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ICSID Highlights Mediation, But Takeoff Could Be Complicated

By **Caroline Simson**

Law360, New York (May 22, 2017, 4:11 PM EDT) -- The International Centre for Settlement of Investment Disputes is set to host a special training course for mediators tailored for investor-state disputes, but experts question whether mediation — a dispute resolution method that is typically associated with commercial feuds — will ever realize its potential in the field.

Mediation is a popular tool used to resolve disputes among businesses, both in the international and domestic context. The American Arbitration Association defines mediation as an informal negotiation assisted by an impartial third party that encourages the parties to craft their own solution, increasing the likelihood that the parties will then be able to get their business relationship back on track.

ICSID announced in February it had teamed up with the Centre for Effective Dispute Resolution, the International Mediation Institute and the International Energy Charter to design a three-day mediator training course that will take place next month. The course is tailored to help attendees handle the specialized nature of investor-state disputes, since adding a country's government into the equation means that certain other considerations — such as political concerns and transparency obligations — must be taken into account.

But while the settling of investor-state disputes before or during an arbitration isn't uncommon — typically, about one third of such disputes are either settled or otherwise discontinued — the idea of using mediation to resolve arbitrations isn't something that's ever really taken off in investment arbitration.

"Mediation in investment treaty disputes is underused and underappreciated," said Cooley LLP partner Marc Suskin.

Investor-state disputes are typically initiated under an investment treaty that includes the host country of the investment and the home country of the investor bringing the claim. In most cases, once a dispute arises, the parties have a "cooling-off period" that lasts between three and six months during which they are obligated to try to negotiate an amicable solution.

"But I've never come across a treaty that explicitly calls for mediation," Suskin said. "A culture of mediation hasn't developed."

It's not as though the concept of mediation is unheard of at ICSID. A similar process known as conciliation has existed in the ICSID Convention for decades, under which a conciliator or a panel of conciliators is appointed by either the parties or the chairman of the administrative council, forming a commission.

During the conciliation, each party presents its case — a process that can include many of the trappings of a full-blown arbitration, such as summoning expert witnesses — and the commission can make certain recommendations, such as the potential terms of a settlement.

After the proceeding is complete, the commission issues a report in which it may decline jurisdiction, or record whether or not the parties reached an agreement.

But that conciliation process at ICSID has only been used a handful of times, so it's still an open question as to whether the use of the similar investor-state mediation process will ever really catch on.

Part of the problem with why mediation is not used during the cooling-off period has to do with the logistics of having a nation involved. It's not unusual for a government to need the entire cooling-off period just to assemble its legal team and to be ready to deal with the dispute, says Crowell & Moring LLP partner Ian Laird, who is co-chair of the firm's international dispute resolution group.

Moreover, unlike in business-to-business disputes, where the parties are usually more interested in resolving the dispute and getting on with their relationship than with sticking out a potentially arduous arbitration, governments may be politically motivated to drag the case out, a phenomenon known as "political downloading."

There's also certain procedural considerations. Governments are often required to comply with certain transparency requirements, which in certain circumstances could mean they'd have to publicize settlement discussions with an investor. Mediations in the commercial context are often confidential, so having a mediator who understands these obligations could be useful, said Baker Botts LLP partner Alex Escobar, who practices public international law and arbitration out of the firm's London office.

The fact that mediation is underused could also be due to a lack of awareness among investors. That's something that the upcoming ICSID course could help to change, he said.

"There's sense behind this initiative," he said.

Despite the difficulties that could potentially get in the way of an increased use of mediation at ICSID, experts agree that encouraging the use of mediation to resolve investor-state disputes has its benefits. One of the most obvious would be a cost benefit.

"Both parties have to weigh how much they're to spend against the likelihood of getting this or that type of compensation and, on both sides, there are risks," Escobar said. "Mediation used in the right way potentially can reduce that risk or eliminate it."

Laird agreed, noting that investor-state arbitration already has an ideal opportunity to encourage the use of mediation during the cooling-off period.

"Having worked with a number of claimants over the years, they would have loved to engage in meaningful early dialogue rather than go through lengthy arbitration," he said. "I think it's something that states need to look to, something that needs more promotion."

--Editing by Katherine Rautenberg and Kelly Duncan.

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