

AMICUS CURIÆ

Journal of the Society for
ADVANCED LEGAL STUDIES

ISSUE 93
Spring 2013



IN THIS ISSUE

DATA PROTECTION

Is it the new privacy? 2

EUROPEAN UNION

Why is Albania not an EU candidate
Member State?..... 6

DISPUTE RESOLUTION

A rethink of investor-state dispute
settlement 14

INTERNATIONAL LAW I

The autonomous interpretation method in
international law with particular reference
to the proposed European Sales Law ... 21

COMPANY LAW

The German public company limited
partnership 31

A rethink of investor-state dispute settlement

by A F M Maniruzzaman

Over the last two decades the world has witnessed a spectacular growth of investor-state dispute resolution by arbitration from a few dozen in 1992 shooting up to 514 cases by the end of 2012 (see UNCTAD's IIA Issues Note - "Reform of Investor-State Dispute Settlement: In Search of a Roadmap" (May 28-29, 2013), at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf). But that trend could stall in the foreseeable future with the realisation of the users that international arbitration (investor-state arbitration, in particular) is increasingly becoming formalised and akin to be "liti-arbitration" or "arbitral litigation", losing its fundamentals that make it attractive to the international business community. In the case of investor-state arbitration various issues have been raised with wider implications beyond the field of arbitration itself, as concerns have been expressed about the role of arbitrators *vis-à-vis* the respondent state's public interest in regulating various matters including environmental protection, low-carbon investments, social and human rights, etc; dire economic consequences flowing from arbitrators' decisions who lack in democratic legitimacy of a domestic or international judicial institution; and inconsistency in arbitral interpretation of investment treaty obligations, hence unpredictability in arbitral decisions on similar or identical issues. Added to this list of concerns may be the growing phenomenon of third-party funding of investor-state arbitration pushing up the costs and the increasing tendency of *amicus* briefs leading investor-state arbitration to be more confrontational and non-confidential (see my article on third-party funding of international arbitration in this link: <http://kluwerarbitrationblog.com/blog/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/>).

The adverse impact of excessive investor-state arbitral awards has recently prompted some resource-rich Latin American countries such as Bolivia, Ecuador and Venezuela to withdraw from the ICSID and to intend to discard the existing BITs to which they are parties. Argentina has also threatened to do so. Australia has discarded investor-state arbitration in favour of its domestic courts. Various interest groups (see <http://tpplegal.wordpress.com/open-letter/>) including the US State Legislators (see <http://www.citizen.org/documents/State-Legislators-Letter-on-Investor-State-and-TPP.pdf>) have lately urged in their

Open Letters the negotiators of the ongoing Trans-Pacific Partnership (TPP) to reject investor-state arbitration. One may wonder if there seems to be a progressive revolution in the field of investor-state dispute resolution.

In some recent ADR surveys in the USA, Europe and Asia-Pacific (eg, Cornell/Pepperdine/CPR (Fortune 1000 corporations) (2011), CPR survey (the Asia-Pacific Region) (2011) and IMI (International Corporate Users) (January-March 2013) it is shown that as an alternative dispute resolution mechanism mediation is increasingly attracting more favourable support in business for various reasons such as cost control, efficiency in time management, privacy, confidentiality, preservation of relationship, informality and flexibility. The phenomenon is true at both domestic and international levels. One survey has noted that binding arbitration has reached its "tipping point" (see http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2221471). It is also noteworthy that the settlement rate of investor-state disputes at ICSID before any final award is rendered is estimated approximately at 30-40 per cent. It points in the direction that there is a good prospect of investor-state dispute settlement by mediation which needs to be explored further.

In response to the growing desire to switch to non-arbitration ADR, namely mediation, well-known institutions such as the OECD and the IBA have taken the initiative to propagate such an alternative. Under the auspices of the OECD a series of symposia took place on investor-state mediation in the past few years and lately on October 4, 2012 the IBA adopted a set of rules on the subject entitled "IBA Rules for Investor-State Mediation" (hereinafter the IBA Mediation Rules - see http://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx). There is more to follow from various other sources, national and international, in the days ahead.

However, two principal issues may prove to be stumbling blocks for the progress of investor-state mediation, viz, (i) the failure to understand the type of mediation that is desirable in investor-state disputes; and (ii) the state authorities' disinclination to mediation for palpable political risk (eg being blamed for bowing to the foreign party's pressure or for any dubious deal, etc) to be faced in their country. It has to be

acknowledged that investor-state disputes are not the same as international commercial disputes nor are the mechanisms in which they are often settled. In the former there could be issues of public interest or the tax payers' concern which is not the case in the latter.

In respect of investor-state dispute settlement it may not always be appropriate to conduct mediation in the same style as in international commercial disputes. There is a garden variety of mediation styles such as facilitative mediation, evaluative mediation, deal making mediation, deal mending mediation, transformative mediation, settlement mediation, expert advisory mediation, wise counsel mediation, and tradition-based mediation (see *Nadja Alexander, "The Mediation Meta Model: Understanding Practice Around the World"*, 26 *Conflict Resol Q* 97 (2008)).

Out of these varieties, as far as an investor-state dispute is concerned, regard must be had to the ones that cater for the accountability of dispute resolvers (state authority or representatives) to the tax payers. Evaluative mediation, which is often called "legal mediation", may be closer to satisfying these requirements. Such mediation is right based and not interest based. In an evaluative mediation the third-party neutral looks at the disputing parties' positional briefs and evaluates them objectively in light of his / her expertise to predict how they would fare in a legally binding decision or arbitration and accordingly makes suggestions to the parties (preferably individually in private) which accord with their legal rights and obligations, industry norms, or other objective social standards. It has, at least, a psychological effect on the concerned state representatives in terms of confidence-building that they stand upon some credible platform in respect of their negotiation with the foreign investor for dispute settlement. It may provide them with some legitimacy for their negotiation, hence a shield for deflecting any political criticism later on.

It may be recalled that in the first ICSID conciliation case between *Tesoro Petroleum Corporation and the Government of Trinidad and Tobago*¹, the conciliator (Lord Wilberforce) conducted, in essence, evaluative mediation between the parties. The ICSID conciliation process thus differs from interest-based mediation (facilitative) but is closer to legal mediation as reflected in that case. However, only in a handful of cases (ie six cases so far) was the ICSID conciliation resorted to. The reasons for this least recourse to conciliation are often mentioned as: (i) inadequate publicity and efforts to popularize the ICSID conciliation mechanism; (ii) the ICSID conciliation process is unlike any traditional mediation (ie interest based); and (iii) there are fewer experts readily available for ICSID conciliation, etc. In order to redress these, the ICSID has lately entertained the idea of introducing the traditional style interest-based mediation in its dispute resolution system. However, the question remains whether traditional mediation should replace

the ICSID conciliation mechanism (or evaluative mediation) for the settlement of investor-state disputes.

It is true that often evaluative mediation in certain circumstances may not lead to the resolution of a dispute because the stronger party as evaluated, be it the state/state entity or the foreign investor, could be less willing to give in. At this juncture comes the need for assisted negotiation by a mediator. Thus, the mediator who has evaluated the parties' positions can assist the parties to reach a "win-win" solution acceptable to both parties. Here is the crunch point! Having had their respective positions evaluated the disputing parties can look around to find out where their respective interests lie and can weigh and balance them to reach a solution themselves in which process the mediator can play a crucial facilitative role.

For example, if the dispute is about environmental regulatory expropriation as the foreign investor's cost of running the business runs excessively high for fulfilling the regulatory requirements, the state party might agree to extend the duration of the project by a reasonable number of years or by any other method to allow the foreign investor's investment balance sheet in a longer term bearable. In an investment dispute various closely related but non-investment issues concerning labour, human rights, environment and climate change, etc, which investor-state arbitral tribunals tend to avoid somehow can be dealt with in mediation for the mutual benefit of the disputing parties.

Given the context of investor-state disputes that concerns public policy issues, state representatives' accountability to the public or the tax payers, it may sound plausible that the mediator starts with the evaluation of the parties' respective positions and then assists them to reach a solution to their disputes in their own terms. Thus, the mediator's style could be described as evaluation-driven-facilitative mediation or evaluative-facilitative mediation (EFM). The parties need to provide in their contract the appropriate dispute mechanism in detail. However, the mediator needs to be cautious that throughout the process impartiality and confidentiality are maintained according to the parties' wishes.

If mediation reaches an impasse, arbitration can be resorted to as a fallback (ie Med-Arb) with the same person as the mediator and arbitrator or a different person as the arbitrator as the parties might agree. It should be mentioned that this process should be a structured and sequential one, given the fact that the state party needs to get its position evaluated for its public accountability purposes (at least for its confidence's sake) before it can explore an interest-based resolution (ie facilitative mediation) of the dispute with its counterparty.

It is noteworthy that the aforementioned IMI survey (<http://imimediation.org/imi-international-corporate-users-adr-survey-summary>) finds a wide support (in respect of dispute resolution generally) for evaluative mediation and for more proactive encouragement from arbitration tribunals and the courts to incorporate mediation into litigation and arbitration proceedings. Such a mechanism (Med-Arb) can be adopted by the disputing parties under the IBA Mediation Rules. Serious considerations may be given to include it in a new generation of bilateral investment treaties (BITs).

Last but not least, for credible and successful investor-state mediation, apart from the subject-matter expertise of the mediator along with other well-perceived qualities, the representation on the state-party side by its some heavyweight (professional or political) and popular figure in high-value or complex cases could be a plus. ☺

¹ See

http://books.google.co.uk/books?id=qJf_RRrWZ_QC&pg=PA399&pg=PA399&dq=Tesoro+Petroleum+Corporation+and+the+Government+of+Trinidad+and+Tobago&source=bl&ots=a3xHe_CEdT&sig=a615JcdH3E6VATfAsR3EAsSb_Vg&hl=en&sa=X&ei=qpKIUbuyF-mL0AWkiYDgBA&ved=0CDEQ6AEwAA#v=onepage&q=Tesoro%20Petroleum%20Corporation%20and%20the%20Government%20of%20Trinidad%20and%20Tobago&f=false

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