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BOOK REVIEW

What Makes Parties Choose Commercial and Investment Mediation?

Martin Hauser
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Mediation in International Commercial and Investment Disputes

Edited by Catherine Titi and Katia Fach Gómez
ISBN 978-0-19-882795-5
395 pages
Oxford University Press, 2019

According to the co-editors, Katia Fach Gómez and Catherine Titi, 'in recent decades, the resolution of international commercial and investment disputes has been dominated by international arbitration. Mediation and conciliation have remained quietly in the background. While a complementary mechanism, international mediation and conciliation have become wide currency compared to the past.' Disputing parties are 'becoming increasingly aware of this alternative method of dispute settlement.'[1] Edna Sussman points that 'many efforts' were made 'over the course of the past ten years to encourage mediation for cross-border disputes.'[2]

Thirty outstanding international experts from academia, mediation and arbitration institutions, and international legal practice, address this complex subject from various angles in 20 excellent and inspirational contributions. The essays provide academic analyses and valuable insights into the services offered by dispute resolution institutions as well as into industries using mediation, like political risk insurance, finance, sovereign debt, energy, intellectual property, and construction. They also offer practical guidance as to the choice of mediators and the relevant ethical rules. This book deals with today's utilization of commercial and investment mediation and the 'developments driving the growth of mediation.'[3] It is not about the technique of mediation in itself.

The book is divided into four parts: the first part comprises 4 essays[4] dealing with 'boundaries, trends and outlook', the second is divided into 6 essays[5] discussing 'mediation rules and mediation in practice', the third is composed of 5 essays[6] touching on 'subject-matter mediation of commercial and investment disputes' and the fourth part consists of 4 essays[7] covering 'special topics in the mediation of commercial and investment disputes'.

1 Catherine Titi, Katia Fach Gómez, 'Summary, Mediation in International Commercial and Investment Disputes', p. vii.

2 Edna Sussman, Forword, p. v.

3 Edna Sussman, p. v.

4 Katia Fach Gómez, 'The Role of Mediation in International Commercial Disputes', pp. 3-20; Catherine Titi, 'Mediation and the Settlement of International Investment Disputes', pp. 21-38; Stacie I. Strong, 'Applying the Lessons of International Commercial Arbitration to International Commercial Mediation', pp. 39-60; Jack J. Coe Jr, 'Current Co-Mediation', pp. 61-78.

5 Alina Leoveanu, Andrija Erac, 'ICC Mediation', pp. 81-100; Eric P. Tuchmann, Tracey B. Frisch, Giovanna Micheli, Yanett Quiroz, 'The International Centre for Dispute Resolution's Mediation Practice and Experience', pp. 101-120; Frauke Nitschke, 'The ICSID Conciliation Rules in Practice', pp. 121-143; Kaj Hobér, Political Risk Insurance and Mediation, pp. 144-159; Danny McFadden, 'The Growing Importance of Regional Mediation Centres in Asia', pp. 160-181; Karen Vanderkerckhove, 'Mediation of Cross-Border Commercial Disputes in the European Union', pp. 182-203.

6 Ilaria Forestieri, Philipp Paech, 'Mediation of Financial Disputes', pp. 207-222; Calliope M. Sudborough, 'Mediating Sovereign Debt Disputes', pp. 223-238; Peter D. Cameron, Abba Kolo, 'Mediating International Energy Disputes', pp. 239-258; Heike Wollgast, Ignacio de Castro, 'WIPO Mediation', pp. 259-277; Alberto Fortún, Alfonso Iglesia, 'Mediation and Other ADR in International Construction Disputes', pp. 278-297.

7 Charles H. Brower II, 'Selection of Mediators', pp. 301-320; Chester Brown, Phoebe Winch, 'The Confidentiality and Transparency Debate in Commercial and Investment

While all essays are diverse, what they have in common is the fact that they implicitly raise the question as to what motivates commercial parties, investors and states, to choose commercial and investment mediation as a dispute resolution mechanism. Nine main motivating or demotivating factors can be identified:

1. Saving time and costs

According to the authors, one of the most important factors for parties to choose mediation, across all sectors, is saving time and cost, including "reputational" cost,[8] in comparison to international commercial and investment arbitration.[9] Such choice does not *per se* exclude occasional success fees for the mediator.[10]

2. Preserving an business relationship

Another important motivating factor is the opportunity to preserve an existing business relationship through mediation, particularly in respect to finance, sovereign debt, intellectual property, construction, and investor-state disputes.[11]

3. Mandate to negotiate

The mandate for one side to negotiate can be motivating or demotivating for the other party.

As is well known, the success of a mediation stands and falls with each party representative's authority to enter into negotiation. In other words, if a representative does not have the necessary mandate to settle the dispute, the mediation is doomed to failure. The outcome is similar when the representative has only a mandate which is internally limited by the company or he lacks the necessary internal support to negotiate and settle the dispute. This difficulty is well known regarding decision-makers in the management of multinational companies.[12] Therefore, mediators are well advised to ascertain that representatives have the necessary mandate and support to allow the mediation to progress.

The authors of the book underline similar state-specific issues. Several government departments may be involved and it may be difficult to identify one agent with authority to negotiate.[13] State representatives, particularly in investment mediation, might be reluctant to settle with foreign investors instead of awaiting a decision imposed by an arbitral tribunal, since it might be damaging for their political career, they may lose their jobs, face unfounded charges of giving in to the opponent, or of incompetency, corruption and criminal proceedings.[14] The mediator may help to clarify and resolve these state-specific issues,[15] but Catherine Titi comes to the conclusion that in many cases arbitration will appear preferable to mediation.[16]

This being said, if in the specific domain of investor-state disputes, the political and/or economic incentives are insufficiently attractive, it is unlikely that the parties will agree to settle. They need sufficient settlement incentives to outweigh the perceived risks of doing so.[17]

Therefore, the parties and the mediator should keep a close eye on such additional, "internal negotiation" among a party's representatives and the ultimate decision-makers within the multinational or state government, which may motivate or demotivate a party's choice of commercial and investor-state mediation as a dispute resolution tool.

4. Exploring mutual interests

Another motivating factor is interest-based negotiation, one of the core features and advantages of mediation.

It is therefore not surprising that the authors emphasize that commercial and investor-state mediation allows parties to share information about their needs and interests and build trust in each other,[18] to go beyond a binary win-lose remedy in sovereign debts disputes,[19] to convert a lose-lose situation into a win-win outcome by exploring underlying interests and creative solutions

Mediation', pp. 321-341; Joe Tirado, Elisa Vicente Maravall, 'Codes of Conduct for Commercial and Investment Mediators', pp. 342-359; Hal Abramson, 'New Singapore Convention on Cross-Border Mediated Settlements', pp. 360-380.

8 Peter D. Cameron, Abba Kolo, p. 240.

9 Edna Sussman, p. vi; Catherine Titi, pp. 22-23; Stacie. I. Strong, p. 48; Alina Leoveanu, Andrija Erac, p. 88; Eric P. Tuchmann, Tracey B. Frisch, Giovanna Micheli, Yanett Quiroz, pp. 106, 111, 113; Frauke Nitschke, p. 139; Danny McFadden, p. 171; Ilaria Forestieri, Philipp Paech, p. 210; Calliope M. Sudborough, pp. 229-230; Peter D. Cameron, Abba Kolo, pp. 240, 244, 254; Heike Wollgast, Ignacio de Castro, pp. 260, 271; Alberto Fortún, Alfonso Iglesia, pp. 291, 297; Chester Brown, Phoebe Winch, pp. 322, 329.

10 Peter D. Cameron, Abba Kolo, p. 250.

11 Edna Sussman, p. v; Catherine Titi, p. 23; Eric P. Tuchmann, Tracey B. Frisch, Giovanna Micheli, Yanett Quiroz, p. 115; Ilaria Forestieri, Philipp Paech, pp. 213-214; Calliope M. Sudborough, p. 230; Heike Wollgast, Ignacio de Castro, p. 261; Alberto Fortún, Alfonso Iglesia, p. 291; Chester Brown, Phoebe Winch, p. 329.

12 Catherine Titi, p. 38.

13 Calliope M. Sudborough, p. 232; Catherine Titi, p. 36.

14 Catherine Titi, pp. 36-38; Jack J. Coe Jr, p. 74; Alina Leoveanu, Andrija Erac, pp. 98-99; Calliope M. Sudborough, pp. 232-233; Peter D. Cameron, Abba Kolo, pp. 255-256, 258; Chester Brown, Phoebe Winch, p. 324.

15 Jack J. Coe Jr, p. 74; Calliope M. Sudborough, p. 233.

16 Catherine Titi, pp. 37-38.

17 Peter D. Cameron, Abba Kolo, p. 256; Jack J. Coe Jr, p. 74.

18 Catherine Titi, p. 23; Jack J. Coe Jr, p. 72; Eric P. Tuchmann, Tracey B. Frisch, Giovanna Micheli, Yanett Quiroz, p. 118.

19 Calliope M. Sudborough, pp. 230-231.

thereby generating significant value in energy disputes,[20] and in general, to enable tailored solutions that are not available in an adjudicative process.[21]

However, conciliation under the ICSID Rules differs in that the conciliator examines the parties' contentions and evaluates their respective merits in the hope that such evaluation may assist the parties in reaching an agreed settlement.[22]

Therefore, when selecting their mediator, it is important for parties to be aware of his or her mediation style, and whether they favour a broader interest-based perspective or a narrower focus corresponding to a more evaluative style.[23]

5. Confidentiality and transparency

As a general rule, confidentiality is another motivating key factor in favour of mediations which can be conducted confidentially among a small number of participants behind closed doors.[24]

By contrast, the use of videoconferencing via the Internet for online mediation sessions generates a series of security risks, which need particular attention in order to protect confidentiality.[25] This is even more important since the increased use of the Internet platforms due to the current international health crisis.

However, confidentiality has been subject to adjustments. Under the ICC mediation rules, the fact that settlement proceedings are taking place is no longer confidential in itself.[26]

In addition, the appropriateness of confidentiality is challenged when one of the mediating parties is a state. Whereas mediation of a commercial dispute lacks a public interest, this is not the case in investment mediation where a tension exists between the imperatives of confidentiality and calls for transparency.[27]

Therefore, the IBA Rules on investment mediation carve out from the confidentiality obligation the fact of the existence of the mediation, any resulting settlement and its terms. This approach is considered an adequate balance between these competing considerations.[28]

6. Enforcement mechanism

The availability or lack of an enforcement mechanism for mediated settlement agreements is said to be an important motivating or demotivating factor for the parties considering mediation as a dispute resolution tool.[29]

For the authors of this book, the international enforceability of arbitral awards under the New York Convention of 1958 and under the ICSID Convention of 1965[30] led to the increasing predominance of international commercial arbitration over international conciliation or mediation, even though, at the outset, ICC and ICSID conciliation were of equal importance to commercial arbitration and even the preferred method for investment dispute resolution.[31]

According to Stacie I. Strong, the international community has since become somewhat disenchanted with the costs, delays and procedural formality associated with contemporary arbitration and some individuals and institutions have begun to search for a better way of resolving cross-border commercial disputes. Of the various options, mediation has established itself as a leading alternative to international commercial arbitration.[32]

However, the most frequently cited obstacle to the widespread use of mediation in commercial and investment disputes is the lack of an available enforcement mechanism, similar to the New York Convention. This gap is supposed to be filled by the Singapore Convention on the Enforcement of International Mediated Settlement Agreements which was opened for signature in August 2019[33] and which is said to be particularly relevant for Asian states, and especially for China.[34]

Other authors nevertheless stress that a mediated settlement agreement is likely to be complied

20 Peter D. Cameron, Abba Kolo, pp. 245, 251.

21 Edna Sussman, p. vi.

22 Frauke Nitschke, p. 130.

23 Charles H. Brower II, p. 312.

24 Karen Vanderkerckhove, 'Confidentiality under the EU Mediation Directive', pp. 184, 188-189; Heike Wollgast, Ignacio de Castro, p. 261; Alberto Fortún, Alfonso Iglesia, p. 291.

25 Katia Fach Gómez, p. 11.

26 Alina Leoveanu, Andrija Erac, p. 86.

27 Chester Brown, Phoebe Winch, pp. 321-341 (329); Catherine Titi, p. 35; Kaj Hobér, Confidentiality and transparency in political risk mediations, p. 156.

28 Chester Brown, Phoebe Winch, pp. 334, 340; for ICSID conciliation, Frauke Nitschke, p. 138.

29 Stacie I. Strong, pp. 48-49.

30 Calliope M. Sudborough, p. 226.

31 Alina Leoveanu, Andrija Erac, p. 82; Frauke Nitschke, p. 123.

32 Stacie I. Strong, p. 39.

33 Edna Sussman, p. v ; Catherine Titi, p. 24 ; Stacie I. Strong, pp. 46-47 ; Frauke Nitschke, p. 141 ; Calliope M. Sudborough, pp. 233-234; Peter D. Cameron, Abba Kolo, pp. 245-246, 257; Heike Wollgast, Ignacio de Castro, p. 260; Hal Abramson, pp. 360-380 (366).

34 Danny McFadden, pp. 180-181.

with voluntarily. Since the outcome is amicable and voluntary, with respect to financial disputes, enforcement in the proper sense is unnecessary. A mediated settlement could also be converted to the terms of a consent award.[35]

The Singapore Convention will not go into effect until September 2020 as a result of three countries having ratified it so far. One learns from Karen Vanderkerckhove's essay, that neither the EU nor its member states have yet signed the Singapore Convention. They follow a different philosophy which does not provide for cross-border enforcement without prior control in the country where the settlement agreement was concluded. Therefore, a Draft Convention on the Recognition and Enforcement of Foreign Judgments relating to Civil and Commercial Matters is currently in circulation. While the possibility of the EU and its member states acceding to the Singapore Convention is not excluded,[36] it is not yet accepted either.

It results from the book's essays, that the intensity of the authors' call for an international enforcement mechanism, such as the Singapore Convention, reflects a certain degree of 'interdependence' of disputing parties in specific sectors: the more they are 'tied' together by a common project, as might be the case in finance, construction, or international IP transactions, the less enforceability of a negotiated settlement appears to be an issue. In 'looser' cross-border relationships among the disputing parties, particularly with a power imbalance, when a state or state entity is involved, a party may have more reason to be sceptical of any spontaneous and voluntary compliance with the terms of a mediated settlement agreement resulting only in a new, not directly enforceable contract. According to the parties' interdependence, the prospects for enforcement may indeed act as a motivating factor in favour or against choosing mediation to resolve their dispute.

7. Enhancing mediator credibility

The authors plead in favour of enhancing mediator credibility by boosting the quality of mediation services. It is said that mediation needs to evolve into a true profession with high practice and ethical standards, such as a common international code of conduct for mediators. Users of mediation need to see these standards operating effectively. The selection of mediators should take into account their skills, capabilities and personalities. Increased transparency of the quality of mediators would motivate parties and enable mediation to grow.[37]

8. Commencing mediation

Commencement of the mediation process may be motivated by the dispute and escalation prevention mechanism inherent in mediation pursuant to a dispute resolution clause or upon voluntary submission.[38] According to the ICC, ICDR and WIPO, the majority of institutional mediations are initiated on the basis of pre-existing contractual agreements,[39] often multi-tiered dispute resolution clauses which have the purpose of minimizing a possible escalation.[40] Parties also submit to mediation during contractual 'cooling off periods,' or on the basis of 'required'[41] mediation clauses. Since mediation is a voluntary process based on party autonomy, the compatibility of the voluntary acceptance of the mediation process with compulsory mediation requirements is discussed.[42]

9. Cultural and psychological elements

In general, choosing mediation is also motivated by cultural and human considerations such as the willingness to meet and understand the other party while expressing emotions about what has occurred.[43]

In his essay, Danny McFadden draws a comprehensive picture of the cultural developments of mediation in Asia, as influenced by the philosophy of Confucius, while reaching out to investment disputes in connection with infrastructure developments arising from China's Belt and Road initiative (New Silk Road).[44]

35 Edna Sussman, p. v ; Eric P. Tuchmann, Tracey B. Frisch, Giovanna Micheli, Yanett Quiroz, pp. 116-117 ; Karen Vanderkerckhove, p. 189 ; Ilaria Forestieri, Philipp Paech, p. 215.

36 Karen Vanderkerckhove, pp. 198, 200, 203; reluctant regarding the Draft Convention on the Recognition and Enforcement of Foreign Judgments, Stacie I. Strong, p. 46; Hal Abramson, p. 346.

37 Katia Fach Gómez, pp. 12-19; Jack J. Coe Jr, pp. 63, 73; Eric P. Tuchmann, Tracey B. Frisch, Giovanna Micheli, Yanett Quiroz, pp. 108-109; Frauke Nitschke, p. 128; Charles H. Brower II, pp. 301-320; Joe Tirado, Elisa Vicente Maravall, pp. 342-359 (357,358).

38 Catherine Titi, p. 29 ; Kaj Hobér, p. 158; Peter D. Cameron, Abba Kolo, p. 248.

39 Alina Leoveanu, Andrija Erac, p. 93 ; Eric P. Tuchmann, Tracey B. Frisch, Giovanna Micheli, Yanett Quiroz, p. 106; Heike Wollgast, Ignacio de Castro, pp. 265, 266-268.

40 Kaj Hobér, pp. 156, 157; Alberto Fortún, Alfonso Iglesia, p. 292.

41 Eric P. Tuchmann, Tracey B. Frisch, Giovanna Micheli, Yanett Quiroz, p. 116.

42 Katia Fach Gómez, pp. 4-7; Catherine Titi, pp. 25, 33-34; Ilaria Forestieri, Philipp Paech, p. 211.

43 See Katia Fach Gómez, pp. 10-11.

44 Danny McFadden, pp. 160-181.

Regrettably, this book does not contain a similar essay about American or European cultural approaches, which would have rounded it off and could have shed some more light on what makes parties choose or not choose mediation.

While Stacie I. Strong briefly mentions 'a purported party preference for adjudicative, rather than consensual, forms of dispute resolution', she nevertheless considers that the lack of an appropriate international enforcement mechanism for mediated settlement agreements is the cause of why parties continue to prefer international arbitration to mediation. However, human beings do not solely follow rational choices, not even in commercial disputes, as *homo economicus*.

Cultural and psychological elements should be taken into account when reflecting on the motivation of parties in selecting their dispute resolution tools. One important cultural aspect may be the prevailing view of decision-making in the society in which a party operates, which in many places is still hierarchical. Only since recent times, and through the Internet, we are compelled to negotiate. 'More slowly in some places, more rapidly in others, the pyramids of power are shifting into networks of negotiation. This quiet revolution ... could be called the "negotiation revolution."'[45] In addition, particularly in conflict, human beings reveal their competitive drive to 'win' and are initially not open for 'win-win' solutions.[46]

Therefore, in addition to considerations about the lack of an international enforcement mechanism for mediated settlement agreements, the cultural and psychological elements may help to explain why mediation is still not the preferred dispute resolution tool for international disputes.

Overall, this book is outstanding in that it compiles, for the first time, a knowledgeable account of different sectors from experts and practitioners on international commercial and investment mediation, and deserves unreserved recommendation.

45 Roger Fisher, William Ury, Bruce Patton, foreword to the 3rd edition, *Getting to Yes - negotiating agreement without giving in*, Boston 2012; in German and French, Martin Hauser, *Wirtschaftsmediation in Frankreich und Deutschland im Vergleich*, Frankfurt a.M. 2016, pp. 54-63 https://www.mediationaktuell.de/sites/ma.site/files/produkte/downloads/sr_viadrina_bd02_hauser_ebook.pdf
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46 In German and French, Martin Hauser, Was kann die Parteien für die Mediation motivieren? https://martinhausermediation.com/wp-content/uploads/2019/11/motivation-Parteien-Mediation_Martin-Hauser.pdf
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