

Reform of Investor-State Dispute Settlement - UNCITRAL

THE ROLE OF MEDIATION IN ISDS

Webinar on 18 June 2020, 2-4 pm (CEST)

The UNCITRAL Secretariat and the ISDS Academic Forum are organizing a webinar on the topic of mediation. The webinar will focus in particular on the existing legal framework and practice of mediation as well as its role in future ISDS.

See attached:

- Note from the Rapporteur of Working Group III (Annex 1)
 - Background information (Annex 2)
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The webinar is open for participation to all UNCITRAL Working Group III member and observer States delegations as well as inter-governmental and non-governmental organizations with observer status. Please, contact the Secretariat for the connection details at uncitral@un.org and join on **18 June 2020, from 2-4 pm (CEST)**.

Programme

1. Opening of the session (2-2.15pm)

Welcome remarks, by Anna Joubin-Bret, Secretary, UNCITRAL and Malcolm Langford, ISDS Academic Forum

Short remarks on the proposed inter-sessional meeting in November 2020, by Ms. Teresa Cheng, Secretary for Justice of the Hong Kong Special Administrative Region, People's Republic of China

2. Presentations (2.15-3.10 pm)

Introduction

Natalie Morris-Sharma, Rapporteur, Working Group III

Catherine Kessedjian, Prof. em., Mediator, Arbitrator, ICSID Conciliator – List of France

Presentation of the Academic Forum Paper

Mediation in Future Investor-State Dispute Settlement,
Academic Forum on ISDS Concept Paper 2020/16, 5
March 2020, available at

<https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf>

Anne van Aaken, A. von Humboldt Professor for Law and Economics, Legal Theory, Public International Law and European Law, University of Hamburg

Discussion

From two-party to multi-party dispute resolution: a negotiation analysis perspective, Arvid Bell, Lecturer, Harvard University, Director of the Negotiation Task Force

Mediating collective interests, Deborah Masucci, FCI Arb, Arbitrator and Mediator, Co-Chair of the International Mediation Institute (IMI)

The line of authority within the State, Barton Legum, Partner, Dentons

ICSID Mediation Rules – Expanding the Pie in Investment Dispute Settlement, Frauke Nitschke, ICSID Representative

3. Comments by participants (3:10-3:50 pm)

Participants will be invited to make comments and raise questions.

4. Concluding remarks (3:50-4:00 pm)

Shane Spelliscy, Chairperson, Working Group III

Annex 1 – Note from the Rapporteur

Distinguished delegates,

This webinar organised by UNCITRAL on the topic of the role of mediation in ISDS is, like the other webinars we have had in the series, intended to facilitate the continued effective and efficient functioning of the Working Group, particularly during the current situation when physical meetings are not possible. The webinar is solely for informational purposes and does not in any way replace our Working Group sessions.

As the last webinar of the season, it is fitting that the topic of today's seminar – the role of mediation in ISDS – casts our minds forward as, while the role of mediation in ISDS may not be large now, by all accounts it is set to grow.

A few preliminary remarks are in order, taking a leaf from UNCITRAL's recent work on the Singapore Convention on Mediation and the amended Model Law on Mediation. First, by "mediation", we are referring to a process whereby the disputing parties attempt to reach an amicable settlement of their dispute, with the assistance of a third person or persons lacking the authority to impose a solution upon the parties to the dispute. In addition, for the purposes of this webinar, the terms "mediation" and "conciliation" are to be understood as interchangeable.

In our Working Group papers, submissions and discussions thus far, questions regarding dispute prevention and mitigation, specifically alternative dispute resolution methods such as mediation, have been consistently raised as a common theme of interest. Alternative dispute resolution methods have been cited as a means of reform of ISDS that have the potential to address concerns over cost and duration. Specifically, mediation offers the promise of cost-effective and time-effective dispute resolution. Not only can mediation be used as a tool to prevent disputes from emerging or escalating to formal investment disputes, in the event of a formal investment dispute, mediation enables the disputing parties to clarify and crystallise, and therefore focus on, the issues in the dispute. It also offers a higher degree of flexibility and autonomy to the disputing parties. This allows parties to shape the way their disputes are resolved, including by agreeing on innovative solutions that would enable the longer-term preservation of their commercial relationship and of the foreign investment.

Interest in mediation as a form of alternative dispute resolution in the investor-State context has increased.

Rules on mediation that can be applied to ISDS have been developed by the International Chamber of Commerce, the International Bar Association, and the Energy Charter Conference, as well as by ICSID and UNCITRAL. Mediation is not explicitly referred to in the majority of existing investment treaties (though this may not mean that the use of mediation is prevented in such cases). That being said, recent treaties have signaled possible new trends, through the introduction of frameworks such as annexes dedicated to mediation, as a complement to the option of investor-State arbitration. Additionally, there has

been favourable reception on the part of investors of the prospect of mediation in the investor-State context. Evidence of this has been cited in the Academic Forum's concept paper on mediation in ISDS, which Anne van Aaken will be presenting on.

In respect of UNCITRAL's work in this area, we have seen an upsurge in interest in mediation, including in the investor-State context, following the conclusion of the Singapore Convention on Mediation. As most of you would be aware, UNCITRAL Working Group II (Dispute Settlement), which I had the privilege of chairing, had, from 2015 to 2018, worked on what became the United Nations Convention on International Settlement Agreements Resulting from Mediation (also known as the "Singapore Convention on Mediation") and the 2018 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation. The Singapore Convention on Mediation opened for signature in Singapore on 7 August 2019. To date, the Convention has been signed by 52 countries, from all regions of the world. It has been ratified by 4 countries, and will enter into force later this year, on 12 September 2020.

The Singapore Convention on Mediation enables mediated settlement agreements to be enforced and invoked internationally, so long as the requirements of the Convention are met. In short, it is to mediated settlement agreements, what the New York Convention is to arbitral awards. In this way, the Singapore Convention on Mediation responds to one of the key obstacles that had been cited with regards to the use of mediation in a cross-border context, namely that the outcome of a mediation cannot be enforced internationally the way an arbitral award can. Already, the Singapore Convention on Mediation has been taken into consideration by various mediation rules, such as ICSID's new Mediation Rules, which Frauke Nitschke will take us through later.

Notwithstanding the intensified interest in mediation on the parts of States, investors, and international institutions, experience with mediation in the investor-State context is less widespread. Today's webinar seeks to encourage us to keep thinking about some important questions, relating to the questions for consideration that the UNCITRAL Secretariat has already put before us in document A/CN.9/WG.II/WP.190. These include:

- (a) what are the specific characteristics and contexts of investor-State disputes that we need to bear in mind, including their complexity and the issues and public interests that such disputes often concern, and how and why would mediation be well-placed respond to such a characteristics and contexts;
- (b) what can we already learn from the use of mediation in the investor-State context, including in terms of best practices as well as some obstacles faced, and how could we promote further knowledge and capacity building;
- (c) how could treaty dispute settlement mechanisms be designed to give room for mediation, including stipulating when mediation should or could take place, and how could mediation interrelate with other forms of dispute resolution such as an ongoing or subsequent arbitration;
- (d) how could government structures be designed to give room for mediation, including to ensure that there is the appropriate authorisation and accountability on the part of State representatives to utilise mediation.

These questions and more, will be tackled by our presenters today. In addition to Anne van Aaken and Frauke Nitschke who I have mentioned, we will also have the opportunity to hear from Arvid Bell, who will demonstrate to us the complexities of ISDS; Deborah Masucci, who will speak on mediating collective interests; and Barton Legum, who will address the line of authority within the State.

I look forward to the thoughtful presentations and to your questions and comments during today's webinar. I also look forward to our further conversations on this issue in the Working Group, once we are able to see each other again.

Sincerely,

Natalie Y. Morris-Sharma
Rapporteur of Working Group III

Annex 2 – Background information

The following documents contain information on the history and current status of the discussion on a multilateral instrument in Working Group III and provide for a basis for the discussions. Further material can be found on the UNCITRAL website (https://uncitral.un.org/en/working_groups/3/investor-state).

- Document [A/CN.9/WG.III/WP.190](#) Note by the Secretariat on dispute prevention and mitigation - Means of alternative dispute resolution;
 - Catherine Kessedjian, Anne van Aaken, Runar Lie, Loukas Mistelis, “Mediation in Future Investor-State Dispute Settlement”, Academic Forum on ISDS Concept Paper 2020/16, 5 March 2020, available at <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf>.
 - See also bibliographic references published by the Academic Forum, available under “Additional resources” at https://uncitral.un.org/en/working_groups/3/investor-state or <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/> and <http://bit.ly/isds-academic-forum>
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