УНІВЕРСИТЕТСЬКІ НАУКОВІ ЗАПИСКИ
ISSN 2078-9165. University Scientific Notes · 2026 · № 5 (113). С. 165-179

УДК 341.63 DOI: 10.37491/UNZ.113.11

No Dispute, No Arbitration? Pre-Arbitration Settlements and Awards on Agreed Terms at the International Commercial Arbitration Court*

Ievgen BOIARSKYI,
Candidate of Science of Law, Research Associate in the Department of Methodology of European Integration of Private Law, Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine, Kyiv, Ukraine,
ORCID 0000-0003-0273-422X, e-mail: ievgen.boiarskyi@gmail.com.

Abstract. The article discusses the legality of arbitral awards on agreed terms issued on the basis of a settlement agreement reached through mediation before the commencement of arbitral proceedings at the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry. The relevance of the problem is determined by the growing role of mediation in international dispute resolution, the increasing use of hybrid mediation-arbitration mechanisms, and the practical expectation of parties that a mediated settlement may acquire enhanced enforceability if transformed into an arbitral award. The purpose of this article is to establish whether the existence of a dispute constitutes a necessary prerequisite for the commencement and conduct of arbitral proceedings, followed by the rendering of an enforceable arbitral award. The analysis demonstrates that arbitration, by its nature, serves the purpose of resolving existing disputes and that the existence of such a dispute constitutes a fundamental prerequisite for the right to apply to an arbitration and for the exercise of adjudicative function by the arbitration tribunal. A settlement reached through mediation before the commencement of arbitral proceedings effectively eliminates the underlying dispute and, therefore, deprives arbitration of its subject matter. Moreover, an arbitral award rendered in the absence of any dispute may encounter substantial obstacles concerning its legal validity, recognition, and enforcement both under Ukrainian law and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. In conclusion, the article argues that the procedure allowing the conversion of a pre-arbitration mediated settlement into an arbitral award on agreed terms fails to guarantee the enforceability expected by the parties. It is therefore proposed that the applicable institutional rules be amended to exclude the possibility of rendering an arbitral award on agreed terms where the parties settled their dispute before the commencement of arbitral proceedings.

Keywords: international commercial arbitration, mediation, pre-arbitration settlement, award on agreed terms, existence of a dispute, recognition and enforcement, private-law mechanisms for advancing national interests.

* For this article, “International Commercial Arbitration Court” refers to the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC).

Received: 06 September 2026. **Accepted:** 18 October 2026
Published online: 28 October 2026. **Published in print:** 30 October 2026
© Boiarskyi, I., 2026
Open Access License: CC BY 4.0

Introduction

On 20 December 2018, the United Nations («**UN**») General Assembly adopted the UN Convention on International Settlement Agreements Resulting from Mediation («**Singapore Convention**») establishing a framework for the right to invoke as well as enforce settlement agreements [1]. The Convention seeks to increase the value and effectiveness of mediation as a means of alternative dispute settlement and has jump-started the development of relevant regulation in Ukraine, which signed the Singapore Convention (together with 45 other States) on 7 August 2019 [2].

On 16 November 2021, the Ukrainian parliament passed Law No. 1875–IX on Mediation («**Law on Mediation**») [3]. Article 3(2) of the Law on Mediation establishes an operational framework for mediation, providing, among other things, that mediation may be held before referring the matter to international commercial arbitration, during arbitral proceedings and at the stage of enforcement of an international arbitral award [3].

In parallel, on 17 December 2020, the Presidium of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry («**ICAC**») approved a plan for the expansion and development of ICAC's services, including by introducing mediation and other hybrid procedures [4]. Consequently, on 2 August 2022, the Presidium published the Rules of Mediation of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry («**ICAC Rules of Mediation**») [5].

The ICAC Rules of Mediation govern mediation as a separate dispute resolution procedure, administered by ICAC. Moreover, Appendix No. 2 to ICAC's Rules on Mediation provides for rules on combined dispute settlement procedures involving both mediation and international commercial arbitration [5]. Section II, in particular, is titled *«Mediation-Arbitration»* and envisages the following two-stage procedure, which is in the focus of the present article [5]:

- if the parties settle their dispute through mediation and agree to submit their settlement agreement for issuance of an arbitral award on agreed terms, then
- upon termination of mediation proceedings and based on the parties' respective petition ICAC initiates arbitration proceedings, governed by the Rules of ICAC, to record the settlement agreement in the form of an arbitral award on agreed terms.

The purpose of the above procedure is to ensure the enforceability of the settlement agreement, reached via mediation, and to avoid the need to hold separate court or arbitration proceedings, in case either party declines to comply with its terms. Similar mechanisms can be found in the mediation rules of other arbitral institutions. For example, the 2025 Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce provide in Article 11 as follows: «*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 or her to confirm the settlement agreement in an arbitral award.*» [6].

As a matter of comparison, the Singapore Convention is binding on 22 States (Ukraine did not ratify), whereas the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 («**New York Convention**») is binding

upon 172 States [7]. This means that the New York Convention has a substantially broader geographic reach and, therefore, is more efficient in securing the enforceability of arbitral awards, which is the primary concern of the parties when deciding to record their settlement in a consent award.

Where the parties submit an existing dispute to mediation and the mediation results in a settlement agreement fully resolving that dispute, the original dispute is brought to an end. In its Ruling rendered on 19 January 2021 in case No. 916/661/20 the Grand Chamber of the Supreme Court defined a settlement agreement as *«a written agreement between the parties to a dispute, entered into voluntarily for the purpose of resolving the dispute on mutually agreed terms. Thus, by foregoing judicial protection, the parties bring the existing legal conflict to an end by independently resolving their differences on agreed terms, without state coercion»* (emphasis added) [8].

A settlement agreement may provide for the termination, variation or supplementation of the parties' rights and obligations, including arrangements for the satisfaction of their respective claims. The parties may agree to release their mutual claims immediately or over some time after the conclusion of a settlement agreement. Nevertheless, when the parties proceed with lodging a joint petition to ICAC requesting to record their settlement in the form of an award on agreed terms, the parties expressly admit that there is no subsisting dispute between them concerning the matters covered by the settlement agreement.

This raises the question of whether the parties may validly commence arbitral proceedings solely for the purpose of converting their pre-arbitration settlement agreement into an award on agreed terms, notwithstanding the absence of a subsisting dispute requiring adjudication. Such a possibility appears difficult to reconcile with the adjudicative nature of arbitration, which presupposes the existence of a dispute to be resolved by an arbitral tribunal.

For example, Klaus Peter Berger argues that the *«the conversion of a settlement agreement reached in mediation into an arbitral award on agreed terms [….] is highly problematic, due to the fact that a dispute is a necessary precondition for an arbitration»* (emphasis added) [9]. In the same vein, Patricia Louise Shaughnessy treats the very issue as *«highly controversial»* [10].

The subject of this article also forms part of the broader discussion on modernizing private-law mechanisms for advancing Ukraine's national interests in the context of the evolving international legal order. In particular, ensuring the enforceability of the outcomes of alternative dispute resolution mechanisms, including arbitration and mediation, is essential for the effective protection of the rights and legitimate interests of Ukrainian participants in cross-border commercial relations.

Below, the author examines whether the existence of a dispute constitutes an essential requirement for arbitral proceedings under the auspices of the ICAC from three perspectives:

(A) a right to invoke an arbitration agreement,
(B) an adjudicative function of ICAC and/or an arbitral tribunal, and
(C) validity and enforceability of the arbitral award on agreed terms.

A. Existence of Dispute as a Prerequisite for Invoking an Arbitration Agreement

The parties' arbitration agreement is the cornerstone of arbitration. In particular, as explained by Lord Hoffmann in *Premium Nafta Products Ltd & Ors v Fili Shipping Co Ltd & Ors* [2007] UKHL 40, the parties have the power to determine *«what kind of disputes they intended to submit to arbitration»* (emphasis added) [11].

Reference to the scope of disputes is an indispensable part of any definition of the agreement to arbitrate. For example, Article II(1) of the New York Convention provides that *«[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship […]»* [12]. Similarly, Article I(1a) of the European Convention on International Commercial Arbitration of 1961 («**European Convention**»), which is binding on Ukraine, provides that it shall apply *«to arbitration agreements concluded for the purpose of settling disputes arising from international trade […]»* [13]. Law No. 4002–XII dated 24 February 1994 «On International Commercial Arbitration» («**ICA Law»**), which is based on the 1985 Model Law of the United Nations Commission on International Trade Law, defines an agreement to arbitrate as *«an agreement by the parties to submit to arbitration all or certain disputes […]»* [14].

Black's Law Dictionary (9th edition) defines the term «*dispute*» as a *«conflict or a controversy, esp. one that has given rise to a particular lawsuit»* [15, p. 540]. To cover conflicts of different kinds, drafters of arbitration agreements tend to employ the words «*disputes*», «*differences*», «*controversies*», «*claims*», etc. In the same vein, ICAC's model arbitration clause provides that ICAC shall settle *«[a]ny dispute, controversy or claim»* between the parties [16].

According to Gary Born, *«[i]n practice, virtually every commercial disagreement will constitute a dispute»* [17]. This means that in modern practice the threshold for establishing the existence of a dispute is rather low. For example, in *Exfin Shipping (India) Ltd Mumbai v Tolani Shipping Co Ltd Mumbai* [2006] EWHC (Comm) the debtor admitted its debt and offered to pay within an extended time period, but the creditor rejected the offer. Justice Langley found that *«[i]f one party says you must pay now and the other refuses to do so they are in dispute»* [18]. Or in *Amec Civil Engineering Ltd* v. *Secretary of State for Transport* Lord Justice May explained that a rejection of a claim, which leads to a dispute, may also be inferred from the respondent's silence for a period of time [19].

However, an arbitration agreement cannot be invoked, if there is no dispute between the parties at all. In *CDH Fund v Limited Partnership, CDH Grand Cattle Holdings Limited, Management, Li Lei and Xiong Fei v. CMBICDHAW Investments Limited* [2023] HKCFI 760 Justice Mimmie Chan found that the sole arbitrator lacked jurisdiction to render an award, given that there had been no dispute to consider [20]. In that respective arbitration matter the claimants sought relief in the form of a declaration of non-liability in the circumstances, when the respondent had accused third parties, not the claimants, of fraudulent misrepresentation. The sole arbitrator rejected the respondent's position regarding the lack of dispute, and decided that the claimants had a legitimate interest in seeking the declaratory relief [20]. Justice Chan disagreed and set aside the award, holding, in particular, that *«for there to be a valid arbitration process and a valid award, there has to be a formulated dispute, and the right of the parties to put an arbitration agreement into effect does not arise until and unless there is a dispute between the parties to the agreement. [...] Unless there is a dispute, there is nothing to refer to arbitration»* (emphasis added) [20]. Later the very findings of Justice Mimmie Chan were confirmed by the Court of Appeal [21].

Ukrainian courts have not had an occasion to express their view on the consequences of an absence of a dispute on the jurisdiction and/or operation of the arbitral tribunal. Nevertheless, the available court practice confirms that the right to apply to an arbitration arises upon an emergence of a dispute:

- In the Case No. 910/5253/18 the Commercial Cassation Court of the Supreme Court considered whether a claimant could be bound by an arbitration clause

in a contract, to which it was not a party. In its Ruling dated on 14 August 2018 the Court held as follows: *«The claimant was not a party to the Contract and, consequently, none of its terms were binding on the claimant. This also applies to the Contract provision on arbitration of all disputes in connection with the Contract, including its invalidity. That provision was applicable if a dispute arose between the parties to the Contract themselves, and not between them (or one of them) and a third party who was not a party to such a contract, i.e. the Claimant in this case»* (emphasis added) [22].

- The Case No. 910/17566/17 concerned a claim for the recovery of 3 % annual interest and inflation-related losses arising from the respondent's failure to pay the debt awarded under an arbitral award rendered by a Stockholm arbitral tribunal, which had been recognised and declared enforceable in Ukraine as early as 2001. In its Ruling of 6 November 2018, the Northern Commercial Court of Appeal held that the respondent could not rely on the arbitration clause to challenge the jurisdiction of the Ukrainian commercial courts, since *«the claims in Case No. 910/17566/17 do not fall within the scope of the arbitration clause, as the dispute arising from the breach of contract had already been resolved in favour of the claimant by the arbitral award of 17 July 2000 and was therefore conclusively settled. Consequently, the arbitration clause can no longer be given effect in the present case»* (emphasis added) [23].
- In Case No. 920/241/19 on 3 March 2020 the Commercial Cassation Court of the Supreme Court held as follows: *«An arbitration agreement has both positive and negative effects: it obliges the parties to submit their disputes to arbitration and confers jurisdiction on the arbitral tribunal over disputes falling within the scope of the arbitration agreement (the positive effect). If a dispute arises that falls within the scope of the arbitration agreement, either party may refer it to an arbitral tribunal. On the other hand, an arbitration agreement precludes the parties from seeking to resolve their disputes before national courts (the negative effect). […]»* (emphasis added) [24].

Hence, as concluded by Markiian M. Malskyi, to exercise the right to refer a dispute to international commercial arbitration, the following conditions must be met [25, p. 103]:

1) Existence of a valid arbitration agreement, and
2) Existence of a dispute between the parties.

However, if an arbitration agreement provides for an application to arbitration with the sole purpose of fixing the parties' settlement in the form of an award on agreed terms, such an application is necessarily premised on an absence of any dispute between the parties. In other words, such an arbitration agreement actually requires that there are no disputes between the parties.

For further illustration, ICAC's recommended combined clause for Mediation-Arbitration provides as follows: *«[…] If the parties settled a dispute, controversy or claim by means of mediation, the agreement based on the results of the mediation shall be submitted to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine for rendering an award on the agreed terms in accordance with its Rules»* (emphasis added) [26]. The aim of this clause is not directed at dispute resolution. Instead, it envisages the arbitral tribunal performing a function distinct from resolving a dispute.

Given its reliance on a mediated settlement that resolves the dispute between the parties, the above arbitration clause fails to comply with the definitions of an

arbitration agreement, cited above. As a consequence, such a clause is very unlikely to constitute a jurisdictional basis for international commercial arbitration in Ukraine.

B. Existence of Dispute as a Prerequisite for the Exercise of Adjudicative Function

Before analysing the relevance of the existence of a dispute as a prerequisite for the functioning of ICAC and/or an arbitral tribunal, the author finds it useful to consider relevant case practice developed by the International Court of Justice («**ICJ**»). Although the ICJ operates in the field of public international law, its practice is of interest for three reasons:

(1) arguably, ICJ is the leading judicial institution within the international legal system,

(2) like international arbitration, the ICJ exercises contentious jurisdiction based on the States' voluntary consent, and

(3) ICJ has considerable jurisprudence on the relevance of establishing an existing dispute for performing its judicial function.

1. Existence of Dispute as a Condition for the Exercise of the ICJ's Judicial Function

According to Article 92 of the UN Charter, the ICJ is the principal judicial organ of the UN [27]. And Article 36(3) of the UN Charter provides, among other things, that *«legal disputes should as a general rule be referred by the parties to»* the ICJ [27].

Further, the ICJ Statute provides that the Court's contentious function is focused on resolution of disputes. In particular, Article 38(1) of the ICJ Statute provides that its function *«is to decide in accordance with international law such disputes as are submitted to it»* [28]. Article 36(2) of the ICJ Statute clarifies that its jurisdiction extends to *«legal disputes»* [28].

The most cited definition of a dispute in ICJ jurisprudence comes from its predecessor, the Permanent Court of International Justice («**PCIJ**»), in *The Mavrommatis Palestine Concessions* case (Greece v. United Kingdom): *«A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons»* [29]. As noted by Christian Tomuschat in his commentary to Article 36 of the ICJ Statute, the said definition has been maintained by the ICJ *«without any significant modification as to its terms»* [30].

The ICJ underscored the relevance of the existence of a dispute for exercising its judicial function in the *Nuclear Tests* case (Australia v. France), where it concluded as follows: *«The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since «whether there exists an international dispute is a matter for objective determination» by the Court»* (emphasis added) [31].

The requirement of the existence of a dispute means that in the absence of a dispute, the ICJ cannot perform its contentious judicial function. This conclusion is reflected and/or developed in the following jurisprudence of the ICJ.

No judgment if the claim loses its object in the same case, the ICJ added that «[t]*he dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared because the object of the claim has been achieved by other means»* [31]. Whereas Australia requested the ICJ to decide on the legality of French nuclear weapon tests in the South Pacific Ocean as well as to order cessation of any further tests, and whereas France made a series of public statements on cessation of

such further tests, the ICJ held that the claim of Australia had lost its object and *«any further finding would have no raison d'etre»* [31].

Pre-agreed issue is not a dispute. In the *Frontier Dispute* the ICJ was requested to delimit the land boundary between Burkina Faso and Niger, consisting of three sectors [32]. However, before commencement of the ICJ proceedings, two sectors of the frontier had already been agreed by the parties based on the work of the Joint Technical Commission on Demarcation of the Burkina Faso-Niger boundary. Therefore, the parties asked the ICJ to delimit only one sector of their frontier and to record in its judgment the parties' agreement regarding the delimitation of the other two sectors. The ICJ rejected the latter request. In particular, in par. 48 of its Judgement the ICJ referred to Article 38(1) of its Statute and noted that *«the requests that parties submit to the Court, must not only be linked to a valid basis of jurisdiction, but must also always relate to the function of deciding disputes»* [32]. Because there was no dispute between the parties regarding the delimitation of the frontier, the ICJ found their request incompatible with its judicial function [32].

Importantly, the ICJ distinguished this case from *Free Zones of Upper Savoy and the District of Gex (Second Phase)* (France v. Switzerland) and *Société Commerciale de Belgique* (Belgium v. Greece), in which the PCIJ allowed recording in its judgment the parties' settlement agreement, reached during the court proceedings, not before [32].

No dispute — no jurisdiction. In 2016 the ICJ rendered three landmark judgments in *Cases on Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. United Kingdom, Marshall Islands v. Pakistan, and Marshall Islands v. India), where the Court rejected the applicant's claims in their entirety due to the absence of a dispute. Based on Articles 36 and 38 of the ICJ Statute, the ICJ confirmed that *«[t]he existence of a dispute between the Parties is thus a condition of the Court's jurisdiction»* [33; 34; 35].

Therefore, the existence of a dispute as of the date of the commencement of contentious proceedings is a necessary condition for the ICJ's jurisdiction and the exercise of its judicial function. This requirement cannot be dispensed with by the parties' mutual agreement, since their consent cannot override the inherent limits of the ICJ's judicial function.

2. Existence of a Dispute as a Prerequisite for the Exercise of ICAC's Adjudicative Function

ICAC was established in 1992 as an independent arbitral institution, operating under the aegis of the Ukrainian Chamber of Commerce and Industry. Article 14(5) of the Law of Ukraine No. 671/97–BP dated 2 December 1997 «On Chambers of Commerce and Industry in Ukraine» provides that the operation of ICAC is governed by the law of Ukraine [36].

Dispute resolution constitutes both the purpose and the function of arbitration. For example, the European Convention provides in Article 1(2b) that the term *«arbitration»* implies settlement of disputes by arbitrators, appointed on an ad hoc basis or by permanent arbitral institutions [13; 37].

The same approach is taken towards ICAC as well. Article 38 of the Law of Ukraine No. 959-XII dated 16 April 1991 «On Foreign Economic Activity», titled *«Consideration of Disputes Arising during Foreign Economic Activity»*, provides that *«Disputes arising between foreign economic activity entities, foreign business entities during such activity shall be considered by courts of Ukraine, as well as with the consent of the parties to the dispute by the International Commercial Arbitration Court and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of Ukraine and other*

dispute settlement bodies if this does not contradict the current laws of Ukraine or is provided for by the international agreements of Ukraine» (emphasis added) [38].

Further, the ICA Law underscores the necessity of the existence of a dispute for the operation of international commercial arbitration in the following articles (among others):

- Article 1(2 and 4) lists the types of disputes that may be referred to international commercial arbitration by the agreement of the parties [14];
- Article 7(1) defines an arbitration agreement as «*an agreement by the parties to submit to arbitration all or certain disputes* [...]» [14];
- Article 17(1) empowers an arbitral tribunal to «*grant interim measures related to the subject-matter of the dispute*» [14];
- Article 26(2) provides for the parties' right *«to present expert witnesses in order to testify on the disputed issues*» [14];
- Article 28(1) provides that an 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»* [14]; and
- Article 32(2) prevents an arbitral tribunal from ordering termination of the proceedings in case the claimant withdraws his claim, but «*the respondent* objects *thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute»* [14].

Particular attention should be paid to Article 21, which provides that *«[u]nless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent*» [14]. This provision establishes the default rule for determining the point in time when arbitral proceedings commence with regard to a particular dispute. According to the *Analytical Commentary on Draft Text of UNCITRAL Model Law*, the *«request for that dispute to be referred to arbitration»* must identify a particular dispute submitted to arbitration [39, p. 49]. This necessarily means that neither Article 21 nor any other article of the ICA Law does not envisage the possibility to commence arbitral proceedings in the absence of a dispute between the parties.

The above resonates with the Judgment of the Durban and Coast Local Division of the Supreme Court of South Africa in *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1980 (1) SA 301 (D), where Didcott J stated that *«Arbitration is a method for resolving disputes. That alone is its object, and its justification. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is then nothing for the arbitrator to decide»* [40].

Contrary to the above, par. 3 Section II of Appendix No. 2 to ICAC's Rules on Mediation expressly provides that *«[t]he parties who settled the dispute through mediation and agreed to submit the Agreement based on the results of the mediation to the ICAC for the issuance of an Arbitral Award on the agreed terms shall submit to the ICAC a petition for the issuance of the Arbitral Award on the agreed terms [...]. Such petition shall be considered under the expedited procedure in accordance with the third part and parts from the fifth to seventh of Article 45 of the ICAC Rules, without filing a Statement of Claim»* (emphasis added) [5]. This rule expressly envisages commencement of ICAC arbitration proceedings when the parties' dispute has already been settled and both parties confirm it in their petition to ICAC. If ICAC sustains this petition and commences arbitral proceedings in lack of an underlying dispute, such proceedings may be seen falling outside of the scope of the ICA Law and, therefore, not capable of creating respective legal consequences for the parties.

To sum up, engagement of ICAC and/or the arbitral tribunal after the settlement of the parties' dispute does not align with their adjudicative / dispute resolution function.

C. Existence of a Dispute as a Prerequisite for the Validity and Enforceability of an Arbitral Award

The most significant consequence of commencing and conducting arbitral proceedings in the absence of a dispute is that the enforceability of an arbitral award on agreed terms rendered by an arbitral tribunal constituted under the auspices of the ICAC may be called into question.

1. ICA Law

As explained above, the commencement of arbitral proceedings in the absence of a dispute between the parties does not comply with Article 21 as well as other articles of the ICA Law. And due to the said non-compliance it is highly unlikely that such arbitral proceedings can produce an enforceable arbitral award.

The ICA Law repeatedly frames arbitral proceedings as well as defines the grounds for setting aside, recognition, and enforcement of an arbitral award by reference to a dispute. Articles 34 and 36 of the ICA Law permit an arbitral award to be set aside, or its recognition and enforcement to be refused, in the following instances:

- *«the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration [...]»* (emphasis added) [14], and
- «*the subject-matter of the dispute is not capable of settlement by arbitration under the legislation of Ukraine*» (emphasis added) [14].

Most importantly, Article 30(1) of the ICA Law provides that *«[i]f, during arbitral proceedings, the parties settle the dispute, including by way of mediation, 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»* (emphasis added) [14]. This article envisages a procedure to be followed if the parties settle their dispute during the arbitral proceedings.

Further reference is made to *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, interpreting the above article as follows: *«Article 30 only applies if arbitral proceedings have commenced and the final award has yet to be made. Where a full and final settlement of any claim has been reached before arbitral proceedings have commenced, a dispute no longer subsists to be referred to arbitration. It follows that such an agreed settlement may not be made in the form of an award under article 30»* (emphasis added) [41, p. 124].

Accordingly, if an arbitral tribunal renders an award on agreed terms based on a pre-arbitration settlement, in the author's view such an award would fall outside the scope of Article 30(1) of the ICA Law. This means that such an award would most likely not qualify as an *«arbitral award»* within the meaning of the ICA Law and, therefore, would not be recognized as binding and enforceable in Ukraine.

2. New York Convention

Unsurprisingly, the existence of a dispute is also a necessary prerequisite for the recognition and enforcement of a foreign arbitral award under the New York Convention. Article 1(1) provides that the Convention applies to *«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»* (emphasis added) [12]. Accordingly, if the parties commence arbitral proceedings by making a joint application for rendering an award on agreed terms, such an award, if rendered, would likely fall outside the scope of the New York Convention.

The above conclusion is reinforced by the Order and Amended Opinion of the U.S. Court of Appeals for the Ninth Circuit dated 15 April 2019 in the case of *Castro v. Tri Marine Fish Co.* [42]. In that case immediately after signing the settlement agreement,

Mr. Castro was deceived into meeting with an "arbitrator" in a public lobby of a nearby office building with the purpose of fixing the settlement in the form of an arbitral award. Although no arbitration proceedings were duly commenced, the "arbitrator" signed a one-page document, titled *"Order"* recognizing the settlement and dismissing the "case" without prejudice.

The Court held that an instrument, which recorded a settlement agreement entered into by the parties, did not fall within the definition of a *"foreign arbitral award"* under the New York Convention, given that there had been no dispute between the parties by the time they met with the arbitrator [42]. In particular, Mr. Castro agreed to release his claims against Tri Marine Fish Co. in exchange for a monetary compensation. Then he agreed to proceed to a different building believing that there he would pick up a settlement check, not to participate in a fast-track procedure on rendering the award on agreed terms.

In his Opinion Judge McKeown concluded that: "[...] *in this unusual appeal, we have an arbitral award in name only. There was no dispute to arbitrate, as the parties had fully settled their claims before approaching an arbitrator; the purported arbitration consisted of an impromptu meeting in a building lobby; and the "proceedings" disregarded the terms of three arbitration agreements between the parties and the issuing forum's arbitral rules. We conclude that the resulting order is not an arbitral award entitled to enforcement under the Convention*" [42].

In the author's view the same approach may be taken towards any arbitral award on agreed terms recording a pre-arbitration settlement, including a settlement reached via mediation.

***

Considering that an arbitral award on agreed terms recording a pre-arbitration settlement does not fall within the scope of the term *"arbitral award"* under the ICA Law and considering that the same kind of award may not constitute a *"foreign arbitral award"* under the New York Convention, it is likely to become unenforceable both in Ukraine and abroad. This means that the whole purpose behind recording a pre-arbitration settlement in the form of an arbitral award becomes defeated.

Conclusion

In light of the foregoing, the procedure set out in the ICAC Rules of Mediation for rendering an arbitral award on agreed terms on the basis of a pre-arbitration settlement may not meet the expectations of the parties that agree to these Rules. Given that these Rules allow commencement of ICAC arbitral proceedings and rendering an award on agreed terms in the circumstances when the dispute had already been settled,

(a) the underlying agreement of the parties to respective Rules may not qualify as an arbitration agreement,

(b) relevant proceedings are likely to become incompatible with the adjudicative / dispute resolution function of ICAC and/or an arbitral tribunal, and

(c) the resulting award may not qualify as an arbitral award under the ICA Law or the New York Convention.

In these circumstances, the author proposes amending Section II of Appendix No. 2 to the ICAC Rules on Mediation by removing the procedure allowing parties to obtain an arbitral award on agreed terms where the underlying dispute was settled before the commencement of arbitral proceedings. This amendment would enhance legal certainty in arbitration, promote compliance of arbitral awards on agreed terms with both the ICA Law and the New York Convention, and, consequently, contribute to

the advancement of Ukraine's national interests in the sphere of alternative dispute resolution.

In the meantime, to ensure the enforceability of a potential award on agreed terms the parties are advised to engage in settlement negotiations and/or mediation of their disputes after the commencement of arbitral proceedings.

Declarations

Funding. This research was conducted without external funding within the framework of the research project «Theoretical and Applied Foundations for the Modernisation of Private Law Support of the National Interests of Ukraine under the Transformation of the International Legal Order» (State Registration No. 0126U000090) of the Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine.

Conflict of Interest. No conflict of interest exists.

Use of Artificial Intelligence. Artificial intelligence (Microsoft 365 Copilot, Microsoft Corporation) was used for language editing of the article (style, grammar, and translation), improving wording without altering the substance of the text, and preparing a preliminary draft of the abstract. The author independently conducted the research, analysed academic and legal sources, developed the legal reasoning and conclusions, and prepared the final manuscript. All original ideas belong to the author. The novelty of the research is entirely the author's own scholarly contribution.

List of sources

1. United Nations Convention on International Settlement Agreements Resulting from Mediation : resolution 73/198 adopted by the General Assembly on 20 December 2018. *United Nations. United Nations Official Document System (ODS)*. URL: https://docs.un.org/en/A/RES/73/198 (date of access 05.09.2026).
2. Status: United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation). *United Nations Commission on International Trade Law (UNCITRAL)*. URL: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (date of access 05.09.2026).
3. Про медіацію. Закон України від 16.11.2021 р. № 1875–IX. *Верховна Рада України. Законодавство України*. URL: https://zakon.rada.gov.ua/go/1875-20 (дата звернення: 05.09.2026).
4. International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry. Overview of Activities in 2020. Kyiv : ICAC at the UCCI, 2021. *International Commercial Arbitration Court*. URL: https://icac.org.ua/wp-content/uploads/report_sum_en_2020_draft5.pdf (date of access 05.09.2026).
5. Mediation Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry. Kyiv : International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry. *International Commercial Arbitration Court*. URL: https://icac.org.ua/wp-content/uploads/Pravila-mediatsiyi_ENG.pdf (date of access 05.09.2026).
6. SCC Mediation Rules 2025. *SCC Arbitration Institute* URL: https://sccarbitrationinstitute.se/wp-content/uploads/2025/01/mediationrules_eng.pdf (date of access 05.09.2026).
7. Contracting States. *New York Convention*. URL: https://www.newyorkconvention.org/contracting-states/contracting-states (date of access 05.09.2026).
8. Постанова Великої Палати Верховного Суду від 19.01.2021 р. у справі № 916/661/20. *Єдиний державний реєстр судових рішень*. URL: https://reyestr.court.gov.ua/Review/94803670 (дата звернення: 17.10.2026).

9. Berger K. P. Integration of Mediation Elements into Arbitration: 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators. *Arbitration International*. 2003. Vol. 19, Iss. 3. P. 387–403. DOI: https://doi.org/10.1093/arbitration/19.3.387.
10. Shaughnessy P. L. Turning Settlements into Arbitral Awards. Cambridge Compendium of International Commercial and Investment Arbitration / ed. by S. Kröll, A. K. Bjorklund, F. Ferrari. Cambridge : Cambridge University Press, 2023. P. 1486–1512. DOI: https://doi.org/10.1017/9781108304467.049.
11. Premium Nafta Products Ltd and Others v Fili Shipping Company Ltd and Others [2007] UKHL 40, 17 October 2007. House of Lords. UK Parliament. URL: https://publications.parliament.uk/pa/ld200607/ldjudgmt/jd071017/ship-1.htm (date of access 05.09.2026).
12. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. New York, 10 June 1958. *New York Convention*. URL: https://www.newyorkconvention.org/english (date of access 05.09.2026).
13. European Convention on International Commercial Arbitration. Geneva, 21 April 1961. United Nations Economic Commission for Europe. *New York Convention*. URL: https://www.newyorkconvention.org/media/uploads/pdf/1/0/104_othertreaties-1961-genevaconvention.pdf (date of access 05.09.2026).
14. Про міжнародний комерційний арбітраж. Закон України від 24.02.1994 р. № 4002–XII. *Верховна Рада України. Законодавство України*. URL: https://zakon.rada.gov.ua/go/4002-12 (дата звернення: 05.09.2026).
15. Black's Law Dictionary / ed. B. A. Garner. 9th ed. St. Paul, MN : West, 2009. 1920 p.
16. Recommended Arbitration Clause. International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry. *International Commercial Arbitration Court*. URL: https://icac.org.ua/en/arbitrazh/arbitrazhne-zasterezhennya/ (date of access 05.09.2026).
17. Born G. B. Legal Framework for International Arbitration Agreements. International Commercial Arbitration. 3rd ed. Kluwer Law International, 2021. Ch. 2, upd. Nov. 2023. *Kluwer Arbitration*. URL: https://www.kluwerarbitration.com/document/kli-ka-born-2021-ch02 (date of access 05.09.2026).
18. Exfin Shipping (India) Ltd Mumbai v Tolani Shipping Co Ltd Mumbai [2006] EWHC 1090 (Comm), 17 May 2006. *DMC's CaseNotes*. URL: https://archive.onlinedmc.co.uk/exfin_shipping_v__tolani_shipping.htm (date of access 05.09.2026).
19. Amec Civil Engineering Ltd v Secretary of State for Transport [2005] EWCA Civ 291, 17 March 2005. Court of Appeal of England and Wales (Civil Division). *BAILII*. URL: https://www.bailii.org/ew/cases/EWCA/Civ/2005/291.html (date of access 05.09.2026).
20. CDH Fund V Limited Partnership, CDH Grand Cattle Holdings Limited, CDH Investments Management (Hong Kong) Limited, Li Lei and Xiong Fei v CMBICDHAW Investments Limited [2023] HKCFI 760, 15 March 2023. Court of First Instance of the High Court of Hong Kong. *Jus Mundi*. URL: https://jusmundi.com/en/document/decision/en-fund-cattle-management-li-lei-and-xiong-fei-v-cmb-decision-of-the-court-of-first-instance-of-the-high-court-of-hong-kong-2023-hkcfi-760-wednesday-15th-march-2023#decision_47123 (date of access 05.09.2026).
21. CMBICDHAW Investments Limited v CDH Fund V Limited Partnership and Others [2024] HKCA 516, 10 July 2024. Court of Appeal of the High Court of Hong Kong. *Jus Mundi*. URL: https://jusmundi.com/en/document/decision/en-cdh-fund-v-limited-partnership-cdh-grand-cattle-holdings-limited-management-li-lei-and-xiong-fei-v-cmbicdhaw-investments-limited-judgment-of-the-hong-kong-court-of-appeal-of-the-high-court-of-hong-kong-2024-hkca-516-wednesday-10th-july-2024#decision_66567 (date of access 05.09.2026).

22. Постанова Касаційного господарського суду у складі Верховного Суду від 14.08.2018 р. у справі № 910/5253/18. *Єдиний державний реєстр судових рішень*. URL: https://reyestr.court.gov.ua/Review/76090352 (дата звернення: 05.09.2026).
23. Постанова Північного апеляційного господарського суду від 06.11.2018 р. у справі № 910/17566/17. *Єдиний державний реєстр судових рішень*. URL: https://reyestr.court.gov.ua/Review/77914162 (дата звернення: 05.09.2026).
24. Постанова Касаційного господарського суду у складі Верховного Суду від 03.03.2020 р. у справі № 920/241/19. *Єдиний державний реєстр судових рішень*. URL: https://reyestr.court.gov.ua/Review/88050865 (дата звернення: 05.09.2026).
25. Мальський М. М. Арбітражна угода: теоретичні та практичні аспекти. Львів : Літопис, 2013. 374 с.
26. Рекомендовані медіаційні застереження. Міжнародний комерційний арбітражний суд при Торгово-промисловій палаті України. *International Commercial Arbitration Court*. URL: https://icac.org.ua/en/mediation/rekomendovani-zasterezhennya/ (дата звернення: 05.09.2026).
27. Charter of the United Nations. *United Nations*. URL: https://www.un.org/en/about-us/un-charter/full-text (date of access 05.09.2026).
28. Statute of the International Court of Justice. *International Court of Justice*. URL: https://www.icj-cij.org/statute (date of access 05.09.2026).
29. Mavrommatis Palestine Concessions (Greece v. Great Britain). Judgment No. 2 of 30 August 1924. P.C.I.J. Series A, No. 2. Permanent Court of International Justice. *International Court of Justice*. URL: https://www.icj-cij.org/sites/default/files/permanent-court-of-international-justice/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf (date of access 05.09.2026).
30. The Statute of the International Court of Justice: A Commentary / ed. by A. Zimmermann, C. J. Tams, K. Oellers-Frahm, C. Tomuschat. 3rd ed. Oxford : Oxford University Press, 2019. DOI: https://doi.org/10.1093/law/9780198814894.001.0001.
31. Nuclear Tests (Australia v. France). Judgment of 20 December 1974. I.C.J. Reports 1974. P. 253. *International Court of Justice*. URL: https://www.icj-cij.org/sites/default/files/case-related/58/058-19741220-JUD-01-00-EN.pdf (date of access 13.09.2026).
32. Frontier Dispute (Burkina Faso/Niger). Judgment of 16 April 2013. I.C.J. Reports 2013. *International Court of Justice*. URL: https://www.icj-cij.org/sites/default/files/case-related/149/149-20130416-JUD-01-00-EN.pdf (date of access 05.09.2026).
33. Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom). Preliminary Objections, Judgment of 5 October 2016. I.C.J. Reports 2016. P. 833. *International Court of Justice*. URL: https://www.icj-cij.org/sites/default/files/case-related/160/160-20161005-JUD-01-00-EN.pdf (date of access 05.09.2026).
34. Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India). Jurisdiction and Admissibility, Judgment of 5 October 2016. I.C.J. Reports 2016. P. 255. *International Court of Justice*. URL: https://icj-web.leman.un-icc.cloud/sites/default/files/case-related/158/158-20161005-JUD-01-00-EN.pdf (date of access 05.09.2026).
35. Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan). Jurisdiction and Admissibility, Judgment of 5 October 2016. I.C.J. Reports 2016. P. 552. *International Court of Justice*. URL: https://www.icj-cij.org/sites/default/files/case-related/159/159-20161005-JUD-01-00-EN.pdf (date of access 05.09.2026).
36. Про торгово-промислові палати в Україні. Закон України від 02.12.1997 р. № 671/97-ВР. *Верховна Рада України. Законодавство України*. URL: https://zakon.rada.gov.ua/go/671/97-вр (дата звернення: 05.09.2026).
37. Hascher D. T. European Convention on International Commercial Arbitration of 1961: Commentary. Yearbook Commercial Arbitration. 2011. Vol. XXXVI. P. 504–562.

International Council for Commercial Arbitration (ICCA). URL: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media113534204360520hascher_commentary_on__the_european_convention_1961.pdf (date of access 05.09.2026).
38. Про зовнішньоекономічну діяльність. Закон України від 16.04.1991 р. № 959–XII. *Верховна Рада України. Законодавство України*. URL: https://zakon.rada.gov.ua/go/959-12 (дата звернення: 05.09.2026).
39. Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration : Report of the Secretary-General. A/CN.9/264. Vienna : United Nations, 25 March 1985. 79 p.
40. Parekh v Shah Jehan Cinemas (Pty) Ltd and Others, 1980 (1) SA 301 (D). *Zalari Law Reports*. URL: https://reports.zalari.co.zw/cases/1980-1-sa-301-d-parekh-v-shah-jehan-cinemas-pty-ltd-and-others (date of access 05.09.2026).
41. UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration. New York : United Nations, 2012. V, 232 p. United Nations publication, Sales No. E.12.V.9. ISBN 978-92-1-133793-8.
42. Castro v. Tri Marine Fish Co., No. 17-35703, Order and Amended Opinion of 15 April 2019. United States Court of Appeals for the Ninth Circuit. *Justia US Law*. URL: https://law.justia.com/cases/federal/appellate-courts/ca9/17-35703/17-35703-2019-04-15.html (date of access 05.09.2026).

UKRAINIAN METADATA

Євген БОЯРСЬКИЙ

Науково-дослідний інститут приватного права і підприємництва імені академіка Ф. Г. Бурчака Національної академії правових наук України (м. Київ)

Немає спору — немає арбітражу? Доарбітражне врегулювання та рішення на узгоджених умовах у Міжнародному комерційному арбітражному суді

Анотація. Досліджено правомірність ухвалення арбітражного рішення на узгоджених умовах на підставі мирової угоди, досягнутої за результатами медіації до початку арбітражного провадження в Міжнародному комерційному арбітражному суді при Торгово-промисловій палаті України. Актуальність проблеми зумовлена зростанням ролі медіації у сфері міжнародного вирішення спорів, дедалі ширшим використанням гібридних механізмів медіації та арбітражу, а також практичними очікуваннями сторін щодо того, що врегулювання, досягнуте шляхом медіації, може одержати примусове виконання у разі його трансформації в арбітражне рішення. Метою дослідження стало визначення того, чи є наявність спору між сторонами необхідною передумовою для ініціювання та ведення арбітражного провадження, яке має завершуватися ухваленням арбітражного рішення, що підлягає примусовому виконанню. Проведений аналіз свідчить про те, що арбітраж, за своєю природою, призначений для вирішення наявних спорів, а наявність спору є необхідною передумовою для звернення до арбітражу, а також для здійснення арбітражем функції вирішення спорів. Мирова угода, досягнута за результатами медіації до початку арбітражного провадження, фактично усуває спір між сторонами та відповідно позбавляє арбітраж його предмета. Крім того, арбітражне рішення, ухвалене за відсутності будь-якого спору між сторонами, може зіткнутися з істотними перешкодами щодо його юридичної чинності, визнання та виконання як відповідно до законодавства України, так і відповідно до Конвенції ООН про визнання та виконання іноземних арбітражних рішень 1958 року. Обґрунтовується, що процедура, яка дозволяє трансформувати мирову угоду, досягнуту шляхом медіації до початку арбітражного провадження, в арбітражне рішення на узгоджених умовах, не гарантує можливості її примусового виконання, на яку розраховують сторони. У зв'язку з цим пропонується внести зміни до відповідних арбітражних правил шляхом виключення можливості

ухвалення арбітражного рішення на узгоджених умовах у випадках, коли сторони врегулювали свій спір до початку арбітражного провадження.

Ключові слова: міжнародний комерційний арбітраж, медіація, доарбітражне врегулювання спору, арбітражне рішення на узгоджених умовах, наявність спору, визнання та виконання, приватноправове забезпечення національних інтересів.

Надійшла: 06.09.2026. Прийнята: 18.10.2026. Опублікована онлайн: 28.10.2026. Надрукована: 30.10.2026

Для цитування / How to cite:

ДСТУ 8302:2015: Boiarskyi I. No Dispute, No Arbitration? Pre-Arbitration Settlements and Awards on Agreed Terms at the International Commercial Arbitration Court. *Університетські наукові записки*. 2026. № 5 (113). С. 165-179. DOI: https://doi.org/10.37491/UNZ.113.11.

APA 7th: Boiarskyi, I. No Dispute, No Arbitration? Pre-Arbitration Settlements and Awards on Agreed Terms at the International Commercial Arbitration Court. *University Scientific Notes,* (5(113), 165-179. DOI: https://doi.org/10.37491/UNZ.113.11.