

Kluwer Mediation Blog

Mandatory Investor-State Conciliation in New International Investment Treaties: Innovation and Interpretation

Ana Ubilava (University of Sydney Law School) · Saturday, September 5th, 2020

In recent years, mediation has been actively discussed for the investor-state dispute settlement (ISDS) regime, particularly as a means of reducing costs and delays. This interest is one reaction to growing discontent about the option of investor-state arbitration (ISA) typically offered by host states in international investment treaties, to make substantive commitments (like non-discrimination) [more credible for foreign investors](#). Investor-state mediation (ISM) has been raised by some states in ISDS reform deliberations underway since 2018 through the United Nations Commission on International Trade Law ([as mentioned recently on this Blog](#)). In August 2018, the Centre for Settlement of Investment Disputes (ICSID) [announced](#) new draft [ICSID Mediation Rules](#), in addition to longstanding but hardly ever used ICSID Conciliation Rules. These Mediation Rules will be accessible to States and investors irrespective of their membership to ICSID.

A year later, in 2019 the United Nations Convention on International Settlement Agreements Resulting from Mediation was opened for signature, coming into effect from 12 September 2020, and in principle can be used [for ISDS](#). This Singapore Convention on Mediation does not differentiate between mediation and conciliation or any other dispute resolution mechanism resulting in settlements, as long as the procedure that resulted in such settlement agreements complies with the definition of Article 2(3):

“Mediation” means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (“the mediator”) lacking the authority to impose a solution upon the parties to the dispute.

Some recent treaty practice also reflects this growing popularity of ISM dispute settlement mechanisms. Unlike the older bilateral investment treaties (BITs) and even some newer investment chapters in Free Trade Agreements (FTAs), the newest generation of such international investment agreements (IIAs) often have [express references to mediation](#) and conciliation. However, even when they do, almost all IIAs only make such third-party procedures voluntary; foreign investors and host states would have to agree later and separately to try mediation.

Out of over 3000 IIAs world-wide, it seems that only two treaties – the [Hong-Kong – United Arab Emirates BIT](#) (HK-UAE) and [Indonesia-Australia Comprehensive Economic Partnership Agreement](#) (IA-CEPA) FTA, both signed in 2019 – provide instead for mandatory conciliation as a pre-condition to arbitration. However, under both treaties, conciliation becomes mandatory only

for the claimant investor, not for the respondent state.

HK-UAE BIT has a three-tier dispute resolution system: amicable settlement through standard consultations (direct negotiations) during a specified cooling-off period, an additional conciliation step before arbitration (if requested by the host state), and finally investor-state arbitration through the relevant arbitration rules of ICSID, UNCITRAL or the Stockholm Chamber of Commerce. Article 8(3) stipulates:

When required by the Contracting Party, if the dispute cannot be settled amicably within six months from the date of receipt of the written notice, it shall be submitted to the competent authorities of that Contracting Party or arbitration centres thereof, for conciliation.

Initially disputants are allowed six months to try and settle their dispute amicably through consultations. Once this six-month period is over and if the dispute is not settled amicably, conciliation becomes mandatory (for the claimant investor) only if it is initiated by the respondent (the Contracting Party to the BIT). It seems the conciliation is then allocated another six months. According to Article 8(5):

If the dispute cannot be settled amicably within six months from the date of receipt of the written notice or from the start of the conciliation referred to in paragraph (3) of this Article, the dispute shall upon the request of the investor be settled by arbitration...

Therefore, unless the respondent initiates conciliation, the claimant can proceed directly to arbitration once the cooling-off period for amicable settlements ends. However, it is unclear when the condition of mandatory conciliation is deemed to be met: (a) whether the initiation of conciliation and its submission to competent authorities is enough; or (b) whether actual participation in the process is also mandatory.

The BIT is also silent on whether it is possible to cut down the additional six months for conciliation because the settlement is unlikely. One scenario would be where it becomes obvious from the beginning that the respondent had initiated conciliation with the sole purpose of delaying arbitration and has no intention of actually attempting to settle. Overall, this unilaterally mandatory conciliation step increases the total ISDS timeline by six months because conciliation is not integrated into the cooling-off period. Instead it represents an additional middle step in between the existing amicable settlement and consequent arbitration.

Another multi-tiered ISDS clause, as unconventional as that of the HK-UAE BIT, is the ISDS clause provided under the IA-CEPA. Its uniqueness lies similarly in the unilaterally mandatory nature of conciliation (mediation), which the host state can make a pre-condition to the foreign investor proceeding to arbitration. Article 14.23 states:

If the dispute cannot be resolved within 180 days from the date of receipt by the disputing Party of the written request for consultations, the disputing Party may initiate a conciliation process, which shall be mandatory for the disputing investor...

The claimant can proceed to ISA in two ways: (1) if the consultations were unsuccessful, and once the cooling-off period is over, but only if conciliation has not been initiated by either of the disputants; and (2) if the consultations were unsuccessful, but the conciliation has been initiated, whereupon it becomes mandatory for the investor. Therefore, conciliation too has to be unsuccessful for the claimant to then progress to investor-state arbitration.

Under one interpretation, the ISDS timeline for each of the dispute resolution steps under IA-CEPA are cumulative. In particular, the timeline without mandatory conciliation under IA-CEPA is 180 days for consultations plus 90 days before the claim is submitted to arbitration. By contrast, the timeline with mandatory conciliation consists of consultations (180 days) followed by conciliation (120 days) plus 60 days before the claim is submitted to arbitration. Therefore, under this interpretation mandatory conciliation increases by 90 days the otherwise 270-day process before reaching arbitration by 90 days.

A second interpretation is that these timeframes are overlapping. Specifically, if the notice of intent for arbitration is permitted to be given to the respondent during the consultation or conciliation period, then the 60- or 90-day waiting period before commencing arbitration could be counted within these times. However, the treaty is not clear whether the notice of arbitration can be issued within the 180-day cooling off period and/or 120-day conciliation period, or whether the notice of arbitration can be given only after these stipulated time periods end (as under the first interpretation). This is because, while initiating conciliation is permitted during the consultations (Article 14.23), no such provision is provided for the notice of intent for arbitration (Article 14.26). Therefore, what can be said with certainty is that mandatory conciliation increases the overall ISDS timeline by (up to) 120 days.

In addition, like the HK-UAE BIT, IA-CEPA provides no additional information on whether it is permissible to have the 120 days of mandatory conciliation waived for the claimant if it becomes apparent that the respondent is not participating or when the settlement becomes unlikely.

Another important element to consider in IIAs when incorporating mandatory ISM is whether claimants can bypass the mandatory conciliation step through the most-favoured nation (MFN) obligation. This is when States are required to treat each other's investors and investments no less favourably than they treat investors and investments of other, non-contracting states. Accordingly, claimant investors may invoke a treaty between the host State (respondent) and a different State (other than the home State of the claimant) which does not have a multi-tiered ISDS clause and that instead provides direct access to ISA. (Sometimes, however, the MFN provision expressly limits its applicability to later treaties signed by the host state with third parties.) IA-CEPA (Article 14.21(3)) and HK-UAE (Article 4(8)) do not have an express carve-out of ISDS from MFN, so an investor is not allowed to bring claims alleging the breach of MFN clause because any other IIA contains a more favourable ISDS provision.

Notwithstanding the recent steps towards promoting more ISM, the concept of mandatory mediation is still not widely practiced. Various commentators and practitioners have voiced [concerns](#) over the role of mediation in ISDS, even on a voluntary basis, which has sometimes progressed into arguments against the idea of mandatory ISM as a pre-condition to arbitration. However, my new [empirical study](#) – which examines the validity of common concerns against mandatory ISM through statistical and econometric analysis of amicable settlements generally among concluded ISA cases – has found that none of some commonly purported concerns were strongly significant in practice (for example, settlements do not pay less than awards, settlements do not impede transparency of outcomes because the confidentiality of awards depends largely on the decision of the parties regardless of the outcome).

With the Singapore Convention on Mediation promising greater enforceability of settlement agreements, the new ICSID Mediation Rules being promoted for investor-State disputes, and an emerging trend of express references to mediation and conciliation in new treaties, it seems like the

right time to explore the grounds of integrating mandatory ISM in the current ISDS regime. This would ensure the full utilisation of this dispute resolution step, which is unlikely to happen with current voluntary, [opt-in references](#). Nonetheless, the two recent treaties analysed here highlight some issues of interpretation, including for timelines, deserving careful consideration by future treaty negotiators and drafters.

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

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

A promotional graphic with a black background. On the left, white text reads: "Learn more about the newly-updated *Profile Navigator and Relationship Indicator*". On the right, there is a circular icon with a magnifying glass over a group of people. At the bottom left, the Wolters Kluwer logo is displayed.

This entry was posted on Saturday, September 5th, 2020 at 8:22 am and is filed under [ADR](#), [Commercial Mediation](#), [cross-border mediation](#), [Developing the Field](#), [Dispute Resolution](#), [Enforcement](#), [Future of mediation](#), [International Law](#), [International Mediation](#), [Investor-state mediation](#), [Promoting Mediation](#), [Research](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.

