

Note from the General Editor

This issue of the *BCDR International Arbitration Review* is devoted to the role of mediation among methods of dispute resolution. Mediation is now recognized as one of the most expeditious and cost-effective dispute resolution mechanisms. Several factors have contributed to the ever-increasing popularity of mediation, including the frustration caused by delays in overwhelmed courts and the growing criticism of the duration and cost of arbitration. Yet, it appears that many lawyers still find a variety of reasons to avoid the mediation process, thus denying their clients a valuable dispute resolution alternative.

The eleven articles in this issue, authored by various mediation practitioners, explore all aspects of mediation and analyze different approaches and methodologies within the field.

This issue comprises four main sections, together with two reports on conference panels that have discussed salient features of mediation in investor-state disputes, the topic of the fourth section.

The first section is entitled the “creation of standards for mediation.” It examines in detail the evolution of the UNCITRAL mediation framework, focusing on the 2018 United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention), and providing a review of the BCDR-AAA 2019 Mediation Rules.

The first article in this section, by Judith Knieper, provides a historical perspective of the UNCITRAL framework and includes commentary on the inclusive multilateral drafting processes which contributed to the success of the UNCITRAL mediation instruments. UNCITRAL’s efforts have contributed significantly to lifting mediation out of the shadow of arbitration and elevating it into a universally recognized stand-alone dispute-settlement method.

The second article, by Natalie Y. Morris-Sharma, focuses on the Singapore Convention, which is an important pillar of the UNCITRAL mediation framework. It discusses its significance as a multilateral cross-border tool and provides an informed understanding of the Singapore Convention. Ms. Morris-Sharma sets out the process that went into the drafting of the Singapore Convention and provides guidance for its adoption by domestic legislators and enforcing authorities.

In the same vein, the third article in the first section, by Adrian Winstanley, addresses the BCDR-AAA Mediation Rules of 2019 and how they have advanced from the BCDR-AAA 2011 mediation rules. Mr. Winstanley shows, through detailed analysis, the modernization that has been achieved in the 2019 rules, making them comparable to the widely accepted mediation rules of other leading institutions, and resulting in flexibility, efficiency and cost-effectiveness in the mediation process.

The second section of the issue addresses the “impact of COVID-19,” and how the challenging circumstances that the world is facing in the efficient resolution of commercial disputes during the COVID-19 pandemic may be addressed through mediation. In these articles, the reader will find a re-imagining of the role of mediation from conventional dispute resolution into a means of developing the business process and a facilitator of business models.

The first article in this section, co-authored by Hannah Tümpel and Amelia Redmond, asks how the attributes of mediation can make it particularly relevant in resolving commercial disputes resulting from the impact of COVID-19, and how mediation can improve deal-making in a time of crisis. The authors maintain that online mediation has made the proceedings even faster, more cost-efficient, and more accessible than before the pandemic struck.

The second article, by Mark E. Appel, focuses on the important role that a skilled mediator can play in repositioning family-owned businesses, which is an area in all economies that has been particularly hard-hit by COVID-19. The author proposes the re-assessment of the role of the mediator as a business facilitator and process manager, helping businesses to ignite their creative spark, to navigate pandemics, and to move forward.

The third section of this issue addresses “mediation expressions.” The first article, by Rhéa Jabbour, catalogues the various current forms of mediation and their characteristics.

The second article, by Richard W. Naimark, explores the important role of cross-cultural considerations in mediation, an area often overlooked, yet with very significant consequences for the mediation process itself. Through a succinct analysis of the concept of culture and its place in communications, the author presents the case for mediation as a tool for the enhancement of cross-cultural negotiations.

The third article, by Fatma Ibrahim, takes a critical look at legislation regulating mediation in Egypt. It makes a strong case for a clear framework and vision guiding and defining the scope of such legislation. The author argues that, otherwise, such legislation risks not being synchronized with local needs, which in turn may significantly reduce its usability and effectiveness. Ms. Ibrahim concludes that the importance of incorporating local needs through the use of empirical

studies must be balanced against best practices, so that the resulting mediation system is neither totally foreign nor excessively rigid.

The fourth section of the issue explores the role of mediation in investment dispute settlement from the perspective of the amendments of the ICSID conciliation mechanism and the proposed investment mediation framework. It further explores the role of mediation in multiple ministry disputes, and the potential for mediation beyond simply that of a specific alternative to arbitration.

The first article in this section, by Frauke Nitschke, compares and contrasts ICSID's current conciliation and arbitration processes and provides a comprehensive and detailed overview of the proposed amendments of the conciliation rules, followed by a similar analysis of the new draft ICSID mediation rules. Ms. Nitschke's analysis highlights the potential benefits of the adoption of domestic legislative frameworks that specifically encourage and legitimize the use of mediation, including for governmental entities.

The second article, by Barton Legum, addresses the problems that may arise when an investment claim brings into the dispute one or more ministries in addition to that with sectoral responsibility. The author explores how the interposition of new actors into governmental decision-making has many and significant implications for the design of a successful investor-state mediation process. Mr. Legum explores this topic from three angles: timing, the process of mediation, and likely outcomes.

The third article in this section, by Éloïse M. Obadia, considers how and why mediation as an alternative to arbitration in investor-state disputes has recently come to be the subject of considerable criticism. The author acknowledges that not all disputes can be mediated, and that mediation remains under-used in investor-state disputes. Her article, therefore, proposes other mediation-centered tools that may be considered, such as grievance management mechanisms and engagement with an investment ombudsman, both of which may incorporate mediation techniques.

In addition to these four sections, the issue includes reports on two important conference panels.

The first report is of a panel entitled "To what extent are conciliation and mediation efficient in the settlement of investor-state disputes?" held at the BCDR/SCC Investment Arbitration Conference in Manama on 18 November 2018. This panel revolved around the premise that, given the growing criticism of investment arbitration, other amicable dispute resolution mechanisms, such as mediation and conciliation, offer several advantages that remain largely unexplored by investment arbitration practitioners.

Speakers reflected on the frameworks and institutional support currently available for investor-state mediation, and its greater flexibility and precise

adaptability to the parties' needs. They presented an overview of the use of mediation in the MENA region. The panel's recommendation was for the enactment of legislation requiring lawyers to discuss alternative dispute resolution options with their clients, and providing for mediation or conciliation as a mandatory pre-condition to arbitration, thus encouraging the early adoption of negotiation techniques, including in emerging investor-state disputes.

The second report is of a panel entitled "Alternative tools for effective investment/investor protection" held in London at the 5th EFILA Annual Conference on 30 January 2020. This panel emphasized the emergence of mediation as a preferred method of resolving disputes. It considered whether, and if so how, Investor-State Dispute Settlement (ISDS) mediation differed from other kinds of mediation, particularly international commercial mediation, and what were the obstacles that appeared to prevent the effective use of mediation in ISDS. It then turned to the measures that might be adopted to encourage its greater use. Several issues were identified by the panelists in this regard: (1) in ISDS, commercial interests are overlaid with the state's political interests and other community and third-party interests; (2) the apparently innate reluctance of state representatives to engage in mediation; and (3) the view of some governments of mediation as an insufficiently formal process, without well-defined procedures to preserve state interests.

The panel considered whether mediation rules specific to ISDS, such as the 2012 International Bar Association (IBA) Rules for Investor-State Mediation and the 2016 Energy Charter Treaty (ECT) Guide on Mediation, had led to an increase in ISDS mediation. In doing so, it compared and contrasted ICSID's mediation rules and its conciliation rules. The panel concluded with an examination of the enforcement process of a mediated settlement agreement compared to the seamless process of enforcement of arbitral awards, and an examination of the Model Instrument on Management of Investment Disputes, which was approved by the Energy Charter Conference on 23 December 2018.

The articles and reports in this issue provide a solid theoretical and practical groundwork for the use of mediation in dispute settlement. They invite the reader to consider mediation as an essential ADR tool and encourage counsel seriously to consider its regular and routine use. Further, the breadth of practical and theoretical knowledge in this issue should act as a catalyst for parties in dispute to overcome any prejudices against mediation and to familiarize themselves with mediation through self-education and the pursuit of its implementation in their day-to-day practices.

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