

Alternative Dispute Resolution: Mediation

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Executive Summary

Alternative Dispute Resolution (ADR) provides an efficient, non-confrontational alternative to traditional litigation, using methods such as mediation, arbitration, and adjudication to resolve disputes. Mediation, in particular, stands out as a flexible and cost-effective solution, fostering open communication and cooperation between parties. The growing complexities in international trade, coupled with the rise of specialized sectors like e-commerce, have underscored the need for efficient dispute resolution mechanisms. For Pakistan, a robust legal framework supporting mandatory mediation is vital for fostering trust among both local and foreign investors while ensuring that commercial disputes are resolved swiftly and cost-effectively. Pakistan's judicial system has recognized its importance in commercial and corporate matters. The Supreme Court has increasingly endorsed mandatory mediation to reduce the burden on the judiciary and encourage quicker settlements. Additionally, Pakistan's potential accession to the Singapore Convention on Mediation would provide a globally recognized framework for enforcing mediated settlement agreements, further enhancing Pakistan's attractiveness to international investors. The Singapore Convention, ratified by key trading partners like Qatar, offers Pakistan a strategic advantage in promoting international trade while ensuring that it can include necessary reservations, such as those concerning national security, to safeguard state interests.

Policy Recommendations

- To ensure consistent implementation of mandatory mediation in Pakistan, it should be incorporated into the ADR Act. The Supreme Court's authority under Article 189 of the Constitution would reinforce this mandate.
- Pakistan should consider ratifying the Singapore Convention including reservations especially for state matters including those of national security. This would allow Pakistan to balance its participation in the Convention with the protection of its vital interests.
- Through a collaborative effort with the Federal and Provincial Ministries of Law and Justice, the Supreme Court of Pakistan should identify the list of cases suitable for mediation. The global trend includes cases of claim cases such as business and commercial disputes.
- The Pakistan Mediators Association (PMA) Training Program should incorporate training mediators in conducting mediation sessions through online platforms being mindful of technological advancements.

Alternative Dispute Resolution:

Alternative Dispute Resolution (ADR) encompasses a range of methods for resolving disputes outside of traditional litigation. These methods, which can involve bilateral or multi-party negotiations, mediation, arbitration, or adjudication, are characterized by their non-confrontational approach.¹

A primary incentive for parties to choose ADR over litigation is the opportunity for a more collaborative and understanding process. Unlike adversarial litigation, ADR procedures often foster cooperation and allow parties to gain a deeper comprehension of each other's perspectives. Additionally, ADR can lead to more innovative solutions that may not be feasible within the constraints of formal legal proceedings².

The Role of Mediation in Managing Trade Disputes

Mediation stands out as the most flexible, efficient, and user-friendly method among various ADR strategies. Unlike formal court proceedings, mediation fosters a more informal environment, encouraging open communication and creative problem solving. The mediator's role is not to impose decisions but to facilitate a dialogue that helps parties reach a mutual understanding and explore potential solutions. Even when mediation does not result in an immediate resolution, it often helps the parties clarify aspects of their dispute, which may prevent unnecessary litigation and foster the possibility of future settlements.

As economic activity continues to grow and international investments expand, trade entities are increasingly engaging in transactions with both local and foreign business communities. In these interactions, they seek assurances to safeguard their investments, protect their interests and rights, and ensure that trade, commercial, and corporate disputes are resolved swiftly and cost-effectively within a legal framework. Mediation has become a key global tool for dispute resolution, with the Singapore International Arbitration Centre (SIAC) in the Asia-Pacific, particularly in Hong Kong, serving as a leading example³.

The emergence of specialized trade sectors, including e-commerce, has made international trade relations more complex, with a higher likelihood of disputes between

¹ UNESCO, Shamir Yona and Ran Kutner, 'Alternative Dispute Resolution Approaches and Their Application' (2003 (Technical Documents in Hydrology: PC-CP series)

² Mitropoulos Panagiotis and Howell Gregory, "Model for Understanding, Preventing, And Resolving Project Disputes", *Journal of Construction Engineering and Management*, 127: 3(2001)

³ 'What Is the Singapore International Arbitration Centre (SIAC)?' (Curtis, Mallet-Prevost, Colt; Mosle LLP) accessed 8 September 2024

business parties. These disputes require a resolution process that is efficient, expert-led, enforceable, cost-effective, and easily accessible, while also being mutually acceptable to both local and foreign stakeholders. To effectively manage and resolve commercial and investment disputes, a robust and well-designed domestic legal framework is crucial. Such a framework is necessary to build trust among foreign investors by guaranteeing the protection of their rights and interests in business and trade agreements.

Judicial Endorsement of Mandatory Mediation in Pakistan

In Pakistan, the judicial system has recognized mediation as an essential tool for resolving disputes, particularly in corporate, tax, and commercial matters. Courts, including the Supreme Court of Pakistan, have consistently encouraged mediation to avoid unnecessary delays and save both judicial time and the expenses incurred by the parties involved. This approach has been endorsed in significant rulings, such as in M.C.R. (Pvt) Ltd, Franchisee of Pizza Hut Versus Multan Development Authority and Others⁴, which held that

“It is the duty of the Courts in Pakistan to see the rights of the parties and to protect their interest in order to build confidence of investors in Pakistan ”

Particular emphasis has been added to the use of mediation in settlement of corporate and tax dispute. The Supreme Court of Pakistan has held in Federation of Pakistan and Others Versus Attock Petroleum Limited⁵ Islamabad that

“The centuries old traditional method of settlement of private dispute through negotiation is not only familiar in the modern world, but this voluntary scheme for settlement of tax dispute through mediation and negotiation is an effective method to be followed...”

Courts in Pakistan are also increasingly encouraging mandatory mediation. In recent years, proactive steps have been taken to institutionalize mediation within the judicial process. The Lahore High Court, for instance, has implemented Court Backed Mandatory Mediation in landmark cases such as Faisal Zafar Versus Sirajuddin⁶ and Province of Punjab Versus Haroon Construction Company⁷, signaling a transformative shift towards prioritizing mediation, particularly in complex commercial and contractual disputes. Similarly, the Sindh High Court

⁴ 2021 CLD 639

⁵ 2007 SCMR 1095

⁶ 2024 CLD 1

⁷ 2024 SCMR 947

in Descon Engineering Limited Versus Cynergyico PK Limited⁸ has required parties to engage in mediation before pursuing arbitration, further reinforcing the judiciary's endorsement of mediation over other alternative dispute resolution methods. With strong judicial backing and its efficiency in resolving disputes, mandatory mediation is becoming a key component of Pakistan's legal framework.

The Singapore Convention on Mediation

The Singapore Convention on Mediation⁹ offers a comprehensive framework for international commercial mediations. It was adopted by the United Nations General Assembly in 2019 and entered into force on September 12, 2020. It outlines specific requirements for mediators, including their qualifications and conduct during the mediation process. Additionally, the Convention provides guidelines for the negotiation and execution of mediation agreements, which establish the terms and conditions of the mediation. One of the most significant aspects of the Convention is its provisions for the enforcement of mediated settlements. Under the Convention, parties can seek court orders to enforce mediated settlements as binding judgments, making them legally enforceable in participating countries. Moreover, the Convention addresses the recognition and enforcement of foreign mediated settlements, facilitating the cross-border enforcement of agreements reached through mediation. This enhances the enforceability and predictability of mediation outcomes in an international context.

Legislation Pertaining to Mediation in Pakistan

Pakistan has witnessed a gradual shift towards alternative dispute resolution (ADR) mechanisms in recent years. Several key legislative enactments, including the Code of Civil Procedure 1908, the Arbitration Act, 1940, and the Alternative Dispute Resolution (ADR) Act, 2017, have paved the way for arbitration, mediation, and other ADR processes to be utilized in resolving disputes between parties.

While voluntary mediation has been a longstanding practice in Pakistan, there is growing momentum for making it a mandatory step before initiating formal court proceedings. This approach can significantly reduce the burden on the judiciary and promote more efficient dispute resolution.

⁸ Suit 449/2022

⁹ <https://www.singaporeconvention.org/>

The Alternative Dispute Resolution Act, 2017 provides a comprehensive framework for ADR in Pakistan. It outlines procedures for referring disputes to ADR centers, appointing neutrals, conducting mediation proceedings, and enforcing settlements. To further enhance the quality and credibility of ADR services, the Federal Government has also introduced the ADR Mediation Accreditation (Eligibility) Rules, 2023. These rules establish standards for the accreditation of mediators and maintain a register of accredited professionals.

In recent years, ADR mechanisms have been introduced in the merged districts of Khyber Pakhtunkhwa as well via the Khyber Pakhtunkhwa Alternative Dispute Resolution Act, 2020. However, the Khyber Pakhtunkhwa judiciary has not actively endorsed the concept. This slow adoption of ADR¹⁰ can be attributed to a complex interplay of factors. Cultural influences, such as the prevalence of the jirga system, have deep roots in the region, making it challenging to introduce new approaches like ADR. To address this current challenge, it is imperative to institutionalize the jirga system, aligning it with ADR practices.

Lack of Explicit Provisions on Mandatory Mediation

According to Article 189 of the Constitution of Pakistan:

“Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other Courts in Pakistan”

Hence, the judgments advocating for mandatory mediation become binding. However, it is important to formalize the concept in the ADR Act. This would provide a clear legislative framework for implementing and enforcing mandatory mediation, ensuring that it becomes a consistent and well-regulated practice across the country.

Benefits of Ratifying the Singapore Convention

The Singapore Convention establishes a harmonized framework for the efficient and cost-effective enforcement of mediated settlement agreements between traders. For Pakistan, joining this Convention would strengthen its dispute resolution framework by offering an attractive alternative to arbitration and litigation that is both faster and more cost-effective. From a national perspective, Pakistan’s accession would also reduce the burden on its courts while encouraging lawmakers to refine domestic laws related to commercial mediation.

¹⁰ Rizvi, I. “ADR: Midway Between Court and Jirga in Pakistan” (2021) <https://courtingthelaw.com/2021/09/14/laws-judgments-2/adr-midway-between-court-and-jirga-system/>

In terms of enhancing the business environment and attracting foreign investment, Pakistan's participation in the Convention would allow mediated settlement agreements between Pakistani and foreign enterprises to be recognized and enforced in other member states, and vice versa. Currently, several of Pakistan's key trading partners, including China have signed the Singapore Convention, while countries such as Qatar and Singapore have ratified the convention further highlighting the benefits of Pakistan's accession in facilitating international trade and investment¹¹.

The Need for Reservations in the Convention

Article 8(1)(a) of the Singapore Convention¹² allows a State to declare that the Convention shall not apply to mediation agreements where the State itself, any government entity, or any individual acting on behalf of a government agency is a party. This reservation provides States with the flexibility to limit their obligations under the Convention, particularly in matters involving state actors. However, excluding government entities from the scope of the Convention may also prevent such actors from enforcing their own mediation agreements with business partners.

The Convention grants Contracting Parties the discretion to make reservations as deemed appropriate, allowing them to exclude mediation agreements involving the state, government entities, or individuals acting on behalf of government agencies, either fully or selectively. This reservation can also be applied to state agencies operating in specific sectors, such as national security and defense.

For Pakistan, it would be prudent to include such reservations when acceding to the Convention, particularly in matters concerning national security and state interests. This approach would enable Pakistan to limit its obligations under the Convention while still benefiting from the framework in areas that do not involve sensitive state matters. By making

¹¹ 'Jurisdiction Profiles: Singapore Convention on Mediation' (Jurisdiction Profiles | Singapore Convention on Mediation) accessed 5 September 2024

¹² "A Party to the Convention may declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention."

targeted reservations, Pakistan can safeguard its national security interests while leveraging the Convention's advantages in fostering international trade and investment.

Recommendations:

- To ensure consistent implementation of mandatory mediation in Pakistan, it is important to formalize it into the ADR Act. The Supreme Court's authority under Article 189 of the Constitution would then reinforce this mandate.
- Pakistan should consider ratifying the Singapore Convention including reservations especially for state matters including those of national security. This would allow Pakistan to balance its participation in the Convention with the protection of its vital interests.
- Through a collaborative effort with the Federal and Provincial Ministries of Law and Justice, the Supreme Court of Pakistan should identify the list of cases suitable for mediation. The global trend includes cases of claim cases such as business and commercial disputes.
- The Pakistan Mediators Association (PMA) Training Program should incorporate training mediators in conducting mediation sessions through online platforms being mindful of technological advancements.

Action Matrix

Options for Pakistan

Option	Pathways to Solution	Implementation of Solution	Actors Responsible	Implementation Timelines
Identifying Suitable Cases for Mandatory Mediation	Consultation process from domestic courts and lawyers to identify the cases, which would benefit most from the mechanism.	The first initiative should be to conduct an assessment identifying the suitable cases such as commercial and corporate.	<ul style="list-style-type: none"> • The Supreme Court of Pakistan • Law and Justice Commission of Pakistan • Ministry of Law and Justice 	3-6 Months for developing a list of suitable cases.
Ratification of the Singapore Convention on Mediation.	Pakistan should draft its own Act on mediation to ratify the Singapore Convention, as it ratified the New York Convention on Arbitration through the Recognition And Enforcement (Arbitration Agreements And Foreign Arbitral Awards) Act 2011.	Pakistan should include reservations pertaining to the non-applicability of the convention in state matters of issues such as that concerning national security.	<ul style="list-style-type: none"> • Ministry of Law and Justice. • National Assembly of Pakistan. 	6-12 Months of the Legislation Process
Incorporate Mandatory Mediation in the ADR Act.	A collaborative review process involving legal experts, policymakers, and stakeholders to be conducted to assess the propose amendments	To ensure consistent implementation of mandatory mediation in Pakistan, it is important to formalize it into the ADR Act	<ul style="list-style-type: none"> • Ministry of Law and Justice. • National Assembly of Pakistan. 	2-6 months for consultation 6-12 months for Parliamentary amendments
Expanding the Scope of PMA's Training Program	Online mediation should be incorporated in the training program.	The Pakistan Mediators Association (PMA) Training Program should incorporate training mediators in conducting mediation sessions through online platforms being mindful of technological advancements.	<ul style="list-style-type: none"> • Ministry of Law and Justice. • Pakistan Mediators Association • Law and Justice Commission of Pakistan 	6-12 months for updating the curriculum.