Kluwer Mediation Blog

Investor — state mediation: how the landscape is changing

Nadja Alexander (Editor) (Singapore International Dispute Resolution Academy) · Friday, April 16th, 2021

Slowly but surely the dispute resolution landscape is shifting for investment related disputes.

More than half the respondents to the International Dispute Resolution Survey published by the Singapore International Dispute Resolution Academy (SIDRA) last year indicated that they have been involved in an investor-state dispute between 2016 and 2018. And, it is of course no surprise the majority of survey respondents indicated that institutional arbitration was the mechanism of choice to resolve investor-state disputes.

However, as has been covered in numerous previous posts, investor-state arbitration is now facing a serious legitimacy crisis. Amongst other issues, there is growing discomfort that a relatively small group of privately appointed arbitrators sit in judgment over regulatory measures adopted by States that affect the public interest in various ways – issues related to labour law, environment, public health, human rights, and the list goes on.

Arising out of the backlash, the United Nations Commission on International Trade Law has convened a Working Group (UNCITRAL WGIII) to reform investor-state dispute resolution. Possible reforms include greater use of non-adversarial dispute settlement mechanisms, such as mediation. The need for reform has also been identified in users' responses to the previous SIDRA Survey with at least half the respondents identifying mediation as a desirable reform measure for investor-state dispute resolution. Amongst other things, UNCITRAL WG III has been actively discussing legal questions such as the amendment of old-generation treaty provisions regarding pre-arbitration requirements, time-frames for amicable solutions, and the inclusion of mandatory mediation in treaties as a prerequisite to arbitration.

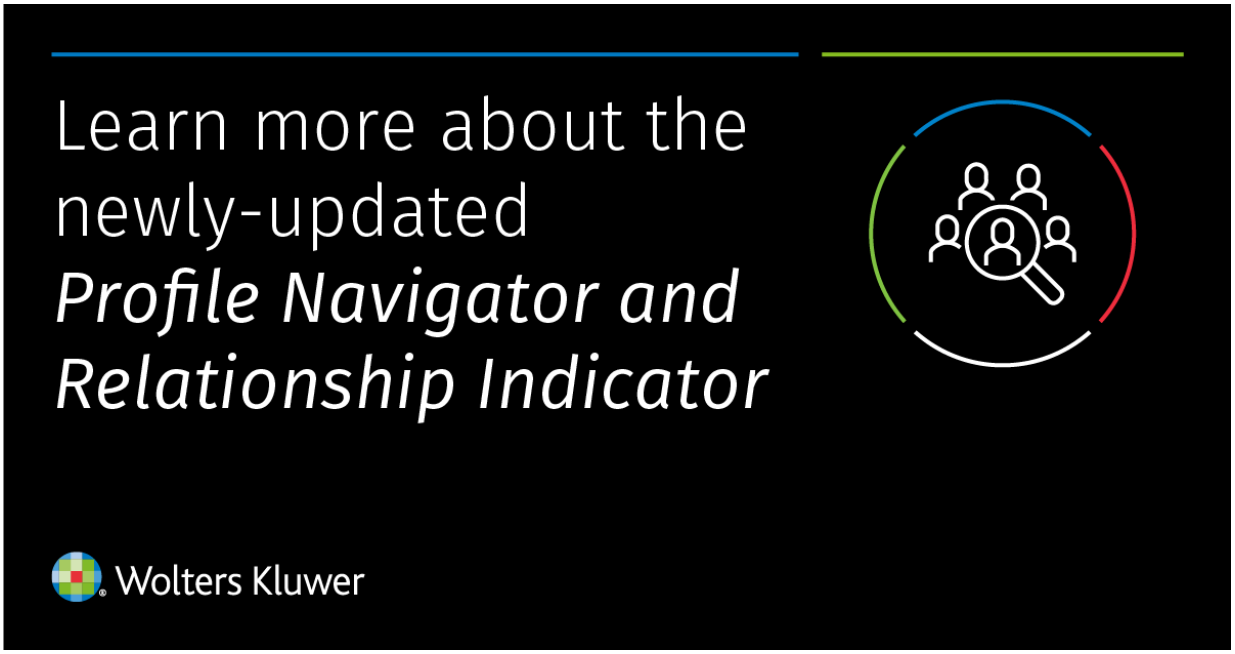
Already the investor-state dispute resolution landscape is undergoing a variety of reforms. Investors and states can now choose to use a variety of dispute settlement mechanisms in their investment agreements, with non-adversarial means gaining prominence. By way of example, the EU-Singapore Investment Protection Agreement provides a structured framework for the use of mediation. Annex 6 provides a set of procedural rules applicable to mediation, such as the initiation of mediation procedure, appointment of the mediator, timeframe of mediation, and the implementation of a mutually agreed solution. One of the interesting points under this agreement is the role of the mediator. Article 4.3 of Annex 6 provides that the mediator may offer advice and propose a solution for consideration of the disputing parties who may accept or reject the proposed solution or may agree on a different solution. As it is clear from this provision, the role of the mediator goes beyond facilitating negotiations between disputing parties and embraces a more

evaluative mediation approach. Annex 7 of the Agreement also provides a code of conduct applicable to the tribunal, appeal tribunal and mediators appointed under this agreement, which is a novel feature of investment treaties. In another illustration, the EU-Vietnam Investment Protection Agreement, which was signed on 30 June 2019 and at the time of writing has not come into force, provides for mediation as a voluntary means for settlement of investment disputes.

Further, and as pointed out in previous blogs, the adoption of the Singapore Convention can potentially accelerate the use of mediation by offering an expedited enforcement mechanism for international commercial mediated settlement agreements.

An interesting finding from the SIDRA survey was that insofar as mediation was used in investment disputes, it was more likely to be ad hoc rather than institutional mediation. This finding seems to reflect the fact that mediation occurs within an arbitral framework and in most cases as the result of informal efforts rather than regulatory requirements. This is set to change. Parallel to shifts in the regulatory space, institutional efforts to facilitate stand-alone mediation services are apparent. Here is one prominent example. In the course of its work on developing a new set of investor-state mediation rules, the International Centre for Settlement of Investment Disputes (ICSID) has entered into a cooperation agreement with the Singapore International Mediation Centre (SIMC). The "Agreement on General Arrangements" signed a few weeks ago, provides for the use of SIMC's facilities and services for mediation proceedings conducted under the auspices of ICSID, as well as enhanced technical collaboration between the two centres. This is the first cooperation agreement for ICSID with a centre (SIMC) that is exclusively focused on mediation and it is envisaged that this institutional collaboration will extend the use of institutional mediation for investor-state disputes.

And so the dispute resolution landscape for investment-related matters continues to evolve with regulatory and institutional changes afoot.



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