

Navigating Investor-State Mediation: Insights from Global Experts and Emerging Trends

Dhatri Talwar

On June 26, 2024, [Singapore Very Young Arbitration Practitioners](#) ("SG VYAP") and the [Young Investment Treaty Forum](#) ("Young ITF") jointly organised a [webinar](#) on investor-state mediation, titled "Investor-State Mediation: The Future is Now?". Moderated by Ms. **Sunita P. Advani**, Founder and Chair of **SG VYAP** and Arbitral Assistant to Mr. **Michael Lee** of [Twenty Essex](#) in Singapore, the panel comprised of:

- Mr. **Tat Lim**, the Founding Partner of Aequitas Law LLP and Maxwell Mediators Singapore, who is known globally for his mediation expertise;
- Dr. **Fan Yang**, a Legal Counsel at **China Harbour Engineering Company Ltd.**, who specializes in construction contracts and international arbitration and is also a CEDR and HKMAAL accredited mediator and an investor-state disputes mediator trained by the [International Center for Settlement of Disputes](#) (ICSID), the [Center for Effective Dispute Resolutions](#) (CEDR), the Energy Charter Secretariat, and the International Mediation Institute (IMI);
- Mr. **Bart Wasiak**, a Senior Associate at **Arnold & Porter**'s London office whose practice focuses on high-stakes international arbitration and investment treaty arbitration and who has been recognized as a Future Leader by Who's Who Legal; and
- Ms. **Karolina Latasz**, a Senior Associate at **Squire Patton Boggs**'s London office who has extensive experience in investment treaty and commercial arbitration. She is a co-founder of Young Investment Treaty Forum and has been recognized as a Future Leader by Who's Who Legal 2025.

The informative session included deliberations on various questions regarding Investor-State Mediation and concluded with breakout groups engaging further on the relevant issues with the panelists.

In addressing the question of "what mediation is and why it is so popular as an Alternative Dispute Resolution (ADR) mechanism", Mr. **Lim** explained that mediation involves a neutral facilitator helping parties resolve disputes through dialogue. While mediation is popular in Singapore, which the [Singapore Convention on Mediation \(2019\)](#) is named after, Mr. Lim noted that mediation is not popular in every part of the world. He stated that in some regions, mediation is not commonly used, but globally, in jurisdictions where it is already established, "mediation is on the uptake and on the rise and certainly becoming increasingly popular". He attributed this growth to the support from institutions like the [International Chamber of Commerce \(ICC\)](#) and Singapore International Mediation Center (SIMC), emphasizing that mediation can be enforced as an agreement of itself and as an agreement enforceable in its own right. Mr. Lim concluded that businesses and legal sectors endorse mediation because it simplifies dispute resolution, allowing people to resolve disputes in daily life without any complicated rules, making it a natural and effective method for conflict resolution.

In explaining why and how mediation is utilized in the context of Investor-State Dispute Settlement ("ISDS"), Mr. **Bart Wasiak** explained that ISDS generally involves disputes arising from investment treaties, which impose obligations on states regarding investor protection. Investors can initiate dispute resolution proceedings against states to enforce these rights. Typically, these treaties require initial attempts at amicable settlement discussions between the investor and the state before formal arbitration proceedings can be commenced. Mr. Wasiak then described four scenarios in which mediation can be employed in the ISDS context:

- **Early Use:** Mediation can be employed early in a dispute, even before formal proceedings are initiated, during the amicable settlement period.
- **Later Use:** More commonly, mediation is often used later in the dispute, during arbitration, when parties have exchanged pleadings and their respective case strengths and weaknesses are evident. Arbitrators may also recommend mediation at this stage.
- **Parallel Process:** Mediation can proceed concurrently with arbitration, allowing both processes to advance simultaneously rather than suspending arbitration proceedings pending the conclusion of any mediation.

- **Post-Award Settlement:** Even after an arbitral award, mediation may still be pursued to achieve a settlement without engaging in additional legal battles such as setting aside proceedings or enforcement challenges.

In exploring how mediation differs from ISDS arbitration, Mr. Wasiak highlighted that "a fundamental difference is arbitration is a very adversarial process, whereas mediation, by nature, is a process designed to identify common ground and discuss parties' interests, rather than focusing on who is right and who is wrong."

In discussing why mediation is used in the ISDS context and its potential impact, Mr. Wasiak acknowledged its suitability for certain disputes, particularly where the investor maintains an ongoing interest in their investment or when a functional relationship persists between the investor and the state, allowing flexibility in adjusting disputed measures. However, he noted that there are limitations to the usage of mediation in cases where relationships have broken down, investments no longer exist, or allegations of expropriation arise, making mediated settlements less feasible. Mr. [Wasiak](#) noted that there are reasons to be skeptical as to the transformative potential of mediation in the context of ISDS, citing a lack of systematic use, and noting that mediation tends to be ad hoc and confined to specific cases where both parties find it beneficial. While recognizing mediation's potential to resolve disputes, he remains uncertain about its broader effectiveness in practice.

Dr. **Fan Yang**, on the other hand, believes mediation is well-suited for ISDS and has transformative potential without being overstated in its context. She emphasizes that mediation's flexibility, confidentiality, and focus on common interests rather than legal positions can significantly benefit parties involved. However, she notes several hurdles, including awareness gaps, parties' reluctance to compromise, and the need for skilled mediators familiar with ISDS complexities. Dr. Yang underscores that ISDS often restricts remedies to monetary damages or property restitution, which may not always be optimal. Quoting Professor Jeswald Salacuse from a 2009 paper, she points out that "while an arbitration award is a one-dimensional solution to a problem, a mediated solution is multidimensional", highlighting mediation's potential to offer diverse settlement terms. Thus, she views mediation as transformative due to its capacity for expansive, customized resolutions in ISDS disputes.

Mr. Wasiak outlined a non-exhaustive list of recent developments shaping investor-state mediation in ISDS. Firstly, he noted that there has been significant criticism of the ISDS system in recent years, prompting some countries to reduce their involvement and creating an opportunity for mediation as an alternative dispute resolution method. Secondly, he mentioned that some treaties now explicitly refer to mediation, although he expressed reservations about mandating it. Thirdly, he pointed out that [ICSID](#) introduced the first [ICSID Mediation Rules](#) in 2022, tailored specifically for investment disputes. Fourthly, Mr. Wasiak highlighted CEDR's 2021 publication of an investor-state mediation guide for lawyers and clients, aimed at enhancing mediation engagement. Lastly, he discussed the establishment of an investor-state mediation panel by CEDR and Abu Dhabi Investment Centre (ADGM), comprising trained mediators with expertise in ISDS. He concluded that these developments underscore a growing interest in mediation for resolving ISDS disputes.

In response to whether investor-state mediation preserves investor-state relationships and safeguards future Foreign Direct Investment ("**FDI**") flows, Dr. Yang emphasized its role in fostering understanding and cooperation between parties. She accentuated that mediation helps maintain and strengthen these relationships, thereby creating a more predictable and amicable environment for resolving disputes, as highlighted in the CEDR guide. Dr. Yang noted that mediation is particularly effective when both parties are committed to maintaining ongoing relationships and engaging in negotiations. She described mediation as facilitating earlier and more flexible exploration of critical issues and relationships, which is beneficial for FDI by demonstrating a proactive approach to investors and reducing the risk of disputes. Dr. Yang also highlighted that access to investor-state mediation is enhanced when states implement frameworks conducive to negotiations, empowering officials to settle matters confidently.

Ms. **Karolina Latasz** discussed the draft [UNCITRAL provisions on mediation](#) and the [UNCITRAL Guidelines on Investment Mediation](#), noting their non-binding nature as models is intended to provide drafters of treaties with adaptable language for inclusion in the prospective investment treaties. She highlighted that these provisions, consisting of just five articles, are tailored to meet essential dispute resolution needs within investment treaties. Central to these rules is Article 1, which establishes mediation based on the [Singapore Convention on Mediation](#) framework, and emphasizes its voluntary nature with parties encouraged, not mandated, to mediate. Ms. Latasz underscored that mediation begins only upon a party's request, and highlighted both positive aspects and areas for improvement for these provisions. She praised its role in initiating discussions and signaling openness to mediation. However, she noted its limitations, such as its application only to future treaties and not to the preexisting 3000 treaties and considered whether this lacuna could be solved by an adoption of a multilateral treaty akin to the [Mauritius Convention on Transparency \(2014\)](#), albeit recognizing the challenges of achieving consensus. Ms. Latasz also proposed exploring mechanisms to compel parties to engage in mediation during cooling-off periods, potentially enhancing its effectiveness in dispute resolution. Ultimately, she stressed that the final language of these provisions will depend on treaty drafters' decisions.

On tips for junior lawyers looking to gain experience in investor-state mediation, Mr. Lim recommended that junior lawyers could start by deliberately exploring the spectrum of dispute resolution in their current roles. He stressed the importance of focusing on

mediation opportunities and volunteering for neutral roles to gain exposure to various processes. Dr. Yang also encouraged junior lawyers to consider integrating Artificial Intelligence ("AI") into ISDS arbitration and mediation. She highlighted the potential for young lawyers to collaborate effectively with AI tools to improve efficiency, given the evolving landscape of ISDS.

ABOUT THE AUTHOR

Dhatri Talwar is an LL.M. graduate specializing in International Arbitration and Dispute Resolution from the **National University of Singapore**. Based in New Delhi, India, she has established her own practice, where she handles commercial, criminal, and civil disputes. With her background in arbitration and litigation, Dhatri is driven to advance her expertise further in alternative dispute resolution mechanisms.

Editor: Bernice Tan, Senior Associate, Drew & Napier LLC

*This article was first [published](#) on the *Jus Mundi Blog*.*

URL: <https://www.biicl.org/blog/93/navigating-investor-state-mediation-insights-from-global-experts-and-emerging-trends>