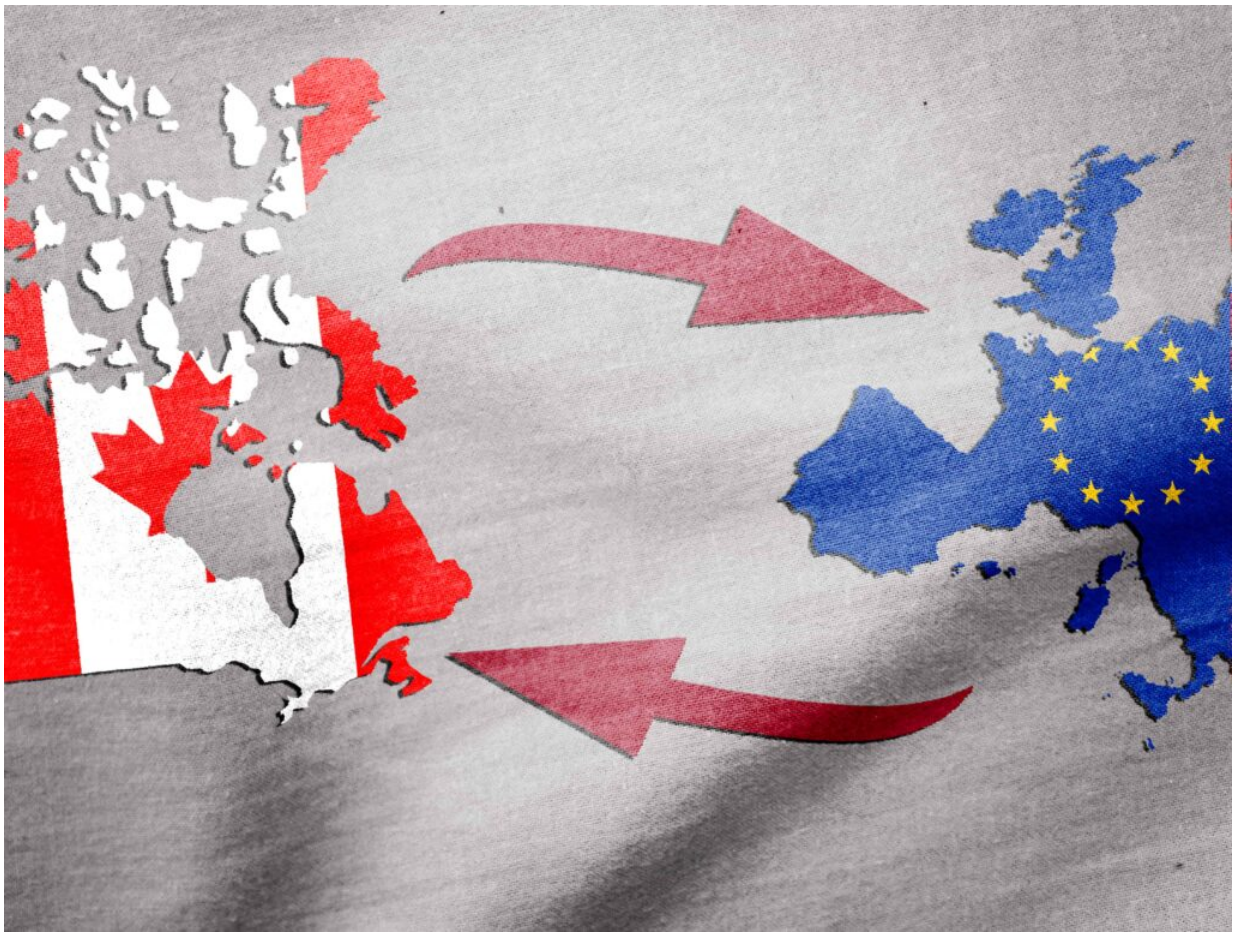
Kluwer Mediation Blog

The EU and Canada adopt mediation rules for the CETA investment court system

Rafal Morek (DWF LLP) · Thursday, February 18th, 2021

On 29 January 2021, the European Union and Canada adopted four decisions providing for specific rules regarding the Investment Court System ("ICS") agreed in the 2016 EU-Canada Comprehensive Economic and Trade Agreement ("CETA"). One of them includes the Rules for Mediation.



See: general facts about CETA.

The CETA was signed on 30 October 2016, and is yet to be ratified by its signatories. While certain provisions of the CETA are provisionally applied (since 21 September 2017) in advance of its ratification, the Agreement's key elements (including substantive investor protection and the ICS provisions) do not yet apply. They will enter into force together with the Decisions, upon the

ratification of the CETA by all EU Member States.

The Rules for Mediation are a part of the dispute resolution scheme for investment disputes between investors and states. Together with the ICS (*departing from key features of the traditional investment arbitration such as party-appointed arbitrators and the absence of an appeal mechanism* – see Articles 8.27-29 of the CETA), they reflect a new approach to investment-related disputes.

The Rules for Mediation regulate: the initiation of mediation (Article 3), appointment of the mediator (Article 4), rules of mediation procedure (Article 5), and termination of the mediation.

> The Decision defines that the objective of mediation is "*to facilitate the finding of a mutually agreed solution through a comprehensive and expeditious procedure*" (Art.2).

This goal reiterates the one emphasized in Article 8.20.4 of the CETA.

While mediation remains **voluntary**, the Rules oblige a party to which a mediation request is addressed to "***give sympathetic consideration to the request***" (Article 3).

A **mediator** shall not be a national of either Party, unless the disputing Parties agree otherwise (Article 4.3). The mediator is to be appointed by agreement of the disputing parties. The disputing parties may also request that the Secretary General of ICSID appoint the mediator (Article 8.20.3 of the CETA).

A peculiar feature of the Rules for Mediation is the request party's obligation to produce a "***detailed description of the problem***" within 10 days from the appointment of the mediator (Article 5.1). The responding party may answer within the next 20 days with its "*comments to the description of the problem*" (Article 5.1).

The role of the mediator is described in a way that focuses on "*bringing clarity to the problem concerned*", and includes such tools as to "*seek the assistance of or consult with the relevant experts and stakeholders*".

The Rules explicitly permit the **evaluative mediation style**, in particular allowing the mediator "*to offer advice and propose a solution for the consideration of the disputing parties*" (Article 5.3), or to issue "*a factual report*" on request of the disputing parties (Article 5.6).

Mediation is to be **confidential**, and **explicit evidentiary exclusions** are stipulated in Article 7.

The Decision establishing the Rules for Mediation will enter into force upon the ratification of the CETA by all the EU Member States.

It remains interesting to see whether mediation will play a more important role than in the past (see some other posts on this blog from 2017, 2019 and 2020) in investor-state disputes.

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