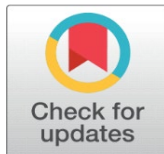
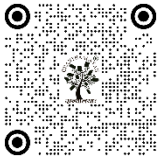


MEDIATION AS AN ALTERNATIVE TO INTERNATIONAL COMMERCIAL ARBITRATION: ISSUES AND CHALLENGES

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ABSTRACT

“The method adopted by business parties to dispute resolution has shifted over the previous decade. While conventional conflict resolution techniques such as litigation and arbitration remain popular, commercial parties are increasingly turning to alternative dispute resolution methods to discover ways that better suit their commercial objectives and offer efficient and effective results. Mediation is frequently the solution. Mediation helps the parties to maintain control of the situation and focus on a commercial solution rather than legal action. It has the power to transform a commercial conflict into a business opportunity. As a result, mediation is a primary choice, with arbitration and lawsuit as backup options. In this paper, in addition to describing the features of mediation and how the process works, the benefits, and drawbacks of mediation are explored, as well as ideas for how to encourage mediation in business conflicts.”

Keywords: Commercial Disputes, Mediation, and Alternative Dispute Resolution

1. INTRODUCTION

Commercial parties' approaches to conflict settlement have evolved during the previous ten years. Although conventional conflict settlement procedures (e.g. litigation and arbitration), commercial parties are increasingly turning to alternative dispute settlement (ADRs) for strategies that are more appropriate to their business goals and that yield efficient and effective solutions. Mediation is often the solution. Mediation is an alternative dispute resolution (ADR) method in which a neutral third party aids disputing parties in reaching an amicable resolution of their disagreements stemming from or pertaining to a other legal or contractual relationship. Rather than accepting anything imposed by a third party, the parties decide whether or not to reach an agreement and, if so, what that agreement's substance will be.

The mediator does not have the authority to force a settlement to the disagreement on the parties. In this paper, besides the characteristics of mediation, the benefits and disadvantages of mediation as well as the way to promote mediation in business conflicts are studied and how to promote mediation are examined.¹

The Convention on Mediation in Singapore is designed to ensure the implementation by the United Nations Committee on International Trade of international trade settlement agreements concluded through mediation (UNCITRAL 2019). The International Bar Association (IBA) guidelines are used to solve the initial investor-state disagreements. The conciliation technique of the International Center for Settlement of Investment Disputes (ICSID) is used more frequently than before. In its inaugural mediation and a new boom in the mediation training sector, a bilateral investment treaty was recently dealt with by the International Chamber of Commerce. Although a mediator does not "teeth" the negotiation dynamics are changed by the presence of a mediator. The notion of mediation, since there were many components of mediation, is not new to the Indian system.²

2. MEDIATION IN THE DISPUTE RESOLUTION CLAUSE

There is an ongoing debate about whether mediation should be made necessary for all or certain conflicts before using the most effective ADR approach. In most countries, the parties' decision to participate in mediation is completely their own; courts, in the general, do not have the authority to compel parties to join into settlement discussions. Some believe that because the effectiveness of mediation depends on parties' willingness to compromise their viewpoints, forcing unwilling disputants to engage in such conversations would be antithetical to the spirit of the process.³ It is possible that mandatory mediation would be advantageous for some family and basic commercial conflicts since it would reduce the number of dockets in courts while also providing significant efficiency (in terms of time and money) to disputants. However, it's important to remember that a failed mediation procedure might lead to delays in the process and a waste of financial resources.⁴

Where the parties reach agreement to attempt to resolve a disagreement through mediation first and then arbitrary or legal proceedings continue, if mediation does not resolve a problem, mediation and arbitration or litigation might be successfully combined. In other words, the parties agree to mediate before initiation arbitration or judicial proceedings. The terminology used to define these obligations are escalation provisions or multi-tier clauses.

Mediation can be integrated into the process of contract settlement when a contract is written. This ensures not only that mediation is automatically considered when a discrepancy emerges, but also that the parties do not lose faces when asking mediation; this is solely the role of the contract. Parties which conclude a mediatorial agreement may be strongly willing to handle their disputes without recourse to arbitration or proceedings. Clearly, time, money, and reputation of arbitration are far more than mediation expenses. Consequently, the parties should be careful to include in their contract a mediation clause. However, remember that it may be too early to achieve an agreement in a practical way when the discrepancy begins.⁵

Commercial agreements contain more and more a necessity for parties to strive to settle any problems by mediation before arbitration procedures are initiated (so-called med-arb clauses).

For example, parties can draft their dispute resolution clause as follows: "In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled

¹ Mark Theoharis, What Is Alternative Dispute Resolution (ADR) – Mediation & Arbitration, Money Crashers, (July 13, 2025, 9:00 AM), <https://www.moneycrashers.com/alternative-dispute-resolution-adr-mediation-arbitration/>

² Dr. Madabhushi Sridhar, ADR: An Attempt to Achieve Constitutional Goal of Complete Justice in India, adrr, (July 13, 2025, 9:35 PM), <https://adrr.com/adr4/ADR-Constitution.htm>

³ Tamara Relis, Perceptions in Litigation and Mediation (Cambridge: Cambridge University Press, 2009), p. 65-89

⁴ Explain The Advantages And Disadvantages Of Alternative Dispute Resolution', The Lawyers & Jurists, (July 13, 2025, 10:07 AM), <https://www.lawyersjurists.com/article/advantages-disadvantages-alternative-dispute-resolution/>

⁵ Ajay Thakur, What every Indian should know about mediation, Blog iLeaders, (July 13, 2025, 12:46 PM), <https://blog.ipleaders.in/indian-should-know-about-mediation/>

under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.”⁶

As an agreement to reach an agreement, the contractual obligations to mediate will be unlawful if it only refers to the desire or purpose to reach agreement before arbitration or proceedings have been initiated. However, when the wording of what the parties have to do is sufficiently precise, such as designating a specific ADR technique, it is sufficiently sure and hence enforceable. When the agreement is enforceable, the courts might order that such actions be postponed until mediation. If the problem is arbitrated, an arbitrator might not decide until the mediation process is concluded. Where a mediation agreement has been breached and a proceedings have been stayed, parties might be entitled to certain achievements and/or damages.⁷

3. ISSUES FOR MEDIATION IN SINGAPORE CONVENTION W.R.T. NEW YORK CONVENTION

3.1. RECIPROCITY ISSUES

In recognition and enforcement, reciprocity plays an important role. It grants a country honours in its own country and enforces them. Arbitration has, like at the New York Conference, been able to identify and enforce reciprocal award. For example, disputes occurred between India and the other country then the enforcement of awards in India will be executed under Indian law from reciprocity territories. The Singapore Convention does not include the provision of reciprocity arrangement as it will create uncertainty. But this can be a drawback of Legal certainty as it might be possible most of the countries will having multilateral agreements which may lead to the origin of the settlement agreement. And this settlement agreement cannot always give identification of place or seat specifically as Arbitration.

3.2. RESERVATIONS UNDER SINGAPORE CONVENTION⁸

- The reservation under Article 8(1) (b) of the Singapore Convention signifies two reservations. Firstly, it is given to the States for their sovereign immunity to their government agencies for the protection of national security and public policy. Moreover when the government is in its commercial capacity dealing with infrastructure and defense contracts then also protection from national security and public policy cannot be diluted. And Secondly, the Singapore Convention provides parties on an “opt” basis subjected to its application by the member states or contractual parties.
- This provision of reservation under the Singapore Convention gives rise to consensual nature. It means the intention of the parties towards the agreement. In the absence of mediation, the parties may freely abandon the settlement if they select mediation before the beginning thereof, as mediation does not guarantee the execution of the agreement. Like in the case of arbitration, the parties have the liberty to select their arbitrators and have an arbitral awards finality mechanism and it binds the parties to the arbitral judgement following the settlement process. However, mediation is not the same. The parties resolve the problems here, but there is no binding nature of award that ensures the parties after settlement.
- Therefore, the parties will select the techniques that will provide the greatest solutions and provide fairness for enforcement in choosing any alternative conflict settlement. And the largest disadvantage is mediation without award enforcement.

3.3. UNIFORMITY IN LAWS

The New York Convention has a standard of rules and laws for Arbitration which brings uniformity to enforce the settlement agreement. Whereas in Singapore Convention there are no formal rules has been described, for example, who will be the mediator, who will appoint the mediator, what are the qualifications of the mediator, whether the parties

⁶ Parties wishing to use proceedings under the ICC Mediation Rules should consider choosing one of the clauses below, which cover different situations and needs, International Chamber of Commerce, (July 13, 2025, 2: 53 PM), <https://iccwbo.org/dispute-resolution-services/mediation/mediation-clauses/>

⁷ Introduction to Mediation, Singapore Law Watch, (July 14, 2025, 12:07 PM), <https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-03-mediation>

⁸ Ibid

have the autonomy to choose a mediator, whether the settlement of agreement can be enforced through an award, whether the award has recognition and its finality. These all questions are unanswered. Without the standard of uniformity in rules and provisions it will not results in an effective manner and it will not ensure the confidentiality which arbitration ensures to the parties. Moreover, Article 5(1) (d) of the New York Convention allows parties to shy away from enforcement. And thus, this provision should be revoked or take this issue and expand in a new way.⁹

3.4. GROUNDS FOR REFUSAL OF ENFORCEMENT¹⁰

- The ground for refusal of enforcement in the Singapore Convention is more as compared to the New York Convention. In New York Convention, the enforcement and recognition of awards are kept in a higher position and it can be refused if the arbitration agreement is against public policy. Whereas, the Singapore Convention, provides Article 5 for the grounds of refusal of enforcement and is in the terms of consensus of parties of the settlement agreement in respective to mediation.
- Article 5(1) of the Singapore Convention says ‘serious breach by mediator’ provision for the refusal and it can be refused only when it is directly contrary to the settlement agreement. This limits the scope of mediation on grounds of refusal.
- Another reason is ‘due processes in mediation. Under the Singapore Convention, the parties resolve the disputes by reaching voluntarily and cannot have refusal through procedural aspects. Like in New York Convention, under Arbitration, the parties can be brought refusal on the grounds of the composition of the arbitral tribunal, or any jurisdictional issues. Thus, in Singapore Convention in terms of refusal is ineffective.
- Also, the ‘seat’ is another reason for limiting the scope in refusal of grounds. In New York Convention, the arbitration has a ‘seat’ that recognizes the enforcement of arbitral awards and has allowed judicial review from two courts. Further, under Singapore Convention does not have a ‘seat’ for mediation settlement and can have a judicial review from one court only. This is the biggest drawback which cannot be effectively brought Singapore Convention.
- Further, mediation under Singapore Convention settles either through fast track procedure or summary procedure, it might be cost-effective but it cannot be a challenge and is without evidentiary value. But in New York Convention, the arbitral awards passed can be challenged. Thus, this is the reason the scope under Singapore Convention is limited and it has to be wider for achieving its objective.¹¹

3.5. SUI GENERIS AGREEMENT

- The Singapore Convention is a sui generis instrument that does not arise from contractual parties. If the parties choosing any instrument of alternation dispute resolution will first look at whether they have autonomy and whether that instrument giving legal effect. Like under New York Convention, the arbitration provides a legal effect to the agreement. The parties are bound to choose their arbitrator by themselves or by arbitral courts. They have contractual rights and binding procedures. The arbitral awards recognize and enforced.
- The Preamble of Singapore Convention states that objective mediation is to resolve international commercial disputes. Today there are various multilateral agreements and cross-border disputes. There is a need to have contractual obligations, in case of a breach, there should be remedies provided under the convention. From the intention of the private parties disposing of the settlement will not give legal effect in enforcing the agreement or any other international contracts. This reduces the finality and certainty of the convention. Moreover, the disputes resolved through mediation cannot be used as precedents for other similar cases. Though it will be

⁹ Zareen Qayyum, The Enforceability of Proposed Reforms to Investor–State Dispute Settlement, Oxford Academic, (July 14, 2025, 2:32 PM), <https://academic.oup.com/icsidreview/article-abstract/35/1-2/253/5900774?redirectedFrom=fulltext>

¹⁰ Alessa Pang, Andre Yeap and Kelvin Poon, International Arbitration 2020, Chambers and Partners, (July 14, 2025, 2:56 PM) <https://practiceguides.chambers.com/practice-guides/international-arbitration-2020/singapore>

¹¹ Veronika Vanisova, Current Issues in International Commercial Mediation: Short Note on the Nature of Agreement Resulting from Mediation in the Light of the Singapore Convention, (July 14, 2025, 3:06 PM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3413560

less time-consuming, cost-effective, easy formalities with no other additional requirements like having evidence, seal, and signed. Thus, it will not give more credibility to which New York Convention has in conducting the arbitration.¹²

Hon'ble Justice A.K. Sikri, Judge Supreme Court of India emphasized the virtues of Mediation in commercial disputes in *Vikram Bakshi v. Sonia Khosla* [(2014) 15 SCC 80. as follows:

“Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.”

A significant legislative step has been made in order to create the appropriate legislative framework to enable international trade mediation. The final draft of the Proposal of the Singapore Convention on the Enforcement of Mediated Settlement Agreements (Singapore Convention), which will be offered for signing on August 1, 2019, was agreed upon by the UNCITRAL Working Group II. It is envisaged that the new Convention of Singapore would affect the field of international business arbitration with the same good effect as the New York Convention (1958).¹³

3.5.1. ISSUES AND CHALLENGES UNDER INTERNATIONAL COMMERCIAL MEDIATION

In the presence of legislatures and court decisions that provides for the operation of mediation clauses, the efficacy of mediation in a cross-border mediation depends on the following factors and is limited to:

1) The willingness of the parties to mediate in good faith as mediation a voluntary process.

The willingness of the party to mediate is one of the important phenomena as referring a dispute to mediation is a three-fold aspect:

- Both the parties are agreed to mediate.
- Either of the parties is trying to avoid mediation.
- Either of the parties using Mediation as a weapon to delay other adjudication processes.

The process is voluntary brings in the ideology of good faith i.e. in case a dispute arises and parties have a dispute resolution clause referring to mediation as the first way to resolve the dispute.

Therefore, the parties agreeing to mediate will lead to the success of the dispute resolution clause as it is a voluntary process. But, if one party is agreeing to mediate and the other is not in favor of it, a dispute resolution clause should be drafted in such a manner that,

- Minimum no. of Sessions of mediation before moving to other modes of dispute resolutions.
- Consequences of not adhering to mediation result in form of liquidated damages or recovery of legal fees.
- Stipulates the commencement and conclusion of the mediation proceeding.

A similar view can be seen in the judgments of South African Courts:

In *Hooper Bailie Associated Ltd v. Natcon Group Pty Limited*, the parties agreed that “conciliation” would conclude before arbitration would proceed.

In *Aiton Australia Pty Ltd v Transfield Pty Ltd*. “where a stay of proceedings was sought based on a mediation clause. While there was no legislative basis for enforcing dispute resolution clauses other than those which provided for arbitration, Einstein J believed that an agreement to conciliate or mediate was enforceable provided that it was expressed as a condition precedent to litigation or arbitration?”

2) Cultural Assumptions

The style and culture of mediation are one of the biggest factors in conducting mediation. The issues under cultural assumptions can be understood w.r.t. three factors:

¹² Mayanka Dhawan, Enforcement of International Commercial Mediated Settlement Agreements, India Corplaw, (July 14, 2025, 5:06 PM), <https://indiacorplaw.in/2025/02/enforcement-of-international-commercial-mediated-settlement-agreements.html>

¹³ Ibid

- Primary considerations (Interest, Perspective: Individualist and Collectivist)
- Secondary considerations (Communication etc.)

Primary considerations: The primary considerations can be understood concerning the interest, perspective of an individual.

1) Identification of Individualists and Collectivists

- **Individualist:** “The participants understand the process of mediation as an interaction of humans i.e. they value on individual’s priority. The traits which reflect this approach of parties are relying on personal preferences, personal freedom, and achievement. The following approach re-confirms mediation being a voluntary process that strengthens the doctrine of Party Autonomy. But in a Case, wherein multiple participants are there, the approach of the party needs to be understood by the mediator. For example, in a mediation proceeding between two countries wherein there are multiple parties to the proceeding claiming distributorship, a party and the mediator need to understand the beneficiaries connected to them.
- **Collectivist:** The participants understand the process of mediation is an act of social interest. The traits which reflect this approach is relying on harmony, solidarity, and teamwork. But in a long run, participants think about their interests. If in a condition all the participants on the same side work with collectiveness, it is against the principle of Mediation is voluntary. Therefore, the mediator should work towards Collectivism w.r.t. Individualism.

2) The transfer of confidential information between parties vis-à-vis its admissibility in court proceedings and the mediation clauses

While a mediation agreement allows parties to agree on confidentiality requirements, most mediation organizations have laws which address this. The International Chamber of Commerce's (ICC) Mediation Rules, for example, provide that the mediation (the mediation (but not the fact that it is taking place, has taken place, or will take place) is secret and confidential unless the parties agree otherwise or relevant legislation demands it.

In consequence, contributions provided by a third party or by mediator cannot be used as evidence in arbitration, proceedings or similar proceedings unless a party wants to utilize these contributions independently. Views stated, settlement ideas given, and any confessions made by another party in mediation are all subject to the same rules. The CIC observed that “Information regarding negotiation, mediation, conciliation and counseling will fall under exempted clause of information of other spouse, being personal and given in fiduciary capacity and, no public interest is established in disclosure, while there is larger public interest in protecting that information as that would help mediation to flourish, hence such information shall not be disclosed.”

3) Enforceability of Cross border Mediation Settlement Agreements

The enforcement of cross-border mediated settlements may now be carried out indirectly, depending on the enforcing state's enforcement of enforcement legislation. A settlement agreement is regarded as a private contract in nations where no such laws exist and implemented under contract law of the competent authority. Two tendencies for accelerated enforcement, on the other hand, emerge in jurisdictions that have established laws to support it. First, a mediated agreement can be enforced in court by requesting summary enforcement or asking for enforcement after having the agreement notarized in accordance with the enforcing State's criteria.

4) Power of Narration w.r.t Party Autonomy

This can be understood with an example, an international website designing company “X” and an Indian online shopping platform “Y” came into an agreement for designing of a platform and connected matters thereof. The agreement was terminated by company “X”. Thereof, “Y” conveyed “X” that due to termination of the agreement, “X” cannot use the website designed by “Y”. Even, “X” had paid huge sums for the designing of the website. Finally, a mediator was appointed and when “X” narrated his part that the software was designed using “HTML” script, that’s the reason they terminated the agreement. Then, Y narrated his part that X cannot use the website as it was the hard work of years and the agreement had been terminated. So, the mediator asked Y whether you can design a website in other formats like CSS. Javascript etc. in the similar charges. Y agreed to it.

5) Legal Advisers’ knowledge about Dispute resolution

The legal adviser when referring a commercial dispute to any mode being litigation, mediation, and arbitration, etc., the legal adviser must know the best-suited model, which is cost-effective and time-saving.

6) In the U.K., because of the Court of Appeal judgment in *Halsey v. Milton Keynes General NHS Trust*

“Legal advisers must ensure that they not only know about mediation but that they can and do advise their clients before and during litigation (including arbitration) whether to use mediation and, if so, when to do so. Equally, legal advisers must be able to protect their clients (and themselves!) against an adverse cost order or suit if they decide not to try to resolve the dispute by mediation.”

4. EXPLORING ALTERNATIVE DISPUTE RESOLUTION

- The Supreme Court observed that “all cases relating to trade, commerce, contracts, consumer disputes, and even tortious liability could normally be mediated.”
- Justice NV Ramana, Supreme Court Judge, recently stressed the importance of an alternate dispute resolution procedure to reduce the pendency of Indian courts proceedings.

He observed that “the different ADR processes provide millions of people a platform to settle their issues and an effective execution of these processes can surely reduce the pendency. He also emphasized that the ADR mechanisms maximize stakeholder participation and allow litigants a degree of control over the resolution process.”

In this context, Justice Ramana observed, “Since ADR is designed around a participatory model, its adoption is going to break existing barrier; from being an ‘outsider to the process’ the citizens with their direct involvement will be the ‘insiders in the process.’”

- The Supreme Court asked “the government to consider the feasibility of enacting an Indian Mediation Act to take care of various aspects of mediation in general.”

5. CONCLUSION

“In a world full of disagreements, the scope of arbitration, mediation, and litigation have grown. Various laws have been passed and accords have been made to address the current demands. Despite their success, their efficacy must be re-evaluated and re-tested. On the other hand, these projects have shown that many different dispute resolution procedures are globally understood. Several forms of alternative dispute settlement methods were used to adjudicate international commercial conflicts from time to time with surprising success. All techniques are inconvenient, but in diverse contexts and circumstances they have proved beneficial. On the other side, the mediation process proved to be the most successful method for resolving disputes. It is generally known that the confidentiality of the mediation process creates trust and promotes involvement by the parties. However, the mediation process does not ensure that a solution will be found.

When it comes to closing agreements and creating contracts, the dispute resolution mechanism that is included in the boilerplate terms after the contract is usually overlooked. It is critical, however, that this clause receives the same level of attention as the contract's main terms. Failure of the parties to agree on or include a proper dispute resolution clause may result in protracted and potentially costly disagreements about the dispute resolution processes to be used in a particular contract. Before any issue develops, the parties should always express their desire for dispute resolution in their contracts, regardless of the rules they choose. Otherwise, it may be more difficult for the parties to reach an agreement after a dispute has arisen.

To sustain long-term international relationships, voluntary means of settlement are generally preferable to adjudicative techniques in the domain of international dispute resolution. Unlike adjudicative approaches, mediation gives the parties total authority over the process and allows them to communicate directly with one another. It also allows the parties to be as creative as possible with their answers. Mediation helps the parties to maintain control of the situation and focus on a commercial solution rather than legal action. It has the power to transform a commercial conflict into a business opportunity. As a result, mediation is a primary choice, with arbitration and lawsuit as backup options.

Arbitration is centered on finding a solution to a problem. There is no such thing as a flawless system. The ideal method would be for countries to use mediation as a first choice, with arbitration or lawsuit as a fallback option if mediation failed.”

CONFLICT OF INTERESTS

None.

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None.

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