



Trending in International Dispute Resolution

Efficient Alternative Dispute Resolution Strategy -
An important safeguard for businesses

Introduction

COVID-19 has caused unprecedented disruptions to a wide range of business sectors, causing significant strain on finances and operations of businesses. The crisis has led to a considerable surge in the number and type of cross-border commercial disputes as many businesses faltered and were unable to perform contractual obligations.

With focus on continuity and minimising losses, organisations prefer a dispute resolution strategy that is not only efficient but also cost-effective and aligned to the commercial interests of the parties to dispute.

To formulate the most suitable dispute resolution strategy, organisations need to holistically weigh their specific requirements, the pros and cons of each dispute resolution mechanism and the severity of a potential dispute. The cost, speed, enforceability, finality and impartiality/neutrality differ across all dispute mechanisms and should be considered carefully.

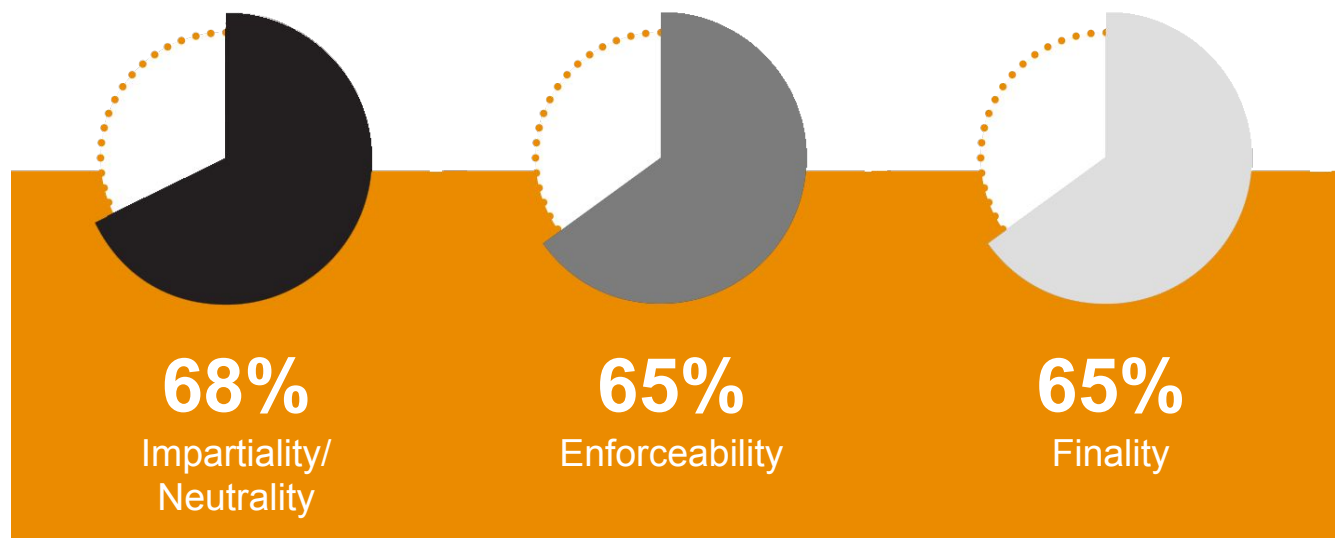
Alternative Dispute Resolution (ADR) mechanisms, such as Arbitration and Mediation, particularly in the context of international disputes, have been on the rise as organisations envisage resolving disputes quickly and amicably, instead of engaging in long-drawn legal actions.

Arbitration: The popular choice

In a survey report published by the Singapore International Dispute Resolution Academy (SIDRA) in July 2020, **arbitration remains the most preferred mechanism for cross-border dispute resolution**. Nearly three out of four (74%) SIDRA Survey (1) respondents used this mechanism for dispute resolution between 2016 and 2018.



Top 3 factors that dispute resolutions users indicated as satisfactory



Over 80% of SIDRA Survey respondents who used arbitration believe these factors are important and absolutely crucial when deciding on arbitration.

Reasons for the popularity of arbitration include:

- Arbitration bodies are not rooted in any particular national legal system, preserving the **impartiality and neutrality of the process**.
- The arbitration process results in an internationally **enforceable** and recognised arbitral award, almost irrespective of the seat of the arbitration.
- The arbitral award is **final** and the parties of the dispute are **bound to comply** with the award rendered by the Tribunal except in limited circumstances.

(1) PwC assisted in conducting the SIDRA Survey, which aims to understand how dispute resolution stakeholders including corporate executives, in-house legal counsels, lawyers and legal advisers, make decisions around resolving cross-border disputes. Over 300 respondents across 46 countries participated in the SIDRA Survey, conducted between January to July 2019. The full survey report was published on 3 July 2020.

While arbitration remains a popular choice, key concerns noted by respondents include:



High cost of arbitration:

Only 25% of SIDRA Survey respondents who used arbitration as a dispute resolution mechanism were satisfied with the costs of arbitration.



Speed of the process:

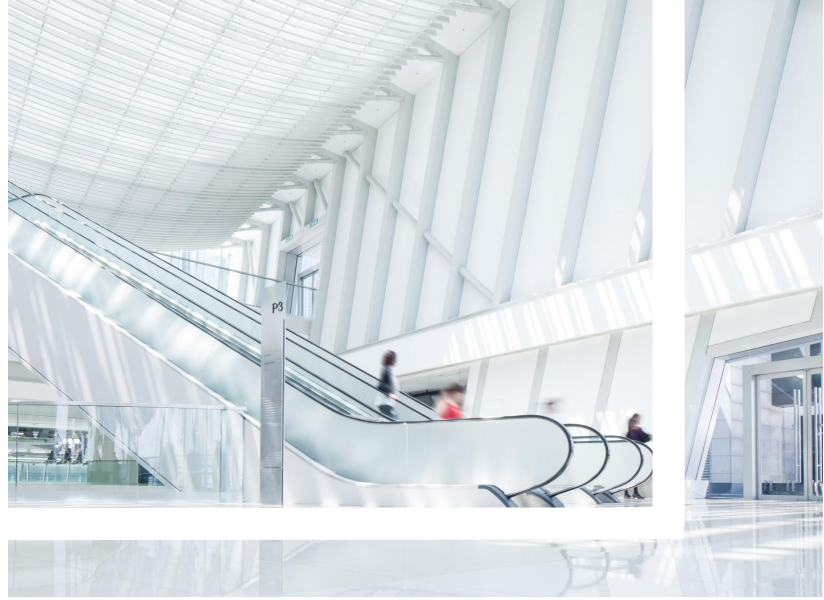
30% of the users were satisfied with the speed of arbitration in dispute resolution. The underuse of fast track proceedings potentially impedes the efficiency of the arbitration process, according to SIDRA Survey respondents.

The **lack of available, suitable and experienced arbitrators** for the constitution of the arbitral tribunal tend to exacerbate the delays in the process and increase the cost of the proceedings.

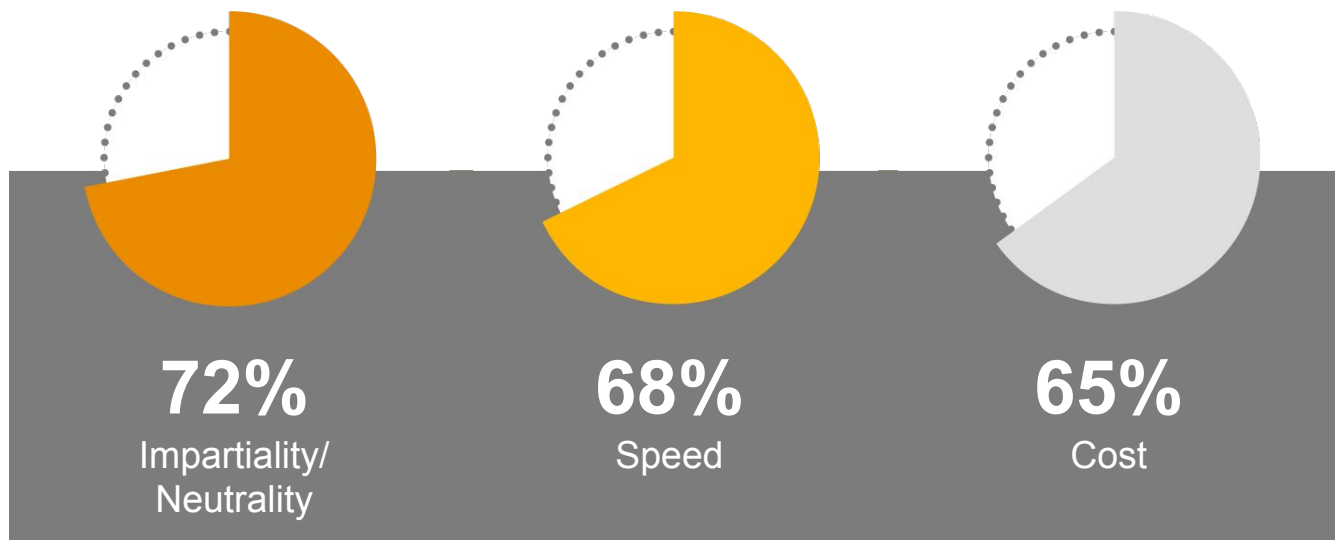


Mediation: The rising star

Mediation is a popular alternative dispute mechanism, albeit a less popular choice compared with arbitration. One in four (26%) SIDRA Survey respondents used Mediation as a dispute resolution mechanism during the two year period between 2016 to 2018.



Top 3 factors that dispute resolutions users indicated as satisfactory



Over 80% of SIDRA Survey respondents believe these factors are important and absolutely crucial, when deciding on mediation.

Reasons for choosing mediation include:

- Mediators **exclude their personal bias** and focus on assisting all parties of the dispute arrive at a mutually agreed settlement.
- With **reasonable cost and speed of execution**, mediation responds to dispute resolution users' expectations that a **collaboration** can lead to a **more efficient** resolution of commercial disputes.

Although 55% of the SIDRA survey respondents indicated that they were "satisfied" or "very satisfied" with the enforceability of the agreed outcome, they highlighted the **difficulty in enforcing the mediated settlement agreement** as a key concern, making mediation a less attractive choice to resolve commercial disputes.

The popularity of mediation in Singapore is likely to increase moving forward amid some recent key regulatory developments.



Singapore's Perspective

In response to the unprecedented challenges brought about by the pandemic, the Ministry of Law in Singapore has introduced the COVID-19 (Temporary Measures) Act ⁽²⁾. It aims to provide temporary relief to businesses that are unable to perform their contractual obligations in the current business climate and encourages them to negotiate.

In addition, the ratification of the Singapore Convention on Mediation in 2019 and passing of the Singapore Convention on Mediation Act 2020 has the potential to narrow dispute resolution users' expectation gap as to the enforceability of mediation. Parties to a mediation in Singapore can now apply to record the mediated settlement agreement as a court order, thereby providing some level of assurance as to the enforceability of the agreement in cross-border mediations.

This perceived ability to enforce a mediated agreement may cause a rise in the use of mediation as an alternative dispute resolution mechanism, either as a standalone method or as part of a broader resolution approach involving arbitration or litigation.

(2) <https://www.mlaw.gov.sg/news/press-releases/2020-04-20-covid-19-temporary-measures-act-provisions-relating-to-temporary-reliefs-to-commence-on-20-april-2020>



5 Steps to formulating an effective alternative dispute resolution strategy

1

Assess the risks associated with the transaction that may give rise to a dispute between the parties to the transaction.

2

Select the most suitable dispute resolution mechanism and the appropriate jurisdiction in which to seat the process.

3

Modify the ADR clauses if needed to tailor the mechanism to the specifics of the risks of a potential dispute between the parties.

4

Request a review of the contract by dispute specialists to identify weaknesses in the approach adopted or the manner in which the agreed mechanism seeks to resolve a potential dispute.

5

Monitor the performance under the contract for events that might trigger disputes or signal the potential for materialisation of identified risks so that disagreements can be resolved amicably prior to disagreements evolving into disputes requiring a formal resolution process.

Contact

Michael Peer

Partner, Head of Disputes Advisory
PwC South East Asia Consulting
+65 9663 9089
michael.peer@pwc.com

Dmitry Kosarev

Forensics Director
PwC Singapore
+65 9671 1326
dmitry.kosarev@pwc.com