WHAT'S WRONG WITH MEDIATION?*

Arabuluculuğun Nesi Yanlış?

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ABSTRACT

Mediation is one of the oldest dispute resolution mechanism. Throughout history, the practice of mediation was not the greatest or higher than its counterparts. Despite always being on the table, it was not preferred because either it is found as a useless attempt or most of the time perceived as a waste of time. Due to its voluntary and non-binding nature, it is always deemed wide open to abuse when there is bad faith. This article right here presents the assessment of the advantages and disadvantages of mediation at the international dispute resolution platforms. There are certain reasons of mediation that encourage parties to perform mediation while at the same time there are particular weaknesses which lead parties towards more secured methods of dispute resolution when it comes to their interests. At the international level, it was also asked in this article whether a Singapore-like Convention might suit the investment disputes considering the positive and negative features of mediation. Suggestions were made as to what extent the mediation should stay loyal to its characteristics and on what occasions the practice could leave being conservative via hybrid means of settling agreements.

Keywords: Investment Law, Investment Mediation, Investment Disputes, Mediation, Singapore Convention.

ÖZET

Arabuluculuk, en eski uyuşmazlık çözüm mekanizmalarından biridir. Tarih boyunca, arabuluculuk uygulaması emsallerinden daha büyük veya daha çok değildi. Her zaman masada olmasına rağmen ya boş bir girişim olarak görülmesi ya da çoğu zaman vakit kaybı olarak algılanması sebebiyle tercih edilmemiştir. İhtiyari ve bağlayıcı olmayan niteliği nedeniyle, kötü niyet söz konusu olduğunda her zaman suistimale açık olduğu kabul edilmiştir. İşte bu

* There is no requirement of Ethics Committee Approval for this study.
The meaning of the title is neither how mediation dares to arbitration, nor nothing is wrong with mediation and it's just fine. Instead, the title literally refers to that; what is wrong with mediation as we are trying to make it better?

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makale, uluslararası uyuşmazlık çözümü platformlarında arabuluculuğun avantaj ve dezavantajlarının değerlendirilmesini gözler önüne sermektedir. Arabuluculuğun, tarafları arabuluculuk yapmaya teşvik eden belirli nedenleri olmakla birlikte, aynı zamanda tarafların çıkarları söz konusu olduğunda onları daha güvenli uyuşmazlık çözüm yöntemlerine yönlendiren bazı zayıflıkları da vardır. Uluslararası düzeyde, arabuluculuğun olumlu ve olumsuz yönleri dikkate alınarak Singapur[1] benzeri bir Sözleşmenin yatırım uyuşmazlıklarına uygun olup olmayacağı da bu makalede araştırılmıştır. Arabuluculuğun ne ölçüde karakteristik özelliklerine sadık kalması gerektiği ve uygulamanın hangi durumlarda muhafazakarlıktan çıkarak uyuşmazlıkların hibrit yöntemlerle çözüleceği konusunda da önerilerde bulunulmuştur.

Anahtar Kelimeler: Yatırım Hukuku, Yatırım Arabuluculuğu, Yatırım Uyuşmazlıkları, Arabuluculuk, Singapur Konvansiyonu.

INTRODUCTION

The mediation has been in the trends of international law practice for the last decade and so does for the resolution of investment disputes. Due to its disadvantages, it is repeatedly proposed to undergo reforms and change its characteristics. However, will these changes boost the use of mediation or endanger the future of mediation? The question of what mediation lacks and requires in fitting into the international sphere of commercial and investment disputes or does it really need a change in its form to serve better is going to be addressed in this article.

The fundamental characteristics of mediation are flexibility, voluntariness and being non-binding. Since all three are in interaction with each other, a change in one could directly deform the essential features of mediation. Yet the mediation has become the focus of reformists in recent years and had its share of the innovations such as gaining enforceability by the Singapore Convention.[2] The problem that is likely to occur here is that the mediation may face losing its essence upon these developments. Mediation, after losing its non-binding nature, the flexibility first and then accordingly the confidentiality which all accepted as the crucial advantages compared to arbitration might happen to be at risk of disappearing in time.

However, as the greater demand of practitioners will continue, whether because of the harmful drawbacks of arbitration or the attraction of mediation itself, such modernization either will improve the wider use of mediation or just simply take mediation to somewhere which is not mediation at all.

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1 Nuray Ekşi, "Arabuluculuk Sonucunda Yapılan Milletlerarası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Konvansiyonu (Singapur Konvansiyonu)", *UTTDER* 1 (2020) 27-91.

2 <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements> accessed 01 January 2024.

I. THE RATIONALE BEHIND THE SINGAPORE CONVENTION

Intensive use of international commercial arbitration is breaking records each year as the global trade peaks. Such that the practice of it has become an indispensable reference for the parties of the commercial contracts in time.[3] Accordingly, today now the vast majority of the international commercial contracts, drafts, regulations and so on are in favor of the solution of the disputes through arbitration as the one and only reliable mechanism at present.[4]

However, even the arbitration had pathologic examples of failing from a perfect enforcement convenience of the New York Convention. It was experienced that some countries dissented to enforce the decisions rendered by the arbitral tribunals due to state immunity.[5] In addition, the intensive use of the arbitration in time has also developed its unique bureaucracy, heavy workload of proceedings and astronomic amounts of bills for the legal costs. On the contrary, besides the comparatively swift[6] and cheap[7] proceedings, the benefits of the mediation vary in many ways in respect of protecting the relationship and providing long-lasting and strengthened business links.[8] First of all, the flexibility of the mediation procedures provides an easier flow of information between the parties and it gives a productive ambience regarding the solution of the dispute as they will have greater control and power over the dispute which in arbitration, they may not have.[9] The mediation method with a

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3 Margaret Moses, *The Principles and Practice of International Commercial Arbitration*, 2nd ed. (Cambridge, New York: Cambridge University Press, 2012). Giuditta Cordero Moss, *International Commercial Arbitration: Different Forms and Their Features* (Cambridge: Cambridge University Press, 2013).

4 Peter D. Cameron, *International Energy Investment Law: The Pursuit of Stability* (Oxford: Oxford University Press, 2010). Andrew Newcombe, *Law and Practice of Investment Treaties: Standards of Treatment* (2009).

5 Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on international arbitration*, 6th ed. (Oxford: Oxford University Press, 2015) 653-660. Malcolm Simpson, "Enforcement of Arbitral Awards: Be Alive to the Rule Against Re-litigation", *Corporate Disputes Magazine* October-December (2017) 191-192.

6 Dragos Marian Radulescu, "Mediation–An Alternative way to Solve Conflicts in the International Business Environment", *Procedia - Social and Behavioral Sciences* 62 (2012) 293.

7 In practice, according to Walde, average cost of mediation is up to 25% of the whole direct litigation costs and he estimates the average number of costs for big investment arbitration cases at the ICSID as USD 3-5 million. Thomas Walde, "Mediation/Alternative Dispute Resolution in Oil, Gas and Energy Transactions: Superior to Arbitration/Litigation from a Commercial and Management Perspective", *OGEL 2* (2003) 5-7.

8 Thomas Walde, "Pro-Active Mediation of International Business and Investment Disputes Involving Long-Term Contracts: From Zero-Sum Litigation to Efficient Dispute Management", *OGEL 4* (2003) 7-8.

9 John G. Merrills, *International Dispute Settlement*, (5th ed. Cambridge: Cambridge University Press 2011) 18.

settlement focus has several advantages in response to address these problems of the arbitration.[10] Mediation also shows a sign that the parties are trying to overcome the dispute to keep their long-term business relationship alive and show their good intention on the market sensitivity as it is just a mutual settling process that does not have an antagonist character.

Despite its less experience compared to arbitration, the attention of disputants and lawyers is gradually increasing.[11] As a result, the idea of mediation as one of the most popular forms of the ADR methods, appeared as it could be offered to the resolution of international commercial disputes[12]. In order to eliminate all kinds of these worries regarding arbitration, finally, Singapore Convention came out as a response to finish the discussions and get the mediation off the ground into the commercial disputes. The Singapore Convention was discussed, drafted, developed by the UNCITRAL Working Group II and adopted on 20 December 2018, and opened for signature on 7 August 2019. From this time forward, what will be experienced in practice is going to tell us whether that was a good idea or not.

A. Principles of the Convention

Singapore Convention has been signed by 55 countries so far since it was open on 7 August 2019. The Convention enters into force six months after the deposit of the third instrument of ratification, acceptance, approval or accession by the signatories of the Convention (Article 14/1). Thus the signature is not sufficient and to carry into effect, the Convention is subject to ratification, acceptance or approval by the signatories (Article 11/2). Then that means the party to the Convention consents to apply full enforceability to international settlement agreements resulting from mediation (Article 3/1)[13].

The requirements to prove a settlement agreement whether it resulted from mediation are also noted down by the Convention. For instance, the mediator's signature on the settlement agreement; a document signed by the mediator indicating that the mediation was carried out; an attestation by the institution

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10 Energy ADR Forum Report by CAEM (The Centre for the Advancement of Energy Markets), Using ADR to Resolve Energy Industry Disputes: The Better Way (2006) 12.

11 According to Walde, the most distinctive feature of mediation is a neutral person is chosen by the parties to lead them to settle the dispute by reaching a mutually bargaining position rather than imposing a settlement by judge. Walde, "Mediation/Alternative Dispute Resolution in Oil, Gas and Energy Transactions: Superior to Arbitration/Litigation from a Commercial and Management Perspective" (n 7) 4.

12 Ener M A, "Singapur Konvansiyonu: Arabuluculuk Anlaşmalarının New York Konvansiyonu", *AHBVÜHFD* 4 (2019) 232.

13 Talat Kaya, "Singapur Sözleşmesi ve Uluslararası Ticari Arabuluculuk Sonucunda Ortaya Çıkan Sulh Anlaşmalarının Tanınması ve İcrası Meselesi" *MÜHF-HAD* 2 (2019), Prof. Dr. Ferit Hakan Baykal Armağanı 985.

that administered the mediation or any other evidence acceptable to the competent authority[14]. If the mediation is conducted electronically, it is still valid if the communication among them for the course of mediation is proved (Article 4).

In addition, there are also grounds for refusing to grant relief by the competent authority. These grounds firstly can be the parties' incapacity. Second, there is a cluster of reasons concerning the settlement agreement when it is invalid, inoperative, incapable of being performed under the law to which the parties have validly subjected or the law applicable deemed by the competent authority. Again the settlement agreement may not be final, not be binding or might have been subsequently modified, the obligations in the settlement agreement could have been performed or may not be clear and comprehensible, or that granting relief would be contrary to the terms of the settlement agreement[15]. Thirdly, the impartiality of the mediator and a serious breach by the mediator in which without that, a party would not have entered into the settlement agreement[16]. Finally, with regards to the mediation procedure; the competent authority can also refuse to grant a relief sought by a party when it would be contrary to the public policy of that party or the subject matter of the dispute is not capable of settlement by mediation under the law of that party[17]. All of the abovementioned grounds are listed in Article 5 of the Convention and exhaustive.[18] The Working Group aimed to keep the available defences to a minimum, as a complex mechanism with many review grounds would be problematic for parties who want a fast and efficient process.[19]

Article 7 of the Convention also ensures parties to avail of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon. It means that the Convention allows the continued application of law or treaties of the country where the settlement agreement is sought to be

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14 Mustafa Erkan, *Arabuluculuk ve Singapur Sözleşmesi* (Oniki Levha Yayınları, 2020) 147.

15 Ersin Erdoğan, "Milletlerarası Arabuluculuk Anlaşma Belgelerinin İcrasına İlişkin BM Sözleşmesinin (Singapur Sözleşmesi) Değerlendirilmesi" *Arabuluculuğun Geliştirilmesi Uluslararası Sempozyumu,* 6-7 December (2018) Ankara 199-200.

16 Sibel Özel, "Arabuluculuk Sonucunda Yapılan Milletlerarası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Sözleşmesi: Singapur Konvansiyonu" *MÜHF-HAD* 2 (2019), Prof. Dr. Ferit Hakan Baykal Armağanı 1203.

17 ibid (n 16) 1204. Erdoğan, "Milletlerarası Arabuluculuk Anlaşma Belgelerinin İcrasına İlişkin BM Sözleşmesinin (Singapur Sözleşmesi) Değerlendirilmesi" (n 15) 201.

18 United Nations Convention on International Settlement Agreements Resulting from Mediation "Singapore Convention On Mediation", Information Brochure, Signing Ceremony, Singapore, 7 August 2019, 3.

19 Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements", *Pepperdine Dispute Resolution Law Journal,* Volume 19/1, (2019) 42.

relied upon that offers a regime more favorable than that of the Convention. This is a part of the purpose of the Convention where it seeks to encourage granting relief under the Convention in the greatest number of cases as possible.[20]

Parties to the Convention can make reservations and withdraw reservations at any time and the procedure of the entering into effect is similar to the Convention itself (Article 8/3-5). The reservation rights of the parties took place in article 8/1 of the Convention[21]. According to this, there are only two ways of reservation and no other reservations are permitted except those (Article 8/2). First, a party may declare a reservation on not to apply the Convention to settlement agreements to which it is a party, or to which any governmental agency or any person acting on behalf of a governmental agency is a party to the extent specified in the declaration. Second, a party can declare that the Convention applies only to the extent that the parties of a settlement agreement have agreed to the application of the Convention (Article 8/1). The latter envisages a general reservation and leaves more freedom to the commercial parties of a settlement agreement. Up to now, Belarus, Georgia, Kazakhstan and Saudi Arabia had the first type of reservation and the Islamic Republic of Iran declared a specified reservation together for both types.[22]

B. Promotion of the Convention and the Purpose

First of all, Singapore Convention will boost the consideration of multistep clauses in business contracts. The added value of these clauses to the dispute resolution regime is indisputable. At this angle, mediation with an enforceable background will highly likely take its place in between enforceable arbitration as the final remedy and the mostly voluntary consultations and negotiations. Parties are going to take mediation into consideration at the contract drafting stage. Today now, it is worldwide accepted that they are already default-like clauses and best suited to the individual needs of the parties. Adding mediation to that ladder will no doubt reinforce the structure of these escalated clauses. Enforceable mediation unquestionably encourages parties to draft multi-tiered clauses and also perform in due course. One benefit is also the prevention of abuse of mediation in these clauses as delay tactics that may lead to a later arbitration case in which to enforce an arbitral award becomes too late and impractical. In this respect, parties should be consulted on the future viability of the "enforceable" settlement agreement and the potential of the applicability of the Convention. A diligently drafted multistep clause together with enforceable mediation would also provide an extra trust to the parties in such clauses.

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20 "Singapore Convention On Mediation", Information Brochure, (n 18) 3.

21 Mustafa Serdar Özbek, *Alternatif Uyuşmazlık Çözümleri* (Yetkin Yayınları, 2022) 922.

22 As of January 2024: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en> accessed 01 January 2024.

The main significance of the Convention is, initially, to help the disputants to focus on their disagreement and encourage them to settle in an amicable way. Eventually, by the time the dispute is resolved, the commercial relationship between the two former disagreeing parties will be healed, strengthened and sometimes renewed. To do this, it is required to integrate the mediation through all kinds of international commercial law instruments in the most efficient way to get the best benefit. It is of importance to attract the interest of the legal environment in promoting the adoption of the Convention and the most effective use of mediation. Subsequently, this may lead to an increase in the expertise of mediation by the dispute resolution institutions of each state. To sum up, the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States.[23]

II. MEDIATED SETTLEMENT AGREEMENTS RESULTING FROM INVESTMENT DISPUTES AND THE SINGAPORE CONVENTION

Singapore Convention, regardless of the other pros and cons, aimed to help enforceability of the settlement agreements resulted from commercial disputes. Hence the arbitration still stands as the basic mechanism for commercial disputes, apparently the costlier, faster and more constructive ADR method; mediation has emerged and now has the same effect as arbitration.

In the first place, concerns about the enforceability have widely risen on the settlement agreements which resulted from commercial mediation and finally, in 2018, model convention and model law on international commercial mediation have been prepared by UNCITRAL Commission and opened for signing on 7th August 2019, Singapore[24] and came into force on 12 September 2020.[25] The apparent matter regarding the Convention is now whether it can be applied to settlement agreements resulting from mediation between host states and investors.

A. Applicability of the Singapore Convention to the Investment Mediation

The biggest criticism regarding the Singapore Convention here appears as the uncertainty that whether it applies to the investment disputes or not.

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23 Preamble, Singapore Convention.

24 The documents can be found here: <https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation. https://www.singaporeconvention.org/convention-text.html> accessed 01 January 2024.

25 <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en> accessed 01 January 2024.

It is indeed unclear in the text that the settlement agreements resulting from investment mediation would benefit from the Convention.

Even though the name of the Convention and the specific model law purports that this development could cover only commercial mediation, it does not explicitly ban to apply the settlement agreements resulted from investment mediation. Can this approach of the Convention be interpreted as the extension of the scope to the mediated settlements of investment disputes? However, in our thought, the same developments for the settlement agreements resulted from mediation in investment disputes will require more concentration likewise it has been done in commercial mediation due to the intrinsic nature of the investment disputes. That seems a long way off at first but could be promoted as said developments can be perceived as encouraging for the doctrine of investment law.[26]

In the current situation, model law explains that the term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; *investment*; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; and carriage of goods or passengers by air, sea, rail or road.[27]

As it is given here, a wide range of business activities non-exhaustively presented under the term commercial including "*investment*". The term investment also may refer to domestic investments and commercial transactions of foreign investors with local or other foreign investors and that is still a commercial law subject matter and the disputes that arise are available to benefit from the Convention. Therefore, the term commercial should not be given a wider interpretation to cover the transactions between foreign investors and the host states as "investment disputes". It needs to elaborate and give much clarity to the scope to include such disputes in the Convention. In addition, any wording with regards to the scope must take place directly in the text of the articles.

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[26] Laura Kaster, "Will There Be a Vast Worldwide Expansion of Mediation for International Disputes?", *Alternatives to the High Cost of Litigation* Volume 33, no. Issue 8 (2015) 122. Mercy McBrayer, "The Singapore Mediation Convention: Could it apply to investor-state disputes?", *Corporate Disputes Magazine* October-December (2019) 100-101.

[27] United Nations Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)

Article 8 of the Convention allows certain reservations as explained above. One is that a party may declare a reservation for not to apply the Convention to settlement agreements to which it is a party. Pursuant to this article, such reservations can be declared and withdrawn at anytime. In addition, the states are not allowed to make reservations on a dispute by dispute basis so it is to be applied for all disputes. In this regard, states hold the option to declare reservations as well as not to declare any reservation. So, when a state does not make a reservation, according to a view, it can be construed that the Convention was drafted in such a way as to leave the door wide open for its application to the states themselves and not only their citizen commercial parties.[28]

In our opinion, although this interpretation may look defendable to a certain extent, it still sounds a little bit too fictitious. The uncertainty regarding the applicability of the Singapore Convention on investment mediation is of much important subject that cannot be left to the inextricable discussions of academics. In addition, investment disputes indicate a number of disparities compared to commercial disputes which render them sort of inconvenient to be accepted under the scope of this Convention. In this respect, a brand new Convention that specifically gives enforceability to the mediated agreements resulting from the disputes between investors and host states would provide utmost assistance to the resolution of this uncertainty. Nevertheless, assuming the existence of such a Convention, there would still be problems in the adaptation to the practice of bringing two completely different parties together and sit them at the table as "two parties".

B. Challenges to the Application of Mediation to the Investment Disputes

Similar to commercial mediation, a host state and an investor can also conduct mediation for an investment dispute and they can conclude a settlement agreement as well. However, then the challenges that apply to the investment disputes will differentiate them from commercial disputes in many ways.[29]

The main difference between investment disputes and commercial disputes is the role of the host states. Host states, unlike commercial parties, are inevitably the heavier side of the dispute resolution table. As the name reveals, they are also the hosts of the dispute table as the "respondent" in every case.[30] This is because of the pervasive structure of the host states. It is truly

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28 Laura Kaster, "Will There Be a Vast Worldwide Expansion of Mediation for International Disputes?" (n 26) 122. Mercy McBrayer, "The Singapore Mediation Convention: Could it apply to investor-state disputes?" (n 26) 102.

29 For detailed research, please see Mustafa Oğuz Tuna, *Alternative Dispute Resolution in Energy Industries* (Routledge, 2022).

30 Jose Daniel Amado, "From Investors' Arbitration to Investment Arbitration: A Mechanism

an investment agreement between the host state and the foreign investor but in fact, it is a permission, license and sometimes a concession given by the host state to the investor who is bound up by the laws of it. When a dispute arises, a party of that dispute may have to continue to pay taxes to the opposite party of the dispute, continue to perform his liabilities by law made by the opposite party of the dispute, continue to seek relief from the competent authorities whose wages regularly disbursed by the opposite party of the dispute. In sum, there is not a manageable counterparty in front of the investors. On the other side, sovereignty is a substantial issue for both sides to pay regard to. The host state is accountable before the public so any misconduct may result in facing complaints regarding the "give-in" image of the host state. In addition, the nature of mediation is to be voluntary. Therefore, reaching a consensus is more difficult than commercial mediation since any party can act evasively and may not be willing to continue the proceedings. If truth be told, any subject matter left to the will of the parties is open to abuse.

Mediation is non-binding and is not enforceable in principle. Lack of enforceability has always been deemed as the prime and the greatest drawback of mediation. ICSID conciliation rules always had to face criticism on the lack of enforceability despite successful examples.[31] However, the registered ICSID conciliation cases are now only thirteen and this number equals 1.4% of the whole ICSID registered cases so far.[32] One survey also exposed that 74% of the respondents believed that an international instrument similar to New York and ICSID for the arbitration would encourage mediation and conciliation.[33] As long as such a step is not taken for investment mediation, sooner or later these numbers are not likely to change and this obstacle will keep standing in front of mediation.

In the current practice, to secure the enforcement of the settlement agreement, parties may request a bank guarantee that covers the estimated

for Allowing the Participation of Host State Populations in the Settlement of Investment Conflicts" *University of Cambridge Faculty of Law Legal Studies Research Paper Series* [2014] 29.

31 Tesoro Petroleum Corporation v. Trinidad and Tobago, CONC/83/1, Report issued on 27 November 1985. Lester Nurick and Stephen J. Schnably, "The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago", *ICSID Review: Foreign Investment Law Journal* Volume 1, no. Issue 2 (1986).

32 The ICSID Caseload Statistics (ISSUE 2023-2) Chart 2: All ICSID Cases Registered by Applicable Rules, 2.

33 Author and the conductor of this survey later on led the Working Group II of UNCITRAL and finalized the development as Singapore Convention. Stacey Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*, *Legal Studies Research Paper Series Research Paper No. 2014-28* (2014) 45.

value of the merit, as well as a separate deposit, which could be asked just for the merit of the case. This guarantee assures the enforcement in the case that a non-performance of the settlement agreement. But the dispute, more or less, should be able to be calculated. The guarantee provisions should be drawn prior to the proceedings of mediation and should not be deemed as a sign of giving in from any claim of the depositing party.

Confidentiality is one of the key features of commercial mediation as well as commercial arbitration.[34] Generally, it is not abnormal for the market to remain unaware of the existence of a dispute whether it has arisen or not.[35] Thus, confidentiality is more assured in mediation not only for the context but for the entire dispute.[36] However, in investment arbitration, the ICSID awards are publicly available. This is due to transparency as the key feature of investment disputes opposite to commercial ones. The reasons lie behind the transparency rule for investment arbitration must be considered for the investment mediation too. It is again because of the role of the host state and public concerns. Host governments are accountable for their transactions including a settlement agreement which may result in the government to be bound up with.[37] Transparency ensures to prevent host states from doing whatever they cannot do through arbitration, to do with mediation.

Abuse and bad faith of the parties always constitute a risk for a perfect, fair and successful mediation. As a matter of fact, as long as the mediation is a voluntary and non-binding method of dispute resolution, it is always open to abuse to delay the proceedings by the bad-intentioned party. For instance, the parties can conclude a settlement agreement after negotiations but in order to bring enforceability, the parties can just make up a mediation case which backdated on the paper and go through the Singapore Convention. It may first sound a tricky convenience as long as both parties are keen to do this but the spirit and the justification of the Convention would contradict with such "well-intentioned" corruption.[38] It is close to impossible to figure out the intention

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34 Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration*, *International arbitration law library,* (Alphen aan den Rijn Biggleswade: Wolters Kluwer Law & Business, 2011).

35 Noah Robins, "Use of Mediation for Investment Disputes", *OGEL 2* (2004).

36 By contrast, confidentiality in ADR methods is more likely to appear for sides and the dispute as it is an amicable way in itself. Arthur Marriott and Henry Brown, *ADR Principles and Practice* (3rd ed. London: Sweet & Maxwell, 2011) 517. Nadja Marie Alexander, *International and Comparative Mediation: Legal Perspectives*, *Global trends in dispute resolution* (Alphen aan den Rijn: Kluwer Law International, 2009) 245.

37 Michael Cover and Wolf von Kumberg, "The Energy Charter Treaty and ADR in the Context of Investor/State and Other Disputes", *Energy Charter Secretariat Knowledge Centre - Occasional Paper Series* [2016] 6.

38 "Singapore Convention On Mediation", Information Brochure, (n 18) 1.

of the parties beforehand so the duty of the rules of the mediation proceedings together with the assistance of the appropriate mediator, is to make sure that the mediation which started in consensus, must continue through the end even the parties do not settle, hence it is to find out that they cannot settle.

Arbitration has developed its own laws, regulations, proceedings and system throughout the years. That brought a top level of expertise to academics, arbitrators and the legal world. The same is not the case for mediation or even close.[39] Therefore, it is a rare coincidence to find a mediator who has a satisfactory experience in mediation as well as an expertise in substantive law. As a result, lack of expertise automatically affects the success of the mediation.

There is no precedent in mediation.[40] The previous mediation proceedings, no matter how similar, do not necessarily set an example for another. It is always the case on the agreements to mediate that the parties include articles providing that the mediators are not bound up with previous or other settlement agreements made in different mediation proceedings. It is of course due to the flexible nature of mediation. Having no precedent in mediation can cause contradictory outcomes but the parties cannot claim against them as it consensual in principle.

The proceedings of the mediation are not uniform.[41] Even if the institutional mediation rules are adopted, parties would always offer to alter the rules to a form in which is more favorable for them. So the other party either should get along or also cannot be rigid to the flexibility rule with their decisions as it is one of the key features of mediation. This and such barriers to standardization will always bear a disturbance from the perspective of the mediators and third parties.

Last but not least, cross-cultural disputes have always been tiresome for international commercial disputes.[42] Considering investment disputes together with other parameters, cultural divergence makes it more difficult to settle out of arbitration. A breach deemed not legitimate for a party may not have the same effect for another with different cultural background regarding his legal system.[43]

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39 Virginia A. Greiman, *Twenty-Seventh Annual International Law Symposium: The Public/Private Conundrum in International Investment Disputes: Advancing Investor Community Partnerships* (2011) 6.

40 This is even the case for arbitration. For example, two cases against Pakistan; Bayindir v. Pakistan and SGS v. Pakistan resulted with two different decisions on jurisdiction. While the arbitration has this contrast in its practice, mediation seems further away from providing safer results for the parties.

41 Jeswald Salacuse, "Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution", *Fordham International Law Journal* Volume 31, no. Issue 1 (2007) 159.

42 Thomas Walde, "Efficient Management of Transnational Disputes: Case Study of a Successful Interconnector Dispute Resolution" 3.

43 Daniel Posin, "Mediating International Business Disputes", *Fordham Journal of Corporate &*

All in all, considering the abovementioned challenges and the absence of a Singapore-like Convention, the current practice will continue to resolve the issues regarding the enforcement via arbitration. Hence, it is still not unusual for tribunals to hold the proceedings and invite parties for a possible settlement. To do this, following the commencement of arbitration proceedings pursuant to a treaty, parties can any time reach a settlement by themselves or through an ADR option and may request from the arbitral tribunal to embed such settlement agreement into the arbitral award. This will strengthen the enforcement of the settlement because arbitral awards can be enforced internationally through the New York and ICSID Conventions[44]. This also might be possible for domestic proceedings if it is allowed by the domestic procedural rules. On the other option, before any arbitral step is taken, some institutions allow the parties to appoint a mediator on the condition that agreeing upfront and then to act as an arbitrator when it comes to concluding a settlement agreement in an arbitral award.[45]

III. FUTURE OF MEDIATION

First of all, right now the mediation is not enforceable in its nature and the practice is on a voluntary basis. As the mediation is not binding in general and based on the consensus of the parties regarding the outcome, the main critique is that each party can always exploit this by using delay strategies if one has no intention of reaching an agreement[46]. One of the conveniences of arbitration procedure for the parties in which is to be able to enforce the awards lacks in mediation. The outcome of the process is treated by law as a regular agreement thus the parties may have to file a lawsuit to enforce it and there is always a risk that the other party may anytime be against that. The flexibility of mediation in finding solutions provides the ability to proceed quickly but it is limited by the boundaries established through existing laws and regulations. Very complex issues and disputes contain violence or any misbehaviour against law sometimes do not make it appropriate to get benefit from mediation techniques. These types of disputes could only be brought to law enforcement.

Financial Law Volume 9 (2004) 465. Munir Maniruzzaman, "The Problems and Challenges Facing Settlement of International Energy Disputes by ADR Methods in Asia: The Way Forward " *Journal of International Energy Law and Taxation*, no. Issue 6 (2003) 196.

44 Mustafa Serdar Özbek, *Tahkim Hukuku* (Yetkin Yayınları, 2022) 1831, 1835.

45 With the name in practice "Hybrid" methods. For example SCC Mediation Rules Article 14.

46 An opposite view to that critique says: *"This ability of any party to abort a mediation should not be seen as a flaw in the procedure. It is an incidental aspect of a party's freedom to act in this process. It is an essential pre-condition for free negotiations to take place. A party does not enjoy this freedom to withdraw without consequences in litigation or arbitration. To do this is to lose the case."* Marcus Stone, *Representing Clients in Mediation : A New Professional Skill* (London; Edinburgh: Butterworths, 1998).

Given all the abovementioned drawbacks, the Singapore Convention aimed to ease and erase all negative approaches and make mediation more accessible to the large masses. International commercial mediation became the example of such enterprise and the future of mediation will have essential feedback from the reaction of mediation practice to this Convention. Eventually, it is anticipated to expand what is experienced in international commercial mediation to the use of mediation in other branches of law.

A. Current Usage of Mediation and Where is it Now?

It has always been a mystery whether we were able to know if mediation is already used in international commercial or investment disputes. According to some academics, mediation is very often used[47], and for some of them, it is not[48]. Although these arguments are not based on scientific data, in fact, it would not be possible to obtain such knowledge due to the confidential and flexible nature of the mediation.[49] Mediation is now the most popular alternative dispute resolution way to arbitration at the moment but not the only one. There are others which some of them are few experienced in the international arena but some of them never as far as is known[50]. These are negotiation, conciliation, expert determination, early neutral evaluation and so on.[51]

The negotiations over a specific disagreement between the parties or to renegotiate the parties' positions when a dispute has arisen are always anticipated during the contract term. Negotiations or renegotiations, therefore are not deemed as an alternative dispute resolution mechanism most of the time. However, the parties are definitely able to prefer to negotiate the dispute

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47 Eric De Brabandere, "The Settlement of Investment Disputes in the Energy Sector", in *Foreign Investment in the Energy Sector - Balancing Private and Public Interests*, ed. Eric De Brabandere and Tarcisio Gazzini (2014) 131. Michael Reisman, "International Investment Arbitration and ADR: Married but Best Living Apart", *ICSID Review-Foreign Investment Law Journal* Volume 24 (2009) 187.

48 As stated: "has not become widely used" on Salacuse, "Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution" (n 41) 174. "it is extremely underused" on Linda Reif, "Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes", *Fordham International Law Journal* Volume 14, no. Issue 3 (1990).

49 Francisco Orrego Vicuna, "Arbitration in a New International Alternative Dispute Resolution System", *News from ICSID* Volume 18, no. No 2 (2001) 10.

50 Leading dispute resolution institutions have launched their own mediation, conciliation, expert determination and neutral evaluation rules. UNCITRAL published its "Conciliation Rules" in 1980. The term "conciliation" here means as conciliatory which covers all conciliation, mediation, neutral evaluation, mini-trial or similar terms whichever any amicable solution settled by the neutral third party.

51 Henry Brown, *ADR Principles and Practice* (n 36). Stephen B. Goldberg, Frank E A Sander, Nancy H. Rogers, Sarah Rudolph Cole, *Dispute resolution: Negotiation, Mediation, Arbitration, and Other Processes.*

at the first step as an ADR way. After negotiations, should the parties' deadlock positions continue, the process naturally develops from the consensual attempt by passing through a neutral's non-binding recommendations to a confrontational stalemate at the end. As a matter of fact, it is a common practice called *"escalate", "stepped"* or *"tiered"* process of dispute resolution which guides the parties to respectively resort to negotiation-mediation-arbitration step by step. That system has been integrated into the dispute resolution clauses by almost every model international contracts with slight differences from each other, more or less in the same form.

Simultaneously, shortcomings of the mediation and the efficacy of arbitration; mostly the enforceability brought these two together in seeking a way out of the impasse and came out as the "hybrid" methods of dispute resolution. Hybrid ADR procedures consist of using at least two different dispute resolution methods together in the same dispute resolution process to reach the same goal. They are preferred more to get benefit from the advantageous features of both dispute resolution processes rather than their disadvantages. Hybrid methods receive their names from the combination of them.[52] Common examples encountered in practice are; med-arb, arb-med[53] and arb-med-arb.[54] Neither ICSID nor UNCITRAL provides separate rules for med-arb or arb-med.[55] However, as it is a voluntary-based dispute resolution mechanism after the arbitration begins, parties may request discontinuance of the proceedings and nothing stops them to use mediation, conciliation or any other ADR method combined within a hybrid process and the same route the other way around.

Unlike its growing popularity in commercial disputes, the use of mediation in investor-state disputes is limited. In fact, only 143 out of up to 3300 treaties offers mediation as a choice.[56] However, despite its underuse in practice,

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52 R. Doak Bishop, "A Practical Guide for Drafting International Arbitration Clauses", *International Energy Law & Taxation Review* Volume 16 (2000) 60.

53 Özbek M S, "Arabuluculuk İle Tahkim Yöntemlerinin Kesişme Bölgesi: Arabuluculuk-Tahkim" *Yargıtay Dergisi 1 (2017)* 55.

54 Carol Ludington, "Med-Arb: If the Parties Agree", *Transnational Dispute Management* Volume 14, no. Issue 1 (January 2017). Elizabeth Telford, *Med-Arb: A Viable Dispute Resolution Alternative* (IRC Press, 2000). Eunice Chua, "A Contribution to the Conversation on Mixing the Modes of Mediation and Arbitration: Of Definitional Consistency and Process Structure", *Transnational Dispute Management* Mediation & ADR, no. Issue 5 (2018).

55 Anna Joubin-Bret and Jean Kalicki, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill, 2015) 232. An example of a hybrid procedure is allowed by China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules Article 47 - Combination of Conciliation with Arbitration.

56 As of January 2024: <https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search> accessed 01 January 2024.

there seems to be hope in the future for the mediation.[57] In order to increase the spread of mediation, the question of why not using the mediation more often than it is now can be asked fairly. Indeed, 36% of the investment treaty arbitration cases were either discontinued or settled and only 11% of these cases were rendered in an arbitral award.[58] These cases demonstrate a gap here and give an idea that there might be potential on whether the parties could try to deal amicably for not to incur the disadvantages of these failed arbitration cases. To fill such a gap, it is important to assess the response of investment disputes to the mediation because there is a growing interest in mediation for investment law as well as all areas of law. In other words; there are lots of advantages of mediation but the use of it in practice was considered low[59] and the increasing trend of mediation is worthy to be promoted as to whether the use of mediation could be increased more. With this idea, in the absence of a Convention that ensures enforceability, we are certainly in favor of the use of mediation through hybrid mechanisms for investment disputes because it is also a way of promotion for further developments which may lead to a likewise Convention later.

B. Non-binding nature of mediation: Advantage or disadvantage?

Mediated settlement agreements between host states and foreign investors are not able to take advantage of the enforceability convenience of New York and ICSID Conventions which has been granted to arbitral awards. For this reason, the enforceability of the mediated agreements, inter alia, could be accepted as the most significant concern throughout the discussions regarding mediation in the first stage when it is compared to arbitration.[60] It has been argued among the academia whether the abovementioned-like convention could be adopted for the settlement agreements resulting from investment mediation or not. As mentioned above, 74% of the respondents of a survey, stated that bringing enforceability through an international convention would definitely encourage the practice of mediation and conciliation.[61] Hence, it

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57 Jeswald Salacuse, "Mediation in International Business", in *Studies in International Mediation*, ed. Jacob Berkovitch (Palgrave Macmillan UK, 2002) 213. Silvia Constain, "Mediation in Investor–State Dispute Settlement: Government Policy and the Changing Landscape", *ICSID review* Volume 29, no. Issue 1 (2014) 25.

58 The ICSID Caseload – Statistics (Issue 2023-2) Chart 20: All Concluded ICSID Arbitrations – Settled or Otherwise Discontinued, 14.

59 *Investor–State Disputes: Prevention and Alternatives to Arbitration. UNCTAD Series on International Investment Policies for Development.* (2010) 63.

60 International Mediation Institute, *International Mediation & ADR Survey - Census of Conflict Management Stakeholders and Trends* (2016) 25.

61 Stacey Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*, *Legal Studies Research Paper*

has already come into force for commercial mediation, but would it benefit investment mediation in the same way? Before getting into that question, we need to deeply consider the functionality of the Singapore Convention as what will be experienced here, is going to shed a light on similar developments in other disciplines.

It is an obvious fact that the enforceability of the mediated settlement agreements will rocket the use of mediation in international commercial disputes. The concern is what comes after that. In the plainest form, a binding mediation will stay close to a fictitious "simplified arbitration". ADR is the title that covers the entire ways to approach a dispute outside the traditional court litigation. Thus, it is literally meant to include arbitration as well. Indeed, commercial arbitration used to be an alternative to litigation.[62] However, the absence of a globally accepted international court mechanism and following the intensive practice of the arbitration in time with regard to the side effects on the parties, have turned it into the litigation of international commercial disputes and so do the investment disputes.[63] The hesitation here appears to be as what if the future of enforceable mediation resembles the journey of the arbitration which was then born as an alternative response to what it is criticized now.

As well as being accepted as a disadvantage, the non-binding feature of mediation may also promise some advantages to the parties in terms of having the chance to trade off where they cannot have it in arbitration.[64] In fact, the uncertainty of mediation encompasses multiple and unknown possibilities of outcomes in which the arbitration has two certain options at the end.[65] A mediation, for instance, may result in a settlement agreement on a tax reduction, various incentives, a variety of licences in the same or different sectors to be given, debt restructuring, performance of action or inaction as well as a certain amount of money to be paid while the arbitration is due to give an only two-way outcome in which a monetary compensation should be made by the loser to the winner of the case.

Series Research Paper No. 2014-28 (2014) (n 33) 45.

62 Arthur T. Ginnings, *Arbitration: A Practical Guide*, Published by Gower ed. (England: 1984) 18.

63 Jack J. Coe, "Toward a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch", *UC Davis Journal of International Law and Policy* Volume 12.1 (2007) 11.

64 Margrete Stevens, "Investor-State Mediation: Observations on the Role of Institutions", in *Contemporary Issues in International Arbitration and Mediation - The Fordham Papers* [2009] 9.

65 Claudia Caluori, "Guidelines for Mediation in Investor-States Disputes", *Transnational Dispute Management* Volume 15, no. Issue 1 (2018) 5.

In addition, being non-binding grants parties more hegemony over the outcome of the dispute but rather in the arbitration, they have to deliver the decision-making to a third party to be bound by the award and have no effect on the outcome. So, there could be a risk of losing the attraction of the non-binding feature of mediation if it gains enforceability because the parties may forfeit the freedom to design the outcome. And yet, one asserted that the multiple-choice outcome is an advantage as long as the proceedings are under the parties' control.[66] Having control over the dispute is of significance to assess the effectiveness of mediation and it follows an inverse proportionality with the enforceability. Since enforceability revives the third-party's position; the more the outcome of the mediation is enforceable, the less the parties have control over the dispute.

Considering confidentiality, non-binding mediation can be used to get advantageous information from the opposite side. As it is not a mandatory process, there is always a risk that each party can change its mind and decide to leave during the procedures or to be against the settlement agreement afterwards.[67] Even if the mediation is mandatory to be exhausted by the parties and if the dispute is at an unsolvable complicated level, the parties may want to refrain from continuing mediation and that might need to be penalized. Thus the parties then may face the risk of being the victim of these mandatory "amicable" processes.[68]

In the final analysis, the advantages of being binding and non-binding must be evaluated by the parties. It should not be forgotten that the enforceability of the outcome directly affects the willingness of the parties and accordingly the antagonism between them. Sometimes, the parties may not be fond of battling for the dispute and prefer lower levels of confrontation as a policy and sometimes the specific circumstances require so. Taking advantage of the non-binding feature of mediation can also be limited by the parties themselves and that boundaries must not be exceeded otherwise it will appear as exploitation and that might entail reliance issues which possibly leads to bad faith. Overall, when it is considered with the nature of the dispute, being non-binding was always thought of as a drawback and this predominated over its positive sides.

The voluntary nature of mediation also cannot be ignored and that is strongly linked to the non-binding feature. The enforceability of the settlement

66 Susan D. Franck, "Using Investor–State Mediation Rules to Promote Conflict Management: An Introductory Guide", *ICSID review* Volume 29, no. Issue 1 (2014) 79.

67 Student Notes, "Mediation of Investor-State Conflicts Bottom-up Systems for Dispute Resolution", *Harvard Law Review* Volume 127, no. Issue 8 (2014) 2559.

68 Cameron Green, "ADR: Where did the 'alternative' go? Why mediation should not be a mandatory step in the litigation process", *ADR Bulletin of Bond University* Volume 12, no. Issue 3 (2010) 5.

agreements really affects the parties' intentions on starting off the mediation. There are indeed cases or positions that make the parties not willing to go to mediation if the settlement agreement was enforceable or vice versa. Another matter to be assessed at this point is the mandatory application of mediation. Mandatory access to mediation is a discussable topic on many points. Indeed, mandatory mediation procedures are exceptionally governed in some countries or only for specific fields of law as a precondition to the adjudicative proceedings. Even at mandatory mediation parties do not have to reach an agreement over mediation but to attempt, to participate in mediation is necessary by law here.[69]

As a policy choice, several countries apply a mandatory application of mediation in domestic legal systems.[70] Either by court-annexed or with an assistive institution, it is aimed to melt down the dilatory workload of domestic courts by compelling parties to perform mandatory mediation for specific disputes or the disputes up to a designated threshold. Indeed one survey proclaimed that, when the mediation was used before the litigation, 65% of the cases settled while only 29% of the cases settled when it was not used.[71] However, at the international level, no investment treaty known so far has a dispute resolution clause with compulsory mediation.[72] In fact, it could be a pragmatic policy measure in the domestic platform but the integration of similar mandatory measures at the investment treaty level may not produce outcomes as it is expected in the first place because it is against its voluntary character.[73] Indeed, a survey supports this idea revealing the fact that there is an essential difference between the settlement rates of mandatory mediation with 50% and voluntary application of mediation with 71%.[74]

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69 Maryam Salehijam, "A Call for a Harmonized Approach to Agreements to Mediate", *Transnational Dispute Management* Volume 15, no. Issue 1 (2018) 23.

70 Henry Brown, *ADR Principles and Practice*, (n 36) 94.

71 Tina Nabatchi, Lisa Blomgren Bingham, Jeffrey M. Senger and Michael Scott Jackman, "Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes", *Ohio State Journal on Dispute Resolution* Volume 24, no. Issue 2 (2009). P.258.

72 <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping> accessed 01 January 2024.

73 *"Given the research suggesting that non-suitable matters are unlikely to result in a settlement and that mandatory mediation is less effective than voluntary processes, the author is of the view that mandatory mediation is not appropriate and is likely to lead to negative cost consequences for disputing parties.*" Green, "ADR: Where did the 'alternative' go? Why mediation should not be a mandatory step in the litigation process." (n 68) 6. Jennifer Reynolds, "Foreword: ADR for the Masses", *Oregon Law Review* Volume 90, no. Issue 3 (2012) 695.

74 Lisa Blomgren Bingham, "Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes." 225.

These and similar such concerns bear a great deal of hesitation regarding mandatory mediation implementations despite its mission to encourage the practice of it.[75] It should be noted here that only to fulfil, to attempt mediation is mandatory as the parties cannot be obliged to conclude a settlement agreement.[76] Even though the arbitral tribunals have different approaches to the necessity of the fulfilment of cooling-off periods[77], the idea of compelling investors to stay the period for every dispute will be wide open to abuse and considered far from the good faith principle.[78]

CONCLUSION

It is anticipated that the enforceability can boost the use of mediation among larger contents and different sectors and practitioners. Together with this, it is also facing the risk of losing its advantageous sides when it is enforceable just like its greater kin arbitration which is explained above. Therefore, significant steps must be taken at the domestic and international levels before it begins to soar worldwide. According to us, it is the dispute resolution institutions first to take the necessary measures on the application of mediation by adopting and standardizing their rules.

It can be, to a certain extent, defended that to maturate the standards of the mediation under the Singapore Convention and put it on the right track to provide with the best of it, might naturally take time. However, it also signals that no lessons have been taken from the pathologic practice of arbitration which may, unfortunately, repeat in the form of its binding little brother; mediation - as a newborn arbitration. In this sense, we strongly urge the legal world that the abovementioned steps must be taken into account and carried into effect before it begins to turn into arbitration.

On the other side, it is obvious that what has been developed for commercial disputes seems inevitable to be experienced for the resolution of investment disputes as well. In the current practice of mediation, although it initially aims the commercial disputes, the applicability of the Singapore Convention to the investment disputes is not rigorously rejected, instead, there must be a distinctive legal regulation; convention, laws, annexes etc. as to whether the

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75 James Claxton, "Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?", *Journal of Japanese Law*, no. Issue 47 (2019) 13.

76 Kendall Isaac, "Pre-Litigation Compulsory Mediation: A Concept Worth Negotiating", *University of La Verne Law Review* Volume 32, no. Issue 2 (2011) 179. Salehijam, "A Call for a Harmonized Approach to Agreements to Mediate." (n 69) 23.

77 Tuna, "Alternative Dispute Resolution Mechanisms in International Energy Investment Disputes", (n 29) 93-99.

78 Enron Corporation and Ponderosa Assets, L.P. v. Argentina Republic (ICSID Case No. ARB/01/3), Decision on Jurisdiction, 14 January 2006. Para 88.

scope of the Convention excludes or includes the investment disputes. One hopeful news for a future project is the already prepared infrastructure of the investment mediation with specific rules published by the dispute resolution institutions like ICSID[79] and IBA.[80]

It can be admitted that this Convention was a missing piece[81] for the promotion of mediation in international commercial disputes. But now, is it time for the investment disputes? The process of the timeline might give a better hint:

1958 - Commercial Arbitration has become enforceable with the New York Convention.

1966 - Investment Arbitration has become enforceable with the ICSID Convention.

2019 - Commercial Mediation has become enforceable with the Singapore Convention.

???? - Investment Mediation will now become enforceable with a brand new Convention.

As the timeline demonstrates the path, it is now inevitable to wait for a Convention to guarantee the enforceability of settlement agreements resulted from mediation between host states and foreign investors. Considering the investment arbitration, it took almost a decade to build the same development for investment arbitration as it is in commercial arbitration. Analogically, it doesn't have to be that far but the nature of the due commissions, meetings, plannings, all negotiations and so yet, we highly recommend a likewise initiative must get off the ground rapidly while the discussions are still in the air. The establishment may take place within the body of the World Bank or UNCTAD who may produce certain guidelines for the practice. One may suggest making amendments to current Conventions like ICSID additional facility rules. However, as it will require special consideration to the rules and procedures because of the differences of investment disputes highlighted above, it would be best to have its own Convention to cover up all the loopholes and give investment mediation a stronger background.

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79 <https://icsid.worldbank.org/sites/default/files/WP_4_Vol_1_En.pdf> accessed 01 January 2024.

80 <https://www.ibanet.org/Document/Default.aspx?DocumentUid=8120ED11-F3C8-4A66-BE81-77CB3FDB9E9F> accessed 01 January 2024.

81 Adrian Cole and Guillaume A. Hess, Middle East – A Mediation Desert, Corporate Disputes Magazine, Jan-Mar (2019) 104.

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