MEDIATION IN INTERNATIONAL COMMERCIAL AND INVESTMENT DISPUTES

edited by
CATHARINE TITI
KATIA FACH GÓMEZ
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Foreword

Edna Sussman

This book will serve an important need. While mediation has been a subject of discussion in international circles for many years, it is now poised to grow dramatically. Relatively little has been published that comprehensively covers the subject. This book fills that gap.

A review of the many efforts made over the course of the past ten years to encourage mediation for cross-border disputes and the repeated statements by users of a preference for collaborative resolution of disputes confirms the importance of the contribution the book's authors offer practitioners and users.

In recognition of the fact that mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties, and is more likely to be complied with voluntarily and to preserve an amicable and sustainable relationship between the parties, the European Union issued its Mediation Directive in 2008. In recognition of those same factors and the contribution of mediation to producing savings in the administration of justice, court-annexed mediation is increasingly being implemented in jurisdictions around the world. The introduction of mediation laws is also on the rise, as exemplified by Brazil's successful enactment of its mediation law in 2015. The World Bank issued its Mediation Series in 2016, offering learning resources to assist states in developing mediation policy and law, understanding mediation essentials, and assisting in conflict management design.

Responses from users across jurisdictions highlight the current interest in mediation. The 2015 Queen Mary University of London and White & Case survey found that users felt that counsel could do more to encourage settlement, including the use of mediation during an arbitration. The Global Pound Conference, which convened 4,000 dispute resolution stakeholders in twenty-eight conferences across twenty-four countries throughout 2016 and 2017 identified as a key insight that users sought greater use of non-adjudicative protocols to resolve disputes.

The most significant development in the field of international mediation is the completion in 2018 by the United Nations Commission on International Trade Law (UNCITRAL) of the Convention on International Settlement Agreements Resulting from Mediation, to be commonly known as the Singapore Convention. The new convention, which many view similarly to the New York Convention for mediation, will assure both enforcement and recognition of mediated settlement agreements and is intended not only to enable users of mediation to reap the benefits of their solutions, but also to drive the increased use of mediation, just as
the New York Convention drove the increased use of arbitration. In a parallel instrument, UNCITRAL completed the development of an amendment to the 2002 Model Law on International Commercial Conciliation to add provisions related to enforcement of mediated settlement agreements.

Historically, while mediation was largely limited to commercial disputes and those dealt with by diplomacy between states with respect to disputes of geopolitical consequences, the burgeoning caseload of investor–state disputes over the past ten years has brought mediation to this arena as well. The early discussions of mediation for investor–state disputes at the Fordham International Arbitration and Mediation Conference in 2008 was followed by the development in 2012 of the International Bar Association (IBA) Rules for Investor–State Mediation. In 2013, the United Nations Conference on Trade and Development (UNCTAD) published a roadmap of five paths for reform of investor–state disputes settlement, listing first the need to promote alternative dispute resolution as the preferred process. In recognition of the importance of mediation, in 2018 the ICSID proposed amendments to its conciliation rules in order to improve the process it offers.

These are just a few of the developments driving the growth of mediation to which this book responds. The authors address the necessary subjects. Chapters discuss both commercial and investor–state disputes, as well as innovative ways in which the process can be designed to maximize the chances of a successful resolution. Procedures for the conduct of mediation at the major institutions, as well as information about mediation in various geographic areas, are thoughtfully presented. The need for a uniform cross-border ethical framework for the conduct of mediation is a cogently presented call to action. The authors not only discuss mediation in industry sectors in which mediation is now frequently used, but also include areas where mediation has to date not been extensively utilized but that would benefit from the use of processes for amicable resolutions, e.g. financial disputes. Finally, the authors offer practical guidance, e.g. on the selection of mediators and confidentiality versus transparency in commercial and investment mediation.

This book is an excellent and wide-ranging contribution that will serve to inform practitioners and users, as mediation is increasingly utilized to maximize user satisfaction with a process that is less costly, more efficient, and can enable tailored solutions that are not available in an adjudicative process.
Summary

In recent decades, the resolution of international commercial and investment disputes has been dominated by international arbitration. Mediation and conciliation have remained quietly in the background. While a complementary mechanism, international mediation and conciliation have become wide currency compared to the past. Mediation rules that have been in disuse have gained momentum; dispute settlement centres now introduce and promote new mediation rules; the European Union is encouraging international mediation both in the commercial and investment sphere, and mediation provisions are included in secondary EU legislation and in the new EU international investment agreements (IIAs); a new initiative in the United Nations Commission on International Trade Law (UNCITRAL) aims to ensure enforcement of international commercial settlement agreements resulting from conciliation; the first investor–state disputes are mediated under the IBA rules; the International Centre for Settlement of Investment Disputes (ICSID)’s conciliation mechanism is used more often than in the past; the International Chamber of Commerce (ICC) has recently administered its first mediation case based on a bilateral investment treaty; and a new training market on mediation is flourishing. As a consequence, academics, investment treaty negotiators, lawyers, and disputing parties are becoming increasingly aware of this alternative method of dispute settlement.

*Mediation in Commercial and Investment Disputes* addresses this highly topical theme. It brings together a group of outstanding, highly qualified experts from academia, mediation, arbitration institutions, and international legal practice who address the subject in all its complexity from a variety of angles.

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PART I

COMMERCIAL AND INVESTMENT MEDIATION

BOUNDARIES, TRENDS, AND OUTLOOK
The Role of Mediation in International Commercial Disputes

Reflections on some Technological, Ethical, and Educational Challenges

Katia Fach Gómez*

I. Introduction

This chapter reflects on the role currently played by mediation in the resolution of international commercial disputes. This objective is both broad and ambitious and the chapter benefits from the fact that this book contains over a dozen contributions from prestigious authors in the mediation sector who all adroitly address a broad range of aspects of international commercial mediation. The chapter's main focus is consequently the outlining and discussing of a specific series of issues that aim to complement the analysis developed by the other contributors in this edited volume.

Section II therefore explores the new meaning that some scholars have attached to the widely used acronym ADR (alternative dispute resolution). Considering mediation an important part of the ‘appropriate dispute resolution’ mechanisms available to commercial disputants suggests that a new light is shining through this important sector and the principles that it embraces, such as access to justice. This central idea is developed in Section III, which addresses various highly topical issues in the framework of commercial mediation: the dilemma of compulsory mediation in non-family contexts; the impact of developments in information and communication technology on the mediation milieu; the role of ethics in the contemporary mediation world; and the structure and main objectives of training schemes in international commercial mediation. Section IV concludes the discussion and leads on to the thematic studies of international commercial mediation.

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II. Mediation as a Cornerstone of a Holistic International Dispute Resolution Scheme

The legal term *mediation*, which has raised so many uncertainties with regard to definition and scope, is linked to the broader notion of ADR. This term’s use has frequently implied a clear boundary dividing litigation before public judicial bodies on the one hand, and options that have typically been classed as ‘alternatives’ on the other. One of the outcomes of this dualist approach may be that part of the traditional academic debate has revolved around justifying the benefits of ADR mechanisms such as mediation and reflecting on the dangers that ADR may pose for national public justice systems.

A series of phenomena have recently converged in defence of a far more holistic approach to dispute resolution, especially at the international level. What were formerly known as ADR mechanisms have increasingly shed their ‘alternative’ label and gained recognition and become part of a truly multi-faceted dispute resolution system. As argued elsewhere in this book, the development has brought about the creation of new resolution mechanisms which are becoming interdependent to some extent, all of which is driven by the desire of the newly flexible dispute resolution system to provide its users with tailor-made solutions.

Fully aware of this reality, enclaves like Singapore have implemented a range of measures with the aim of becoming all-embracing international dispute resolution hubs. Not only does Singapore possess a well-developed national judicial system, which includes the Singapore International Commercial Court (SICC), but it also has powerful arbitration and mediation institutions, e.g. the Singapore International Arbitration Centre (SIAC) and the Singapore International Mediation Centre (SIMC).

2 See Chapter 3, this volume.
instead of competing with each other, the separate parts work together to attract the largest possible volume of legal business at the global level.\textsuperscript{6} One author has even coined the meaningful term ‘international dispute resolution tourist destination’\textsuperscript{7} for such places.\textsuperscript{8}

The systemic evolution of public and private dispute resolution mechanisms towards a non-hierarchical coexistence is also expected to produce effects in terms of the principle of access to justice. This key principle, which is alluded to various times throughout this chapter, is likely to become broader in scope in the future. If it is concluded that access to justice no longer refers solely to access to state court justice but to non-adjudicative protection mechanisms as well, many relevant changes are going to occur (e.g. the drafting and judicial interpretation of various international and regional provisions addressing this major issue will need to be modified).\textsuperscript{9} Scholars state that a new paradigm of ‘integral justice’ has been created in the twenty-first century, based on a system of ‘shared justice’. In its detractors’ view, this system may actually mean the public authorities’ abandonment of one of their core functions: the administration of justice and the control of the way in which it is imparted.\textsuperscript{10}

III. Contemporary Key Challenges in the Field of International Commercial Mediation

This section reflects on a number of contemporary challenges in international commercial mediation. As will be explained, one factor that is common to them all is their contribution via various mechanisms to locating mediation as a cornerstone of a holistic international dispute resolution scheme.


\textsuperscript{8} Shannon Salter, ‘Online Dispute Resolution and Justice System Integration: British Columbia’s Civil Resolution Tribunal’ (2017) 34 (1) Windsor Yearbook of Access to Justice 112.


\textsuperscript{10} Silvia Barona Vilar (ed.), Mediación, arbitraje y jurisdicción en el actual paradigma de justicia (Civitas Thomson-Reuters, 2016).
A. The Compulsory Mediation Dilemma

The question frequently arises as to why mediation is not more successful in quantitative terms.\(^{11}\) It is sometimes pointed out in answer that mediation is not an especially well-known practice throughout the business sector;\(^{12}\) that not all lawyers recommend it to their clients in commercial disputes;\(^{13}\) and that the level of stakeholder confidence in mediation providers and mediators leaves room for improvement.\(^{14}\)

All this begs the question as to whether the public authorities should give mediation in commercial disputes the final push by using mandatory mechanisms such as imposing a legal obligation to mediate as a pre-condition of access to the courts in some cases (via out-of-court mediation); establishing mediation as a requirement during legal proceedings (via court-referred or court-annexed mediation); or by using quasi-compulsory means in the sense of resorting to persuasive instruments such as cost orders.\(^ {15}\)

Policies of this type may be justified because mediation has extremely convincing intrinsic benefits, or because it is actually seen as an effective option for reducing the burden on national judicial systems. While such approaches are defended in the mediation community,\(^{16}\) they also have stalwart detractors who highlight mediation’s firm basis in party autonomy. These critics also feel that the notion of compulsory mediation is an oxymoron that could clash with the right

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\(^{11}\) European Commission, 'Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU' 2014, http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET(2014)493042. This does not prevent statistics offered by some mediation providers such as the Singapore Mediation Centre from showing a constant increase in the number of cases that have been raised, as well as in the disputed sums. Tan Tam Mei, 'Record Year for Mediation Centre in 2017', https://www.straitstimes.com/singapore/record-year-for-mediation-centre-in-2017.

\(^{12}\) However, the 2018 International Arbitration Survey, 'The Evolution of International Arbitration', reveals that there might be a change where this issue is concerned, since 'The in-house counsel subgroup reflects a clear preference for international arbitration together with ADR (60%) over international arbitration as a stand-alone (32%) [...] as the preferred method of resolving cross-border disputes'. https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration.

\(^{13}\) Nevertheless, a 2016 survey indicates that '[u]sers are dramatically more familiar with mediation (50%) than their advisors perceive them to be (6%) [...]'. Advisors are more familiar with mediation (40%) than Users perceive them to be (30%), and recommend mediation more often (70%) than Users perceive they do (47%)'. International Mediation Institute, '2016 International Mediation & ADR Survey. Census of Conflict Management Stakeholders and Trends', http://www.odreurope.com/assets/site/content/IMI_survey_2016.pdf.


\(^{15}\) As indicated, the notion of mandatory mediation, an issue that falls outside the hard core of this chapter, can be defined according to varying degrees of potential imperativeness.

of access to the judicial system, for instance, or simply be less effective due to lack of party will. 17

The debate is far from closed. Public sector advisory bodies like the UK’s Civil Justice Council 18 are contributing to the creation of an intense legal, professional, and social discussion around compulsory mediation. 19 Meanwhile, the legislatures of EU-member states like Italy 20 and Greece 21 have recently made effective use of the room for manoeuvre provided by Article 5.2 of the Mediation Directive, 22 enacting mandatory mediation in a range of different types of civil and commercial disputes. 23 Countries like Australia, which is outside this EU Directive’s scope,
have also implemented various mandatory mediation schemes.\textsuperscript{24} Time will tell whether such initiatives, temporary or not, are capable of producing the desired results in terms of consolidating mediation as an ADR mechanism in the resolution of commercial disputes.

B. Mediation in the Information and Communication Technology Era

Our daily lives have changed considerably in just a few decades, mainly as a result of a range of new technologies, from Facebook, Siri, Alexa, 3-D printers, wearable tech, and exoskeletons to self-driving cars, to name but a few. It is also indisputable that the global economy and its commercial transactions now operate transnationally and are increasingly reliant on technologies that enable commercial transactions to be carried out in nanoseconds. Taking all these factors into account, it seems clear that commercial mediation cannot, and should not, remain on the periphery of the many advances driven by Information and Communication Technologies (ICTs). This section therefore contains a few observations on this highly complex and fast-moving topic.

The starting point is that new technologies have been incorporated into commercial mediation processes at many different levels. ICT facilitates user access to dispute resolution services and enables both disputants and the neutral party to use technological tools at many points of the mediation process: electronic filing; email and video-conferencing; document management and information sharing software; private online conversations instead of in-person caucuses; electronic signatures; and more.\textsuperscript{25} These options no longer come as a surprise to anyone.

As this book shows,\textsuperscript{26} online dispute resolution (ODR) of consumer disputes can be viewed as the tip of the iceberg in the process of interconnecting new technologies and non-family ADR schemes.\textsuperscript{27} Much has already been written about these


\textsuperscript{25} Most mediation providers already provide online dockets for their users; see, for example, the WIPO Electronic Case Facility. See also Chapter 14, this volume. Likewise, the Australian Resolution Institute has created MODRON, https://www.resolution.institute/membership-information/odr-online-dispute-resolution. This type of initiative is called a document-oriented approach, as opposed to the case-oriented approach that in turn develops into predictive systems.

\textsuperscript{26} See Chapter 10, this volume.

\textsuperscript{27} Likewise, family mediation has spearheaded the increasing use of technology in ADR, with projects such as the Dutch divorce platform Rechtwijzer (https://rechtwijzer.nl/). From this perspective, commercial mediation is harvesting the fruits of pioneering advances in the field of family mediation. The following reflection is relevant in this context: 'In England & Wales, we have a major court reform project that is introducing Online Dispute Resolution for small claims up to £25,000, for divorce, for guilty pleas in criminal cases, and for many tribunal claims in relation to social entitlements and other issues. We should not kid ourselves that commercial disputes will not ultimately follow. We need to get our online dispute resolution processes right, so that they can take their place in the court structure
ODR-type resources, usually focused on business-to-consumer e-commerce and with an emphasis on improving the global community’s access to justice—including disadvantaged groups who can rely on ODR as a social inclusion tool.

It is unquestionable that traditional justice mechanisms used to be out of reach for a large part of the global population, and that nowadays these types of digital justice fill this gap. What is not so clear, as will be discussed later, is whether or not these ODRs are eroding the quality of deeply rooted ADR mechanisms and other guarantees that should accompany them.

On a separate issue, implementing of commercial contracts executed via blockchain undoubtedly generates legal controversies, some of them derived directly from the technological peculiarities of these contracts. For this reason, resolving them in an offline mediation environment does not seem to be the optimal solution. Dispute resolution platforms such as the Decentralized Arbitration and Mediation Network (DAMN) and new protocols created by traditional ADR providers, such as JAMS, are therefore promoting the application of ‘smart ADR mechanisms’ such as mediation for solving problems arising from ‘smart contacts’.

In addition, the international commercial mediation field’s current reality and potential are both much broader than these non-jurisdictional e-initiatives and innovative software options. Artificial intelligence (AI) brings us to the mainly uncharted waters of a technological utopia (or otherwise), in which not only have geographical frontiers disappeared but technology also develops without limits. Big data, for instance, allows disputants to make informed decisions, which can lead to the escalation or abandonment of the controversy. Furthermore,
AI resources may enable the implementation of algorithm-driven mediation based on predictive analytics or may lead to human mediators being replaced by a multi-agent system in the shape of an empathetic hologram, avatar, or android.

With regard to these highly advanced situations in terms of AI, a not insignificant group of contemporary authors seems to consider that complex AI innovations are not yet mature enough to be applied in the commercial mediation field. The digital divide and the importance of both the human element and cultural and gender-focused nuances in mediation mechanisms in fact converge in the defence of a mediation system in which AI developments should not play essential roles. At best, some authors consider commercial mediation combining ‘great computer design and human interfaces’ to be an optimum solution. This approach, therefore, focuses on complementarity rather than replacement—or, to use typical jargon from the sector, it conceives technology as the ‘fourth party’.

It is remarkable that the Case Cruncher Alpha programme has obtained better results than highly-qualified lawyers predicting the results of 775 non-payment disputes in the insurance context, which were to be resolved by a financial ombudsman, see https://www.case-crunch.com/index.html#progress-bars. Tests of this type have also been carried out in the construction mediation context. Chun-Yi Hwang and Nie-Jia Yau, ‘An Experimental Case-Based Reasoning Mechanism for Construction Mediation’, http://www.iaarc.org/publications/fulltext/S06-3.pdf.

A multi-agent system is defined as ‘a group of entities (may be software or hardware) which will “feel” the circumstances they are in and make intelligent decisions in order to achieve some common goal (like proposing a solution for the parties in dispute) based on knowledge from every agent in the system. For an agent to be considered so, it must show some basic abilities: autonomy, reactivity, pro-activity and sociability which means agents must operate on their own, read their environment and react accordingly, they must show initiative and take their own actions and be able to relate to other agents in order to achieve their goals. Additionally, an agent may show characteristics such as mobility, learning, veracity, emotions, among others’. Francisco Andrade, Paulo Novais, Davide Carneiro, and José Neves, ‘Conflict Resolution In Virtual Locations’, in Irene Portela and Maria Manuela Cunha (eds), Information Communication Technology Law, Protection and Access Rights: Global Approaches and Issues (IGI Global, 2010) 33. Sophia, developed by Hanson Robotics, might be an example of this; see http://www.hansonrobotics.com/sophia/.

It has recently been declared that, ‘[d]espite the existence of some automated systems that operate on well delimited legal domains, the development of fully autonomous ODR systems is still far from what was initially envisioned. In fact, nowadays we cannot talk about intelligent or intuitive ODR tools’. Davide Carneiro, Paulo Novais, Francisco Andrade, John Zeleznikow, and José Neves, ‘Online Dispute Resolution: An Artificial Intelligence Perspective’ (2014) 41 Artificial Intelligence Review 211, 237–8. Ethan Katsh, considered to be one of the founders of the field of IDR, has made the following distinction between simple and complex disputes: ‘there are actually only a limited number of categories of dispute [on eBay]. The thing broke, it wasn’t what it was advertised to be, whatever. Five or six or seven or eight of those. If you can figure out what categories these disputes are likely to fall into, you can set up systems to them, but it is harder to do that with more complex disputes. I think that’s one of the big challenges’. Aled Davies, ‘The Evolution of ODR Mediator—Ethan Katsh’, https://www.judiciary.uk/wp-content/uploads/2015/02/ethan_katsh_int2_evo_of_odr.pdf.

In the words of Samantha Hardy: ‘It seems more probable that we may see the increased use of automated systems to supplement the traditional mediation process whereby second-generation systems are used to facilitate some aspects of the mediation process’. Samantha Hardy, ‘Avatars as
While awaiting future developments, it cannot be ignored that in a few years the digital native generation will occupy important positions in the global mediation market as disputants or mediation providers. This is likely to bring about radical changes in perception and the corresponding shifts in the mediation policy of private and public stakeholders. In contrast to older generations’ less-than-favourable attitude towards ICT-driven mediation, new generations will probably not feel that human mediators’ cognitive processes are more reliable than those of AI-driven devices. In short, provided that the appropriate technological means are available, feelings such as trust, a sense of security, and confidence will no longer be exclusively created by human mediators.

One consequence of all of this is that the shape of commercial mediation has become more complex due to the impact of these myriad new technologies. New agents come into play in the classical relationship between the disputants and the third-party neutral: the technological elements themselves, referred to as the ‘fourth party’, and the technological service provider, also known as the ‘fifth party’.\(^\text{39}\)

Many legal challenges arise inside and around this multi-faceted and technologically assisted mediation ecosystem, among which are confidentiality linked to information security, and mediation quality. Whereas confidentiality has always been considered one of offline mediation’s great assets, with a limited number of well-justified exceptions,\(^\text{40}\) the current technologically driven mediation scenario generates a series of risks regarding this fundamental aspect. For instance, a software security virus or an external contractor error can make information about a mediation process public; a subject involved in a mediation case may leak confidential information via the Internet; data may be hacked by someone from outside the dispute; or the massive amount of data collected by an ODR platform could be misused. Examples like these show that a range of effective legal responses are required in the face of controversial situations regarding data retention, transfer, and destruction in a technology-driven mediation environment.\(^\text{41}\) These responses also need to take the transnational character of these situations into account, as this chapter has consistently highlighted.

So far, initiatives that address this type of technological issue in the mediation sphere are still a minority; nonetheless, it is worth mentioning some pioneering examples. In the private sphere, the detailed Competency Criteria for e-Mediators

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\(^\text{39}\) This term was coined by Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Wiley, 2011).

\(^\text{40}\) See Chapter 17, this volume.

drawn up by the International Mediation Institute (IMI), and the Advice for mediators working with technology produced by the Centre for Effective Dispute Resolution (CEDR) are both significant. In the public sphere, this statement from the Practice Standards of the 2015 Australian National Mediator Accreditation System (NMAS) is worth noting: ‘a mediator must take care to preserve confidentiality in the storage and disposal of written and electronic notes and records of the mediation and must take reasonable steps to ensure that administrative staff preserve such confidentiality’.

Where the quality of technology-assisted mediation is concerned, some authors fear that the promotion of ODR as a broad equal access portal to conflict resolution may have a negative side: a decline in the quality of mediation mechanisms. There is a danger that procedural justice, clearly identified through principles such as due process in more classical contexts, like litigation or international arbitration, may be diluted in the framework of ODR mechanisms. Various soft law documents have been produced to promote and protect ODR quality, such as the International Council for ODR (ICODR) Standards dealing with ODR programme quality and the previous work developed by the National Center for Technology and Dispute Resolution on principles for ODR practice. It is clear that technology-assisted mediation raises a series of uncertainties with ethical roots, which currently seem under-regulated.

C. Ethics in a Changing Mediation World

Another chapter of this book discusses the fact that multiple private and public initiatives have been implemented in the mediation field to create codes of conduct for mediators. These ethical codes are justified in terms of increasing the consistency, credibility, and confidence levels within the mediation world. In addition, these codes of conduct have a further merit: they have served and continue to serve

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43 Advice for mediators working with technology: https://www.cedr.com/about_us/modeldocs/?id=70.
49 See Chapter 18, this volume.
as useful inspiration in the ethical context of international commercial and investment arbitration.\textsuperscript{50}

However, the existence of these mediator codes does not in any way mean that ethical controversies have disappeared from the mediation ecosystem. On the contrary, a consequence of a combination of circumstances, they are clearly on the increase. Firstly, we are far from having a global and harmonized code for mediators. In fact, the multiple existing codes neither have identical content nor specify their scope of application in all cases, which creates abundant problems at a practical level. Secondly, the codes are widely said to be characterized by vagueness, to lack key definitions,\textsuperscript{51} and to be less than exhaustive in their inclusion of the relevant ethical issues.\textsuperscript{52} This would explain, for example, the doubts that still exist as to which ethical rules should be applied to professionals such as lawyer-mediators, who are, in theory, subject to two different sets of ethical rules.\textsuperscript{53} Thirdly, the codes’ effectiveness is also questioned, especially if they belong to the soft law field and are not always accompanied by effective grievance processes for complaints about a mediator breaching rules of conduct.\textsuperscript{54} A fourth and final factor that would explain the abundance of ethical controversies in contemporary mediation is its incorporation of ICT.

To look more closely at some of the issues already addressed in section B of this chapter on ICT, with the aim of reflecting on the ethical consequences of this new mediation configuration, it is worth returning to the idea that contemporary mediation is a complex multi-faceted phenomenon that involves an ever-increasing number of parties. Rather than supporting the hypothesis that the ethical parameters traditionally applicable to offline mediation have lost their validity in the modern context of technology-assisted mediation, it seems more reasonable to argue that the ethical parameters applicable to mediators remain essentially valid, but that they are in need of continued and flexible reinterpretation.\textsuperscript{55}

\textsuperscript{50} Katia Fach Gómez, \textit{Key Duties of International Investment Arbitrators} (Springer, 2018).
\textsuperscript{51} These vaguely expressed codes have promoted initiatives such as the non-binding opinions issued by the Committee on Mediator Ethical Guidance of the ABA Dispute Resolution Section. An interesting online resource on this subject is the National Clearinghouse for Mediator Ethics Opinions, https://www.americanbar.org/groups/dispute_resolution/resources/Ethics/.
\textsuperscript{52} Scholars have affirmed: 'because general codes like the \textit{Model Standards} reduce the mediator’s ethical landscape to generic and commonly undisputed principles, they poorly inform the more common and difficult mediator choices. Provisions are substantively vague, and the framework is arguably problematic.' Andrea C. Yang, ‘Ethics Codes for Mediator Conduct: Necessary but Still Insufficient’ (2009) 22 The Georgetown Journal of Legal Ethics 1229. In the same sense: Susan Nauss Exon, ‘How Can a Mediator Be Both Impartial and Fair: Why Ethical Standards of Conduct Create Chaos for Mediators’ (2006) 2 Journal of Dispute Resolution 1.
\textsuperscript{53} In the words of Rainey, ‘[t]he adjustment in ethical standards will be evolutionary, not revolutionary, and will be accomplished over time through dialogue with practitioners who are facing the new demands, restrictions and freedoms brought to third-party by technology.’ Daniel Rainey, ‘Third-Party
very simply, ICT’s entry into the mediation context requires mediators to be aware of the content newly re-acquired by traditional ethical principles, since this brings with it new obligations for the neutral third party. As an example, the principle of mediator impartiality and independence may currently be affected by various circumstances originating in technology (for example, if a professional does not fully inform the parties regarding which ICT is used in the course of the mediation, or a mediator has a conflict of interest regarding the automated provider). Likewise, the principle of party autonomy in contemporary mediation needs to include the disputants’ acceptance of the mediator's choices of technology.\textsuperscript{56}

Another key idea in the understanding of contemporary commercial mediation and its ethical challenges is that non-legal professionals play an extremely important role in the design, use, and monitoring of ICT-driven mediation.\textsuperscript{57} Multidisciplinarity has permanently permeated the essence of this ADR mechanism.\textsuperscript{58} From an ethical perspective, if the general claim is that mediator ethics is still an under-regulated area\textsuperscript{59} the same can be argued even more fervently with regard to the ethical standards applicable to other mediation-connected professions, such as ODR developers. Although there are professional bodies, for example, the Australian Computer Society, that have developed ethical codes for their members,\textsuperscript{60} practice shows that many non-legal professionals who dedicate themselves to the mediation field are neither certified nor members of these bodies; thus, their ethical standards are currently little short of nebulous.

This scenario justifies initiatives like that presented in 2018 by the Institute of Electrical and Electronics Engineers (IEEE): the drafting of a 266-page document entitled ‘Ethically Aligned Design: A Vision for Prioritizing Human Well-Being with Autonomous and Intelligent Systems’.\textsuperscript{61} Many of the issues addressed in this text will undoubtedly require in-depth discussion by mediation’s legal and non-legal professionals.

\textsuperscript{56} Ibid., 46–9.
\textsuperscript{57} Philip Hanke, ‘Computers with Law Degrees? The Role of Artificial Intelligence in Transnational Dispute Resolution, and its Implications for the Legal Profession’ (2017) 2 Transnational Dispute Management; see also Katia Fach Gómez and Weiwei Zhang, ‘Non-Legal Adjudicators in National and International Disputes’ (2017) 2 Transnational Dispute Management; Leah Wing, ‘Ethical Principles for Online Dispute Resolution: A GPS Device for the Field’ (2017) 3 (1) International Journal of Online Dispute Resolution 12.
\textsuperscript{58} Darin Thompson, ‘Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution’ (2015) 1 International Journal of Online Dispute Resolution.
D. Training for International Commercial Mediation

This book aims to be an educational tool for use on the mediation and ADR courses that are increasingly being run by universities, dispute resolution providers, bar associations, and other institutions worldwide. Its practical nature is the result of clear drafting, the reference to many leading cases and relevant examples, and the inclusion of a commercial mediation fact pattern.62

What follows is a series of observations on university-taught commercial mediation, which is believed to be a pivotal element for creating a pro-mediation culture. Leaving aside the multiple financial, sociological, cultural, and university policy-related factors that may shape these studies’ specific characteristics in particular countries or regions, any course focusing on commercial mediation should be a priori characterized by the following features:

1) Offering varied and interactive teaching tools aimed at developing the students’ practical skills and that have to be mastered by the experts teaching the courses.

Apart from lectures, workshops, and a wide range of drafting exercises, commercial mediation courses usually offer live role-plays, mock mediations, and participation in mediation clinics.

2) Experts teaching mediation must have well-developed ICT skills.

Directly connected with the first criterion, and as mentioned previously in this chapter, all mediation courses today are supported to a great extent by new technologies. Students are encouraged to make use of online environments and distance learning platforms in the same way that lecturers use mediation cartoons, online conflict style inventories, and filmed mediations.63

3) While the primary aim of university mediation courses is obviously to train future mediators, this should not be their only goal.

The mediation market is still limited64 and mediation courses therefore also need to meet other broader and equally praiseworthy objectives, such as training

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62 See Chapter 4, this volume.
64 Nevertheless, it has been argued that the use and understanding of social media shown by young professionals may help them to gain a professional access to the mediation world. Gregg Relyea, 'Social Media- tion: A Bridge for Young Mediators to Enter and Re-Define the Profession?', April 2018, https://www.mediate.com/articles/relyeag8.cfm.
different types of professionals who will incorporate the mediation culture into their work habits.

4) Mediation courses must also benefit from multidisciplinary groups.

It is crucial for non-law students with economics, business, management, or engineering expertise to also master commercial mediation. It follows from this that mediation courses need not necessarily be taught in law faculties.

5) The syllabi should also reflect the highly diverse nature of this non-adversarial discipline.

In line with no. 4, and without neglecting the important legal bedrock of commercial mediation, mediation courses should also offer socio-psychological training, i.e. include content on communication skills, as well as the technological aspects of contemporary mediation and the ethical challenges connected to it;

6) All mediation courses must give international perspective the importance it deserves.

The fact that commercial mediation with international aspects is becoming increasingly common has already been highlighted.

As mentioned earlier, these university courses are sometimes directly linked to commercial mediation competitions. There is no better way to implement the learning-by-doing approach that is so inherent to the mediation context than by student participation in these international competitions. The International Chamber of Commerce (ICC) undoubtedly plays a pioneering role worldwide in this field, as shown by the magnificent data from the fourteen

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65 In contexts such as construction, the contractual regulation of this kind of business is usually carried out through model contracts developed by private sector professional institutions such as the International Federation of Consulting Engineers (FIDIC). The contracts usually address dispute resolution via multi-tier clauses, which have traditionally attached great importance to the figure of the engineer in their initial phase. This example clearly justifies the need for these professionals to have specialist training in ADR. Maria R. Lamari, ‘The Role of Alternative Dispute Resolution in Government Construction Contract Disputes’ (1994) 23 Hofstra Law Review 205. See also Chapter 15, this volume.


67 The relevant private international law issues that international commercial mediation may raise are addressed, for example, in: Horst Eidenmüller and Helge Großrichter, ‘Alternative Dispute Resolution’, in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio, Encyclopedia of Private International Law (Edward Elgar, 2017).

editions of its mediation moot in Paris,\textsuperscript{69} as well as the proliferation of regional pre-moots.\textsuperscript{70}

In relation to these observations, it is useful at this point to look briefly at the study of commercial mediation as a means of becoming a certified mediator. The two key principles that need to be referred to in this context are on the one hand party autonomy in mediator selection\textsuperscript{71} and on the other state intervention in mediator selection and training. Although these principles may be viewed a priori as contradictory, an analysis of comparative law shows that they have, in fact, managed to coexist in different ways in multiple national legislations. For instance, some national provisions limit the parties’ freedom of choice in the context of court-annexed mediation or when mediating on specific issues relating to business areas in which the state has a specific interest. Likewise, the parties’ freedom to select their preferred mediator may be affected by a range of different requirements regarding his/her professional or academic qualifications or training (which are sometimes pre-requisites for allowing mediators to be included in a register or qualify as certified mediators).\textsuperscript{72} Underlying all these impositions is the state’s interest in establishing and guaranteeing a certain level of quality in mediation services.\textsuperscript{73}

The United States is a pioneer in the mediation certification field, as in many other commercial mediation-related issues.\textsuperscript{74} A long-running debate began there several decades ago regarding the need to provide the mediation process with legitimacy through mediator credentialing.\textsuperscript{75} The major benefits such professionalization is expected to bring about—which can also be extrapolated to many other countries—include increased harmonization of mediation quality; enhanced mediator credibility as a result of an external statement of quality; and the creation of

\textsuperscript{69} See Chapter 5, this volume.
\textsuperscript{70} The interest that the ICC is showing in Asia via pre-moots deserves to be highlighted (https://iccwbo.org/event/icc-international-commercial-mediation-competition-hong-kong/), as it is another example of a reality that is revealed throughout this book: the region’s dynamism and growing weight in the international commercial mediation field. See also Chapter 9, this volume.
\textsuperscript{71} The choice of mediator (or co-mediators) is a key issue, as it is in the international arbitration context. See also Chapter 16, this volume.
\textsuperscript{72} Esplugues (n 9) 236–9 provides a thorough analysis of comparative law in the subject matter.
\textsuperscript{73} Developing this statement, Moffit indicates four possible quality assurance mechanisms in the mediation context: public front-end mechanisms, private front-end mechanisms, public back-end mechanisms, and private back-end mechanisms. Michael L. Moffitt, ‘The Four Ways to Assure Mediator Quality (And Why None of Them Work)’ (2009) 24 (2) Ohio State Journal on Dispute Resolution 191.
\textsuperscript{74} Mary Ellen O’Connell, ‘Introduction to the Symposium Issue on the Americanization of International Dispute Resolution’ (2003–2004) 9 Ohio State Journal on Dispute Resolution 1.
greater awareness within the professional group of certified mediators, positioning them as a more skilful lobby to foster mediation practices.\(^{76}\)

With respect to the substantive content of and methodological approach to such specialist professional training, the logical starting point is that the applicable regulation must be complied with. However, it is not uncommon for national or sub-national legislations to provide nothing more than brief general indications,\(^{77}\) leaving those offering this type of training in the mediation market enough room for manoeuvre. Thus, international harmonization in the certified training field is currently far from being a real possibility; in fact, in some paradigmatic cases a nation-wide mediator certification has not yet been achieved.\(^{78}\) In practice, the regulatory gaps left by public bodies are being addressed through soft law means by important private institutions, e.g. the American Bar Association (ABA)\(^{79}\) or the International Mediation Institute (IMI), both of which have made significant efforts in this field.\(^{80}\)

One of the outcomes of the scant standardization in mediation certification requirements is the large number of professional mediation training courses currently available. In principle, it seems that the essence of the courses in this burgeoning market should not differ substantially content-wise from the university courses referred to above in this chapter.\(^{81}\) Nevertheless, vis-à-vis academic freedom, in the professional context many stakeholders wish their own approaches to training to prevail in terms of course content and methodology, with the aim of guaranteeing their perspective on quality of mediation training. For all these reasons, any individual wishing to work in the mediation field needs to weigh a great many factors before choosing a commercial mediation training course, including the geographical context in which the neutral third party would act.

\(^{76}\) In greater detail, see Michelle Robinson, ‘Mediator Certification: Realizing its Potentials and Coping with its Limitations’ (2007) American Journal of Mediation 51.

\(^{77}\) In the case of Spain, see Alberto José Lafuente Torralba, ‘La formación del mediador y el coste de la mediación: dos aspectos cruciales aunque menoscapiados por la Ley 5/2012 de 6 de julio’, in Juan Pablo Murga Fernández and Salvador Tomás Tomás (eds), Il diritto patrimoniale di fronte alla crisi economica in Italia e in Spagna (CEDAM, 2014) 385.


\(^{80}\) For instance, the ODR Task Force of the IMI has released a document detailing a measurable set of criteria for competency in e-mediation aimed at professionals participating in qualifying assessment programs. IMI Certification in E-Mediation Competency Criteria for e-Mediators, https://www.imimediation.org/about-im/who-are-imi/online-dispute-resolution-task-force/.

Another important aspect is that, regardless of the formal educational requirements imposed by public or private institutions on those wishing to enter the profession, it seems reasonable to envisage training as a life-long commitment for mediators, whose requirements may harden over time. Principle 1.1 of the European Code of Conduct for Mediators addressed this issue in 2004: ‘Mediators must be competent and knowledgeable in the process of mediation. Relevant factors include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.’ This question was also dealt with a year later in the Model Standards of Conduct for Mediators adopted by the American Arbitration Association (AAA), the American Bar Association (ABA), and the Association for Conflict Resolution (ACR): ‘A mediator should attend educational programs and related activities to maintain and enhance the mediator’s knowledge and skills related to mediation.’ The notion of continuous training is also reflected in the 2018 Edinburgh Declaration of International Mediators’ statement: ‘We are committed to maintaining and raising professional standards through training, continuing development and sharing of best practice.’ On a practical level, some mediation training providers have already instituted re-certification processes.

Finally, it should be noted that mediation training is also required of other groups such as judges. In 2018, the European Law Institute (ELI) and the European Network of Councils for the Judiciary (ENCJ) approved a Statement of European Best Practice in relation to the approach that courts and judges should adopt in interacting with all types of ADR processes. It states that, ‘[i]n encouraging ADR, Courts and Judges should […] be provided with training and continuing professional education in ADR, so that they understand those domestic and EU ADR processes currently available in their Member State.’

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86 For instance, the National Association of Certified Mediators (NACM), http://www.mediatorcertification.org.
87 Other professional groups, e.g. lawyers, should not distance themselves from the study of these subjects, including their technological component. David Syme, ‘Keeping Pace: On-Line Technology and ADR Services’ (2006) 23 Conflict Resolution Quarterly 343. In this sense, in 2012 the ABA amended Section 1.1 of its Model Rules of Professional Conduct, which now reads as follows: ‘to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice including the benefits and risks associated with relevant technology, engage in continuing study and education to comply with all continuing legal education requirements to which the lawyer is subject’. See https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.
IV. Concluding Remarks

It would be fallacious to state that all commercial controversies with a foreign connection are nowadays resolved thanks to the classical legal tools provided by private international law. Traditional international litigation remains in good health, but reality shows that ADR mechanisms are still growing at a remarkable rate in the international business field and that they have consequently attracted increasing interest from legal and non-legal scholars.

On the basis that the monopoly on the resolution of international commercial disputes disappeared a long time ago, this chapter has focused its attention on international commercial mediation. This specific ADR mechanism has proved to be a useful instrument for various types of disputants and conflicts, as well as being sufficiently flexible to adapt with a certain speed to the radical changes taking place at technological and social levels. Mapping the profiles and main characteristics of contemporary commercial mediation, as this chapter and the book itself aims to do, also makes it possible to predict how this institution will position itself in the face of future challenges.
Mediation and the Settlement of International Investment Disputes

Between Utopia and Realism

Catharine Titi

I. Introduction

Investment arbitration is the default mode of settling international investment disputes. So while in other contexts arbitration is discussed as an alternative dispute resolution (ADR) mechanism, in international investment law, alternative is typically that which is not arbitration—or national court proceedings. More particularly, ADR in this context tends to refer to ‘soft’, non-binding procedures, such as negotiations, consultations, and mediation. ADR is also sometimes used to refer to dispute prevention policies (DPPs). This chapter focuses on investment mediation, and discusses some DPPs to the extent that they resemble mediation.

The advantages of mediation are well known. Mediation is voluntary. The parties are the masters of the game, drive the process, and have control over the outcome. Mediation is less formal and more flexible than arbitration. Jeswald Salacuse has presented this in the following terms. Disputants can theoretically resort to four ‘ideal’ types of dispute settlement: negotiation, mediation, arbitration, and

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2 No distinction is made in this chapter between the terms ‘mediation’ and ‘conciliation’. In line with the overall approach taken in this book, the term ‘mediation’ is used to also refer to ‘conciliation’. Although ‘mediation’ and ‘conciliation’ are not coterminous, the difference between them is one of degree rather than of substance. Conciliation is often described as a more formal process than mediation (‘very formal, structured and result oriented’), with the conciliator assuming a more directive or interventionist role, to the extent that it has been described as ‘non-binding arbitration’. Mediation is more flexible and less formal, and it is sometimes likened to a process of ‘assisted negotiation’ (UNCTAD (n 1) xiii–xiv, xix). The line between the two can be unclear.

3 E.g. UNCTAD (n 1) xii, where DPPs are termed ‘preventative ADR’. Similarly, in Susan D. Franck, ‘Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in International Investment Agreements’, in Karl P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008) 143, 160.

adjudication.\textsuperscript{5} These ideal types exist on a continuum from negotiation to adjudication and as parties move along the continuum, they increasingly lose flexibility and control over their dispute.\textsuperscript{6} Salacuse’s construct is useful to place mediation in context. In contrast with negotiations, in mediation the parties do not have \textit{absolute} control over their dispute; the presence of a third-party neutral alters the dynamics between the parties.\textsuperscript{7} But contrary to arbitration, the mediator does not have the power to impose a solution on the parties.\textsuperscript{8} Adjudication offers the least degree of flexibility to the parties, since both the court’s jurisdiction and the process is determined by the applicable law and not, as in arbitration, by the agreement of the parties.\textsuperscript{9} 

Other oft-cited advantages of mediation include that it is cheaper and faster than arbitration.\textsuperscript{10} Over time investment arbitration has become expensive and time-consuming. In 2012, average arbitration costs were calculated at 8 million US dollars per case\textsuperscript{11} and in 2014, at 10 million US dollars.\textsuperscript{12} In reality, the average amount appears to be lower: a 2017 study found that average party costs were 6,019,000 US dollars for the claimant and 4,855,000 US dollars for the respondent, while average tribunal costs were 933,000 US dollars.\textsuperscript{13} Mediation tends to be cheaper than arbitration. It involves both lower party costs, partly because mediation is less pleadings-intensive than arbitration,\textsuperscript{14} and lower institutional/third-party neutral costs. For example, the average institutional costs of concluded conciliation proceedings at the International Centre for Settlement of Investment

\begin{itemize}
\item \textsuperscript{6} Ibid., 154–5.
\item \textsuperscript{7} Ibid., 154.
\item \textsuperscript{8} Cf. (n 3) on the role of conciliators.
\item \textsuperscript{9} Salacuse (n 5) 154–5.
\item \textsuperscript{10} E.g. ibid., 155; Thomas W. Walde, Proactive Mediation of International Business and Investment Disputes Involving Long-Term Contracts: From Zero-Sum Litigation to Efficient Dispute Management (2004) 5 Business Law International 99, 100–1.
\item \textsuperscript{14} Coe (n 4) 16.
\end{itemize}
Disputes (ICSID) are 182,000 US dollars, i.e. less than 20 percent of estimated tribunal costs in arbitration.¹⁵ In addition, cost allocation in investment arbitration was found to be unpredictable.¹⁶ By comparison, costs incurred in mediation, such as in conciliation proceedings at ICSID, are ‘borne equally by the parties’.¹⁷ The length of investment arbitrations is another disadvantage. In 2012, this was calculated at over three years at ‘first instance’, and about two years for ICSID annulment.¹⁸ By contrast, investment mediation proceedings are shorter. According to ICSID data, all but one of concluded investment mediations were completed in under two years.¹⁹ One case was settled in a little under three years,²⁰ while in one case the conciliation commission rendered its report less than six months after the case was registered.²¹

Another advantage of mediation is that the parties can preserve their business relationship going forward.²² Building an investment relationship typically requires a significant commitment of capital and other resources, and mediation can help the disputing parties preserve their economic relationship.²³ It has further been argued that mediation has the potential to improve business relationships, if the disputing parties use it as an opportunity not only to solve their dispute but also to share information about their needs and interests and build trust in each other.²⁴

Mediation may be appropriate for disputes that involve very sensitive issues and where the parties wish to retain control of the outcome, including notably when the claimant seeks more than compensation. Indeed, it may be more useful for the investment to reverse, for example, a decision to recall a licence rather than to obtain compensation. But retaining control can also be particularly important from the viewpoint of the host state. Consider the following example: while restitution is not a remedy regularly sought in investment arbitration (and much less is it granted),²⁵ sometimes investors do seek specific performance. In Philip Morris

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¹⁵ See Chapter 7, this volume. Notice that the amount for tribunal costs given above (933,000 US dollars) is the average for investment arbitration irrespective of the applicable arbitration rules or administering arbitral institution; arbitration tribunal costs at ICSID are slightly lower (at 920,000 US dollars). But the discrepancy with ICSID conciliation is still significant. For the amounts, see Hodgson and Campbell (n 13).


¹⁷ Article 61(1) of the ICSID Convention. See also Chapter 7, this volume.

¹⁸ Times vary for review proceedings before national courts for non-ICSID arbitrations. Gaukrodger and Gordon (n 11) 71.


²³ Salacuse (n 5) 155.

²⁴ Welsh and Schneider (n 22) 77.

²⁵ There is at least one case where the tribunal granted specific performance in lieu of damages. This is ATA Construction v Jordan, ICSID Case No. ARB/08/2, Award (18 May 2010), see Susan D. Franck and Lindsey E. Wylie, ‘Predicting Outcomes in Investment Treaty Arbitration’ (2015) 65 Duke Law
v Uruguay and Philip Morris v Australia, the claimant asked that the respondent withdraw the legislative measures it had adopted or refrain from applying them to the claimant’s investment, and only in the alternative did it request compensation.\(^\text{26}\) Where specific performance is sought, mediation may be desirable, particularly if the state party wants to ensure that a tribunal does not enjoin it to act in a certain way (as opposed to ordering compensation). In the two Philip Morris cases, claims were eventually rejected.\(^\text{27}\) Given the facts at issue, it seems unlikely that a tribunal would have ordered specific performance, i.e. that the state withdraw its public health legislation, or that it render it inapplicable to the claimant.

But mediation also has several disadvantages. Precisely because it is a voluntary process, it is not possible to make a party comply with its outcome\(^\text{28}\) and the mediation agreement is not enforceable in the way an arbitral award is—although the Convention on International Settlement Agreements Resulting from Mediation (Singapore Mediation Convention) is set to change the landscape in this respect.\(^\text{29}\) There is further no certainty that mediation will yield a settlement, and the process may turn out to be a waste of time and resources.\(^\text{30}\) In addition, mediation as a non-adjudicative means of dispute settlement is said to retard ‘jurisprudential growth’; in other words, it does not contribute to the development of the law.\(^\text{31}\) Mediation produces neither ‘soft’ precedents, nor guidance, nor legal certainty going forward for the issues resolved.

Moreover, mediation leaves the contested state measures, which may affect other investors too, under a shadow of doubt as to their conformity with international law. Contrast this with the example of the above-mentioned arbitration in Philip Morris v Uruguay, where it was made clear that the state had no responsibility under international law for the health measures it adopted. Finally, mediation assumes that the investment relationship is not in such dire straits or that the crux of the dispute is not so important to the disputing parties that they are not prepared to make any concessions or even sit around the same table to discuss. In some cases, mediation may be simply unworkable. For these reasons, investment mediation cannot replace arbitration in general\(^\text{32}\).

\(^{26}\) Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Uruguay, ICSID Case No. ARB/10/7, Award (8 July 2016), para. 12; Philip Morris Asia Ltd v Australia, UNCITRAL, PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015), para. 89.

\(^{27}\) In Philip Morris v Uruguay on the merits, and in Philip Morris v Australia at jurisdiction.

\(^{28}\) Coe (n 4) 17.

\(^{29}\) See Chapter 19, this volume.

\(^{30}\) Coe (n 4) 17.

\(^{31}\) Ibid., 25; Salacuse (n 5) 179.

\(^{32}\) Ibid., 32, where the author stated that the idea ‘that conciliation might fully replace arbitration is both unrealistic and undesirable’. 

but it is certainly useful as a complementary option that the parties can consider in specific cases.\footnote{Cf. Salacuse (n 5) 176.}

The remainder of this chapter canvasses the existing options for mediation under investment agreements, and some options outside these treaties, and the institutional developments that reveal that mediation is on the rise. Subsequently, it considers the co-existence of mediation and arbitration and presents the former as an alternative that, while it cannot—and should not—displace arbitration, can be a very useful complement for a number of disputes. Indeed some disputes may never be resolved without mediation, e.g. because of arbitration’s prohibitive costs. Next, it considers some of the challenges presented by investment mediation, and the final section concludes.

II. The Status Quo of Mediation under Investment Treaties (and Some Options outside Treaties)

A. Mediation under Investment Treaties

Although mediation has not gained much currency as a method of settling investor–state disputes when compared to arbitration, means of amicable settlement are generally a preliminary step before the investor can seise an arbitral tribunal. Some treaties make this step an apparently quasi-compulsory precondition to arbitration through the use of so-called ‘waiting’ or ‘cooling-off’ periods.\footnote{In reality, the extent to which a step is treated as ‘compulsory’ or not depends on the tribunal. Two contradictory strains currently exist in arbitral case law. According to one of them, waiting periods can be bypassed by the application of the most-favoured-nation treatment. See Lars Markert and Catharine Titi, ‘States Strike Back—Old and New Ways for Host States to Defend Against Investment Arbitrations’, in Andrea Bjorklund (ed.), Yearbook on International Investment Law & Policy 2013–2014 (Oxford University Press, 2015) 409.}

Waiting or cooling-off periods generally last from three to six months and are intended to encourage the amicable settlement of the dispute.\footnote{E.g. see Articles 23 and 24(3) of the US Model BIT (2012); Article 22 of the Canadian Model BIT (2012 version); Article 8 of the UK–Egypt BIT (1975) and Article 8 of the UK–Ethiopia BIT (2009).} It has been argued that the term is somewhat of a misnomer and that in fact the parties do not just have to wait but must take positive action to avert the need to arbitrate their dispute.\footnote{Christoph Schreuer, ‘Travelling the BIT Route—Of Waiting Periods, Umbrella Clauses and Forks in the Road’ (2004) 5 Journal of World Investment & Trade 231, 238–9.} However, international investment agreements (IIAs) do not impose on disputing parties an actual obligation to engage in amicable procedures. For example, the 2012 US model bilateral investment treaty (BIT) provides in an article entitled ‘Consultation and Negotiation’ that:

}\footnote{Cf. Salacuse (n 5) 176.}

\footnote{In reality, the extent to which a step is treated as ‘compulsory’ or not depends on the tribunal. Two contradictory strains currently exist in arbitral case law. According to one of them, waiting periods can be bypassed by the application of the most-favoured-nation treatment. See Lars Markert and Catharine Titi, ‘States Strike Back—Old and New Ways for Host States to Defend Against Investment Arbitrations’, in Andrea Bjorklund (ed.), Yearbook on International Investment Law & Policy 2013–2014 (Oxford University Press, 2015) 409.}

\footnote{E.g. see Articles 23 and 24(3) of the US Model BIT (2012); Article 22 of the Canadian Model BIT (2012 version); Article 8 of the UK–Egypt BIT (1975) and Article 8 of the UK–Ethiopia BIT (2009).}

\footnote{Christoph Schreuer, ‘Travelling the BIT Route—Of Waiting Periods, Umbrella Clauses and Forks in the Road’ (2004) 5 Journal of World Investment & Trade 231, 238–9.}
In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.\textsuperscript{37}

The use of mediation is clearly, if not expressly, included in the provision for ‘non-binding, third-party procedures’. Even absent this specification, provision for ‘amicable settlement’ would include mediation. However, an initial doubt is raised about the existence of an \textit{obligation} to pursue such procedures by the use of the hortatory ‘should’ (e.g. instead of a more directive ‘must’, ‘shall’, etc.). This is confirmed by the ensuing article in the US model BIT, which allows a disputing party to initiate arbitration ‘[i]n the event that [it] considers that an investment dispute cannot be settled by consultation and negotiation’.\textsuperscript{38} Provided that six months have elapsed since the dispute arose, the claim can be submitted to arbitration.\textsuperscript{39}

Investment treaties expressly mention arbitration, but only exceptionally do they refer to mediation or conciliation. For example, the BIT concluded between the United Kingdom and Kenya in 1999 provides the contracting parties’ consent to submit any investor–state dispute to ICSID ‘for settlement by conciliation or arbitration’.\textsuperscript{40} In fact, a number of BITs concluded by the United Kingdom and the United States give the parties’ consent to conciliation.\textsuperscript{41} Some French BITs make reference to the jurisdiction of ICSID, thereby also including their consent to ICSID conciliation.\textsuperscript{42} A somewhat different provision exists in the 1992 Germany–Jamaica BIT, which states that nothing in the agreement shall be construed as preventing the disputing parties from agreeing to submit their dispute to conciliation or arbitration.\textsuperscript{43} This treaty does not provide the states’ offer to submit disputes to conciliation or arbitration, but rather requires that the disputing parties subsequently agree to conciliation or arbitration. Some Indian BITs also make reference to conciliation, especially under the Conciliation Rules of the United Nations Commission on International Trade Law (UNCITRAL), and a few give advance consent to conciliation.\textsuperscript{44} Analogous provisions have existed for a long time in numerous BITs involving various parties around the world.\textsuperscript{45}

This trend is confirmed and to a small degree expanded in new investment agreements that expressly mention mediation (or conciliation) as a dispute settlement

\textsuperscript{37} Article 23 of the US Model BIT (2012).
\textsuperscript{38} Article 24 of the US Model BIT (2012).
\textsuperscript{39} Article 24(3) of the US Model BIT (2012).
\textsuperscript{40} Article 8(1) of the Kenya–United Kingdom BIT.
\textsuperscript{42} Bottini and Lavista (n 41) 365–6.
\textsuperscript{43} Article 11(3) of the Germany–Jamaica BIT.
\textsuperscript{44} Bottini and Lavista (n 41) 367.
\textsuperscript{45} For examples until 2010, see, in general, ibid.
option. For example, the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) provides that:

[i]n the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures, such as good offices, conciliation, or mediation.\(^{46}\)

The 2017 Pacific Agreement on Closer Economic Relations (PACER) Plus goes one step further. Its provision on 'Good Offices, Conciliation and Mediation' is worth citing in full. It states:

1. The Parties to the dispute may at any time agree to good offices, conciliation or mediation. Procedures for good offices, conciliation or mediation may begin at any time and be terminated at any time.
2. If the Parties to the dispute agree, procedures for good offices, conciliation or mediation may continue while the matter is being examined by a Panel established or reconvened under this Chapter.
3. Proceedings involving good offices, conciliation or mediation and positions taken by the Parties to the dispute during these proceedings shall be confidential and without prejudice to the rights of any Parties to the dispute in any further or other proceedings.
4. The Secretary-General of the Pacific Islands Forum Secretariat or their nominee may, acting in an ex officio capacity, offer good offices, conciliation or mediation with a view to assisting Parties to reach a mutually satisfactory solution.\(^{47}\)

The 2016 Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada contains a similar provision. Article 8.20 on 'Mediation' provides that:

1. The disputing parties may at any time agree to have recourse to mediation.
2. Recourse to mediation is without prejudice to the legal position or rights of either disputing party under this Chapter and is governed by the rules agreed to by the disputing parties including, if available, the rules for mediation adopted by the Committee on Services and Investment pursuant to Article 8.44.3(c).\(^{48}\)

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\(^{46}\) Article 9.18 of the CPTPP. A similar provision exists in Article 10.15(1) of the Pacific Alliance Additional Protocol.

\(^{47}\) Article 6 of Chapter 14 of PACER Plus.

\(^{48}\) According to this provision, the Committee on Services and Investment may, if the contracting parties agree, 'adopt rules for mediation for use by disputing parties.'
3. The mediator is appointed by agreement of the disputing parties. The disputing parties may also request that the Secretary General of ICSID appoint the mediator.

4. The disputing parties shall endeavour to reach a resolution of the dispute within 60 days from the appointment of the mediator.

5. If the disputing parties agree to have recourse to mediation, Articles 8.19.6 and 8.19.8 shall not apply\(^49\) from the date on which the disputing parties agreed to have recourse to mediation to the date on which either disputing party decides to terminate the mediation. A decision by a disputing party to terminate the mediation shall be transmitted by way of a letter to the mediator and the other disputing party.

The EU–Singapore Investment Protection Agreement (IPA)\(^50\) includes an annex (Annex 6) on the ‘Mediation Mechanism for Disputes between Investors and Parties’. The objective of the mechanism is to ‘facilitate the finding of a mutually agreed solution through a comprehensive and expeditious procedure with the assistance of a mediator’.\(^51\) Detailed provisions follow on practical and procedural issues, notably on the selection of the mediator, the initiation and conduct of the procedure, the implementation of the settlement agreement, the relationship with dispute settlement, and time limits and costs.\(^52\) Like CETA, the EU–Singapore IPA specifies that the mediation mechanism is without prejudice to the parties’ legal positions under investor–state dispute settlement (ISDS) or state–state dispute settlement (SSDS).\(^53\) The IIA expressly protects the confidentiality of the mediation procedure (although any disputing party may disclose that a mediation is taking place).\(^54\) Last, but not least, the treaty specifies that in the event of another dispute settlement procedure under the agreement, disputing parties shall not rely on or introduce as evidence in such dispute settlement procedures, nor shall any adjudicatory body, tribunal or panel take into consideration:

(a) positions taken by the other disputing party in the course of the mediation procedure;
(b) the fact that the other disputing party has indicated its willingness to accept a solution to the measure subject to mediation; or
(c) advice given or proposals made by the mediator.\(^55\)

\(^{49}\) These provisions concern time limits and withdrawal of a request for consultations.

\(^{50}\) The EU–Singapore IIA has been separated from the EU–Singapore FTA, following Opinion 2/15 of the Court of Justice of the European Union (CJEU) on the division of competences between the EU and its member states in relation to the EU–Singapore FTA, as envisaged at the time.

\(^{51}\) Article 1 of Annex 6 of the EU–Singapore IPA.

\(^{52}\) Articles 2–8 of Annex 6 of the EU–Singapore IPA.

\(^{53}\) Article 6(2) of Annex 6 of the EU–Singapore IPA.

\(^{54}\) Article 6(3) of Annex 6 of the EU–Singapore IPA.

\(^{55}\) Article 6(1) of Annex 6 of the EU–Singapore IPA.
Both CETA and the EU–Singapore IPA further incorporate a code of conduct for arbitrators and mediators.\textsuperscript{56} The codes describe various responsibilities, disclosure obligations, duties, independence and impartiality, obligations of persons formerly acting as mediators, confidentiality, and expenses.\textsuperscript{57} The provisions refer to arbitrators, but apply \textit{mutatis mutandis} to mediators.\textsuperscript{58}

B. Dispute Prevention Policies under Investment Treaties

Some investment treaties provide for dispute prevention mechanisms that resemble mediation. This is notably the case of Brazilian cooperation and facilitation investment agreements (CFIAs). Between 2015 and the spring of 2018, Brazil signed nine such agreements, including the plurilateral Intra-MERCOSUR Investment Facilitation Protocol (2017). The CFIA concluded between Brazil and Angola in 2015 became the first Brazilian investment treaty to enter into force in October 2017. CFIAs focus on DPPs that aim to minimize the number of conflicts that escalate into formal disputes.\textsuperscript{59} If DPPs in the Brazilian model fail, the contracting parties, but not the investor, can submit the dispute to interstate dispute settlement. A particular DPP that has been inserted in the CFIAs is recourse to ombudsmen or national focal points.\textsuperscript{60} Focal points are \textit{not} mediators; indeed, their role in this respect is one of dispute prevention, rather than settlement, but their functions undeniably overlap with some form of mediation.

National focal points are designated by each party.\textsuperscript{61} In this respect they are not third-party neutrals and they are established at the national, rather than the international, level. For instance, in Brazil focal points are established within the Chamber of Foreign Trade (CAMEX),\textsuperscript{62} the Council of Ministers of the Brazilian Chamber of Commerce, an inter-ministerial body for foreign trade presided over by the Minister of Development, Industry and Foreign Trade.\textsuperscript{63} Their principal task is to assist investors from the other party in their territory.\textsuperscript{64} They are tasked with investment promotion and facilitation and with dispute prevention. It is only with respect to that latter part (dispute prevention) that their function is redolent of mediation. Their responsibilities comprise: assessing, in consultation with relevant

\textsuperscript{56} Annex 29-B of CETA and 7 and 11 of the EU–Singapore IPA.
\textsuperscript{57} Ibid.
\textsuperscript{58} Ibid.
\textsuperscript{59} UNCTAD (n 1) xiv. On Brazil’s investment policy, see, in general, Catharine Titi, ‘International Investment Law and the Protection of Foreign Investment in Brazil’ (2016) 2 (1) Transnational Dispute Management: Special Issue on Latin America, Ignacio Torterola and Quinn Smith (eds).
\textsuperscript{60} The terms are used interchangeably in the chapter.
\textsuperscript{61} Article 17(1) of the Brazilian Model CFIA of 3 March 2016 (version 2.3.1) (hereinafter Brazilian Model CFIA).
\textsuperscript{62} Article 17(2) of the Brazilian Model CFIA.
\textsuperscript{63} CAMEX’s functions are established by Decree n. 4.732/2003.
\textsuperscript{64} Article 17(1) of the Brazilian Model CFIA.