The Rising Interest in the Mediation of Investment Treaty Disputes, and Scope for Increasing Interaction between Mediation and Arbitration

Kluwer Arbitration Blog
September 29, 2016

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Please refer to this post as: Esmé Shirlow (Associate Editor), 'The Rising Interest in the Mediation of Investment Treaty Disputes, and Scope for Increasing Interaction between Mediation and Arbitration', Kluwer Arbitration Blog, September 29 2016, http://arbitrationblog.kluwerarbitration.com/2016/09/29/the-rising-interest-in-the-mediation-of-investment-treaty-disputes-and-scope-for-increasing-interaction-between-mediation-and-arbitration/

Recent developments indicate there may be increasing interest in the creation of alternative forms of dispute resolution for investor-State disputes. One potential alternative is mediation. This post outlines how 2016 has been an important year for investor-State mediation, considers how mediation interacts with investment treaty arbitration, and the benefits and risks associated with such a development.

The Rise of Investor-State Mediation?

Three recent developments have highlighted the potential for mediation to work in tandem with, or even as a replacement for, investment arbitration.

First, States are increasingly negotiating treaties incorporating mediation as a form of investor-State dispute settlement. The text of the Comprehensive Economic and Trade Agreement (CETA) proposed for signature by the European Commission in July this year, for example, provides for mediation of investor-State disputes

(Article 8.20). Discussions in the April negotiating round of the Regional Comprehensive Economic Partnership, similarly indicated interest amongst negotiators in including alternative dispute resolution options for investor-State disputes.

A second development occurred on 19 July, with the Energy Charter Conference adopting a "Guide on Investment Mediation". This Guide is an "explanatory document" designed to encourage States and investors to actively consider mediation for investor-State disputes. The Guide covers a range of matters, including the rules which may apply to mediation proceedings, the likely structure of a mediation, and the enforceability of any resulting settlement agreement. The Guide also canvasses the key differences between existing mediation or conciliation rules. These include the IBA Investor-State Mediation Rules (2012), the ICC Mediation Rules (2014), the ICSID Rules of Procedure for Conciliation Proceedings (2006), the PCA Optional Conciliation Rules (1996), the Stockholm Chamber of Commerce Mediation Rules (2014), and the UNCITRAL Conciliation Rules (1980). With the exception of the IBA Rules, the ECT Guide differs to existing sets of rules insofar as it focusses specifically upon *investor-State* treaty-based mediation.

Finally, a further development occurred in August, when IAReporter broke news of an "apparent first" investor-State mediation. The dispute, between the Philippines and a French company, was filed under an investment treaty and is being conducted under the IBA Rules.

Distinguishing Mediation from other forms of Dispute Settlement

Article 33 of the UN Charter provides a useful list of the range of mechanisms available for the settlement of international disputes. These include: "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means". These options differ from one another in three key ways: some result in more binding outcomes, some are political processes whereas other are more legal, and some offer the disputing parties greater control over structure and outcome. Addressing some of these characteristics, the ECT Guide describes mediation as:

> *"a process in which a neutral third party, a mediator, meets with the disputing parties and actively assists them in reaching a settlement based on their*

business interests and risk assessments or policy considerations and not only their legal positions."

Mediation is frequently likened to conciliation. In fact, both the ECT Guide and PCA Conciliation Rules specifically use "mediation" and "conciliation" interchangeably. While these two forms of dispute settlement are similar, they are not entirely identical. One key difference is their level of institutionalisation, and the extent to which the third party is empowered to suggest terms of settlement. Mediation is easier to distinguish from arbitration and judicial settlement:

- Mediation is typically facilitative, rather than evaluative: the mediator does not issue a binding decision, with the disputing parties instead retaining control over the process and its outcome. Parties might, however, opt for "evaluative" rather than "facilitative" mediation and so vest more power in the mediator to settle the dispute.
- Mediation is an "interests-based" rather than a "rights-based" This feature makes mediation particularly appropriate for disputes involving long-term investments or investors embedded within a host State. As the ECT Guide observes, a key advantage of mediation is that it offers parties the possibility of retaining or even improving their relationship (Section 12). Mediation is also not subject to standing or jurisdictional requirements and so may be more inclusive of a broader range of participants.
- Mediation is likely to be less formal, placing emphasis upon communication between the parties. The ECT Guide, for example, recommends that the teams of individuals engaged in mediation proceedings be kept "as small as possible in order to maximise engagement" (Section 5.3). These features of mediation mean that it is likely to be both quicker and cheaper than arbitration. This is recognised in Article 8.20(4) of CETA, which provides that parties "shall endeavour" to resolve investor-State disputes taken to mediation within 60 days from the appointment of the mediator.

These features of mediation may offer disputing parties advantages over other dispute settlement options. Parties might even merge different processes to address their own requirements. "Med-arb", for example, fuses mediation and arbitration by having one person act as mediator and arbitrator in a unitary process.

Integrating Mediation with Arbitration

The linkages between arbitration and mediation are particularly evident in the investor-State field in terms of institutions and personnel. Currently, mediation is being addressed by the same institutions, or in the same agreements, that address investment arbitration. The "apparent first" investor-State mediation also involves a well-known investor-State arbitrator as mediator. In addition to these sociological interactions, mediation might interact with arbitration procedurally in a number of ways.

Mediation might precede arbitration. The ECT Guide suggests that mediation could play a role during the "cooling-off" period under treaties, during which time disputing parties consult with one another to settle the dispute. Typically, investment treaties leave to disputing parties the choice of means by which this consultation might be achieved. This means that disputing parties can comply with these provisions without resorting to mediation. States could, however, introduce binding mediation requirements into future treaties. Nancy Welsh and Andrea Kupfer Schneider suggest that such treaties "could require the parties' participation in….an initial mediation session, with the parties themselves then choosing whether to proceed further in mediation at that time".

Mediation can also occur during an arbitral proceeding. Both the IBA Rules (Article 2(4)) and CETA (Article 8.20) expressly contemplate this possibility. This use of mediation can support disputing parties to reach a settlement of their dispute or, if no settlement is forthcoming, to refine or narrow the issues to be addressed in the arbitral proceeding. There has been at least one case in which an investor-State tribunal specifically encouraged the disputing parties to make this use of mediation. In that case, the tribunal observed at the end of the hearing that "the aims of both sides seem to be approximately aligned, and that the black and white solution of a legal decision in which one side wins and the other side loses is not the optimum outcome in this case". On this basis, it recommended that the parties might "seek out somebody who might act as a mediator or reconciliatory" to settle the dispute.

Finally, mediation might offer an alternative to arbitration. The confidentiality of mediation makes it difficult to assess whether it is already playing a role in diverting disputes from arbitration. Depending on the applicable rules, parties may be required to keep confidential documents exchanged during mediation, the

outcome or settlement terms, or even the fact that the mediation is taking place. In addition to the rather peripheral role played by investor-State conciliation, the enforceability of mediation settlements gives reason to conclude that mediation is unlikely to replace arbitration in the near future. While a mediation settlement results in a binding contract, further involvement of an arbitrator would be required to make that contract enforceable under treaties like the New York Convention. That said, UNCITRAL has recently made progress towards the development of an instrument for the enforcement of settlement agreements resulting from international commercial conciliation. Similar developments could in the future address issues of enforceability of settlement agreements resulting from investor-State mediation under treaties.

A Step in the Right Direction?

In 2011, Anna Spain lamented that mediation was “underappreciated” as a means of settling international disputes. She suggested that this may be because there were at that time no “universally accepted procedural rules governing the use and practice of mediation”. This year’s developments show that the tide may be turning. There is, however, reason for caution, particularly where there remain uncertainties around the standards of transparency that would attach to such methods of dispute settlement. Diverting investor-State disputes to mediation may undercut the important gains made in respect of transparency in investor-State arbitration. The ECT Guide specifically recognises that non-transparent use of mediation in the investor-State context may have implications for the legitimacy of settlement agreements. Confidentiality also makes it difficult to establish “what works, when it works, and why it works”. Nevertheless, these developments in investor-State mediation offer much food for thought. Given the possible ways in which mediation and arbitration might interact, it will be particularly interesting to see the extent to which they remain linked in future practice.