

Report on Panel 4: To what extent are conciliation and mediation efficient in the settlement of investor-state disputes?

Moderator: Annette Magnusson, Secretary-General, Arbitration Institute, Stockholm Chamber of Commerce

Speakers: Hannah Tümpel, Director of Communications and Engagements, United World Colleges, United Kingdom

Laila El Shentenawi, Senior Associate, Al Tamimi & Co., United Arab Emirates

Mohamed Abdel Raouf, Partner, Abdel Raouf Law Firm, Cairo

Eloïse Obadia, Investment Legal Consultant, World Bank, Washington D.C.

Rapporteur: Salim S. Sleiman, Senior Case Manager, Bahrain Chamber for Dispute Resolution (BCDR-AAA), Manama

In her introduction, **Annette Magnusson** recalled that there was increased criticism of investment arbitration and said that other amicable dispute resolution mechanisms, such as mediation and conciliation, offered advantages that remained largely unexplored by investment arbitration practitioners, not only in terms of saving time and costs, but also in terms of efficiency and of creating sustainable solutions.

Ms. Magnusson remarked that mediation and conciliation often proved to be more convenient and efficient than arbitration in resolving disputes. She encouraged investment arbitration practitioners to welcome and embrace mediation and conciliation as their go-to dispute resolution mechanisms instead of avoiding them and urged practitioners to familiarize themselves with these processes in order to better understand their advantages.

Hannah Tümpel reflected on the frameworks and institutional support currently available for investor-state mediation.

Alongside general mediation rules which can be adapted to investor-state disputes, such as those of the ICC or the LCIA, mediation rules specific to investment have been developed more recently. They include the 2012 IBA Rules for Investor-State Mediation, the 2016 Energy Charter Conference Guide on Investment Mediation, the 2018 Draft ICSID Mediation Rules, and the 2018 Convention on International Settlement Agreements Resulting from Mediation. Ms. Tümpel considered the emergence of such rules to be indicative of the growing market of investor-state mediation. She believed these would lead to greater confidence in the mediation process, given that they had been developed by established institutions familiar with, and in some cases specializing in, investment arbitration and dispute resolution and therefore well qualified to adapt their mediation rules to the specifics of investor-state disputes.

Ms. Tümpel then looked more closely at the 2012 IBA Rules for Investor-State Mediation as an illustration of how these rules address investment dispute practitioners' most common reservations regarding mediation, such as the lack of clarity as to when a mediation formally commences; mediators' qualifications; their precise role; the lack of rules on mediators' independence and impartiality; the availability of mediation notwithstanding the absence of a prior mediation agreement or the commencement of arbitration proceedings; the authority of party representatives to make binding commitments; and the enforcement of settlement agreements reached through mediation.

Ms. Tümpel concluded that, besides being an effective tool for settling complex investor-state disputes, mediation also offers the added value of greater flexibility and can be adapted precisely

to parties' needs, ultimately allowing them to reach a more sustainable solution than might be achieved through arbitration.

Laila El Shentenawi then presented an overview of the use of mediation in the MENA region, referring to statistics that regional arbitral institutions had shared with her.

She began by drawing attention to the low number of mediation cases registered in the region in 2018 compared to previous years. She gave the example of the CRCICA (which adopted new mediation rules in 2013) and the DIFC-LCIA which had each received only 2 new mediations in 2018. Prior to 2018, the CRCICA had registered a total of 11 mediations; and the DIFC-LCIA had registered 6 mediations in 2017 alone. Ms. El Shentenawi recalled, however, that the low uptake of mediation, particularly compared to arbitration, was not specific to the MENA region. For example, the ICC registered only 30 new mediations in 2017, far fewer than the 810 new arbitration cases filed until the end of December of the same year. Moreover, parties often resorted to ad hoc mediation, which were not reflected in the statistics of arbitral institutions.

Ms. El Shentenawi then addressed factors which she considered to have contributed to the low uptake of mediation in the region. She identified, in particular, a reluctance to adopt multi-tier dispute resolution clauses providing for mediation; the absence of mediation from most BITs to which Arab states are party, and the absence in some states of any legislative or regulatory support for mediation. Nonetheless, efforts were being made in some Arab states to raise the profile of mediation in the region: Jordan, Morocco and, most recently, Lebanon had enacted mediation laws, while other states, such as Egypt, the KSA and the UAE, had ongoing projects relating to mediation, including through legislative and judicial reform and the provision of mediation training for judges, with a view to the use of mediation skills during cases to encourage settlement.

Ms. El Shentenawi also noted that Arab states were not yet disclosing their policies with regard to

signing the Convention on International Settlement Agreements Resulting from Mediation and the adoption of the corresponding Model Law as approved at the 51st Session of UNCITRAL on 26 June 2018 (Singapore Convention), which could also contribute to the development of mediation in the region.

Ms. El Shentenawi concluded by recommending that Arab states enact legislation allowing parties engaged in litigation to be penalized financially for refusing to engage in mediation and requiring lawyers to discuss dispute resolution arrangements with their clients so as to identify the optimal approach to take rather than simply directing them towards the mechanism with which they are most familiar.

Mohamed Abdel Raouf shared some practical perspectives on investor-state amicable dispute resolution mechanisms (ISADR), focusing in particular on the respective roles of the mediators/conciliators, the host states and the foreign investors.

Dr. Abdel Raouf said that a mediator's primary role was to enable the parties to understand each other rather than actively to pursue the resolution of the dispute. He stressed the importance of mediators being familiar with both procedural and substantive issues which may arise in investor-state dispute settlement proceedings. He urged mediators always to see the full picture and to keep the mediation process alive even when resolution seems elusive.

Dr. Abdel Raouf then described some of the measures which might be adopted by host states to help ensure the success of the mediation process. Such measures included requiring mediation or conciliation as a mandatory precondition to arbitration; creating positive conditions by ordering the suspension of legal proceedings, prosecutions and threats that would aggravate the dispute; and reducing the exposure of public officials involved in the settlement process to the gaze and

criticism of an uninformed public, which was likely to deter them from seeking a voluntary settlement as opposed to the safe option of an arbitral award imposed by a third party.

As for the role that foreign investors could play in ensuring the success of the mediation process, Dr. Abdel Raouf recommended that they create conditions conducive to mediation by accepting and encouraging the amicable settlement of disputes; channeling their complaints through official bodies rather than using the media to place excessive pressure on states; not making unreasonable claims; and not abusing their rights by, for instance, filing parallel proceedings in multiple fora.

In his concluding remarks, Dr. Abdel Raouf said that investor-state mediation was not sufficiently tested and that the currently available legal framework governing investor-state mediation and conciliation was predominantly based on rights rather than interests. He referred to certain contractual remedies that would secure the enforcement of settlement agreements and wondered whether evaluative mediation, “arb-med-arb” and more transparency would contribute to the development of ISADR.

Eloïse Obadia, the fourth and final speaker, addressed the developing use of mediation by states.

Ms. Obadia highlighted some of the problems faced by states when resorting to amicable dispute resolution mechanisms. One of these was the involvement of multiple state agencies, which, in most instances, created internal conflicts over the decision as to which agencies or individuals would participate in the dispute resolution process on behalf of the state. Other problems were the allocation of the costs of the settlement process among the different agencies and, perhaps most importantly, the decision as to which agency would ultimately dictate the strategy of the state and determine when an acceptable outcome had been reached. Another difficulty faced by states was media criticism concerning the legitimacy of the settlement process and the integrity of the

individuals leading the process on behalf of the state. Ms. Obadia also pointed out that, while most settlements required only the approval of a governmental authority, some settlements might require an act of the legislature, which could delay or even completely obstruct a settlement.

Ms. Obadia recommended that states enact legislation expressly addressing these issues and encouraging the early use of negotiation in emerging investor-state disputes. She cited the example of Peru, which, in 2006, passed Law No. 28933 on the State Coordination and Response System for International Investment Disputes. This put in place a mechanism to inform Peruvian authorities and agencies about international commitments and established a process for evaluating claims and using negotiation and mediation to resolve investment disputes whenever possible. Ms. Obadia urged other states to take similar initiatives covering, for instance, the creation of a specific body to deal with potential investor-state disputes, the mandate of such a body, its relationship with other public entities, its budget, its internal procedures for determining whether or not a potential dispute should be submitted to amicable settlement and for approving settlements, and the training and immunity of its members.

Ms. Obadia then emphasized that amicable processes, such as mediation and conciliation, should not be resorted to only after a dispute had risen, but also at earlier stages when investors were facing issues arising from government conduct, so as to stop these issues from escalating into a dispute that could jeopardize future investment, particularly in light of the fact that much FDI comes from reinvestment. Ms. Obadia referred here to the World Bank's "Systemic Investment Response Mechanism" (SIRM), an early warning-and-tracking mechanism intended to identify and to resolve issues arising from a state's conduct, ensuring that states respond to investors' grievances in a timely and appropriate manner and in accordance with the state's laws, regulations and international investment agreements. Ms. Obadia said that several SIRM pilot projects were

being implemented. The most advanced of these, in Bosnia and Herzegovina and in Georgia (through the Business Ombudsman office), had helped to retain USD 55 Million (2016–2017) and USD 119 Million (2017) of investment respectively, and more than 600 jobs in each of these countries.