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International commercial mediation and dispute resolution contracts

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Introduction

Every transaction has the potential to go wrong and international commercial contracts are not spared this plight. It is when an international commercial contract fails – irrespective of the reasons, that the impact of different legal and cultural backgrounds of the parties come to light. The obvious venue for commercial disputes to be decided is generally understood to be in court (litigation)[2] or before an arbitral tribunal (arbitration)[3]. However, there are numerous other alternative dispute mechanisms[4] available to parties that are less well known and also deserve consideration; not least because they offer parties methods of resolving the dispute between them in a more time and cost-efficient manner, and with a stronger focus on the commercial interest of the parties. Mediation is one of these mechanisms.

This chapter provides an overview of the basic concepts of mediation; how it distinguishes itself from but can also be employed together with other dispute resolution mechanisms such as, in particular, arbitration; the legal framework; and practical guidelines when drafting a mediation agreement in the context of international commercial contracts.

State of Play

There is a growing awareness of benefits of mediation in the international business community.[5] In the first international survey to examine how businesses and their legal representatives make decisions about their choice of dispute resolution mechanism, the SIDRA Survey Report 2020[6] confirms the commercial appeal of mediation for users – both legal users (external lawyers) and client users (corporate decision-makers and inhouse counsel). Looking at specific aspects of mediation, more than 80 per cent of users indicated

[1] Thank you to Terence Yeo and Pitamber Yadav for their research assistance in the preparation of this paper.
[2] INSERT CROSSREFERENCE
[3] INSERT CROSSREFERENCE
[4] The term “alternative dispute resolution” generally refers to alternatives to litigation. However, the acronym 'ADR' is also used with various other meanings such as "amicable" or "appropriate" dispute resolution. The alternatives include, amongst others, adjudication, facilitation, mediation as well as combinations thereof.
[5] Thomas Stipanowich and J. Ryan Lamare, ‘Living with 'ADR': Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations’ (2014) 19(1) Harvard Negotiation Law Review 1, 1.
[6] Singapore Dispute Resolution Academy, ‘SIDRA International Dispute Resolution Survey: 2020 Final Report (Jul 3, 2020) <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/index.html> accessed 26 September, 2020 (SIDRA Survey Report 2020). In this chapter, all percentage references to this and other surveys have been rounded up or down to the closest full percentage.

the following factors as being important in their selection of mediation as their process of choice:

- Impartiality
- Speed
- Confidentiality
- Procedural flexibility
- Cost.[7]

Further, user satisfaction with these factors is high. For example, satisfaction with impartiality in mediation (86 per cent) is high and similar to that in litigation (85 per cent) and arbitration (84 per cent).[8] A significant difference in user satisfaction emerges in relation to speed and costs. According to the Survey Report, satisfaction with the speed and costs of mediation (68 per cent speed; 65 per cent costs) towers over that of litigation (45 per cent speed; 48 per cent costs) and arbitration (30 per cent speed; 25 per cent costs),[9] giving mediation a competitive advantage and demonstrating the commercial appeal of mediation.

National and international private institutions have taken the initiative to offer a broad range of tools, for example assisting parties to choose mediators, administering mediation proceedings and related services. In parallel, legislators are increasingly seeking to provide a sound legal framework for mediation. Both these developments are making professionally conducted mediation more accessible and attractive for business.

One of the many advantages of mediation is considered to be the high level of voluntary compliance of the parties with the outcome.[10] From the perspective of international business users, the prospect of voluntary compliance is positive in terms of zero enforcement costs.

However the expectation of voluntary compliance provides little comfort in those cases in which a party defaults on the settlement agreement -- and this factor, namely the lack of a well-established international direct enforceability regime[11] – accounts for the significantly lower usage of mediation compared to arbitration, despite the high satisfaction levels when mediation is used. Arbitration was used by 74 per cent of respondents to resolve their disputes between 2016 to 2018 -- as opposed to 49 per cent for litigation; 27 per cent for mixed mode dispute resolution; and 26 per cent for mediation.[12]

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[7] SIDRA Survey Report 2020, 46, Exhibit 7.1.1.

[8] SIDRA Survey Report 2020, 7, Exhibit 4.1.3. The survey revealed these three factors were considered as important influencers of users' choice of dispute resolution mechanism, second only to direct enforceability.

[9] SIDRA Survey Report 2020, 10, Exhibit 4.2.2. Compare the findings of the Commonwealth Secretariat, '2019 Study on International Commercial Arbitration' at section 3.7 which indicates that not all arbitrations are lengthy – a factor which would reduce the costs associated with the arbitral procedure.

[10] See Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (4th edn, Jossey-Bass 2014) 453–455. This has also been confirmed by surveys comparing compliance with mediated settlements to compliance with court judgments, see Craig A. McEwen and Richard J. Maiman, 'Small claims mediation in Maine: an empirical assessment' in Carrie Menkel-Meadow (ed), *Mediation : Theory, Policy and Practice* (Routledge 2018).

[11] Direct enforceability was ranked by users the top factor overall in influencing users' choice of dispute resolution mechanism: SIDRA Survey Report 2020, 8, Exhibit 4.1.4.

[12] SIDRA Survey Report 2020, 5, Exhibit 4.1.1, and 7, Exhibit 4.1.3.

In practice, this issue is often resolved by combining arbitration and mediation procedures that transpose a mediated settlement agreement into an (enforceable) arbitral award on agreed terms.[13] The SIDRA Survey Report 2020 empirically confirms that users who sought to preserve business relationships with their counterparts and were also concerned to have the security of a direct enforceability regime turned to a mixed mode (hybrid) procedure combining mediation and arbitration, rather than arbitration alone.[14]

Most recently, the question of direct enforceability has been tackled by the United Nations Commission on International Trade and Law (UNCITRAL), which has reworked and renamed its Model Law on International Commercial Conciliation (2002) to Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018),[15] Further, in 2020, the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention) came into force.[16] To those familiar with arbitration, these instruments are comparable with the UNCITRAL Model Law on International Commercial Arbitration (1985 amended 2006) and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). By creating a uniform international standard and an instrument that is enforceable nearly worldwide, these instruments contributed significantly to the institutional capacity-building in relation to arbitration. This led to its acceptance and success as a tool to resolve disputes arising out of international commercial contracts. We may now expect a similar development concerning mediation.[17]

Table 1 offers a comparative overview of the features of international arbitration and mediation, respectively.

Table 1 Comparative Features of International Arbitration and Mediation

Characteristic	Arbitration	Mediation
International framework	Established international legal framework adopted by 83 States:[18] *see* UNCITRAL Model Law on International	Less established international framework adopted by 33 States:[19] *see* UNCITRAL Model Law on International Commercial Mediation

[13] This solution has its limitations and potential pitfalls. See Laurence Boulle, 'International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework' (2014) 7(1) Contemporary Asia Arbitration Journal 35.

[14] SIDRA Survey Report 2020, 73, Exhibits 9.2.1 and 9.2.3.

[15] The full text of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (Model Law on Mediation) is available online at <https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation>.

[16] The full text of the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) is available online at <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements>.

[17] At the time of writing, 53 States (including the People's Republic of China, India and the United States of America) have signed the Singapore Convention.

[18] Figures are available on the UNCITRAL website <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.

[19] Figures are available on the UNCITRAL website <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status>.

	Commercial Arbitration (1985 amended in 2006).	(previously Model Law on Conciliation 2002, amended in 2018 and the term "conciliation" was replaced with "mediation"). On a regional level, *see* the EU Directive on Mediation in Civil and Commercial Matters (2008).
Enforceability of outcomes	International framework for enforceability of outcomes: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which has 165 signatories at the time of writing.[20]	International framework for enforceability of outcomes: the Singapore Convention on Mediation was ratified in 2020 and has 53 signatories at the time of writing.[21]
Jurisprudence and case law	Significant body of cases interpreting arbitration law,[22] giving arbitration strong legal backing and arguably a degree of legal certainty.	Growing but still a limited number of cases interpreting mediation law, resulting in a lack of legal certainty and predictability.
Cost	Generally higher costs are associated with arbitration.	Generally lower costs are associated with mediation.
Time	Lengthy process over months or years.[23]	Shorter duration of process over days, weeks or months.
Nature of presentations	Highly legalistic and technical arguments.	Highly flexible and can move beyond legal issues.
Decision-making	By arbitrator based on the legal arguments presented.	By parties on whatever basis they choose, whether it be legal rights, commercial,

[20] Figures are available on the UNCITRAL website <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2>.

[21] Figures are available on the UNCITRAL website <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status>.

[22] See, for example, the CLOUT database on the UNCITRAL website: <https://uncitral.un.org/>.

[23] See, for example, SIDRA Survey Report 2020, 30. However, not all types of arbitration are lengthy. For example, the London Maritime Arbitrators Association (LMAA) and the Grain and Feed Trade Association (GAFTA) arbitrations are often regarded as efficient by users: Commonwealth Secretariat, '2019 Study on International Commercial Arbitration', section 3.7.

		financial, and personal interests or a combination of factors.

Meaning of Mediation

Given that the origins of mediation can be traced back to traditional communities in Asia, Africa, the Pacific, and to the ancient Greeks and Romans, and also has religious roots in Confucianism, Judaism, Christianity and Islam,[24] it is only natural that there is not only one type of mediation and no uniformly standardised mediation format. Moreover, mediation is employed in countless different areas that do not all operate according to the same (social or legal) rules. As an example, family mediation differs from criminal (victim-offender) mediation and both differ from commercial mediation. All are mediation but under different parameters. Accordingly, how mediation is conducted may be influenced by regional concepts or the environment in which it is employed.

Mediation in Commercial Cross-Border Disputes

In the context of international commercial contracts, we can consider the definition of mediation provided by the Model Law on Mediation as an international common denominator. While an UNCITRAL Model Law is merely a recommendation directed at national legislators for implementation, it offers an opportunity to work toward harmonised practice and uniform standards within the international commercial dispute resolution community. Article 1(3) of the Model Law on Mediation provides,

> "For the purposes of this Law, **'mediation' means a process**, whether referred to by the expression mediation, conciliation or an expression of similar import, **whereby parties request a third person or persons ('the mediator') to assist them in their attempt to reach an amicable settlement of their dispute** arising out of or relating to a contractual or other legal relationship. **The mediator does not have the authority to impose upon the parties a solution to the dispute**." [Emphasis added.]

This wording captures the core characteristics of mediation and underlines its nature as a highly flexible process which is determined by the agreement of the parties and the guidance of the mediator.[25] The concept of mediation as offering a bespoke solution for each case is confirmed by the fact that the only mandatory provision in the Model Law on Mediation[26] regarding the mediation proceedings is Article 7(3) which addresses the issue of procedural fairness. It stipulates that,

[24] See F. Matthews-Giba, 'Religious Dimensions of Mediation' (2000) 27 Fordham Urban Law Journal 1695, 1696–1703.

[25] Similar wording is used to define mediation under Article 2(3) of the Singapore Convention: 'Mediation' means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute.

[26] This is made clear by Article 4 of the Model Law on Mediation, which – under the heading 'Variation by agreement' – sets out that "Except for the provisions of article 7, paragraph 3, the parties may agree to

> "In any case, in conducting the proceedings, the mediator shall seek to maintain **fair treatment of the parties** and, in so doing, shall take into account the circumstances of the case." [Emphasis added.]

No further mandatory provisions are necessary to conduct mediation because the outcome of mediation can only be a settlement agreed by the parties. Each party at all times maintains full decision-making power over the dispute during the mediation. Should the situation arise that one or both parties' interests are not given sufficient consideration in the mediation, the outcome will most likely be that no settlement agreement is reached but never a decision imposed by the mediator. Because of the parties' control over the outcome, the core of the mediation process is to a great extent self-regulatory.

Scope of application of international commercial mediation

Different definitions of "international commercial mediation" will impact the application of legal instruments, such as the Singapore Convention. By way of example, there are differences between the Singapore Convention and the Model Law on Mediation[27] (both instruments drafted by UNCITRAL). Further, these parameters may differ from those set out in national legislation on mediation and the differences here may be more far-reaching. Accordingly, it is important to be aware of these definitions and the limitations they impose. Here we consider the meaning of the terms, "international" and "commercial" in three cross-border legal instruments, namely the Singapore Convention, the Model Law on Mediation and the European Union (EU) Mediation Directive.[28]

International

In very broad terms, mediation is international if it arises out of a cross-border context. This is the basic premise of the Model Law on Mediation,[29] the Singapore Convention[30] and the EU Mediation Directive.[31]

The most obvious scenario (as set out by the EU Mediation Directive) is if the parties to the mediation have their places of business in different States.

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exclude or vary any of the provisions of this section." This freedom of the parties to deviate from all other provisions is limited to the conduct of the mediation itself, it does not extend to the provisions on (recognition and enforcement of) international settlement agreements reached in mediation contained in section 3 of the Model Law on Mediation.

[27] Note that in the analysis below the Model Law on Mediation is taken as a hypothetical example of national legislation on mediation. To date legislation based on or influenced by the Model Law has been adopted in 33 States in a total of 45 jurisdictions, according to the UNCITRAL Secretariat (see <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status>).

[28] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (EU Mediation Directive).

[29] Article 2 (2) and (3) of the Model Law on Mediation.

[30] Article 1(1) of the Singapore Convention.

[31] Article 2 of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (EU Mediation Directive).

The Model Law on Mediation and the Singapore Convention also include the case in which the place of business of the parties is in a different State than that in which a substantial part of the obligations of the commercial relationship is to be performed or with which the subject matter of the dispute is most closely connected.

Only the Model Law on Mediation leaves it in the disposition of the parties to agree that their mediation is international and thereby falls within its scope of application.[32]

Commercial

The definition of 'commercial' in an international context poses challenges. As already noted in The Guide to Enactment and Use of the 2002 Model Law on Conciliation,[33]

> "No strict **definition of 'commercial'** is provided in the Model Law, the intention being that the term be interpreted broadly so as to cover matters arising from all legal relationships of a commercial nature, whether contractual or not […] the test is **not based on** what the **national law** may regard as 'commercial'."[34] [Emphasis added.]

Instead of a definition, the Model Law provides a non-exhaustive list of examples of commercial relationships which include, but are not limited to, any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; and carriage of goods or passengers by air, sea, rail or road.[35]

The Singapore Convention does not directly address the issue, although the wording of its Article 1(1), which defines the scope of application, clearly sets out that the Singapore Convention,

> "applies to an agreement resulting from mediation […] to resolve a **commercial dispute** […]" [Emphasis added.]

Also, Article 1(2) of the Singapore Convention explicitly excludes its application to settlement agreements,

> "concluded to resolve a dispute arising from transactions engaged in by one of the parties (a **consumer**) for personal, family or household purposes;
>
> or

[32] Article 3(4) of the Model Law on Mediation which may be understood as a sort of 'opt-in' clause.
[33] UNCITRAL Model Law on International Commercial Conciliation With Guide to Enactment and Use 2002. Available online at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90953_ebook.pdf>.
[34] UNCITRAL Model Law on International commercial Conciliation with Guide to Enactment and Use [2002] mn 29.
[35] Footnote 1 of the Model Law on Mediation.

relating to **family, inheritance or employment law**." [Emphasis added.]

Finally, Article 5(2)(b) of the Singapore Convention also allows the enforcing State to refuse to grant relief if the subject matter of the dispute is not capable of settlement by mediation under the law of that State. For example, in some jurisdictions there may be mandatory adjudication procedures for certain types of cross-border disputes. According to South Korean law, some intellectual property disputes may not be capable of settlement at mediation based on the orthodox view that such disputes fall within the exclusive jurisdiction of specialised dispute resolution authorities under the Korean Intellectual Property Office.[36]

By contrast, the EU Mediation Directive is not limited to commercial disputes. Its scope covers civil and commercial matters, excluding only disputes regarding rights and obligations which are not at the parties' disposal under the relevant applicable law, in particular, revenue, customs or administrative matters.[37]

Based on comparison of the scope of application of the Model Law on Mediation, the Singapore Convention as well as the EU Mediation Directive, it becomes clear that the definition of the subject matter that may (or may not) fall within the scope of the respective legal instrument varies. Parties should factor in these differences when they contemplate the legal framework applicable to the mediation process as well as to potential enforcement proceedings.

Third-Party Neutral

The role of the third-party neutral (in terms of mediation: the mediator) is–to a great extent–what shapes mediation (and, in practice, contributes significantly to a successful outcome).[38] Considering that international commercial mediation is virtually devoid of mandatory rules regarding the actual conduct of mediation,[39] the integrity of the mediator is a crucial factor.[40] Most legal instruments require a mediator to be neutral,[41] more specifically independent and impartial towards the parties. Specifically, the Model Law on Mediation sets out that the mediator,

> "**shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence**. A mediator, from the time of his or her

[36] See Gyooho Lee, Keon-Hyung Ahn and Hacques de Werra, 'Euro-Korean Perspectives on the Use of Arbitration and ADR Mechanisms for Solving Intellectual Property Disputes' (2014) 30 Arbitration International 91, 104.
[37] Article 1(2) of the EU Directive on Mediation.
[38] See section below on 'Distinguishing Mediation and Negotiation'.
[39] See footnote 26 above.
[40] See SIDRA Survey Report 2020, 56, Exhibit 7.3.1.
[41] For a discussion on the quality of mediator neutrality see, for example, Susan Douglas, 'Neutrality in Mediation: Study of Mediator Perceptions' (2008) 8(1) Queensland University of Technology Law and Justice Journal 139–157; James D. D. Smith, 'Mediator Impartiality: Banishing the Chimera' (1994) 31(4) Journal of Peace Research 445–450.

> appointment and throughout the mediation proceedings, shall without delay disclose any such circumstances to the parties."[42] [Emphasis added.]

The Singapore Convention reinforces this requirement as a State may refuse to grant relief based on a mediated settlement agreement if there is a,

> "**failure by the mediator to disclose** to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement."[43] [Emphasis added.]

The duty of a mediator to disclose[44] any potential conflict of interest is also mandated by codes of conduct that have been established regionally, such as the European Code of Conduct for Mediators,[45] or adopted by institutions, for example, the Model Standard of Conduct for Mediators as approved inter alia by the American Bar Association.[46]

Such Codes of Conduct[47] stand to gain in importance now that the Singapore Convention foresees that an enforcing State may refuse to grant relief if there is a,

> "**serious breach by the mediator of standards** applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement."[48] [Emphasis added.]

One of the perhaps most disputed scenarios is whether a mediator may also act as an arbitrator or judge (and vice versa) regarding the same dispute.[49] On one hand, the concern is that parties may hesitate to engage in open communication in mediation if the role of the mediator may change from facilitator to that of an adjudicator. On the other hand, there is a risk that due process may be violated if the arbitrator or judge in his/her previous role as a mediator has, e.g. in a caucus (a private and separate meeting between the mediator and a disputing party), become privy to information that has not been shared with the other party and to which the other party thus cannot respond. The arbitrator or judge would have to

[42] Article 6(5) of the Model Law on Mediation.
[43] Article 5 (1)(f) of the Singapore Convention.
[44] On the topic of disclosure in the comparable context of arbitration see Alexis Mourre, 'Conflicts Disclosures: The IBA Guidelines and Beyond' in Stavros Brekoulakis, Julian D.M. Lew and Loukas Mistelis, *The Evolution and Future of International Arbitration* (Wolters Kluwer 2016) 357–364. The IBA Guidelines on Conflicts of Interest in International Arbitration [revised version 2014 and updated 2015] are available online at <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#Practice%20Rules%20and%20Guidelines>.
[45] Available online at <https://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf>.
[46] Available online at <https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.pdf>.
[47] Together with national legislation on the conduct of mediation as well as the qualifications of a mediator.
[48] Article 5(1)(e) of the Singapore Convention.
[49] See the detailed discussion below in section 'Mediation in Mixed Mode Procedures'.

take particular care to ignore all information obtained in the caucus session when deciding on the merits.[50] It is for this reason that the Model Law on Mediation provides that,

> "unless otherwise agreed by the parties, **the mediator shall not act as an arbitrator in respect of a dispute that was or is the subject of the mediation proceedings** or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship."[51] [Emphasis added.]

Note that this provision does not exclude a mediator from acting as an arbitrator but requires explicit and informed consent[52] of the parties who must be aware of the risk involved. Similarly, there is nothing preventing mediators from acting as arbitrators and vice versa under the Singapore Convention.[53] Such an approach is also implicit in the definition provided by Article 3(b) of the EU Mediation Directive, 'Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

Characteristics of Mediation

Mediation allows the parties to resolve their disputes in a confidential procedure that is conducted by a neutral whose role is to assist the parties in reaching a settlement. The procedure itself is highly flexible and can be adapted to the needs and wishes of the parties, including such practicalities as choice of language and place of the mediation. In terms of content, mediation often bears resemblance to a negotiation process.

Distinguishing Mediation and Negotiation

In practice, many parties who have previously not engaged in mediation seek to better understand the advantage of mediation compared to negotiation, or whether mediation can still take place after negotiation has failed. The answer to both questions lies in the changed dynamics of communication when a neutral third-party joins a conversation: The mere presence of a third-party can change the tone in which parties communicate; the fact that

[50] For a broad discussion on this dilemma see Klaus Peter Berger and J. Ole Jensen, 'The Arbitrator's Mandate to Facilitate Settlement' (2017) 40(3) Fordham International Law Journal 915.
[51] Article 13 of the Model Law on Mediation. Also note that according to Article 3(7) of the Model Law on Mediation the provisions it contains on the mediation process (not enforcement of a mediated settlement agreement) do not apply in cases where a judge or an arbitrator attempt to facilitate settlement in the course of judicial or arbitral proceedings.
[52] Bernd Ehle, 'The Arbitrator as a Settlement Facilitator in Walking a Thin Line – What an Arbitrator can do, must do or must not do' (2010) 88–89.
[53] Although Article 1(3) of the Singapore Convention explicitly excludes its application to settlement agreements that have been concluded in the course of proceedings before a court or that have been recorded and are enforceable as an arbitral award, this merely serves to delineate the scope of application from other treaties. The working group reports make clear that mere involvement of a judge or arbitrator would not exclude the settlement agreement from the scope of the Singapore Convention. See Report of Working Group II (Arbitration and Conciliation) on the Work of its sixty-fourth Session, UNCITRAL, UN Doc. A/CN.9/867 [2016] mn 131.

the third-party was previously not involved necessitates that the other parties inform him/her of the subject matter of the dispute and its background, this allows the parties themselves to recap the entire situation but also forces them to focus on what is relevant; If the parties have abandoned direct negotiation, they can avail themselves of the third-party to convey messages to each other (this process is often referred to as shuttle mediation). In more abstract terms, a skilled mediator will have a sophisticated toolset of to build rapport with the parties, to prevent one party from hijacking the negotiation, to establish a zone of possible agreement between the parties, and help them broker a constructive, workable solution. In this way, the mediator, to a great extent, relieves the parties of the burden of process management and sets the scene to allow parties to focus on what they want to achieve in a settlement.

The mediator bears the responsibility of conducting the mediation process in a manner that best suits the specific dispute that is to be resolved. A hallmark of mediation is its flexibility, and this has resulted in diverse approaches to, and styles of, mediation. These are discussed below. In international commercial mediation, parties will generally seek the services of a professional, credentialed mediator.[54] Moreover, commercial parties will often employ specialised mediation counsel to advise them in the mediation proceedings and regarding the choice of the mediator.[55]

Mediation Practice Models

Mediation is an accepted tool for resolving commercial disputes and used frequently in common law jurisdictions such as the United States of America, the United Kingdom, Canada, Australia and Singapore.[56] It is also a recognised form of dispute resolution in China with growing relevance for commercial disputes, [57] especially in the context of the 'Belt and Road Initiative'. It is established but is less frequently employed in civil law jurisdictions,[58] although the EU has fostered mediation with EU-legislation.[59] For much of the rest of the world, however, it is either an unknown, niche, or relatively recent practice in the business context.[60] As a result, the approaches used in commercial mediation in common law

[54] International Mediation Institute (IMI), Types of Certifications for Mediators <https://www.imimediation.org/practitioners/certify/>.
[55] IMI, Types of Certifications for Mediation Advocates <https://www.imimediation.org/practitioners/certify/>.
[56] These jurisdictions were 'early adopters' of mediation – perhaps in part due to the 'litigation crisis' with backlogs of several years in the courts and astronomical costs associated with litigating a case. See Nadja Alexander, 'Mediation on trial: Ten verdicts on court-related ADR' (2004) 22(1) 1 Law in Context 8–24.
[57] Jing Liu, Jiang Hong and Fei Ning, 'Annual Review on Commercial Mediation in China (2018)' in *Commercial Dispute Resolution in China: An Annual Review and Preview* (Beijing Arbitration Commission 2018) 50–59.
[58] For an examination of the differences in development of mediation in common law and civil law countries, see Nadja Alexander, 'What's Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions' (2001) 13(2) Bond Law Review 1.
[59] In particular, the EU Mediation Directive but also regarding B2C disputes Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (EU Directive on consumer ADR) and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (EU Regulation on consumer ODR).
[60] Michael McIlwrath and John Savage, *International Arbitration and Mediation: A Practical Guide* (Wolters Kluwer 2010) 180.

jurisdictions, currently influence approaches and mediation techniques applied in international commercial mediation.[61]

As previously outlined, mediation involves a third-party neutral assisting disputing parties to negotiate a settlement to their dispute. It is influenced by approaches to negotiation and the distinction between positions and interests.[62]

- Position-based negotiation
  Positions can be equated with the solution each party already has in mind and would like to see the other party agree to. A settlement on this basis will require concessions on one or both sides and will, generally, be a compromise between the parties' positions. Mediation approaches based on positional negotiation tend to resemble a classic negotiation or bargaining process.

- Interest-based negotiation
  Interests can be described as the underlying concerns, needs or interests of the parties, basically the 'why' behind a position. Shifting the focus from positions to interests aims to foster a more constructive dialogue between the parties and allowing them to create alternative options solutions that serve their interests, for example, an offsetting transaction instead of direct payment. Mediation approaches based on interest-based negotiation aim to encourage parties to focus on interests and add value to the negotiation table in a collaborative environment.

Beyond this, mediation practice models depend on a range of other factors.[63] Broken down to the bare essentials, they can be distinguished by (i) the extent a mediator will infuse his or her views in the mediation process and (ii) whether the subject matter of the dispute is strictly limited to the core conflict or is to be resolved in the context of the relationship between the parties. Five well-known mediation practice models in cross-border disputes are: [64]

- Directive (or Wise Counsel) Mediation
  The role of the mediator is elevated to a more authoritative persona (sometimes comparable to a 'wise one') who is expected to provide guidance and even recommendations to the parties. This mediation approach draws on interest-based negotiation.

[61] Note that all categories described below merely serve as a rough means of orientation. In practice, the lines of delimitation are often blurred, and there are countless variations and refinements.
[62] The concept of principled negotiation was developed in the late 1970's and early 1980's as part of the Harvard Negotiation Project (HNP). The concept is described in Roger Fisher, William L. Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (3rd edn) (Penguin Books 2012).
[63] See, for example, Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed* [1996] Vol 1 Issue 7 Harvard Negotiation Law Review 7–51.
[64] For more detail and other styles, see Nadja Alexander, 'The mediation metamodel: Understanding practice' (2008) 26(1) Conflict Resolution Quarterly 97–123.

- Evaluative (or Expert Advisory) Mediation
  The mediator guides parties towards a realistic settlement by giving opinions and views on the strengths and weakness of the (legal) position of each party. Here, mediators may also suggest options for settlement. This mediation approach draws on position-based negotiation.

- Settlement (or Shuttle) Mediation
  The mediator facilitates a position-based negotiation between the parties. They may separate parties and shuttle between them. Here, mediators may share their views on various aspects of the dispute with the parties, however they fall short of making concrete recommendations for settlement.

- Facilitative Mediation
  Here the principle of self-determination of the parties regarding the brokering of a solution is in the forefront. Accordingly, the mediator assists the parties to identify relevant interests and to create alternative solutions that satisfy each party's interests. This mediation approach draws on interest-based negotiation.

- Transformative Mediation
  This mediation practice model focuses strongly on the relationship between the parties and, subsequently, resolving the dispute by creating better mutual understanding and changing how the parties interact with each other. This mediation approach draws on dialogue-based approaches to resolving differences.

In international commercial mediation, a range of practice models and variations therefore can be used, depending on the dynamics of the dispute and the disputants. Skilled mediators will often traverse the lines between the practice models as the situation requires. From a business perspective, this is an attractive approach because it opens up the opportunity and added value of also addressing financial, relational and operational needs in a hands-on manner. These factors may be relevant if the dispute relates to an ongoing business relationship, such as a long-term supply contract or a complex infra-structure project with multiple parties needing to cooperate smoothly during a bumpy economic or political period.

In addition to different mediation practice models, there are also different approaches regarding the number of mediators. In many or most cases, there will only be one mediator. However, more than one mediator can be useful. This concept – often referred to as co-mediation – has, in part, evolved from the insight that parties and the process can benefit from two or more mediators who have different skill-sets or backgrounds, for example, a lawyer and an industry expert.[65] The Vienna Airport mediation offers a useful

[65] For further considerations on the pros and cons of co-mediation, see Lela P. Love and Joseph B. Stulberg, 'Practice guidelines for co-mediation: Making certain that two heads are better than one' (1996) 13(3) Mediation Quarterly 179; Simon Mason and Sabrin Kassam, 'Bridging Worlds: Culturally Balanced Co-Mediation' (2011) 52 Politorbis 69.

illustration here. In this high profile mediation , three mediators were selected from three different countries: Austria, Germany and Switzerland.[66]

The mediation process commenced in 2000 and focused on (1) noise pollution issues and (2) the environmental and economic impact of the Vienna Airport's expansion plans for a third runway. A mediated settlement was reached in 2003 in relation to the first issue, and a mediated settlement package was reached in 2005 in relation to the second. At the conclusion of the mediation, an information, communication and compliance monitoring platform was established, called 'Dialogforum Flughafen Wien'.

> "Since the end of the mediation process for the third runway Dialogforum Flughafen Wien has played a key role in dialogue with local residents. It is a non-profit organisation functioning as an information and communication platform for continuing the dialogue inaugurated during the mediation process with 120 municipalities, the provinces of Vienna, Lower Austria and Burgenland, and citizens' action groups. Its members represent around two million people. […] The Vienna Airport mediation process and Verein Dialogforum Flughafen Wien are regarded worldwide as examples of best practice in open, fair and transparent public participation.
>
> Dialogforum monitors compliance with the agreements concluded during the mediation process and deals with issues, questions and conflicts arising through the development of air traffic and enlargement of the airport."

In terms of mediation practice model, one of the Vienna Airport mediators, Horst Zillessen describes the *transformative* nature of this multi-party mediation involving government, corporations and community groups. Initially, the large number of participants and lack of trust between participants made communication and decision-making difficult, lengthy and cumbersome. In an attempt to balance process efficiency with process inclusivity, the mediation structure was streamlined:[76]

> "... this serious slimming-down of the mediation structure was made possible by changes in the attitudes and approaches of the mediation participants, which can be described as a learning process in the sense of transformative mediation. In the many work-intensive meetings they had learnt to understand and respect each other in their various, sometimes diametrically opposed interests. They had developed a sense of trust that nobody wanted to trick anybody else and for this reason they were able to accept that they would no longer take part in all meetings, because they no longer feared that this would impair their ability to defend their interests. At least equally important was the trust in the fairness of the mediation, which had developed in the course of the process and which had given almost all the participants the assurance that a decision to the detriment of a third party who was not represented at the negotiation table would not be accepted."

[66] Horst Zillessen, 'The transformative effect of mediation in the public arena' (2004) 7(5) Alternative Dispute Resolution Bulletin 82.

Mediators

In terms of selection of mediators, the SIDRA Survey Report 2020 indicates that users value ethical and experienced mediators with cultural and linguistic familiarity. Specifically, the Report shows that a majority (87 per cent) of legal and client users ranked good ethics as an 'absolutely crucial' or 'important' in their choice of mediator, followed closely by dispute resolution experience (86 per cent) and language (83 per cent). More than 70 per cent of users ranked efficiency (78 per cent), industry/issue-specific knowledge (77 per cent), cultural familiarity (72 per cent) and cost (72 per cent) as 'absolutely crucial' or 'important'. Fewer users considered formal qualifications (59 per cent) and that the mediator comes from a third-party country (53 per cent) as 'absolutely crucial' or 'important'.[67] However these percentages remain above 50 per cent indicating that these factors cannot be dismissed. As indicated previously, the link between ethics and formal qualifications may become stronger in light of new regulatory developments such as the Singapore Convention place the spotlight on professional standards for mediation practice and this is congruent with users' priorities.

The importance of cultural familiarity in mediator selection raises the issue of cultural and diversity among the international mediator pool. In arbitration and judicial circles this remains a hotly debated issue,[68] as diversity is seen to play an important role in the legitimation of dispute resolution systems.[69] However, Anna Howard notes that the mediation profession has not yet been subjected to the same scrutiny, [70] despite calls for a more diverse pool of qualified, skilled and experienced mediators. [71] Early research by CEDR suggests that commercial mediation profession in the UK is lacking in gender and ethnic diversity as outlined below.[72]

An internet search of the mediator panels of five organisations that list mediators for cross-border mediation is one possible indicator of the extent of gender and cultural diversity in

[67] See SIDRA Survey Report 2020, 56, Exhibit 7.3.1.

[68] Lucy Greenwood, 'Tipping the balance – diversity and inclusion in international arbitration' (2017) 33 Arbitration International 99; Lizzie Barnes & Kate Malleson, 'The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity' (2011) 74(2) Modern Law Review 245.

[69] Armin von Bogdandy & Ingo Venzke, *In whose name?: A public law theory of international adjudication* (Oxford: Oxford University Press 2014).

[70] Anna Howard, 'Investor-State Mediation: Who Will Be At The (Top) Table?' *Kluwer Mediation Blog*, 16 October 2020.

[71] See, for example, International Mediation Institute, "Ten Good Reasons to become IMI Certified" <https://imimediation.org/practitioners/ten-good-reasons-become-imi-certified/> accessed 26 September, 2020.

[72] CEDR, Diversity and Inclusion in Commercial Mediation, https://www.cedr.com/foundation/currentprojects/diversityinclusion/ accessed 15 October, 2020. Note that the internet survey discussed in this chapter is independent of the CEDR Diversity Survey, however the statistics appear to be consistent with the findings of the CEDR Diversity Survey.

international mediation practice. The five institutions surveyed are IMI,[73] SIMC,[74] CPR,[75] CEDR,[76] and HKIAC.[77] These institutions were selected on the basis of two factors: a) their profile as established institutions that provide mediators for international commercial mediation services, and b) the accessibility of a discrete mediator panel list on the internet. The data collected is set out in tabular form in the appendix to this essay. A brief diversity analysis of the panels follows.

IMI's panel distribution appears the most diverse with just over 70 per cent of mediators identifying as either North American (38 per cent) or European (35 per cent) in a fairly even split. 14 per cent of mediators identified as being from Asia, seven per cent from Oceania. The lowest representation came from South America and Africa, and this was consistent across all panels.

Membership of the other panels suggests that the location of the institution may have an influence on the dominant mediator culture. For example, CPR is a US based organisation and 77 per cent of its mediators hail from North America; CEDR's headquarters are in London and 98 per cent of its mediators are European. Similarly, in Hong Kong, 98 per cent of HKIAC's listed mediators are from Asia. Elsewhere in Asia, however, Singapore's SIMC offers a more diverse selection of mediators. While nearly 50 per cent of mediators are from Asia, 22 per cent are from Europe, 13 percent from Oceania and 12 per cent from North America.

In terms of gender, the panels of all surveyed institutions comprise more men than women. Again IMI appears to lead in terms of diversity. The IMI panel has the smallest disparity between the number of listed male (59 per cent) and female mediators (41 per cent) with an 18 per cent difference, followed by CEDR with a 24 per cent difference in the number of male and female mediators, HKIAC with a 29 per cent difference, CPR with a 54 per cent difference and SIMC with a large 56 per cent difference. Actual percentages are available in the appendix to this chapter.

Of course these findings reflect panel listings and do not indicate who is actually mediating cross-border commercial disputes. Anecdotal evidence suggests that it is a small group of mediators who do most of the work. Commentators[78] suggest two main reasons for this:

[73] International Mediation Institute <https://imimediation.org/> accessed 26 September, 2020. Note that while IMI offers a list of certified mediators for cross-border mediation work, it is the only surveyed institution that does not directly offer mediation services. It was nevertheless included in the survey due to the following factors: a) its international standing, b) its sole focus on international mediation and c) the fact that is has no real "home" jurisdiction with the IMI working and meeting virtually or in different global locations – in this sense IMI is truly an international mediation organisation.

[74] Singapore International Mediation Centre <https://www.simc.com.sg/> accessed 26 September, 2020.

[75] International Institute for Conflict Prevention & Resolution <https://www.cpradr.org/> accessed 26 September, 2020.

[76] Centre for Effective Dispute Resolution <https://www.cedr.com/> accessed 26 September, 2020.

[77] Hong Kong International Arbitration Centre < https://www.hkiac.org > accessed 26 September, 2020.

[78] For example, Lucy Greenwood makes this point in the context of arbitrators. The issues are similar in relation to mediators. See Lucy Greenwood, 'Tipping the balance – diversity and inclusion in international arbitration' (2017) 33(1) Arbitration International 99.

1) information asymmetry in the mediation market. Parties do not have access to the type of information they need to make informed choices about mediators and t his exacerbates the challenges in opening up the market to diverse professionals.
2) The inward-looking feedback loop that informally exists among lawyers, mediators and other dispute resolution professionals in relation to selection of mediators. The word-of-mouth referral system perpetuates the bias towards selecting those 'in the club', making it very hard for the typically more diverse group of outsiders to be appointed.

Business leaders such as Deborah Masucci, former Head of the American International Group Inc's Employment Dispute Resolution Program and Co-Chair of the IMI, have publically endorsed the need for a diverse pool of internationally recognised mediators who carry with them a trust mark of competence, skill and experience, and the backing of reputable organisations.[79] The transparency and accessability of such professional mediator pool would go a long way wards addressing information asymmetry and helping users make more informed choices in relation to mediators. IMI continue to develop this idea through their diverse mediator panel and international certification. Added to this, channels for users to offer feedback and make complaints is central to a professional system for mediation and opens it up beyond the insider referral chains. In this regard IMI has established a system to facilitate client feedback and peer review to mediators on a regular basis.[80] These initiatives indicate the start of a more transparent, accessible, systemised and professionalised approach to mediator selection, which should, in time, increase the diversity of mediators in cross-border practice.

Mediation and technology

As social distancing has become a standard way of living and doing business with the global pandemic, platforms for the conduct of virtual/online hearings have the potential to become the 'new normal' for conducting cross-border mediation sessions. In cross-border settings, online mediation is considered to be affordable and convenient because it minimises, and in some cases eliminates, the need for participants to travel and reduces the costs associated with using physical meeting rooms. The Singapore Convention on Mediation anticipates a growth in the use of online mediation and expressly recognizes mediated settlement agreement concluded online.[81]

SIDRA's 2020 International Dispute Resolution Survey,[82] which was conducted pre-Covid 19, identified mediation users views in relation to the use of technology in mediation.

[79] See, for example, International Mediation Institute, "Ten Good Reasons to become IMI Certified" <https://imimediation.org/practitioners/ten-good-reasons-become-imi-certified/> accessed 26 September, 2020.

[80] International Mediation Institute, "Ten Good Reasons to become IMI Certified" <https://imimediation.org/practitioners/ten-good-reasons-become-imi-certified/> accessed 26 September, 2020.

[81] See Articles 2(2) and 4(2) of the Singapore Convention on Mediation.

[82] SIDRA Survey Report 2020. See also "2018 International Arbitration Survey: The Evolution of International Arbitration" (White & Case) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration.PDF> accessed November 20, 2018. This

Almost half (48 per cent) of client users (compared to 28 per cent of legal users) rated platforms for the conduct of virtual/online hearings as 'extremely useful' or 'useful'. There was an almost identical finding as regards e-discovery/due diligence. By availing themselves of virtual platforms, client users are able to participate in meetings and mediation sessions online with minimal disruption to their schedules and business. Similar results were reported in relation to negotiation support and automated negotiation tools,[83]and analytics for appointment of mediator and/or counsel.[84] These findings suggest that client users are ahead of legal users in recognising the usefulness of technology in mediation. They also present an opportunity for legal users to consider greater use of technology in mediation, particularly in light of the impact of the global health pandemic of 2020.

From an institutional perspective, mediation institutions are increasingly embracing technology and many are forming strategic partnerships with online dispute resolution providers to develop their mediation tools and software. The Digital Readiness Index (DRI) for Mediation[85] Institutions uses five indicators to measure the digital readiness of insitutions offering cross-border mediation services; these are (1) case filing and management, (2) mediator panel, (3) mediation process, (4) storage and security, and (5) client resources and capacity building. Leading mediation service providers on the DRI include JAMS,[86] SIMC[87] and CPR.[88]

One challenge for the international development of online mediation is the lack of a coherent infrastructure within which service providers can operate. Given that online mediation providers operate independently (that is, they are not connected with a legal or professional association), there is fragmentation in relation to benchmarks and best practices.

To this end, a number of regulatory instruments and initiatives have been introduced both with an international and regional focus. UNCITRAL initiated work to draft procedural rules for online dispute resolution (ODR) in B2B and B2C. However, this work was terminated as no consensus could be reached on the content of the rules. Instead it was decided to settle on a non-binding descriptive document, namely the Technical Notes of the meetings and these were adopted in July 2016. Since then – and as indicated previously -- UNCITRAL has recognised the use of ODR in international mediation practice in its drafting of Article 2(2) of the Singapore Convention on Mediation.[89] This provision establishes that the writing requirement for an iMSA may be met by electronic communication provided the

survey , which focuses on arbitration, indicates an increase in the use of arbitration in conjunction with mediation.

[83] SIDRA Survey Report 2020, 59, Exhibit 7.4.2.

[84] SIDRA Survey Report 2020, 59, Exhibit 7.4.2.

[85] Nadja Alexander and Allison Goh, 'Tech4Med Index: How technology is making mediation services more accessible' in M. Findlay, J. Ford, J. Seah & D. Thampapilla eds, *Regulatory Insights on Artificial Intelligence: Research for policy* (Edward Elgar, Cheltenham, 2021) forthcoming.

[86] JAMS was previously known as Judicial Arbitration and Mediation Services <https://www.jamsadr.com/> accessed 26 September, 2020.

[87] Singapore International Mediation Centre <http://simc.com.sg/> accessed 26 September, 2020.

[88] International Institute for Conflict Prevention & Resolution <https://www.cpradr.org/> accessed 26 September, 2020.

[89] The Singapore Convention on Mediation is discussed in the context of Trend 3, above.

information in the electronic communication is accessible for subsequent reference. What this means is that where a party seeks to enforce an iMSA resulting from an ODR procedure in a contracting State to the Singapore Convention, the iMSA being electronic in nature is unlikely to present an issue to its enforcement.

On a regional level, a European legal framework for consumer Alternative and Online Dispute Resolution has been established by the following legislative instruments:

- the Directive on consumer ADR ("ADR Directive")[90];
- the Regulation on consumer ODR ("ODR Regulation"); and[91]
- the Commission Implementing Regulation on consumer ODR[92].

In Asia, member economies of the Asia Pacific Economic Cooperation (APEC) are working on the adoption of a regional ODR platform for resolving commercial cross-border disputes.[93] The platform would include a set of opt-in ODR procedures and rules, taking guidance from the UNCITRAL Technical Notes on Online Dispute Resolution, referred to previously.[94]

Administered vs Ad-Hoc Mediation

The terms 'administered mediation' and 'ad-hoc mediation' only refer to the administrative framework for mediation. Parties may choose to delegate case management to a service provider who will administer the matter, instead of dealing with all practicalities themselves on an ad-hoc basis.

There are countless national and international service providers. Recently, more and more arbitral institutions, such as the International Chamber of Commerce (ICC),[95] the Vienna International Arbitral Centre (VIAC),[96] the Korean Commercial Arbitration Board International (KCAB)[97] or even the International Centre for the Settlement of Investment Disputes (ICSID)[98] are stepping into the arena to promote their mediation (often combined with arbitration) services. In addition, the growth of dedicated international mediation institutions, such as the Singapore International Mediation Centre (SIMC)[99] and the Japan

[90] Directive 2013/11/EU.
[91] Regulation (EU) No 524/2013.
[92] Commission Implementing Regulation (EU) 2015/1051 of 1 July 2015.
[93] See < https://aimp2.apec.org/sites/PDB/Lists/Proposals/DispForm.aspx?ID=2614> accessed 12 October 2020.
[94] UNCITRAL Technical Notes on Online Dispute Resolution <https://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf> accessed 12 October 2020.
[95] See 'Chapter 6: Other Methods of Dispute Resolution Under ICC Rules' in Herman Verbist, Erik Schaefer, et al., *ICC Arbitration in Practice* (2nd edn) (Wolters Kluwer 2015) 245–275.
[96] See Alice Fremuth-Wolf, 'Mediation and Arbitration in Vienna – One-Stop-Shop Solution for Parties under the Vienna Rules and the new Vienna Mediation Rules' (2016) 34(2) ASA Bulletin 301–321.
[97] Korean Commercial Arbitration Board (KCAB). <http://www.kcabinternational.or.kr/main.do>
[98] Frauke Nitschke, 'The ICSID Conciliation Rules in Practice' in Catharine Titi and Katia Fach Gómez, *Mediation in International Commercial and Investment Disputes* (Oxford: Oxford University Press 2019).
[99] Singapore International Mediation Centre (SIMC) <http://simc.com.sg/>

International Mediation Centre (JIMC),[100] signals a shift towards more focussed and sophisticated institutional support for international commercial mediation.

Institutional support begins with the provision of model clauses that contracting parties can use as templates.[101] Further, the institutions provide default rules[102] that deal with various procedural aspects of mediation ranging from the formality of initiating mediation, to the choice of mediator, to the language of the mediation, and so on. In practice, parties can be inclined to disagree regarding these points once a dispute has arisen; therefore, it often proves useful to have a set of pre-agreed default rules. By referring to the mediation rules of a specific institution, parties will be understood to have incorporated those rules as default rules should they enter into mediation. Besides logistics and a ready-to-use set of mediation rules, the main benefits of a service provider are support in identifying suitably qualified and experienced mediators as well as driving the process forward.

Court-related Mediation

Although mediation is an 'alternative dispute resolution' mechanism, i.e. an alternative to litigation in court, this does not mean that there are no points of contact between mediation and the courts. In some jurisdictions, parties to an international commercial contract may find themselves encouraged to consider or even be directed towards mediation by courts in the course of a litigation.[103] Incentives to mediate can also be found in the context of international commercial courts such as Form 10 of the Singapore International Commercial Court (SICC) Practice Directions.[104]

The notion of court-related mediation dates back to 1976, when Frank Sander formulated the concept of a 'multi-door courthouse'[105] to allocate incoming court cases to the most appropriate method of dispute resolution. Accordingly, parties would be directed to a better-suited dispute resolution mechanism, while the workload of courts would be reduced and allow judges to focus on those cases that cannot be resolved by other means.

The most common explanation for the appeal of this idea in common law jurisdictions lies in the avoidance of the high (not only financial) expenditure to take a case to court, starting from the extensive discovery process to the employment of jury trials in civil cases, as well as a way to deal with sometimes significant court backlogs.[106] In various civil law

[100] Japan International Mediation Centre (JIMC) <https://www.jimc-kyoto.jp/>
[101] These templates are usually available on the web pages of the service providers, sometimes in several languages.
[102] These mediation rules are generally also available on the web pages of the service providers.
[103] For example, in *Lomax v. Lomax*, [2019] EWCA Civ 1467 (6 August 2019) the English Court of Appeal has held that a judge can refer the parties to ADR even in the absence of one or both parties' consent.
[104] Form 10 of Singapore International Commercial Court (SICC) Practice Directions (PD). See also SICC PD para 76(1). Before the first Case Management Conference takes place, counsels for all the parties need to confirm with them whether they want to proceed with "mediation or any other form of alternative dispute resolution".
[105] Sander, 'Varieties of Dispute Processing' (1976) 70 F.R.D. 111, recounted in detail in Gladys Kessler and Linda J. Finkelstein, 'The Evolution of a Multi-Door Courthouse' (1988) 37(3) Catholic University Law Review 577–579.
[106] See Nadja Alexander, 'Mediation on trial: Ten verdicts on court-related ADR' (2004) 22(1) Law in Context 8–24.

jurisdictions, there is a notion that 'mediation' has always been incorporated into court procedure, because judges are authorised to explore the possibility of a settlement of the case with the parties and can record settlements in a binding manner–whether such a process qualifies as 'mediation' is to be doubted and has been the subject of debate both in theory and in practice.[107] As an example, the provisions of the Model Law on Mediation do not apply in cases where a judge or an arbitrator attempt to facilitate settlement in the course of judicial or arbitral proceedings.[108]

Due to the different legal systems and traditions, court-related mediation comes in various formats: it can take the form of a mandatory direction or a mere suggestion by a court; it can take place within the court proceedings and/or outside the court; it can be conducted by members of the judiciary, court employees or external service providers. What the formats have in common is that – if mediation does not result in settlement – the case will be put back on track for litigation.[109]

Mediation in Mixed Mode Procedures

Mixed mode procedures refer to dispute resolution procedures involving a combination of dispute resolution mechanisms. The most used mixed mode procedures involve mediation and arbitration elements.[110]

The results of the 2020 SIDRA Survey[111] on international dispute resolution confirm the important role of mixed mode procedures. While the rate of use of international mediation (26 per cent) was considerably less than arbitration (74 per cent) and litigation (49 per cent), this changed significantly after taking into account the use of mediation a component of mixed mode procedures. The SIDRA Survey found that the total use of mediation (53 per cent) -- either as a standalone (26 per cent) or within a mixed mode procedure (27 per cent) – surpassed the rate of use of international litigation. In other words mediation is used in cross border disputes more often then we tend to think. This is likely to increase with the coming into force of the Singapore Convention.

[107] See Nadja Alexander, 'What's Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions' (2001) 13(2) Bond Law Review 1–29, in particular 'Thesis 5': The settlement function inherent in the judicial role in the German civil tradition has been confused with mediation (the mediative element in the judicial role).

[108] Article 3(7) of the Model Law on Mediation. Note this exclusion does not extend to the enforcement of mediated settlement agreements.

[109] See Nadja Alexander, 'Mediation on trial: Ten verdicts on court-related ADR' (2004) 22(1) Law in Context 8–24.

[110] On mixed mode procedures, see also Stefan Kröll [eds: insert chapter name] also in this volume; and see Thomas Stipanowich, 'Arbitration, Mediation and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med and Settlement-Oriented Activities by Arbitrators' (forthcoming 2021) 26 Harv. Negot. L. Rev. (manuscript at #), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3689389>.

[111] SIDRA Survey Report 2020. See also "2018 International Arbitration Survey: The Evolution of International Arbitration" (White & Case) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration.PDF> accessed November 20, 2018. This survey , which focuses on arbitration, indicates an increase in the use of arbitration in conjunction with mediation.

Further, when users were asked why they elected to use a mixed mode (hybrid) procedure involving mediation rather than standalone arbitration, the overwhelming response revealed the primary reason as a need to preserve business relationships. When asked why they did not use mediation as a standalone process, most respondents indicated that they were concerned about the lack of an international direct enforcement mechanism for mediation.

As indicated previously, the Singapore Convention on Mediation promises an direct enforceability mechanism for international mediated settlement agreements.[112] However it will take some time before the enforcement mechanism of the Singapore Convention offers users the same confidence as the enforcement mechanism concerning foreign arbitral awards offered by the New York Convention.[113] Accordingly, the interest in mixed mode procedures will continue to grow.

There are numerous advantages to integrating mediation with arbitration. Where parties settle the matter amicably, benefits of mediation may be reaped, such as:

- reduced cost and time investment in resolving the dispute;
- outcomes that might not have been achievable through a strictly determinative process; and
- opportunities for preserving or renewing the business relationship between the parties.

A properly constituted arbitral tribunal may, as part of the arbitration process, issue consent awards based on mediated settlement agreements,[114] which would enjoy the benefits of arbitration's enforceability regime under the New York Convention.[115] In the absence of settlement, the arbitration continues and the parties are assured of an outcome in the form of an adjudicated arbitral award.

[112] The Singapore Convention on Mediation came into force on 12 September 2020.

[113] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (New York Convention), <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards>

[114] Gary Born, *International Commercial Arbitration* (2nd edn) (Wolters Kluwer 2014) 3021–3027; and see Article 30 of the UNCITRAL Model Law on International Commercial Arbitration.

[115] 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards. It should be emphasised that for the consent award to be enforceable under the New York Convention, "An arbitral tribunal [must have] the authority to make [the] consent award [which accrues] only if the parties commenced an arbitration regarding an actual dispute. The authority to make a consent award does not extend to cases where the parties settle a dispute and then subsequently commence an arbitration solely for the purpose of recording the settlement as a consent award."(Gary Born, *International Commercial Arbitration* (2nd edn) (Wolters Kluwer 2014) 3023). At first glance, consent awards appear as an attractive option for parties in an international dispute as they promise a high level of enforceability associated with cross-border arbitral awards; however, they also raise several challenging questions. Steele argues that consent awards are a 'trick of legal fiction'. The US commentator does not deny that there are benefits to consent awards, but argues that they are not arbitral awards per se, but are just treated as such. See Brette L. Steele, 'Enforcing International Commercial Mediation Agreements as Arbitral Awards Under the New York Convention' (2006–2007) 54 UCLA Law Rev. 1385, 1397–1398. For an examination of consent awards, see Gary Born, *International Commercial Arbitration* (2nd edn) (Wolters Kluwer 2014) 3021–3027.

This phenomenon of arbitrators taking on a mediation role is not new. It has a long tradition in the People's Republic of China (PRC),[116] and is also practised by arbitrators from certain civil law jurisdictions such as Germany – a reflection of the German judicial tradition of settlement.[117] However, the practice is not generally considered to be a part of western arbitral tradition, particularly in common law jurisdictions. There are various reasons for this observation. Determinative dispute resolution, such as litigation and arbitration, guarantees the right of parties to have a fair hearing in front of adjudicators based on principles of natural justice. This principle enshrines the parties' right to hear and respond to all arguments made against them and their case. There are no private caucus meetings, which are usually available in mediation. In mixed mode dispute resolution processes therefore, it follows that decision-makers such as arbitrators, even if involved in mediation windows, must proceed with caution if they intend to conduct a caucus with individual parties, as this could be seen as potentially:

- breaching the principles of natural justice; and
- creating a bias, or at least the perception of bias in the decision-making process.

The greatest concern is that the third-party neutral adjudicator may be objectively seen as inappropriately taking confidential information into account when making binding decisions on the parties' rights and obligations. The risks to procedural fairness, impartiality and the integrity of both arbitration and mediation processes cannot be over-emphasised.[118] The point is well illustrated in the Hong Kong decision of *Gao HaiYan and another v Keeneye Holdings Ltd* and others.[119]

> "The case concerned the validity of a share transfer agreement and was brought to arbitration under the Xi'an Arbitration Commission (XAC) rules in the People's Republic of China. The XAC Rules contained a clause granting the arbitrators broad authority to act as conciliators (or mediators) and propose settlement agreements. During an adjournment in arbitration proceedings, a member of the tribunal contacted a lawyer for the respondent and invited him and a friend of the

[116] In China, Art. 51 of the Arbitration Law of the People's Republic of China provides that conciliation may be conducted by an arbitral tribunal, and if settlement occurs, the tribunal may document it as either a written conciliation statement or an arbitration award in accordance with the settlement agreement. See "中华人民共和国仲裁法" ('Arbitration law of the People's Republic of China') at <http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4624.htm> accessed November 20, 2018; for an unofficial English translation of the arbitration law, proceed to the WIPO website, at <http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn138en.pdf> accessed November 20, 2018.

[117] See Stefan Kröll, 'Promoting Settlements in Arbitration: The Role of the Arbitrator' in P Shaughnessy & S Tung (eds), *The Powers and Duties of an Arbitrator* (Kluwer Law International 2017) 209–210.

[118] Additionally, it bears emphasis that careful drafting of the mixed mode dispute resolution clause is necessary. Drafters must not fall into the trap of pointing to conflicting forums for dispute resolution: see Richard Garnett, 'Coexisting and Conflicting Jurisdiction and Arbitration Clauses' (2013) 9(3) Journal of Private International Law 361. Furthermore, different jurisdictions have different requirements for specificity of alternative dispute resolution clauses which must be fulfilled for them to be rendered enforceable by the courts: see *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236 (Australia); *Wah (aka Alan Tang) and another v Grant Thornton International Ltd and others* [2012] EWHC 3198 (the United Kingdom); *Hyundai Engineering and Construction Co Ltd v Vigour Ltd* [2005] HKEC 258 (Hong Kong); and *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 (Singapore).

[119] *Gao HaiYan and another v Keeneye Holdings Ltd and another* [2011] HKCFI 240; [2011] 3 HKC 157.

respondent, Zeng, to a meeting. Over dinner at the Shangri-La Hotel, the secretary-general of the XAC conveyed that the tribunal took the respondent's position and regarded the share transfer agreement to be valid, but that the tribunal wanted the respondent to consider compensating the claimant by a certain amount to settle the dispute. Zeng agreed to convey the tribunal's view to the respondent. Though the respondent was satisfied that the tribunal took its view of the share transfer agreement, it ultimately disagreed with the proposed compensation. The arbitration resumed, and – much to the respondent's surprise given the information relayed after the Shangri-La meeting – the tribunal issued an award favourable to the claimant that the share transfer agreement was not valid.

When the claimant proceeded to enforce the award in Hong Kong, the respondent challenged the enforcement on grounds of bias, pointing to the informal dinner meeting at the Shangri-La. The claimant contended that the meeting amounted to a [culturally acceptable form of] mediation under the XAC rules.

However, in his judgment, Justice Reyes expressed reservations about whether the so-called mediation complied with the Rules, pointing to numerous 'unusual' aspects of the process, including the:

- venue and timing, namely dinner in a hotel rather than a formal venue;
- fact that parties did not appear to consent to the time and place of the mediation;
- fact that parties also did not appear to consent to a third-party 'mediator', namely the Secretary-General;
- fact that mediation was conducted by a non-presiding member of the Tribunal and the Secretary-General of the XAC, an unusual combination;
- fact that parties did not attend the mediation; rather a non-party who was thought to have influence over the respondents was asked to attend;
- fact that the applicants did not appear to have been consulted about the proposal put to the respondents and it is unclear how the compensation figure in the proposal (RMB 250 million) was calculated; and
- fact that the 'mediators' asked the person in attendance, Zeng, to 'work on' the respondents to accept the proposal. This seems to amount to more that neutral communication of a message.

Therefore, despite the mediation label, Justice Reyes seemed to doubt whether the process was indeed mediation.

The *Keeneye* case sends a strong signal to dispute resolution practitioners. […] Combining facilitative processes, such as mediation, with determinative processes, such as arbitration, must be done in a manner that maintains the integrity of both processes and ensures procedural fairness and the perception thereof.

In this case Justice Reyes concluded that the events at the Shangri-la Hotel would have given the fair-minded observer 'a palpable sense of unease' and would have caused the apprehension of a real risk of bias. As a matter of public policy, therefore, he refused enforcement of the Award. Ultimately, the decision to refuse

enforcement of the award was overturned on appeal;[120] nevertheless his Honour's comments about looking beyond the label remain relevant and reflect the approach of the Singapore Convention."[121]

Intending to balance the tension between, on one hand, upholding the principles of natural justice and minimizing the risk of perceptions of bias, and on the other hand, maximising party autonomy in private dispute resolution processes, contemporary arbitration regulation across a range of jurisdictions provides for the possibility of mediation or other settlement opportunities within the framework of arbitration. For example, arbitration laws in England, Austria and Germany provide that an amicable settlement of a dispute within an arbitration procedure shall be recorded by the tribunal as an award on agreed terms if so requested by the parties.[122] Such awards have the same effect as any other award concerning the merits of the case.

In Bermuda and Hong Kong, parties to an arbitration agreement may appoint a conciliator to assist them settle their dispute, with the advantage that any resulting settlement is treated as an award on an arbitration agreement and, with the leave of the court, may be enforced *domestically* in the same manner as a judgment to the same effect.[123] The disputants must be parties to an arbitration agreement, but it is not essential that they have initiated arbitration proceedings before the appointment of a conciliator, for the mediated settlement agreement to be treated, for its enforcement, *domestically* as an arbitral award.[124] Choong and Weeramantry emphasise that such these awards may not be enforced *internationally* under the terms of the New York Convention. [125]

In terms of institutional mixed mode rules and protocols for cross-border disputes, two illustrations are offered here. First, Article 24 (read with Appendix IV) of the ICC Arbitration Rules (2017)[126] recognise ADR and mediation as part of a case management toolbox that

[120] *Gao Haiyan and Another v Keeneye Holdings Ltd and another* [2012] HKEC 2110.
[121] This case illustration is from Nadja Alexander and Shouyu Chong, *Singapore Convention on Mediation: a Commentary* (Kluwer Law International 2019) 60–61.
[122] See s. 52 of the English Arbitration Act 1996 <http://www.legislation.gov.uk/ukpga/1996/23/data.pdfs> accessedNovember 20, 2018; §. 605 para. 2 of the Austrian Arbitration Act (as introduced by *SchiedsRÄG 2006* amending sections 577-618 Austrian Code of Civil Procedure) (an official translation is provided at https://www.ris.bka.gv.at/Dokumente/Erv/ERV_2006_1_7/ERV_2006_1_7.pdf); and §. 1053 of the *Zivilprozessordnung* (ZPO, Code of Civil Procedure) < https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html> accessed November 20, 2018.
[123] See ss. 20 and 48 of the Bermuda International Conciliation and Arbitration Act 1993, < http://bermudalaws.bm/laws/Consolidated%20Laws/Bermuda%20International%20Conciliation%20and%20Arbitration%20Act%201993.pdf> accessed November 20, 2018; and s. 66 of the Hong Kong Arbitration Ordinance (Cap. 609) < https://www.elegislation.gov.hk/hk/cap609> accessed November 20, 2018.
[124] John Choong and J. Romesh Weeramantry (gen eds), *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (Thomson Reuters 2011) at [66.17]. See also Yarik Kryvoi and Dmitry Davydenko, 'Consent Awards in International Arbitration: From Settlement to Enforcement' (2015) 40 Brooklyn Journal of International Law, 827-868.
[125] See John Cheong and J. Romesh Weeramantry (gen eds), *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (Thomson Reuters 2011) at [66.17].
[126] International Chamber of Commerce Arbitration Rules (in force as from 1 March 2017) <https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf> accessed November 20, 2018.

can be drawn upon to shape dispute resolution to suit the parties' needs. In another illustration, the Singapore International Mediation Centre (SIMC) offers a streamlined arb-med-arb procedure and a corresponding arb-med-arb clause. Lee comments,

"A unique aspect of SIMC's services is the offering of an Arb-Med-Arb procedure in partnership with the Singapore International Arbitration Centre (SIAC). Under this scheme, a dispute begins as an arbitration which is adjourned while mediation is attempted. If parties are able to settle their dispute through mediation, their mediated settlement may be formally incorporated in a consent arbitration award. As consent awards, when properly made in extant arbitration proceedings, are accepted as arbitral awards, they are generally enforceable in approximately 150 countries under the New York Convention. If parties are unable to settle their dispute through mediation, the arbitration proceedings will continue with very modest additional time and expense having been incurred."[127]

The Arb-Med-Arb Protocol proceeds in roughly three stages. After proceedings have been initiated and the arbitral tribunal has been constituted, the tribunal will issue a stay of the arbitration. At that time, the SIAC will automatically refer the case to the SIMC for mediation. The SIMC will administer mediation proceedings, which are to be completed within eight weeks of the referral from SIAC. If the parties successfully settle their dispute in mediation, they may request the arbitral tribunal to issue a consent award following the terms of their settlement. If the parties are not able to resolve their dispute in mediation, the arbitral tribunal will lift the stay of arbitration and resume arbitration proceedings.

The AMA Protocol may be adopted by the agreement of the parties at any time during the arbitration proceedings, or may be incorporated by reference into a dispute resolution clause in the underlying contract between the parties. The AMA Protocol retains a strict timeline for compliance and makes use of triggers such as the automatic referral to SIMC once the arbitral tribunal has issued a stay of arbitration. The SIAC administers all fee collections on behalf of itself and the SIMC so that parties need not pay more than one set of fees for the entire proceeding. Further, the division between arbitration and mediation proceedings is strictly observed under the Protocol: arbitrators do not act as mediators for the parties, and the mediation is administered by the SIMC separately from the arbitration proceedings administered by the SIAC.

The AMA Protocol aims to offer the best elements of mediation and arbitration while minimizing the risks of combining the two processes. It ensures flexibility and reduces the costs and time barriers usually associated with switching between dispute resolution methods. It guards against potential apprehension of bias by keeping the arbitration and mediation proceedings entirely separate from one another, with separate neutrals for the arbitrator and mediator roles, as well as separate

[127] Joel Lee, 'Singapore Developments – the Singapore International Mediation Institute and the Singapore International Mediation Centre' (November 14, 2014) Kluwer Mediation Blog < http://mediationblog.kluwerarbitration.com/2014/11/14/singapore-developments-the-singapore-international-mediation-institute-and-the-singapore-international-mediation-centre/> accessed November 20, 2018.

institutions. Under the Protocol, mediation does not commence until after arbitration proceedings have been initiated. This satisfies the requirement that arbitration proceedings must arise out of a "dispute" between the parties. Finally, the AMA Protocol provides the parties an opportunity to arrive at a settlement agreement, parts or all of which may be issued in the form of an award; this is significant, as research suggests that compliance rates with settlement agreements are higher than compliance rates with arbitral awards.

Beyond the AMA Protocol, other design options can be employed to avoid potential pitfalls of combining mediation and arbitration processes. Two of these are set out below.

- Mediation windows with all members of the arbitral tribunal present at, or conducting, the mediation. Only one of the tribunal members conducts the private mediation sessions and in the event of the arbitration resuming, that tribunal member is replaced. This variation allows all tribunal members access to joint session discussions at mediation, ensuring therefore that, should the matter not settle and the arbitration resume, the tribunal is abreast of all developments apart from *ex parte* communications between the now retired mediator and the parties.
- "Med-arb simultanés" – a procedure offered by the Centre for Mediation and Arbitration in Paris[128] according to which an arbitration process runs simultaneously with, and independently from, a mediation process. Generally, the parties set a time frame for the completion of the mediation. If the mediation does not result in a mediated settlement then the arbitration will result in an award binding on the parties eight days after the mediation deadline has expired. During the parallel processes, the mediator and arbitrator are not able to communicate with each other about the case. However, at the end of each day or during breaks, the parties may consult with their legal representatives in each dispute resolution process about the progress that has been made.

Other mixed mode dispute resolution procedures

Drawing on the principles of dispute systems design,[129] mixed mode dispute resolution procedures often favour facilitative processes as the initial interventions to encourage flexibility, party-driven dialogues and collaborative solutions. If conflict remains after facilitative interventions, then advisory and determinative mechanisms can be introduced. Even in arb-med-arb procedures mediation is ideally introduced early in the overall procedure once the arbitration has been formally commenced. Further, mechanisms to allow parties to loop forward and loop back can be effectively built into mixed mode dispute

[128] For the 'Med-arb simultanés' Rules, see http://www.cmap.fr/le-cmap/le-reglement-de-med-arb-simultanes/

[129] On dispute systems design, see Cathy Costantino and Christina Merchant, *Designing Conflict Management Systems* (San Francisco: Jossey Bass, 1996); John P Conbere, 'Theory Building for Conflict Management System Design' (2001) 19(2) Conflict Resolution Quarterly 215–236; Jennifer F Lynch, 'Beyond ADR: A Systems Approach to Conflict Management' (2001) 17(3) Negotiation Journal 207; Ilija M Penusliski 'A Dispute Systems Design Diagnosis of ICSID' in Michael Waibel, Asha Kaushal, Kyo-Hwa L. Chung and Claire Balchin (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* Alphen aan den Rijn: Kluwer Law International 507–536.

resolution so that parties can move through the procedure to advisory and/or determinative processes but can return to collaborative processes at any stage of a mixed mode procedure.

While there is no limit to the mixed mode dispute resolution procedure that parties and their advisors may design, here are some frequently used combinations:

- Negotiation–Mediation–Arbitration;
- Mediation–Arbitration;
- Arbitration–Mediation–Arbitration;
- Negotiation–Mediation–Neutral Evaluation–Arbitration.

A further step in mixed mode dispute resolution involves the incorporation of preventative elements into the design to help parties proactively manage differences to prevent them from escalating into disputes and minimise the risks of time and cost overruns particularly in large cross-border projects. Such mixed mode designs are used in complex cross-border infrastructure projects in the form of Dispute Review Boards.[130] The Singapore Infrastructure Dispute-Management Protocol[131] is an illustration of this approach. It takes a proactive dispute prevention approach by requiring parties to appoint a Dispute Board (comprising up to three neutral professionals who are experts in relevant fields such as engineering, quantity surveying and law) from the start of the project, rather than only after disputes have arisen. The Protocol helps anticipate issues and prevent differences from escalating into full-blown disputes which become difficult and expensive to resolve. If disputes arise, the Protocol provides a range of methods which can help address the disputes at hand. These include mediation, and advisory and determinative dispute resolution processes. Under the Protocol, full professional and administrative support is provided through the Singapore International Mediation Centre (SIMC) and the Singapore Mediation Centre (SMC). These institutions can help with identifying and appointing Dispute Board members as well as with meeting, escrow and other administrative services.

Mediation Clauses in International Commercial Contracts

Most users of international commercial mediation enter the process as the result of a dispute resolution clause. A well-drafted international dispute resolution clause can manage risks associated with cross-border disputes. These risks include:

[130] Consider Paul Taggart, "Dispute Boards as Pre-Arbitration Tools: Recent Developments and Practical Considerations" (February 28, 2015) Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2015/02/28/dispute-boards-as-pre-arbitration-tools-recent-developments-and-practical-considerations/> accessed November 20, 2018; and Rafal Morek, "Dispute Boards: Resolving Construction Disputes in Real Time" (April 9, 2012) Kluwer Mediation Blog <http://mediationblog.kluwerarbitration.com/2012/04/09/dispute-boards-resolving-construction-disputes-in-real-time/> accessed November 20, 2018.

[131] Janice Heng, "Singapore launches new dispute management protocol for mega infrastructure projects" The Business Times, October 23, 2018, available at <http://www.businesstimes.com.sg/government-economy/singapore-launches-new-dispute-management-protocol-for-mega-infrastructure> accessed November 20, 2018.

- excessive costs and delay associated with determining jurisdictional issues before the substantive matters can be heard; [132]
- the unpredictability of law and forum and its impact on the subject matter of the dispute;
- lack of clarity about preferred language and potential multilingual confusion; and
- the impact of unexpected economic changes and currency fluctuations.

The dispute resolution clause is an ideal vehicle to manage private international law issues concerning mediation. Most professionally drafted international dispute resolution clauses include a choice of law sub-clause and a forum selection sub-clause.[133] Choices of forum and law encourage the export of legal and other services beyond borders and offer opportunities for increased access to justice where parties can negotiate their dispute resolution terms at arm's length. Drawing on freedom of contract principles, courts increasingly give effect to properly drafted dispute resolution, including mediation, clauses.[134] In several jurisdictions including Hong Kong and Singapore, mediation legislation

[132] On different approaches to financing litigation see J Zekoll, 'Comparative Civil Procedure' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press 2006) at 1356–1357. About third-party funding of dispute resolution, note recent developments in Singapore and Hong Kong, indicating a shift in attitude to risk management in Asia: see Leslie Perrin (ed), "Third Party Litigation Funding Law Review" (1st edn) (Law Business Research Ltd 2017) 78–86 for information on Hong Kong, and 125–134 for information on Singapore.

[133] See the following decisions of the Supreme Court of the United States concerning forum selection: in an international context *The Bremen v Zapata Offshore Co*, 407 US 1 (1972) and in a domestic setting *Carnival Cruise Lines, Inc v Shute*, 499 US 585 (1991). The Court has recognised the validity of such clauses, upholding them in both cases and has strongly endorsed their use. See also *Vimar Seguros y Reaseguros SA v M/V Sky Reefer* 515 US 528 (1995) which involved an arbitration clause and which has been applied by several District courts to choice of court clauses. Outside of American jurisprudence, for an extremely thorough analysis of the contractual foundations of dispute resolution clauses, see Tiong Min Yeo, 'The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements' (2005) 17 SAcLJ 306. Also see, for a detailed perusal of legal enforceability of alternative dispute resolution (ADR) clauses, Keith Han and Nicholas Poon, 'The Enforceability of Alternative Dispute Resolution Agreements – Emerging Problems and Issues' (2013) 25 SAcLJ 455: from a perusal of precedents from England, Australia, Hong Kong and Singapore, the authors have advised "parties (and their legal advisors)[…] to pay very careful attention to ensure that ADR clauses are felicitously drafted [in order for it to be] ultimately enforceable" (at [47]), as it appears to be the sentiments of courts across several jurisdictions that ADR clauses must be *meticulously drafted* so that it may not be rendered unenforceable for uncertainty. Consider *Sulamérica CiaNacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638; *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236; and *Hyundai Engineering and Construction Co Ltd v Vigour Ltd* [2005] HKEC 258. For views about proper drafting and enforceability of mediation clauses in continental Europe (e.g., German and Austrian perspectives), see generally: Nadja Alexander, 'International and Comparative Mediation – Legal Perspectives' (Wolters Kluwer 2009), at 'Chapter 4 – Pre-Mediation II: Mediation Clauses and Agreements to Mediate" (i.e., pp. 171 – 213)

[134] In respect to principles governing choice of court agreements, see Tiong Min Yeo, 'The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements' (2005) 17 SAcLJ 306. There is a noteworthy exception to the enforcement of an exclusive choice of court agreement pointing to Singapore: if the parties can show 'strong cause' against its enforcement (e.g., if having the Singapore courts seize jurisdiction would amount to an abuse of the court's process), the Singapore courts would stay their own jurisdiction (see *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] SGCA 65); However, this exception *does not* apply when the Singapore courts must exercise their jurisdiction according to their convention obligations under the Hague Convention of 30 June 2005 on Choice of Court Agreements. For a detailed perusal of legal enforceability of alternative dispute resolution (ADR) clauses, Keith Han and Nicholas Poon, 'The Enforceability of Alternative Dispute Resolution Agreements – Emerging Problems and Issues' (2013) 25 SAcLJ 455: from a perusal of precedents from England, Australia, Hong Kong and Singapore,

expressly recognises mediation clauses and agreements;[135] in Singapore section 8 of the Mediation Act expressly permits courts to stay litigation proceedings and make appropriate orders pending the fulfilment of a mediation clause.

Within a forum selection clause, parties can designate a method of dispute resolution such as mediation or arbitration or a court in a particular jurisdiction. They must *avoid* allocating co-existing jurisdictions to more than one forum at a time (i.e., avoid clauses which designate *both* court of country A *and* arbitration in country B).[136] Where parties select a forum but no law, it is only an indication that the law of the selected forum is to apply. Forums may be selected for reasons – such as interpersonal networks and familiarity with own courts – that have little to do with the nature and content of their laws.[137] For example, a contractor in country A supplying a manufacturer for the first time in country B might prefer to deal with the law of its legal system with which it is familiar, even though enforcement might be sought in country B. Where parties have only inserted a forum selection clause into their contract, the choice of law question (i.e., governing law of the contract) is left to the court of the chosen forum to decide. Therefore, the distinction between these two types of clauses is important for parties and their legal representatives.

Guidance for Practitioners

In this final section we set out guidance for practitioners in relation to drafting mediation clauses and representing clients in mediation.

Guidelines for drafting mediation clauses

When designing and preparing mediation clauses, consider the following points:

1. Select a jurisdiction with well-developed mediation and dispute resolution institutions, accessible high-quality mediation facilities, access to qualified and experienced mediators, and where the courts are familiar with and supportive of mediation procedures, mediation agreements and mediated settlement agreements;
2. Choose an applicable law that offers a robust regulatory framework for mediation in that it appropriately regulates various aspects of mediation *inter alia* rights and obligations of participants in cross-border mediation (including mediators, parties, lawyers) and recognises the relevant mediator practice standards and ethical codes.

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the authors have advised "parties (and their legal advisors)[…] to pay very careful attention to ensure that ADR clauses are felicitously drafted [in order for it to be] ultimately enforceable" (at [47]), as it appears to be the sentiments of courts across several jurisdictions that ADR clauses must be *meticulously drafted* so that it may not be rendered unenforceable for uncertainty. Consider *Sulamérica CiaNacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638; *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236; and *Hyundai Engineering and Construction Co Ltd v Vigour Ltd* [2005] HKEC 258. For views about proper drafting and enforceability of mediation clauses in continental Europe (e.g., German and Austrian perspectives), see generally: Nadja Alexander, "International and Comparative Mediation – Legal Perspectives" (Wolters Kluwer, 2009), at 'Chapter 4 – Pre-Mediation II: Mediation Clauses and Agreements to Mediate" (i.e., pp. 171 – 213).

[135] For Hong Kong see s 2(1) Mediation Ordinance Ord. No. 15 of 2012 and for Singapore see s 4 Mediation Act 2017.

[136] Richard Garnett, 'Coexisting and Conflicting Jurisdiction and Arbitration Clauses' (2013) 9(3) Journal of Private International Law 361

[137] Jan Smits, 'Diversity of Contract Law and the European International Market' in Jan Smits (ed), *The Need for a European Contract Law: Empirical and Legal Perspectives* (Groningen: Europa Law Publishing 2005) 171.

In terms of drafting mediation clauses, we offer the following guidelines.

1. Mediation clauses must provide for mediation as a condition precedent to litigation, that is the clause must be in *Scott v. Avery* form.
2. With mixed mode dispute resolution clauses, avoid allocating simultaneous fora for different processes (such as mediation and arbitration). Set out the timing and other circumstances that trigger each dispute resolution tier of the clause (e.g. the Singapore Arb-Med-Arb Protocol[138] examined above).
3. Mediation clauses must be certain and complete. This means clauses should specify procedures to initiate, establish, administer and conduct the mediation, including:
    a. Triggering mechanism: how and when (notice period) the mediation process is initiated.
    b. Scope of mediation: the disputes to be covered by mediation.
    c. Applicable procedural and substantive law.
    d. Place of mediation and venue or method for selection thereof.
    e. Language of the mediation.
    f. Method for selection of mediator/s.
    g. Method for selection of other participants in mediation, such as representatives and experts.
    h. Method for determination of costs, fees and other charges, and how and by whom they will be paid.
    i. Description of mediation procedure.

4. Where parties agree to reach consensus on the matters identified in item 3 above, to create certainty there should be a fall-back arrangement if they cannot agree.
5. Where clauses intend to incorporate mediation procedures, codes of conduct and standards from a recognised service-provider, language must be used which incorporates the relevant instruments as amended from time to time.
6. Where institutional mediation rules are incorporated into a mediation clause (item 5), these should be tested against the requirements listed in items 3 and 4. Do not assume that all institutional rules will comply with the drafting requirements of mediation clauses.

Guidelines on legal and ethical obligations of lawyers representing clients in mediation

Lawyers representing clients in mediation are referred to as mediation advocates. Mediation advocacy has become a legal specialisation. It involves a knowledge and a comprehensive skill-set which is very different from that of trial advocacy.[139] It also involves

[138] For more information on the Singapore International Arbitration Centre and Singapore International Mediation Centre Arb-Med-Arb protocol, proceed to the Singapore International Mediation Centre website at <http://simc.com.sg/siac-simc-arb-med-arb-protocol/>.

[139] On mediation advocacy see H Abramson, *Mediation Representation: Advocating in Problem-Solving Process*, Boulder Colorado, National Institute for Trial Advocacy 2013; see also IMI's mediator advocacy checklists at <www.imimediation.org>.

a specific set of legal and ethical duties. For example, in Australia, the Law Council of Australia has issued a set of Guidelines for Lawyers in Mediation.[140]

While the duties of mediation advocates vary from jurisdiction to jurisdiction, they generally include the following types of obligations:

1. Duty to advise on appropriate dispute resolution options including mediation;
2. Duty to check for conflicts of interest;
3. Authorisation to act as advocate or solicitor according to the applicable professional legal rules; note that in relation to international mediation special exemptions may be made for foreign lawyers;[141]
4. Duty to assist clients in preparation of mediation (including when to mediate, selection of mediator and written preparation for mediation);[142]
5. Duty to act in good faith to attempt to achieve settlement of the dispute;[143]
6. Duty to advise clients in mediation: this may involve helping to formulate offers, assess the feasibility of offers made by other parties and assist in drafting settlement terms;[144]
7. Duty of confidentiality;[145]
8. Duty to comply with professional standards of conduct;[146]
9. Post-mediation, a duty to report in writing to clients on the mediation.[147]

Conclusion

This chapter has explored mediation as a form of dispute resolution suitable for the resolution of international commercial disputes. When business partners from different jurisdictions are closing a deal, their minds are typically focussed on business success and not on the various things that could go wrong. Yet things do go wrong. The unexpected occurs and differences between business partners emerge and develop into cross-border disputes.

Mediation offers a flexible and relationship-friendly mechanism to resolve cross-border disputes. It can operate as a stand-alone dispute resolution process or a mixed mode procedure. A number of international legal instruments have been developed to regulate its use, most recently the Singapore Convention on Mediation. Practitioners wishing to keep mediation alive as a dispute resolution option for their clients are well-advised to include mediation provisions as part of their clients' dispute resolution clauses. This chapter has offered some practical guidelines for drafting such clauses and for participating in mediation as a legal adviser.

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[140] Law Council of Australia, *Guidelines for Lawyers in Mediation*, last updated April 2018. Referred to in this chapter as the *LCA Guidelines*. See also the reference to skills in s 6.1 of the *LCA Guidelines.*

[141] See, for example, the Singaporean Legal Profession Act , Part IV, s 35B.

[142] See ss 3, 4 and 5 of the *LCA Guidelines*. On written preparation for mediation see N Alexander et al, Singapore Mediation Handbook, Lexis Nexis 2019 at 188 et seq.

[143] See s 2.2 and s 6.1 of the *LCA Guidelines.*

[144] See s 6.2 of the *LCA Guidelines.*

[145] See s 2.1 of the *LCA Guidelines*.

[146] See s 6.3 of the *LCA Guidelines.*

[147] See s 7 of the *LCA Guidelines.*

Appendix

Institutional mediator panel members according to regional affiliation

Centre for Effective Dispute Resolution (CEDR)[148]

- **Mediators by regional affiliation**

Region	Number	Percentage (2d.p.)
Africa	0	0%
Asia	0	0%
Europe	10	97.6%
North America	2	1.6%
Oceania	1	0.8%
South America	0	0%
Total	125	100%

Hong Kong International Arbitration Centre (HKIAC)[149]

- **Mediators by regional affiliation**

Region	Number	Percentage (2d.p.)
Africa	0	0%
Asia	811	97.83%
Europe	10	1.21%
North America	3	0.36%
Oceania	5	0.60%
South America	0	0%
Total	829	100%

International Institute for Conflict Prevention & Resolution (CPR)[150]

- **Mediators by regional affiliation**

Region	Number	Percentage (2d.p.)
Africa	1	0.24%
Asia	20	4.72%
Europe	57	13.44%
North America	325	76.65%
Oceania	2	0.47%
South America	19	4.48%
Total	424	100%

[148] Information from <https://cedr-commercial.com/#mediators>.

[149] Information from <https://www.hkiac.org/templates/globalpage/gplistRst.php?pageNum_listrst=0&totalRows_listrst=829&tit=0&fn=&ln=&rsd=&te=&fa=&em=&prof=&aop%5B%5D=0&kw=>.

[150] Information from <https://cprcustomerservice.microsoftcrmportals.com/SignIn?ReturnUrl=%2Fneutrals%2Ffind-a-neutral%2F>

International Mediation Institute (IMI)[151]

- **Mediators by regional affiliation**

Region	Number	Percentage (2d.p.)
Africa	5	1.98%
Asia	36	14.23%
Europe	89	35.18%
North America	95	37.55%
Oceania	18	7.11%
South America	10	3.95%
Total	253	100%

Singapore International Mediation Centre (SIMC)[152]

- **Mediators by regional affiliation**

Region	Number	Percentage (2d.p.)
Africa	2	2.99%
Asia	33	49.25%
Europe	15	22.39%
North America	8	11.94%
Oceania	9	13.43%
South America	0	0%
Total	67	100%

Institutional mediator panel members according to gender

Centre for Effective Dispute Resolution (CEDR)[153]

- **Mediators by gender**

Region	Number	Percentage (2d.p.)
Male	77	61.6%
Female	48	38.4%
Total	125	100%

Hong Kong International Arbitration Centre (HKIAC)[154]

- **Mediators by gender**

[151] Information from <https://www.imimediation.org/find-a-mediator/?profile_type=mediator&um_search=1>.
[152] Information from <http://simc.com.sg/mediators/?_sft_simc-panelist-type=international-mediator>.
[153] Information from <https://cedr-commercial.com/#mediators>.
[154] Information from <https://www.hkiac.org/templates/globalpage/gplistRst.php?pageNum_listrst=0&totalRows_listrst=829&tit=0&fn=&ln=&rsd=&te=&fa=&em=&prof=&aop%5B%5D=0&kw=>.

Region	Number	Percentage (2d.p.)
Male	508	61.28%
Female	321	38.72%
Total	829	100%

International Institute for Conflict Prevention & Resolution (CPR)[155]

- **Mediators by gender**

Region	Number	Percentage (2d.p.)
Male	325	76.65%
Female	99	23.35%
Total	424	100%

International Mediation Institute (IMI)[156]

- **Mediators by gender**

Region	Number	Percentage (2d.p.)
Male	150	59.29%
Female	103	40.71%
Total	253	100%

Singapore International Mediation Centre (SIMC)[157]

- **Mediators by gender**

Region	Number	Percentage (2d.p.)
Male	52	77.61%
Female	15	22.39%
Total	67	100%

[155] Information from <https://cprcustomerservice.microsoftcrmportals.com/SignIn?ReturnUrl=%2Fneutrals%2Ffind-a-neutral%2F>.
[156] Information from <https://www.imimediation.org/find-a-mediator/?profile_type=mediator&um_search=1>.
[157] Information from <http://simc.com.sg/mediators/?_sft_simc-panelist-type=international-mediator>.