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Mediation in ISDS

Reviewing the Enforceability of International Mediation Settlement Agreements in Investment Disputes

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List of Abbreviations

ADR	Alternative Dispute Resolution
AMA Protocol	Arb-Med-Arb Protocol of SIAC and SIMC
AML	Arbitration and Mediation Law (Ecuador)
Arb	Arbitration
BIT	Bilateral Investment Agreement
CEPA	Closer Economic Partnership Agreement
CETA	Canada-European Union Comprehensive Economic and Trade Agreement
CMA	Concurrent Mediation and Arbitration (Shadow Mediation)
CPR	Civil Procedure Rules (UK)
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
EC	European Commission
ECT	Energy Charter Treaty
EU	European Union
EU Mediation Directive	EU Mediation Directive 2008/52/EC of the European Parliament and the Council
FTA	Free Trade Agreement (Gebührengesetz)
GOCP	General Organic Code of Processes (Ecuador)
GebG	Austrian Fee Act
IPA	Investment Protection Agreement
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes of the World Bank
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
ICSID MR	ICSID Mediation Rules
(I)MSA	(International) Mediation Settlement Agreement
IMI	International Mediation Institute

ISDS	Investor-State Dispute Settlement
JAMS	(formerly) Judicial Arbitration and Mediation Services
Med	Mediation
MIC	Multilateral Investment Court
New York Convention (NYC)	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
PPP Agreement	Public Private Partnership Agreement
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
SIDRA Survey	International Dispute Resolution Survey of the Singapore International Dispute Resolution Academy
SIMC	Singapore International Mediation Centre
Singapore Convention	The United Nations Convention on International Settlement Agreements Resulting from Mediation
UMA	Uniform Mediation Act (US)
UNCITRAL	United Nations Commission On International Trade Law
UNCITRAL Model Arbitration Law	The UNCITRAL Model Law on International Commercial Arbitration
UNCITRAL Model Mediation Law	UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation
UNCITRAL Working Group II	Working Group of the UNCITRAL on Dispute Settlement
UNCITRAL Working Group III	Working Group of the UNCITRAL on Investor-State Dispute Settlement Reform
UNCTAD	United Nations Conference on Trade and Development
VIAC	Vienna International Arbitral Centre of the Austrian Federal Economic Chamber

1 Introduction

A whole toolbox of options is available to settle investment disputes. Mediation is one of these options. This tool is generally acknowledged as being cost efficient, party driven, interest based, flexible, and fast. However, the most important benefit – particularly in the context of investment disputes – seems to be the high probability that the parties will comply with their "self-made" mediation settlement agreement ("MSA") and thus be able to maintain their business relationships.

Mediation is well established in classical commercial disputes (between entities) and in disputes between private parties, but also in disputes between states. In the past few years, as part of the United Nations Commission On International Trade Law ("UNCITRAL") Working Group III on Investor-State Dispute Settlement ("ISDS") Reform discussions on the reform of investor-state dispute settlement, there has been extensive debate as to whether mediation should have a more prominent place in the ISDS system.[1] Strengthening mediation in the ISDS context was endorsed by the international community, and the International Centre for Settlement of Investment Disputes of the World Bank ("ICSID") has gone so far as to draft new investment mediation rules, which came into force on July 1, 2022.[2]

A dispute resolution technique must always be tailored to the specific context. It is a very different exercise to conduct mediation between private parties, between entities, between states, and between entities and states. Likewise, it also makes a difference whether the mediator sees him or herself in domestic or cross-border disputes. However, even in different settings, the mediator will always apply the same fundamental principles, which leads to this tool's competitive advantage. In the view of the author, it is true that the lessons learned in one context can and should be adapted to another.

The dialogue on the use of mediation in ISDS was accelerated due to increasing concerns regarding enforcement of international mediation settlement agreements ("IMSA"), and an

[1] For a review of the current status and all working documents of Working Group III: Investor-State Dispute Settlement Reform, visit the UNCITRAL website at: https://uncitral.un.org/en/working_groups/3/investor-state.
[2] ICSID Mediation Rules, which entered into force on July 1, 2022, are available at: https://icsid.worldbank.org/sites/default/files/documents/ICSID_Mediation.pdf.

international convention for enforcing commercial mediation settlement agreements came into force in 2019 (the "Singapore Convention").[3]

Some may claim that the question of enforceability with regard to mediation settlement agreements is not relevant at all due to the consensual nature of this process, as the parties tend to comply with the settlement terms to which they have agreed anyway. Thus, there is no need for enforcement of such results. However, although this may be true in many cases, this ideal notion does not fully reflect reality. One should – and a person acting in the field of dispute resolution must – always be prepared for the worst-case scenario. The worst-case scenario is that a party does not comply with the agreed settlement terms and, further, is facing difficulties when trying to enforce the agreed-upon result. Therefore, it is imperative to know how to enforce the settlement agreement, which is the central research issue of this thesis.

This research examines the following questions: Is mediation as a dispute resolution tool able to gain a foothold in investor-state disputes? Is it accepted in practice as an alternative to arbitration or perhaps as a useful addition to it? In general, parties want to have their dispute resolved in an efficient and final manner. Can this goal be effectively achieved through a consensual process such as mediation? What possibilities are there to enforce international mediation settlement agreements, and are the existing options reliable in the sense that they are sufficiently developed and provide procedural predictability?

To explore these and related issues, the thesis is structured as follows:

- *First*,[4] the context regarding investment disputes is established, and mediation explained. The author also looks at recent practice, considering the inclusion of mediation clauses in investment treaties and reported cases. As a final point of this chapter, the author, after illustrating the development of an institutional framework in support of mediation, addresses the question of why disputing parties, at least in investment cases, are still reluctant to use mediation instead of arbitration.

- *Second*,[5] the author considers how international mediation settlement agreements can be enforced in selected jurisdictions and what issues could arise. The chosen countries

[3] The United Nations Convention on International Settlement Agreements Resulting from Mediation, which entered into force September 12, 2020, is available at: https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf.
[4] Chapter 2 on "Mediation in the Context of ISDS", pp. 6-40.
[5] Chapter 3 on "Domestic Approaches to the Enforcement of MSAs", pp. 41-59.

are characterized by common law as well as civil law jurisdictions and include countries in which mediation is well established as a dispute resolution tool and countries in which it is still in its infancy. Given that the Singapore Convention is already in force, the selection also includes states that have already signed and ratified the Convention and states that have not.

- *Third*,[6] the author examines the Singapore Convention in detail and assesses whether it applies to investment disputes. Following the discussion of this most recent addition, the author explores whether international mediation settlement agreements can also be enforced under other international conventions. This includes existing conventions, such as the ICSID Convention[7] and the New York Convention,[8] but also considers enforcement under the proposed Multilateral Investment Court ("MIC").[9] Regarding the New York Convention in particular, the question is less whether international mediation settlement agreements can be enforced than under what circumstances enforcement can be achieved. Suppose enforcement of international mediation settlement agreements is easily done. In that case, it is arguably questionable whether the new Singapore Convention, in addition to the existing conventions, actually brings added value to the practice of mediation.

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[6] Chapter 4 "Enforcement of MSAs under Existing and Developing International Enforcement Regimes", pp. 60-80.

[7] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, entered into force October 14, 1966 ("ICSID Convention"), and ICSID Regulations and Rules, entered into force July 1, 2022, available at: https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf.

[8] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, entered into force June 7, 1959, available at: https://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf.

[9] Bungenberg, M. and Reinisch, A. (2021) "Draft Statute of the Multilateral Investment Court" in Bungenberg, M., Hobe, S., Reinisch, A. and Ziegler, A. R. (eds) *Studies in International Investment Law*, Nomos: Baden-Baden, Vol. 37, available at: https://www.nomos-elibrary.de/10.5771/9783748924739.pdf.

2 Mediation in the Context of ISDS

2.1 Characteristic Features of Investment Disputes

The underlying rationale behind the host country concluding investment treaties is to attract foreign investment by granting the investor substantive protection and effective remedy in case of interference by the host government. The ISDS-system avoids having states interact with one another on behalf of their citizens through diplomatic protection. Instead, the investment treaty regime was established to depoliticize disputes by allowing direct resolution between the investor and host state. In such situations, the investor is not dependent on the willingness of its home state to act and initiate interstate proceedings and need not rely on the domestic courts of host countries.

Currently, several methods exist to settle investment disputes and the rules and procedures applied in principle. These methods were devised primarily for and successfully applied in the resolution of classical commercial disputes between private parties (i.e., disputes that arise out of a domestic or international commercial transaction between entities).[10]

As in commercial dispute resolution, the parties in an investor-state context can choose between different methods to solve their conflict. Arbitration, though increasingly criticized, remains the method most often chosen for several reasons (including global enforcement of arbitral awards and numerous other beneficial features).[11]

Investor-state dispute settlement is often associated with investment arbitration under the rules of the ICSID. However, investment disputes can also be governed by other institutional rules.[12] That said, the other rules and institutions administering the proceedings are first and foremost

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[10] Dolzer, R. and Schreuer, C. (2012) "Settling Investment Disputes", in Dolzer, R. and Schreuer, C. (eds) *Principles of International Investment Law*. 2nd edn. Oxford: Oxford University Press, pp. 233-312, at p. 237.

[11] Ibid., p. 236; Reinisch, A. (2020) "Investor-state dispute settlement", in Reinisch A. (ed) *Advanced Introduction to International Investment Law*. Cheltenham, UK: Edward Elgar Publishing Limited, pp. 99–130, at p. 99; Coe, J. J. (2010) "Should mediation of investment disputes be encouraged, and, if so, by whom and how?" in Rovine, A. W. (ed) *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, 3rd edn, Brill | Nijhoff, pp. 339–357, at p. 342.

[12] For instance, the 2013 UNCITRAL Arbitration Rules, including the Rules on Transparency in Treaty-based Investor-State Arbitration, or pursuant to rules of institutions such as the 2017 SCC Arbitration Rules of the Stockholm Chamber of Commerce (SCC), the 2020 LCIA Arbitration Rules of the London Court of International Arbitration (LCIA), the 2021 ICC Rules of Arbitration of the International Chamber of Commerce (ICC), the 2018 HKIAC Administered Arbitration Rules of the Hong Kong International Arbitration Centre (HKIA), the (investment-specific) 2021 Vienna Rules on Investment Arbitration of the Vienna International Arbitral Centre (VIAC), the 2011 CRCICA Arbitration Rules of the Cairo Regional Center for International Commercial Arbitration (CRCICA). The rules are available at the official website of each institution.

tailored to commercial arbitration involving only private entities. As a result, the approaches applied in the latter type of proceedings have found their way into ISDS.[13]

In ISDS, this commercial perspective is accompanied by a public international law approach. It predominates in arbitrations based on a standard contractual choice-of-forum clause stipulating arbitration as the chosen form of dispute settlement (contract arbitration). It is also present, though, when the arbitration is based on a statue or a treaty.[14] While investment treaties are instruments of public international law, they differ from most treaties in that they allow investors to directly proceed against states (or vice versa), typically according to the rules of procedure established for commercial arbitration. To some extent, private law dispute resolution mechanisms have been grafted onto public international law treaties, which demands that practitioners apply different approaches in one proceeding.[15]

Although comparison can be drawn to commercial disputes between private entities, investor-state disputes carry their own unique features that must be considered irrespective of the means applied:

- *Different nature of parties*. Investment disputes involve a private party (the investor) on the one side and a sovereign state/sub-entity thereof on the other side. In contrast, parties in commercial arbitration proceedings are private business entities with the same legal rights and obligations.[16]

- *Involvement of regulatory and political aspects*. The dispute typically arises from an act or a failure to act by a sovereign. For instance, a host state might deny the investor building or operating permits through specific regulatory action. Alternatively, the investment might be affected by regulatory measures related to areas such as the environment, economy, or human rights.[17] While an investor's main concern is the return on investment (i.e. a purely commercial interest), the state may face a range of other issues

[13] Dolzer, R. and Schreuer, C. (2012) *Settling Investment Disputes* (n 10), p. 237.
[14] Reinisch, A. (2020) *Investor-state dispute settlement* (n 11), p. 100.
[15] Roberts, A. (2013) "Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System", *The American Journal of International Law*, 107(1), Cambridge University Press, pp. 45-94, at p. 45.
[16] UNCTAD (2010) "Investor-State Disputes: Prevention and Alternatives to Arbitration" in *UNCTAD Series on International Investment Policies for Development*. United Nations: New York and Geneva, available at: https://unctad.org/system/files/official-document/diaeia200911_en.pdf, p. 10.
[17] Roberts, A. (2013) *Clash of Paradigms* (n 15), p. 45.

that extend beyond purely financial considerations.[18] A dispute rising from an investment can easily become a political matter within the state and across borders.[19]

- *High impact on third parties*. As indicated above, these disputes often concern general regulatory measures involving public interests.[20] An investor-state dispute affects not only the disputing parties but can also concern third parties (e.g., the local residents who are impacted – positively or negatively – by the investment). In principle and as inspired by the traditional commercial dispute resolution between private parties, investor-state dispute settlement proceedings remain confidential unless the parties agree otherwise.[21] However, due to the special nature of investor-state disputes and their potential implications for third parties, the rules governing investor-state arbitration increasingly provide some transparency and the possibility for third-party participation.[22]

- *Organizational difficulties***.** When measures or acts were taken at lower levels of government, inter-institutional divergences can hamper a timely reaction by the state and can make it difficult for an investor to identify the appropriate contact person within the government. In most cases, the government officials charged with handling the dispute are not the same people who took the actions that led to the dispute.

- *Coordination issues during proceedings*. The involvement of a sovereign party often includes the involvement of several actors, which can lead to structural and coordinative difficulties during proceedings. It may be unclear which government agency is responsible for handling a dispute. A brokered settlement might necessitate the approval of multiple government agencies or even require specific legislation to approve the terms of the settlement.

- *Importance of long-term relationships*. The nature of the business relationship between the disputing parties is often based on long-term commitment and a complex business relationship, which can lead to a situation of mutual dependence. For instance, a country's citizenry could be dependent on a foreign private investor to provide public

[18] Note (2014) "Mediation of investor-state conflicts", *Harv. L. Rev.*, 127(8), pp. 2543–2564, at p. 2544, 2547.
[19] UNCTAD (2010) *Investor-State Disputes* (n 16), p. 11.
[20] Roberts, A. (2013) *Clash of Paradigms* (n 15), p. 45.
[21] Ibid., p. 46.
[22] For instance, Article 14a of the 2021 Vienna Investment Arbitration Rules, available at: https://www.viac.eu/en/investment-arbitration/content/vienna-rules-investment-2021-online; UNCTAD (2010) *Investor-State Disputes* (n 16), p. 11; Bonnitcha, J., Skovgaard Poulsen, L. N. and Waibel, M. (2017) "Chapter 9: Legitimacy and Governance Challenges", in *The Political Economy of the Investment Treaty Regime*. 1st edn. Oxford: Oxford Public International Law, pp. 233–260, at p. 247.

services. In turn, the investor may have spent significant amounts of capital in the undertaking, and a return on investment may not be possible for many years. Therefore, it is in the interest of both the investor and the state to maintain a functioning business relationship despite a legal dispute.[23]

- *High amounts and financial burden*. Finally, investor-state arbitrations tend to involve large sums of money, on average many times what is at stake in commercial arbitrations. Consequently, arbitral awards in investor-state disputes impose a considerable financial burden on the losing party.[24]

These special features and additional complexities must be considered when promoting mediation in ISDS. Often, such mediation involves multiple governmental departments, conflicting priorities, domestic law restrictions on claims settlements, and difficulties associated with "fact-finding" early in the process. These factors can make the mediator's task formidable. Nevertheless, both states and investors have expressed a desire for a mediation option in ISDS, as it might lead to settlement more quickly, less expensively, and in a higher percentage of cases.[25] Indeed, mediation has already proven its worth in disputes between private parties and to some extent in inter-state conflicts as well.[26] There are plausible reasons to believe that mediation can be a valuable addition to the typical methods employed in the ISDS framework.[27]

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[23] UNCTAD (2010) *Investor-State Disputes* (n 16), p. 12; Salacuse, J. W. (2007) "Is there a better way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution", *Fordham International Law Journal*, Vol. 31(1), pp. 138–185, at p. 141.
[24] Salacuse, J. W. (2007) *Is there a better way?* (n 23), pp. 142-143.
[25] Welsh, N. and Schneider, A. K. (2013) "The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration", *Harv. Negot. L. Rev.* Vol 71(18), pp. 71- 144, at p. 132.
[26] On the growth and development of domestic and international commercial mediation see Harv. L. Rev. (2014) *Mediation of investor-state conflicts* (n 18), pp. 2550-2552.
[27] Ibid., p. 2550.

2.2 Mediation

2.2.1 Mediation – a distinct tool in the ISDS toolbox

Investor-state dispute settlement encompasses a variety of options to resolve conflicts (including the processes set out in Article 33(1) of the United Nations Charter). To highlight the special characteristics of mediation, the author first offers a short description of the most prominent dispute resolution methods (omitting fact-finding[28] and litigation before courts). This overview is followed by a detailed analysis on mediation and an illustration of how mediation can be combined with other means such as arbitration.

a) Negotiations

Through negotiations, parties may be able to settle their dispute without assistance from a third party.[29] It is the simplest, most confidential, flexible, and most common form of amicable dispute resolution and is typically the first step in the process. Dispute settlement clauses in investment treaties often provide "cooling-off periods"[30] during which the disputants engage in consultations. The purpose of this phase is to present conflicting positions and find the lowest common denominator. However, while an investor raising the dispute possibly has already established its facts and prepared its arguments, the government still needs time to internally coordinate and capture the facts of the dispute. This may hamper constructive negotiations.

Even when negotiations are conducted, such attempts often run the risk of ending in a deadlock. Moreover, in an asymmetrical relationship, the weaker party may need to accept an inequitable solution that leads to further frustration. There is no third party available to oversee negotiations and assist them in overcoming impediments.

Negotiation techniques are of course also utilized in other dispute resolution methods as a vital instrument for helping parties advance toward a solution. Indeed, negotiation is a fundamental and indispensable tool. Despite that, though, in highly sensitive cases where the parties'

[28] "Fact-finding" refers to a dispute prevention tool offered by ICSID according to which a committee conducts inquiries into and provides an assessment on relevant circumstances in the pre-dispute phase. The new ICSID Fact-Finding Rules, which entered into force on 1 July 2022, are available at: https://icsid.worldbank.org/rules-regulations/fact-finding/rules/introductory-note.

[29] Jonathan, B., Poulsen, L. N. S. and Waibel, M. (2017) "Investment Treaty Arbitration", in Jonathan, B., Poulsen, L. N. S., and Waibel, M. (eds) *The Political Economy of the Investment Treaty Regime*. Oxford University Press, pp. 59-92, p. 82.

[30] A "cooling-off period" in investment treaties is a specified period in which the claimant has should abstain from initiating arbitration proceedings and first attempt to find a solution amicably.

positions are particularly divergent, this method reaches its limits, and only some attempts lead to settlements.[31]

b) Conciliation

The ICSID Convention expressly provides for a choice between conciliation or arbitration.[32] In conciliation procedures, the parties to the dispute institutionalize and formalize the involvement of a third party. This involves establishing a conciliation commission to investigate and examine the facts and prepare a report that suggests a non-binding solution.[33] Although dispute resolution clauses in international treaties[34] refer to this method, it is rarely used in practice. As of this writing, ICSID has recorded only 11 conciliation cases (1.3% of total of ICSID cases).[35]

While some[36] may use the terms "conciliation" and "mediation" interchangeably, there are notable differences. Conciliation is a more formal, fact-based process that is less flexible than mediation. A conciliation commission has a more directive or intervening function, such that it has been referred to as "non-binding arbitration" or "mini-arbitration."[37] It should also be noted that the concept of "mediation" is now better understood internationally, and mediation is used more frequently than conciliation.[38]

c) Arbitration

Arbitration evolved into the default mode of domestic court proceedings for settling international investment disputes.[39] Most international investment agreements permit international arbitration under the ICSID Arbitration Rules or UNCITRAL Arbitration Rules or provide their

[31] For a detailed discussion on negotiation Merrills, J. G. (2017) "Negotiation" in Merrills, J. G. (ed) *International Dispute Settlement*, 6th edn, Cambridge: Cambridge University Press, pp. 1-21.
[32] The ICSID Convention (n 7) deals with Conciliation in Part III Articles 28–35, and with Arbitration in Part IV Articles 36-55.
[33] Dolzer, R. and Schreuer, C. (2012) *Settling Investment Disputes* (n 10), p. 236.
[34] For instance, the Bryan Treaties of 1913/1914; Vienna Convention on the Law of Treaties of 1969; Convention on the Law of the Sea of 1982; the Convention on Biological Diversity of 1992.
[35] ICSID (2022-1) "The ICSID Caseload – Statistics", available at: https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf, p. 9.
[36] Coe, J. J. (2005) "Toward a Complementary Use of Conciliation in Investor–State Disputes – A Preliminary Sketch", *Davis Journal of International Law & Policy*, 12(1), pp. 7-46, at p. 7.
[37] Titi, C. (2019) "Mediation and the Settlement of International Investment Disputes - Between Utopia and Realism", in Titi, C. and Gómez, K. F. (eds) *Mediation in International Commercial and Investment Disputes*. New York City: Oxford University Press, pp. 21–38, at p. 21 at n 2.
[38] The blending of these two methods is probably because ICSID until recently only had Conciliation Rules.
[39] According to ICSID Caseload – Statistics (2022-1) (n 35), Chart 3, p. 9, 90.6% of all ICSID cases were ICSID Convention Arbitration cases and 7.9% ICSID Additional Facility Arbitration cases; Titi, C. (2019) *Between Utopia and Realism* (n 37), p. 21.

own dispute settlement procedure.[40] These procedures typically do not require prior recourse in the domestic courts of the host state.[41] States occasionally also give prior consent to arbitration through domestic law. Finally, the parties' agreement to arbitrate may be established in an investment contract or, less frequently, in an ad hoc agreement.

Domestic courts possess defined, mandatory jurisdiction over particular classes of cases. In contrast, arbitration is a binding, private dispute resolution mechanism based on the agreement of the disputing parties to submit a conflict to a specific person (sole arbitrator) or persons (arbitral tribunal) for resolution. The party-appointed arbitrator listens, considers the facts and legal arguments, and then renders a final and binding decision (arbitral award). The parties may, however, settle at any point throughout the process.[42] The disputing parties have broad flexibility to determine how the arbitration is conducted. Their authority is subject only to the mandatory requirements of the arbitral rules they chose to govern the arbitration with as well as any mandatory procedural rules imposed by the investment treaty.[43] In ICSID arbitration, an award is subject to minimal review by the ICSID Annulment Committee and directly enforceable under the ICSID Convention. Non-ICISD awards (including awards rendered under the ICSID Additional Facility Rules) are enforceable under the New York Convention and are subject to limited review by domestic courts.

As an advancement from diplomatic protection and action in domestic courts (the traditional means of dispute resolution), arbitration offers investors direct and effective access to a neutral forum. The option for direct dispute resolution is likely to attract foreign investment. By consenting to international arbitration, the host state shields itself against other processes, notably diplomatic protection. It allows the parties to select arbitrators who have the necessary expertise in the field. In addition, the parties appreciate the confidential nature of the arbitration. However, the confidentiality of proceedings has been criticized, and many have demanded greater transparency in investor-state arbitration.[44]

[40] For instance, Section F of the Canada-European Comprehensive Economic and Trade Agreement ("CETA"), 14 January 2017, L 11/23, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017A0114(01)&from=EN.
[41] UNCTAD (2010) *Investor-State Disputes* (n 16), p. 10.
[42] On the effects of settlement agreements in arbitration, Pàez-Salgado, D. (2015) "Effects of Settlements in Investor-State Arbitration", *Kluwer Arbitration Blog*, 24 February 2015, available at: http://arbitrationblog.kluwerarbitration.com/2015/02/24/what-are-the-effects-of-a-settlement-agreement-between-the-locally-incorporated-company-and-the-host-state-on-the-foreign-shareholders-pending-bit-claim/.
[43] Jonathan, B., Poulsen, L. N. S. and Waibel, M. (2017) *Investment Treaty Arbitration* (n 29), p. 60.
[44] Dolzer, R. and Schreuer, C. (2012) *Settling Investment Disputes* (n 10), pp. 236, 286-286.

Although there is a deep-seated preference for arbitration, the practice is not without its deficiencies. In arbitration, parties relinquish control and defer responsibility to the arbitrator, making it difficult to predict the imposed outcome. Moreover, by the time the arbitration occurs, the relationship has typically been damaged to such a degree that the investment will not continue. Additionally, dispute complexity and issue novelty often result in lengthy and expensive arbitrations. In theory, the parties enjoy considerable autonomy to shape the proceedings through agreement, but this is difficult to exercise in practice once a dispute has arisen. Investor-state arbitrations also tend to involve vigorous battles over jurisdiction (a feature of nearly every case), challenges to arbitrators (seemingly with increasing frequency), and regular post-issuance attacks on the awards.[45] In part due to the arbitration characteristics just outlined, investor-state disputes settle or discontinue at an appreciable rate.[46] It has been argued that mediation might promote even higher settlement rates and, in particular, more satisfactory results.[47]

d) Mediation

In 2018, ICSID proposed stand-alone mediation rules to its member states that entered into force on July 1, 2022.[48] The ICSID defined mediation as "a consensual process in which parties negotiate their dispute directly with one another, with the help of a third party (the mediator). The mediator's role is to assist the disputing parties with their negotiations."[49] The ICSID further refers to mediation as "facilitated negotiation".[50]

The mediator clarifies disputed issues of fact and actively participates in the process, meaning they do not act solely as a communication channel. Instead, the mediator is authorized and expected to reconcile the conflicting positions by building an environment of trust and confidentiality through caucusing, unveiling needs and interests, advancing fresh ideas, transmitting each party's proposals to the other (if authorized), and sometimes by informally proposing solutions.[51]

The proposals the mediator makes are based on the information the parties themselves supply rather than through a separate investigation, which is a feature of *conciliation*. Furthermore,

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[45] Coe, J. J. (2019) *Should mediation of investment disputes be encouraged?* (n 11), p. 344.
[46] Ibid., p. 345; ICSID Caseload – Statistics (2022-1) (n 35), Chart 9, p. 13.
[47] Coe, J. J. (2019) *Should mediation of investment disputes be encouraged?* (n 11), p. 345
[48] ICSID Mediation Rules (n 2).
[49] ICSID (2021) "Background Paper on Investment Mediation", available at: https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_Investment_Mediation_Oct.2021.pdf, p. 1.
[50] Ibid.
[51] The concept of mediation with regard to proposing solutions to the parties is understood differently in different jurisdictions and also depends on the context and parties.

mediation focuses on interests instead of rights and encourages parties to design a bargain that is not circumscribed by the legal case of each.

For a mediation process to be successful, a cooperative attitude and active participation are crucial. Unlike an arbitrator, it is not the mediator's role to decide the legal merit of a claim based on past events, and they do not have the authority to impose a binding decision. The parties retain control of their dispute and are free to settle it in whole or in part and to determine the exact settlement terms, thereby allowing tailored solutions.[52]

In contrast, the win-lose format of *arbitration* typically produces a zero-sum, non-integrative outcome, often limited to announcing a monetary obligation or a lack of one. Unlike the imposed outcome of arbitration, a mediated result is the product of mutual assent and joint crafting, allowing a win-win outcome. For example, such a win-win outcome might mean reversing a decision to revoke a license rather than receiving compensation.[53] The award is not only unpredictable, but the prevailing party must take significant steps to recover even when an award is rendered in its favor. The prevailing party is also likely to face severe hostility from the defeated party. In addition, the time and expense required for arbitration are exceptionally high relative to the time and expense that parties might invest in mediation.[54] Mediation entails lower costs for the involved parties, in part because it is less pleading-intensive and requires lower costs for the institution or the neutral.[55] Another argument in favor of mediation compared to stand-alone arbitration proceedings is its potential to preserve relationships.[56] Establishing an investment relationship usually demands a substantial and long-term commitment of equity and other resources. If an investor resorts to investment arbitration, he or she should be aware that the process could burn bridges and alienate the host country. In only a few instances have the funds recovered through an arbitral award been reinvested in the host country.[57] Mediation allows parties to resolve the dispute early enough for the investment to potentially continue. Mediation can even improve business relationships where parties not only to settle their dispute but also exchange information about their needs and interests, using the opportunity to rebuild

[52] Coe, J. J. (2005) *Toward a Complementary Use of Conciliation in Investor–State Disputes* (n 36), p. 15; Harv. L. Rev. (2014) *Mediation of investor-state conflicts* (n 18), pp. 2543, 2549.
[53] Coe, J. J. (2005) *Toward a Complementary Use of Conciliation in Investor–State Disputes* (n 36), pp. 23-24.
[54] Weinstein, D. and Manukyan, M. (2019) "Making Mediation More Attractive For Investor-State Disputes", *Kluwer Arbitration Blog*, 26 March 2019: http://arbitrationblog.kluwerarbitration.com/2019/03/26/making-mediation-more-attractive-for-investor-state-disputes/.
[55] Coe, J. J. (2005) *Toward a Complementary Use of Conciliation in Investor–State Disputes* (n 36), p. 16.
[56] Ibid., p. 15. Welsh, N. and Schneider, A. K. (2013) *Harv. Negot. L. Rev.* (n 26) p. 77.; Salacuse, J. W. (2007) *Is there a better way?* (n 23), p. 155.
[57] Weinstein, D. and Manukyan, M. (2019) *Making Mediation More Attractive For Investor-State Disputes* (n 54).

mutual trust.[58] From an economic and political standpoint, a government may also want to convey favorable messages to potential foreign investors through its efforts to amicably resolve existing disputes. Arguably, mediation also provides ample opportunity to include non-disputant stakeholders in the process – at least to supply input. To that extent, it may facilitate community acquiescence or higher acceptance of the result. Mediation is also exceedingly flexible; it can adapt to diverse legal cultures and integrate with arbitration proceedings without unduly disrupting either process.[59]

Despite all these advantages, mediation rarely used in ISDS. One reason might be an absence of obligations to engage in it. Another could be that host country officials fear the responsibility for the settlement that comes with mediation. For self-protective reasons, government officials prefer a high loss blamed on the arbitrator to a lower-value settlement payment or a creatively designed renegotiated deal for which they must take personal responsibility. Finally, as mediation is not binding, it is not perceived as an adequate substitute for arbitration.[60]

However, if the process is well-designed and understood as an additional tool in the ISDS toolbox, the benefits are likely to outweigh the aforementioned concerns.

2.2.2 The mediation process

Mediation is an informal but structured process with five key elements, which this sub-section outlines. As in arbitration, the parties in mediation may agree that the process should be governed by a specific set of institutional rules, which the parties can typically tailor to their needs. The ICSID Mediation Rules (“MR”)[61], for instance, provide for the following mediation process (emphasis added):

> The mediation process commences with an agreement to mediate, which may be concluded before or after a dispute arises (MR 5-6). Once the parties have agreed to mediate (with or without the assistance of the ICSID Secretariat), they file a request for mediation, which is registered (MR 7). The next step is the selection and appointment of the mediator (MR 12-14). The mediator is appointed either by agreement of the parties or by the ICSID Secretary-General upon request of the parties. The parties then provide the mediator with initial written statements setting out the issues in dispute and their views on these issues as well as on the mediation procedure (MR 19). Thereafter, the mediator and the parties will meet to determine the ground rules for the conduct of the mediation (called the Mediation Protocol) (MR 19 and 20). During the process the mediator will assist the parties to identify their needs and interests and facilitate the negotiation of a mutually agreeable solution (MR 17-18, 21). If

[58] Welsh, N. and Schneider, A. K. (2013) *Harv. Negot. L. Rev.* (n 25), p. 77.

[59] Inspired by experimentation in private commercial process design, various hybrid formats are possible, see Thesis sub-section 2.2.3.

[60] Jonathan, B., Poulsen, L. N. S. and Waibel, M. (2017) *Investment Treaty Arbitration* (n 29), p. 83.

[61] ICSID Mediation Rules (n 2). Mediation under these rules is broadly accessible, open to all states and investors, not requiring any ICSID membership or nationality.

the parties reach an agreement on all or some of the issues in dispute, a settlement agreement will be concluded. (ICSID, Background Paper on Investment Mediation, 2021, p. 2)

i) Necessary pre-conditions

The fundamental precondition of mediation is the voluntary participation of all parties.[62] Parties can consent to mediate in advance or after a dispute arises.[63] In addition, investment treaties or host state's domestic laws may provide a standing offer to mediate, which an investor then accepts. Another option, though, is for the host state to initiate mediation when a dispute arises.[64] The mediator should ensure that only certain relevant persons attend the mediation sessions and clarify what ratification requirements and approval process would be necessary in case a settlement is considered. Specifically, only those with a maximum degree of authority to reach an agreement or who maintain a direct rapport with the agency possessing settlement authority should attend.[65]

ii) The mediator

The mediator is appointed by agreement from the parties.[66] It might be beneficial in particularly complex multi-party cases to appoint two mediators (so-called co-mediation) who represent different expertise, disciplines, genders, or cultural backgrounds.[67] The parties may freely agree to any particular qualifications they deem appropriate.[68] Despite being trained, certified, trustworthy, impartial and independent, and fair, the mediator must have excellent procedural/mediation process competence as well as communication and negotiation skills. Furthermore, the mediator should be familiar with other means of dispute resolution (like arbitration) and know how to combine them safely.[69]

The mediator should be able to understand the investor's and the governments' motivations and fears. Understanding the context and framework and being knowledgeable of issues common in investment disputes is advantageous for exploring the strengths and weaknesses of a party's asserted stance as well as for developing proposals and knowing when to enact them. Given the

[62] Although advance consent allows the mediation procedure to commence, it, by itself, is not sufficient to ensure its successful conclusion. Because it is a consensual proceeding, substantive consent is required. Titi, C. (2019) *Mediation and the Settlement of International Investment Disputes* (n 37), p. 35.
[63] ICSID MR 5-6.
[64] Titi, C. (2019) *Mediation and the Settlement of International Investment Disputes* (n 37), p. 35
[65] ICSID (2021) Background Paper (n 49), p. 9, Energy Charter Treaty, "Guide on Investment Mediation", 19 July 2016 (https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf), p. 9; see also ICSID MR 20(4).
[66] ICSID MR 13(1).
[67] ECT Guide on Investment Mediation (n 65), pp. 12-13, see also ICSID MR 13(1).
[68] ICSID MR 12(2).
[69] ECT Guide on Investment Mediation (n 65), pp. 12-13.

involvement of a state, the mediator should have experience with governments.[70] Possessing some background knowledge is, then, essential for understanding the complex issues inherent in investment controversies. However, expertise in investment law is not strictly necessary, as the parties may at any time agree to consult legal or other experts. Furthermore, employing two mediators – one process expert and one expert on factual issues – is another potentially suitable way for the parties to reach a solution.[71]

The parties may consider selecting a mediator known for applying a facilitative[72] rather than an evaluative approach.[73] There are different views on whether, and if ever, mediators should attempt to evaluate merits.[74] From the authors' point of view, a powerful mediator should be capable of applying several approaches. If requested to evaluate merits, it is vital that the mediator has deep exposure to investment law and never purports to conclusively predict the eventual outcome of an issue of substantive and procedural law. The mediator should use an evaluative approach only in a transparent way to encourage rethinking, devise suitable compromises, and lead parties to a win-win settlement. In so doing, the mediator should be well-versed in the regulations, guidelines, and rules of professional conduct that are applicable to investor-state mediation and the legal framework surrounding it.[75]

Other necessary qualifications, of course, include authenticity,[76] patience, perseverance, sensitivity, creativity, and flexibility, and awareness of his/her own and the parties' capacities.[77] Finally, the mediator should be able to determine when someone else must step in or when other means are needed. Exceeding the mediator's capacities causes the entire mediation to fail.

[70] ICSID (2021) Background Paper (n 49), p. 7.
[71] Weinstein, D. and Manukyan, M. (2019) *Making Mediation More Attractive For Investor-State Disputes* (n 54).
[72] "Facilitative" means that the mediator is only facilitating negotiations without assessing the merits.
[73] "Evaluative" means that the mediator, when invited, offers the parties an assessment of the merits.
[74] Arguably in investment disputes, an evaluative approach should be applied predominantly. Coe, J. J. (2019) "Concurrent Co-Mediation: Toward a More Collaborative Centre of Gravity in Investor-State Dispute Resolution", in Titi, C. and Gómez, K. F. (eds) *Mediation in International Commercial and Investment Disputes*. New York City: Oxford University Press, pp. 61-78, at pp. 75-76.
[75] IMI Competency Criteria for Investor-State Mediators of the International Mediation Institute, 19 September 2016, available at: https://www.imimediation.org/en/about/who-are-imi/ism-tf/imi-competency-criteria-for-investor-state-mediators/, pp. 3-6.
[76] A mediator should be aware of his/her own personality, his or her strengths, and weaknesses. To pretend differently does not help the process but irritates the parties, with the mediator risking the loss of credibility.
[77] Lenz, C. (2008) "Mediationsverfahren" in Hagen, J. and Lenz, C. (eds) *Wirtschaftsmediation*. MANZ'sche Verlags-und Universitätsbuchhandlung. Vienna, pp. 92-119, at pp. 107 et seq.

iii) Other participants involved

In addition to the parties and the mediator, legal representatives, experts, and non-disputing parties may attend the mediation if their input is required or beneficial for the resolution.

Legal representatives assume a different role in mediation than in adversarial processes such as arbitration. The focus is not on legal arguments or the submission of evidence; instead, lawyers should take a collaborative approach and assist their clients in exploring their true interests. In keeping those in mind, lawyers should seek forward-looking resolutions of the contentious issues within the governing legislative framework.[78]

The parties may also wish to employ experts, including financial or other experts who can provide a reality check, generate offers, or finalize detailed settlement terms.

Investor-state disputes are also likely to involve and affect civil society or other stakeholders. Because of the flexibility of the mediation process, parties are free to determine whether the participation of non-disputing parties is desirable and to define the scope and operational parameters for such involvement. This involvement could take the form of written submissions on specific points or more active participation.[79]

iv) The conduct of a mediation

The mediation process consists of three phases: 1) initial phase, 2) main phase (which in turn involves an opening phase, an exploration phase, and a negotiation phase), and 3) concluding phase.[80]

In the *initial phase*, parties submit written statements to the mediator summarizing the background of the controversy and status, as well as other material and information considered helpful to familiarize the mediator with the dispute.[81] Following this step, a first joint session is conducted, during which participants develop a protocol for conducting the mediation.[82] This

[78] ICSID (2021) Background Paper (n 49), p. 9.
[79] ICSID MR 19.
[80] ICSID (2021) Background Paper (n 49), p. 11; Lenz, C. (2008) *Mediationsverfahren* (n 77), p. 93 et seq.
[81] ICSID MR 19.
[82] ICSID MR 19, 20.

protocol covers issues such as language, venue(s), confidentiality, and disclosure of information.[83] The parties may also agree on the seat of mediation.[84]

Regarding the confidentiality of mediation proceedings, there is one fundamental rule: no confidential information obtained by the mediator from one party shall be disclosed by the mediator to another party or other participant except when explicitly authorized by the parties or as mandated by law or ordered by a court.[85] Typically, the parties explicitly agree that anything introduced into the mediation process shall be "without prejudice." Furthermore, unless the law governing the mediation stipulates otherwise, the mediator is precluded from giving testimony/advice/expert opinion in any pending or future investigation, action, or proceeding regarding the subject matter of the mediation.[86] Due to the involvement of states, some adaptations to strict confidentiality can increase the legitimacy of the process and potential settlement agreement in the general public's eyes. At the same time, government officials may be shielded from potential criticism of the reasonableness of any concessions or amounts paid to the investor. In turn, this may also facilitate the debunking of any corruption allegations associated with the mediation agreement.[87] A balanced approach between confidentiality and transparency could be to provide information about the existence of mediation between the parties and the most relevant elements of the agreement.[88]

In the first session, the mediator explains the procedural steps and the potential results in detail. He or she ensures that the correct attendees are present and that the required internal processes are in place to foster effective communication between the individuals attending the session and those with the authority to make decisions. Thus, in the first mediation session, the mediator addresses the proper representation of the parties and the ratification and approval procedures, accounting for the specific requirements for a binding agreement.[89]

The *main phase* begins with an opening, continues with exploration, and ends with the negotiation phase. Parties make their preliminary assertions during the main phase, while the mediator

[83] Confidentiality obligations and limitations on confidentiality may (1) be prescribed in international agreements applicable to the mediation; (2) be established by party agreement; (3) be set out in the investment mediation rules agreed upon by the parties; and (4) be established by the domestic legal framework applicable to the mediation and/or applicable to its participants (including for example domestic rules applicable to lawyers or mediator). ICSID (2021) Background Paper (n 49), p. 14.
[84] ECT Guide on Investment Mediation (n 65), pp. 13-18.
[85] Ibid., see also ICSID MR 10.
[86] ECT Guide on Investment Mediation (n 65), pp. 13-18.
[87] Ibid.
[88] IMI Competency Criteria (n 75), p. 2.
[89] IMI Competency Criteria (n 75), p. 2.

helps to explore the underlying interests and needs to find common ground and identify aspects important to the disputing parties. The mediator assists the parties in developing and exchanging settlement options.[90] Tools used in this phase may include holding joint and separate meetings (caucus),[91] seeking expert advice (e.g. legal, financial, etc.), and conducting field trips. The mediator is not authorized to prescribe a solution to the dispute and can only make proposals if jointly requested by the parties.[92] If consensus is reached on all or some of the disputed issues, a settlement agreement may also be attained.[93]

Mediators can use different strategies to persuade conflicting parties to settle. The criterion for differentiating strategies appears to be the degree to which a mediator influences the process and controls its outcome. Those strategies include the following: (i) communication-facilitation, (ii) formulation, and (iii) proactivity.[94]

The mediator as "communicator" functions as a channel of communication when parties to the dispute cease to communicate effectively. Strategies for communication include reaching out to parties, identifying needs and interests, explaining the situation, providing missing pieces of information, and actively listening. As a "formulator," the mediator assumes a more proactive stance, encouraging parties to reframe the issues or establish a formula for resolving their dispute. In this role, mediators must add the qualities of creativeness and ingenuity to the communicator's requirements of tact and empathy and must seek to discover the parties' real and fundamental interests. Formulation tactics additionally include controlling the pace and formality of sessions, proposing procedural steps and taking minutes to structure the process, and guiding the parties to narrow their focus to the key matters at issue. As a communicator and formulator, the mediator applies a purely *facilitative* approach.[95]

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[90] ICSID MR 17-18, 20-21; ICSID (2021) Background Paper (n 49), p. 11.
[91] Utilizing caucus sessions in the mediation process is a common and very useful feature in mediation. Sometimes only separate meetings allow the mediator to explore each party's underlying interests and concerns and identify barriers to settlement to develop possible settlement options. The principle of confidentiality applies. Information shared by a party with the mediator in caucus is confidential unless the disclosing party explicitly authorizes disclosure to the other party – see also ICSID MR 17(4) and ICSID (2021) Background Paper (n 49), p. 12; ECT Guide on Investment Mediation (n 65), pp. 13-18.
[92] ICSID MR 17(1) and 21(3).
[93] ICSID (2021) Background Paper (n 49), p. 2.
[94] A number of studies roughly distinguish between those types of strategies, echoing the classifications developed by Zartman, I. W. and Touval, S. (1985) "International Mediation: Conflict Resolution and Power Politics", *Journal of Social Issues*, 41(2), pp. 27–45.
[95] For a detailed description of mediation techniques see Lenz, C. (2008) "Mediationstechniken" in Hagen, J. and Lenz, C. (eds) *Wirtschaftsmediation*. MANZ'sche Verlags-und Universitätsbuchhandlung. Vienna, pp. 120-154.

Should these strategies prove ineffective at finding compromise, the mediator (if agreed by the parties) assumes a more proactive and *evaluative* role, potentially sharing its own assessment of the case.[96] The mediator attempts to change the parties' perceptions or persuade them to adopt a nimbler bargaining posture.[97] This strategy increases the chance of bringing the parties to an agreement. With the parties' consent, the mediator may also make his or her own settlement proposal at an appropriate stage of the mediation – usually when negotiations have reached an impasse.[98] If either party rejects, bargaining continues. If both parties accept, settlement occurs.[99]

In the *concluding phase*, the parties formulate and record the detailed terms of the settlement and, if necessary, seek the approval of the responsible authorities.[100] Furthermore, questions on enforceability are addressed during this phase. If the parties were unable to reach a settlement, the mediation is terminated, and other dispute resolution methods are potentially utilized.[101] Even if a settlement agreement is concluded, it is possibly that it settles only part of the dispute, with the remainder to be adjudicated in an arbitration or other forum.[102]

v) The outcome

The outcomes of the mediation process are as follows: the parties were unable to reach an agreement at all, they reached a verbal non-binding agreement, they reached a written non-binding agreement that specifies the settlement terms, or they reached a written and signed binding agreement.

Mediation is as effective as the disputants allow it to be; hence, the outcome of the mediation depends on the parties themselves. This is an essential characteristic of mediation that limits its possibilities but does not destroy its value. Sometimes, parties find no solution, and the only option is to terminate the mediation process. However, mediation is still successful if it allows the parties to enhance their understanding of the dispute and the interests involved, evaluate the merits of the opponent's position, and narrow the disputed issues. For instance, some investment

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96 IMI Competency Criteria (n 75), p. 3.
97 Bercovitch, J. and Wells, R. (1993) "Evaluating mediating strategies: A theoretical and empirical analysis", *Peace and Change*, 18(1), pp. 3-25, at pp. 7-8.
98 Weinstein, D. and Manukyan, M. (2019) *Making Mediation More Attractive For Investor-State Disputes* (n 54).
99 An example of a successful mediation after applying different strategies and tools is the mediation by Thomas Wälde in the energy dispute between the Swedish, State-owned company Vattenfall and the Polish State-integrated energy company PSE. See Wälde, T. (2006) "Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation", *Arbitration International*, 22(2), pp. 205-232.
100 IMI Competency Criteria (n 75), p. 2.
101 ICSID MR 22 and ICSID (2021) Background Paper (n 49), p. 11.
102 IMI Competency Criteria (n 75), p. 3.

treaties allow parties to reasonably engage in mediation during cooling-off periods. Such a step can lead to productive direct negotiations or streamline arbitration or adjudication.[103]

2.2.3 Hybrid proceedings

Mediation does not solely function as a stand-alone mechanism. Indeed, in investment disputes in particular, it might be beneficial to consider mediation as more than an alternative to arbitration. It can also be a flexible auxiliary process sometimes conducted before or after arbitration, as well as in between or even concurrently alongside arbitration when appropriate.[104]

The idea of a hybrid dispute resolution is supported by many arbitral institutions and their rules, reflecting users' desire for a flexible dispute resolution process tailored to their needs.[105] There are numerous possibilities for combining adversarial and consensual dispute settlement methods, each with its own potential merits and challenges.[106] Such processes can be employed in an existing dispute resolution clause, or they can be agreed upon after the dispute has arisen. This sub-section aims to briefly describe the most prominent hybrid processes and indicate why parties may opt for them. This sub-section is confined to the following combinations: a) Arb-Med, b) Med-Arb, and c) Arb-Med-Arb processes, as well as d) Shadow/Concurrent Mediation. It does not address arbitrator-facilitated settlements.[107]

a) Arb-Med

In one version of Arb-Med, the parties agree on a single neutral who assumes the role of both arbitrator and mediator. The neutral first conducts a formal arbitration by taking evidence and drafting an arbitral award. However, he or she does not disclose the findings to the parties,

[103] Weinstein, D. and Manukyan, M.(2019) *Making Mediation More Attractive For Investor-State Disputes* (n 54).
[104] Ibid.; ICSID (2021) Background Paper (n 49), p. 4; ECT Guide on Investment Mediation (n 65), p. 3; Sejko, D. (2020) "Background Paper for Session 3 – Hybrid Models of Arbitration and Mediation", *UNCITRAL Working Group III on ISDS Reform - Virtual Pre-Intersessional Meeting on the Use of Mediation in ISDS*, available at https://aail.org/wp-content/uploads/2020/11/2020_UNCITRAL_WGIII_Background_Paper_Session_3.pdf,p. 20; Coe, J. J. (2019) *Concurrent Co-Mediation* (n 74), p. 78.
[105] Chua, E. (2019) "Enforcement of International Mediated Settlements Without the Singapore Convention on Mediation", *Singapore Academy of Law Journal*, Vol. 31, pp. 572-597, at pp. 593-594. A highly regulated Arb-Med-Arb procedure is offered by the Singapore International Arbitration Centre's ("SIAC") and Singapore International Mediation Centre's ("SIMC") Arb-Med-Arb Protocol ("AMA Protocol"); others include the Vietnam Meditation Centre's Arb-Med-Arb Protocol, the Vienna International Arbitration Centre's ("VIAC") Arb-Med-Arb model clause.
[106] Chua, E. (2018) "A Contribution to the Conversation on Mixing the Modes of Mediation and Arbitration: Of Definitional Consistency and Process Structure", *Journal of Transnational Dispute Management*, pp. 1-15, at pp. 3-6.
[107] For a detailed commentary on arbitrator-facilitated settlements read Kaufmann-Kohler, G. (2009) "When Arbitrators Facilitate Settlement: Towards a Transnational Standard – Clayton Utz/University of Sydney International Arbitration Lecture", *Arbitration International*, Vol. 25(2), pp. 187-205.

instead keeping the award sealed in an envelope.[108] The arbitrator then switches roles and continues as mediator, facilitating communication between the parties to encourage settlement. At this stage, the parties have already had time to assess their legal positions but cannot predict the outcome of the arbitration. For the neutral, who is switching roles, this process is challenging since the parties might be tempted to elicit what is written in the award. The neutral must therefore be very experienced and immune to the parties' skilled interventions or their counsels' attempts to attain details of the award. Naturally, a counsel seeks the optimal outcome for their clients; consequently, he or she assesses proposals made during the meditation against the expected outcome of the arbitration. There is also a risk that the neutral is tempted to manipulate the parties in such a way that their settlement offers converge with the content of the arbitral award.

A mediation might also be utilized after an arbitral tribunal has issued an award. The parties may wish to negotiate the quantum and timing of payment or negotiate other terms in a less formal mediation setting after an award has been rendered.[109]

The benefit of having the same neutral person as arbitrator and mediator in the models mentioned in this sub-section is evident: namely, the potential cost and time savings.[110] However, as sub-section 4.4.2 discusses, concerns over matters such as impartiality and confidentiality make such double-hatting a controversial subject.

b) Med-Arb

This model engages mediation to reach an early amicable settlement to avoid arbitration (often during the cooling-off period, as some investment agreements stipulate). Arbitration, typically with the same neutral who switches roles, is only initiated if the parties are unable to reach a settlement agreement.[111] More precisely, arbitration proceedings are initiated when either of the following two circumstances occur. First, the mediation could fail to produce a positive outcome between the parties, leading to arbitration. Second, the negotiations could be successful, but the parties still choose to proceed with arbitration because they want to have the outcome

[108] The envelope would then be opened and the award binding upon the parties only if the mediation proves to have been without success.
[109] Coe, J. J. (2019) *Concurrent Co-Mediation* (n 74), p. 63.
[110] Ross, D. (2013) "Med-Arb/Arb-Med: A More Efficient ADR Process or an Invitation to a Potential Ethical Disaster?" in Rovine, A. W. (ed) *Contemporary Issues in International Arbitration and Mediation*, Martinus Nijhoff Publishers, Leiden/Boston, 2012, pp. 352-366, at pp. 357-358.
[111] Read further in: Scanlon, M. K. and Bryan, K. A. (2010) "Will the Next Generation of Dispute Resolution Clause Drafting Include Model Arb-Med Clauses?" in Rovine, A. W. (ed) *Contemporary Issues in International Arbitration and Mediation,* Martinus Nijhoff Publishers, Leiden/Boston, Vol. 3 2009, pp. 429-435, at p. 430.

converted into an award on agreed terms. In so doing, they would receive their desired globally enforceable title under the New York Convention. However, it is debatable whether this convention truly applies to awards on agreed terms, particularly when the settlement agreement is generated in the mediation session before an arbitrator has been appointed.[112] This form of hybrid proceedings must be carefully designed because jurisdictions apply different standards. In some jurisdictions, this may result in an unenforceable award, whereas in others med-arb settlements may be perfectly enforceable.[113] Sub-section 4.4.3 provides a more in-depth discussion of the enforceability of awards on agreed terms.

Against this background, practitioners prefer to use mediation only during or after the initiation of arbitration proceedings. This action embeds mediation in the arbitration process, as suggested in the following model.[114]

c) Arb-Med-Arb

According to this model, arbitration proceedings are initiated first, and settlement through mediation is typically attempted before conducting substantive arbitration hearings. If the same neutral acts as arbitrator and mediator, the arbitration is often stayed for a specified time (mediation window).[115] If mediation is successful, the proceedings can either be declared terminated or continued in arbitration to receive a consent award. If no agreement was reached during the mediation, the process at best resolved some of the issues in dispute, leaving the remainder to the arbitrator to decide. Although commentators agree that this model secures the international enforceability of a consent award under the New York Convention, it might not be the most cost-efficient choice. In addition, if the arbitrator and the mediator are a single individual, the concerns associated with double-hatting would apply as well, risking potential challenges.[116]

[112] Sekjo, D. (2020) *Hybrid Models of Arbitration and Mediation* (n 104), p. 25, for example denies the option to register a settlement reached through Med-Arb as an award enforceable under the New York Convention 1958.
[113] Cheng, T. (2010) "Reflections on Culture in Med-Arb" in Rovine, A. W. (ed) *Contemporary Issues in International Arbitration and Mediation,* Martinus Nijhoff Publishers, Leiden, Vol. 3 2009, pp. 421-429, at pp. 426-428.
[114] Singapore International Dispute Resolution Academy (2020) "SIDRA International Dispute Resolution Survey: 2020 Final Report":, available at: https://sidra.smu.edu.sg/sidra-international-dispute-resolution-survey-final-report-2020, pp. 73-76.
[115] ECT Guide on Investment Mediation (n 65), pp. 13-18.
[116] See in more detail sub-sections 2.4.2 and 2.4.3.

d) Shadow Mediation/Concurrent Mediation and Arbitration

This model has been proposed to address some of the issues present in other hybrid models.[117] The basic notion is that one or more mediators "shadow" the arbitration by introducing mediation at different points throughout the proceedings to generate an agreement that can be enshrined in an arbitral award. The appointed mediators and arbitrators[118] in this scenario must act cooperatively and simultaneously to achieve high efficiency and satisfactorily solve the dispute. The processes are treated separately. The arbitrator should not attend mediation sessions before a settlement agreement is reached, but he or she may arrange meetings with the parties in the presence of the mediators to render a consent award.[119] Thus, even if no final settlement is attained, the mediation shadowing the arbitration can enhance both the adversarial process and the parties' understanding of their cases. Although this model is highly promising and seems suitable for resolving investment disputes, it might involve higher costs.

The latest SIDRA survey indicated the reasons for a user's choice of hybrid proceedings.[120] Accordingly, the most critical factors users considered when selecting hybrid mechanisms over standalone arbitration were 1. the preservation of business relationships, 2. efficiency, 3. costs, and 4. speed.[121] When ranking the factors that influenced their choice of stand-alone mediation, users did not rank finality and enforceability of the outcome highly. Despite this, they considered them important factors for combining mediation with arbitration.[122] The results of the SIDRA survey overall revealed that hybrid proceedings have, from the users' perspective, the potential to reduce the disadvantages perceived in both stand-alone arbitration (lack of efficiency, costs, duration, destruction of relationship, win-lose outcome) and stand-alone mediation (lack of finality and enforceability).

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[117] See Coe, J. J. (2019) *Concurrent Co-Mediation* (n 74), p. 63 et seq., and Coe, J. J. (2011) "Concurrent Med-Arb (CMA) - Some Further Reflections on a Work in Progress" in Franck, S. D. and Joubin-Bret, A. (eds) *UNCTAD, Investor-State Disputes: Prevention and Alternatives to Arbitration*, II (2010) pp. 43-48, at pp. 46-47.
[118] This could be, for instance, three arbitrators and one mediator, one arbitrator and one mediator, or one arbitrator and two mediators.
[119] Coe, J. J. (2011) Concurrent Med-Arb (n 117), pp. 46-47.
[120] SIDRA Survey (2020) *Final Report* (n 114).
[121] Ibid., pp. 73-74.
[122] Ibid., p. 75.

2.3 Practice

2.3.1 Investment treaty clauses on mediation

This sub-section focuses on the recent evolution of the investor-state mediation framework in investment agreements.[123] Indeed, early Bilateral Investment Agreements ("BITs") BITs do not mention "mediation" explicitly. This omission was possibly due to an expectation that any investors would avail themselves of the ICSID's conciliation procedure.[124]

A review of more recent investment treaties demonstrated a discernible trend of including mediation as an additional option for dispute resolution. The "Overview of Investment Treaty Clauses on Mediation" published by ICSID in July 2021 indicated that such clauses can be divided in four categories.[125] These categories illustrate that the starting point was merely proposing mediation during the cooling-off period. More recent treaties, though, have proactively proposed mediation (also with very specific and conducive language and some with comprehensive procedural rules).

A *first category* of investment treaties explicitly allows for mediation or other methods of amicable dispute resolution before conducting arbitration. Dispute settlement clauses in earlier investment treaties often contained an amicable settlement period without further specifying the process the parties may use. What is required[126] is simply that the set cooling-off period (often 6 months) expires before the dispute can be referred to arbitration.[127] Other more recent treaties have used language such as "through non-binding third party procedures"[128] (with some

[123] To conduct this research and to access the investment treaties referred to in this sub-section, the UNCTAD Investment Policy Hub database has been utilized. The Investment Policy Hub is accessible at: https://investmentpolicy.unctad.org.
[124] Weeramantry, R., Chang, B., Sherard-Chow, J. (2020) "Investor-State Arbitration Meets Mediation: Putting Mediation and Conciliation Back into ISDS - The Asian Experience", *Kluwer Arbitration Blog*, 2 October 2020, available at: http://arbitrationblog.kluwerarbitration.com/2020/10/02/investor-state-arbitration-meets-mediation-putting-mediation-and-conciliation-back-into-isds-the-asian-experience/.
[125] ICSID (2021) "Overview of Investment Treaty Clauses on Mediation", available at: https://icsid.worldbank.org/sites/default/files/publications/Overview_Mediation_in_Treaties.pdf, which is based on Kang, D. and Sherard-Chow, J. (2021) "Dataset on Investor-State Conciliation and Mediation Provisions", *Centre for International Law (CIL)*. For another analysis, see Fan, K. (2020) "Mediation of Investor-State Disputes: A Treaty Survey", *Journal of Dispute Resolution*, Vol. 2, pp. 327-342.
[126] Whether this pre-step is really required, i.e. treated as "compulsory" or not, however, will depend on the specific arbitral tribunal. In more detail, Markert, L. and Titi, C. (2015) "States Strike Back - Old and New Ways for Host States to Defend Against Investment Arbitrations" in Bjorklund, A. (ed) *Yearbook on International Investment Law & Policy 2013–2014*, Oxford University Press, pp. 401-435, p. 409.
[127] Other claim that the parties cannot simply wait but that some sort of positive action is required to comply with such cooling off periods. See Schreuer, C. (2004) "Travelling the BIT Route - Of Waiting Periods, Umbrella Clauses and Forks in the Road", *Journal of World Investment & Trade*, 5(2), pp. 231-256, pp. 238-239.
[128] e.g. China-New Zealand Free Trade Agreement ("FTA") (2008) Article 152; US Model BIT (2012) Article 23, the Argentina-UAE BIT (2018) Article 20, the Taiwan-Viet Nam BIT (2019) Article 18.

adding expressly: such as mediation or other means)[129] or have specifically provided for optional mediation. Some have even included the state's prior consent to conduct mediation at the investor's choice .[130] While these treaties allow recourse to mediation, they are not precise and arguably not conducive to the use of mediation.

A *second category* of dispute settlement clauses extends further. It encourages mediation or other amicable dispute resolution methods by introducing certain requirements to be met during the cooling-off period. Such requirements include timeframes in which the mediation or other methods should commence[131] or that it should take place over a certain minimum timeframe.[132] Others include language such as "shall give favorable consideration to (e.g. mediation)".[133]

The *third category* promotes the utilization of mediation or other consensual settlement methods even more progressively. Some of these clauses impose an obligation on both disputing parties to undertake amicable means of dispute resolution (with mediation sometimes designated the default method).[134] Others encourage amicable dispute resolution procedures by requiring a specific process be conducted before initiating an arbitration.[135] In addition, some clauses state that the investor is obligated to participate in a stipulated procedure for amicable dispute resolution at the state's discretion.[136] Those provisions have not, then, singled out mediation as a method. Instead, they list it as a possible alternative to conciliation or solely mention conciliation.

The *fourth* – and arguably most enthusiastic – *category* of dispute resolution clauses in investment treaties comprises the clauses that permit mediation at any point in time (i.e., before or

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[129] e.g. Canada Model BIT (2021) Art 25, Dominican Republic-Central America-United States FTA (2006) Art 10.15; Australia-Hong-Kong IA (2019) Art 23.1, Australia-Peru FTA (2020) Art 8.19, Kazakhstan-UAE BIT (2018) Art 10, Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") (2018) Art 9.18, Central America-Republic of Korea FTA (2018) Art 9.16, Chile-Hong Kong, China SAR BIT (2016) Art 20.1, Norway Model BIT (2015) Art 14.2, Egypt-Mauritius BIT (2014) Art 10(1), South African Development Community Model BIT (2012) Art 29.1, Egypt- Switzerland BIT (2010) Art 12(1), Austria Model BIT (2008) Art 20, United States-Mexico-Canada Agreement (2018) Art 14.D.2. Although these clauses provide for voluntary mediation, they typically do not provide prior consent, thus requiring a separate mediation agreement.
[130] e.g. Mainland-Hong Kong, Mainland-Macau, Closer Economic Partnership Agreement ("CEPA") Investment Agreements (2017) Arts 19 and 20; China-Taiwan Province of China Cross-Straits Bilateral Investment Protection and Promotion Agreement (2012) Art 13.
[131] e.g. ASEAN Comprehensive IA (2009), Canada-Moldova BIT (2018), Belarus-Hungary BIT (2019), EU-Viet Nam IPA (2019), Japan-Morocco BIT (2020) and CETA (2017).
[132] e.g. Colombia Model BIT (2017) Art 13(3).
[133] e.g. Netherlands Model BIT (2019) Art 17.1.
[134] e.g. Common Market for Eastern and Southern Africa ("COMESA") Investment Agreement (2007) Art 26, Costa-Rica-UAE BIT (2017) Art 14.
[135] e.g. EU-Viet Nam IPA (2019) Article 3.35, EU-Singapore IPA (2018) Art 3.4.
[136] e.g. Mauritius-UAE BIT (2015) Art 10(3)(4), Armenia-UAE BIT (2016) Art 10.3, Indonesia-Australia CEPA (2019) Art 14.23, Hong Kong, China SAR-United Arab Emirates BIT (2019) Art 8(3).

during the period of amicable settlement or concurrently with a pending arbitration).[137] The EU-Singapore and the EU-Viet Nam IPA (see Annex 15-C) for example address the relationship between mediation and arbitration in more detail. The Burkina Faso-Canada BIT (2015) Article 23, the Canada-European Union Comprehensive Economic and Trade Agreement ("CETA") (2017) Article 8.20[138], the CPTPP (2018) Article 28.6, the Netherlands Model BIT (2019) Article 17(1), the Pacific Agreement on Closer Economic Relations Plus ("PACER Plus") (2017) Article 6 Chapter 14, the Belgium-Luxembourg Economic Union BIT (2019) Article 19, and the Thailand Model BIT (2012) Article 10, also serve as examples of this category. In these treaties, the parties are first required to enter a mediation agreement.

Certain characteristics are noticeable when reviewing the dispute settlement clauses:

First, most investment treaties do not regulate the mediation procedure, arguably to allow the parties to choose their desired process (e.g. by agreeing on specific institutional rules). However, some recent exceptions that include details on the process, giving the parties guidance, clarity about the structure, and predictability (for instance, CETA, 2017) with Annex 29-B[139] and 29-C.[140] Following this are the EU-Singapore IPA (2018) with its Annex 6[141] and the EU-Viet Nam IPA (2019) with its Annex 9). The COMESA IA (2007), Article 26(4), and the Belgium-Luxembourg Model BIT (2019), Article 19(C) give fewer details but still include some aspects of mediation. The Agreement for the Termination of Bilateral Investment Treaties between the member states of the EU takes a novel approach in which the word mediation/mediator is not explicitly mentioned but the most important attributes of mediation are described:[142]

> The settlement procedure shall be overseen by an impartial facilitator with a view to finding between the parties an amicable, lawful and fair out-of-court and out-of-arbitration settlement of the dispute which is the subject of the Arbitration Proceedings. The settlement

[137] This may include the use of stand-alone mediation as well as hybrid proceedings (see sub-section 2.2.3).
[138] CETA in Section F provides for a 3-stage-process when a dispute arises: Frist consultations under Art 8.19 (as a mandatory step), then, mediation under Art 8.20 (as a voluntary step) and, lastly, the initiation of arbitration under Art 8.23.
[139] Annex 29-B provides for a code of conduct for arbitrators, including disclosure obligations, duties of arbitrators, independence and impartiality of arbitrators, confidentiality, and more. The code of conduct applies, *mutatis mutandis*, to mediators.
[140] Annex 29-C sets out detailed rules of procedure for mediation, including initiation of the proceeding (Art 2), selection of the mediator (Art 3), rules of procedure for mediation (Art 4), implementation (Art 5), confidentiality (Art 6), time limits (Art 7), costs (Art 8), and review (Art 9).
[141] The EU-Singapore IPA sets out detailed provisions on practical and procedural issues, notably on the selection of the mediator, the initiation and conduct of the procedure, the implementation of a mutually agreed upon solution, the relationship with other dispute settlement methods, time limits and costs. Similarly, the EU-Viet Nam IPA.
[142] This is in line with some of the EU Commission's parallel efforts to push mediation in the context of investment protection, including to replace intra-EU BITs. See Charlotin, D. in IA Reporter, 27 July 2017 (https://www-iareporter-com.uaccess.univie.ac.at/articles/european-commission-unveils-plans-for-new-intra-eu-mediation-system-to-supplant-network-of-intra-eu-bits/).

procedure shall be impartial and confidential. Each party to the settlement procedure shall have the right to make its views known.[143]

Additionally noteworthy are China's Agreements with its two Special Administrative Regions (the CEPA Agreements), as they contain a detailed mediation mechanism with reference to specific mediation institutions.[144] They also contain other innovative aspects, including requirements for the qualifications and skills of mediators, provisions on enforcement of mediated settlements, confidentiality, and a compulsory mediation management conference procedure. These agreements do not provide for arbitration at all.[145]

Second, investment treaties more frequently contain an express "without prejudice" clause,[146] although this can also be agreed upon by the parties, and institutional rules usually foresee such a provision.[147] Similarly, questions of confidentiality and disclosure of information in mediation are explicitly provided for in some treaties,[148] although this can likewise be addressed by the parties and is usually addressed by institutional rules.[149]

Third, recent investment treaties provide more detail on the pre-arbitration period. The cooling-off period was typically not used to attempt to find a resolution to the dispute but rather to prepare for arbitration without interaction between the parties. Adding mediation explicitly at this stage (as one of the possible options under the heading "non-binding third party processes") may help the parties gain structure and guidance through third-party assistance rather than simply await arbitration. This development is also reflected in more recent treaties.

The *Fourth*, including compulsory mediation in dispute settlement clauses, has thus far not received considerable support in treaty practice. The aforementioned investment agreements envisage non-binding mediation of investor-state disputes as a complementary means of dispute

143 Article 9(7) of the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, L 169/1, 29 May 2020, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A0529(01)&from=EN.

144 For Mainland it is the Mediation Center of the China Council for the Promotion of International Trade/the China Chamber of International Commerce, and the China International Economic and Trade Arbitration Commission (CIETAC). For Hong Kong it is the Hong Kong Mediation Commission (HKMC) of the Hong Kong International Arbitration Centre and the Mainland-Hong Kong Joint Mediation Center (MHJMC).

145 China-Macau CEPA Investment Agreement (2017) and the China-Hong Kong CEPA Investment Agreement (2017) Art 19.1.

146 e.g. Canada Model BIT (2021) Art 26, Argentina-Japan BIT (2018) Art 25(1), CPTPP (2018) Art 9.18(3), also CETA (2017) Art 8.20(2); EU-Singapore IPA (2018) Art 6 (2) of Annex 6, Belgium-Luxembourg Economic Union Model BIT (2019) Art 19, Thailand Model BIT (2012) Art 10.4, CPTPP (2018) Art 28.6.

147 e.g. ICSID MR 11.

148 e.g. Thailand Model BIT (2012) Art 10.4, and CETA (2017) in Annex 29-C Art 6, PACER Plus (2017) Art 6 Chapter 14, CPTPP (2018) Art 28.6, EU-Singapore IPA (2018) Art 6(3) of Annex 6.

149 e.g. ICSID Mediation Rule 10.

resolution. Some authors[150] have argued that mandating compulsory mediation could provide the incentive necessary for parties to mediate, increasing the number of disputes referred to mediation and therefore also raising the number of settlements. Other scholars strongly disagree.[151] Those who disagree believe that mediation is inherently a voluntary method and should not be forced. In their view, good faith cannot be guaranteed, and such mandatory clauses could substantially increase duration and costs.[152] The author agrees with the second school of thought in principle, while emphasizing that mediation should be encouraged. Sometimes a bit of pressure is needed to try new things. For instance, requiring parties to attend one mediation session, with the parties then deciding for themselves whether to pursue it further, might foster the choice of mediation.[153]

2.3.2 Cases

Due to the confidential nature of mediation, it is challenging to find tangible data on the utilization of mediation in investment disputes. An electronic research uncovered only a few reported cases with little information.[154] Subject to the applicable rules, parties are free to decide to keep the mediation completely confidential.[155] However, in some reported instances, tribunals have encouraged parties to attempt amicable dispute resolution, such as *Achmea v. Slovakia.*[156] In others, parties themselves have agreed to conduct mediation either i) before the

[150] Welsh, N. and Schneider, A. K. (2013) *Harv. Negot. L. Rev.* (n 26), pp. 129–130; Weinstein, D. and Manukyan, M. (2019) *Making Mediation More Attractive For Investor-State Disputes* (n 54); see also Claxton, J., Nottage, L. and Ubilava, A. (2020) "Pioneering Mandatory Investor-State Conciliation Before Arbitration in Asia-Pacific Treaties: IA-CEPA and HK-UAE BIT", *Kluwer Arbitration Blog*, 5 September 2020, available at: http://arbitrationblog.kluwerarbitration.com/2020/09/05/pioneering-mandatory-investor-state-conciliation-before-arbitration-in-asia-pacific-treaties-ia-cepa-and-hk-uae-bit/.

[151] Titi, C. (2019) *Mediation and the Settlement of International Investment Disputes* (n 37), p. 34.

[152] For a further analysis on the users' perception on introducing mandatory mediation, see Kessedjian, C., et al (2020) "Mediation in Future Investor-State Dispute Settlement", *Academic Forum on ISDS Concept Paper 2020/16*, available at: https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf, pp. 10-11.

[153] In more detail: Claxton, J. M. (2020) "Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Demands?", *Pepperdine Dispute Resolution Law Journal*, 20(1), pp. 78-100.

[154] The method used for this research has been to investigate all cases that list mediation in available databases and to review articles in key online resources and make a comprehensive electronic check on available ISDS related documents. The few reported cases presented in this sub-section can be largely found on https://www.iareporter.com.

[155] Esmé Shirlow (2016) "The Rising Interest in the Mediation of Investment Treaty Disputes, and Scope for Increasing Interaction between Mediation and Arbitration", *Kluwer Arbitration Blog*, 29 September 2016, available at: http://arbitrationblog.kluwerarbitration.com/2016/09/29/the-rising-interest-in-the-mediation-of-investment-treaty-disputes-and-scope-for-increasing-interaction-between-mediation-and-arbitration/.

[156] In this case, the tribunal emphasized that the "the black and white solution of a legal decision in which one side wins and the other side loses is not the optimum outcome in this case". PCA Case No. 2008-13, *Achmea B.V. v. The Slovak Republic*, Final Award, 7 December 2012, https://www.italaw.com/sites/default/files/case-documents/italaw3206.pdf.

notice of arbitration, ii) after the notice of arbitration is served, iii) in parallel with arbitration, or iv) as an alternative to arbitration.[157]

i) In a construction case (*Oztas Construction v. Libya*), the claimant (a Turkish investor) in 2015 submitted a mediation request to the ICC ADR Centre and the respondents (LIDCo and Libya). The claimant expressed a willingness to resolve the dispute amicably through mediation in line with the ICC Mediation Rules. The claimant also, though, threatened arbitration if contractual obligations were not complied with. The respondents did not answer to the request for mediation, and the claimant therefore resorted to arbitration. The respondents contested that the cooling-off period provided for under the Turkey-Libya BIT had been met by the mediation request. They further argued that the request was not properly served to Libya, as Libyan law did not authorize the Libyan Embassy to accept notifications on the state's behalf. The tribunal rejected both contentions.[158]

Another investor-state mediation was held in 2016 between the *Commercial Bank Guinea Equatorial* and its principal shareholder, *Yves-Michel Fotso*, as claimants against the State *Equatorial Guinea*. Mediation was agreed upon in a settlement agreement signed by all parties (the 2012 Protocol), which was meant to settle an arbitration award won by the bank. However, it was not adhered to by all parties. In accordance with the protocol's dispute resolution provisions, a mediation was initiated with Michèle Weil-Guthmann as mediator. However, the parties failed to reach an agreement and therefore continued with arbitration. The arbitral tribunal held Equatorial Guinea liable for failing to comply with the settlement agreement.[159]

An attempt for amicable dispute resolution was reported in ICSID-claims in relation to the energy sector between *Duke Energy and Electroquil v. Ecuador* for certain breaches of the US-Ecuador BIT. A local mediation took place in December 2000 based on a mediation agreement concluded between the Ecuadorian Ministry of Energy and Mines and Ecuadorian corporation Electroquil S.A. to settle disputes over

[157] See also Kessedjian, C., et al (2020) *Mediation in Future Investor-State Dispute Settlement* (n 151), p. 9 et seq.
[158] *Oztas Construction v. Libya*, final award, 14 June 2018, ICC Arbitration No. 21603/ZF/AYZ (full text: https://www-iareporter-com.uaccess.univie.ac.at/wp-content/themes/iareporter/download.php?post_id=41935).
[159] *CBGE and Yves-Michel Fotso v. Equatorial Guinea*, award unpublished, IAReporter news, 15 February 2021 (for a summary, see: https://www-iareporter-com.uaccess.univie.ac.at/articles/investigation-equatorial-guinea-loses-icc-arbitration-due-to-failure-to-comply-with-earlier-settlement-agreement-in-investment-dispute/).

fines and performance. However, the mediation was unsuccessful (not much further is known), and it became a local arbitration proceeding.[160]

ii) There was also a dispute between the Republic of Philippines and Systra SA and its local subsidiary Systra Philippines Inc. (*Systra v Philippines*). Within it, a mediation was conducted right after the initiation of arbitration under the France-Philippines BIT. The dispute arose from unresolved issues with several infrastructure projects. To avoid arbitration, the parties decided to refer their dispute to mediation under the 2012 IBA Rules for Investor-State Mediation, with institutional support by the ICC-ADR Centre. The mediator was J. Christopher Thomas.[161]

In a mining dispute between the Central African Republic and a Canadian miner, Axmin (*CAR v Axmin*), the two parties only recently agreed to proceed to mediation under the auspices of ICC, a few months after Axmin had submitted an arbitration claim to the ICC in June 2020. The dispute centered around a stalled gold mining project. It was reported that the parties agreed to mediation to resolve the difficulties "within a short period of time" and that the mediation is still pending; however, nothing further has been revealed yet.[162]

iii) A mediation conducted in parallel to arbitration occurred between the Pan African Burkina group and Burkina Faso (*Pan African Burkina and others v Burkina Faso*). The dispute arose from a 2012 public private partnership agreement (PPP Agreement) regarding the exploitation of a manganese deposit in Burkina Faso and railway projects connected to it. Political changes in the state led to the suspension of Pan African's required expert permit in 2016, and negotiation attempts to resolve the issues failed. A parliamentary commission on mining activities even recommended that the government end its partnership with Pan African and begin corruption investigations against the owner of Pan African, *Frank Timis*. At that point, in accordance with the PPP Agreement, Pan African decided to start mediation proceedings with Ouagadougou's Arbitration, Conciliation and Mediation Centre

[160] *Ministry of Energy and Mines (Ecuador) v Electroquil S.A.*, December 2000 (IAReporter news, 26 August 2008: https://www-iareporter-com.uaccess.univie.ac.at/articles/duke-energy-obtains-5-57-million-us-in-dispute-with-ecuador-over-energy-generation/).

[161] *Systra SA v Philippines* (IAReporter news, 14 April 2016: https://www.iareporter.com/articles/in-an-apparent-first-investor-and-host-state-agree-to-try-mediation-under-iba-rules-to-resolve-an-investment-treaty-dispute/).

[162] *Central African Republic v Axmin* (IAReporter news, 3 July 2021: https://www-iareporter-com.uaccess.univie.ac.at/articles/western-africa-round-up-angola-is-set-to-ratify-the-icsid-convention-a-new-icc-tribunal-in-a-dispute-involving-ivory-coast-a-mining-mediation-with-the-central-african-republic-and-a-new-award-agai/).

(CAMC-O). However, before the mediation was concluded, Pan African submitted its arbitration request with the ICC, claiming damages for the project's expropriation. Burkina Faso counterclaimed damages in an almost identical amount. According to the investors, one of the reasons to seek arbitration was their lack of success in mediation. Burkina Faso contended that the arbitration claims were inadmissible, arguing that Pan African had begun the arbitral proceedings before the mediation concluded. They did not, according to Burkina Faso, await the three-month period between the end of the mediation and the initiation of arbitration proceedings as provided for in the PPP Agreement. In the award from spring 2019, the arbitral tribunal held the claims admissible based on three arguments. First, the mediation rules allow for parallel proceedings if necessary to preserve the party's rights. Second, Pan African, in its request for arbitration, had indicated that the tribunal would need to decide the dispute if the mediation failed, which indicated that Pan African did not unduly hinder the mediation proceedings. Third, although the PPP Agreement foresees a time period, a violation of that period, according to the tribunal, does not lead to a forfeiture of the claimant's rights.[163]

In 2019, another mediation case was initiated (*Sierra Leone v Timis Mining*). Sierra Leone's recent canceling of several mining licenses led companies based on mining and infrastructure contracts to bring arbitration claims against the state. It was reported that Timis Mining, also active in the region (and associated with Frank Timis), asked the government to enter a mediation process.[164]

No case with concurrent mediation and arbitration (see above, sub-section 2.2.3 d)) has been reported thus far. Consequently, the author strongly recommends reading Jack J. Coe's book contribution "shadow mediation," in which he leads the reader through a hypothetical mediation case ("Water Delivery in Ruritania") and demonstrates several features of a successful shadow co-mediation.[165] Accordingly, the

[163] *Pan African Burkina and others v Burkina Faso* (IAReporter news, 18 March 2020: https://www-iareporter-com.uaccess.univie.ac.at/articles/analysis-aynes-chaired-icc-tribunal-finds-that-state-validly-terminated-public-private-partnership-and-rejects-corruption-allegations/, and IAReporter news of 3 July 2018: https://www-iareporter-com.uaccess.univie.ac.at/articles/icc-tribunal-refuses-to-grant-provisional-measures-absent-irreparable-harm/.
[164] *Sierra Leone v Timis Mining* (The Patriotic Vanguard, 11 October 2019: http://thepatrioticvanguard.com/government-of-sierra-leone-versus-sl-mining-and-shandong) and IAReporter news, 11 October 2019: https://www-iareporter-com.uaccess.univie.ac.at/articles/west-africa-investor-arbitration-round-up-cases-involving-ghana-cameroon-sierra-leone-and-cote-divoire/.
[165] Amongst others: using the evaluative approach, caucus sessions, concurrency, co-mediation.

arbitration and mediation processes must be coordinated to a certain degree. The two types of neutrals (at best one arbitrator and two mediators) should collaborate and coordinate their activities.[166]

iv) Another recent case was a contract-based dispute between a mine operator and Mali relating to a gold mine located in South-Eastern Mali (*Societe des Mines de Loulo S.A. (Somilo) v. Mali*). A mediation followed an award rendered by an ICISID tribunal in 2016. Jurisdictional objections by the respondent claimed the investor had failed to first attempt to settle the dispute amicably as required by the establishment agreement (EA). These objections were rejected by the tribunal. There was no cooling-off period – only a negotiation requirement in the EA, which the investor at several junctures tried to initiate. For this reason, the tribunal felt that it was competent to decide upon the case and awarded the claimant around EUR 29.2 million for taxes wrongly levied by the state. In 2017, the investor reported that Mali had complied with the award but that the state's tax authorities had refused to recognize the tribunal's finding that VAT payments are recoverable. This led to further disputes over VAT reimbursements. To resolve them, the parties apparently agreed to conduct mediation instead of arbitration. In 2019, it was reported that "the government and Barrick's Mali management team had made progress in resolving outstanding tax disputes and the company expected to conclude the agreed mediation process soon."[167]

In a case between a foreign investor and a state in Africa (parties unknown), the investment contract at issue only provided for arbitration. Despite this, the parties decided to attempt mediation to avoid ceasing operations. The parties were not, however, able to settle at that point in time. Therefore, they proceeded with arbitration. In the arbitration process, the parties did come to an agreement. According to the mediator (Stephen Schwebel), preparations for the mediation were inadequate, and he was not provided sufficient information. Moreover, due to the complexity of the case, the mediator would have needed additional assistance by an informed economic and business team to introduce profound financial and technical ideas. The

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[166] Coe, J. J. (2019) *Concurrent Co-Mediation* (n 74), pp. 62-70.
[167] See the Barrick Report Q2 of 2019: https://barrick.q4cdn.com/788666289/files/doc_news/2019/08/Strong-Q2-Points-to-Annual-Production-at-Top-End-of-Guidance-Range-for-Barrick.pdf; and IAReporter news, 13 November 2019: https://www-iareporter-com.uaccess.univie.ac.at/articles/revealed-in-confidential-award-in-societe-des-mines-de-loulo-s-a-somilo-v-mali-tribunal-found-breach-of-contractual-tax-stabilisation-clause/.

mediator assumed that the exchange of written pleadings among the parties in the arbitration and the prospects of a binding decision were conducive to a settlement in this case.[168] No information is available on whether the mediation proceeding before the arbitration also contributed to the rapprochement of the parties' positions, which is plausible.[169]

Another case where parties resorted to mediation as an alternative to arbitration was *Vattenfall-PSE Swepol Dispute* in its formal stages from late 2002 to 2003. The parties were unable to reach an agreement themselves but – following the suggestions of an external legal adviser – concluded a procedural deal to submit the dispute to a formal mediation process. This in itself shows the parties' efforts to reach an agreement to preserve their business relationship – arguably the ideal prerequisite for a mediation. The investor agreed to postpone filing a notice of arbitration, and Thomas Wälde was appointed the sole mediator in the energy dispute between Swedish state-owned company Vattenfall and Polish State-integrated energy company PSE. In contrast to the dispute mediated by Stephen Schwebel, the mediator in this instance was provided complete files of previous negotiations and was assisted by three high-level experts in the field of electricity regulation, electricity engineering, and financial analysis. The complete files and extensive "intelligence gathering" through formal and informal bilateral consultation helped the mediator identify the issues impeding a settlement. The next important step for the mediation team was to connect the information gathered and internally brainstorm about the proposal they would forward to the parties. Then, the mediator prepared two formal papers. One reflected the project's history, the parties' interaction, negotiation attempts, perceptions of the parties and external factors. The other assessed in detail each party's particular situation based on document review, consultations, and additional investigation by the mediator. The focus was to highlight each parties' situation, interests, and strategies and to emphasize the benefits of reaching an agreement in mediation compared to the risks of arbitration. When the time was right, after another round of consultations, the mediator and his team of experts devised a proposal that was further developed and negotiated by the senior executives of both parties. In the end, the

[168] Schwebel, S. M. (2011) "Is mediation of foreign investment disputes plausible?", *Justice in International Law*, pp. 318-323, at pp. 318-319.
[169] Sim, C. (2018) "Conciliation of Investor-State Disputes", Conference Paper, *UNCITRAL Emergence Conference: Asian Perspectives on the Harmonisation and Convergence of Business Laws*, pp. 1-35, at p. 238.

parties were satisfied that the proposal was rooted in their own ideas and were able to implement it to their mutual benefit. Preserving the business relationship was the best outcome for both parties.[170]

The most recent reported mediation case was the *US-Korean fuel cell dispute*, which occurred between Connecticut-based FuelCell Energy (a fuel cell manufacturer) and South Korea's POSCO Energy and a subsidiary (the largest private energy producer). Mediation occurred after the parties had gone through five ICC arbitrations in which claims and counterclaims exceeded $1 billion USD.[171] The mediation conducted by George Lim SC at the Singapore International Mediation Centre was successful, and the agreement was published in a stock exchange filing.[172]

While noting that many cases are not disclosed, the author concludes this sub-section with the two most recent reported cases. The first was the case of the *Dominican Republic and Oldebrecht*, which was successfully mediated in January 2020 by international mediator Mercedes Tarrazón under the ICC Mediation Rules.[173] The second is a pending mediation case conducted under the new ICSID Mediation Rules.[174] Although these cases have revealed exceedingly little information, both are worth mentioning. In the first case, Mercedes Tarrazón highlighted procedural resemblances between mediation in ISDS and cross-border commercial mediation between entities, which supports the idea of adapting existing frameworks to the ISDS context. The second case simply proves interest in an additional form of dispute resolution in ISDS.

[170] The mediator himself presents a detailed analysis of the mediation proceedings in: Wälde, T. (2006) *Efficient Management of Transnational Disputes* (n 99), at pp. 218 et seq. He also reports on three other mediation cases in Wälde, T. (2004) "Proactive Mediation of International Business and Investment Disputes Involving Long-Term Contracts: From Zero-Sum Litigation to Efficient Dispute Management", *Bus. L. INT'l*, Vol. 99, pp. 103-106.

[171] Settlement Agreement with POSCO Energy Co., Ltd. and Korea Fuel Cell Co., Ltd. of 20 December 2021, at: https://d18rn0p25nwr6d.cloudfront.net/CIK-0000886128/8905af08-615e-465e-8f06-ebdeabf4f5e9.pdf.

[172] For a detailed report on the dispute, cf. Jack Ballantyne, "US-Korean fuel cell dispute settles", *Global Arbitration Review*, 6 January 2022, available at: https://globalarbitrationreview.com/settlements/us-korean-fuel-cell-dispute-settles?utm_source=US-Korean%2Bfuel%2Bcell%2Bdispute%2Bsettles&utm_medium=email&utm_campaign=GAR%2BAlerts#.

[173] Mercedes Tarrazón reported on the case in a conference on Investor-State Mediation, organized by BIICL in cooperation with the ISDS Mediation Working Group, on 8-9 December 2020. For further information, see https://www.biicl.org/blog/17/investor-state-mediation-trends-risks-and-opportunities?cookiesset=1&ts=1627849851.

[174] This information was shared by ICSID Legal Counsel, Frauke Nitschke, at the side event "Round-table on Investor-State Mediation" during the 54th Session of the UNCITRAL Commission, on 7 July 2021: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/flyer_icsid_event.pdf.

2.4 Recent Developments and key Issues

2.4.1 Emerging institutional framework

The international community is formulating an institutional framework for the use of mediation in the ISDS context. As part of the general reform discussions on ISDS, the UNCITRAL Working Group III on Investor-State Dispute Settlement Reform is exploring mediation as a method to resolve investor-state disputes. This approach has received considerable support, notably from China, Indonesia, Thailand, the EU, and the US. Investor-state mediation received formal backing early on from the European Commission in particular.[175]

With expertise in drafting procedural rules, several arbitral and other types of institutions recently published investment-specific mediation rules and/or guidelines, some of which have existed for years. As such, in 2018, the ICSID proposed the adoption of new mediation rules. These entered into force on 1 July, 2022 and have since been used in at least one mediation. In addition, the ICSID offers mediator training specifically for investor-state disputes.

The International Bar Association Rules on Investor-State Mediation ("IBA Rules for Investor-State Mediation") were formally adopted on 4 October, 2012 and drafted by the IBA Subcommittee on State Mediation. They were the first regulations designed specifically for investor-state disputes.[176] Mediation under the IBA Rules may be conducted at any time, even if other dispute resolution proceedings have already been initiated.[177]

Regarding guidelines, the Energy Charter Conference, supported by several institutions (the ICSID, the SCC, the PCA, and UNCITRAL) adopted the Energy Charter Treaty Guide on Investment Mediation ("ECT Guide on Investment Mediation").[178] Their goal in doing so was to assist investors and governments in deciding whether to use mediation. The International Mediation Institute Competency Criteria for Investor–State Mediators ("IMI Competency

175 European Commission (2015) "Online Public Consultation on Investment Protection and Investor-To-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)", p. 89, available at: https://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.
176 IBA Rules for Investor-State Mediation of the International Bar Association, 4 October 2012, available at: https://www.ibanet.org/MediaHandler?id=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C.
177 For a discussion on the IBA Rules for Investor-State Mediation, see Joubin-Bret, A. and Legum, B. (2014) "A Set of Rules Dedicated to Investor-State Mediation: The IBA Investor-State Mediation Rules", *ICSID Review - Foreign Investment Law Journal*, 29(1), pp. 17-24, at p. 19.
178 ECT Guide on Investment Mediation (n 65).

Criteria")[179] must also be mentioned in this regard, as they aim to facilitate the selection of competent and suitable mediators for investor-state disputes.

When designing procedural rules, most institutions have referred to those devised for commercial mediation.[180] The Vienna International Arbitral Centre only recently adopted the VIAC Rules of Investment Arbitration (Part I) and Mediation (Part II). Indeed, the Vienna Investment Mediation Rules are identical to those for commercial disputes because they were deemed sufficiently flexible and adaptable to the parties' needs. Pursuant to the Introduction to the VIAC Rules, "the VIAC Rules of Investment Mediation ("Vienna Investment Mediation Rules") complement the Vienna Investment Arbitration Rules, and may be used either independently of, or in conjunction with, arbitration proceedings."[181]

Another interesting development was the 2018 amendment of the "Model Law on International Commercial Conciliation" from 2002, now entitled the "UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation" (henceforth the "UNCITRAL Model Mediation Law").[182] Furthermore, as an update to the UNCITRAL Conciliation Rules of 1980, the recent adoption of the UNCITRAL Mediation Rules (2021).[183]

These rules complement the introduction of a multilateral instrument on enforcement: the Singapore Convention. It opened for signature in Singapore on 7 August, 2019 and entered into force on 12 September, 2020.[184]

These are all promising developments that will likely enhance the use of mediation in the future. However, at the moment, it is difficult to determine the frequency at which mediation is currently used in ISDS. This is due to a lack of documentation resulting from confidentiality and little practice. It is imperative to understand the reasons parties are reluctant to revert to

[179] IMI Competency Criteria (n 75).
[180] e.g. the 2014 Mediation Rules of the International Chamber of Commerce (ICC), the 2014 Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the 2012 Mediation Rules of the London Court of International Arbitration (LCIA), the 2021 Vienna Mediation Rules of the Vienna International Arbitral Centre (VIAC). Also, the Hong Kong International Arbitration Centre's (HKIAC) Mediation Rules and the Optional Conciliation Rules of the Permanent Court of Arbitration (PCA) have been in effect for some time.
[181] VIAC Rules of Investment Arbitration and Mediation 2021, entered into force 1 July 2021, available at: https://www.viac.eu/en/investment-arbitration/content/vienna-rules-investment-2021-online.
[182] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation of 2018, published in 2022 in Vienna, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01363_mediation_guide_e_ebook.pdf.
[183] UNCITRAL Mediation Rules, adopted in 2021, published in 2022 in Vienna, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01369_mediation_rules_ebook_1.pdf.
[184] Singapore Convention (n 3).

mediation and, amid increasing criticism of arbitration, clearly continue to prefer to rely on arbitration. It is evident that mediation in the investor-state context differs from that in standard commercial situations. A solid framework is therefore required to permit parties to mediate. To achieve this framework, stakeholders must be aware of the concerns and impediments to the broader use of mediation in the ISDS-system.

2.4.2 Remaining concerns

The author identified several main concerns on the state's side. These are internal complexities and uncertainty regarding authorizations, fear of corruption allegations,[185] fear of personal liability and criticism,[186] and the appearance of weakness and thus the encouragement of frivolous claims and speculations. From the investor's perspective, there are likewise concerns about the sign of weakness but also the probability of simply prolonging an already expensive process due to a lack of structure and of a guaranteed result. Most importantly, investors are hesitant due to a lack of guaranteed compliance. According to the SIDRA survey,[187] enforceability is one of the main criteria when selecting a dispute resolution method. This is especially true in investment disputes, where there is usually much at stake. In these cases, the outcome of the mediation extends beyond monetary compensation as awarded by an arbitration tribunal. It also includes specific performance from the parties to the mediated settlement, making the possibility to enforce the settlement terms an essential component.

In principle, voluntary compliance of a mediation settlement agreement is more probable because it is the parties themselves that craft a solution they perceive as fair and capable of performing.[188] However, there may be instances where settlements are not adhered to.[189]

[185] An evaluative approach to mediation in investor-state disputes, including written settlement proposals submitted by a mediator in a written report, thus allowing some transparency, as well as the administration of the mediation process by an institution can help to ease fears of potential allegations of corruption or abuse of powers towards the government authorities representing the state in such mediation. Cf. ECT Guide on Investment Mediation (n 65), p. 16.

[186] While in arbitration, responsibility will be shifted to the arbitral tribunal that determines the outcome of the award, in mediation, the government official himself will have to take responsibility for any concessions included in a settlement agreement, risking being questioned by political opponents and the public in general. Cf. Ibid.

[187] Users selected enforceability as one of the top three factors influencing their choice of dispute resolution mechanisms in investor-state disputes. SIDRA Survey (2020) *Final Report* (n 114) at vii.

[188] "For example, a structured settlement with payment terms within a party's ability to pay is much more likely to be paid and useful to the other party than a court money judgment which leaves the prevailing party with the unhappy task of moving forward with collection actions as the loser simply cannot make the payment." Sussman, E. (2008) "The Final Step: Issues in Enforcing the Mediation Settlement Agreement", *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, Leiden, The Netherlands: Brill | Nijhoff. 2009, Vol. 2, pp. 343-359, at p. 344.

[189] Among others the Law Reform Commission (2010) Report: "Alternative Dispute Resolution: Mediation and Conciliation", LRC 98-2010, available at: https://www.lawreform.ie/_fileupload/reports/r98adr.pdf, mn 4.87.

According to Edna Sussman, the main reasons parties retreat from a mediated settlement agreement, causing further litigation, are as follows:

- a change of heart after the mediation is over;
- a new boss or new ownership in the company;
- there actually wasn't an agreement with respect to a material term or there was a lack of agreement on the interpretation of a term;
- external factors intervene, such as currency fluctuations, that suddenly turn a good deal into a bad deal;
- impossibility of performance for a variety of reasons such as government action, business reverses, natural events;
- public consequences; for example there may be a great deal of negative publicity or public reaction that's not favorable.[190]

Mediated settlement agreements are more complicated to enforce than arbitral awards because they are not given the binding force or enforceability enjoyed by an arbitral award under the New York Convention.[191] In many jurisdictions, mediated settlements are enforced as contracts, meaning that a party will need to begin from scratch – with a contract they want to enforce. Cross-border enforcement is even more complicated. Insufficient enforcement mechanisms might, then, frustrate the benefits of mediation, like efficiency (in terms of time and cost) and the preservation of business relationships.[192] Many studies support the view that a reliable enforcement mechanism would significantly impact the use of mediation in cross-border disputes.[193]

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[190] Sussman, E. (2008) *The Final Step* (n 188), p. 344-345.
[191] Although the Singapore Convention (n 3) is set to change this.
[192] Sussman, E. (2008) *The Final Step* (n 188), p. 345.
[193] Amongst others: SIDRA Survey (2020) *Final Report* (n 114); Herbert Smith Freehills, PwC and the International Mediation Institute (2018) "Global Pound Conference Series: Global Data Trends and Regional Difference", p. 14 (https://www.globalpound.org); Strong, S. I. (2016) "Realizing Rationality: An Empirical Assessment of International Commercial Mediation", *Washington and Lee law review*, 73(4), pp. 1973-2085, at p. 2051, 2055; International Mediation Institute (2017) "IMI Survey Results Overview: How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements" (https://www.imimediation.org/2017/01/16/users-view-proposal-un-convention-enforcement-mediated-settlements).

3 Domestic Approaches to the Enforcement of MSAs

3.1 General Remarks

As noted above, one of the main concerns about mediation relates to the enforceability of international mediation settlement agreements (MSAs). The root of this concern lies in the fact that mediation is regulated to different extents in domestic legal frameworks. As a result, countries apply different approaches to enforce mediation settlement agreements. The purpose of this chapter is to highlight these differences.

The issue of MSA enforceability has received significant attention in recent years. In particular, UNCITRAL has undertaken the challenge of creating a legal instrument for simplified enforcement of international settlement agreements resulting from mediation. The Singapore Convention entered into force on 12 September, 2020; at the time of writing, the Convention has 55 signatories, 10 of which[194] have ratified it.[195]

Using the context of the Singapore Convention, the author illustrates different jurisdictions and the respective enforcement mechanisms. The author begins this work by examining her own jurisdiction (Austria), including the framework of the EU, in greater detail. In total, eight countries are covered: four common-law countries (UK, US, Hong Kong, and Mainland China) and four civil-law countries (Austria, Japan, Brazil, Ecuador).

3.2 Austria (Within the Framework of the EU)

The Austrian legislative framework has no specific legal regime regarding the enforcement of MSAs. An informal out-of-court settlement (international/national), according to Austrian law, is regarded as a new contract, which is per se no executory title. Like any private agreement, Austria refuses to directly enforce such settlements. If a party wishes to enforce a contractual right, it must refer to the competent court to gain an executory title in a contentious court proceeding. If, however, a settlement was concluded in proceedings pending before a court or an arbitral tribunal, it would be an executory title that is directly enforceable under the Austrian Enforcement Act (*Exekutionsordnung*).[196]

[194] Belarus, Ecuador, Fiji, Georgia, Honduras, Kazakhstan, Qatar, Saudi Arabia, Singapore, Turkey. For a list of jurisdictions and status, see: https://www.singaporeconvention.org/jurisdictions.
[195] A detailed analysis of the Singapore Convention will be provided in Section 4.1.
[196] Austrian Enforcement Act, “Exekutionsordnung” RGBl. Nr. 79/1896, last amended by, BGBl. I Nr. 61/2022.

The EU Mediation Directive 2008/52/EC of the European Parliament and the Council was passed on 21 May, 2008 ("EU Mediation Directive"), establishing common minimum standards. Following its enactment, legal changes were made to the individual member states regarding the enforceability of international MSAs.[197] As Recital 19 of the 2008 EC Directive states, "mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties."

The EU Mediation Directive requires EU member states to establish a procedure that can render mediation agreements enforceable at the request of both parties. Article 6 of the EU Mediation Directive stipulates the following:

> Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability. (Article 6 para. 1 EU Mediation Directive)
>
> The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made. (Article 6 para. 2 EU Mediation Directive)

In its report, the commission recommended "that for a mediated settlement agreement to be an enforceable contract, it must be in writing and signed by all the parties and, as the case may be, by the mediator or conciliator."[198] However, the EU Mediation Directive did not establish a harmonized mechanism, leaving the choice of procedure and competent authority to the member states.[199]

Following the implementation of the EU Mediation Directive, Austria offers different options for securing the enforceability of MSAs. It is possible to convert an out-of-court settlement to an enforceable notarial deed (*vollstreckbarer Notariatsakt*), according to Sec. 3 of the Austrian Notarial Code (*Notariatsordnung*) or into a court settlement (*prätorischer Vergleich*), according to Sec. 433 Civil Procedure Code (*Zivilprozessordnung*). In this manner, the legislature

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[197] Directive 2008/52/Ec of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, L 136/3: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF.

[198] LRC Report 98-2010 (n 189), mn 4.94.

[199] Article 6 of the EU Mediation Directive has been successfully introduced in all Member States and builds on previous regulations and conventions. Brussels I bis Regulation (EU 1215/2012), Brussels II bis Regulation (EC No 2201/2003) and the European Enforcement Order (Regulation (EC 805/2004) provide for two other types of enforceable documents besides court judgements and decisions, that is, court settlements, and authentic instruments.

enabled the creation of an executory title without requiring contentious court proceedings.[200] Furthermore, an MSA to be converted into an arbitral award.[201] These instruments are enforceable not only under the Austrian Enforcement Act but, under the rules of European civil procedure law, also in any other EU member state.[202]

In its comments to the UNCITRAL Secretariat, the Austrian delegation thus declared its doubts about the need of another mechanism for immediate enforceability of mediation results. It argued that

> (…) [T]here already exist functioning structures for generating enforceability, in particular international arbitration which allows for converting an agreement into an arbitral award and thereby making it enforceable under the regime of the 1958 New York Convention. A possible parallel structure might have little or no added value. It could even reduce the value of existing structures by enhancing legal complexity in the field and thus confusing market participants.[203]

Austria does provide structures to generate MSA enforceability. However, mediation practitioners have increasingly criticized a double burden when concluding out-of-court mediation settlements and converting such MSAs to an enforceable title. Both, the conclusion of the settlement as well as the conversion into an enforceable title – often to the parties' surprise – require to pay relatively high fees. The double burden results from the following legal provisions:

a) *Stamp duty for settlement agreements.* According to the Austrian Fee Act of 1957 (*Gebührengesetz* – "GebG") settlements (out of court) are subject to a fee. The stamp duty (*Rechtsgeschäftsgebühr*) amounts to 2% of the total value of the obligations assumed by each party. In cases of pending litigation – in other words, if the settlement is the amicable result of court proceedings – a fee of 1% of each party's performance is assessed. The basis of the assessment is the total value of the performances to be stipulated in the settlement agreement.

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[200] Austrian Enforcement Act (n 196), Section 1 No 5 and 17.

[201] Ibid., Section 1 No 16. The Austrian Code of Civil Procedure at Section 605 No 2 provides: "If, during arbitral proceedings, the parties settle the dispute and if the parties are capable of concluding a settlement on the subject-matter in dispute, they may request (…) the arbitral tribunal to record the settlement in the form of an arbitral award on agreed terms, provided that the contents of the settlement do not violate the fundamental values of the Austrian legal system (*ordre public*). Such award shall be made in accordance with Section 606. It shall have the same effect as any other award on the merits." Civil Procedure Code, "*Zivilprozessordnung"* RGBl. Nr. 113/1895, last amended by, BGBl. I Nr. 61/2022.

[202] Frauenberger-Pfeiler, U. (2019) "Art 10 Vienna Mediation Rules" in *VIAC Handbook - A Practitioner's Guide*, mn 16; on the EU Regulations concerning cross-border enforcement, see above (n 199).

[203] A/CN.9/846, 27 March 2015: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V15/020/92/PDF/V1502092.pdf?OpenElement.

b) *Court fees*. Court fees arise from the recourse to courts under the Austrian Court Fees Act (*Gerichtsgebührengesetz*). When a judge records an out-of-court settlement, court fees are incurred as a result of obtaining the court's services, which in itself is not particularly surprising.[204]

The settlement fees under the GebG, however, are problematic in the following two scenarios:

1) Settlements concluded before arbitral tribunals are subject to a fee. Despite the contrary view in existing literature, this was confirmed by the Austrian Higher Administrative Court (*Verwaltungsgerichtshof* – "VwGH") in 2013.[205] Accordingly, a settlement before an arbitral tribunal faces the higher (2%) stamp duty because it is not an "ordinary court" within the meaning of Section 1 of the Austrian Court Jurisdiction Act (*Jurisdiktionsnorm* – "JN").

2) Out-of-court settlements concluded from mediation are also subject to fees. Especially in the case of mediation settlements, it is often in the interest of the parties to make them enforceable by having a court record them, which in turn triggers court fees. Thus, such settlements may trigger a fee under both the Austrian Courts Fees Act and the Austrian Fees Act. As mentioned above, this results in a double burden for the involved parties.

In the view of the author, Austria would benefit from removing the stamp duty for settlement agreements. If settlement conclusions are "burdened" with fees, the parties may become less willing to resolve their disputes consensually. Inversely, eliminating the settlement fee can be an additional incentive for the parties to settle and quickly resume business.[206] This is of particular importance during the COVID-19 pandemic, in which it is vital to economically, quickly, and effectively route for the resolution of disputes and the preservation of business relationships.[207]

[204] Austrian Fee Act of 1957, "*Gebührengesetz 1957*" BGBl. Nr. 267/1957, last amended by BGBl. I Nr. 227/2021, Section 33 TP 20 GebG and the Austrian Court Fees Act, "*Gerichtsgebührengesetz"* BGBl. Nr. 501/1984, last amended by BGBl. I Nr. 61/2022.

[205] Judgment of the Austrian Verwaltungsgerichtshof (VwGH), 2011/16/0214, 18 March 2013: https://www.ris.bka.gv.at/JudikaturEntscheidung.wxe?Abfrage=Vwgh&Dokumentnummer=JWR_2011160214_20130318X01&ShowPrintPreview=True. The VwGH however expressly only refers to settlement agreements within the meaning of Section 1380 Austrian Civil Code without mentioning arbitral awards on agreed terms.

[206] An argument against eliminating the settlement fee would be the revenue that the State would lose from the elimination of this fee. However, so far it could not be determined whether this revenue is significant enough to outweigh this predicament, see the parliamentary request on budget revenues from out-of-court settlements, available at: https://www.parlament.gv.at/PAKT/VHG/XXVI/J/J_04108/index.shtml.

[207] Because of Covid-19, some institutions (e.g. VIAC and JIMC-SIMC) have offered simple and low-cost mechanisms to resolve disputes amicably.

To avoid surprises, it is essential for the mediator to clarify the available enforcement mechanism and the resulting fees. In any case, it is advisable to include a provision in the settlement agreement stipulating which party will bear the associated fees to avoid triggering a further dispute.

At the time of writing, neither the EU nor its member states have signed the Singapore Convention. Although the EU progressively advocates for the resolution of disputes through ADR and mediation (examples include the EU Mediation Directive, the ADR Directive,[208] and the Online Dispute Resolution ("ODR") Directive[209]), it has not decided whether to join the Singapore Convention. To understand their position, several factors must be considered:

- In the European Union's view, there is currently little clarity on how to proceed structurally and what to expect from mediation. This is also the reason for the relatively poor track record of mediations in commercial – let alone in investor-state – disputes.[210] According to the European Union, a permanent court structure would bring much-needed predictability and structure to mediation, encouraging its use.[211] Moreover, international mediation settlement agreements could benefit from an enforcement mechanism attached to the multilateral investment court.

- In most EU member states, judges have attempted to reconcile between parties to help them reach an agreement. In addition, the EU follows a certain philosophy that does not envisage immediate cross-border enforcement of MSAs without preliminary scrutiny by a judge or notary in the settlement country. In contrast to the Singapore Convention, which provides for direct enforcement, cross-border enforcement within the EU first requires granting such enforcement power in one country before enforcing the enforcement instrument in another. Mediation settlement agreements are converted into enforceable instruments that are enforceable cross-border based on pre-existing tools

[208] The ADR Directive (2013/11/EU) aims to ensure EU consumers' access alternative dispute resolution. Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), L 165/63: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0011.
[209] The ADR Directive was complemented with the ODR Regulation (524/2013). Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR). L 165/1: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0524.
[210] Except for Italy, where mediation is partially mandatory.
[211] On the EU proposal of a Multilateral Investment Court and its enforcement mechanism, see Section 4.2.

common in the domestic laws of EU member states, as mentioned above. Thus, the Singapore Convention and the EU Mediation Directive take different approaches.[212]

- The official reason, however, is that the European Commission has not decided whether it is the competence of the EU to sign the Singapore Convention or the competence of each member state to sign individually. As long as the European Commission has not taken a position on that matter, it is unlikely that a member state will do so on its own. However, since the Singapore Convention (unlike the New York Convention) is not based on reciprocity, mediation practitioners in the EU eagerly await the European Commission's position.

To conclude, the EU Mediation Directive is often cited as one of the most progressive instruments recognizing the importance of enforcement of MSAs. Despite this, it is only applicable in cross-border disputes within the European Union and has other shortcomings. It also fails to specify how to prove that an agreement has resulted from mediation. Moreover, an enforceability request requires additional written consent after an MSA is concluded, which makes it easier for an unwilling party to back out.[213] The EU (or its Member States) would thus benefit from singing the Singapore Convention, particularly for conducting business outside the EU.[214]

3.3 United Kingdom (after Brexit)

According to UK law, a mediation settlement agreement is enforced as a contract under the principles of English contract law.

The domestic legislation governing mediation are the Civil Procedural Rules ("CPR"). According to the CPR, civil domestic disputes must be referred to the so-called pre-action protocols. These expressly provide that the parties should attempt to settle their dispute through alternative dispute resolution, including mediation, before commencing litigation.[215]

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[212] Meidanis, H. P. (2020) "Enforcement of mediation settlement agreements in the EU and the need for reform", *Journal of Private International Law*, 16(2), pp. 275-299, at pp. 276-281.

[213] To avoid the change of hearts after signing an MSA, it would be wise to include additional consent already into an MSA itself. Some EU Member States, however, deviate from this and do not explicitly require such additional consent (Belgium, Czech Republic, Hungary, Italy, Greece, Slovakia, Poland).

[214] Žukauskaitė, M. (2019) "Enforcement of Mediated Settlement Agreements", *Vilnius University Press*, Vol. 111, pp. 205-217, at p. 211.

[215] Civil Procedural Rules, No. 3132 (L. 17), 1998: https://www.legislation.gov.uk/uksi/1998/3132/contents/made; Lambert, D. and Finlayson, N. (2019) Mediation in the United Kingdom, *Lexoloy – Getting The Deal Through*, 9 September 2019, available at: https://www.lexology.com/library/detail.aspx?g=02ee5416-79ba-484b-bd62-eb26318d330b.

In a “Tomlin Order,” the terms of settlement agreed between the parties are recorded but not ordered by the court. The effect thereof is that all further proceedings in the claim are stayed except for the purpose of carrying such terms into effect. Ultimately, though, a Tomlin Order is not enforceable as a judgment, at least not without a further order. Consequently, enforcing a settlement agreement remains an action for breach of contract.[216]

The EU Mediation Directive brought changes to the legislative framework. However, mediation had previously been a well-established feature of the English System, and the government felt that the UK’s legal framework had already largely complied with the EU Directive’s provisions. Therefore, only a small number of changes to UK legislation was required.[217] Furthermore, the EU Mediation Directive was enacted solely with respect to cross-border mediations.

The Civil Procedure Amendment Rules 2011 and the Cross-Border Mediation (EU Directive) Regulations 2011 (the 2011 Regulations) performed the implementation into UK law.[218] The Civil Procedure Amendment Rules 2011 amended the CPR to include provisions found at CPR 78.23 to 78.28, governing the areas of confidentiality, enforceability, and limitation.[219]

Article 6 of the Mediation Directive was implemented into English law under CPR 78, through which a procedure was inserted to enforce cross-border mediation settlement agreements. Under CPR 78, the parties may agree to have cross-border MSAs converted to a court order (so-called “Mediation Settlement Enforcement Orders”).

Due to UK’s exit from the EU, the EU Mediation Directive ceased to apply. Legislation was passed to revoke the implementation of the EU Directive (the Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019) and associated changes to the CPR.[220] Thus, the respective provisions of the EU Mediation Directive (on confidentiality, enforcement, and limitation) no longer applied to cross-border mediations taking place in the UK. As a result, enforcement

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[216] Repper, E. (2014) “Settlement agreements: the importance of early planning”, *Thomson Reuters (Professional) UK Limited*, available at: https://www.keatingchambers.com/wp-content/uploads/2016/02/Briefing-Dispute-resolution-with-copy.pdf.

[217] Raban-Williams, R. (2020) “Post-Brexit Mediation in the UK”, 10 March 2020, *Seddons*, available at: https://www.seddons.co.uk/our-thinking/post-brexit-mediation-uk.

[218] The Civil Procedure (Amendment) Rules 2011, Statutory Instrument 2011 No. 88 (L. 1), 6 April 2011 (https://www.legislation.gov.uk/uksi/2011/88/contents/made); and The Cross-Border Mediation (EU Directive) Regulations 2011, Statutory Instrument 2011 No. 1133, 20 May 2011 (https://www.legislation.gov.uk/uksi/2011/1133/contents/made).

[219] Lambert, D. and Finlayson, N. (2019) *Mediation in the United Kingdom* (n 215).

[220] The Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019, Statutory Instrument 2019 No. 469, 1 January 2021: https://www.legislation.gov.uk/uksi/2019/469/introduction/made.

of IMSAs in the UK has become a difficult litigation exercise. Opposing parties have a range of options for challenging an IMSA, and courts have a wide margin of appreciation to lift confidentiality and deny enforceability.[221]

At the time of writing, it is uncertain whether the UK intends to ratify the Singapore Convention. The impetus for the UK to do so may have increased since its exit from the EU. The Singapore Convention would be a tool to again enhance the rights of enforcement and, in particular, improve the world's perception of the UK as a preeminent dispute resolution forum.[222] According to Michael Kallipetis,[223] UK practitioners have actively lobbied in this matter at the Ministry of Justice of the UK. In the debate of 2 September, 2020, at the Second Reading of The Private International Law (Implementation of Agreements) Bill, John Howell and Robert Buckland emphasized the importance for the UK to sign, ratify and implement the Singapore Convention.[224]

3.4 United States

The US has a strong public policy favoring alternative dispute resolution, including mediation. However, it contains no uniform set of rules for mediation or MSA enforcement. Those state jurisdictions, which allow for mediation legislation, differ in their approaches to the required form of MSAs, the scope and nature of the afforded confidentiality protections, and other aspects of mediation.[225]

Generally, MSAs are enforced like any other contractual agreement: courts apply traditional contract law principles, and little regard is given to the mediation context. This means that the court considers evidence to determine whether a binding contract was entered into and review

[221] For a detailed analysis read: Anderson, D. Q. (2015) “Litigating over Mediation - How Should the Courts Enforce Mediated Settlement Agreements?”, *Singapore Journal of Legal Studies*, pp. 105-134.
[222] Causton, P. (2014) “Cross Border Mediation in a Post Brexit World”, 4 May 2020, *The UK Law Societies' Joint Brussels Office*, available at: https://www.lawsocieties.eu/main-navigation/cross-border-mediation-in-a-post-brexit-world-by-peter-causton/6000992.article.
[223] Michael Kallipetis is a Commercial Mediator and member of Independent Mediators - London, UK. He shared his view on the UK's jurisdiction and where it is heading to at the event “A Came Gathering: Voices on the Singapore Convention Two Years On”, presented by JAMS, Society of Mediation Professionals (Singapore) and Global Mediation Alliance, in September 2021. The program recording can be accessed here: https://www.jamsadr.com/events/2021/voices-on-the-singapore-convention-two-years-on.
[224] UK Parliament, Commons Chamber, Private International Law (Implementation of Agreements) Bill [Lords] Volume 679: debated on Wednesday 2 September 2020, see in particular at 4.39 pm. Accessible at: https://hansard.parliament.uk/commons/2020-09-02/debates/FB161092-BD00-4BF6-8362-F71A764CA6BF/PrivateInternationalLaw(ImplementationOfAgreements)Bill(Lords).
[225] Sussman, E. (2006) “A brief survey of US case law on enforcing mediation settlement agreements over objections to the existence or validity of such agreements and implications for mediation confidentiality and mediator testimony”, *IBA Legal Practice Division Mediation Committee Newsletter*, pp. 32-40, at p. 32.

any defenses raised. Only a minimal number of state jurisdictions provide for summary procedures for the enforcement of (international) MSAs.[226] The US courts have thus far also failed to determine whether a settlement converted into an arbitral award on agreed terms is eligible for enforcement under the New York Convention.[227]

According to Edna Sussman, the enforceability of MSAs constitutes a significant source of litigation in courts. The legal theories typically employed when attacking MSAs include a lack of agreement, capacity, and authority, and the presence of duress, fraud, misrepresentation, and mistake.[228] In such enforcement proceedings, courts struggle with conflicting demands: clarifying the facts of a case while maintaining the confidentiality of the mediation process. US courts handle this matter differently, with many relying heavily on mediator testimony.[229]

The Uniform Mediation Act ("UMA"),[230] adopted in 2001, addressed this latter issue and aimed to foster uniformity of rules on mediation. However, few states have adopted the UMA so far. Furthermore, considering that no uniform federal mediation law exists, differences in the several jurisdictions persist.[231] Addressing expedited enforcement of MSAs, the final draft of the UMA incorporated a provision permitting parties to jointly petition the court to enter a judgment consistent with the MSA. However, the reviewing committees discarded the idea, and no such mechanism for MSAs (domestic or international) was established.[232]

At UNCITRAL in July 2014, the US became the first to suggest developing a multilateral convention on "conciliation" modeled on the New York Convention. The US signed the Singapore Convention on 7 August, 2019 but has yet to ratify it. Assuming the US intends to do so, the appropriate mode of implementation must be determined. A treaty may be self-executing in the

[226] e.g. California, Texas, Ohio, North Carolina, Oregon. If an agreement settling such a dispute is in writing signed by the parties (or their representatives) and the mediator, the agreement will be given the same effect as an arbitral award. Cf. A/CN.9/846/Add.1, Compilation of comments by Governments, 15 April 2015, item 24 (https://documents-dds-ny.un.org/doc/UNDOC/GEN/V15/024/58/PDF/V1502458.pdf?OpenElement). Colorado too provides for a summary proceeding for enforcement of MSAs, see Sussman, E. (2008) *The Final Step* (n 188), p. 354.
[227] A/CN.9/846/Add.1 (n 226).
[228] Sussman, E. (2006) *A brief survey of US case law* (n 225), p. 32.
[229] Ibid., p. 35.
[230] Uniform Mediation Act, adopted by the National Conference of Commissioners on Uniform State Laws, 2001: https://www.uniformlaws.org/committees/community-home?CommunityKey=45565a5f-0c57-4bba-bbab-fc7de9a59110. In 2003 UMA incorporated a provision providing for the applicability of the UNCITRAL Model Law on International Commercial Conciliation to any mediation, unless agreed otherwise.
[231] Sussman, E. and Weiner, C. A. (2015) "Striving for the "Bullet-Proof" Mediation Settlement Agreement", *NYSBA New York Dispute Resolution Lawyer*, 8(1), pp. 22-26, at p. 22.
[232] Sussman, E. (2008) *The Final Step* (n 188), p. 346.

US, or it may be necessary to first implement legislation (at the federal and/or state level).[233] Some advocate that the Singapore Convention should be considered self-executing for the following reasons. *First*, enacting legislation for implementation is unnecessary because there is no existing domestic legislation on the convention's subject matter that would require clarification. *Second*, passing legislation for implementation would significantly delay the ratification of the Singapore Convention and hence also the willingness of other countries to ratify it. *Third*, this approach would be consistent with prior practice of implementing private law treaties (e.g. the UN Convention on CISG).[234]

On 17 February, 2020, the American Bar Association passed Resolution 104 A, which the House of Delegates adopted.[235] This resolution urged all nations, including the US, to sign and implement the Singapore Convention. It also specifically urged the executive branch and Senate to regard the convention as self-executing under US law. It remains unknown whether the executive branch will transmit the convention to the Senate for its advice and consent.

3.5 Hong Kong SAR and Mainland China

In view of the Mainland and Hong Kong CEPA Investment Agreement, both the mediation framework of Hong Kong (A.) and the framework of China (B.) are presented. Then, the author returns to the enforcement mechanism under the CEPA (C.).

A. Hong Kong

Mediation is a recognized form of ADR in Hong Kong and is governed by the "Mediation Ordinance," which came into effect on 1 January, 2013.[236] The legislative framework does not mandate mediation. The court can, though, order parties to consider mediation and impose adverse cost orders for an unreasonable failure to mediate.[237] Interestingly, the Mediation

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[233] For a detailed reading on the different modes of implementation read Schnabel, T. (2019) "Implementation of The Singapore Convention: Federalism, Self-Execution, And Private Law Treaties", *The American Review of International Arbitration*, Vol. 30, pp. 265-289, at p. 278.
[234] Ibid., p. 282 et seqq.
[235] Resolution 104A, American Bar Association, adopted by the House of Delegates, 17 February 2020, available at: https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2020/2020-midyear-104a.pdf.
[236] Mediation Ordinance, L.N. 167, 2012: https://www.elegislation.gov.hk/hk/cap620. For more details on the mediation framework in Hong Kong, see McFadden, D. (2013) "Mediation in Greater China: The New Frontier for Commercial Mediation", *Wolters Kluwer (HK)*, pp. 218–219.
[237] This was strongly encouraged by the Hong Kong Judiciary that issued Practice Direction 31 in 2010 (https://legalref.judiciary.hk/lrs/common/pd/pdcontent.jsp?pdn=PD31.htm&lang=EN). See also, Department of Justice -

Ordinance defined mediation, inter alia, as a "structured process" for devising other consensual dispute resolution methods.[238]

The enforceability of MSAs is not directly addressed in the ordinance.[239] In Hong Kong, MSAs are enforced as contractual agreements in court unless they were reached in the context of arbitration and converted into an arbitral award enforceable under the New York Convention. It should, however, be noted that a working group in Hong Kong explicitly declined to utilize the arbitration framework for enforcement as it considered the grounds of resisting enforcement of domestic and international awards unsuitable for international MSAs.

The party seeking enforcement in court must prove the validity of the MSA against objections that the party resisting enforcement raises. If a court action has already been brought, it may be a condition of the settlement agreement for the action to be withdrawn or discontinued. The terms of the settlement agreement can then be recorded as a consent order or consent judgment, through which the settlement agreement becomes enforceable as a judgment of the court. In the case of cross-border mediations, enforcement is subject to existing treaties regarding the recognition and enforcement of foreign judgments between Hong Kong and other States.[240]

As Hong Kong increasingly positions itself as a focal point for resolving disputes emerging from the Belt and Road Initiative ("BRI"), it may also be willing to reconsider the issue of establishing for a direct enforcement procedure for IMSAs.[241]

B. China

The People's Republic of China (PRC) also recognizes mediation as a form of dispute resolution. It regulates mediation under "The People's Mediation Law of the People's Republic of China."[242] Parties are under no obligation to mediate, even if they contractually agree to do so. In contrast to mediation in Hong Kong, a failure to mediate does not attract adverse cost

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The Government of the Hong Kong Special Administrative Region, 2010, "Report of the Working Group on Mediation": https://www.doj.gov.hk/en/legal_dispute/pdf/med20100208e.pdf, p. 3.

[238] Chua, E. (2019) "Enforcement of mediated settlement agreements in Asia – A path towards convergence", *Asian International Arbitration Journal*. *Research Collection School of Law*, pp. 67 – 268, p. 17.

[239] The Hong Kong Working Group on Mediation considered it unnecessary to include an expedient enforcement mechanism as mediated settlement agreements are voluntary agreed and thus compliance is likely. There was also no consensus on the grounds to deny enforcement. See, Report of the Working Group on Mediation (n 236), pp. 119-120. The Working Group did not separately study and consider *international* mediated settlement agreements.

[240] Chua, E. (2019) *Enforcement of mediated settlement agreements in Asia* (n 238), p. 17.

[241] Ibid., p. 18.

[242] The People's Mediation Law of the People's Republic of China (Order of the President of the People's Republic of China No.34), entered into force in 2011, regulates the mediation process in detail and also addresses the enforceability of mediation agreements: https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=85806.

sanctions. However, also in PRC, courts do encourage mediation. The enforcement of MSAs is likewise similar to that in Hong Kong. Settlements reached through mediation conducted by a court are enforceable as court judgments.[243] Mediations conducted in the context of arbitration are enforceable as arbitral awards.[244] Out-of-court/arbitration MSAs are enforced as contracts, but the parties, by mutual consent, may apply to the have the court recognize and in turn enforce the agreement as a court judgment.[245]

In both the domestic context and PRC's international relations, mediation is viewed as an important tool, particularly for resolving disputes arising from the BRI.[246] To encourage and support international commercial mediation, the PRC government signed the Singapore Convention. However, to also ratify and implement the Singapore Convention in the PRC framework, further amendments to its civil procedure law would be required.

C. CEPA Agreement

The China - Hong Kong CEPA Investment Agreement (2017)[247] lists mediation as a means for dispute resolution when a conflict arises from a claim by a Hong Kong (Art 19) or a Mainland (Art 20) investor.

The "Mediation Mechanism for Investment Disputes" was published to provide details on the mediation procedure. It established an integrated mediation mechanism for resolving investment disputes under the CEPA Agreement. Accordingly, the investor of one side can submit the dispute to the mediation institution where the investment was made. To ensure the enforceability of MSAs, Section 4.3 stipulated that "[i]nvestors can apply for enforcement of a

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[243] Articles 93 and 97 of the Civil Procedure Law of the PRC, adopted 1991, promulgated by Order No 44 of the President of the PRC: https://www.refworld.org/pdfid/3ddbca094.pdf.

[244] Article 51 of the Arbitration Law, adopted 1994, promulgated by Decree No.31 of the President of the PRC: http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201312/20131200432698.shtml. In more detail, Kaufmann-Kohler, G. and Kun, F. (2008) "Integrating Mediation into Arbitration: Why it Works in China", *Journal of International Arbitration*, 25(4), pp. 479-492, at p. 490.

[245] Article 26 of the CCPIT/CCOIC Mediation Rules.

[246] Ministry of Law Singapore, "Singapore and China Mediation Centres Work Together to Help Businesses Resolve Disputes along Belt and Road", *Ministry of Law Press Release*, 19 September 2017: https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/singapore-and-china-mediation-centres-work-together-to-help-busi.html.

[247] Investment Agreement of the Mainland and Hong Kong Closer Economic Partnership Arrangement, entered into force 28 June 2017, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3780/china---hong-kong-cepa-investment-agreement-2017-.

mediation settlement agreement in accordance with the relevant laws and regulations of the side where the investment is made."[248]

3.6 Japan

According to James Claxton,[249] Japan has recently experienced considerable institutional innovation, mediation community growth, and legislative change. Court (mainly in family disputes) and administrative (to resolve consumer/labor disputes) mediation have long been features in Japan, while non-governmental mediation (conducted in the private sector) is less common. In 2004, however, legislative steps were taken to encourage non-governmental mediation as well.[250] Another novelty was the amendment to the Foreign Lawyers Act.[251] Under the so-called "fly-in, fly-out regime," foreign lawyers were permitted to represent parties in international mediation proceedings.[252]

Article 267 of the Japanese Code of Civil Procedure states the following about court-annexed mediations and the legal effect of judicial settlements: "When a settlement or a waiver or acknowledgement of a claim is stated in a record, such statement shall have the same effect as final and binding."[253] Article 22 of the Japanese Civil Execution Act states that "Compulsory execution shall be carried out based on any of the following [...] (i) A final and binding judgment."[254] In relation to some types of disputes, parties are even obligated to attempt court mediation before commencing litigation. Thus, the settlement record is equivalent to a court order, and the settlement is enforceable in the same way as a court order.[255]

For out-of-court MSAs, though, there is no procedure for expedited enforcement. Article 275 of the Japanese Code of Civil Procedure only addresses settlement cases prior to the filing of

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248 See, CEPA Mediation Mechanism for Investment Disputes, available at: https://www.tid.gov.hk/english/cepa/investment/files/mediation.pdf.

249 James Claxton acts as independent arbitrator and mediator as well as an associate professor at the Waseda University. He presented the jurisdiction of Japan during the event "A Came Gathering: Voices on the Singapore Convention Two Years On", presented by JAMS, Society of Mediation Professionals (Singapore) and Global Mediation Alliance. The program recording can be accessed here: https://www.jamsadr.com/events/2021/voices-on-the-singapore-convention-two-years-on.

250 The Act on Promotion of the Use of ADR (Act No. 151 of 2004, entered into force 1 April 2007, available at: https://www.cas.go.jp/jp/seisaku/hourei/data/AOP.pdf), promotes and regulates this type of mediation.

251 The Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers, Act No. 66 of 1986, ("Foreign Lawyers Act"): https://www.japaneselawtranslation.go.jp/en/laws/view/2787/en

252 Article 58-2 of the Foreign Lawyers Act.

253 Japanese Code of Civil Procedure, Act No. 109, 26 June 1996, last amended by Act No. 36 of 2011: https://www.japaneselawtranslation.go.jp/en/laws/view/2834/en.

254 Japanese Civil Execution Act, Act No. 4, 30 March 1979, last amended by Act No. 2 of 2019: https://www.japaneselawtranslation.go.jp/en/laws/view/3483/en.

255 Find further information, on the website of the Ministry of Foreign Affairs of Japan: https://www.mofa.go.jp/fp/hr_ha/page22e_000344.html.

action at the court. In such instances, if both parties appear before the summary court with a written settlement, the court will ascertain its validity.

Under present Japanese law, international MSAs are mere contracts that cannot be enforced equally as an arbitral award. However, the Commercial Mediation Rules by the Japan Commercial Arbitration Association ("JCAA") address this. Upon arriving at a settlement agreement, the JCAA states that parties "may agree in writing to appoint the mediator as an arbitrator and request such arbitrator to record the settlement in the form of an arbitral award."[256] This provision aims to make a settlement agreement an enforceable arbitral award under Article 38 of the Japanese Arbitration Act.[257] However, the JCCA also assumes that if the dispute has been settled by party agreement in the mediation proceedings before the parties appoint the arbitrator, the arbitrator has no jurisdiction because he or she has nothing to decide.[258]

Japan also yet to sign the Singapore Convention. According to James Claxton, the main reason is legal constraints on domestic mediation that must first be resolved. Against this backdrop, a legislative subcommittee has turned its attention to domestic mediation and concentrated on drafting laws to enforce mediated settlement agreements for domestic commercial disputes. The text of the law is meant to be consistent with the provisions of the Singapore Convention.[259]

3.7 Brazil

Until 2015, the legislative framework on mediation in Brazil remained in its infancy. Since then, it has developed more quickly. Mediation was recently regulated in Brazil through two laws: the "Mediation Act"[260] and the new "Civil Procedure Code."[261] Furthermore, Brazil signed the Singapore Convention on 4 June, 2021 to become the 54th signatory to the treaty.[262]

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[256] Article 27 of the JCCA Commercial Mediation Rules, entered into force 1 February 2020, available at: https://www.jcaa.or.jp/common/pdf/mediation/JCAA_Commercial_Mediation_Rules_en.pdf.

[257] Act No. 138, entered into force 1 August 2003, last amended by Act No. 147 of 2004, available at: https://www.japaneselawtranslation.go.jp/en/laws/view/2784/en. According to Art 37, settlements reached before an arbitral tribunal during the course of an arbitration procedure (ruling on agreed terms), shall have the effect of an arbitral award and thus are enforceable under the regime of the New York Convention.

[258] A/CN.9/846/Add.1, 15 April 2015, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V15/024/58/PDF/V1502458.pdf?OpenElement, item 14.

[259] See *supra* (n 249).

[260] Mediation Act: Law No. 13140/2015, 26 June 2015: http://www.camaradearbitragemsp.com.br/en/res/docs/Brazilian_Mediation_Act.pdf.

[261] Civil Procedure Code: Law No. 13105/2015, 16 March 2015 https://www.lawyerinbrazil.com/wp-content/uploads/2019/06/BRAZILIAN_CODE_OF_CIVIL_PROCEDURE-1.pdf. The Civil Procedure Code now provides that when a case is brought to court, it must be submitted mediation or conciliation phase before the defendant files the answer.

[262] Press release of 7 June 2021, UNIS/L/313: https://unis.unvienna.org/unis/en/pressrels/2021/unisl313.html.

The Mediation Act regulates both court and private mediation (Chapter I), as well as mediation for disputes involving public entities (Chapter II).[263] It states the following about the enforceability of MSAs:

> If an agreement is entered into by the parties, the final mediation instrument shall become an instrument enforceable out of court and, if such agreement is ratified by a court, it shall be a judicially enforceable instrument. (Article 20 of the Mediation Act)

This MSA is considered an enforceable title under Brazilian law, meaning that it may be directly enforced if breached. The Mediation Act distinguishes between an extrajudicial execution instrument (resulting from out-of-court mediation) and a judicial execution title (if the parties submit the final terms to judicial confirmation).[264] They are equally enforceable, and no evidence is required beyond the written MSA. According to Art 28 of the Mediation Act, parties often submit the MSA for judicial confirmation prior to non-compliance in order to act cautiously and limit any questions about potential nullities.[265]

In addition, and as a novelty in the Brazilian legislative framework, the new Civil Procedure Code governs the enforcement of MSAs concluded abroad. In other words, it determines whether that settlement agreement constitutes a title to execution. According to Art 784 Section 1, "[e]xtrajudicially enforceable instruments originating in a foreign country do not require ratification to be executed." Section 3 continues to stipulate the requirements for such enforceability (fulfillment of the requirements for its constitution, demanded by the laws of the country where it was executed, and designating Brazil as the country where the obligation must be performed).

Some jurisdictions (e.g. Japan) allow parties to request that the mediator act as arbitrator to transform the MSA into an award. However, Article 7 of the Mediation Act explicitly prohibits such double-hatting.[266] That said, parties are permitted – even encouraged – to refer the dispute

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[263] For further information on mediation in Brazil, see Mendonça Costa, M. and Matthes Dotto, C., "Mediation in Brazil", published at the website of the Swiss-Brazilian Chamber of Commerce, 20 September 2021: https://swisscam.com.br/en/publicacao/doing-business-in-brazil/34-mediation-in-brazil/; Siqueira Castro, C. R. "The mediation agreement in Brazil and its essential requirements, recognition and enforcement", published by the International Bar Association, date unknown: https://www.ibanet.org/article/90750472-5198-4900-9E2F-063150D5768A; Maia, A. "Mediation in Brazil", published at Lexology – Getting the Deal Through, 9 September 2019: https://www.lexology.com/library/detail.aspx?g=5139a3bb-afc0-4844-b265-3819c059ab47.

[264] In certain cases (involving a dispute concerning inalienable but contestable rights), the settlement agreement must be submitted to judicial confirmation.

[265] Maia, A. (2019) *Mediation in Brazil* (n 263).

[266] Article 7 of the Mediation Act (n 261) states: "The mediator may neither act as an arbitrator nor as a witness in legal or arbitration proceedings concerning a dispute in which he/she has acted as a mediator."

to mediation at any time during an arbitration procedure or court action.[267] A settlement agreement ratified by an arbitrator is enforced like a court ruling.[268]

To summarize, Brazil has not yet ratified the Singapore Convention. Despite this, several existing norms can be used to enforce international agreements. The Brazilian Civil Procedure Code recognizes the enforceability of international extrajudicial titles if the formal requirements are fulfilled. Since the law expressly admits MSAs and recognizes their enforceability, there is no need for further judicial homologation. According to Carlos Roberto Siqueira Castro, the Singapore Convention will nevertheless be vital for facilitating and fostering international trade between Brazil and other signatory states.[269]

3.8 Ecuador

Ecuador is one of the few states that has ratified and implemented the Singapore Convention.[270] Due to a considerable demand for mediation, Ecuador provides a modern and mediation-friendly legislative framework.[271]

Since 1997, the Ecuadorian Arbitration and Mediation Law ("AML")[272] for domestic disputes has acknowledged that a mediation settlement agreement (*acta de mediación*) has the effect of a judgment and can be automatically enforced by court order. It does not require any separate recognition process from the court or any further formality.[273] The signature of the parties and the mediator alone is sufficient for the agreement to be considered an authentic instrument with

[267] Article 28 Arbitration Law (Law No. 9307/96 as amended by Law No. 9307 of 23 September 1996, available at: https://cbar.org.br/site/en/brazilian-legislation/law-no-9-307-96-english/) and Article 3 of the Civil Procedure Code (n 261).
[268] Article 28 and Article 31 Arbitration Law (n 267).
[269] Mr. Siqueira Castro, Partner at Siqueira Castro Advogados in Rio de Janeiro, in its presentation on the jurisdiction of Brazil during the event "A Came Gathering: Voices on the Singapore Convention Two Years On", presented by JAMS, Society of Mediation Professionals (Singapore) and Global Mediation Alliance, in September 2021. The program recording can be accessed here: https://www.jamsadr.com/events/2021/voices-on-the-singapore-convention-two-years-on.
[270] Ecuador ratified the Singapore Convention on 12 September 2020, just two days before it entered into force. Press Release of 10 September 2020, UNIS/L/302:https://unis.unvienna.org/unis/en/pressrels/2020/unisl302.html.
[271] The Constitution of the Republic of Ecuador (Article 190) explicitly mentions mediation as an alternative procedure for dispute resolution: https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html.
[272] Arbitration and Mediation Law, enacted in 1997 and amended in 2006: https://ccq.ec/wp-content/uploads/2019/01/Ley-de-Arbitraje-y-Mediación.pdf.
[273] Article 47 (4) AML (n 272). The Arbitration and Mediation Law further provides for provisions on mandatory mediation prior to arbitration, the mediation procedure, the establishment of mediation centers, and provisions relating to community mediation for indigenous groups.

res judicata effect.[274] Thus, Ecuadorian law recognizes MSAs as different from regular contracts under contract law.

It has even been argued that Ecuador predated the Singapore Convention on this matter.[275] In 2015 – four years before concrete discussions on a multilateral instrument began – the Ecuadorian government issued a new procedural code called the General Organic Code of Processes ("GOCP"),[276] which acknowledged *foreign* mediated settlement agreements as judgments. The GOCP explicitly allows foreign settlements in Ecuador to have the force granted to them by the relevant international treaties (Article 103 GOCP). In the absence of such treaties, such mediation instruments are enforced as a judgment. The GOCP additionally permits courts to order the execution of international mediated settlement agreements without reviewing the substance of the matter (Article 363 GOCP para 5). During enforcement proceedings, the legislation only permits objections to mediation instruments signed in domestic proceedings that arise *after* that instrument is signed.[277]

Since the ratification and implementation of the Singapore Convention, the procedure for enforcing international MSAs in Ecuador has been as follows. To recognize and homologate settlements, (i) Article 4 of the Singapore Convention's form requirements must be met, (ii) the MSA must comply with the formalities required to be considered authentic in the state that issued it, (iii) the MSA must be translated into Spanish, and (iv) the domicile of the party the settlement agreement is being enforced against must be specified (Article 104 GOCP).[278]

The following discusses the possibility of transforming an MSA into a consent award. According to the AML, once arbitration proceedings have begun, they may end in a settlement agreement that has the same effect as an arbitral award.[279]

[274] Article 47 (3) AML (n 272).
[275] Ximena Bustamante, who is an arbitrator and mediator at Pactum Dispute Resolution Consulting in Quito, Ecuador, shared this view on the Ecuadorian mediation framework at the event "A Came Gathering: Voices on the Singapore Convention Two Years On", presented by JAMS, Society of Mediation Professionals (Singapore) and Global Mediation Alliance, in September 2021. The program recording can be accessed here: https://www.jamsadr.com/events/2021/voices-on-the-singapore-convention-two-years-on.
[276] The General Organic Code of Process as amended on 22 May 2015, Registro Oficial No 506: https://ccq.ec/wp-content/uploads/2019/01/Código-Orgánico-General-de-Procesos.pdf.
[277] Such objections relate to the extinction or modification of the obligation set forth in the instrument, see A/CN.9/846 (n 203), item 8.
[278] A description of the Ecuadorian jurisdiction is available at the official website of the Singapore Convention: https://www.singaporeconvention.org/jurisdictions/ecuador.
[279] Article 28 AML (n 272).

However, the law does not allow for arbitral proceedings of which the sole purpose is to enable a settlement between the parties to be treated as an award; instead, it requires an actual dispute. In cases of hybrid proceedings, the procedure must begin with arbitration for a consent award to be enforceable in Ecuador based on the New York Convention or the Inter-American Convention on International Commercial Arbitration.[280]

3.9 Summary

In the jurisdictions illustrated above, it is common that, in principle, a mediation settlement agreement governs the contractual relationship between the parties. In most of the presented jurisdictions (especially in common-law jurisdictions), the legal status of an MSA is considered no different from the legal status of a negotiated settlement. This means that the parties must resort to the litigation system they avoided in the first place. Furthermore, under the rules and principles of contract law, a panoply of legal defenses is available for non-complying parties. In this comparison, only Brazil and Ecuador to a certain extent treat MSAs as "super contracts," granting them special status and direct enforceability.

The grounds available for a competent authority to refuse enforcement of MSAs vary depending on the means chosen for enforcement. If a party attempts to enforce an MSA as a judgement, the available grounds for refusal differ from those available when the MSA is enforced as an ordinary contract.[281]

A majority of these jurisdictions have enacted legislation that provides for some kind of expedited process through which MSAs are converted into enforceable judgments, notarial deeds, or arbitral awards. In some countries (e.g. PRC), this depends on whether the mediation occurred in front of a court. Whether the law also covers *international* MSAs depends on the particular legislation. Most jurisdictions (except for Brazil and Ecuador) do not explicitly reference international MSAs.

Therefore, even if an expedited procedure for converting an MSA to an enforceable instrument is available, enforcement options outside the home jurisdiction remain limited unless there are pre-negotiated obligations in place. These can take the form of a bilateral (e.g. the China-Hong Kong CEPA Agreement) or regional instrument (e.g. EU).

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[280] A/CN.9/846 (n 203), item 8.
[281] A/CN.9/WG.II/WP.187, 27 November 2014, pp. 7-8, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V14/080/44/PDF/V1408044.pdf?OpenElement.

A particular technical issue arises in legislation that converts an international MSA into an arbitral award. Some countries explicitly provide that, *after* they have reached the settlement, parties may appoint an arbitrator to receive a consent award that is an enforceable title (e.g. Hong Kong); others explicitly deny the possibility (e.g. Brazil, Ecuador, Japan). Opinions differ on whether such an award would be enforceable under the New York Convention. Although some states have attempted to clarify this issue (e.g. Brazil, Ecuador, Hong Kong, Japan), others have not (e.g. US).[282]

Overall, states' tendency to enact mediation legislation and offer different solutions to MSA enforcement is noteworthy. However, there is a considerable disparity among provisions on enforcement of MSAs, and only a small number of states have ratified the Singapore Convention. As a result, there remain significant uncertainties, especially in cross-border disputes. Whether states decide to sign and ratify the Singapore Convention appears to depend on how the domestic legal framework on mediation is developed.[283]

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[282] This legal fiction between consent awards issued after – as opposed to before – the commencement of arbitration will be addressed in more detail in sub-section 4.4.3.

[283] A description of the jurisdiction of each ratification State (Belarus, Ecuador, Fiji, Georgia, Honduras, Kazakhstan, Qatar, Saudi Arabia, Singapore, Turkey) and its implementing legislation, can be found here: https://www.singaporeconvention.org/jurisdictions.

4 Enforcement of MSAs Under Existing and Developing International Enforcement Regimes

4.1 Enforcement Under the Singapore Convention

4.1.1 General remarks

After several years of development within UNCITRAL Working Group II on Dispute Settlement, the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention") was adopted in December 2018 and entered into force in September 2020.[284] This Convention is modeled after the New York Convention, which has facilitated the growth of arbitration by setting conditions for the recognition and enforcement of foreign arbitral awards.[285] The Singapore Convention provides a similar regime for cross-border enforcement of IMSAs.[286] It also allows a party to invoke an IMSA to prove that a matter has already been resolved and documented.[287] The overarching aim of the Singapore Convention is to bolster the predictability of IMSAs and thus promote mediation as an alternative method of resolving cross-border commercial disputes.[288] Thus, the Singapore Convention addresses exactly the concerns discussed in the previous chapters. This section provides an overview of the main provisions of the Singapore Convention.[289]

Due to the wide variety of enforcement frameworks in use, the crafting of the Singapore Convention posed a challenging exercise. Instead of searching for a dominant trend and harmonizing domestic laws according to this trend, the approach chosen was to provide direct enforcement of IMSAs under specific criteria, with the enforcing jurisdiction assessing compliance

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[284] Singapore Convention (n 3). Up-to-date information on the Singapore Convention and its status is available on the UNCITRAL website: https://uncitral.un.org/ and the official website of the Singapore Convention: https://www.singaporeconvention.org. On the course of the debate in UNCITRAL, see Schnabel, T. (2019) "The Singapore Convention on Mediation: Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements," *Pepperdine Dispute Resolution Law Journal*, 19(1), pp. 1-60.
[285] Deason, E. E. (2015) "Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?" *Dispute Resolution Magazine*, pp. 32-38, at p. 33; Manukyan, M. (2019), "Singapore Convention Series: A Call For A Broad Interpretation Of The Singapore Mediation Convention In The Context Of Investor-State Disputes," *Kluwer Mediation Blog*, 10 June 2019, available at: http://mediationblog.kluwerarbitration.com/2019/06/10/singapore-convention-series-a-call-for-a-broad-interpretation-of-the-singapore-mediation-convention-in-the-context-of-investor-state-disputes/.
[286] The key mandate of the Singapore Convention is stipulated in Article 3.
[287] Article 3(2) of the Singapore Convention.
[288] See the Preamble of the Singapore Convention.
[289] For a comprehensive, article-by-article commentary on the Singapore Convention, see Alexander, N. and Chong, S. (2019) "The Singapore Convention on Mediation: A Commentary," *Kluwer Law International*, available at: https://www.kluwerarbitration.com/book-toc?title=The%20Singapore%20Convention%20on%20Mediation:%20A%20Commentary.

according to these criteria.[290] This is also the approach of the New York Convention.[291] Neither convention discusses how the enforcement regime at the domestic level should look.[292] Instead, the form of enforcement proceedings is determined by the jurisdiction where enforcement is sought. In contrast to most domestic enforcement regimes, the Singapore Convention recognizes MSAs as legally distinguishable from an ordinary contractual settlement arrived at between parties without the assistance of a third party.

4.1.2 Scope of application

According to Article 1 para. 1, the Singapore Convention applies "to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international (…)".[293] As illustrated below, the Singapore Convention is formulated in a broad manner; thus, the scope of the settlement agreements covered by the Convention is wide.

The Convention broadly defines "mediation."[294] What is required is that the parties try to resolve their dispute amicably with the assistance of a third party that is not the ultimate decision-maker.[295] A settlement agreement is already "in writing" if its content is recorded in any form, including electronic communication.[296]

The Convention applies to "settlement agreements which are commercial in nature," irrespective of whether the parties are commercial entities.[297] The term "commercial" is meant to be broadly construed.[298] There is no restriction on the type of remedies or contractual obligations

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[290] A/CN.9/WG.II/WP.187 (n 280), p. 8.
[291] Deason, E. E. (2015) *A New Legal Framework?* (n 285).
[292] Chua, E. (2019) "The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution," *Asian Journal of International Law*, Vol. 9, pp. 195-205, at pp. 197-198.
[293] Article 1(1) Singapore Convention.
[294] In more detail Chong, S. and Steffek, F. (2019) "Enforcement of International Settlement Agreements Resulting From Mediation Under The Singapore Convention – Private International Law Issues in Perspective," *Singapore Academy of Law Journal*, Vol. 31, pp. 448-486, at pp. 457-459.
[295] Article 2(3) of the Singapore Convention.
[296] Ibid., Article 2(2).
[297] A/CN.9/WG.II/WP.195, 2 December 2015, para. 14 (https://documents-dds-ny.un.org/doc/UNDOC/LTD/V15/086/28/PDF/V1508628.pdf?OpenElement); A/CN.9/867, 10 February 2016, paras. 100, 102-105, 109-110 (https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/008/00/PDF/V1600800.pdf?OpenElement); A/CN.9/896, 30 September 2016, para. 146, 152 (https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/085/10/PDF/V1608510.pdf?OpenElement); A/CN.9/WG.II/WP.202, 14 July 2017, para. 6(ii) (https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/050/10/PDF/V1705010.pdf?OpenElement); A/CN.9/WG.II/WP.200, 28 November 2016, para. 2 (https://documents-dds-ny.un.org/doc/UNDOC/LTD/V16/101/13/PDF/V1610113.pdf?OpenElement).
[298] Article 1 (1) Singapore Convention; A/CN.9/861, 17 September 2015, para. 40 (https://documents-dds-ny.un.org/doc/UNDOC/GEN/V15/065/85/PDF/V1506585.pdf?OpenElement). Reference can also be made to the

that can be included in the agreements. Thus, pecuniary as well as and non-pecuniary remedies may be included.[299]

Settlements expressly excluded due to their underlying subject matters are those that are "[c]oncluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes" and those "relating to family, inheritance, or employment law"[300]. In addition, and to differentiate from other multilateral treaties (in particular, the New York Convention and the Hague Convention on Choice of Court Agreement), the Singapore Convention does not apply to settlement agreements obtained through court (approved by a court, concluded in the course of court proceedings, or enforceable as a judgment in the state of a court) or arbitral proceedings (i.e. those settlement which have been recorded and are enforceable as an arbitral award).[301]

Furthermore, the term "international" is broadly defined in Article 1 para. 1.[302] In contrast to the New York Convention, the Singapore Convention references no seat as the location of mediation is irrelevant and only the place of application is decisive.[303] Thus, the enforcement mechanism is not exclusive to parties or MSAs from states that have ratified the Singapore Convention. If a party to the MSA has assets in a contracting party to the Convention, in general, these assets can be directly enforced under the Singapore Convention.

4.1.3 The procedure and requirements

A party seeking relief under Article 3 of the Singapore Convention has to supply the competent authority of a contracting state with the signed settlement agreement and with evidence that the agreement was the result of international mediation.[304] According to Article 4 para. 1 lit. (b) (i)-(iv) of the Singapore Convention, such evidence can be demonstrated in different ways.[305]

UNICTRAL Model Mediation Law, which provides a non-exhaustive illustrative list of commercial relationships in Article 3 (n 180).

[299] A/CN.9/861 (n 297) para. 47-50.

[300] Article 1(2)(a) and (b) of the Singapore Convention. A/CN.9/861 (n 297) paras. 41-43.

[301] Article 1(3) of the Singapore Convention.

[302] With regard to the term "international," see A/CN.9/861 (n 297) para. 39.

[303] With regard to the lack of "seat," see A/CN.9/861 (n 297) para. 35. For more detail, see Chong, S., "Singapore Convention Series: Why Is There No Seat of Mediation," at the website of the Singapore International Dispute Resolution Academy, date unknown: https://sidra.smu.edu.sg/singapore-convention-series-why-there-no-seat-mediation.

[304] As to the requirements, see Article 4 of the Singapore Convention.

[305] In countries such as the UK and the US, where it is common practice that the mediator should not sign the MSA as he or she is neither a party to the agreement nor a witness, the persons involved can ensure the evidence in other ways; see in particular Article 4(1)(b)(iv) of the Singapore Convention.

If the requirements are met, the contracting state, according to Article 3 para. 1 of the Singapore Convention has to enforce the IMSA in accordance with its rules of procedure and the conditions outlined in the Convention. However, the right to enforce is not absolute.

4.1.4 Grounds for refusing to grant relief

Like the New York Convention, the Singapore Convention in Article 5 para. 1 provides for limited grounds on which the competent authority may refuse to grand enforcement of an IMSA.[306] The grounds listed in para. 1 are exhaustive but permissive. They relate to the way the settlement was crafted and must be invoked and established by the party against whom enforcement is sought. These grounds according to Article 5 para. 1 are (a) party incapacity; (b)(i) the agreement is null and void, inoperative, or incapable of being performed under the laws to which the parties have validly subjected it or the law deemed applicable; (b)(ii) the agreement is not binding or definitive; (b)(iii) the agreement has been modified; (c)(i) the obligations in the settlement agreement have been performed; (c)(ii) the obligations are not clear or comprehensive; (d) there is an express prohibition of enforcement in the agreement; (e) there has been a serious breach by the mediator of standards applicable to the mediator or the mediation without which the party would not have entered into the settlement agreement; and (f) there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediators' impartiality or independence.[307]

In addition, Article 5 para. 2 of the Singapore Convention provides for two reasons, which the competent authority can raise *ex officio*: (a) "Granting relief would be against the public policy of the enforcing jurisdiction" or (b) "The subject matter of the dispute is not capable of settlement by mediation" under the domestic law of the enforcing jurisdiction.[308]

4.1.5 Reservations

According to Article 8 of the Singapore Convention, states are authorized to make only two reservations.[309] A signatory may (a) exempt agreements with governmental parties (be it the contracting state, a governmental agency, or any person acting on behalf of such agency) and

[306] Some of the reasons are similar to the New York Convention Article V (n 8).
[307] Article 5 (1) of the Singapore Convention. For an analysis of the grounds for refusal, see Chong, S. and Steffek, F. (2019) *Enforcement of International Settlement Agreements* (n 294) pp. 468-484.
[308] Article 5 (2) Singapore Convention.
[309] Ibid., Article 8 (2).

(b) require enforcement of MSAs only "to the extent that the parties to the settlement agreement have agreed to the application of the Convention."[310]

In Working Group II, there have been debates as to whether the Singapore Convention would also apply to settlements concluded in the ISDS context. In particular, the Working Group discussed whether the reference to "commercial" also includes settlements that result from investment mediation involving a government or governmental agency.[311] According to the *travaux préparatoires*, the view generally shared was that the term "commercial" should be broadly construed.[312] This definition allows for applications to settlements resulting from investor-state disputes.[313] After all, government agencies also operate commercially and may seek to resolve disputes arising from such activity through mediation.[314] However, as a compromise, the negotiators granted the right to declare under Article 8 para. 1 lit (a) to exclude settlement agreements to which its government or other public entities are a party.[315] To date, four of the ratifying states (Belarus, Georgia, Kazakhstan, Saudi Arabia) have exercised this reservation.[316] Iran

[310] Article 8 (1) of the Singapore Convention.
[311] A/CN.9/861 (n 297) paras. 44-45.
[312] See "Travaux préparatoires: Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention on Mediation")," available at: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/travaux. See also Tan, R. (2020) "Investor-State Arbitration Meets Mediation: The Singapore Convention on Mediation as Game-Changer," *Kluwer Arbitration Blog*, 29 September 2020, available at: http://arbitrationblog.kluwerarbitration.com/2020/09/29/investor-state-arbitration-meets-mediation-the-singapore-convention-on-mediation-as-game-changer/.
[313] The UNCITRAL Working Group II noted that government entities should not be automatically excluded from the Singapore Convention and chose to address this issue with an "opt out" mechanism (Article 8 (1) lit (a)). A/CN.9/WG.II/WP.198, 30 June 2016, para. 24 (https://documents-dds-ny.un.org/doc/UNDOC/LTD/V16/040/09/PDF/V1604009.pdf?OpenElement); A/CN.9/867 (n 297) para. 111. In an UNCITRAL Working Group III meeting, the UNCITRAL Secretariat with regard to Article 8 of the Singapore Convention stated that it allows states "to tailor [the] application [of the Convention] in a flexible manner, including in the context of investor-State dispute settlement" A/CN.9/WG.III/WP.160, 27 February 2019, para. 54 (https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/011/57/PDF/V1901157.pdf?OpenElement). On the issue of whether it includes *all* or *a limited scope* of investment disputes, see Manukyan, M., *Singapore Convention Series* (n 285).
[314] A/CN.9/861 (n 297) paras. 44-46; A/CN.9/WG.II/WP.195 (n 297) paras. 19-21; A/CN.9/WG.II/WP.198 (n 313) para. 24; A/CN.9/867 (n 313) para. 111; A/CN.9/896 (n 297) para. 62; A/CN.9/WG.II/WP.200 (n 297) para. 21; A/CN.9/WG.II/WP.205, 23 November 2017, para. 28 (https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/083/16/PDF/V1708316.pdf?OpenElement). With regard to *acta jure imperii* (liability of a state for its acts or omissions in the exercise of its authority), see A/CN.9/867 (n 313) paras. 113–114; A/CN.9/WG.II/WP.198 (n 313) para. 24 and 28. The Working Group "confirmed its understanding that the Convention would not have any impact or interfere with the public international law aspects of state liability or state immunity." Cf. A/CN.9/896 (n 297) paras. 61, 146; A/CN.9/WG.II/WP.200 (n 297).
[315] A/CN.9/861 (n 297) para. 46.
[316] The declarations and reservations are available via the United Nations Treaty Collection, Chapter XXII, Status as of 5 July 2022, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en.

has made the reservation upon signature, “subject to confirmation upon ratification, acceptance or approval.”[317]

If a state makes use of the second reservation, the Singapore Convention applies “only to the extent that the parties to the settlement agreement have agreed to the application of the Convention” (Article 8 para. 1 lit. (b)). Thus, the enforcement regime becomes available only to international commercial parties sophisticated enough to know that it exists and which have agreed to it. As regards the “opt-in” provision in Article 8 para. 1 lit. (b), Georgia and Kazakhstan have declared this reservation, and Iran has done so upon signature.[318]

4.1.6 Current status and outlook

At the time of writing, the Singapore Convention has 55 signatories, of which 10 states have ratified or approved the Convention.[319] Considering that the Convention was signed on “day one” by 46 states (the highest number of first day-signatories to a United Nations trade convention) and by some of the largest economies in the world – including the US, China, and India, the Singapore Convention undoubtedly is off to a good start. However, only 10 of the signatory states have also ratified the Convention to date: Belarus, Ecuador, Fiji, Georgia, Honduras, Kazakhstan, Qatar, Saudi Arabia, Singapore, and Turkey. As the Singapore Convention is binding only upon ratification in the signatory state, the success of the Convention will depend on how many states ratify it, how many of them declare the reservations mentioned above, and finally how well it works in practice.[320] In particular, ratification by the world’s most important economies – the US, China (signatory states), and the EU (no signatory yet) – might trigger other countries to join the Singapore Convention.[321]

Some criticism of the Convention has been expressed, especially by US scholars.[322] The concerns raised refer to the scope of settlement agreements, the grounds for refusal (the language used is broad and untested and could *a fortiori* give rise to litigation and delay enforcement; there is no universally accepted mediator code of conduct, no set-aside mechanism under the

[317] See Article 8(3) of the Singapore Convention.
[318] On the status of the Singapore Convention, see the United Nations Treaty Collection (n 316).
[319] Ibid.
[320] The Convention’s official website, at www.singaporeconvention.org, is an excellent source for those interested in following up on its signing and ratification status.
[321] With regard to the US: Schnabel, T. (2019) *Implementation of The Singapore Convention* (n 233), p. 275. See also Clark, B. and Sourdin, T. (2020) “The Singapore Convention: A Solution in Search for a Problem?” *Northern Ireland Legal Quarterly*, 71(3), pp. 481-502.
[322] e.g. Kelly, R. (2022) “Will Your State Law Be Preempted? Why Two Sections of the Singapore Mediation Convention Are Problematic,” 40(2), February 2022, *Alternatives*, pp. 19-21. and Stute, D. J. and Wansac, A. N. (2021) “The Singapore Convention: Not much there, there,” ITA in Review, 3(1), pp. 32-57.

Singapore Convention). Some criticism also targets the reservations provided in Article 8. However, on a positive note, those reservations – in particular, the reservation noted in Article 8 para. 1 lit. (b) – could provide a solution for states with some of the concerns mentioned above.[323]

As illustrated in Chapter 3 of this thesis, the Singapore Convention will likely influence domestic mediation regimes and become a main driver of future domestic and international developments in mediation. In addition, in the ISDS context, the Convention may encourage a reconsideration of the choice of arbitration in favor of mediation, due to the increased prospects of enforceability.[324]

4.1.7 Practical considerations

As of the entry of force of the Singapore Convention, the parties and their counsel in cross-border disputes should be aware of the status of the Convention and should take certain steps to be prepared and be able to take advantage of this new enforcement mechanism:

- Parties should be aware of whether the states in which enforcement should take place have ratified the Singapore Convention and what reservations have been declared by these states.
- Because of the reservation in Article 8 para. 1 lit. (b), parties may want to include a clause in the settlement agreement in which parties opt in to the Singapore Convention's application to avoid any confusion if further states declare the reservation.
- Parties should also analyze whether they are "international" as defined in the Singapore Convention to ensure that an agreement is not subject to challenge as a "domestic" agreement outside the scope of the Convention.
- Mediation clauses should specify that any mediation settlement agreement must be in writing and duly signed by the parties, as well as signed or certified by the mediator.

[323] Kelly, R. (2022) *Will Your State Law Be Preempted? Why Two Sections of the Singapore Mediation Convention Are Problematic* (n 322), pp. 19-21.
[324] Appel, M. E. (2018) "A 'Done Deal' for States and Investors? The United Nations Convention on International Settlement Agreements Resulting from Mediation," *Journal of Enforcement of Arbitration Awards*, 1(2), pp. 1-12.

- Parties should meet the criteria for enforceability set forth under the Singapore Convention and include explicit language that the mediator is certifying that the mediation took place but that the mediator is not a witness or a party to the agreement.

4.2 Enforcement Under a Prospective Multilateral Investment Court

To address the need for systemic reform of the current ISDS system, the EU is committed to the establishment of a permanent body, the Multilateral Investment Court ("MIC").[325] The negotiations to establish the framework for such a permanent body are ongoing at UNCITRAL.[326] The EU proposed that such a system would also provide for dispute resolution through ADR and, in particular, mediation.[327] A pool of experienced mediators that would be different from the pool of adjudicators would be available and committed to a code of conduct. Furthermore, the mediation process would be backed by institutional and logistical support (e.g., by establishing a mediation center with support staff dedicated to the mediation procedures). The time to conduct mediation could be prior to litigation or during litigation. The mediation solution might then benefit from a separate enforcement mechanism attached to the MIC without review at the domestic level. The permanent court structure would also address concerns in that it would offer predictability and structure to mediation as well as promote the effectiveness of the result.[328]

In general, establishing an enforcement mechanism within the MIC system is vital to avoid legal uncertainties. The MIC Draft Statues in Articles 56–58 foresee a specific system for enforcement in MIC member states and non-MIC member states.[329] MIC decisions would not benefit from the enforcement system of the ICSID Convention, as the ICSID Convention as is

[325] On the key features of the MIC project: A/CN.9/WG.III/WP.159/Add.1, 24 January 2019 (https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/004/19/PDF/V1900419.pdf?OpenElement). The following EU trade and investment agreements contain a clause to facilitate the transition from the current system to the establishment of a multilateral investment court: CETA Art 8.29; EU-Vietnam IPA Art 3.41; EU-Singapore IPA Art 3.12; EU-Mexico Agreement in Principle Section C of the Chapter on Investment.
[326] For the latest developments of the ISDS reform discussions, visit the UNCITRAL website at: https://uncitral.un.org/en/standing.
[327] As demonstrated in Section 3.2, the EU is a firm advocate for the resolution of disputes through alternative methods, notably mediation.
[328] European Commission, DG TRADE, Delegation of the European Union to UNCITRAL Working Group III - Virtual Pre-Intersessional Meeting of 9 November 2020: The use of mediation in ISDS (https://trade.ec.europa.eu/doclib/docs/2020/november/tradoc_159038.pdf); see also the submission of the European Commission, A/CN.9/WG.III/WP.145, 12 December 2017 (https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/088/32/PDF/V1708832.pdf?OpenElement).
[329] Bungenberg, M. and Reinisch, A. (2021) *Draft Statute of the Multilateral Investment Court* (n 9), pp. 75-77.

now would not apply to such proceedings.[330] It is also uncertain whether MIC decisions would benefit from the system under the New York Convention, as MIC decisions would need to embody "New York Convention-awards."[331] This concerns the question of consistency of the procedures foreseen in the different conventions, in particular to what extent MIC decisions could qualify as arbitral awards under these conventions.[332] It remains to be seen whether in the MIC statute any reference will be made to existing conventions.[333]

To facilitate enforcement under the MIC framework, Article 58 of the MIC Draft Statute proposes to establish an enforcement fund from which final MIC decisions would be settled and to which the member states would have to contribute.[334] Whether this fund would also include settlements resulting from a mediation procedure also remains to be seen.

Assuming that the MIC will emerge and that it will provide for its own enforcement mechanism, the success of such a mechanism will again depend on the number of MIC member states and the acceptance by domestic courts executing enforcement. After all, it is the courts of each state that are ultimately responsible for interpreting and applying international conventions such as the ones mentioned above.

4.3 Enforcement Under the ICSID Convention

The enforcement regime under the ICSID Convention is very efficient. All parties to the ICSID Convention (currently 164 member states)[335] are obliged to enforce ICSID awards (pecuniary obligations) as if demanded by a final judgment of their own national court.[336] Thus, ICSID

[330] A/CN.9/1004/Add.1, 28 January 2020, para. 78 et seq. (https://documents-dds-ny.un.org/doc/UNDOC/GEN/V20/007/33/PDF/V2000733.pdf?OpenElement); Bungenberg, M. and Reinisch, A. (2021) *Draft Statute of the Multilateral Investment Court* (n 9), p. 34.

[331] A/CN.9/1004/Add.1 (n 329) para. 62; Bungenberg, M. and Reinisch, A. (2021) *Draft Statute of the Multilateral Investment Court* (n 9), p. 34. It has been suggested that enforcement under the NYC might be possible based on Article 1(2) of the NYC, as an arbitral award made by "permanent arbitral bodies." A/CN.9/WG.III/WP.185, 29 November 2019, para. 57 (https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/113/57/PDF/V1911357.pdf?OpenElement); However, domestic courts that interpret and apply the NYC might render divergent decisions on whether the MIC is considered a permanent arbitral body. A/CN.9/1004/Add.1 (n 330), paras. 70-71.

[332] In more detail: Bungenberg, M. and Reinisch, A. (2020) "Recognition and Enforcement of Decisions" in Bungenberg, M. and Reinisch, A. (eds) *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, European Yearbook of International Economic Law, pp. 155-173, paras. 479 et seq.; Bungenberg, M. and Reinisch, A. (2021) *Draft Statute of the Multilateral Investment Court* (n 9), p. 34.

[333] See as an example Article 8.41(5) CETA and the provisions in the EU-Vietnam IPA and the TTIP draft.

[334] Bungenberg, M. and Reinisch, A. (2021) *Draft Statute of the Multilateral Investment Court* (n 9), p. 35.

[335] Status as of 5 July 2022. Database of ICSID Member States, available at: https://icsid.worldbank.org/about/member-states/database-of-member-states.

[336] ICSID Arbitration Rule 54: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. [. . .]."

awards are not reviewed by the executing state court. The only objection admissible is an objection based on the principles of state immunity in enforcement proceedings.[337]

There is no specific enforcement mechanism for settlements resulting from mediation. The only way that a party could benefit from the simplified enforcement regime is if the agreement is reached as a corollary to an ongoing ICSID arbitration and the settlement terms are embodied in an arbitral award pursuant to Rule 43(2) of the ICSID Arbitration Rules.[338]

For relief of a non-pecuniary nature and non-ICSID investment arbitral awards (including awards under the ICSID Additional Facility Rules or other rules), resort can be made to the enforcement regime under the New York Convention (if enforcement is sought in one of the state parties to this convention).[339]

If an IMSA is not embodied in an arbitral award, however, the parties could still benefit from the enforcement regime under the Singapore Convention.[340] The new ICSID Mediation Rules[341] were drafted to align with the Singapore Convention such that an IMSA would meet its enforceability requirements.[342] Thus, although the new ICSID Mediation Rules do not provide for simplified enforcement of settlements reached through a mediation process, they seem to have recognized its importance and have integrated the Singapore Convention into the ICSID framework.

4.4 Enforcement Under the New York Convention

4.4.1 General remarks

The enforcement mechanism under the New York Convention ("NYC"), due to the large number of members (currently 170 parties[343]), is similarly efficient to that under the ICSID Convention. It is also generally considered that investment arbitral awards are subject to the New

[337] ICSID Arbitration Rule 55: "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."
[338] ICSID Arbitration Rule 43(2): "If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award."
[339] Bungenberg, M. and Reinisch, A. (2020) *Recognition and Enforcement of Decisions* (n 332) para. 485 et seq.
[340] Nitschke, F. (2021) "The Proposed ICSID Mediation Rules," *University of St. Thomas Law Journal*, 17(2), pp. 422-454, at p. 425.
[341] ICSID Mediation Rules (n 2).
[342] Nitschke, F. (2021) *The Proposed ICSID Mediation Rules* (n 341), p. 426 (n 340).
[343] Status as of 5 July 2022: https://treties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-1&chapter=22&clang=_en-.

York Convention (in accordance with Article I paras. 1 and 3 NYC), and investment disputes are considered "commercial" disputes for the purposes of Article I para. 3 NYC.[344]

Each contracting state is obliged to recognize and enforce "New York Convention-awards."[345] In comparison to the ICSID Convention, however, states retain some control through the additional grounds for non-recognition and non-enforcement as stipulated in Article V of the NYC. A contracting state can refuse enforcement based on the following reasons:

> conflict with the ordre public; invalidity of the arbitration agreement; violation of the right to be heard; lack of jurisdiction of the tribunal: flawed constitution of the arbitral tribunal or a lack of binding legal force and/or the annulment of the arbitral award according to the lex arbitri or the law of the state of residence.[346]

The NYC only applies to arbitral awards. For mediation settlement agreements, this means that such settlements must first be converted into an arbitral award ("consent award" or "award on agreed terms") to be eligible for enforcement under the NYC. In principle, this conversion can be easily achieved through hybrid proceedings (Med-Arb/Arb-Med-Arb[347]). At first glance, it might therefore seem that the well-established enforcement system of the NYC is sufficient for the purpose of enforcing IMSAs and that a separate enforcement regime specifically for this purpose would be superfluous. However, it is worth taking a closer look at the details and potential risks associated with combining mediation and arbitration as a vehicle for securing the enforceability of MSAs. The most significant concerns relate to (i) the double-hatting of the neutral in hybrid proceedings and (ii) the extent to which the NYC can be applied to mediation settlement agreements.

4.4.2 The impact of "double-hatting" in hybrid proceedings

In order to promote efficiency and finality in the resolution of disputes, institutions and states have been adapting their rules and laws to grant the parties of a dispute the autonomy and flexibility to conduct hybrid proceedings (see Sub-section 2.2.3 for a description of designs).[348]

[344] Bungenberg, M. and Reinisch, A. (2020) *Recognition and Enforcement of Decisions* (n 332) paras. 486-488.
[345] Article III NYC: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."
[346] Bungenberg, M. and Reinisch, A. (2020) *Recognition and Enforcement of Decisions* (n 332) para. 489.
[347] For a description of these hybrid processes, see sub-section 2.2.3.
[348] Chua, E. (2019) *Enforcement of International Mediated Settlements* (n 105), p. 586.

Many of these laws and rules allow that such proceedings can be conducted by a *single neutral*.[349]

The benefits of having the same person acting as mediator and arbitrator are obvious: resolving the dispute more expeditiously, efficiently, and at a lower cost.[350] However, there are also risks that may surface during the process, particularly at the enforcement stage.[351] The neutral should be aware of his or her role and the way he or she is required to behave when acting as arbitrator and when acting as mediator. Most complaints relate to due process concerns due to the neutral's double-hatting.[352]

For instance, when *Arb-Med* is conducted with the arbitrator preparing the award (which first remains under seal) and subsequently conducting the mediation, the arbitrator-turned-mediator should refrain from applying evaluative (instead of facilitative) techniques. The parties in the mediation might feel coerced into accepting a resolution (namely the arbitrator's already prepared decision) to which they do not fully subscribe. Furthermore, it may be more challenging to conduct mediation after the parties have participated in an adversarial process.[353]

When the neutral switches hats in *Med-Arb* proceedings, he or she has to be even more careful not to engage in evaluative techniques and not to reveal to the parties the merits of their respective cases.[354] Enforceability concerns with Med-Arb relate to the use, disclosure, or non-disclosure of information received confidentially through caucusing in mediation. On the one hand, the benefits of caucusing as a tool to bring about settlement are likely to be negated, as the parties under supervision of their counsel will be reluctant to disclose their true interests and settlement positions knowing that arbitration may follow the mediation.[355] On the other hand, a counsel may attempt to "manipulate" the mediator to advance their client's case. Another question that arises due to the switching of roles is whether an arbitrator who previously acted

[349] For an overview of these laws and rules: Ross, D. (2013) *Med-Arb/Arb-Med* (n 110), pp. 352-357.
[350] Because the neutral is already acquainted with the dispute, no double work or extra expenses are required.
[351] Appointing the mediator as arbitrator could render the award unenforceable under the NYC. Risks include the invalidity of the arbitration agreement, improper constitution of the arbitral tribunal, due process concerns related to caucusing, and excess of mandate. Steele, B. L. (2007) "Enforcing International Commercial Mediation Agreements as Arbitral Awards under the New York Convention," *UCLA Law Review*, Vol. 54, pp. 1385-1412, at pp. 1399-1405.
[352] Sekjo, D. (2020) *Hybrid Models of Arbitration and Mediation* (n 104), para. 50.
[353] In contrast, some suggest it is the prepared award under seal that increases the likelihood of settlement between the parties for psychological reasons. Chua, E. (2019) *Enforcement of International Mediated Settlements* (n 105), p. 590.
[354] Sekjo, D. (2020) *Hybrid Models of Arbitration and Mediation* (n 104), para. 52.
[355] Ibid., para. 61; Chua, E. (2019) *Enforcement of International Mediated Settlements* (n 105), p. 589

as mediator is able to decide a case only on the facts and law introduced by the parties in the arbitration.[356]

If a mediation is not successful, parties may be tempted to challenge the award. A party may challenge the award due to perceived or actual bias, arguing that information received confidentially by the mediator in the mediation process influenced the arbitration decision-making. Moreover, if a party disclosed facts in a caucus session that the other party was not aware of and did not have an opportunity to comment, and believes that those facts were material to the outcome of the arbitrator's decision, that other party might claim a violation of the right to be heard. In response to the latter concern, some laws and rules require the arbitrator to disclose any confidential information he or she deems material to the outcome of the arbitration before commencing the arbitration stage.[357] However, a potential negative effect of such a disclosure requirement is that parties might be reluctant to reveal any information when conducting hybrid processes under such rules. The Chartered Institute of Arbitrators' Practice Guideline 7 goes even further and provides that the parties waive potential challenges based on settlement efforts.[358]

The three-stage process of *Arb-Med-Arb* can be streamlined to combine the advantages of Med-Arb and Arb-Med and to partly limit their pitfalls; however, in the case of a double-hatting of the neutral, the risks of perceived or actual bias and of parties refraining from sharing confidences or using mediation for collateral purposes are still apparent.[359]

To eliminate these risks, some laws and rules discourage the conducting of hybrid proceedings by the same neutral.[360] From an ethical or enforceability standpoint, having separate neutrals is the safest option, as due process concerns can be mitigated. However, it is not always the most efficient option. There are less savings in time and costs, and skillful coordination between the neutrals is required.[361]

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[356] See Boulle, L. and Qin, J. (2016) "Globalising Mediated Settlement Agreements," *Journal of International and Comparative Law*, 3(1), pp. 33-54, at p. 41.
[357] Such requirements, for instance, can be found in the laws and rules of Hong Kong, Singapore, and South Africa.
[358] Chartered Institute of Arbitrators, "Guideline 7", 6 December 2011: https://ciarb.org/media/4214/2011-adr-procedures-in-arbitration.pdf.
[359] Chua, E. (2019) *Enforcement of International Mediated Settlements* (n 105), p. 592; Boulle, L. and Qin, J. (2016) *Globalising Mediated Settlement Agreements* (n 356), p. 41.
[360] For instance, Art 13 UNCITRAL Model Mediation Law (n 181) and Mediation Rule 15 of the (formerly) Judicial Arbitration and Mediation Services ("JAMS") (https://www.jamsadr.com/international-mediation-rules/).
[361] Sekjo, D. (2020) *Hybrid Models of Arbitration and Mediation* (n 104), para. 51.

Thus, although the prospect of conducting mediation and at the same time receiving a final award enforceable under the NYC is appealing and is one of the main reasons why parties opt for such proceedings, parties should be aware that such enforceability is not guaranteed due to possible challenges on various grounds, including that of apparent bias.[362] As elaborated in the following sub-section, even when different neutrals conduct the process, the risk remains that a consent award is not enforceable under the NYC.

4.4.3 Enforceability of an award on agreed terms

The main advantage of combining mediation and arbitration is that a settlement reached through mediation can be converted into an arbitral award ("award on agreed terms"/"consent award").[363] Many domestic laws and institutional rules recognize consent awards and even encourage the use of techniques to facilitate settlement between the parties which is then embodied into an award.[364] This practice, in principle, paves the way for enforcement under the New York Convention.

However, since the NYC itself does not refer to consent awards[365] and also does not provide for an autonomous definition of arbitral awards, the question arises as to whether such consent awards qualify as an "arbitral award" for the purposes of Article V of the NYC.[366] With regard to consent awards, the UNCITRAL Secretariat states:

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[362] For a demonstration on how apparent bias in enforcement proceeding with regard to consent awards rendered after the conduct of a hybrid process, see the Hong Kong case of Hong Kong case of *Gao Haiyan v Kenneye Holdings Ltd*: 2 December 2011 HKCA 489; [2012] 1 HKLRD 627: https://vlex.hk/vid/gao-haiyan-and-another-845327329.

[363] The terms "consent award" and "award on agreed terms", in general, are used interchangeably.

[364] Sussman, E. (2008) *The Final Step* (n 187), p. 355. The UNCITRAL Model Law on International Commercial Arbitration 1958 ("UNCITRAL Model Arbitration Law"), as adopted in 2006 (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf) in Art 30 expressly permits and recognizes consent awards and in Article 31 gives such awards the same status and effect as any other award. With regard to domestic laws, see for instance, English Arbitration Act, Sec 51; German Civil Procedure Code, Sec 1053; Belgian Judicial Code, Art 1712(1); Austrian Civil Procedure Code, Sec 605; Netherlands Code of Civil Procedure, Art 1069(1); Hong Kong Arbitration Ordinance, Sec 66; Australian International Arbitration Act, Schedule 2, Art 30; Chinese Arbitration Law, Art 49; Indian Arbitration and Conciliation Act, Sec 30(2); Japanese Arbitration Law, Art 38(1); Malaysian Arbitration Act, Sec 32; South Korean Arbitration Act, Art 31; Costa Rican Arbitration Law, Art 30(1); Peruvian Arbitration Act, Art 50(1).

[365] See also the UNCITRAL Secretariat, "Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral awards", September 2016, New York, para. 36: "The Convention is silent on the question of its applicability to decisions that record the terms of a settlement between parties. During the Conference, the issue of the application of the Convention to such decisions was raised, but not decided upon. Reported case law does not address this issue." (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2016_guide_on_the_convention.pdf).

[366] The issue of the application of the NYC to consent awards was raised during the negotiations that led to its adoption, but no decision was made. *Travaux préparatoires*: United Nations Economic and Social Council, Recognition and Enforcement of Foreign Arbitral Awards: Report by the Secretary-General, E/2822, 31 January 1956, Annex I (Comments by Governments), pp. 7, 10 (https://documents-dds-ny.un.org/doc/UNDOC/GEN/N56/027/29/PDF/N5602729.pdf?OpenElement); *Travaux préparatoires*: United Nations Conference

> The Convention is silent on the question of its applicability to decisions that record the terms of a settlement between parties. During the Conference, the issue of the application of the Convention to such decisions was raised, but not decided upon. Reported case law does not address this issue.[367]

The prevailing view is that when a settlement is reached and converted into an arbitral award after the parties at some point have been able to present their positions in an adversarial process (e.g., if the settlement is reached after commencement of arbitration and appointment of the arbitrator), such consent awards qualify as final and binding awards under the NYC.[368] Nevertheless, enforcement could fail under certain circumstances.[369]

This may be the case, *inter alia*, if a settlement agreement is reached as a result of a mediation and only then is the arbitral tribunal appointed to convert the settlement agreement into an arbitral award (e.g., Med-Arb).

Many jurisdictions require (with regard to the arbitration agreement) that there must be a "dispute" or "controversy," at least when the arbitrator is appointed.[370] Accordingly, if the dispute was already settled following mediation, an arbitrator cannot be appointed to incorporate the settlement into an arbitral award.[371] Such an award would be null and incapable of enforcement under these laws.[372]

Similar conclusions have been drawn with regard to the NYC. As, according to Article 1(1), the NYC only applies to "arbitral awards (…) arising out of *differences* between the parties," consent awards that incorporate a settlement agreement that has been reached prior to the

on International Commercial Arbitration, Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, E/CONF.26/L.26, 27 May 1958, E/CONF.26/L.26 (https://documents-dds-ny.un.org/doc/UNDOC/LTD/N58/125/88/PDF/N5812588.pdf?OpenElement).

[367] UNCITRAL Secretariat Guide, para. 36 (n 365).

[368] e.g. Born, G. B. (2021) "Form and Contents of International Arbitral Awards" in Born, G. B. (ed) *International Commercial Arbitration*, Kluwer Law International, 3rd edn, pp. 3259-3368, at p. 3275 with further references.

[369] Sussman, E. (2010) "The New York Convention Through a Mediation Prism," *Transnational Dispute Management*, 5(4), pp. 10-13; Sussman, E. (2008) *The Final Step* (n 188), pp. 343-59; Steele, B. L. (2007) *Enforcing International Commercial Mediation Agreements as Arbitral Awards under the New York Convention* (n 351) pp. 1399-1405.

[370] e.g. Section 51 of the English Arbitration Act, 1996 c. 23, 17 December 1996: https://www.legislation.gov.uk/ukpga/1996/23/contents.

[371] Born, G. B. (2021) *Form and Contents of International Arbitral Awards* (n 368), p. 3272.

[372] In addition, strictly speaking, the UNCITRAL Model Arbitration Law in Art 30(1) conditions rendering an award on agreed terms on the occurrence of a settlement "during arbitral proceedings." However, some jurisdictions that are based on the Model Law have amended the provisions in order to permit the creation of consent awards where the settlement results from mediation only.

appointment of the arbitral tribunal could not be enforced under the Convention.[373] However, opinions by legal scholars examining this issue differ.[374]

Because of this unpredictability, hybrid proceedings that commence with arbitration (e.g. Arb-Med-Arb/concurrent mediation and arbitration) are considered to be the safest option when it comes to enforceability under the NYC.[375] In other words, even if a mediation is conducted immediately after commencement of arbitration and a settlement is then consensually reached and this settlement is incorporated into an award, such an award on agreed terms would be the result of "differences" between the parties and would thus fall under the purview of the NYC.[376] The same holds true for arbitrator-facilitated settlements.[377]

If the NYC applies to consent awards incorporating a settlement reached during arbitration that reflect the agreement of the parties and are not based on the arbitrator's own analysis and conclusion as to the dispute, why should settlements resulting from a consensual process and referred to the arbitral tribunal thereafter by agreement not benefit from the enforcement regime under the NYC? After all, "differences" clearly existed at some point, and the parties wish to finally resolve their dispute. Unlike in some domestic statutes, there is no temporal element in Article 1(1) of the NYC. The convention does not specify when the "difference" must exist in time and in relation to the time of the appointment of the arbitrator.[378] Furthermore, the NYC was drafted long before mediation's current acceptability and usage.

The wording of the NYC does not expressly bar recognition of consent awards, and considering the debate between scholars, the applicability of the NYC with regard to such consent awards appears to be at least ambiguous.

However, since domestic courts are the ones to apply and to interpret the convention and since the NYC is silent on this issue, significant insecurity is associated with enforcement following hybrid proceedings. As suggested by Edna Sussman, a recommendation or interpretation

[373] Chua, E. (2019) *Enforcement of International Mediated Settlements* (n 105), p. 587 with reference to Wolski, B. (2013) "Arb-Med-Arb (and MSAs): A Whole Which Is Less Than, Not Grater Than, the Sum of its Parts?" *Contemporary Asia Arbitration Journal*, 6(2), p. 249, at p. 262. Also relevant in this context are Article 2(1) and Article 5(2) of the NYC.
[374] Sussman, E. (2008) *The Final Step* (n 188), p. 358; Chua, E. (2019) *Enforcement of International Mediated Settlements* (n 105), p. 587.
[375] Sussman, E. (2010) *The New York Convention Through a Mediation Prism* (n 369), p. 12; Wolski, B. (2013) *Arb-Med-Arb* (n 373), p. 262.
[376] An arbitral tribunal must always be wary of whether the parties' way of proceeding is a means to achieve something illicit.
[377] For more detail, see Kaufmann-Kohler, G. (2009) *When Arbitrators Facilitate Settlement* (n 107), pp. 187-205.
[378] Sussman, E. (2008) *The Final Step* (n 188) 358.

provided by UNCITRAL clarifying the applicability to consent awards (resulting from mediation) could be a solution to this concern.[379]

At the time of writing, however, it seems unlikely that UNCITRAL would expressly confirm the NYC's applicability to consent awards rendered by an arbitrator appointed *after* the dispute has been settled through mediation. States do not want to expand the NYC's scope of applicability and also prefer to maintain some degree of flexibility to recognize and enforce awards or not.[380] Furthermore, the NYC is not tailored to the concerns raised in the mediation context[381] and some defenses for challenging an arbitral award "do not easily translate or transfer to mediation"[382] (e.g., those that relate to the arbitral tribunal's composition and the scope of its authority). Some authors have even described the practice of converting settlements into consent awards as a "convenient" but "ill-fitting hook."[383]

Even if a consent award is considered an award under the NYC, a party may still challenge it for an excess of mandate (under Article V(1)(c)), for lack of objective arbitrability (Article V(2)(a)), or on public policy grounds (Article V(2)(b)).[384] Scholars also emphasize that particular scrutiny is required by domestic courts when the rights of third parties are affected.[385]

Finally, although, unlike arbitral awards, consent awards are not required to be "reasoned,"[386] an arbitral tribunal, to be on the safe side, should include reasons supporting the settlement's validity and why it is authorized to issue the consent award.

4.4.4 Practical considerations and proposals

As illustrated above, the enforceability of MSAs under the NYC is not guaranteed. When drafting hybrid dispute resolution clauses, the benefits and risks of hybrid proceedings should be

379 Ibid., p. 359.
380 See Mariottini, C. M. and Hess, B. (2021) "The Notion of 'Arbitral Award'" in Ferrari, F. and Rosenfeld, F. J. (eds) *Autonomous Versus Domestic Concepts under the New York Convention*, Kluwer Law International, Vol. 61, p. 54.
381 Among others, Steele, B. L. (2007) *Enforcing International Commercial Mediation Agreements as Arbitral Awards under the New York Convention* (n 351), p. 1388.
382 Wolski, B. (2014) "Enforcing Mediated Settlement Agreements (MSAs): Critical Questions And Directions For Future Research," *Contemporary Asia Arbitration Journal*, 7(87), p. 98. For more detail, see also Chua, E. (2019) *Enforcement of International Mediated Settlements* (n 105), p. 588.
383 Wolski, B. (2014) *Enforcing Mediated Settlement Agreements (MSAs)* (n 381), p. 98.
384 See Brekoulakis, Ribeiro, and Shore (2015) "UNCITRAL Model Law, Article 30" in Mistelis, L. (ed) *Concise International Arbitration*, 2nd edn, p. 894; Judgment of the German Bundesgerichtshof, III ZB 55/99, 2 November 2000, where an applicant alleged that forged annual reports had been submitted to induce the party to agree to the settlement that formed the basis of the consent award (https://www.degruyter.com/document/doi/10.1515/ihr.2003.3.3.150a/pdf).
385 S Born, G. B. (2021) *Form and Contents of International Arbitral Awards* (n 368), p. 3276.
386 Ibid., p. 3271.

carefully weighed. Special care is required when conducting such proceedings and also when drafting the MSA and converting it into a consent award. With consideration to local and institutional rules, all parties involved in the process should take the following points into consideration:

With regard to the drafting of Arb-Med-Arb clauses:

- An Arb-Med-Arb clause should include language that all disputes are arbitrable, including those relating to non-compliance with the arbitration agreement, or to relating a potential settlement resulting from mediation,

- and that the arbitral tribunal is authorized to convert it into a consent award.

With regard to the process:

- Informed and written consent by the parties at every step of the way – especially when moving from mediation to arbitration or vice versa – is vital to avoiding ethical pitfalls and potential challenges.

- If the parties opt for a single neutral, the arbitration agreement should include a statement that the parties consent to the same person acting as both an arbitrator and mediator and resuming as an arbitrator in the event the mediation does not succeed.

- The possibility of caucusing and the handling of confidential information should be addressed in detail, in particular when the parties opt for a single neutral.[387]

- A clear statement should be given concerning the arbitrator's duty to remain impartial when serving in his or her role as arbitrator.

- If the neutral is permitted to consider confidential information, disclosure of such information following a waiver of confidentiality and an opportunity to comment in the arbitrations should be provided for.

- Finally, the parties' waiver of any challenges arising out of the dual role of the neutral as arbitrator-mediator will help to protect the enforceability of the consent award.

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[387] If the parties chose a single neutral, the option should be provided to opt-out of this choice and revert back to a classic step process to appoint an independent arbitrator who renders the award. This procedure is important to protect the integrity of the process even if it results in a loss of efficiency.

With regard to drafting the final result:

- The mediator should always keep in mind any enforceability issues that might arise when formulating the settlement agreement with the parties. Amongst other relevant issues that need to be considered when drafting a settlement agreement,[388] the MSA should state the appliable law for the settlement agreement and that the parties will request the arbitral tribunal (or the same mediator) to incorporate such settlement agreement into the award. In addition, the mediator may also want to provide a written statement that the settlement resulted from mediation, that it is fair, that the terms are commercially reasonable, and that mediation was conducted in good faith. The latter, especially if made publicly available, is in the interest of the government involved in an investment case to counter any allegations of corruption.

- The arbitrator, when transforming the settlement agreement into a consent award, should draft an award that conforms with the formality requirements of Article 31 of the Model Arbitration Law and is reasoned to some extent. It should at least state the reasons why he or she is authorized to render a consent award, include the explicit consent of the parties to the hybrid process, and may even include the waivers by the parties.

In response to the concerns raised in the previous Sections, the Singapore International Mediation Centre ("SIAC") and the Singapore International Mediation Centre ("SIMC") have developed an interesting solution to combine arbitration and mediation in a clear and predictable manner. The SIAC/SIMC Arb-Med-Arb Protocol ("AMA Protocol")[389] aims to grant efficiency and at the same time to ensure that a consent award is enforceable under the NYC.[390] The AMA Protocol as a first step provides that arbitration commences with the SIAC. As a next step, the arbitral tribunal is appointed, and after submission of the notice of arbitration and the response thereto, the arbitration is stayed and the dispute submitted to the SIMC for mediation. The AMA Protocol requires the mediation process to be completed within eight weeks (unless exceptionally extended). It also provides that the parties pay combined fees and deposits to the SIAC and offers institutional support for finding qualified arbitrators and mediators. Finally, under the AMA Protocol, parties shall agree that any dispute settled by mediation at the SIMC "shall fall

[388] For a detailed list of issues to consider when drafting a settlement agreement, see the ECT Guide on Investment Mediation (n 65), item 12.
[389] SIAC-SIMC Arb-Med-Arb Protocol, available at: http://simc.com.sg/dispute-resolution/arb-med-arb/.
[390] Žukauskaitė, M. (2019) *Enforcement of Mediated Settlement Agreements* (n 214), p. 209.

within the scope of their agreement" to avoid any challenges based on a lack of jurisdiction of the arbitral tribunal.[391]

For ISDS disputes, even more creative process designs have been suggested, such as shadow mediation/concurrent Med-Arb ("CMA").[392] CMA entails the following four advantages:

First, the mediation settlement embodied in an arbitral award will be enforceable because arbitration was initiated first.

Second, the process is not conducted by the same neutral and the arbitrator has limited opportunity to access confidential information, which preserves the impartiality of neutrals.

Third, as the mediator may attend the arbitration, and conduct the mediation either toward the end of arbitration proceedings or at various points during them, the right time for mediation can be found and efficiency increased. However, there is also the possibility that the arbitrator attends mediation sessions (without participating in caucusing) and renders an award in case the mediation is unsuccessful with or without additional hearings and documents, according to the particular circumstances.[393]

Fourth, if mediation is successful and the parties reach a settlement, there is also the option that the arbitrator meets with the parties in the mediators' presence to reach finalize a consent award that is final and binding and likely to achieve compliance.[394] This procedure, which requires high-level coordination skills between the neutrals, thus allows for comprehensive dispute resolution and decreases the likelihood of enforceability proceedings in the first place.

In summary, although additional procedural steps are required and it is likely that parties therefore face additional expenses and more time burdens, if conducted carefully, hybrid processes are a compelling option for parties concerned about the international enforceability of their mediated settlement agreements, at least until the Singapore Convention has gained a global reach similar to the NYC.

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[391] For commentary on the AMA Protocol, see Chua, E. (2014) "A New Dawn for Mediation? The Launch of the Singapore International Mediation Centre (SIMC) and Introduction of the SIAC-SIMC Arb-Med-Arb Protocol," *Kluwer Arbitration Blog*, 29 December 2014: http://arbitrationblog.kluwerarbitration.com/2014/12/29/a-new-dawn-for-mediation-the-launch-of-the-singapore-international-mediation-centre-simc-and-introduction-of-the-siac-simc-arb-med-arb-protocol/.

[392] See Coe, J. J. (2011) *Concurrent Med-Arb* (n 117), pp. 46-47.

[393] Ross, D. (2013) *Med-Arb/Arb-Med* (n 110), p. 358.

[394] Sekjo, D. (2020) *Hybrid Models of Arbitration and Mediation* (n 104), para. 71.

5 Conclusion

Mediation has recently received significant attention in the ISDS reform discussions at UNCITRAL Working Group III. The latest developments indicate that mediation has emerged to some extent in the context of investment disputes. Clauses in investment treaties increasingly provide for mediation, and an institutional framework is evolving. Moreover, there are existing investment cases in which disputing parties have resorted to this tool.

Mediation has long been an attractive option as a stand-alone mechanism in commercial disputes between private business entities. However, in disputes involving investors on the one side and states or state-owned entities on the other, mediation should not be predominantly understood as a stand-alone option or a replacement for arbitration. In investment disputes in particular, intertwining arbitration and mediation can be extremely effective. When parties in mediation are not able to reconsider their positions, the threat of a binding and enforceable award might be the most effective method of engendering readiness to reach a compromise. Conversely, the possibility to move away from the adversarial process by utilizing mediation windows may, with the assistance of a skilled mediator, allow the parties to generate a more satisfactory outcome consistent with the broader purpose of a long-term investment relationship between foreign investors and host states.[395]

Although in mediation both parties give their consent to the terms of the mediated settlement agreement, it would be shortsighted to assume that compliance is guaranteed. One of the main concerns is that IMSAs lack finality (i.e., enforceability). After all, parties do not want mediation; they want results. Therefore, for mediation to be used in practice, enforcement of IMSAs must be as straightforward as enforcing an arbitral award. To this end, MSAs should not be treated as ordinary contracts for two reasons: First, mediation is a structured process governed by procedural safeguards. Second, the presence of the mediator serves not only to facilitate the negotiation between the parties to reach an agreement, but also to prevent abuse and procedural irregularities.

Most domestic laws, however, treat MSAs as regular contracts. Hence, non-compliance with the settlement terms constitutes a breach of contract, prompting the other party to initiate court or arbitration proceedings (exactly what the parties tried to avoid in the first place) in order to receive an enforceable title. In response, some countries provide that MSAs can be entered and

[395] IMI Competency Criteria (n 75), p. 1.

enforced as a court judgment, as a notarial deed, or as another authentic instrument. This procedure, however, is often restricted to court-annexed mediation or to cases filed in court, and enforcing such titles across borders usually is complex and costly. As an alternative, some domestic laws permit arbitral tribunals to convert MSAs into consent awards, thus, in principle, allowing the parties enforce agreements as an arbitral award. Again, some laws limit this possibility to settlements reached during ongoing arbitrations.

Although the prospect of enforcement of IMSAs (transformed into a consent award) under the NYC seems promising, this procedure is not without risks. First, if a single neutral acts as arbitrator and mediator, challenges based on due process-related issues are likely. Second, the international validity of consent award issued by an arbitrator appointed after a settlement is still uncertain. Unless the parties were already engaged in arbitration, they would need to initiate arbitration – adding duration and costs – merely to rubber-stamp their settlement agreement. Even more significantly, creating an arbitral award is not always a practical solution for parties that wanted to avoid arbitration in the first place.[396]

The current systems in place for the enforcement of IMSAs tend to be cumbersome, and using a convention that was not intended to include IMSAs entails risks and uncertainties. Indeed, there are some ways (based on domestic laws, bilateral agreements, or conventions) to enforce MSAs, but it is a complex system and difficult to find a way through this "enforcement jungle." The Singapore Convention offers the potential to produce a uniform international standard and, following the example of the NYC, to encourage the growth of mediation in cross-border disputes, including investor-state disputes.

However, today, it remains to be seen whether the Singapore Convention will achieve the same reach as the ICSID or the NYC and how many states will make reservations. If this instrument is not embraced for investor-state disputes, hybrid proceedings such as Arb-Med-Arb and Concurrent Mediation and Arbitration (“Shadow Mediation”) are still the best option to ensure enforcement of mediation results. These issues regarding the enforceability of IMSAs should also be considered in the further development of a permanent body (the MIC).

In the view of the author, effective mediation is not the only answer, but it is a necessary part of the answer to the concerns raised in the ongoing ISDS reform discussions.

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Abstract English

Mediation has long been an approved method for resolving commercial disputes between private business entities. Recently, it has also received significant attention in the ISDS reform discussions at UNCITRAL Working Group III. Strengthening mediation as an alternative and an addition to arbitration in the ISDS context has evidently been endorsed by the international community.

One of the most frequently mentioned benefits of mediation in resolving investment disputes, is the high probability that the parties will comply with their “self-made” mediation settlement agreement and thus be able to maintain their business relationships. However, it would be short-sighted to assume that compliance is guaranteed. One of the main concerns raised by users continues to be that mediation lacks finality (i.e., enforceability). After all, parties do not want mediation; they want results. To some extent, these concerns were addressed with the enactment of the Singapore Convention in 2019, which provided a framework for enforcing international commercial mediation settlement agreements.

Against this backdrop, this thesis examines the *status quo* of mediation in ISDS. To analyze this issue, it considers the special features of investment disputes, recent treaty and case practice, and relevant institutional developments. In addition, it assesses the roots of the general concerns over enforceability of mediation results by exploring different jurisdictions (civil and common law) to illustrate what methods are currently available for enforcing a mediation settlement agreement, now that the Singapore Convention is existing. The thesis continues by examining the Singapore Convention, considering in detail the question of its applicability to investment disputes. It also considers the enforceability of international mediation settlement agreements under other existing international convention such as the ICSID Convention, the draft statues of the proposed Multilateral Investment Court, and the New York Convention. Overall, it illustrates that intertwining arbitration and mediation – if conducted with sufficient care – can be extremely effective and attractive to users concerned with the enforceability of their mediated settlement agreements. The thesis concludes by analyzing the relevant question of whether the enforceability of mediation settlement agreements converted into an award on agreed terms is guaranteed under the New York Convention.

Abstract German

Mediation gilt längst als bewährte Methode für die Beilegung von Handelsstreitigkeiten zwischen Unternehmen. Zuletzt hat diese Form der Streitbeilegung auch in den ISDS-Reformdiskussionen der UNCITRAL-Working Group III große Beachtung gefunden. Die Stärkung der Mediation als Alternative und Ergänzung zur Schiedsgerichtsbarkeit im ISDS-Kontext wurde von der internationalen Gemeinschaft sichtlich befürwortet.

Ein häufig genannter Vorteil von Mediationsverfahren ist die hohe Wahrscheinlichkeit, dass sich die Parteien an ihre selbst erarbeiteten Lösungen halten und es ihnen dadurch gelingen kann, ihre Geschäftsbeziehungen zu bewahren. Gleichwohl wäre es kurzsichtig, davon auszugehen, dass die Einhaltung der Vergleichsbedingungen garantiert ist. Nach wie vor äußern Nutzer große Bedenken aufgrund der fehlenden Endgültigkeit von Mediationen und mangelnden Durchsetzbarkeit daraus resultierender Vergleiche. Die Parteien wollen schließlich nicht die Mediation an sich; sie wollen Ergebnisse. Bis zu einem gewissen Grad wurden diese Bedenken mit dem Inkrafttreten des Singapur Übereinkommens im Jahr 2019 aufgegriffen, das einen Rahmen für die Durchsetzung internationaler Mediationsvergleiche schuf.

Vor diesem Hintergrund wird der gegenwärtige Entwicklungsstand der Mediation in der Investor-Staat-Streitbeilegung analysiert, wobei jüngste Vertrags- und Verfahrenspraxis sowie relevante institutionelle Entwicklungen berücksichtigt werden. Um die Ursachen für die Bedenken hinsichtlich der Vollstreckbarkeit von Vergleichen zu ermitteln, werden (im Kontext des Singapur Übereinkommens) unterschiedliche nationale Rechtsordnungen untersucht und dabei veranschaulicht, welche Mittel und Wege der Durchsetzung den Parteien zur Verfügung stehen. Anschließend wird nicht nur das Singapur Übereinkommen im Besonderen in Hinblick auf dessen Anwendbarkeit auf Investitionsstreitigkeiten untersucht, sondern auch die Durchsetzbarkeit von Mediationsvergleichen nach anderen bestehenden Übereinkommen (ICSID-Übereinkommen, New Yorker Übereinkommen) und nach den vorgeschlagenen Statuten eines Multilateralen Investitionsgerichtshofs. Die Arbeit zeigt, dass die Kombination von Schiedsgerichtsbarkeit und Mediation in Form von hybriden Verfahren - mit der notwendigen Sorgfalt durchgeführt - äußerst effektiv und attraktiv für jene Nutzer sein kann, die Bedenken hinsichtlich der Vollstreckbarkeit ihrer Mediationsvergleiche haben. Die Arbeit schließt daher mit einer Analyse der entscheidenden Frage, ob die Vollstreckbarkeit von Mediationsvergleichen, die durch das Schiedsgericht in einen Schiedsspruch mit vereinbartem Wortlaut umgewandelt werden, durch das New Yorker Übereinkommen tatsächlich gewährleistet ist.