https://doi.org/10.22364/iscflul.8.1.26

**Marta Urbane,** *Dr. iur., assistant professor*
Riga Stradiņš University
Faculty of European Studies, Latvia

# OPPORTUNITIES AND CHALLENGES OF MEDIATION IN INTERNATIONAL COMMERCIAL DISPUTES

## MEDIĀCIJAS IESPĒJAS UN IZAICINĀJUMI STARPTAUTISKOS KOMERCSTRĪDOS

**Keywords:** mediation, international commercial disputes, Singapore Convention

**Atslēgvārdi:** mediācija, starptautiski komercstrīdi, Singapūras Konvencija

**Kopsavilkums**

Pēdējo gadu laikā uzsāktas vairākas iniciatīvas, lai veicinātu izpratni par mediāciju un plašāku tās izmantošanu starptautiskos komercstrīdos. Mediācijas izmantošana starptautisku komerciālu strīdu risināšanā veicina ilgtermiņa biznesa attiecību saglabāšanu un attīstību. Tai ir mazāka ietekme uz savstarpējām biznesa attiecībām kā šķīrējtiesai vai strīda izšķiršanai tiesvedības procesā. Neraugoties uz mediācijas priekšrocībām, joprojām pastāv neuzticība mediācijas procesam. Pastāv bažas par mediācijas ļaunprātīgu izmantošanu, un ir nepietiekama izpratne par mediācijas rezultātu izpildi. Tiek uzskatīts, ka milzīgs solis mediācijas plašākai izmantošanas veicināšanai ir Singapūras Konvencija, kas ietver arī mediācijas rezultātu izpildi.

## Introduction

Mediation as an alternative dispute settlement method has become more frequently applied among commercial parties around the world during the last decade. In practice, it could be considered both as an alternative to settle the dispute in arbitration or as a supplement to arbitration. In general, mediation is structural, confidential, and flexible dispute resolution method where a neutral and independent third person helps the parties to reach resolution of

their dispute.[1] In the context of the wider use of mediation, both the legal and institutional framework for international commercial mediation has progressed in last decade.

Mediation is business friendly, as it allows the parties to retain good business relationships which is crucial in long-term international business projects. Despite the benefits of commercial mediation in resolving international commercial disputes, there is still a resistance by the parties involved in international commercial dispute and their representatives. This article aims to discuss the advancing role of mediation in international commercial disputes by considering its benefits and restrictions in this particular sphere. Special attention is dedicated to resistance to applying mediation in international commercial disputes from the perspective of Latvian legal practitioners. The author will use inductive reasoning, analyses, and qualitative research methodology.

## 1. Legal and institutional framework of international commercial mediation

A system for conducting international commercial mediation has been well established in the last decade. Mediation is available in almost every major international arbitration organization. Each organization has its own set of mediation rules, methods for selecting mediators, and administrative assistance for facilitating mediations. Some of the organizations are International Chamber of Commerce (ICC), American Arbitration Association (AAA), The Arbitration Institute of the Stockholm Chamber of Commerce (SCC), International Center for Settlement of Investment Disputes (ICSID), China International Economic and Trade Arbitration Commission (CIETAC) and others.

The European Union adopted the European Mediation Directive (2008/52/EC) to promote amicable dispute settlement like mediation in cross-border commercial disputes.[2] The Directive implies that Member States must arrange for agreements achieved through mediation to be enforceable through a mechanism of their choice. The enforcement of judgment legislation allows these agreements to be enforced in other Member States. The European Mediation Directive applies where two or more parties to a cross-border dispute of a civil or commercial nature voluntarily attempt to reach an amicable settlement with the assistance of a mediator. Notwithstanding the decent ground for promoting mediation in European Union Legal Affairs Committee of the European Parliament, found

[1] See: Howard A. EU Cross-Border Commercial Mediation: Listening to Disputants – Changing the frame; Framing the Changes. The Netherlands: Kluwer Law International B.V, 2021, p. 288.; Brooker P. Mediation Law: Journey through Institutionalism to Juridification. USA: Routledge, 2013, pp. 1–4.

[2] Directive (EU) 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, OJ, L 134/3, 24.5.2008.

that the Directive "remains very far from reaching its stated goals of encouraging the use of mediation".[3] This opinion is shared by many legal scholars.[4]

Recently, the need for an international commercial mediation framework was acknowledged, specifically to address the issues concerning enforcement of the mediation results. This step was taken by the Working Group II of the UNCITRAL. The group approved the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) in August, 2019. The Singapore Convention is expected to have the same positive impact on international commercial mediation as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in 1958 on international commercial arbitration. The overall aim of both of these Conventions is for foreign awards and settlement agreements to be recognized and enforced in a State other than the State in which recognition and reinforcement is sought.

Despite the fact that the Singapore Convention should help parties who must seek remedy in court, its primary objective is to encourage parties to mediate in the numerous circumstances when mediation would not otherwise be sought. It is presumed that in most circumstances parties will abide by the mediated settlements they reach due to the nature of mediation, therefore, the Singapore Convention will rarely need to be cited in court.[5]

International commercial disputes are often complex and time-consuming, and they require more time and resources to resolve. Due to the complexity of these disputes, many have criticized the use of international commercial arbitration.[6] As a consequence of the increasing cost of international commercial arbitration, parties have become more focused on finding ways to resolve their disputes more efficiently and at a lower cost. That is also a reason why the process of the international commercial mediation should not be overregulated to maintain flexibility.[7]

---

[3] European Parliament. A Ten-Year Long "EU Mediation Paradox". When an EU Directive Needs to be More… Directive. PE 608.847, 2018. Available: https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf [viewed 04.11.2021.].

[4] See Howard A. EU Cross-Border Commercial Mediation: Listening to Disputants – Changing the Frame; Framing the Changes. The Netherlands: Kluwer Law International B.V, 2021, p. 288.

[5] Schnabel T. The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements. Pepperdine Dispute Resolution Law Journal, 2019, Vol. 19:1.

[6] See: Nolan-Haley J. Mediation: The New Arbitration. Harvard Negotiation Law Review, Fordham Law Legal Studies Research Paper, 2012, No. 1713928.

[7] Vanisova V. Current Issues in International Commercial Mediation: Short Note on the Nature of Agreement Resulting from Mediation in the Light of the Singapore Convention. Charles University in Prague Faculty of Law Research Paper, 2019, No. 2019/II/5.

## 2. The nature of mediation in international commercial disputes

The characteristics of mediation are addressed extensively in legal literature.[8] Those apply also in the context of international commercial mediation. Generally, mediation is a voluntary process that enables parties to resolve disputes through a third party. It is confidential and typically flexible, and it has other special features that make it stand out.

When the parties have ongoing commercial contacts, mediation is important, since it allows them to retain their current relationships and negotiate a win-win solution, which is more difficult to achieve through arbitration or litigation. Mediation is becoming more popular in long-term contracts, such as international infrastructure and building contracts, according to studies.[9] It is important that parties of a dispute are entitled to determine process of mediation in accordance with each other's interest and business needs. For example, parties can choose the location of the mediation, its form, language, the mediator, the time frame and make many other choices related to the process.[10] Advantages of mediations also include cost and time efficiency. On average, mediation takes one to two months to settle the dispute.[11] Mediation offers a wide range of settlement options, which would not be possible through arbitration and litigation. Thus, mediation allows parties to treat economic outcomes more creatively. Like arbitration, mediation also offers confidentiality, which at times is crucial to business interests and reputation.[12] Mediation benefits can help to transform a confrontational relationship into a cooperative one, potentially benefiting the parties' long-term relationship and business goals.

It must be considered that, if mediation does not result in a settlement, the parties may incur additional fees as a result of the necessity to use another dispute resolution method, such as arbitration or litigation, to obtain a binding and valid decision regarding the dispute at hand. This also means that there is a risk that the mediation process will be exploited and used in bad faith.

Recent legal measures, such as the Singapore Convention, have contributed to resolving the enforceability issue of international commercial mediation results. In terms of the enforceability of final awards, only international commercial arbitration has so far been distinguished from international litigation and mediation. Given that the Singapore Convention is a relatively new legal instrument, its future

---

[8] See: Moffitt M. L., Schneider S. K. Dispute Resolution: Examples & Explanations. 2nd edition. USA: Aspen Publishers, 2011, p. 83.

[9] Tarman Z. J. Mediation as an Option for International Commercial Disputes. Annales XLVIII, 2016, N. 65.

[10] Shamir Y. Alternative Dispute Resolution Approaches and Their Application. Israel Center for Negotiation and Mediation (ICNM), UNESCO-IHP, 2002, No. 7, p. 30.

[11] Carey S. SCC Practice: Mediation. Arbitration Institute of the Stockholm Chamber of Commerce, December 2017, Available: https://sccinstitute.com/media/231969/scc-practice-note-mediation-final.pdf [viewed 04.11.2021.].

[12] Radford M. F. Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters. Pepperdine Dispute Resolution Law Journal, 2012, p. 242.

significance in enforcing mediation outcomes remains to be seen, nonetheless, it offers a great deal of potential for increasing the use of mediation in cross-border commercial disputes.

Mostly the choice to engage in international commercial mediation remains entirely at the discretion of the parties when negotiating a dispute resolution clause. Dispute escalation clauses that require mediation before going to court or arbitration are rather frequent. In the event of a dispute, a mediation clause in the agreement may establish a clear understanding of conflict settlement, avoiding possible misunderstandings. Most international organizations offering mediation services (ICC, ICSID and others) also provide mediation clause examples. Largely, a mediation clause in an international commercial contract should include a definition of mediation, a clear obligation to try mediation before resorting to an adjudicatory option like arbitration, the ability for the mediator to serve as an arbitrator in the same dispute, and applicable mediation rules. A general mediation clause in the contract should not mean that it is possible to challenge the arbitral tribunal's jurisdiction on the basis that a pre-issue mediation agreement was not implemented.[13] However, it gives the parties a clear understanding on dispute settlement procedure.

## 3. Resistance to international commercial mediation from the perspective of Latvia

Empirical research has found that in various situations, parties make errors that can affect their decisions when it comes to settling a dispute. These errors of representatives can also distort their choices when it comes to advising clients about settlement or mediation. Consequently, more resources are invested in litigation than needed, and courts are forced to waste their limited resources by making decisions that are unnecessary.[14]

The author performed qualitative research – in-depth interviews with specialists in international commercial law – to better understand the resistance of legal practitioners in Latvia to using mediation in resolving international commercial conflicts. The experts were chosen based on the following criteria: attorneys at law, more than five-year specialization in international commercial law and experience in international commercial dispute settlement. The aim of the interviews was to clarify challenges and opportunities for international commercial mediation from the point of view of legal practitioners in Latvia. After an in-depth qualitative study data analysis, the author concluded that the main bias against international commercial mediations was the lack of trust in the process, as

[13] Judgment of the England and Wales High Court (Commercial Court) of 8 October 2021 in case No. 2666 NWA & Anor v. NVF & Ors. Available: https://www.bailii.org/ew/cases/EWHC/Comm/2021/2666.html [viewed 04.11.2021.].

[14] Wistrich A. J., Rachlinski, J. J. How Lawyers' Intuitions Prolong Litigation. Cornell Law Faculty Publications, No. 602, 2013.

well as gaps in knowledge and experience in international commercial mediation. The experts also mentioned issues with the parties' authorization to enter into a new contract as a result of the mediation, and likewise the accountability to shareholders who would not agree to a claim reduction. Those biases, according to the author, could be explained by a lack of awareness about the possible outcomes of mediations, which could go beyond legal reasoning and be more related to business solutions rather than legal solutions. Experts were also concerned about the potential of delaying the dispute resolution process in general, if mediation was used in bad faith. At the same time, experts demonstrated faith in mediation on technically complex issues, when the majority of the disagreements are about specific industry or technology knowledge. According to the experts, if both parties are interested in long-term business partnerships and a conflict emerges in the middle of a project, mediation is an excellent way to keep the relationships intact while resolving the dispute amicably. Some specialists emphasized that the results of mediation have more options and that mediation is faster than arbitration in international commercial disputes. The experts' responses on the requirements for mediators were similar. The findings suggest that in international commercial disputes, parties demand a mediator who is business-oriented, competent, has international experience, good communication and language skills, and is flexible. Some experts emphasize the importance of mediators specializing in international commercial disputes or having specific understanding of the industry where the conflict has arisen. The author observed that experts with prior international commercial mediation experience were far more confident about it and more willing to use it in international commercial disputes. It suggests that experience in international commercial mediation leads to trust in this alternative dispute settlement method.

## Conclusions

1. Recent legal initiatives have promoted the international commercial mediation as a significant instrument for settling international commercial disputes. International commercial mediation is a structured and confidential process – a dispute resolution method where a neutral mediator helps the parties reach a voluntary resolution of their dispute. Mediation is a sustainable instrument for settling international commercial disputes and it guarantees the parties efficient access to justice.
2. The Singapore Convention intends to address the difficulties that arise in implementing international settlement agreements originating from international commercial mediation, as well as to promote mediation as a preferred means of international commercial conflict resolution. The Singapore Convention grants the agreements resulting from mediation a legal status *sui generis* with its own rights and place them on the same level of credibility as international arbitral award enforced under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

3. Due to the possibility of using mediation in bad faith, the author's empirical research has revealed that among legal practitioners in Latvia still remains a strong bias against international commercial mediation. At the same time, it was found that expertise and long-term professional growth of mediators could help in building confidence in international commercial mediation.

## BIBLIOGRAPHY

### Literature

1. Brooker P. Mediation Law: Journey through Institutionalism to Juridification. USA: Routledge, 2013.
2. Carey S. SCC Practice: Mediation. Arbitration Institute of the Stockholm Chamber of Commerce, December 2017. Available: https://sccinstitute.com/media/231969/scc-practice-note-mediation-final.pdf [viewed 04.11.2021.].
3. European Parliament. A Ten-Year Long "EU Mediation Paradox". When an EU Directive Needs to be More…Directive. PE 608.847, 2018. Available: https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf [viewed 04.11.2021.].
4. Howard A. EU Cross-Border Commercial Mediation: Listening to Disputants – Changing the frame; Framing the Changes. The Netherlands: Kluwer Law International B.V, 2021.
5. Moffitt M.L., Schneider S.K. Dispute Resolution: Examples & Explanations (2nd edition). USA: Aspen Publishers, 2011.
6. Nolan-Haley J. Mediation: The New Arbitration. Harvard Negotiation Law Review, Fordham Law Legal Studies Research Paper, No. 1713928, 2012.
7. Radford M.F. Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters. Pepperdine Dispute Resolution Law Journal, 2012.
8. Schnabel T. The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements. Pepperdine Dispute Resolution Law Journal, 2019, Vol. 19:1.
9. Shamir Y. Alternative Dispute Resolution Approaches and Their Application. Israel Center for Negotiation and Mediation (ICNM), UNESCO-IHP, 2002, No. 7.
10. Tarman Z. J. Mediation as an Option for International Commercial Disputes. Annales XLVIII, N. 65, 2016.
11. Vanisova V. Current Issues in International Commercial Mediation: Short Note on the Nature of Agreement Resulting from Mediation in the Light of the Singapore Convention. Charles University in Prague Faculty of Law Research Paper, 2019, No. 2019/II/5.
12. Wistrich A. J., Rachlinski, J. J. How Lawyers' Intuitions Prolong Litigation. Cornell Law Faculty Publications, No. 602, 2013.

### Legislative acts

13. Directive (EU) 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, OJ, L 134/3, 24.5.2008.

**National court practice**

14. Judgment of the England and Wales High Court (Commercial Court) of 8 October 2021 in case No. 2666 NWA & Anor v NVF & Ors. Available: https://www.bailii.org/ew/cases/EWHC/Comm/2021/2666.html [viewed 04.11.2021.].