
BARRIERS TO ENFORCEMENT OF MEDIATED SETTLEMENT AGREEMENTS IN CROSS-BORDER COMMERCIAL DISPUTES: A COMPARATIVE STUDY

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1. Introduction

Due to globalization, the growth of international commerce, and the interconnectedness of financial systems, cross-border business conflicts have grown more frequent. Today's businesses sometimes operate in many countries, resulting in intricate contractual arrangements. Due to its flexibility, anonymity, and affordability as compared to litigation or arbitration, parties often choose Alternative Dispute Resolution (ADR) processes, especially mediation.

In most cases, mediated settlement agreements are regarded as legally enforceable contracts. Their enforcement across countries has always been questionable, in contrast to arbitral rulings. When parties to cross-border business disputes are situated in different nations with disparate legal systems and enforcement standards, this poses a serious problem. The efficacy of mediation is often compromised by the lack of a consistent enforcement mechanism. An important step forward in resolving enforcement concerns was the adoption of the Singapore Convention on Mediation in 2019. It offers a consistent structure for international mediated settlement agreements to be recognized and enforced. Not all nations are signatories, however, and obstacles are still caused by disparities in national legal systems. Although India's domestic mediation enforcement tools have been reinforced by the Mediation Act, 2023, cross-border enforcement is still dependent on international treaties and foreign authorities. For business partners involved in foreign commerce with Indian firms, this causes uncertainty.

Different techniques to enforcing mediated agreements have been implemented by comparative legal systems including the United States, the United Kingdom, and the European Union. Some include mediation with court-backed procedures, while others depend on contractual enforcement. These variations demonstrate the dispersed worldwide strategy for enforcing

mediation. Classifying mediated settlement agreements as contracts, consent decrees, or quasi-judicial rulings is one of the main issues. Enforceability in foreign jurisdictions is directly impacted by this categorization.

The lack of procedural consistency in mediation techniques between jurisdictions is another problem. Enforcement resistance in foreign courts is often caused by disparities in secrecy regulations, mediator accreditation, and procedural protections. Refusal of enforcement is also heavily influenced by public policy reasons. Even if the agreement is legitimate in the nation of origin, courts in many countries may refuse to execute mediated settlements if they contravene local public policy requirements. Through a comparative perspective, this study critically investigates the obstacles to the execution of mediated settlement agreements in cross-border commercial disputes. It focuses on institutional, legal, and procedural issues and suggests changes for a more uniform international framework.

2. Hypothesis

The lack of an uniform international enforcement mechanism can thus give rise to tremendous legal and procedural challenges for the efficient implementation of mediated settlement agreements in trans-border commercial disputes.

In *International Commercial Mediation*, Nadja Alexander discusses the increasing relevance of mediation as a means to solve international commercial disputes and addresses the legal challenges in enforcing mediated settlements across jurisdictions. The author looks at the benefits of mediation (flexibility, confidentiality, maintenance of commercial relationships and the lack of a uniform international enforcement option) and critically assesses the lack of a uniform international enforcement option.¹

The arbitration aspect of Gary Born's work is his strength, and it offers usefully comparative insights into the enforcement mechanisms of the international dispute resolution systems. The author thoroughly explores how effective the New York Convention is in ensuring enforcement of arbitral awards versus the more limited regime that existed for mediation awards in the past. The book provides explanations for the enforceability of international dispute resolution systems preferred by international business, and the significance of certainty in international disputes. Born was no exception to the rule that comparative observations help to explain the

¹Nadja Alexander, *International Commercial Mediation* 45–67 (Kluwer Law International, 2009).

need for international reform to enforcement of mediation mechanisms through the Singapore Convention.

In this article, Laurence Boulle and MiryanaNesic explore the theoretical and practical aspects of mediation, with a focus on commercial dispute resolution. The authors examine the principles of mediation, such as voluntariness, neutrality and confidentiality, as well as legal aspects of enforcing the settlement agreements.²

In this article, Timothy Schnabel discusses the impact the Singapore Convention has had on the development of an international regime for the enforcement of mediated settlement agreements. The goals and scope of the Convention, as well as the enforcement provisions are explained, and the grounds for refusing enforcement are analyzed.³

3. Implementation of the mechanisms in other jurisdictions.

3.1 United States Approach

The US adheres to a more contractual approach to settling a mediated settlement agreement. Generally, these agreements are regarded as legally binding contracts when they are validly made by mutual consent, offer, acceptance and consideration. But in contrast to arbitral awards of the Federal Arbitration Act, settlements negotiated by mediation do not necessarily have direct enforcement status. Rather, the aggrieved party will have to pursue an independent enforcement action in a competent court in case one of the parties breaches the agreement.⁴

In the United States, the common law approach to contract law is normally used in cases that are brought before courts and involve a dispute that has been resolved by a mediated settlement. This implies that other concerns like validity, capacity, duress, fraud, or misrepresentation could be reviewed prior to enforcement being awarded. Although this will guarantee certainty in the law at the domestic level, it also creates a redundancy process in the way procedures are conducted because parties need to re-litigate parts of the settlement agreement in the enforcement process.

An important aspect of the U.S. system is the judicial promotion of settlement agreements by

²Gary Born, *International Commercial Arbitration* 201–230 (3rd ed., Kluwer Law International, 2021).

³Laurence Boulle & MiryanaNesic, *Mediation: Principles, Process and Practice* 132–150 (Butterworths, 2010).

⁴Mauro Rubino-Sammartano, *International Arbitration Law*, Kluwer Law International.

mediation, in civil and commercial disputes. Court-annexed mediation programs are frequently referred to by the federal and state courts. After a settlement has been achieved, the terms can be included into a consent judgment by the courts and the personal agreement will be transformed to an order that can be utilized in courts. This is a hybrid solution that enhances enforceability but still requires court intervention⁵Dorcas Quek Anderson discusses the provisions for enforcement of the Singapore Convention and contrasts these with enforcement processes under arbitration. The article examines the reasons for refusal of enforcement (incapacity, public policy and mediator misconduct). The author points out the practical challenges that may occur because of the interpretation of the domestic courts and stresses the importance of uniformity in the interpretation of the Convention in order for it to be successful. The article helps people to comprehend the ongoing legal challenges to cross-border mediation

3.2 United Kingdom Approach

United Kingdom: United Kingdom follows a similar contract-based approach to enforcing mediated settlement agreements. Such contracts are usually regarded as binding contracts in the UK as long as they meet the necessary requirements of a contract formation that is to include offer, acceptance, consideration as well as the intention to establish legal relations. When these conditions are satisfied, the agreement can be enforced according to general contract law.

The aggrieved party has to initiate an action in breach of contract before the civil courts in the event of breach. The courts then decide on the existence of a valid settlement agreement and whether this agreement has been breached. This would make the settlements reached through mediation legally binding, although there is no one to do what the United States does which is to proceed with further litigation in the event of non-compliance.

The UK system is unique in that it uses consent orders, and the terms of a mediated settlement may be formally entered into by a court. The settlement, after being transformed into a consent order, becomes a court order and is therefore directly enforceable by the execution processes. The mechanism is effective in enhancing the enforceability of the mediated agreements in the domestic jurisdiction.

⁵Dorcas Quek Anderson, The Enforcement of Mediated Settlement Agreements under the Singapore Convention, 20 *Cardozo Journal of Conflict Resolution* 1017, 1025–1044 (2019).

The UK courts have continually been advocating mediation as a preferred dispute resolution mechanism particularly in business disputes. Courts will usually suggest that parties should resolve disputes by using mediation and may impose sanctions on parties who will refuse to use ADR unreasonably. This judicial support improves the effectiveness of mediated settlements in practice. Nevertheless, when it comes to cross-border disputes, enforcement issues are not any better than in other jurisdictions. Even though consent order enhances domestic enforceability, the international recognition remains subject to the laws of the enforcing jurisdiction. There is no single enforcement treaty specifically on mediated settlements and therefore there is always the risk that the UK-mediation arrangements would be doubted in a foreign country, especially where the results of the mediation are not directly enforceable instruments.

4. Barriers to Enforcement

4.1 Inconsistent Recognition of Law.

Lack of consistent legal recognition across jurisdictions is one of the greatest obstacles to the enforcement of mediated settlements in cross-border commercial disputes. Law systems have varying conceptual approaches to mediation results. Whereas in common law jurisdictions like the United States and the United Kingdom most mediation settlements are considered as a private contract, in civil law jurisdictions such as the United States such settlements frequently need further judicial sanction to enforce. This deviation brings ambiguity as to the lawfulness of such agreements in cases where parties want to enforce them in a foreign jurisdiction. In the chapter titled 'The Global Trend Towards Mediation Rather Than Arbitration and Litigation in International Commercial Disputes', S.I. Strong examines the growing global trend toward mediation as an alternative to arbitration and litigation in international commercial disputes. It explores the benefits of mediation in economic and relational terms and highlights enforceability as a key challenge for mediation to become a widely accepted method.⁶

The non-uniformity creates inconsistent enforcement criteria. In certain jurisdictions, a mediated settlement is enforceable as a contract per se, but in others, it has to be transformed into a consent decree or court order. Such a procedural difference poses uncertainty to international business entities that use mediation as a last-resort dispute resolution method. This

⁶S.I. Strong, Beyond International Commercial Arbitration? The Promise of International Commercial Mediation, 45 *Washington University Journal of Law & Policy* 11, 20–39 (2014).

was indirectly captured in the case of *Bhatia International v. Bulk Trading S.A.*⁷ that identified the significance of party autonomy in international business dealings, but also noted that there were complexities in international business dealings due to the differences in procedural laws in different jurisdictions.

In the same case, due to the recognition of foreign awards in *Renusagar Power Co. Ltd. v. General Electric Co.*⁸, the Court stressed that the foreign award should be consistent with the domestic legal standards to be enforced, which supports the notion that recognition relies heavily on the jurisdiction-related demands. This also applies to mediated settlements without a consistent international system. Therefore, the lack of harmonised legal recognition is still a root cause of a lack of reliability and predictability of mediation as a cross-border dispute resolution mechanism.

4.2 Lack of Binding International Framework.

Even though the Singapore Convention on Mediation (2019) was developed to offer a consistent legal framework on the application of international mediated settlement agreements, the effectiveness of the Convention will be limited since not all countries have signed the Convention yet. The Convention has not been signed by many large commercial jurisdictions and has not been fully applied by them, thus limiting its universal applicability.

The Convention seeks to establish equality between mediated settlements and arbitral awards under the New York Convention in terms of their enforceability. But in reality it is diffused. Until it has become widespread, parties cannot be confident that a negotiated settlement will be enforceable in all jurisdictions concerned in cross-border transactions.

The significance of a binding international framework can be indirectly observed in the case *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*⁹ when the Supreme Court supported the validity of arbitration agreements and awards by international standards, stating that uniformity through treaties is the key to effective resolving of cross-border disputes. The argument underscores the issue of enforceability whereby it relies on internationally recognized structures.

⁷(2002) 4 SCC 105

⁸(1994) Supp (1) SCC 644

⁹(2017) 2 SCC 228

4.3 Public Policy Exceptions

Another significant barrier to the enforcement of the mediated settlement agreements in cases of cross-border disputes is the issue of public policy. Courts in a different jurisdiction may decline to enforce a valid agreement when the agreement is under the law of a different jurisdiction, even though the agreement is valid under that law. This introduces ambiguity and uncertainty to international enforcement. In most jurisdictions, public policy exceptions are widely construed, and courts have a wide power to decline to enforce. This covers instances of illegality, fraud, breach of statutory requirements or agreements that are considered to be against the basic tenets of justice or morality. Consequently, even the consensual mediated settlements can be nullified at the enforcement phase.

The mediation of cross-border business disputes has been experiencing a gradual change in the admissibility of the mediated agreements because of the growing acceptance of the mediation as a major form of dispute resolution. Nevertheless, even with these developments, the system has not been totally integrated and implementation has still been largely reliant on local legal frameworks. The progressive process of harmonisation is being observed, although it remains partial and uneven among jurisdictions. The increased role of institutional mediation structures is one of the most significant modern phenomena. International commercial institutions such as the International Chamber of Commerce (ICC) and Singapore International Mediation Centre (SIMC) have started standardising mediation procedures. The purpose of these institutional structures is to enhance trust in mediated outcomes by promoting neutrality, procedural fairness, and accreditation of professional mediators and indirectly enforceability.

This doctrine is applicable in the case of *Renusagar Power Co. Ltd. v. General Electric Co.*¹⁰ wherein the Supreme Court of India stated that the foreign awards may not be enforced in case they are against the public policy. The Court on its part interpreted the public policy narrowly in order to avoid overindulgence in judicial intervention. This argument can also be applied to cross-border mediated settlements. In *Vijay Karia v. Prysmian Cavi E Sistemi SRL*¹¹, the Supreme Court also explained that the objections based on public policy must be viewed in a limited manner, and they cannot be refused based on insignificant factors. This ruling upholds the restraint in using the public policy exceptions in international commercial enforcement.

¹⁰(1994) Supp (1) SCC 644

¹¹(2020) 11 SCC 1

Although judicial authorities have attempted to confine public policy application, there is still a lot of confusion in its application especially in cross border mediation where cultural, legal and regulatory distinctions are high.

Eunice Chua discusses the implications of the Singapore Convention and the extent to which it is likely to resolve some of the common issues that have been raised about the enforceability of mediated settlements. Despite the Convention, the article stresses that there are several obstacles that can still hinder its implementation, including inconsistencies in procedural matters, judicial discretion, and public policy exceptions.¹² Manon Schonewille presents the evolution of commercial mediation in international business transactions and explores institutional and legal issues that arise in practice. The article addresses matters of enforceability, differences in culture, flexibility in procedure and the ethics of mediators in cross-border conflicts.¹³

4.4 Procedural Differences

Another significant issue to implement the mediated settlement agreements internationally is the procedural differences of the jurisdictions. The practices of mediation differ greatly among the countries in the form of procedure, level of confidentiality, credentials of mediators, and institutional arrangements.

The Supreme Court of India in *BALCO v. Kaiser Aluminium Technical Services Inc.*¹⁴ stressed the significance of considering procedural autonomy in the process of resolving international disputes, although at the same time indicated that uniformity in the standards of enforcement is necessary.

4.5 Jurisdictional Conflicts

The jurisdictional issues in cross-border disputes between the two countries concern which is the proper venue to enforce the mediated settlement agreements. In global business dealings, parties will tend to be in more than one jurisdiction, which results in overlapping jurisdictional

¹² Eunice Chua, *The Singapore Convention and the Enforcement of Mediated Settlements*, 36 *Arbitration International* 157, 163–180 (2020).

¹³ Manon Schonewille, *Commercial Mediation and International Practice*, 34 *Conflict Resolution Quarterly* 245, 252–270 (2017).

¹⁴ 2012 9 SCC 552

claims. This brings about legal ambiguity on the area where enforcement proceedings should be filed.

Lack of a clear jurisdictional framework to enforce mediation is likely to lead to forum shopping, where parties seek to choose jurisdictions that are more conducive to their case. This compromises predictability and inflates the cost of litigation in transnational disputes. Joel Lee and Anselmo Reyes offer an in-depth examination of the Singapore Convention on Mediation and how it will enhance the enforcement of international mediated settlement agreements. The authors compare the Convention to the regime for enforcing the New York Convention and consider its role to encourage international commercial mediation.¹⁵

Bhatia International v. Bulk Trading S.A. (¹⁶the Supreme Court of India discussed the jurisdiction in international commercial arbitration and emphasized the difficulties that emerge when more than one jurisdiction is concerned. The argument applies to the enforcement of mediation, where the same ambiguity of jurisdiction can be found.

In *BALCO v. Kaiser Aluminium Technical Services Inc.*¹⁷, the Court further explained the principle of territoriality in arbitration, stressing that the jurisdiction is directly related to the seat of arbitration. But this is mostly lacking in the mediation enforcement systems.

Moreover, the case *Centrotrade Minerals and Metal Inc. v. Hindustan copper Ltd.*¹⁸ indicates the significance of the autonomy of parties in choosing the methods of dispute resolution, but it also shows that conflicts of jurisdiction may occur when one of them seeks enforcement in a different legal regime. Consequently, the enforcement of mediated settlement agreements in cross-boundary disputes is greatly complicated by the issue of jurisdiction, and even greater efforts are required to develop more concise international guidelines and harmonised legal systems.

5. Suggestions

First, nations ought to ratify more of the Singapore Convention to Mediation in order to

¹⁵Joel Lee & Anselmo Reyes, *The Singapore Convention on Mediation: A Commentary* 88–110 (Wolters Kluwer, 2022).

¹⁶2002) 4 SCC 105

¹⁷(2012) 9 SCC 552

¹⁸(2017) 2 SCC 228

establish a common international enforcement system. The broader involvement will minimize jurisdictional differences and improve legal predictability in intercountry cases.

Secondly, international mediation standards should be aligned with domestic laws. Nations ought to consider enacting explicit legal frameworks that define the agreements reached through mediation as binding tools that are cognizant to arbitral awards.

Thirdly, the training of the judiciary should be upgraded so that the courts are well placed to deal with issues of cross-border enforcement of mediation. This consists of knowledge in international treaties and comparative law.

Fourthly, to establish trust in international enforcement regimes, institutions need to standardise the mediation processes, such as the accreditation and confidentiality rules of mediators. Lastly, the parties that are involved in international contracts ought to have distinct mediation provisions that define the jurisdiction of the enforcement and the law that ought to apply in order to prevent future conflicts.

6. Conclusion

Mediated settlement agreements enforcement on cross-border commercial disputes is an area of dispute resolution that is still developing and very tricky. Although mediation has a lot of benefits in terms of speed, cost and confidentiality, the effectiveness of this method is constrained by the difficulties in enforcing it across jurisdictions.

There has been no standard international system that mediated settlements are treated differently, thus lowering their effectiveness in international trade. The Singapore Convention on Mediation is an excellent move towards the right direction, but it will only be effective with the adoption and implementation of it by a large number of people.

Comparative study reveals that although jurisdictions such as the US, UK, and EU have established partial enforcement mechanisms, fragmentation is still present. This leaves international businesses that have mediation as a means of resolving disputes in doubt.

To overcome these hurdles, global legal harmonisation, more robust institutional designs, and expanding the participation of the treaty is necessary. In the absence of these reforms, mediation in cross-border business disputes will still have its potential curtailed due to the

barriers to the enforcement of mediated settlements.

Finally, reinforcement of enforcement mechanisms will bring more confidence in mediation as a primary form of international commercial dispute resolution and facilitate facilitation of easier international trade relations.

The continued evolution of international commercial mediation also depends on how states integrate the Singapore Convention on Mediation into their domestic legal systems. Even in countries that have signed the Convention, effective enforcement requires enabling legislation, judicial awareness, and procedural clarity. Without proper domestic incorporation, the Convention risks remaining symbolic rather than operational, limiting its ability to resolve real enforcement challenges in cross-border disputes.

Another important development is the increasing reliance on hybrid dispute resolution

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