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# International Arbitration Report

## **What The Singapore Convention Tells Us About Dispute Resolution: Lessons From The Past And Visions Of The Future**

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**A commentary article  
reprinted from the  
October 2020 issue of  
Mealey's International  
Arbitration Report**



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# Commentary

## What The Singapore Convention Tells Us About Dispute Resolution: Lessons From The Past And Visions Of The Future

By  
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In the mid-1980's a close friend and newly minted MBA from a highly prestigious U.S. institution queried what in the world possessed me to consider an internationally-focused career. He contended that the United States possessed the biggest and most vibrant economy in the world, with its greatest business and professional opportunities. My response: 'the world is shrinking, the balance of economic power is shifting, and future competitiveness will depend on intra-global commercial interplay.'

My friend went into brick and mortar retail, ultimately becoming CEO of a major U.S. retail group. The company today, a multi-brand conglomerate is dependent on a global supply chain to keep up with a domestic market whose tastes and purchasing patterns are constantly shifting. Competition is fierce for want of his defining a global brand. My friend has become the victim of his opportunity calculation, while at the mercy of my own.

Recounting this story is not meant to disparage my brilliant and earnest friend. Yet, it represents a parable

to which the legal community should take heed. Yes, the old model of doing business still functions and surely will continue to be profitable for some time to come. Yet, we need to be attuned to the shifting sands under our feet in order to assure our future relevance. Reliance on global supply chains has been put under serious scrutiny in the wake of the COVID-19 pandemic. Nonetheless, it will be difficult to imagine a global economy in which businesses will amputate the cost, work force specialization, and other advantages of cross-border service and production efficiencies. The 2020 economic crisis is revealing less the evil of global supply chains than it is the planning that is needed to anticipate, and agility needed to manage their disruptions. We, surely, are moving forward, not back, in the evolution of global markets.

Let's return to the 1950's. The advent of the New York Arbitration Convention responded, primarily, to the chilling effect that the inability of enforceability of cross-border contracts had on international trade and investment. The New York Convention broke new ground, in providing an explicit, default enforcement mechanism for arbitral awards among its signatories.

This execution facility, building on other structural advantages, permitted establishing arbitration as the methodology of choice for cross-border commercial conflict resolution. The conflict resolution clause defaulting to arbitration increasingly became the norm in contract drafting between signatory countries, and, over time, the legal profession responded with enthusiasm, producing thousands of competent professionals to function as arbitrators and arbitration advocates in international commercial disputes.

Today, companies and investors worldwide can be confident, trusting that a well-administered arbitral process can be utilized to protect their legal interests across borders and in the great majority of the nations around the globe. This comes with reasonable assurances of expediency, competency, and lack of bias, along with the predominant execution regime that functions as if the award were a judicial judgment in the country in which it is being enforced.

The arc of the New York Convention's taking force in June 1959 to today presents a wonderful story of vision, rationality, and cooperation, on which the world's economies have depended to become more closely aligned, knowing that businesses and financiers can count on legal protections when doing business abroad, among signatory nations. This has facilitated great strides in economic growth and development throughout the globe. So, one might ask, "isn't that enough? Why mess with a system that works so very well? What is the big deal with mediation and the Singapore Convention?"

These are not *naive* questions. Nonetheless, just like my friend in brick and mortar's query over three decades ago, these, perhaps, are not the *appropriate* questions to be asked. Yes, arbitration works and works well in perhaps a majority of cases. Surely it is a structural standard that should be maintained and supported. Yet, that does not presuppose that arbitration is the *best* resolution methodology in *all* commercial cases, that it *cannot coexist* productively with other methodologies, and, perhaps most importantly, that it is a fully *adequate* methodology for the parties engaged in a commercial dispute.

### Is Arbitration the *best* resolution methodology for commercial disputes?

Clearly, that depends on the dispute. Notwithstanding the emergence of specific-situation, streamlined arbitral structures, typical institutional arbitral costs, and time to award have witnessed a steady increase over time, as confidence in tribunals decreases. *A priori*, if a dispute can be resolved more quickly, more economically, and in a less contentious manner in mediation than in arbitration, surely the parties would choose mediation. This, of course, begs two questions: what is the *meaning* of resolution and whether the dispute *can* be *resolved* in mediation.

Questioning the *meaning* of resolution is the gateway to considering not just the tangential benefits that mediation brings to the table that arbitration cannot address (preservation of business relationships being, perhaps, paramount) but the value of partial resolution or narrowing of the scope of the dispute. In concrete terms, is it advantageous to engage in mediation in situations in which there is low expectation of full resolution yet high expectation of partial resolution, which, should that be the case, would contribute to a more efficient subsequent arbitral process?

Aside from the difficulty in defining an applicably resonant structural meaning of resolution, there also is the question of its temporal meaning. In an extreme situation, can resolution be considered to have been achieved through mediation should an impasse be declared at the end of the scheduled mediation session and full agreement reached the very next day? What if settlement is achieved two weeks or two months later? Of course, there are myriad other permutations to this hypothetical that could have an impact on one's views, e.g. did the mediator initiate post-impasse contact, was the mediator paid for work beyond the impasse, what was the extent of the "post mediation" interplay between the parties from termination of the formal mediation to the point of coming to an agreement, etc.

Arbitration, of course, has the promise of finality to which mediation cannot lay claim. Regardless of strong enforcement mechanisms in some jurisdictions and the widespread belief that the Singapore Convention will guarantee the same in mediations dealing with cross-border commercial disputes, there is no guarantee that any given mediation will result in a settlement agreement that can be so enforced. In other words, the relevance of enforcement is moot in the case that there is no agreement to subject thereto.

Efficiency of process is a key element in any comparative consideration of arbitration and mediation. This is a reflection of the contrasting structures of the two processes. Arbitration, in order to assure fairness, neutrality, and due process must rely, and, thus, be constrained by procedural rules. Mediation, by contrast, has no such constraints, as its result is adhered to voluntarily by the parties, rather than being imposed by the managing neutral.

A significant threat to the promise of arbitration has become pronounced over the last years. It is in the

interplay between efficiency and due process. A vicious cycle has arisen in which a rise in arbitral challenges based on due process pressures arbitrators to be more lenient process managers, often permitting presentation of mounds of evidence that may be irrelevant to issues central to the case and to permit endless sur-replies where the governing contract, procedural rules, or terms of reference remain silent or are ambiguous on the topic.

Institutions have stepped up, particularly by introducing expedited and/or streamlined arbitral rules that may be applied to certain situations, which provide protection for the arbitrator(s) to maintain appropriate process efficiency without unduly endangering the viability of their award.

Notwithstanding the welcome efforts of arbitral institutions to address arbitral efficiency, arbitration will never be able to challenge the efficiency of mediations, in which the mediator has the leeway to structure the conversation in whatever way reflects the best path to arrive at resolution and may change directions as soon and as often as circumstances dictate.

Time to resolution, forum fees, legal fees, stress and extensive distraction of the parties from their core business all augur in favor of at least an attempt at mediation, either before or during the arbitral process. The implicit acceptance of *coexistence* between arbitration and mediation in the above statement is important. The existence or potential for engaging in the arbitral process can be a powerful incentive for the parties to settle in mediation. Yet, mediation is not necessarily and inevitably a replacement for arbitration, *mediation can enhance the efficiency of the arbitral process*, if not by resolving the dispute, then *by narrowing or defining the terms to be determined by the arbitral tribunal*. In such a situation, a stepped system provides a powerful efficiency mechanism even in the absence of a reaching a settlement in mediation.

### Coexistence

The last decade has revealed myriad possibilities not merely for coexistence of arbitration with other methodologies, such as mediation, but also the willingness of arbitral practitioners to embrace such possibilities.

Perhaps the first significant step in this direction was the development and use of “Stepped Clauses” constituting the dispute resolution clauses of commercial contracts. These clauses typically dictate either that prior to formal initiation of an arbitral process, or at any point in that arbitral process, the parties agree to attempt to come to consensual resolution through mediation. Such clauses are significant, structurally, by allowing users to take advantage of the possibility of consensual resolution in mediation, with its numerous advantages, while, in the end, being able to count on the finality of arbitration should a consensus not be achieved in mediation. These stepped clauses serve to guarantee to the parties a manner of *have your cake and eat it too* contractual assurance.

Many issues can arise in the practical application of stepped clauses that require careful clause drafting. The most fundamental of these is the inherent internal conflict of a neutral wearing the hat both of an arbitrator and a mediator in the same case. This is due to the rules of the game that govern each of these two different processes. The story goes as follows.

Arbitration rules typically require that all parties in the dispute be present for all conferences with any and all arbitrators, be the recipients of all documents received by the arbitrators, or otherwise be party to any and all communications with those arbitrators. In other words, as to the participants in the arbitration, there is complete transparency in regard to exchanges with the arbitrator/arbitrators. This no-ex-parte communication rule that engenders this transparency is fundamental to the fairness of the arbitral process, in which the arbitrators must base their award on a legal analysis of the facts. The scales of justice require the ability of each side to challenge the veracity and relevance of each piece of information communicated by the other party or its witnesses to the arbitrators.

By contrast, the overriding principle and driving motor of mediation is confidentiality, not just between the mediation participants and the rest of the world, but, and more importantly for this conversation, between the mediator and each party. Skillful mediators will encourage each party to reveal their deep secrets to that mediator: the type of information that cannot be revealed to the other party/parties, but will color the nature, quantum, and/or timing of an acceptable solution for them. To use a simple example, a respondent

might be unable to offer immediate payment to the claimant because it is teetering on insolvency due to a short-term credit crunch. It is important for the mediator to know that any payment to the claimant will need to be structured over time, where it might be perilous for the claimant to be aware of respondent's credit situation.

So, theoretically, there is no impediment to an arbitrator migrating to mediation in the same case. However, the reverse is impossible, as the mediator turned arbitrator (or returning to a prior arbitration role) will be the holder of confidential information that could bias his/her legal judgment of the case or otherwise color his award.

Nonetheless, there exists a salient practical impediment to an arbitrator metamorphosing into a mediator in a given case: what happens should the case not settle in mediation. Best practice dictates that single-case migration to mediator be avoided for that very danger. There is the crack of countervailing opportunity, should the parties agree to "binding mediation." Yet, best practice dictates either bringing in a separate mediator for such instances or, better, appointing a "shadow" mediator from the outset, ready to step in as needed.

The other coexistence model is, in fact, a group of practices that have been referred to as "Mixed Mode ADR." Consideration of the various iterations of this practice is beyond the scope of this article. Although, I will point out that, through neutral polyvalence, the injection of mediation techniques into arbitration at key points can transform the practice into a more harmonious, efficient, and streamlined process. As noted international arbitrator based in Vienna, Cristophe Liebscher has indicated, arbitration can become a form of teamwork, in which all parties are engaged in a collective exercise.

A telling commentary was made by noted Brazilian arbitrator Adriana Braghetta in a webinar on April 29, 2020. In response to a question regarding the threat that mediation might pose to arbitration, she suggested that arbitration will become a process that will be characterized as a "center of excellence," where appropriate cases will receive appropriate treatment.

Be it through convergence or specialization, or both, arbitration and mediation will survive and thrive together in the foreseeable future.

## Adequacy

Yet, the above begs the question: when to use which and how to combine the two disciplines?

Arbitration's adequacy depends on the goals of the parties in dispute. To the extent that the parties are seeking a purely monetary outcome for a single discrete set of circumstances, arbitration, likely, would be a perfectly adequate methodology for attaining that result, independent of whether it, alone, be the *best* modality. However, it may not be so adequate in other situations. Two such situations are where there are elevated confidentiality concerns and where an ongoing business relationship is involved or desired.

There are two important considerations with regard to confidentiality: in their rules and in their application.

Typically, confidentiality rules in arbitration extend to the arbitrator(s) but not the parties, whereas the mediation confidentiality extends to all mediation participants. Among other risks, a party disgruntled by the nature or quantum of an arbitral award potentially may broadcast the same to the public.

Beyond this, in practice, there typically are many more participants in arbitration than in mediation, including fact witnesses and expert witnesses rarely found in mediation. As these may not be willing participants, attempts to hold them to some level of confidentiality might frustrate their participation or otherwise be impossible to enforce.

An example of the importance of confidentiality is large insurance coverage disputes, pivoting on liability for an event in which lives were lost. I have served as a mediator in such cases in which the heightened confidentiality of mediation served as a virtual guarantor that surely explosive knowledge of the proceedings and their outcome would have caused significant public outcry that would have done damage to the reputation of both the insurer and the insured.

But, the more interesting question, here, is the adequacy of the process in itself to resolve the matter that is being considered.

As referenced above, this most frequently is seen in situations in which an ongoing business relationship is desired or required. The classic example is in situations

in which a business has but a single viable supplier of a certain crucial, irreplaceable input. The process of arbitration, in its classic legalistic format of one party vying against the other, tends to sour the relationship in the course of resolving the dispute. Conversely, the collaborative nature of mediation not only diffuses antagonism, but opens the door to consideration of proactive restructuring that will encourage mutually-productive future interaction among the parties.

As intimated above, whereas arbitration looks backward, attempting to do justice to historic malfeasance or negligence, mediation has the capacity and a tendency to look forward. This simple dichotomy, combined with the fact that mediation be a consensual process, reveals myriad opportunities to use mediation and mediation techniques that simply would not be feasible within an arbitration context.

An excellent example is a case in which I was involved as a mediator in late 2019. Government agencies, wishing to see restructuring of an industry monopolized at every level by a single, vertically-integrated concern, mandated a resolution by arbitration of the monopolist's pricing for services at a specific, crucial vertical level, should that monopolist be unable to come to an agreement on that pricing with the first new market entrant to appear. Moreover, the regulatory body mandated that the outcome of the negotiations/arbitration serve as the price that would be charged not just to that specific market entrant but for any subsequent entrant for a period of ten years.

Indeed, the parties were obliged to go to arbitration, as they could not bridge a monumental gap in their proposed pricing levels. It is worth noting that each party substantiated its demand with extensive, mutually exclusive economic analyses, based on substantial empirical data gathered from other markets.

The arbitrators, all highly distinguished jurists, were tasked, then, to choose, in essence, which pricing theory was correct, where the divergence in the price indicated by each theory was so vast as to either prevent the viability of the market entrant's doing business (and, thus, frustrating the government's goal of breaking up the monopoly), or make doing business impossible for the monopolist (thus, wreaking havoc in the industry). Theoretically, the tribunal could cut the baby in half (or some other proportion). Yet, this would be very

difficult to justify legally and simply would be a throw of the dice as to the viability of the outcome.

The government dictated that the arbitration process be concluded within six months of its launch. This accelerated schedule was absolutely crucial for the new market entrant, as it was burning through its seed money, waiting to go into operation.

Some eighteen months into the arbitration, the parties decided to proceed in a separate mediation process. After five days of mediation, not only had a price been agreed to by the parties, but they also had agreed to and signed a contract (almost a foot high when stacked), that set out the terms and conditions of their business relationship, that would govern all such transactions for the ten year-period.

The case demonstrates adequacy on multiple levels:

1. Competency regarding subject matter. It is not reasonable to task a tribunal with the responsibility to set pricing in a case like this, in which government mandate requires systemic outcome viability and party proposals are radically divergent. Mediation provided the parties with the opportunity to substitute their own expertise and realistic notions of how they could sustain business (independent of what each originally demanded of the other) for those of the tribunal.
2. Time to resolution. Eighteen months into the process, the arbitration had not yet gone to evidentiary hearing. Ultimate time to award issuance was unclear and, certainly, not immediately forthcoming. The market entrant, with limited funding, may not have survived completion of the arbitral process, even if the tribunal ultimately would have decided in its favor. Mediation facilitated the parties to come to a rapid resolution, thereby freeing the parties of the perils of extended time to resolution.

The arbitral tribunal was tasked with setting the price for a given service, but was not tasked with establishing the terms of the relationship, the latter being fundamental to conducting business.

The above points demonstrate three specific and significant ways in which mediation was adequate, but arbitration was not:

- putting the onus of the pricing decision in the hands of the parties, i.e., those who know the tolerance for commercial viability,
- extraordinarily efficient timing, as opposed to timing that could frustrate the viability of the outcome,
- going beyond the administrative mandate of arbitration to define the crucial element of the terms of the relationship.

### External Considerations

As we all know, the COVID-19 pandemic has introduced extraordinary stresses on every aspect of modern life. Dispute resolution is not immune from the same. One productive innovation whose ubiquity has been accelerated by this advent is utilization of technology, particularly videoconferencing technology.

Particularly salient here is that increased use of videoconferencing into the ADR realm will demystify it and, therefore, open the path for its increased use, regardless of the timeline or reality of returning to the status quo *ex ante*. Videoconferencing already has and surely will continue to make ADR more efficient, by eliminating travel and bypassing the need to meet in person.

Among other benefits, we will be able to expect compressed timelines for arbitral processes, and reduced expense for both arbitration and mediation. As practitioners, we will be able to take on more cases and clients

as we dedicate less time to travel and logistics, freeing-up more time for core work.

### Looking Forward

The sands are shifting. The star of mediation is ascending with strength, bolstered by a Singaporean turbocharge. Arbitration, in turn, is adjusting, adapting, and focusing. The advent and tragedy of a global pandemic is facilitating consolidation of efficiencies within alternative dispute resolution that will allow it to better absorb systemic court deficiencies and pandemic-induced stresses.

We have no reason to believe that the historic trend line of global economic integration will not continue into the future. ADR, therefore, will take on increasing importance and it is rising to the challenge.

As it does so, we must be cognizant not merely of the advantages and disadvantages of each, but when each might best apply and how the two might best work together.

Considering the myriad advantages of mediation, arbitration, and their related offspring, this, surely, is the moment in which we need to consider these disciplines as preferred methods of dispute resolution, in contradistinction to that represented by the word “alternative” in the ADR moniker. ■





**MEALEY'S: INTERNATIONAL ARBITRATION REPORT**

*edited by Samuel Newhouse*

**The Report** is produced monthly by



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ISSN 1089-2397