

**THE RISE OF COMMERCIAL MEDIATION IN THE ASEAN COUNTRIES:
HARMONIZATION FOR A BETTER TOMORROW**

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Abstract:

Consensual dispute resolution has been deep-rooted in several ASEAN cultures, where saving faces and preserving relationships are among the cultural pillars of society. However, the Western legal systems – which prioritize adversarial dispute resolution – were transplanted to many ASEAN countries. Litigation gradually became the only practical way to resolve disputes. Fortunately, the movement toward non-adversarial dispute resolution brought back mediation to ASEAN countries, notably in Singapore in the 1990s. The last decade witnessed the growth of commercial mediation as an effective method of dispute resolution in ASEAN countries. In this paper, the author argues that commercial mediation has a promising future in ASEAN countries thanks to its appropriateness in the context of Asian cultures. However, governing laws on commercial mediation in ASEAN countries are divergent. Hence, regional and international cooperation, especially the harmonization of mediation laws, will play an essential role in enhancing competence and professionalism in mediation practice, thus contributing to the success of commercial mediation in ASEAN countries.

Keywords: ASEAN, dispute resolution, harmonization, mediation.

I. Introduction

In 1967, ASEAN issued the Bangkok Declaration, which stated: “To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter.”¹ This statement shows the importance of legal cooperation among countries in the ASEAN region. To achieve this goal, all ASEAN States must work together to harmonize their respective legal systems.

¹ Declaration 2(2) of the ASEAN Declaration (Bangkok Declaration), 1967.

In recent years, ASEAN countries have been working towards establishing the ASEAN Community since December 2015.² One of the main challenges for achieving ASEAN's goals is to fulfill the requirements of legal harmonization towards building ASEAN's General Agreements, thereby promoting the region's deep and broad integration, as enshrined in the ASEAN Charter. "Harmonization may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions."³ This is a clear requirement, and each country must play an active role in establishing a common legal framework of ASEAN to reduce differences and legal barriers and facilitate the establishment and development of ASEAN countries.

As a regional community following the general trend of the world, the issue of ASEAN integration and legal harmonization in ASEAN is a matter of concern for the whole community. With the diverse nature of economy, politics, and society, the legal system of ASEAN countries is also diversified under many different models, such as Brunei, Singapore, Malaysia, and the Philippines are under the system of case law (Common Law); Vietnam, Laos, Cambodia, and Thailand are under the written law system (Civil Law); Indonesia combines both case law and written law; Some Muslim countries also apply religion... However, they all have one thing in common: litigation gradually became the sole viable option for resolving disputes.

This is a contemporary phenomenon with long-standing origins, which is partly attributable to the extreme fatigue of the region's overworked court systems. A general pessimism with courts can be attributed to slow, strict, and expensive procedures. High expenses resulting from judicial inefficiencies, including those associated with public expenditures and private legal counsel, have caused growing dissatisfaction with courts.

The issues above made it necessary to seek less expensive, quicker, flexible, and riskier worldwide solutions to global problems that give the disputants an ex-ante assurance and predictability in the resolution of the disputes. Mediation fits this description and would be preferable to litigation in some given circumstances.⁴

In the 1990s, particularly in Singapore, the push for non-adversarial dispute resolution brought mediation back to the ASEAN States. Commercial mediation has been more popular as an efficient means of resolving disputes in the ASEAN States during the past ten years. This article argues that commercial mediation has a bright future in the ASEAN States due to its suitability in the setting of Asian cultures. The success of commercial mediation in the ASEAN States will largely depend on regional and international harmonization and cooperation, which will be crucial in raising professionalism and competency in mediation practice. The authors argue the Singapore Convention will be essential in achieving this.

This paper reviews the Legal Framework at the National Levels of some ASEAN States, the Singapore Convention, and some commentary from an ASEAN perspective.

II. Legal Framework at National Levels

a) Vietnam

² Kuala Lumpur Declaration on The Establishment of The ASEAN Community 2015

³ 'Frequently Asked Questions - FAQ Mandate and History' (United Nations Commission On International Trade Law) <https://uncitral.un.org/en/about/faq/mandate_composition/history> accessed 7 October 2022

⁴ Mary F. Radford, *Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters* (21th edn, Bluebook 2001) <https://heinonline.org/HOL/Page?handle=hein.journals/pepds1&div=18&g_sent=1&casa_token=&collection=journals> accessed 7 October 2022

i) Overview

Currently, the legal framework for commercial mediation is quite complete. Primarily the Government has issued Decree 22/2017/ND-CP (Decree 22) on commercial mediation based on the UNCITRAL Model Law on International Commercial Conciliation, detailing the principles of mediation and submission. Mediation procedures, mediator standards, establishment and operation of commercial mediation organizations. This Decree comprehensively stipulates the mode of mediation. In addition, the Civil Procedure Code 2015 (the CPC) has paid great attention to mediation when dedicating chapter XXXIII, prescribing the procedure for recognizing the results of successful out-of-court mediation.⁵

However, not all disputes can be resolved through mediation under Decree 22. Article 2 of Decree 22 provides the scope of dispute resolution by mediation: “Disputes arising from commercial activities; Disputes between the parties at least one of them is engaged in commercial activities; and Other disputes which are prescribed by law to be resolved through commercial mediation.”⁶

Mediations in Vietnam are confidential under Decree 22: “Information relating to a mediation case shall be kept confidential unless otherwise agreed upon in writing by involved parties or otherwise prescribed by law.”⁷

Thus, businesses can completely trust and choose mediation to resolve their disputes. The mediation method gives companies a lot of advantages, which can be mentioned as saving time, litigation costs, and confidentiality. The parties themselves take the initiative to create settlement results without causing any impact or bad influence and keep the relationship with their partners. In particular, when choosing the mediation method, if the parties cannot reach an agreement, they can choose to bring the dispute to court or arbitration without any limitation.

ii) Mediation process

Authorized mediators will perform commercial mediation in line with Decree 22 and the regulations of the respective mediation center. Parties to a commercial dispute may voluntarily choose a commercial mediator to assist them in attempting to resolve the disagreement.

According to the VMC Rules, for example, the mediator shall conduct the mediation in such a manner as they consider appropriate, with the consent of the parties, taking into account the circumstances of the case, the parties’ wishes, and the need for a speedy settlement of the dispute; and may make proposals for the settlement of the dispute at any stage. The mediator may hold joint mediation sessions with the parties or separately with each party.⁸

iii) Qualifications for Commercial Mediators

Decree No. 22 On Commercial establishes the qualifications necessary to practice as a commercial mediator in Vietnam. These qualifications include “a. Holding a university degree, with at least two years of experience in the mediator’s field of training; b. Mediation skills, training, and an understanding of the law, business, and commerce; and c. Being of good moral character.”⁹

Mediation institutes and service providers may establish additional criteria for registered mediators. These may include, for example, mediation training. Mediators must be registered with

⁵Alexander, Nadja, ‘Vietnam series: Four key features of the commercial mediation framework’ (2018) Research Collection School Of Law.

⁶ Article 2 Decree 22/2017/ND-CP.

⁷ Article 4 (2) Decree 22/2017/ND-CP.

⁸ Article 7 (2) of the VMC Mediation Rules.

⁹ Article 7 Decree 22/2017/ND-CP.

the Department of Justice or accredited mediation organizations such as the Vietnamese Mediation Centre. Each mediation center must submit a list of mediators to the department of justice in the city or province where it has registered for operation. Any change to the list of mediators must be notified to the department of justice. Ad-hoc mediators must also be registered at the department of justice in the city or province where the mediator resides. These initiatives set a high standard for commercial mediators and demonstrate the Government's desire to professionalize commercial mediation practice in Vietnam.

iv) How are settlement agreements enforced?

The CPC sets out rules regarding the recognition and enforcement of settlement agreements reached in both court-annexed mediation and mediated settlements reached outside court proceedings. Mediated settlements reached outside of court proceedings, if recognized by the court, have legal effect and are enforceable. The concerned parties may request the relevant court to recognize the mediated settlement.

Where a mediation conducted by an arbitration tribunal under the Law on Commercial Arbitration 2010 results in a settlement, the tribunal will prepare minutes of the successful mediation to be signed by all parties, and the arbitrator and the arbitration tribunal shall issue a decision recognizing the agreement of the parties. This decision shall be final and have the same validity as an arbitral award.

Vietnam has not yet signed the United Nations Convention on International Settlement Agreements resulting from Mediation (also known as the "Singapore Convention on Mediation").¹⁰

b) Singapore

i) Overview

Mediation is a recognized form of ADR in Singapore. In Singapore, the mediation movement was actively resurrected in the 1990s. Mediation is now employed not only for personal conflicts but is also a vital aspect of the Singapore legal system. It is commonly used as a conflict settlement method in courts, government agencies, enterprises, and other industries.

The introduction of the Singapore Mediation Act ("Mediation Act 2017") on 1 November 2017 and the Singapore Convention on Mediation Act ("Mediation Act 2020") on 12 September 2020 allows parties to apply to the Singapore courts to record their mediated settlement agreement as an order of the court. This enables the agreement to be directly and immediately enforceable as a court order if there are subsequent breaches of the terms of the agreement.

In 2013, the Court of Justice and the Ministry of Law appointed a Working Group to look into developing Singapore as the center of international commercial mediation. The key recommendations were: "(1) the formation of the Singapore International Mediation Centre (SIMC); (2) the formation of the Singapore International Mediation Institute (SIMI); (3) the enactment of a Mediation Act; (4) extension of tax exemptions and incentives to mediation; (5) enhancing rules and court processes; and (6) reaching out to target markets and key industries."¹¹ This has shown that the Singapore government has actively promoted mediation in Singapore and encouraged parties to try mediation before resorting to litigation.

Singapore mediations are confidential. Aside from the mediator and the parties, no one else can access the mediation procedures. If mediation fails, discussions that may prejudice a party will not be disclosed in court. Furthermore, the mediator may not disclose anything discussed in private

¹⁰ As of October 2022.

¹¹ ICMWG, 'Executive Summary: Recommendations of the Working Group to Develop Singapore into a Centre for International Commercial Mediation'.

interviews between the mediator and a party throughout the mediation process to any other party. When mediation sessions are conducted at SMC, mediators and parties are bound by an agreement that prevents disclosing mediation-related material.

Several statutory protections, including privilege and secrecy requirements, have been implemented to protect the confidentiality of mediation. Sections 19 and 20 of the Community Mediation Centres Act and Section 23 of the Evidence Act are examples of these laws.

ii) Mediation process

Mediation in Singapore has been largely institutionalized. In addition to court-based mediation, disputants might undertake exceedingly structured private mediation. Parties who wish to pursue private mediation refer disputes to the SIMC.

To meet the increasing demand for quality dispute resolution services and to help Singapore become a premier destination for legal services and dispute resolution in Asia and globally, the SIMC was established on 5 November 2014 as an independent, not-for-profit institution that aims to provide world-class mediation services aimed at the needs of parties in cross-border commercial disputes, particularly those centered in Asia.¹² Together with the Singapore International Arbitration Centre (“SIAC”) and the Singapore International Commercial Court, the launch of the SIMC fulfills the suite of options available to international users of cross-border commercial dispute resolution services.

The SIMC provides three primary services:

“First, it primarily administers mediations if parties have agreed to have the mediation conducted under the SIMC Mediation Rules; Second, for mediations which are not administered under the SIMC Mediation Rules, parties may consent to use SIMC’s services as an appointing authority for mediators or experts on an ad hoc basis; Third, SIMC collaborates with SIAC to provide services under an innovative hybrid process known as “Arb-Med-Arb.”

“Arb-Med-Arb” is a process whereby a dispute is formally referred to arbitration before mediation is attempted. After signing an arbitration agreement or commencement of the arbitral proceedings, the arbitration is stayed for the parties to mediate their dispute. If the parties can resolve their dispute through mediation, their mediated settlement agreement may be recorded as a consent arbitral award. This arbitral award would be internationally enforceable under the framework of the New York Convention. If the parties cannot settle their dispute through mediation, they can continue with the arbitration proceedings.

Under the SIAC-SIMC Arb-Med-Arb Protocol, the arbitrators and mediators are separately and independently appointed by SIAC and SIMC, respectively. The arbitrators and mediators would ordinarily be different persons unless otherwise agreed by the parties. With this process, the cost-effectiveness and flexibility of mediation are combined with the finality and enforceability of arbitration.

Private mediation could also be conducted by the SMC, a non-profit organization guaranteed by the Singapore Academy of Law. Typically, one or both parties contact SMC with a request for mediation. The case may also be referred to SMC by the courts. When all parties’ consent has been obtained, SMC arranges for the Mediation Agreement to be signed, appoints a mediator, and attends to all other administrative details such as date, time, and place for mediation. A party may reject the proposed mediator if it has valid reasons (e.g., conflict of interests). The parties’ lawyers play a significant role in assisting the mediator and advising the parties throughout the mediation

¹² Allen & Gledhill LLP, ‘Singapore International Mediation Institute and Singapore International Mediation Centre’ (5 November 2014) <<https://www.lexology.com/library/detail.aspx?g=884c2a95-29d5-4d6f-b520-033bd43194d9>> accessed on 13 October 2022

process. As one of the four designated mediation service providers under the Mediation Act 2017, mediation settlements administered by the SMC can be converted into an immediately enforceable court order.”¹³

iii) Qualifications for Commercial Mediators

There is no law or structure governing the accreditation or standards of mediators in private mediations; Nevertheless, mediators may opt to become accredited by a mediation organization. The Singapore International Mediation Institute (“SIMI”), an independent professional standards organization for mediation, maintains a tiered accreditation structure for mediators who want to be classified as SIMI mediators.¹⁴ Similarly, SMC has created its mediator training and accreditation program. The SMC offers mediation workshops for nominees from various professional and trade organizations. They may be selected for the Panel of Principal Mediators based on their evaluation following the workshop. Every year, SMC’s certification is up for renewal. A mediator must follow the SMC’s Code of Conduct under the SMC Mediation Procedure, which guides the mediator concerning issues such as neutrality, impartiality, and confidentiality.¹⁵

iv) How are settlement agreements enforced?

The legal status of settlement agreements will depend on: “(i) the intention of the parties; (ii) the context of the mediation; and (iii) the existence and nature of relevant statutory requirements.”¹⁶

Most private mediations require parties to minimize the terms of the agreement in writing and signature on the document. It would be a contractually binding agreement. As a result, the enforceability of such settlement agreements is governed by standard contractual norms.

Section 12 of the Mediation Act established a novel procedure for converting a privately mediated settlement agreement into a court order. This one-of-a-kind mechanism is intended to entice parties to engage in the mediation process by assuring them of the finality and enforceability of their mediated agreements.

Designated Mediation Service Providers have access to the expedited enforcement mechanism. This includes mediations performed by a SIMI-qualified mediator or mediations handled by the Singapore Mediation Centre, Singapore International Mediation Centre, WIPO Mediation and Arbitration Center and Tripartite Alliance for Dispute Resolution. To obtain a court order, all parties must agree to the application, and the mediated settlement agreement must be in writing and signed by all parties. Unless the court permits an extension of time, the application must also be made within eight weeks of settling.¹⁷

¹³ Linklaters, ‘Commercial mediation in Singapore: How mediation is conducted?’ (5 August 2022) <<https://www.linklaters.com/en/insights/publications/commercial-mediation-a-global-review/commercial-mediation-a-global-review/singapore>> accessed on 14 October 2022

¹⁴ The Singapore International Mediation Institute (SIMI), ‘About The SIMI Credentialing Scheme’ <<https://www.simi.org.sg/What-We-Offer/Mediators/SIMI-Credentialing-Scheme>> accessed on 14 October 2022

¹⁵ Singapore Mediation Centre (SMC), ‘Certification SMC Mediation Skills Assessment Accreditation’ <<https://www.mediation.com.sg/course/mediation-skills-assessment/>> accessed on 14 October 2022

¹⁶ Singapore Law Watch, ‘About Singapore Law’, (Ch. 03 Mediation, B. Status of settlement agreements arising from mediation, Section 3.6.2) <<https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-03-mediation>> accessed on 15 October 2022

¹⁷ Section 12 of the Singapore Mediation Act (“Mediation Act 2017”) on 1 November 2017

Section 12(4) of the Act specifies four circumstances in which the court would not record the settlement as a court order, ranging from the agreement being illegal to the presence of nullifying factors like duress.¹⁸

c) *Indonesia*

i) *Overview*

The Arbitration and Alternative Dispute Resolution Act of Indonesia (“Act”) governs mediation in issues subject to alternative dispute resolution (i.e., resolution outside the courts by consultation, negotiation, mediation, conciliation, or expert evaluation) as well as litigation. The option of mediation is statutorily available for issues subject to alternative dispute resolution. However, it is optional. Mediation is necessary in the case of court-involved conflicts, with a few exceptions. No statutes specifically address mediation in the context of arbitration procedures.

Mediation is mandated under Article 6 of the Act if the disputing parties cannot reach an agreement through negotiation.¹⁹ However, the Act does not provide sufficient guidance on using mediation as a dispute settlement. As a result, this article will refer to the Supreme Court Regulation No. 1 of 2016 governing Mediation Procedure in the Court of Justice (“Regulation 1/2016”). Although Regulation 1/2016 governs mediation within the jurisdiction of a court of justice, the regulations included therein are founded on the same universal principles of mediation as a dispute resolution within or outside the courts of justice.

According to Article 14 of Regulation 1/2016, the primary objective of mediation is for disputing parties to settle their differences through a neutral party known as a mediator. However, as a neutral third party, the mediator shall have no authority to impose a decision on the parties. Furthermore, because the mediator does not play an active role in the resolution, he is not required to urge the conflicting parties to achieve an agreement. The mediator’s role is limited to assisting the disputing parties in reaching an out-of-court settlement.

A successful mediation will result in a written agreement between the parties making the outcome final and binding.²⁰ If such an agreement cannot be reached, the contesting parties can look for a solution elsewhere through litigation or arbitration.²¹

Mediations resulting from alternative dispute resolution are confidential. According to Article 6(6) of the Act: Efforts to resolve disputes or differences of opinion through mediation shall be undertaken in confidentiality.”²²

Regulation 1/2016 stipulates that the parties’ utterances during the mediation be inadmissible as evidence in court proceedings, that the mediator’s notes be destroyed at the end of the mediation, and that the mediator not appear as a witness in the subsequent court proceedings. There is also a general obligation of confidentiality in mediations performed under the auspices of the Indonesian Mediation Centre (Pusat Mediasi Nasional) and according to its guidelines.

ii) *Mediation process*

The Arbitration and Alternative Dispute Resolution Act of Indonesia (Law no.30 of 1999) established a phased mediation sequence with growing third-party intervention in mediation resulting from alternative dispute resolution. A direct meeting between the parties must occur after

¹⁸ Section 12(4) of the Singapore Mediation Act (“Mediation Act 2017”) on 1 November 2017

¹⁹ Article 6 of the Arbitration and Alternative Dispute Resolution Act of Indonesia (Law no.30 of 1999)

²⁰ Article 7 of the Arbitration and Alternative Dispute Resolution Act of Indonesia (Law no.30 of 1999)

²¹ Article 9 of the Arbitration and Alternative Dispute Resolution Act of Indonesia (Law no.30 of 1999)

²² Article 6(6) of the Arbitration and Alternative Dispute Resolution Act of Indonesia (Law no.30 of 1999):

“Efforts to resolve disputes or differences of opinion through mediation, as contemplated in paragraph (5), shall be undertaken in confidentiality. The settlement reached shall be set out in a written agreement, signed by all parties concerned, within thirty (30) days.”

an agreement to mediate within 14 days. If the conflict is still unresolved after the direct meeting, the parties may seek one or more expert advisors' or a mediator's help. The parties may ask an arbitration or alternative dispute resolution organization to appoint a mediator if the matter is still unresolved after 14 days, notwithstanding such outside assistance.²³

The Supreme Court Regulation No. 1 of 2016 also specifies conduct and sets specific timelines. Parties must present their case summaries (a document created by the respective parties outlining the facts of the case and their settlement proposal) to counterparties and the mediator within five days of the mediator's appointment.

The mediation must be finished within 30 days, although this can be extended with the parties' consent for 30 days. The judge overseeing the case must approve any further extensions. The matters discussed during mediation are not restricted to the specifics of the case and the requested relief. The parties may agree that experts may be used during the mediation, provided they first agree on whether the expert's opinion is binding or non-binding.²⁴

iii) Qualifications for Commercial Mediators

The Indonesian Supreme Court maintains overall control as the mediators' statutory regulator. The Indonesian Mediation Centre and Indonesian Institute for Conflict Transformation are among the organizations it has accredited to offer mediators training and accreditation.

iv) How are settlement agreements enforced?

Settlement agreements are valid as binding contracts between parties.²⁵ Additionally, parties can submit the settlement agreement to the court through the mediator so that it can be noted as a court order. Before recording the settlement as a court judgment, the court will assess the settlement agreement in light of public policy, third-party interests, and enforceability issues. If necessary, the court may issue instructions to the parties and mediator to bring the agreement into compliance.

The settlement agreement must be filed with the court for publication as a court decision unless it expressly provides for the cancellation of the claim that has already been resolved. Finally, the settlement agreement must be implemented within 30 days after its registration to the court of justice.²⁶

d) Malaysia

i) Overview

The basics of mediation, i.e., the facilitation of settlement with the assistance of a third party, have been a practice of Malaysians for millennia, with roots traceable to the teachings of Islam, Hinduism, Buddhism, Christianity, and Confucius. In Malaysia's modern society, statutory mediation is evident. The insurance and banking sectors each had their mediation bureaus, known as the Insurance Mediation Bureau and the Banking Mediation Bureau, respectively. Both were founded as non-profit organizations.²⁷ Other industry-specific mediation centers handle consumer

²³ Article 2 of the Arbitration and Alternative Dispute Resolution Act of Indonesia (Law no.30 of 1999)

²⁴ Benny, Riyanto & Hapsari, Tunjung & Dewi, Nurul, 'Transplanting mediation into Indonesian civil judicial system' (2017) *Journal Sampurasun : Interdisciplinary Studies for Cultural Heritage*.

²⁵ Article 7 of the Arbitration and Alternative Dispute Resolution Act of Indonesia (Law no.30 of 1999)

²⁶ Article 8 of the Arbitration and Alternative Dispute Resolution Act of Indonesia (Law no.30 of 1999)

²⁷ Asian Mediation Association, 'Malaysian Mediation Centre' <<http://asianmediationassociation.org/node/15>> accessed on 16 October 2022

claims and the housing industry. Some Malaysian laws, such as the Workman's Compensation Act 1952 and the Trade Unions Act 1959, necessitate mediation.²⁸

Mediation is regarded as a more practical method of resolving court problems. In this context, on 13 August 2010, Malaysia's Chief Justice issued a Practice Direction on mediation, which went into effect on 16 August 2010.²⁹

This Practice Direction applies to commercial and contractual conflicts and issues involving intellectual property. It also provides the following ways of referral to mediation: parties can choose between (A) judge-led mediation, and (B) mediation by a mediator agreed upon by both parties.

In Malaysia, however, mediation is a voluntary process in legal proceedings. The method for initiating mediation is based on the Judge's authority to direct. Suppose a Judge can discover difficulties that may be amicably resolved between the parties. In that case, they will highlight those topics to the parties and recommend how those issues may be remedied. The Judge may request that the parties meet in their chambers in the presence of their counsels and may offer mediation to the parties. If they consent to the mediation, they will be asked whether they want it to be judge-led or referred to a mediator. This Practice Direction also includes the processes for carrying out these two possibilities.

But a legal framework for mediation as a method of alternative dispute resolution outside a court proceeding is still needed. To remedy this, the Mediation Act 2012 (the Act) went into effect on 1 August 2012. 'Mediation,' according to the Act, means "a voluntary process in which a mediator facilitates communication and negotiation between parties to assist them in reaching an agreement."³⁰

However, the Act does not mandate that disputes be settled through mediation before going to court or arbitrating. Additionally, parties may decide to mediate concurrently with any arbitration or civil court case. Mediation does not serve as a stay or extension of a procedure that has already begun.³¹

Mediation in Malaysia is confidential. The Practice Direction provides that all disclosures, admissions, and communications made under a mediation session are strictly on a 'without prejudice basis. Such communications do not form part of any record, and the mediator shall not be compelled to divulge such records to testify as a witness or consultant in any judicial proceeding unless the parties consent to its inclusion.³² Also, the Mediation provided that: "No person shall disclose any mediation communication." Unless with the consent of the party or required by law.³³

ii) Mediation process

Parties may select and appoint a mediator from the list of Certified Mediators accredited by the Malaysian Mediation Centre (an organization established under the auspices of the Malaysian

²⁸ Dato Cecil Abraham, 'Alternative dispute resolution in Malaysia' (2006) <http://www.aseanlawassociation.org/9GAdocs/w4_Malaysia.pdf> accessed on 16 October 2022>

²⁹ Practice Direction No.5 of 2010 on Mediation, Federal Court of Malaysia

³⁰ Article 3 of the Mediation Act 2012, Laws of Malaysia

³¹ Article 4 of the Mediation Act 2012, Laws of Malaysia

³² Mohammad Naqib Ishan Jan and Ashgar Ali Ali Mohamed, 'Mediation in Malaysia: The Law and Practice' (2010) LexisNexis 497

³³ Article 15 of the Mediation Act 2012, Laws of Malaysia

Bar Council), the Asian International Arbitration Centre, or any other mediator agreed upon by both parties. Parties may even designate more than one mediator if necessary.³⁴

After the mediator is appointed, the parties must attend a pre-mediation meeting where the mediator will meet the parties for the first time, explain the mediation process, and disclose any potential or actual conflict of interest (if any). The mediator will also ask the parties for a summary of the facts and relevant documents.³⁵

Parties must sign an agreement to mediate at the end of the pre-mediation conference. A settlement agreement can be used to memorialize any agreement reached after a successful mediation. The mediator will facilitate the parties' detailed discussion of the parameters of the settlement agreement.³⁶

iii) Qualifications for Commercial Mediators

Article 7 of the Act provides that "only a person who (1) possesses the relevant qualifications, special knowledge or experience in mediation through training or formal tertiary education; or (2) satisfies the requirements of an institution concerning a mediator, can be appointed as a mediator."³⁷

Before taking the position, a mediator is also expected to disclose any knowing information that a reasonable person would believe will impair the mediator's objectivity, including any financial or other personal stakes in the mediation's outcome. Additionally, Article 9 of the Act mandates that a mediator act impartially and independently to help the parties come to a satisfactory resolution of the dispute and provide suggestions for how to do so.³⁸

However, the Act does not govern the standardization of competency standards with minimum credentials for mediators, whether or not through an accreditation system where a body has the right to revoke or grant accreditation. However, becoming increasingly necessary to be accredited by an organization to arbitrate in a specific situation. For instance, before one can participate in mediation services, the Malaysian Mediation Centre (MMC), the Kuala Lumpur Regional Centre for Arbitration (KLRC), and the Construction Industry Development Board (CIDB) would demand a diploma from an accepted training program.³⁹

iv) How are settlement agreements enforced?

Any settlement reached after a successful mediation session may be written and signed by the parties in a Settlement Agreement. Still, in every event, the parties must record the terms of the settlement as a consent judgment. If either party breaches any term in the settlement agreement, the aggrieved party may sue the defaulting party for breach of the settlement agreement. If proceedings have been commenced in court, the settlement agreement may be recorded before the court as a consent judgment or judgment of the court.⁴⁰

e) Thailand

i) Overview

Thailand's conflict resolution system now includes mediation, a long-standing idea throughout Asia. Institutionalized mediation has a particularly long history in Thailand. The first formal regulation of mediation was made in the 1934 Thai Code of Civil Procedure. Since then,

³⁴ Article 7 of the Mediation Act 2012, Laws of Malaysia

³⁵ Article 10 of the Mediation Act 2012, Laws of Malaysia

³⁶ Article 12 of the Mediation Act 2012, Laws of Malaysia

³⁷ Article 7 of the Mediation Act 2012, Laws of Malaysia

³⁸ Article 9 of the Mediation Act 2012, Laws of Malaysia

³⁹ Mohammad Naqib Ishan Jan and Ashgar Ali Ali Mohamed, *Mediation in Malaysia: The Law and Practice* (LexisNexis 2010) 509-510

⁴⁰ Article 13,14 of the Mediation Act 2012, Laws of Malaysia

several pieces of legislation have included mediation in Thai law. Parties have been asked to participate in mediation before starting court proceedings since the Consumer Protection Act of 1979 made mediation mandatory for all consumer matters. Court officers are allowed to assist judges in conducting court mediation sessions under the Consumer Protection Act 2008 (CPA 2008). Later, the Code of Civil Procedure (Amendment) Act 1999, which revised the Thai Civil Procedure Code, mandated mediation in all minor cases. The court of justice has played a significant role in guiding the mediation process.

The Mediation Act B.E. 2562, Thailand's first comprehensive mediation law, was passed in 2019. An out-of-court procedure for civil dispute mediation was introduced under the Act. However, given that its terms specify that only conflicts with a maximum of 5 million THB⁴¹ (USD 160,000) may be subject to this process⁴², its application is constrained.

Additionally, under the act, if a party demands that the other party perform the settlement agreements but the party against whom the demand is made does not comply, the party making the demand may request with the Thai court for the enforcement of the settlement agreements. Unless it appears to the court that there are specific (and only very restricted) grounds to refuse its execution, the competent court shall issue an order to enforce the settlement agreements. Finally, the Act mandates establishing a private mediation system subject to accreditation and training.

The mediation process is entirely confidential. Unless the parties have already consented, no information concerning the proceedings may be disclosed by the mediator or the parties, and no facts or evidence may be used in court proceedings.⁴³

ii) Mediation process

The Office of the Judiciary's Alternative Dispute Resolution Office (ADRO) 's Thai Mediation Center (TMC) is in charge of organizing and carrying out in-court and out-of-court mediation as well as giving the general public legal advice on mediation and conciliation. The ADRO also creates the frameworks, procedures, and guidelines for mediation in Thailand.

“Mediation proceedings at the TMC follow the Office of the Judiciary Out-of-Court Mediation Rules (TMC Rules). A typical out-of-court mediation proceeds as follows:

- One party sends a written Request for Mediation to the Alternative Dispute Resolution Office (ADRO). The ADRO sends a copy to the other party, who has 15 days to accept or decline to participate in the mediation. The mediation is automatically refused if the other party does not reply within 15 days.
- If the other party agrees to the mediation, the ADRO then arranges a meeting between the parties to appoint a mediator and commence the proceedings. The parties can choose a mediator from the ADRO's list of mediators or mutually agree on a mediator. The ADRO can appoint a new mediator for any potential conflict of interest if the parties cannot agree on one.
- The parties choose the language(s) to be used and sign a written acknowledgment of the mediation process. The mediator can choose the language(s) if the parties cannot agree on the language(s) to be used.
- The mediator will conduct the proceedings according to conditions decided upon by the parties. However, if there is no agreement, the mediation proceedings are at the mediator's discretion but must follow the TMC Rules. The parties must cooperate in good faith with the mediator, including any necessary documents and other evidence requests.

⁴¹ Thai Baht

⁴² Section 20 (4) of the Mediation Act B.E. 2562 (2019)

⁴³ Section 29 of the Mediation Act B.E. 2562 (2019)

The mediator must be guided by fairness, impartiality, neutrality, and independence in conjunction with the parties' wishes. The mediator has no power to impose a settlement on the parties. A routine TMC mediation has four phases:

1. Preparation – the mediator examines the dispute using the case files and can request more information from the parties.

2. Opening – The mediator makes an opening statement which includes an introduction of the mediator and the participating parties, an explanation of everyone's roles, and any ground rules.

3. Interest – The mediator identifies each party's interests and the areas of dispute using the provided and discovered information.

4. Solution – The mediator works to reduce the number of disputed issues and offer possible solutions.”⁴⁴

iii) Qualifications for Commercial Mediators

The Dispute Mediation Act requires that mediators register with the regulatory body established by the Act. Mediators must have completed accredited training programs and have work experience in industries that support dispute resolution. A mediator's responsibilities and authority include setting mediation rules, assisting the parties in resolving their disputes, and acting impartially.⁴⁵

The Thai Mediation Center was founded and has collaborated closely with Thailand's courts of justice to educate and improve mediators' professional skills and accredit mediators. TMC has planned various programs in collaboration with the courts to encourage mediation, most notably the annual “Let's Mediate” program, a settlement month project that takes place in every court of justice in Thailand each July and August. TMC-accredited mediators have worked in a variety of Thai locales. More than 2,000 mediators are currently on the field. These educated mediators come from various occupational and professional backgrounds, including former judges, legal professionals, accountants, bankers, retired civil servants, company owners, and community leaders.⁴⁶

iv) *How are settlement agreements enforced?*

If the parties reach an agreement, the mediator must write it down, and all parties and the mediator must sign it.⁴⁷ If a settlement reached through mediation is not followed, it may be enforced through court procedures within three years of the agreement's date.⁴⁸ If the parties can achieve an agreement or a compromise, the mediator will file the agreement or compromise agreement with the court. If the court determines that the agreement or compromise agreement corresponds to the parties' objectives and the principles of good faith and fair dealing and is not illegal, the court will order the party to comply.⁴⁹

⁴⁴ Dej-Udom & Associates Attorneys-at-Law, ‘Arbitration and Mediation in Thailand’ <<https://www.dejudomlaw.com/litigation/alternative-dispute-resolution-in-thailand/>> accessed on 17 October 2022

⁴⁵ Price Sanond, ‘Thailand encourages mediation of certain disputes as an alternative to litigation’ (November 13, 2020) <<https://www.pricesanond.com/blog/thailand-encourages-mediation-of-certain-disputes-as-an-alternative-to-litigation.php>> accessed on 17 October 2022.

⁴⁶ The 4th Asian Mediation Association, ‘Thai Mediation Center’, <<http://amaconference2016.ccpit.org/EN/AboutAMA/37928358-1d80-44ca-bd68-76ca207caaf1.html>> accessed 18 October 2022

⁴⁷ Section 30 of the Mediation Act B.E. 2562 (2019)

⁴⁸ Section 32 of the Mediation Act B.E. 2562 (2019)

⁴⁹ Section 33 of the Mediation Act B.E. 2562 (2019)

III. The Singapore Convention

Before delving into the substance of the Singapore Convention, the mere existence of a convention rather than a softer instrument is an accomplishment in and of itself. Many delegations supported developing model legislative provisions rather than a convention at the 65th session of the UNCITRAL Working Group II (the Working Group) due to concerns about the lack of a harmonized approach to the enforcement of settlement agreements, both in legislation and in practice.⁵⁰

The Working Group agreed that a binding instrument, such as a convention, would provide certainty and help to promote mediation in international trade.⁵¹ It did, however, acknowledge that the concept of mediation was new in some jurisdictions and that flexible model legislative measures would be more viable. Nonetheless, at its 66th session, the Working Group reached a creative compromise approach on five critical issues, including the form of the instrument, which would simultaneously involve the preparation of a model law and a convention.⁵²

a. Overview

The Singapore Convention on Mediation, also known as the United Nations Convention on International Settlement Agreements Resulting from Mediation (the “Convention”), paves the way for settlements reached through mediation to be recognized internationally. It is a significant step forward in promoting mediation as a tool for resolving international disputes. Since the Convention’s formal opening for signature on 7 August 2019, 55 nations have done so, with signatory States ranging from Afghanistan to Venezuela and including the United States, Singapore, and China, three major international trading partners.⁵³

The Convention intends to address the problem of the absence of a mechanism for the simple international recognition and enforcement of settlement agreements. Currently, these agreements only have the status of contracts and require additional legal action to enforce compliance if one side doesn’t adhere to the conditions. When there are international parties, this may entail legal action to uphold the agreement in a foreign state. To enforce settlement agreements reached through mediation, parties will be allowed to apply directly to the courts of party States that have ratified the Convention without commencing additional actions.

b. Scope of application

A process “where the parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons lacking the authority to impose a solution upon [them]” is called mediation under the Convention.⁵⁴ Most written agreements to settle international commercial disputes that arise through mediation will be upheld in the courts of any signatory state, provided that specific requirements are met⁵⁵ (examined below). The Convention does not define what constitutes a mediator for this purpose.

⁵⁰ Report Of Working Group II (Dispute Settlement) On The Work Of Its Sixty-Fifth Session, UNCITRAL, UN Doc. A/CN.9/896 (2016), At Para. 139; Edna Sussman, ‘A Path Forward: A Convention For The Enforcement Of Mediated Settlement Agreements’ (2015) 6 Transnational Dispute Management 5,6

⁵¹ Chang-Fa LO, “Desirability Of A New International Legal Framework For Cross-Border Enforcement Of Certain Mediated Settlement Agreements” (2014) 7 Contemporary Asia Arbitration Journal 119 At 135–6.

⁵² Report Of Working Group II (Dispute Settlement) On The Work Of Its Sixty-Sixth Session, UNCITRAL, UN Doc. A/CN.9/901 (2017), Para. 52.

⁵³ United Nations Convention On International Settlement Agreements Resulting From Mediation, XXII

⁵⁴ Article 2 (3) Of The United Nations Convention On International Settlement Agreements Resulting From Mediation

⁵⁵ Article 1 (1) Of The United Nations Convention On International Settlement Agreements Resulting From Mediation

The Convention does not protect settlement agreements where one party is a consumer or those involving family, inheritance, or employment law. Additionally, the Convention will not apply to settlement agreements that have been recorded and are enforceable as arbitral awards, as well as settlement agreements that have been approved by a court or reached during court proceedings (and are thus already enforceable as judgments).⁵⁶

Moreover, signatory States may declare that the Convention will not apply to public contracts involving the Government or any of its agencies. Belarus and Iran have already made such a declaration. States may also stipulate that the parties to the settlement agreement to be enforced have to have agreed to the Convention's application; Iran has again made a declaration to that effect.⁵⁷

c. Conditions for recognition

First, the settlement agreement must have been reached after the involved state ratified the Convention, emerged from mediation (as described above), and be in writing. Still, it may also have been reached electronically.⁵⁸

Second, the dispute must be international. This will be the case if at least two of the settlement agreement's parties have places of business in different States or if the parties' places of business are in a different state than where a significant portion of the settlement agreement's obligations must be carried out, or where the settlement agreement's subject matter is most closely related.⁵⁹

Third, parties must submit several documents to the competent authority of the state where they wish enforcement to take place, including the settlement agreement signed by the parties and the mediator, as well as documentation showing that the settlement agreement was the result of mediation, which the mediator must sign.⁶⁰

In some jurisdictions, mediators may be hesitant to sign the settlement agreement since doing so could be interpreted as endorsing an arrangement in which the mediator is required to maintain objectivity or that it could violate the mediator's confidentiality obligation. To demonstrate the legitimacy of the settlement agreement, a party may, according to the Convention, offer "any other evidence acceptable to the competent authority."⁶¹

d. Grounds for refusing relief

However, the competent authority has the right to reject Convention enforcement. "Following are some grounds for refusal:

- A party to the settlement was under some form of incapacity;
- The settlement agreement is technically ineffective, is not binding or not final, or has been subsequently modified;
- The obligations in the settlement agreement have already been fulfilled or are not apparent or comprehensible;
- Granting relief would be contrary to the terms of the settlement agreement itself;

⁵⁶ Article 1 (2,3) Of The United Nations Convention On International Settlement Agreements Resulting From Mediation

⁵⁷ XXII 4. COMMERCIAL ARBITRATION AND MEDIATION - United Nations Convention On International Settlement Agreements Resulting From Mediation

⁵⁸ Article 2 (2) Of The United Nations Convention On International Settlement Agreements Resulting From Mediation

⁵⁹ Article 1 (1) Of The United Nations Convention On International Settlement Agreements Resulting From Mediation

⁶⁰ Article 4 Of The United Nations Convention On International Settlement Agreements Resulting From Mediation

⁶¹ Article 4 (1) (iv) Of The United Nations Convention On International Settlement Agreements Resulting From Mediation

- There was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement;
- There was a failure by the mediator to disclose circumstances that raise justifiable doubts as to their impartiality or independence and that failure had a material impact or undue influence on a party that would not otherwise have entered into the settlement agreement;
- It would be contrary to the public policy of the state where enforcement is sought (for example, fulfillment of the underlying contract would amount to fraud or would be otherwise illegal);
- The subject matter of the dispute is not capable of settlement by mediation under the law of the state where enforcement is sought.”⁶²

In actuality, proving the existence of a basis for contesting enforcement may be challenging. For instance, there is no explanation or advice as to when a mediator’s breach will be deemed “serious” enough for a party to claim it would not have entered the agreement but for the breach. Furthermore, the Convention does not mention the “standards” that shall be applied to the mediator. The regulation of mediators and mediations is left to local law and practice because there are no universally recognized rules of behavior. As observed from the previous review of mediation practice throughout the ASEAN States, several governments require mediators to complete formal training and accreditation.

In some cases, mediators willingly consent to self-regulation. However, in some areas, there is absolutely no regulation. Although it’s safe to say that most mediators uphold the highest moral standards, the absence of suitable norms could serve as a foundation for criticism. Additionally, if a settlement is challenged on the grounds of substantial mediator bias or misconduct, the mediation process may be examined, violating the mediation process’s fundamental confidentiality.

IV. An ASEAN perspective

The Singapore Convention can significantly influence the practice of international dispute resolution in ASEAN, where mediation is regarded as a beneficial tool for resolving economic conflicts due to its compatibility with Asian sensibilities and culture.⁶³ In a 2011 exploratory survey by the International Institute for Conflict Prevention and Resolution, 122 in-house and outside attorneys from the Asia-Pacific region participated. Of the respondents, 72 percent said their company or firm generally supported mediation (as opposed to 69 percent for arbitration), and 78 percent said their company or clients had used mediation to settle disputes in the past three years.⁶⁴

In recent years, many ASEAN States have actively pushed for the use of mediation. This has included, among other things, passing legislation or acts governing mediation. For example, Vietnam’s Decree 22 (2017), the Singapore Mediation Act 2017, and the Malaysian Mediation Act 2012 all established frameworks to provide certainty in mediation. Judiciaries have also issued

⁶² Article 5 Of The United Nations Convention On International Settlement Agreements Resulting From Mediation

⁶³ See generally, Joel LEE and TEH Hwee Hwee, eds., *An Asian Perspective on Mediation* (Singapore: Academy Publishing, 2009).

⁶⁴ International Institute for Conflict Prevention and Resolution, ‘Attitudes Toward ADR In the Asia-Pacific Region: A CPR Survey’ (CPRADR, 2011) <<https://www.cpradr.org/programs/international-initiatives/asia/asia/res/id=Attachments/index=0/asia-pacific-survey.pdf>> accessed 18 October 2022

Practice Directions to encourage the referral of cases to mediation by incentivizing counsel and the parties to consider and attempt mediation at an early stage. Examples include Practice Direction No.5 of 2010 on Mediation, the Federal Court of Malaysia, Indonesia Supreme Court Regulation No. 1 of 2016, and the Singapore Supreme Court Practice Directions. Establishing institutions and regulations to support mediation is another way to encourage it. Some regional examples are Vietnam Mediation Center, Singapore International Mediation Institute, and the Indonesian Mediation Centre.

Despite these encouraging developments, compared to international business arbitration, international commercial mediation is still vastly underutilized.⁶⁵ A survey commissioned by the Singapore Academy of Law and published in 2016 of 500 respondents, including commercial law practitioners, in-house counsel, and public sector legal professionals in Singapore and around the region reflected that seventy-one percent preferred to use arbitration, twenty-four percent of litigation, and a mere five percent mediation, with enforceability, confidentiality, and fairness as leading factors for choosing arbitration.⁶⁶

The Singapore Convention has the potential to alleviate concerns about enforcement and allow for a rise in the actual usage of mediation as a result of favorable attitudes toward it. Given the prospect of increased conflicts in Asia with trade initiatives like the ASEAN Economic Community, international commercial disputes in ASEAN must be resolved swiftly and effectively. Increased recognition and enforcement of international mediated settlement agreements would also be in the best interests of the many ASEAN dispute resolution agencies.

V. Conclusion

As this analysis of mediation procedures demonstrates, mediation is becoming more common in each regional jurisdiction. It offers a workable option for parties to handle and settle disputes outside the typical courtroom and arbitration frameworks. Through mediation, parties can resolve their disputes amicably. It enables parties to independently come to amiable agreements based on their interests quickly and affordably. Organizations opt for mediation since it makes it easier to preserve commercial relationships and is upholdable in the courts of the nations that have ratified the Singapore Convention. The Singapore Convention was created to replicate for mediation the success of arbitration, and mediated agreements become enforceable in any country that has accepted the convention. The judge will support their application as if it were a judgment issued by a national court.

Given the inconsistent methods used in ASEAN for implementing foreign judgments, the Singapore Convention offers a more direct and effective route than the possibilities for cross-border enforcement of mediated settlement agreements as a court order or arbitration award,⁶⁷ as well as the difficulties brought on by combining arbitration and mediation.⁶⁸ The Singapore

⁶⁵ KIM Shi Yin, “From ‘Face-Saving’ to ‘Cost Saving’: Encouraging and Promoting Business Mediation in Asia” (2014) 32 *Alternatives to the High Cost of Litigation* 158, at 158.

⁶⁶ Singapore Academy of Law, “Study on Governing Law and Jurisdiction Choices in Cross-Border Transactions” (2016),

⁶⁷ Adeline CHONG, ed., *Recognition and Enforcement of Foreign Judgments in Asia* (Singapore: Asian Business Law Institute, 2017) 3–4.

⁶⁸ Bobette WOLSKI, “Arb-Med-Arb (and MSAs): A Whole Which Is Less Than, Not Greater Than, the Sum of its Parts?” (2013) 6 *Contemporary Asia Arbitration Journal* 249; Eunice CHUA, “A Contribution to the Conversation on

Convention would limit the grounds that competent authorities may reject to enforce mediated settlement agreements from other jurisdictions and will require them to do so.⁶⁹ The Singapore Convention will outline the exceptions to enforcement and offers a straightforward framework for applying for enforcement. The Singapore Convention is projected to receive broad acceptance from the ASEAN States, increasing legal Cooperation, harmonization, and unification and ushering in a better tomorrow for ASEAN dispute resolution.

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⁶⁹ Laurence BOULLE, “International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework” (2014) 7 Contemporary Asia Arbitration Journal 35 at 59

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