

# **ENFORCING MEDIATED SETTLEMENT AGREEMENTS (MSAs): CRITICAL QUESTIONS AND DIRECTIONS FOR FUTURE RESEARCH**

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## **ABSTRACT**

*This article discusses a range of critical issues and policy concerns involved in the ongoing debate about the status of mediated settlement agreements (or MSAs) reached in cross-border disputes. It examines current methods of MSA enforcement in various jurisdictions and it identifies their strengths and shortcomings. The article then focuses on two questions:*

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In addition to her teaching work at universities, Bobette has been a regular instructor at mediation, negotiation and trial advocacy skills courses for legal firms and a number of professional bodies in Australia, including the Office of the Director of Public Prosecutions (Queensland).

Bobette practised as a mediator from 1991-2007 with a number of institutions including the Legal Aid Office (Qld), the Queensland Building Tribunal, and the Supreme Court of Queensland. Bobette has published extensively in the areas of dispute resolution, legal skills and legal education. Her most recent research interest is in the ethics of legal representatives in mediation, which was the subject of her PhD thesis. The author can be reach at [bwolski@bond.edu.au](mailto:bwolski@bond.edu.au).

1. *Why should mediation and MSAs be given preferential treatment over unassisted negotiation and traditional contracts?; and alternatively,*
2. *Why should mediation not be given special treatment? Would a system which enforced MSAs undermine the values and objectives of mediation? It is suggested that such a system would, in fact, further central values and objectives of mediation such as those of self-determination, consensuality and party autonomy.*

*The article then suggests directions for future research and analysis. We (the international community) have two main options for the future. We can:*

1. *Maintain the status quo (with some MSAs being enforceable as contracts, some as consent court orders, some as consent arbitral awards, and some not enforceable at all); or*
2. *Create a new system for the enforcement of MSAs, a New York Convention style system which recognises and enforces MSAs as MSAs.*

*The first option will perpetuate diversity, a lack of uniformity and uncertainty in the use of mediation. The second option poses challenges, but we ought to strive to overcome them. The arguments in favour of creation of a new system for mediation are persuasive.*

**KEYWORDS:** *mediation, cross-border disputes, mediated settlement agreement, MSA, consent arbitral award, UNCITRAL Model Law on International Commercial Conciliation, EU Directive on Mediation*