



Date: 17 July 2020 **Time:** 2:00pm CEST

Moderator: Mr. Wolf von Kumberg

Panelists: Dr. Judith Knieper, Mr. Alejandro Carballo Leyda, Ms. Frauke Nitschke, Mr. Mark Appel, Dr. Malik Dahlan, Mr. James South

Presentation Summary:

Mr. Wolf von Kumberg (International Arbitrator and Mediator), moderator for the webinar, kickstarted the session by asking: (i) what the trend will be for globalization and international investment in a post-Covid19 world; and (ii) what impact such trends will have on Investor-State Dispute Settlements (ISDS). Mr. von Kumberg added that the signing of the Singapore Convention on Mediation (SCM)¹ and increasing criticisms against arbitration in ISDS catapulted the growth of investor-State mediation. Panellists were then invited to share more about the initiatives that have been introduced by the different institutions to aid the development and use of mediation in ISDS.

Dr. Judith Knieper (Legal Officer, United Nations Commission on International Trade Law (UNCITRAL) Secretariat) presented on the UNCITRAL framework on mediation and shared about the progress of the reforms. One of the greatest steps undertaken by UNCITRAL in relation to mediation was to draft the SCM. The SCM is a key instrument as it provides an efficient framework for the enforcement of international settlement agreements. The SCM is complemented by the [Model Law on Mediation](#),² the [Conciliation Rules](#),³ and the [draft](#)

¹ United Nations Convention on International Settlement Agreements Resulting from Mediation.

² UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.

³ United Nations Commission on International Trade Law Conciliation Rules, 1980.

[UNCITRAL Notes on Mediation](#).⁴ Dr. Knieper is confident that the Conciliation Rules and the UNCITRAL Notes on Mediation will be adopted in the upcoming UNCITRAL Commission sessions. That aside, she stated that UNCITRAL's [Working Group III: Investor-State Dispute Settlement Reform](#) has a three-step mandate: (i) to identify all relevant issues, (ii) to identify if these issues are on reform, and (iii) to develop solutions to the issues. In that context, many States had identified mediation as a core issue. Accordingly, Working Group III will explore ways to promote, foster, and improve access to mediation in the ISDS context.

Next, Mr. Mark Appel (International Arbitrator and Mediator) began his presentation with an overview of the [International Mediation Institute's \(IMI\) Investor-State Mediation Competency Criteria](#) as published by the [IMI's Investor-State Task Force](#):⁵

- Familiarity with procedural and substantive issues in investor-State disputes;
- Expertise in mediation;
- Familiarity with and understanding of the different negotiation and mediation techniques;
- Understanding of ISDS arbitration process;
- Cross-cultural expertise; and
- Familiarity with tools and technologies to conduct online mediation effectively.

The criteria was developed with the goal to assist States and investors in identifying and choosing a competent mediator to mediate their respective disputes.

Moving on, Mr. Alejandro Carballo Leyda (General Counsel & Head of Conflict, Resolution Centre at Energy Charter Secretariat (ECS)) gave a brief summary on the steps taken by the ECS to promote investment mediation in the Energy sector. He shared that in 2015, the ECS found out through a series of roundtables and dialogues that many investors and State officials lacked awareness about mediation. They were also uncertain about the application of the mediation process. To help overcome the lack of awareness and uncertainty, the ECS adopted the [Guide on Investment Mediation](#). Additionally, mediation awareness trainings and technical advice were also offered to government officials. Furthermore, [the Model Instrument on Management of Investment Disputes](#) was created to provide a framework within a State. This

⁴ A draft copy of the International Commercial Mediation: Draft UNCITRAL Notes on Mediation, as at July 2019, can be accessed [here](#).

⁵ A copy of the IMI Investor-State Mediation Competency Criteria can be accessed on IMI's website [here](#).

framework would guide government officials and investors in the coordination and management of investment disputes. It would also guide the assessment of different dispute resolution mechanisms that are available so that the stakeholders can make an informed decision in relation to their dispute.

The next presenter, Ms. Frauke Nitschke (Senior Counsel & Team Leader, International Centre for Settlement of Investment Disputes (ICSID)), shared about the ICSID new mediation rules. There were strong indicators from the States that they were willing to adopt mediation as a dispute resolution mechanism. This led to the ICSID proposing a set of specific rules for investment mediation. The proposed ICSID mediation rules has been worded broadly to accommodate the different styles of mediation. Unlike UNCITRAL's definition, mediation and conciliation were thought to be different dispute resolution mechanisms under the ICSID framework. Ms. Nitschke explained that under conciliation, there would be three members forming the conciliation commissions. Accordingly, all the members would be appointed like in an arbitration process. Mediators on the other hand, are appointed by the agreement of all the parties. She added that the proposed rules would allow the ICSID to facilitate the initiation of mediation by transmitting an 'invitation to mediate' to the other party of the dispute. Besides these proposed rules, the ICSID has been working on capacity building with mediators and government officials through courses, webinars, newsletters, and interactions through online platforms.

Next, Mr. James South (Managing Director of Centre for Effective Dispute Resolution (CEDR)) shared on the current trend in investor-State mediation awareness and mediator training. He stated that there has been a real shift in awareness from state investors and institutions over the years. He added that awareness training for all stakeholders continue to contribute to the growing interest in mediation. Further, he emphasized that it is necessary to create a cadre of competent mediators with skillsets that can effectively deal with the growing demand in mediation in investor-State disputes. These skills include but are not exhaustive to process design, co-mediation, intercultural competency, process considerations, and confidentiality versus transparency requirements. He was confident that the fundamental systemic reform through the SCM and the proposed ICSID mediation rules would catapult the growth of mediation within the ISDS context.

Finally, Mr. Malik Dahlan (Principal of Institution Quraysh for Law and Policy) presented on the use of investor-State mediation in the Belt and Road Initiative (BRI). He stated that the BRI would have a great impact on the infrastructure sector in an estimate of 60-100 countries. Therefore, it becomes essential to consider mediation for disputes in BRI for the following reasons:

- Lack of multilateral dispute resolution framework;
- Lack of institutional framework to administer dispute resolution mechanisms; and
- Lack of dispute resolution forum.

He also placed emphasis on factors of cultural and language differences that mediators would be to be acutely aware of when mediating between international parties. Mr Dahlan also shared that the Republic of China has taken an active role in the domestic promotion of the SCM and mediation awareness through its people's courts. Although it will take time, Mr. Dahlan is encouraged that the rest of the world will eventually understand the complexities of mediation.

Q&A Discussion

Some questions addressed during the session:

- How would the SCM promote mediation in investor-State disputes?
- How would the SCM apply in the ISDS context?
- Following the investor-State mediator competency criteria, how does one pick the 'right' mediator?
- How would the co-mediation style be adopted in investor-State disputes?
- How would the Model Instrument on Management of Investment Disputes as developed by the ECS address investment-State mediation?

We invite you to listen to the panel's answers to the questions from the video record of the session [here](#).

The team at SIMI and IMI would like to express our gratitude and appreciation to Mr. von Kumberg, Dr. Knieper, Mr. Leyda, Ms. Nitschke, Mr. Appel, Dr. Dahlan, and Mr. South, for sharing their time to join this roundtable panel session, and to all participants for joining us live from around the world.

About the Speakers

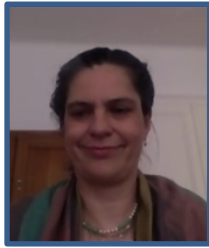


Wolf von Kumberg is a certified CEDR mediator and an arbitration Fellow of the Chartered Institute of Arbitrators. He has over 30 years of international legal and business experience and has mediated and arbitrated numerous types of international commercial and investor state disputes. While serving as a Legal Director in Litton Industries Inc. and then as a Legal Director and Assistant General Counsel-International to Northrop Grumman Corporation, Wolf engaged with Governments and State Agencies in 52 countries dealing with trade, security and investment matters. In Northrop, he was also responsible for developing a dispute management process including an ADR Policy, Guidelines and International Dispute Clauses. In addition, he was involved in its international compliance program and complex investment negotiations with States. Wolf was also responsible for all international disputes including mediation, adjudication and arbitration.



Dr. Alejandro Carballo-Leyda (LLB with Economics, Certificate on international conflicts, LLM, PhD in international law, Harvard Program on Negotiation, CEDR accredited mediator) is the General Counsel of the Energy Charter Secretariat and head of its Conflict Resolution Centre, which provides good offices and mediation support to investors and governments. He coordinated the Guide on Investment mediation (2016) as well as the Model Instrument on Managing Investment Disputes (2018) and co-organised the first trainings for investment mediators. Currently, he is in charge of the discussions on the modernisation of the Energy Charter Treaty and supports several countries in developing their internal instrument on managing/preventing investment disputes.

Previously, Alejandro advised states and private clients on a wide range of public and private international law issues. He edited the book on *Asian Conflict of Laws* (Wolters Kluwer, 2015) and participated in the working groups of UNIDROIT Principles of International Commercial Contracts (2010 ed.) and Hague Conference Principles on Choice of Law in international contracts.



Dr. Judith Knieper is a legal consultant with 28 years of professional experience. She has been working in South East Europe from 1998 -2013 for numerous donors/organizations, e.g. OSCE, CoE, Worldbank and GIZ, the Deutsche Gesellschaft für Internationale Zusammenarbeit, the German international cooperation. She conducted two regional projects in the area of CISG and Alternative Dispute Resolution for GIZ. Currently, she is working for UNCITRAL as legal officer in Vienna, Austria being responsible for the UNCITRAL Transparency Standards (the Transparency Registry being operated with the funding by the European Union and by OFID (the OPEC Fund for International Development)). She obtained both Legal State Exams in Frankfurt, Germany as well as her PhD.



Frauke Nitschke is a senior counsel at the International Centre for Settlement of Investment Disputes (ICSID). Frauke serves as the team lead for ICSID staff handling proceedings in English. Frauke also serves as Secretary of tribunals, conciliation commissions and *ad hoc* committees in investor-State proceedings conducted pursuant to the ICSID Convention and the ICSID Additional Facility Rules involving a variety of economic sectors and legal instruments. Frauke further leads ICSID's investor-State mediation activities, including the drafting of the proposed Mediation Rules and amendments to ICSID's conciliation frameworks. Prior to joining ICSID, Frauke served in the World Bank's Legal Vice Presidency and the Inspection Panel. Frauke is an accredited mediator and admitted to the D.C. and New York State Bar. She holds a law degree from the Freie Universität Berlin, an LLM from Georgetown University Law Center, and a Master's Degree in Psychology from the FernUniversität Hagen.



James South is the Managing Director of the Centre for Effective Dispute Resolution (CEDR). As a mediator, facilitator, consultant and trainer, James has over 25 years of experience in over 30 countries, working with individuals, organisations and public institutions to prevent, manage and resolve conflict effectively.

A lawyer in his native New Zealand, James acts as a mediator both in the UK and internationally, specialising in corporate and commercial disputes, with particular experience in international commercial contracts, Insurance & Finance, Property, Sales of Goods & Services and Employment & Workplac.



Prof. Dr. Malik R. Dahlan is a prominent multi-jurisdictional qualified lawyer and international mediator. He is currently the Senior Mediation Fellow of Harvard University Negotiation Task Force. He is the Principal of Institution Quraysh for Law & Policy (iQ) and a Chaired Professor of International Law and and Public Policy at Queen Mary University of London.

He is a Fellow of the Chartered Institute of Arbitrators a CEDR accredited mediator and Senior Research Fellow of the Rand Corporation. He is also former Trustee of the International Mediation Institute. He was Special Advisor to former Chief Justice of England's and Wales, Lord Woolf, and the founding Director of the QFC International Dispute Resolution Center. He is an expert in trade, energy and investment and has written about Investor-State Dispute Settlement (ISDS) and the Belt and Road Initiative (BRI).



Mark Appel is an independent, international Arbitrator, Mediator, Consultant and Trainer.

Mark has nearly 40 years of global arbitration and mediation experience, having served in both executive and senior executive positions at the American Arbitration Association (AAA) and International Centre for Dispute Resolution (ICDR), leaving ICDR/AAA as Senior Vice President, EMEA in December of 2015.

An experienced mediator and mediator trainer, Mark is a founding, now honorary, Director of the International Mediation Institute. He provides Arbitration, Mediation and Conflict Management Consultancy and Training Services through Appel Dispute Resolution LLC.

Mark is an International Member of ArbDB Chambers, London, and takes his arbitrator and mediator appointments through Chambers.