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Editorial

Apresentamos, com muito orgulho, o número 9 da *Revista Brasileira de Alternative Dispute Resolution – RBADR*. Trata-se de um número especialmente dedicado à mediação na Ásia.

Vinicius de Moraes (1913-1980), poeta carioca, afirma em seu poema "Carne", de 1933: "Que importa se a distância estende entre nós léguas e léguas./Que importa se existe entre nós muitas montanhas?/O mesmo céu nos cobre e a mesma terra liga nossos pés."[1] É exatamente esse o objetivo da cultura da paz: unir os povos. Tal cultura conseguiu reunir Brasil e Singapura por meio do Centro Brasileiro de Mediação e Arbitragem (CBMA) e do Singapore International Mediation Centre (SIMC). O presente número é verdadeiro exemplo de cooperação internacional entre duas instituições de *alternative dispute resolution* de referência.

As portas do sistema de tribunais multiportas estão se abrindo por toda parte, e esta edição da revista é uma evidência robusta. Nosso agradecimento ao presidente do SIMC, George Lim; ao CEO do SIMC, Chuan Wee Meng; a Siddharth Jha, conselheiro de Parcerias Internacionais do SIMC, e ao editor convidado, Benatt Beng Tat Lee, secretário-geral da SIMC. Esta edição não seria uma realidade sem seu incrível trabalho e contatos na Ásia.

O número é composto por quatorze artigos. Onze deles são sobre o status da mediação em países asiáticos específicos ou regiões: Hong Kong, China, Sri Lanka, Camboja, Indonésia, Japão, Malásia, Cingapura, Coreia do Sul, Tailândia e Vietnã. Um dos artigos é sobre mediação na República da Bielorrússia, outro sobre arbitragem na China, e também há uma resenha do livro *Dispute Board Manual: A Guide to Best Practices and Procedures*, escrito pela Dispute Resolution Board Foundation (DRBF).

Agradecemos a todos os autores e leitores da revista. O intercâmbio das melhores práticas em ADR é vital para o desenvolvimento doméstico e internacional da cultura de paz.

Daniel Brantes Ferreira, Ph.D.
Editor-in-Chief

[1] Veja-se o poema completo: "Carne/Que importa se a distância estende entre nós léguas e léguas/Que importa se existe entre nós muitas montanhas?/O mesmo céu nos cobre/E a mesma terra liga nossos pés./No céu e na terra é tua carne que palpita/Em tudo eu sinto o teu olhar se desdobrando/Na carícia violenta do teu beijo./Que importa a distância e que importa a montanha/Se tu és a extensão da carne/Sempre presente? (MORAES, Vinicius. Carne. *In:* MORAES, Vinicius. *O caminho para a distância*. [*S .l.*]: [*s. n.*], 1933. p. 27. Disponível em: http://cabana-on.com/Ler/wp-content/uploads/2017/09/Vinicius-de-Moraes-O-Caminho-para-a-Distancia.pdf. Acesso: 13 jun. 2023).

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Editorial

We proudly present the Brazilian Journal for *Alternative Dispute Resolution – RBADR*, Issue 9. It is a special issue dedicated to mediation in Asia.

Vinicius de Moraes (1913-1980), a poet from Rio de Janeiro, states in one of his poems, entitled "Flesh" (*Carne*), written in 1933: "What does it matter if the distance stretches between us leagues and leagues?/What does it matter if there are many mountains between us?/The same sky covers us, and the same earth connects our feet."[1] The purpose of the culture of peace is to unite people. Thus, such culture has joined Brazil through the Brazilian Centre for Mediation and Arbitration (CBMA), and Singapore through the Singapore International Mediation Centre (SIMC). This issue is a true example of international cooperation between leading alternative dispute resolution institutions.

The doors of the multi-door courthouse system are opening all around, and this issue is robust evidence. We must show our appreciation to SIMC's President, George Lim; SIMC's CEO, Chuan Wee Meng; Siddharth Jha, SIMC's International Partnerships Counsel; and to this issue's guest editor, Benatt Beng Tat Lee, SIMC's Registrar. This issue would not be a reality without their incredible work and network in Asia.

The issue is composed of fourteen papers. Eleven papers are about the mediation status in specific Asian countries or regions: Hong Kong, China, Sri Lanka, Cambodia, Indonesia, Japan, Malaysia, Singapore, South Korea, Thailand, and Vietnam. One paper is on mediation in the Republic of Belarus; another piece is on arbitration in China, and there is also a book review on the *Dispute Board Manual: A Guide to Best Practices and Procedures*, written by the Dispute Resolution Board Foundation (DRBF).

We thank all the authors and journal readers. The exchange of the best ADR practices is vital for the domestic and international development of the peace culture.

Daniel Brantes Ferreira, Ph.D.
Editor-in-Chief

[1] See the full poem in Portuguese: Carne - Que importa se a distância estende entre nós léguas e léguas Que importa se existe entre nós muitas montanhas? O mesmo céu nos cobre E a mesma terra liga nossos pés. No céu e na terra é tua carne que palpita Em tudo eu sinto o teu olhar se desdobrando Na carícia violenta do teu beijo. Que importa a distância e que importa a montanha Se tu és a extensão da carne Sempre presente? (MORAES, Vinicius. Carne. *In O caminho para a distância*. [*S.l.*]: [*s.n.*], 1933. p. 27. Available at: http://cabana-on.com/Ler/wp-content/uploads/2017/09/Vinicius-de-Moraes-O-Caminho-para-a-Distancia.pdf. Accessed on: 13 Jul. 2023).

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Guest Editor's Note

When the Singapore International Mediation Centre (SIMC) was invited to put together a series of papers on the mediation scene across Asia, we saw it as an opportunity to present to a global readership, a panoramic snapshot of the state of mediation in Asia. These series of papers present mediation "as-is" in respect of each jurisdiction, ranging from those with far-developed mediation eco-systems to those where the use of mediation is still at a nascent stage.

From the outset, we did not feel that we would be able to add much to the large number of academic papers already published on mediation, nor were we best qualified to do so. However, as a major mediation service provider to an international clientele, we work hand-in-hand with many mediation practitioners in various countries who are well placed to present mediation from their viewpoint as practitioners. We therefore sought their collaboration, to present mediation from a ground-level perspective in their respective jurisdictions. As such, the primary focus of these series of papers is not on mediation concepts or principles but on the current state of mediation in each jurisdiction, as seen through the eyes of these practitioners.

Working with mediation practitioners as opposed to academic scholars on a project of this nature poses its own unique characteristics and challenges. Professionals in the academic field are accustomed to living under the yoke of a "publish or perish" mandate. Industry practitioners are under no such pressure. On the contrary, writing papers of such nature imposes a strain on the time they have to devote to their daily professional responsibilities to their constituents. As a result, managing their compliance to set publication milestones and deadlines, can be challenging. A few practitioners slated to write papers for their jurisdictions, had expressed strong enthusiasm to contribute to the project, but eventually, had to regretfully withdraw their participation due to work commitments or other reasons. This is however, par for the course in a project of this nature.

While some suggestions were given to the mediation practitioners on the topics that they might consider covering in their contributions to this edition of the Journal, they each had their own perception of what the most essential aspects of mediation that they should focus on were in relation to their respective jurisdictions. Given that they are closer to the on-the-ground pulse of mediation in their respective jurisdictions, we did not think it appropriate to insist that they fit their contribution into any prescribed, straight-jacketed format. They were therefore given essentially a free rein in this respect and to adopt their own styles of presentation, which are

inevitably nuanced by their different cultural backgrounds. Hence readers will find that the scope, focus and style of presentation in each paper varies.

Nevertheless, despite these challenges, through sheer dogged persistence and the good-spirited endeavour on the part of all the contributing practitioners, we managed to cobble together this series of papers. As I read the papers, I certainly found them enriching my understanding of mediation as practised in these various jurisdictions and I hope the readers will similarly find them enlightening and useful. Most of all, I have enjoyed my interactions with the various practitioners who have contributed these papers and wish to use this opportunity to thank them for their generous participation in this project.

Benatt B.T. Lee, CFA
Registrar
Singapore International Mediation Centre

DOI: 10.52028/rbadr.v5i9.SIMC

Introduction to Singapore International Mediation Centre – SIMC

Mediation is about collaboration: SIMC is pleased to collaborate with the Brazilian Centre for Mediation and Arbitration – CBMA to collate this special series of articles dedicated to Mediation in Asia for the *Brazilian Journal for Alternative Dispute Resolution – RBADR*, Issue 9. This would not be possible without the hard work and dedication of SIMC Registrar, Mr Benatt Lee, as the General Editor, together with all the contributors to this special edition, many of whom are our partners and friends in Asia, and the strong support of Dr Daniel Bantes Ferreira, Ph.D., as the Editor-in-Chief and the CEO of CBMA.

SIMC was set up in 2014 as a not-for-profit organisation that offers professional dispute resolution services tailored to the evolving needs of businesses, working across multiple jurisdictions covering both common and civil law traditions. Our panel of over 70 international independent mediators have extensive experience resolving cross-border disputes and are highly regarded for delivering successful outcomes in complex, high-stakes commercial disputes.

Over the last 9 years, SIMC has seen its caseload grow by multiple folds to a total of more than 300 case filings with a total dispute value of US$15.6 billion. The parties are from more than 50 countries. These disputes arise from various industries and specialty areas: construction, shipping, energy, intellectual property and most recently from investor-state disputes and cryptocurrency disputes. We have disputes ranging from US$200,000 to the largest dispute value to date at US$4 billion. On average, the value of the disputes are about US$53 million. The settlement rate at SIMC remains at about 70% despite the growth in case numbers, complexity and types of disputes.

We have also been organising mediation workshops in various cities to train mediators from China, India, Japan, South Korea, Sri Lanka, Maldives, Philippines, Pakistan, Mongolia, Nepal and other Asian countries. In August 2023, we will hold a workshop in Costa Rica with participants from the Latin American region representing countries such as Costa Rica, Mexico, Colombia, Peru, Brazil and the Bahamas. We are helping to build a global community of experienced and passionate mediators to support counsel and parties to resolve disputes in a professional, creative and cost-effective way. As an organisation, we believe that a diversity of perspectives, language, culture, expertise and strengths is essential to success, and we are committed to supporting our talent base and communities that share our values and vision for a more peaceable world.

With the signing of the Singapore Convention on Mediation in 2019 and its coming into force in 2020, we expect to see many more countries sign and ratify the Convention in the years ahead. We are privileged to be at this juncture in history to witness and participate in the growth of mediation globally.

We invite you to join us on this exciting journey.

Chuan Wee Meng, CEO
Singapore International Mediation Centre

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Mediation in Cambodia: Current Status, Development and Prospects

Leang Sok

Mediation Program Advisor at the Cambodian Centre for Mediation (CCM). Leang has been involved in research on alternative dispute resolution (ADR) at the local level, namely in matters relating to domestic violence and intimate partner violence. He is a trained mediator and is currently a pro-bono mediator at CCM, which provides extensive mediation training in collaboration with domestic and international mediation houses. CCM has engaged at the national level to provide inputs and consultation on ADR, mediation, and legal aid in Cambodia. Leang holds a master's degree in Sociology-Anthropology, and he received extensive training on transitional justice, international human rights law, gender equality, business and human rights, as well as mediation, together with experiences in providing training and research.

Abstract: This article explores the current status, development and prospects of mediation in Cambodia. Various alternative dispute resolution (ADR) mechanisms such as mediation, arbitration, conciliation and negotiation are still in the process of finding their proper places in the dispute resolution eco-system. Principle-based mediation in particular, is in its infancy, including its concepts, the role of mediators as compared to that of conciliators or arbitrators and the incorporation of mediation by lawyers and arbitrators in their respective practices. Various stakeholders including government, local and international private sector and community organizations are at different stages in their exploration of mediation as well. Institutions providing labour and commercial arbitration are seeking opportunities to provide mediation services, while different laws have incorporated sections dealing specifically with mediation. These have created potential opportunities for mediation to develop and grow in the current context of Cambodia, including deliberations on the ratification of the Singapore Convention on Mediation.

Concept of 'Mediation' in Confusion with other ADR Approaches

The understanding of 'mediation' in Cambodia is limited for various reasons. First of all, to the public it is just a form of Alternative Dispute Resolution (ADR), which could be anything but court-related. Secondly, there is limited understanding of what mediation itself entails and people cannot distinguish between different

approaches within the spectrum of ADR. Thirdly, the various Khmer terms for ADR (including negotiation, conciliation, mediation, compromise) have been used interchangeably which further hinders understanding of what exact form of ADR is being referred to in each context. However, most often it is a reference to the conciliation process where power dynamics are considerably disproportionately vested in either the third party conducting the conciliation process and/or between parties themselves.

Research by Women Peace Makers (WPM) and the Cambodian Centre for Mediation (CCM) found that even local authorities which provide conflict resolution in their routine work were not able to distinguish between ADR-related terms like reconciliation, mediation, arbitration and so on. As a result, it is often not clear to them which specific mode of ADR they had employed. Even the media, has not accurately reported on ADR proceedings in Cambodia. A news media outlet that publishes both in the Khmer and English language, used an English term for 'mediation',[1] while in the Khmer language it used another term which had a different meaning from 'mediation'.

However, it is clear that the most dominant form of ADR in Cambodia is '(re)conciliation'. Compromise and concession are familiar concepts and their acceptance in the name of harmony and "saving face" is accorded more importance than ensuring a level-playing field between disputing parties. For example, if one or all parties to a dispute refuse to accept what is offered by the third-party conciliator, such third party might not receive it well and could deem the parties as not having given them the appropriate level of respect. As a result, they would find a way to pressure the parties into accepting their offered solutions rather than letting the parties decide the outcome.

A recent companies survey[2] conducted in Cambodia by the National Commercial Arbitration Center (NCAC) found that 81 percent of the 399 respondents had never heard of mediation as an option for dispute resolution (NCAC, 2022, unpublished). However, 78 percent of 404 respondents agreed or strongly agreed that the awareness of mediation's benefits needed to be raised.

Mediators and Roles of Mediators

A number of Cambodians have received training overseas (including from Australia, USA, UK, Singapore) to be accredited or certified mediators.[3] Some have received this accreditation as far back as ten or more years ago. However, their

1 CHANDARA, 2023.
2 This was supported by International Finance Corporation (IFC).
3 On the mediators' training in Brazil see: AWAD, 2020, p. 57-66.

actual practice as a mediator and the demand for their service as mediators has been limited. There is a discernible difference in the perceived status of those who have been accredited by an overseas institution but who have very limited practical experience in mediation and those who received their training in Cambodia without accreditation from any legally recognized institution. This difference in perception persists even where the overseas accredited mediator has failed to renew his or her accreditation.

This in effect has made those receiving mediation training in Cambodia feel that they are not officially qualified or deemed capable of conducting mediations. It has been observed in a number of training sessions, that this issue surfaced again and again, and is a deterrent to anyone aspiring to be a mediator in Cambodia.

The competition between lawyers, arbitrators and mediators from an income-generation perspective has created a contentious environment among these different professions in Cambodia. It does not help that the role of mediators has still not been clearly defined in the public's perception.

Development of Mediation in Cambodia

In 2008, the Ministry of Justice (MoJ) and Ministry of Interior (MoI) in cooperation with United Nations Development Program (UNDP), initiated a 3-year Access-to-Justice program to introduce mediation at the sub-national level. The program created a manual providing mediation guidelines for various types of disputes. The manual distinguishes, with concise explanation, the differences between each approach of dispute resolution within the ADR spectrum, from highly informal to highly formal, and includes negotiation, conciliation, mediation, arbitration and adjudication.

The program was piloted in a number of districts[4] (through Justice Service Centers (JSCs)) and Commune Dispute Resolution Committees (CDRCs) at commune levels. The JSCs and CDRCs have been under-resourced and regular trainings were discontinued after the conclusion of the UNDP-sponsored program. Unfortunately, Cambodia's attempts in 2008 to create JSCs and CDRCs with the objective of rolling out mediation nationwide did not do enough to raise awareness of the usefulness of mediation.

After the failure to provide sufficient services and resources to JSCs and CDRCs, talk of the provision of legal aid at the national level gave the previous

[4] Administration in Cambodia is divided by Capital and Provinces, followed by districts and further followed by communes. In Cambodia there are 25 provinces (including one capital city). Each province is subdivided into a number of districts and each district is subdivided into a number of communes and each commune is sub-divided into different villages.

program a new lifeline. JSCs and CDRCs were considered the most appropriate channels to provide legal aid at the sub-national level. At the same time, there was a campaign launched to reduce the backlog of cases in the courts. As a result, the number of JSCs grew to 68 in 2020, concurrently as MOJ was attempting to accelerate the provision of legal aid in Cambodia. As more JSCs were set up and reactivated, two additional staff members were recruited and trained to assist the mediations.

The MOJ launched a rigorous campaign between May 2020 and June 2021, to reduce the courts' backlog of cases which had overwhelmed the court facilities. Within that 13-month period, more than 37,900 criminal cases were resolved at the prosecution stage, investigative stage and the trial stage – equivalent to 96 percent of the total of over 39,500 backlogged criminal cases.[5] The revitalization of JSCs soon came to an end, when an administrative reform at district level created an Office of Legal and Local Dispute Resolution in 2021, to be directly under supervision of district-level administration. This relieved all the duties and offices of the existing JSCs.

There was also a structural reform in MOJ. MOJ had a Department of Mediation and Local Dispute Resolution. At its earlier stage, the Mediation department was placed hierarchically under the General Department of Criminal Affairs but it was later moved to be under the General Department of Civil Affairs in 2021. This could be interpreted as a determination that mediation services are deemed to be more appropriate in civil matters than criminal affairs.[6]

Court-annexed mediation was briefly discussed, but has not materialized to this date.

Mediation within the Non-Government Sector

UNDP has a pool of mediators for UNDP staff-related disputes. However, cases were limited. A number of reasons for this have been raised,[7] including the lack of awareness among staff about the mediation procedure and the benefits of using mediation service. Another reason could be psychological, as staff could perceive the need to seek a third party for resolving their conflict as a sign of weakness rather than viewing it as engaging a professional service.

The Asian Development Bank (ADB) has recently had several mediators accredited by the Singapore International Mediation Institute following an

5 DARA, 2021.

6 On mediation in Brazil see: FERREIRA; SEVERO, 2021. See also: FARIAS, 2020.

7 Personal communication with Mr. Savath Meas, the Executive Director of Cambodian Center for Mediation (CCM).

assessment conducted by the Singapore International Mediation Center (SIMC), one of which is Cambodian. A conversation with this Cambodian mediator, suggests that mediation would be beneficial to staff welfare in resolving disputes within ADB-funded projects across Cambodia.[8] It is mandatory under the Office of Professional Conduct to deal with internal dispute and within project implementation.

Mediation is seen as a softer approach in dispute resolution. The existing Compliance Review Panel of ADB is perceived to be stricter in terms of outcomes, with less flexibility. The introduction of mediation is seen as a more effective and cost-effective alternative, which also leaves the parties' relationship in a more positive state after the disputes have been resolved.

CCM was established in 2010 and has been assisting the government in the early Access to Justice program since 2008. CCM has conducted research on ADR and mediation, as well as organized mediation training under cooperation with internationally-accredited mediators. CCM has attracted a pool of local and international mediators to provide pro-bono mediation services and to promote mediation in general.

Moreover, other civil society organizations (CSOs) and private law firms have been exploring the possibility of bringing mediation to the fore as well. CSOs see benefits of mediation, in particular, in the resolution of daily disputes. For some law firms, adding mediation services is seen as an additional income-generating line of business on top of their existing legal practice. There is also an aspiration to be among the first to provide services in this field.

Growing Trend in the Formulation and Practice of Mediation

The Ministry of Justice is well on course in its development of ADR. After multiple consultative workshops with development partners and local and international CSOs, MOJ announced in April 2021, the setting up of a mediation training team to be made up of specialists from state institutions as well as national and international CSOs.[9] In late 2021, the Ministry of Justice developed a plan and direction for the establishment of a non-judicial dispute resolution mechanism at the local level for 2022.[10] In March 2022, MOJ signed an Memorandum of Understanding (MOU) with Oxfam in Cambodia and with a local organization, WPM, on a project that would strengthen the mechanisms for and the implementation of sub-national mediation.[11] The MOU with these two organizations provided MOJ

[8] Personal communication with Mr. Sambath Kim, SIMC-accredited mediator and ADB Safeguarding Specialist.
[9] DARA, 2021.
[10] MINISTRY..., 2021.
[11] SOCHAN, 2022.

financial support and technical assistance respectively. This is an indication that MOJ is actively engaged in the development of ADR in Cambodia. Senior officials, including the Secretary of State, have been leading various consultations and discussions including attending overseas conferences related to mediation. Moreover, Senior officials of the MOJ also attended the VII Asia Pacific Mediation Conference in South Korea in December 2022.

The Ministry of Women's Affairs (MoWA) has developed Guidelines on Limited Use of Mediation to Respond to Domestic Violence, after advocacy based on evidence from research by WPM and CCM found that the practice of ADR at sub-national level was not principle-based and lacked gender sensitivity and a survivor-centered approach. Domestic violence is, to a certain extent, a criminal offence,[12] but has not been dealt with under any criminal legal provisions. They have been resolved through ADR mechanisms instead. The Law on Prevention of Domestic Violence and Protection of Victim ("DV Law") provided an option for mediation in some articles but there were no specific guidelines, training or resources to ensure a gender-sensitive mediation practice.

A batch of mediators have been trained and trainings are now being rolled out to local authorities at sub-national level, to deal with domestic violence cases at the commune level. Based on WPM and CCM research,[13] local authorities who are the service providers, have requested that they be provided with proper trainings on mediation and an understanding of the differences between various related terms like mediation, conciliation, arbitration and negotiation.

In labour dispute resolution, the Arbitration Council (AC), which was established in 2003 with the support of the Ministry of Labour, employers and unions, is empowered to assist parties in resolving collective labour disputes in Cambodia.[14] As at March 2023, it had registered 3,043 cases of labour disputes, with a success rate of 75.16 percent.[15]

In addition to conducting arbitrations, Arbitration Council Foundation (ACF), the secretariat supporting the function of AC, had in 2018, commissioned a study on the demand for fee-based mediations in Cambodia, in order to expand its generally-applauded services, and to enhance the sustainability of the institution.[16] However, the findings of the study suggest that the demand for a fee-based mediation service by the ACF was quite low.[17] The study found that the lack of demand for mediation services might be a reflection of a range of factors, including an apparent decline in

[12] According to Law to Prevent Domestic Violence and Victim Protection in Cambodia.
[13] SUYHEANG, 2020.
[14] Retrieved from: https://www.arbitrationcouncil.org/about-ac/.
[15] Retrieved from: https://www.arbitrationcouncil.org/.
[16] THE ARBITRATION COUNCIL FOUNDATION, 2018, p. 3.
[17] THE ARBITRATION COUNCIL FOUNDATION, 2018, p. 4.

labour disputes in recent years, a lack of knowledge and awareness about the role that external mediation services could play, some uncertainty over the quality of service delivery as perceived by employees and employers, and challenges relating to affordability.[18]

In the commercial context, Cambodia adopted a Law on Commercial Arbitration in 2006, to fulfil a requirement when Cambodia joined the World Trade Organization (WTO) in 2004. The functioning and operation of the National Commercial Arbitration Center (NCAC) was regulated in 2009 and amended in 2010. Similar to ACF overseeing the AC in the labour sector, the NCAC was established to oversee and assist the functioning of commercial arbitration. It was only in 2015 that NCAC started to receive cases. Within a period of five years from 2015 to 2020, NCAC received only 25 cases with total sum in dispute in excess of USD 72 million. However, not all cases submitted were administered by NCAC as the center found that it had no jurisdiction over 8 percent of the cases while another 4 percent was withdrawn by parties. All administered cases have been concluded with 28 percent receiving a final award and 60 percent comprising cases that are still active.[19] Cases submitted included business disputes from various industry sectors such as international trade, banking and financial services, corporate, real estate and construction.[20]

In addition to arbitration services, in March 2022, NCAC has provided mediator training and now has 16 commercial mediators accredited by the Center of Effective Dispute Resolution (CEDR), which is based in the UK. It is therefore ready to provide mediation for commercial disputes.[21]

After this first batch of commercial mediators were trained, NCAC had plans for a second training. However, with the lack of cases in commercial arbitration, commercial mediation would probably be put on hold.[22]. This could mean that while NCAC has commercial mediators in place, it would not be launching this initiative at full scale for now. Moreover, with the latest list of 65 commercial arbitrators,[23] and 25 cases submitted, with only 22 cases administered, there are limited cases for the available number of arbitrators.

In 2022, NCAC conducted a survey with the purpose of filling the knowledge gaps on:[24] (1) current dispute resolution practices among Cambodian companies; (2) companies' perceptions about the efficiency of the available dispute resolution

[18] THE ARBITRATION COUNCIL FOUNDATION, 2018, p. 4.
[19] NCAC, 2023b.
[20] NCAC, 2023b.
[21] MUNMAKARA, 2022.
[22] Personal communication with Ms. Sophary Noy, a lawyer and a commercial arbitrator.
[23] NCAC, 2023a.
[24] NCAC, 2022.

mechanisms in terms of time, cost, process and neutrality (judges, arbitrators or mediators); and (3) companies' experience and perceptions of the commercial mediation regime in Cambodia.

The survey found a mix of options that have been used in dispute resolution including negotiation, mediation or arbitration. While 31 percent of the respondents went through mediation, 81 percent (out of 26 respondents) were presented the opportunity to choose mediation.[25] However, it should noted that, as highlighted earlier, the confusion in Khmer words used to describe these different methods could affect the accuracy of these statistics.

Pragmatism and Exploration of Mediation Practice

Various legislation incorporate provisions related to mediation. These include DV law, Code of Civil Procedures, Labour Law, Land Law, Investment Law, Law on Management and Administration of Commune and Sangkat Council and the Law on Insurance 2014. Mediation is also adopted as the compliance mechanism of ADB loans for mega-project development.

Mediation in Cambodia has been adopted in the following sectors, as seen in practice and provided in legal text: traditional customary practice, community, sub-national level (currently guidelines are being developed for family disputes), legal aid, commercial, labour, telecommunication, land conflicts, insurance, potential intellectual property rights. Mediation has been seen as a more useful and cost-effective dispute resolution mechanism by those who have been exposed to mediation training. During CCM training, participants from banking sector have indicated that mediation training has proved to be useful in their dealings with customers. It is, at the very least, a useful soft skill.

Mediation Opportunities

There has been a growing interest in the provision of mediation services but less on the demand side. It has been observed that while those who have received mediation training have gained an understanding of what mediation is, user awareness is still limited. Locally-trained and overseas-accredited mediators might see the importance of mediation services in Cambodia but the demand for their services might not be explicit or as high as expected by mediators. A study by the Arbitration Council Foundation (ACF) found low demand. However, it should be taken into consideration that while mediators get exposed to theories, principles and benefits of mediation practice, the public and those who may need the service

[25] NCAC, 2022, p. 7.

do not have a similar level of exposure to mediation, which prevents them from seeing the usefulness of mediation service. So the *status quo* might not have improved, although excitement is emerging on the supply side.

Various stakeholders have been putting in more effort to provide services and training for selected target groups. At the same time, various stakeholders are also developing guidelines, codes of conduct, best practices and a record of lessons learnt for their own sectors. These independent efforts to promote mediation could be due to a lack of awareness of the similar and complementary efforts being put in place by other institutions. Some have also sent their officials for training, accreditation or made efforts to bring international training centers into their realm, to grow the capacity for mediation within Cambodia.

The current on-going debate is whether Cambodia should have a mediation law as a starting point to kick-start mediation in the country. Cambodian overseas-accredited mediators still see proper mediation practices missing in the country's ADR system. While centers to provide mediation services and training have been established, once trained, the local mediators trained by overseas-accredited mediators or other local mediators still have doubts on their accreditation status and question if they are qualified to provide mediation services in Cambodia.

The Level of Receptivity to the Singapore Convention on Mediation and the Possible Hurdles to Cambodia's Accession to and Ratification of the Convention

There is an optimism among local mediators that Cambodia would benefit from accession to and ratification of the Singapore Convention on Mediation.[26] However, ratifying an international convention is often treated with caution. Cambodian CSOs have been calling for the Cambodian government to ratify other conventions, including ILO Convention on Domestic Work (C189) and on Violence and Harassment in the World of Work (C190). While the government tends to support these calls, there has been very slow progress. It has been observed that the government has often and on various occasions stated that more time is needed to conduct a careful and thorough study on the advantages and the disadvantages of ratifying these conventions.

The government might not have the confidence at the moment, to ratify the Singapore Convention on Mediation without proper analysis to have the reassurance that the benefits of acceding to and ratification of the Convention would outweigh any potential additional burdens. Afterall, ratifying a convention comes with obligations.

[26] See COMETTI; MOSCHEN, 2022. See also: MASON, 2021.

Cambodia has ratified 8 out of 9 International Human Rights Treaties and in all of them, the government has both reporting and implementation obligations. Some of these obligations have been fulfilled and while others have been delayed.

Moreover, although 56 countries have signed or acceded to the Convention so far, only 11 have ratified. In addition, no country in ASEAN, other than Singapore itself, have ratified the Singapore Convention on Mediation (although ASEAN members Brunei, Malaysia, Philippines and Laos have also signed the Convention). So, raising awareness of the Convention's benefit to the regional bloc would be the next step in getting the relevant governments of the other ASEAN's member states to be on the same page.

However, the effort to raise the level of receptivity for the Singapore Convention on Mediation is illustrated in an effort by SIMC, in conjunction with the Singapore Ministry of Law, in organizing in a capacity-building workshop held in March 28–29, 2022 in Phnom Penh.[27] About 20 participants from Cambodia's Ministry of Commerce, Ministry of Justice, and the National Commercial Arbitration Center attended the workshop. It was an opportunity for Singapore and Cambodia to exchange views and share experiences[28] on mediation.

Looking into the Future

Mediation has a great potential to become a better mode of dispute resolution than bringing cases to court given the unpredictable nature of the court system, and the high rates of disputes reported at the community and sub-national administration levels.

While other forms of ADR still have their place, a principle-based dispute resolution mechanism in the form of mediation could provide another option which in the long run, could enter the mainstream like arbitration (in commercial and labor disputes) with more effort to raise awareness to mediation.

The government, CSOs and practitioners are all aware of the barriers to access to the courts such as the overwhelming backlog of cases in the courts and the insufficient number of judicial personnel. They have suggested ADR in general, as the solution to these problems. However, there is still a lack of understanding as to what form of ADR would be appropriate

Overseas-accredited mediators have expressed the wish to support the government in accelerating the introduction of legal or policy frameworks on mediation. They have made attempts through individual meetings and other platforms to push the government to accede to and ratify the Singapore Convention

[27] SIMC, 2023.
[28] SIMC, 2023.

on Mediation, as they see this to be one the most effective way to raise awareness of the use and practice of mediation.

Increasing publications on mediation in the local language would also go a long way to raise its awareness among the public. For a start, there should be clear categorization with clear distinction of the different mode of ADR. This would help raise the awareness and understanding of mediation.

Cambodia has scored very low in the ranking of World Justice Project. It would be time-consuming and costly to rectify formal court procedure to improve itself in the index. Going to court is not viewed favorably in daily life in Cambodia. As a result, many conflicts would go unresolved. In addition, the one who brings a dispute to court would usually be the party that has the greater ability to sustain and succeed in court proceedings, by reason of better financial resources and social connections, putting the other party at a disadvantage.

As a result, commercial arbitration and mediation have been applauded as positive steps forward, as international standards are in place with predictable schedule and procedures. However, this is still at an early stage and more cases and experience would be needed to improve the skills of those in these fields so as to build more confidence from related sectors and the public.

Conclusion

Cambodia is in a stage of positive development in mediation practice, in the light of various new provisions in laws and policies, as well as the growing and emerging efforts to raise awareness in mediation. Apart from government efforts, various stakeholders have increasingly been involved in the formulation and development of services and legal frameworks on mediation. However the demand for mediation from users is still limited. There needs a wide public education in order to ensure the users are well aware of this mode of ADR in the form of mediation. Moreover, there needs to be more synergies between different stakeholders so that their efforts are complementary to each other in building and shaping of legal and policy framework for mediation in Cambodia.

The efforts by the government with the financial and technical support from development partners and CSOs, indicate an intention to move mediation and ADR in general, forward. However, these efforts cannot be fully dependent on non-government sources of funding, without an integration with the national budget or it would be a challenge for the government to take ownership of these initiatives.

Historical and cultural practice of ADR in Cambodia in the form of conciliation where a third party plays a more dominant role, is still the main form of ADR adopted in Cambodia. An integrative approach to existing general ADR mechanism that is culturally sensitive will be required for mediation to take root.

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How Court or Legislation Mandated Mediations are Conducted in Hong Kong

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Abstract: The Judiciary of Hong Kong has long been a supporter of mediation. To facilitate the use of mediation by disputants, it has implemented various practice directions and pilot schemes. This article discusses the practice of mediation within civil cases and makes references to Case Settlement Conference, Financial Dispute Resolution, Children's Dispute Resolution, the proposed duty mediator scheme for family cases, and the recent development of mediator-assisted proceedings.

I Introduction

1. Mediation is an attractive option for parties to consider in resolving their disputes. It is an efficient, effective and consensus-oriented dispute resolution method where parties can explore solutions beyond remedies that can be granted by the court.[1] By resolving disputes through mediations, parties can reduce the time and costs involved in litigations, ensure confidentiality, avoid publicity, maintain

[1] Department of Justice of the Government of the Hong Kong Special Administrative Region, *Report of the Working Group on Mediation* (2010) at §§1.1, 3.2 and 3.12.

good relationship between themselves, and make effort to build a harmonious community.[2]

2. The Judiciary of Hong Kong has always been a supporter of mediation. Former Chief Justice of Hong Kong Andrew Li in his Opening Address at the 'Mediation in Hong Kong: The Way Forward' Conference in 2007 and Permanent Judge Johnson Lam in his speech for The Hong Kong Legal Week 2022 on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" in 2022 stressed the commitment and support of the Judiciary to the development of mediation in Hong Kong.[3]

3. Mediation in Hong Kong has resulted in satisfactory results. In 2021, based on the mediation reports filed, taking into account the mediated cases which resulted in full agreement and cases without agreement but eventually disposed of within 6 weeks, the settlement rate at the Court of First Instance was 54%, while that at the District Court was 66%.[4]

4. In support of mediation, the Judiciary has implemented various practice directions and pilot schemes. For example, under the court-annexed mediation schemes, staff in the Integrated Mediation Office and the Building Management Mediation Co-ordinator's Office introduce litigants to mediation and provide pre-mediation sessions to them, but do not conduct the actual mediation.[5] In July 2022, the Integrated Mediation Office (West Kowloon) commenced operation, to which the adjudicators of the Small Claims Tribunal refer suitable cases for mediation.[6] The mediations would be conducted by private mediators on a *pro bono* basis.[7]

5. This article provides the reader with a perspective of how court mandated mediations are conducted in Hong Kong.

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2 Department of Justice of the Government of the Hong Kong Special Administrative Region, *Report of the Working Group on Mediation* (2010) at Foreword, §§1.4, 3.16 and 7.96.

3 Andrew Li CJ, Opening Address at the 'Mediation in Hong Kong: The Way Forward' Conference on 30 November 2007, retrieved from https://www.info.gov.hk/gia/general/200711/30/ P200711300131.htm; Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 2.

4 Summary of Mediation Reports filed in the Court of First Instance in 2021, retrieved from https://mediation.Judiciary.hk/en/doc/2021_CFI_EN.pdf and Summary of Mediation Reports filed in the District Court in 2021, retrieved from https://mediation.Judiciary.hk/en/doc/2021_DC_EN.pdf.

5 Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 3.

6 "Integrated Mediation Office (West Kowloon)", retrieved from https://mediation.Judiciary.hk/en/imo_wk.html; Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 4.

7 Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 4.

II Mediation in General Civil Cases

6. Practice Direction 31, which provides guidance on mediations, came into effect on 1 January 2010 and was superseded by a newer version subsequently on 1 November 2014. [8] It applies to the majority of civil proceedings in the Court of First Instance and the District Court, with a few exceptions such as personal injury cases, equal opportunity cases and proceedings in the Construction and Arbitration List.[9] Family mediations are specifically regulated by Practice Direction 15.10.

7. Practice Direction 31 first requires that "where all the parties are legally represented, solicitors acting respectively for the parties shall file in Court a Mediation Certificate at the same time as the time tabling questionnaire filed under Order 25, rule 1".[10]

8. On the Mediation Certificate, parties have to state whether they are willing to attempt mediation and their reason(s) for refusing to attempt mediation, while the solicitor has to confirm that he or she has explained this option to the client.[11] The Mediation Certificate focuses the minds of the parties on attempting mediation, facilitates lawyers in advising clients on mediation and provides information to the Court for assessing whether a party's refusal to mediate is reasonable.[12]

9. A party wishing to attempt mediation should serve a Mediation Notice on the other parties in the dispute, then the other parties should respond by way of a Mediation Response within 14 days.[13] Where there are differing proposals in the Mediation Notice and the Mediation Response, parties should attempt to reach agreement on the proposals and reduce the discussion into the Mediation Minute.[14]

10. The Mediation Notice sets out the scope of mediation, the rules for mediation, choice of mediator, time and venue of mediation, costs and the minimum level of participation which should qualify as a sufficient attempt at the mediation; whereas the Mediation Response sets out any agreements and disagreements to the proposals and proposes alternatives.[15] The Mediation Notice and Response

8 Practice Direction 31 (superseded version) dated 12 February 2009; Practice Direction 31 dated 14 August 2014.

9 Practice Direction 31 at §2 and Appendix A. On multiparty mediation cases in Brazil see FERREIRA; SEVERO, 2021, p. 5.

10 Practice Direction 31 at §9.

11 See Practice Direction 31 at Appendix B.

12 Department of Justice of the Government of the Hong Kong Special Administrative Region, *Report of the Working Group on Mediation* (2010) at §1.8.

13 Practice Direction 31 at §§10 and 11.

14 Practice Direction 31 at §12.

15 See Practice Direction 31 at Appendices C and D.

facilitate dialogue on mediation, identify areas of agreement and disagreement, and assist the court to decide on directions to be made.[16]

11. To prevent sham mediations and facilitate the Court's exercise of case management responsibilities, the Court may also direct parties to report the results of mediation, including the time and costs spent on mediation, progress of mediation and the date of completion of mediation.[17]

12. The codes of conduct of the Law Society of Hong Kong and the Hong Kong Bar Association put a duty on solicitors and barristers respectively to advise the client on mediation if settlement may be in the client's interests.[18]

13. The above procedures are crucial for litigants as the Court will consider parties' conduct in making a cost order. Paragraph 4 of Practice Direction 31 provides that "in exercising its discretion on costs, the Court takes into account all relevant circumstances. These would include any unreasonable failure of a party to engage in mediation where this can be established by admissible materials. Legal representatives should advise their clients of the possibility of the Court making an adverse costs order where a party unreasonably fails to engage in mediation".

14. Cost sanctions are supported by Order 62 Rule 5(1)(aa) and (e) of the Rules of the High Court Cap.4A - the Court would consider the underlying objectives set out in Order 1A Rule 1, which includes increasing cost-effectiveness and ensuring that the case is dealt expeditiously, and the conduct of all parties, which includes reasonableness in refusing to mediate.[19] To avoid an adverse costs order, parties are expected to engage in mediation unless there is a valid and reasonable explanation not to do so.[20]

15. Where one or more parties are not legally represented, on the application of a party or on the Court's own motion, the Court may direct parties to follow the procedures specified under Practice Direction 31 with modifications.[21]

16. In effect, the mediation regime stipulated in Practice Direction 31 is mandatory for most civil cases in Hong Kong. One may argue that parties may choose not to engage in mediations so long as they are willing to bear the costs consequences, but it is unlikely that parties would want to bear the costs of the opposing party, no matter how much financial resources one may have.

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16 Department of Justice of the Government of the Hong Kong Special Administrative Region, *Report of the Working Group on Mediation* (2010) at §1.8.

17 "Report on Mediation" of "Working Party on Mediation", retrieved from https://mediation.Judiciary.hk/en/workingparty.html#rom.

18 The Law Society of Hong Kong, *The Hong Kong Solicitor's Guide to Professional Conduct* at §10.17 Commentary 3; Hong Kong Bar Association, *the Code of Conduct of the Bar of the Hong Kong Special Administrative Region* at §10.27.

19 Department of Justice of the Government of the Hong Kong Special Administrative Region, *Report of the Working Group on Mediation* (2010) at §§1.8 and 1.9.

20 Allan Leung and Douglas Clark, *Civil Litigation in Hong Kong* (5th ed., Sweet & Maxwell 2017) at §9.075.

21 Practice Direction 31 at §§18 to 20.

17. There are two exceptions to the mediation requirement. The first one is where one or more parties are unrepresented, the parties are not put under pressure to mediate unless the Court directs. The second one is where parties have a reasonable explanation for refusing to engage in mediation.

18. Some solicitors consider mediation "as a process that needs to be gone through as part of getting a case to trial".[22] Parties might engage in mediations unwillingly for the purpose of avoiding adverse cost consequences, hence they only aim at showing a minimum level of participation to the Court. Such attitude shows a complete lack of commitment towards resolving their respective disputes through mediation. The Code of Conduct of the Hong Kong Bar Association states that "… if mediation is inappropriate in any given case, Counsel should not advise the client "to go through the motion" without making a genuine attempt to settle the dispute. It is unethical and unprofessional knowingly to participate in a mediation for the purpose of going through the motions, or so as to enable a representation to be made to the Court that mediation has been attempted".[23]

19. This is an inevitable flaw in the mediation regime under Practice Direction 31. Afterall, the success of mediation depends on the parties' willingness and commitment to settle their disputes amicably and not through the court mandated procedures. The regime can be improved, if judges start to probe the reasons behind why mediation was not successful and if the reasons given are inadequate to justify a departure from using mediation to resolve one's dispute, the judge may compel one to attempt mediation again. This will send a strong signal to disputants that they will have to go that extra mile to resolve their respective disputes and not simply pay lip service to the process.

III Case Settlement Conference

20. In line with the objective of facilitating the settlement of disputes under Order 1A Rule 1 of the Rules of the District Court Cap.336H, the District Court commenced a pilot scheme in 2018 to "introduce the idea of assisted settlement into the case management process to further promote the use of alternative dispute resolution ("ADR") in civil litigation and to instill among litigants as well as their legal representatives a culture of exploring settlement".[24] As the settlement

[22] Allan Leung and Douglas Clark, *Civil Litigation in Hong Kong* (5th ed., Sweet & Maxwell 2017) at §9.084.

[23] Hong Kong Bar Association, *the Code of Conduct of the Bar of the Hong Kong Special Administrative Region* at §10.27 Footnote 28.

[24] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §§1 and 2.

rate was high, the pilot scheme has been extended and is now called the Case Settlement Conference (hereinafter known as "*CSC*").[25]

21. The Court may fix a CSC at any stage of the proceedings, but parties should seek directions at the stage of Case Management Summons or consent summons.[26] The Court will take into account all relevant circumstances in deciding whether a CSC should be held, such as the information provided in the Timetabling Questionnaire in accordance with Practice Direction 5.2, which includes parties' attempt in mediation.[27] The Court may consider a case not suitable for CSC where parties produce a mediation report showing that they have attended a mediation previously which lasted a reasonable duration, and solicitors confirm that the parties are "*entrenched in their positions with no reasonable prospect to settle*".[28]

22. Not later than 7 days before the CSC, one of the parties have to lodge and serve a paginated CSC bundle, providing (i) a one-page summary of each party's case; (ii) a list of issues; (iii) copies of key documents; (iv) a statement of the parties' latest offer and counter-offer; and (v) a copy of the mediation report (if any).[29] At the same time, parties should lodge and exchange a statement of costs in the format in Appendix A of Practice Direction 14.3 to provide information on their costs incurred up to the CSC and their estimated costs up to and including the trial.[30]

23. The typical directions of the Court would direct the following persons to attend the CSC: (i) every party who is a natural person, or where a party is a corporation, a representative authorized to settle the case; and (ii) the legal representatives of the parties.[31]

24. A master sitting in chambers (not open to the public) will conduct the CSC on a without prejudice basis by reviewing and evaluating the process of any without prejudice negotiation and mediation between the parties, addressing parties directly, narrowing down the issues, conducting cost-benefit analysis and

[25] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §§3 and 4; Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 7.

[26] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §6.

[27] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §7 and Appendix 3 §5; see Practice Direction 5.2 at Appendix A.

[28] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §7.

[29] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §§20 and 21 and Appendix 2.

[30] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §24 and Appendix 2; see Practice Direction 14.3 at Appendix A.

[31] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §25 and Appendix 2.

exploring settlement options with the parties.[32] The CSC master will not deal with contested case management issues nor interlocutory applications, and will not have any further involvement in the case if the case is not settled after the CSC. [33] The CSC master will not hold private sessions to discuss the case with a party in the absence of the other party.[34]

25. CSCs provide an opportunity for the parties to have a "*face-to-face dialogue to discuss their case*".[35] Legal representatives are expected to support and advise the parties with a collaborative mindset, but not to advocate and argue their case at a CSC, as the master will not adjudicate on the dispute.[36] Non-compliance with the directions for preparation of CSC and unreasonable conduct at the CSC may have cost consequences. [37]

26. In 2023, the CSC pilot scheme added the option of having a mediator participate in a CSC, which is known as Mediator-assisted Case Settlement Conference (hereinafter known as "*MCSC*").[38] A MCSC should only be held after the parties have undergone a mediation session.[39]

27. In addition to the previously stated procedures, the preamble of the consent summons for a MCSC should include the identity of the mediator, the details of the previous mediation and the parties' agreement that the Court may discuss with the mediator in the absence of the parties prior to and during the MCSC.[40] The consent summons should also provide for the lodgement of a mediator's note, which should contain (i) the common grounds agreed by the parties; (ii) the remaining issues in dispute; and (iii) the concerns and latest proposal of each party in relation to the disputed issues.[41]

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[32] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §§9, 27 and 28 and Appendix 3 §§7 and 8; Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 7.

[33] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §§28 and 29.

[34] Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 7.

[35] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at Appendix 3 §4.

[36] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §26 and Appendix 3 §11.

[37] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §31.

[38] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §4; Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 7.

[39] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §14.

[40] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §15.

[41] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §16.

28. The MCSC hearing will be listed before a judge sitting in chambers (not open to the public) instead of a master.[42] The judge may adjourn the hearing at any stage to allow the parties to continue with the mediation at the facilities inside the court building, and the parties can go back to the judge with the mediator to seek the assistance of the Court.[43]

29. In my view, CSC and MCSC are hybrid procedures of litigation and mediation. On one hand, like a mediator, the CSC master or the MCSC judge facilitates settlement by without prejudice discussions with the parties. Parties may voice out their stance more freely than in trial. On the other hand, the master or judge only conducts the CSC or MCSC hearing in the presence of both parties and does not participate in the private sessions with the parties separately. CSC is directed by the Court in an order, hence attendance is compulsory, no matter whether the parties are willing to discuss further. Mediators normally would persuade parties to take a middle ground without commenting on the law, but masters or judges might comment on the weaknesses of all parties' cases.

30. The new MCSC scheme combines the advantages of conventional mediation and CSC. Parties can now share confidential matters/information with the mediator in individual sessions without fear of the information being disclosed to the other party, while at the same time, the MCSC judge can make authoritative comments to encourage parties to settle.

IV Financial Dispute Resolution

31. The Financial Dispute Resolution (hereinafter known as "*FDR*") Pilot Scheme provided in Practice Direction 15.11 applies to most ancillary relief applications in family cases, except where parties apply for nominal maintenance or have reached an agreement on ancillary relief.[44] The FDR procedure consist of three phases - the First Appointment, the FDR hearing and trial.[45] It aims to provide the parties with an opportunity to explore all possibilities to settle their disputes in relation to ancillary relief and to avoid greater expense and the uncertainty of what a trial may endure.[46]

32. Not later than 7 days before the FDR hearing, the applicant for ancillary relief, who is usually the Petitioner, should deliver to the Court a paginated FDR

[42] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §17.

[43] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §19; Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at pages 6 and 7.

[44] Practice Direction 15.11 at §1.

[45] Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §§7.027 to 7.030.

[46] Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §§7.072 and 7.080.

bundle containing relevant documents and all offers, proposals and responses made by a party, whether they are made orally, in open correspondence or correspondence without prejudice save as to costs.[47] On the last working day before the FDR hearing, parties exchange with each other and deliver to court a written estimate of costs incurred up to the hearing.[48]

33. Although not specified in the Practice Direction, it is good practice for parties to arrive at court at least 30 minutes early to conduct settlement negotiations in order to narrow down the issues before the FDR hearing.[49]

34. Paragraph 9 of Practice Direction 15.11 stipulates that "*Both parties shall personally attend every hearing unless the court otherwise orders*." Where legal representatives attend the FDR hearing, they are required to have full knowledge of the case.[50]

35. During the FDR hearing, parties should be prepared to address the Court the key elements of their case and their reasons for the proposed settlement terms, then the judge acts as a facilitator to point out matters of concern, remind parties of the risks and costs of litigation if the case goes to trial, and encourage parties to make compromises.[51] The judge will not deliver a ruling on any of the disputed issues, but he or she may express the Court's concern to a party's position on a particular issue especially when the stance is unreasonable, so as to facilitate settlement negotiations.[52]

36. The nature of FDR hearings is less adversarial.[53] There are usually short adjournments to allow parties to continue with their negotiations outside the courtroom, when an impasse arises, parties may return to the courtroom and invite the FDR judge to give indications as to how a trial judge may rule on the specific issue.[54]

37. FDR hearings are without prejudice, and evidence of anything said during the FDR hearing is not admissible in evidence in any subsequent hearings if the FDR is unsuccessful. [55] The FDR judge will have no further involvement in the case.[56]

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47 Practice Direction 15.11 at §8(d) and (e); Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §7.068.
48 Practice Direction 15.11 at §10.
49 Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §7.071.
50 Practice Direction 15.11 at Explanatory Note §4.
51 Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §7.073.
52 Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §7.073.
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54 Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §7.078.
55 Practice Direction 15.11 at §8(c); Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §7.086.
56 Practice Direction 15.11 at §8(b); Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §7.086.

38. In *LLC v LMWA*,[57] the Court of Appeal made the following observations in paragraph 68 of the judgment:

> 68. The husband and the wife had previously attempted mediation without success. At the hearing, this Court suggested that the effectiveness of the process could be enhanced if a FDR can be held with the assistance of a mediator. There can be matters on which a FDR Judge can give useful views and steer the parties to explore at greater length with a mediator. With such steering, a mediator can work more effectively with the parties separately in a way which a FDR Judge cannot. The mediator can also refer some issues which divided the parties to the FDR Judge for an authoritative opinion. With synergy between the FDR Judge and the mediator, it is also more likely in cases where parties reach agreement on some but not all the issues, a more cost-effective way to resolve the outstanding issues could be worked out.

39. LLC v LMWA gave rise to the mediator-assisted Financial Dispute Resolution (hereinafter known as "*MFDR*"), the first MFDR took place in October 2019 which resulted in full settlement agreement. [58] Up to October 2022, 22 MFDRs had taken place with a settlement rate of 89%. [59]

V Children's Dispute Resolution

40. The Children's Dispute Resolution (hereinafter known as "*CDR*") Pilot Scheme was introduced in 2012, and was later adopted as the standard practice, with the intention to "ensure that whilst the best interests of children remains the court's paramount concern, that lasting agreements concerning children are obtained quickly and in a less adversarial atmosphere"[60] Similar to the FDR procedure, the CDR procedure aims to narrow down issues, save costs and encourage parties to consider alternative dispute resolution.[61] The CDR procedure also consists of 3 phases - the Children's Appointment, the CDR hearing and trial.[62]

41. The CDR hearing is similar to the FDR hearing in a number of ways. Parties should prepare a CDR hearing bundle consisting of all relevant documents

[57] [2019] 2 HKLRD 529.

[58] Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 6.

[59] Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 6.

[60] Practice Direction 15.13 at §§1 to 3. On mediation in the Brazilian schools see: FARIAS, Bianca O. Mediação de conflitos em ambientes educacionais: um horizonte com novas perspectivas. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 2, nº 3, 2020, pp. 157-194.

[61] Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §11.014.

[62] See Practice Direction 15.13 at §§6 to 25.

relating to the children's issues, and should exchange with each other and deliver to the court a cost estimate. [63] The judge will act as a conciliator and all parties should attend the CDR hearing, so that the judge can speak to the parties directly in a less formal setting than in a conventional hearing, in the hope of promoting free and spontaneous discussions.[64] The judge may give indications on his or her possible ruling on issues in dispute if he or she were the trial judge, but will not make any determination of disputes.[65]

42. The same judge will conduct both the CDR hearing and the FDR hearing, but at separate occasions. [66] In practice, the CDR hearing will usually be heard before the FDR hearing, because the Court can only ascertain the appropriate financial settlement for the parties after determining the children's living and care arrangements, which will have a financial impact on the parties' needs and expenses.[67]

43. In addition to the bundle, parties are required to file and exchange their detailed Statement of Proposal about the future arrangements for the children.[68] If directed by the Court previously at the Children's Appointment hearing, third parties such as the Social Welfare Officer and child experts will also be required to attend the CDR hearing.[69]

44. However, there is a key difference between the CDR hearing and the FDR hearing. A CDR hearing is not privileged but on an open basis, hence anything said and any admission made orally or in writing in the CDR hearing is admissible as evidence in trial.[70] If the CDR hearing is unsuccessful, the same judge may hear the child related matter in trial.[71]

45. As CDR hearings are not conducted on a without prejudice basis, there are concerns whether a mediator-assisted Children's Dispute Resolution (hereinafter known as "*MCDR*") is possible.[72] Permanent Judge Johnson Lam opined that MCDR "would only be viable if the relevant practice direction is amended to provide for

63 Practice Direction 15.13 at §20; Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §11.045.
64 Practice Direction 15.13 at §15; Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §§11.022 and 11.023.
65 Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §11.022.
66 Practice Direction 15.13 at §16.
67 Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §11.044.
68 Practice Direction 15.13 at §13.
69 Practice Direction 15.13 at §15; Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §11.023.
70 Practice Direction 15.13 at §§16 and 17; Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §11.021.
71 Practice Direction 15.13 at §16.
72 Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 6.

the parties consenting to such process being conducted on a without prejudice basis".[73]

46. I understand that there are debates on whether CDR hearings should be held on without prejudice basis.[74] In my view, the reason why CDR hearings are not privileged is that the Court regards the best interests of children as the paramount consideration. The judge will have continuous supervision over the children's disputes and parents cannot change their stance in relation to the children in the CDR hearing and trial. If MCDR hearings are without prejudice, they may pose a challenge on how the Court can evaluate the best interests of children continuously. The practice of MCDR requires more discussions and remains to be explored.

VI Proposed Duty Mediator Scheme

47. The Judiciary is considering the expansion of court-annexed mediation service by setting up a pilot scheme of duty mediator for simple family disputes in the Family Court.[75] The Court will refer suitable cases to mediation conducted inside the court building by a duty mediator who will be remunerated at a fixed hourly fee.[76]

48. Based on the name of the scheme, I anticipate that junior members of the legal profession would be given more opportunities to act as a mediator, just as they represent parties in criminal cases under the Duty Lawyer Scheme. More experience in mediation would foster a stronger body of mediators in Hong Kong and facilitate the development of mediation, which is beneficial to the public as a whole.

VII Conclusion

49. The Judiciary of Hong Kong has made great strides in promoting alternative dispute resolution. It has set up various offices to facilitate the use of mediation, implemented schemes to encourage parties to engage in mediations to settle their disputes, and published guidance notes and practice directions to maintain

[73] Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 6.

[74] Johnson Lam PJ, Speech on "Mediator-assisted Financial Dispute Resolution/ Child Dispute Resolution ("M-FDR/CDR") - Concerns, Feasibility and Benefits" on 27 July 2022 at pages 8 and 9.

[75] Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 4. On mediation in family law in Brazil see: BRAGANÇA, Fernanda; Netto, Fernando G. M. O protocolo familiar e a mediação: instrumentos de prevenção de conflitos nas empresas familiares. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 2, nº 3, 2020, pp. 217-230.

[76] Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 5.

consistency. The Judiciary has been keen to explore creative ways to facilitate settlement of disputes in a fair, expeditious and cost-effective manner.

50. While this article covered general mediation in civil cases, CSC and MCSC, FDR and MFDR, CDR and CFDR, and the proposed duty mediator scheme for family cases, it has not covered every single scheme proposed and implemented by the Judiciary.

51. As discussed above, each scheme has its unique features, ranging from conventional mediation to court procedure with mediation elements. General civil mediations, family mediations and the proposed duty mediator schemes are essentially private mediations encouraged by the Court, as parties unreasonably refusing to engage in mediations may face cost sanctions.

52. CSC and FDR are similar to conventional mediations, but parties are compelled to participate. The master or judge is more authoritative on the merits of legal issues than a mediator, but it is less able to give suggestions on negotiation strategies and address parties' non-legal concerns.[77] CSC and FDR are without prejudice in nature.

53. CDR is the least akin to conventional mediations, as there are no individual sessions, and the discussions are not privileged. The judge conducts CDR in a less adversarial manner and communicates with the parties directly, to achieve a consensus.

54. MCSC and MFDR are innovative procedures combining mediation and court proceedings. Parties benefit from the advantages of having a mediator, such as being able to have individual sessions to preserve confidential information from the other party and being able to obtain advice on negotiation strategies. At the same time, the master or judge can steer parties back on track when parties insist on meritless arguments. It remains to be seen how MCDR will be developed and whether CDR will be conducted in a without prejudice basis in the future.

55. With the continuous support from the Judiciary, the legal profession and the general public, I am confident that the diversified usage of mediation will continue to benefit all stakeholders going forward thus creating a harmonious society that we can all be proud of.

[77] Johnson Lam PJ, Speech on "Mediator-assisted Financial Dispute Resolution/ Child Dispute Resolution ("M-FDR/CDR") - Concerns, Feasibility and Benefits" on 27 July 2022 at page 2.

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Mediation in China – Past, Present and Future

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Abstract: Mediation, as an alternative dispute resolution method, is becoming increasingly popular across many jurisdictions. Asia is no exception. After its signing of the Singapore Convention, mediation in China has taken another step forward. This article will start from the concept of mediation in China, going through the proceedings and enforcement mechanism. It will also investigate the current development as well as the aspects that need to be further improved. Additionally, this article will spend a few lines on the prevalence of international mediation, the foreseeable developments in mediation in future China when introducing China's level of receptivity to the Singapore Convention and the existing hurdles to its ratification.

Introduction

Mediation, as an alternative dispute resolution method, is becoming increasingly popular across many jurisdictions.[1] Asia is no exception. In June 2018, the 51st session of the United Nations Commission on International Trade

[1] On multiparty mediation in Brazil see: FERREIRA; SEVERO, 2021. See also: FARIAS, 2020. See: AWAD, 2020. On mediation in Palestine see: SHAAT, 2020.

Law (UNCITRAL) witnessed the adoption of the "Convention on International Settlement Agreements Resulting from Mediation" (also known as the "Singapore Convention"). The Singapore Convention[2] marks a new chapter for the resolution of international commercial disputes and will exert significant and far-reaching historical significance on the settlement of international commercial disputes.

China signed the Singapore Convention on 7 August 2019. The signing of the Convention provides a valuable opportunity for commercial mediation to thrive and to become an important path among the diversified dispute resolution routes in China. China is also taking this opportunity to accelerate the process of independent legislation on commercial mediation to promote the coordinated development of China's commercial mediation system with the international community.

I Chinese Mediation in Context

A The Fundamentals: Concept and Law

In Ancient China, mediation, as a dispute resolution method, was praised as "eastern experience" and was regarded as a reflection of traditional wisdom. In its long history, mediation has been used to resolve conflicts in various scenarios. It has been exceptionally handy when the conflict is about family matters[3] or neighbourhood disputes.

Mediation in China has taken on new shape in a modernised society. There are currently four categories of mediation that are frequently invoked in China - judicial mediation, arbitration institution mediation, people's mediation and commercial mediation. For judicial, arbitration institution and people's mediation, the legal basis and related rules are respectively scattered in laws and normative documents such as the *Civil Procedure Law*, the *Arbitration Law*, and the *People's Mediation Law*. For commercial mediation, China has yet to establish specialized legislative instruments. This may explain why the current mediation system on the face mainly involves people's mediation and mediation conducted as an ancillary process during litigation and arbitration, laying less emphasis on commercial mediation as an independent procedure. Nevertheless, with the Singapore Convention coming into play, commercial mediation is gaining greater social energy and form an indispensable part of the Chinese mediation practice.

Judicial mediation, also known as court mediation, refers to the activity of resolving civil disputes through voluntary negotiation between the two parties under the guidance of the judges of the court. The filing of a lawsuit is a prerequisite

[2] See COMETTI; MOSCHEN, 2022, p. 37-57. See also: MASON, 2021.
[3] On mediation in family Law in Brazil see: BRAGANÇA, 2020.

for judicial mediation because it is an ancillary procedure during the litigation process. Judicial mediation is mainly governed by relevant provisions in the *Civil Procedure Law*. Article 100 of the *Civil Procedure Law* stipulates that "when a settlement agreement is reached by mediation, the people's court shall prepare a consent judgment. A consent judgment shall state the claims, facts of the case and results of mediation. The judges and court clerk shall affix their signatures and the people's court shall affix its seal to a consent judgment, which shall be served on both sides. Once a consent judgment is signed by both sides, it shall become legally binding."

Arbitration institution mediation refers to mediation conducted by the arbitration tribunal during the arbitration process based on the parties' autonomy. The commencement of arbitration is a prerequisite for arbitration institution mediation because it is an ancillary procedure attached to the arbitration process. Arbitration institution mediation is mainly governed by relevant provisions in the *Arbitration Law*. Article 51 of the *Arbitration Law* stipulates that "the arbitration tribunal may carry out mediation prior to giving an arbitration award. The arbitration tribunal shall conduct mediation if both parties voluntarily seek mediation. If mediation is unsuccessful, an arbitration award shall be made promptly. If mediation leads to a settlement agreement, the arbitration tribunal shall make a written mediation statement or make an arbitration award in accordance with the result of the settlement agreement. A written mediation statement and an arbitration award shall have equal legal effect."

Another type of mediation with unique Chinese characteristics is people's mediation. People's mediation refers to the activities of the people's mediation commission, which uses persuasion and guidance to encourage the parties to reach a voluntary settlement agreement. It is mainly provided in the *People's Mediation Law*. Considering that the parties are not charged any fees by conducting people's mediation,[4] and the mediators are usually staffed by administrative organs, people's mediation has a public interest and administrative character.

As for commercial mediation, there is no authoritative definition in the Chinese legal context. According to the *Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation* formulated by UNCITRAL, Article 1 stipulates that commercial mediation means a process whereby parties request a third person or persons 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.

[4] Article 4 of *The People's Mediation Law* stipulates that "people's mediation commissions may not charge fees for the mediation of disputes among the people".

It is evident that commercial mediation is significantly different from the three types of mediation mentioned above. *First*, judicial mediation and arbitration institution mediation both require the commencement of litigation or arbitration proceedings, but commercial mediation is an independent mediation process, and the mediator is not a judge or arbitrator. *Secondly*, commercial mediation is market-oriented and operates on commercial logic, while people's mediation is social-oriented and is endowed with the responsibility to contribute to public interest and to maintain social stability.

After China signed the Singapore Convention, the number of commercial mediation institutions has risen. More institutions and enterprises have attached importance to the role of commercial mediation in the settlement of commercial disputes. In order to further promote the sound development of the commercial mediation industry and to study the interface between the Singapore Convention and the Chinese legal system, the China Council for the Promotion of International Trade (CCPIT) has commissioned the Institute of International Law of the Chinese Academy of Social Sciences to conduct a "Research on Commercial Mediation Legislation" project. Research reports have been consistently produced on Chinese commercial mediation legislation. These projects will definitely contribute to the development of the Chinese commercial mediation system and forthcoming legislation.

B The Procedure: How Mediation is Conducted in China

In Chinese practice, judicial mediation and arbitration institution mediation are conducted by judges and arbitrators, who would usually be the same judge and arbitrator hearing the matter and rendering a final judgment or arbitral award if the mediation does not result in a settlement. When conducting people's mediation, the mediators propose solutions during and after parties' negotiations on the same footing and assist them to reach a settlement agreement on their own.

As for commercial mediation, in absence of existing legislation, the mediation procedure is prescribed by each commercial mediation centre. In accordance with the mediation rules, the common model is that the parties submit a mediation application and other materials to the mediation centre and pay the corresponding mediation fee. The parties may then choose a mediator from the mediation centre's roster of mediators (or from outside the roster), who may mediate the dispute in any manner they deem appropriate to facilitate a settlement between the parties. The mediation proceeding is conducted at the physical venue of the mediation

centre. If the parties agree otherwise, or if the mediator deems it necessary, the mediation may take place at another location.[5]

C The Enforcement Mechanism

In the current Chinese legal system, a domestic settlement agreement resulting from mediation must be transformed into an enforceable judgment through judicial procedures in order to be enforced. Article 201 of the *Civil Procedure Law* stipulates that "to apply for the judicial confirmation of a mediation agreement reached under the mediation of a legally established mediation organization in accordance with the law, both parties to the mediation agreement shall, within 30 days from the date when the mediation agreement takes effect, jointly file an application with the following people's court..."

Therefore, before getting transformed into an enforceable judgment through judicial procedures, domestic settlement agreements only have contractual binding force and cannot be directly enforced by the court. The Supreme People's Court clarified its "civil contract" nature of settlement agreements in Article 20 of the *Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation*, which stipulates that "for an agreement of a nature of a civil contract reached through mediation by an administrative organ, a people's mediation organization, a commercial mediation organization, an industrial mediation organization or any other organization with the mediation function, the parties may apply to the people's court having jurisdiction for confirming the validity of such an agreement after the mediation organization and mediators affixing their signatures or seals to it." Therefore, in China, domestic settlement agreements only have the contractual binding force and can only obtain enforceability by being converted into court settlement agreements, arbitration settlement agreements or arbitration awards, or by applying for judicial confirmation from the court. Article 358 of the *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China* stipulates that "Where a settlement agreement is found to have the following characteristics after examination, the people's court shall make a ruling rejecting the application: (1) violation of mandatory legal provisions; (2) damaging to national interests, public interests or legal rights and interests of others; (3) violation of public order and good customs; (4) violation of

[5] See: China Council for the Promotion of International Trade/China International Chamber of Commerce Mediation Center Mediation Rules (2012 Edition); Mediation Rules of International Commercial Mediation Center for the Belt & Road (2021 Edition); Beijing Arbitration Commission Mediation Center Mediation Rules (2011 Edition).

the principle of voluntariness; (5) unclear in content; (6) other factors that make it not possible for it to be judicially confirmed." Therefore, the judicial confirmation process for settlement agreements is led and promoted by a presiding judge, who bears the obligation to conduct a full-fledged review.

II The Development of Mediation in China

A The Mediator

The demand for trained and experienced mediators in China is growing. However, the qualifications of mediators and the accreditation system can vary in different regions. There is currently no unified standard for mediator training and accreditation. Qualified mediators are also unevenly dispersed nationwide.

For commercial mediation institutions, there are both full-time and part-time mediators working in the institutions. They are mainly appointed by mediation organizations, invited as special guests, or qualified through training and examination organized by these institutions. In the absence of a unified law for commercial mediation, each institution has developed its own qualifications for mediators.

For example, the CCPIT Mediation Centre requires its mediators to have a university degree or above, a certain level of legal and specialized knowledge, be under 70 years old and in good health, and the requirements can be relaxed for those with rich experience. Additionally, the centre has different professional background requirements for mediators in different industries and professional fields. The Shanghai Commercial Mediation Centre (SCMC) has similar basic requirements for mediator education and age as the CCPIT Mediation Centre but requires its mediators to be proficient in one or more foreign languages and to possess higher professional background requirements. The CCPIT Mediation Centre also cooperates with the Effective Dispute Resolution Centre of UK to train and foster specialized commercial mediators for international commercial dispute resolution. The Belt and Road International Commercial Mediation Centre has also trained and fostered specialized mediators who are familiar with the commercial culture and environment of countries along the Belt and Road, have an adversarial mindset, and possess international commercial negotiation skills to handle relevant disputes. In Beijing Zhongguancun Entrepreneur Commercial Mediation Centre, well-known entrepreneurs serve as mediators to leverage their industry strengths.

Some institutions require more than 5 years of work experience for retired judges, lawyers, or other legal professionals, while others require more than 10 years. Some institutions have also formulated detailed rules for behaviour

assessment, such as conflicts of interest, inability to ensure sufficient time and energy to handle cases, and unfamiliarity with the fields involved in the case. If the above situations exist, mediators should proactively decline the parties' selection or the mediation centre's appointment. It is arguable whether uniformity is desirable, taking into account the existing situation in China. As a matter of fact, with the scale of China's population in mind, a simplified and unified standard for all mediators dealing with disputes from all walks of life may be an underestimation of the complexity in Chinese legal reality. It may be worth exploring further the current mode of having institutions implementing different standards to meet the need of various industries.

Meanwhile, many institutions do not have clear rules for follow-up training or total training time. This is an area that warrants improvement in China. The training topics are incomprehensive as well. Even if there are regulations on mediator education and training, they mainly focus on mediation rules and procedures, and are vastly different from the knowledge and abilities possessed by international commercial mediators, such as economic and technical knowledge, commercial sense and cross-border communication and coordination skills. To conclude, the current situation of commercial mediators in China can be summarized as follows: the number of professionally trained mediators are relatively limited, and the qualifications of commercial mediators vary.

Upon deeper analysis, one of the reasons for the current state of affairs is that existing legislation does not distinguish between the qualifications required for a commercial mediator and a people's mediator. The qualifications required for a people's mediator under the current *People's Mediation Law* are very general and subjective. Article 14 of the *People's Mediation Law* stipulates that "people's mediators must be adult citizens who are impartial, decent and dedicated to the people's mediation work, and have a certain level of education, policy understanding and legal knowledge. The administrative departments of justice of the county people's governments shall provide vocational trainings for the people's mediators on a regular basis".

Article 15 of the *People's Mediation Law* goes on to stipulate that "where a people's mediator commits any of a list of acts in the course of mediation, the people's mediation commission which he belongs to shall criticize and educate him and order him to correct himself. If the circumstances are serious, the entity which recommended or appointed him shall dismiss him from the position or employment. The list includes (i) showing favoritism to a party concerned; (ii) insulting a party concerned; (iii) asking for or accepting money or goods or seeking for other illicit benefits; or (iv) divulging the individual privacy or trade secret of a party concerned". Article 9 of *the People's Mediation Law* stipulates that "the members

of the people's mediation commission of a villagers' committee or neighbourhood committee shall be selected at the villagers' meeting, the villagers' representative meeting or the residents' meeting. The people's mediation commission of an enterprise or a public institution shall be selected by the employees' assembly, the employees' representative meeting or the labour union".

Opinions of the Commission for Political and Legal Affairs of the CPC Central Committee, the Supreme People's Court, the Ministry of Justice, and Other Departments on Strengthening the Building of the People's Mediator Team further stipulates that: "People's mediators shall be adult citizens who are impartial and honest, upright, self-disciplined, enthusiastic about people's mediation work and possess a certain knowledge of culture, policies, and law. The mediators of township (sub-district) people's mediation commissions shall generally possess high school educational qualifications or above, and mediators of industry and professional people's mediation commissions shall generally have a junior college educational qualification or above, the knowledge of the relevant industries, expertise, or work experience."

This reveals a significant discrepancy between the training and qualifications of people's mediators and the requirements for commercial mediators. For instance, the academic requirement for professional people's mediators is only a university degree or above. However, commercial mediation needs to use commercial knowledge and experience to mediate disputes between parties. The highly subjective standards for people's mediators are clearly too low and do not match the nature and needs of commercial mediation. Based on the current situation in China, while ensuring adequate theoretical knowledge, commercial experience, mediation skills, completion of mediation training, and sufficient time to engage in mediation work, the commercial mediator team in China will still mainly consist of renowned scholars, retired judges, entrepreneurs, industry experts, and lawyers for a period of time.

B Mediation Institutions

There are currently several commercial mediation institutions or centres in China, including state-run or government-sponsored mediation institutions, non-enterprise community mediation centres or civil social groups registered with the Civil Affairs Bureau, and private profit-making enterprises such as partnership enterprises, sole proprietorship enterprises, and companies that are piloting commercial mediation centres in different regions. These centres provide a physical infrastructure conducive to the conduct of mediation, with dedicated rooms and facilities for mediation sessions.

For example, there are the CCPIT Mediation Centre, The Shanghai Commercial Mediation Centre (SCMC) and The Belt and Road International Commercial Mediation Centre. In Beijing's Zhongguancun Entrepreneur Commercial Mediation Centre, well-known entrepreneurs serve as mediators to leverage their industry knowledge. In coastal areas where the shipping industry has developed, there are also maritime mediation centres, such as the Shanghai Maritime Mediation Centre and the Jiangsu Maritime Mediation Centre. In 2012, the CCPIT also established the country's first e-commerce mediation centre. Although these organizations are all engaged in commercial mediation, the overall development of commercial mediation organizations has been slow, lacking institutionalization and standardization.

Apart from domestic institutions, China values input by international organisations as well. The Singapore International Mediation Centre (SIMC) is no doubt the pioneer among these institutions. SIMC is working very closely with its counterparts in China to promote mediation. In June 2018, a Specialist Mediators' workshop was jointly organized by SIMC and CCPIT in Shanghai. It was the first of many joint training programmes focused on equipping mediators in Singapore and China with the skills to manage disputes in relation to the Belt and Road Initiative (BRI). Recently, in late 2022, SIMC joined the CCPIT Hangzhou's China (Hangzhou) Intellectual Property and International Commercial Mediation Cloud Platform as the first foreign international mediation organisation to be offered to the Hangzhou platform's users. What's more, the SIMC-SCIA Med-Arb Protocol (signed 25 November 2022) applies to all disputes submitted to SIMC for mediation, whether directly by parties, or via the Shenzhen Court of International Arbitration (SCIA) through commencement of arbitration proceedings. Resulting mediated settlement agreements can be registered as a consent arbitral award by SCIA and enforceable in China and potentially under the New York Convention in 170 jurisdictions. It represents an unprecedented level of formalised cooperation between SIMC and a foreign arbitral institution to offer a "mixed mode" mechanism, in line with global trends where mediation and arbitration are not mutually exclusive, but instead used in complementary ways to achieve a satisfactory outcome.

C Prevalence of Mediation in China

(1) Mediation as a Mandatory Prelude to Legal Proceedings

As a matter of principle, mediation is neither a court mandated process nor a mandatory preclude to legal proceedings in China. According to the *Civil Procedure Law*, in civil cases, the court may suggest that the parties attempt mediation

before proceeding to trial. If both parties agree, the court will refer the case to a mediation centre.

However, according to the latest legislative trend, in some regions in China, for certain types of disputes, such as labour disputes and traffic disputes, mediation would become a mandatory prelude to legal proceedings. In these cases, the parties are required to attempt mediation before they can file a lawsuit. For example, in 2022, Shanghai High People's Court and Shanghai Judicial Bureau have issued *Several Opinions on Deepening the Exploration of Implementing Mediation Procedures as Prelude to Legal Proceedings*, which clearly state that from July 1, 2022, mediation procedures will be implemented before the litigation process for disputes involving family, neighbouring relations, small debts, labour disputes, consumer rights, and traffic accidents. Pre-litigation mediation will be explored and implemented throughout the city. For disputes that meet the conditions for pre-litigation mediation, the court may itself arrange pre-litigation mediation on its own.

These opinions point out that the scope of application of pre-litigation mediation procedure should be accurately limited to the types of cases that are applicable. For the types of cases applicable for pre-litigation mediation procedure, the parties should be promptly informed. Besides, the mandatory mediation prelude to legal proceedings does not restrict the parties' rights to apply for interim measures to the court. Before the interim measures (*e.g.*, interim measures for *status quo*) are in place, the judge should be reminded to carefully decide whether to conduct pre-litigation mediation. Further, if pre-litigation mediation is successful, in order to ensure the effectiveness and enforcement of the settlement agreement, both parties can jointly apply to the people's court for judicial confirmation. If one party refuses to perform or does not fully perform the settlement agreement, the other party can apply to the people's court for enforcement. Fourthly, during the mediation stage, some actions of the parties can be effective till the litigation stage. If the parties fail to reach a settlement agreement when the mediation proceeding is concluded, the mediator, with the consent of all parties, can record in writing the undisputed facts during the mediation process and have the parties sign and confirm it. In the litigation proceeding, the parties generally do not need to provide evidence for undisputed facts confirmed during the mediation process. It is believed that such confirmation in mediation procedure can effectively advance the progress of the litigation procedure.

(2) Mediation in China as a Means of Dispute Resolution

Although mediation as a mandatory process is limited within a narrow scope, mediation as an alternative dispute resolution method has seen a rapid growth in the past several years and has become more prevalent.

People's mediation in China is mediation on a large scale. According to the 2021 annual report of the Supreme People's Court, by the end of 2021, there were 63,000 mediation organizations and 260,000 mediators registered on the online platform of the people's court. The number of disputes mediated online by courts nationwide exceeded 10 million in 2021, and the number of successful cases mediated through social forces before litigation reached 6.107 million.

Compared to people's mediation, the number of commercial mediation organizations is limited, but their development is steadily increasing. Commercial mediation organizations in China can generally be divided into three categories.

The first category is mediation organizations under chambers of commerce and industry associations. An example will be mediation centres established in the China International Chamber of Commerce – CCPIT as well as the mediation centres established in the national industrial and commercial contacts system. As of the end of 2021, there were 59 branch mediation centres established by the China International Chamber of Commerce –CCPIT in various provinces, cities, autonomous regions, and some important cities across the country, handling more than 2,000 mediation cases on average per year. There are 3,001 commercial mediation organizations under the national industrial and commercial contacts system, which have mediated various types of disputes since 2018, handling an average of 32,500 cases per year.

The second type are mediation centres established by commercial arbitration institutions in various regions, as well as temporary mediation organizations appointed by the arbitration institutions themselves and the arbitration tribunals during the arbitration process. For example, the Beijing Arbitration Commission/ Beijing International Arbitration Center (BAC) established the BAC Mediation Center on August 1, 2011, which handled 10 mediation cases involving investment finance, engineering construction and other fields in 2021, with a total dispute amount of up to 4.407 billion yuan. The Shenzhen Arbitration Commission/Shenzhen Court of International Arbitration (SCIA) established the SCIA Mediation Centre and the Shenzhen Securities and Futures Industry Dispute Mediation Centre, handling 1382 cases in the capital market and 1365 cases in exhibitions in 2021. The 270 arbitration institutions nationwide have vigorously carried out mediation work during the arbitration process, and have achieved a relatively high success rate through the mediations conducted by the arbitration tribunals during the arbitration process and the assistance of the arbitration institutions in mediation.

For example, in 2021, BAC concluded a total of 7,216 cases, of which 4,434 cases were concluded by award, accounting for 61.45%; 1,161 cases were concluded by mediation, accounting for 16.09% (a year-on-year increase of 41.41%) and 1,621 cases were concluded by withdrawal, accounting for 22.46%

(a year-on-year increase of 28.14%). In 2021, SCIA concluded a total of 7,438 cases, of which 5,512 cases were concluded by award, accounting for 74%; 562 cases were concluded by mediation, accounting for 7.6%; and 1,364 cases were concluded by withdrawal, accounting for 18.3%. The Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center) (referred to as SHIAC below) concluded a total of 1,473 cases in 2021, of which 1,095 cases were concluded by award, accounting for 74%, including 193 cases settled by a consent award, accounting for 18%; and 378 cases were concluded by withdrawal, accounting for 26%. As of the end of 2021, the Wuhan Arbitration Commission (WAC) had accepted a total of 221,005 arbitration cases, and the overall settlement rate of mediated cases in previous years was above 60%.

From the above statistical data, the withdrawal and mediation rates of the concluded arbitration cases by BAC, SCIA, SHIAC, and WAC have respectively reached 38.6%, 25%, 44%, and 60%. In addition to unsuccessful mediations, it is estimated that more than 50% of cases have gone through mediation. In 2021, the 270 arbitration institutions nationwide accepted a total of 415,889 arbitration cases, and the number of cases settled by mediation and settlement was 93,162, accounting for 35% of the total number of cases accepted.

The third type are mediation organizations established through cooperation of social forces, such as the International Commercial Dispute Prevention and Resolution Organization established in Beijing, the Belt and Road International Commercial Mediation Center, the Shanghai Economic and Trade Commercial Mediation Center, the China Commercial Mediation Development Cooperation Mechanism, the Guangdong-Hong Kong-Macao Arbitration and Mediation Alliance established in Shenzhen, etc. These mediation organizations are currently in the nascent stage of development.

On February 28, 2018, the people's court online mediation platform was officially launched, marking a further step in the implementation of diversified dispute resolution. Over the past three years, the number of mediation organizations, mediators, and the number of pre-litigation mediation cases have all increased significantly. The number of mediation organizations has increased nearly 25 times from 1,264 in 2018 to 32,937 in 2020. The number of mediators has increased nearly 11 times from 13,791 in 2018 to 165,333 in 2020. The number of civil cases successfully resolved through pre-litigation mediation has increased from 568,000 in 2018 to 4.24 million in 2020.

D The Integration of Mediation with Other Dispute Resolution Mechanism

China is vigorously promoting the diversified dispute resolution mechanisms of Mediation-Litigation Coordination and Mediation-Arbitration Coordination. The aim is to establish a platform incorporating all kinds of dispute resolution mechanisms thereby enhancing accessibility, flexibility and convenience to alternative dispute resolution methods.

The model of Mediation-Litigation Coordination is to connect litigation with administrative mediation, people's mediation, commercial mediation, industry mediation and other non-litigation dispute resolution methods. First, for a case that falls within the scope of civil actions accepted by the people's court within its jurisdiction, the people's court may, after receiving the written or oral complaint and before formally docketing the case, according to its functions or upon application of a party, appoint an administrative organ, a people's mediation organization, a commercial mediation organization, an industrial mediation organization or any other organization with the mediation function to conduct mediation. Secondly, subject to the consent of both parties or when the people's court deems necessary, the people's court may, after docketing a case, authorize an administrative organ, a people's mediation organization, a commercial mediation organization, an industrial mediation organization or any other organization with the mediation function to assist in the mediation of the civil case.

At present, the courts are gradually carrying out the practice of Mediation-Litigation Coordination through the establishment of the Mediation-Litigation Coordination Centre, which plays a positive role in the overall promotion of the diversified settlement of conflicts and disputes.

The Mediation-Arbitration Coordination refers to the combination of mediation and arbitration to achieve a composite dispute resolution method that complements the advantages of the two. In practice, a few arbitration institutions have cooperated with mediation centers. For example, Beijing International Arbitration Centre and the China Securities Investor Services Centre have signed the Framework Agreement on Cooperation between arbitration and mediation. Another example is the cooperation agreement between China International Economic and Trade Arbitration Commission and Beijing Retio Legal and Commercial Service Centre for the Belt and Road Initiative.

Through the arrangement of Mediation-Arbitration Coordination, if the parties have reached mediation before applying for arbitration, they can apply to the arbitration commission for filing a case and forming an arbitration tribunal based on the arbitration agreement, and the arbitration tribunal shall make a written conciliation statement or make an arbitration award in accordance with the result

of the settlement agreement. This is to achieve a seamless coordination of arbitration and mediation and conferring the settlement agreement enforceability.

III Signing the Singapore Convention: The Road Ahead

A The Singapore Convention: Opportunities and Obstacles

Signing the Singapore Convention is no doubt a great leap in the course of the development of mediation in China. In 2018, commissioned by the relevant departments of the Chinese government, researchers from the Institute of International Law of the Chinese Academy of Social Sciences conducted a relevant assessment of China's signing of the Singapore Convention and submitted an assessment report to the relevant departments. On the basis of the final report on the evaluation of the Singapore Convention, researchers from the Institute of International Law of the Chinese Academy of Social Sciences also completed the study on the ratification and implementation mechanism of the Singapore Convention, which systematically studied the Convention, its ratification and implementation mechanism in China, and put forward recommendations to promote the Singapore Convention in China from legislative, judicial and enforcement levels. It also put forward proposals to promote the implementation of the Singapore Convention in China in these aspects.

This section considers the current usage of international mediation in China, and the opportunities brought by the Singapore Convention. On the other side of the coin, there also exist hurdles in the current Chinese legal system to fully accommodate the Singapore Convention. As a last step, this section looks into potential future development in the field of mediation in China.

(1) International Mediations in China

As introduced above, there is no existing legal framework in China to enforce settlement agreements resulting from mediation by foreign institutions. Without such a mechanism in place, the incentive for domestic and international users to select mediation for international dispute resolution is substantially reduced.

After the introduction of the Singapore Convention, commercial mediation gradually gained publicity in China. Several waves of specialised mediation centres emerged within arbitration institutions and chambers of commerce. Still, the use of mediation at that time was still largely confined to domestic users. While recognizing the possibility of dispute resolution through international mediation, arbitration is still the mainstream of alternative dispute resolution. Mediation

is often a prelude to arbitration, but seldom a stand-alone mechanism to settle international disputes.

International mediation is still in its introductory phase in China. It is also expected that the use of international mediation will continue to grow after China's ratification of the Singapore Convention.

(2) Enforceability of Settlement Agreements

Paragraph 3, Article 2 "Definition" of the Singapore Convention defines "mediation" as follows: "'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." In the drafting process of the Convention, the Working Group also expressed the view that "mediation" should not be restricted to that carried out under the auspices of a mediation institution or be implying an "arranged or organized process". Accordingly, enforcement of settlement agreements resulting from both institutional and non-institutional mediation can be sought in accordance with the Singapore Convention.

However, as illustrated above, the legally-regulated mediation in China can be categorized as mediation affiliated with the courts, mediation affiliated with arbitration institutions, and mediation administered by commercial mediation institutions. Ad hoc mediation cannot fall into the scope, which renders uncertainty to its enforceability. Such mismatch may create extra difficulty if the parties are expecting certain enforceability that is beyond contractual binding force to be granted to the settlement agreement resulting from ad hoc mediation.

Further, according to Article 463 of the *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China and Article 18 of the Provisions of the Supreme People's Court on Several Issues Concerning the Judicial Enforcement of People's Courts (for Trial Implementation)*, an effective legal instrument requested by a party for enforcement by the people's court must have clear and definite stipulations on rights and obligations and the objects of claims as well. In the practice of separating trials and enforcement by China's courts, the enforcement division of the courts would quite often only enforce effective legal instruments which contain definite provisions on claims and debts. It is not uncommon for the courts to refuse to enforce conditional debts in effective legal instruments. The content of a commercial settlement agreement is arguably more flexible and elastic than a judgment or an award. Therefore, obligations subject to conditions, time limits and concurrent or advance performance by the other party are likely to be more prevalent in settlement agreements than

in judgments and awards. If a party relies on the Singapore Convention to seek direct enforcement of a settlement agreement, there are concerns that settlement agreements dealing with certain flexibility on its subject matters would not fully enjoy the current mandatory enforcement mechanism in China.

(3) Lack of Preservative Measures in the Course of Applying for Enforcement of Settlement Agreements

In China's long-term judicial practice, interim measures can only be granted by courts for domestic litigation and arbitration. As there is no specific provision on the preservation of property during the proceeding of recognizing and enforcing foreign arbitral awards in the New York Convention or relevant laws of China, regional courts hold different views when deciding on this type of application for interim measures. It is argued, among others, that property preservation requested by the parties during the judicial review of recognition and enforcement of foreign arbitral awards by the courts falls into the scope of international judicial assistance, and therefore should be considered based on international treaties China has concluded or joined, or reciprocal treatments between China and the country where the arbitration institution is located, if any.

The Singapore Convention also does not address the issue of preservation measures. Therefore, a similar dilemma may arise for Chinese users when applying for interim measures before submitting their application to enforce a settlement agreement. A potential way out might be for the courts to refer to the provisions on interim measures for preservation in domestic litigation and arbitration when the parties apply to enforce a settlement agreement. The Supreme People's Court may issue a new guidance document on this matter. This is not only in line with the principle of direct enforcement stipulated in Article 3.1 of the Singapore Convention, under which settlement agreements are presumed to be valid and enforceable, but also manifests China's pro-mediation stance and the equal treatment of mediation, litigation and arbitration.

B Next Steps

(1) Future Steps to Incorporate Singapore Convention into the Current Legal System

To better connect the Chinese legal community and Chinese users to the international stage, it is imperative that China takes steps to better accommodate the Singapore Convention into its current legal system.

First, giving direct enforceability to international mediation agreements is not only the minimum requirement that China should meet when joining the Convention, but it is also compatible with the demand for efficient resolution of disputes in international commercial activities. Convenient enforcement of mediation agreements is an important requirement for international commercial activities. In order to achieve this goal, China should also conform to the requirements of the Convention after signing it and give direct enforceability to international mediation agreements.

Second, as far as domestic commercial mediation agreements are concerned, considering the relatively unregulated situation of commercial mediation in China, if domestic settlement agreements are directly given enforceability, it may be too heavy a burden to the current developing legal system in China. The court would not be able to conduct judicial review as an intermediate process to gradually grant the adjudicative power to mediators.

Therefore, the path for endowing mediation agreements with enforceability in China's commercial mediation law can be divided into two steps. First is granting enforceability to international settlement agreements to fulfil the obligations prescribed by the Convention. For this purpose, future legislation may recognize qualified international settlement agreements as "enforceable legal documents" within the framework of civil litigation law. *Secondly*, domestic settlement agreements still need to go through judicial review and confirmation by the courts. Only settlement agreements that have been recognized by the courts as effective are qualified to apply for court recognition and enforcement. When the commercial mediation market in China matures and the supporting mechanisms for commercial mediation become more established, consideration can then be given to granting direct enforceability to domestic mediation agreements.

(2) Other Endeavours in the Field of Mediation

On 16 February 2023, the International Organization for Mediation (IOMed) Preparatory Office was established in Hong Kong, signalling the commencement of China's endeavour to establish a brand-new inter-governmental organisation for international mediation. Currently, there are nine Contracting Parties to the Joint Statement on Founding the International Organization for Mediation.

It remains to be seen what role this organisation will play in international dispute resolution. Looking at the backdrop, this organisation was founded in the context of inter-state disputes between Ethiopia, Egypt and Sudan. Therefore, it is anticipated that it will conduct State-to-State mediations. For commercial mediation between private parties or mediation for investor-State disputes, it is less clear whether the mandate of the IOMed will cover these other areas of disputes.

IV Conclusion

This review of mediation in China explores how the use of mediation has taken shape in the Chinese legal context. Against this backdrop, the status of mediation in China is easier to understand – it sits in the middle of a loose and non-binding means of settlement and a mature system that deals with commercial undertakings. China's signing of the Singapore Convention is expected to give a boost to the development of commercial mediation and a wider embracement of international practice and standards of mediation in China.

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Mediation Ecosystem in Indonesia

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Abstract: Mediation is a method of dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution. In Indonesia, mediation is divided into court

annexed mediation and out of court mediation. Court annexed mediation is regulated in SCR 1/2016. Meanwhile, the legal basis for out of court mediation is scattered across industrial sectors. The trend in Indonesia, of both court-annexed mediation and out of court mediation, has been increasing over years. Based on the available data, it can be concluded that out of court mediation has a higher success rate than court-annexed mediation.

The SCM is an international convention or agreement regarding the recognition of settlement agreements resulting from mediation. Right now, Indonesia has not signed and ratified the SCM. To sign and ratify the SCM, Indonesia must prepare the regulatory basis to implement the SCM, namely by amending or updating the current legislation, Law 30/199 and SCR 1/2016, to cover the legal basis for implementing SCM.

A Overview of Mediation in Indonesia

Alternative dispute resolution is a procedure for settling a dispute by means other than litigation, such as arbitration or mediation.[1] In Indonesia, alternative dispute resolution is regulated in Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution ("**Law 30/1999**").[2] One alternative form of dispute resolution referred to in Law 30/1999 is mediation.

Mediation is a method of dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution. [3] Law 30/1999, the legal basis for conducting mediation in Indonesia, does not explicitly define ~~regulate~~ the meaning of mediation.

One author defines mediation as follows:[4]

1. Mediation is a process of resolving disputes based on a voluntary principle through negotiation.
2. The mediator involved is tasked with assisting the disputing parties to find a solution.
3. The mediator involved must be accepted by all the disputing parties.
4. The mediator does not have the authority to decide the matter during the negotiation.

[1] GARNER, 2009, p. 91.
[2] On conflict coaching in Indonesia see: BASTOMI, 2020, p. 41-50.
[3] GARNER, 2009, p. 1070.
[4] NUGROHO, 2019, p. 24.

5. The aim of mediation is to produce an agreement acceptable to the disputing parties.

In summary, mediation is a process of voluntary dispute resolution facilitated by a mediator whose job is to help the parties resolve their disputes and where the settlement is decided by the parties.[5]

As a non-adjudicative dispute resolution process, mediation has the following advantages and disadvantages:

ADVANTAGES	DISADVANTAGES
In the mediation process, the parties have greater flexibility and the process is less formal compared to litigation and arbitration.	Because the parties cannot be compelled to appear, to be effective, mediation requires the initiative of the parties
Mediation is carried out confidentially so that the privacy of the parties is maintained.	A party who lacks good faith can misuse mediation to prolong the process or to fish for information that will benefit them in any subsequent adjudicative process.
The parties can directly participate in negotiating a resolution without having to be represented by a lawyer.	Since mediation focuses on the parties' interests rather than their strict legal rights in the resolution of a dispute, mediation is deemed inappropriate to use if the parties' intention is to obtain a definitive determination of their respective legal rights. Such determination can only be decided by a judge.
Not only legal aspects are negotiated, but also other aspects of the dispute.	In a court annexed mediation, judge and court personnel mediators are free of charge, but due to court schedules and the limited number of judges and court personnel mediators, their availability to mediate properly is limited.
Mediation is consensual and collaborative in nature so as to create a win-win solution for the parties.	If the parties cannot achieve resolution in mediation, it may lead to litigation, whereas arbitration, say, produces a final and binding arbitral award.
Mediation can restore and even improve the relationship between parties.	Parties might deliberately not comply with the Agreement to Mediate, by sending a representative who does not have sufficient authority, who is unprepared, or who is indecisive.

B Mediation Environment in Indonesia

1 Court Annexed Mediation and Out-of-Court Mediation

Law 30/1999 states that mediation is recognized as an alternative dispute resolution mechanism. However, based on Supreme Court Regulation Number 1

of 2016 on Mediation ("**SCR 1/2016**"), in resolving a civil dispute in court, the parties must first resolve their dispute through mediation, except for cases that are excluded in SCR 1/2016.[6] From the above, it can be said that there are two categories of mediation in Indonesia: (i) court annexed mediation; and (ii) out of court mediation. These two types of mediation will be discussed in Sections C and D below.

2 Mediators and Mediator Certification Agencies

SCR 1/2016 stipulates that each court-annexed mediator must have a mediator certificate. To obtain a mediator certificate, a mediator must attend and pass certified mediator training organized by the Supreme Court or by mediator certification agencies that have obtained Supreme Court accreditation. Such agencies are accredited by the Supreme Court pursuant to the decree of the Chief Justice of the Supreme Court Number 117/KMA/SK/VI/2018 concerning Procedures for Granting and Extension of Accreditation of Mediator Certificate Provider Institutions for Non-Judge Mediators ("**DCJSC 117/2018**"), which aims to provide guidance and guarantee the quality of mediator certificate training issued by the mediator certification agencies.[7]

C Court Annexed Mediation

Article 4 paragraph (1) SCR 1/2016 has regulated the following:

> All civil disputes submitted to court, including cases of resistance (*verzet*) over default judgment (*verstek*) and resistance by litigants (*partij verzet*) and third parties (*derden verzet*) against the implementation of decisions that have permanent legal force, must first seek settlement through mediation, unless otherwise specified herein.

Pursuant to SCR 1/2016, in court annexed mediation, mediators may consist of judges or other persons who have mediator certificates.

6 Article 4 paragraph (1) of SC 1/2016.
7 Point III of DCJSC 117/2018.

In court annexed mediation, the parties have the right to nominate the desired mediator. This right must be exercised by the parties within 2 (two) days after the presiding judges explain the obligation to mediate to the parties.[8] If the parties do not appoint a mediator within 2 (two) days, the chair of the presiding judges will appoint a mediator judge or court officer who has a mediator certificate to carry out the mediation.[9] The parties can also nominate more than one mediator.[10]

SCR 1/2016 stipulates that the parties must mediate in good faith.[11] If the plaintiff does not show good faith during the mediation, then the presiding judges may dismiss the lawsuit.[12] If the defendant is deemed to not have good faith, they will be charged a mediation fee.[13] The mediators can declare that a party or parties do not have good faith if:[14]

a. parties, after being duly summoned twice in a row, fail to attend the mediation without a valid reason;
b. parties having attended the first mediation, do not attend the next meeting without a valid reason even though they have been duly summoned twice in a row;
c. consecutive absences of the parties have disrupted the mediation schedule without a valid reason;
d. a party, having attended mediation, does not submit and/or respond to the other party's case resume;[15] and/or
e. parties do not sign the draft of settlement agreement[16] that has been agreed upon without a valid reason.

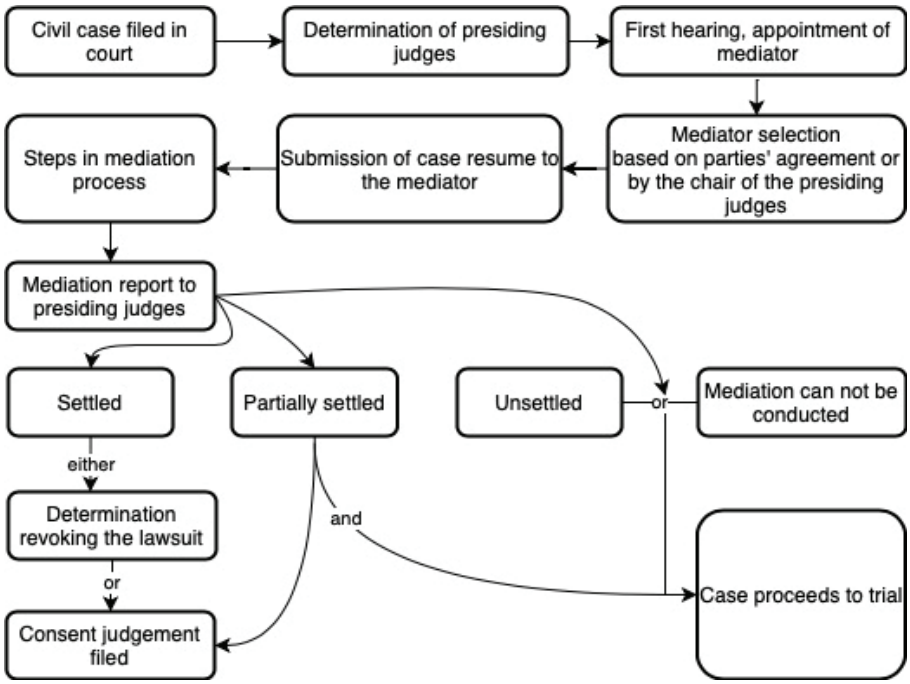
The parties can agree to hold the mediation in court (in the court's mediation room) or outside the court. However, mediation must be carried out in court when:

a. mediation is conducted by judges or court officers; or
b. when a non-judge mediator is appointed to co-mediate with a judge or court officer.

8 Article 20 paragraph (1) of SCR 1/2016.
9 Article 20 paragraph (3) of SCR 1/2016.
10 Article 19 of SCR 1/2016.
11 Article 7 paragraph (1) of SCR 1/2016.
12 Article 22 paragraph (2) of SCR 1/2016.
13 Article 22 paragraph (2) and Article 23 paragraph (23) and paragraph (1) of SCR 1/2016.
14 Article 7 paragraph (2) of SCR 1/2016
15 According to Article 1 point (7) of SCR 1/2016, case resume is a document made by the parties that contains the case and settlement review.
16 According to Article 1 paragraph (8) of SCR 1/2016, agreement resulting from the mediation in the form of a document containing the terms of settlement of the dispute signed by the parties and the mediator.

The following flowchart illustrates the court annexed mediation stages according to SCR 1/2016:

Court-Annexed Mediation Process Flowchart



Court annexed mediation can be conducted online as per Article 5 paragraph (3) of SCR 1/2016, which regulates that mediation can be carried out using audio-visual media which allows direct participation by the parties. Furthermore, Supreme Court Regulation Number 3 of 2022 on Mediation in Courts Electronically ("**SCR 3/2022**") provides a legal umbrella for holding court annexed mediation online.

Online court annexed mediation can be carried out if the parties agree to carry out mediation electronically[17] in a virtual space using an application agreed upon by the parties.[18] The virtual space is a legitimate mediation space with the same status as the mediation room in court.[19]

[17] Article 5 paragraph (1) of SCR 3/2022.
[18] Article 11 paragraph (1) of SCR 3/2022.
[19] Article 12 of SCR 3/2022.

D Out of Court Mediation

Apart from court annexed mediation, as regulated in SCR 1/2016, mediation is also carried out outside the court. In Indonesia, out-of-court mediation can be done in the following industry settings:

a Financial Services Sector Disputes

Based on the Financial Services Authority/*Otoritas Jasa Keuangan* ("**FSA**") Regulation Number 61 of 2020 on Alternative Dispute Resolution Institutions ("**FSAR 61/2020**"), the Financial Sector Alternative Dispute Settlement Institution/ *Lembaga Alternatif Penyelesaian Sengketa Sektor Jasa Keuangan* ("**LAPS SJK**") is an institution that settles financial services disputes outside the court. LAPS SJK facilitates dispute resolution between consumers[20] and financial service providers/ *penyelenggara usaha jasa keuangan* ("**FSP**"). Disputes that can be submitted to the LAPS SJK are disputes between consumers and the following categories of FSP:

a. *Commercial Banks;*
b. *Rural Banks/Financing Banks;*
c. *Securities Trading Brokers;*
d. *Investment Managers;*
e. *Pension Funds;*
f. *Insurance Companies;*
g. *Reinsurance Companies;*
h. *Financial Institutions;*
i. *Pawn Companies;*
j. *Guarantee Companies;*
k. *Information Technology-Based Borrowing-Lending Service Providers;*
l. *Crowdfunding Service Operators;*
m. *Microfinance Institutions;*
n. *Indonesian Export Financing Institutions;*
o. *PT Permodalan Nasional Madani (Persero); and*
p. *Other financial service institutions conducting intermediary fund management and depository activities in the financial services sector, both carrying out their business activities conventionally and sharia, based on statutory provisions in the financial services sector.*

[20] Based on Article 1 point (3) of POJK 61/2020, a consumer is a party that places their funds and/or makes use of the services available at PUJK.

FSAR 61/2020 limits the disputes that can be submitted to LAPS SJK, to disputes where:[21] (a) the FSP has offered a settlement, but it was rejected by the consumer, or the FSP has not responded to the complaint; (b) the dispute is not in the process of, or has already been decided by, a court, arbitration, or other alternative dispute resolution institution; (c) the dispute is a civil case.

Based on the data that we received from LAPS SJK, below are LAPS SJK's data on the docket and dispute resolution at LAPS SJK from 1 January 2021 until 31 March 2023.

LAPS SJK Docket **1 January 2021 - 31 March 2023**	
Complaints	**Amount**
Complaint Received	3648
Complaint Rejected	1664
Complaint Accepted	1984
Settled in the early stage, through: Financial Service Providers' internal dispute resolution (bipartite) and verification	348
Dismissed (Financial Service Providers rejected, consumers revoked the complaints)	311
In Progress	852

Source: Financial Sector Alternative Dispute Settlement Institution/Lembaga Alternatif Penyelesaian Sengketa Sektor Jasa Keuangan, received by 2 May 2023.

LAPS SJK Resolution **1 January 2021 - 31 March 2023**		
Methods	Settled	Not Settled
Facilitation	9	10
Succes Rate	47%	53%
Mediation	230	218
Success Rate	51.3%	48.7%
Arbitration	6	

Source: Financial Sector Alternative Dispute Settlement Institution/Lembaga Alternatif Penyelesaian Sengketa Sektor Jasa Keuangan, received by 2 May 2023.

Based on the data above, it can be inferred that from January 2021 until March 2023, the percentage of the case exercised by LAPS SJK is around 84.3% (the number of cases that settled in the early stage, in progress, and settled,

[21] Article 32 paragraph (1) of POJK 61/2020.

which contains the case settled and non-settled on facilitation, mediation, and arbitration, divided by the number of complaints accepted). Also, mediation by LAPS SJK has a success rate of 51.3%.

Dispute resolution in the financial services sector has recently been boosted by the promulgation of Law Number 4 of 2023 on Development and Strengthening of the Financial Sector ("**Law 4/2023**"). Under Law 4/2023, LAPS SJK has gained more recognition and is now regulated by law, where previously it was regulated by FSA regulations. The development is expected to provide better outcomes for mediation in financial services sector disputes.

b Consumer Disputes Mediation

Every consumer who is harmed can sue business actors through an institution tasked with resolving disputes between consumers and business actors or through the courts. Settlement of consumer disputes can be resolved through court or out of court. Mediation is one of the methods to resolve consumer disputes. The Consumer Dispute Settlement Agency/*Badan Penyelesaian Sengketa Konsumen* ("**BPSK**") has the duty and authority to conduct the handling and settlement of consumer disputes through mediation.[22]

Based on the Minister of Trade Regulation Number 17/M-DAG/PER/4/2007 on Duties and Authorities of the Consumer Dispute Settlement Agency and Procedures for Settlement of Consumer Disputes ("**MOTR 17/2007**"), to resolve disputes through mediation, the parties must first try to settle the dispute by conciliation. In the mediation process, the chair has the duty to: (a) summon the disputing consumers and business actors; (b) summon witnesses and experts when necessary; (c) provide a forum for consumers and business actors who have disputes; (d) actively reconcile consumers and business actors in disputes; (e) actively provide suggestions for resolving consumer disputes under regulations in the field of consumer disputes.[23]

The parties are given the freedom to resolve disputes through mediation. The chair acts actively as a mediator to provide advice, instructions, suggestions, and other efforts to resolve disputes. The mediation results are then outlined in the form of a decision.[24]

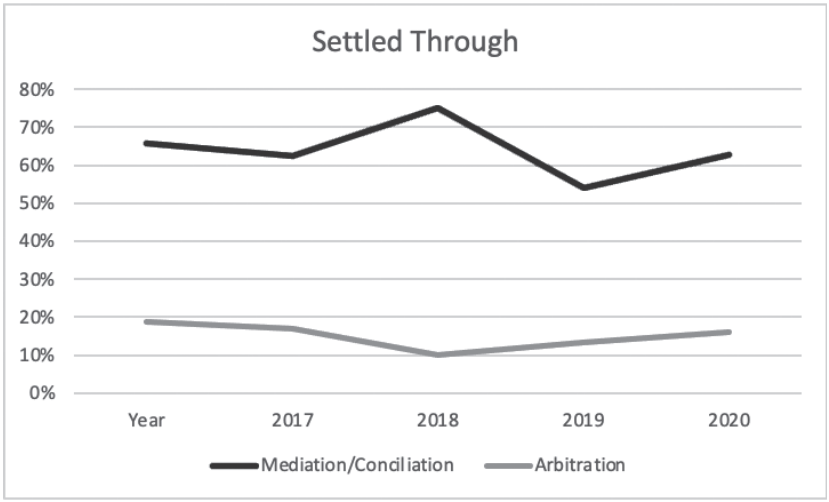
Based on the data that we received from BPSK, below are BPSKs data on the consumer protection dispute resolution from 2017 to 2021.

[22] Article 17 (1) of MOTR 17/2007.
[23] Article 17 paragraph (2) of MOTR 17/2007.
[24] Article 17 paragraph (3) of MOTR 17/2007.

Consumer Protection (CP) Dispute Resolution					
Year	Number of Cases	Settled through			Not Settled
		Conciliation	Mediation	Arbitration	
2017	762	55	447	144	116
2018	1157	105	618	197	237
2019	1049	38	748	106	157
2020	1043	43	520	140	340
2021	1619	41	976	261	341

Source: Ministry of Trade, Directorate General of Consumer Protection and Trade Compliance, received by 29 March 2023.

Based on the data above, it can be concluded that mediation at BPSK has an increasing trend. Mediation success rate per year are as follow:
2017: 58.6%
2018: 53.4%
2019: 71.3%
2020: 49.8%
2021: 60.2%.



Furthermore, mediation is the most widely used and taken option to settle disputes compared to conciliation and arbitration.

c Land Disputes Mediation

Land dispute mediation is regulated by the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Regulation Number 21 of 2020 on Handling and Settlement of Land Cases ("**MOAASP/NLAR 21/2020**"). Land disputes mediation can be conducted by and at the initiative of (a) Ministry, Regional Offices, or Local Offices under their respective authorities and/or at the initiative of the disputing parties; or (b) Individuals or institutions at the initiative of the disputing parties.[25]

Land dispute mediation must be attended by the parties. If the parties cannot attend mediation, the parties can be represented by their attorneys/proxies. If the parties fail to attend the meditation after being properly invited 3 (three) times, the mediation will be declared a failure. In conducting mediation, the parties may invite experts and/or relevant agencies. After reaching an agreement, the result of the mediation is outlined in a settlement agreement which is then registered at the District Court to obtain a settlement deed (referring to SCR 1/2016). If the mediation fails, then the Ministry, Regional Office, or Local Office, according to their authority, will decide the case.[26]

d Medical/Health Disputes Mediation

Based on Law Number 36 of 2009 on Health and its amendments based on Law Number 6 of 2023 ("**Law 36/2009**"), if there are health workers who are suspected of negligence in conducting their profession, such negligence must be resolved first through mediation.[27] Mediation is conducted if there is a dispute between health workers, as health service providers, and patients, as recipients of health services.[28] Mediation aims to resolve disputes outside the court by a mediator agreed by the parties.[29]

The definition of a medical dispute is not strictly regulated in Law 36/2009. However, Article 58 paragraph (1) stipulates that everyone has the right to claim compensation against a person, health worker, and/or health provider who causes them harm due to errors or negligence in the health services they receive. Losses, as referred to in Article 58 paragraph (1), also include unauthorized disclosure of medical records.[30]

25 Article 43 paragraph (2) of MOAASP/NLAR 21/2020.
26 Article 44 of MOAASP/NLAR 21/2020.
27 Article 29 of Law 36/2009.
28 Elucidation of Article 29 of Law 36/2009.
29 Elucidation of Article 29 of Law 36/2009.
30 Elucidation of Article 58 paragraph (1) of Law 36/2009.

e Mediation in Labor/Industrial Relations Disputes

Settlement of labor disputes or industrial relations is regulated in Law Number 2 of 2004 concerning Settlement of Industrial Relations Disputes ("**Law 2/2004**"). Industrial relation disputes refer to contentions which trigger conflict between employers and employees.

Types of disputes covered by Law 2/2004 are: (a) dispute of rights;[31] (b) dispute of interests;[32] (c) dispute over employment termination;[33] and (d) dispute over worker unions[34] within a company.

Dispute settlement through mediation is facilitated by a mediator from the relevant manpower offices on the Regency or City level.[35] Mediation is the second stage in the settlement of industrial relations disputes after the disputing parties failed to reach a settlement in bipartite negotiation. If mediation does not result in a settlement, the mediator will issue a written recommendation.[36] The party refusing the mediator's recommendation can bring the dispute to the Industrial Relation Court.[37]

NUMBER OF INDUSTRIAL RELATION DISPUTES RESOLVED THROUGH MEDIATION ON 2022[38]		
No.	**Type of Cases**	**Total**
1	Disputes of rights	1,270
2	Disputes of interests	248
3	Dispute over employment termination	3,075
4	Dispute over worker unions within a company	48
Total		**4,641**

Source: Directorate General of Development of Industrial Relations and Employment Social Security, Data from January to December 2022.

[31] Article 1 point (2) of Law 2/2004 defines disputes of rights as a dispute which occurs due to the non-fulfillment of rights because there is in conformity between the implementation or interpretation of provisions under laws and regulations, employment agreement, company regulation, or collective labor agreement.

[32] Article 1 point (3) of Law 2/2004 defines dispute of interests as a dispute which occurs in the course of an employment relationship due to the absence of agreement concerning the drawing up, and or amendment of work requirements which are established under the employment agreement or company regulation, or collective labor agreement.

[33] Article 1 point (4) of Law 2/2004 defines dispute over employment termination as a dispute which occurs due to the absence of agreement concerning the employment termination which was conducted by one of the parties;

[34] Article 1 point (5) of Law 2/2004 defines among worker unions/labor unions as a dispute between a worker union/labor union with another worker union/labor union within a company due to lack of consensus concerning the membership, and implementation of union-related and obligations.

[35] Article 8 of Law 2/2004.

[36] Article 13 paragraph (2) of Law 2/2004

[37] Article 14 paragraph (1) of Law 2/2004

[38] Directorate General of Development of Industrial Relations and Employment Social Security of Ministry of Manpower, Data Perselisihan yang Diitangani dan Diselesaikan oleh Mediator Tahun 2022. Accessed on: 16 March 2023, https://satudata.kemnaker.go.id/data/kumpulan-data/952.

Based on the data above, 4,641 industrial dispute cases were resolved using mediation in 2022.

f Intellectual Property Disputes Mediation

Intellectual property rights is a category of intangible rights protecting commercially valuable products of the human intellect. The category comprises not only trademark, copyright, and patent rights, but also trade-secret rights, publicity rights, moral rights, and rights against unfair competition.[39] In Indonesia, intellectual property rights are divided into: (a) patents; (b) trademarks; (c) industrial designs; (d) geographical indications; (e) trade secrets; (f) integrated circuit designs; and (g) copyrights.

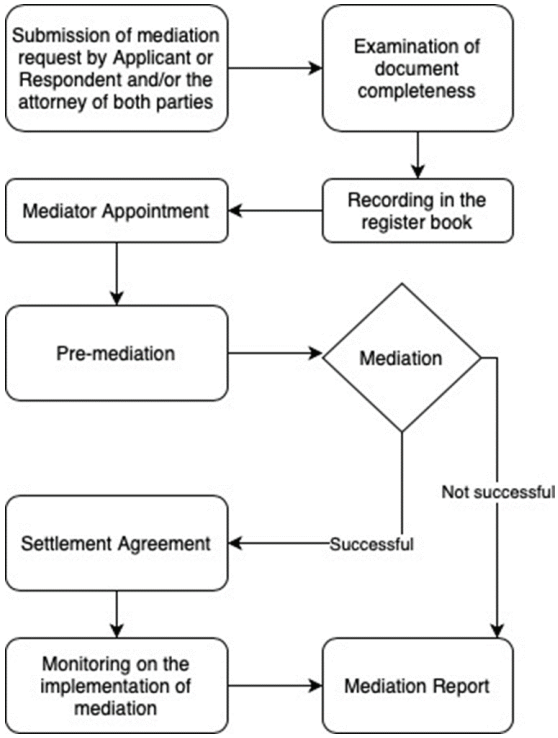
Type of Intellectual Property	Regulation
Patent	Law Number 13 of 2016 on Patent as amended by Law Number 6 of 2023
Trademark and Geographical Indication	Law Number 20 of 2016 on Trademark and Geographical Indication as amended by Law Number 6/2023
Industrial Design	Law Number 31 of 2000 on Industrial Design
Trade Secret	Law Number 30 of 2000 on Trade Secrets
Integrated circuit design	Law Number 32 of 2000 on Layout Designs of Integrated Circuit
Copyright	Law Number 28 of 2014 on Copyright

Each intellectual property is covered by several laws. Below is the flowchart illustrates the mediation process at the Directorate General of Intellectual Property of Ministry of Law and Human Rights.[40]

[39] GARNER, 2009, p. 881.

[40] Directorate General of Intellectual Property of Ministry of Law and Human Rights. Accessed on: 16 March 2023, www.dgip.go.id/menu-utama/penyidikan-ki/sengketa?kategori=Penyelesaian.

Mediation Process at The Directorate of General of Intellectual Property of Ministry of Law and Human Rights



E Enforcement of Mediation Settlement

Indonesian civil procedural law, through the *Herziene Inlandsch Reglement* ("**HIR**") recognizes the legal power of mediation settlement, both from court annexed mediation and outside court mediation. Article 130 paragraph (2) HIR stipulates that the settlement deed has the same effect of a final and binding court decision, and cannnot be appealed. Therefore, it can be enforced.

1 Court Annexed Mediation Resolution

If the parties reach an agreement in court annexed mediation, the parties can record their agreement in a settlement agreement.[41] The parties, through the mediator, can propose to the presiding judge that the settlement agreement be

[41] Article 1 point (8) of SCR1/2016 defines a settlement agreement as an agreement resulting from mediation in the form of a document containing dispute resolution provisions signed by the parties and the mediator.

recorded and reinforced by a settlement deed.[42] If the parties do not want to convert the settlement agreement into a settlement deed, the settlement agreement must contain a clause to withdraw the lawsuit.[43]

In the event that the parties wish to turn the settlement agreement into a settlement deed, the presiding judges will study and examine the settlement agreement within a maximum period of 2 (two) days.[44] After that, if the presiding judges decide that the settlement agreement is not in accordance with Article 27 paragraph (2), which stipulates that the settlement agreement must not contain provisions that: (a) conflict with law, public order, and/or morality; (b) harm third parties; or (c) which cannot be implemented, then the judge will return the settlement agreement for revision by the parties and the meditator with a period for revision of no longer than 7 (seven) days from the date of receipt of the revision instruction.[45] If the settlement agreement needs no revisions, by no later than 3 (three) days, the presiding judges will set the date of the hearing to announce the settlement deed.

From 2020 to 2022, the Supreme Court has issued the Supreme Court Annual Report. Based on the report, the following statistics relate to mediation in court for from 2020 to 2022 are as follow:

YEAR 2020[46]						
No	**Court**	**Number of Mediated Cases**	**Status of Mediation**			
			Settled	**Not Settled**	**Dismissed**	**In Process**
	District Court	36.366	1.125	14.955	20.286	0
Success Rate (%)			**3.09**	**41.12**	**55.78**	**0**
	Religious Court	59.257	4.052	53.093	2.112	0
Success Rate (%)			**6.83**	**89.59**	**3.56**	**0**
Total		**95.623**	**5.177**	**68.048**	**22.398**	**0**
Total Percentage (%)			5.41	71.16	23.42	

[42] Article 27 paragraph (4) of SCR1/2016. Article 1 point (10) of SCR 1/2016 defines a settlement deed as a deed that contains the contents of the settlement agreement and the judge's decision that strengthens the settlement agreement.
[43] Article 27 paragraph (5) of SCR 1/2016.
[44] Article 28 paragraph (1) of SCR 1/2016.
[45] Article 28 paragraph (2) and Article 28 paragraph (3) of SCR 1/2016.
[46] SUPREME COURT OF THE REPUBLIC OF INDONESIA, 2020.

YEAR 2021[47]						
No	**Court**	**Number of Mediated Cases**	**Status of Mediation**			
			Settled	**Not Settled**	**Dismissed**	**In Process**
	District Court	39.888	1.187	16.251	21.193	1.257
Success Rate (%)			**2.98**	**40.74**	**53.13**	**3.15**
	Religious Court	62.464	8.964	52.596	904	0
Success Rate (%)			**14.35**	**84.20**	**1.45**	**0**
Total		**102.352**	**10.151**	**68.847**	**22.097**	**1.257**
Total Percentage (%)			9.91	67.26	21.58	1.22

YEAR 2022[48]						
No	**Court**	**Number of Mediated Cases**	**Status of Mediation**			
			Settled	**Not Settled**	**Dismissed**	**In Process**
	District Court	40.551	1.362	16.985	20.863	1.341
Success Rate (%)			**3.36**	**41.89**	**51.45**	**3.31**
	Religious Court	68.831	19.499	47.705	1.243	384
Success Rate (%)			**28.33**	**69.31**	**1.81%**	**0.56**
Total		**109.382**	**20.861**	**64.690**	**22.106**	**1.725**
Total Percentage (%)			19.07	59.14	20.21	1.58

From the Supreme Court's annual reports, court annexed mediation has a very low success rate, but still has an increasing trend from year to year. From the author's experience, the low success is driven by the following obstacles in the mediation process:

1 Mediation relies heavily on the initiative of the parties. If the parties do not have the initiative to resolve the problem, then resolving a dispute through mediation is difficult.

2 If the parties do not have good faith, then the mediation process will not run smoothly. For example, one of the parties deliberately does not attend mediation in order to prolong the mediation process.

47 SUPREME COURT OF THE REPUBLIC OF INDONESIA, 2021.
48 SUPREME COURT OF THE REPUBLIC OF INDONESIA, 2022.

3 Specifically for court annexed mediation, mediation is regarded as a formality because the parties must first mediate before the court will hear their case.

2 Outside Court Mediation Resolution

SCR1/2016 provides a legal basis for the enforcement of mediation settlement agreements for parties mediating outside the court. Parties that have reached settlement, either with or without the assistance of a certified mediator, may submit a settlement agreement[49] to the competent court to obtain a settlement deed[50] by filing a lawsuit.[51] In a lawsuit to obtain a settlement deed, the presiding judges will ratify the settlement agreement in a decision without examining the merit of the case within 14 (fourteen) days since the registration of the lawsuit.[52]

A settlement agreement submitted by the parties to obtain a settlement deed must comply with the provisions stipulated in Article 27 paragraph (2) SCR 1/2016, namely, it must not contain provisions that: (a) conflict with law, public order, and/or morality; (b) harm third parties; or (c) which cannot be implemented.[53] If the settlement agreement is not in accordance with those provisions, the presiding judges will provide instructions to the parties to revise the settlement agreement. Based on these instructions, the parties must immediately revise and resubmit the settlement agreement.[54]

F Indonesia and the Singapore Convention on Mediation

The Singapore Convention on Mediation ("**SCM**") is an international convention or agreement regarding the recognition of settlement agreements resulting from mediation. On 7 August 2019, the SCM was officially announced and signed by 46 (forty-six) countries.[55] The SCM aims to provide binding legal certainty to mediation agreements on international business disputes for countries that have signed the SCM.

The SCM draws its inspiration from the New York Convention, which provides legal certainty for the enforcement of international arbitral awards, while the

[49] Article 1 point (8) of SCR1/2016 defines a settlement agreement as an agreement resulting from mediation in the form of a document containing dispute resolution provisions signed by the parties and the mediator.
[50] Article 27 paragraph (4) of SCR1/2016. Article 1 point (10) of SCR 1/2016 defines a settlement deed as a deed that contains the contents of the settlement agreement and the judge's decision that strengthens the settlement agreement.
[51] Article 36 paragraph (1) of SCR 1/2016.
[52] Article 36 paragraph (3) and Article 36 paragraph (4) of SCR 1/2016.
[53] Article 37 paragraph (1) of SCR 1/2016.
[54] Article 37 paragraph (2) of SCR 1/2016.
[55] On the Singapore Convention in Brazil see: COMETTI; MOSCHEN, 2022. See also MASON, 2021.

SCM provides legal certainty for the enforcement of settlement agreements from international mediation or conciliation. The existence of the SCM means that international mediation agreements can be recognized by countries that have signed or acceded to and ratified the SCM.

However, Indonesia has not signed and ratified the SCM. To ratify the SCM, Indonesia must make preparations, one of which is to prepare the regulatory basis to implement the SCM. Indonesian laws and regulations are still not in line with some provisions regulated in the SCM.

Law 30/1999, as the legal basis for implementing alternative dispute resolutions, does not yet regulate the enforceability of the inter-state mediation (the term of international mediation is not yet covered in Law 30/1999). On the other hand, HIR and SCR 1/2016 only regulate the implementation of mediation at the district court level. Therefore, to adopt the SCM, Indonesia has to adjust or update its laws and regulations to make sure the laws and regulations are in line with the SCM.

G Conclusion

Mediation is a method of dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution. In Indonesia, mediation is divided into court annexed mediation and out of court mediation. Court annexed mediation is regulated in SCR 1/2016. Meanwhile, the legal basis for out of court mediation is scattered across industrial sectors.

The trend in Indonesia, of both court-annexed mediation and out of court mediation, has been increasing over years. Based on the available data, it can be concluded that out of court mediation has a higher success rate than court-annexed mediation.

The SCM is an international convention or agreement regarding the recognition of settlement agreements resulting from mediation. Right now, Indonesia has not signed and ratified the SCM. To sign and ratify the SCM, Indonesia must prepare the regulatory basis to implement the SCM, namely by amending or updating the current legislation, Law 30/199 and SCR 1/2016, to cover the legal basis for implementing SCM.

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Mediation in Japan

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Abstract: The preference for amicable dispute resolution is deeply rooted in Japanese culture, and there is a long history in Japan of using mediation to manage conflicts. Mediation was used to resolve disputes between merchants and samurai warriors in the 17th century and to resolve claims between private actors and utility companies arising from the Fukushima nuclear disaster in the more recent past. While court mediation is common in contemporary Japan, private mediation is comparatively rare despite legislative changes in 2007 meant to promote growth. Mediation in Japan tends to be evaluative, and private sessions with parties are common. These standards derive, in part, from procedures used in court mediation. However, norms are being revisited in the case of commercial disputes. In 2018, the Japan International Mediation Center opened in Kyoto, prompting greater attention to alternative models of mediation and international commercial mediation standards. Meanwhile, recent international mediation trainings and events have paid more attention to aspects of mediation that are uncommon in court mediation in Japan including joint sessions and non-evaluative facilitation. A recent high-profile international commercial mediation highlighted the potential of co-mediation to manage linguistic and cultural differences. These movements have not resulted in a sea change in mediation culture, but they may in time lead to greater diversification of procedures and perceptions about mediation.

Historical Background

The preference for resolving disputes amicably has cultural and structural roots in Japan. For example, the first written constitution of Japan of 604 AD, reflecting Confucianist teaching, stresses the importance of social harmony and conflict avoidance. Disputants have historically relied on community leaders and councils to help them resolve disputes amicably. Beginning in the 14th century, for instance, trade guilds mediated disputes among their members and between members and the government.[1] From the 17th to 19th centuries, priests acted as mediators in disputes between merchants and samurai warriors.

Japanese authorities have meanwhile created alternatives to litigation, including a court-annexed conciliation system considered below, and have at times encouraged the public to avoid courts. During the Ashikaga period (1336-1600), for instance, courts stressed that peasants should stay away from their chambers. As a result of these and other factors, Japan has comparatively few court litigations for a country of its size. There were only 518,997 new civil litigations including general and family disputes[2] in 2021, remarkable for the third largest economy on the planet with a population of over 125 million people. Consistent with this emphasis on amicable settlement, the mediation landscape in Japan has developed to include a combination of court mediation and private mediation supported by the judiciary and public bodies.

Contemporary Conceptions of Mediation

When the Japanese public encounters mediation, it is mostly likely to be in the context of court proceedings. Judges routinely press parties before them to amicably settle their disputes. Disputants separately have recourse to court conciliation before and during litigation. Conciliation committees make legal and factual assessments of disputes and advise litigants how they should be resolved. As a result of these processes, mediation may be commonly understood by many as a form of dispute evaluation, that may include legal assessment, aimed at ending or avoiding adversarial proceedings though mutual compromise (*gojo* in Japanese).

Over the past decade, there has been an increase in trainings and conferences on mediation that present different conceptions of mediation. These events have emphasized the mediator's role[3] in helping parties to communicate

1 A summary history of mediation in Japan can be found in Ronda Roberts Callister and James A. Wall, Jr. (1997).

2 On mediation in family Law in Brazil see: BRAGANÇA; NETTO, 2020.

3 See AWAD, 2020.

more effectively, not simply evaluate claims, and the potential of mediation to create value in negotiations by focusing on the interests of the parties, aiming at possible "win-win" resolutions that, in the commercial context, may include future business between the parties. This trend suggests growing interest of more facilitative aspects of mediation practice among some practitioners.[4]

Court Mediation in Japan

Japan does not have a single mediation act. The Civil Conciliation Act of Japan provides for a procedure of court-annexed conciliation by committees. The Code of Civil Procedure recognizes the right of judges to encourage settlement, propose settlement terms to parties, and enforce settlement agreements that result from court conciliation as court judgements within Japan. These processes are considered further below.

Conciliation Committees *(chotei)*

Court conciliation is commonly used before litigation and may be initiated by disputants without the need to commence adversarial proceedings. Conciliation is not a mandatory pre-condition to litigation except in specific categories of disputes that include landlord-tenant disputes over changes in rent and certain family disputes, but not general commercial disputes. In 2020, there were 161,660 new conciliations of civil and family disputes nationwide. Of these, 43.9% were successfully resolved taking on average 4.2 months each to conclude.

A conciliation committee normally comprises a judge and two, occasionally more, commissioners. Where conciliation takes place during litigation, a different judge from the judge presiding over the case is normally chosen. The co-commissioners come from outside the judiciary and are chosen for their leadership and work experience. There is no formal system of mediation training for the commissioners.

Court conciliation sessions are held about once every three weeks and last around an hour for each session. They normally comprise only private meetings between the committee and each of the parties and their counsel, though joint meetings with both parties may be held depending upon possible progress of discussions. In practice, judges sitting on the committees often do not attend the sessions. Committees may assist the parties to negotiate or assist them to evaluative the claims, particularly when judges participate, by assessing facts and law and proposing settlement options. Attorneys normally speak on behalf of the

[4] On mediation in Brazil see: FERREIRA; SEVERO, 2021. See also: FARIAS, 2020.

parties though parties sometimes supplement the statements of their attorneys or answer direct questions from the committee.

Conciliation sessions are not open to the public, but information exchanged during the process is not treated as confidential or without prejudice by law and may be used in the related litigation. If a settlement is reached under the guidance of the committee, the agreement is treated as a court judgement for the purposes of enforcement. Where parties reach a settlement on terms different than those suggested by the committee, the committee may, in principle, refuse to recognize that the agreement resulted from the conciliation. In practice, however, settlement agreements between parties are given effect unless they violate public policy or order.

Judicial Mediation *(wakai)*

Once adjudicatory proceedings are underway, the judge hearing the dispute may propose a form of judicial mediation or the parties may request it. The parties are legally required to comply, but judges tend not to insist if one or more parties does not wish to participate.

The judicial mediation process is similar to court conciliation in many respects. Sessions last about an hour each, are held about once every three weeks, and normally comprise private meetings with each party and counsel. Attorneys tend to speak on behalf of the parties. Judges commonly adopt an evaluative style, assessing facts and law and helping the parties to evaluate options for settlement. If a settlement agreement cannot be reached on terms set by the parties, the judge will commonly make a settlement proposal. The settlement proposal may address any issue that divides the parties, not just legal claims, and need not be limited by the relief sought by the claimant. If the parties do not accept the proposal, the adjudicatory process resumes. Judges commonly refer ongoing litigations to conciliation, not least because judges in Japan tend to have large caseloads. Parties have the freedom to accept judicial proposals to conciliate though this is not required by law.

Private Mediation in Japan

Despite the traditional importance of mediation globally, private mediation has not historically been used or supported by law in Japan. This changed with the enactment in 2007 of the Act on Promotion of Use of Alternative Dispute Resolution (Act), which addresses the relationship between private dispute resolution services, the courts, and the government. The Act includes a certification system for private mediation centers and reporting obligations. It also empowers

judges to order a stay of lawsuits and the suspension of limitation periods pending the outcome of private mediations. The Act does not address confidentiality, the use of information obtained in mediation in related court proceedings, or the enforcement of mediated settlement agreements. When court enforcement is needed, settlement agreements reached in private mediation must therefore be enforced as contracts in the normal way.

Since the Act became law, private institutional mediation remains uncommon in Japan. There have, however, been important exceptions to the limited uptake of private mediation. After the Fukushima Dai-ichi Nuclear Power Plant meltdown in 2011, for instance, a private dispute resolution center offering mediation services was created to manage claims by people who were affected against the operator of the power plant. By August 2013, the center had received 7,313 applications for mediation and had settled 4,239 disputes.

Because of limited uptake and confidentiality of proceedings, it is difficult to generalize about the nature of private mediation in Japan. There is inherently greater scope for flexibility in the duration, process, and style of mediation than in court conciliation, but in practice the parties and mediators tend to adopt the same evaluative style. The recent growth in interest in international commercial mediation, considered next, has potential to change conceptions of mediation.

International Commercial Mediation

In 2018, the Japan International Mediation Center-Kyoto (JIMC), one of a small number of dedicated mediation institutions worldwide, was created with the purpose of administering international commercial mediations. The JIMC is a grassroots initiative by Japanese attorneys that is affiliated with the Japan Association of Arbitrators, an organization founded in 2008 to encourage the development of private arbitration and mediation. The JIMC offers mediation rules, a list of mediators, and administrative services for mediations including logistical support for hearings and support to parties selecting mediators, as well as providing some training programs, including a mock-mediation discussed below.

The JIMC has been supported since its inception by the Singapore International Mediation Centre (SIMC), which itself began administering international commercial mediations in 2014. The JIMC and SIMC concluded a protocol in 2020 for the joint administration of expedited mediations. The protocol was used for the first time in 2021 to resolve a commercial dispute between Japanese and Indian parties concerning a failed joint-venture agreement.[5] Under the terms of the protocol,

[5] Co-author Yoshihiro Takatori was a mediator of this dispute.

the SIMC assisted the Indian party to select a mediator, the JIMC assisted the Japanese party to select a mediator, and the institutions shared responsibility for case administration.

The mediation, which resulted in settlement, offers an example of how mediation institutions can collaborate effectively as well as how co-mediation can bridge cultural and linguistic gaps between disputants. A co-mediation roleplay based on the protocol, with simultaneous English-Japanese interpretation, was held at an event in Japan in 2022. In the roleplay and panel discussion that followed, emphasis was placed on the benefits of facilitative features of mediation.[6]

International commercial mediations are also administered by the Japan Commercial Arbitration Association (JCAA), the leading Japanese arbitration institution. The JCAA first published commercial mediation rules in 2009 and revised them in 2020. The JCAA offers a list of mediators and administrative services for mediations. The JCAA also offers the possibility of integrating arbitration and mediation in its rules. Notably, the commercial arbitration rules recognize the right of arbitrators to act as mediators where the parties expressly agree, and the mediation rules provide a procedure for converting mediated settlement agreements into arbitral awards for the purposes of cross-border enforcement ("arb-med-arb"). The JCAA has been very active in promoting international mediation practice and its arb-med-arb procedure in recent years.[7] The institution has also administered a co-mediation under its 2020 rules.

The creation of the JIMC and the JCAA rules revision coincide with the creation of new venues for dispute resolution hearings in the two largest cities in Japan. The Japan International Dispute Resolution Center (JIDRC) opened facilities in central Osaka in 2018 and in central Tokyo in 2020. This center, which has funding from the government, comprises hearing rooms, interpretation booths, and technology to support virtual proceedings.

Prospects for Mediation in Japan

The past decade has seen important global developments in international commercial mediation. The United Nations promulgated the first treaty on international commercial mediation and revised its model mediation law and rules of mediation procedure. The developments in Japan, including improved institutional support for private mediation and new hearing facilities, have also been remarkable. They have amplified attention to international commercial mediation in

[6] The authors played roles in the mock-mediation and as speakers in the related panel.

[7] Co-author Takatori presented at an online mediation webinar by JCAA on 15 February 2023 that was well attended.

Japan and spawned trainings and events. But will this result in more Japan-related mediations or change conceptions about mediation among Japanese companies?

While there is interest in mediation among a few Japanese companies that operate internationally, there is no evidence of a significant increase in the use of private mediation yet. The caseloads at the JIMC and JCAA remain modest. The tendency of Japanese businesses to resist formal dispute resolution and to resist using lawyers may even discourage the use of private mediation. Businesses may assume that lawyers are necessary for private mediations. When businesses decide that it is time to bring in lawyers, they may consider the relationship to be broken and litigation to be inevitable. Some practitioners may also consider that complex commercial disputes or especially contentious disputes are not appropriate for mediation. To the authors, this underestimates the potential of mediation and underscores the need for a change in mindset to encourage further development of mediation practice in Japan.

The legacy of recent mediation trends may be, in the short term, more about legal change than more mediation. Japan has not ratified the Singapore Convention on mediation.[8] It is said that the government has had other priorities, notably managing the pandemic, and that a unilateral obligation on the judiciary to give special treatment to international mediated settlement agreements, which are fundamentally private contracts, is objectionable to some. There are also concerns about the relationship between the treaty and domestic legislation. If the convention were ratified, settlement agreements from international mediations would be easier to enforce in Japanese courts than those issued in the course of domestic mediations.

A small but influential group of Japanese attorneys has been encouraging the government to ratify the Singapore Convention. Owing in part to their efforts, the Japanese legislature is now considering both the adoption of the Singapore Convention as well as revisions to the Japanese domestic laws on mediation and enforcement procedure. The changes to the domestic law include provisions for facilitated enforcement of mediated settlements agreements reached in private mediations that aim to bring the domestic regime in line with the regime for facilitated enforcement under the Singapore Convention. In other words, the move to improve legal support for private *international* mediation may result in improved legal support for private *domestic* mediation by encouraging changes in the legal framework to support the mediation process and the enforcement of mediated settlement agreements at the domestic level.

[8] On the Singapore Convention in Brazil see: MASON, 2021. See also: COMETTI; MOSCHEN, 2022.

Another dynamic to follow is institutional cooperation. The JIMC project was inspired by a small number of lawyers who created the center from the ground up without financial support from the government or leverage from an arbitration institution. The JIMC was buoyed from the start by the support of the SIMC, which initially shared resources and know-how and has since worked with the JIMC to jointly administer mediations and to promote international commercial mediation at trainings and events. This kind of cooperation and cross-institutional capacity-building may serve as a model for mediation initiatives beyond Japan.

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Introduction to Mediation in Malaysia

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Abstract: Mediation has been in Malaysia as a modern problem-solving mechanism for over twenty years. Mediation has found its way into many industries in Malaysia. Institutions have been established to train mediators and to also facilitate the registration of cases for mediation and appointment of mediators. Malaysia is one of the first in the region to have a Mediation Act and features interesting clauses including immunity for trained mediators. Apart from court-annexed mediation which often is carried out in the absence of lawyers, private *ad hoc* or institutional mediation is also part of the Malaysian mediation landscape and lawyers generally have a larger and more important role in first designing a mediation overture and then supporting their client to conclusion.

I The Concept of Mediation in Malaysia

The concept of mediation in Malaysia is captured in the Malaysian Mediation Act 2012[1] as a confidential and structured process in which an impartial and

[1] Mediation Act 2012 (Act 749) was gazetted on 22 June 2012. It was about 5 years in the making before being legislated. It is currently pending an update and potential revamp.

independent third party, known as a mediator, assists parties in a dispute to communicate and negotiate with each other with the aim of facilitating a mutually acceptable agreement. A mediator does not have the power to impose a solution on the parties and any settlement reached during the Mediation is binding only if a parties agree to it in writing.

II A Brief Look at the Statutory Provisions of the Malaysian Mediation Act 2012

The short title of the Act is that it is an Act to promote and encourage mediation as a method of alternative dispute resolution by providing for the process of mediation, thereby facilitating the parties in disputes to settle their disputes in a fair, speedy and cost-effective manner and to provide for related matters.

The Act describes mediation as a voluntary process[2] which means that in Malaysia a party is not required or mandated to participate in mediation and can withdraw from the process at any time. Party autonomy is recognized.

A mediator who enjoys the protection of the Act is required to have the relevant qualifications, special knowledge or experience in mediation through training or formal tertiary education or satisfy the requirements of a mediator as prescribed by an institution.[3]

A mediated settlement agreement must be authenticated by the attending mediator under the Act.[4] A settlement agreement is binding on the parties[5] and may be recorded before the court if court proceedings have been commenced.

III Statutory Protections and Enabling Features of the Act

The Malaysian Mediation Act 2012 provides several statutory protections and enabling features to mediation including:

1) *Confidentiality:* Mediation communication is statutorily recognized as confidential and it cannot be disclosed or used as evidence in any legal proceedings unless with the consent of the parties involved or if disclosure is required under the Act or under any written law for the purposes of implementation or enforcement of a settlement agreement.[6]

2 Mediation Act 2012 section 3. The Act does not apply to mediations conducted by a judge or officer of the court pursuant to any civil action filed in court or the legal aid department.
3 Mediation Act 2012 section 7.
4 Mediation Act 2012 section 13(3).
5 Mediation Act 2012 section 14 (1), 14(2).
6 Mediation Act 2012 section 15(1), 15 (2).

2) *Privilege:* Mediation communication is statutorily recognized as privileged. Such communications cannot be subject to discovery or be admissible in evidence in any proceedings subject to exceptions including:

a) An express waiver of privilege in writing by the parties, the mediator and the non-party;

b) Any threat to inflict bodily injury or to commit a crime or to plan or attempt to commit a crime or to conceal a crime or criminal activity or an ongoing crime or criminal activity;

c) To prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator; or

d) To prove or disprove a claim or complaint of professional misconduct or malpractice against a party, non-party or representative of a party based on their conduct during any mediation session.[7]

3) *Impartiality and independence of mediators:* The Act requires mediators to act impartially and independently in the mediation process[8]

4) *Mediator's role:* The Act permits the mediator to assist the parties to reach a satisfactory resolution of the dispute and to suggest options for the settlement of the dispute[9]

5) *Immunity:* Mediators have immunity from civil liability for any act or omission done in good faith during the mediation process.[10]

6) *Agreement to mediate:* The commencement of a mediation must be signified by the parties entering into a mediation agreement which shall be in writing and signed by the parties. Key provisions in a mediation agreement include an express agreement of the parties to submit their dispute to mediation, the appointment of the mediator, issue of costs and other matters deemed appropriate by the parties.[11]

7) *Settlement agreement:* Any settlement agreement reached during the mediation process must be in writing and signed by the parties and is deemed binding on the parties.[12]

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7 Mediation Act 2012 section 16(1), 16(2). The exception to this provision, in theory, can be used in relation to even advisors whose conduct during the mediation session is unprofessional and/or deliberately disruptive to the mediation process.

8 Mediation Act 2012 Section 9 (3).

9 Mediation Act 2012 Section 9(2). This is strictly speaking not a pure facilitative mediation approach where mediators may pose a few options for consideration (if any). Mediators trained by the Malaysian International Mediation Centre are generally aware of this provision and are further trained to be mindful that parties must nevertheless have autonomy in the decision-making process and therefore option suggestion is to be exercised very carefully and only at the appropriate juncture.

10 Mediation Act 2012 section 19.

11 Mediation Act 2012 section 6(2).

12 Mediation Act 2012 section 13(2), 14.

8) *Mediation in context of legal action/arbitration:* Any person may initiate a mediation before considering any legal action or arbitration. However, a mediation commenced under the Act does not prevent the commencement of any legal action in court or in arbitration and does not act as a stay of proceedings.[13] Parties must be mindful of limitation issues in considering their preferred approach as there is no deemed suspension of the limitation period while parties endeavour to resolve their dispute through mediation. The general strategy would be to fix a period to mediate matters failing which legal action will be filed. Alternatively, legal actions are filed and then stayed for mediation to take place.
9) *Platform for communication:* The objectives of the protections provided in the Act are to encourage parties to engage in the mediation process as a first step by creating a safe and confidential environment where parties can in theory communicate freely and potentially negotiate a mutually acceptable agreement without fear that their statements or proposals may be used against them in subsequent court or arbitral proceedings.
10) Future revamps of the Mediation Act may contain provisions to convert mediated settlement agreements to court orders if carried out by registered mediators; and to implement the recognition and ratification of the Singapore Convention on Mediation.[14]

IV Mediation in Action in Malaysia

There are several hundred trained private mediators in Malaysia with different levels of experience and expertise.

Mediation in Capital Market Matters

Mediation for the capital markets industry in Malaysia is carried out by the Securities Industry Dispute Resolution Centre (SIDREC). The Securities Commission of Malaysia has established a mediation framework which sets out guidelines and procedures for mediation in capital market matters and disputes in Malaysia for financial institutions which are its members. The financial institutions that come under the purview of the Securities Commission are obliged to refer disputants to SIDREC which is an independent body established for the settlement of disputes

[13] Mediation Act 2012 section 4 (2).
[14] On the Singapore Convention and its benefits to Brazil see MASON, 2021. See also COMETTI; MOSCHEN, 2022.

between investors and such financial institutions, if they are unable to address a complainant's issues directly.

The mediation process for SIDREC typically involves the following steps:

1) *Request for mediation:* The parties involved in the dispute may request mediation by submitting a request in writing to SIDREC.
2) *Appointment of a mediator:* SIDREC will appoint a mediator from its panel of accredited mediators who has relevant experience both in mediation and capital market disputes.
3) *Agreement to mediate:* The parties will enter into a mediation agreement which outlines the scope of the dispute and emphasises the confidentiality of the process.
4) *Mediator as facilitator:* The mediator will conduct the mediation session with the parties involved, identifying the issues in dispute and facilitating communication between the parties with the aim of exploring possible solutions to the dispute.
5) *Monetary limit:* There is no monetary limit for claims to be brought to SIDREC.
6) *Mediation fee:* Mediation of dispute involving claims below RM250,000 (est. USD50,000) are available free of charge to investors however claims above RM250,000 are subject to fees to be paid to SIDREC.
7) *Legal representation:* Parties are not allowed to be represented by legal counsel for claims below RM250,000 but are allowed to be represented by legal counsel for claims above RM250,000.
8) *Settlement agreement:* Any settlement agreement reached by parties during the mediation process will be reduced to writing, signed and witnessed by the mediator.
9) *Mediation guidelines:* SIDREC's guidelines on mediation emphasize principles of confidentiality, impartiality and from the perspective of the investor – participation is voluntary. Financial institutions who are members of the Securities Commission are obliged to participate in any mediation brought about on account of a notice of mediation filed by an unhappy investor who meets SIDREC's eligibility criteria.

Mediation in Family matters

Mediation in Family[15] matters is common-place and takes place in both private and court settings.

[15] On mediation in family matters in Brazil see BRAGANÇA; NETTO, 2020.

Pre-divorce mediations and child inclusive mediations appear to be a growing trend as legal advisors and disputants recognize the value in early engagement as well as engaging children (who are old enough to weigh in on matters) to be part of the process.

Mediation in Construction Matters

The earliest mediators in Malaysia were trained in the context of mediation for the construction industry. The theory is that most construction related parties in Malaysia are open to an amicable attempt to resolve their disputes to allow the company to continue with its ongoing construction projects.

However, often unequal bargaining strengths lead to adjudication, litigation or arbitral proceedings being used as preferred weapons to thwart and demolish a financially weaker party.

The option of resolving a dispute using mediation is available in various agreements and standard construction contracts. For example, the Standard Agreement and Conditions of PAM Contract 2018 (Without Quantities) provides that mediation may be attempted to resolve construction disputes between the Employer and Contractor. Mediation is also provided in the Construction Industry Development Board (CIDB) Standard Conditions of Contract for Building Works (2000) where the parties are required to first attempt mediation before being able to commence an arbitration.

In all circumstances, mediation can only take place with the consent of both parties, and a lot depends on their advisors as well. Often, an amicable settlement is not able to be achieved due to distrust having reached a tipping point or worse, financial imbalance between the parties puts one party on a clear course to financial failure which is taken advantage of by the commercially stronger party. Mediators with gravitas and creativity and who are also seen as independent and impartial can encourage parties to try to resolve the dispute and differences. The roles of the lawyers and legal representatives remain crucial as the parties will rely on wise counsel during mediation proceedings to structure solutions which are not only durable but commercially sensible in the long run.

Mediation in Commercial Matters

Transactional lawyers have been emerging as mediation advocates in commercial disputes as they appear to resonate with the ethos of solving problems quickly. This is diametrically opposite to traditional litigation lawyers whose reward structure appears to be tied to the long game where the litigator's continued rewards are tied to appeals and elaborate enforcement processes.

In an unreported resolution of a multi-million ringgit commercial and construction related dispute, a set of litigators who displayed "advisor hesitancy" in refusing to agree to a second mediation – eschewing its potential on account of one previous bad mediation session led by an arbitrator – were eventually side-lined by their client's transactional lawyer who stepped into the mediation arena and the assisted the client to reach a mediated settlement agreement within a much shorter period than it would have taken by arbitration or litigation.

Users in the future may benefit from the perspectives and skill sets of their transactional lawyers in commercial disputes particularly if litigators insist that litigation is the only way to solve a problem.

V Court-Annexed Mediation v. Private Mediations

Court mediation is carried out by registrars or judges. It is common knowledge that mediations carried out in the courts have the general nature of judicial settlement meetings as opposed to mediations where issues are identified, and parties underlying needs and interests are explored. The Malaysian Mediation Act does not apply to court mediators or mediation proceedings.[16]

At present, mediation is not a mandatory prelude to legal proceedings in Malaysia although it remains encouraged after matters have been filed in court. Several Practice Directions have been issued by the Courts to encourage court-annexed mediation but the response to court-annexed mediation has been arguably grudging as opposed to enthusiastic compliance.

Court-annexed mediation is available for free and more often than not, the registrars or judges exclude lawyers from being physically present when speaking to the parties. The exclusion of lawyers has been an unfortunate practice for many years and appears to imply that lawyers are obstructive to the cause of mediation as opposed to facilitative.

Behind closed doors and in the absence of the representing legal counsel, court registrars have been known to ask parties about their legal costs as a means to encourage the parties to resolve their matter and save on legal fees. This has created tension within the profession as mediation then is seen as a process that throws sand into the proverbial lawyer's "rice bowl".

Mediation in private settings tend to be resoundingly different as lawyers are not just welcomed but encouraged to participate in the mediation setting by professionally trained mediators. Mediation often takes a full day or half a day.

[16] Malaysian Mediation Act section 2 (b).

In professionally carried out mediations, counsel play an extremely vital role in preparing and guiding their clients prior to, during and after a mediation. Mediations in private settings are generally helmed by the partners in charge of the file who take on their role as mediation advocates in a meaningful manner.

The protocol for court annexed mediation in Malaysia also includes the possibility for courts to refer a case to private mediation. However, as there are private mediator costs to be borne by the parties, parties tend to elect free court mediation once they have filed their matter in court unless their counsel collectively agree that private mediation would be more appropriate for their case.

There is no sanction to obstructive conduct in thwarting mediation attempts (yet).

VI How Court or Legislation Mandated Mediations (If Any) Are Conducted in Malaysia

There is no court mandated or legislatively mandated mediation in general civil and commercial matters. Family matters and matters in the industrial court are routinely mediated as a natural (but not mandated) first step. In the Syariah Court which has jurisdiction over Muslim marriages and inheritance, a form of mediation called Sulh is practised.

In Malaysian civil courts, disputes are generally mediated by a judge who will not oversee the trial in the matter. In exceptional cases, parties can consent to the same judge, but this is not encouraged in the Rules of Court Mediation to prevent allegations of bias.

Generally, parties prefer a different judge to conduct their mediation as judges have been known to disclose their views about a matter as a means to encourage settlement consideration. As mentioned earlier, it is a source of tension that lawyers are often excluded from the mediation chamber as the registrar or judge wants to speak to parties in private. It remains a mystery what a registrar or judge needs to say to parties which cannot be confidently said in front of the party's lawyers.

This element of secrecy has created distrust and discomfort among some lawyers. Regrettably some registrars and/or judges (with their own security of income and pension plans) anecdotally point to reducing lawyer's fees as an incentive to resolve matters outside the earshot of the lawyers. The incidences of this which was more rampant about 10 years ago happens less so now but much of the damage has been done. In response, some lawyers who are genuinely supportive of mediation and who work hard to prepare parties for mediation, have

fee agreements that secure their income regardless of whether the matter is resolved by mediation or litigation.

The Rules for Court Assisted Mediation are found in the public domain.[17] In the absence of statutory provisions, these rules operate as guidelines for all judicial officers who act as mediators in court assisted mediation. The Rules do not act as a fetter upon the discretion of the mediator to help parties resolve disputes. However, mediators are urged to have regard to these rules so that the mediation process adheres to the principles of fairness and justice.

All judges and judicial officers involved in trial work are encouraged to mediate cases in an effort to save time and money for all parties involved. However, judges and judicial officers are strictly not permitted to mediate cases which are on their own trial list. This is to prevent judges from being unfairly accused of attempting to avoid hearing certain cases. Judges may only mediate cases which are on the trial list of other judges. Judges in stations where there is only one judge may make use of the video conferencing facility to exchange cases for mediation.

The Rules set out cases that are highly recommended for mediation. They suggest that Judges and judicial officers should automatically refer the following cases for mediation during case management hearings: (a) Personal injury cases (b) Family cases (c) Goods sold and delivered cases.

However, the referral to mediation can be revoked if the parties object to the mediation at the outset of the proceedings. It is recognized that other cases can be referred to mediation as well with the consent of the parties.

In court assisted mediation the role of a mediator is two-fold. In the first stage, the mediator is a neutral and impartial person who facilitates communication between parties so that they can resolve the dispute themselves. In the second stage, the judicial officer who acts as a mediator may often be called upon to suggest solutions or advice. Upon such request, the mediator should obtain consent of the other party before proceeding to give a neutral evaluation. The Rules stipulate that the additional duty of giving a neutral evaluation must be discharged with caution, tact and diplomacy so that the impartiality of mediator and the mediation process are not compromised.

The Rules also explain how judicial officers should conduct a mediation. Judicial officers are reminded that they should always bear in mind that the ends do not justify the means (paragraph 1.3 of the Rules). The rules include a reminder that a judicial officer who acts as a mediator should desist from taking cases where relatives or friends are involved, either directly or indirectly. Although a

[17] Available at: https://judiciary.kehakiman.gov.my/portals/media/others/Rules_for_Court_Assisted_Mediation.pdf.

mediator would not be making a decision, he may be open to the accusation that the mediation process was skewed in obtaining a favourable settlement for one side or the other if he has a personal interest in the case.

The Rules include provisions on confidentiality and note-takin The Rules in fact state that it is advisable to allow lawyers to be present during mediation proceedings as they may assist their clients to explore options to settle.[18] The reasons are: (a) In court assisted mediation, the dispute had already reached the litigation stage and the lawyers have already become stakeholders; (b) the presence of lawyers will give added credence to the voluntariness of the parties; and (c) the lawyers may also assist to draw up the consent judgment if the mediation is successful.

Unfortunately, there is also a provision in Rule 10.2 where the Rules state "where a lawyer appears to be part of the problem instead of the solution, the mediator in his discretion may limit the participation of the lawyer with the consent of the party". It is a common practice that lawyers are excluded suggesting in all those cases that the lawyer is perceived to be a "problem".

VII The Popularity of Mediation in Malaysia as a Dispute Resolution Process and the Obstacles to Parties Adopting Mediation as a Means to Resolve Their Disputes

Culturally, most disputants perceive that their dispute must be "fought" in court or through arbitration. This is the first hurdle advisors must overcome to secure the confidence of a client in mediation.

The perception of mediation is that it is a soft skill and does not take much effort. The perception of mediation having soft significance has changed over the last several years as high value mediations become known in the public domain and highly visible dispute disappear off the radar under the shroud of having been settled through mediation.

When China announced in 2015 that disputes involving Belt and Road projects would be mediated, a noticeable jump in professionals wanting mediation training was observed. This coupled with the Pound Conference Series in 2016/2017 and the Singapore Convention on Mediation has invariably raised the perception of mediation in Malaysia.

Not all clients are sophisticated or have the leadership measure to recognize that their investment into the dispute ahead of them may be better placed in

[18] Rule 10.

mediation where they may unlock cash more quickly, return to productive business swifter and/or salvage a profitable relationship.

One key obstacle to adopting mediation as a means to resolve their dispute remains the perception of lawyers that they cannot make a sustainable living by advocating mediation. Therefore, as a strategy, they file their suits or prepare the notices of arbitration to demonstrate their getting up and having done so, then position themselves for mediation. This has the advantage of having a next step ready if the mediation does not succeed.

Having said that, there is a growing segment of Malaysian lawyers and corporate organisations who recognize the wisdom of early effective resolutions and are able to draw clients who appreciate that skill and the rates of pre-action mediation have increased.

While, parties can opt for private mediation, the chances are that, if they were willing to pay for mediation, this may independently be organised by their counsel and potentially undertaken prior to the court process. After filing their matter in court and with the ostensible availability of free mediation by the registrars/judges, there is notably hesitation of parties when they have to pay for private mediation. However, in complex cases, there are parties who are agreeable to share costs, or one party bears the full costs of private mediation while court proceedings continue.

Apart from that, the common default mediator is the court mediator. Separate to the sense of displacement and diminished value that lawyers apparently feel in a court mediation setting, there is no clear value accorded to lawyers who prepare their clients for a mediation nor a recognized treatment for costs following a successful mediation.

The mistake lies in the narrative that the lawyers have done very little at the stage of mediation while ignoring that the lawyers may have done significant case preparation even before filing the suit.

The narrative encouraged by the local professional mediation institutions like the Malaysian International Mediation Centre (previously known as the Malaysian Mediation Centre) is for lawyers in a mediation to ensure clients recognize the significance of their getting up and preparation work. However, the challenge remains that many memories prevail where lawyers were apparently jostled for massive discounts by their clients in the early days of court mediation on the basis that all they “did” was show their client “where the court was located” (on account of being excluded from the main mediation process).

While International mediation exists in Malaysia, but statistics are not readily available as many are undertaken on an *ad hoc* basis and are largely unreported.

VIII The Extent of Development of the Mediation Ecosystem in Malaysia

A Local Mediation-Related Legislation

Malaysia is one of the earliest Asian nations to formulate a Mediation Act in 2012.

The early draft of the Mediation Act contained visionary components such as requiring mediation to precede any court action as well as the enforceability of mediated settlement agreements. Unfortunately, the other influencers to the drafting deleted those visionary provisions. At this point in time, it is hoped that the revamped Mediation Act is likely to feature those visionary provisions once again.

Other progress:[19] Despite Malaysia's arguably slow start in mainstreaming mediation, an impact was made when Malaysian mediators were part of a world first, through the Malaysian Government legislating that mediation would be used to assist parties who required assistance with Covid-19 related disputes and introduced a scheme to assist disputants in disputes related to the movement control order on account of Covid-19. One of the most notable aspects of the project was that the Malaysian Government paid experienced mediators to mediate the registered matters. The project crossed all parts of Malaysia including East Malaysia.

The disputes identified for assistance by the Covid-19 Mediation Centre include disputes between commercial landlords and tenants, tourism related disputes, pilgrimage package disputes, commercial contracts, construction related disputes and claims for professional services among others.

The ethos for this mediation programme came from professional thought leaders wanting to assist in the unlocking of cash at a time when all parties potentially faced crisis not caused by recalcitrance but by circumstances beyond their control. The project was the author's brainchild but could not have been done without the Malaysian Government's amazing vision and support as well as the Malaysian Bar Council who supported the programme.

Primary support also came from Datuk Kuthubul Zaman (the Chairperson of the Malaysian International Mediation Centre for over 20 years) whose vast knowledge of what worked and what did not in mediation was invaluable.

In a world-first, the Malaysian Government paid mediators respectably fees of between RM2000 (for 4 hours of mediation) up to RM8000 (for 2 days of mediation). [approximately USD500 – USD 2000] for each case. This helped to eschew the unfortunate perception that most mediators were in casual retirement

[19] Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020. section 9.

mode and were wealthy enough to work for free or conversely, mediators had nothing else meaningful to do or inherently have no or low value and therefore should be asked to volunteer their time for token fees. The competing comparison was that created by determined and professional arbitrators, adjudicators and judges, none of whom work for free or low or token fees.

Covid-19 Mediation Initiative was carried on for two years although it was initially slated for one year. In tandem with the Covid-19 Mediation Initiative, a Mediate First Policy was launched in the second year of the programme which drew 55 law firms which made a pledge to assist parties affected by Covid 19 to endeavour to mediate first.

B The Local Enforceability of Mediated Settlement Agreements and the Procedure for Enforcement

Currently mediated settlement agreements are enforced like any contract. Having said that, there are very few cases of mediated settlement agreement heading in the direction of court for enforcement.

The primary reason is that most mediated settlement agreements include a feature to return back to mediation if compliance encounters difficulties and most trained mediators are skilled at testing the proposed agreement for durability and practical compliance.

C Availability of Trained Local Mediators and Mediator Training Bodies

Mediators have been trained in Malaysia since the late 1990s.

The Malaysian International Mediation Centre is the leading mediation centre in Malaysia exclusively devoted to maintaining standards, training and mediation awareness building. It was set up in 1999 and comprise a panel of trained mediators who are required to be professionals and to ideally undertake refresher courses to remain on panel.

In the early days, the mediators were required to have at least 7 years post-qualification experience in order for the mediators to carry the appropriate gravitas in a mediation chamber. Over time mediators of all ages were trained.

A strong focus on Mediation Advocacy commenced in 2015 as there was a recognition that case creation required the recognition and respectful acknowledgement of lawyers who not only steer cases to mediation but prepare the parties and participate meaningfully in the mediation sessions. The somewhat low value proposition of mediation continues to impair mediation as most mediators

in Malaysia themselves did not steer their own court cases to mediation but like mediators around the world, tend to wait for appointments to be mediators.

Training & Accreditation

The Malaysian International Mediation Centre has trained over 600 mediators of whom approximate 250 mediators continue to apply to be empanelled. It encourages mediators to attend refresher courses to maintain standards of the mediators.

There are presently several hundred trained local mediators in Malaysia including IMI certified mediators and IMI qualified mediators. IMI qualification does not immediately qualify for registration as a mediator of the Malaysian International Mediation Centre and competency assessments are carried out prior to empanelment. Local trained mediators include mediators for municipality matters (DBKL mediators) and Shariah Courts.

Other notable organisations with Mediation focus on Malaysia is the Asian International Arbitration Centre (AIAC) which featured its first Mediation Rules in 2013 and then in 2018. The author was part of the project for the update of both sets of Mediation Rules including the AIAC Mediation Rules 2018 which features Med-Arb provisions.

One of the more successful mediation centres is the Securities Industry Dispute Resolution Centre (SIDREC) which was set up as an independent dispute resolution centre of the Securities Commission of Malaysia. Mediations are carried out by a mixture of in-house mediators and an external panel of specialist capital market mediators.

D Availability of Local Accreditation Bodies for Trained Mediators and How the Accreditation System Works

In Malaysia, the Malaysian International Mediation Centre accredits the trained mediators.

Trainers and assessors are similarly trained to train other mediators. Potential Mediators undergo an intensive 40-hour training course which culminates in a practical assessment.

Upon assessment – the assessors will assess whether a MMC trained mediator is capable of running a mediation without supervision.

All MMC mediators are encouraged to continue their training, participate as mediation advocates so that they can observe and learn from more experienced mediators and to volunteer as much as possible to be mediators in any matter that may come their way.

E Availability of Physical Infrastructure Conducive or Dedicated to the Conduct of Mediation

The Malaysian International Mediation Centre has excellent facilities for mediation as do most of the arbitral institutions. Such venues can accommodate large numbers of parties and host hybrid mediation as well.

Mediations also routinely take place in law firms and other neutral venues at the option of parties and their advisors.

The onset of Covid compelled mediators and parties to adapt and most mediators and parties became adept at online mediation.[20] Most online mediations take place on Zoom platforms or similar with mediators also being able to contact parties via WhatsApp calls or messages. The incredible dexterity that mediators have had to develop in light of upskilling to cater for online mediation has been staggering.

F Extent of Integration of Mediation with Other Local Dispute Resolution Institutions *i.e.* Courts/Arbitration Centres

In Malaysia, mediation remains very much a silo-ed practice although it is not uncommon to find references to multi-prong dispute resolution clauses which require parties to undergo mediation before considering arbitration which will be final and binding.

At the point of a dispute when the parties are the angriest and least co-operative, re-steering to mediation can sometimes be perceived as anti-climactic, so parties persist with arbitration proceedings.

Full integration between mediation and arbitration is discussed in theory but there are few anecdotes of true integration.

In Malaysian thought leadership, true integration of mediation and arbitration processes with a mediator and arbitrator sitting shoulder and shoulder together, earning the same fees and participating in accordance with their appropriate office has been discussed. However, this remains a theory as no institution has implemented a suitable structure for such an integrated process yet.

[20] For online dispute resolution see ELISAVETSKY; MARUN, 2020; FERREIRA *et al.*, 2022.

IX Foreseeable Developments in Mediation in the Near Future in Malaysia

The rebranding of Malaysian International Mediation Centre is a nod towards future developments in Malaysia.

Malaysia-China Mediation Initiatives exist and envisages that mediators for matters involving Chinese related projects can be housed in Malaysia.

Malaysia International Mediation Centre has entered into MOUs with various groups and continues to create awareness through their speaking and training programmes. The key challenge with any and all of these MOUs is that there is low or no outreach to users and a renewed focus on user engagement is on the pipeline.

Malaysia was part of the group of first signatories of the Singapore Convention on Mediation.

It was a delight to be in the room when the thunderous applause greeted the late Malaysian Minister VK Liew as he went up the stage to sign the Convention. He would later be instrumental to encouraging his department to set up the taskforce for the ratification of the Singapore Convention. This will take some time as the Malaysian Mediation Act also needs to be updated at the same time.

The first response to the publicity about the Singapore Convention was that all mediation training programmes filled up with waiting lists bursting at the seams. Corporate and transactional lawyers who are so pivotal to the early conversations about dispute resolution need to be made aware to continue to articulate mediation as a first or preferred dispute resolution approach in their agreements.

The main hurdles to Malaysia's use of the Convention remains the very practical aspect of whether advisors are sufficiently incentivised to use it. High moral paradigms do not work. Mediation work needs to be as sustainable as other problem -solving mechanisms. Mediators who themselves are unwilling mediation advocates are part of the problem. Mediation Advocacy may need to be reframed as speciality field instead of something of a tick box.

Tick box mediation advocacy should be frowned upon with cost sanctions. These are some of the reforms that may needed to elevate mediation in Malaysia as a sustainable practice area for lawyers and a beneficial mechanism for users and investors.

28 March 2023

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Evolution of Mediation in Singapore

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Abstract: Mediation is a dispute resolution method in which the parties attempt to reach an agreement with the help of a neutral third party who does not have adjudicatory powers. A successful mediation results in a mediated settlement agreement that contractually binds the parties. While mediation is ancient, its roots are unknown. Some believe it began in 1800 B.C. in modern-day Syria, where the Mari monarchy utilised it to settle disputes with other kingdoms. Others trace it back to Phoenician commerce, ancient Greece, and the Roman civilisation. However, thankfully mediation's enduring impact is certain. Mediation usage has grown exponentially over the centuries and is gaining popularity in commercial disputes as it allows parties to retain direct control over the outcome and by reason of its confidential, inexpensive, efficient, and compelling nature. This too is the case for Singapore, where mediation has emerged as a pivotal alternative dispute resolution mechanism and has helped in transforming the overall landscape of conflict resolution and facilitate an efficient and cost-effective solutions. This phenomenon has gained pace after the adoption of the United Nations Commission on International Trade Law ("UNCITRAL") Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention on Mediation").

Through this article, we have attempted to present a comprehensive analysis of the evolution of mediation in Singapore, and the intent of mediation before dwelling into its domestic and international growth. Additionally, the article will focus on the legal frameworks and most importantly the institutionalisation of the

[1] This paper was written with the assistance of Carina Lim.

process, coupled with the creative use of incentives and legislation that helped to strengthen the mediation eco-system in Singapore. The article also examines various hybrid models and will attempt to identify the challenges and future prospects for the continued growth and development of mediation in Singapore.

Introduction

The success of mediation lies in the willingness to collaborate. Understanding each other's perspectives, needs, and interests is critical. Ultimately, a party feels satisfied when the dispute is resolved with closure, and the issues are resolved holistically. Singapore has adopted a collaborative approach by creating in its dispute resolution framework, a synergy between the mechanisms, users, institutions and the judiciary. As a result, mediation has become an effective medium of dispute resolution, and the Singapore Convention on Mediation[2] has put it on an international pedestal. To create a robust justice system, the priorities of the institutions have shifted from an adversarial towards a consensual and collaborative resolution. The alternative dispute resolution ("ADR") movement started early in Singapore and was meticulously planned with the establishment of dispute resolution institutions, amendments to the legislation, the growth of service providers, and most importantly, with support from the government and the judiciary. Having made significant strides in the international development and recognition of mediation, Singapore has gained global recognition as a preferred destination for resolution of international disputes.

Today, private mediation by organisations like the Singapore Mediation Centre ("SMC") and community-based mediation through the Ministry of Law's Community Mediation Clinics ("CMCs") offer a whole suite of mediation services to cater to the needs of domestic disputes. There are also organisations that provide sector-based mediation services such as Financial Industry Dispute Resolution Centre ("FIDReC") which was instituted as part of one of the Monetary Authority of Singapore's initiatives to provide mediation services for the resolution of all eligible retail disputes with financial institutions.[3] Operating alongside these to cater to international disputes is the Singapore International Mediation Centre ("SIMC"). Additionally, global mediation centres, such as the World Intellectual Property

[2] On the Singapore Convention in Brazil see: COMETTI, Anna K. F; MOSCHEN, Valesca R. B. The Singapore Convention in the framework of the Investor-State Dispute Settlement System. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 4, nº 7, 2022, pp. 37-57. See also MASON, Paul E. A Convenção de Cingapura e seus benefícios para o Brasil. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 2, nº 4, 2021, pp. 181-193.

[3] FIDReC, *About Us*, https://www.fidrec.com.sg/about/ (last accessed May 8, 2023).

Organization ("WIPO") Arbitration and Mediation Center,[4] have established offices in Singapore – further strengthening Singapore's mediation arsenal. The increasing adoption of mediation as a dispute resolution mechanism is a global movement, and Singapore, despite being one of the smallest nations, has emerged to be a dispute resolution hub in the East.

A The Mandate for Mediation

Since it was first introduced in the former Subordinate Courts (now known as the State Courts), mediation has always been premised on voluntariness – parties cannot be compelled, nor does the Court compel parties, to mediate. However, such an emphasis on the voluntary nature of mediation has arguably 'softened' in recent years as amicable dispute resolution has slowly been 'entrenched' in Singapore's legal framework. For example, the Rules of Court (Cap 322, 2021 Rev Ed) were amended to include, amongst others, rules that impose a duty on parties to consider "amicable resolution" prior to and during civil proceedings,[5] and that the court may consider "efforts made by the parties at amicable resolution" in deciding to make adverse orders against any party when considering the award of legal costs.[6] Given that there are financial consequences for refusing mediation, viz amicable dispute resolution, where the Court is satisfied that the reasons for refusal are unsatisfactory, mediation is arguably implicitly 'mandatory' as parties are encouraged to consider ADR methods before resorting to litigation as a last resort. Thus, ADR including mediation, has assumed an unprecedented importance within the reformed civil justice regime's focus on efficiency and active case management.[7]

However, mediation is mandatory for some matters. For example, under Section 139I of the Women's Charter (Cap 353, 2020 Rev Ed), where parties proceed with a contested divorce and have children below the age of 21, parties or their children (or both) must be ordered to attend mediation and/or counselling, unless the court considers it to not be in their interests. Another example is of

[4] The WIPO Arbitration and Mediation Center is one of the three mediation service providers recognised by the Intellectual Property Office of Singapore ("IPOS"), and it is the only global centre to provide specialist services for intellectual property and technology disputes. It is also a designated mediation service provider and so with the consent of the parties, its mediated settlement agreements also be registered and enforceable as orders of court under the Mediation Act 2017. See IPOS, *Mediation*, https://www.ipos.gov.sg/manage-ip/resolve-ip-disputes/mediation (last accessed May 8, 2023); WIPO, *The WIPO Arbitration and Mediation Center Singapore Office*, https://www.wipo.int/amc/en/center/singapore/ (last accessed May 8, 2023).

[5] Order 5, Rule 1 of the Rules of Court (Cap 322, 2021 Rev Ed).

[6] Order 21, Rules 2 and 4 of the Rules of Court (Cap 322, 2021 Rev Ed).

[7] Dorcas QUEK ANDERSON, *Empowering the courts to order the use of amicable dispute resolution: The Singapore Rules of Court 2021,* 41(3) Civil Justice Quarterly 191 (2022).

cases filed with the Small Claims Tribunal where Section 17 of the Small Claims Tribunals Act imposes a statutory obligation on the Registrar, when a claim has been filed, to invite parties for a "consultation with a view to effecting a settlement acceptable to all the parties". Furthermore, since April 2017,[8] mediation with the Tripartite Alliance for Dispute Management is compulsory before the matter is heard by an Employment Claims Tribunal. Further, it was announced in March 2023 that under the enhanced Community Dispute Management Framework, mediation for neighbourly disputes over noise will be mandatory.[9]

Despite not being mandatory, amicable dispute resolution, particularly mediation, has a strong presence in the early stages of legal proceedings in Singapore. Due to the pro-amicable dispute resolution culture, the strong legal framework that promotes and supports it, as well as the active push from the judiciary, mediation has been successfully positioned as "the first stop".[10] Besides that, where parties have mediation clauses incorporated in their contracts, the Court will enforce such clauses, and parties are bound to negotiate in good faith.[11] Given that the Court of Appeal had also held that where parties incorporate a multi-tier dispute resolution clause and that parties are mandated to mediate prior to arbitration, such clauses are enforceable and effective.[12] Crucially, it was also held that the parties' obligation to mediate would be viewed as a pre-condition to a valid arbitration.[13] Thus, while not always court-mandated as a prelude to legal proceedings, mediation plays a key role in dispute resolution in Singapore.

It is pertinent to note that the advocates and solicitors now have a professional duty to advise their clients about the various ways their disputes may be resolved using an appropriate form of ADR. This is supported by Supreme Court guidelines, which state that lawyers have a duty to explain the benefits of mediation, the process, and what might be achieved over and above what remedies are available through the courts.[14]

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8 Employment Claims Act 2016.

9 Yuen-C THAM, *Mediation to be mandatory for noise disputes between neighbours*, Mar. 28, 2023, available at https://www.straitstimes.com/singapore/politics/mediation-to-be-mandatory-for-noise-disputes-between-neighbours (last accessed Apr. 27, 2023).

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11 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] SGCA 48.

12 *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2013] SGCA 55.

13 *Ibid.*

14 Dorcas QUEK ANDERSON, *The development of mediation for civil disputes* in MEDIATION IN SINGAPORE: A PRACTICAL GUIDE 313, 332 (Danny McFadden and George Lim SC eds, Sweet & Maxwell, 3d ed, 2021).

B The Growth of Mediation in Singapore

Traditionally, mediation is referred to the process where disputants talked about their differences and were afforded counsel to resolve their disputes amicably. In Singapore, this typically involved 'respected community leaders' who would act as a neutral party. Following the establishment of modern Singapore's legal system, mediation took a back seat as the government prioritized the development of court-based processes (i.e., litigation). However, in the late 1990s, mediation was resurrected primarily through the efforts of the judiciary, particularly the enormous support of the then presiding Honourable Chief Justice Yong Pung How. Aside from the aim to clear a backlog of cases before the courts, another key goal of the judiciary's push for mediation was its belief that mediation benefited the society and its individuals by preserving harmony and cohesion.

The groundwork for a comprehensive ADR system in Singapore was laid in the mid-1990s, when the then-Minister for Law and Foreign Affairs, S Jayakumar, appointed a high-level committee on ADR ("ADR Committee") in 1996, which comprised both public and private sector representatives to investigate how ADR processes, particularly mediation, could be promoted in Singapore.[15] The ADR Committee, chaired by then-Minister of State for Law and Home Affairs Ho Peng Kee, was tasked with reviewing current uses and considering new uses for ADR processes in Singapore. In this vein, the ADR Committee proposed a conceptual model for how mediation should fit into the overall Singapore national infrastructure for court-based and non-court-based mechanisms to resolve not only commercial but also community disputes.[16]

Singapore's concept of access to justice through mediation has evolved over the last two decades. Court-based mediation was established in 1994, followed by commercial mediation in 1997 and community mediation in 1998. Two opposing forces have influenced the relationship between the mediation movement and access to justice: the desire to create an indigenous model of mediation and the need for it to be aligned with the internationally accepted mediation principles. The introduction of mediation coincided with a shift from adversarial justice to a more traditional form of conciliatory justice, in which a respected mediator served as an advisor to the disputants and was trusted to ensure the fairness of the process. As mediation was now viewed as complementary and co-equal to court adjudication,

[15] Prof S Jayakumar, Minister for Law and Foreign Affairs, Speech at the 15th Anniversary Dinner of the Singapore Institute of Arbitrators (May 24, 1996) (transcript available at https://www.nas.gov.sg/archivesonline/data/pdfdoc/sj19960524s.pdf) (last accessed May 8, 2023).

[16] See Assoc Prof Ho Peng Kee, Minister Of State For Law And Home Affairs, Address at The Conference on "Resolving Disputes: Exploring The Alternatives" (Mar. 31, 1998) (transcript available at https://www.nas.gov.sg/archivesonline/data/pdfdoc/1998033101.htm) (last accessed Apr. 27, 2023).

the revival of conciliatory justice strengthened the relationship between mediation and access to justice. This trajectory, however, has been tempered by the need to ensure that Singapore's mediation practice adheres to international best practices regarding the protection of parties' autonomy. Recent efforts to promote the use of mediation in cross-border disputes have emphasised this need.[17]

Thus, mediation is now a crucial component of Singapore's judicial system[18] over and above of it being used for interpersonal issues. It is frequently employed to resolve disputes in courts, organisations, businesses, and other settings. As previously highlighted, the Singapore courts now have the option to record mediated settlement agreements as court orders following the passage of Singapore's Mediation Act ("Mediation Act 2017") on 1 November 2017, which allows for parties to consensually apply for their privately mediated settlement agreements to be registered as an order of court, provided the conditions for the Act's applicability are satisfied.[19] This includes factors such as, whether the mediation was conducted by a certified mediator,[20] or handled by a designated mediation service provider,[21] the mediated settlement agreement is in writing and signed by all parties and no proceedings have been commenced in any court. The application must be made within eight weeks of the date of settlement unless the court grants an extension of time.[22] These conditions apply to any mediation conducted under a mediation agreement where (a) the mediation is conducted entirely or partially in Singapore; or (b) the agreement states that the Act or Singapore law will apply to the mediation.[23] Moreover, with the Singapore Convention on Mediation Act being passed on 12 September 2020, it is now possible for an international settlement agreement to be enforced as a court order after fulfilling the necessary steps under Section 4 of the Act.

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17 Dorcas QUEK ANDERSON, *The evolving concept of access to justice in Singapore's mediation movement*, 16(2) International Journal of Law in Context, Research Collection School Of Law, 128-145 (2020).

18 On multiparty mediation in Brazil see FERREIRA, Daniel B; SEVERO, Luciana. Multiparty Mediation as Solution for Urban Conflicts: A case analysis from Brazil. BRICS Law Journal, Vol. VIII, nº 3, 2021, pp. 5-29. https://doi.org/10.21684/2412-2343-2021-8-3-5-29. See also: FARIAS, Bianca O. Mediação de conflitos em ambientes educacionais: um horizonte com novas perspectivas. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 2, nº 3, 2020, pp. 157-194. See: AWAD, Dora R. Mediação de conflitos no Brasil: atividade ou profissão. . Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 2, nº 4, 2020, pp. 57-66. On mediation in Palestine see: SHAAT, Haia. Mediation in Palestine. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 2, nº 3, 2020, pp. 231-249.

19 Section 12 of the Mediation Act 2017.

20 For example, a SIMI-certified mediator whereby SIMI is a premier independent professional standards body for mediation in Singapore and the region. For more information: SIMI, https://www.simi.org.sg (last accessed May 2, 2023).

21 They are the Tripartite Alliance for Conflict Settlement, SMC, SIMC, the WIPO Mediation and Arbitration Center. See Press Release, Ministry of Law, Mediation Act to commence from 1 November 2017 (Nov. 1, 2017) (available at htts://www.mlaw.gov.sg/news/press-releases/mediation-act-to-commence-from-1-november-2017) (last accessed May 8, 2023).

22 Section 12 of the Mediation Act 2017.

23 Section 6(1) of the Mediation Act 2017.

Given that there are also other legislation supporting the mediation ecosystem, such as the Income Tax Act 1947 and the Income Tax (Qualifying Mediation and Qualifying Mediator) Rules 2016,[24] the growth of mediation in Singapore is likely to be sustained. Where the relevant requirements are met, non-resident mediators can enjoy tax incentives for their services.[25] From 1 April 2023 to 31 December 2027, gross income derived by non-resident mediators from mediation work carried out in Singapore will be subject to a concessionary withholding tax rate of 10%, or the mediator may elect to be taxed at 24% on net income. This applies to income derived from mediation services for a mediation that was conducted in Singapore or was planned to take place in Singapore, but the dispute was settled before the mediation. Mediation services extend to those that were rendered pursuant to an agreement to mediate specifying Singapore as the venue for the mediation. To qualify, at least one of the following must apply: (a) the mediator is certified or accredited, or (b) the mediation is administered by a designated mediation service provider such as SIMC. Other initiatives in Singapore to further incentivise mediation such as the Revised Enhanced Mediation Promotion Scheme (REMPS) – a funding scheme by IPOS to partially cover parties' mediation costs for disputes before IPOS that are to be mediated.[26]

C Mediations in Singapore

There are 3 broad categories of mediation in Singapore – community-based, court-based, and private mediation.

C.1 Community-Based Mediations

Community-based mediation is offered through the CMCs, where matters are mediated by volunteers. By providing a safe and neutral space for dialogue, community-based mediations empower individuals to voice their concerns, understand different perspectives, and work towards mutually acceptable resolutions. These mediations have proven effective in resolving neighbourhood disputes, interpersonal conflicts, and other community-related issues, thereby

[24] The Rules are based on the Recommendations of the Working Group to develop Singapore into a Centre for International Commercial Mediation by the International Commercial Mediation Working Group ("ICMWG"), available at https://www.mlaw.gov.sg/news/press-releases/icmwg-recommendations. *Infra* note 37.

[25] Sections 13 and 43 of the Income Tax Act.

[26] IPOS, *Revised Enhanced Mediation Promotion Scheme (REMPS)*, https://www.ipos.gov.sg/docs/default-source/growing-your-business-with-ip/funding-assistance/remps-information-sheet.pdf (last accessed May, 8 2023); IPOS, *Revised Enhanced Mediation Promotion Scheme Frequently Asked Questions (FAQ https://www.ipos.gov.sg/docs/default-source/growing-your-business-with-ip/funding-assistance/remps-faq.pdf* (last accessed May 8, 2023).

enhancing social cohesion and nurturing a sense of belonging among residents. Privilege and secrecy of mediations by the CMCs are enshrined by sections 19 and 20 of the Community Mediation Centres Act 1997. The success of community-based mediations in Singapore reflects the country's commitment to fostering strong community ties and ensuring peaceful coexistence.

C.2 Court-Based Mediations

The State Courts' Court Dispute Resolution Cluster ("CDRC"), Family Justice Courts, and the Small Claims Tribunal offer court-based mediation. Apart from being referred for mediation, when mediation is requested and all parties agree, parties can also undergo court-based mediation with either a judge in the CDRC or a court volunteer mediator. While the cases that go for court-based mediation range from civil disputes to matters relating to protection from harassment, not all matters can be mediated through the courts. For example, as the Supreme Court does not offer any mediation services, the court can only allow parties' request to mediate by giving directions to facilitate mediation, e.g., adjourning the matter.

At the 1996 Opening of Legal Year Address, the then Attorney-General Chan Sek Keong floated the idea of institutionalising private commercial mediation.[27] Thereafter, SMC was launched in August 1997. SMC plays a significant role in facilitating court-based mediations, providing trained mediators and a structured process for parties to engage in constructive dialogue. Court-referred mediations cover a wide range of disputes, including civil, commercial, and family matters. As SMC developed, it began to establish specialist schemes to mediate industry-specific matters. For example, the Alternative Dispute Resolution Sports Scheme was launched in early 2008, and the Council for Estate Agencies Mediation Scheme in 2011. Such efforts continue with a scheme aimed at resolving disputes between telco and media service providers that was launched in April 2022.[28]

C.3 Private Mediations

Most private mediations require parties to reduce the terms of the agreement in writing and to have their signatures to the document. The legal standing of settlement agreements will depend on (i) the intention of the parties; (ii) the

[27] Attorney-General Chan Sek Keong, Address at The 1996 Opening of Legal Year (Jan. 6, 1996) (transcript available at https://www.agc.gov.sg/docs/default-source/speeches/2010–1992/speech-1996.pdf) (last accessed May 2, 2023); See Laurence BOULLE and Hwee Hwee TEH, Mediation – Principles, Process and Practice 207 (Butterworths Asia, Singapore ed, 2000).

[28] See generally Kit TANG, New Scheme to Help Resolve Disputes with Telco and Media Service Providers, Channel News Asia, Mar. 4, 2022, available at https://www.channelnewsasia.com/singapore/new-scheme-help-resolve-disputes-telco-media-service-providers-2536191 (last accessed Apr. 27, 2023).

context of the mediation; and (iii) the existence and nature of relevant statutory requirements. If the conditions are satisfied, it would constitute a binding contract. As a result, accepted contractual principles determine whether such settlement agreements can be enforced. Additionally, with the Mediation Act 2017, parties can apply for privately mediated settlement agreements to be recorded as an order of court if the statutory requirements are met.[29]

Generally, in private mediations, apart from the mediator and the parties, no one else would be allowed to attend the mediation.[30] Mediation proceedings are also conducted on a 'without prejudice' basis, meaning that if the mediation is unsuccessful, anything that transpired during the mediation that could possibly be used against a party's interest, may not be presented in subsequent arbitration or court proceedings (unless it would have been subject to and disclosed under the normal discovery process). In addition, unless it is the wish of the party to share any information provided in the course of mediation, the mediator is prohibited from divulging any information obtained in the private sessions with one party to the other parties in the mediation. Mediators, and parties would be obligated by a mediation agreement that forbids the disclosure of such information pertaining to the mediation. To safeguard the privacy of mediations, several statutory safeguards, such as privilege and secrecy obligations, have been put in place. These laws include, for instance, Section 23 of the Evidence Act which stipulates that admissions in civil cases are not relevant where they were made:

> (a) upon an express condition that evidence of it is not to be given; or
>
> (b) upon circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.[31]

While there are various ADR organisations in Singapore, only four are designated mediation service providers for the purposes of the Mediation Act 2017. While the Tripartite Alliance for Dispute Management and the Intellectual Property Organization Arbitration and Mediation Center focus on mediations of disputes in specialised areas, SIMC and SMC provide mediation services that cater to a broader range of disputes.

[29] Section 12 of the Mediation Act 2017.

[30] Some staff members of mediation service providers who are bound by confidentiality obligations may be present to assist the mediator and parties with administrative affairs.

[31] Section 23 (1) of the Evidence Act.

SMC is a designated mediation service provider under the Mediation Act 2017, which means that settlement agreements from mediations at SMC may be registered as an order of court under the Mediation Act 2017 and enforceable as such, if the conditions of the Act are satisfied. It is supported by the Singapore Academy of Law. SMC has mediated more than 5,200 matters worth over SG$10 billion since its launch in 1997.[32] Usually, one or both parties request mediation by contacting SMC. The courts may also refer the case to SMC. SMC arranges for the mediation agreement to be signed by all parties, finds a mediator, and takes care of all other administrative issues such as date, time, and location for mediation. If either party has good justification, it may reject the suggested mediator (e.g., conflict of interests). The parties may also make a request for a specific mediator to be appointed. The mediator receives valuable support and counsel from the parties' lawyers throughout the mediation process. Similar to SIMC, settlements from mediations handled by the SMC can, with the consent of the parties, also be registered and enforceable as orders of court, after fulfilling the provisions under Section 12 of the Mediation Act 2017.

SIMC stands out for its mediation services targeted at the needs of parties in cross-border commercial disputes. SIMC was established on 5 November 2014 as an independent, not-for-profit institution to meet the growing demand for quality dispute resolution services and to help Singapore become a premier destination for legal services and dispute resolution in Asia and globally. Since its establishment, SIMC has handled more than 300 international mediation matters with a cumulative dispute value of more than US$15 billion, with parties originating from 51 jurisdictions as of May 2023. SIMC offers three main services for conducting mediation: First, it primarily administers mediation if parties agree that the mediation will be conducted in accordance with the SIMC Mediation Rules. Secondly, for mediations not administered in accordance with the SIMC Mediation Rules, parties may consent to use SIMC as an *ad hoc* appointing authority for mediators or experts. Thirdly, SIMC works with other domestic and foreign dispute resolution organisations to offer mixed-modes dispute resolution services, such as the Singapore International Arbitration Centre ("SIAC") to provide services under an innovative hybrid process known as 'Arb-Med-Arb',[33] the Shenzhen Court of International Arbitration ("SCIA") under an 'Med-Arb' protocol,[34] and the Singapore International Commercial Court ("SICC") under a 'Lit-Med-Lit' protocol.[35] These protocols are discussed further in the *Multi-tiered Clauses, Mixed-modes and*

[32] SMC, *About Us*, https://www.mediation.com.sg/about-us/about-smc/ (last accessed May 2, 2023).
[33] *Infra* Section E.1.
[34] *Ibid.*
[35] *Infra* Section E.2.

Protocols section of this paper. As SIMC is also a designated mediation service provider under the Mediation Act 2017, settlement agreements from mediations administered by SIMC can be recorded as an order of court for enforcement.[36]

D Singapore's Evolution into an International Dispute Resolution Hub

The evolution of Singapore's mediation landscape from its initial domestic focus to its current international focus necessitated careful design, planning, and implementation. Singapore has long been regarded as one of the most competitive countries and best places to do business.[37] Singapore's location makes it a key node and gateway for businesses serving the Asia-Pacific region. It also serves as a strategic launchpad for access to major and emerging markets in Southeast Asia, China, and India. With Singapore at the epicentre of this economic activity, demand for legal and dispute resolution services has also increased.[38]

Mediation in Singapore reached new heights following its development at the international level. In 2013, the Ministry of Law welcomed the recommendations by the International Commercial Mediation Working Group ("ICMWG") to develop Singapore into an international commercial mediation centre. These included the formation of a professional standards body for mediation, the establishment of an international mediation service provider, a legislative framework, exemptions and incentives, and the enhancement of existing rules and court processes to encourage greater use of mediation. The main suggestions included: (1) the establishment of SIMC; (2) the establishment of Singapore International Mediation Institute ("SIMI"); (3) the promulgation of a Mediation Act; (4) the extension of tax exemptions and incentives to mediation; (5) the improvement of rules and court processes; and (6) reaching out to target markets and key industries.[39] These demonstrate how the Singapore government has actively promoted mediation in Singapore.

Singapore as a nation, does not hesitate to take risks to achieve its goals. When it recognises an opportunity, a strategy is immediately formulated, and resources are mobilised to effectively secure the benefit. Extended decision-making

[36] Section 12 of the Mediation Act 2017; Ministry of Law, *supra* note 19.

[37] IMD World Competitiveness Booklet 2022, International Institute for Management Development (Jun. 2022) (available at https://imd.cld.bz/IMD-World-Competitiveness-Booklet-2022) (last accessed May 8, 2023).

[38] See generally Gloria LIM, *International Commercial Mediation The Singapore Model*, 31 SAcLJ 377, 401 available at https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/1465/Citation/JournalsOnlinePDF (last accessed Apr. 27, 2023). *Infra* note 55.

[39] ICMWG, *supra* note 22.

processes are rarely used because getting things done is the main priority. To boost international investor and commercial confidence, Singapore has worked hard to establish a clear, progressive, and business-friendly dispute resolution framework that is in line with international legal and trade developments. This has resulted in various reforms to strengthen the mediation regime in the context of international commercial mediation. This means that parties who want the Mediation Act 2017's provisions and associated benefits to apply to their contracts can specify it in their contracts.

Singapore has been a strong proponent of the development of international rules to develop and promote the use of international commercial mediation, in addition to ensuring that Singapore's domestic legislation supports international commercial mediation. UNCITRAL completed its work on the Singapore Convention on Mediation in July 2018 and Singapore was an active participant in the deliberations and helped shape the final instrument.[40] At its 73rd session in New York in December 2018, the United Nations General Assembly adopted the United Nations Convention on International Settlement Agreements Resulting from Mediation and recommended that it be named after Singapore,[41] making the Singapore Convention on Mediation the first UN treaty named after the city-state. Interestingly, it saw a record number of signatories on the first day of its launch.[42] Since then, various other countries have signed the Singapore Convention on Mediation, and others are in the process of ratification. Uruguay was the most recent country to ratify the Singapore Convention on Mediation, which she did on 28 March 2023, and on 3 May 2023, the United Kingdom became the 56th country to sign it.

E Multi-tiered Clauses, Mixed-modes and Protocols

Considering that there can be no ancillary 'proceedings' to a mediation, it is evident that the time and cost savings afforded through mediation are generally indefeasible. Furthermore, given that mediations are typically set up in short period and the lead-up prior to the mediation does not involve huge bundles of evidentiary documents or extensive submissions, there is arguably good cause for parties or

[40] Report of the United Nations Commission on International Trade Law, 51st Session, 25 June – 13 July 2018, U.N. Doc A/73/17 ; GAOR, 73rd Session, Supp. No. 17 (2018).

[41] Report of the United Nations Commission on International Trade Law, Fifty-first session (25 June–13 July 2018) General Assembly Official Records Seventy-third Session Supplement No. 17. (Page 9) - https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/052/21/PDF/V1805221.pdf (last accessed May 30, 2023)

[42] 46 signatories signed up to the Singapore Convention on Mediation on the first day of its launch and there are 56 signatories and 11 of which have ratified it, as at May 8, 2023. See Singapore Convention on Mediation, https://www.singaporeconvention.org (last accessed May 8, 2023).

counsel to consider the incorporation of mediation clauses in their contractual agreements.

Parties to international commercial contracts frequently agree that any dispute arising from them will be resolved by various stated processes in sequence, and often do so at the beginning of contract negotiations. Multi-tiered dispute resolution clauses, also known as escalation clauses, serve several functions. The main goals are to reach an early settlement through a more informal process, saving the parties time and money from having to resort to more formal arbitration or litigation. Other reasons for agreeing on an escalation clause include putting alternative dispute resolution methods on both parties' agendas from the start, without requiring either party to give up a perceived strategic advantage once a dispute has arisen.

The first tiers of a multi-tier dispute resolution process can include a variety of methods, such as inter-party negotiations involving higher management, as well as conciliation, mediation, adjudication, mini-trials, or dispute boards — all of which, save for negotiations, involve the engagement of a third party in facilitating dispute resolution. Commercial mediation is one of the most commonly agreed-upon early-tier dispute resolution methods, often followed by arbitration if mediation is unsuccessful. The approach to mixed-modes dispute resolution may involve 2 tiers or 3 tiers.[43]

E.1 Mediation & Arbitration

Suggested pre-litigation solutions in these multi-tier dispute resolution clauses could include hybrid forms of mediation and arbitration known as Med-Arb or Arb-Med, in which one person is entrusted with both mediating and arbitrating the parties' dispute. There is no standard definition for these processes, and they come in a variety of flavours. In general, 'Med-Arb' refers to a process in which parties initiate mediation and if that fails, parties will undergo arbitration. Generally, parties agree in writing that the process is binding from the very beginning – setting it apart from 'classical' mediation.[44] 'Arb-Med' is defined as a process in which parties initiate arbitration and then choose to have at least one (or the sole) member of the arbitral tribunal mediate the dispute. If mediation is unsuccessful, the arbitration will be resumed with the same arbitrator(s). The Arb-Med process may involve the arbitral tribunal drafting an award early in the arbitral

[43] For example, a 2-tier mechanism would be the SIMC-SCIA MA Protocol (*Infra* note 48) and the SIMC-SIAC AMA Protocol is a 3-tier mechanism (*Infra* note 45).

[44] Katie SHONK, What is Med-Arb? The pros and cons of med-arb, a little-known alternative dispute resolution process, Harvard Law School, Mar. 6 2023, available at https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/ (last accessed May 8, 2023).

process, which is then sealed and only released to the parties if the subsequent mediation is unsuccessful. As Rosoff observes, "both Med-Arb and Arb-Med face the same issues associated with assigning one person to serve as both mediator and arbitrator".[45]

Indeed, in practice, both processes are met with considerable scepticism, particularly with regard to the impartiality of an arbitrator who has received confidential information in mediation that a party may not have disclosed in arbitration — especially if such information is disclosed in a private caucus during mediation. On the other hand, parties are unlikely to disclose information or bottom lines for settlement in mediation to the same individual(s) who will later adjudicate the dispute if mediation fails.

In light of this, SIAC and SIMC have jointly devised a novel solution to the issues highlighted above. To coincide with the SIMC's official launch on November 5, 2014, they presented their joint Arb-Med-Arb Protocol ("AMA Protocol") which involves a three-stage process. The first step is to start arbitration proceedings before SIAC. Following the filing of a Notice of Arbitration and the formation of the arbitration tribunal, the arbitration at SIAC is stayed to allow the parties to mediate their disagreement with SIMC. The matter is referred back to arbitration in the third and final stage, which concludes with the issuance of an enforceable award in accordance with the terms of the settlement, if the dispute was settled during mediation. Under the terms of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is more commonly known as the New York Convention, this arbitral award would be enforceable across 170 countries.[46] However, where mediation does not result in a settlement, the stay may then be lifted, and parties would then resume their arbitral proceedings. The arbitrators and mediators are chosen individually and independently under the AMA Protocol by SIAC and SIMC, respectively. Through this procedure, mediation's flexibility and cost-effectiveness are paired with arbitration's enforcement and finality.[47]

The AMA Protocol applies where the parties have agreed in their contract to do so or where they have otherwise agreed to submit a dispute for resolution under it. In other words, parties can agree to submit their disputes to the AMA Protocol at any time, including after a dispute has arisen and even when arbitral

[45] See, *e.g.*, Jacob ROSOFF, Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings, 26 J Int'l Arb 89 (2009).

[46] New York Arbitration Convention, *List of Contracting States*, https://www.newyorkconvention.org/list+of+contracting+states (last accessed May 8, 2023).

[47] SIMC, *The New SIAC/SIMC AMA-Protocol: A Seamless Multi-tiered Dispute Resolution Process Tailored to the User's Needs*, https://simc.com.sg/blog/2015/04/14/the-new-siacsimc-ama-protocol-a-seamless-multi-tiered-dispute-resolution-process-tailored-to-the-users-needs/ (last accessed May 2, 2023).

proceedings have already begun. For parties wishing to refer disputes under the AMA Protocol, SIAC and SIMC provide a model dispute resolution clause, the 'Singapore Arb-Med-Arb Clause',[48] which like most model clauses, provides for the bare necessities of an arbitration agreement. Therefore, parties may want to consider amending it to meet the specific needs of their commercial transaction. In any case, parties should include language specifying the location and language of the arbitration, as well as the number of arbitrators they want to hear their case. The model arbitration clauses available on SIAC's website may provide them with supplementary guidance in this regard.

The SIAC-SIMC AMA Protocol is to be commended because it addresses issues that are truly relevant to the practice of international dispute resolution. It combines mediation's efficiency with the certainty and enforceability of an arbitral award. It also ensures a smooth transition between the arbitration and mediation phases of the process, which is not guaranteed by many other mediation and arbitration combinations. The AMA procedure is also cost-effective and transparent. Furthermore, the AMA Protocol includes financial rules that coordinate filing fees and cost advances for the arbitration and mediation stages of the procedure. The seamless transition between the arbitration and mediation stages should also promote cost efficiency.

However, there still remains some practical issues that must be addressed. Some believe that a critical question is whether and to whom a party requiring urgent interim relief during the mediation phase of the AMA process – during which the arbitration is stayed – should address such a request.[49] In an ideal world, such issues can be resolved through mediation. If the worst happens, a party can always terminate mediation in order to regain access to the arbitral tribunal to seek an order for interim relief.

The SIAC-SIMC AMA Protocol is expected to be fully embraced by users of international dispute resolution services. It appears to be tailored to their need for time- and cost-effective dispute resolution, with an emphasis on finding mediated

[48] The Clause reads:

"All disputes, controversies, or differences ('Dispute') arising out of or in connection with this contract, including any question regarding its existence, validity, or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC') in force at the time.

Following the commencement of arbitration, the parties agree to make a good faith effort to resolve the dispute through mediation at the Singapore International Mediation Centre ('SIMC') in accordance with the SIAC-SIMC Arb-Med-Arb Protocol in effect at the time. Any settlement reached during the mediation shall be referred to the SIAC-appointed arbitral tribunal and may be made a consent award on agreed terms."

[49] See Paul TAN & Kevin TAN, Kinks in the SIAC-SIMC Arb-Med-Arb Protocol, Law Gazette, Jan 2022, available at https://lawgazette.com.sg/feature/kinks-in-the-siac-simc-arb-med-arb-protocol/.

solutions to business disputes that look forward rather than backwards. As a result, it could be exactly what users have been looking for.

Separately, SIMC and SCIA have collaborated to establish the SIMC SIMC-SCIA Med-Arb Protocol ("MA Protocol") to allow the recording of any settlement agreement resulting from mediation at SIMC as an arbitral award of the SCIA, which would then be enforceable under the New York Convention. This is beneficial for parties with disputes in China or whether the location of the subject matter is in China.[50] Parties may adopt the MA Protocol to obtain greater finality in mediation outcomes if enforcement of settlement agreements is required.[51]

SIMC has also partnered with the Singapore International Arbitration Centre (SIAC) and the Singapore Chamber of Maritime Arbitration (SCMA) to offer Arb-Med-Arb (AMA) procedures under their respective Arbitration Rules.[52]

E.2 Mediation & Litigation

Another option in multi-tier dispute resolution clauses is to use mediation alongside litigation, such as through a litigation-mediation-litigation ("Lit-Med-Lit") protocol. The biggest advantage of such a Lit-Med-Lit protocol, relative to hybrid mechanisms that combine mediation and arbitration, is that it addresses the concerns of 'defensive arbitration' –[53] where the arbitrator may succumb to poor practices like not enforcing the timeline or excessively allowing evidence and submissions to be admitted, which may stem from the arbitrator's fear of facing a challenge on the grounds of natural justice. While there may be other safeguards provided by the arbitration institution, like the SIAC Rules 2016 Rule 19.1, to deter arbitrators from engaging in defensive arbitration, it nevertheless remains a possibility, and the only viable recourse in such a situation would be litigation. This is because actions to set aside or to enforce arbitral awards can only be heard by the courts. In Singapore, this is further aggravated by the fact that the grounds for

[50] See Jonathan Yuen, Yu Zheng, Ang Leong Hao and Ang Tze Phern, Singapore: New Med-Arb Protocol: SIMC Mediation Settlement Agreements To Be Enforceable As SCIA Arbitral Awards, 14 December 2022, available at https://www.mondaq.com/arbitration–dispute-resolution/1260546/new-med-arb-protocol-simc-mediation-settlement-agreements-to-be-enforceable-as-scia-arbitral-awards (last accessed June 7, 2023)

[51] SIMC, *Med-Arb*, https://simc.com.sg/disputeresolution/medarb/#:~:text=The%20Singapore%20International%20Mediation%20Centre,arbitral%20award%20of%20the%20SCIA (last accessed May 2, 2023).

[52] SIMC, Arb-Med-Arb, https://simc.com.sg/dispute-resolution/arb-med-arb/ (last accessed June 7, 2023).

[53] See Honourable Justice Philip Jeyaretnam, Judge of the Supreme Court of Singapore and President of the Singapore International Commercial Court, Address at Launch of Litigation-Mediation-Litigation Protocol & SICC Model Jurisdiction Clause for International Arbitration Matters on "Appropriate Dispute Resolution" (Jan. 12, 2023) (transcript available at https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/launch-of-litigation-mediation-litigation-protocol-sicc-model-jurisdiction-clause-for-international-arbitration-matters—address-on-appropriate-dispute-resolution_30348675-f929-42b1-b648-3af900a330e2.pdf) (last accessed Apr. 27, 2023).

such an action are exhaustive under the Arbitration Act 2001 and the International Arbitration Act 1994.

In January 2023, SIMC and SICC jointly established a Lit-Med-Lit framework with a view to promoting the amicable resolution of international commercial disputes ("LML Protocol").[54] It operates similarly to the SIAC-SIMC AMA Protocol, such that litigation started at the SICC is first stayed to allow the parties to see if they can settle their dispute through mediation at SIMC. This stay will last for either eight weeks from the mediation commencement date or until the date on which the mediation ended as set out in SIMC's notification – whichever date is earlier. The mediation will be administered in accordance with the Mediation Rules of SIMC. Should the stay have expired, a case management conference will be convened by the SICC Registry for parties to seek directions to either extend the stay or to adjourn subsequent mediation sessions. If parties are able to arrive at a settlement agreement, the parties can then agree to have the settlement agreement recorded by the SICC as an order of court. If there is no settlement at the end of the mediation, the litigation at SICC resumes. Parties may choose to adopt the LML Protocol when contracts are being negotiated by incorporating the model LML Clause into their agreements. Alternatively, parties may, by a separate agreement, adopt the LML Protocol at any other time, such as after a dispute has arisen.[55]

During this period, parties may make an application to SICC for interim or supplementary orders so as to preserve their rights and notify SIMC of its application and SICC's subsequent decision. The power to grant interim orders, such as an injunction ensures that any judgment or order made in the SICC proceedings, or in any subsequent mediated settlement agreement is not rendered ineffectual by the dissipation of assets by a party.

Similar to the model clause for the SIMC-SIAC AMA Protocol, the model clause for the LML Protocol offers parties some room for deviation.[56] While the

[54] Joint Media Release, Singapore International Commercial Court and Singapore International Mediation Centre, Singapore International Commercial Court Launches Mediation-Friendly Protocol with Singapore International Mediation Centre to Advance Singapore as Asian Hub for Dispute Resolution (Jan. 12, 2023) (available at https://www.judiciary.gov.sg/news-and-resources/news/news-details/joint-media-release-singapore-international-commercial-court-launches-mediation-friendly-protocol-with-Singapore-international-mediation-centre-to-advance-Singapore-as-Asian-hub-for-dispute-resolution) (last accessed Apr. 27, 2023).

[55] SIMC, *Singapore International Commercial Court Launches Mediation-Friendly Protocol with Singapore International Mediation Centre to Advance Singapore as Asian Hub for Dispute Resolution*, https://simc.com.sg/blog/2023/01/13/singapore-international-commercial-court-launches-mediation-friendly-protocol-with-singapore-international-mediation-centre-to-advance-singapore-as-asian-hub-for-dispute-resolution (last accessed May 2, 2023).

[56] The Clause reads: "The parties agree that any dispute, controversy or claim arising out of or in connection with the present contract (including any question regarding its existence, validity or termination) (the "Dispute") shall first be referred to the [Singapore International Mediation Centre] for mediation in accordance with the [Singapore International Mediation Centre Mediation Rules] for the time being in

LML Protocol only came into effect in early January 2023, this development is highly welcomed as it offers parties another hybrid dispute resolution mechanism that allows for greater efficiency, reduced time and financial costs as well as the registrability and enforceability of a mediated settlement agreement as an order of court.[57] While recording the mediated settlement agreement as an order of court will require all parties to consent,[58] it is hypothesised that the LML Protocol will be well-received and increasingly adopted, especially for disputes relating to insolvency and far-reaching assets, or those involving multiple parties. Additionally, where the mediated settlement agreement is recorded as an order of court, it would have the status of an order from the Singapore High Court. This may be preferred by parties who require the 'bite' of enforcement within Singapore or jurisdictions that typically enforce Singaporean judgments with confidence.

F Mediation Infrastructure in Singapore

Another crucial component of the robust legal ecosystem is the supporting physical infrastructure. In 2002, a Legal Services Working Group of the Economic Review Committee emphasised the need for "good infrastructure and facilities" to turn Singapore into a regional ADR service centre. Planning for this followed, and Maxwell Chambers, an integrated ADR complex, was opened in 2010. Apart from the state-of-the-art rooms that were custom-designed and fully equipped to meet the needs of ADR, the building was expanded in 2017 so as to house international institutions as well as dispute chambers and practices. Mediation organisations housed in Maxwell Chambers Suites include SMC, SIMC and the WIPO Arbitration and Mediation Center amongst other leading dispute resolution institutions.

To boost connectivity and reduce physical barriers, Maxwell Chambers has also entered the International Arbitration Centre Alliance with Arbitration Place (Toronto and Ottawa, Canada), International Dispute Resolution Centre (London, United Kingdom), Abu Dhabi Global Market Arbitration Centre (Abu Dhabi, United Arab Emirates) and the International Arbitration Centre Chambers (Astana,

force. Suppose the dispute cannot be resolved through mediation within [8 weeks] after commencement of mediation at the [Singapore International Mediation Centre], or within such other period as may be agreed by the parties. In that case, the parties shall submit the dispute to the exclusive jurisdiction of the Singapore International Commercial Court."

57 SIMC, *supra* note 51.

58 Section 12 of the Mediation Act 2017.

Kazakhstan).[59] Through this alliance, parties can attend a hybrid mediation or hearing at the closest partner facility.[60]

G Capacity Building and Accreditation

The efforts to promote cross-border commercial mediation have resulted in the formation of SIMI, which sets national mediation standards. Since its establishment following recommendations from the ICMWG in 2014, SIMI has promoted the growth of both national and international mediators in Singapore through a strong accreditation system. SIMI is an accrediting body that maintains the standard of mediators in Singapore. SIMI offers Registered Training Programs, which are carried out by centres such as SIMC and SMC. In addition to the 40 hours of accredited training, the centres make sure that the quality of standards of mediators is maintained at a high level. SIMC is one of the centres that offers mediator training for accreditation by SIMI and, as one of the first international mediation centres in the world, it also supports the development of mediation globally. SIMC has trained senior judges, lawyers, and businessmen from both developed and developing countries in Asia and beyond. In addition to the trainings for accreditation, SIMC has customised a special mediation program for experienced legal and business professionals interested in mediating cross-border commercial disputes in its key markets. SIMC is stringent in carefully selecting the participants for the program who are later empanelled as SIMC's Specialist Mediators who assist in co-mediating complex cross-border disputes. Beyond the conventional programs, SIMC supports in capacity building projects in South and Central Asia in collaboration with other international agencies, such as the Commercial Law Development Program, a division of the U. S. Department of Commerce.

With the strict standards and these institutions in place, mediation will continue to develop and make its mark as an appealing dispute resolution process. Such standards will uphold the legitimacy and effectiveness of the mediation process, increasing the demand for domestic and international mediation cases.

In Singapore, the professional mediator standards set by SIMI have resulted in a growing pool of qualified mediators in Singapore and Asia. However, there has been limited training of advocates for mediation. While seemingly small, this is an important issue as lawyers still play an important role in promoting mediation,[61]

[59] The International Arbitration Centre Alliance. Retrieved from: https://www.iacaglobal.com. Accessed on: Apr. 27, 2023.

[60] The International Arbitration Centre Alliance. Retrieved from: https://www.iacaglobal.com. Accessed on: Apr. 27, 2023.

[61] See QUEK ANDERSON, *supra* note 13 on the duty to advise clients on the mediation process and its benefits.

preparing their clients ahead of and advising during mediation. They are in a position to contribute collaboratively and constructively to the mediation and thereby assist their clients in reaching an agreement that reflects their interests and needs. Parties can negotiate more effectively with legal representation, which can help speed up the mediation process. With lawyers increasingly participating in mediation as a result of court-ordered mediation, it is strongly believed that mediation advocacy standards would help to propel Singapore's mediation services internationally while also further promoting it at home. Educating lawyers on mediation advocacy will greatly dispel the misconception that mediation advocacy skills are a given if lawyers are trained litigators.

To fill this lacuna in training, SIMC is actively working with IMI to offer Mediation Advocacy Qualifying Assessment Programs ("MA-QAPs"). In Asia, apart from the Institute for Certification and Training of Lusophone Mediators which offers the programme through its Macau office, MA-QAPs are only offered by Singaporean ADR organisations that partnered with IMI, as of May 2023.[62]

H Future of Mediation

With mediation in Singapore steadily growing, especially that of international mediation, there is much to look forward to. Domestically, after the rise of industry-specific tribunals, it is believed that there will be more mediators specialising in their chosen areas. This will likely be strengthened through making mediation a compulsory element before the matter is heard by the tribunal. The strategic establishments of institutions such as SMC and SIMC, contributed to the growth of mediation and provided a platform for parties to seek quality mediation-related services. The country's strong legal framework, impartial judiciary, and commitment to upholding the rule of law provide a conducive environment for parties from around the world to engage in mediation.

In relation to international mediation, it is hypothesised that Singapore will see an increase in matters relating to the Belt Road Initiative. As economies recover from the disruptions caused by the Covid-19 pandemic and as borders reopen, widespread international cooperation on the Belt Road Initiative is expected to grow, notwithstanding the pessimistic global economic outlook. Singapore is uniquely positioned to be the heart of mediation not only because it has a developed and robust legal eco-system and is known to be where 'the East meets the West.' While the Belt Road Initiative involves 151 countries and 32 international organisations, much of the spotlight will invariably be on China as it leads this project. With that

[62] They are SIMC, Singapore International Dispute Resolution Academy, Sage Mediation, See IMI, *Find a Program*, https://imimediation.org/orgs/find-program/ (last accessed May 9, 2023).

in mind, it is heartening that China has affirmed its close links with Singapore and its trust in the Singaporean legal system. On 1 April 2023, a MOU on the Management of International Commercial Disputes in the Context of the Belt and Road Initiative through a Litigation-Mediation-Litigation Framework was signed between the Supreme Court of Singapore and the PRC Supreme People's Court.[63] As such, there will be two LML frameworks developed by the respective courts, and they shall run in parallel. In Singapore's context, this framework triggers the LML Protocol of SICC, where parties adopt the Model Clause.[64]

Lastly, technology will also play a significant role in shaping the future of mediation in Singapore. The advancement of online mediation platforms and virtual dispute resolution mechanisms has the potential to enhance accessibility and convenience for parties involved in cross-border disputes, which realised remarkably during the worldwide Covid-19 lockdown. The government's support, the growing demand for alternative dispute resolution, Singapore's global reputation, and the integration of technology are all factors that contribute to the positive future of mediation.

Access to justice and effective resolution of disputes are important to be in line with the constant economic and social changes occurring globally. Development of mediation, though it being one of the oldest methods of dispute resolution, is considered to be latest of all the processes. Mediation's growth and development has accelerated as a result of Singapore's continuous collaborative efforts – and growth only comes through continuous efforts. Mediation is about making an effort, and I would like to end by a line by Mick Jagger – "you can't always **get what you want**, but if you **try sometimes**, you might find, you **get what you need**."

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[63] Memorandum Of Understanding Between The Supreme Court Of Singapore And The Supreme People's Court Of The People's Republic Of China (Apr. 1, 2023) (available at https://www.sicc.gov.sg/docs/default-source/memorandum-of-guidance/lml-mou-factsheet-and-details.pdf) (last accessed Apr. 27, 2023).

[64] The Model Clause reads: "Each party irrevocably submits to the exclusive jurisdiction of Singapore International Commercial Court any dispute arising out of or in connection with this contract (including any question relating to its existence, validity or termination). The parties agree that after the commencement of court proceedings, they will attempt in good faith to resolve any such dispute through mediation in accordance with the Litigation-Mediation-Litigation Protocol of the Singapore International Commercial Court."

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Mediation in South Korea

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Abstract: In Korea, there is a common notion that mediation is conducted mostly by the court, and many civil disputes are in fact handled by court-annexed mediations. Court-annexed mediations are commenced either by the parties' application or when the court hearing a litigation case decides to refer it to mediation. Mediation cases are handled by a designated mediation judge in each court, but the judge may appoint a standing mediation member or a three-member mediation committee to mediate the case instead. When a court hearing a litigation case decides to refer the case to mediation, it may also determine to conduct mediation by itself instead of sending the case to a designated mediation judge. A successfully concluded mediation will be recorded as a "record of voluntary mediation", and such record is granted the same effect as a final and conclusive judgment. Meanwhile, private mediations that are conducted outside the court as well as international mediations are prevalent in Korea as yet, but interest in those fields is recently growing among legal practitioners.

1 The Concept of Mediation in Korea

In Korea, mediation is an alternative dispute resolution mechanism to a court's judgment in which a third party in a neutral position recommends that the disputing parties make concessions and resolve their dispute by mutual understanding and agreement. Parties engage in dialogue and negotiation through mediation with the help of the mediator and settle the dispute according to reason and the actual circumstances rather than by legal principles. Compared to litigation, mediation has many advantages, such as being able to resolve disputes amicably and autonomously by simple, prompt, and inexpensive procedures.

There are primarily three types of mediation in Korea – *i.e.*, (a) court-annexed mediation, (b) administrative agency mediation, and (c) private mediation.

a) Among these, court-annexed mediation,[1] meaning mediations of cases which began by either a party's application to resolve a dispute via mediation under the auspices of a court (called "court mediation by application") or a court's referral of a pending litigation case to mediation (called "court-mandated mediation"), is the most prevalent type of mediation in use. According to the 2022 Judicial Almanac published by the Korean Supreme Court, in 2021, 88,715 civil cases were handled by the courts in Korea through civil mediations and 13,502 family law cases were handled by the courts of Korea through family mediations.[2]
b) In addition, various administrative agencies conduct mediations in accordance with relevant laws and regulations, as will be explained below.
c) Private mediations, conducted by mediators privately paid by the parties,[3] have historically been rarer in Korea.

Court-annexed civil mediation is a widely used mechanism for alternative dispute resolution in Korea. Out of the 88,715 civil mediation cases handled by the court in 2021, 78,368 cases (about 88%) were cases referred to mediation by the court during the course of a litigation, and the remaining 10,347 cases began as mediations via a party's application.[4]

In Korea, there is a common notion that mediations for civil and family law cases are conducted through court-annexed mediations. Such court-annexed mediations are actively conducted, and the success rate is also relatively high. Particularly in the cases where mediations are conducted by the judge hearing

1 On court-annexed mediation cases in Brazil see FERREIRA; SEVERO 2021. See also: BRAGANÇA; NETTO, 2020, On non-violent communication (NVC) in Brazil see: MORAIS; WOHLKE, 2021. See also: FARIAS, 2020. See also SERPA, 2020.
2 THE SUPREME COURT, 2022, p. 690; p. 706.
3 For mediations under (a) and (b), remuneration for mediators are determined in accordance with the relevant legislations and generally not directly paid by the parties.
4 THE SUPREME COURT, 2022, p. 690.

the case, the success rate is higher as the parties are more likely to accept the suggestions made by the judge who may review the dispute again if the case is transferred back to litigation. The success rate is also higher when the mediation is conducted in a later stage of the litigation.

In civil cases, mediation is not required as a mandatory prelude to legal proceedings. However, mediation is mandatory in certain types of family law cases. Article 50 of the Family Litigation Act provides that a person who intends to institute a litigation or request an adjudication from the family court for certain family litigation cases, such as cases relating to marriage or adoption, is required to first make a request for mediation. This is also called the principle of prefixing mediation for family affairs.

As disputant parties in Korea generally understand mediations to be conducted during the course of litigation, out-of-court private mediations conducted by mediators appointed by the parties have been rare in Korea to date.

2 The Process of Court-Annexed Mediations

Court-annexed civil mediations may be commenced either as court mediation by application at the parties' initiation, or as court-mandated mediation initiated by the judge. In the case of a court mediation by application of a party, the dispute resolution process begins as a mediation (*i.e.*, in lieu of commencing litigation). Additionally, the court hearing a case may refer the case to court-mandated mediation at any stage of the litigation proceedings, including the appellate level, for an attempted amicable resolution of the dispute. In recent years, early mediation has been emphasized in order to resolve disputes as soon as possible before full-fledged litigation commences (albeit mediations which commence in later stages of a litigation typically have a higher chance of achieving a positive result).

When a disputant party requests a court mediation by application, the case will be assigned to a designated mediation judge of the applicable court. The designated mediation judge can mediate himself/herself or appoint (i) a mediation committee or (ii) a standing mediator affiliated with the court, to mediate. When a standing mediator is appointed by the designated mediation judge to conduct the mediation, such standing mediator will have the same authority as the designated mediation judge would. In contrast, when a mediation committee is appointed by the designated mediation judge to conduct the mediation, the committee conducts the mediation and reports the result to the designated mediation judge, who will proceed with the next steps (as explained below).

When a case is referred by a judge to court-mandated mediation, a new case number is assigned for the mediation. While such cases are, in principle, sent to a designated mediation judge, the court hearing the case may nonetheless decide

to directly mediate the case if it deems appropriate to directly handle the case.[5] If the court decides to appoint a designated mediation judge for the case, just as in the case of court mediation by application, the designated mediation judge can mediate himself/herself, or appoint (i) a mediation committee or (ii) a standing mediator, to mediate. The powers and authorities of a mediation committee or a standing mediator are the same as in a court mediation by application. If the judge hearing the case decides to mediate the case, he/she will have the same authority as a designated mediation judge would.

A mediation committee is comprised of three members who each serve a two-year term. Mediation committee members are appointed in advance by the chief judge of the high courts or district courts, from among those of learning and good reputation. They are appointed to hear mediations in panels of three mediators. Each court has different number of mediation committee members – for instance, the Seoul Central District Court currently has 344 mediation committee members with expertise in various fields.[6]

The standing mediator system was introduced in 2009 following an amendment to the Civil Mediation Act. Standing mediators work full time as mediators for cases sent to them by the courts and have the same authority as judges with respect to mediation matters. Unlike ordinary members of a mediation committee, standing mediators must be qualified as an attorney-at-law and they are appointed by the head of the National Court Administration of the Supreme Court from among those legal practitioners who have more than 10 years of legal experience, or who have more than three years of experience as a mediation committee member in civil or family law case.[7] Standing mediators are prohibited from holding concurrent jobs and are in a position equivalent to public officials.

Once it has been decided who will mediate, a mediation hearing will be held. If the mediation is successfully concluded, the result will be recorded as a "record of voluntary mediation", and such record is granted the same effect as a final and conclusive judgment which entails executory power and *res judicata*.[8]

On the other hand, if the parties fail to reach an agreement but are not very far apart in their positions, the mediator (*i.e.*, the designated mediation judge, the judge hearing the case who mediated, or the standing mediator who mediated) can issue a "decision in lieu of mediation" for a fair resolution of the case. Any party who is dissatisfied with this decision may file an objection within two weeks from the receipt of the written decision. If an objection is filed by any of the parties,

5 Article 7(3) of the Civil Mediation Act.
6 SEOUL CENTRAL DISTRICT COURT, [2023].
7 Article 10(1) of the Civil Mediation Act.
8 Article 29 of the Civil Mediation Act.

the case will be transferred (back) to litigation. Otherwise, the decision in lieu of mediation is granted the same effect as a final and conclusive judgment.[9]

3 The Mediation Ecosystem in Korea

A Local Mediation-Related Legislation

Court-annexed mediations for civil and family matters are provided for under the Civil Mediation Act and the Family Litigation Act, respectively.

There are also a number of laws relating to administrative agency mediations in various fields. Examples include:

- Framework Act on Consumers, which provides for mediation by the Consumer Dispute Settlement Commission;
- Environmental Dispute Mediation Act, which provides for mediation by the Environmental Dispute Resolution Commission;
- Act on the Protection of Financial Consumers, which provides for mediation by the Committee for Mediation of Financial Disputes;
- Housing Lease Protection Act, which provides for mediation by the Housing Lease Dispute Mediation Committee;
- Monopoly Regulation and Fair Trade Act, which provides for mediation by the Korea Fair Trade Mediation Agency; and
- Internet Address Resources Act, which provides for mediation by the Internet Address Dispute Resolution Committee.

The results of these mediations do not generally have the same effect as final and conclusive judgments.

Korea does not have a framework legislation for private mediation.

B Availability of Trained Local Mediators, Mediator Training and Accreditation Bodies

The Civil Mediation Act stipulates that the courts should provide mediation committee members with regular education and training opportunities (although this does not apply to standing mediators).

Interest in private mediation has been growing recently and there are efforts to provide training for private mediators.[10] For instance, the Korean Commercial Arbitration Board (KCAB) and the Korean Society of Mediation Studies (KSMS) provide a joint expert training program on mediation (basic and advanced courses)

[9] Articles 30 and 34 of the Civil Mediation Act.
[10] On the mediators' training in Brazil see AWAD, 2020.

on a regular basis. The Korea International Mediation Centre, which was established in September 2020, also holds expert training events on international commercial mediation.

Training programs for mediators and accreditation systems for trained mediators are still in their beginning stages in Korea. According to the KCAB and the KSMS, those who have completed both the basic and advanced courses of the mediation expert training program jointly conducted by the two organizations are eligible to apply for the KSMS's mediation expert certification evaluation.

C Mediation Venues and the Integration of Dispute Resolution Options in Korea

Court-annexed mediations are conducted in courts' facilities. Private mediation can take place anywhere as agreed by the parties, and the KCAB also rents out conference rooms and other facilities for mediation.

The Seoul Central District Court has implemented its early mediation system since March 2010, and the KCAB was designated as a court-linked mediation agency for such early mediations by the Seoul Central District Court and conducts such mediation cases.

Separately, Article 39 of the KCAB Domestic Arbitration Rules provides that "*the parties may at any time during the arbitral proceedings request mediation of all or part of the dispute upon a written agreement in accordance with the Mediation Rules of KCAB.*" The mediators should not be members of the arbitral tribunal hearing the arbitration. However, the KCAB International Arbitration Rules contain no such mediation request provision.

4 Foreseeable Developments in Mediation in the Near Future in Korea

Court-annexed mediation will continue to be favoured by disputing parties in Korea.

International mediation is not prevalent in Korea yet. Parties to an international arbitration sometimes consider resolving their dispute through international mediation, but this remains rare. Legal practitioners have recently begun to take interest in international mediation. For international disputes involving a Korean party, some parties and practitioners are increasingly making efforts to try conducting mediation during the course of the dispute, which may lead to further use of international mediation in Korea.

Korea signed the Singapore Convention on Mediation on 7 August 2019, but has yet to ratify it.[11] In order to become a contracting state, Korea needs to ratify the Convention and enact implementation laws. On 10 March 2021, Korea's Ministry of Justice launched a task force to conduct research on enacting an implementation law.[12]

A possible hurdle to Korea's ratification of the Convention is that private mediation is not yet an actively used dispute resolution mechanism in Korea. There is not even a framework legislation for private mediation.

There are also potential incongruities with the current Korean legal framework. For example, a settlement agreement under the Singapore Convention would not have the same effect as a final and conclusive judgment of a Korean court under the Korean Civil Execution Act, unlike the results of court-annexed mediations. It is also not clear under Korean law what legal effects such settlement agreements under the Convention would entail.[13]

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Mediation in Sri Lanka

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Abstract: This article discusses the use of the non-adversarial dispute resolution practice in Sri Lanka in its early periods and the subsequent introduction of mediation in its current more sophisticated form in more recent years, as a response to the need to provide a more accessible, cost effective, speedy and non-adversarial alternative to litigation, and the attempt to introduce mediation in more recent times to the commercial dispute resolution regime. Also discussed is Sri Lanka's commitment to the principles of the Singapore Convention and the prospects for the growth of mediation in the country.

Historical Use of Non-Adversarial Dispute Resolution Methods

Sri Lanka's history is dotted with periods during which there was a strong belief in and use of informal methods of dispute resolution. The only methods used during the pre-colonial times are known to have adopted informal processes blending with the culture, systems and the dictates of an unwritten law that prevailed then. Informal forums called "Village Councils" (*Gam Sabhawa's*) functioned in an environment that was devoid of strict rules of procedure and were presided over by wise elders (men) who listened to the disputants directly sans counsel and decided right and wrong and meted out 'justice'. The process is known to have had elements of adjudicatory features but also sought to make peace between disputants. The Councils held audience in public places and listened to complaints in relation to minor disputes. Successive rulers introduced more formal methods, particularly to respond to growing trade and business, culminating in

the institutionalization by the British of a court system which ensured that, over time, litigation based on an adversarial approach became the most formidable mechanism that disputants could have recourse to, with few exceptions. Despite the metamorphosis from informal tribunals to formal courts, the need to provide for inexpensive, easily accessible, less formal methods did not wane. In response, the country experimented with several mechanisms in the form of "Village Tribunals" , "Rural courts", and in 1958 "Conciliation Boards". Mediation was introduced in 1988.

Mediation – Introduction and Evolution

Mediation was first institutionalized in Sri Lanka with the enactment of the Mediation Boards Act, No. 72 of 1988. The Conciliation Boards Act No. 10 of 1958, which had provided for the use of conciliation as a means of resolving minor disputes, was repealed due to its weaknesses and an alternative was required. The need was for a statute that sought to eliminate all the weaknesses that the Conciliation Boards were found to have been riddled with, and which had been the reasons for its repeal, and yet ensure a non-adversarial approach. After studying global trends, mediation was identified as the preferred option given its growing acceptance globally. The introduction of a non-adversarial process to assist parties to resolve disputes based on their interests and needs rather than on strict legal positions was thought to be a meaningful intervention at this juncture. The 1988 Act incorporated all of the key features of mediation.

As the challenge to reduce the litigation overload grew, it was thought necessary to divert certain identified categories of actions of a higher value away from courts in cases where a non-adversarial approach was perceived to be more appropriate. The result was the enactment of the Mediation (Special Categories of Disputes) Act, No. 21 of 2003 to provide for the establishment of Mediation Panels for the resolution of specified categories of actions by mediators with appropriate qualifications.

Both these statutes provide for State-managed mediation services that can be accessed by disputants free of charge. The only expense to the disputant is the cost of a stamp to the value, which is prescribed by the Minister,[1] which is required to be affixed on the application. The State bears the expenses of maintaining the system as it does to maintain the courts of law.

Sri Lanka's attempts to introduce mediation for commercial dispute resolution through government-sponsored schemes have either not been successful or remains

[1] For applications in terms of the 1988 Act the fee prescribed originally was a very small amount of Rs. 5/=.

as yet largely untested, as will be seen in this article. Hence, the experience thus far has been limited to community level dispute resolution. However, inspired by global trends, there are serious efforts being made currently[2] for the increased use of facilitative mediation for commercial dispute resolution.

Mediation as Understood in the Sri Lankan Dispute Resolution Regime

Mediation is understood by a majority of disputants as a process which is very similar to the informal methods adopted in the past. The commonality between those processes and facilitative mediation as currently understood, is the informality of the process. Disputants understand that in mediation, there is no Judge, disputants appear in-person and speak for themselves, there is no representation by lawyers and no need for copious pleadings and documentation.

When disputants access the Community Mediation Boards (CMBs) today it is not necessarily with an understanding of all the features of facilitative mediation that distinguishes it from the processes used in the past. They do so because they must. At the level of resolving minor disputes, it is unlikely that party autonomy and the party-centric features will always be something that they are comfortable with or even need. It is a reality that at village level, disputants sometimes desire to be told how a problem can be solved because they do not have the sense of empowerment or the capacity to decide for themselves. Hence it is true that in CMBs there may be a tendency sometimes to deviate from the principle of a non-coercive approach and nudge the disputants with some suggestions as to how the dispute can be resolved. It is not a matter of adopting the evaluative mediation method but a sort of adaptation to suit the culture. However, studies do not show that mediators force solutions upon the disputants. That would be a transgression that would be unacceptable.

Sri Lanka is currently engaged in creating an eco-system for the use of mediation for business related disputes. The culture that would develop around commercial mediation would be very different. It can be expected that for now, the practice of mediation in this sector will be faithful to the true principles of facilitative mediation. It is exactly these distinguishing intrinsic features of facilitative mediation that users will find attractive. In commercial mediation, disputants will be those who can identify their needs and interests within a business environment and who can weigh the prospects for a solution that meets their needs and a belief in the process which offers features that are totally at variance with an adversarial

[2] As in April 2023.

approach. The mediators will need to have a very high degree of skill and expertise. The users will also be inspired by the prospects of speedy resolution and reduced expenditure that mediation offers, all of which are important for business. Essentially, mediation will be opted for voluntarily rather than mandatorily because the process offers these values that arbitration and litigation do not.

The Legal Framework for the Use of Mediation

Currently Sri Lanka has two statutes that are operational. The Mediation Boards Act (1988) which provides for the establishment and functioning of CMBs and the Special Categories of Disputes Act (2003). The provisions of these Acts are based on the premise that minor disputes that have the potential to be settled amicably and meaningfully outside of the courts should be referred to mediation mandatorily to provide the disputing parties the opportunity to pursue an amicable settlement. The reference to mediation is mandatory but staying within the mediation process is at the absolute discretion of the parties. A party has the right to refuse to attend a mediation or to withdraw from mediation at any stage. Hence there is no interference with the right to access a court of law. There was also an acceptance that, mediation being a new process, it was not advisable to vest discretion regarding its use in disputants by providing solely for voluntary reference.

The Community Mediation Boards

Mediation Boards were established across the country in 329 administrative divisions with approximately 8,400 functioning as mediators on these Boards.[3] In time, these Boards came to be referred to as "Community Mediation Boards" ("CMBs"). This initiative sought to address the challenge to reduce the case overload in courts and also to inspire a certain degree of stability in a community by resolving disputes using a non-adversarial approach that had better prospects for future peace among the disputing parties. The "duty" of a Mediation Board was articulated in the Act to be "by all lawful means to endeavor to bring the disputing parties to an amicable settlement and to remove, with their consent and wherever practicable, the real cause of grievance between them so as to prevent a recurrence of the dispute or offence...". That provision recognized the salient features of interest-based mediation – party autonomy and the non-coercive intervention of the

[3] THE MEDIATION BOARDS COMMISSION, [2023].

Mediator to identify needs and interests. The reference of disputes valued below a defined monetary threshold,[4] to mediation, was made mandatory by law.

The Mediation Boards Commission is vested with the task of appointing mediators. The Commission comprises five members at least three of whom are required to be from among those who have held office in the courts at the apex of the Sri Lankan court system, i.e., the Supreme Court or Court of Appeal. It was accepted that the inclusion of a majority of retired Judges of the superior courts would ensure the integrity of the appointment of Mediators and their independence. In evaluating the weaknesses of the Conciliation Boards, it was found that vesting powers of appointment in a political functionary compromised the ability of appointees to maintain independence.

The process to make appointments to the CMBs is set out in the Act. Nominations for appointment may be recommended by persons and bodies that are *not of a political nature* and also by the District Secretary of the area. Those who are selected by the Commission as being suitable to be considered, are required to follow a preliminary training in mediation skills and techniques. The Ministry of Justice maintains a cadre of mediation trainers who provide training. A report is required to be submitted in respect of each of the trainees and appointments are made by the Commission upon a consideration of the reports. The thinking was that training is a vital prerequisite to be a mediator and that the quality of the mediation would be assured if appointees had the necessary skills and aptitude. This feature sought to eliminate one of the identified weaknesses of the Conciliation Boards, where persons sought to bring about conciliation without the benefit of any special knowledge of the process, training or skill. The intention to keep politically affiliated persons out of these Boards and to thereby inspire confidence in its impartiality is also clear.

The Act sets out the categories of disputes that must be mandatorily referred to mediation, and also the categories of disputes that cannot be entertained by Mediation Boards. Disputes that must mandatorily be referred to Mediation are:

a) Disputes where the value is below the monetary threshold set out in the Act, unless it is one which gives rise to a cause of action which is specifically excluded by the Act. The current threshold introduced in 2016 is Rs, 500,000/=.[5]

   The categories of disputes that are specifically excluded are fifteen actions that are considered unsuitable to be settled through the CMBs. These include matrimonial disputes, disputes relating to trusts, adoption

[4] In 1988 the value threshold was below Rs.25,000/=, increased to Rs. 250,000/= in 2011 and stands at Rs. 500,000/= since 2016.

[5] Approximately US$ 1,375 in terms of current exchange rates.

of children, partition of land, Testamentary cases, election petitions, breach of fundamental rights, admiralty actions and actions under the Mortgage Act.

b) Disputes relating to specifically identified criminal offences punishable under the Penal Code. These are minor offences that are considered suitable for settlement through mediation rather than through prosecutions and punishment in court.

The following categories of disputes cannot be entertained by a Mediation Board:

- Where one party is the State;[6] or
- Where one party is a public officer, and the dispute relates to the recovery of property, money or other dues; or
- Where the Attorney General has initiated proceedings in respect of an offence.

The principle is that there can be no compromise when the dispute is with the State. It needs to be emphasized that this ouster applies only in respect of CMBs.

Where the value of the dispute is above Rs. 500,000, parties could submit those disputes for mediation voluntarily, unless the dispute relates to a matter which is specifically excluded. No statistics are available to indicate whether any of the applications to these Boards are in respect of disputes valued above the mandatory threshold.

In 2022, there were a total of 210,342 disputes pending before the CMBs.[7] Of the total number of disputes that went into the mediation process, 58% were mediated, 42% were not settled because one party didn't show up and 40% were settled after mediation. The positive factor is that of the number that was mediated, 69% were successful. The avoidance of mediation by refusing to attend is a cause for concern and needs to be addressed.

The Mediation (Special Categories of Disputes) Panels

Delay and expense in litigation was defeating the delivery of justice and several business groups were demanding better options. The Mediation (Special Categories of Disputes) Act, No. 21 of 2003 was the response. The Act provides for the establishment of Mediation Panels to mediate defined categories of disputes, in identified areas of the country. The category of dispute, the areas in which Panels are to be established, and the monetary threshold below which the disputes of this category must mandatorily be referred to mediation are required to be set out in

[6] Conversely, this is a possibility in other countries, such as Brazil. See: FERREIRA; SEVERO, 2021.
[7] Statistics of the Mediation Boards Commission.

Orders made by the Minister. In essence it's a policy decision that must be made based on "the need to provide for the meaningful resolution of disputes relating to social and economic issues".[8] The qualifications that mediators must have are required to be prescribed by Regulation made by the Minister.

While those appointed to CMBs are not required to have any specific educational qualifications, a distinguishing feature of this Act is that the Minister is required to prescribe the qualifications that a Mediator must possess having regard to the nature of the category of disputes that must be mediated. Different qualifications may be prescribed for different categories of disputes. The requirement that mediators must have specific qualifications, defines the significant difference between the two forums.

Panels of mediators were appointed under this Act in 2005 after the Tsunami of 2004 for the resolution of tsunami related disputes and in 2015, 2018 and 2021 for the resolution of disputes relating to the *ownership of lands.* The 2015 and 2018 Orders sought to establish Boards primarily in the Administrative Districts in the North and East to resolve land disputes that resulted due to the North-East conflict. The life of the people in Sri Lanka is closely connected to land and it was important to resolve the many issues faced by the people in these areas as a result of the conflict. A new Order of January 2022 provided for Panels to be established throughout the country but with a reduced scope.

The Orders currently in force[9] provide for the establishment of Panels for the resolution of "Financial disputes" (*i.e.,* disputes arising out of a financial business transaction) in six identified administrative districts in the country[10] and land disputes excluding certain causes of actions,[11] in all administrative districts in the country.[12] Land disputes and Financial disputes below the value of Rs. one million[13] are required to be mandatorily referred to these Panels, and court jurisdiction is ousted unless mediation fails.

The Commercial Mediation Center of Sri Lanka

Although statutory provision[14] was introduced in year 2000 to establish this Center, it was not able to be sustained and the Act is to be repealed. The Act states that the functions of the Center shall be "to promote the wider acceptance

8 Section 2(2) of the Act of 2003.
9 As at end April 2023.
10 Orders published in the Gazettes of December 21, 2022 and April 21 2023.
11 The excluded categories include actions that are required to be filed in the Primary Courts to prevent a breach of the peace, and also rent/lease actions.
12 Order published in the Gazette of January 6, 2022.
13 Rs. 1 million = approx. US$ 2,750.
14 The Commercial Mediation Centre of Sri Lanka Act, No 44 of 2000 as amended by Act No. 37 of 2005.

of mediation and conciliation for the resolution and settlement of commercial disputes; to encourage parties to resolve commercial disputes by mediation and conciliation; and to conduct settlement proceedings using mediation and conciliation". This statute was enacted as a response to the need identified by the business community for more efficient dispute resolution for commercial disputes. The Act provided for the appointment of a Board of Management with majority representation from four Chambers of Commerce,[15] aimed at assuring that there would be private sector ownership. The Board of Management was vested with the responsibility of making Rules for the manner of making applications, the procedure to be followed, the fees to be levied and a Code of Conduct for mediators. These were required to be approved by the Minister. The intention was to have private sector ownership with financial support from the Government.

The failure to sustain this Centre is attributed to a mismatch between the objective of ensuring private sector ownership and autonomy and the inability to honor that principle in implementation.

Common Features of the Statutes

The features discussed here are those in the CMB Act (1988), the CMCSL Act (2000) and the Special Categories of Disputes Act (2003).

- *Ouster of court jurisdiction* – In terms of the 2003 Act, if the parties have entered into a mediation agreement,[16] and a Panel for that category of dispute has been appointed, court jurisdiction is ousted unless mediation has been attempted and been unsuccessful. The ouster does not apply to actions seeking interim relief.
- *Objective of Mediation* – The Acts of 1988 and 2003 articulate the objective by providing that it's the duty of a mediator "by lawful means to endeavor to bring the parties to an amicable settlement and to remove with their consent wherever practicable, the real cause of the grievance between them so as to prevent a recurrence of the dispute."
- *Reference by a court or a Labor Tribunal* – A court may refer a dispute to a Mediation Board, with the consent of the parties. Under the Act of 2003, a Labor Tribunal has that power too.
- *Confidentiality* – All the statutes provide for confidentiality.

[15] (1) The Ceylon Chamber of Commerce, (2) the National Chamber of Commerce, (3) the Federation of Chambers of Commerce and Industry, and (4) the Ceylon National Chamber of Industries.

[16] A mediation agreement is an agreement to refer any dispute that may arise under a contract, to Mediation.

- *Prescription* – The period commencing the date of reference to Mediation and ending on the date of issuing the certificate of non-settlement is excluded in computing the prescriptive period.
- *Time limits to complete proceedings* – The Acts of 1988 and 2003 provide that proceedings must be concluded within 60 days. The Act of 1988 provides that in the case of offences, the proceedings must be concluded by a CMB in 30 days, highlighting the fact that criminal offences need to be concluded speedily to prevent an escalation of conflict.
- *Settlement Agreement* – Where the parties agree to settle, the parties enter into a "Settlement Agreement" which is signed by the parties and the Mediator. That brings closure to the Mediation.
- *Non-settlement certificate* – Where the parties are unable to reach an agreement, a non-settlement certificate is issued by the mediator. If litigation is pursued thereafter, and the cause of action is one which should have mandatorily been referred for mediation, this certificate is proof of compliance.
- *Enforcement of a mediated settlement agreement.*

Although there's no specific statutory provision, it is accepted that the parties assume a legal obligation to honor the terms of the settlement, and in the event of a violation, it can be treated as a breach of a contractual obligation as under any other agreement. In the case of Court referred mediations**,** a decree of court is required to be entered based on the terms of the Settlement Agreement. Where the settlement is reached on a reference by a Labor Tribunal, an Order is required to be made by the Tribunal, in terms of the settlement.

- *Exclusion of legal representation at a mediation*

The Acts of 1988 and 2003 provide that parties cannot be represented by an Attorney at Law, agent or other person. However, the prohibition does not extend to spouses or to a parent, guardian or curator appearing on behalf of a minor or a person under any disability. There is no bar however, to lawyers being present at the mediation, (a sort of "potted plant" presence),[17] where the lawyer is present and advises the disputants only when requested. The rationale for this exclusion is that mediation is a party centric process, and the intention is to give primacy to the wishes of the parties without being overwhelmed or intimidated by the dictates of others. Many lawyers have trained as mediators and perform in that role extremely well. It is another area of specialization that lawyers can pursue.

[17] This approach is discussed by Jean R. Sternlight (1999).

The International ADR Centre

The CCC-ICLP International ADR Center (Guarantee) Ltd., (IADRCSL) was established in 2018[18] as a purely private sector led not-for-profit limited liability company, as a joint venture initiative of the Ceylon Chamber of Commerce (CCC) and the Institute for the Development of Commercial Law and Practice (ICLP). The CCC is the oldest business Chamber in the country and one of the oldest in the region.[19] The ICLP is a non-profit entity[20] established to achieve a wide range of objectives relating to the advancement of commercial law and practice and has operated its arbitration center since March 1996.

The IADRCSL was mooted at a point in time when Sri Lanka was challenged to improve its dispute resolution regime for investors and improve the doing business landscape. At this juncture the efforts of the Government to establish an International Arbitration Centre[21] and the CMCSL through public-private partnerships had failed. The IADRCSL was established as a purely private sector initiative to fill that lacuna and offers arbitration and mediation services for commercial dispute resolution and has its own arbitration and mediation rules.

The Type of Mediation

The type of mediation that is used in Sri Lanka up to now is facilitative mediation or interest-based mediation. The training of mediators[22] by the Ministry of Justice as well as the training carried out by the IADRCSL promotes facilitative mediation. Essentially, this is the non-coercive approach where the mediator acts as a facilitator who assists and inspires disputing parties to reach solutions that respond to their needs and interests. Salient rules such as respecting the other party, confidentiality of the matters discussed, application of the 'without prejudice' principle, the independence and impartiality of the mediator to affirm the integrity of the process, are all entrenched in the Sri Lankan statutes and also in the Mediation Rules of the IADRCSL. As stated earlier, the CMBs may at times be tempted to play a more proactive role in suggesting solutions in situations where parties want the mediator to perform that role. No doubt, in time, the need for other types will be considered if needed.

[18] Incorporated under the Companies Act No. 7 of 2007.
[19] The CCC was established in 1839 and acquired legal status upon the enactment of the Chamber of Commerce Ordinance, No. 10 of 1895.
[20] Incorporated under the Companies Act No. 7 of 2007 on September 2nd, 1992.
[21] The Sri Lanka International Arbitration Centre (SLIAC).
[22] See: AWAD, 2020. See also: FARIAS, 2020.

New Legislation on Mediation for Civil and Commercial Disputes

An important development in Sri Lanka's mediation landscape is the proposed *Mediation (Civil and Commercial Disputes)* statute. The need for statutory recognition of vital principles that apply to the conduct of mediations in the private domain needs to be addressed. A Bill drafted by the IADRCSL has been submitted to the government and is currently being finalized.

The Singapore Convention

Sri Lanka signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention)[23] on August 7, 2019 when it first opened for signature in Singapore. The adoption of a Convention by the United Nations on the recommendation of UNCITRAL signaled the increasing belief in mediation as an effective mechanism in the dispute resolution arena in trade and business matters. The Government is currently finalizing a Bill drafted by the IADRCSL. Sri Lanka is hopeful of ratifying the Convention after the enactment of the law in Parliament. With the enactment of domestic legislation and the ratification of the Convention thereafter, Sri Lanka will provide a user-friendly environment to enforce mediated international settlement agreements relating to commercial matters.

Prospects for the Expansion of the Use of Mediation

The need for alternatives to litigation grows, as delays in courts have reached ridiculous levels. The practice of arbitration in Sri Lanka has not inspired confidence as a viable alternative that has eliminated delay and expense.

Searching for ways to reduce delays has been the preoccupation of many Ministers of Justice over many years. A 1984/85 study on the "Laws Delays and Legal Culture Committee" headed by Supreme Court Justice R. S. Wanasundera contained a poignant observation that "in an adversarial system of justice such as ours, delays destroy justice, deterrence is lost, costs are increased, court resources are wasted, and severe emotional hardship is inflicted upon litigants. In combination, these factors undermine the efficacy of the whole legal system, sapping its strength, vitality and even its integrity, and making the majority of litigants lose confidence". These sentiments remain relevant today, 38 years later, not only for Sri Lanka but globally. While substantive and procedural laws can be reformed in an attempt to eliminate delaying features, the legal culture which is a

[23] On the Singapore Convention see: COMETTI; MOSCHEN, 2022. See also: MASON, 2021.

significant contributor can only be reformed through good practice. Here is where we have failed. Hence the continuing focus on alternatives.

Laws Delays is not a phenomenon that's peculiar to Sri Lanka. It is a problem in many jurisdictions across the globe, and Sri Lanka has looked at global success stories to define and refine its own interventions.

In 2021, Sri Lanka enacted the Colombo Port City Economic Commission Act, No. 11 of 2021, providing for the establishment of the Colombo Port City Special Economic Zone to promote the Colombo Port City area as an attractive investment destination and attract enhanced foreign direct investment into the country. The objective of *creating a safe and conducive business environment and facilitating the ease of doing business* is also recognized as an objective in the statute. The Act provides for the establishment of an international commercial dispute resolution center for the purpose of offering ADR services, including mediation. Providing for the establishment of an ADR Center and recognizing mediation as one of the processes to be provided by the Center, resonates the global acceptance of mediation for commercial dispute resolution.

Notably, the *Mediation (Civil and Commercial Disputes) Bill* is forward-looking. Any private sector entity that offers mediation outside of the courts, will have the benefit of this legislation. In the current context, Sri Lanka does not have an eco-system that provides for the use of mediation for non-commercial civil dispute resolution (*e.g.* Divorce, child custody, etc.)[24] and it's expected that this lacuna will soon be filled due to the growing interest in mediation.

The need for court-referred mediation and court-annexed mediation in respect of several categories of disputes is urgent given the prospects of better results through mediation. The proposed new Bill includes provision for courts to refer disputes to mediation, and in terms of the current situation this essentially means to external service providers.

Conclusion

The prospects for the growth of mediation in Sri Lanka is very real. The dependence on the Government to provide all the answers to address the concern of delays in laws must stop. The arbitration practice prevails outside of the Government regime and mediation is emerging globally as the new option of choice. Those who realize that it's not smart to spend time and money just to be proven right (and risk being proven wrong), will find reason to have hope in the new developments in relation to mediation. It is the responsibility of service providers to ensure that quality service is provided and sustained.

[24] For Family Law Mediation in Brazil see BRAGANÇA; NETTO, 2020.

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Mediation in Thailand

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Abstract: As mediation has been gaining popularity in recent years, this paper outlines the general perception and requirements of mediation, including international mediation, in Thailand. Considering the supportive measures stipulated in the laws of Thailand and the high likelihood of Thailand's accession to and ratification of the Singapore Convention on Mediation, although there are certain procedural complications in the horizon, mediation is likely to have a glittering future in the legal landscape of Thailand.

I The Understanding of "Mediation" in Thailand

In line with the general understanding of mediation, mediation in Thailand refers to a conflict management process that relies on an impartial and independent individual who has the consent of the conflicting parties to utilise his/her expertise in conflict management and to facilitate the resolution of the dispute as a mediator.

Alternative dispute resolution in Thailand is mainly driven by the Court of Justice, rather than private organisations or parties. Nonetheless, Thailand has been supporting a mediation-friendly environment without the involvement of the court in the recent years, resulting in mediation being categorised into court-annexed mediations and out-of-court mediations.

A Court-Annexed Mediation

The Civil Procedure Code of Thailand B.E. 2477 (1934) (as amended) ("**Civil Procedure Code**") has recognised the importance of mediation, particularly institutionalised mediation. The Civil Procedure Code encourages mediation as an alternative dispute resolution method as prescribed in Sections 19, 20, 20 *bis* and 20 *ter*. The court has the power to order the parties to appear in court if it sees that such appearance may bring about an agreement or a settlement. No matter how far the proceedings have been conducted, the court has the power to mediate to enable the parties to reach an agreement and to settle their dispute. Other legislation supporting court-annexed mediation include the Consumer Protection Act B.E. 2522 (1979) (as amended) which promotes mediation relating to the violation of consumers' rights before the filing of complaint to the court.

In-court civil mediation can be proceeded either prior to or after the filing of the complaint to the court. Prior to 8 November 2020, Thailand's familiarity with mediation was limited to a mediation occurring after the filing of complaint to the court as the Civil Procedure Code only supported in-court civil mediation session during the course of the court proceedings.

Since 8 November 2020, court-supervised pre-litigation mediation has been implemented to promote mediation as an alternative means for civil dispute resolution prior to a lawsuit.[1] In this scenario, both parties can request the court to appoint a mediator and if they reach an agreement, the parties may request the

[1] For ease of reference, Section 20 ter of the Civil Procedure Code which concerns mediation prior to the filing of a case with the court is excerpted ahead: "Prior to filing a case with the court, the prospective party may file a petition to a court that has jurisdiction of such case in order to request the court to appoint a mediator to mediate matters between the two parties. Such petition shall include the names and addresses of the parties involved, including the details of the dispute. If the court deems it appropriate, the court will then accept the petition and proceed to inquire about the willingness of both parties to attend the mediation. If the counterparty agrees with the mediation, the court shall then have the power to summon all relevant parties to court, to which the parties may decide to come with or without a lawyer. The court shall proceed to appoint a mediator to further the mediation process through the application of Section 20 bis. If parties are able to compromise or agree on certain terms, the parties shall propose such agreements, terms or conditions to the court. Once the court has considered the proposed agreement and decides that such agreement abides by the intent of both parties, is made with good faith, and is not contrary to the law, both parties shall then be made to sign a written agreement.

On the day of the settlement or the compromise agreement under paragraph one, the parties may request the court to adjudicate the terms of the agreement by presenting the reasons for necessity. If the court deems that it is necessary and appropriate to make a judgement at that moment, the court shall make an adjudication in accordance with the said agreement or compromise agreement by applying the provisions of Section 138 *mutatis mutandis*.

There are no court fees for the request and implementation of this section.

The court orders issued under the provisions of this section is final.

Where the court orders the appointment of a mediator but such mediation is unsuccessful, if it appears that the prescription period after submission of the case has already expired, or will expire within 60 days after the date of the mediation's conclusion, the prescription period shall be extended to 60 days after the mediation's conclusion."

court to render a judgment based on the agreed terms so that the civil disputes can be settled without the need for litigation. This saves the parties time and resources and also results in benefits to the economy and society as a whole.

The pertinent provisions of the Civil Procedure Code should be read together with the Regulation of the President of the Supreme Court on Mediation B.E. 2554 (2011) ("**Supreme Court's President Regulation**"). Under the Supreme Court's President Regulation, the Court Mediation Center will be established if necessary to conduct court-annexed mediation properly and efficiently, and to promote and support alternative dispute resolution measures particularly in the form of mediation.

The Court Mediation Center has the following powers and authority:

(1) to manage the mediation as assigned or ordered by the person in charge of judicial affairs or the panel of judges;
(2) to promote and disseminate alternative dispute resolution measures particularly in the form of mediation;
(3) to prepare a directory and documents in mediation case files;
(4) to provide and collect data and statistics regarding mediations of the court, and to evaluate the court mediation performance;
(5) to prepare the mediation lists and coordinate with mediators;
(6) to collect the performance report of mediators;
(7) to coordinate with other authorities relating to alternative dispute resolution; and
(8) to proceed any action as assigned by the person in charge of judicial affairs.

B Out-of-Court Mediation

Supplementary to court-annexed mediation as stipulated in the Civil Procedure Code, the Dispute Mediation Act B.E. 2562 (2019) ("**Dispute Mediation Act**") prescribes provisions in respect of out-of-court mediation. The Dispute Mediation Act defines "mediator" as a person registered and appointed to perform duties in the mediation. In other words, mediators must be registered with and appointed by the pertinent regulatory authority.

Requirements and Standing of Mediators

A person registered as a mediator must satisfy the following criteria:

a) Qualifications

A mediator must be a person:

(1) having successfully completed the dispute mediation training under the programme accredited by the Commission on National Development of Justice Administration under the law on national development of justice administration; and

(2) possessing experience in areas beneficial to the dispute mediation.

b) Prohibitions

A mediator must not be a person:

(1) having been sentenced to imprisonment by a final judgment, except for an offence committed through negligence or a petty offence;

(2) that is incompetent, a quasi-incompetent person or a person of unsound mind or mental infirmity; and

(3) having had the status of a mediator revoked under the Dispute Mediation Act, where a period of five years has not yet elapsed up to the date of submission of the application for a certificate of registration as a mediator.

c) Duties and Powers of a Mediator

A mediator has the following duties and powers:

(1) to lay down directions for the holding of mediation;

(2) to assist, facilitate and make suggestions to parties with respect to ways for ending disputes;

(3) to conduct mediation on the basis of impartiality; and

(4) to prepare a settlement agreement in accordance with the results of the mediation.

d) Mediator's Protection

In the case where a mediator carries out an act in discharge of his or her duties in good faith, the mediator will be afforded protection and will not be liable both in civil matters and in criminal matters.

e) Ethical Standards

Additionally, a mediator must carry out the duties by maintaining the following ethical standards:

(1) performing duties on the basis of impartiality, independence, justice and non-discrimination;
(2) attending the mediation on every occasion and, in the case of inability to attend the mediation, give prior notification of reasons and necessity to the agency conducting the mediation;
(3) performing duties expeditiously without causing unreasonable delay in the mediation;
(4) upholding integrity and honesty and refraining from demanding or taking property or any other benefit from parties or other persons involved in the dispute;
(5) performing the mediation duties politely;
(6) keeping matters relating to the mediation confidential;
(7) refraining from adjudicating the dispute or forcing any party to sign a settlement agreement; or
(8) other cases prescribed by the Minister of Justice in the Ministerial Regulation.

A mediator must also disclose to the parties facts that are likely to give rise to justifiable doubts as to the mediator's impartiality and independence in the performance of duties as a mediator.

Disputes Eligible for Mediation

Under the Dispute Mediation Act, disputes eligible to mediation are the following.

a) Civil Disputes

(1) disputes concerning land other than disputes relating to ownership;
(2) disputes between heirs which concern property to be obtained by way of succession;
(3) other disputes as prescribed in the Royal Decree; or
(4) disputes other than those in (1), (2) and (3), of which the amount of claim does not exceed THB 5 million (approximately USD 145,000) or which do not exceed the amount as prescribed in the Royal Decree.

Note that mediation of civil disputes under the Dispute Mediation Act is not permissible if it relates to a right in respect of a person, family or ownership of immovable property.

b) Criminal Disputes

(1) compoundable offences; or
(2) petty offences under Sections 390, 391, 392, 393, 394, 395 and 397 of the Penal Code of Thailand and other petty offences not affecting the public as prescribed in the Royal Decree.

Note that criminal cases falling under the jurisdiction of the Juvenile and Family Courts under the law and procedures relating to juvenile and family courts are barred from mediation under the Dispute Mediation Act.

Results of Mediation

a) Successful Mediation

If the parties reach an agreement after mediation, the mediator will prepare a memorandum of mediation or ensure the preparation of a settlement agreement in writing which will be signed by the parties and the mediator.

b) Unsuccessful Mediation

In the case where the mediation terminates without achieving a settlement, if it appears that the statutory limitation period has expired during the mediation or is due to expire within 60 days as from the date on which the mediation concludes, the statutory limitation period will be extended for another 60 days as from such date.

Enforcement of Settlement Agreement

If the provisions of the settlement agreement resulting from mediation are not complied with, the parties can enforce such settlement agreement via court proceedings within three years from the date of the agreement. The court will issue an order for the enforcement of a settlement agreement unless it is apparent to the court, or the party against whom the agreement is intended to be enforced proves, that:

(1) a party has deficiency with regard to the capacity to conclude the settlement agreement;

(2) a ground of the dispute or the settlement agreement is, in essence, expressly prohibited by law, impossible or contrary to public order or good morals;
(3) the settlement agreement has been procured by fraud, coercion, threat or other unlawful act; or
(4) there exists an incident regarding the appointment of the mediator which materially affects the preparation of the memorandum of agreement.

Other than under the Dispute Mediation Act, out-of-court mediation is available at numerous organisations under relevant regulations with different legal requirements, depending on the nature of the case, including the Rights and Liberties Protection Department, Lawyers Council of Thailand, Insurance Mediation Center, Legal Execution Department, and Thailand Arbitration Center, among others.

II The Popularity of Mediation in Thailand as a Dispute Resolution Process and the Obstacles to Parties Adopting Mediation as a Means to Resolve Their Disputes

The concept of mediation in Thailand has been instilled in the Civil and Procedure Code since 1934. Since then, the popularity of mediation as an alternative dispute resolution has been continuously growing resulting from its efficiency in bringing about satisfactory outcomes, its reflection of the intentions of the parties, as well as its ability to preserve the relationship of the parties. From the procedural aspect, mediation can also be utilised to alleviate the judicial backlogs caused by protracted court actions. It is worth highlighting that the institutionalised mediation and out-of-court mediation, which allow either party to request for mediation prior to the filing of complaint to the court, assist the relevant parties to put off and potentially avoid altogether, the immediate costs of court proceedings (such as fees in relation to drafting of complaint) and lengthy court procedures.

In comparison to litigation, mediation is considered significantly cheaper and quicker. When the parties are the ones to arrive at a final solution in a non-confrontational and confidential environment with the help from an impartial and independent mediator, there is a high chance that a positive result for all relevant parties can be achieved, and possibly even resulting in a win-win situation. Also, the settlement agreement resulting from the mediation is legally binding. In other words, a reliable enforcement mechanism can be immediately activated if the party with the obligation decides not to comply with the provisions in the settlement agreement. As matters discussed during mediation are on a without prejudice basis, any admissions or statements made by the parties in the course

of mediation, proposals made by the mediator or documents prepared solely for the purpose of mediation, cannot be used in subsequent judicial proceedings, arbitral proceedings or any other proceeding.

However, certain obstacles remain in the adoption of mediation as a means to resolve disputes. The relevant parties can opt for mediation only when all parties agree on adopting mediation as a means of dispute resolution. Furthermore, there are concerns around the expertise of the mediator, such as the fear that the mediator's lack of knowledge in a specific area of law might potentially lead to an inefficient solution. Also, mediation requires both parties to genuinely commit to resolving the issues in good faith or otherwise it will result in a systemic distrust and a failed mediation. This is because either party can withdraw from the proceeding whenever they no longer see that mediation is likely to lead to a resolution of the dispute.

Based on the statistics of pre-litigation mediation of the Court of Justice for the year 2021, there were a total of 1,852 cases (1,784 civil cases and 68 criminal cases) of mediation in the courts, of which 995 cases were successfully resolve, 142 cases were unsuccessful, 478 cases were disposed, and 237 cases were to be proceeded in the subsequent year. In other words, 995 out of 1,137 cases eligible for and which proceeded with mediation in 2021 were successfully settled via mediation prior to the complaint being filed with the court, which reflects a success rate of approximately 88%.

As for mediation after the filing of complaint to the court in 2021, statistics of the Court of Justice show there were a total of 182,639 cases (176,291 civil cases and 6,348 criminal cases) of mediation in the courts, of which 163,239 cases were successful resolved, 8,481 cases were unsuccessful, 7,291 cases were disposed, and 3,628 cases were to be proceeded in the subsequent year. In other words, 163,239 out of 172,350 cases eligible for and which proceeded with mediation in 2021 were successfully settled via mediation in the course of the court proceedings, reflecting a success rate of 95%.

Other organizations have also put in place their own mediation platforms and reported their mediation statistics. For instance, the Rights and Liberties' Protection Department reports 88.6% of the disputes referred to mediation under its management in 2021 was successfully settled, reducing the 667 cases from being filed with the relevant courts (650 civil cases and 17 criminal cases). This means a reduction in public expenditure of THB 82,457,700 and a reduction of government costs by THB 1,250,894. Moreover, the number of people submitting applications for mediation has skyrocketed from the previous year. While there were 864 applications filed in 2020, there were 2,382 applications filed in 2021, evidencing an increase of 175.69% from the previous year.

The Thailand Arbitration Center's 2021 Annual Report states that there were 18 mediation cases under its management in 2021, 10 out of 18 cases were successfully resolved utilizing Thailand Arbitration Center Rules on Mediation B.E. 2559 (2014) (as amended). Note that this requires the parties to have in place a mediation clause agreeing that the disputes will be settle by conciliation in accordance with the Rules of the Thailand Arbitration Center and under the management of Thailand Arbitration Center.

Considering the roaring success substantiated by the precedents and the support from measures such as those stipulated in the Civil Procedure Code and Dispute Mediation Act, the perception towards mediation remains positive and promising. Mediation is therefore likely to have a glittering future in the legal landscape of Thailand.

III The Prevalence of International Mediation in Thailand

The absence of a central organisation to collect data specifically in relation to international mediation in Thailand makes it quite onerous to identify the exact number of international mediation cases in Thailand in the past years. One of the possible institutions that have settled international mediation in Thailand that comes to mind is the Thailand Arbitration Center.

Based on sources within the Thailand Arbitration Center, the statistics of international mediation in Thailand heard by the Thailand Arbitration Center from 2019 to 2022 are as follows.

Year	Number of All Mediation Cases	Number of International Mediation Cases
2022	8	3
2021	8	3
2020	7	2
2019	2	1
Total	25	9

In all of the 9 international mediation cases settled, the parties to the mediation were mixed. Some of the disputes were between Thai nationals and foreigners, while some involved only foreigners.

Mediation's popularity has grown by leaps and bounds in the past few years. This extends to the number of cases of international mediation in Thailand which has gradually increased in recent years. Although it may not be as prevalent as international arbitration, the steady encouragement of international mediation in Thailand through the possibility of Thailand's accession and ratification of the

Singapore Convention on Mediation could potentially encourage international mediation to thrive in Thailand in the upcoming years.

IV Foreseeable Developments in Mediation in the Near Future within Thailand

In recent years, Thailand has actively pushed for the use of mediation by, among other things, passing legislation specifically governing mediation, namely the Dispute Mediation Act. It has established frameworks to provide more certainty regarding mediation procedures. Furthermore, the constant legal developments in Thailand to promote mediation such as the implementation of pre-litigation mediation and online mediation promoted by the Court of Justice, and mediation services offered to the parties by non-court institutions (such as the Thailand Arbitration Center), show the positive outlook on the future of mediation within Thailand.

The attitude towards mediation has been quite positive. A number of organisations, both in the public and private sectors, have been encouraging parties to refer their disputes to mediation as a means of neutral dispute resolution mechanism led by an effectively skilled mediator. Many institutions, such as the Thai Chamber of Commerce, are in the process of establishing a mediation center for mediations to be carried out by specialised professionals who have the understanding in both the commercial aspect as well as the dispute resolution aspect in relation to a case. A continuous increase of cases referred to mediation can be anticipated as it has proven to be an efficient means, both time and cost-wise, of dispute resolution.

Thailand has not yet acceded to nor ratified the Singapore Convention on Mediation. In order to enhance the enforcement of international settlement agreements resulting from international mediation on cross-border commercial disputes, it is necessary for Thailand to accede to and ratify the Singapore Convention on Mediation. Given the prospect of increased disputes involving international elements, the seemingly unstoppable rise in popularity of international mediation should incentivise the relevant authorities of Thailand to take steps forward for Thailand's accession to and ratification of the Singapore Convention on Mediation. Currently, the requisite draft legislation is still being processed. Although it will take some time for the draft bill to be finalized by all the relevant authorities, we can expect it to happen going forward. Thailand will eventually adhere to the same international standard regarding enforceability of international settlement agreements resulting from mediation.

There had been discussion within the relevant authorities even before the Singapore Convention on Mediation came into effect that Thailand would be one of the founding signatories to the Convention. Nonetheless, this did not materialize as the accession and ratification of the Convention in Thailand would require the translation of the Convention's provisions into domestic law to create a binding effect of the obligations under such an international convention within the Thai legal system. It is expected that the draft legislation will tend to mirror the provisions of the Singapore Convention on Mediation, with some adjustments and reservations to be made in order for it to run parallel with the Civil and Commercial Code as well as other relevant legislation and regulations. The level of receptivity in general should be high, with some issues still under further discussion. These include the scope of jurisdiction, elements of international status, and the extent of the Convention's application to settlement agreements to which a governmental agency is a party.[2]

The hurdles to Thailand's accession and ratification of the Singapore Convention on Mediation remain the same as they were years ago. The procedural complication of the accession and ratification of an international convention, in particular the implementation of the obligations of such a convention through local laws entails the cooperation and execution of several relevant authorities. Hence, a delay in the enactment of such laws by reason of the very protracted process, is inevitable.

Overall, we can expect that the Bill governing the enforcement of international settlement agreements resulting from mediation to be implemented in Thailand will reflect a high level of receptivity to the Singapore Convention on Mediation. This is an issue we will be closely monitoring in future developments.

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An Assessment of Commercial Mediation Activities in Vietnam: Advantages and Challenges

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Widely recognized as a leading lawyer in dispute resolution and has consistently received recognition from reputable organizations such as The Legal 500, Asia Legal Business, Asia Law Profiles, Chambers & Partners, Chambers Global and Vietnam's Minister of Justice. Foreign investors view Quang as an experienced counsel who would be capable to handle a wide range of challenging legal matters in Vietnam and is adept at negotiating legal proceedings, arbitration, and out-of-court settlements. Under Quang's leadership, Rajah & Tann LCT has successfully represented clients and provided advice on a diverse range of local and international disputes, including those related to foreign investment, commercial transactions, tax litigation, and construction. In addition to his legal practice, Quang is a court member of the ICC for Vietnam and is also a renowned arbitrator for the Vietnam International Arbitration.

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Partner at R&T LCT's Hanoi office and has extensive experience in both contentious and non-contentious legal matters. He specializes in foreign investment matters and has played a key role in facilitating and closing multiple M&A transactions across various industries. With his expertise, Duy is well-equipped to provide clients with comprehensive advice on a broad range of disputes. Duy is a valuable member of the firm's Top-Tier Dispute Resolution practice group and has been instrumental in successfully resolving commercial disputes in Vietnamese courts at all levels. In addition, he is a mediator at the Vietnam International Commercial Mediation Center, which further enhances his dispute settlement skills.

Abstract: Since Vietnam became a member of the World Trade Organization (WTO) on January 11, 2007, its economy has maintained impressive growth within the region and the world. Its average GDP growth rate from 2012 to 2022 was 6.02%. Despite the Covid-19 pandemic, its GDP grew by 8.02%[1] in 2022. The country's flourishing investment development, however, has posed significant challenges to the handling of the investment and commercial disputes. To alleviate the burden on the local court system, Vietnam has made efforts to explore alternative dispute resolution mechanisms in recent years. Commercial mediation has gained popularity within the business community.

[1] PEOPLE'S ARMY NEWSPAPER, 2023.

This article aims to provide an overview of the commercial mediation mechanism as an "out-of-court dispute resolution process, and to assess its future potential in Vietnam.

1 Perception of Commercial Mediation as a Means of Dispute Resolution in Vietnam and the Obstacles Faced by its Users

Vietnam has four common methods used in settling commercial disputes: negotiation, mediation, arbitration and court litigation. Negotiation, mediation and arbitration are collectively known as Alternative Dispute Resolution (ADR) or "out-of-court" resolutions. Mediation is classified into different regimes, including out-of-court mediation (also known as commercial mediation) and "court-annexed mediation".

1.1 Out-of-Court/Commercial Mediation

The out-of-court commercial mediation regime in Vietnam is primarily regulated by Decree No. 22/2017/ND-CP issued by the Government on 24 February 2017 ("**Decree 22/2017/ND-CP**"). This Decree governs general the principles of mediation, mediation institutions, mediators, procedure for conducting mediation and the legal outcome resulting from such proceedings.

One of the main requirements for mediation is the presence of a mediation agreement between the disputing parties, in which they provide their consent to mediate based on the terms and conditions set forth in the agreement.

The parties involved in the commercial disputes have the option to mutually choose a mediator from a list of mediators provided by a registered mediation institution, or a list of individual mediators announced by the local department of justice in each province or city.

These disputants also have the right to select a specific set of rules from a commercial mediation organization that applies to their case. Alternatively, they may agree on their own procedures for the mediation process. In the event that the parties are unable to agree on a procedure, the appointed mediator will propose one. However, any proposed rules or procedures would still be subject to

the approval of the disputants, which reflects the fundamental principle of party autonomy and the essence of the commercial mediation.

The mediation process may be terminated at any time if the parties in the dispute reach a mutual agreement on a settlement outcome. Alternatively, the mediator may suggest terminating the mediation if it is no longer necessary, for instance, when the parties' positions make it unlikely that an amicable settlement can be achieved.

If a settlement agreement is reached during mediation, the parties will enter into a mediated settlement agreement that is binding on them as a civil agreement. Either party may then file a request with the court to recognize and enforce the settlement agreement as a record of successful mediation in accordance with the Civil Procedural Code 2015. The competent court's decision to recognize such mediated settlement agreement will be considered a court judgment and can be enforced in the same manner as a court judgment in accordance with the Law on Civil Judgement Enforcement 2014.

1.2 Court-Annexed Mediation

The Law on Court-Annex Mediation and Dialogue 2020 recently introduced a mediation regime that empowers the courts to conduct a mediation prior to the formal acceptance of a lawsuit. The aim is to allow the courts to explore the possibility of amicably resolving disputes through mediation, rather than resorting to formal court proceedings.

Procedurally, once a statement of claim has been validly submitted, a judge will be appointed to supervise the mediation process and inform the parties of their respective rights and interests. If the parties jointly agree on a specific mediator, the judge will appoint that mediator to proceed with the mediation. The appointed mediator can follow up by arranging joint or separate meetings with the disputants to understand their intentions and desires. Several of these meetings could be arranged until both parties are aware of the other's intentions and are able to determine whether a win-win solution can be agreed upon. However, any party may refuse to participate in the court-annexed mediation process. Conversely, it is open at any stage of the mediation for the parties to enter into a settlement of their commercial dispute, if they have the intention, goodwill, and voluntariness to amicably do so.

If the court-annexed mediation procedures end without any consensus to resolve the dispute, the court will prepare "minutes on failed mediation" and proceed to the next step of formal court proceedings. On the other hand, if the parties reach an agreement during the mediation, the court will prepare "minutes on successful mediation" with the parties as witnesses. This will be followed by

a court decision recognizing the successful mediation. Such a decision will be binding on the parties and enforceable in the same manner as a judgment.

This article focuses on the assessment of out-of-court commercial mediation, which has been regulated and more actively implemented in recent years in Vietnam. Top of Form.

1.3 The Limited Use of Commercial ("Out of Court") Mediation in Vietnam

Despite the availability of a legal framework and mediation services in Vietnam, the use of commercial mediation remains uncommon in practice. As of 2020, there were less than 30 reported cases of commercial mediation, out of which only 11 cases were successful.

According to the annual report in 2021 by the Vietnam International Arbitration Centre (VIAC) and its Vietnam Mediation Center (VMC), the VMC handled only 24 disputes through mediation in the period from 2018 to 2021, with 10 cases settled in 2021, compared to 270 arbitration cases handled by VIAC. Another reputable mediation center in Vietnam, the Vietnam International Commercial Mediation Center (VICMC), recorded that only about 15 mediation cases had been handled by the organization to date.

In comparison to court-annexed mediation, Vietnamese courts have received a total of 541,962 petitions and requests in the period from 1 January 2021 to 1 July 2022, with 114,332 cases conducted via mediation procedures, equivalent to 21%. The mediation success rate was about 37.2% in 2021 and 62.8% for the first half of 2022. However, 70% of those successful mediations related to marriage and family disputes, such as divorces and requests for dividing joint assets and the custody of children, rather than commercial disputes.

1.4 Obstacles to Parties Adopting Commercial Mediation as a Means to Resolve Their Commercial Disputes in Vietnam

There are several possible reasons for the limited popularity of commercial mediation in Vietnam.

First, whenever there is a deadlock in negotiation, it appears to be a current "habit" for parties to resort to litigation or arbitration to resolve their dispute. Although during the arbitration and court proceedings, mediation is also encouraged, it is difficult to make parties agree to mediate because both parties often believe that justice is in their favor, and compromise is unnecessary.

Secondly, commercial mediation is still a new dispute resolution mechanism in Vietnam even if the general concept of mediation has been introduced in the Vietnamese legislation system for some time. Decree 22/2017/ND-CP (issued by the Government in 2017) is considered as the first legal document which comprehensively governs out-of-court commercial mediations and provides a clear legal regime for the establishment and operation of commercial mediation centers in Vietnam. Given the short time of Decree 22/2017/ND-CP's implementation, there are still several challenging issues to commercial mediation. For example, the number of commercial mediation centers established in Vietnam and the number of qualified mediators who have been professionally trained and equipped with the relevant skills are still limited. Additionally, the business community may not yet fully understand the advantages of commercial mediation and may view it as an unnecessary procedure which just incurs additional time and money for the parties.

Thirdly, current Vietnamese legislation is not fully conducive to the use of mediation in Vietnam. In particular, the Vietnamese law does not specifically provide for the mediation period to be excluded from the computation of the limitation period. In this regard, the limitation period under the law to initiate a commercial lawsuit is only 2 years from the moment the legitimate rights and interests are infringed upon. As a result, parties may be rushed into lodging a petition to commence legal proceedings in order to meet the deadline. On the other hand, in some other jurisdictions, the time dedicated to mediation is excluded from the limitation period, which better encourages the parties to consider mediation as the first choice to resolve their dispute.

Last but not least, the fact that Vietnam has not yet become a member of the 2018 United Nations Convention on International Settlement Agreements Resulting From Mediation ("**Singapore Convention on Mediation**"). Accordingly, the mediated settlement agreements conducted overseas by foreign mediation organizations may face a challenge in being recognized and accepted for enforcement in Vietnam. Vietnamese courts highly unlikely recognize and accept such mediated settlement agreements conducted overseas by foreign mediation organizations for enforcement in Vietnam. On the other hand, the mediated settlement agreements conducted in Vietnam may face a challenge in being recognized and accepted for enforcement in other countries subject to the laws of such countries. These may potentially cause the foreign investors and foreign enterprises to hesitate when considering settling their disputes involving its business and investment activities in Vietnam through mediation.

2 The Prevalence of International Mediation in Vietnam

Vietnamese legislation currently provides a mechanism for the Vietnamese courts to recognize and enforce settlement agreements arising from mediation conducted by mediators and domestic mediation organizations which are established and registered under Decree 22/2017/ND-CP.

Foreign commercial mediation institutions are permitted to establish a commercial presence in Vietnam, such as a representative office to conduct liaison and promotional activities or a branch to carry out commercial mediation activities in Vietnam in accordance with Decree 22/2017/ND-CP. Foreign commercial mediation institutions are required to take responsibility for a branch's compliance with Vietnamese law in its operations. They are also required to appoint a commercial mediator to be the head of the branch and to act as its authorized representative. A foreign commercial mediation institution that has been licensed to establish and operate a branch in Vietnam may directly conduct mediation activities in Vietnam, and any settlement agreement arising from mediations that they conduct would be recognized by the Vietnamese courts for enforcement.

However, there are currently no specific provisions under Vietnamese law on the recognition of settlement agreements arising from mediations conducted by parties at foreign mediation organizations. Therefore, the recognition and enforcement of such settlement agreements still remain to be addressed by the Vietnamese courts. There has been no published case of a settlement agreement arising from a mediation conducted by a foreign mediation organization being recognized and accepted for enforcement by the Vietnamese court.

With that being said, the fact that Vietnamese legislation has made it possible for the establishment and operation of commercial presences of foreign commercial mediation institutions in Vietnam, is a significant step forward. However, pending Vietnam's accession to and ratification of the Singapore Convention on Mediation, the recognition and enforcement of the settlement agreements arising from mediations conducted via international mediation overseas, still remain unresolved. Overall, given the current legal framework on commercial mediation in Vietnam, the use of mediation for the settlement of international commercial disputes in Vietnam is still not popular.

3 Foreseeable Developments in Commercial Mediation within Vietnam in the Near Future

Mediation practice in Vietnam is still in its early stages of development. Nonetheless, there are some reasons for an optimistic view on the development of commercial mediation practice in Vietnam.

3.1 Commercial Mediation Activities Are Encouraged in Vietnam

The Civil Procedural Code 2015 has given emphasis to mediation by devoting a chapter (Chapter XXXIII) on the procedure for the recognition of the results of mediation and other out-of-court methods of dispute resolution. The use of commercial mediation to resolve disputes is also encouraged under the Party's guidelines and the State's legal policies. Resolution No. 49-NQ/TW dated 02 June 2005 issued by the Politburo on the "*Judicial Reform Strategy to 2020*" sets out the task of "encouraging the settlement of certain disputes through negotiation, mediation and arbitration".

With the issuance of Decree 22/2017/ND-CP, the principles of mediation, the order of mediation procedures, the standards of mediators, the establishment, registration and operation of commercial mediation organizations have also become clearer and more specific. Moreover, there are promising indications that Vietnam may upgrade and promulgate a separate law (which is higher than Decree level) to regulate this dispute settlement regime.

The Vietnamese authorities have expressed an ambition and made efforts to promote and encourage commercial mediation so as to improve the judicial system in general. The aim is to reduce the workload of the court system, expediting the settlement of disputes for the purpose of enhancing the development of the economy and society.

3.2 Increased number of commercial mediation centers and mediators in Vietnam

According to a preliminary survey conducted by the Ministry of Justice of Vietnam (MOJ), as at the end of 2021, there were 15 mediation centers established and 7 arbitration centers having authority to conduct mediations in Vietnam. There are also more than 100 qualified commercial mediators.

VMC and VICMC are regarded as the most reputable and leading commercial mediation centers in Vietnam. They were established since the effective date of Decree 22/2017/ND-CP. In practice, these organizations have handled most of the commercial cases in Vietnam so far. Most mediation centers operate with the view of providing social support and assistance to businesses through mediation at a competitive cost. Mediation centers have proactively conducted various activities to enhance public awareness of the benefits of commercial mediation.

3.3 Mediation Training Activities in Vietnam

Currently, the law of Vietnam does not mandate professional training for commercial mediators. There is also no mediator training included in the compulsory educational modules offered in Vietnamese universities or the Judicial Academy. This is currently being reviewed so as to meet the anticipated upcoming demand for mediators. Mandatory training and examination could improve the professionalism and skills of mediators and establish the role of a commercial mediator as a recognized profession. The leading commercial mediation centers in Vietnam such as VMC or VICMC have regularly offered training courses on professional mediation skills for trainees from various background.

In local provinces, professional training has focused on improving the quality of mediation activities at the grassroots level. These activities are performed by mediators licensed by the local Judicial Department. Mediation experts from key centers have been invited to share their knowledge and expertise with local mediators.

3.4 Promotion and Development Activities Regarding Commercial Mediation

Nowadays, the leading mediation centers such as VMC and VICMC are quite active in conducting promotional and development activities. For example, in the year 2022, there were 2 big tournaments on mediation skills held by these organizations. V-Med competition (Vietnam Mediation Moot) was held by VICMC in August 2022 as the first Vietnamese commercial mediation tournament in Vietnam for candidates from leading universities in the country.[2] Concurrently, the ICMC 2022 competition (VMC-HLU International Commercial Mediation Competition) was held by VMC is the first English commercial mediation tournament with a great number of candidates from universities nationwide. In addition, numerous workshops and seminars were held by these leading mediation centers which help to promote the awareness of commercial mediation practice and generate vibrant discussion among the key players in the market to further develop this dispute settlement mechanism.[3]

VMC and VICMC also aim to set up cooperations and partnerships with other organizations including law firms. Several commercial mediators are lawyers and specialists from different organizations. Such cooperations and partnerships have

[2] Available at: https://vicmc.vn/v-med-2022-vietnam-mediation-moot/.

[3] Available at: https://www.vmc.org.vn/tin-tuc-su-kien/to-chuc-thanh-cong-cuoc-thi-hoa-giai-thuong-mai-quoc-te-vmchlu-icmc-2022-n910.html.

brought significant efficiency and benefits to the development of mediation practice in Vietnam.

4 The Level of Receptivity to the Singapore Convention on Mediation and the Possible Hurdles to Vietnam's Accession to and Ratification of the Convention

Under the Law on International Treaties (No. 108/2016/QH13 dated 09 April 2016, the National Assembly of Vietnam), in general, the ministerial-level State agencies are entitled to propose to the Government on the needs of accession to a specific international treaty. The proposing State agency would be obligated to organize different procedures such as checking and examination of Vietnam's current related regulations and international treaties; conducting research on the effect of such international treaty on Vietnam's national defense, public security, politics and social fabric; seeking opinions and comments from other related State agencies (i.e., the Ministry of Foreign Affairs, Ministry of Justice, etc.). The final decision on accession to such international treaty would require the ratification by the Vietnam's National Assembly or the President for each specific case.

4.1 The Possible Hurdles to Vietnam's Accession to and Ratification of the Singapore Convention on Mediation

Important international documents governing commercial mediation include the Singapore Convention on Mediation and the UNCITRAL model law on mediation. The Singapore Convention on Mediation is considered as an effective tool to resolve international trade disputes, creating favorable conditions for international trade to develop harmoniously, thereby contributing to the implementation of the sustainable development goals. However, to this date, Vietnam is still not a member of the Convention. Vietnam's accession to and ratification of this Convention may face the following hurdles and obstacles.

First, the Singapore Convention on Mediation is also quite new and its implementation by its member states have so far been quite limited, which leads to a limited source of experience for non-member state like Vietnam to evaluate when considering accession and ratification. This makes it more challenging for the Vietnamese authorities to analyze and evaluate the Convention's effect on issues of national defense, public security, economy and society in a prudent manner.

Secondly, there are still certain discrepancies between Vietnamese law and the provisions of the Singapore Convention on Mediation. For example, under the current legislation, the Vietnamese courts may only recognize dispute settlement

agreements assisted and held by mediators and mediation organizations registered to operate under the provisions of Decree 22/2017/ND-CP. As there are no specific provisions on the recognition of settlement agreements arising from mediations conducted by overseas mediation organizations which are not registered a presence to operate in Vietnam, Vietnamese courts are likely to refuse the recognition and enforcement of such settlement agreements. Therefore, it is necessary for Vietnam to carefully study and consider any amendments or supplementation to its current laws to align it with the requirements of the Singapore Convention on Mediation. For instance, Vietnam may need to enact a separate law on commercial mediation in order to specifically provide for the recognition and enforcement of settlement agreements arising from mediation conducted by overseas qualified/licensed mediation centers or individual mediators.

Thirdly, Vietnam's court system has a limited workforce as well as limited experience in handling commercial cases with foreign elements. Therefore, if Vietnam was to develop a mechanism to recognize and enforce settlement agreements related to international mediation, it might be a significant challenge for Vietnam's court system and judges.

Fourthly, although the number of commercial mediation centers and mediators in Vietnam is considerable, the number of experienced ones is still rather limited. This is because the number of mediation cases has been quite limited. Consequently, many commercial mediators have not had the chance to practice and sharpen their skills. As a result, Vietnam's mediation centers may not be able to compete side-by-side with international mediation centers if Vietnam accedes to the Singapore Convention on Mediation.

4.2 Progress and Level of Receptivity to the Singapore Convention on Mediation

Despite the perceived obstacles highlighted above, having recognized the potential and advantages of commercial mediation, Vietnam has initiated several actions to kickstart the research and evaluation of the possibility of joining the Singapore Convention on Mediation.

During 2020, in the review of 15 years implementing Resolution 48-NQ/TW and Resolution 49-NQ/TW regarding the development of Vietnamese judicial system, the Vietnamese Politburo set out the goal to further improve the alternative dispute mechanism. Consequently, the Prime Minister decided in the Decision 1268/QD-TTg dated 02 October 2019 to ratify the action plan on improving the mediation and arbitration mechanism and proactively assigned the Ministry

of Justice to review and evaluate the possibility of Vietnam's accession to and ratification of the Singapore Convention on Mediation.

5 Conclusion

Commercial mediation offers numerous advantages, including cost and time efficiencies, flexibility of process and confidentiality. It can also produce win-win solutions that satisfy the parties' interest, while preserving their relationship and reputation. Despite recent efforts to promote the use of mediation in Vietnam, more needs to be done to enhance its adoption as a means of dispute resolution.

Vietnam's legal frameworks and policies should be more supportive and aligned with international standards. Commercial mediation centers and mediators should provide better training, promotional activities, and service quality standards to assist parties in settling their commercial disputes more effectively. The business community should also be more receptive to mediation as a means of alternative dispute resolution. If these challenges are addressed, commercial mediation can become the preferred choice for both domestic and foreign investors in Vietnam for settling their commercial or investment disputes.

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Arbitration with Chinese Characteristics and Its Long Pathway towards International Standards

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Abstract: The Chinese Arbitration Law (aka "CAL") was adopted in 1994 and further amended in 2017. Currently, this law is considered a cornerstone in the development of arbitration legislation in China. It is worth adding, however, that CAL does not go along with the UNCITRAL Model Law on International Commercial Arbitration (adopted in 1985 and amended in 2006 respectively). There are numerous discrepancies between the UNCITRAL Model Law and the CAL. Nonetheless, the Draft amendments, which are currently under public consultation, seem to be a cornerstone in bringing Chinese arbitration closer to international standards worldwide. In addition, it should be stressed that the proposed Draft still includes many solutions that differ from the UNCITRAL Model Law and still underpin the arbitration with Chinese characteristics. It is too early to assess whether all these amendments will pass and change the Chinese landscape of international commercial arbitration, but it is certainly worth watching.

Keywords: China. Arbitration. Dispute Resolution.

1 Introduction

The Chinese Arbitration Law (aka "CAL")[1] was adopted in 1994 and further amended in 2017. Currently, this law is considered a cornerstone in the development

[1] 中华人民共和国仲裁法 [Arbitration Law of the People's Republic of China], 2022.

of arbitration legislation in China. It is worth adding, however, that CAL does not go along with the UNCITRAL Model Law on International Commercial Arbitration[2] (adopted in 1985 and amended in 2006 respectively). There are numerous discrepancies between the UNCITRAL Model Law and the CAL. Indeed, Chinese legislation reflects the most substantial principles in terms of contemporary arbitration law, but at the same time, it also represents the so-called arbitration with Chinese characteristics. This study aims at setting forth the features of the CAL by confronting it with the UNCITRAL Model Law. Therefore, the paper outlines the discrepancies between the UNCITRAL Model Law and Chinese legislation. The article also sheds light on a draft amendment to the arbitration law issued in 2021. Lastly, it seeks to answer whether the draft amendment would significantly change the landscape of dispute resolution in China and thus have an impact on international commercial arbitration.

Overall, according to the binding provisions of the CAL, there is a considerable difference between domestic arbitration, foreign-related arbitration, foreign arbitration, and arbitration involving Special Administrative Regions (such as Hong Kong and Macau) and Taiwan. Given the multifarious types of arbitration cases, all domestic cases must be managed by a Chinese arbitral tribunal. Simultaneously, a judicial review process of domestic arbitral awards differs from foreign-related and foreign arbitral awards. To illustrate, a foreign-related arbitration case refers to a case with a foreign party, foreign subject matter or other foreign factors. In the case of this type of arbitration, the parties are allowed to choose the applicable law, institution, rules, and seat of arbitration. Foreign arbitration, in turn, is understood as an arbitration handled by a foreign arbitral tribunal or *ad hoc* arbitration beyond the territory of the People's Republic of China (PRC). Finally, disputes involving wholly foreign-owned enterprises (WFOEs) which have been registered within the Free Trade Zone (FTZ) can be carried out outside China, while others WFOEs, registered outside the FTZ, must be handled by a chosen Chinese arbitration commission.[3]

Recently, the Chinese lawmaker adopted a more pro-arbitration stance by creating a background for a new international commercial arbitration landscape across the country. It is also visible given the regulatory and policy documents confirming the need to strengthen and further improve the multifarious dispute resolution mechanism in the PRC. Therefore, the Chinese legislator realized that there was a need to amend the binding provisions of the CAL to attract more foreign parties to settle arbitration disputes in mainland China. Hence, the Ministry

[2] UNCITRAL, 2022.
[3] MIMI, 2020, p. 282-283.

of Justice issued a proposal to revise CAL (namely the Draft for Public Comments). Along with this draft, explanatory notes were also issued on 30 July 2021.[4] Briefly, compared to the actual binding provisions in China, the new ones will expand the scope of arbitration cases, incorporate *ad hoc* arbitration, and include that the selected arbitration institutions will be no longer a prerequisite of a valid arbitration agreement, among others.

2 Chinese Arbitration Law in View of the UNCITRAL Model Law

2.1 Discrepancies between the 1985 UNCITRAL Model Law and Chinese Arbitration Law

Along with the proclamation of the People's Republic of China (PRC), the significance of arbitration as an alternative dispute resolution mechanism has increased. To start with, the Chinese arbitration system is institution-monopolized which means that merely institutional arbitration is permitted according to the binding provisions of the 1994 Arbitration Law of the PRC (aka Chinese Arbitration Law, CAL).[5] This legal act is widely considered a cornerstone in the development of arbitration in Mainland China. The National People's Congress Standing Committee adopted the aforementioned provisions on 31 August 1994 which entered into force on 1 September 1995.[6]

At the outset, it should be stressed that CAL does not reflect fully the UNCITRAL Model Law on International Commercial Arbitration (hereinafter 'UNCITRAL Model Law') which was adopted in 1985 and amended in 2006. Even though Chinese legislation reflects the most substantial principles of contemporary arbitration law, there are still many differences which result in existing the so-called arbitration with Chinese characteristics.[7]

The adoption of the CAL is a result of the increasing popularity of commercial arbitration as the primary means of dispute settlement flowing from the economic reforms introduced in the 1980s. This law applies to arbitrations based upon voluntary agreements, concluded between the parties, which explicitly express their will to arbitrate. Therefore, the CAL includes both procedural and substantive rules and principles regarding the entire arbitral proceedings from the establishment of arbitral tribunals to the enforcement of arbitral awards.[8]

4 KUN, 2021, p. 21.
5 中华人民共和国仲裁法. Available at: http://www.npc.gov.cn/npc/c30834/201709/c8ca14070ead4c6d904610eea0f535fb.shtml. Accessed on: 7 Dec. 2022.
6 WEIXIA, 2017, p. 261.
7 ŁĄGIEWSKA, 2020, p. 42.
8 WEIXIA, 2021, p. 92.

The binding provisions of the CAL differ domestic arbitration from foreign-related arbitration, foreign arbitration and arbitration involving Special Administrative Regions (such as Hong Kong and Macau) and Taiwan. National arbitration cases must be held by the domestic arbitral tribunal. Considering a foreign-related arbitration, this type applies while dealing with a case including a foreign party, foreign subject matter or other foreign factors. Therefore, the parties can freely choose the applicable law, institution, and rules as well as the seat of arbitration. Foreign arbitration refers to arbitration proceedings handled by a foreign arbitral tribunal or the so-called *ad hoc* arbitration beyond mainland China. Lastly, the cases of wholly foreign-owned enterprises (WFOEs) which were registered within the Free Trade Zone (FTZ) can be settled even outside of the territory of the PRC, whereas cases of other WFOEs have to be handled merely by the Chinese arbitral institutions.[9] Following the aforementioned classification, many different regulations apply depending on whether the case concerns domestic arbitration or foreign and foreign-related.

In addition, the aforementioned monopolized institution system functioning in China stems from Articles 16 and 18 of CAL which stipulate the necessary conditions to conclude a binding arbitration agreement under Chinese law.[10] This entails that an arbitration agreement must include a designated institution to handle the proceedings, otherwise such an agreement is invalid. Accordingly, the institutional monopoly still exists in China and has not been changed thus far. Interestingly, Chinese arbitration law does not explicitly forbid *ad hoc* arbitration. Nonetheless, there are two chief impediments that the *ad hoc* arbitration is not fully protected and thus allowed under the binding provisions in China. Firstly, an arbitration agreement must designate an "arbitration agreement" to be valid. Hence, an arbitration agreement providing the submission of a dispute to *ad hoc* arbitration is not valid. Secondly, in the case of arbitral awards rendered by the *ad hoc* arbitration institution, such an award cannot be enforced under Articles 58, 63, 70 and 71 of the 1994 Arbitration Law.[11]

Furthermore, the doctrine of competence-competence is not fully recognized under Chinese law. According to this concept, the arbitral tribunal is competent to review and assess the effectiveness of an arbitration agreement. Hence, it has the power to decide on its jurisdiction. Such competence stems from the theory of autonomy and focuses on both the independence and competence of the arbitral tribunal itself. Even if such a doctrine is widely recognized under the UNCITRAL Model Law, Chinese lawmaker does not embrace this concept. Under Article 20 of the

[9] MIMI, 2020, p. 282-283.
[10] ŁĄGIEWSKA, 2022, p. 218.
[11] WEIXIA, 2017, p. 262.

CAL, where the parties challenge the validity of an arbitration agreement, a request can be submitted to the arbitration commission or the people's court. In the case when both parties take some actions, that is one party requests the arbitration commission to issue a decision and the other requests the people's court, the arbitration commission should be silent. This entails that the people's court has jurisdiction over the validity of the arbitration agreement. Scholars emphasize the deficiencies and disadvantages of such a solution. First, the arbitration institution itself should be responsible for deciding on its jurisdiction. Currently, it merely fulfils its role as an administration and case management body. Nonetheless, it does not have any power or even expertise to decide on the effectiveness of an arbitration agreement. Second, along with the submission of a case to the people's court, the question concerning time and cost efficiency arise.[12]

Although China endeavours to resemble the solutions in force in international commercial arbitration, namely solutions adopted in the 1985 UNCITRAL Model Law, it cannot be considered a UNCITRAL Model Law country. There are peculiarities in Chinese arbitration law which result in arbitration with Chinese characteristics.

2.2 *Ad hoc* Arbitration within the Pilot Zones

Some innovative solutions linked to *ad hoc* arbitration are introduced in China through pilot programs launched in the Free Trade Zones (FTZ). These pioneering developments are based on SPC's 'Opinions on Providing Judicial Safeguards for the Construction of Pilot Free Trade Zones'[13] issued on 30 December 2016. According to Article 9 (s) of this Opinion, it is possible to handle *ad hoc* arbitration under certain conditions that should be met. Hence, this Article stipulates that "If two enterprises registered in FTZ agree that relevant disputes shall be submitted to arbitration at a specific place in mainland China, according to specific arbitration rules, or by specific personnel, the arbitration agreement may be determined as valid. If the people's court holds that the arbitration agreement is null and void, it shall request the court at the next higher level for review. If the superior court consents to the opinions of the subordinate court, the former shall report its review opinions to the Supreme People's Court level by level and render a ruling after the Supreme People's Court makes a reply." Given that, the *ad hoc* arbitration agreement is valid when two conditions are met. First, both parties are already registered within the FTZ; and second, the arbitration agreement fulfils the so-called "three specific conditions", that is specifies the place of arbitration

[12] WEIXIA, 2017,p. 268.

[13] 最高人民法院关于为自由贸易试验区建设提供司法保障的意见. Available at: https://www.court.gov.cn/zixun-xiangqing-34502.html. Accessed on: 15 Jan. 2023.

in mainland China, arbitration rules and arbitrators. It is worth adding, however, that even if the aforementioned requirements are met, the Chinese people's court still has the power to decide on the validity of the arbitration agreement. Such a conclusion stems from the provision providing that "the arbitration agreement may be determined as valid". The wording "may" emphasizes that the court enjoys the discretion to decide on its validity.[14]

Nonetheless, it is possible to handle *ad hoc* proceedings within the pilot zones. To illustrate, the Hengqin Free Trade Zone adopted the first "Ad hoc Arbitration Rules" (横琴自由贸易试验区临时仲裁规则) on 23 March 2017. These rules entered into force on 15 April 2017 and follow the Zhuhai Arbitration Commission (ZAC) Rules and the UNCITRAL Arbitration Rules with some modifications. In addition, they reflect the competence-competence principle. Hence, the arbitral tribunal is competent to decide on its jurisdiction over the disputed case. The parties can also freely appoint arbitrators, agree on how to appoint them or even agree on an appointing authority. It is noteworthy, however, that the ZAC is a default authority. Furthermore, the appointing authority can also decide on the withdrawal or replacement of arbitrators, if necessary. In terms of qualifications of arbitrators, the "Ad Hoc Arbitration Rules" provide the same criteria as for the institutional arbitrators. In other words, they should fulfil the criteria stipulated in the Chinese Arbitration Law. Nonetheless, whereas the ZAC is considered the appointing authority, the arbitrators would be appointed according to the list of arbitrators.

Considering the fees and costs, the "Ad Hoc Arbitration Rules" are likewise the UNCITRAL Rules. Therefore, the fees are calculated by mutual agreement between the parties and the tribunal. If the consensus cannot be achieved, the appointing authority makes a decision. It is noteworthy, however, that there are no specific provisions on how to determine arbitration fees in such *ad hoc* arbitration proceedings. Interestingly, the Rules stipulate as well that upon the parties' consent, the arbitral tribunal can benefit from third-party services such as financial management, tribunal secretaries and lease of venues. Finally, in terms of the arbitral award, the ZAC should confirm such an *ad hoc* award. Therefore, if the arbitral tribunal renders an award, each party can directly apply to ZAC to confirm the award. Throughout the confirmation, such an award is considered to be an institutional one.[15]

Overall, the introduction of *ad hoc* arbitration within the FTZ can be seen as a foothold for this type of dispute settlement. Some scholars point out, however,

[14] JINGZHOU; ZHONG, 2021, p. 62-63.
[15] SUN, 2017.

two chief defects regarding the *ad hoc* arbitration reform in China. First, these regulations are not consistent with the currently binding provisions of Chinese Arbitration Law. Second, due to a lack of independence in terms of administrative processes, the parties cannot freely apply proper administration procedures. Given that, to overcome the aforementioned pitfalls, more open and liberalized reform is needed.[16]

2.3 Arb-Med-Arb Mechanism in China

Both mediation and arbitration belong to the most popular forms of alternative dispute resolution mechanisms applied in the case of commercial disputes. Mediation can be thus defined as a voluntary dispute settlement process where the parties can reach a consensus which is not obligatory.[17] Given its features and voluntary nature, mediation is a kind of negotiation held by a mediator. Arbitration, in turn, is a dispute settlement process held by an arbitrator or a panel of arbitrators who hear a case and render an arbitral award in favour of one of the parties involved.[18] The med-arb mechanism combines both of these dispute resolution methods and thus an arbitrator serves as well as a mediator.[19]

Gu Weixia emphasizes that the med-arb process is of an "international" nature. Even if mediation itself can be regarded merely as a "local" product linked to the specific legal culture within a specified jurisdiction, its character changes through arbitration and most notably the enforcement of arbitral awards abroad.[20]

In the case of China, the concept of med-arb (*tiaojie – zhongcai* 调解仲裁) should be understood as any process combining mediation with arbitration.[21] Therefore, the Chinese approach does not differ two situations: 1. where the arbitrator or arbitral tribunal decides to mediate by itself; 2. where an arbitrator is simultaneously a mediator in the course of the same proceedings. Given the Chinese med-arb process, the arbitrators and mediators perform both roles. To improve efficiency, it is a common practice that the mediation is conducted by the same arbitrator who previously handled arbitration proceedings. Chinese officials explain that the arbitrator acting as a mediator has already been acquainted with the case and thus can fully perform its new role. According to this concept, if the parties do not reach a consensus through mediation, the entire arbitration

16 ZUO, 2020, Vol. 5, p. 107-108.
17 On multiparty mediation in Brazil see FERREIRA; SEVERO, 2021. See also: FARIAS, 2020. On mediation in Palestine see SHAAT, 2020.
18 On arbitration in Brazil see: MUNIZ, 2020.
19 CHUYANG (Alexis), 2015, p. 1297.
20 WEIXIA, 2021, p. 221.
21 On hybrid and multi-tiered clauses in the Brazilian and international sphere see: FERREIRA, 2021. See also: FERREIRA; GIOVANNINI, 2020.

proceedings would be sped up and shortened till the issuance of the arbitral award.[22] Hence, those who advocate for the arb-med mechanism emphasize that such a solution should be regarded as an advantage to the parties. The dispute can be thus resolved faster. Nonetheless, this begs the question of whether the arbitrator-turned-mediator will be neutral towards the parties and will not impose its thoughts on the parties involved. As such, a possible conflict and a question of impartiality stem from the dual roles of arbitrator changing into a mediator.

It is worth adding, however, that there is a significant discrepancy between these two different roles undertaken by the same person. An arbitrator is deemed to assess the merits of a disputed case and render an arbitral award, whereas a mediator is responsible for smoothing communication between the involved parties to reach a consensus. Hence, while an arbitrator performs his duties as a mediator, he will also be potentially exposed to some privy information that would not be accessible to him in the course of arbitral proceedings. This means that if the mediation fails, the arbitrator can lose his impartiality given the confidential information previously disclosed during the mediation process. It leads to an apparent bias concerning the part of the arbitrator. Such a bias concerns mostly the so-called "evaluative mediation" based on an assessment of the weaknesses and strengths of both parties. During such a mediation process, the mediator takes part in the substantive discussion concerning the merits of a case which is an unusual situation in arbitration proceedings. He can thus form his own view or preferences on the disputed case throughout the conducted discussion prior to the arbitration proceedings.[23]

To sum up, the med-arb process should be defined as hybrid proceedings combining mediation with arbitration. Whereas mediation is widely considered a "local" product linked to the specific legal culture of a certain jurisdiction, while being combined with arbitration, it becomes of an "international" nature. Hence, such a med-arb mechanism commences being enforced even overseas.

3 Shanghai Pilot Free Trade Zone: Halfway to Total Liberalization

The SHFTZ Rules are widely recognized as much more open-minded and innovative compared to the CAL. In fact, if parties agreed to submit their disputes to SHIAC and handled their case, the said Rules apply to both the parties, substantial issues or subject of dispute or "where the parties have agreed to refer disputes to

[22] WEIXIA, 2016, p. 85-86.
[23] WEIXIA, 2016, p. 90.

the FTZ Arbitration Court or have referred disputes to SHIAC to be conducted by the FTZ Arbitration Court unless the parties agree otherwise".[24]

The SHFTZ Arbitration Rules include separate provisions on interim measures. In fact, they apply for the sake of protecting property or evidence from being transferred or damaged: "(a) property preservation measures; (b) evidence preservation measures; and (c) measures requiring a party to perform certain acts or prohibiting a party from performing certain acts; (d) pre-arbitration interim measures; (e) emergency arbitrator procedures; and (f) procedures for changes of interim measures".[25] In addition, there are specific time limits which apply in the case of interim measures. Therefore, "if a party applies for preservation before or during the arbitration, such application shall be immediately accepted," and that "in urgent cases, if the corresponding requirements provided in laws are satisfied, a decision shall be made within 24 hours and then transferred for enforcement immediately".[26]

The SHFTZ Arbitration Rules allow the so-called emergency procedures. Under these Rules, a party can apply for interim relief from a provisional arbitrator. Considering the time, this option is available between the acceptance of a case and the constitution of the tribunal. Practically, this means that the provisional arbitrator may issue a decision within 20 days after being appointed. The arbitral tribunal benefits from the same competences.[27]

There are also truly innovative solutions concerning the appointment of arbitrators. This means that there is a dual mechanism model. Therefore, the parties "may either appoint arbitrators from the Panel of Arbitrators or recommend persons from outside of the Panel of Arbitrators as the arbitrator". Interestingly, under Article 27 of the SHFTZ, parties are also allowed to "reach an agreement on the joint recommendation of a person who is outside of the Panel of Arbitrators as the presiding/sole arbitrator". There are even more detailed provisions, namely the Judicial Review of Arbitrators Appointed outside of the Panel. According to Article 9 of these provisions, "where one party/parties recommends/jointly recommend arbitrators or the presiding (sole) arbitrator out of the Panel of Arbitrators, it shall be recognized under the judicial review, if the appointment has been affirmed by the Chairman of SHIAC, the appointed persons satisfy the criterion on the qualification provided in Article 13 of the Arbitration Law of PRC, and the proceedings of appointment are legitimate under the SPFTZ Arbitration Rules and relevant provisions of Chinese laws".[28]

[24] BIN, 2017, p. 275.
[25] BIN, 2017, p. 277.
[26] BIN, 2017, p. 278.
[27] BIN, 2017, p. 277.
[28] BIN, 2017, p. 278.

Lastly, the SHFTZ Arbitration Rules allow issuing of award *ex aequo et bono*. Nonetheless, it is noteworthy that under Article 13 of the Opinions, "where the tribunal renders an award *ex aequo et bono*, the proceedings may be recognized in judicial review, if the proceeding is agreed to jointly by the parties in writing, does not violate mandatory provisions of Chinese laws, and the award rendered in the proceeding complies with the SHFTZ Arbitration Rules".[29]

To sum up, the SHFTZ differs significantly from the solutions adopted in the CAL and introduces international standards. Although these Rules are worth watching, currently they do not comply with the CAL. These differences need to be addressed in the future.[30]

4 Proposed Amendments to Chinese Arbitration Law and their Impact on Foreign Parties

The Ministry of Justice of the PRC issued draft amendments to Chinese arbitration law on 30 July 2021.[31] Those regulations are currently under public consultation. First and foremost, it is noteworthy that the proposed reform has the aim of approaching Chinese legislation to international standards. Hence, most of the changes comply with international practice. Nonetheless, there are still some differences with the UNCITRAL Model Law that need to be addressed.

Shu Zhang and Peng Guo emphasize that the aforementioned draft amendment should be regarded as a significant step forward in terms of compliance with international standards. Many issues have been addressed to be in line with international law and practice, however, some specific Chinese features still exist and have been maintained by the Chinese lawmaker. Interestingly, some distinctive features have been even more developed and thus resulted in furthering such non-compliance with international expectations.[32]

The most important changes concern the following aspects: the validity of arbitration agreements, the competence-competence principle, concept of the seat of arbitration and arbitration proceedings.

Considering the validity of arbitration agreements, as already mentioned, the binding provisions of the CAL reflect rather a rigid approach. Therefore, the designation of an "arbitration commission" is regarded as a necessary element to draft a valid arbitration agreement under Chinese law. The draft amendment abandons such restrictions and thus stipulates that the parties should merely

[29] BIN, 2017, pp. 278-279.
[30] BIN, 2017, p. 279.
[31] MINISTRY OF JUSTICE, 2021.
[32] ZHANG; GUO, 2021.

express their will to arbitrate. This solution complies with international standards and corresponds with Article 7 of the UNCITRAL Model Law. The aforementioned changes also impact foreign-party-related disputes. With this regard, the draft provisions endorse the applicable law while determining the validity of the arbitration agreements. First, the arbitral courts should apply the law chosen by the parties. If the parties did not choose it in the arbitration agreement, then the law of the seat of arbitration prevails. Finally, if the parties decided neither on the applicable law nor on the law of the seat of arbitration, the arbitral court may apply Chinese law in terms of the validity issues. Compared to the previous regulations, this solution abandons the concept of "the law of the place where the arbitration institution is located" (as provided under Article 18 of the Law of the Applicable Laws in Dealing with Foreign-related Civil Relationships).[33]

Concerning the competence-competence principle, the draft amendment grants the power of determining the jurisdiction of the court and the validity of the arbitration agreement to the arbitral tribunal. In addition, the arbitration court is also competent to determine if the arbitration proceedings might be continued in the case of "lack of jurisdiction". Throughout the adoption of this solution, the Chinese arbitration law will fully reflect the competence-competence principle. Notably, the timeframe for the jurisdictional challenge is less strict under the draft provisions. Compared to the CAL stipulating that the jurisdictional challenge must be raised prior to the first hearing, the amendment provides that the arbitral tribunal should determine the timeframe for such a challenge to be raised.[34]

According to the currently binding provisions of the CAL, there is no reference to the concept of the 'seat of arbitration'. The draft, however, fulfils this loophole and recognizes the 'seat of arbitration'. Therefore, along with the adoption of this legal concept, there will be no doubt concerning the place where the arbitral award is rendered and which court is competent to supervise the relevant issues, *i.e.* the review based on the jurisdictional matters, or the annulment of arbitral awards. This change does not consider the location of the arbitration institution anymore, but, in turn, focuses on the parties' choice of the seat of arbitration. Such an approach fully complies with international practice in arbitration.[35]

Furthermore, the draft amendment also opts for *ad hoc* arbitration to be conducted in foreign-related commercial arbitration cases (Article 91 of the Draft provisions). Therefore, "The parties may designate an arbitration institution to assist with the issues relating to the establishment of the arbitral tribunal, or,

[33] 《中华人民共和国涉外民事关系法律适用法》[Law of the Applicable Laws in Dealing with Foreign-related Civil Relationships]; cf. ZHANG; GUO, 2021.
[34] ZHANG; GUO, 2021.
[35] ZHANG; GUO, 2021.

in the absence of an arbitration institution consented to by the parties, request a designated arbitration institution from the court of the seat, the place where the party is located, or the place having the closest connection with the dispute (article 92 of the Draft)".[36] Despite the "pilot projects" allowing to handle *ad hoc* arbitration to some extent in the selected special economic zones, such a concept has never been recognized and confirmed at the legislative level. Hence, the draft amendment should be regarded as a cornerstone legitimizing the *ad hoc* arbitration for foreign parties in China.

It is noteworthy that the draft provisions are more flexible in terms of arbitrator's appointment. This means that the parties can also select an arbitrator beyond the arbitrator's list approved by the arbitration institution. In addition, the parties can set specific requirements for arbitrators. Such a solution does not exist under the binding CAL provisions. Another change concerns the appointment of the presiding arbitrator. Currently, if the parties fail to jointly select the presiding arbitrator, the chairman of the arbitrator institutions appoints it. Nonetheless, the Draft stipulates that the other two arbitrators should first seek to appoint the presiding arbitrator. This means that, on the one hand, arbitration institution plays a less significant role in determining the panels of the arbitrator to handle a case. On the other hand, this change should be considered through the lens of increasing the autonomy of arbitral proceedings within the Chinese legal system.[37]

5 Conclusion

The CAL differs significantly from the UNCITRAL Model Law. The aforementioned Draft amendment has the aim to bring China closer to international standards in arbitration. Although the Draft is already innovative compared to binding provisions, it still does not fully comply with the UNCITRAL Model Law. Therefore, one could even say that arbitration with Chinese characteristics still exists in this country. No one could really predict whether all amendments would pass and put Chinese legislation closer to international commercial arbitration worldwide.

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[36] ZHANG; GUO, 2021.
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Mediation Application Areas in the Republic of Belarus and Essentials of Family Mediation Legal Regulation[1]

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Abstract: The introduction of the institution of mediation into the Belarusian legislation took place in 2013, and since that time there has been an expansion of the scope of its practical application. Using the analysis method in the study three groups of mediation application areas in the Republic of Belarus were identified: the most popular mediation application areas (family mediation; commercial mediation; mediation in criminal proceedings); potentially demand mediation spheres (school mediation; environmental mediation; labor mediation); not applicable (guardianship; adoption; domestic violence). A legal description of the institution of family mediation in the Republic of Belarus has been developed and proposals to improve legislation in the field of family mediation have been formulated.

Keywords: Mediation. Right to Defense. Dispute resolution. Family Mediation. Family Legal Relations. Mediation in Criminal Proceedings. Belarusian Legislation.

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1 Introduction

Over the past few decades, international law has been steadily working to scale up alternatives to the judicial procedure for dispute resolution. Mediation is the most successful in this area – one of the conciliation procedures, deservedly positively received by the national legislations of many states, and the Republic of Belarus is not an exception.

The purpose of this work is to summarize the most effective experience of introducing mediation mechanisms into Belarusian practice as a conciliation procedure. The achievement of the goal was facilitated by the solution of a number of tasks: the definition of universal and regional standards and principles of mediation applicable to the Republic of Belarus; the study of those areas of public relations where the use of mediation is most in demand and widespread.

The results of the study were obtained on the basis of general scientific methods of cognition (system-structural method) and procedures for analysis, synthesis, generalization of empirical data; special legal methods (comparative legal and formal legal methods).

2 Legal Framework of Mediation Standards

2.1 Universal Standards of Legal Framework for Mediation

Among the key universal standards in the context of this work, which establish the legal framework of mediation as a method of alternative dispute resolution, the following can be distinguished:

1) The Conciliation Rules of the United Nations Commission on International Trade Law (UN General Assembly Resolution 35/52, December 4, 1980), which recognizes "the value of conciliation as a method of peaceful settlement of disputes arising in the context of international commercial relations";[2]
2) The Model Law "On International Commercial Conciliation" (UN General Assembly Resolution 57/18, June 24, 2002), "developed taking into account the practice of applying conciliation procedures in various States and recommended to States for use in national legislation";[3]

[2] Conciliation Rules of the United Nations Commission on International Trade Law [Electronic resource]: General Assembly Resolution 35/52, December, 4, 1980. URL: https://goo.su/WEyxIr. Access date: 11.12.2022.

[3] Model Law of the United Nations Commission on International Trade Law on International Commercial Conciliation [Electronic resource]: UN General Assembly Resolution 57/18, November, 19, 2002. URL: https://goo.su/ma43NAJ. Access date: 05.12.2022.

3) The Basic Principles for the Application of Restorative Justice Programs in Criminal Matters (Economic and Social Council Resolution 2002/12, July 24, 2002), in which the restorative process is understood as "any process in which the victim and the offender and, where appropriate, any other persons or members of the community affected by any crime, actively participate in the joint settlement of issues arising in connection with the crime, as a rule, with the help of an intermediary".[4]

2.2 Regional Standards of Legal Framework for Mediation

The most important principles and norms that defined the regional framework for the implementation of mediation and influenced the formation of the Belarusian mediation model are: the idea to take measures to simplify access to alternative dispute resolution methods and increase their effectiveness (1986);[5] the idea to oblige judges to encourage the parties reconciliation (1994);[6] the idea of a wider use of mediation in family disputes, as well as the idea of the mediator's role as an impartial and neutral party that helps to negotiate and reach their own joint agreements to the parties (1998);[7] the idea of the need for mediation in criminal cases as an addition to the traditional criminal process or as an alternative to it (1999);[8] ideas about the advantages of dispute resolution methods in connection with savings, greater freedom of action, obtaining not only a legal solution, but also a fair solution (2001);[9] the idea of encouraging mediation in civil cases due to its potential to reduce the burden on the courts, but not in order to replace

[4] Basic principles of the application of restorative justice programs in criminal justice matters [Electronic resource]: Economic and Social Council Resolution 2002/12, July, 24, 2002 // Compilation of United Nations standards and norms in crime prevention and criminal justice. URL: https://goo.su/ZC9gCQ. Access date: 11.12.2022.

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the judicial system (2002);[10] the idea of implementing the principle of ensuring better access to justice through both judicial and non-judicial methods of dispute resolution (2008);[11] the idea of mediation as an instrument of forming ethics of business turnover and harmonization of public relations (2013).[12]

In fact, the establishment of universal and regional standards for the administration of justice and the realization of the right to protection, as well as the efforts made by the legislative bodies of interstate entities, led to the legal consolidation in national legislations, including in the legislation of the Republic of Belarus, of alternative dispute resolution methods, and, as a result, contributed to the expansion of the list of dispute resolution methods and the humanization of national legislations.

3 Areas and Premises for the Mediation Implementation into Belarusian Legislation

3.1 Groups of Mediation Application Areas in the Republic of Belarus

Belarusian authors, along with foreign colleagues, widely cover various aspects of alternative dispute resolution and conciliation procedures in the field of:

1) marriage and family relations;[13]
2) restorative mediation and criminal procedure;[14]
3) civil proceedings;[15] [16]
4) economic justice;[17] [18]

[10] On mediation in civil cases [Electronic resource]: Recommendation No. Rec(2002)10 of the Committee of Ministers of 18 September 2002, "i". URL https://goo.su/uPBGQK3. Access date: 11.12.2022.

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5) tax relations;[19]
5) prospects for the development of mediation;[20]
6) education;[21]
7) ecology;[22]
8) healthcare;[23]
9) labor relations;[24]
10) and others;[25]

In the national practice of the Republic of Belarus, mediation procedures are most often used in dispute resolution and in the consideration of cases in the field of:

1) marriage and family relations (Article 6, Article 13, Article 35^1, Article 36 of the Code of the Republic of Belarus on Marriage and Family, hereinafter – CMF).[26] In 2021, the number of mediations conducted on disputes arising from family legal relations amounted to 417 (224 of it – mediation in connection with the dissolution of marriage);[27]
2) criminal procedure (Article 30^1, Article 43, Article 50 of the Criminal Procedure Code of the Republic of Belarus, hereinafter – CrPC).[28] According to the Supreme Court of the Republic of Belarus, in the first half of 2022, the courts of general jurisdiction considered 17 134 criminal cases with sentencing.[29] At the same time, the number of persons whose cases were terminated by the court of the first instance on appeal

[19] LYUBICH, Oleg. Mutually agreeable procedure for resolving tax disputes with the participation of foreign persons. Justice of Belarus, No. 2, p. 41, 2022.
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[29] Brief statistical data on the activity of courts of general jurisdiction in the administration of justice for the 1st half of 2022 [Electronic resource]: Supreme Court of the Republic of Belarus. URL: https://clck.ru/33NMJu. Access date: 26.01.2023.

amounted to 628 people, 195 of them – in connection with reconciliation with the victim[30];

3) relations between counterparties (Article 40^1, Article 113^1, Article 262^1 – Article 262^3 the Economic Procedural Code of the Republic of Belarus[31]; Article 61, Article 160, Article 164, Article 165, Article 280, Article 285, Article 414 of Civil Procedure Code of the Republic of Belarus[32] (hereinafter – CPC)). In 2021, the judicial board for Intellectual Property Affairs of the Supreme Court of the Republic of Belarus considered 162 cases, of which 63 cases (38.9%) terminated proceedings at the stage of pre-trial preparation in connection with voluntary settlement of disputes: 34 cases – in connection with the refusals of plaintiffs from claims (Article 164, 1 part, paragraph 3 of CPC), in 29 cases – in connection with the approval of settlement agreements (Article 164, part 1, paragraph 4 of CPC). In 8 cases, applications were left without consideration (in 7 cases – in connection with the conclusion of mediation agreement (Article 165, part 1, paragraph 5 of CPC). In 1 case, the application was left without consideration due to its submission on behalf of the interested person by a person who does not have the authority to sign and present it (Article 165, part 1, paragraph 3 of CPC).[33]

At the same time, it should be noted that great prospects are open up for school mediation. The reasons for its implementation are "the stress imbalance of children and adolescents, what is often the cause of conflicts in the school environment; the need to individualize the process of educating the younger generation; the search for new technologies for conflict resolution; the effectiveness of creating "School reconciliation services" in educational institutions in international practice".[34] In the 2015/2016 academic year, a project of school mediation was launched in the Republic of Belarus. Nevertheless, we can't say that school mediation practice is widespread implemented. As well as the use of mediation in the consideration of disputes arising from labor relations, environmental, in the field of healthcare, there

[30] *Ibid*.

[31] Economic Procedural Code of the Republic of Belarus [Electronic resource]: The Law of the Republic of Belarus, December 15, 1998, No. 219-Z; ed. by the Law of the Republic of Belarus of 27.05.2021, No. 113-Z. National Legal Internet Portal of the Republic of Belarus, 29.05.2021, 2/2833.

[32] Civil Procedure Code of the Republic of Belarus [Electronic resource]: The Law of the Republic of Belarus, January 11, 1999, No. 238-Z; ed. by the Law of the Republic of Belarus of 27.05.2021, No. 113-Z. National Legal Internet Portal of the Republic of Belarus, 29.05.2021, 2/2833.

[33] Information on the results of the work of the judicial board for Intellectual Property Affairs of the Supreme Court of the Republic of Belarus for 2021 [Electronic resource]: Supreme Court of the Republic of Belarus. URL: https://goo.su/VJPJ07. Access date: 07.12.2022.

[34] School mediation [Electronic resource]: Center „Mediation and Law". URL: https://goo.su/IdciUx. Access date: 27.01.2023.

are just single facts of the use of mediation technologies, and not an established practice.

3.2 Premises for the Mediation Implementation into Belarusian Legislation

As we see it, and as follows from established international practice, the demand for mediation in Republic of Belarus in current areas, is due to a set of circumstances:

1) creating conditions for realization of the right to judicial protection what is guaranteed by the Constitution of the Republic of Belarus[35] (Article 60, paragraph 1);
2) the intention of the state to unload the judicial system and reduce the burden on one judge;
3) the intention of the state to increase the level of independence and responsibility of the disputing parties, to develop corporate ethics, the ability to negotiate, the skills to find comfortable conditions for dispute resolution among counterparties.

3.2.1 Creating Conditions for the Realization of the Right to Judicial Protection

Being first enshrined in Article 11 of the Universal Declaration of Human Rights (1948),[36] the legal framework of the right to judicial protection has significantly expanded over time, providing to the subject much more guarantees of its implementation.

This right includes the right to " a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[37] 1950; Article 14, part 1 of International Covenant on Civil and Political Rights,[38] 1966).

[35] Constitution of the Republic of Belarus of 1994 [Electronic resource]: The Law of the Republic of Belarus, March 15, 1994 No. 2875-XII; ed. by the republican referendums of November 24, 1996, October 17, 2004 and February 27, 2022. National Legal Internet Portal of the Republic of Belarus, 04.03.2022, 1/20213.

[36] Universal Declaration of Human Rights [Electronic resource]: Adopted by UN General Assembly Resolution 217 A (III), December 10, 1948. URL: https://t.ly/dALk. Access date: 07.12.2022.

[37] European Convention for the Protection of Human Rights and Fundamental Freedoms [Electronic resource]: Council of Europe Convention, Rome, November 4, 1950. URL: https://t.ly/Vh8v. Access date: 07.12.2022.

[38] International Covenant on Civil and Political Rights [Electronic resource]: Adopted by UN General Assembly Resolution 2200 A (XXI), December 16, 1966. URL: https://t.ly/tZuJ. Access date: 07.12.2022.

The interpretation of this right is well reflected in the General Comments of the Human Rights Committee No. 32, according to paragraph 44 of which "whenever appropriate, in particular where the rehabilitation of juveniles alleged to have committed acts prohibited under penal law would be fostered, measures other than criminal proceedings, such as mediation between the perpetrator and the victim, conferences with the family of the perpetrator, counselling or community service or educational programs…".[39]

3.2.2 Reducing the Burden on the Judicial System and Judges

3.2.2.1 Consideration of Disputes Arising from Marital and Family Relations

The family in the Republic of Belarus is protected by the state, which strives to create the most favorable conditions for its existence. This is indicated in Article 32 of the Constitution of the Republic of Belarus in accordance to which "marriage as a union of a woman and a man, family, motherhood, fatherhood and childhood are protected by the state".[40]

Among the tasks of the legislation on marriage and family, CMF calls "strengthening the family in the Republic of Belarus as the natural and basic unit of society on the principles of universal morality, preventing the weakening and destruction of family ties" (Article 1).[41]

The importance of the institution of the family for the state is evidenced by the content of paragraph 13 of the National Security Concept of the Republic of Belarus, in which among the national interests in the demographic sphere is named "strengthening the institution of the family as a social institution most favorable for the realization of the need for children, their upbringing".[42] As goals and objectives of demographic security, the Law of the Republic of Belarus "On

[39] General comments No. 32. Article 14: Equality before courts and tribunals and the right of everyone to a fair trial [Electronic resource]: Human Rights Committee, ninetieth session, Geneva, 9 – 27 July 2007, CCPR/C/GC/32. URL: https://t.ly/Tlgx. Access date: 07.12.2022.

[40] Constitution of the Republic of Belarus of 1994 [Electronic resource]: The Law of the Republic of Belarus, March 15, 1994 No. 2875-XII; ed. by the republican referendums of November 24, 1996, October 17, 2004 and February 27, 2022. National Legal Internet Portal of the Republic of Belarus, 04.03.2022, 1/20213.

[41] The Code of the Republic of Belarus on Marriage and Family [Electronic resource]: The Law of the Republic of Belarus, July 9, 1999, No. 278-Z; ed. by the Law of the Republic of Belarus of 19.05.2022, No. 171-Z. National Legal Internet Portal of the Republic of Belarus, 24.05.2022, 2/2891.

[42] On the approval of the National Security Concept of the Republic of Belarus [Electronic resource]: Decree of the President Republic Belarus, November 9, 2010, No. 575; ed. Decree of the President of the Republic Belarus on 24.01.2014, No. 49. National Legal Internet Portal of the Republic of Belarus, 30.01.2014, 1/14788.

Demographic Security of the Republic of Belarus" specifies "the formation of high spiritual and moral standards of citizens in the field of family relations, increasing the prestige of the family in society" (Article 5).[43]

Nevertheless, there is a negative transformation of the institution of the family in the Republic of Belarus: high divorce rates, an increase in the number of single-parent families with children, social orphanhood, facts of domestic violence. Belarusian researchers pay attention to the problems of degradation of the family institution in the Republic of Belarus, identify the causes of this negative phenomenon and develop measures aimed at their elimination.[44] [45]

The data of the National Statistical Committee of the Republic of Belarus indicate high rates of divorce in court:

- in 2021: 34,386 divorces (59,649 marriages were registered);
- in 2020: 35,144 divorces (50,384 marriages were registered);
- in 2019: 34,470 divorces (62,744 marriages were registered).[46]

During the first half of 2022, the courts of the Republic of Belarus considered:

- 12,254 claims for divorce of spouses (12,236 claims were satisfied);
- 1,204 claims for deprivation of parental rights (1,087 claims were satisfied);
- 4,759 applications for the recovery of alimony for minor children (4,759 applications were satisfied).[47]

The family is a social institution in which relationships are not amenable to legal influence. It is impossible to put the relations of love, care, friendship, support, warmness between family members into a legal framework. Therefore, it is difficult to provide formal evidence to the court resolving disputes arising from marital and family relations. This has a negative impact on the effectiveness of judicial protection in general.

The solution to these problems can be found in additional procedures to eliminate contradictions between family members, without going to court. Mediation is one of such procedures.

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[43] On demographic security of the Republic of Belarus [Electronic resource]: The Law of Republic Belarus, January 4, 2002, No. 80-Z; ed. The Law of the Republic of Belarus on 09.01.2018, No. 91-Z. National Legal Internet Portal of the Republic of Belarus, 18.01.2018, 2/2529.

[44] ANDRYIASHKA, Maryna V. Violence is an additional indicator of the degradation of the institution of the family as a demographic threat. Bulletin of the BarGU. The series "Historical Sciences and Archeology. Economic sciences. Legal sciences", Issue 6, p. 109, 2018.

[45] ANDRYIASHKA, Maryna V. Subsidiary indicators of the degradation of the institution of the family as a demographic threat. Justice of Belarus, No. 1, p. 37, 2020.

[46] Statistical year of the Republic of Belarus – 2022 / I. V. Medvedev, E. I. Kuharevich [et al.]; National Statistic Committee of the Republic of Belarus. Minsk: NSC, p. 53. 2022.

[47] Brief statistical data on the activity of courts of general jurisdiction in the administration of justice for the 1st half of 2022 [Electronic resource]: The Supreme Court of the Republic of Belarus. URL: https://clck.ru/33NMJu. Access date: 26.01.2023.

Nevertheless, despite the high potential of mediation in the field of marriage and family relations, experts point to the insufficient pace of implementation of this tool, distrust and low interest of the disputing parties. It is noted that "... mediation as a conflict resolution tool has not been widely used in our country".[48]

Among the reasons for the rare appeal of Belarusian citizens to the services of mediators are: the novelty of the mediation procedure for the Republic of Belarus; a high degree of conflict between the parties to the dispute; lack of negotiation skills and traditions; insufficient awareness of citizens about the essence of mediation, the procedure for its conduct and positive aspects of its application; lack of public confidence in the mediation procedure itself (society in general is still considers the court as the only possible way to resolve conflicts).

Since September 1, 1999, due to the entry into force of the CMF, the possibility of divorce in an administrative order in the registry office was abolished. From that time until 2013, the dissolution of marriage could only be carried out in court, which significantly increased the average monthly burden on judges. Thus, in 2011, the proceedings of the general courts of the Republic of Belarus received almost 55 thousand criminal, more than 360 thousand civil and about 442,000 administrative cases. The average monthly receipt of cases per judge of the district court for the year was 96.3 cases and materials.[49]

These conditions were a prerequisite for the restoration in the modern legislation of the Republic of Belarus of the administrative procedure for the dissolution of marriage in the civil registry offices. This procedure was familiar to the Belarusian Soviet marriage and family legislation, as it was provided for by Article 34 of the Code on Marriage and Family of the Belarusian SSR of 1969, according to which the dissolution of marriage was carried out in court, and in cases of divorce by mutual consent of spouses who do not have minor children (Article 40), as well as at the request of one of the spouses, if the other spouse is recognized as missing or incapacitated, or convicted of committing a crime to imprisonment for a term of at least three years (Article 41), – in the civil registry offices.[50]

In accordance with paragraphs 19 and 20 of Article 1 and Article 5 of the Law of the Republic of Belarus No. 342-Z of January 7, 2012 "On Amendments and

[48] The Plenum of the Supreme Court of the Republic of Belarus adopted a resolution "On the application of legislation by courts when considering cases of divorce" [Electronic resource]: Supreme Court of the Republic of Belarus. URL: https://goo.su/UNtrU. Access date: 18.01.2023.

[49] Reducing the burden on judges will improve the quality of judicial proceedings in Belarus [Electronic resource]: BELTA – News of Belarus, 1999 – 2022. URL: https://goo.su/tUFGq. Access date: 07.12.2022.

[50] On the approval of the Code on Marriage and Family of the Belarusian SSR [Electronic resource] : National Legal Information Center of the Republic of Belarus, 2003 – 2022. URL: https://goo.su/IB4SBdA. Access date: 07.12.2022.

Additions to the Code of the Republic of Belarus on Marriage and Family",[51] the administrative procedure for the dissolution of marriages returns to the CMF from January 1, 2013.

In 2013, according to the Supreme Court of the Republic of Belarus, the average monthly workload per judge was 79.5 cases and materials per month.[52]

In 2019, the staff load in the courts of general jurisdiction of the Republic of Belarus amounted to 71.3 cases and materials per month (in 2018 – 73.5); in economic courts – 73 cases and materials (in 2018 – 76.4).[53]

Currently, the National Statistical Committee of the Republic of Belarus does not keep records of administratively dissolved marriages. In this regard, the total number of marriages dissolved in the registry office is unknown, which does not contribute to transparency. An approximate picture can be formed by studying data from open sources with fragmentary reports of city and district registry offices. In total, 364 marriages were dissolved by registry offices in the Brest region in 2022.[54] In particular, 169 divorces were registered in the registry office of the Baranovichi City Executive Committee in 2022;[55] from January 1 to January 26 , 2023 , 10 marriages were dissolved in the same registry office department.[56] This is only one city in the country and without taking into account statistical data on expenses incurred in the registry office department of the Baranovichi district executive Committee. It should be noted that the administrative-territorial structure of the Republic of Belarus assumes the presence of 6 regions and 118 districts. Thus, the introduction of an administrative procedure for the dissolution of marriage is a valuable alternative to the judicial procedure for the dissolution of marriage. The dissolution of marriage in the registry office is possible only by agreement of the spouses, which meets the objectives of the application of conciliation procedures and contributes to the unloading of the Belarusian judicial system.

[51] On amendments and additions to the Code of the Republic of Belarus on Marriage and Family [Electronic resource]: The Law of the Republic of Belarus, January 7, 2012, No. 342-Z. National Register of Legal Acts of the Republic of Belarus, No. 9, 2/1894, 2012.

[52] On the efficiency of the courts of the Republic of Belarus in 2013 [Electronic resource]: The Supreme Court of the Republic of Belarus. UR: https://goo.su/et9ypQ. Access date: 07.12.2022.

[53] Criteria for selection of candidates for judges have been updated in Belarus [Electronic resource]: BELTA – News of Belarus, 1999 – 2023. URL: https://goo.su/f9yht. Access date: 18.01.2023.

[54] About the work done in 2022 [Electronic resource]: Brest City Executive Committee. URL: https://goo.su/QNgVNi5. Access date: 27.01.2023.

[55] Divorced three times: records for the dissolution of marriages are set in Baranovichi [Electronic resource]: Nash Krai, 2015 – 2023. URL: https://clck.ru/33P9BK. Access date: 27.01.2023.

[56] At what age they get married and get divorced, they found out in the Baranovichi registry office [Electronic resource]: Nash Krai, 2015 – 2023. URL: https://goo.su/axvuBtZ. Access date: 27.01.2023.

3.2.2.2 Consideration of Criminal Cases

The use of mediation in the field of criminal justice is also in demand in order to unload the judicial system. Thus, in the Decision of the Constitutional Court of the Republic of Belarus dated May 17, 2021 No. R-1270/2021 „On compliance with the Constitution of the Republic of Belarus with the Law of the Republic of Belarus „On Amendments to Codes on criminal Liability" is expressed the legal position, according to which "the introduction of the institute of mediation into the criminal process ensures further humanization of criminal law policy and differentiation of punishments, reducing the workload of the judicial system, reducing the number of punishments related to imprisonment, as well as the resolution of problems in the penal enforcement system associated with the execution of penalties in the form of imprisonment".[57]

Paragraph 6 of Article 2 of the Law[58] of the CrPC is supplemented by a new Article 30[1] "Reconciliation of the accused with the victim", according to which reconciliation of the accused with the victim is carried out on the basis of a voluntary expression of will to resolve the conflict (dispute) between them arising in connection with the commission of a crime, including by concluding a mediation agreement; reconciliation of the accused with the victim is carried out voluntarily and personally; reconciliation with minors by the accused or the victim is carried out with the participation of their legal representatives; if reconciliation of the accused with the victim is carried out by mediation, then the accused and the victim choose a mediator for its conduct on their own initiative and mutual consent.

The implementation of mediation procedures in criminal proceedings "makes it possible to implement the concept of humanization and differentiation of punishments, reduces the workload of the judicial system, contributes to the reduction of penalties associated with deprivation of liberty. Accordingly, this leads to the resolution of problems in the penal system associated with the execution of penalties in the form of imprisonment. The release of the accused from criminal liability in connection with repentance, reconciliation with the victim will be a stimulating factor in the law-abiding behavior of the perpetrators of the crime, as well as contribute to a faster and more effective restoration of the violated rights of the victim, reducing the judicial burden".[59]

[57] On compliance with the Constitution of the Republic of Belarus with the Law of the Republic of Belarus "On Amendments to Codes on criminal liability" [Electronic resource]: The decision of the Constitutional Court of the Republic of Belarus, May 17, 2021, No. R-1270/2021. National Legal Internet Portal of the Republic of Belarus, 21.05.2021, 6/1798.

[58] On the amendment of codes on criminal liability [Electronic resource]: The Law of Republic Belarus, May 26, 2021, No. 112-Z. National Legal Internet Portal of the Republic of Belarus, 08.06.2021, 2/2832.

[59] The Ministry of Justice – on the introduction of the institute of mediation in criminal proceedings and on changes in the CrPC [Electronic resource] : National Center for Legal Information of the Republic of Belarus,

The Belarusian legislator has taken a progressive step to introduce the institution of mediation in the criminal process. While in Russian criminal proceedings, this idea, despite widespread discussion in scientific circles, has not yet received legislative consolidation.

Thus, according to the Federal Law of the Russian Federation No. 193-FZ of July 27, 2010 "On Alternative Dispute Settlement Procedure with the participation of an intermediary (mediation procedure)"[60], the scope of mediation in Russian law is limited to disputes arising from civil, administrative and other public legal relations, including in connection with the implementation of entrepreneurial and other economic activities, as well as disputes arising from labor and family relations.

At the same time, according to K. I. Popov,[61] certain features of mediation are provided for in Article 76 of the Criminal Code of the Russian Federation, which regulates exemption from criminal liability in connection with reconciliation with the victim: "a person who has committed a minor or moderate crime for the first time can be released from criminal liability if he reconciled with the victim and made amends to the victim of harm".[62]

Indeed, this type of release can be considered as a kind of way to settle a criminal conflict: the parties are the victim and the person who committed the crime; this person compensates to the victim damage caused by the crime; the parties make a decision voluntarily; the result of reconciliation is the victim's statement on the termination of the criminal case. Thus, the dispute that arose between the parties as a result of the commission of a crime is terminated, and the violated legal relations are restored.

However, according to Article 25 of the Criminal Procedure Code of the Russian Federation[63] (hereinafter – CrPCRF), a criminal conflict is resolved by an investigator or a court. And that fundamentally distinguishes the reconciliation of the parties from the institution of mediation, as far as a characteristic feature of mediation is the involvement in the reconciliation process of a third person

2003 – 2023. UR : https://goo.su/UGNEwP. Access date: 26.01.2023.

60 On an alternative dispute settlement procedure with the participation of an intermediary (mediation procedure): Federal Law No. 193-FZ of July 27, 2010 (ed. on July 26, 2019) // Collection of Legislation of the Russian Federation. 2010. No. 31, Article 4162; Collection of Legislation of the Russian Federation. 2019. No. 30, article 4099.

61 POPOV, K. I. Mediation in criminal law – myth or reality? Military law, No. 2 (72), p. 227, 2022.

62 The Criminal Code of the Russian Federation No. 63-FZ of 13.06.1996 (ed. on 29.12.2022) // Collection of Legislation of the Russian Federation. 1996. No. 25, Article 2954; Collection of Legislation of the Russian Federation. 2023. No. 1 (Part I), Article 29.

63 Criminal Procedure Code of the Russian Federation No. 174-FZ of 18.12.2001 (as amended on 29.12.2022) // Collection of Legislation of the Russian Federation. 2001. No. 52 (Part I), Article 4921; Collection of Legislation of the Russian Federation. 2023. No. 1 (Part I), Article 57.

(a mediator) who is not interested in the outcome business and persuades the parties to make a common and satisfactory decision for everyone.

Unlike the mediation procedure, reconciliation of the parties does not mean the mandatory termination of the criminal case. Article 25 of the CrPCRF refers to the right to terminate a criminal case, and not the obligation to do this. The following persons have the right to make such a decision: a court; an investigator with the consent of the head of the investigative body; an inquirer with the consent of the prosecutor.

3.2.3 Increasing the Independence and Responsibility of the Disputing Parties

The State is making efforts to create mechanisms for comfortable dispute resolution between counterparties. First of all, by legally securing the possibility for the parties to choose a way to resolve the dispute. On the one hand, this contributes to increasing the responsibility of the parties, and on the other hand, it contributes to the development of corporate ethics, negotiation skills, skills to find optimal and most comfortable conditions for dispute resolution among counterparties.

In 2013, the Constitutional Court of the Republic of Belarus expressed a legal position according to which "the provisions of the Constitution ... do not exclude the possibility of using alternative methods of conflict resolution under certain conditions", and also refers that mediation "... does not replace existing jurisdictional mechanisms, but complements them, providing participants in civil turnover with additional opportunities to settle arisen disputes".[64] Indeed, the practice of alternative commercial dispute resolution is the most eloquent evidence of these circumstances.

The use of mediation between transnational counterparties require a creation "... the necessary legal mechanisms for the effective regulation of economic and other activities in the interests of man and society".[65] The corresponding legal position is expressed in the Decision of the Constitutional Court of the Republic of Belarus in 2021.

The ratification of the Singapore Convention on Mediation (2018) by the Republic of Belarus on June 25, 2020 predetermined the need to take into account its provisions in national legislation, in this regard, the Law of the Republic of

[64] On compliance with the Constitution of the Republic of Belarus with the Law of the Republic of Belarus "On Mediation" [Electronic resource]: Decision of the Constitutional Court of the Republic of Belarus, July 8, 2013, No. R-841/2013. National legal Internet portal of the Republic of Belarus, 24.07.2013, 6/1324.

[65] On the state of constitutional legality in the Republic of Belarus in 2020 [Electronic resource]: Decision of the Constitutional Court of the Republic of Belarus, March 11, 2021, No. R-1256/2021. National legal Internet portal of the Republic of Belarus, 18.03.2021, 6/1782.

Belarus No. 89-Z of January 6, 2021 "On Amendments to Laws on mediation" was adopted.[66]

The Constitutional Court of the Republic of Belarus, carrying out mandatory preliminary control of the constitutionality of the legal provisions, highly appreciated mediation as a way of "resolving international commercial disputes, creating a legal mechanism for recognizing and enforcing international mediation agreements reached as a result of the out-of-court mediation procedure in the country, expanding the possibilities of business entities in choosing means of dispute settlement to ensure their rights and legitimate interests in international economic relations".[67]

4 Mediation in Resolving Family Disputes in the Republic of Belarus

4.1 Advantages of Family Mediation

The mediation procedure, according to Article 3 of the Law of the Republic of Belarus "On Mediation"[68] is based on the principles of voluntariness; good faith, equality and cooperation of the parties; impartiality and independence of the mediator; confidentiality. The flexibility of the mediation procedure makes it possible to reduce the severity of the conflict that has arisen between the disputing parties, improve communication between family members, and preserve the possibility of further communication between them.

The advantage of family mediation is *reducing the costs of dispute resolution*, compared with the costs of settling such disputes in court. For example, in the Republic of Belarus, spouses wishing to dissolve a marriage and divide joint property pay the following payments:

the state fee for consideration of a claim for divorce (at the same time, the amount of the state fee doubles if a divorce is the second or more for one of the spouses);

the state fee for consideration of a claim of division of common joint property (5% of the price of the claim).

[66] On changing the laws on mediation [Electronic resource]: Law Rep. Belarus, January 6, 2021, No. 89-Z // National legal Internet portal of the Republic of Belarus, 14.01.2021, 2/2809.

[67] On compliance with the Constitution of the Republic of Belarus with the Law of the Republic of Belarus "On Amendments to laws on mediation" [Electronic resource]: Decision of the Constitutional Court of the Republic of Belarus, December 28, 2020, No. R-1253/2020. National legal Internet portal of the Republic of Belarus, 12.01.2021, 6/1779.

[68] On mediation [Electronic resource]: the Law of the Republic of Belarus, July 12, 2013, No. 58-Z ; ed. by the Law of the Republic of Belarus on 06.01.2021, No. 89-Z. National legal Internet portal of the Republic of Belarus, 14.01.2021, 2/2809.

In addition, expert examinations may be appointed to clarify the value of the property. The parties also bear the costs of lawyers for representation in court and drafting the necessary legal documents.

Using the mediation procedure, the parties *pay only remuneration to the mediator*, the amount of which is determined by the agreement. At the same time, in accordance with Article 17 of the Law "On Mediation", remuneration expenses are equal for the parties, unless a different procedure is defined by their agreement.

The next advantage of mediation is *the shortening of the dispute resolution period*. We have an example. During the dissolution of a marriage, between the spouses arose a dispute on division of common joint property, which they could not resolve without a conflict and appealed to the court. The trial lasted four years. The solicitors of the parties advised them to contact a mediator. The spouses owned an unfinished house with no heating and a plot of land, and the ex-spouses could not make a decision how to divide it. During the negotiations, the parties indicated a solution each of them sees in the current situation. However, the parties could not discuss these decisions, since each statement was accompanied by accusing each other of the causes of the current conflict, the disintegration of the family.

With the help of mediators, the parties realized that it is important not only what they agree on, but also how they do it. The ex-spouses realized that they could not conclude an agreement not only because of a different vision of the situation, but also because of the inability to establish a dialogue among themselves. During the mediation process, the parties worked out rules of conduct that they agreed not to violate. With each subsequent meeting, the negotiations were calmer, which made it possible to discuss the available options for resolving the dispute without mutual accusations. During the mediation process, the true interest of the parties was revealed. Both ex-spouses understood that they did not want to live together in an unfinished house. The parties came to an agreement, under the terms of which one party buys a share of construction materials invested in an unfinished house. The agreement allowed one party to purchase a new separate living space in the city; and to the other party – to finish building a house and stay in the countryside.[69]

4.2 Disadvantages of Family Mediation

The lack in Belarussian family legislation of legal norms defining the features of family mediation is the reason for the lack of demand for mediation as an alternative way to resolve family disputes.

[69] TARASOVA, N. V. The long-term judicial dispute of the former spouses was resolved thanks to mediation. Lawyer, No. 4, p. 17, 2018.

According to Article 2 of the Law "On Mediation", it is possible to use family mediation. However, it is not specified which disputes can be submitted for resolution within the framework of mediation. A direct indication of the possibility of mediation is mentioned in the Belarusian family legislation in the following cases:

- when the state body registering acts of civil status accepts an application for divorce, the spouses are explained their right to participate in an information meeting with a mediator (in Article 35^1 of the CMF);
- when the court accepts a statement of claim for divorce, the spouses are explained their right to a voluntary settlement of the dispute with the participation of a mediator, including their right to participate in an information meeting with a mediator (Article 36 of the CPC). The provisions of Article 36 of the CMF are detailed in paragraph 4 of the Resolution of the Plenum of the Supreme Court of the Republic of Belarus "On the application of legislation by courts when considering divorce cases",[70] which states that spouses are explained their right to voluntarily settle property disputes and disputes related to the upbringing and maintenance of children with the participation of a mediator.

Consequently, only spouses who are terminating a marriage can accept mediation and only on issues of resolving property disputes, as well as disputes related to the upbringing and maintenance of children.

Despite the fact that these provisions of the Belarusian legislation actually reduce family mediation to mediation used by spouses who are in the process of divorce, we believe that the subject composition of family mediation is much broader.

Firstly, mediation can be applied not only by spouses, but also by ex-spouses, as far as in accordance to Article 13 of the CMF, in the Marriage Contract the parties can provide, among many other things, "types of disputes between spouses (former spouses) arising from marital and family relations",[71] which can be transferred by them for settlement with the participation of a mediator.

Secondly, there are many disputes in families that are not related to the dissolution of marriage. We believe that mediation can be used to settle a dispute between any family members who have had a strong connection with each other for a long time.

[70] The Plenum of the Supreme Court of the Republic of Belarus adopted a resolution "On the application of legislation by courts when considering cases of divorce" [Electronic resource]: Supreme Court of the Republic of Belarus. URL: https://goo.su/UNtrU. Access date: 18.01.2023.

[71] The Code of the Republic of Belarus on Marriage and Family [Electronic resource]: The Law of the Republic of Belarus, July 9, 1999, No. 278-Z; ed. by the Law of the Republic of Belarus of 19.05.2022, No. 171-Z. National Legal Internet Portal of the Republic of Belarus, 24.05.2022, 2/2891.

Indirectly, such a conclusion follows from the general rule: "in cases stipulated by the agreement of the parties, interested persons, before applying to the court with a claim for the protection of violated or disputed rights arising from marital and family relations, have the right to settle the dispute with the participation of a mediator"[72] (Article 6 of the CMF).

Thirdly, the Belarusian legislation does not define to which categories of family law disputes mediation is applicable.

Speaking about the mediability of disputes, V. Kamenkov and I. Belskaya argue that "... mediation should be adequate to the problem being solved. The potential of its effectiveness is determined by the following criteria: 1) the interest of the parties in the cost-effectiveness of solving the problem (reducing the cost of funds, time and other resources of the parties to achieve an acceptable result); 2) the willingness of the parties to respect the interests of their partner and fulfill the agreements reached voluntarily and promptly; 3) satisfaction of the parties with independently developed terms of dispute settlement; 4) the desire to maintain business (commercial) partnerships".[73]

In addition to these universal criteria of mediation, its legal criteria are also distinguished in the specialized literature. Thus, E. Chichina refers to them the following: the affiliation of the disputed legal relationship to the branches of civil, family or labor law; the private-law nature of the disputed legal relationship; the absence of a legislative ban on mediation[74]. At the same time, E. Chichina rightly believes that "the ban on mediation can be expressed both directly and indirectly: by referring a dispute to the exclusive jurisdiction of the court and the inability of the parties to restore the violated right on their own".[75]

To these criteria, we also add that a dispute can be settled by mediation only if the nature of the dispute allows for several resolution options.[76]

The specified criteria of mediability of the dispute will not allow mediation to be used in resolving any family dispute. We agree with N. Gordiychuk in her opinion that the use of mediation in family disputes is impossible in resolving such disputes as: numerous facts of domestic violence, continuing at the time of preparation for mediation or occurring in the recent past; child abuse; intimidation, threats, serious imbalance of forces between the parties; mental illness of one of

[72] *Ibid.*

[73] KAMENKOV, Viktor, BELSKAYA, Irina. Article-by-article commentary to the Law of the Republic of Belarus dated 12.07.2013 No. 58-Z "On Mediation" [Electronic resource] : [as of 11.01.2023] // ConsultantPlus. Belarus / LLC "YurSpektr", National Center of Legal Information of the Republic of Belarus, Minsk, 2023.

[74] CHICHINA, Elena. Legal criteria of mediability of disputes under the legislation of the Republic of Belarus. Pravo.by, No. 2, p. 45, 2017.

[75] *Ibid.*

[76] KHALETSKAYA, Tatsiana. On mediability of hereditary disputes. Scientific works of BSEU, Issue 11, p. 584, 2018.

the parties; incapacity of one of the parties; drug addiction of one of the parties; deliberate misrepresentation and provision of deliberately false information; refusal or inability to follow the basic rules of the mediation procedure.[77]

We believe that it is difficult to use mediation in relations related to adoption, selection of a child without deprivation of parental rights, deprivation of parental rights, restoration of parental rights. Disputes on these categories of cases can be resolved exclusively in court.

We believe that mediation in the family sphere can be applied due to resolve disagreements arisen in the private legal sphere, when the parties can show autonomy of will in resolving the conflict: divorce, division of property, payment of alimony, parental rights etc.

Family disputes, as a rule, are characterized by increased conflict, unwillingness of the parties to hear each other, the presence of mutual reproaches. A mediator who settles a dispute between family members should strive to "reduce the intensity of passions", restore friendly relations between family members, and contribute to building a constructive dialogue between them. In addition, the mediator's task in such disputes is "to take special care of the well–being and protection of the interests of children, to push parents to focus on the needs of children, to remind them of their main duty concerning the maintenance of the well-being of children and to point out to them the need to inform and advise their children".[78] All this imposes an increased level of responsibility on the mediator.

Unfortunately, there are no requirements for the specialization of mediators in the Belarusian legislation. According to Article 4 of the Law "On Mediation", a mediator should not have a legal education. A person wishing to become a mediator must:

- be trained in the field of mediation in accordance with the procedure established by the Ministry of Justice of the Republic of Belarus, or to have experience as a mediator in accordance with proceeding legislation;
- obtain a mediator's certificate issued by the Ministry of Justice of the Republic of Belarus on the basis of the decision of the Qualification Commission on Mediation.

Currently, a mediator can be a person who has any education (legal, psychological, economic, sociological, etc.) and any profession. In the Belarusian practice of mediation, there is no consensus on who a mediator should be by profession and occupation.

[77] GORDIYCHUK, Nikolai. Features of family mediation in divorces. Psychology and psychotherapy of the family, No. 2, p. 14, 2017.

[78] BRYUKHINA, E., CHERTKOVA E. Mediation as an alternative way of settling family disputes in the Russian Federation. Bulletin of Tomsk State University, Law, No. 39, p. 138, 2021.

For example, the Deputy Chairman of the Belarusian Republican Bar Association T. Matusevich believes that "a lawyer is an ideal candidate for a mediator: they are sociable, they know which side to approach in order to settle everything without bringing the dispute to court"; "a lawyer is constantly in conflict, he has the opportunity to foresee its development in the future".[79]

There can be no definite answer to the question of which profession representative will perform the functions of a mediator in their best way. We agree with the opinion of A. Molotnikov: "the most effective mediator can be only the candidate who has legal knowledge, has the skills of a psychologist and the wisdom of a judge".[80]

We believe that regardless of the profession and education of a person who has decided to become a mediator, they should have such features as the ability to listen and analyze, the ability to clearly express their thoughts and manage their emotions. The mediator must have the skills of a psychologist: must be able to listen to the parties, must find common ground to resolve the conflict. The mediator must also have special legal knowledge. In this matter, we agree with the point of view of V. Blazheev, who believes that the mediator "must rely on the law" and "act within the law",[81] "the mediator must have certain knowledge in jurisprudence"[82] (knowledge in sphere of jurisprudence will let him feel more comfortable in the process of dispute resolution).

With regard to family mediation, some authors propose: to define the criteria of the mediator's professionalism and to differentiate the areas of specialization of mediators with the definition of special requirements for them (primarily in the field of family mediation); to isolate the norms on family mediation due to the importance of family relations; to develop special requirements for family mediators and training programs for mediators.[83]

The institute of mediation in the legal system of the Republic of Belarus has a significant potential for its development, including in the field of family relations, however, this potential is not fully realized.

[79] Mediation in Belarus: how pre-trial disputes are resolved in the republic [Electronic resource]: Sputnik. URL: https://goo.su/ADId. Access date: 11.01.2023.

[80] MOLOTNIKOV, Alexander. Mediation. A new approach to conflict resolution [Electronic resource]: Digest. URL: https://goo.su/17WDm0. Accessed: 28.01.2023.

[81] BLAZHEEV, Viktor. We need a culture of out-of-court dispute resolution. Mediation and law, No. 2, p. 11, 2008.

[82] Ibid, p. 15.

[83] SADOVNIKOVA M. N., ANISHCHENKO A. S. Requirements for a mediator: modern approaches and trends in the development of the Institute. Siberian Legal Bulletin, No. 4 (87), p. 114, 2019.

5 Conclusion

1) The mediation model implemented in the legislation of the Republic of Belarus correlates with the legal framework of this institution, fixed by universal standards. With regard to regional standards, is used a stipulation: for national legislation of the Republic of Belarus is recommended a Model Law No. 39-14 "On Mediation (Out–of-court settlement of Disputes)", adopted on November 29, 2013 by a Resolution of the Interparliamentary Assembly of the Commonwealth of Independent States.
2) The scope of mediation in the Republic of Belarus can be divided into three groups: the most in demand; potentially in demand; inapplicable.
3) The most in demand area to apply a mediation in the Republic of Belarus is family legal disputes. Family mediation has a number of advantages over the judicial procedure for dispute resolution (triple "R"): mediation allows the parties to the dispute to *reduce* costs; the time for dispute resolution is *reduced*; conflict between family members and in society is *reduced*.
4) The demand for mediation in the Republic of Belarus, including in the family legal sphere, is insufficient due to disadvantages in the legal regulation of mediation. Significant disadvantages of the legal regulation of family mediation are:

– the lack of a direct indication of persons who have the right to apply to family mediation to consider a dispute arising from marital and family relations;
– lack of clear criteria for mediability in family disputes;
– ignoring the fact that not all disputes can be referred for resolution under the mediation procedure;
– lack of requirements for the education of mediators and their competencies.

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Book Review

Dispute Board Manual: A Guide To Best Practices And Procedures

EASTON, Graham; RUSSO, Ann (Ed.). *Dispute Board Manual*: A Guide To Best Practices And Procedures. Geneva: Dispute Resolution Board Foundation – DRBF, Nov. 2019. E-book. 144 p. ISBN: 978-1-643070-69-5. Available at: https://www.drb.org/dispute-board-manual.

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Abstract: This is a book review of the *Dispute Board Manual: A Guide to best practices and procedures*. The book, written in 2019, is a Manual by The Dispute Resolution Board Foundation (DRBF) and brings all the dispute board essentials in a practical and accessible way. It is a free download document available in English, Spanish and Portuguese. The manual is a must-read piece by all dispute resolution professionals, legal professionals and, mainly, construction professionals.

Keywords: Alternative Dispute Resolution. Dispute Boards. Construction. Proceedings.

Introduction

As a reaction to judicial proceedings delay and to poor authorities' justice administration, the concept of a multi-door courthouse blossomed and evolved internationally and within domestic jurisdictions. Litigation became an option, such as conciliation, negotiation, mediation, arbitration, and dispute boards. Though the multi-door concept was first coined in 1976 by Harvard Law School Professor Frank E.A. Sander[1] it was long before widespread in the international sphere.

Negotiation, conciliation, mediation (including multiparty),[2] arbitration,[3] and dispute boards are alternatives to state courts and, if well-applied to a conflict, are more effective, flexible, cheaper and speedy. Also, hybrid (Med-Arb) and multi-tiered dispute resolution clauses are effective solutions depending on the dispute.[4]

Technology is also currently vastly applied in judicial proceedings[5] and alternative dispute resolution with software applications, the use of videoconference.[6] Also, with the proceedings' digitalization, the use of electronic evidence is increasing,[7] which brings risks and benefits to parties.[8] In a nutshell, information technology applied to ADR and online dispute resolution (ODR)[9] are in constant development.

Dispute Board has developed since the 70s, initially in the U.S., to resolve construction disputes that, at the time, were being directed to arbitration. Currently, the dispute board is recognized as an effective way to solve construction disputes in its ad hoc or institutional model. This is undoubtedly due to The Dispute Resolution Board Foundation – DRBF and its members. The foundation, established in 1996, is a non-profit organization composed of mainly lawyers and engineers.[10] In 2019, the foundation published the *Dispute Board Manual: A Guide to best practices and procedures* in English, Spanish, and Portuguese.[11]

The dispute board aims to avoid arbitration and judicial proceedings, and international and domestic (Brazilian) experience shows that this mission is being accomplished.

1 SANDER, 2021.
2 FERREIRA; SEVERO, 2021.
3 See: DRAHOZAL, 2019. See also: FERREIRA; OLIVEIRA, 2019. See also: SCHMIDT; FERREIRA; OLIVEIRA, 2021.
4 On hybrid and multi-tiered clauses in the Brazilian and international sphere see: FERREIRA, 2021, See also: FERREIRA; GIOVANNINI, 2020.
5 MANEA; IVAN, 2022.
6 FERREIRA *et al.*, 2022.
7 FERREIRA; GROMOVA, 2023.
8 FERREIRA; GROMOVA, 2023.
9 FERREIRA *et al.*, 2022. See also: ELISAVETSKY; MARUN, 2020.
10 The Dispute Resolution Board Foundation's history is available at: https://www.drb.org/history.
11 Available at: https://drbf.mclms.net/en/package/3545/course/7648/view. Access: 9 Jun. 2023.

In Brazil, several institutions already offer administered Dispute Board services, such as CBMA,[12] CAM-CCBC,[13] CIESP-FIESP,[14] CAMARB,[15] and FGV-Câmara.[16] The parties experiencing Dispute Boards in Brazil are giving positive feedbacks.[17] Also the Brazilian dispute board practitioners have published relevant literature like the *Manual de Dispute Boards, Teoria, Prática e Provocações*.[18]

Nevertheless, the dispute board community is somewhat restricted. The community is attempting to spread the word around the globe about this conflict solution model and the best dispute board practices. The Dispute Resolution Board Foundation – DRBF plays a central role, and publishing the Dispute Board Manual (free download) evidences this argument. Also, the realization of conferences on the topic in several countries enriches the practice and propagates dispute boards.

The *Dispute Board Manual: A Guide to best practices and procedures* has four sections and nineteen chapters. It also brings an essential glossary as an annex (relevant for readers unfamiliar with DBs).

The book is helpful for lawyers, arbitrators, engineers, mediators, students, scholars, and businesspeople interested in dispute boards in practice.

The dispute board practice, such as mediation and arbitration, is forever under discussion and evolving. Therefore, this book is an essential guide to the ADR community, and anyone interested in conflict solution best practices.

1 The Book's Content

Dispute boards are crucial to project management, particularly construction industry projects; this is why the central area of the book is conflict solutions intertwined with engineering and business.

The book aims to be a guide that updates and explains the best DBs practices. The *Dispute Board Manual: A Guide to best practices and procedures* has four sections and nineteen chapters. Section 1 (Background on Dispute Boards – divided into three chapters) introduces the topic explaining the historical background and the dispute board's essential elements. We must emphasize Chapter 3, which compares dispute boards with other ADR types (mediation, adjudication, and arbitration), depicting similarities and differences.

[12] Available at: https://cbma.com.br/. Access: 09.06.2023.
[13] Available at: https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/. Access: 9 Jun. 2023.
[14] Available at: http://www.camaradearbitragemsp.com.br/pt/index.html. Access: 9 Jun. 2023.
[15] Available at: https://camarb.com.br/en/. Access: 9 Jun. 2023.
[16] Available at: https://camara.fgv.br/. Access: 9 Jun. 2023.
[17] On Dispute Boards in Brazil see: NETO, 2019. See also: SOUSA, 2020.
[18] NETO; SALLA, 2019.

Section 2 (Dispute Board Concepts – divided into three chapters) addresses vital concepts and renders a toolkit for readers who want to learn and apply dispute boards effectively. Chapter 4 enlightens the process, chapter 5 brings the DBs attributes, and Chapter 6 addresses the DRBF Code of Ethical Conduct, where readers should give special attention to its canon 1 (Conflict of Interest and Disclosure).[19]

Section 3 (Establishing Dispute Boards - divided into five chapters) approaches the types of Dispute Boards. Chapter 8 (Best Practice Guidelines for Contract Documents) is a cornerstone to DBs, for it addresses the Dispute Resolution Clause and the dispute board specification.

Section 4 (Dispute Boards – Implementation and Process – divided into eight chapters) addresses the dispute board operationalization since the nomination of the dispute board members (Chapter 12), passing through the hearing procedures (Chapter 16), the recommendations and decisions (Chapter 17), and finally reaching the implementation of the DB findings (Chapter 18), and the review, termination or renewal of the Dispute Board (Chapter 19). We must highlight Chapter's 18 final part, where the Manual addresses the enforcement of DB decisions in different jurisdictions.

2 The Analysis

The DRBF manual undoubtedly is a reference guide for DB users. Because it is written by experienced professionals (some of them with legal and engineering backgrounds), it is a practical handbook that outlines the dispute board fundamentals and best practices both for beginners and experts.

The book organization is logical and follows the whole dispute board timeline. It starts with the historical background (Chapter 1), teaches the readers to draft a dispute resolution clause (Chapter 8), goes through all the proceedings (Section 4), and finishes with the dispute board termination or renewal. Thus, it addresses, in a concise manner, all the dispute board toolbox.

The Manual is a must-read by all practitioners and dispute resolution professionals, not to mention legal professionals that practice mainly in the construction field.

The Manual fulfills its goal of being a complete dispute board guide. Nevertheless, this objective brings along a downside which is a somewhat simple approach. The Manual provides no literature review on the topic, no references, and no case law. Its next edition could dedicate a chapter on dispute board practical

[19] On the arbitrator's duty to disclose in Brazil see: SANTOS; FERREIRA, 2021.

cases of its four regions and jurisprudence. As an example of this argument: the manual cites the enforcement of dispute board decisions in different jurisdictions (Chapter 18) and mentions "few reported instances of attempts to enforce decisions"; however, it does not cite these few attempts.[20] These cases would surely interest the audience.

Therefore, the reader looking for a more profound comprehension of the specific topics addressed by the Manual will undoubtedly have to resort to other sources, such as scientific papers. Nonetheless, the Manual suits its purpose perfectly: it is the starting point with a practical approach.

3 Conclusion

The *Dispute Board Manual: A Guide to best practices and procedures* is the starting point for anyone wanting to learn more about dispute boards, their fundamentals, and best practices.

Drafter by practitioners to practitioners, it encompasses all a reader needs to know on dispute boards in a quick and down-to-earth fashion. Its free download format fulfills DRBF's mission of spreading the dispute culture around the globe and making the best dispute board practices accessible.

A suggestion for improvement (though we are not sure that is the editors' goal) would be adding literature to the book and an annex of sources such as journals that publish pieces on dispute boards.

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[20] For example, on the attempts to set aside arbitral awards in Brazilian courts, see: FILHO; FERREIRA, 2020.

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INSTRUÇÕES PARA OS AUTORES

A *Revista Brasileira de Alternative Dispute Resolution – RBADR*, com periodicidade semestral, é um periódico especializado no campo das vias alternativas de solução de conflitos, como a Arbitragem, a Mediação, o *Dispute Board*, a área de Desenho de Sistemas e, ainda, o tema da *Online Dispute Resolution*, dentre outras temáticas igualmente relevantes.

As propostas de artigos para edição em nossa revista deverão ser enviadas para conselhorevistas@editoraforum.com.br ou editorial.rbadr@gmail.com.

Os trabalhos deverão ser acompanhados dos seguintes dados: nome do autor, sua qualificação acadêmica e profissional, endereço completo, telefone e *e-mail*.

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Roga-se aos autores o compromisso de não publicação em outras revistas e periódicos.

A revista reserva-se o direito de aceitar ou vetar qualquer original recebido, de acordo com as recomendações do seu corpo editorial, como também o direito de propor eventuais alterações.

Os trabalhos deverão ser redigidos em formato Word, fonte Times New Roman, tamanho 12, espaçamento entre linhas de 1,5. Os parágrafos devem ser justificados. O tamanho do papel deve ser A4 e as margens utilizadas idênticas de 3 cm. Número médio de 15/40 laudas. Os textos devem ser revisados, além de terem sua linguagem adequada a uma publicação editorial científica.

Serão aceitos trabalhos redigidos na língua portuguesa e inglesa.

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