

INVESTOR STATE MEDIATION AN OVERVIEW

Wolf von Kumberg
Independent Arbitrator and Mediator
Arbitra
London & Washington D.C.

DEVELOPMENTS IN INVESTOR STATE MEDIATION

During the last 10 years, leading international dispute organisations, including the International Centre for the Settlement of Investment Disputes (**ICSID**), the United Nations Commission on International Trade Law (**UNCITRAL**) and the Energy Charter Conference (**ECT**) have focused on the Investor- State dispute settlement needs of the global community.

They have responded with a multiple of Investor-State Mediation initiatives including: mediation rules published by ICSID, the International Bar Association (**IBA**), UNCITRAL and ICSID process guides (ECT Mediation Guide and ICSID Background Paper on Investment Mediation) and statutory/regulatory frameworks (ECT Model Instrument), ISDS reform UNCITRAL Working Group III and an Overview of Mediation Provisions in Investment Treaties spear headed by Romesh Weeramantry and the CIL..

The recent enactment of the United Nations Convention on the Enforcement of International Settlement Agreements Resulting from Mediation (**Singapore Convention**) has also contributed to the legitimacy of mediation in resolving international disputes. To date, 55 States have signed the Convention and 9 have ratified it.

The IBA and the International Mediation Institute (**IMI**) have also supported the effective use of Investor-State Mediation with, among other things, investment dispute focused model rules and mediator selection criteria.

CEDR through working with an advisory group of 16 international ISDS Law Firms, has published an Investor-State Mediation Guide for Lawyers and their clients.

Capacity building in the form of training mediators and State officials to understand the process of Investor State mediation has been taking place through ICSID, the ECT and CEDR.

The first Investor State Mediator Panel was Launched in March 2022 and is seated at the ADGM in Abu Dhabi.

SUITABILITY OF CASES FOR INVESTOR-STATE DISPUTE MEDIATION

Maintaining relationships

Mediation is particularly well-suited to cases where both the Investor and the State have an interest in maintaining an on-going relationship and where there is a general willingness to engage in negotiations (mediation is essentially facilitated negotiation).

Monetary and non-monetary issues

Where the key issue in dispute is quantum, mediation serves parties by expanding the perspective beyond sums and allowing the identification of a quantum range and similarly valued non-monetary remedies.

Early resolution

Mediation should be considered as an early part of the parties' investment grievance resolution process, before disagreements harden into disputes.

Parties control

Mediation is helpful where there is a desire to keep control of the process and the outcome, especially if possible solutions extend beyond purely monetary relief.

State settlement framework

Access to mediation is facilitated where a State has implemented a framework within which negotiations can take place and State officials feel empowered and are authorised to settle matters without fear of repercussions and in accordance with existing laws.

TIMING

Investor-State Mediation can be accessed to effectively resolve disputes at any point in the dispute resolution continuum, including:

Pre-arbitration

Mediation can be an effective early, pre- arbitration settlement tool when provided for as part of the Investor-State dispute resolution process. Ideally, mediation should be incorporated as a key part of State investment legislation and rule-making ([See ECT Model Instrument on Management of Investor Disputes](#)).

In anticipation of arbitration

Mediation can also be used in anticipation of the Investor-State arbitration process. Investors have had some success in sending their draft Demand for Arbitration to the State before filing and inviting settlement discussion.

Cooling off period

This period, contained in many Treaties, can be a useful trigger point for the parties to consider mediating, although that is often not the case. This consideration should be reinforced by Institutions and outside counsel. However, consideration should be given to mediating sooner, as even at this point, positions may have become entrenched.

In parallel

After the commencement of arbitration, mediation should be considered in parallel with Investor-State Arbitration proceedings. An arbitral tribunal's determination on liability or quantum can create the opportunity for mediated negotiations.

Post award

Mediation could also be considered post- Award, where review, enforcement and payment risks still exist.

SETTLEMENT OPTIONS

In mediation, parties can safely address non-contractual economic, social and political needs in addition to contractual issues. All of these considerations are of key importance in resolving investment disputes.

In many cases, monetary damages may be the least likely “currency” for settlement purposes in Investor-State disputes, yet that is the most common remedy in investment arbitration. Awards against a State have an enormous impact on State budgets. Finding an amicable resolution through mediation is therefore extremely attractive.

Through mediation, if a settlement can be devised by the parties that is a positive outcome for the Investor and the State. This could include solutions such as renegotiating the terms of existing agreements, bringing in new investors to buy out existing investments, negotiating alternative investments.

Through mediation the parties can create a host of non-monetary settlement remedies, including regulatory change, extra-contractual commitments (e.g. labour contract commitments, community or environmental improvements) and new contracts.

The design process for mediation permits a wide range of possible stakeholders, in addition to the direct parties to the dispute (such as Community Groups or NGOs), to be included in the process so that a more comprehensive settlement can be achieved, and broader remedies agreed. This will lead to a more acceptable political and social outcome than an award imposed by an arbitral tribunal.

Conclusion

There is an on-going need to build capacity for mediation in ISDS before it becomes an accepted part of the process through:

- Continuing education of State officials, external counsel, investors and the ADR community
- Continuing to train specialized IS Mediators and establish credible panels from which they can be selected
- Increasing the inclusion of mediation provisions in IIAs through information drives by international institutions
- Review the timing opportunities for mediation and when it might be most effectively introduced in the dispute resolution process (for example during cooling off periods in IIAs)
- Using the assistance of mediation institutions such as CEDR in the drafting of practical mediation provisions
- Ongoing support for mediation by Institutions such as ICSID, UNCITRAL and The ECT
- Effective process design
- Better understanding for the cost/benefit of resolving matters through mediation
- Dealing with the perceived obstacles to the use of mediation in ISDS:
 - Transparency vs confidentiality
 - Risk to State officials
 - Political risk
 - Working internal State Framework for mediation to be utilized within
 - Enforceability of mediated settlements
 - Cost and time elements



Wolf von Kumberg has been involved in international business for over 25 years, latterly as the Assistant General Counsel—International for Aerospace Security leader Northrop Grumman Corporation and prior to that as Legal Director for the conglomerate Litton Industries, Inc. In those roles, he was responsible for the International Dispute Resolution Program and compliance activity, including drafting of ADR policies and guidelines, as well as implementation and training. He has held board positions with several of the leading international ADR institutions and is on their training faculties. Wolf is now an independent mediator and arbitrator with Arbitra Arbitrators and Mediators, with offices in London and Washington D.C. and also advises companies and States on implementing effective conflict avoidance programs tailored to their needs. He has been an accredited mediator for 20 years and an arbitration Fellow of the Chartered Institute of Arbitrators since 1998. Over the past six years, Wolf has been involved in helping to develop the field of investor/State mediation together with **ICSID**, The Energy Charter Treaty Secretariat (**ECT**) and the Center for Effective Dispute Resolution (**CEDR**). He is now focusing on energy transition risks in investor/State relationships and the use of mediation to mitigate the effect of these disputes on net zero climate goals.

arbitra™

Arbitra London

Juxon House
100 St Paul's Churchyard
London EC4M 8BU
T// +44 (0) 207 936 7070

Arbitra Washington DC

Midtown Center
1100 15th Street NW
Suite 420
Washington DC, 20005
T // +1 202 964 2727

E // info@arbitra.co.uk