INTERNATIONAL COMMERCIAL MEDIATION & ADR Framework

Roles & Responsibilities

Mediation Landscape

Construction, manufacturing, and energy industries are facing a range of challenges that are causing delays and uncertainty. COVID-19 has had a major impact on these industries, with shutdowns, supply chain disruptions, and shortages causing delays and increased costs.

In addition to COVID-19, other neutral events such as natural disasters, economic downturns, and geopolitical conflicts can also cause delays and uncertainty in these industries. For example, political conflicts and invasions can lead to disruptions in supply chains and logistics, making it difficult for companies to obtain the materials and resources they need to complete projects.

Moreover, supply chain disruptions can be caused by a variety of factors, such as transportation bottlenecks, production shutdowns, and labor shortages, all of which can result in delayed deliveries, increased costs, and reduced efficiency.

To address these challenges, companies in these industries are potentially turning to mediation and other alternative dispute resolution (ADR) methods to resolve conflicts and reach mutually beneficial agreements. Mediation can help to facilitate discussions among stakeholders, identify common ground, and develop solutions that work for all parties involved.

Moreover, the use of technology such as virtual mediation can help to overcome the logistical challenges posed by COVID-19 and other neutral events. By conducting mediation sessions online, parties can participate from anywhere in the world, which can help to facilitate negotiations and speed up the resolution of disputes.

To resolve disputes related to this trend, ADR practitioners should have a better understanding of the purpose and consequences of adopting a specific type of mediation at the outset, whether it be for settle a dispute or another purpose.

Furthermore, enhanced institutionalized and flexible legal framework for ADR - specifically for mediation - has been potentially emerged for cross-border disputes, built environment, finance, investment in energy projects such as solar & wind turbine, oil and gas, power plant and water conservation, Engineering Procurement and Construction (EPC) or Energy Treaty Charter (ETC) and for infrastructure development, shipping, mining and marine, where internal and external risk factors are at a premium. This is especially true in the Belt and Road Initiative (BRI) countries.

The success of institutional mediation is influenced by various factors, including the orientation, quality, expertise, and role of the mediator, the mediation process, the roles of the parties and their representatives or supporters & assistance, the outcome of the mediation, and any internationally recognized rules, harmonized laws, and protocol or

standards applicable to the mediation procedures, and the success rate of enforcement.

Amicable settlements reached through institutional mediation help to achieve cost and time-effective middle ground solutions with better governance, informed and standardized best practices across borders, instilling confidence throughout the agreed duration of transaction or contracts.

The Singapore Mediation Convention, also known as the United Nations Convention on International Settlement Agreements Resulting from Mediation, is a multilateral treaty that aims to facilitate the enforcement of cross-border commercial mediation settlements. It was adopted by the United Nations General Assembly in December 2018 and entered into force on September 12, 2020.

The Convention has been signed by 55 countries as of March 30, 2023, including major world economies such as China, the United States, and India. However, it is worth noting that signing the Convention does not necessarily mean that a country has ratified it or that it will become part of its domestic law.

So far, 11 countries have ratified the Convention, including Singapore, Fiji, Qatar, and Saudi Arabia. Ratification is a process by which a country formally agrees to be bound by the treaty and to implement its provisions in its domestic law. Once a country ratifies the Convention, it becomes a party to it and is legally obligated to comply with its terms and confirm it '**status quo**' for better prospects, investment, cooperation and free trades.

The Convention provides a framework for parties to a mediation settlement agreement to seek its enforcement in any of the countries that have ratified it. This can be particularly useful in cross-border disputes where parties may face difficulties enforcing a settlement in a foreign jurisdiction. By providing a streamlined and uniform process for enforcing such agreements, the Convention aims to promote the use of mediation as an effective means of resolving international commercial disputes.

On the other hand, there are other types of mediation that are employed in practice to avoid disputes rather than attempt to resolve them. These include project mediation, facilitative mediation, deal mediation, and bespoke mediation which are briefly described below and can be used in various contexts to prevent disputes from arising or to address issues at an early stage.

Project mediation is generally used to address issues that may arise during a project's planning, design, and construction phases. Project mediation can help parties to identify and resolve disputes early on, reducing the risk of delay, cost overruns, and other project-related issues.

Facilitative mediation is a type of mediation that focuses on communication and dialogue between parties to help them reach a mutually acceptable agreement. The mediator in this type of mediation does not offer opinions or suggestions but instead facilitates the conversation between the parties to help them find common ground.

Deal mediation is used in negotiations to help parties reach a mutually acceptable agreement on a deal. This type of mediation is often used in business transactions, mergers, and acquisitions, where parties may have competing interests and objectives.

Bespoke mediation is tailored to the specific needs of the parties and the circumstances of the dispute. This type of mediation can be used in complex and high-value disputes where parties may require a more customized approach to the mediation process.

Mediation can be a useful tool in a variety of contexts, including major infrastructure construction projects, teams comprised of multiple nationalities and cultures, public-private partnerships, investment treaties, joint ventures, consortia, free trade agreements, foreign direct investment, and more.

Other than the above appointment, there are three ways in which a mediation can be initiated, therefore the parties are selecting it as default or by compulsion or voluntarily as illustrated below:
(a) By the Court or the Regulatory Tribunal (with the agreement of the parties)
(b) By virtue of a contractual provision to refer to mediation
(c) At the voluntary request of one or more parties to a dispute, with the agreement of the other party/parties

Benefits of Mediation

Mediation is a structured settlement negotiation facilitated by a neutral third party, the mediator, who has no decision-making power. The style of mediators

can vary from pure facilitators who assist the parties in their negotiations in contrast to evaluators who express views on merits and outcomes to encourage settlement.

The value of claims and disputes globally is on the rise. It is apparent that the Covid-19 pandemic, followed by the Russian-Ukraine war, has led to a broken supply chain, economic sanctions, a deep global recession, shortages, increased food and energy bills, as well as local and global economic and geopolitical turmoil. These events have caused changes in political or governmental spheres, investment priorities, energy issues, and trade tensions, which are likely key pressing issues.

The Mediation provides an opportunity to re-establish lines of communication that can be severed when the dispute escalates. Furthermore, it is not at all uncommon for a settlement to result in the two or four or eight weeks or so after an unsuccessful mediation, as the parties each weigh the proposals and offers made and the point of reaching an agreed term.

In the case of major infrastructure projects, project mediation can help to prevent disputes and resolve issues that may arise during the planning, design, and construction phases of the project. This can include issues related to project delays, cost overruns, and design changes.

In the case of public-private partnerships and investment treaties, deal mediation can be used to help parties reach mutually acceptable agreements on the terms of the partnership or investment. This can help to avoid disputes and ensure that both parties are satisfied with the terms of the agreement.

In the case of joint ventures and consortia, bespoke mediation can be used to address issues that may arise between the parties, such as conflicts over decision-making or profit-sharing. Mediation can help to ensure that the parties maintain a positive working relationship and continue to work towards their common goals.

In the case of foreign direct investment and special economic zone facilitation for port city development, facilitative mediation can be used to help parties communicate effectively and reach mutually acceptable agreements on issues related to investment, regulation, and development. This can help to ensure that the investment is successful and that the parties maintain a positive relationship going forward.

These type of mediation helps with the well expertise input in the relevant field to address the issues and to proactively avoid or minimize the potential disputes which would occur during the progress of the project or development is highly likely. Hence, this also helps connecting trades & investment between ASIA and the World, with more corporation and democracy.

The mediator plays pivotal role in coordination and assistance to integrate successful treaties, international joint venture and partnership or consortium agreements and support consultation process at the start or designing of a company, project or programme, facilities, business, and to promote flexible legal framework at the outset in order to address the issues proactively.

In contrast, FIDIC's 2017 2nd edition's Dispute Avoidance and Adjudication Board (DAAB) is exclusively designed to help avoid and/or resolve disputes once the project is awarded and the DAAB is constituted, either through a standing or ad-hoc agreement. This mechanism is mainly used in construction contracts.

It is important to consider the value that mediators and the DAAB can bring to major infrastructure or mixed-use development projects. While there may be a cost associated with their involvement, their expertise and guidance can ultimately lead to more successful and sustainable outcomes for the project as a whole.

It is therefore wise to view their involvement as an investment rather than an additional cost. By working with mediators and the DAAB, developers can benefit from their knowledge and experience, which can help to identify and address potential issues early on in the development process, ultimately saving time and money in the long run. Additionally, the involvement of mediators and the DAAB can help to ensure that the development aligns with broader community and environmental goals, which can help to build support and buy-in for the project.

In addition to that, following strength of mediation, parties and their representatives or counsels are willing to choose it due to the following reasons:

- A third-party mediator is introduced, who typically spends at least a part of the mediation process engaged in shuttle diplomacy between parties located in separate rooms. This enables parties to

appraise their cases with the mediator in confidence.
- The focus of the process is upon the interests of the parties rather than their legal rights. Factors such as business relationships, external commercial pressures, reputational issues or personal emotions, competitions normally play a bigger part.
- The process is conciliatory and the outcome consensual. This is in contrast to the contentious approach in adjudication and the imposition of a solution by an adjudicator.

While most mediators follow a broadly standard template, the procedure is entirely flexible, to suit the parties and depend on the dispute. The mediation is confidential, usually lasts no more than a day or two and it may be run through on-line or in-person or hybrid sessions - parties joint together or ex-part or separately, is therefore relatively cheap and most advantageous.

Even if the mediation is unsuccessful and a settlement is not achieved on the day of the mediation, the process still provides an opportunity for the parties to assess the extent to which they are preserving their rights and interests, and to consider the true economic costs and risks of not resolving the dispute in a timely manner.

In essence, mediation trigger its own significance among other ADR methods due to following reasons:

- Situation where a dispute with low risk;
- less in legality or minimum evidential process desired;
- long-term relationship and continuity of business interest are of important;
- self-determination of the parties is foremost important;
- Value addition rather than adversarial approach;
- Desiring third party neutral & expert's inputs;
- Agreement exists to mediate with an institutional rule or court direction; and,
- Contractually agreed as an option to mediate.

In all types of mediation, the goal is to avoid disputes or to resolve them amicably and efficiently. Mediation can be a useful alternative to traditional litigation, providing parties with greater control over the outcome and the opportunity to preserve their ongoing business relationships. Overall, mediation can be a valuable tool in a variety of contexts, helping parties to resolve disputes and avoid costly and time-consuming litigation.

Mediator's orientation: Evaluative v facilitative Role

Evaluating, assessing, and deciding for others is radically different than helping others to evaluate, assess, and decide for themselves. Judges, arbitrators, neutral experts, and advisors are evaluators. Their role is to make decisions and give opinions. In contrast, the role of mediator is to assist disputing parties in making their own decisions and evaluating their own situations.

Unless technically defined the role in detail there will be a question always arise - except abide by the rules as internationally recognised - whether ADR Practice always bound to advise best alternative out of the choice to their clients in the first place?

If so, then it's crucial for the Dispute advisor or avoider who should carry out a preliminary critical study on the dispute matter in depth with the key issues in connection with the parties and chose a best ADR method that's with a realistic framework would works in the interest of resolving the dispute effectively and in good faith manner.

Since, in practice, applications are invariably held by adopting ADR Institutional rules for privately held mediation or mediation by incentive statutory instrument which will then compulsion by court or mediation prerequisite by judicial court.

Although this paradoxical application may confuse clients regarding its finality, a well-informed client familiar with ADR would be impressed with why, for instance, mediation is a better option at the outset compared to other ADR methods, arbitration, or any combination that may work better than litigation.

When choosing an ADR, institutional rules can be helpful in making an informed decision about the process and the role that the parties or ADR resolver have defined to some extent. However, this role can present a dilemma in mediation and may greatly affect enforcement for various reasons, as listed below.

- Risk, uncertainty, diversity & evidential necessity;
- Compromise domestic law and international rules and treaties;

- Parties tactics
- different region or geographical place (Sri Lanka V Australia, Asia V Africa);
- different Type or source of law (English common law v common law in Africa, common law - Singapore v civil law -codified law- Dubai except DIFC/Free Economic Zone, Saudi Arabia - Sharia law);
- applicable law of the main land and special economic zone (Sri Lanka v Colombo Port City Special Economic zone);
- lack of statutory mechanism to administer or enforce the settlement agreement reached from the mediation, for example in Malaysia Mediation Act 2012; The Statutes of the Republic of Singapore Mediation Act 2017;
- duration of transition period to piloting and adopting the Model law of the Singapore mediation convention or status of ratification/acceptance/approval of the states;
- styles of a mediator in acting in the capacity of whether facilitating or evaluating or amicably settling or transforming;
- what extent the rules, code of conduct, protocol, standards applicable to the mediation process which are recognised in other states;
- confidentiality ground as a result of data breach or penetration due to online platform and various third parties' involvement; and,
- Parties' tactic challenges on the validity of the settlement agreement.

With keeping this points, mediators can act in the interest of an objective-based solution by evaluating the issues at hand. They can also facilitate parties in finding a way forward for their long-term business relationships or preserving their market interests. Additionally, they may act as a mini-arbitrator or lawyer, strictly adhering to procedural rules and evaluating evidence. Ultimately, mediators must maintain a balance of these roles while acting impartially and neutrally, and preserving confidentiality and disclosure obligations.

However, this dilemma should narrowly construe for the usage of mediation and its fundamental function to get the benefits out of it. So, it's completely stepping forward and some way undermine the notion of the legality itself.

The attitude of the client is important in each of these situations. During a mediation, the mediator will often explore how evaluative or facilitative they needed to be. It's important for lawyers to remember that they know their client far better than the mediator does.

One of the most important things you can do for your client in preparing for a mediation is to consider what mediation techniques will be helpful. Sharing those views with the mediator in advance of the mediation will go far in helping the mediator properly manage the negotiation. In other words, help the mediator understand where on Riskin's Grid which separate the broad and narrow problems with respect to evaluation and facilitation orientation.

The mediator who facilitates would assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers or representatives.

Accordingly, the parties can create better solutions than any other mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.

Leonard Riskin, a renowned Law Professor & ADR scholar, defines mediation as 'a process in which an impartial third party, who lacks authority to impose a solution, helps others resolve a dispute or plan a transaction'.

Riskin's categorization of mediation as including evaluative as well as facilitative approaches has not been universally embraced, though the concepts and terminology served as a focal point to continuing debate to choose optimal style of mediation.

The mediators who evaluate and assumes that the participants want and need them to provide some guidance as to the appropriate grounds for settlement - based on law, industry practice or technology - and that they are qualified to give such guidance by virtue of their training, experience, and objectivity.

Many academics and practitioners take the view that a facilitative approach is the essence of mediation and that any evaluative process should be identified not as mediation, but as a distinctly different type of alternative dispute resolution, such as 'neutral evaluation'

Prof. Love adopted the classic description of the mediator's role as one of facilitating communication, promoting understanding, focusing on interests,

seeking creative solutions to problems, and enabling parties to reach their own agreements.

Love's notes are of the great deal in the particular interest of the role of a mediator as evaluators in contrasting with facilitators who require different competencies, training, and ethical guidelines to perform these divergent roles.

He asserts that 'any orientation that is ***evaluative*** as portrayed on the Riskin grid is conduct that is both conceptually different from, and operationally inconsistent with, the values and goals characteristically ascribed to the mediation process.

Thus, it is important to consider whether an evaluative approach should really be considered as a style of mediation, or a completely separate process. However, as it appears that evaluation does at times occur in mandatory mediation process.

The classic role of the evaluator is to make decisions and give opinions with respect to the merits and likely outcomes of disputes, using predetermined criteria to evaluate evidence and arguments presented by adverse parties. The evaluative mediator's tasks include finding facts by properly weighing evidence, judging credibility and allocating burden of proof, determining and applying relevant law, rules or customs and rendering an opinion.

The evaluator's tasks not only divert the mediator away from facilitation, but can also compromise a mediator's neutrality in actuality and/or in the eyes of the parties to the mediation by virtue of providing an evaluation or opinion of the case.

It is submitted that while an evaluation rather than facilitative mediation may better suit the needs of some clients and achieve settlement in certain circumstances, it should be obtained in the context of a clearly labelled alternative process that is separate and distinct from mediation.

An evaluation should be clearly recognized as an entirely different activity, requiring a focus and technical skills different from those employed in a mediation. As previously indicated, while the mediator assists others in evaluating, assessing and deciding upon their own resolution to disputes, an evaluator assesses and provides a decision or opinion with respect to the merits of a dispute.

These two activities require not only different mental processes, techniques and skills, but also require or should require different rules, regulations, guidelines and standards to regulate the mediators and evaluators' roles and actions.

With all of the problematic aspects of an evaluative approach to mediation, it seems that the facilitative approach has earned its place as the preferred model. It may well be that in time we will come to recognize that certain classes of cases are not well suited to facilitative mediation and some element of an evaluation will be employed in order to encourage settlement.

It is submitted that evaluation should be offered as a separate form of dispute resolution, and should be clearly labelled, for example as 'neutral evaluation', rather than as a hybrid form of 'evaluative' mediation, so that all parties know what to expect out of the process.

This evaluative process should be subject to separate rules and guidelines within the context of court-connected dispute resolution. Facilitative mediation responds to the needs and interests of the parties, and does require lawyers to give up some of the traditional control that they have had over the conduct of a civil action.

Mediation process in General

Despite to the facts that various countries have adopted different approaches and options for mediation, with: different rules and law to the application and process; specific objectives in mind to dealt with dispute; challenges on the nature and the subject matter of the dispute is in question, likely outcomes and the public policy against to the manner in which the substance of a key issue is handled.

These facts, again would direct the dispute in to another ladder in the resolution mechanism. Again, it would create a room for arbitration for the enforcement purpose, for instance.

Nevertheless, many authors highlighted that there would be situation necessary to go for arbitration - whereas the lack of enforceability mechanism would result to a detrimental effect following to even upon an arbitral award is issued. Therefore, it's necessary to dealt case to case basis and to resolve the dispute in the interest of the parties and the merit of the dispute.

How a mediation is set to complete its procedures and toward what orientation a mediators should behave in his or her role in the range of facilitation or exerting influence or direction or evaluation, importantly dispute avoidance rather resolution to dealt with each procedural issues and on the substantive issue of the dispute in general.

Indeed, who exert or impose influence on decision and at what level of participation in the decision making of each aspect of the procedural issues in question: whether the Mediator or dispute participants or their representative? realizing what consequences in doing so, undermine the notion of the mediation principles.

Following facts and questions would determine how the conduct must be perform in light of the substantive and procedural issues are of important aspects, such as: logistics, time frame, Pre-Mediation or Mediation sessions, submission of statements and preliminary meetings, opening statement, caucuses, procedures for defining the problem, developing and presenting proposals.

Most mediations last one day, some more complex (especially multi-party) disputes may take longer but it is rare to exceed three days hearings and total period approximately 2- 4 or maximum 9 months to be framed depend on the nature of the dispute. This would really challenge the parties to focus on key issues in dispute and to set aside the finer detail that often diverts their energies and leads to deadlock.

Parties attending the mediation may do so alone, or with professional advisers, counsel and representative (lawyers or other support person). Normally, there will be some pre-mediation conducted by the mediator with the parties or their expert representatives, mainly to ensure that parties understand the process and to set up logistic details.

In commercial mediations, the parties will generally share a file or position statement with the other side and the mediator before the date of the mediation, to set out their respective positions. It is important that those attending a mediation have authority to settle the dispute, or at least that they have access and lines of communication open to those with such authority.

The day will start with an open meeting where everyone will present their position on the issues to be resolved and that will lead to questions and discussion. There will then normally be a series of private meetings between the mediator and each party and the day will continue with combinations of private and open meetings until a resolution is achieved.

In mediations where no settlement is reached, it is often the case that differences are considerably narrowed and frequently parties will come to a resolution within a few weeks of the mediation, it's here often seen as helping break deadlock even if a settlement was not reached on the day of the mediation.

International Mediation

Generally there will be two main approaches in the procedure widely based around continental-style memorial or common law-style pleadings, where in both approach, a statement may have followed or will be followed by an opening meeting, with the presents of all, and then there will be breakout (or caucus) meetings, with the mediator shuttling to and from in a ***'Kissinger style'*** would narrow the issues to the solutions and propose interest-based solutions for the parties understanding to resolve the issue collaboratively.

It is important for practitioners to consider the differences and to think critically about which approach is most appropriate for the case whether memorial approach or pleading or mixture of them which would suitable for effective conduct of the process.

The memorial approach is most commonly used in commercial arbitration, where submission statement requires with all and full claims or counter claim statement and supporting documents, full evidence with all fact and law relevant to the case prior to the hearings or concurrently at the hearing of the case.

The rules of various institutes also themself inherent of the approach where evaluative mediation desired by the parties or the outcome involve considerable evidential basis of the procedure demanded or usual market practice and or norms in a jurisdiction.

In contrast, in the pleading approach, the parties first submit in a short hearing only summarise the factual statement of their key issues of the case which is invoked for relief and any necessary submission substantiating the claims such as supporting documents, witness statement, expert evidence which may require to be followed aftermath, till the final hearing.

The pleading approach most suitable where the evidence requires for lesser extent or nothing for evaluation and when the interest-based approach or facilitate the parties for their decision to agree a compromised terms are desired, so that the middle ground solutions reached and by rules and the convention, the agreed terms of settlement is binding and enforceable even across the member states of SMC.

The negotiating part in the caucus plays crucial as this generally gives proposals or options for the parties taking their position and sign when the other parties concurrent with the terms.

Negotiating style offer major insights to consider the following challenges to address the business and legal deal making in ordinary business and financial negotiations - which often a Mediator should ideally possess such skills in addressed the followings questions, how:

- to realistically assess whether an agreement potentially exists?
- a 'wide-angle lens' and 'game-changing' moves away from the negotiating table can create space for a deal and enable favourable outcomes at the table?
- careful sequencing, coalition building, and handling those who would block a deal are keys to multiparty effectiveness?
- the importance and means for truly understanding, reading, and building rapport with your counterparts?
- assertiveness and empathy can be productively combined?
- to act opportunistically as circumstances, shift while maintaining a strategic perspective?

What a determined persistence rather than blinding insight is often the essential ingredient for success; as well as Effective (and ineffective) ways to make proposals, frame concessions, build credibility, utilize constructive ambiguity, embark on separate dealings among the parties rather than deal with them together, and when to opt for an open versus a secret process.

This classic model has been refined by practised mediators to involve a much higher degree of pre-mediation engagement by all concerned, to narrow the issues and the documents.

There may even be several pre-mediation meetings or preliminary conference meeting to this end, so that there is ample time to reach a settlement. This model lends itself to complex and cross-border disputes, such as encountered in the area of multilateral investment treaties and trade law, energy law, banking law or competition law and the like.

It is critical in this area to choose a mediator who knows about competition law which has its own language and precedents that take it out of mainstream litigation. It also may mean a lawyer who understands the sector in question and who may have some grounding in economics in relation to trading, competition and businesses.

If the dispute is cross-border, language and cultural skills are going to be at a premium. The parties will get the mediator they choose and agree, rather than a judge who may not be an expert regarding to this, and who may be allocated rather than selected.

The main providers, such as ADR institutes, have appropriate mediators on their panels. Their recommendations can be cross-checked with membership of such bodies as the Competition Law Association in the respective country.

Hence, experts pointed out, 'people are not necessarily after abstract lawyers [as mediators] now'; 'increasingly, people are looking for mediators who have an understanding of the business environment in which the dispute is based and an understanding of the industry'. Perhaps the best of both words is to have a lead mediator, supported by a competition law expert who deliver effective, commercially-driven solutions to clients.

The competition lawyer ideally has experience on the followings and able to:

- devising compliance policies and programmes.
- advising and defending clients operating in regulated sectors in relation to competition and economic regulatory matters, including

compliance with licence conditions and price reviews.

- assisting clients in obtaining clearance for mergers and joint ventures.

representing clients involved in competition disputes, including before the courts, appeals against regulators' decisions, judicial review proceedings, follow-on damages actions and commercial disputes.

Assisting clients throughout market studies and market investigations including the design and implementation

of remedies. Advising clients on the application of competition law to commercial agreements, joint ventures, strategic alliances, business strategies and conduct.

Many countries in the western part of the Balkans to introduce and implement mediation as a way of dispute resolution, followed by the International Finance Corporation (IFC), a member of the World Bank Group, got interested in boosting it in nineties. There is often a fine line between healthy self-assertiveness and self-centredness. In the non-Western world ADR was not always be the standard, but it is not exceptional either.

In contrast with the western jurisdictions, civil courts will often order out of court mediation in Asia, irrespective of the parties' wishes as a routine part of case management. Out of court mediation is gradually becoming more common in Asia Pacific and increasingly the norms in Middle eastern countries as the benefits of what a skilled mediator can achieve become more widely recognised and international mediation rules established by the Institutes are functioning effectively and relatively well is self-evident.

More frustrating for a satisfying judicial process is the costs. Prognostication of the costs combined with the uncertainty of the final judicial decision will in many cases be a key factor in deciding whether to start legal proceedings or take it lying down.

The successful functioning of small and medium sized enterprises (SMEs) is vital for starting up an orderly society and economy. They need a method of ADR which is accommodating, inspiring and confidential. A system of ADR which works well is important in attracting foreign investors. This is the reason why the Governments' supported mediation as a way of improving the commercial climate for foreign investors.

First, it is necessary that the professionals in the judicial system who were involved in ending conflicts were introduced to mediation generally. Moreover, lawyers had to be rendered mediation-minded. After its introduction, enthusiasm for mediation appeared intense.

It is striking that, contrary to the situation in many western countries, interested professionals participating in mediation training were not only judges or lawyers but came from a diverse group of professionals, such as journalists, psychologists, engineers, economists, sociologists, doctors and political scientists. Legal thinking and acting are often an impediment because lawyer-mediators fall into the trap of using their legal skills and knowledge. people are only just beginning to realise that the non-lawyer may be a valuable mediator.

Meanwhile, by educating, monitoring and supervising, a group of highly qualified mediators should have been formed. There is much enthusiasm, but at the same time the BASL, ADR Centre Sri Lanka, CIArb, SIAC, ICDR, AIADR, THAC, ICLP-CCC, RICS, SCCA, DIAC, etc. are together with the partners in the various countries keeps a close watch on the quality of the mediators and on the mediations accomplished, to achieve and secure that there is a programme of continuing education for mediators as well as for the judiciary and other legal professionals.

However, the struggle for existence due to the lack of professional mediators. Setting up a pilot mediation centre with the collaboration of Chamber of Commerce. In an emerging economy in developing country which potentially has markets in property and infrastructure, Mediation would be a completely new phenomenon for the people of these countries, originating from a foreign culture. Instead of the authoritarian judge, a third party without any governmental pressure is guiding people to the solution of their conflicts.

For a bank, it has a specific interest in the money tied up in legal procedures, and this money is now being freed through mediation and can thus be used by entrepreneurs in SMEs. In low-income countries this money may very often mean the difference between staying in business and going bankrupt. The amounts are breath-taking. All this is realised by much effort put in by many (international) organisations together with committed nationals of the several countries who know exactly what took place and the best method of conflict resolution.

ADR in practice falls twofold in the context of enforcement mechanism, using in continuation with hybrid system where the internationally recognised rules and convention applies and by application of single ADR law or statutory mechanisms (i.e., Arbitration/mediation/adjudication law) which applies distinctly of the administration of the ADR and of the enforcement of the outcome.

The outcome extended to the consent award or settlement in agreed terms or a combination of binding

decision or determination or recommendation, for instance most of the states has its own mediation law or already adopted in the consultation process or billing stage towards a legislative mechanism for the effective conduct of the mediation and enforcement of the MSA, meanwhile, also promote SMC by adopting UNCITRAL Model law or a similar content and enforcing MSA across the member states of the SMC.

As the recognition of the MSA for international mediation unlike reached like International Arbitration's 'status quo', as most of the countries have adopted the arbitration legislature and a member of the NYC for recognition of Arbitral award. This may be due to the various reasons, such as: regional or state wise variance of the necessity of the mediation and the trending, demands and its job market, lack of legislative adoption, varied approach and orientation of the mediator and his or her expertise and less in legality or less in evidential basis of the procedure and also there will be court directed mediation and other existing legal landscape of the mediation.

Furthermore, ethics often blend with questions about effective practices. For example, issues surrounding confidentiality and neutrality or impartiality principles are often described as ethical in nature, yet they involve more than considerations of ethics.

Similarly, efforts at articulating mediator qualifications sometimes also included ethical considerations, even though the stated goal is to distinguish standards of practice and ethics from quality considerations and competency. Cross-over discussion is inevitable. Several different ethical codes have been created by ADR-Mediation Institutes worldwide. While the codes vary considerably, they share several themes: competency, neutrality, confidentiality, self-determination, and quality assurance make appearances in virtually all articulations of mediator ethics.

Therefore, whether the Arbitration law which allows mediation - hybrid approach and a specific mediation law that in consistence with UNCITRAL model law that would easily assisting the cross-border enforcement by SMC or with the varied approach in countries at presently exist in practice with institutional mediation rules, adopting best practices and standard or protocol perhaps SMC adopted as a defence mechanism are options for mediation which must be objectively taken in to account of implementing mediation.

Enforceability of Mediated settlement?

A question might arise with regards to the enforceability of the settlement agreement, bearing in mind that the parties are from different states and treaty to Singapore Mediation Convention, or one of them with the treaty to any of the convention.

With the numerous countries have already treaty to the Singapore's Mediation convention, it's likely that the enforcement of settlement agreement between cross boarder countries are with certain confidence for the parties, in particular its distinct legal framework.

Hence, it should be examined whether a legally enforceable settlement through mediation is possible at the outset, whilst continuity of business operations and economic activities have considered as paramount whereas the increased awareness of ADR and its benefits somewhat in place instead long arguing in litigation specially in investment and construction contracts disputes.

On the other hand, in other states the enforcement may be affected greatly, due to:

- different continent or geographical place (Western vs Asian);
- chosen Law & language (common law - England Vs civil law -UAE);
- lack of legislative mechanism to administer the Mediation
- least progress in adopting the UNCITRAL Model law for the Singapore mediation convention purpose.
- rules, code of conduct or protocol, standards & styles applicable to the mediation process state wise may vary or inconsistence in its practice.
- confidentiality ground is a major threat as a result of data breach or penetration due to online platform and various third parties involve.
- by these reasons, likely chances that the aggrieved party may act in bad faith or tactically used it as a good defence to not to honor the agreement settled in other states.
- With or without agreement to mediation, parties' representation, Place of the Debtor's Asset than seat, sectors, complexity and value of the dispute would raise major concern for other option.
- In respect of the orthodox use of the mediation styles and stages of the proceedings in different jurisdiction would compromise the

enforcement on the procedural ground of a court in other state where the enforcement is sought.

Economic conditions and adopting Mediation law

Similar to many other countries, various building projects, Energy, Infrastructure & Road Development has enormous progressed in the past has been halted in various part of the Sri Lanka over the recent years.

Hence, the recent past multiple environment disasters in the sea and the several waves of the pandemic has made a huge loss to the country in terms of its potential trade and businesses and the balance of the economy vice-versa.

The shortage of foreign currencies can affect the ability of businesses to import necessary goods and services, while the drop in tourism can harm the hospitality and related industries.

Hyper-inflation in food and beverages can lead to increased prices and reduced access to basic necessities, and elevated inflation of other goods and materials can impact production costs and consumer purchasing power. The geopolitical tensions can also have wide-ranging effects on the economy and society, including on trade, investment, and security.

the construction industry has been facing significant challenges in recent years due to various factors such as shortage of construction materials and labor, increased costs of materials, shortage of liquidity, and economic uncertainties.

These challenges have not only affected the construction industry but also other sectors and industries that depend on it. The COVID-19 pandemic has also exacerbated the situation, leading to supply chain disruptions, reduced demand, and increased costs. However, with the right strategies and policies in place, the industry can overcome these challenges and achieve sustainable growth.

The high construction costs and scarcity of resources have led to a re-evaluation of investment and funding agreements for construction projects. Investors and developers are increasingly seeking more innovative and cost-effective solutions, such as modular construction and sustainable building materials. This requires a closer collaboration between the parties involved in the project to ensure a sustainable and financially viable outcome.

The use of ADR methods such as mediation and arbitration can play a crucial role in resolving disputes and promoting a collaborative approach to construction projects.

geopolitical tensions and supply chain disruptions have certainly contributed to the rise in oil prices and affected the availability of coal, which in turn has impacted the cost of energy production. This has had a ripple effect on various industries and sectors, including the construction industry, where the cost of materials and transportation has increased.

Yes, the Belt and Road Initiative (BRI) launched by China in 2013 is a significant development in Asia and beyond. It is a massive infrastructure and investment project that aims to connect Asia, Europe, and Africa through a network of roads, railways, ports, and other infrastructure projects.

The BRI has the potential to significantly boost economic growth and development in participating countries, but there are also concerns about the project's impact on the environment, debt sustainability, and geopolitical implications. The pandemic has also affected the progress of some BRI projects, but China has reaffirmed its commitment to the initiative.

Price adjustment provisions can help mitigate the risks of fluctuating prices and inflation, and should be carefully crafted to ensure fairness to all parties. It's also important to have a strong supply chain and strategic partnerships in place to ensure timely delivery of materials and goods. In the event of disputes or disagreements, a well-structured ADR method can help facilitate efficient and cost-effective resolution.

It is important to ensure that any provisions for price adjustment in contracts are fair and equitable for all parties involved. This can be achieved by setting clear criteria for price adjustments, such as changes in the cost of materials or labor, and establishing a transparent process for implementing such adjustments.

In addition, incorporating alternative dispute resolution mechanisms, such as mediation or arbitration, can provide a cost-effective and timely way to resolve any disputes that may arise regarding price adjustments or other contract terms.

The standard of equity is not defined by a specific threshold or cap limit. Rather, it is assessed based on the specific circumstances and facts of each case.

Events that could not have been foreseen by an experienced contractor or business person, and which are outside of their control, may be taken into consideration when assessing whether the equity standard has been met. Ultimately, the determination of whether the equity standard has been met is made on a case-by-case basis.

Estimating the total demand for a desired commodity product-oriented export plan is crucial for the success of such a plan.

It requires a thorough analysis of the market trends, consumer behaviour, and economic policies. Cooperation between the government and the private sector is also essential to ensure that the plan is aligned with the country's overall economic goals and that the legal framework is supportive of the initiative.

Regarding the power cut and increased price of unit rate intermittently, it is important to address the root cause of these issues and take appropriate measures to prevent them from affecting productivity and revenue streams.

Investing in alternative sources of energy and improving the infrastructure can help to mitigate the impact of power cuts. Additionally, implementing effective price adjustment mechanisms can help to ensure that the unit rate remains reasonable and reflective of the prevailing market conditions.

It is indeed possible that with the IMF loan assistance and progressive credits, foreign funders and banks may be more willing to initiate loans for green energy and sustainable development, agriculture and manufacturing improvement, and other areas that can contribute to the desired economic recovery.

Such investments can not only help stimulate economic growth, but also promote environmental sustainability and social development. However, it will also depend on the specific policies and conditions set forth by the IMF and other lenders, as well as the level of cooperation and commitment from the government and private sector.

On the other hand, Port City development would ideally be an international business hub in the South Asian region in the post Covid 19 era and is of self-evident that, it's in progressive on the rise of its investments and expected the construction would stimulate the economy progressively in the long run.

Therefore, foreign investor or developer will be more confidence when there is an adequate and flexible legislative mechanism to resolve if any dispute arises, by cost effective expedited way with good faith manner and practising internationally recognised standards and ethical code of conduct and rules, that ensure long continuity of the business relationships and added value to the entire processes.

However, the Adjudication in the domestic level is popular in resolving construction contemporary issues effectively and the decision arrived by evaluating the parties' submissions, evidence and sites and office visits. Registered Adjudicators are maintained by the Authority. Those who are experience in the field and know how well the norms and custom that functioning in the industry and by other professed background they practice, although lack of law for its procedural administration.

Perhaps adopting a domestic Mediation law to regulate the standard of mediation process substantially consistence with Model law which would ensure both domestic and international mediation to function well and consistence with Singapore mediation convention, in the investment and development arena as well as encourage joint venture, public private partnership arrangement through the application of competitive law. The ratified position of SMC would further give rise to easiness of doing trade and business in Sri Lanka and would create the mediation job market as well.

Among the rise of embedded online resolution system in e-commerce, increased the usage of virtual platform ever before in ADR (Alternative Dispute Resolution) - Arbitration, Mediation, Hybrid Arbitration, Adjudication, Expert determination, early neutral evaluation – sectoral/regional issues yet influence the dispute volume and nature for better option to resolve effectively than at the litigation.

The role of the various Institutes, Dispute boards and ADR Centres, Dispute Adjudication Services and law firms have geared up to cope with the situation more efficiently for the mutual benefits and better outcomes, with the speedy and cost-effective solution and eliminating risk and un-lock value on the ADR table, ensue good dealing with ego, relationships based on the interests and legal rights and entitlement, strengths and weakness of the parties.

Since the introduction of the Singapore Convention on Mediation, the global attractiveness of ADR-Mediation is on the rise specially in assisting the BRI countries, and those markets that promote professional mediation, among various range of issues surrounding the risk relation to varied approach and styles in the mediator orientation and reaching the settlement agreement for the enforceability are still exist.

If, as many mediators contend, a new profession has evolved, then regulatory aspects of practice such as credentialing or licensing seem inevitable. The topic of quality control is expansive, and matters of "quality" in mediation encompass many aspects of the mediator's work.

The variety of forms, functions, and definitions of a mediator complicate any efforts at ensuring quality. Further complicating the picture is the range of different public, private, local, and national/international organizations that have undertaken quality-assurance efforts.

No consistent requirements have emerged from these efforts, leaving mediation practitioners and mediation consumers with relatively little coherent guidance or assurance.

If mediation were treated like certain other regulated professions, one could imagine a system of licensure that would provide consistent quality control mechanisms. The existence of ethical guidelines and professional code of conduct is often considered a hallmark of endorsing a profession, and ethical standards with disciplinary consequences provide one mechanism for ensuring quality services.

Regulation includes a wide range of issues such as the management of cases that use mediation, how the mediation is conducted, how mediation participants conduct themselves, and how to ensure the quality of mediators. If, as many mediators contend, a new profession has evolved, then regulatory aspects of practice such as credentialing or licensing seem inevitable. The topic of quality control is expansive, and matters of "quality" in mediation encompass many aspects of the mediator's work.

Similarly, efforts at articulating mediator qualifications sometimes also included ethical considerations, even though the stated goal was to distinguish standards of practice and ethics from quality considerations and competency. Cross-over discussion is inevitable. Several different ethical codes have been created by both public and private mediator organizations. While the codes vary considerably, they share several themes: competency, neutrality, confidentiality, self-determination, and quality assurance make appearances in virtually all articulations of mediator ethics.

Ethical guidelines should suggest that even if mediators who have had prior dealings with one party believe they can remain impartial, they still must disclose the relationship to all other parties. A final context in which a mediator's neutrality may be challenged involves the mediator's impact or influence on the final outcome or resolution.

In the context of mediation, questions of ethics often blend with questions about effective practices. For example, issues surrounding confidentiality and neutrality are often described as ethical in nature, yet they involve more than considerations of ethics.

Following practical aspects will mostly consider by the mediators, business men, policy & law makers for the issues surrounding the market and region, mediation process, role of mediator and of the settlement agreement way forward for its enforceability.

Firstly, it's required to analyse whether there are any applicable existing rules, principles, norms, customs and laws that regulate or involves in the existing mediation practice.

Secondly, if there are established Institutions, check whether the Institutional mediation rules are maintaining an adequate and an acceptable standard in conducting the mediation process and enforcing the mediated settlement agreement that could be achieved at the outset, in terms of the place which assisting facilitative/directive/influencing approach distinctly lesser extents of evaluative roles, standard of conduct of mediation process and ethical procedure code.

Thirdly, scrutiny whether a comprehensive national law indeed prerequisite to regulate the standard and practice and promote SMC and enforcement of cross boarder Mediated Settlement Agreement (MSA) reached in the domestic or international ADR and or ODR (Online dispute resolution) - whether Mediation law or hybrid mediation or hybrid Arbitration law or protocol is a prerequisite?

Fourthly, whether the UNCITRAL model law for mediation should be adopted to reform the bill or

new legislative mechanism like an Arbitration law, what protocol or code of conduct dictate the standard of mediation process and of the professional mediator's role and procedural conduct, once is implemented regulating the practice in consistence with recognised international practice or comply with acceptable standards.

Finally, what are the minor amendment in the existing Arbitration law that allow or direct a new, voluntary, commercial international mediation or with domestic mediation, that will make the scope of the mediation consistence with the UNCITRAL Model law, art.6 which is clearly exclude the cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement . It's clear that mediation triggered from the Agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

Furthermore, identifying whether any other separate/special legislation require to resolve disputes held through online, which will protect the process in respect to the private and confidentiality procedures and security of data. As the pace of online platform normally includes third parties, such as: internet providers, hardware and software providers in addition to the disputing parties during the virtual sessions.

It could be ideal to consider an option reciprocate from the mediation process to arbitration and viz-versa - Hybrid Arbitration or Mediation, would still be a better choice for the disputing parties' perspective, rather than stand-alone mediation or stand-alone arbitration, for the following reasons in general:

- This assists the intention of resolving the dispute in mediation would still preserve and cost effective as well.
- Possible situations that would arise where a party dishonouring the agreed matters following to the settlement procedures is once occurred.
- If any enforceability matters potentially desired by the parties. For example, inter-state / investment / joint venture / community disputes may also further demand on face-to-face meetings or hearings, rather than conducted virtually. This due to financial detrimental effects or economic condition of a country or situation where difficult to sustain the business activity in a market economy, otherwise an award is rendered indeed is necessary.
- Unlike in parallel application or in milestone (Med-Arb) to step further to arbitration from mediation would obviously potentially consume extra cost and time compare to a direct arbitration application, despite the facts highlighted below, parties would normally not engage the former.
- Substance of the dispute for instance related to the construction or property or whether E-Commerce for which the transaction is connection with
- Whereas certain confident that an expeditious decision in Arbitration would potentially expect by the disputing parties' counsel or legal Professionals or expert construction professional due to the likely outcome.

Mediation Model Clauses

With the ever-increasing inclusion of mediation in dispute escalation clauses in contracts, it is becoming the favoured first route, among other popular ADR methods such as expert witness, expert determination, and early neutral evaluation in recent time for resolving dispute in investment in particular BRI & other PPP projects, joint venture and investment agreement etc. is concern.

The FIDIC guide line suggests, in case the Employer and Contractor alternatively wish to agree to settle dispute amicably by Mediation Options add the following Sub Clause respectively:

Mediation Optional Sub-Clause 20.5

'Once an independent and impartial mediator has been appointed upon request made to the appointing entity or official named in the Contract Data, the Dispute shall immediately be referred to the mediator by the Parties or by either Party, and the Mediator shall facilitate negotiation meeting strictly and confidentially by consulting the parties within a week and suitably make time table and agenda for mediator meeting (Including if any online platform and procedures) to reach his recommendation or opinion within a month time.

The mediation recommendation, and/or any negotiations taking place, or non-binding opinion of the Mediator during the mediation meeting, shall not be referred to by either Party in any concurrent or subsequent proceedings, unless such negotiations

conclude with a written legally binding agreement signed by the Parties as per the mediator's recommendation or otherwise reach agreement on the settlement of the Dispute.'

SIMC Mediation clause

All disputes, controversies or differences arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall before or after the commencement of any other proceedings, be first referred to mediation in Singapore at the Singapore International Mediation Centre in accordance with its Mediation Rules for the time being in force.

Hong Kong Mediation Centre Mediation clause

The following Mediation clause is recommended by Hong Kong Mediation Centre to insert in any business contract, a similar clause is found in many other Institutions as well:

'*Any dispute arising from or in connection with this contract shall be submitted to Hong Kong Mediation Centre for mediation which shall be conducted in accordance with the Centre Mediation Rules in effect at the time of the mediation.*'

Arb-Med-Arb clauses

SMC has collaborated with the Singapore Chamber of Maritime Arbitration and the Law Society of Singapore for Arb-Med-Arb (AMA) procedures under their respective Arbitration Rules.

Singapore Chamber of Maritime Arbitration Arb-Med-Arb procedure

The following is the model clause for the AMA procedure under the Singapore Chamber of Maritime Arbitration (SCMA) Rules. For more information on the SCMA AMA procedure, please refer to the SCMA Rules (3rd edition) Handbook.

Any and all disputes arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore Chamber of Maritime Arbitration ("SCMA Rules") for the time being in force at the commencement of the arbitration, which rules are deemed to be incorporated by reference in this clause.

The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the disputes referred to arbitration through mediation at the Singapore Mediation Centre ("SMC"), in accordance with the SCMA AMA Protocol for the time being in force [refer to Schedule C of the SCMA Rules (3rd edition, October 2015)]. Any settlement reached in the course of the mediation shall be referred to the Arbitral Tribunal appointed in accordance with the SCMA Rules and may be made a consent Award on agreed terms.

Law Society Arbitration Scheme Arb-Med-Arb procedure:

'1. Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by The Law Society of Singapore (the "Law Society") under the Law Society Arbitration Scheme ("LSAS") in accordance with the Arbitration Rules of the Law Society for the time being in force, which rules are deemed to be incorporated by reference in this clause ("Arbitration Rules").

2. The seat of the arbitration shall be Singapore.
3. The Tribunal shall consist of one arbitrator.
4. The language of the arbitration shall be English.
5. The parties further agree that following the commencement of arbitration, they will attempt to resolve the Dispute through mediation at the Singapore Mediation Centre, in accordance with the Law Society Arb-Med-Arb Procedure under the Arbitration Rules for the time being in force. Any settlement reached in the course of the mediation shall fall within the scope of this arbitration agreement and may be referred to the Arbitral Tribunal appointed in accordance with this clause and may be made a consent award on agreed terms.'

Singapore Infrastructure Dispute-Management Protocol standard clause

The following is a standard clause that falls within the meaning of "Agreement" as defined in Clause 1.2(b) of the Singapore Infrastructure Dispute-Management Protocol (SIDP) which parties should adapt to suit their needs. For more information on SIDP, please refer to the SIDP booklet.

Parties shall establish a Dispute Board in accordance with the Singapore Infrastructure Dispute-Management Protocol 2018 ("the SIDP"), which is

incorporated by reference. The Dispute Board shall comprise of [one/two/three] member[s]. The Dispute Board shall assist parties in preventing, managing and resolving differences or disputes in accordance with the terms of the SIDP.

Why Mediation must be a way forward?

Mediation is a very frequent form for the parties to try and reach a structured negotiated settlement. Usually, a single mediator and a co-mediator will be appointed by the parties. Practically always this form is being used as a way of trying to solve a situation of conflict without having to refer it to court or arbitration.

Mediation process is private and confidential where by a third-party neutral assist the parties come to an agreed outcome or solutions on their own. This third-party neutral act impartially and his or her role is to control the resolution process. The content of the mediation and the resultant outcome are controlled by the parties-the outcome is not a decision of the third party. Whereas, a company is involved the person representing the company must have authority to enter into any agreement which might be reached.

It is a very popular method of resolving disputes across a variety of industries with or without any distinct law enacted for mediation law, but has increasingly place an enforcement mechanism for the different types of mediation by various passage, such as judicial proceedings and court order, court mandate and Singapore mediation convention.

Several organisations, have: own draft agreement template for mediation or model clauses for contracts; rules for the conduct of mediations process; ethical standard or code of conduct for mediators, protocol for hybrid choice and panels/published lists of mediators from which parties can select a mediator.

According to the Code of Judicial Procedure it is possible for a court to order mediation and to appoint a mediator. In practice, a condition for this is that the parties, when asked by the court, agree or gives consent to that mediation shall take place. Experience mediators revealed that the mediation is an effective way of solving disputes.

Black's Law Dictionary has defined Mediation as 'A method of non- binding dispute resolution involving a neutral third party who tries to help the disputing parties to reach a mutually agreeable solution.' It has been rightly said by Joseph Grynbaum 'An ounce of mediation is worth a pound of arbitration and a ton of litigation.'

The application of court directed mediation is quit for some time not been popular for civil and commercial disputes, not exceptional to Sri Lanka, although the issues of family matters and community disputes are being resolved through mediation effectively through court compulsion. The Technology advancement and backlog of several unresolved cases emerge the courts to deal mediation in the digital platform of smaller scale disputes which thrive for betterment of the businesses.

Since, there are fast track arbitration and expedited or emergency Arbitration are still available as an alternative to Mediation in providing interim relief or even consent award once the MSA reached and the parties wish to obtain such award on an agreed term on their own decisions.

However, parties or their legal representative or contract managers most of the time choose arbitration due to conventional and tested method, resistance to change the mindset, less awareness of the real benefit of the mediation and the dispute process desire at the outset desire evidence for binding decision, uncertainty of outcome which will not considered for win-win solution.

Hence, the parties and states are expecting towards more sustainable growth through cost effective value addition mechanisms in the businesses and trade via resolving the disputes through alternative platform which gives confidence to the parties to a cost-effective cheap and speedy method and least risk in its enforceability.

Furthermore, on the one hand a status quo of an administrative law and or a legislative mechanism further increase confidence, but on the other hand much argued through which the professional practice is not over regulated but must be ensured for real benefits in terms of job markets, interest and economy.

With that context, mediation is generally described as a consensual, structured negotiation, facilitated by an independent, trained, neutral, competent third party seek to facilitate the parties impartially to reach and agree their own solutions, which most institutes follow these principles in practice abide by the rules and or implemented by the mediation law.

Conciliation and Mediation lie at each end of a spectrum or continuum of non-binding dispute resolution. Although, mediation has covered in this text under the Conciliation category or would have taken as interchangeable, but has given closer attention when necessary distinction to the mere different in the context of binding nature and outcome between those two methods could be achieved and the respective role of the resolver is considered appropriately.[i]

Conciliation often provides, or results in a decision, or recommendation, from the conciliator; conciliation lies at the adjudicative end of the continuum. Mediators are reluctant to provide such decisions or recommendations, indeed some mediators will not. Mediation lies at the facilitative end of the spectrum. Any settlement agreement which occurs is the parties' own decision for proposed solutions made by the mediators.

Consider that the legislation is now in operation, although it seems that a lot of work has already been done, drafting, introducing the legislation is the easy part of the job. What really matters is the actual introduction and implementation of the system of mediation and not only to regulate mediation but to lay down rules concerning the protection of the profession of mediator.

Implementation of Mediation

Despite to the contemporary issues, most interesting scenario would likely to get attention as to whether how to resolve a dispute where the disputants have agreed nothing about an ADR method or a distinct governing law of a prior agreement for a dispute resolution method.

In the context of dispute arises in the business or trades or investment or construction, and real estate development or renewable energy and infrastructure, parties are involving from different states in contracts or treaties, the answers for the choice would vary but mostly depends on the following's reasons:

1. through online or in-person session or even in a court or out of the court procedures;
2. available remedies for them to overcome the higher cost or time-consuming litigating procedure;
3. any issues surrounding on enforceability or ability to obtain a court order, are of a great concern, if the aggrieved party dishonour the settlement or award or decision at a later stage, without a reasonable ground!
4. what extent the New York convention on Arbitration or Singapore Convention on mediation are playing crucial role in this situation, circumventing the parties who tactically challenge on a mediated settlement agreement made in a state? whether the state neither a member state of Singapore convention nor the proceedings of the mediation approach falls evaluative style but the process heavily relies on evidential submission or in the state where model law for mediation not adopted or no domestic law supporting or no legislative mechanism available for the conduct of the mediation;
5. in the absence of such statutory mechanism to administer or enforce the outcome of the particular ADR-mediation in other states, what are the standards and code of conduct, protocol and rules available?
6. any ADR-mediation legal framework is available to ensure the effective conduct;
7. major concerns, such as cost effectiveness, speedy solution, sustainable resolution, proactive dispute avoidance and value addition itself in the process conform a long-term continuity of the business and trades between cross boarder countries with the desired objectives and interests;
8. which extent that the technical and legal procedures and evidential difficulties to open up and review the dispute matters are desired very minimum as required in arbitration or litigation - this implies lack in its legality for the outcome;
9. Region, sector, complexity and the value or nature of the dispute;
10. status whether binding between the parties is effective legally or contractually;
11. final and binding decision or arbitral award or judgment;
12. what possibility a court order with settlement agreement can be obtain or what possibility an arbitral award may be opted, without a new arbitration process;
13. which extent the parties would consider Decision, Determination or Recommendation from a third-party neutral;
14. how could a court or tribunal in a state will consider the validity of agreement, for the settlement agreement made in other states, where the confidential process a matter for serious question as to the limitation to find what would have happen between parties, if the formation of that contract agreement were under undue

influence or duress or fraud (without prejudice in the subsequent resolution!);
15. If the session is fully online, what is the applicable law governing the seats or procedures !
16. strict legal procedure or evidential requirement than collaborative cognitive approach;
17. sustainable choice or speedy solution; and,
18. what extent the Resolver power to decide or lack in imposing decision

Therefore, in order to choose a best ADR choice, the following points are important:

- Brainstorm above reasons for pros and cons;
- Analyse critically with the constraints like cost and time and give priority to legal certainty or trade or business relationships;
- Facilitate and weighting the party's preference and interests by responding the high priority is for either interests or legal rights;
- Make them aware to the best options available at the outset, and consult for choice for their effectiveness and finality;
- If the parties have not accepted, narrowing the gap on risk involves in the constraints and facilitate to broad the issue for them to accept;
- Assist the parties by explain their position of the explored issues and consequences if no settlement is reached for their agreement rather than advice or express opinion or decision on how the outcome is likely to be implemented by a court for the case; and,
- Assess party's weaknesses and strengths to direct them for their self-determination.

It could be safely concluded that a hybrid arbitration such as Med-Arb or Arb-Med-Arb like in the SIAC-SIMC protocol established in Singapore, protocol in Australia/New Zealand would be a far better option than standalone Arbitration or mediation. (again depend on the party's choice due to various reasons for the choice, in particular cost and enforcement and sectors or region wise the choice may vary)

Hybrid choice potentially reduce the time consumed to the entire process as it has mediation as an additional layer. Possibility is that the process would come to an end when the agreement between party is reachable. Hence, a parallel application would be ideally a good choice when the tendency of resolving the dispute or enforcement takes exceptionally much more time or likely that the result lies uncertain outcome at the advance stage.

However, in construction, the method of choice is depending on the sensitivity of an issue in terms of value and its nature of the claim or dispute, as it's involved more than one method subsequently occur when one choice is fails to satisfy the party, then dissatisfied party step in to escalate the dispute to the next method as contractually agreed, either binding contractually or legally.

For example, the Engineer's performing duties under FIDIC 2017 is neutral (similar to a mere quality of a mediator but imposing his decision in contrasting the mediator provide a facilitative role than evaluative) in his determination between the Employer and Contractor, there are typical sequence of events in Agreement or Determination under Sub-Clause 3.7, once start to performing the duty as per Sub-Clause 3.7.1, as listed below:

- Agreement is reached within 42 days, error found in the Engineer's Notice of agreement and corrected by 7 days.
- The Parties' early advice that agreement cannot be reached and so Engineer's determination is necessary, no error in Engineer's determination.
- No agreement within 42 days, Engineer determines within 42 days, error found in the Engineer's determination and corrected.

In circumstances where the DAAB has given its decision but one or both Parties is/are dissatisfied with the decision, the provisions of this Sub-Clause are intended to encourage the Parties to settle a Dispute amicably, without the need for arbitration. Rather than considering the 28-day period stated in this Sub-Clause 21.5 as a 'cooling-off period'

FIDIC recommends that the parties avail themselves of this opportunity to actively engage with each other with a view to settling their dispute. Such active engagement may be by, for example:

- direct negotiation by senior executives from each of the Parties;
- mediation;
- expert determination (using, for example, the Expert Rules published by the competent body - ex. International Chamber of Commerce)
- or other form of alternative dispute resolution that is not as formal, time-consuming and costly as arbitration such as early neutral evaluation and conciliation.

It is not uncommon for parties to remove the Dispute Adjudication Board (DAB) clauses from the contract

at the outset, as they perceive it as an additional cost. However, this approach may not be advisable as it could lead to delays and uncertainty if a dispute arises. Parties may agree to appoint a Dispute Board on an ad-hoc basis, rather than having a standing DAB or sole adjudicator appointed at the outset. This approach allows the parties to consider the dispute resolution mechanism that would best suit the particular dispute, while bearing in mind the cost and time implications.

If the Parties cannot agree on any DAAB member, Sub-Clause 21.2 [Failure to Appoint DAAB Member(s)] applies and the selection and appointment of the DAAB member(s) should be made by a wholly impartial entity with an understanding of the nature and purpose of a DAAB.

Conciliators and neutral evaluators are also commonly used in ADR to assist parties in resolving disputes. Conciliators work with the parties to facilitate communication and negotiation to reach a mutually acceptable resolution, while neutral evaluators provide an independent assessment of the issues in dispute to assist parties in reaching a settlement. These approaches can be particularly useful in complex disputes where the parties may benefit from additional guidance or input from an experienced neutral third party.

Indeed, the construction industry has faced significant challenges in the past few years due to economic conditions and the pandemic. However, these challenges have also created opportunities for collaboration and sustainable growth. The implementation of a proper ADR-mediation framework can provide a low-cost and time-effective method for resolving disputes, which would benefit all parties involved. This could lead to increased investment opportunities and greater confidence in the industry, both locally and internationally.

ADR can play a crucial role in maintaining the confidence of third-party funders and developers to invest in on or offshore projects. Through the use of ADR mechanisms such as mediation or arbitration, parties can address any disputes or issues that arise during the project development process in a timely and cost-effective manner. This can help to maintain the continuity of the project and ensure that it is completed successfully. Moreover, ADR can provide a neutral forum for parties to renegotiate contract clauses and major terms and conditions of the agreement to adapt to new circumstances, without having a detrimental impact on the general public and the state as a whole.

Not only with the numerous experts and potential Mediators that attract a better seat for mediation in a jurisdiction, the seat must be sophisticated legal landscape at off shore or economic free zones, that would create a balance safeguarding the developer, investor and their business & trade relationship while it should also stream line with the governing law, public policy and sovereign and security of the main land.

Its self-evident that ADR-Mediation is immense in progressive and successful in many ways to resolve the dispute for the betterment of the international business community, state governments and traders. Therefore, no doubt that Singapore convention will leverage the enforcement of the settlement agreement made outside the jurisdictions via mediation which may be held via online or in-person.

Moreover, in infrastructure, real estate development, and buildings in mainland and emerging economies, including free zones or financial cities, it is common to involve multiple parties such as shareholders and joint ventures throughout the planning, development, and continuous operation process. Ensuring continuous operation and output is of foremost importance.

Mediation can provide a more cost-effective and time-efficient alternative to traditional litigation or arbitration, while still ensuring a legally binding and enforceable settlement. It can also help parties to maintain a positive business relationship and avoid the potential reputational damage that can result from a public dispute.

ADR-Mediation remains the best and inevitable choice for resolving disputes during these unprecedented times. The increased pace of recognition of mediated settlements, coupled with the Singapore Convention, provides stakeholders with added confidence. While there are still issues surrounding the enforceability of settlements involving debtors' assets located in remote or difficult-to-access places, or those involved in insolvency proceedings, these are objective questions that must be addressed in light of the surrounding circumstances.

In construction contracts such as FIDIC or the Standard Bidding Documents of Construction Industry & Development Act in Sri Lanka, arbitration

is often the default method of dispute resolution if the parties are unable to resolve their differences through negotiation, mediation, or adjudication. This is because construction disputes can be complex, involving multiple parties and significant financial implications.

Arbitration is seen as a more formal and structured process compared to mediation, and can provide a final and binding resolution to disputes. It involves the appointment of an independent third party, known as the arbitrator, who will hear evidence from both sides and make a decision based on the facts presented.

However, even in construction contracts, parties can still opt for hybrid dispute resolution methods that incorporate mediation or other forms of dispute resolution alongside arbitration. This can help parties to work together more collaboratively, and may lead to faster and more cost-effective resolution of disputes.

When failing to address the key issues proactively or during the early stage, it would likely that the conflict causes serious damages and create disputes.

Standard documents are mostly dealt these issues in advance and includes remedy to resolves the risk and apportion it appropriately. Hence, each project is unique and one key issue would change the risk pattern completely different to other project. for example, one project delay is predominant factor where is another quality is foremost important.

This potentially would demand to adopt the mechanism to resolve it through ADR-Mediation as specific choice even though it's not a final and binding option or having less in legality.

In terms of law, any amendment to existing arbitration laws should reflect the incorporation of mediation. Additionally, to ensure ethical standards (unlike those for advocates or lawyers), adequate training and guidance notes should be made available to practitioners from various ADR institutes such as CIArb, SIAC, HKIAC, and ICDR. This will ensure the success of ADR-mediation, which adds value to business efficacy rather than emphasizing legal certainty of relief, and emphasizes the adoption of model laws for mediation.

Finally, it is cannot be undermined the notion of the cyber security issues, failing of which would likely to distract the confidence of the participants on confidentiality ground, eventually would likely to raise a serious question to the ADR-Mediation resolver and disputants with the increased threaten to disciplinary procedures to the depletion of the data protection environment.

Therefore, it must be all the disputing and third parties' responsibility is to ensure a fair and reasonable protection is made so that no deliberate loss or unintentional damages would occur to any participants. This is most relevant when the resolver is an independent dispute board or sole mediator or Arbiter involves in an ADR, other than formally established Institutes administering or appointing the resolver.

It is also a good practice of self-check on adopting antivirus - malware & spyware or ransomware protection, passwords protection, taking regular backups in a safe clouds or external hard drives, removing or stop the unnecessary software applications and websites that are recognised unsafe should be stopped browsing or make legal sanction to prevent operating those websites.

Re-setting smart phones and re-format Desktops & Laptops computers where only necessary or if it is likely to finds the environment is unsafe. Strictly adhere to a data protection policy that has implemented.

[i](a) Chartered Institute of Arbitrators, UK
(b) Dubai International Arbitration Centre (DIAC)
(c) Saudi Center for Commercial Arbitration
(d) Indian Institute of Arbitration & Mediation
(e) Mediation shall be as per Abu-dhabi Global Market, shall be as per Court - Annexed Mediation
(f) Mediation Rules 2017 published by the International Chamber of Commerce (the "ICC", which is based at 33-43 Avenue du Président Wilson, 75116 Paris, France) https://iccwbo.org/dispute-resolution services/mediation/mediation-rules
(g) In order to settle the dispute amicably by Mediation, use Mediation Rules 2017 published by the International Chamber of Commerce (the "ICC", which is based at 33-43 Avenue du Président Wilson, 75116 Paris, France) https://iccwbo.org/dispute-resolution services/mediation/mediation-rules/ or, alternatively, to the following mediation rules:
(h) The ADR Center, Sri Lanka
(j) Singapore International Mediation Center
(k) Hong Kong international Mediation
(l) Chinese International mediation
(m) Malaysian international mediation Centre
(n) (THAC) Thailand Arbitration Centre; *Any dispute arising*

out of or in connection this contract, the parties agree to settle the disputes by conciliation in accordance with the Rules of Thailand Arbitration Center and under the management of Thailand Arbitration Center. The parties agree to participate in the conciliation in good faith and undertake to abide by the terms of any settlement reached"
(p) RICS UAE mediation Panel
(q) Oman Commercial Arbitration Centre
(r) Bahrain Chamber for Dispute Resolution
(s) London Court of International Arbitration Centre
(t) Vietnam Mediation Center
(u) Qatar International Center for Conciliation and Arbitration.
(v) The Mediation Center, Burjman
(w) New Zealand Dispute Resolution Centre
(x) Swiss Arbitration Centre
(y) Australian Centre for International Commercial Arbitration
(z) International Dispute Resolution Centre