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## Consent Awards in International Arbitration: From Settlement to Enforcement

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# CONSENT AWARDS IN INTERNATIONAL ARBITRATION: FROM SETTLEMENT TO ENFORCEMENT

*Yaraslau Kryvoi\* & Dmitry Davydenko†*

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## INTRODUCTION

Consent awards, being effectively settlement agreements recorded by arbitration tribunals as awards, raise a number of difficult legal questions, ranging from the right of arbitrators to refuse recording of the settlement as a consent award to the possible use of consent awards to cover illegal activities. Understanding what makes consent awards different from “normal” arbitration awards will help successfully navigate from settlement to enforcement. This Article presents the first major study of the legal regime governing consent awards in international arbitration.

According to some estimates, settlements before or after arbitration proceedings amount to up to 30 percent of all administered arbitrations.<sup>1</sup> Another study suggests that over 40 per-

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1. Eugen Salpius, *The Decision to Settle*, 69 ARB. 155, 155–58 (2003).

cent of settlements were reached before the first arbitration hearing.<sup>2</sup> Subsequently, many of these settlement agreements are recorded as consent awards.<sup>3</sup> However, despite this impressive popularity of settlements and the complex legal questions they pose, very little has been written on the legal issues related to settlement agreements and consent awards. In 2014, the United Nations Commission on International Trade Law (“UNCITRAL”) agreed to authorize its Working Group to consider the issue of enforcement of international settlement agreements.<sup>4</sup> In 2015 the Working Group reported to UNCITRAL a summary of its findings and recommendations, and was instructed to commence work on the enforcement of settlement agreements resulting from international commercial conciliation.<sup>5</sup>

The practice of recording settlement agreements in the form of arbitral awards dates back to Ancient Greece. The Greek philosopher Isocrates (436-338 BC), in a court speech on behalf of the respondent in “Against Callimachus,” argued that the case was already settled in an arbitral award on agreed terms.<sup>6</sup>

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2. Loukas Mistelis, *The Settlement-Enforcement Dynamic in International Arbitration*, in 19 AM. REV. INT’L ARB. 377, 379 (2008). Other studies suggest more modest figures. See, e.g., MICHAEL BÜHLER & THOMAS WEBSTER, HANDBOOK OF ICC ARBITRATION 317 para. 26–5 (observing that the number of awards by consent dropped from 13 percent between 1987 and 1996 to 10 percent between 1997 and 2006). Some suggest that in arbitration parties settle less often than in litigation. A possible explanation is that parties feel that they own the arbitration process in a way that they do not in litigation. See generally Alison Ross, *Arbitration Settlements, and Tectonic Shifts, Occupy Other Speakers*, GLOBAL ARB. REV., Sept. 23, 2009.

3. For example, in 2013, 40 out of 471 awards rendered by the International Chamber of Commerce (“ICC”) International Court of Arbitration were consent awards. See INT’L COURT OF ARBITRATION, *2013 Statistical Report*, 25 ICC INT’L CT. ARB. BULL. 1, 14 (2014).

4. See U.N. GAOR, U.N. Comm’n on Int’l Trade Law, paras. 9, U.N. Doc. A/CN.9/WG.II/WP.182 (July 14, 2014).

5. See U.N. GAOR, 63d sess., para. 7, U.N. Doc. A/CN.9/WG.II/WP.190 (July 13, 2015).

6. Isocrates informed the court that the claimant’s friends proposed that he should pay two hundred drachmas to fully settle the claim, which the respondent accepted. The parties applied to one Nicomachus to fix the settlement as an arbitral award to ensure its finality. Later on, the respondent apparently denied the fact of settlement and the dispute’s submission to arbitration. He argued that he would have never agreed to Nicomachus being the arbitrator, as he knew he was an “old friend” of Isocrates. However, the claimant explained to the court that the arbitrator was requested merely to

The ancient Greeks used to fix arbitral awards on agreed terms on the most vital disputes in stone or bronze.<sup>7</sup> For example, a surviving stela dating back to 363 B.C. indicates the terms of settlement of a dispute regarding the division of a plot of land.<sup>8</sup>

Nowadays, a number of international instruments encourage mediation and conciliation,<sup>9</sup> both of which specifically aim at helping parties reach an amicable settlement.<sup>10</sup> The World Bank established the International Centre on Settlement of Investment Disputes (“ICSID”) to encourage settlement of investment disputes through mediation and arbitration.<sup>11</sup> The

formalize a settlement rather than to hear a dispute. Therefore, he argued, it was not strange for the respondent to accept this individual as the arbitrator. Derek Roebuck, *Best to Reconcile: Mediation and Arbitration in the Ancient Greek World*, 66 J. CHARTERED INST. ARB. 275, 281 (2000).

7. *Id.* at 284.

8. According to inscription on the stela located in the temple of Athena, certain arbitrators mediated a settlement between specified disputants who confirmed that its terms were acceptable to them. The settlement provided for a right of certain persons to lease a plot of land and their duty to pay a certain rent for it. The parties expressly waived any other rights of claim against each other. As today, the consent awards contained no reasons. WILLIAM FERGUSON, *THE SALAMINIOI OF HEPTAPHYLAI AND SOUNION* 7 (1938).

9. The terms “conciliation” and “mediation” are used interchangeably in this Article.

10. *See, e.g.*, G.A. Res. 35/52, pmbl. (Dec. 4, 1980) (“recognising the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations”); G.A. Res. 57/18, Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law, pmbl. (Jan. 24, 2003) (“recognizing the value for international trade of methods for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably [and] [c]onsidering that the use of such dispute settlement methods results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States”).

11. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States pmbl. para. 1, Mar. 18, 1965, 4 I.L.M. 524 [hereinafter ICSID Convention]; *see also* Int'l Ctr. for Settlement of Investment Disputes [ICSID], *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, para. 9, ICSID/15/Rev.1 (Mar. 18, 1965), [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf). ICSID Rule of Procedure 21(2) refers to organising a pre-hearing conference held “to consider the issues in dispute with a view to reaching an amicable settlement.” *Id.*

UNCITRAL urged national courts to regard settlement as a desirable outcome of civil procedure.<sup>12</sup>

This Article begins by demonstrating that settlement remains a preferred outcome of disputes because it helps the parties to reduce costs, save face, and retain good business relations. Additionally, parties often prefer the certainty of settlement to the uncertainty of an arbitration award. Furthermore, parties may also want to have additional enforceability of their settlement by asking an arbitral tribunal to record it as an arbitration award. Whether enforced under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (also known as the “ICSID Convention”) or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), a consent award is treated as a normal arbitration award by the enforcing courts.

Part I of this Article analyzes various arbitration rules in order to demonstrate that, despite their occasional ambiguity, it remains for an arbitral tribunal to decide whether it will record a settlement agreement as an arbitration award. The tribunal must ensure that it renders an enforceable award, in particular by determining whether there was a genuine dispute within its jurisdiction. Failure to do so may result in an arbitration award being set aside by a court in the seat of arbitration or refusal to recognize and enforce the award in domestic courts.

Part II examines consent awards as a cover for illegality. Parties to an arbitration proceeding may not have a genuine dispute but instead try to get an arbitration award to cover improper activities such as tax evasion or money laundering. In case of a consent award, the “losing” party may have no incentive to challenge the award in the courts. In such situations, responsibility to identify and uncover illegal transactions lies with the arbitrators. On the other hand, judges will need to ensure that the award did not breach not only any applicable law, but also transnational public policy.

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12. AM. LAW INST. & UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE paras. 24.1–2 (2004), <http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf> (“The court, while respecting the parties’ opportunity to pursue litigation, should encourage settlement between the parties when reasonably possible . . . . The court should facilitate parties’ participation in alternative-dispute-resolution processes at any stage of the proceeding.”).

Part III discusses issues related to the enforceability of consent awards rendered as a result of mediation or alternative dispute resolution methods, which typically do not result in a binding decision. The authors argue that the enforceability of the award will depend upon whether the arbitral tribunal resolved a genuine dispute or merely rubber-stamped a settlement agreement reached in mediation. The Article concludes by highlighting instances where tribunals and enforcing courts are likely to treat consent awards differently from “normal” arbitration awards and its implications for designing an effective dispute resolution procedure.

## I. THE LEGAL REGIME GOVERNING CONSENT AWARDS

### A. *The Purpose and Nature of Consent Awards*

Consent award (also known as award on agreed terms) is essentially an arbitral award recording a settlement agreement reached by the parties in dispute. What makes them different from “normal” arbitration awards is that the arbitral tribunal does not consider the dispute on the merits, but instead puts the parties’ agreement into shape of an award.

To understand the legal issues arising out of consent awards, it is important to establish what drives parties to settle their dispute, the legal nature of settlement agreements, and the reasons for seeking consent awards. Even though most arbitration rules and national laws provide for the possibility of recording a settlement as a consent award, it is not always clear how much discretion arbitrators have to do so. The law and practice is even less uniform on whether arbitrators can play a proactive role in helping parties reach a settlement, which they can subsequently record as a consent award.

#### 1. Why Settle?

Although the legal effect of a settlement agreement may vary in different legal systems,<sup>13</sup> it remains essentially a contract.<sup>14</sup>

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13. Some legal systems do not have any special provisions on the enforceability of such settlement agreements, and they are enforced the same as any contract between parties. UNITED NATIONS, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATIONS WITH GUIDE TO ENACTMENT AND USE 56 (2004) [hereinafter UNCITRAL MODEL LAW & GUIDE]. Other States provide for enforcement in a summary fashion if the parties signed a settle-

“Settlement” can be described as a legally enforceable contract, by which parties terminate their dispute, usually by mutual concessions.<sup>15</sup> It often involves a promise of payment or other consideration and an agreement not to pursue any further claims.

Settlement also serves as a risk-management tool. In many cases arbitrating parties cannot predict how the arbitral tribunal will evaluate the merits of their legal position and interpret the applicable legal rules. Consequently, the outcome of the dispute resolution by arbitration usually remains uncertain. A party may prefer the certainty of settlement to the uncertainty of an arbitration award in the future. Desire to reduce costs, avoid time-consuming arbitral proceedings and to remain on friendly terms with the other party can serve as additional incentives to settle.<sup>16</sup> Amicable settlement of disputes facilitates restoration of the atmosphere of mutual trust, even after a dif-

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ment agreement that contains a statement that the parties may seek summary enforcement of the agreement. *Id.* at 57. Settlements might also be the subject of expedited enforcement, for example, if they are notarized or formalized by a judge. In Austria, for example, a settlement agreement is as enforceable as any other contract; if it was drafted and negotiated by lawyers on behalf of the parties, confirmed by a State court, or notarized, then a settlement agreement becomes directly enforceable. See Markus Roth & David Gherdane, *Mediation in Austria: The European Pioneer in Mediation Law and Practice*, in *MEDIATION: PRINCIPLES & REGULATION IN COMPARATIVE PERSPECTIVE* 273 (Klaus Hopt & Felix Steffek eds., 2013). Similarly, in Switzerland and the United States, a settlement agreement authorized by a judge shall enjoy expedited enforceability. *Id.* at 1217, 1280.

14. BÜHLER & WEBSTER, *supra* note 2, at para. 26–12 (“A settlement is a contract and has the effect as such. A consent Award is an adjudication of issues and has the ancillary effects of an adjudication. Therefore, if there is a subsequent dispute between the parties, for example, the effect of a consent Award may be different from that of a settlement.”).

15. *E.g.*, CODE CIVIL [C. CIV] [CIVIL CODE] art. 2044 (Fr.) (“Settlement agreement is a contract by which the parties end the dispute already arisen or prevent a dispute which can arise”). French case law and legal doctrine confirm that mutual concessions constitute an essential element of settlement agreement (Cour de Cassation, chamber civil, Nov. 22, 1988. Cited from Code civil, *Litac* at 1067 (2001); PAUL-HENRI ANTONMATTEI, & JACQUES RAYNARD, *DROIT CIVIL: CONTRATS SPECIAUX* 428 (1997). For an example in U.S. case law, see *Gorman v. Holte*, 164 C.A.3d 984 (1985).

16. Mistelis, *supra* note 2, at 388.

ficult dispute. Additionally, settlement helps to promote further cooperation.<sup>17</sup>

If parties discontinue proceedings at any time prior to the rendering of an arbitral award,<sup>18</sup> they will not be charged the full administrative fees of the arbitrators. Arbitrators' fees usually depend on how much work the arbitrators did prior to the settlement. If parties decide to opt for an award by consent, then arbitrators will spend additional time examining or drafting the award. On the other hand, parties may decide to draft the award themselves and then propose it to the arbitrators for approval and rendering.<sup>19</sup>

Starting arbitration proceedings may also serve as a bargaining tool to motivate an opposing party to come to an agreement.<sup>20</sup> A request to arbitrate a dispute may become a wake-up call for management to understand that the other party is serious about pursuing legal remedies.<sup>21</sup> Also, for interested third parties an arbitral award issued by a neutral tribunal may look as a more respectable basis for payment than a mere agreement of the parties.<sup>22</sup> Parties may withdraw from the arbitral proceedings either separately or as part of a settlement agreement. If a settlement agreement provides for some conditions preceding its entry into force, an arbitral tribunal issues a consent award after the parties' confirmation that such conditions have been satisfied and the settlement agreement has taken effect.<sup>23</sup>

17. CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (2009).

18. Settlement can also take place after the award is rendered - parties may prefer to settle in order to avoid the costs incurred in enforcement proceedings. According to one study, 40 percent of surveyed corporations negotiated a settlement resulting in a discounted but prompt payment after the award was rendered. More than half of all post-arbitral award settlements settled for over 50 percent of the arbitral award. Mistelis, *supra* note 2, at 384-385.

19. MARTIN F. GUSY ET AL., *A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES* 321 (2011).

20. *See, e.g.* Kyriaki Karadelis, *Uzbek Mobile Claim Settles*, *GLOBAL ARB. REV.* (Aug. 1, 2014), <http://globalarbitrationreview.com/news/article/32867/uzbek-mobile-claim-settles/>.

21. Mistelis, *supra* note 2, at 382.

22. ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 383 (1991).

23. *See, e.g.* *AbitibiBowater Inc. v the Government of Canada*, ICSID Case No. UNCT/10/1, Consent Award, (Dec. 15, 2010),

## 2. Why Seek a Consent Award?

Terminating arbitral proceedings does not necessarily result in a consent award. Parties may prefer not to obtain a consent award but to instead keep their settlement agreement confidential. They may also decide to suspend the proceedings until the settlement agreement has been complied with.<sup>24</sup>

Domestic or international enforceability is the main reason why parties may wish to have their agreement recorded as an arbitral award.<sup>25</sup> Where under applicable national law settlements may constitute directly enforceable titles, consent awards aim to achieve or enhance their international enforceability.<sup>26</sup> The additional costs of having the settlement agree-

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/abitibi-03.pdf> (settling by consent under ICSID Arbitration Rules, para. 19). The parties agreed that the settlement agreement would take effect after approval by a specified court, expiration of all relevant appeal periods for such approvals, and the specified new company was formed. *Id.*

24. This allows the parties to avoid disclosing the terms of the settlement to the Tribunal (and the ICC Court during ICC arbitration). The ICC Secretariat will then invite the ICC Court to note the withdrawal and fix the costs of arbitration. In some situations, no payments are due or payments have already been made. The parties would only seek an enforcement award when they need an enforceable recognition of their settlement. BÜHLER & WEBSTER, *supra* note 2, at 316.

25. For example, German courts found that only a settlement agreement recorded in the form of an arbitral award on agreed terms could be declared enforceable under Article 36 of the UNCITRAL Model Law on International Commercial Arbitration. One judgment explained that such recording must comply with Article 30, paragraph 2's formal requirements, stating that it was an award on its face. Otherwise, a record of the settlement alone is insufficient for it to be deemed enforceable. RECHTSPRECHUNG DER OBERLANDESGERICHTE IN ZIVILSACHEN [OLGZ] [Higher Regional Court of Frankfurt], June 28, 1999, 3 Sch 01/99 <http://www.dis-arb.de/en/47/datenbanken/rspr/olg-frankfurt-am-case-no-3-sch-01-99-date-1999-06-28-id49> (Ger.); *See also* RECHTSPRECHUNG DER OBERLANDESGERICHTE IN ZIVILSACHEN [OLGZ] [Higher Regional Court of Frankfurt], Mar. 14, 2003, 20 Sch 01/02, <http://www.dis-arb.de/en/47/datenbanken/rspr/olg-frankfurt-am-case-no-20-sch-01-02-date-2003-03-14-id240> (Ger.) (finding that the formal requirements applicable to an award on agreed terms were not fulfilled as the settlement did not have the form of an arbitral award).

26. Philipp Peters & Christian Koller, *The Award and the Courts – The Notion of Arbitral Award: An Attempt to Overcome a Babylonian Confusion*, in *AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION* 137 (Peter Klein et al. eds., 2010).

ment recorded as an arbitration award are likely to be minimal, compared to the resources already spent on arbitration.<sup>27</sup>

All major international arbitral institutions establish a favourable regime for the parties' settlement allowing parties to discontinue their arbitration proceedings at any time by mutual consent. Additionally, many sets of arbitration rules explicitly support the possibility of fixing settlements in consent awards. These rules include the International Court of Arbitration of the International Chamber of Commerce ("ICC") rules,<sup>28</sup> the American Arbitration Association rules,<sup>29</sup> London Court of International Arbitration ("LCIA") rules,<sup>30</sup> UNCITRAL Arbitration rules,<sup>31</sup> among others.<sup>32</sup>

However, even where national law does not expressly provide for arbitrators' power to issue consent awards, such power inherently belongs to arbitrators. This follows from the general principle *favor conciliationis* (that is, favouring conciliation of

27. See Bruce Polichar, *Enforcing Settlement Agreements in Arbitration Proceedings*, 78 ARB. 152, 152 (2012).

28. See, e.g., ICC Rules of Arbitration art. 32, Jan. 1, 1988, 28 I.L.M. 231.

29. See, e.g., AM. ARBITRATION ASS'N, *Arbitration Rules and Mediation Procedures*, r. 48(a) (2013), [https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004103&revision=latestreleased](https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased) ("If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a 'consent award.' A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.")

30. LONDON COURT OF INT'L ARBITRATION, *LCIA Arbitration Rules* art. 26.9 (2014), [http://www.lcia.org/dispute\\_resolution\\_services/lcia\\_arbitration\\_rules.aspx](http://www.lcia.org/dispute_resolution_services/lcia_arbitration_rules.aspx) [hereinafter *LCIA Arbitration Rules*].

31. UNCITRAL, MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 30 (2008), [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf). [hereinafter UNCITRAL MODEL LAW ON ARBITRATION].

32. See, e.g., JAMS ARBITRATION AND MEDIATION SERVICES, JAMS INTERNATIONAL ARBITRATION RULES r. 36.1 (2011), <http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-International-Arbitration-Rules.pdf> ("If a settlement is reached, the Tribunal may, at the request of the parties, record the settlement in the form of an Award on Agreed Terms. An Award on Agreed Terms need not contain reasons."); see also Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation ("ICAC") § 41 (2005), available at [http://www.tpprf-mkac.ru/ru/component/docman/doc\\_download/160-rules-of-the-icac](http://www.tpprf-mkac.ru/ru/component/docman/doc_download/160-rules-of-the-icac).

disputing parties) existing in any developed legal system.<sup>33</sup> This also follows from the principle of autonomy of the parties' will. An arbitral tribunal decides how to conduct the arbitration, but the substance of the dispute always rests within the parties' discretion: they may dispose of the dispute by their mutual agreement.

Unlike in a typical arbitration, the tribunal does not resolve the dispute on the merits, but instead reflects the agreed settlement terms of the parties. An arbitral tribunal may not issue an award on agreed terms without such a request from both parties of the settlement agreement.<sup>34</sup> As mentioned above, parties may decide not to have a consent award once settlement is reached.<sup>35</sup> Consent awards may contain statements confirming that the parties do not admit any liability by entering into such awards,<sup>36</sup> denying all liability and wrongdoing in connection with the settled dispute,<sup>37</sup> or discharging and releasing each other from all claims in litigation and arbitration.<sup>38</sup> Parties may also agree on a conditional settlement upon the issuance of a consent award. In this case if the consent

33. DAVYDENKO DMITRY LEONIDOVICH, PRIMIRITELNYE PROCEDURY V EVROPEISKOI PRAVOVOI TRADICII [AMICABLE DISPUTE RESOLUTION IN THE EUROPEAN LEGAL TRADITION] XXIV–XXVI (2013). *See also*, AMERICAN LAW INST. & UNIDROIT, *supra* note 12, art. 24.1–2; UNCITRAL MODEL LAW & GUIDE, *supra* note 13 (“[T]he Commission was generally in agreement with the general policy that easy and fast enforcement of settlement agreements should be promoted.”).

34. THE BAKER & MCKENZIE INTERNATIONAL ARBITRATION YEARBOOK 2007, at 53 (Nancy Thevenin ed., 2008).

35. *LCIA Arbitration Rules*, *supra* note 30, art. 26.8 (“[I]f the parties do not require a consent award, then on written confirmation by the parties to the LCIA Court that a settlement has been reached, the Arbitral Tribunal shall be discharged and the arbitration proceedings concluded, subject to payment by the parties of any outstanding costs of the arbitration under Art 28.”).

36. *See, e.g.*, TCW Group, Inc. v. Dominican Republic, Consent Award, 2008 I.I.C. 410 (Perm. Ct. Arb. 2009) (agreeing to consent award under UNCITRAL rules; “Claimants and Respondents jointly agree that no Party has admitted any liability by entering into the Agreement.”).

37. *Id.*; *see also* Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan, Case No. Arb/07/25, Consent Award (ICSID 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0873.pdf> (“[T]he Claimant and the Respondent deny any and all liability or wrongdoing in connection with the facts, transactions, allegations, claims and occurrences underlying or relating to ICSID Case.”).

38. *Id.*

award is not rendered, the proceedings will continue and the tribunal will issue a final award.<sup>39</sup>

A consent award is normally considered final, as it ends the dispute submitted to arbitration in its entirety and brings the proceedings to an end.<sup>40</sup> Parties may reach either partial or total settlements. Portions of the dispute that are settled will be regarded as *res judicata* and future action on those issues will be barred, while those unresolved will still be open to future action. Even where no payments are due, the consent award will serve as a shield against future claims.

### *B. Responsibilities of the Arbitral Tribunal*

#### 1. Rendering a Consent Award: A Right or an Obligation of the Tribunal?

To render a consent award, an arbitral tribunal must first decide on its competence to hear the dispute in question. When arbitrators record the settlement, they do not decide the case on the merits but they dispose of the dispute. Therefore, if for instance, a dispute is nonarbitrable or the arbitrators lack authority to resolve it for another reason, they may not proceed to consider the settlement of the parties.<sup>41</sup> Where a tribunal finds itself competent to hear a dispute, it must decide which law is applicable to the substance of the parties' relations.<sup>42</sup> Both the

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39. BÜHLER & WEBSTER, *supra* note 2, at 317.

40. *See, e.g., id.* at 317.

41. Maurice Courvoisier, *Chapter 3, Part II: Commentary on the Swiss Rules, Art. 34, in ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE 582* (Manuel Arroyo ed., 2013) ("Usually, the arbitral tribunal will comply with the parties' request to render an award on agreed terms . . . . In exceptional circumstances, however, the arbitral tribunal, to protect its own interests, may refuse to do so . . . . Namely, the arbitral tribunal will not accept the parties' request, if the object of the settlement is not arbitrable, if the arbitral tribunal has justifiable doubts about the legality of the transaction contemplated by the parties' settlement, . . . or if the settlement violates the international [public order]."); *see also* PRACTITIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 217 (Frank-Bernd Weigand ed., 2010) ("[E]nforcement [of the consent award] will be denied when the dispute was not arbitrable or the settlement goes against public policy.").

42. An arbitral tribunal cannot proceed to decide the dispute on the merits before it establishes its competence to hear the case. *See, e.g., UNCITRAL MODEL LAW ON ARBITRATION, supra* note 31, art. 16 ("(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.") However, when an arbi-

applicable law and the agreement between the parties determine the powers and responsibilities of the arbitral tribunal. In particular, the very possibility of making a consent award will depend on whether the settlement terms contradict some mandatory rule of applicable law.<sup>43</sup>

Nearly all major arbitration rules give discretion to a tribunal on whether or not to render a consent award based on a settlement agreement. This reflects a modern trend in arbitration rules. For example, under the 1988 ICC Rules of Arbitration, arbitrators were under an obligation to accept the parties' request to sign an award by consent.<sup>44</sup> The current 2012 Rules however, provide that the signature of an award by consent is subject to the arbitrators' discretion.<sup>45</sup> In this respect, the wording of World Intellectual Property Organization ("WIPO") arbitration rules differs because the rules do not appear to give discretion to the tribunal whether or not to render a consent award.<sup>46</sup> However, the authority of the arbitral tribunal to re-

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tral tribunal rules on its own jurisdiction and finds itself competent to hear the case, it needs to decide which law is applicable to its substance. UNCITRAL Model Law on Arbitration provides in this regard in Article 28:

- (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

43. The International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry of the Russian Federation followed this approach in unpublished case No. 44/2003, in which an award was entered on November 3, 2003 (excerpt from the award reproduced in Russian language in the Russian law electronic database ConsultantPlus on 25 August 2015). The tribunal explained its obligation to first decide on its competence to hear the dispute and establish the applicable law; then the tribunal explained that it must check whether the settlement agreement contradicts the applicable law.

44. INT'L CHAMBER OF COMMERCE, *Conciliation and Amended Arbitration Rules*, art. 17 (1988) (superseded by INT'L CHAMBER OF COMMERCE, *Rules of Conciliation and Arbitration* (1998)), <http://www.jus.uio.no/lm/icc.conciliation.arbitration.rules.1988/doc.html#151>.

45. INT'L CHAMBER OF COMMERCE, *Rules of Arbitration of the International Chamber of Commerce*, art. 32 (2012).

46. WORLD INTELLECTUAL PROPERTY ORGANIZATION, *WIPO Arbitration Rules*, art. 67(b) (2014), <http://www.wipo.int/amc/en/arbitration/rules/newrules.html> ("If, before the award is made, the parties agree on a settlement of the dispute, the Tribunal

fuse to render the consent award if they consider the settlement terms unlawful may follow from applicable procedural law.

The UNCITRAL Model Law expressly authorises the tribunal to object to recording a settlement in the form of an arbitration award.<sup>47</sup> Various grounds may give reason to arbitrators to reject such a request. For example, a settlement document itself may not look like a genuine expression of the will of the two parties.<sup>48</sup> An arbitration tribunal is under an obligation to both satisfy itself that the parties have settled a genuine dispute and to bear in mind the risk that the consent award may be used for an improper purpose.<sup>49</sup>

Following the UNCITRAL Model Law, most national laws expressly provide for the possibility of arbitrators to reject the recording of a settlement agreement as a consent award. In practice, however, arbitrators have little discretion if requested by the parties to issue a consent award. They should render such an award if they find both the dispute genuine and the settlement terms lawful or they must refuse rendering such an award if they find proper grounds to believe the settlement

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shall terminate the arbitration and, if requested jointly by the parties, record the settlement in the form of a consent award. The Tribunal shall not be obliged to give reasons for such an award.”).

47. UNCITRAL MODEL LAW ON ARBITRATION, *supra* note 31, art. 30 (“1. If, during 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 . . . An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.”).

48. For instance, in one case decided by a Brazilian court it was impossible to identify the person who had signed it on behalf of the respondent, which became the reason to deny recognition of that award. S.T.J. 833-US (2005/0032212-5), Relator: Eliana Calmon, 16.08.2006, 209 DIÁRIO DA JUSTIÇA [D.J.] 30.10.2006, 209 (Braz.), *available at* <http://www.oas.org/es/sla/ddi/docs/Brasil%20-%20SUBWAY%20PARTNERS%20C.V.%20vs%20HTP%20High%20Technology%20Foods%20Corporation%20SA%20Ementa.pdf>.

49. *See, e.g.*, Georgios Petrochilos, Sylvia Noury, et al., *ICSID Arbitration Rules, Chapter V, Arbitration Rule 43 (Settlement and Discontinuance)*, in *CONCISE INTERNATIONAL ARBITRATION* 285–86 (Loukas Mistelis ed., 2010).

terms to be unlawful.<sup>50</sup> Failure to do so may even result in the award being unenforceable.<sup>51</sup>

In the United States, parties may agree to settle a dispute at any stage prior to the issuance of the award and request the endorsement of the settlement agreement by a tribunal in the form of a consent award.<sup>52</sup> Under the English Arbitration Act 1996 if, during arbitral proceedings the parties settle the dispute, “[t]he tribunal shall terminate the substantive proceedings and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award.”<sup>53</sup> The German Code of Civil Procedure provides that upon the parties’ request an arbitral tribunal shall record the settlement in the form of an arbitral award on agreed terms, unless the substance of such agreement contradicts the *ordre public*.<sup>54</sup> Such an award shall have the same effect as any other award on the merits of the case.<sup>55</sup>

In contrast, French law is silent as to consent awards.<sup>56</sup> It is likely that legislators believed that such power of the arbitrators is self-evident given that the arbitration procedure is determined by the parties’ agreement. Yet some recent arbitration laws of other countries, which historically follow the

50. See discussion of unlawfulness, *infra*.

51. See, e.g., Law of the Russian Federation on International Commercial Arbitration (Aug., 14, 1993), available at [http://www.tpprf-mkac.ru/en/component/docman/doc\\_download/180-law-of-the-russian-federation-on-international-commercial-arbitration-in-force-14-august-1993](http://www.tpprf-mkac.ru/en/component/docman/doc_download/180-law-of-the-russian-federation-on-international-commercial-arbitration-in-force-14-august-1993).

52. See, e.g., CAL. CIV. PROC. CODE §1297.302 (1988); see also Peter Doyle & Michael Reisman, *United States, in ARBITRATION IN 47 JURISDICTIONS WORLDWIDE* (2009), <http://www.kirkland.com/siteFiles/Publications/5783168B1949F84468D7E20DBA71C7F0.pdf>. State legislation also has provisions on consent awards.

53. Arbitration Act 1996, c. 23, § 51 (Eng.).

54. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Dec. 5, 2005, BUNDESGESETZBLATT [BGBl], § 1053. (Ger.).

55. In one case the German Federal Court of Justice explained that the enforcement of an arbitral award on agreed terms is subject to the general principles applicable to the enforcement of arbitral awards. Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 2, 2000, III ZB 55/99 (Ger.), available at <http://www.dis-arb.de/de/47/datenbanken/rspr/bgh-az-iii-zb-55-99-datum-2000-11-02-id2>.

56. See Décret 2011-48 du 13 janvier 2011 de portant réforme de l'arbitrage [Decree 2011-48 of January 13, 2011 on Arbitration Reform] JOURNAL OFFICIEL DE LA REPUBLIC FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 14, 2011 (reforming the law governing arbitration).

French legal tradition, expressly mention consent awards.<sup>57</sup> According to a general consensus, it is not an arbitrator's discretion but an arbitrator's duty to render an enforceable award.<sup>58</sup> In the context of recording a settlement agreement as a consent award, this means making sure that the settlement terms are not unlawful.<sup>59</sup>

Timing is important for a settlement agreement to become an award. Usually a consent award becomes possible after a tribunal has been constituted. For instance, the ICC Rules of Arbitration require that a settlement be recorded in the form of a consent award only after the file has been transmitted to the arbitral tribunal.<sup>60</sup> Otherwise the tribunal will have no right to

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57. See CODE JUDICIAIRE/GERECHTELLJK WETBOEK [C.JUD/GER.W.] art. 1712 (Belg.) (consent award); see also Loi 93-42 du 26 avril 1993 de l'arbitrage [Law 93-42 of April 26, 1993 on Arbitration] JOURNAL OFFICIEL DE LA RÉPUBLIQUE TUNISIENNE [J.O.R.T.] [OFFICIAL JOURNAL OF THE REPUBLIC OF TUNISIA], art. 15, 75, May 4, 1993. Interestingly, Belgian Judiciary Code, section 3 Art 1712 provides that the decision by which the arbitral award is declared enforceable is invalid to the extent the parties' agreement is annulled. This illustrates the priority of the parties' agreement which indeed follows from the principle of autonomy of the parties' wills and contractual nature of arbitration.

58. JULIAN LEW, *The Law Applicable to the Form and Substance of the Arbitration Clause*, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION (Albert Jan van den Berg ed., 1998) ("The ultimate purpose of an arbitration tribunal is to render an enforceable award.").

59. For example, in one case decided by Russian commercial courts, the claimant requested that an individual entrepreneur transfer a flat that he or she had received in accordance with an indemnity agreement, to which the defendant agreed because he failed to abide by the terms of a promissory note he had provided to the claimant. Soon after initiating proceedings the parties proposed the settlement agreement, which very closely followed the indemnity agreement. The court refused to approve the agreement because it determined that the parties abused their procedural and substantive rights concerning the transfer of property. Case No. A60-8482/2007 of Sverdlovsk region. For further discussion, see *infra* part II.

60. ICC Rules of Arbitration, art 32. The "Award by Consent" reflects other important nuances "[i]f the parties reach a settlement after the file has been transmitted to the arbitral tribunal in accordance with article 16, the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so."

render a consent award. However, such a possibility relates only to current disputes.<sup>61</sup>

## 2. Can an Arbitrator Mediate?

Unlike legally binding arbitration, mediation is a non-binding interest-based method of dispute resolution.<sup>62</sup> Mediation aims to identify the parties' interests underlying their legal positions, and to find a solution mutually satisfying such interests. A mediator renders no binding decision but rather only manages the negotiation process. As result, an outcome of a successful mediation always embodies the parties' agreement. In contrast, in arbitration the process is evaluative and an outcome usually constitutes an adjudicatory decision of a neutral third party rather than the parties' agreement.

Engaging a tribunal in settlement negotiations may benefit the parties as the tribunal has knowledge about the dispute to guide the parties towards settlement. However, if settlement negotiations fail, the parties' settlement proposals may influence the final award.

According to the International Bar Association Guidelines on Conflict of Interest in International Arbitration ("IBA Guidelines"), even if parties expressly agree that an arbitrator will assist them in settlement of the dispute, the arbitrator must resign if, as a consequence of settlement efforts, he or she develops doubts as to their ability to remain impartial or independent in the future course of arbitration proceedings.<sup>63</sup> The IBA Guidelines allow arbitrators to assist parties in reaching a settlement of the dispute at any stage of the proceedings, but only upon an express agreement by the parties.<sup>64</sup> Otherwise such relationship would constitute an impermissible conflict of

61. Existence of a dispute between the arbitrating parties is a necessary precondition of an arbitral award. *See also* MICHAEL MUSTILL & STEWART BOYD, *COMMERCIAL ARBITRATION* 128 (2010).

62. NADJA ALEXANDER, *INTERNATIONAL AND COMPARATIVE MEDIATION* 27 (2009) ("[M]ediation focuses on parties' commercial, financial, social and personal interests, without excluding their rights . . . . Conversely arbitration is a rights-based determinative process in which the parties agree to be bound by the decision of an arbitrator or arbitral panel.")

63. INTERNATIONAL BAR ASSOCIATION, *GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION* 1, 9 (2014), *available at* [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx) [hereinafter *GUIDELINES ON CONFLICTS*].

64. *Id.*

interest. In other words, the award being on agreed terms does not reduce the importance of the requirements of impartiality and independence.<sup>65</sup> UNCITRAL Notes on Organising Arbitral Proceedings warn arbitral tribunals to be cautious while making proposals to amicably settle disputes.<sup>66</sup> However, at the same time they recommend scheduling arbitral proceedings so as to facilitate settlement.<sup>67</sup>

Civil and common law jurisdictions differ on the issue of an arbitrator's involvement in settlement negotiations. Arbitration rules in civil law jurisdictions often provide that arbitrators are expected to facilitate settlement discussions. For example, in Germany under the Rules of German Institution of Arbitration (die Deutsche Institution für Schiedsgerichtsbarkeit – DIS) “at every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute.”<sup>68</sup> WIPO Arbitration Rules contain similar provisions.<sup>69</sup>

At the same time in common law jurisdictions originating from English law, judges and arbitrators are not supposed to play a proactive role.<sup>70</sup> For example, the Code of Ethics for Arbitrators of the American Arbitration Association provides that

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65. See, e.g., Dato Dr Muhammad Ridzuan Bin Mohd Salleh v. Syarikat Air Terengganu Sdn Bhd, High Court of Malay., Kuala Lumpur, 2012 MLJU 184 (2012) (the sole arbitrator appointed for arbitration under Kuala Lumpur Regional Centre for Arbitration rules failed to disclose important information and consent award was subsequently dismissed by a domestic court).

66. UNCITRAL, NOTES ON ORGANISING ARBITRAL PROCEEDINGS 18 (2012), <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf> (“Attitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement. Given the divergence of practices in this regard, the arbitral tribunal should only suggest settlement negotiations with caution. However, it may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations.”).

67. *Id.*

68. Deutsche Institution für Schiedsgerichtsbarkeit [DIS] Rules 98, § 32.1 (1998) (Ger.), available at <http://www.dis-arb.de/en/16/rules/dis-arbitration-rules-98-id10>.

69. See World Intellectual Property Organization [WIPO] Arbitration Rules, art. 65(a) (2002) (“The Tribunal may suggest that the parties explore settlement at such times as the Tribunal may deem appropriate.”).

70. Christopher Koch & Erik Schafek, *Can it Be Sinful for an Arbitrator Actively to Promote Settlement?*, 1999 ARB. & DISP. RESOL. L.J. 147, 155 (1999).

it is not improper for an arbitrator to suggest to the parties to discuss the possibility of settlement, but the arbitrator should not be present or otherwise participate in settlement discussions.<sup>71</sup> Even in situations when facilitation by arbitrators is expected, there are certain limits on their involvement in settlement negotiations.<sup>72</sup>

Parties will be estopped from challenging the arbitrator's impartiality where they expressly allowed him or her to participate in settlement discussions. Therefore, whether in a common or civil law jurisdiction, in order to minimize the risk of subsequent challenges the tribunal needs to obtain express consent from the parties to engage in settlement discussions. Quite frequently parties will approve such activity of arbitrators because it can increase the probability of reaching a fair settlement agreement. However, some parties may be reluctant to advance and discuss settlement proposals with the arbitrator because they may fear that such discussion may affect his or her opinion on the merits of the case and consequently the award on the merits, should they fail to reach an amicable settlement. Furthermore, a party may fear that if they decline a settlement proposal made by the arbitrator such conduct itself may displease the arbitrator which can have an adverse effect on the future award. As result, sometimes parties do object to exercising a conciliatory function by arbitrator.

### 3. Can a Mediator Become an Arbitrator Merely for the Purpose of Issuing a Consent Award?

As discussed above, unlike an arbitrator, a mediator has no authority to decide on the merits of the dispute. When parties wish to appoint as arbitrator the same individual who acted or will act as a mediator, this may endanger the enforceability of the parties' consent award. Mediation has a number of features, which may become inconsistent with the principles of due process applicable to the arbitration procedure.<sup>73</sup> In arbi-

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71. *Id.*

72. For instance, in *Wicketts and Sterndale v. Brine Builders* [2001] C.I.L.L. 1805, the English court removed the arbitrator because of his incompetence – the arbitrator intervened in settlement negotiations to make sure that his expenses and fees would be paid.

73. Brette Steele, *Enforcing International Commercial Mediation Agreements as Arbitral Awards under the New York Convention*, 54 UCLA L. REV. 1385, 1399 (2007).

tration, an arbitrator normally does not meet with the parties separately.<sup>74</sup> In mediation, most rules authorise a mediator to hold private caucuses with each of the parties separately.<sup>75</sup> Private caucuses serve various purposes, including serving as a source to obtain additional information or to assist a party in safely exploring existing options for settlement or alternatives to agreement.

In arbitration, all information provided by a party to an arbitral tribunal must be communicated to the opposing party in a timely fashion.<sup>76</sup> In contrast, in mediation, a mediator may disclose information confidentially given by one party in private caucuses to the opposing party, only where the former expressly authorises the mediator to do so.<sup>77</sup> Parties may also request

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74. INTERNATIONAL BAR ASSOCIATION [IBA], RULES OF ETHICS FOR INTERNATIONAL ARBITRATORS, para. 8 (1987), *available at* <http://www.translex.org/701100> (“Involvement in settlement proposals . . . Although any procedure is possible with the agreement of the parties, the arbitral tribunal should point out to the parties that it is undesirable that any arbitrator should discuss settlement terms with a party in the absence of the other parties since this will normally have the result that the arbitrator involved in such discussions will become disqualified from any future participation in the arbitration.”).

75. CENTRE FOR EFFECTIVE DISPUTE RESOLUTION, MODEL MEDIATION PROCEDURE (2014), *available at* [http://www.cedr.com/about\\_us/modeldocs/?id=21](http://www.cedr.com/about_us/modeldocs/?id=21) (“The mediation. It is normal for each of the parties to have a private room for confidential consultations on their own and with the mediator during the mediation.”).

76. *See, e.g.*, Jacob Rosoff, *Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings*, 26 J. INT'L ARB. 89, 90 (2009) (“One of the benefits of mediation is that a mediator can engage in private caucuses with the parties. During the mediation phase, a mediator may be exposed to confidential and prejudicial information without being required to disclose this information to all parties involved in arbitration. When an arbitrator-mediator receives information that is likely to bias him during these caucuses, opponents of Med-Arb and Arb-Med claim this will render the arbitrator-mediator unfit to continue as an impartial arbitrator should mediation fail.”).

77. *E.g.*, United Nations Comm'n on Int'l Trade Law, UNCITRAL CONCILIATION RULES art. 8 (1980) [hereinafter UNCITRAL CONCILIATION RULES], <http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf> (“When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it

the arbitrator to make a consent award where they resolve their dispute through another technique called mediation-arbitration (“med-arb”).<sup>78</sup> In med-arb parties usually<sup>79</sup> appoint a neutral person as a mediator and arbitrator from the outset of a dispute-resolution procedure so that they can arbitrate the dispute should the mediation not bring about a settlement.<sup>80</sup> Can using such techniques lead to the refusal to enforce the resulting arbitral award because it “was not in accordance with the agreement of the parties? Failing such agreement, was the procedure not in accordance with the law of the country where the arbitration took place?”<sup>81</sup>

Generally an arbitrator can mediate the same dispute only upon express request of the parties.<sup>82</sup> The UNCITRAL Model Law on International Commercial Conciliation provides that parties may agree to appoint a mediator as arbitrator in the

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be kept confidential, the conciliator does not disclose that information to the other party.”).

78. For more information on this technique, see Rosoff, *supra* note 76, at 89–100.

79. There are different approaches to defining med-arb. Thus, according to some researchers the usual case of med-arb involves one person being appointed as a mediator, and, if mediation fails, either the mediator or another person subsequently arbitrating the dispute. See Christopher Newmark & Richard Hill, *Can a Mediated Settlement Become an Enforceable Arbitration Award?*, 16 *ARB. INT’L* 81, 81–87 (2000).

80. The following measures would reduce the risk of refusal to enforce the arbitral award under Art. V(1)(d) of the New York Convention: the terms of the dispute resolution should be as clear as possible and include the extent to which the arbitrator can use material revealed at mediation stage; whether all material facts will be disclosed if mediation fails; whether the arbitrator will be bound in his decision to any proposal he may have made at mediation; and whether any positive result from mediation should be formalized in an award, or in a separate agreement. Julian Lew, *Multi-Institutional Conciliation and the Reconciliation of Different Legal Cultures*, in *NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND* 421, 428 (Albert Jan van den Berg ed., 2005).

81. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(d), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter *New York Convention*].

82. *E.g.*, AMERICAN ARBITRATION ASS’N, *THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES* 6 (2004), [https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_003867](https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_003867) (“An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.”).

same dispute on which he mediated, or in a relevant dispute.<sup>83</sup> In the absence of such express agreement, a mediator must not be an arbitrator in such disputes. The purpose of this rule is to provide greater confidence in the conciliator (mediator) and in mediation as a method of dispute settlement.<sup>84</sup> That is, parties are likely to speak more candidly with the mediator if they know that he or she will not render a binding decision on their dispute should they fail to reach a settlement agreement.<sup>85</sup>

Similarly, the IBA Guidelines provide that before assisting the parties in reaching a settlement, the arbitrator should obtain their express agreement that such assistance shall not disqualify him or her from continuing to serve as the arbitrator in the same or a relevant dispute.<sup>86</sup> Such express agreement will serve as an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in a settlement or from getting access by the arbitrator to certain information during the process of settlement.<sup>87</sup> This explains the prohibition for a mediator to become an arbitrator in the same or a relevant dispute—such a person would lose impartiality because of what he learnt in the course of the mediation procedure.<sup>88</sup>

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83. UNCITRAL MODEL LAW AND GUIDE, *supra* note 13, art. 12 (“Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.”).

84. *Id.* at 50–52.

85. Rosoff, *supra* note 76, at 93 (“Hybrid procedures become problematic when mediation fails and the arbitrator-mediator resumes his role as a biased arbitrator.”).

86. GUIDELINES ON CONFLICTS OF INTEREST, *supra* note 63.

87. However, notwithstanding such agreement, the arbitrator must resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings. GUIDELINES ON CONFLICTS, *supra* note 63.

88. UNCITRAL MODEL LAW ON INT'L COMMERCIAL CONCILIATION, *supra* note 13, art. 12, paras. 50, 78 (2004) (“The purpose of article 12 is to provide greater confidence in the conciliator and in conciliation as a method of dispute settlement. A party may be reluctant to strive actively for a settlement in conciliation proceedings if it has to take into account the possibility that, if the conciliation is not successful, the conciliator might be appointed by the other party as an arbitrator in subsequent arbitration proceedings.”). *See also, e.g.*, Rosoff, *supra* note 76, at 89–90 (2009) (“The most pressing concern

In some jurisdictions courts and legislatures allow parties to waive their procedural rights.<sup>89</sup> A party cannot successfully challenge the neutrality of an arbitrator if the parties waived their rights to challenge for lack of impartiality resulting from an arbitrator's double status of mediator and arbitrator.<sup>90</sup> Also, the parties cannot challenge the arbitral award referring to *ex parte* meetings with the neutral arbitrator where they expressly agreed to such meetings.<sup>91</sup> In some countries, however, waiver of the right to procedural fairness may be regarded as contrary to public policy.<sup>92</sup> Only by carefully examining the relevant arbitration rules and laws governing arbitrators' conflict of interests applicable in the country where arbitration takes place or where the parties seek enforcement of the arbitral award, parties can minimise the risk of challenges of their consent award.

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for these hybrid procedures is the requirement that the arbitrator-mediator maintain impartiality throughout the process. If the arbitrator appears to have become biased as a result of the hybrid procedure, then the parties may attempt to challenge him on this basis. However, waiving potential challenges that may arise during hybrid proceedings can ensure a smooth resolution of a dispute.”).

89. Steele, *supra* note 73, at 1407 (“If courts are hostile to the idea of enforcing mediation agreements as arbitral awards, they may take this approach to strike down mediation agreements on the procedural grounds discussed above. If the competing interest in encouraging use and enforcement of arbitration agreements controls, party signatures on a consent award will waive due process and arbitrator-mandate challenges.”).

90. Rosoff, *supra* note 76, at 91 (“There are two areas that require special attention for the arbitrator-mediator. First, he must ensure that he is not subject to a challenge for impartiality; and secondly, the arbitrator-mediator must be wary of the potential requirement that he disclose any circumstances giving rise to a perceived bias.”).

91. Thus, in a U.S. court case, a party relied on the arbitrators relying on information communicated by the party in a confidential private meeting in mediation. The court dismissed this argument and enforced the award, invoking the parties' amended arbitration agreement, which provided that the arbitrator “may rely on information which he deems relevant, whether obtained in *ex parte* communication or otherwise.” U.S. Steel Mining Co., L.L.C. v Wilson Downhole Serv., 2006 WL 2869535, at \*5 (W.D. Pa. Oct. 5, 2006).

92. Alan Limbury, *ADR in Australia*, in *ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES* 429, 453–54 (Arnold Ingen-Housz ed., 2011).

### C. Enforcing Consent Awards

Consent awards are covered by the general definition of awards<sup>93</sup> and therefore general rules governing the enforcement of arbitral awards also apply to them.<sup>94</sup> The main reason why parties are interested in recording settlements as a consent award is to enforce it without having to launch new arbitral or court proceedings. However, neither the New York Convention nor the ICSID Convention mentions the enforceability of consent awards.<sup>95</sup> This raises a number of issues related to the legal nature of consent awards and possible enforcement challenges.

#### 1. Enforcement under the New York Convention

The New York Convention neither defines the term “arbitral award” nor mentions consent awards. This silence raises the question of whether consent awards qualify as arbitral awards under the Convention. The answer to this question may depend on whether a consent award is a genuine arbitral award, or whether it remains merely a contract. Indeed, consent awards differ from usual arbitral awards in several respects. As discussed above, in a consent award, an arbitral tribunal records the agreement of the parties, rather than their own decision on the merits.<sup>96</sup> Some scholars even argue that consent awards should not be enforceable under the New York Convention because strictly speaking, consent awards are not arbitral awards and are only treated as such.<sup>97</sup>

The *travaux préparatoires* of the New York Convention do not clarify the extent to which the Convention applies to consent

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93. INT'L COUNCIL FOR COMMERCIAL ARBITRATION, ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES 18 (Pieter Sanders ed., 2011), [http://www.arbitration-icca.org/media/1/13890217974630/judges\\_guide\\_english\\_composite\\_final\\_jan2014.pdf](http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf).

94. Peters & Koller, *supra* note 26, at 137–69 (2010).

95. As consent awards by their nature record the parties' agreement and thus constitute a result of mutual will of the parties, they need enforcement much less frequently than “ordinary” arbitral awards on the merits of the dispute.

96. See discussion *infra* Part II.

97. Steele, *supra* note 73, at 1397.

awards.<sup>98</sup> To interpret the notion of “award” one can refer to the UNCITRAL Model Law on International Commercial Arbitration,<sup>99</sup> which provides that an award on agreed terms “has the same status and effect as any other award on the merits of the case.”<sup>100</sup> In other words, recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only on limited grounds.<sup>101</sup>

Under the New York Convention, consent awards can be challenged at the enforcement stage for the excess of mandate of the arbitrator in the jurisdiction where enforcement is sought.<sup>102</sup> A competent authority of the country in which, or

98. UNCITRAL, *Travaux Préparatoires for the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_travaux.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_travaux.html). (last visited Aug. 20, 2015).

99. U.N. GAOR, 40th Sess., 112th plen. mtg., at 1, U.N. Doc. A/RES/40/72 (Dec. 11, 1985) (“[T]he Model Law, together with the Convention on Recognition and Enforcement of Foreign Arbitral Awards . . . significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.”).

100. UNCITRAL MODEL LAW ON ARBITRATION, *supra* note 31, art. 30(2).

101. For instance, under Article 36 of the Model Law,

Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) a party to the arbitration agreement . . . was under some incapacity; or the said agreement is not valid . . . ; or (ii) the party against whom the award is invoked . . . was . . . unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . . ; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (v) the award has not yet become binding on the parties or has been set aside or suspended . . . ; or (b) if the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

*Id.*

102. New York Convention, *supra* note 81, art. V(1)(c) (“The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the

under the law of which, it is rendered can also set the award aside.<sup>103</sup> As mentioned above, some national laws, such as French law, do not expressly provide for the power of the arbitral tribunal to render consent awards. Some authors believe that this creates a risk of arbitrators issuing consent awards that exceed their mandate, even where the applicable arbitration rules allow it.<sup>104</sup> There is also a concern that arbitrators who make consent awards in the absence of statutory regulation might be overstepping their mandate.<sup>105</sup>

Some jurisdictions explicitly give consent awards the “same status and effect” as arbitral awards,<sup>106</sup> while others simply identify consent awards as arbitral awards. According to the prevailing view, consent awards can be enforced “as any other award.”<sup>107</sup>

A legal provision of a settlement agreement may break legal rules of one jurisdiction and remain legal under rules of another jurisdiction. For example, certain payments may be regarded as commercially acceptable and necessary in one jurisdiction, but as corruption or bribery in another jurisdiction, and in addition as contrary to transnational public policy.<sup>108</sup> The New York Convention does not make recognition and enforcement of the arbitral award in other jurisdictions a valid ground for challenging recognition and enforcement. In other words, as

scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.”)

103. *Id.* art. VI.

104. Brette Steele recognizes this problem and argues that the parties can hardly cure it by a waiver because the problem deals directly with interpretations of applicable law rather than the scope of the discrete dispute. Steele, *supra* note 73, at 1406–07.

105. PIETER SANDERS, *THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION* 234, 248 (2004).

106. *See, e.g.*, Arbitration Act 1996, c. 23, §51 (Eng.) (“An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case.”)

107. *See, e.g.*, WILLIAM CRAIG, WILLIAM PARK & JAN PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 358 (2000).

108. RICHARD KREINDLER, *CTR. FOR GLOBAL DEV., IS THE ARBITRATOR OBLIGATED TO DENOUNCE MONEY LAUNDERING, CORRUPTION OF OFFICIALS, ETC.? THE ARBITRATOR AS ACCOMPLICE – SHAM PROCEEDINGS AND THE TRAP OF THE CONSENT AWARD* 1 (2007), [http://www.cgdev.org/files/15197\\_file\\_CombatingCorruption.pdf](http://www.cgdev.org/files/15197_file_CombatingCorruption.pdf).

long as the award has not been set aside or suspended in the place where it was rendered, courts will be guided by their domestic law in deciding whether to recognise and enforce an arbitral award.

Some jurisdictions such as the United Kingdom allow parties to arbitral proceedings a limited right of appeal on a point of law in domestic courts.<sup>109</sup> However, a consent award cannot be appealed on a point of law,<sup>110</sup> because such award normally does not contain the tribunal's reasoning on the merits of the dispute.<sup>111</sup> Moreover, the parties' request to record a settlement as an arbitral award may be regarded as a waiver of the parties' right to challenge the award, except in relation to matters of public policy.<sup>112</sup> This follows from the principle of prohibition of contradictory behaviour of each party to arbitral proceedings.<sup>113</sup> The same principle is embodied in the UNCITRAL Model Law on International Commercial Arbitration.<sup>114</sup> Therefore when parties have actively participated in the arbitral proceedings and submitted their settlement agreements to the arbitral tribunal for recording in a consent award, they should be estopped from challenging the award by referring to procedural violations.<sup>115</sup>

109. See, e.g., Arbitration Act 1996, c. 23, § 69(1) (Eng.).

110. This follows from the English Arbitration Act. *Id.*

111. *Id.* § 52(4).

112. See TORE WIWEN-NILSSON, CONCILIATION: ENFORCEMENT OF SETTLEMENT AGREEMENTS 6–7 (2007), <http://www.uncitral.org/pdf/english/congress/Wiwen-Nilsson.pdf>.

113. See, e.g., Bayerisches Oberstes Landesgericht [BayObLG] [Higher Court of Appeal of Bavaria] Sept. 23, 2004, No. 4Z Sch 005–04 (Ger.) (excerpted in 30 YEARBOOK COMMERCIAL ARBITRATION 568, 571 (2005)).

114. UNCITRAL MODEL LAW ON ARBITRATION, *supra* note 31, art. 4 (“A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object.”).

115. UNCITRAL MODEL LAW ON ARBITRATION, *supra* note 31, art. 34(2) (“An arbitral award may be set aside by the court . . . only if: (a) the party making the application furnishes proof that . . . (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law.”).

If the settlement agreement covers issues not covered by the arbitration agreement, an arbitral tribunal will have no jurisdiction to render an award on these matters and enforcement will be refused.<sup>116</sup> Parties may try to rectify this by an additional written agreement.<sup>117</sup> Even if the settlement covers issues that lie outside the scope of arbitration, a partial enforcement is possible under article V(c) of the New York Convention.

Whatever procedure the parties decide to follow, the tribunal must be dealing with a genuine disagreement to have jurisdiction. Where parties appoint an arbitral tribunal after a settlement to merely record the settlement in the consent award, there is no “difference” between the parties to resolve; the parties have already settled the dispute. A “difference” is a necessary precondition of an “award” in the sense of the New York Convention.<sup>118</sup> Additional issues arise with regard to international enforceability under the New York Convention of consent awards resulting from mediation.<sup>119</sup>

## 2. Enforcement under the ICSID Convention

The ICSID Convention does not specifically mention the power of the arbitral tribunal to render awards on agreed terms or their enforcement. However, ICSID Arbitration Rules allow such awards.<sup>120</sup> Although some awards have been published<sup>121</sup>

116. New York Convention, *supra* note 81, art. V(1)(c).

117. *Id.* art. II (requiring that the arbitration agreement be in writing).

118. *See, e.g.*, New York Convention, *supra* note 81, art. I (“This Convention shall apply to the recognition and enforcement of arbitral awards . . . arising out of differences between persons, whether physical or legal.”); *see also id.* art. II (“to submit to arbitration all or any differences which have arisen or which may arise between them”).

119. *See infra* Part IV.

120. ICSID ARBITRATION RULES, RULE 43: SETTLEMENT AND DISCONTINUANCE (2006), [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf) (“If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding . . . . If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award”).

121. *See, e.g.*, Goetz (Belg.) v. Burundi, ICSID Case No. ARB/95/3 (Feb. 10, 1999), 15 ICSID REV. 457 (2000), <http://icsidreview.oxfordjournals.org/content/15/2.toc.pdf>; Lemire (U.S.) v.

most settlement agreements remain unpublished, including those that were adopted by tribunals in the form of a consent award.<sup>122</sup>

Under the ICSID Convention, the settlement agreement approved by the tribunal in effect transforms into an award, which according to Article 54(1) has the same status as a final judgment of domestic courts. Therefore, consent awards rendered by an arbitral tribunal within proceedings under the ICSID Arbitration Rules are enforceable in the same way as any other ICSID arbitral award. Failure to enforce the award would be a breach of the Convention and trigger diplomatic protection under Article 27 of the ICSID Convention.

The possibility of annulment is a crucial consideration in the enforceability of ICSID awards; therefore it is important to understand the various grounds on which the annulment of consent awards may be granted.<sup>123</sup> While most grounds for annulment are no different when applied to consent awards as compared to usual awards, one ground requires brief explanation. Under Article 5 (1)(e) the award can be annulled if it “has failed to state the reasons on which it is based.”<sup>124</sup> However, in the context of consent awards this ground should not apply because the ICSID Arbitration Rules specifically allow consent awards.

## II. ILLEGALITY IN CONSENT AWARDS

Since consent awards record agreements drafted by the parties, they are more likely to hide some kind of illegality as compared to situations when a neutral arbitrator drafts the award.<sup>125</sup> As discussed earlier, the arbitrator should reject a request to record a settlement agreement as an arbitration award if he finds that the award may be used for an improper or illegal purpose. This section examines possible illegal activi-

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Ukraine, ICSID Case No. ARB(AF)/98/1 (Sept. 18, 2000), 15 ICSID REV. 530 (2000), <http://icsidreview.oxfordjournals.org/content/15/2.toc.pdf>.

122. See, e.g., *Cemex Asia Holdings Ltd. v. Rep. of Indonesia*, ICSID Case No. ARB/04/3 (Feb. 23, 2007); *WRB Enterprises, Inc. v. Grenada*, ICSID Case No. ARB/97/5 (Dec. 21, 1998); *Guadeloupe Gas Products Corporation v. Nigeria*, ICSID Case No. ARB/78/1 (July 22, 1980).

123. ICSID Convention, *supra* note 11, art. 52.

124. See *New York Convention*, *supra* note 81, art. 5 (1)(e).

125. See *Wising Up to the Wise Guys*, LAWYER (Mar. 19, 2012, 8:45 AM), <http://www.thelawyer.com/wising-up-to-the-wise-guys/1011854.article>.

ties, which could be concealed under the mask of consent awards, sources of law that apply to determine illegality, and the consequences of establishing illegality.

#### *A. Consent Awards Tainted by Illegality*

Nearly all arbitration rules allow a tribunal to decline recording a settlement agreement as a consent award only if a tribunal has a good reason to believe that the arbitration or the settlement agreement is used for an improper cause. For instance, such improper cause can consist of an abuse of one's rights,<sup>126</sup> money laundering,<sup>127</sup> bribery,<sup>128</sup> financing terrorism,<sup>129</sup> and breaches of competition law or covering other illegal activities.<sup>130</sup>

It may be particularly difficult to uncover illegal activities hidden by consent awards. In one scenario, only one party commits illegal activities and the other party is unaware of it, and subsequently challenges the award. In this respect, challenges will not differ from those raised in relation to "normal" arbitral awards. However, a more likely scenario in the context of consent awards is when both parties know the settlement agreement is illegal. For example, one of the parties may bring a claim before the tribunal, which looks superficially genuine, but arises out of a sham agreement. The other party will not contest it. The parties settle the "dispute," and the tribunal records the settlement award. The "winning party" then receives an internationally recognized award, under which it gets

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126. For example, where a controlling shareholder initiated arbitration against its subsidiary and then caused the subsidiary to agree not to oppose the merits of the claim. *Kiyue Co. Ltd. v. Aquagen International Pte. Ltd.*, High Court, [2003] 3 SLR(R) 130 (Sing.), [http://www.singaporelaw.sg/sglaw/images/ArbitrationCases/\[2003\]\\_3\\_SLR\(R\)\\_0130.pdf](http://www.singaporelaw.sg/sglaw/images/ArbitrationCases/[2003]_3_SLR(R)_0130.pdf).

127. Bernardo Cremades & David Cairns, *Corruption, International Public Policy and the Duties of Arbitrators*, 58 DISP. RESOL. J. 76, 84 (2004).

128. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, 37 I.L.M. 1, [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf).

129. See, e.g., G.A. Res. 109, International Convention for the Suppression of the Financing of Terrorism (Dec. 9, 1999).

130. Mikhail Skuratovskij, *Mirovloe Soglashenie: Problemy Pravoprimenitelnoi Praktiki (Amiable Agreement: Problems of Law Enforcement Practice)*, 3 ARBITRAZHNYI I G`RAZHANSKI PROCESS 21, 21 (2011).

a payment, which appears legitimate on its face.<sup>131</sup> Alternatively, a contract may be real, but “the price at which it is entered might be inflated.”<sup>132</sup> In this scenario none of the parties have an incentive to reveal improper conduct and it might be difficult to uncover fraudulent or illegal activities. It is particularly challenging to understand responsibilities of the arbitral tribunal in this situation.

### *B. Determining What Conduct is Illegal*

Two broad categories of transactions can be regarded as illegal in the absence of any widely agreed definition: any transaction that in its formation, purpose or performance involves the commission of a legal wrong (other than breach of the transaction itself); and conduct which is contrary to public policy.<sup>133</sup>

A wide variety of acts can be regarded as illegal: transactions that interfere with the administration of justice, are prejudicial to the status of marriage or involve or promote sexual immorality, or constitute a restraint to trade or the doing of an illegal act in a friendly foreign country. Additionally, transactions which encourage such conduct, can also be illegal.<sup>134</sup>

#### 1. Domestic Law

Several domestic legal systems usually come into play in international arbitration: the chosen substantive law, the law of the seat of arbitration, and the law governing the arbitration clause. In addition, an applicable company law, law of the status of the natural person, or the place of the contract performance, may also play a role.

In most cases parties agree upon the applicable substantive law in their contract. If not, the issue is decided on the basis of applicable procedural law, in particular relevant arbitration rules. For instance under UNCITRAL Rules, if parties fail to

131. See Kristine Karsten, *Money Laundering: How it Works and Why You Should be Concerned*, in *ARBITRATION: MONEY LAUNDERING, CORRUPTION AND FRAUD* (Kristine Karsten & Andrew Berkley eds., 2003).

132. Dragor Hiber & Vladimir Pavi, *Arbitration and Crime*, 25 *J. INT'L ARB.* 461, 463 (2008).

133. LAW COMMISSION, *ILLEGAL TRANSACTIONS: THE EFFECT OF ILLEGALITY OF CONTRACTS AND TRUSTS* 2 (1999), [http://lawcommission.justice.gov.uk/docs/cp154\\_Illegal\\_Transactions\\_Consultation.pdf](http://lawcommission.justice.gov.uk/docs/cp154_Illegal_Transactions_Consultation.pdf).

134. *Id.* at 4–5.

agree on the applicable law, a tribunal will apply the law which it determines to be appropriate.<sup>135</sup> A tribunal will also take into account the contract provisions and any usage of trade applicable to the transaction.<sup>136</sup> ICC Arbitration Rules follow a similar approach.<sup>137</sup> The ICSID Convention stipulates that in such situations the law of the host State and applicable international law come into play.<sup>138</sup>

National laws vary on what constitutes unlawful activity. Under the United Kingdom Proceeds of Crime Act 2002, it is a criminal offence to “become concerned in” an arrangement which the person charged knows or suspects to facilitate (by whatever means) the acquisition, retention, use, or control of “criminal property” by or on behalf of another person.<sup>139</sup> Criminal property is broadly defined as property that “constitutes a person’s benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly).”<sup>140</sup> For the purpose of the Act, it is immaterial who carried out the conduct and who benefited from it.<sup>141</sup> Albeit in an obiter dictum, the English Court of Appeal explained that if the settlement does “not reflect the legal and practical merits of the parties” it could be subject to the Proceeds of Criminal Acts Act.<sup>142</sup>

In New South Wales, Australia, prosecution for failure to disclose information about a “serious indictable offence” may be commenced with the approval of the Attorney-General where the person learns of the information “in the course of practicing or following a profession, calling or vocation” prescribed by the regulations.<sup>143</sup>

In the United States, the Money Laundering Controls Act of 1986 criminalizes the conduct of financial transactions involving the proceeds of “specified unlawful activity.”<sup>144</sup> The Act does not establish a minimum monetary threshold, and defines “financial transaction” broadly, and need not involve a financial

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135. UNCITRAL, *UNCITRAL Arbitration Rules*, art. 35.1 (2013).

136. *Id.* art. 35.3.

137. INT’L CHAMBER OF COMMERCE, *Arbitration Rules*, art. 21.2 (2012).

138. ICSID Convention, *supra* note 11, art. 42.1.

139. Proceeds of Criminal Acts Act 2002, c. 29, sec. 328(1) (UK).

140. *Id.* sec. 326(4).

141. *Id.*

142. *Bowman v. Fels* [2005] 4 WLR 609 (Eng.).

143. Crimes Act 1900 No. 40, Sec. 316 (New S. Wales).

144. 18 U.S.C. §§ 1956–1957 (2000).

institution, or even a business. The statute requires the specific intent of an individual in making the transaction to conceal the source, ownership, or control of the funds. Passing money from one person to another with the intent to disguise the source, ownership, location or control of the money, has been deemed a financial transaction under that law.<sup>145</sup> Therefore, if the arbitrator has the requisite intent he or she can be held liable under this statute.

## 2. Public Policy

The UNCITRAL Model Law on International Commercial Arbitration permits setting aside an award on grounds of public policy.<sup>146</sup> Most developed national arbitration statutes are broadly similar to the Model Law.<sup>147</sup> The International Law Association interprets the notion of public policy as an international public policy of a particular State.<sup>148</sup> Therefore the award is subject to the public policy of the seat of arbitration.

In addition, breach of transnational public policy could render the award unenforceable in most jurisdictions around the world.<sup>149</sup> Transnational public policy refers to the principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by civilised nations.<sup>150</sup> Unlike international public policy, transnational public policy is not tied to any particular national law, but rather, re-

145. See *United States*, in WILLIAM H. BYRNES & ROBERT J. MUNRO, *MONEY LAUNDERING, ASSET FORFEITURE AND RECOVERY AND COMPLIANCE, A GLOBAL GUIDE* (2014).

146. UNCITRAL MODEL LAW ON ARBITRATION, *supra* note 31, art. 34(2)(b)(ii) (“An arbitral award may be set aside by the court [in the seat of arbitration] only if: . . . the court finds that . . . the award is in conflict with the public policy of this State.”)

147. GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 256–67 (2009).

148. INT’L LAW ASS’N, COMM. ON INT’L COMMERCIAL ARBITRATION, FINAL REPORT ON PUBLIC POLICY, recommendation 1(e) (2002) [hereinafter *ILA FINAL REPORT ON PUBLIC POLICY*] (“The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as ‘lois de police’ or ‘public policy rules’; and (iii) the duty of the State to respect its obligations towards other States or international organisations.”)

149. Andrea Menaker, *The Determinative Impact of Fraud and Corruption on Investment Arbitrations*, 25 *ICSID REV–FILJ* 67, 72 (2010).

150. *ILA FINAL REPORT ON PUBLIC POLICY*, *supra* note 148.

fers to values shared by all civilised nations. The International Law Association report on public policy stipulates that transnational public policy overrides national laws that otherwise may apply, according to the relevant conflict of laws rules.<sup>151</sup>

To sum up, in order to determine whether the settlement agreement serves an improper purpose and should not be recorded as a consent award, a tribunal needs to consider public policy, the law of the seat of arbitration, the substantive law of the transaction and perhaps the law of the jurisdiction in which enforcement is likely to be sought. Nonetheless, the consent award may be challenged either in the seat of arbitration or in jurisdictions where enforcement is sought for excess of mandate and violating the agreed rules of procedure.

### *C. Consequences of Illegality*

Tribunals and courts may follow different approaches on consequences of illegality. Usually they just refuse to recognise suspicious settlement agreements, rather than revisit the merits.<sup>152</sup> In a well-known ICC case, Judge Lagergen, acting as sole arbitrator, ruled on a case, which involved a contract contemplating bribery of public officials. The judge held that by entering into such an objectionable contract, the parties “have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunal) in settling their dispute.”<sup>153</sup> According to this logic, a court or tribunal does not constitute a proper arena for wrongdoers to resolve their disputes.

Although Judge Lagergen declined jurisdiction to consider the merits of the dispute, the modern trend in international arbitration is to assert jurisdiction over such disputes to determine whether the alleged illegal activities have in fact oc-

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151. *Id.*

152. In one English case, the court not only refused to consider a claim, which involved illegality, but also imposed a fine on the claimants' solicitors to reflect the “indignity of the court.” *Everet v. Williams* [1725, reported in 1893] 9 LQR 197 (Eng.). Similar logic was followed in *Parkinson v. College of Ambulance Ltd. and Harrison*, [1925] 2 KB 1, 13 (Eng.) (“No Court could try such an action and allow such damages to be awarded with any propriety or decency.”).

153. Case No. 1110 of 1963, 10 Arb. Int'l 277, para. 23 (1994) (ICC Int'l Ct. Arb.).

curred.<sup>154</sup> If the arbitrator concludes that the proceedings are being conducted for an illegitimate purpose, arbitrators are expected to take appropriate steps, such as resignation or dismissing the proceedings *sua sponte*.<sup>155</sup> The Chartered Institute of Arbitration recommends that,

if an arbitrator knows or suspects that a request for an agreed award is, or may be, a prelude to an arrangement by which criminal property is to be acquired, retained, used or controlled, he should of course refuse to issue such an award.<sup>156</sup>

Where applicable law unambiguously provides for the effect of illegality of the transaction, a tribunal's discretion should not apply. Where the applicable law is silent on such effect or not straightforward, it will be necessary for the tribunal to interpret such provisions in the light of the criteria mentioned above.

A tribunal must also be aware that a number of jurisdictions make it a criminal offence to facilitate or even to know about transactions that involve unlawful activities, and require reporting them to relevant authorities. If an arbitrator has reliable knowledge that the parties were conducting the proceedings to further a criminal purpose, he or she may be either obliged or justified to report such criminal intent to the relevant authorities.<sup>157</sup> For instance, under the United Kingdom Proceeds of Crime Act a person can avoid responsibility by making a disclosure to the relevant authorities, unless that person has a legitimate excuse for not doing so.<sup>158</sup> Failure to do so may result in committing a criminal offence.<sup>159</sup> This is particularly important in the context of consent awards, when none of the complicit parties will be willing to challenge the award.

154. *See, e.g.*, ALAN REDFERN & MARTIN HUNTER, *supra* note 22, at 143 (2004); PHILIPPE FOUCHARD, EMMANUEL GAILLARD & BERTHOLD GOLDMAN, *INTERNATIONAL COMMERCIAL ARBITRATION* 354 (1999).

155. BORN, *supra* note 147, at 1627.

156. CHARTERED INST. OF ARBITRATORS, *GUIDELINE 12: THE PROCEEDS OF CRIME ACT 2002: GUIDANCE FOR THIRD-PARTY DISPUTE RESOLVERS* para. 4.3 (2007), *available at* <https://www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/12-practice-guideline-16nov2010.pdf?sfvrsn=2>.

157. *Id.* para. 1.1.

158. *Proceeds of Criminal Acts Act 2002*, c. 29, sec. 328(2)–338 (UK).

159. *See, e.g. id.* part 7 (establishing a variety of criminal offences related to money laundering); Council Directive 2005/60, 2005 O.J. (L 309) 15, 17. (dealing with responsibilities of legal professionals to report money laundering).

It is sometimes suggested that one of the purposes of refusing remedies arising out of illegal contracts is to punish the wrongdoer.<sup>160</sup> For the same reason domestic courts often impose exemplary or aggravated damages.<sup>161</sup> Punishment, however, remains a goal of criminal law rather than international arbitration, which is quintessentially a private system of dispute resolution devoid of any public authority. Therefore it is not the arbitrators' role to punish the parties.

This analysis suggests that tribunals have two main options when it comes to settlement agreements tainted by illegality. First, they may decline jurisdiction without a detailed examination of the evidence. Secondly, they may assess jurisdiction, examine the evidence, resign and then dismiss the proceedings. In addition, they might be under an obligation to report illegal activities to the relevant authorities.

### III. CONSENT AWARDS RESULTING FROM MEDIATION

#### *A. What Makes Such Awards Different?*

As in arbitration, parties may want to endow their agreement resulting from mediation with additional enforceability to avoid the necessity and expense of suing on the settlement agreement when the other party fails to fulfil it.<sup>162</sup> Expedited enforcement of a mediated settlement may become important for the parties, especially in international disputes.<sup>163</sup> The parties may agree to appoint the mediator or another person as arbitrator, only to formalise their settlement in an arbitral award.

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160. See, e.g., John Wade, *Benefits Obtained under Illegal Transactions – Reasons for and Against Allowing Restitution*, 25 TEX. L. REV. 31, 35 (1946).

161. See, e.g., LAW COMM'N, REPORT ON AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES, para. 5.25 (1997).

162. Edna Sussman, *The New York Convention Through a Mediation Prism*, 15 DISP. RESOL. 10, 15 (2009) (arguing that if the settlement agreement reached in mediation is not complied with, a great deal of time and money can be lost).

163. The comments to article 14 of the UNCITRAL Model Law on International Commercial Conciliation highlight that “many practitioners put forth the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would for the purposes of enforcement be treated as or similarly to an arbitral award.” UNCITRAL MODEL LAW ON INT'L COMMERCIAL CONCILIATION, *supra* note 13, at 55.

The question is whether such agreements should be enforced as arbitration awards.

According to the International Council for International Arbitration (“ICIA”), not all dispute resolution methods qualify as arbitration and the New York Convention does not cover mediation or expert determination.<sup>164</sup> The ICIA guide defines arbitration as “a method of dispute settlement in which the parties agree to submit their dispute to a third person who will render a final and binding decision in place of the courts.”<sup>165</sup> Some argue that a consent award reached in mediation is a trick of legal fiction.<sup>166</sup> Indeed, the arbitrator is not presented with a current dispute. The dispute is already extinguished and there is nothing to resolve but to grant the settlement as a form of an arbitral award. However, some procedural rules, including rules of the Arbitration Institute of Stockholm Chamber of Commerce, expressly provide that the parties may appoint the mediator as arbitrator to record their settlement in a consent award.<sup>167</sup> Most other jurisdictions remain silent on this matter. When the parties wish to enforce their consent awards in one of multiple foreign jurisdictions, this raises the question of whether such consent awards are enforceable under the New York Convention.

### *B. Enforceability of Consent Awards Resulting from Mediation*

The United Nations Commission on International Trade Law has already approved preparation of a new international legal instrument, possibly a convention dedicated to the enforcement

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164. CRAIG, PARK & PAULSSON, *supra* note 107, at 16.

165. *Id.* at 157.

166. Steele, *supra* note 73, at 1397.

167. See ARBITRATION INST. OF THE STOCKHOLM CHAMBER OF COMMERCE, MEDIATION RULES art. 14 (2014) (Swed.) [hereinafter STOCKHOLM CHAMBER OF COMMERCE MEDIATION RULES] [http://www.sccinstitute.com/media/49819/medlingsregler\\_eng\\_web.pdf](http://www.sccinstitute.com/media/49819/medlingsregler_eng_web.pdf) (“In case of settlement, the parties may, subject to the consent of the Mediator, agree to appoint the Mediator as an Arbitrator and request him/her to confirm the settlement agreement in an arbitral award.”); General Assembly of the Croatian Chamber of Economy, *Narodne novine* [Official Gazette] no. 81/2002, Rules of Conciliation, art. 6 (July 17, 2002), *translation at* [http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation\\_Rules-Conciliation-CC-Economy.pdf](http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation_Rules-Conciliation-CC-Economy.pdf); Society of Maritime Arbitrators, *Rules for Conciliation*, art. 10, SMANY.ORG (MAY 16, 1988) <http://www.smany.org/doc4-rulesForConciliation.html>.

of international mediated settlement agreements.<sup>168</sup> However, currently there is no special mechanism to enforce settlement agreements resulting from mediation. Domestic legislation of a number of States allows parties who have settled a dispute through mediation to appoint an arbitrator specifically to render a consent award.<sup>169</sup> In some jurisdictions the national law expressly provides that settlement agreements reached through mediation upon the parties' agreement shall be enforceable in the same way as arbitral awards.<sup>170</sup> At the same

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168. See U.N. Comm'n on Int'l Trade Law, Planned and Possible Future Work—Part III, at 2, U.N. Doc. A/CN.9/822 (June 2, 2014) (“A convention for conciliation modelled on the New York Convention would . . . address the enforceability of settlement agreements directly, rather than relying on the legal fiction of deeming them to be arbitral awards. This approach would also eliminate the need to initiate an arbitration process (with the attendant time and costs) simply to incorporate a settlement agreement into an award.”).

169. For example, in France a consent award can be rendered at any time by either the conciliator who has become an arbitrator or by another person appointed by the parties as arbitrator for such purpose. DECKERT K., *MEDIATION IN FRANCE: LEGAL FRAMEWORK AND PRACTICAL EXPERIENCES* 475 (Hopt & Steffek eds., 2013). In Croatia, a settlement agreement reached in mediation can take the form of an arbitration consent award even without arbitral proceedings or arbitration agreement. *Art. 13(5) of the Conciliation Act of 2011*, ZAKON.HR, <http://www.zakon.hr/z/169/Zakon-o-mirenju> (last visited Aug. 20, 2015) (“The parties may agree that the [mediated] settlement agreement shall be formalized as an arbitral award on agreed terms.”). Commercial Arbitration Rules of the Korean Commercial Arbitration Board as of September 1, 2011, provide that if the conciliation succeeds, the conciliator shall be regarded as the arbitrator appointed under the agreement of the parties and the settlement reached shall be treated as an award on agreed terms. Commercial Arbitration Rules of the Korean Commercial Arbitration Board, art. 18, para. 3 (Dec. 14, 1993), [http://www.kcab.or.kr/jsp/kcab\\_eng/law/law\\_03\\_ex.jsp](http://www.kcab.or.kr/jsp/kcab_eng/law/law_03_ex.jsp).

170. Thus, in Bermuda, parties to an arbitration agreement may appoint a mediator, and any resulting settlement shall enjoy the status of a consent award and be enforced in an identical manner as a judgment. The disputants must be parties to an arbitration agreement, but it is not necessary for an arbitration procedure to have been started before the appointment of a mediator. International Conciliation and Arbitration Act 1993, 8 Cons. Arb. Law secs. 20 & 48, schs. 1–3 (Bermuda), available at <http://www.bermulaw.com/Laws/Consolidated%20Laws/Bermuda%20International%20Conciliation%20and%20Arbitration%20Act%201993.pdf>. In other jurisdictions mediators are not permitted to act as arbitrators under rules or codes of conduct, but the agreement of the parties and the mediator may be able to override any such limitation. STOCKHOLM CHAMBER OF COMMERCE MEDIATION RULES, *supra* note 167, art. 7(2), [http://www.sccinstitute.com/media/49819/medlingsregler\\_eng\\_web.pdf](http://www.sccinstitute.com/media/49819/medlingsregler_eng_web.pdf) (“Un-

time, some jurisdictions require that the arbitration commence before the settlement is reached; otherwise the mediated settlement will not enjoy the status of arbitral award.<sup>171</sup> In India, any settlement agreement signed by the parties is final and binding on them and persons claiming under them respectively, and has the same status and effect as arbitral award.<sup>172</sup>

It appears from the text of the New York Convention that it does not apply to mediated settlements reached before the commencement of arbitral proceedings. Article I provides that the Convention applies to “the recognition and enforcement of arbitral awards”<sup>173</sup>; this article also states that the term “arbitral awards” shall include “not only awards made by arbitrators appointed for each case, but also those made by permanent

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less the parties have agreed otherwise, a Mediator may not act as arbitrator in any future arbitrations relating to the subject matter of the dispute.”); S. 80(a), Arbitration and Conciliation Act, No.26 of 1996 (India), <http://www.ficci-arbitration.com/htm/acts.pdf> (“Unless otherwise agreed by the parties[,] . . . the conciliator shall not act as an arbitrator . . . in respect of a dispute that is the subject of the conciliation proceedings.”). *See also* UNCITRAL MODEL LAW ON INT’L COMMERCIAL CONCILIATION, *supra* note 13, paras. 50, 78.

171. ARTHUR W. ROVINE, CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 362–63 (2012) (“Jurisdictions such as New York and Brazil require that arbitral tribunal be constituted prior to the settlement of the dispute. Therefore, choice and timing can be everything.”).

172. *See, e.g.*, S. 73–74, Arbitration and Conciliation Act, No.26 of 1996 (India) (“The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.”). However, an Indian court has found that where the parties settled their dispute prior to the start of arbitral proceedings, the dispute was no longer arbitrable. *Nathani Steels Ltd. v. Assoc. Constr.*, (1995) 3 SCC 324 (India). UNCITRAL, 2012 DIGEST OF CASE LAW ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 124 (2012).

173. Article I(1) of New York Convention states:

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

arbitral bodies to which the parties have submitted.”<sup>174</sup> This implies that the Convention covers only the awards of arbitrators or arbitral institutions. Indeed, unlike an arbitrator, a mediator is not deciding the dispute on the merits and not rendering a binding decision.<sup>175</sup>

When parties appoint an arbitral tribunal merely to record a settlement in a consent award, there is no “difference” between the parties to resolve: the parties already negotiated or mediated such difference. From the plain text of the New York Convention it follows that a “difference” is a necessary precondition of an “award” in the sense of the convention.<sup>176</sup> The parties appoint the arbitrators merely to obtain a consent award submit to the arbitration their agreement rather than difference. Notably, the UNCITRAL Model Law on International Commercial Arbitration does not cover to a situation where a mediated settlement was reached before the commencement of arbitration; this article provides only for a settlement reached within an arbitration procedure.<sup>177</sup>

Therefore, it appears that where a mediated settlement is reached *before* the initiation of the arbitration procedure, it cannot be regarded as an arbitral award as defined in the New York Convention because it was reached not in arbitration, but by means of a fundamentally different process.<sup>178</sup> However,

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174. Article I(2) of New York Convention states, “The term ‘arbitral awards’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.”

175. According to Redfern, it is because of their status as judicial or quasi-judicial decisions that arbitral awards are given international recognition and enforcement. Alan Redfern, *Enforcement of International Arbitral Awards and Settlement Agreements*, 54 J.C.I. ARB. 124, 127 (1988); see also Sussman, *supra* note 162, at 12–13 (arguing that UNCITRAL should clarify the applicability of the New York Convention to an award issued by an arbitrator appointed after a mediated settlement agreement is reached).

176. *But see* Sussman, *supra* note 162, at 12 (arguing that article I(1) of the New York Convention does not specify whether it refers to disputes existing by the time of appointment of the arbitrator; “Thus, the Convention language does not seem to expressly bar recognition of an award rendered by an arbitrator appointed after resolution of the dispute. Nor would enforcement seem to otherwise be barred by other provisions of the Convention.”).

177. UNCITRAL MODEL LAW ON ARBITRATION, *supra* note 31, art. 30; see ALEXANDER, *supra* note 62, at 312.

178. ALEXANDER, *supra* note 62, at 28 (arguing that although mediation and arbitration share a number of common features distinguishing them from

there is a practical solution to this problem. Where the parties reached a mediated settlement *after* the commencement of the arbitration procedure, no matter how short the arbitration part was, it would fall within the meaning of arbitral award under New York Convention. Thus, such settlement would be internationally recognizable and enforceable as any other arbitral award.<sup>179</sup>

To conclude, mediated settlements recorded as consent awards are enforceable under the New York Convention under certain conditions. If the parties initiate arbitration first and then use mediation, there will be a genuine unresolved dispute between the parties by the time of commencement of arbitration. A settlement reached after the arbitral tribunal has been appointed and arbitration proceedings began may be recorded as an arbitral award and enforced under the New York Convention. However, if the settlement agreement was concluded before the start of arbitral proceedings, then such agreement should not fall within the notion of arbitral award under the New York Convention. Such settlement agreement should have the status of a contract and be internationally enforceable as such rather than as an arbitral award.

## CONCLUSION

Consent awards are effectively settlement agreements recorded by arbitral tribunals as awards. The consensual nature of consent awards raises a number of issues related to the conduct of arbitral proceedings, including the possible use of consent awards to cover illegal activities and enforcement of consent awards domestically and internationally under the New York Convention.

Although many jurisdictions allow tribunals to render consent awards resulting from mediation, their enforceability will

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court processes, they are fundamentally different in other respects, such as by being determinative rather than facilitative like mediation, and the differing legal nature of their outcomes).

179. Peter Wolrich, *ADR under the ICC ADR Rules*, in *ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES*, 235, 248–49 (Arnold Ingen-Housz ed., 2011) (explaining that the parties may request the arbitral tribunal to render an agreed award when mediation proceedings occur during the pendency of an arbitration covering the same dispute, whether the arbitration is ongoing or has been suspended pending the results of such proceedings).

depend on whether the tribunal dealt with a genuine dispute or an already settled disagreement. This Article illustrates that in most cases consent awards will be enforced as any other arbitral award, but it is important for the parties to demonstrate that not only the underlying settlement agreement was lawful, but also that the dispute was unresolved when the tribunal asserted its jurisdiction. Arbitrators have a duty to issue enforceable awards and should keep these considerations in mind.

Arbitration combined with mediation to reach an enforceable award can be an effective dispute resolution technique. Parties and arbitrators should, however, make sure that conciliation efforts by the arbitrators do not create the risks of nonenforceability of the arbitral awards. Parties and arbitrators should also consider possible conflicts of interest arising in case the same person serves both as arbitrator and mediator. In this regard, it may be important to secure the explicit consent of the parties to allow the same individual to act both as arbitrator and mediator.

Consent awards will remain a preferred choice to amicably settle disputes and to obtain an internationally enforceable award. Understanding what makes consent awards different from "normal" arbitration awards will help the parties successfully navigate from settlement to enforcement.