Investor-State Arbitration Meets Mediation: The Singapore Convention on Mediation as Game-Changer

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Rachel Tan (Singapore International Dispute Resolution Academy)

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The Singapore Convention on Mediation entered into force on 12 September 2020. Its entry into force compels a deeper look at dispute resolution design for investor-state disputes, and encourages a reconsideration of the common choice of arbitration in favour of mediation for two main reasons. The first reason relates to enforcement as the entry into force of the Convention carries increased prospects for the enforceability of international mediated settlement agreements; the Convention being the missing third link complementing the New York Convention and the Hague Convention on Choice of Court Agreements. The second reason relates to how the inherent qualities of mediation could carry advantages for more efficient dispute resolution design, either as a standalone mechanism or in conjunction with hybrid processes.

The Singapore Convention and Enforcement of International Mediated Settlement Agreements

It is undisputed that arbitration, whether institutional or ad hoc, is currently the

mechanism of choice for investor-state disputes. In the Singapore International Dispute Resolution Academy International Dispute Resolution Survey Report 2020 (**SIDRA Survey**), legal users (lawyers and legal advisers) and client users (corporate executives and in-house counsel) across civil and common law jurisdictions ranked **arbitration** as their top choice in settling investor-state disputes. This was the case even though parties have, in theory, the discretion to select a number of processes to settle their disputes (including the processes set out in Article 33(1) of the UN Charter such as negotiation, fact-finding, conciliation, judicial settlement, resort to regional agencies or arrangements, or other peaceful means).

A key reason cited in the SIDRA Survey was the enforceability of arbitral awards, and this comes as no surprise given that such awards may be enforced through the New York Convention or the International Centre for the Settlement of Investment Disputes (**ICSID**) enforcement process.

Absent the Singapore Convention, it is likely that arbitration would remain the mechanism of choice. However, the Singapore Convention enhances the attractiveness of mediation by allowing international mediated settlement agreements to be enforced across national borders, and is in substance the mediation equivalent to the New York Convention. This means that parties can now have the option, and reassurance, of directly enforcing their mediated settlement agreements in state parties that ratify the Convention instead of relying on a mediated settlement agreement as a contract to be enforced in a local court. This is so even for investor-state disputes, because as discussed in Mushegh Manukyan's 2019 post in the Kluwer Mediation blog, the text and *travaux preparatoires* of the Convention supports the interpretation that the Singapore Convention applies so long as a dispute is "commercial".

Naturally, some point to Article 8 of the Convention to argue that states could simply apply the reservations clause, exclude themselves from the Convention in respect of their investor-state disputes, and leave investors without a guarantee of enforcement of any mediated settlement agreement even if the mediation is successful.

However, this is not an undue cause for worry. As seen from the *travaux préparatoires*, the inclusion of Article 8 should be viewed positively as the UNCITRAL Working Group II noted that government entities should not be

automatically excluded from the Singapore Convention (see **A/CN.9/WG.II/WP.198** at [24]; **A/CN.9/867** [111]), and therefore suggested that States who intended to "opt out" could do so by making a reservation under Article 8. In other words, the overriding purpose of the Convention is meant to be inclusionary and to facilitate enforcement even in investor-state disputes involving government entities. Further, it is worth noting that only three states (Saudi Arabia, Belarus, and Iran) out of the 59 states that have signed or ratified the Convention have made reservations under Article 8. Hence, one may conclude that state practice in signing or acceding to the Convention carries a positive trend that reflects the commitment of states to uphold the provisions, object and purpose of the Convention, and correspondingly the commitment to enforce mediated settlement agreements even if they are respondents in a commercial dispute.

Mediation and Investor-State Settlement Process Design

Notwithstanding the above, the question remains – why should states or investors choose to use mediation even if there are good prospects of enforcement? After all, whether the Convention applies to investor-state disputes of a commercial nature is a separate question from whether investors or states will **choose** to use mediation. I proffer three reasons as to why mediation is an attractive proposition.

First, as Professor Jack Coe notes, investor-state arbitration resembles the common law style of commercial litigation, save for the fact that there is slightly more procedural flexibility as the tribunal is not bound by codes of civil procedure and established rules of court. An arbitral tribunal is also bound to decide a case based on the applicable law and the evidence before it, unless parties agree that the tribunal may decide the case *ex aequo et bono.* In contrast, mediation is an inherently flexible process that allows parties to take into account multiple considerations in reaching a settlement agreement, which reduces the strict focus on law and evidence. The practical implication of this is that parties have the ability to arrive at a solution that may not be solely derived based on the law, or even simply result in an award of monetary damages, but have the leeway to come to a creative settlement agreement.

Second, in Jean Kalicki's 2013 Kluwer post on the prospects of mediating investor-state disputes, she notes that mediation has the ability to result in a solution that

can preserve an underlying business relationship, and this factor is relevant as history shows that investment arbitration is "not just an exit strategy, as many investors who commence investor-state arbitration intend or would prefer to remain active participants in the host state market". The SIDRA Survey corroborates this finding as it indicates that it is **client** users who prioritize the maintenance of a business relationship with host states. Since this is a consideration that operates, mediation, as a consensual process, would function as a more advantageous form of dispute resolution as it allows parties to salvage the business relationship before it is too late to mend.

It is also worthwhile to dispel some concerns about states being reluctant to mediate because of a fear of public and/or political criticism. This factor was mentioned in the 2018 Centre of International Law's Report on the Survey to Obstacles to Settlement of Investor-State Disputes and also highlighted by respondents in the SIDRA Survey. However, while this general observation may be accurate at first instance, it is not always the case that states necessarily shy away from mediation. For example, the Government of Indonesia, in its submission to the UNCITRAL Working Group III, suggested **mandatory** mediation after the exhaustion of the consultation process as a way out to prevent a dispute from escalating into a legal dispute. It is also the case that states are increasingly inclined to include procedural rules applicable to mediation in their international agreements (for example the EU-Singapore Investment Protection Agreement) which reflects their willingness to engage with the process.

Third, it is not disputed that investor-state arbitration can be a process that is long and drawn out. In fact, the SIDRA Survey indicates that costs and speed are **not** key considerations for clients in investor-state dispute settlement, reflecting that investors take it as a given that their dispute could be protracted. However, it is nevertheless worth the effort for lawyers and legal advisors to re-think designing the dispute resolution process to employ hybrid mechanisms in investor-state disputes. Mediation is complementary to arbitration as parties may carve out certain sections of the dispute to refer to mediation (which could be subsequently enforceable under the Singapore Convention) and refer other parts of the dispute to arbitration for a determination on the law and the facts. The point is that mediation is flexible enough to be incorporated into dispute resolution design, and a more considered approach to including it in the dispute resolution process could save time, emotional energy and costs for all parties involved.

All in all, while the special attraction of arbitration is that it is definitive and may remove the risks of political and/or public backlash, it is mediation that gives the possibility of a more holistic outcome that cannot be reached by the pure application of the law and facts, and more crucially preserves the possibility of a settlement by consensus. It is this settlement by consensus that has made voluntary compliance possible even when the Singapore Convention was still in draft. After all, the import of the Singapore Convention lies not just in the fact that international mediated settlement agreements will now be enforceable, but also in the promotion of mediation as a credible and mainstream alternative to litigation and arbitration. In the context of an investor-state dispute where complex issues run deep, the incentive to consider mediation is worthwhile for all parties.

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This post is part of a series on the relationship between investor-State arbitration and mediation. To see our full series of posts on this topic, click here