ready to play their role in assisting the parties in testing the reality of their options.

### **2.3 The Separate Session (The Private Session)**

The role of mediator in the private session, apart from exploring further issues a party did not wish to discuss during the first joint session; is to help the parties in turn, to generate realistic options that satisfy their interests and prepare them to negotiate these options in the next stage of the process. So the role of mediator in the private session comprises three tasks as follows:

First, the mediator has to reassure each party that the private session is confidential and encourage him or her to reveal any facts he or she has concealed in the joint session. That will enable the mediator to reach an even better understanding about the dispute and reduce the possibility of the existence of any vitiating factors.

Secondly, the mediator will ask each party to think of as many options as he or she can to solve the dispute. If a party is stuck, the mediator might help by asking questions about the party's needs and ambitions or even consider utilizing a brainstorming tool. In this stage, each party is encouraged to confidently express their actual interests and what he or she thinks of the possible ways of satisfying them.

Thirdly, the mediator has to test with each party, the reality of each option and to ask him or her to consider all the alternatives to the negotiated agreement regarding the best, the worst or the most likely alternatives. This testing process will enable each party to formulate a well informed offer, counter-offer or acceptance in the negotiation. Therefore,, it will lessen the possibility of misrepresentation, mistakes, or uncertainty which ultimately may vitiate the mediated agreement.

At the end of the private session, the mediator has to remind each party that he or she (the mediator), will not be raising any option on their behalf but that each party has to do that themselves when the joint session reconvenes.

## 2.4 The Second Joint Session

The purpose of this session is to enable the parties to negotiate the options that they have formulated in their private session. The actual tasks here in this session are: the parties have to make offers and respond to the counter-offers that might be made by their counterpart; either by counter-offers again or by acceptances.<sup>9</sup> The mediator's role may start early in this stage if the situation requires him or her to encourage parties to start negotiation. Otherwise, in this stage the mediator may sit back and let parties negotiate their offers and acceptances. When the parties reach agreement, the mediator has to help them ensure it is realistic by trying to draw their attention to factors that if negotiated, would make the agreement more durable or at least more complete and easier to enforce.<sup>10</sup> So if the parties are happy with the outcome, the mediator has to ensure that the parties express their commitment in writing.<sup>11</sup>

So, that is the end of the mediation process. It has reached a satisfactory outcome, at least, from the mediator's point of view. Is that going to be the end of it? What are the most likely effects that could result from such an agreement?

## 3. Effects of the Mediation Outcome

When the parties reach a positive outcome, which is going to solve their dispute, some questions may arise about the effect of that outcome. These questions are:

- What is the classification of that outcome?
- In case of non-voluntary execution of an outcome, what options are available to the creditor of that outcome?
- Is choice between options, whatever they are, going to be left to the creditor's discretion?
- Are these options going to change if the outcome has been reached by a 'judge mediator' or in a mediation process held after the dispute had been commenced in a court?

## 4. Classification of the Mediation Outcome

The classification of the mediation outcome is a contract.<sup>12</sup> Hence, it is not a judgment imposed upon parties and against their will. It is not, also, an arbitrary award which has been decided by an arbitrator nominated by the parties. Rather, the parties reached the outcome after they had exchanged informed offers and acceptances. Furthermore, that was not a mere concurrence of offers and acceptances, but there was consideration and an

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<sup>9</sup> Because the style of the negotiation we are dealing with here is principled negotiation, the offer and the counter offers are not going to be positional ones and the acceptances also are not going to be compromises or concede to the other party's offer but - as it has been said before, all offers and acceptances here are made to satisfy both parties' interests.

<sup>10</sup> That is why the mediator has to be not only experienced, but also has to have reasonable knowledge about the field of the dispute. Such experience and knowledge will help the mediator in reality testing by making him or her able to anticipate and address all enforcement issues of the mediated agreement.

<sup>11</sup> Peter Condliffe, *Conflict Management (A Practical Guide)* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2002), 185-190.

<sup>12</sup> David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press, 2006), 348.

intention to create a legal relationship as well.<sup>13</sup> So, all elements necessary for the existence of a valid contract are available.

## **5. How is the Contract Going to be Discharged?**

As with any other contract, the creditor should seek a voluntary discharge of the obligation but if the debtor is still procrastinating, the resolution may differ depending on how the mediation process has commenced in the first place. Generally, there are two hypothetical situations in this regard:

### **5.1 First, Parties Choose to Mediate their Dispute Before Going to Court**

In such a case, the remedies available to the creditor are the same remedies available to any contractor. That is, the creditor can commence a legal proceeding alleging breach of contract and ask for specific performance or other available remedies such as compensatory damages, rescission or reformation as the case might be. Simply, that is because the outcome of the mediation which has been reached is a contract and nothing has been done about it, other than writing and signing it by the parties. So for a court to enforce such a contract it needs to hold a hearing before it will be able to reach any kind of resolution. The mediation process here is not a real dispute resolution process such as adjudication or arbitration and should not be seen as more than a contract facilitation process. In other words, if one of the parties to this process repudiates the agreement, the dispute before a court about this course of action has to start by proving the existence of the agreement and its validity.<sup>14</sup> The court has to consider the merit of the mediated dispute not just the enforcement of the solution that has been reached in the mediation process. In such circumstances, if people have not acted in good faith, the mediation process would be a waste of time, protracting disputes and would undermine the rationale behind the recognition of mediation as a dispute resolution process.

### **5.2 Secondly, Parties Choose to Mediate after their Dispute has been Initiated before a Court**

The classification of the mediation outcome remains the same in this case; however, the most likely scenario in such a situation is to have the outcome decided by the court as a consensual judgment or settlement or as it is expressed in many Australian laws as a 'consent order'.<sup>15</sup> So such a court intervention may be done automatically by virtue of the proceeding that has already been listed in the court. Sometimes parties may opt to have their outcome reviewed by the court. In both cases the outcome will not be seen as a mere contract, but will be seen as a court order.<sup>16</sup> Therefore, the mediation process – in this case – is no longer in existence because the outer appearance of its outcome is a court order and the mediation with all its procedures and its outcome (the contract) is just a ground for the court order. When it comes to identifying the dispute resolution process which brought that outcome into existence, the court order has to be followed, not the contract, the direct outcome of mediation. The outcome (the contract) here is precisely like evidence in any proceeding: it grounds the decision but cannot be seen as an outcome.

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<sup>13</sup> These are the elements of any valid and enforceable contract in common law. Compare the basic elements of contract in the civil law system.

<sup>14</sup> That means the repudiation will nullify the mediation process as a whole. That is because the contract here is a matter of fact and a matter of law so it has to be proved in order to work as a valid ground for any court imposed solution or remedy.

<sup>15</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 34D(2).

<sup>16</sup> Spencer and Brogan, above n 12, 371.

In both hypothetical situations mentioned above, if the creditor elects to go to court because the debtor has not performed his/her duties (obligations) according to the mediation outcome (the contract), the creditor's job might be easier in the second situation than in the first. In the first situation, he/she is most likely to face very protracted proceedings because the debtor might allege frustration<sup>17</sup>, emergency circumstances or any other acceptable excuse to the specific performance of the contract. In the second situation, the proceeding before court is going to be an enforcement proceeding because the debtor here has refused to enforce the court judgment voluntarily or at least he or she has refused to enforce the court order according to the Australian terminology. The subject matter here is more serious than mere contract repudiation. Generally, a creditor is entitled to all enforcement relief available according to the system. For example, he or she can ask for a Mareva Injunction.<sup>18</sup> Debtors may protract proceedings but there is a price they have to pay. That price is, at least, a conviction for contempt of court. So the matter is not as in general proceedings, but the debtor has to consider the repudiation of a mediation outcome carefully because doing so could be very costly and is not worth trying. The debtor is most likely to lose his case in such a dispute because a prudent mediator – as mentioned above – might have discussed the subject matter from all sides to eliminate any potential vitiating factors and to produce a durable outcome before writing the agreement. Also, when the agreement comes before a judge to re-issue as a consensual judgment or consent order, the judge will not recognise the mediation outcome without testing its durability. The envisaged check by the court would involve also the formality of the mediation outcome (writing and signatures of parties and mediator). In brief, when a mediation outcome is issued or re-issued by a court, the court will do that after testing the reality of that mediation outcome to reduce the risk of non-voluntary performance or at least ensure speedy enforcement proceedings before a court if ever needed.

What has just been said is applicable when there are no restrictions or constraints upon the creditor. Sometimes the law or mediation outcome or other agreement might require a specific remedy for such non-compliance with the mediation outcome, whatever its classification. For example, agreement to mediate might be a dispute resolution clause in a bigger contract requiring disputes to be resolved in many steps, one of which is mediation and other steps if mediation does not work, such as arbitration. Mediation may not work because its outcome fails to create a long lasting solution. Also, parties can agree beforehand or after re-occurrence of the dispute to go to mediation again. There is nothing preventing them from doing so.

Mediation, as it has been discussed above, is a good step toward putting an end to an existing dispute by helping parties to reach an agreement, but the durability of that agreement is dubious because there is nothing in the existing system to rely upon so as to compel the repudiator to enforce the outcome or to prevent a malicious party from

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<sup>17</sup> Frustration: the situation where a contractual obligation has, without the default of either party, become incapable of being performed, because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337. Frustration automatically discharges the parties from the obligation to perform, or to be ready and willing to perform, their contractual duties; for example *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169, *Frustrated Contracts Act 1978* (NSW); *Frustrated Contracts Act 1988* (SA). (see: Butt, above n 8, 184.)

<sup>18</sup> That is an interlocutory court order restraining a party from removing from the jurisdiction of the court, or otherwise dealing with, assets which are the subject of the injunction: *Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)* [1975] 2 Lloyd's Rep, 509 (See Butt, above n 8, 274)

manipulating the loose ends of the process.<sup>19</sup> So how could the process be reformed to recreate mediation as a popular and effective dispute resolution option?

## 6. Enforceability of Mediation Outcome

As was said earlier, a mediation outcome up to this moment is either a contract signed by its parties outside the court system or a court order as is the case in Australia: generally, the court-annexed ADR. However in some jurisdictions especially those affected by the civil and sharia law systems,<sup>20</sup> the mediation outcome or (suluh agreement)<sup>21</sup> can be issued as a court judgment which is always called a consensual judgment. The consensual judgment is a final judgment which is unlikely to accept any objection against it before courts of appeals, in spite of the fact that parties voluntarily go to court and have a mediation outcome re-issued by it. So, enforceability of a mediation outcome depends on the formality of that outcome. In other words, the form of the final mediation outcome, whether it is an agreement, consent order or a consensual judgment, specifies the suitable method of enforcement. In conclusion, a mediation outcome is not enforceable in itself but it needs a supportive authority such as a court order. Is that enough for a mediation outcome to be described as a dispute resolution outcome? The answer is no, it does not. In order for it to be so described, two tasks need to be undertaken.

First, the mediation outcome needs to be adopted by the legal system as an enforceable outcome per se. That is, national legal systems have to recognize the enforceability of mediation outcomes in their national legislation or to enact a separate piece of legislation regulating mediation in all its aspects. In some jurisdictions such legislative activities have started. For example, in Australia since 1984 mediation has begun as a community service recognized by the government.<sup>22</sup> In 1991, in respect of Commonwealth legislation, the *Court (Mediation and Arbitration) Act* (Cth) was enacted. Also, in 1996 the *Workplace Relations Act* (Cth) authorized a referral to mediation for the first time in industrial disputes. On the other hand, many organizations nationally and internationally have been established to facilitate mediation in almost all kinds of disputes. As a result, a code of practice began to develop where many bodies, like, for example, the New South Wales Law Society, have issued their own guidelines for members who are practising mediators. The outcome of this legislative movement is that a National Accreditation

<sup>19</sup> Sourdin, above n 5, 257-258, see also: *National Australia Bank v Freeman* [2000] QSC, 295 (This case quoted by Sourdin, above n 5, p 258); See also, Condliffe, above n 11, 190-191.

<sup>20</sup> The custom-based body of law based on the Koran and the religion of Islam. Because, by definition, Muslim states are theocracies, religious texts are law and are distinguished by Islam and Muslims in their application, as Sharia or Sharia law: the sacred law of Islam; Islamic law and also referred to as Muslim law. So thorough is the integration of the justice system and Church under Sharia law that Sharia courts are essentially religious courts and judges are usually local church (Mosque) officials. It is also spelled Shariah or Shari'ah and, in the USA, Shari'a. Because of the religious origin of the word, some prefer to capitalize it and others not. The word 'sharia' means 'the path' or 'the path to water'. Sharia as a source of law, is, by definition, arbitrary and discretionary - some would prefer to describe it as flexible. The *Oxford Dictionary of Islam* proposes a distinction between *sharia* and *fiqh* as follows:

'Whereas shariah is immutable and infallible, fiqh is fallible and changeable.'

Opportunistic jurists will defer to the distinction only when convenient; to propose that an unfavourable tenet of Islamic law is mere fiqh and must cede to a more favourable tenet issue from shariah. But that distinction - which limits sharia to the divinely provided law, and fiqh to the interpretation of sharia - is not universally followed. Many sources refer to fiqh as synonymous to shariah. From Lloyd Duhaime, *Sharia Law* Duhaime.org <<http://www.duhaime.org/LegalDictionary/S/ShariaLaw.aspx>>

<sup>21</sup> That is the equivalent Islamic term to the amicable salvation of disputes or settlement of disputes outside room courts.

<sup>22</sup> Norwood, South Australia, establishment of the Community Mediation Services.



Standard for Mediators<sup>23</sup> has been issued in Australia and accordingly, it will be illegal for a person to act as a mediator without holding a valid national accreditation to do so. Australia is taking steps toward the perfection of mediation practice as an ADR process. However, the important step that still needs to be taken by the legislature in order to reach completion is to make the mediation outcome - once it is signed by the accredited mediator - enforceable to the same extent as any judgment issued by a court in Australia. If that happens, it would not be something unique because it would be similar to the arbitration award. Both of them are dispute resolution processes created by the parties and both of them seek an alternative solution to litigation. Furthermore, because the arbitration award is a determinative decision imposed upon parties while the mediation outcome is a consensual solution chosen by parties to put an end to their dispute, it would be more logically consistent to require the later solution to also be imposed upon its parties rather than the former one. In other words, it would be totally acceptable to make the mediation outcome coercively enforceable against its parties.

Secondly, by virtue of globalization, a large proportion of disputes, especially commercial disputes, become transnational disputes that need some sort of international effort in order to be resolved effectively. So, after the national recognition of mediation outcomes as enforceable outcomes internally, international recognition also needs to be established by the United Nations as it has done in regard to the enforceability of arbitration awards by adopting The United Nation Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 'New York Convention 1958'.<sup>24</sup>

For mediation to be a real and effective dispute resolution process, national and international recognition of mediation outcomes as equivalent to arbitration awards has to occur both in regard to the nature and the enforceability of those outcomes.

## 7. Conclusion

Mediation is a creative idea that results from the sincere, collaborative efforts of psychologists, lawyers and other creative individuals and organizations to resolve disputes in a smart way that satisfies parties' interests, limits costs, and has stood the test of time. However, its outcome as an agreement cannot be enforced before its re-issue as an outcome by a court and hence it cannot be seen as a dispute resolution outcome. Even after its re-issue by court, it is not a mediation outcome but a court judgment. So, it is not an accurate legal analysis for mediation to be classified as a dispute resolution process as its outcome will not directly put an end to a dispute and it is not an enforceable outcome before re-issue by a court. Thus, mediation is a facilitative process of agreement between parties and the mediator is not a dispute practitioner in the technical sense of that term but a facilitator of contracts.

## 8. Recommendations

In conclusion, two recommendations are made:

First, a national Mediation Act should be enacted embodying all the developments that have been made up to the date of its enactment and should provide for the recognition of the mediation outcome as an enforceable outcome just like any arbitration award and to the same extent.<sup>25</sup>

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<sup>23</sup> See: NADRAC website: [www.nadrac.gov.au](http://www.nadrac.gov.au)

<sup>24</sup> Richard Garnett et al, *A Practical Guide to International Commercial Arbitration* (Oceana Publications Inc, 2000) 125.

<sup>25</sup> Enactment of a unified mediation Act in Australia may involve some difficulties relating to issues of diversity and consistency. (see: R Carroll, above n 7). However, the enactment of the *Mediation Act 1997* in

Secondly, lobbying has to be undertaken in international forums and especially in the United Nations for the adoption of an agreement which will provide recognition and enforceability of mediation outcomes internationally.

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the Australian Capital Territory, the *Dispute Resolution Act 2001* in Tasmania and the proposal of the Western Australia Law Reform Commission to enact a Mediation Act in 1999 following the review of the Criminal and Civil System in Western Australia (Western Australian Law Reform Commission, WALRC *Review of the Criminal and Civil System in Western Australia Final Report Project No 92 (1999)*) were very important steps which paved the way for other jurisdictions to do so.

The unification of mediation law does not mean that one piece of legislation has to be produced to govern mediation in all states and territories of Australia, but it requires that separate legislation in each state and territory contains the same or similar provisions. One of the promising indications in this regard was the establishment of the Mediators Standards Boards in September 2010. The board will be responsible for the implementation and maintenance of the National Mediator Accreditation System (NMAS) ([www.msb.org.au](http://www.msb.org.au)).