The Potential Impact of the Singapore Convention on the Development of investor State Mediation

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With the signing of the Singapore Convention in August 2019, mediation has been given new credibility as an international process for the resolution of disputes. Having been an inhouse lawyer for several international companies over more than 25 years, involved in many cross border disputes, this was a decisive moment. Our international contracts had for many years included arbitration provisions for the resolution of disputes. I had also tried to include mediation provisions, but particularly when dealing with States or State entities, I always found I hit a wall. They simply did not want to provide for mediation, in most cases either because they did not understand it, or felt it was a process too ill defined for State officials to be involved with. The result was somewhat better when dealing with private companies, but even there it very much depended on their size and sophistication and critically where they were located in the World.

Fast forward to August 2019 and what has now changed? To understand that in the context of investor state disputes one must first look at what has been happening in the way of encouraging the use of mediation generally. In the past, mediation simply was not often contemplated in the context of the investor state disputes system (ISDS). It had its own unique dispute resolution system that had grown out of Investment Treaties negotiated between individual States (bilateral investment treaties or BITS) or on a multi-lateral basis between larger groups of States such as NAFTA. Previously, these agreements contemplated that arbitration would be used to finally resolve disputes between investors and states. Mediation was not even mentioned or contemplated to have a role in these disputes. ICSID, the body of the World Bank responsible for trade disputes had arbitration rules and in addition, a set of conciliation rules. The conciliation rules were not however, a form of mediation, but rather a tribunal that heard the dispute and then rendered a non-binding opinion. Most parties never used conciliation and moved directly to arbitration. The cooling off period provided for in BITs (usually 3 to 6 months) was not used to try to find a resolution to the dispute, but rather to prepare for the arbitration.

Five years ago, I started assisting the Energy Charter Treaty Secretariat, a grouping of 54 States which establishes a multilateral framework for cross-border cooperation in the energy sector, look at how mediation could be introduced to its Rules. The Rules provided for arbitration to resolve disputes with investors and had a reference to conciliation, without any specific process. The Secretariat was interested in filling in the gaps by providing for the possibility of mediation. We worked on a mediation guide, which would provide the member States with an outline of the mediation process and how it might be used in investor state disputes. The Guide on Investment Mediation was published on the 19th of July 2016. It was recognized that the Guide alone was not enough. States have largely not mediated, because of the lack of an internal framework, through which the mediation process could be carried out. Issues such as

authority to settle, transparency vs confidentiality, responsibility, liability for taking decisions, and state budgets were all a factor. As a result, The Secretariat then went on to review with the member States a model framework that could be adopted within state structures, through which these issues could be dealt with. This Model Instrument on Management of Investment Disputes was published in December 2018 and has been adopted in the interim by several Member States.

In addition to the ECT, I have also been working with IMI, ICSID and CEDR to develop IS mediation awareness programs and training for mediators and States. It was recognized that without this training the knowledge required for States to mediate these disputes, would not exist. In addition, to give the process credibility a cadre of mediators, who not only understood mediation, but also ISDS had to be trained. Since 2017, several annual IS mediator training courses have been held and mediators capable of handling these cases are now prepared.

Even more important for the acceptance of mediation in these disputes is the fact that ICSID, the organization through which most of these disputes are heard, has given its full support to the development effort. This culminated in December of 2019 with ICSID publishing its own IS mediation rules. This has given the initiative credibility with both investors, their counsel and States and was a strong step forward to making mediation part of the ISDS process.

In fact, there have already been several important investor state disputes where mediation has now been used. The most recent reported case (as many are not reported), was that of the Dominican Republic and Oldebrecht that was mediated this January by well known international mediator Mrs. Mercedes Tarrazón. The matter was mediated under the ICC mediation rules and led to a settlement agreement between the parties.

So back to the Singapore Convention. Many aspects of the Convention have been well covered in this webinar series and I will not repeat them, only to point out the Preamble, which to my mind is of key significance to the development of investor-state mediation. It states:

Recognizing **the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,**

Noting **that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,**

Considering **that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,**

***Convinced* that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,**

So, that is the real importance of the Convention to the continued growth of the use of mediation in ISDS. In short, it is the fact that States by signing and ratifying the Convention have recognised the use of mediation as a legitimate instrument for resolving cross border disputes. This gives mediation enormous credibility as a dispute resolution mechanism that can be used as part of the dispute resolution toolkit. Once States have acknowledged this for commercial disputes generally, it is difficult for them to take the position that it does not apply to the State itself or it's agencies when dealing with investors.

In fact, if we take the New York Convention as an example, very few States have excluded the application of the Convention to arbitrations involving States or their agencies. In fact, one of the reasons international arbitration became popular and an acceptable dispute resolution tool, was that arbitral awards can also be enforced against States under the New York Convention. This example provides the blueprint for the enforcement of mediated settlements against States as well. It is not so much enforcement that is important, as most States when they actually agree to a Settlement will abide by its terms, but the recognition by States through the Singapore Convention that mediation is an acceptable means of resolving disputes.

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