JURNAL MAGISTER HUKUM UDAYANA
(UDAYANA MASTER LAW JOURNAL)
Vol. 11 No. 4 Desember 2022
E-ISSN: 2502-3101 P-ISSN: 2302-528x
http: //ojs.unud.ac.id/index.php/jmhu

Mediation Without Giving in: Critical Analysis on The UN Convention on Mediation from The Asean Perspective

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Article Info

Received: 23rd September 2022
Accepted: 8th December 2022
Published: 20th December 2022

Keywords:
Mediation Convention, ASEAN member, Dispute Resolution

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DOI:
10.24843/JMHU.2022.v11.i04.p01.

Abstract

The Mediation Convention is a legal instrument represents final and conclusive dispute resolution outcomes which may be recognized and enforced in accordance with international law. More than 50 countries have ratified the Convention. However, among ASEAN member countries, Indonesia, Thailand, Vietnam, Cambodia and Myanmar have not ratified it. This paper critically examines what are the legal implications and benefits of the Mediation Convention to ASEAN in the context of an integrated economic community. This study employs a normative method by doing a library research to obtain secondary data. Data collecting method uses documentary study towards relevant legal materials. The data analysis employs qualitative analysis involving grouping similar kinds of information together in categories. This research concludes that ratification of the Mediation Convention will promote international business and investment in the region. Moreover, to reap benefits of the Convention, ASEAN countries shall meet requirements as follows: supportive external condition, power balance, inclusivity, adaptation to local norm and coherence.

I. Introduction

International trade and investment have increased tremendously since 1960s as a result of the cooperation between states in eliminating protectionist domestic legislation and in promoting the free exchange of goods and services.[1] As the trade and investment across borders continues to grow, so do the disputes arising out from such activities. Conflict is inevitable in every commercial relationship. Parties to international commercial disputes have long preferred Alternative Dispute Resolution (ADR) to resolve their conflicts. This gives a reason for a trend towards expansion of ADR, including negotiation, mediation and arbitration across the globe.

The United Nations Convention on International Settlement Agreements Resulting from Mediation (the Mediation Convention) achieves enormous success. Opened for signature in early August 2019, until now there are fifty three countries signed the

[1] Ray August, *International Business Law: Text, Cases, and Readings* (New Jersey: Pearson Prentice Hall, 2004).

Convention.[2] While five ASEAN members have signed the Convention,[3] Indonesia, Cambodia, Myanmar, Thailand and Vietnam are yet to show their intention to be part of this Convention. Indonesian legal practitioners, Husseyn Umar suggested that Indonesia should not be in a hurry to ratify the Convention, arguing that it only deals with administrative matters. In-line with that point of view, Huala Adolf also stood in the opinion that Indonesia should wait to ensure that it is ready with the legal implications.[4]

It is widely believed that ASEAN way of resolving disputes are far from adversarial method. This means that there is no aggressive approach and less competition between the parties. As a result, negotiation, mediation and conciliation are the most preferable way of dispute settlements. Such view is supported by various researches such as Moser who describes that mediation and negotiation is the cornerstone of Asian system of dispute resolution, [5] as do Polkinghorne and Ngoc Bich Nguyen in relation to Vietnam, [6] Lazatin in respect to Philippines, [7] and Suvanpanich which says that mediation remains the prevalent means of dispute resolution in Thailand. [8] In Singaporean context, mediation has been used by the Chinese clan associations and within the Malay, Indian and Christian communities. The mediation is believed to reflect "the traditional Asian inscrutability, where it is taboo to wash one's dirty linen in public".[9] Consequently, ASEAN countries commercial disputes are usually resolved through consensus-base processes. Unfortunately, there is a lack of international harmonization in term of recognition and enforcement of mediated settlement agreement.[10] This explains why the Mediation Convention is important to strengthen and increase confidence of the use of mediation in resolving commercial disputes between ASEAN members.

Signing the Convention is in accordance with the rising use of mediation in transnational dispute resolution procedures, including disputes between ASEAN members.[11] It formalizes the acceptance of mediation within ASEAN countries and will

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2 Singapore Management University, "Singapore Convention on Mediation," Singapore International Dispute Resolution Academy, 2021.

3 The South East Asian Nation (ASEAN) members consist of ten countries, five of them already be signatory countries to the Mediation Convention namely: Brunei Darussalam, Laos, Malaysia, Philippines, and Singapore; while five others have not signed the Convention namely: Cambodia, Indonesia, Myanmar, Thailand and Vietnam.

4 Hamalatul Qur'ani, "Kolaborasi Penanganan Sengketa Khusus HKI Melalui Arbitrase Dan Mediasi," Hukum Online, 2019. ttps://www.hukumonline.com/berita/a/kolaborasi-penanganan-sengketa-khusus-hki-melalui-arbitrase-dan-mediasi-lt5d8033fee0987

5 Michael Mose, *People's Republic of China in Dispute Resolution in Asia*, ed. Michael Pryles (Michigan: Kluwer Law International, 1997).

6 Michael Polkinghorne and Ngoc Bich Nguyen, *Vietnam in Dispute Resolution in Asia*, ed. Michael Pryles (Michigan: Kluwer Law International, 1997).

7 Victor Lazatin, *The Philippines in Dispute Resolution in Asia*, ed. Michael Pryles (Michigan: Kluwer Law International, 1977).

8 Thawatchai Suvanpanich, *Thailand in Dispute Resolution in Asia*, ed. Michael Pryles (Kluwer Law International, 1977).

9 Lawrence Boo and Lei Then, *Singapore in Dispute Resolution in Asia*, ed. Michael Pryles (Michigan: Kluwer Law International, 1977).

10 Robert Butlien, "The Singapore Convention on Mediation: A Brave New World for International Commercial Mediationtle," *Brooklyn Journal of International Law* 46, no. 183–213 (2020).

11 Djamila Larabi, "International Settlement," *International Business Law Journal* 6 (2019): 613–28.

provide framework to increase the use of mediation. Compared to a court order or arbitral award, the Mediation Convention provides a more direct and certain path, considering the different practice in South East Asia for enforcing foreign court decisions.[12]

The Convention's main objective is to improve the possibility to enforce transnational business disputes through mediation. This implies that mediated settlement agreement is no longer considered as merely a contractual obligation, but as a binding obligation enforceable through Court of law.[13] Prior to the Convention, mediated settlement agreement was only seen as a contract, which has caused difficulties in pursuing it. Not only does the parties face substantial inconvenience, but also it undermines the advantages mediation has to offer. The difficulties arise due to additional expenses needed to commence legal proceeding and to prove the existence of the agreement. Moreover, the court will treat this case publicly instead of confidentially. This way, the identity of the parties and the merit of the disputes are no longer covered.[14] As a result, the parties' reputation may be in danger.

The high volume of trade and investment activities between ASEAN countries make it unsurprising that the Southeast Asia is the home for international commercial disputes.[15] However, the use of mediation to resolve business disputes in Southeast Asia seems to be lower compare to the use of arbitration.

Adelus and Knieper state that business seem to be more confident to mediate their transnational conflicts provided that an internationally recognized enforcement method is available.[16] Prior to the Mediation Convention, parties to a dispute prefer to choose arbitration since the award can be easily enforced worldwide due to the availability of the Convention on the Recognition and Enforcement of Foreign Arbitral Award. There are some reasons why mediation in international business disputes is less common compare to arbitration. Firstly, parties in international business fear of legal uncertainty in enforcing the mediated settlement agreement. Without legal certainty, the time, effort and money which have been invested for doing mediation became useless. Secondly, the parties did not feel secure since there was no statutory framework exists to enforce agreement resulted from mediation.[17] Prior to the Mediation Convention, the settlement agreement was merely treated in the same way as a contract, which required a court litigation to commence the losing party to comply.

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[12] Eunice Chua, "The Singapore Convention on Mediation- A Brighter Future for Asian Dispute Resolution," *Asian Journal of International Law* 9, no. 2 (2019): 195–205.

[13] Itai Apter, "The Singapore Convention on Mediation: The Right Instrument at the Right Time," *Proceedings of the ASIL Annual Meeting (Cambridge University Press)* 114 (2020): 120–23. https://doi.org/10.1017/amp.2021.31.

[14] Mark E. Appel, "A 'Done Deal' for States and Investors? The New United Nations Convention on International Settlement Agreements Resulting from Mediation," *", Journal of Enforcement of Arbitration Awards* 1, no. 2 (2019): 1–12.

[15] Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements," *Pepperdine Dispute Resolution Law Journal* 19, no. 1 (2019): 1–60.

[16] Edouard Adelus and Judith Knieper, "The Impact of UNCITRAL Arbitration and Mediation?", *International Business Law Journal*, no. 4 (2020): 419-431.

[17] Caroline Asfar-Cazenave, "The Singapore Mediation Convention," *International Business Law Journal* 1 (2020): 47–67.

Going through the litigation means the party needs extra time, costs, and reputation. The involvement of litigation in enforcing mediated settlement agreement makes mediation unattractive for business parties. The Convention on Mediation addressed these concerns by strengthening the effect of international mediated settlement agreement into a new type of legal instrument, which enable the party to directly enforce the agreement.[18]

The Mediation Convention is a legal instrument represents biding and certain conflict settlement in commercial sector, which can be used in the frame work of international law along with international arbitration awards. Article 3 of the Convention stipulates that every country which ratify the Convention has the obligation to enforce a settlement agreement in line with the rules stipulated by the Convention. This provision enables disputing parties to enforce a settlement agreement in another country, provided both countries are signatories to the Convention. The Convention ensures settlement agreement achieved by mediation are enforceable as matter of law.[19] From business players' perspective, the Convention provides flexibility and affordability to resolve cross-border commercial disputes: from traditional large multi-national company, to sole traders, and start-ups.[20]

Mediation is a better alternative compare to arbitration in term of cost and procedural complexity, which burdensome for the parties. Take example from Indonesia, in most cases where Indonesian party becomes involve in international arbitration proceedings, they are always represented by foreign lawyers.[21] The cost to respond to an international arbitration, not include the arbitrator's fee, amounting to US $2,500,000 to $3,000,000. The compensation awarded in arbitration can be excessively high.[22] Moreover, investment arbitration often forces the host country of investment to sacrifice its policy just to avoid arbitration claim from its foreign investor.[23] Almost all ASEAN countries have been named as respondents in various exhaustive arbitration cases.[24] The Mediation Convention will help the states avoid costly arbitration or litigation and promoted a more resilient and harmonious ASEAN cooperation.

While ratification of a convention needs a long process and careful considerations, this paper argues that those challenges will outweigh the benefits. This research aims to deliver a wider perspective on how Mediation Convention not only can expedite and

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[18] *Ibid.*

[19] Suraj Sajnani, "The Singapore Convention: Is This the New York Convention for Mediation?," *Hong Kong Law Journal* 50, no. 3 (2020): 863–76.

[20] Lisa Toohey, "Enhancing Mediation in the Asia-Pacific: The Interaction of the ARMO Regime with Existing Dispute Settlement Mechanisms," *Asian Journal of WTO & International Health Law and Policy* 63–80 (2018).

[21] Language barriers and procedural complexity are often cited as the main problems for domestic lawyers to arbitrate internationally.

[22] Sam R. Luttrell, "Lex Arbitri Indonesia: The Law, Practice and Place of Commercial Arbitration in Indonesia Today," *International Arbitration Law Review* 10, no. 6 (2007): 190–205.

[23] In ICSID arbitration, Newmont sued the Indonesian government for requiring mining companies to build smelter and to increase tax on raw mineral export. Newmont withdrew its suit after reach an agreement with the Indonesian government in which the government agreed to postpone the requirement to build smelter and increase tax.

[24] Indonesia, Malaysia, the Philippines, Vietnam, and Thailand have been sued before international arbitration several times.

promote amicable dispute settlement, but also may strengthen trade and investment between ASEAN members under certain conditions. This article argues that merely being signatory country does not immediately provide a member state with advantages. Individually, there are necessary conditions that the country has to provide. As an economic community, ASEAN will stand to benefit if its member countries individually or collectively sign up for the Mediation Convention.

This paper is in the opinion that the Mediation Convention will significantly increase and improve the confidence on the use of mediation to settle international dispute settlement in ASEAN countries. Not only because it is suitable with the Asian tradition and culture, but also mediation is necessary to preserve business relationship among ASEAN members. However, to reap advantages from the Convention, there are necessary conditions ASEAN members have to meet.

This paper critically examines the legal implications and benefits of the Mediation Convention to ASEAN as an integrated economic community. It also analyzes the necessary conditions ASEAN member countries have to meet both individually and collectively. Furthermore, it will analyze deeply on how the Convention should be effectuated to really provide a win-win solution by considering both parties' interests equally. Discussion in the ASEAN context is crucial not only because this topic has not gained much attention in the literatures, but also there is considerable regulatory and institutional activity as shown in the ASEAN Comprehensive Investment Agreement (ACIA) that contains mediation provisions. Moreover, the ASEAN tradition of peaceful settlement and preference for mediation as against arbitration and litigation has received a stimulus by the Mediation Convention.

Absence of the ratification of the Mediation Convention, Indonesia, Myanmar, Thailand, Vietnam, and Cambodia will less likely to be in an equal position. If ratified, the Convention will serve as a legal platform for mediators and lawyers in ASEAN to anticipate the increasing number of international commercial disputes.

This paper will answer the following problems:

1. What is the importance of ASEAN members to promote mediation and to ratify the Mediation Convention?
2. What are the necessary conditions need to exist so that the UN Convention on Mediation can provide optimum benefit for ASEAN?

There are several studies related to promoting mediation and its factors, one of which is a study related to this research topic conducted by Eunice Chua in 2019. In that research, it was explained about the importance of the Mediation Convention for Asian in terms of dispute resolution. However, this research discusses Asia broadly and not ASEAN which is specifically an economic community.[25] Thus, the scope used by Eunice Chua is narrower than this research. In addition, this research describes what factors can force the Mediation Convention more effective and efficient. Apart from this research, Nadja Marie Alexander in 2021 has also conducted research by discussing the contemporary mediation system in ASEAN. However, this research has not explained the stages required for ASEAN countries so that the Convention can run

[25] Chua, "The Singapore Convention on Mediation- A Brighter Future for Asian Dispute Resolution."

optimally.[26] The difference between this research and the research conducted by Nadja Marie Alexander is the scope, which will also discuss the success factors of mediation based on the Mediation Convention. In addition, the similarity is that the two studies discuss mediation in ASEAN as an international organization where one of the focuses is economic development.

The main focus and aims of this research that hopefully will contribute in the field of ASEAN economic development through improving mediation as a dispute settlement mechanism. Its focus is in ASEAN countries by examining the legal implications and benefits of the Mediation Convention to ASEAN in the context of an integrated economic community. In addition, this article also discusses what steps should be taken by ASEAN member countries in order to promote the Mediation Convention in order to provide optimal benefits. Therefore, this research is not repeating the studies that have already been done.

2. Research Method

To answer the research questions, this study employs a normative method,[27] by doing a documentary study to obtain secondary data.[28] The legal materials earned include primary legal materials;[29] such as Arbitration and Alternative Dispute Settlement Act, the UN Convention on Mediation; as well as secondary legal materials;[30] such as books, journal articles relevant to the topic. Data collecting method use documentary study towards the previous stated legal materials. The data analysis employs qualitative analysis involving grouping similar kinds of information together in categories.

3. Result and Discussion

3.1. Why ASEAN members should promote mediation and need to ratify the Mediation Convention

Disputes are common and became part of commercial activities in a complex international undertaking. It may arise from misunderstandings of how the contract should be carried out to serious issues related to breach of contract. Disputes in commercial sectors should be properly and quickly addressed to avoid the disputes become detrimental to business and the relationship. Business in many regions have moved away from pricy and complex litigation to a flexible and affordable mediation processes as well as other Alternative Dispute Resolution methods.

This part explains why ASEAN members need ratify the Mediation Convention in order to promote the use of mediation instead of arbitration and litigation to settle trade and investment disputes in the region. It will compare and contrast between mediation and arbitration based on the experiences that the member countries have encountered in arbitration.

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[26] Nadja Marie Alexander, "The Emergence of Mediation Law in Asia: A Tale of Two Cities", *Transnational Dispute Management* 18, no. 3 (2021): 1-38.

[27] Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif*, 8th ed. (Jakarta: Grafindo Persada, 2004).

[28] Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: Universitas Indonesia Press, 1986)..

[29] *Ibid.*

[30] *Ibid.*

The globalization of business has significantly impacted ASEAN countries and the way they do business as well as developing commercial relationship. International commercial activities have forced people from different regions with different cultures and backgrounds to connect and interact. Such connections and interactions can be very productive yet impediment at the same time.[31] Pryles and Taylor stated that arbitration is often chosen by parties in Asia with the consideration that it is an adequate basis for corporate decision-making in the 21st century. They specifically refer to big businesses which emphasize the importance of legal certainty and legally binding outcome.[32]

The weaknesses of arbitration and litigation are related to the proceedings. They often referred to as a very stressful process without supporting the business paradigm because the process may take years and cost the parties enormously high legal fees. Arbitration and litigation always end with a win-lose situation where a binding decision is made by arbitral tribunal or judges. Another problem is on the enforcement. Court decisions cannot be enforced in other countries. This makes the decision useless since international disputes always involve parties from different jurisdiction. For arbitration, while the Convention on the Recognition and Enforcement of foreign Arbitral Award enables an arbitral award to be enforced in other signatory countries, the procedure and costs of doing so are also considered as burdensome. Considering the disadvantages of litigation and arbitration, disputing parties in international commercial disputes turn to mediation to resolve and manage their businesses.[33]

In responding to the need of international business players and in order to support amicable way of settling commercial disputes, the United Nation Commission on International Trade Law (UNCITRAL) has initiated the Mediation Convention. The Convention offers tremendous support to a more powerful role of mediation in providing settlement, avoiding unnecessary legal costs and give contribution to the development of harmonious transnational business relationship. The Mediation Convention becomes a milestone in the effort to promote amicable dispute settlement with effective and efficient method.

Considering the advantages and global use of mediation, it should be a preferred dispute settlement method in resolving disputes among ASEAN member states compared to arbitration and litigation. Not only does arbitration costly, its adversarial nature most likely will undermine the relationship among the disputants.[34] Yet, in fact dispute settlement between investors and host countries are mainly regulated under Bilateral Investment Treaties (BIT) in which the majority of the parties prefer in using arbitration. Arbitration based on BIT is very costly and complex, and therefore should

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[31] Alessandra Sgubini, "Mediation and Culture: How Different Cultural Backgrounds Can Affect the Way People Negotiate and Resolve Disputes," Mediate, 2006. https://www.mediate.com/mediation-and-culture-how-different-cultural-backgrounds-can-affect-the-way-people-negotiate-and-resolve-disputes/.

[32] Veronica Taylor and Michael Pryles, *The Cultures of Dispute Resolution in Asia in Dispute Resolution in Asia*, ed. Michael Pryles (Michigan: Kluwer Law International, 1997).

[33] Jacqueline Nolan-Haley, "Mediation: The Best and Worst of Times," *Cardozo Journal of Conflict Resolution* 16 (2015): 731–40.

[34] Robert Butlien, "MEDIATION : A BRAVE NEW WORLD" 46, no. 1 (2020).

be avoided. ASEAN should learn from Latin American countries' experiences in which it counted for 25% of cases in the International Centre for Settlement of Investment Dispute (ICSID). This fact has led to the denunciation of several countries from ICSID due to the harsh result and high cost of the proceeding. [35]

As an economic community, ASEAN needs an instrument to be used to promote mediation. As a binding international instrument, the Mediation Convention is expected to bring legal certainty and predictability, therefore contributing to the Sustainable Development Growth. It is therefore important to discuss how mediation without giving in should work and followed by ASEAN member countries to yield a win-win solution.

There are several reasons why mediation should be used to settle commercial disputes by ASEAN member states. Firstly, mediation support business activities by encouraging business parties from different countries to include a mediation clause, since settlement agreement reached in mediation will be legally binding. Given the business friendly nature of the mediation process in the way that it is cost and time efficient, it provides a reasonable way of resolving conflicts than litigation and arbitration. By resolving commercial disputes amicably in a manner that is more efficient, business are more efficient at handling conflicts and building solid foundations for more cooperations.[36]

Secondly, unlike arbitration, mediation preserves commercial relationships. Mediation offers the disputing parties opportunities to confidentially resolve their disputes with mutual understanding. This way, mediation allows the party to control over the scope of the disputes. The back-and-forth communication between the disputing parties provides opportunities to work together and finds alternatives to reach the best settlement. The parties can create and agree on their own solutions without being controlled by third party.[37]

Thirdly, mediation offers various advantages necessary for business. Mediation is considered as "a therapeutic and empowering process",[38] because the parties will feel more satisfied for being able to resolve their own case. With litigation, parties face uncertainties and difficulties of foreign jurisdictions, different legal systems, and court neutrality. On the other hand, mediation is a voluntary process that promotes win-win solution, to find the best outcome for both disputants. Mediation does not recognize procedural law and does not really use a legal approach and therefore, the process is simple and fast.

Fourthly, mediation is an efficient and harmonized framework for the cross-border commercial disputes. Mediation offers confidentiality, neutrality, conflict of interest awareness, cultural skills, and sensitivity that are important to maintain business

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[35] Nora Ciancio, "The Implications of Recent ICSID Arbitrator Disqualifications for Latin America," *Arbitration Law Review* 6 (2014): 440–66.

[36] Sgubini, "Mediation and Culture: How Different Cultural Backgrounds Can Affect the Way People Negotiate and Resolve Disputes."

[37] Elizabeth Wendy Trachte-Huber and Stephen K. Huber, *Mediation and Negotiation: Reaching Agreement in Law and Business* (Ohio: Anderson Publishing Co, 1988).

[38] *Ibid.*

relationship.[39] Mediation can promote institutional independency since disputants' may create their own mediation agendas without involvement of any institutions. Such *ad-hoc* process is legitimate as long as both parties are in the agreement towards the process, procedures and the mediator.

Lastly, confidentiality is essential for companies because publicity over disputes has the potential to harm the company's reputation. This enables the statements made and all documents furnished during the mediation process to be disclosed and confidential. Both of the parties may exchange statements and documents in total legal confidence with the mediator.
Considering various benefits of mediation, the ratification of the Mediation Convention becomes considerably important for ASEAN members. The UN Convention on Mediation is an important step toward ensuring a harmonized framework of cross-border commercial disputes. It is an effective and perfect means to enforce commercial mediation on the international level. Prior to the Convention, enforcing mediated settlement agreement was an arduous process. [40] The Convention meets a need in the international disputes community. The lack of a universal enforcement mechanism was a crucial reason that parties did not attempt to resolve their commercial cross-border dispute through mediation. With the Singapore Mediation Convention, parties to mediation can enforce the mediation agreement in other countries that also bound to that Convention. There is no need to file a lawsuit related to the implementation of the mediation agreement. This easiness will eventually make dispute settlement efficient and create harmony in dispute resolution among ASEAN countries.

The International Mediation Institute and the New Jersey City University Institute for Dispute Resolution report found that the majority of users and stakeholders in the survey believed that a global mechanism to enforce mediation settlements which applied worldwide would likely to improve business dispute resolutions.[41] Businesses that do not utilize amicable and cooperative conflict resolution procedures such as mediation, negotiation, or conciliation are prone to sacrifice more energy, money, time, and more importantly business relationships.[42]

3.2 The necessary conditions need to exist so that the UN Convention on Mediation can provide optimum benefit for ASEAN

The UN Convention on Mediation provides a legal certainty for mediation settlement to be applied worldwide. While the main objectives of the Convention is to encourage the use of mediation for transnational business disputes, there are several obstacles that make such a goal quite challenging. The ratification of the UN Mediation

[39] Eunice Chua and Asha A. Hemrajani, "Effectively Leveraging Technology in Mediation-Suggestions for a Way Forward in Asia," *Singapore Law Review* 36 (n.d.): 208–23.
[40] Butlien, "The Singapore Convention on Mediation: A Brave New World for International Commercial Mediationtle."
[41] David S. Weiss and Michael R. Griffith, "Report on Empirical Study of Business Users Regarding International Mediation and Enforcement Mechanisms," *Cardozo Journal of Conflict Resolution* 20, no. 4 (2019): 1133–48.
[42] Sgubini, "Mediation and Culture: How Different Cultural Backgrounds Can Affect the Way People Negotiate and Resolve Disputes."

Convention does not immediately provide benefits for member countries. Commitments among the ASEAN members are needed in order for the Convention to give maximum benefits. There are several conditions for mediation to work optimally in ASEAN countries.

The discussions below identify the important environment that need to exist for mediation to work well among ASEAN members. Absence of any following elements may cause ASEAN member countries unable to reap the optimum benefit of the Mediation Convention.

1. Supportive external environment

The environment surrounding the mediation significantly plays role in the success of the mediation. External environment includes judiciary and the government. The Convention provides that signatory countries will enforce settlement agreements in line with the country's own rules of procedures. The main advantages of mediation is its ability to find a win-win solution to disputes. However, if a court's in member country consider the settlement agreement as not in accordance with the local law, the agreement will not be enforced. The characteristic of court rules is its complexity, which causes the process becomes cumbersome and lengthy. The difficulty in enforcing the mediated settlement agreement may outweigh all the benefits that mediation have.

As previously discussed, one of the negative features of the mediation settlement prior to the Convention was its non-legally binding force. Hence, the party needs to file a lawsuit if the other party refused to perform the agreed settlement. This creates inefficiency and legal uncertainty. The judiciary should support mediation in a way that it promotes the enforcement of settlement agreements. While the Mediation Convention includes several grounds on which a court could refuse the enforcement, the Courts should strictly limit the ground for refusal. The grounds for refusal shall only be limited to the following factors: if the agreement is not binding;[43] if there was a breach of applicable standards done by the mediator; or if the mediator failed to state circumstances, which affects their impartiality or independence.[44]

Another obstacle related to the judiciary is due to unfamiliarity with local court's procedure. This requires the party seeking enforcement to find local (domestic) advice on how the enforcement will be done in any given jurisdiction. This means additional costs, time, and effort. There is no uniformity on how the settlement agreement arising from mediation will be enforced by ASEAN members. It really depends on the good faith of each court. Ideally, both the government and court should take proactive steps to improve the ease of doing mediation and its enforcement in their respective countries. The certainty over enforcement of settlement agreements would give mediation legal certainty and legitimacy. At the end, it will encourage other countries to expand their trade and investment into the ASEAN region.

[43] Article 5(1)(b)(ii) the Mediation Convention.
[44] Article 5(1) the Mediation Convention.

The governments of ASEAN member state also have an important role to actively promote mediation as a mean to resolve commercial disputes. This can be done by firstly, ratify the Convention and enacting rules and regulation to promote enforcement. While theoretically by ratifying the Mediation Convention will be simple and easy, in practice there are some difficulties arise. This is due to different legal systems as well as behavior of the government and the judiciary. With little incentives to mediate and no certainty for enforcement, business players would be hesitated to conduct mediation. As multi-national companies continue to use mediation, it is important to support mediation to be institutionalized. The government should take active roles in establishing mediation institution whether for general or specific disputes.

2. Balance of power

Another factor leads to the success of mediation is parties' relative levels of power. Ideally, parties to mediation should have balanced and fair power. While the use of power is a matter of choice, for the success of mediation, the power holder should not use it.[45] This is because whenever the power holder exercises their power, they will tend to direct the other party. Coercion may lead to deadlock.[46] Parties in mediation should be able to control the power they have or even refrain from using it.

For mediation to be successful, ASEAN members have to look for balance of power. This can be done by seeing the other party as a partner to resolve dispute, and more importantly seeing ASEAN as an economic community that has mutual goals and therefore no country is more powerful than others. Parties with unlimited funds tend to feel more powerful than those with financial limits. The parties with unlimited funds may attempt to coerce other parties as a result. The view that certain members are more powerful than others should be eliminated.

3. Inclusivity

The mediation process should be inclusive in the sense that the parties and mediators need to create procedure to consider all needs and opinions in the process. Inclusivity refers to "the extent and manner in which the views and needs of conflict parties and other stakeholders are represented and integrated into the process and outcome of a mediation effort".[47] Inclusivity shall be done to examine the very reason why the dispute arise.[48] Inclusive mediation is a process by which the parties build sustainable harmony by accommodating different societal perspectives owned by the parties in dispute and other stakeholders, into a friendly and peace process. Inclusive process will provide ways for active

[45] Barbara G. Madonik, "Managing the Mediation Environment," Mediate, n.d.
[46] Omer Shapira, "Exploring the Concept of Power in Mediation: Mediators' Sources of Power and Influence Tactics," *", Ohio State Journal on Dispute Resolution* 24, no. 3 (2009): 535–70.
[47] United Nations, *Guidance for Effective Mediation* (New York: United Nations, 2012).
[48] Pablo Romo and Marylene Smeets, "Inclusivity in Mediation Processes: Lessons from Chiapas", Discussion Points of the Mediation Support Network (MSN)," *MSN Discussion Points* 4 (2014): 4–10.

participation between the parties to reach agreement to include multiple perspectives in the mediation process.[49]

4. Cultural and communication barriers

Even though ASEAN members share similar cultures, there are some differences on how to approach a dispute. Significant challenges for business operation in international level are cultures and communications. It is believed that in order to build a communication, the party shall acknowledge the tradition, customs including in the way the other party communicate. Communication methods differs from country to country, depending on the cultural background.[50] When conducting an international mediation, a mediator shall take into account cultural differences between the parties.[51] This is because mediation is not based on legal approach but on communication. The key to a successful mediation in ASEAN is to understand the cultural impact on both mediation and communication techniques.[52]

In respect to communication, there is another barrier faced by ASEAN members, namely language differences. Since ASEAN members have different native languages, English is the only reasonable choice to use. However, the use of English is not free of challenge. Disputing party whose native language is not English are subject to feelings of vulnerability in mediation conducted in English. The party involved in mediation may feel frustrated because they unable to express themselves in a second language as they do in their first language. Therefore, it is important to overcome this language barrier.

5. Coherence, coordination, and complementary of the mediation effort

Pursuing coherence is accepted as an objective in settlement of disputes. Therefore, ASEAN members have to develop specific approaches aimed at fostering greater coherence to achieve greater harmonization and synchronization in the commercial activities among them. The greater the coherence achieved among the members, the more meaningful, effective, and sustainable the impact is likely to be. In order to achieve coherence, coordination is necessary among ASEAN Members. Thus, every member has to participate in collective efforts. All members need to agree to establish a unified structure and undertake joint action to abide to the Mediation Convention. It means that ASEAN members who have not ratified the Mediation Convention, should make an effort to ratify it.

It cannot be denied that the current conditions of ASEAN countries are not ideal enough to provide those necessary conditions. The Mediation Convention lies on the so-called good faith and requires commitment from the member countries. The current situation where only half of the ASEAN members ratified the Mediation

[49] The United Nations, *Guidance on Gender and Inclusive Mediation Strategie* (United Nations Department of Political Affairs, 2017).
[50] Sgubini, "Mediation and Culture: How Different Cultural Backgrounds Can Affect the Way People Negotiate and Resolve Disputes."
[51] *Ibid*.
[52] *Ibid.*

> Convention provides a challenge for the promotion of mediation in the region. Those who have not ratified should understand that mediation is no longer seen as an alternative aside from litigation, but as the next phase in finding resolution over differences after a failed negotiation process.

Without fulfilling those necessary conditions, the Mediation Convention seems unlikely to be successful. The fact that only half members of the ASEAN ratified the Mediation Convention provides difficulty to promotion of the use of mediation for settling international commercial dispute within ASEAN. In addition, following the ASEAN countries' characters that not all fulfilled the necessary conditions, even for countries that have already ratified the Convention not automatically will reap the benefit of it. Ratification the Convention and fulfilling the necessary conditions cannot be separated; instead, both requirement is interrelated and interdependent to make mediation more certain and efficient. For ASEAN members to reap the benefit of the Mediation Convention, it is subject to the same, legally certain and efficient mechanism. The Convention will encourage the use of mediation to the extent that it will become a widely used legal instrument that provides all parties a legal certainty in the enforcement of settlement agreements.[53]

4. Conclusion

In conclusion, it can be said that the current international legal framework on mediation is a sufficient platform to address the need of legal certainty and efficiency in term of mediation settlement agreement. Hence, the fact that availability of Mediation Convention has become a starting point to promote amicable settlement of commercial disputes involving ASEAN members. Given the current international legal structure on alternative dispute resolution, the role of the Mediation Convention in promoting commercial activities in the region is to fulfill the need on legal certainty and efficiency of the enforcement of settlement agreement. The agreement is legally enforceable as it has the same power as court decision. As can be seen from the analysis above, the current conditions in ASEAN members are varies. Not all ASEAN members have or able to fulfill the above stated conditions. Furthermore, only half of the members ratify the convention. Therefore, for mediation to work well in commercial dispute settlement among ASEAN member states will still need a lot of effort and time. In short, ASEAN members need to ratify the Mediation Convention and meet all the necessary requirements to be able to reap the benefit of the mediation in the region.

Acknowledgments

This research project would not have been possible without the support of Faculty of Law, Gadjah Mada University. Thanks to the Research and Publication Unit for awarding me a research award which provides me with the financial means to complete this research.

[53] Hector F. Senties, "Grounds to Refuse the Enforcement of Settlement Agreements under the Singapore Convention on Mediation: Purpose, Scope, and Their Importance for the Success of the Convention," *Cardozo Journal of Conflict Resolution* 20, no. 4 (2018): 1235–58.

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