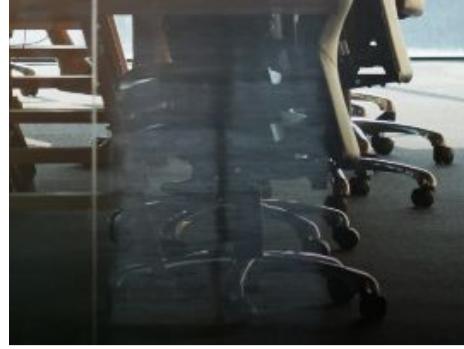




Trending in international dispute resolution

Hybrid dispute resolution delivers the best of both worlds



Introduction

In today's evolving business landscape, disputes are becoming increasingly complex and difficult to resolve. Mediation and arbitration, both commonly-known alternative dispute resolution options, have their benefits and limitations. The former may end in an impasse while the latter might be too costly in the circumstances.

To get the best of both worlds, hybrid dispute resolution - a combination of two or more dispute resolution processes tailored to the users' needs - has emerged as a more flexible and efficient alternative.

A common hybrid dispute resolution mechanism is the mediation-arbitration mechanism ("med-arb"), where parties engage in mediation first and only proceed to arbitration should mediation fail. It is gathering momentum given the relatively lower costs and time investments, as well as the better preservation of business relationships associated with mediation over arbitration.

Many other hybrid dispute resolution mechanisms are emerging as clients make the best use of the benefits offered by various mechanisms. They have the potential to reduce the perceived disadvantages of standalone arbitration or mediation, allowing parties great flexibility and creativity in shaping a resolution process.



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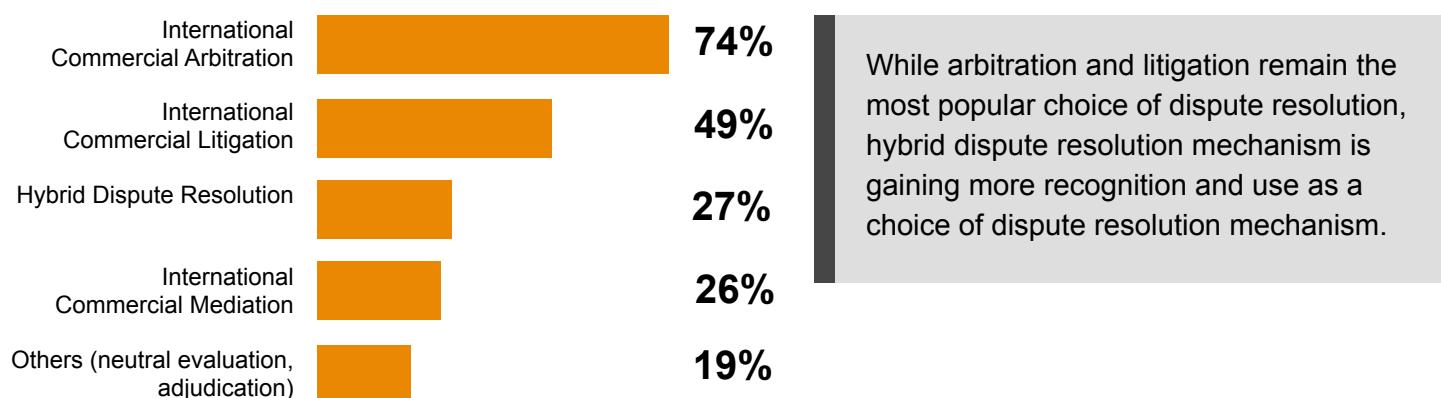
As a key dispute resolution hub, Singapore's legal landscape has evolved over the years to provide support for clients' varied needs.

In 2014, the Singapore International Arbitration Centre (SIAC) and the Singapore International Mediation Centre (SIMC) launched the SIAC-SIMC Arbitration-Mediation-Arbitration (AMA) protocol¹ to synergise mediation and arbitration proceedings between SIAC and SIMC. Under the protocol, the hybrid dispute resolution mechanism may take the form of arbitration-mediation-arbitration ("arb-med-arb"), allowing for arbitration to begin even before mediation is attempted².



In practice, this approach to dispute resolution can be initiated with model clauses written into the contract between the parties, such as in accordance with the SIAC-SIMC AMA protocol or the SCMA-SIMC AMA protocol³. According to the survey report published this year by the Singapore International Dispute Resolution Academy (SIDRA)⁴, more respondents used hybrid mechanisms (27%) than standalone mediation (26%), but fewer compared to arbitration (74%) and litigation (49%) alone (Exhibit 1).

Exhibit 1: Choice of dispute resolution mechanism



Source: SIDRA Survey 2020

The responses from the SIDRA Survey 2020 reflects our belief that hybrid dispute resolution is a strong alternative to traditional or standalone dispute resolution mechanisms in the future of dispute resolution.

This publication analyses the benefits of a hybrid dispute resolution mechanism and highlights the key considerations and decisions in putting a hybrid mechanism into practice.

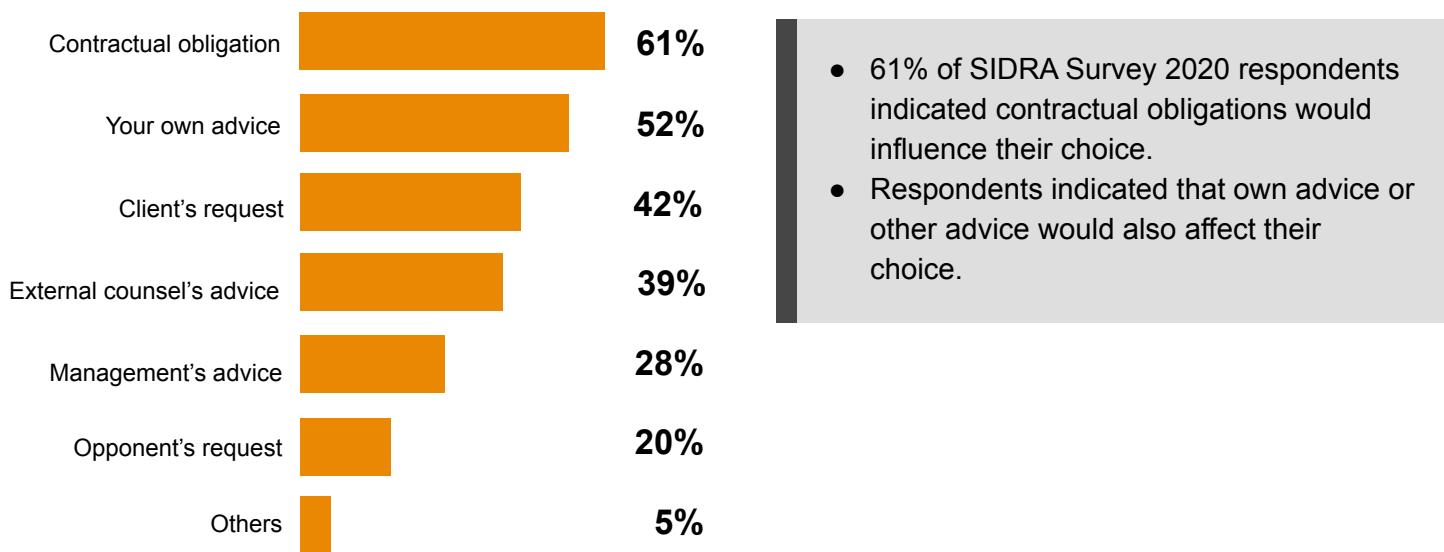
- (1) Launched by SIAC and SIMC in 2014, the Arbitration-Mediation-Arbitration (Arb-Med-Arb) Protocol (SIAC-SIMC AMA Protocol) aimed to provide a flexible dispute resolution mechanism with legally enforceable settlement. In this publication the protocol is referred to as the SIAC-SIMC AMA Protocol. (Source: <http://simc.com.sg/dispute-resolution/arb-med-arb/>)
- (2) The Future of Maritime Dispute Resolution (Source: https://www.supremecourt.gov.sg/Data/Editor/Documents/The_Future_of_Maritime_Dispute_Resolution_231015.pdf)
- (3) Launched by the Singapore Chamber of Maritime Arbitration (SCMA) and SIMC in 2014, the Arbitration-Mediation-Arbitration (Arb-Med-Arb) Protocol (AMA Protocol) aimed to provide a flexible dispute resolution mechanism with legally enforceable settlement. In this publication the protocol is referred to as the SCMA-SIMC AMA Protocol. (Source: <https://www.scma.org.sg/rules#3rd>)
- (4) The [Singapore International Dispute Resolution Academy \(SIDRA\)](#) is a research centre within the Singapore Management University School of Law. PwC assisted SIDRA in conducting the [International Dispute Resolution Survey \(IDRS\) 2020](#), 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 survey, conducted between January to July 2019. The full survey report was published on 3 July 2020. In this publication the survey is referred to as the SIDRA Survey 2020.

Why hybrid dispute resolution?

1. Contractual obligations

Interestingly, respondents from the SIDRA Survey 2020 indicated contractual obligations as the main reason for selecting a hybrid dispute resolution mechanism (61%), which reflects that parties to a contract are prepared to include a model clause for hybrid resolution within their agreement (Exhibit 2).

Exhibit 2: Factors influencing choice of dispute resolution mechanism

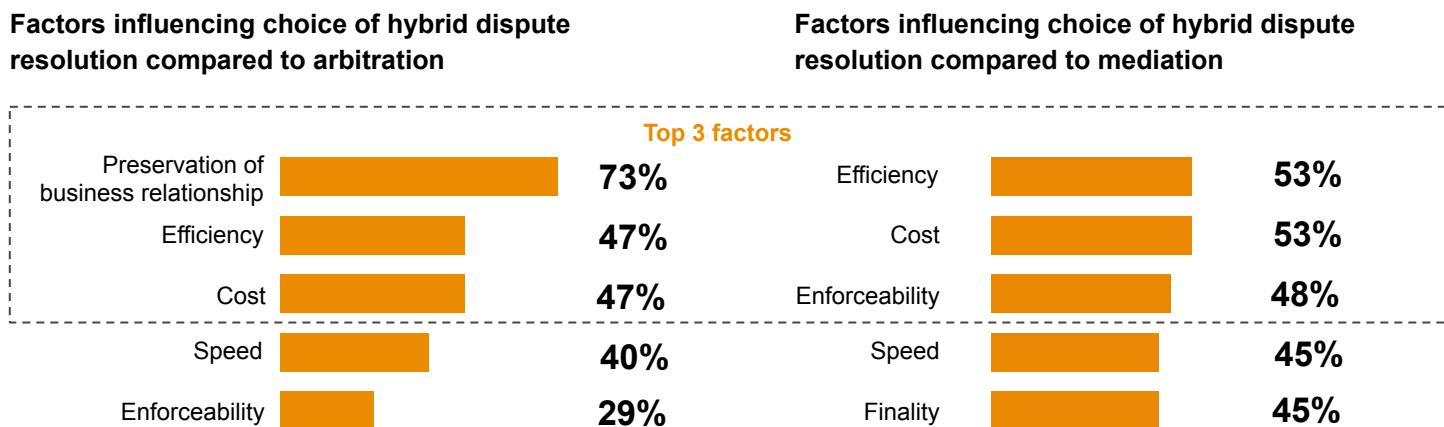


Source: SIDRA Survey 2020

2. Efficiency, cost and speed common factors for the choice of hybrid dispute resolution

Efficiency, cost and speed were ranked similarly as key influencing factors for choosing a hybrid dispute resolution mechanism over either arbitration or mediation, with more than 40% of respondents selecting each of these as an influencing factor (Exhibit 3). This shows that hybrid dispute resolution mechanisms commit parties to a resolution procedure that minimises time and costs, resulting in what is considered to be an efficient resolution to the dispute.

Exhibit 3: Top five factors influencing choice of hybrid dispute resolution over arbitration and mediation



Source: SIDRA Survey 2020

In practice, effective hybrid dispute resolution minimises costs through the efficient allocation of resources and effort to the various elements of a dispute with varying complexities. Parties to a dispute might agree on several points underlying their disagreement while disagreeing on others. In such cases, the agreed points might be resolved in the initial shorter and less costly tiers, and only the remaining issues will be carried through to later stages of arbitration or litigation. This saves the time and money that would have been spent on these extra points. Benefits also arise through avoidance of some costs such as the diversion of management time from the effort from running the business and staff resources from normal business operations, as well as opportunity costs for expansion or further growth plans.

However, it should be noted that adequate preparation for mediation does require some expenditure of time and resources. For example, the SIAC-SIMC AMA protocol allows for a flexible and efficient form of alternative dispute resolution by combining confidentiality and neutrality with enforceability and finality. Parties who have signed an arbitration agreement and/or commenced arbitration may wish to refer their dispute to mediation, either before they commence an arbitration or during the arbitration. Once mediation begins, parties have a fixed time frame of 8 weeks to reach a mediation settlement, which may be recorded as a consent award. If the mediation fails, the parties may then resume with arbitration proceedings.



3. Enforceability and finality

SIDRA Survey 2020 respondents favoured hybrid dispute resolution mechanisms over mediation due to its enforceability (48%) and finality (45%) (Exhibit 3). This is not surprising as parties in a mediation may not reach a settlement agreement, and as a result, mediation is perceived as less enforceable. This is unlike arbitration where the settlement is determined by the arbitral tribunal, which indicates a clearer closure to the dispute.

Looking at the common hybrid resolution protocols⁵ in Singapore, we see that arbitration is commonly positioned at the later tiers of the hybrid mechanism, which offers an enforceable and final closure of the dispute resolution. With a hybrid mechanism, unresolved disputes or conflicts in mediation would be brought to an arbitrator, where parties are subjected to the binding decision of the tribunal.

(5) Namely, the SIAC-SIMC AMA Protocol and the SCMA-SIMC AMA Protocol.

4. Preservation of business relationships

The preservation of business relationships was ranked as the most important factor for the choice of hybrid dispute resolution over arbitration (73%). However, it was not considered to be a factor in the choice of hybrid dispute resolution over mediation (Exhibit 3). Respondents are more concerned with the impairment of business relationships in their choice of standalone arbitration, unlike in mediation where parties seek an acceptable middle ground, creating less strain on the business relationships. A hybrid approach would enable parties to manage the business relationships while retaining the enforceability and finality of the dispute resolution.



The design of the SIAC-SIMC and SCMA-SIMC AMA Protocol is also reflective of this. By allowing the parties the choice of mediation before arbitration, they can better manage the business relationships before the dispute is escalated to an arbitrator. This also offers parties the option of arbitration by a neutral party, should mediation fail.





Choosing the right hybrid dispute resolution resolution in practice

Hybrid dispute resolution mechanisms may take many forms, as users have the flexibility to select and combine a wide range of resolution mechanisms in tiers to meet their specific needs.

We explore some of the key considerations and decisions users must take when determining their hybrid dispute resolution mechanism.

1. Set upfront the tiering order in the hybrid mechanism

Hybrid dispute resolution mechanism allows users to set the order of tiers upfront. Typically, initial tiers are shorter and less expensive processes, such as amicable consultation and/or mediation and/or neutral evaluation or some other form of third-party determination. As seen from the SIDRA Survey 2020, efficiency and cost are major considerations to the selection of a hybrid dispute resolution (Exhibit 3). Where preservation of parties' business relationships is paramount, users chose hybrid mechanisms incorporating mediation or other amicable resolutions as opposed to standalone arbitration. Where enforceability was paramount, users chose hybrid mechanisms prioritising the binding decision of an impartial third party as opposed to standalone mediation.

After exhausting the initial tiers, subsequent tiers would then be longer and more expensive, such as with arbitration or litigation. In such situations, resolution in the initial stages may be motivated by the threat of commencing arbitration immediately should mediation fail, and the time and cost considerations that come with the cost of not settling.

2. Identify levels of details in the contract

There is a tendency for shorter and less expensive processes to be overlooked in the planning stages. These processes should also be expressed with details such as third party involvement, choice of subject matter experts, and time constraints, where possible.

For example, an expert determination or an early neutral evaluation may be deemed necessary for the parties' submissions. Such processes would require a subject matter expert - whether on law, accounting, quantum or industry - to be chosen by the parties. Often, the parties would agree upon and set up their requirements for the expert, which would be written into the agreement between the parties. However, this is done before the actual engagement of the expert, and none of the idealised experts may be able or willing to accept the case - perhaps due to risk management policies or internal independence issues. A preferred solution would be to sign the letter of engagement with the expert at the same time as the underlying agreement. The project is in abeyance until one of the parties engages with the expert.

3. Set a time frame

A dispute resolution may extend longer than planned, depending on circumstances. If no time frame for individual tiers is written into the initial agreement on the dispute resolution mechanism, parties may insist on the completion of the tier, holding back the proceedings.

The SIAC-SIMC AMA Protocol addresses this issue by setting a time frame of 8-weeks for the mediation phase. However, care should be taken to ensure these do not preclude the parties from abandoning mediation if it is not working or not being taken seriously.

In planning for the hybrid resolution mechanism agreement, parties should also consider the time bar concerning the dispute. In the situation where the time bar is approaching and the parties have yet to complete the first tier, a pre-award interest could be considered. If there are agreed delays to the formal litigation or arbitration proceedings to allow for discussions or other forms of resolution, the parties may want to agree to a hiatus in the calculation of pre-award interest in the event a resolution is not found.

4. Avoid appointing the same neutral person as the mediator and arbitrator

Users may seek to blend the stages to get flexibility and cost-savings, however, there may be some controversy around using the same neutral person as mediator and arbitrator. While this may save time and cost in bringing a second neutral up to speed on the facts, relevant law, and parties' positions, there is a risk of the arbitrator's bias due to information obtained during mediation - where positions taken and evidence disclosed are done without prejudice. The changing role of the neutral may lead parties to feel inhibited in the mediation process and disclosing and discussing their interests because of a concern that this information may later be used against them.



An important cause for concern is that there may be a financial incentive to the neutral in proceeding to arbitration. Lower fees are charged in a shorter mediation that resolves the matter. This concern can be addressed by creating a financial incentive for the mediator by arranging payment of a premium if the case settles in mediation. Under the SIAC-SIMC AMA Protocol, this concern is addressed as the arbitrator(s) and the mediator(s) will be separately and independently appointed by the SIAC and SIMC respectively under the applicable arbitration rules and mediation rules of each Centre. Unless the parties otherwise agree, the arbitrator(s) and the mediator(s) tend to be played by different people.



Determining the most appropriate dispute resolution mechanism for you

In determining the most appropriate dispute resolution mechanism, parties need to find the linchpin to the dispute and resolve that. The process should be focussed on identifying the blockages that need to be removed and then removing those barriers. However, it is not always possible to amicably resolve the problem, which results in the need for multi-tiered hybrid approaches.

Moreover, the growing number of legal cases arising from the pandemic due to solvency or other economic issues, coupled with practical considerations such as the closure of courts in many jurisdictions, has led to a backlog of cases and a growing demand for court hearings. As such, a hybrid dispute resolution format such as litigation-mediation-arbitration may begin to emerge as a way around the backlog in courts. Such a format would reduce or even eliminate the need for court hearings, which could hasten the dispute resolution process.

The flexibility of hybrid dispute resolution and its customisable nature can help users to maximise the advantages of various dispute mechanisms. With the more complex nature of the disputes, we will see a rise in hybrid dispute resolution in time to come.

Contact us



Michael Peer

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



Dmitry Kosarev

Director
PwC South East Asia Consulting
+65 9671 1326
dmitry.kosarev@pwc.com



Christine Soon

Senior manager
PwC South East Asia Consulting
+65 9620 7135
christine.ly.soon@pwc.com