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Views from the coal face: the development of international commercial mediation

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ABSTRACT

Mediation use in the international commercial area has been the subject of some research and discussion over the past two decades. In the past five years, however, a number of significant changes have resulted in an increased focus on the use of mediation to resolve international commercial disputes. One significant area of potential change has resulted from the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation, New York, 2018). Apart from this change, domestic commercial mediation has increased in a number of jurisdictions as a result of an increased domestic focus on mediation and, in some instances, mandatory requirements to use mediation that are fostered by legislative instruments or contractual requirements. This article explores the potential and actual use of mediation from the perspective of international commercial mediators, their perceptions of barriers to use and ways to expedite growth as well as discussing the perceived benefits and concerns about what has been referred to as the juridification of mediation.

Keywords: mediators; international commercial mediation; development; barriers; interviews; empirical research.

INTRODUCTION

As mediation use has grown steadily in a range of jurisdictions and dispute areas over recent years,[1] its potential within the international commercial arena has been increasingly highlighted.[2] The use of mediation in this setting has been promoted as an opportunity for parties to resolve complex, high-value disputes in a more cost-effective,

1 For a review of developments, see Nadja Alexander, *Global Trends in Mediation* 2nd edn (Kluwer Law International 2017); Neil Andrews, *The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England* 2nd edn (Springer 2018).

2 By international commercial disputes, we are referring to disputes arising in a commercial context (broadly drawn) involving parties drawn from different jurisdictions.

flexible, and harmonious fashion than the more traditional steps of litigation and arbitration.[3] Despite this, recent evidence suggests that disputants and their lawyers in a number of international commercial settings remain wedded to more traditional determinative processes with mediation remaining on the fringes.[4] The tide may be turning, however. A range of recent developments has propelled interest in mediation in the international commercial arena, the most significant of which is the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation, New York 2018) that has sought to underpin international commercial mediation with a unified enforcement mechanism for settlements rendered along the lines of the New York Convention for international commercial arbitration.[5]

Mediation's profile in the international commercial arena has advanced in other ways, including through rising interest in investor-state mediation,[6] growth in third-party funding initiatives in this field[7] and the development of common professional standards for mediators operating in and across different jurisdictions.[8] Academics have also increasingly turned their attention to mediation in this setting.[9] Empirical research has also grown of late, shedding important new light on the views and experiences of different players in the field including in-house counsel, external lawyers, users and potential users

3 See S I Strong, 'Beyond international commercial arbitration? The promise of international commercial mediation' (2014) 45(1) Washington University Journal of Law and Policy 11.

4 See, for example, International Institute for Conflict Prevention and Resolution and Centre for Effective Dispute Resolution (CEDR), *Insights into Alternative Dispute Resolution* (Report, Winter 2018–2019); Kim Shi Yin, 'From "face-saving" to "cost saving": encouraging and promoting business mediation in Asia' (2014) 32(10) Alternatives to the High Cost of Litigation 158, 158; S I Strong, 'Realizing rationality: an empirical assessment of international commercial mediation' (2016) 73(4) Washington and Lee Law Review 1973, 2034.

5 UNCITRAL, United Nations Convention on International Settlement Agreements Resulting from Mediation, UN Doc A/Res73/198 (20 December 2018), art 14(1).

6 James M Claxton, 'Compelling parties to mediate investor state disputes: no pressure, no diamonds?' (2020) 20(1) Pepperdine Dispute Resolution Law Journal 78; Ignacio de la Rasilla, '"The greatest victory?" Challenges and opportunities for mediation in investor state dispute settlement' (2023) 38(1) ICSID Review 169; Nadja Alexander et al, *International Dispute Resolution Survey* 2nd edn (SIDRA Final Report 2022).

7 Nadja Alexander, 'Ten trends in international mediation' (2019) 31 Singapore Academy of Law Journal 405.

8 Through bodies such as the IMI: see website for further details.

9 Including a new comprehensive text. See Ronán Feehily, *International Commercial Mediation: Law and Regulation in Comparative Context* (Cambridge University Press 2022).

and academics.[10] This article seeks to add to the evidence base around international commercial mediation by reporting on a recent interview-based study conducted with mediators experienced in international commercial mediation.[11]

METHODOLOGY

Nineteen semi-structured interviews were carried out online over Zoom between November 2021 and August 2022.[12] The interviews ranged from 25 minutes to 55 minutes with the average time around 40 minutes. Some recent survey research in the field has included mediators within its pool of respondents.[13] In our work, however, while not claiming to draw statistical generalisations, we made use of semi-structured interviews with our participants to uncover 'thicker descriptions'[14] and gauge international commercial mediators' views as well as lived practical experiences in respect of a range of relevant issues in the field. A semi-structured approach was used to ensure a level of consistency between interviews while allowing interviewees the scope to raise their own issues of concern.

A purposive approach to sampling was taken to ascertain interviewees who were likely to be able to provide information of relevance to the study.[15] Interviewees were therefore drawn from a list of commercial mediators with international experience compiled from the Who's Who 2020 list of mediators with a view to including participants from a wide range of jurisdictions.[16] Some 80

10 Anna Howard, *EU-Cross Border Commercial Mediation: Listening to Disputants – Changing the Frame; Framing the Changes* (Wolters Kluwer 2021); Alexander et al (n 6 above); Strong (n 4 above); David Weiss and Michael Griffiths, *Report on International Mediation and Enforcement Mechanisms* (Institute for Dispute Resolution IDR (NJCU) School of Business, UNCITRAL Working Group II (Dispute Settlement) 2017).

11 An interview study was recently conducted with civil and commercial mediators in Italy, France and Germany. However, the focus of that study was domestic mediation. See Marco Giacalone and Sajedeh Salehi, 'An empirical study on mediation in civil and commercial disputes in Europe: the mediation service providers' perspective' (2022) 2 Revista Ítalo-española De Derecho Procesal 11.

12 A 20th interview was organised but for practical reasons could not be conducted within the time frame of our study.

13 Anne-Marie Hammond, 'How do you write "yes"?: A study on the effectiveness of online dispute resolution' (2003) 20(3) Conflict Resolution Quarterly 261; Strong (n 3 above); Weiss and Griffiths (n 10 above).

14 Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture* (HarperCollins 1973).

15 Norman K Denzin et al, *The SAGE Handbook of Qualitative Research* 6th edn (Sage 2023).

16 The Who's Who lists have now been taken over by the Lexology Index and are no longer available.

invitations were ultimately sent out to procure the 19 interviews.[17] All interviewees were provided with an information sheet regarding the study and signed a consent form setting out our obligations as researchers around maintaining confidentiality and data handling.

Ethical clearance for the study was gained at both Newcastle University, United Kingdom (UK), and the University of Newcastle, Australia. Interviews were transcribed automatically via Zoom and then manually corrected. The transcripts were subsequently manually coded into relevant themes across each of the categories above prior to the analysis being written up.

Interviewee demographics

Mediators we interviewed operated principally out of the following jurisdictions: England and Wales (4); Scotland (1); Ireland (1); France (2); Sweden (1); Switzerland (1); Hong Kong (1); Singapore (2); Australia (3); New Zealand (2); and Malaysia (1).[18] Of the 19 interviewees, 14 were male, four female and one preferred not to record their gender. Lawyer-mediators were heavily prevalent. Seventeen of the interviewees had a legal background[19] and a minority of those were still practising law alongside their mediation activities. Of the remainder, one had a background as an accountant and business advisor and the other in architecture. All but one of the mediators was over 51, split evenly between the 51–60 range and 61–70 range with 4 over 70.[20] This was a very experienced group of mediators ranging from 11 to 34 years of mediation practice. In terms of their mediation experience in the international commercial field, one interviewee noted that all their mediations were currently of the international commercial variety, two other interviewees putting this at 90 per cent and 67 per cent respectively with the others falling between the range of 15–40 per cent.[21] The number of international commercial mediations conducted over the last three years for the mediators ranged from 100-plus down to '5 or 6'.

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17 This response rate is fairly typical in this kind of work and sufficient given the qualitative nature of this study,

18 Given the nature of cross-border mediation, some interviewees worked out of more than one jurisdiction. We recognise that there is a slight skew in respondents drawn from (or near to) our own jurisdictions (UK and Australia) and that unfortunately we were unable to procure interviews with mediators drawn from the United States (US).

19 Two of the interviewees held academic positions in law at the time of the interview.

20 One interviewee was between the range of 41–50.

21 Except that one mediator's international commercial mediation work was limited to employment matters, and it was unclear from our demographic return what percentage of their entire workload this entailed.

Mediators as interviewees

Before proceeding to an examination of findings, we should emphasise that the mediator's voice is a distinct one, rooted in their own commercial interest as provider of mediation services and, on that basis, their views may be expected to be broadly favourable relative to the utility of mediation and reflect their own personal interests to some degree.[22] Our interviewees' position as 'elites' in the field may also influence their views in a way that may not be reflective of mediators more generally. It should also be noted that, although we were keen to emphasise to interviewees that our research concerned international commercial mediation specifically, at times mediators may have been responding to questions by drawing on their experience in mediation more broadly. Indeed, some mediators thought that the general demarcation between international and domestic commercial mediation, even if important definitionally for the application of certain instruments such as the Singapore Convention, was largely a false one in practical terms.[23] Most, however, pointed to the distinct nature of cross-border mediation, including particular issues arising in terms of language barriers and the use of interpreters, the cultural differences of participants and their lawyers drawn from different jurisdictions and the complexity, financial scale of the disputes and jurisdictional issues arising in this context which rendered this form of mediation a special case.[24]

Several broad themes, identified from the literature as pertinent in the field, were raised with the interviewees including:

- the distinct nature of international cross-border mediation;
- barriers to development and opportunities for growth;

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22 It was also apparent to us that some answers were provided on the basis of interviewees' general knowledge of developments and research in the field rather than their direct experience as mediators.

23 Indeed, this may not be surprising given that for some interviewees, the majority of their practice related to domestic mediation.

24 There is no agreed definition of international commercial mediation but the recent Singapore Convention, art 1, ties the definition of 'international' to the settlement agreement. It provides that the agreement is international in that: '(a) At least two parties to the settlement agreement have their places of business in different States; or (b) The State in which the parties to the settlement agreement have their places of business is different from either (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) The State which the subject matter of the settlement agreement is most closely connected.' The term 'commercial' is not defined in the Convention but is defined widely in the amended Model Law. See United Nations, UNCITRAL Model Law on International Commercial Conciliation and Guide to Enactment and Use 2002 (United Nations Report 2004) art 1.

- enforceability issues in respect of mediation settlements and the impact of the Singapore Convention;
- handling lawyers in mediation;
- developing internationally recognised common standards for mediators; and
- the use of online mediation in the cross-border context.

Focus of this article

This article is chiefly concerned with the future development of international commercial mediation, an issue that has been one area of focus in mediation literature and in other fields. Although mediation has become well established in many contexts since its re-emergence as part of the Pound conference-era alternative dispute resolution (ADR) movement,[25] there remains a sense that in many settings it is underused and still lies on the fringes of mainstream legal and disputing cultures. In the European Union cross-border context, for example, there have been recent efforts to help expand the use of mediation.[26] Most governmental initiatives promoting mediation nationally are designed to overcome barriers to uptake.[27] In short, despite well-known critiques of the process,[28] mediation is seen as a 'good thing' leading to greater efficiencies and the durable resolution of disputes and is thus perceived intrinsically as a positive phenomenon. As one might expect, this is a sentiment shared by our interviewees as service providers.

In keeping with the development focus of this article, we thus centre principally on interviewees' responses in the following areas: barriers to mediation's use and ways to expedite growth; and issues around the enforceability of mediated settlements and impact of the Singapore

25 F Sander, 'Varieties of dispute processing' in A Leo Levin and Russell R Wheeler (eds), *The Pound Conference: Perspectives on Justice in the Future – Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (West Publishing Company 1979).

26 See Howard (n 10 above); Giuseppe De Palo et al, *Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to increase the Number of Mediations in the EU* (European Parliament and Directorate-General for Internal Policies, Study 2014).

27 See, for example, Ministry of Justice, *Increasing the Use of Mediation on the Civil Justice System* (Consultation Outcome 1 September 2023); and Northern Territory Government, *Community Justice Centre 2020–21 Annual Report* (28 September 2021).

28 Especially those around access to justice barriers and the dangers of private settlement. See Owen Fiss, 'Against settlement' (1984) 93(6) Yale Law Journal 1073.

Convention on Mediation. We do draw on interviewees' responses from some of the other areas above as appropriate.[29]

In terms of the structure of this article, the first part ('Barriers to mediation') examines findings relative to interviewees' perceptions of the barriers to growth of international commercial mediation. The second part ('Supporting mediation in the international commercial setting') then examines interviewees' views on measures that could be implemented to help expedite growth. The third part analyses interviewees' responses relative to the issue of the enforceability of mediated settlements in international commercial disputes and the impact of the Singapore Convention.

BARRIERS TO DEVELOPMENT

As noted above, despite decades of growth, the notion that mediation remains underused in many contexts is a strong one. Equally, a wide range of measures has been adopted with a view to boosting take-up of mediation across a range of dispute contexts and jurisdictions.[30] Evidence also suggests that mediation is not yet seeing its true potential in international commercial matters.[31] Our interviewees, in general, agreed with the need to overcome barriers to further growth in the international commercial context, even if one responded that they were not personally affected:

> my experience includes a huge amount of international commercial mediations. So personally speaking, I don't actually see the roadblocks in that way. They don't affect me personally very much.[32]

At the outset we note that some interviewees took the view that many of the same issues affecting the growth and further use of mediation more broadly, also applied in the international commercial setting. As one mediator put it:

> Just to be provocative, is there any difference in the barriers that we would discuss as domestic?... I would suggest that the same impediments are likely to be present, as we note domestically, and that the same initiatives in terms of education, confidence building, information and re-categorisation [would be useful].[33]

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29 Our interviewees' experiences with online mediation and views on future trends in this space is discussed in a separate article: Bryan Clark and Tania Sourdin, 'Necessity the mother of invention? International commercial mediators' views on online mediation' (2024) 8(1) Mediation Theory and Practice 53–70.

30 See Howard (n 10 above); De Palo et al (n 26 above).

31 Howard (n 10 above); De Palo et al (n 26 above).

32 Mediator 3.

33 Mediator 4.

As we discuss below, the idea that international commercial mediation's fate is linked closely to development in other areas emerges in our interviewee responses.[34]

Lack of awareness

Although it may seem surprising given the long history of modern mediation in many jurisdictions, many interviewees raised the issue of lack of awareness as a stumbling block to further development in the international commercial field. Typical comments referred to 'generally a lack of awareness of mediation amongst the populace'[35] or 'ignorance of the process'[36]. Another viewed the main barrier as 'awareness of mediation … as a *useful* process' .[37] The latter point may be redolent of misconceptions around what mediation can offer. In this sense, lawyers were cited by some interviewees as lacking a sophisticated appreciation of mediation. Similar sentiments were held regarding potential mediation users. One interviewee noted: 'clients by and large are not familiar with it … [u]nless, they are sophisticated'.[38] In terms of this lack of awareness, as we discuss further below,[39] some interviewees blamed this on ineffective selling and marketing of the mediation process.

Lawyers as gatekeepers

Our data suggests that, to the interviewees at least, commonly held, negative perceptions of mediation were of more significance than mere ignorance. While the jaundiced views of both lawyers and potential users were noted by interviewees as being of import, on balance, they more readily blamed lawyers for erecting barriers to mediation's greater use. For some, this related to the dominant position that lawyers hold relative to their clients in terms of setting out the pathway for resolution of disputes. As one interviewee put it:

> the gatekeepers to mediation tend to be the legal representatives, except in the case of very large multinationals. A client is generally led by their lawyer in terms of litigation strategy and how a case has to be resolved. So, if their lawyer says no, we need to get to go to trial, they'll go to

34 Particularly in the areas of education and practitioner training. See Katia Fach Gómez, 'The role of mediation in international commercial disputes: reflections on some technological, ethical and educational challenges' in Catharine Titi and Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes* (Oxford University Press 2019).

35 Mediator 1.

36 Mediator 8.

37 Mediator 15.

38 Mediator 12.

39 See below under headings 'Education for lawyers' and 'Education about the qualitative benefits of mediation'.

> trial. If the lawyer says no, I think we should try and resolve this by negotiation, they'll go down that route …[40]

Another said: 'a lot of users, unless they are sophisticated users or [General Counsels] who have the knowledge and mandate to make decisions on appointments … tend to … go back to lawyers [for guidance]'[41] One interviewee referred to the recent Pound Conference series[42] where 'lawyers identified themselves as did everybody else, by the way, as the greatest [barrier] to change'.[43]

In this analysis it may be that some of our interviewees were in part at least reflecting on their own experience as lawyers and what they have perceived as the attitudes of their fellow legal professionals. Such viewpoints concur with the established view that, in many settings, lawyers remain the principal gatekeepers to mediation's advancement given their influence over clients and role as repeat players in, and 'buyers' of dispute resolution services.[44] As we discuss below, our interviewees saw the need for educational and profile-raising efforts to focus primarily on lawyers.[45]

Negative views of lawyers towards mediation

The negative views of lawyers reported by our interviewees are rooted in a range of different ideas. Reflecting themes noted in the literature,[46] one common issue arising was the traditional paradigm of legal practice and the challenges mediation may be seen to pose in that context. For some, this cultural jarring was fuelled by misunderstanding of the mediation process. One interviewee noted a conflation of mediation with issues germane to more traditional, legal dispute resolution mechanisms:

> lawyers are not up to date yet with … international mediation. And some of them still believe that they cannot go outside of their jurisdiction … We [as mediators] don't care about the jurisdictions, and we don't care whether your contract was in common law and your partner is a civil law party. I think that would be probably the first barrier that we need to waive.[47]

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40 Mediator 11.
41 Mediator 18.
42 Herbert Smith Freehills and PWC, 'Global Pound Conference Series: Global Trends and Regional Differences' (Global Pound Conference Series 2018).
43 Mediator 10.
44 Bryan Clark, *Lawyers and Mediation* (Springer 2012) ch 2.
45 See Fach Gómez (n 34 above).
46 Julie Macfarlane, *The New Lawyer: How Clients are Transforming the Practice of Law* 2nd edn (UBC Press 2017) ch 3; Clark (n 44 above) ch 2.
47 Mediator 5.

Others referred more generally to the perceived challenges that mediation may pose for lawyers' traditional practice norms. One noted the stifling nature of 'the power of the old paradigm':

> [As lawyers] we are educated, we are taught at law school, we are taught at law firms that this is the way. We litigate, we arbitrate ... you are a trained warrior. And being a trained warrior is good at wartime. But mediation is something completely different. It is a collaboration. And that is like as far as it is between East and West, they don't meet so much.[48]

Another interviewee put it this way:

> [i]t's probably a habit more than anything ... practitioners ... are used to the processes that they typically use whether it be arbitration or maybe negotiation and to change anything takes much more than somebody setting out the advantages ... of the [mediation] process ...[49]

According to another:

> I don't think the barriers are regulatory, I don't think barriers are cultural ... [but rather] the eye-dotting, t-crossing, 'every conflict is about the law' approach that lawyers have. And yet, the law is often just an excuse for a fight that's about something entirely commercial.[50]

Mediation readiness and culture

Some interviewees discussed the varying nature of mediation acceptance in different jurisdictions and the impact that this may have on the use of mediation. According to one:

> [in] some jurisdictions the lawyers are much more resistant to mediation than they are in others. And talking to lawyers in other jurisdictions, I get the feeling that some of them are some way behind where say the UK and the US have got to and Australia in terms of the use of mediation.[51]

Such cultural acceptance can be driven by recognition of mediation in domestic court processes:

> If you're in a domestic jurisdiction which encourages mediation ... the barriers are going to be less ... core process will kind of carry you along ... [such as in] Sydney and some of the New York courts. It's the ones that are cut free from that process where there isn't that the sort of conveyor belt.[52]

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48 Mediator 9.
49 Mediator 14.
50 Mediator 17.
51 Mediator 11.
52 Mediator 3.

Equally, it was seen that cultural acceptance may stem from the need in each jurisdiction to avoid traditional forms of dispute resolution such as courts:

> In this country [the UK] and in the States, the legal fees are so high and it pushes people to mediation. You know, it brings you back to … cultural issues. What is the value of it really to the parties? Not least because the risks of litigation are not the same [in Spain, France and Italy].[53]

Another said:

> One also has to look at the question of legal costs … It's frighteningly expensive to bring a case in the UK … I don't think costs are such a barrier in a number of European countries in particular. But then you've got other issues, and particularly if you move to South America or India. I think delay becomes a real issue as to getting cases sorted before the courts.[54]

Others pointed to the role of the western philosophy underpinning modern mediation that might represent a barrier in some jurisdictions:

> [S]ome jurisdictions have more exposure to mediation than others. And that might mean many asynchronicities between [them] … clearly there are issues about … interpretation of documents, about language, about enforceability which you might elevate … to be particularly special in international [settings]. So, [it's easier] dealing with people who are habituated as it were, into our Western legal and negotiation culture, who would generally understand positional bargaining and interest-based bargaining and the difference between them.[55]

Another interviewee, pointing to the lack of interest of in-house counsel in mediation, noted that this may be a particularly civil law trait:

> [C]orporate counsel voices are absent. And when I've spoken to … Corporate Counsel Associations, they don't understand … You know, their compliance issues, GDPR, or you can come up with ten different issues that they'll rush to a conference to organise. But when it comes to conflict resolution, use of mediation or mixed modes, it doesn't. It's not a hot button for them.[56]

Loss of control and a sense of undervaluing

A perception of mediation undervaluing the worth of lawyers was found in some responses: 'lawyers are not well disposed towards mediation because they don't understand or they feel that it gets in … [the] way,

53 Mediator 7.
54 Mediator 11.
55 Mediator 4.
56 Mediator 10.

it cuts, it undermines them'.[57] Clearly, mediation (or at least certain models of the process) may entail a more interest-based and client-centric approach than is the case in other forms of dispute resolution. This notion – that lawyers fear mediation as an unknown process that does not fully recognise their own expert role, may limit their control and is incompatible with their core practice beliefs – has been made elsewhere.[58]

Lawyering within mediation

Lawyer obstacles also reportedly occurred *within* the mediation process. When we asked our interviewees about their experiences of managing and working with lawyers within a mediation, many recounted positive experiences of lawyer representatives in mediation and the boon they could provide in working with mediators to effect solutions. Others, however, pointed to the traditional, adversarial practices that still occurred to stifle opportunities to settle cases including the need for lawyers to retain control while silencing their clients.[59] Again this was blamed on the proclivity of some lawyers to treat mediation as another adversarial dispute resolution process with their participation blighted by traditional educational practices and cultural norms.[60]

Financial disincentives

Although it has been argued that international commercial mediation has become more lawyer-centric in recent years and hence may represent a financial boon for the profession,[61] the well-worn idea that lawyers resist mediation because they fear it may not be in their financial interests also arose: 'there are myths that have been around mediation ... that you lose money and certainly you probably earn less money in a mediation than you would in arbitration'.[62] Another said: 'You know, there are many more disputes out here that ... should be

57 Mediator 4.

58 Macfarlane (n 46 above) ch 3. By contrast there is evidence that in some contexts, lawyers may dominate mediation proceedings with clients sidelined in evaluative forms of the process: see Kathy Douglas and Becky Batagol, 'The role of lawyers in mediation: insights from mediators at Victoria's Civil and Administrative Tribunal' (2014) 40(3) Monash University Law Review 758.

59 For a discussion of lawyer domination in the US context, see Jacqueline Nolan-Haley, 'Mediation: the new arbitration' (2012) 17 Harvard Negotiation Law Review 61.

60 Similar findings identifying unhelpful lawyer activity as a principal reason for failed mediation was found in a recent study of French, Italian and Belgian mediators – see Giacalone and Salehi (n 11 above) 29–30.

61 See Bryan Clark and Tania Sourdin, 'The Singapore Convention: a solution in search of a problem?' (2020) 71(3) Northern Ireland Legal Quarterly 2.

62 Mediator 14.

mediated. The question is why not? Partly, it is the ADR[63] question, dropping revenue and lawyers are reluctant.'[64] One put it bluntly: 'basically, we were taking the bread out of … [lawyers'] mouths and they didn't like that'.[65]

The related issue of how lawyers charge fees for mediation work was raised:

> they don't know how to build mediation work as a lawyer. And so, because it's true that billing for some waiting time, being silent during a mediation session it's not that easy … it could be difficult for a lawyer to understand how he or she could build a mediation [practice], particularly because mediation is not integrated in the business model …[66]

More provocatively, in pointing to the lucrative nature of running cases through traditional means, it was noted that '[lawyers] are obstructive because they see a case that's pretty mouth-wateringly profitable'.[67] Another said: 'you could understand that they have a financial interest in disputes lasting as long as possible'.[68]

Client resistance

Aside from the view that they might be put off by their recalcitrant lawyers, some interviewees referred to the resistance of would-be users themselves. Research has suggested that, with no guarantee of success, doubts about the value of third-party intervention and a perceived incompatibility with a disputant's desire to fight, mediation may be a hard sell in so far as potential participants are concerned.[69] Our interviewees also alluded to such issues.

One interviewee saw the reluctance to mediate as cemented within the business community in general:

> [I] had a discussion last week [with a lawyer] about mediation … It was clear to all of us on the call that he is frequently in conflict with his business masters and … the reluctance to mediate, that's not cultural or a country-based thing, that's just the way business people think.[70]

Another emphasised the mismatch between the compromise-based nature of mediation and a disputant's desire to win:

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63 To which the interviewee referred to as 'Appalling decline in revenue'.

64 Mediator 12.

65 Mediator 11.

66 Mediator 13.

67 Mediator 19.

68 Mediator 1.

69 Craig McEwen, 'Managing corporate disputing: overcoming barriers to the effective use of mediation for reducing the cost and time of litigation' (1998) 14 Ohio State Journal on Dispute Resolution 1.

70 Mediator 4.

> One of the sticking points, I think is that, when people become impassioned it is very hard to talk to them about what you might call a collaborative process of resolution. So, you have to get over the hurdle of the emotional impact, or the emotional entrenchment in order to produce the willingness to mediate.[71]

For another, the resistance to mediate stemmed from the personal nature of many disputes: 'if it is a case in which there is what I call a personal element, it is more difficult to get people to engage'.[72] Similarly, the lack of trust between some disputants was also cited as a barrier to uptake:

> [When] there is a significant lack of trust between the parties, most parties believe that the other is trying to drag out the process ... In circumstances where [one's opponent] is just trying to delay ... [and] is trying to keep me out of my money ... why on Earth should I agree to put things on hold?[73]

The lack of understanding of the value of third-party mediator intervention was also raised: 'I mean ... [clients] are reluctant. I like to think ... they see the value a neutral third party can add, whereas they ... [say], "well, why bother? why have a mediation? What are they going to add?"'[74] On a related note, another interviewee pointed to the difficulty in pinning down what mediation might entail:

> [Mediation] is a slightly an ephemeral process ... [and] very different from litigation or arbitration. There can be no guarantees of the outcome. They will be dealing with a mediator they may have not met before ... [Clients] say, is the mediator a judge? Will I get a result? So why the hell should I do it? what would it cost me? Jesus, you mean his fees are X?[75]

Standards

In many jurisdictions and also internationally, measures have been developed to establish and enhance common standards of mediation practice to aid the professionalisation of mediation and help gain parties' confidence in mediators. In some contexts, however, it has been suggested that a stifling factor for mediation's growth has been a lack of quality assurance, aided by the *laissez faire* approach traditionally taken to regulation in many jurisdictions.[76] Moreover, the Singapore International Dispute Resolution Academy (SIDRA) 2022 survey revealed that, while the panel size, expertise and cultural familiarity

71 Mediator 12.
72 Mediator 12.
73 Mediator 6.
74 Mediator 8.
75 Mediator 19.
76 Fach Gómez (n 34 above).

of mediators were important for parties choosing particular mediation institutions in international commercial mediation, respondents were not always satisfied with those aspects.[77] In our study, very few mediators identified concerns over standards as a barrier to developing mediation in the international commercial context. As one interviewee remarked: 'I think ... most of the law firms ... are pretty sophisticated and they've got a handle on who they use and who they trust and everything else. So, I don't think it's about "we couldn't find a mediator".' Such views are unsurprising. Our interviewees can be seen as elites operating in fields in which they may trade on their reputation in the market and general experience in mediation and related fields such as law.[78] It is also known that such elites may be neutral or indeed hostile towards the imposition of new standards in mediation as an unnecessary encumbrance on their activities.[79]

In respect of a specific question asked as to whether there should be endeavours to develop common standards for mediation practice across borders, while some mediators expressed more neutral or positive viewpoints with a view to helping promote consumer confidence,[80] many took the view that such steps may be impractical due to the disparate cultural practice norms for mediation found across different jurisdictions. One mediator put it this way:

> The work I've done mediating in different cultures has made it so clear to me that the efforts to over-standardize this will really suck the life out of mediation. I've worked with mediators who would not get accredited in this country because ... their approach ... would be regarded as, you know, off the wall or dangerous or whatever. But they're fantastically effective ... I'm not convinced ... that the international standards have found a way of capturing that.[81]

Another[82] said:

> [T]he first example that comes to mind is that conversation I have with my Californian peers. They do not know what a joint session is and I

77 Alexander et al (n 6 above) para 6.15. Similarly, respondents were not always satisfied with the quality of mediators provided in terms of such matters as industry/issue-specific knowledge, para 6.24.

78 All but one of our interviewees held professional accreditation qualifications, however, from bodies such as IMI, CEDR and Singapore International Mediation Institute. Indeed, many held multiple accreditations.

79 See Art Hinshaw, 'Regulating mediators' (2016) 21 Harvard Negotiation Law Review 163.

80 Some interviewees were keen to see uniform 'disclosure' standards develop pertaining to mediator style to help ensure the informed consent of parties to participate in the process, something already in train – see Universal Disclosure Protocol for Mediation.

81 Mediator 3.

82 Drawn from a European civil jurisdiction.

> don't know what a caucus is. So, what kind of standards are we going to have? Are you going to force me to do caucuses or are you going to force them to do a joint session? … So, the plan is to destroy my profession?[83]

SUPPORTING MEDIATION IN THE INTERNATIONAL COMMERCIAL SETTING

In terms of how to expedite use of mediation, a range of ideas were introduced by our interviewees. As one might expect, given the barriers to growth identified, education and profile-raising for mediation were commonly cited.

Education for lawyers

Many of the calls for greater educational developments centred on lawyers – not surprising based on the commonly espoused view that lawyers are the principal gatekeepers to growth.[84] Many interviewees across different jurisdictions focused on entry-level education for legal professionals. Some representative comments here include:

> I think lawyers should be required to have studied ADR or mediation as a condition of entry to the profession and that will then encourage universities to make it a compulsory subject in the law course.[85]

> Law faculties need to be doing more … Not to over sell [mediation] … but nonetheless familiarise people with [it].[86]

Educating in-house lawyers

In-house lawyers have been identified in the literature as central in the development of dispute resolution processes given the rise of their traditional role in many contexts and the bridge they can form between corporate decision-makers and external lawyers.[87] In this sense, some interviewees focused on the need to educate in-house lawyers, in particular. One interviewee noted that:

> the key people are in-house lawyers. They are the gatekeepers as far as I am concerned. If they have an education that starts at university … in conflict resolution, it is going to … grow the take-up of the process in a way which would be transformative.[88]

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83 Mediator 5.
84 See Fach Gómez (n 34 above).
85 Mediator 1.
86 Mediator 19.
87 Macfarlane (n 46 above); Herbert Smith Freehills and PWC (n 42 above).
88 Mediator 12.

Another called for:

> informing in-house counsel [of] the benefits because … they sort of 'own the disputes' in-house. If they are strong enough in comparison with the external lawyers … they could say … we always start with collaboration and dialogue so that is what I want from you [as external lawyers].[89]

Education about the qualitative benefits of mediation

Echoing findings from other research,[90] some comments referred to the idea that mediation was an extension of negotiation and that this should be a focus of education for lawyers:

> We've forgotten that the roots of mediation are in negotiation and that mediation [is] just an extension of negotiation … [Lawyers must be] prepared to master negotiation, and to recognise that the development of repertoire from the negotiation to other facilitated processes is how they can add enormous value to their clients. And unless we can have lawyers doing that, then I think that there are enormous barriers.[91]

Allied to this is the notion that mediation should not just be held up as an antidote to the ills of traditional dispute resolution processes but rather promoted on its own merits: As one interviewee put it, we should:

> [P]ublicise … the fact that mediation is much more than just about closing litigation. It is about restoring relationships, it is much more constructive, it can bring in anything … not directly in the pleadings … It is an awareness of that which might make mediation more appealing. It is a very pragmatic and flexible process, so it can adapt to different jurisdictions … It is very well suited for cross border disputes.[92]

Trends in educating lawyers

There have been significant changes in legal education over recent years with lawyers in many jurisdictions more conversant with mediation. Recent evidence tells us that mediation and dispute resolution courses are becoming more commonly taught in law schools globally. In India, for example, mediation has recently become a compulsory subject for all undergraduate law students.[93] Equally, UK law schools have made strides in teaching mediation and negotiation too.[94] Within Australia,

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89 Mediator 9.

90 Howard (n 10 above).

91 Mediator 17.

92 Mediator 7.

93 Letter from Bar Council of India to Vice Chancellors, 13 August 2020.

94 For example, the University of Strathclyde, Glasgow, offers free mediation services: 'Strathclyde's mediation services' (*Law School Mediation Clinic*, University of Strathclyde).

the 'civil procedure' subject is now called 'civil dispute resolution' and must include a focus on ADR.[95] Additionally, mediation advocacy and client representation within the process have increasingly been seen as distinct skills in their own right, with the development of new professional training courses, including those by the Standing Committee of Mediation Advocacy[96] and those accredited by the International Mediation Institute (IMI).[97]

Such educational shifts were reflected by some interviewees. One noted that there were, 'a lot of good initiatives going on. And I don't think it's one thing ... I see a completely different generation of lawyers coming out here in Singapore, for example, with very different attitudes to mediating.'[98] Similarly, in respect of their experiences of handling lawyers within mediation, many interviewees recounted positive instances of excellent lawyer advocacy and client representation, with some pointing to the educational gains that had been made in this field.

Educating clients

The need to educate potential users of mediation and to take the mediation message not just to 'law schools, but even business schools'[99] was also raised. According to one interviewee, 'I think it would be great if business schools start teaching about ADR. And people who are running businesses should be told about ADR.'[100] Another said, 'if you were looking to boost mediation, you would ... be doing more education on the client's side to get commercial bodies aware of the benefits of mediation'.[101] This notion of better selling mediation in a meaningful fashion to potential users is not a new one.[102]

Repeated use of mediation

Although there are demonstrable links between education and use, the link between experience and repeat use may be even stronger.[103] Getting people over the line the first time with a process seen as

95 See, for example, *Qualifications and Training*, Victorian Legal Admissions Board.

96 *Mediation Training Courses*, Standing Committee of Mediation Advocates.

97 *Criteria for Mediation Advocacy QAPs,* International Mediation Institute.

98 Mediator 14.

99 Mediator 12.

100 Mediator 16.

101 Mediator 12.

102 Some useful case study examples can be found in Anthony Connerty, 'ADR as a "filter" mechanism: the use of ADR in the context of international disputes' (2013) 79(2) Arbitration 120, 128–133.

103 In the Scottish context, see B Clark and C Dawson, 'ADR and Scottish commercial litigators: a study of attitudes and experience' (2007) 26(April) Civil Justice Quarterly 228, 236

a relatively untried and untested can be a challenge. This was a sentiment shared by some of our mediators in the sense of the importance of gaining the 'confidence of the clients who have experienced it but also again, the lawyers who have used it and they are willing to use it [again]'[104] Another said:

> [Y]ou know people have just got to know about the process ... It's absolutely incredible. If you do a mediation on the international scene and you do it well ... those people will come back.[105]

Mandating mediation

It is against this context of encouraging first use that there has been rising support for mandatory mediation[106] across the globe.[107] Indeed, in many jurisdictions, mandatory mediation has been implemented.[108] While there has been some encouragement of mandatory requirements in the cross-border commercial context,[109] others have noted that many international commercial disputes are often taken out of the formal justice system in any case by reference to arbitration and therefore mandatory court requirements to mediate may have little impact.[110] Nonetheless, in the context of growing general awareness of clients and lawyers of mediation to deal with disputes (many of which will likely occur in the domestic context), then for some interviewees, mandatory mediation holds an attraction:

> [o]ne thing that could help grow it, I think, is ... more mandatory mediation. And you can see from what's going on in the UK at the moment, they're very slowly moving in that direction ... Forcing unwilling parties into the room as distinct from forcing them to reach an agreement can be very helpful.[111]

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104 Mediator 4.

105 Mediator 8.

106 Mandatory mediation can take a number of forms. It may, for example, entail blanket diversion of cases to mediation as a pre-trial requirement, discretionary referral by a judge or other decision-maker or referral to an opening mediation information session.

107 For Australian examples, see Civil Dispute Resolution Act 2011 (Cth), as well as Retail Leases Act 1994 (NSW).

108 Including recent developments in England and Wales in small claims disputes. See Ministry of Justice Press Release, 'Faster resolution for small claims as mediation baked into courts process' (22 May 2024); and the English Court of Appeal in the case of *Churchill v Merthyr Borough Council* [2023] EWCA Civ 1416 which held that the court had the power to compel parties to engage in ADR processes – for a discussion, see B Clark and Z Kizilyuerk, 'Mediation: time to fly?' (2024) 174(8055) New Law Journal 19.

109 De Palo et al (n 26 above).

110 Howard (n 10 above)

111 Mediator 1.

Another interviewee, arguing for temporary compulsion,[112] said:

> I wanted mandatory mediation ... Let's do it for a period of two years, well, three years ... and after that you don't want to do it, that's fine off you go. But I reckon that would be enough to convince the public, the commercial [world] ... and indeed the lawyers.[113]

Such views support the notion that international commercial mediation is not hermetically sealed from mediation operating in other contexts. The idea follows that lawyers and users commonly deal with domestic disputes, and compulsion (and a positive experience therein) in one context will lead to voluntary uptakes in others.[114]

Other measures

Joined-up approaches

Reflecting the idea that not enough had been done to promote international commercial mediation in a unified manner,[115] interviewees called for joined-up measures to help grow the practice. Such developments are already in train. For example, some interviewees pointed to inter-governmental initiatives such as the United Nations Commission on International Trade Law (UNCITRAL) Working Group 3 meetings and developments in the Energy Charter Treaty field.[116] One interviewee noted that '[t]he best weapon is still the ICC [International Chamber of Commerce] who is doing an extraordinary job'.[117]

Another saw the need to bring all relevant stakeholders together:

> we get everybody to meet regularly ... together ... We need members of the legislature, members of the bench, we need lawyers, we need arbitrators, we need mediators ... We need think-tanks or ...[academics].[118]

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112 Don Peters, 'Can we talk? Overcoming barriers to mediating private transborder commercial disputes in the Americas' (2008) 41(5) Vanderbilt Journal of Transnational Law 1251.

113 Mediator 2.

114 Other interviewees expressed the view that mediation participation should never be mandatory.

115 One interviewee decried the "lack of networks" (Mediator 9). Another noted that "there is a tendency for mediation to still be very nationalistic in nature ... there's lack of coordination between key stakeholders ..." (Mediator 10).

116 Mediator 14. This interviewee also pointed out the difficulties for states (and at times private entities) of accountability in voluntarily signing-up to settlements and some of the protocols being developed within organisations to handle this issue.

117 Mediator 5.

118 Mediator 10.

Others talked about the role of 'mediation pledges':

> there are a lot of big companies, global companies that are really using mediation ... If they from time to time, make mediation pledges together ... saying 'we do this, it's great, try this', then the medium sized and the smaller ones will do the same.[119]

Contractual requirements to mediate

Interestingly, only one interviewee discussed ADR clauses in contracts.[120] That interviewee also said that in their experience parties were often reluctant to ask for an ADR clause in a contract for fear of being seen as weak, reflective perhaps of the cultural barriers of lawyers and disputants towards mediation.[121] The lack of reference to this mechanism is perhaps surprising given the fact that this idea has gained significant traction elsewhere as a way to normalise recourse to mediation.[122]

Online mediation opportunities

At the time of interviews, all interviewees were engaged in online mediations. Although there were mixed views about the utility of online mediation when compared with in-person settings,[123] most saw that it was likely to remain a key feature of the international commercial mediation landscape.[124] Moreover, some highlighted the opportunities that online mediation developments might hold for promoting mediation in this field given arising efficiency benefits in terms of savings in travel and accommodation as well as the process benefits that could arise, particularly through online pre-mediation activities.[125] Since the Covid-19 pandemic, when much mediation across different jurisdictions through necessity migrated to virtual platforms, online models have expanded rapidly with some seeing this as a way to grow the field.[126]

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119 Mediator 9.

120 In which parties agree if there is a dispute arising from the contract then they will first attempt mediation prior to engaging in litigation or arbitration.

121 Mediator 16.

122 Clark and Sourdin (n 61 above) 498.

123 Some interviewees did not believe, for example, that the nuances of in-person communication could be adequately captured in the online environment.

124 A full analysis of responses on these issues is available at Clark and Sourdin (n 29 above).

125 Many interviewees also pointed to 'green' benefits of online mediation.

126 CEDR, *The Tenth Mediation Audit: A Survey of Commercial Mediator Attitudes and Experience in the United Kingdom* (1 February 2023); David Sixsmith, 'The Covid-19 response as a mediation blueprint for the future? Mediators' perspectives on the shift to remote mediation in civil disputes' (2022) 7(1) Journal of Mediation, Theory and Practice 35.

THE ENFORCEABILITY OF MEDIATED SETTLEMENTS AND THE IMPACT OF THE SINGAPORE CONVENTION

Some four years in gestation, the Singapore Convention[127] was adopted by the UN General Assembly on 20 December 2018 and signed by 46 countries in Singapore on 1 August 2019. In short, the Convention seeks to undergird international commercial mediation with a unified enforcement regime in a similar vein to the New York Convention for arbitration. At the time of writing, the Convention has been signed by 57 countries although only ratified in 14.[128] The Convention has received a broadly favourable reception from commentators[129] with only a few dissenting voices to be found in the literature.[130] We wanted to specifically explore with all interviewees their perception of the impact of the Singapore Convention on mediation's future development and its underlying basis. We began by asking interviewees if non-enforceability of settlements brokered in mediation – the very issue the Convention seeks to tackle – was an issue they had encountered in practice.

Experience of settlements not enforced

It is clear from the responses that interviewees rarely experienced settlements not being honoured. The highest rate of non-compliance reported by any interviewee was 'in the course of the last five years, maybe twice the most'.[131] Many interviewees said they had never experienced a settlement that had consequently not been adhered to by the parties. Some commented that this related not only to international commercial mediation but all mediation settings within which they operated. One or two qualified these assertions with the caveat 'to my

127 UNCITRAL, United Nations Convention on International Settlement Agreements Resulting from Mediation, UN Doc A/Res73/198 (20 December 2018) art 14(1).

128 However, there has been a steady growth since the time these interviews were conducted.

129 See, for example, Eunice Chua, 'The Singapore Convention on Mediation – a brighter future for Asian dispute resolution' (2019) 9 Asian Journal of International Law 195; Gary Birnberg, 'Singapore Convention brings big changes for litigators and arbitrators' (*JAMS ADR Insights* 5 August 2019); Haris Meidanis, 'International enforcement of mediated settlements: two and a half models – why and how to enforce internationally mediated settlement agreements' (2019) 85(1) Arbitration London 49; Robert Butlien, 'The Singapore Convention on Mediation: a brave new world for international commercial mediation' (2020) 46 Brooklyn Journal of International Law 183.

130 Clark and Sourdin (n 61 above); Sherby & Co, Advs, The Singapore Convention: The Emperor's New Clothes of International Dispute Resolution.

131 Mediator 18.

knowledge', suggesting that there may be times when mediators are unaware of settlements subsequently breaking down.

In terms of the circumstances in which settlements had broken down, some mediators recounted rare examples. For one this occurred 'where one company went bankrupt unexpectedly'.[132] Another said, 'I can think of one case … in over 31 years of mediating … The US party was teetering on the edge of Chapter 11, right? The Italian party wanted a system of enforceability that protected against what happened.'[133] One mediator recalled a case of bad faith in negotiations which in their view no enforcement regime would combat:

> In 27 years, have I ever had a case that there was a problem about enforceability? the answer is yes, once … And if there were different enforceability powers, would that have changed it? My answer is no. That wasn't about enforceability. That was about one party simply not going to be bound by the outcome, they were too volatile.[134]

Reasons for compliance with mediated outcomes

Self-enforcing mediated settlements

Critics of the Singapore Convention have also alluded to the inbuilt mechanisms that can be included within agreements reached to ensure enforceability which may render an external enforcement instrument largely superfluous.[135] Some interviewees alluded to the different kinds of measures that can deployed here:

> where there are concerns, it is more often dealt with by way of the inherent structure of the terms [of the settlement] themselves … far more powerful if the terms are in effect reinforcing rather than externally enforced.[136]

> Sometimes we'll talk about security. You know personal guarantees, liens, etcetera.[137]

> if a company … has a concern over whether the other party is going to pay … [t]hey tend to take more formal security … and register that. So, they've got actually a form of enforcement, quite separate from any court process.[138]

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132 Mediator 10.
133 Mediator 3.
134 Mediator 12.
135 Clark and Sourdin (n 61 above); Sherby & Co (n 130).
136 Mediator 3.
137 Mediator 8.
138 Mediator 11.

> You can always get performance bonds and there are securities that you can get from each other and if proceedings are on arbitral proceedings, then the lawyers will often write into the settlement agreement … that they're not to be discontinued6 until payment has been made or the settlement agreement has been performed.[139]

The role of the mediator in ensuring durable settlements

The role of the mediator in supporting durable, workable settlements was also raised by some interviewees. One noted the importance of a mediator working with lawyers in this regard:

> If you give … [lawyers] very strict instructions and the parameters are narrow, they will [execute those terms] … But if your parameters are wide, they will go around just like a little puppy with a long leash … So, if the parameters are there and the lawyers themselves are drafting it and not the mediator, thank God they're more likely to adhere to it.[140]

Another noted the *responsibility* of mediators to support durable outcomes:

> I take responsibility for seeing in front of me. Is there something here? Is this a robust agreement? … I think it starts with the work that's done in mediation and the strength and the robust nature of the agreement that is set and … getting that commitment between parties.[141]

Another pointed to their preference for getting agreements executed fully in the short term:

> In order to avoid … problems in the execution of a mediation settlement agreement, I'm trying to push the parties to find a settlement which could be executed at once … because if [it] lasts too much you can be sure … that in a few months, few years after the settlement, some dispute will be back.[142]

Using mixed-mode approaches

Some interviewees also pointed to the availability of mixed-mode approaches to render mediated settlements binding, through 'arb-med-arb' approaches if parties, for example, want the protection of the New York Convention.[143]

One noted that:

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139 Mediator 15.
140 Mediator 16.
141 Mediator 2.
142 Mediator 13.
143 Ivo Deskovic, 'Arb-med-arb: a mechanism for dispute resolution not used enough' (*TaylorWessing* 27 May 2020).

> The other solution we have ... [is] a mediation within or during a pending arbitration ... [where] the Arbitral Tribunal ... suspends the proceedings and we ... appoint a mediator ... We can ask the arbitral tribunal to ... put the settlement agreement in the format of an international award ... in order to have ... international enforcement.[144]

Another interviewee said:

> in Singapore and other places there are protocols such as the Med-Arb-Med protocol and ... this is becoming a very sophisticated space ... Also, with international commercial courts you may be able to have your international mediated settlement take the form of a court order.[145]

Although some interviewees were more negative in their appraisal of these mixed-modes, regarding them as 'messy', others viewed med-arb approaches as straightforward. As one said, 'the way to handle that is really easy. You have agreement ... So, you can appoint an arbitrator to make it into a consensual award. So, what's the big deal?'[146]

Is there a perception issue regarding lack of enforceability of settlements?

Despite their lack of experience of real issues with enforceability in practice, there was some recognition that there may be a *perceptual* problem in that potential users and their lawyers may see possible pitfalls over a lack of enforceability of mediated settlements.

While many interviewees referred to this idea – in the words of one, 'the chilling effect that concerns around enforcement or lack of enforceability has'[147] – most commonly such concerns were thought to be held by lawyers. One interviewee noted that: 'I think there is a perception. I once heard a very senior internal council saying "if only mediation could have a New York Convention we would be using [it]".'[148] Another said, 'If you discuss mediation with a colleague, with a lawyer like a litigator or arbitrator, they say this sounds fantastic, good track record ... But, what about enforceability?'[149] Referencing the recent SIDRA survey,[150] one interviewee remarked that 'most of the concern about mediation and lack of enforceability comes from lawyers. And that's no surprise.'[151]

In terms of the rationale behind such a perception, some interviewees blamed ignorance of the mediation process:

144 Mediator 13.
145 Mediator 14.
146 Mediator 16.
147 Mediator 15.
148 Mediator 8.
149 Mediator 9.
150 Alexander et al (n 6 above).
151 Mediator 14.

> In the endless torturous discussions that led to … UNCITRAL to get to the Singapore Convention there was a lot of chat about this and I regularly heard in the early days, 'oh well there is no take up because the agreement is not enforceable' … The trouble with the whole UNCITRAL process was that … 80% of the people talking about it never had the first idea what mediation was and had no experience of it. 20% who were a mix of people who thought it was a good idea or a bad idea. In the end, it all prevailed and [it was] decided that the Convention would increase the take up.[152]

This notion that the views of potential users and lawyers regarding non-enforceability may arise from an uninformed position and a conflation of the mediation process with arbitration has been made in the literature.[153] The importance of speaking from experience was made by one interviewee:

> [In] studies coming out of Germany … qualitative interviews with … CEO's, decision makers who'd been involved in mediations … what really struck me [was] … they were saying actually we mediate … and we don't have any issue with the absence of a direct enforceability mechanism, right. We know there's a risk with mediating but there's a risk with arbitrating, there's a risk with litigating and even if we get a decision we might not get our money or our assets or whatever it might be. And we have good experiences typically with mediation. The risk is minimal …[154]

The wider benefits of the Convention

Limited impact

A minority of mediators felt that take-up of the Convention was not strong enough for it to be impactful in practice. In the words of one, '[w]ith nine notifications? Forget it.'[155] Another thought that 'the Singapore convention will take 5 to 10 years before its effectiveness can be actually realised. The tipping point I mention, I think is when US and China sign up.'[156] Another described the Singapore convention as:

> Just a baby … it has been implemented in the national legal system of very few countries so it will take a lot years … we have to work on it, hope, and lobby for countries to adopt this new system.[157]

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152 Mediator 19.
153 Clark and Sourdin (n 61 above).
154 Mediator 14.
155 Mediator 16. Since this interview was conducted there have been a further five ratifications.
156 Mediator 18.
157 Mediator 9.

Assuaging the doubters

Despite the lack of evidence that enforceability of settlements is an issue in practice, most mediators we interviewed were nonetheless in favour of the Convention, principally as a way to win over the doubters. As one put it, 'the easier it is to enforce a settlement, the more attractive the process would be'.[158] Another said: 'I look at it this way, I think it will have two tiers of impact. The first tier probably has already been largely felt and that's giving confidence to [users to recognise] mediation as an international dispute resolution tool.'[159]

Publicity

Harking back to the need for further promotion of mediation in the cross-border setting, many mediators noted the potential boon arising from the publicity and profile-raising the Convention had given mediation. One interviewee, 'a big supporter of the Singapore Convention', noted that 'I think it's really helpful, but not necessarily for the reasons why it's been touted. I think it's great as an awakening, as a discussion, as part of I'd say, the marketing of commercial mediation at an international level.'[160] Another said: 'It is very welcome in the mediator community … Anything that promotes the values of mediation including enforceability, the fact that it works very well cross border is valuable. I welcome it.'[161] A third was 'open to the possibility that it will give mediation a greater profile. It will give [users] something to hang their hats on, maybe to encourage clients or lawyers'.[162]

Legitimacy and credibility

Many interviewees viewed the impact as going beyond mere publicity, however. Rather, they pointed to the increased *legitimacy* and *credibility* that mediation (and mediators) may gain from the Convention. Underlying this view was the sense that mediation has 'grown-up' and can now compete on the international stage with litigation and arbitration. As one interviewee said, the Convention is 'an exercise in credibility'.[163]

For another, this credibility was 'in the eyes of a general counsel who knows nothing about mediation'.[164] Another interviewee recounted a tale in which they:

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158 Mediator 1.
159 Mediator 18.
160 Mediator 10.
161 Mediator 7.
162 Mediator 4.
163 Mediator 3.
164 Mediator 8.

> Had an e-mail yesterday from a friend … who's doing some work in Kazakhstan and she said the Kazakhs have just ratified [the Convention] … I think the fact that the government have ratified an International Convention, will automatically make you think that mediation is somehow … more built into the … fabric of the system.[165]

Others referenced the power of 'institutionalisation' or 'regulation' of the process. One viewed that the Convention 'has created opening of the mind about mediation. Suddenly, it makes mediation something that is institutionalised. And that probably has drawn a lot of interest for people who were not completely aware of it.'[166] For another, '[i]t's in the nature of things that people like regulation of one sort and another. And they like the ability to be able to point to something.'[167]

Some mediators specifically referred to mediation now standing shoulder to shoulder with more traditional mechanisms:

> I think the Singapore Convention … [is] providing a sense of confidence … particularly for lawyers … I think the impact already is that it's given a lot more visibility, a lot more credibility and a lot more legitimacy … and being … on the same playing field is arbitration and litigation …[168]

Concerns about the Convention

From our interviewees' responses we get a sense that the referencing to lending 'legitimacy' or 'credibility' to mediation or increasing its 'institutionalisation' is designed to appeal primarily to those who remain on the fringes of the process and currently inhabit more traditional forms of dispute resolution. This notion may support the idea that the commonly espoused benefits of informality and flexibility of mediation or its inherent 'lawlessness', seen as attractive by some users of mediation,[169] may in fact be perceived as weaknesses by potential users more comfortable with traditional dispute resolution domains. We caution that, in rushing to embrace legitimacy-raising measures and playing to the concerns of the uninitiated, the qualitative benefits of mediation are not overly compromised. In this sense, a minority of our interviewees referred to negative consequences discussed below.

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165 Mediator 3.

166 Mediator 5.

167 Mediator 11.

168 Mediator 14.

169 See Lenka Holá, Martina Urbanová and David Fiedor, 'Mediation and the degree of its institutionalization in the Czech Republic within the context of the development of the discipline in Europe' (2021) 38(4) Conflict Resolution Quarterly 387; and Alexander et al (n 6 above).

Challenges to enforcement

Some mediators we interviewed, including those who espoused generally positive views, harboured fears around potential negative impacts of the Convention. Some concerns focused on the potential for parties to seek avoidance of mediated outcomes on the basis of alleged misconduct of the mediator. By dint of Convention articles 55(e) and (f) a court may grant relief pertaining to circumstances in which there has been either a 'serious breach of mediator standards' or 'a failure by the mediator to disclose to parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence'. In this regard, one interviewee noted that, '[a] concern … I have is that one of the grounds for resisting enforcement in the Convention is the alleged misconduct of the mediator. That sort of opens up the mediator to being dragged into a continuing dispute over enforcement.'[170] Another said:

> I think [the Convention] is a very great pity … for a whole variety of … reasons, including … 'how can I get out of it being enforced and sue the mediator for malpractice?' and … just simply opened a Pandora's box of things which shouldn't have been part of where mediation is in the present time …[171]

These grounds for challenging enforcement have been the subject of much discussion in academic circles with some commentators seeing it as a way in which parties and their lawyers may seek to avoid settlements reached in mediation.[172] Other scholars have pointed out that the bar for challenge is high and thus in practice not likely to prove problematic in practice.[173]

One specific problem recognised in the literature is that a scenario may arise where the court of enforcement may seek to apply standards which differ from those applicable to mediators drawn from different jurisdictions.[174] As reflected by one interviewee,[175] there are no commonly accepted international standards, and indeed different mediation practice norms may be found in different jurisdictions.[176] Another said:

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170 Mediator 1.

171 Mediator 19.

172 Clark and Sourdin (n 61 above)

173 See Feehily (n 9 above); Karl Mackie, 'Another historic step for mediation' (*LinkedIn Pulse* 8 August 2019).

174 See discussion in Ben Kohler, 'Blaming the middleman? Refusal of relief for mediator misconduct under the Singapore Convention' (2023) 19(1) Journal of Private International Law, 42.

175 Mediator 3.

176 Connie Peck, A Manual for UN Mediators: Advice from UN Representatives and Envoys (United Nations Institute for Training and Research 2010).

> [Where] enforcement is being contested … [parties will] be looking for a route out and the likely easy target … is going to be the mediator. So, people are going to say oh well, the mediator was rubbish … If the net effect … [is] that mediators get trashed in front of domestic courts by parties who want out of the deal they willingly did, that doesn't sound to me like a great outcome … I think something like, a sort of robust discussion with the mediator about risk, which … features in a lot of our work and is quite an important part of the process, in some jurisdictions that could easily be construed as inappropriate pressure, being brought to bear. Well, I mean, who's to judge?[177]

Another interviewee made the more general point that the presence of the Convention may concentrate the parties' minds on the possibility of non-enforcement:[178]

> If you said to people going into mediation have you thought about the Singapore Convention? Instantly you are mucking about in people's negotiation positions … They will head off to the undergrowth … concerning themselves with that.[179]

Breaching confidentiality

The potential negative consequences for mediation in terms of breaching confidentiality were also noted:

> I think the issue that will arise [is] … the extent to which jurisdictions say, well, we can actually look into this and breach … confidentiality … The more international mediations take place, the more that's likely to become an issue because different countries have very different concepts of confidentiality … Some countries probably feel they can open up the mediation without any concerns. Others will regard the mediation as sacrosanct.[180]

Creativity of outcomes

Another interviewee referenced the creativity of outcome possibilities in mediation and the implications the Convention may hold for enforcement in this regard:

> we're going to have to be clearer of which parts of the agreement belong in the consent award and which parts of the agreement belong in the settlement agreement. Because one will be enforceable and accepted as kind of subject matter that you will have the authority to decide. So yes, you can put that in your Convention, but there will always be things in the mediations that I've seen where there are some cultural

177 Mediator 4

178 See Clark and Sourdin (n 61 above).

179 Mediator 19.

180 Mediator 11.

> or friendly or kind of other things that the tribunal would say we can't enforce that.[181]

Juridification

Finally, some mediators were concerned more generally about the juridification of mediation that may result from the Convention's further application and the negative implications this may hold for fluidity and flexibility in the process.

One put it this way:

> Be wary of applying legalistic thinking, the structures and institutions of the legal process, the civil justice process to mediation ... [This may] institutionalize mediation yet again as part of the litigation and civil justice culture. And we actually end up ... with mediation losing its way, the baby gets struck out with the bathwater. It actually might lose its shine, and it might lose its attraction for others because of the way it becomes presented.[182]

Another put it more pithily: 'it's just ... more regulation of mediation when we were a free and wild profession'.[183]

CONCLUSION

This article has reported on some aspects of our study into the views and experiences of international commercial mediators with a focus on the future development of mediation in this setting. Our mediators present a diverse range of views on a spate of issues. In short, the main findings are that their perception is one of mediation remaining underused relative to its potential, on the fringes still of mainstream disputing culture, and in the wake of its traditional alternatives of litigation and arbitration. Ignorance or at least a sophisticated appreciation of the wares of mediation is seen to remain of great import, with cultural dissonance with lawyers – as gatekeepers – seen as the main obstacle to proper development. Although recent commentary has cited lack of assured standards as a potential stumbling block to international commercial mediation's growth,[184] few interviewees saw this as an issue, with the market generally being seen as sophisticated enough to ensure recruitment of high-quality mediation practitioners. The majority of interviewees did not support the development of common standards for international mediation practice either, viewing the practice base as too diffuse.

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181 Mediator 10.
182 Mediator 4.
183 Mediator 8.
184 Fach Gómez (n 34 above)

Education and profile-raising were seen as key for our interviewees in helping to grow the field, with a significant emphasis placed again on awareness-raising for lawyers and would-be participants, including entry-level professional education. In-house counsel were seen as an especially important group in helping drive forward developments in this area. There is some correlation with the views found in other research[185] that lawyer education should focus on the idea that mediation represents assisted negotiation and emphasis placed on the qualitative benefits of the process, rather than selling it as an alternative to traditional means of dispute resolution. Other interviewees saw enhanced roles for government, industry groups and wider constituencies of stakeholders in helping grow the practice base. The data also suggest that international commercial mediation's fate is tightly bound to its journey in domestic matters where familiarity and cultural acceptance of lawyers and users can first take root and then grow into the cross-border domain. In this sense, mediation's journey lies on different trajectories in different jurisdictions. Cultural differences were observed, with some interviewees pointing to the varying levels of receptivity of mediation within different jurisdictions, caused for example, by integration of mediation within the domestic legal system, the need to avoid traditional justice systems (because of costs or delays) or acceptance by local lawyers.

Our mediators did not consider that non-enforceability of settlement was a real barrier to take-up of mediation in this space although many believed that a perceptual barrier in this regard was prevalent, particularly within the legal profession. In this sense, the recent Singapore Convention was largely well received by our interviewees even if most saw it mainly of symbolic significance and a way to greater publicise mediation and imbue the process with more credibility and legitimacy. A minority raised concerns about the potential drawbacks of the Convention, especially around potential challenges to settlements based around mediator misconduct and the general impact of further juridification of the mediation process that the Convention may herald. This is especially relevant in the face of evidence in our study of traditional, adversarial lawyering practices taking place in this realm and the danger that the post-Singapore Convention environment may further encourage this very behaviour. Not many interviewees recognised these potentially negative consequences, but as successful purveyors of mediation services it is perhaps unsurprising that they may focus on the short-term fillip that the Convention may provide in terms of increased demand for their services rather than more negative, potential future impacts.

185 Howard (n 10 above).

In terms of the impact of all these measures, some interviewees reflected the need to create a paradigm shift in which mediation becomes the norm:

One mediator put it this way:

> [A]ll the steps taken for marketing mediation and discussing mediation ... [are] small steps towards bigger steps towards that paradigm shift ... if you compare with the paradigm shift when it comes to electric cars, you have to come to a point where it tips over and all of a sudden everyone wants electric cars. Hopefully, during my lifetime, many companies in dispute, they want mediation because they understand and know the benefits so that's the big thing.[186]

In making that paradigm shift for mediation, we would caution, however, that some of the core essences of the mediation process are not lost along the way. Yes, normalising and legitimising the process and rendering it more palatable to the principal gatekeepers is important. But this is a two-way street. It should be recognised that the lawyer's role within mediation is quite different to that in traditional adversarial processes and calls for a shift in their mindset and a less central role, rather than a tightening of the process to fit their preferred mould. Most of our interviewees expressed the view that mediation was not an homogeneous process. Thus, the field should support varied practice models and resist stringent regulation. It remains to be seen if the increasing juridification of mediation is consistent with this goal.

186 Mediator 9.