Kluwer Mediation Blog

Future of ADR between investors and public authorities

Rafal Morek (DWF LLP) · Friday, August 18th, 2017

The European Commission has recently published a consultation document on the 'Prevention and amicable resolution of disputes between investors and public authorities within the single market'. Industry associations, practitioners (e.g. lawyers, arbitrators, and mediators), civil society organizations, as well other citizens and organizations are invited to submit their contributions through an online questionnaire by November 3, 2017.

The raising interest in using mediation in (foreign) investor-state (public authority) disputes shown by the European Commission is related, among other factors, due to its position on arbitration in intra-EU bilateral investment treaties between them ("intra-EU BITs"). The European Commission initiated infringement proceedings against five Member States requesting the latter to terminate intra-EU BITs, as well as took several other actions to eliminate the use of investment arbitration in intra-EU relations. The so-called ISDS (investor-State dispute settlement) has received bad press recently, although criticism is to a large extent based on shallow analysis, false assumptions and several clichés. No doubt, reform is needed, with some actually already underway (see for example UNCITRAL's activities), and mediation – or more broadly non-adjudicative ADR – is seen as its

important tool.

EU Consultations

The objective of the current consultations is to investigate whether EU rules could be useful in the context of preventing and resolving disputes amicably between investors and public authorities. Amicable resolution of investment disputes, such as through mediation, can help find consensual solutions to problems where they arise. Mediation is presented in the consultation document as an agent of supporting a more predictable, stable and clear regulatory environment to incentivize investments in the Single Market.

As of today the intra-EU BITs provide mainly for arbitration as a binding dispute settlement mechanism, and the use of mediation in this area is close to minimal. In addition, awards rendered by arbitration tribunals are usually not subject to judicial review by national courts and the European Court of Justice, and hence arguably sometimes may be inconsistent with the EU law. The Commission finds that mediation is for a number of reasons highly attractive. It could help to ensure a cost-effective and quick resolution of disputes between investors and public authorities.

The consultations commenced by the Commission follow the actions taken by international organizations, with global or regional outreach, which have been showing their interest in Investor-State Mediation. For those readers who wish to participate in the questionnaire or just to take a closer look at the topic, the following short review of some of those current developments may be interesting.

IBA Investor–State Mediation Rules

In October 2012 the Council of the International Bar Association (IBA) adopted the Investor–State Mediation Rules. The Rules were developed by the IBA's State Mediation Subcommittee, co-chaired by Anna Joubin-Bret and Barton Legum. The Rules have been separately discussed in this blog. After almost five years, as recently correctly observed by Frauke Nitschke, it still remains a challenge as to how and to what extent the IBA Investor–State Mediation Rules could fit into the existing investor–State dispute settlement regime.

ICSID

International Centre for Settlement of Investment Disputes (ICSID) – a central institution for the worldwide ISDS system – is involved in several initiatives to promote investor-State mediation. Only recently, in June 2017, it hosted a conference entitled "Investor-State Mediation: Perspectives from States, Mediators & Practitioners" which featured panels discussing different aspects of the use of mediation in investor-State dispute settlement. Shortly prior to the conference, ICSID, the Centre for Effective Dispute Resolution, the International Mediation Institute (IMI) and the International Energy Charter jointly organized a 3-day training course tailored for mediators in investor-State disputes.

The ICSID Convention and Rules themselves provide expressly for arbitration, conciliation and fact-finding procedures. In no way do they prevent disputing parties from agreeing to mediation and/or early neutral evaluation. As indicated by the ICSID Secretariat, any resulting amicable settlement can be incorporated into an award of the arbitral tribunal, pursuant to ICSID Arbitration Rule 43(2).

IMI Competency Criteria for Investor-State Mediators

The International Mediation Institute took an important step forward in defining the skills and competences relevant for mediators in investment disputes in its IMI Competency Criteria for Investor-State Mediators of September 19, 2016. The aim of this instrument is to assist parties, institutions, designating authorities and other appointing bodies in selecting competent and suitable mediators/co-mediators, for disagreements (or concerns) between private sector entities and States, by creating or developing criteria that can help inform and guide their choices.

Guide on Investment Mediation by the Energy Charter Conference

In July 2016 the Energy Charter Conference (an inter-governmental organization that is the governing and decision-making body for the Energy Charter process, established by the 1994 Energy Charter Treaty) adopted the Guide on Investment Mediation. The Guide explains the mediation process in a comprehensive way in the context of investment disputes in the energy sector. The Guide was designed to assist governments and companies in their decisions on whether to opt for mediation and how to prepare for it.

UNCITRAL

In 2014 the United Nations Commission on International Trade Law (UNCITRAL) started working on an instrument to address enforcement of mediated settlement agreements. The proposed instrument is conceived as a "mediation equivalent" of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. In a nutshell, it would put mediated settlement agreements on the same footing as arbitral awards, and provide business users with legal certainty in international relations.

New generation of investment treaties

Remarkably, a majority of the most recent investment treaties – both multilateral and bilateral – provide for mediation. To take an example, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) – approved by the European Parliament in February 2017 – contains specific provisions on mediation to encourage an amicable solution, with some special enhancements for the SMEs, such as the possibility of having the proceedings via videoconference.

Scholarly publications

Finally, a growing number of scholarly publications have been released on the topic. Readers of this blog can easily find many of them online. An interesting collection of recent articles have been released by the ICSID Review in a special focus issue on 'Alternative Dispute Resolution in Investment Disputes' in Volume 29(1).

Conclusions

It is just remarkable how much has changed in the area of mediation in investor-state disputes from 2012 when I posted another piece on the same topic on this blog. I have no doubt that mediation will become an important facet of the ISDS scheme – and that it will happen much sooner than 2036 (see Martin Svatos' post).

To make sure you do not miss out on regular updates from the Kluwer Mediation Blog, please subscribe here.

This entry was posted on Friday, August 18th, 2017 at 8:20 pm and is filed under ADR, Arbitration, Europe, European Law, Governments/Public Sector, Growth of the Field (Challenges, New Sectors, etc.), International Mediation, Mediation Institutions and Rules, Mediation Users/Clients, Reform, Regulation, Uncategorized
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.