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INTERNATIONAL DISPUTE RESOLUTION CONFERENCE 2019

New Era of Global Collaboration

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Current Answers to the Growing Need for Mediation as a Method to Settle International Trade and Investment Disputes

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Current Answers to the Growing Need for Mediation as a Method to Settle International Trade and Investment Disputes

Session 1 : Trend of Using International Dispute Resolution to Address Trade and Investment Disputes

- I. Mediation in International Trade Disputes
- II. Mediation in Investor-State Disputes
- III. UNCITRAL

I. Mediation in International Trade Disputes

Increase of mediation in international commercial matters

Advantages : speed, flexibility, lower costs, confidentiality

2018 Queen Mary University of London Study

"2018 International Arbitration Survey : The Evolution of International Arbitration" :

Preferred dispute resolution method :

-Arbitration as stand alone method : 48%

-Arbitration in conjunction with ADR : 49% (only 34 % in 2015)

In-house counsel subgroup :

-Arbitration as stand alone method : 32%

-Arbitration in conjunction with ADR : 60%

-Crossborder litigation in conjunction with ADR : 8%

I. Mediation in International Trade Disputes

Reference : International Chamber of Commerce in Paris

-ICC Arbitrations

. 2014	:	791
. 2015	:	801
. 2016	:	966
. 2017	:	810

(Source : ICC Dispute Resolution Bulletin, 2015 / 2016 / 2017 / 2018)

-Approximately 47% of ICC arbitrations withdrawn before final award is rendered

(Source : Secretariat's Guide to ICC Arbitration, 2012)

-Parties are free to resort to ADR or mediation at any stage

-Arb-med ?

-Verify enforceability of arbitral award

-Hong Kong Arbitration Ordinance – Art. 33

-Arbitration Law People's Republic of China – Art. 51

I. Mediation in International Trade Disputes

Reference : International Chamber of Commerce in Paris

-ICC Mediation Rules 2014 replace ICC ADR Rules 2001

-ICC Mediations

- | | | |
|----------|----|--|
| . 2014 : | 25 | - 10 settled within the year
- average duration : 3 months |
| . 2015 : | 16 | - 13 set in motion during the year
- 4 settled within the year
- average duration : 5 months |
| . 2016 : | 32 | - average duration : 60 days
- several settlements without mediator |
| . 2017 : | 30 | - average duration : 6 weeks |

(Source : ICC Dispute Resolution Bulletin, 2015 / 2016 / 2017 / 2018)

II. Mediation in Investor-State Disputes

II.1 International Centre for Settlement of Investment Disputes (ICSID) – Convention of Washington, 18 March 1965

Until 2013 : 448 cases registered under ICSID Convention and ICSID Additional Facility

-439 arbitrations

-9 conciliations of which 7 had been concluded :

- . 3 : commission report recording failure to reach settlement
- . 1 : commission report recording agreement on all issues
- . 1 : commission report recording agreement on some issues
- . 2 : discontinued following settlement prior to constitution of conciliation commission

(Source : F. Nischke, ICSID Review, 2014, Vol. 29/No.1, p. 122)

II. Mediation in Investor-State Disputes

II.1 International Centre for Settlement of Investment Disputes (ICSID) – Convention of Washington, 18 March 1965

2014 ICSID Caseload Statistics (Issue 2015-1) :

- ICSID Convention Arbitration cases : 35
 - ICSID Additional Facility Arbitration cases : 3
 - ICSID Convention Conciliation Cases : 0
 - ICSID Additional Facility Conciliation Cases : 0
 - Disputes settled or otherwise discontinued :
 - . Discontinued at request of both parties : 45%
 - . Discontinued at request of one party : 29%
 - . Settlement agreement in consent award : 15%
 - . Discontinued at initiative of tribunal : 1%
 - . Discontinued for lack of payment advance : 8%
 - . Discontinued for failure of parties to act : 2%
- Conciliation Commission reports : 83% failure / 17 % agreement

II. Mediation in Investor-State Disputes

II.1 International Centre for Settlement of Investment Disputes (ICSID) – Convention of Washington, 18 March 1965

2015 ICSID Caseload Statistics (Issue 2016-1) :

- ICSID Convention Arbitration cases : 50
 - ICSID Additional Facility Arbitration cases : 2
 - ICSID Convention Conciliation Cases : 0
 - ICSID Additional Facility Conciliation Cases : 0
 - Disputes settled or otherwise discontinued :
 - . Discontinued at request of both parties : 47%
 - . Discontinued at request of one party : 27%
 - . Settlement agreement in consent award : 15%
 - . Discontinued at initiative of tribunal : 1%
 - . Discontinued for lack of payment advance : 8%
 - . Discontinued for failure of parties to act : 2%
- Conciliation Commission reports : 83% failure / 17 % agreement

II. Mediation in Investor-State Disputes

II.1 International Centre for Settlement of Investment Disputes (ICSID) – Convention of Washington, 18 March 1965

2016 ICSID Caseload Statistics (Issue 2017-1) :

- ICSID Convention Arbitration cases : 42
 - ICSID Additional Facility Arbitration cases : 5
 - ICSID Convention Conciliation Cases : 1
 - ICSID Additional Facility Conciliation Cases : 0
 - Disputes settled or otherwise discontinued :
 - . Discontinued at request of both parties : 48%
 - . Discontinued at request of one party : 25%
 - . Settlement agreement in consent award : 15%
 - . Discontinued at initiative of tribunal : 1%
 - . Discontinued for lack of payment advance : 8%
 - . Discontinued for failure of parties to act : 3%
- Conciliation Commission reports : 83% failure / 17 % agreement

II. Mediation in Investor-State Disputes

II.1 International Centre for Settlement of Investment Disputes (ICSID) – Convention of Washington, 18 March 1965

2017 ICSID Caseload Statistics (Issue 2018-1) :

- ICSID Convention Arbitration cases : 49
 - ICSID Additional Facility Arbitration cases : 4
 - ICSID Convention Conciliation Cases : 0
 - ICSID Additional Facility Conciliation Cases : 0
 - Disputes settled or otherwise discontinued :
 - . Discontinued at request of both parties : 47%
 - . Discontinued at request of one party : 27%
 - . Settlement agreement in consent award : 14%
 - . Discontinued at initiative of tribunal : 1%
 - . Discontinued for lack of payment advance : 8%
 - . Discontinued for failure of parties to act : 3%
- Conciliation Commission reports : 83% failure / 17 % agreement

II. Mediation in Investor-State Disputes

II.1 International Centre for Settlement of Investment Disputes (ICSID) – Convention of Washington, 18 March 1965

2018 ICSID Caseload Statistics (Issue 2019-1) :

- ICSID Convention Arbitration cases : 49
 - ICSID Additional Facility Arbitration cases : 6
 - ICSID Convention Conciliation Cases : 1
 - ICSID Additional Facility Conciliation Cases : 0
 - Disputes settled or otherwise discontinued :
 - . Discontinued at request of both parties : 48%
 - . Discontinued at request of one party : 26%
 - . Settlement agreement in consent award : 13%
 - . Discontinued at initiative of tribunal : 1%
 - . Discontinued for lack of payment advance : 9%
 - . Discontinued for failure of parties to act : 3%
- Conciliation Commission reports : 86% failure / 14 % agreement

II. Mediation in Investor-State Disputes

II.1 International Centre for Settlement of Investment Disputes (ICSID) – Convention of Washington, 18 March 1965

Proposal for New ICSID (Additional Facility) Mediation Rules
Comment of 2 August 2018 to proposed Article 17 :

"1398. The formal notice of termination is intended to facilitate the enforcement of any settlement agreement reached as a result of the mediation, allowing for such settlement to benefit from the future framework for recognition and enforcement pursuant to the Draft Convention on International Settlement Agreements Resulting from Mediation. Pursuant to Art. 13 of the Draft Convention, the Convention will apply to settlements reached in the context of investment disputes. In the event of a termination of the mediation on other grounds, the notice of termination may assist the parties to evidence their participation in a mediation should such be required prior to the institution of arbitration proceedings." (Source : https://icsid.worldbank.org/en/Documents/X.Amendments_Vol_3_AFMR.pdf)

II. Mediation in Investor-State Disputes

II.2 Energy Charter Treaty (ECT) – 1994

-Article 26 : Settlement of Disputes between an Investor and a Contracting Party

(1) alleged breach of an obligation under Part III shall, if possible, be settled amicably

-Article 27 : Settlement of Disputes between Contracting Parties

(1) parties shall endeavour to settle through diplomatic channels

-In July 2016 the ECT issued a Guide on Investment Mediation by reference to Article 26

(Source :

<https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>)

II. Mediation in Investor-State Disputes

II.3 Comprehensive and Economic Trade Agreement (CETA) between European Union and Canada – 2016

-Resolution of investment disputes between investors and states

-Article 8.20 :

1. The disputing parties may at any time agree to have recourse to mediation.
2. Recourse to mediation is without prejudice to the legal position or rights of either disputing party under this Chapter and is governed by the rules agreed to by the disputing parties including, if available, the rules for mediation adopted by the Committee on Services and Investment pursuant to Article 8.44.3(c).
3. The mediator is appointed by agreement of the disputing parties. The disputing parties may also request that the Secretary General of ICSID appoint the mediator.
4. The disputing parties shall endeavour to reach a resolution of the dispute within 60 days from the appointment of the mediator.

II. Mediation in Investor-State Disputes

II.4 EU-Singapore Trade and Investment Agreements – 2018

-Free Trade Agreement

– Chapter 15 : Mediation Mechanism

ARTICLE 15.1 Objective and Scope

1. The objective of this Chapter is to facilitate the finding of a mutually agreed solution through a comprehensive and expeditious procedure with the assistance of a mediator.

-Investment Protection Agreement

– Article 3.4 Mediation and Alternative Dispute Resolution

1. The disputing parties may at any time, including prior to the delivery of a notice of intent, agree to have recourse to mediation.

2. Recourse to mediation is voluntary and without prejudice to the legal position of either disputing party.

II. Mediation in Investor-State Disputes

II.5 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) – 2019

-Free Trade Agreement

Section B : Investor-State Dispute Settlement

Article 9.18: Consultation and Negotiation

1. In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation.
2. The claimant shall deliver to the respondent a written request for consultations setting out a brief description of facts regarding the measure or measures at issue.
3. For greater certainty, the initiation of consultations and negotiations shall not be construed as recognition of the jurisdiction of the tribunal.

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II. Mediation in Investor-State Disputes

II.6 HKIAC-HKMC – 2019

-to administer disputes between a Mainland Chinese investor and the Government of Hong Kong pursuant to the Investment Agreement under the Mainland and Hong Kong Closer Economic Partnership Arrangement

-entered into on 28 June 2017

(Source : HKIAC communication of 16 January 2019)

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II. Mediation in Investor-State Disputes

II.7 State Commissions of Coordination and Defense in International Investment Disputes

- Peru – 2006
- Colombia – 2011
- Examine any investment dispute and decide whether it shall be submitted to a conciliation or to an arbitration

(Source : F. Nischke, ICSID Review, 2014, Vol. 29/No.1, p. 122)

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II. Mediation in Investor-State Disputes

II.8 IBA Rules for Investor-State Mediation – 2012

- May be applied in addition to procedural rules such as ICC Rules of Arbitration or ICSID Arbitration and Conciliation Rules
- Are sufficiently different and do not overlap

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III. UNCITRAL (United Commission on International Trade Law)

Possible reform of ISDS discussed in Working Group III

-a.o. concerns regarding cost and duration of investor-state arbitration

-For discussion : a.o. preventive or pre-emptive approaches, use of dispute resolution means other than arbitration such as mediation,...

(Source : Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), 6 November 2018, p. 17)

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III. UNCITRAL (United Commission on International Trade Law)

United Nations Convention on International Settlement Agreements Resulting from Mediation – 20 December 2018

UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Conciliation, 2002)

Both instruments will provide common legislative standards for enforcement of international commercial settlement agreements resulting from mediation and make such type of dispute settlement more efficient.

UNCITRAL Conciliation Rules 1980 (under revision – to become UNCITRAL Mediation Rules)

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Thank you !

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