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Investor-State mediation at the tipping point

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Some of you may be familiar with *The Tipping Point*, a book by Malcolm Gladwell. In it, as well as in a follow-up book, *Blink*, Gladwell looks at how and when change occurs. What is that magic point in time, the "tipping point", when inertia, that most powerful of forces, stops holding change back?

The topic of my speech, Investor-State mediation, seems to have arrived at that time and place of change. Why now? What were the sticking points; in other words, what was required in order for real change to occur? What accumulation of events has led us to this place? Let's explore!

You could be forgiven for asking why assisted, voluntary settlements are a novel idea in Investor-State relations. After all, mediation is well-established globally as an efficient and effective conflict settlement tool. From divorce and child custody actions to major commercial disputes, mediators globally work with parties to create process, facilitate effective communication and create sustainable solutions. But this is seemingly not the case in Investor-State relations. Why? Certainly, it's not the absence of problems. Conflict is natural in any commercial relationship, but adding in a significantly different set of goals (so, the profit motive on one hand and the public interest and political well-being on the other) would seem to increase the opportunity for disputes significantly. In 2018 the International Centre for the Settlement of Investment Disputes (**ICSID**) had 56 cases filed. I note, parenthetically, that ICSID had 21 cases in 2008 so a doubling of the ICSID caseload over 10 years. Moreover, mediation's success is due in significant part to the opportunity to craft negotiated solutions that aren't prescribed by contract or law, whether it is an extension of time, renegotiated price or re-allocation of resources.

In 2016, a lawyer friend and internationalist, hearing that I had involved myself in the field of Investor-State mediation, said to me "Investor-State mediation won't work. States don't settle". But it seems they do.

Between 1966 and 2020 approximately 35% of cases filed at ICSID were concluded short of an Award. Of course, reasons beyond settlement exist (eg exhaustion of funds, voluntary claim withdrawal), but I think it would be fair to assume that a fair number of those cases were removed after a negotiated settlement was reached. And, at its heart, mediation is a simple extension of the negotiation process, enhanced negotiation or negotiation plus one (ie the mediator). So why not mediate?

Well, it turns out there were a whole host of reasons but, distilled; many of them come down to trust. Investors and States, in particular, won't use a process they don't trust. The good news is that over the last 8+ years much has been done to provide needed education and address legitimate concerns with the Investor-State mediation process. What follows now is a bit of an event chronology, with object lessons in leadership, effective communication and innovation that have brought us to the tipping point.

In 2012 the International Bar Association published a set of Investor-State Mediation Rules. The Drafting Committee was chaired by two veteran Investor-State practitioners, Anna Joubin-Bret and Bart Legum. At the time, Anna was in private practice. Now she is the chief legal officer of UNCITRAL. Before moving to private practice Bart had worked with the US State Department. The Drafting Committee reads like a "who's who" of leading internationalists. Leadership counts.

As do Rules. Rules, like legislation in the public policy arena, act to legitimise and normalise practice. Rules also set the standard for what process consumers can expect. I'm recalling now one of my own law school professors, who too many years ago held up a set of Commercial Arbitration procedures and said they reflect the "common law" for that process.

The IBA Investor-State Mediation Rules addressed both novel and best practice approaches to mediation for Investor-State cases. By way of example, the Rules addressed the possibility that two mediators, "co-mediators", might be utilised. Why two? Think of an investment project in trouble over community, environmental or labour and employment issues. Might it not be helpful to have an experienced treaty-savvy mediator work in concert with a trusted, locally-based mediator more in tune with community concerns? The IBA Rules also adopted best practice in mediation, speaking to a organisational meeting ("mediation management") and recognising the value of addressing critical issues up front including language(s), pending arbitral or judicial proceedings and their impact on the process, the possibility of adding additional parties to the mediation whose participation might be critical to its success, privacy and confidentiality issues and any special requirements for ratification of any agreement. I'll speak to two other sets of institutional rules later, but in 2012 IBA leadership raised the bar.

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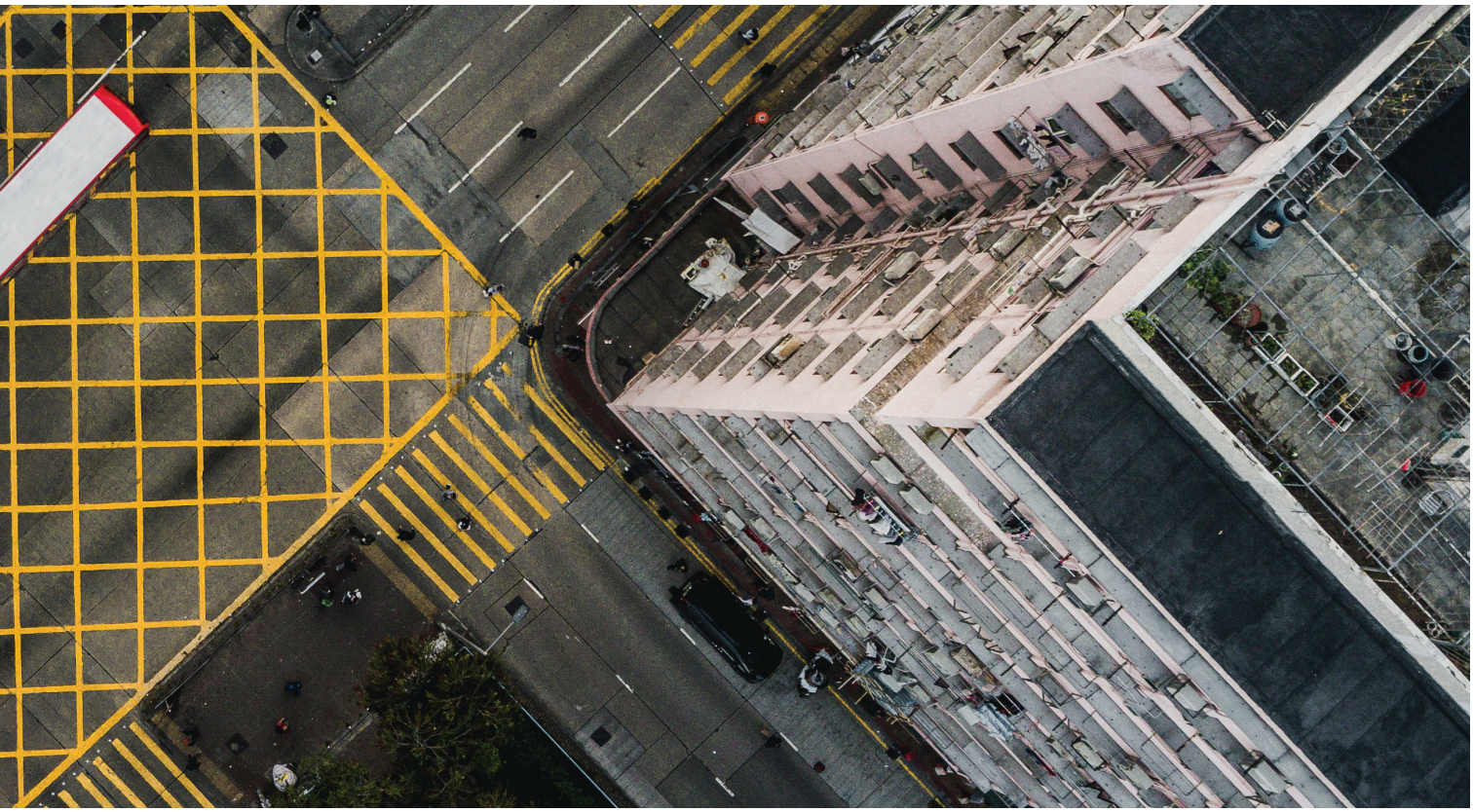
The intersection of public international law and commercial law has always made for an interesting debate regarding what skillset and knowledge base are best suited to the resolution of Investor-State claims. Add political considerations, the possibility of multiple forums and widely-disparate cultural dynamics to that mix and you might start to appreciate the challenge of identifying the right person(s) to assist the negotiation of Investor-State disputes. In one of the first reported Investor-State mediations the parties used the services of Robert Strauss, legendary attorney/advisor to three US Presidents and multiple Corporate CEOs. In 2014 the International Mediation Institute (**IMI**), recognising an opportunity to support mediation in Investor-State relations, created the IMI Investor-State Mediation Taskforce. The first co-chairs of the Taskforce were, you guessed it, Anna Joubin-Bret and Bart Legum. Importantly, the Taskforce took on the subject of qualifying Investor-State mediators, bringing in many of the same international, investor-state experts, academicians and institutional representatives who had been actively engaged in bringing Investor-State mediation to the fore. In 2016 I inherited their good efforts and, in September of 2016 IMI published its Competency Criteria for Investor-State Mediators. The Criteria lay out six areas for examination:

- Understanding of Investor-State issues;
- Experience in mediation and other dispute resolution processes;
- Experience with different forms of negotiation, mediation and conciliation;
- Understanding of arbitration and adjudication;
- Intercultural competency; and
- Other competencies (subject matter expertise, process management skills, technological know-how)

Two quick comments regarding the Criteria; the first goes to mediator flexibility. In mediation, we take parties as we find them, frequently with differing cultures and negotiation styles. My second observation is that the drafters of the IMI Criteria were prescient in anticipating the need for technological competency. Nowadays we mediate on Zoom.

The selection of the right mediator could occupy a talk all on its own, but the Criteria are important because they give process consumers a baseline of expertise and experience to consider. I think it's fair to say that even a brief review suggests it will be a "tall order" to find someone who "ticks all the boxes". So what do you do? Earlier, I mentioned the involvement of the leading investor-state ADR institutions, the Energy Charter Treaty (**ECT**), ICSID and UNCITRAL in development of the IMI criteria. Those same institutions, supported by IMI and working in close concert with the Centre for Effective Dispute Resolution (**CEDR**) developed and delivered a pre-pandemic global series of Investor-State mediator training programmes. Unsurprisingly, the sponsors built the training programme around the IMI Criteria. They included intensive sessions concerning the ISDS environment, law and practice, followed by mediation skills training built to suit the Investor-State environment. By way of example, trainings included the role play involvement of civil society organisations. Attendees were pre-qualified and seemingly came from different worlds including international law, Investor-State arbitration and international commercial mediation. I had the privilege of attending one of those programmes as a member of the faculty. It was extraordinary.

So, courtesy thought leaders and the IBA, the broad parameters of an Investor-State mediation procedure were in place and the question of mediator competency and quality was being addressed. But nagging perceptions and doubts still existed.



A 2016 survey of experienced ISDS practitioners by the Centre for International Law, National University of Singapore, pointed up some of those concerns. It was the strong consensus of those surveyed that States would find the mediation option more problematic than investors. Number one among perceived obstacles to settlement was that States preferred to defer their decision to a third party. An experienced researcher might ask why? Dig a bit deeper and you get to the number three rated obstacle: fear; but of what? Public criticism or worse, future prosecution for corruption (ranked number seven), or the fear of setting a bad precedent (ranked number 16). As any student of history or business management will tell you, fear is a great motivator (or, as it would appear in this case, de-motivator).

Having already staked out a leadership role, Investor-State ADR institutions once more stepped into the breach. I'll start first with the efforts of Alejandro Carballo Leyda and his staff at the Energy Charter Secretariat. In 2016, understanding full well that States and investors won't use a process they don't understand, the Energy Charter Organisation, in cooperation with the IMI Taskforce, published an Investor-State Guide to the Mediation Process. The Energy Charter Investor-State Mediation Guide is comprehensive in nature, addressing both practical and procedural considerations. So, by way of example, the Guide discusses when to mediate, preparing for mediation and providing transparency even while allowing for necessary confidentiality in negotiation.

But ECT didn't stop there, instead carrying out a series of workshops and seminars with government representatives, investors and ISDS experts. The dialogue allowed ECT to explore many of the concerns addressed in the National University of Singapore survey, minimising some and illuminating causes and possible solutions for others. What follows are a couple of examples.

It has always been assumed that the need for transparency would limit States' ability to negotiate complex contract and treaty-based claims. But, State representatives reported that they had found ways to maintain transparency, so reporting on the existence of a dispute, acknowledgement that the parties were engaged in negotiation and outcomes, all while preserving the confidentiality of negotiation sessions. A less anticipated problem proved much tougher. It turns out that many States lack structural and policy support for mediated negotiation. Too often, even where a State wanted to mediate there was either scattered, limited or no process in place or a budget to turn to. So, when hiring a mediator the State had no way to pay her. On receiving this feedback from the Secretariat, the Energy Charter Conference charged the Secretariat with drafting a protocol or protocols that could be voluntarily utilised by States, either by way of developing a domestic Investor-State dispute resolution framework or serving as guidance concerning the practical and legal issues that should be considered by States in developing a conflict management plan for investment disputes.

Energy Charter Secretariat staff began working on these issues with a select subcommittee of the IMI Taskforce made up of experienced Investor-State counsel, arbitrators and mediators. The Secretariat also continued its discussions with State representatives and Investor-State institutions. The resulting Energy Charter Model Instrument on Management of Investment Disputes (**Model Instrument**) delivers the requested comprehensive approach to Investor-State conflict management.

The Model Instrument makes early conflict management a matter of public policy; creates an administrative and budgetary framework; addresses the need for early and effective intra-agency communication and cooperation and balances the competing needs for transparency and confidentiality.

Importantly, the Model Instrument provides a novel, optional solution to address legitimate concerns about political backlash and potential charges of corruption, creating a multi-agency commission to manage treaty-based disputes. Shared decision-making makes for shared risks and rewards.

Two Sets of Rules

Earlier, when speaking about the IBA Investor-State mediation rules, I spoke to the power of procedural rules in terms of legitimising and normalising process. It should come as no surprise then that Investor-State mediation became better known as ICSID World Bank and UNCITRAL took up the challenge of introducing new mediation rules. For reasons I'll explain, their respective Rules are quite different. Let's start with the DRAFT ICSID Mediation Rules.

ICSID staff, and Frauke Nitschke in particular, have been part of virtually every major new initiative in the development of Investor-State mediation. From the start, ICSID faced two issues. Many, if not most, of you will know that ICSID has featured a Conciliation (as opposed to Mediation) process for years. The terms "conciliation" and "mediation" are frequently confused, and for many mean one and the same process. But ICSID's Conciliation process was well defined, if infrequently used, and clearly wouldn't meet current expectations of the mediation process. And, speaking of process, whatever mediation process ICSID published would need to dovetail or fit within the larger ICSID administrative process. Like ECT, ICSID engaged in lengthy conversation with ISDS users, arbitrators and mediators, experts and academicians. What has resulted to date (the hope is that the ICSID Mediation Rules will be adopted in 2021) is a truly bespoke Investor-State mediation process.

The Rules are a bit dense in terms of filing and registration requirements, but it strikes me that that's natural given their place in the larger ICSID dispute settlement process. Happily they reference several ISDS-specific opportunities and needs. By way of example, the Rules specifically address the possibility of one or two mediators (ie co-mediation). They also recognise that the more complex nature of Investor-State disputes will benefit substantially from a fulsome, early discussion of procedural matters. The "first session" envisioned by the Draft ICSID Rules suggests discussion of representation, communication, confidentiality and ratification issues, among others. Early discussion avoids problems and misunderstandings later so, by way of example, providing a ready answer when a commercial colleague asks "why is it taking so long for them to respond?!". Early procedural discussions also create habits of agreement, something negotiators and mediators understand full well. There are subjects that aren't mentioned but should be considered; for example, an Agreement regarding public/media communications during the course of mediation, but a competent Investor-State mediator will know enough to "fill in the blanks".

The draft UNCITRAL Mediation Rules have taken a different course, but again for good reason. UNCITRAL Rules historically have been the global standard for a whole host of commercial disputes. UNCITRAL is necessarily less focused on any particular commercial use, let alone something as esoteric as Investor-State mediation. That broad prospective has resulted in a simplified, "only the essentials", set of mediation procedures. So, by way of example, the draft UNCITRAL Mediation Rules address:

- When mediation begins and ends;
- appointment of the mediator(s);
- conduct of the mediation and communications, including a provision for an "early" meeting;
- confidentiality of the mediation process, including the Settlement Agreement, except where agreed otherwise, required by law or for purposes of enforcement and non-admissibility of mediation in other proceedings;
- the Settlement Agreement and its impact, for purposes of an enforcement regime and the Singapore Convention; and
- mediator immunity from service of process for testimony in legal proceedings and limitation of liability.

There have been a number of useful comments from various States on the current draft. Notable among them are calls from China and Italy to make online mediation an appropriate option.

What should also prove of immense value to parties and practitioners alike is the draft UNCITRAL Notes on Mediation (**Mediation Notes**). Many of you will be familiar with the UNCITRAL Notes on Organising Arbitral Proceedings, originally published in 1996 and updated in 2016. The Mediation Notes provide practical advice on the rationale for Rules approaches. The Mediation Notes also provide practical advice concerning the organisation and conduct of the mediation proceedings, including online dispute resolution, and enforcement issues with reference to the Singapore Convention.

This leads me to what might be characterised as the single greatest contributor to increased confidence in international mediation: the Singapore Convention.

Some of our colleagues in the mediation community could be forgiven for not understanding the need for an enforcement mechanism in mediation. After all, mediated settlements are arrived at voluntarily by the parties to the dispute themselves. I recall a study favourably comparing the staying power of mediated settlements versus judicial orders in the US almost 40 years ago. But recall we are trying to

change perceptions of the mediation process. And, it is a fact that in many jurisdictions a mediated settlement agreement is tantamount to a contract, with the usual defences to enforcement (eg lack of agreement on essential terms, lack of authority). And that has made users uncertain. At the 2016-2017 International Mediation Institute Global Pound Conference legislation for enforcement and recognition of mediated agreements was ranked among the top needs of process users and would-be users.

Enter the United Nations Convention on International Settlement Agreements Resulting from Mediation (**Singapore Convention**). The Singapore Convention provides a simple, straight-forward global mediated settlements enforcement regime. Here, a few quick notes. The Convention is designed to act as a shield as well as a sword, providing a defence (ie already settled) to subsequent legal actions. In deference to States, the Convention relies on existing State enforcement regimes. There are of course grounds for setting aside mediated agreements, including public policy, so attention will need to be paid to post-ratification Court decisions. I've noted that three ratifying States to date (Belarus, Iran and Saudi Arabia) have exempted the State from coverage under the Convention. With respect, that's a lost leadership and revenue opportunity. States, and particularly States wishing to encourage Foreign Direct Investment, will do well to include State agreements within the protections afforded by the Singapore Convention. Given that the State is in a position to establish the enforcement regime and readily available tools for doing so (for example, the Energy Charter Model Instrument), States are in the enviable position of bringing procedural order, effective State notice, preparation and response to the resolution of claims against State and Para-Statal entities.

The conversation proceeds. Active support for mediation dialogue, best practices and tools is ongoing at UNCITRAL Working Group III (ISDS Reform).

What about results? As Miguel de Cervantes famously said, "the proof of the pudding is in the eating". In a recently reported Invester-State mediation, the profile of the mediator who assisted the parties looked very much like the IMI's Investor-State Mediator Selection Criteria. Speaking of IMI, in checking their website today the page featuring the Energy Charter Model Instrument has, in a matter of months, been downloaded over 15,000 times. For those of us familiar with the history of the NY Convention, it might come as something of a surprise, or perhaps delight, that some 55 States have adopted the Singapore Convention. Covid-19 has, if anything, accelerated the need for negotiated solutions. Investors are plagued with supply chain disruptions and employee health; States are re-allocating their budgets to address the enormous health and economic challenges presented by the Pandemic.

Is Investor-State Mediation at the "tipping point"? I think so, but time will tell.

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