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Gharavi on his firm's new mediation platform

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***Hamid Gharavi** of Derains & Gharavi explains the decision to launch the firm's standing ad hoc mediation platform for investor-state and commercial disputes.*

What drove our creation of a standing ad hoc mediation platform? We at Derains & Gharavi believe that current circumstances warrant the creation of a platform with its own set of rules and designated mediators – **www.dg-mediation.com** – to facilitate amicable settlements in commercial and investor-state disputes, including during the cooling off period in bilateral investment treaties or in parallel to arbitrations brought under investment laws or treaties.

The platform might also be used pursuant to post-dispute agreements in relation to commercial and sports-related contracts.

Awards rendered and published over the last decade, as well as data on annulment, enforcement and seizures, afford the business and arbitration community the opportunity to comprehensively assess options going forward when disputes arise. Investors know that adventurous attempts to access jurisdiction, let alone abusive or fraudulent ones, will be dead-end exercises giving rise to adverse cost orders.

The setbacks suffered by the Uzan family in initiating investor-state cases using fronts such as Saba Fakes (in ICSID Case No. ARB/07/20), Cementownia (in ICSID Case No. ARB(AF) 06/2) and Libananco (in ICSID Case No. ARB/06/8), through which they launched 11-figure claims against Turkey, can attest to this.

So can many other claimants, including Phoenix Action, as a result of its claim against the Czech Republic (ICSID Case No. ARB/06/5), and Philip Morris, as a result of its claim against Australia (PCA Case No. 2012-12).

As for legitimate claims, investors now know that arbitration is more likely than not to be a disruptive, long, costly and uncertain process. This is because of the large number of factual, legal, financial and human hurdles that accumulate along the way. Investors also know that, even if they prevail on jurisdiction, admissibility, causation and liability, the monetary claims will be closely scrutinised.

Even if they win, the delays and outcome may not be worth the effort and disruption to their business. The conclusion that has been voiced by some winning parties – for example, **the CEO of Metalclad, upon winning against the United Mexican States** (in ICSID Case No. ARB(AF) 97/1) – is that more effort could and should have been employed to settle the case.

States, too, are now on notice. The disruptive, lengthy, costly and uncertain nature of arbitration works both ways. They are aware that investment instruments can lead to adverse awards against them, ordering the payment of full compensation based on fair market valuations, as well as compound interest and possible costs orders, which will damage their reputation and be enforceable against their assets worldwide.

South Korea is among the states that can attest to this, having failed to annul a Permanent Court of Arbitration investment treaty award issued in favour of the Iranian Dayyani family of investors in consumer electronics, leading to the enforcement of the award in the UK, with a commercial interest rate of 8% applied, and the effective seizure of its assets in France.

This may have in part encouraged South Korea to unblock billions of US dollars withheld from another Iranian claimant, the Central Bank of Iran, which had served a notice of dispute on the state invoking the same bilateral investment treaty, in the hope of mitigating some of the damages and thus its exposure moving forward.

Past cases have also shown states that, even when they do ultimately win an investor-state case, the delays, expenses and other consequences can be unbearable. Observers were surprised when a state, Romania, recently expressed discontent after prevailing in an ICSID arbitration against Nova Group Investments, a Dutch holding company for the late insurance and media tycoon Dan Adamescu.

The award, though impeccably in Romania's favour, had been issued more than two years after the evidentiary hearing and the state had adverse provisional measures in place against it during seven of the eight years of the arbitration.

Finally, there is the luck of the draw in the arbitrator appointment process and in the litigation risk. This has aggravating consequences in investment arbitrations, more so than in commercial arbitrations, because of the notable broadness of international legal norms such as arbitrariness and fair and equitable treatment principles and the lack of scrutiny of awards other than at the ICC International Court of Arbitration.

All this explains why both investors and states are, more than ever, willing to explore means to amicably settle disputes both before arbitration starts and during the process. According to a 2018 working paper of the Centre for International Law at the National University of Singapore by **Seraphina Chew**, **Lucy Reed** and **Christopher Thomas QC**, state officials, who were less amenable until recently to settlement, no longer face the same level of internal political or administrative impediments (ranging from public criticism to allegations of corruption) if they engage in alternative means to amicably settle a dispute when the case justifies it.

It is recognised that this will save the expenditure of public funds on institutional, arbitrator, counsel and expert fees, and reduce the risk of an adverse monetary award and reputational harm.

Yet, to settle, the willing parties need three things: the right alternative dispute resolution process; the right platform and rules; and the right people to guide settlement.

Why mediation?

Mediation is an effective process. Its attributes and scope to allow parties to understand each other's positions, narrow down differences and ultimately reach partial or full settlement are, by now, well acknowledged for both commercial and investment disputes, and need not be repeated here. In fact, according to 2023 research by **Catherine Kessedjian**, **Anne van Aaken, Runnar Lie**, **Loukas Mistelis** and **José Maria Reis**, the options of mediation or conciliation are not only included in a large number of multi-tier dispute resolution contractual clauses but also in the cooling-off clauses of over 600 investment treaties.

As for the mediation platform and rules, there are several good options, including those of ICSID and the ICC, which are suitable for both commercial and investment arbitrations. ICSID even offers an innovative and efficient option for an investor to file a mediation request even when the state from which it hails, or the respondent state, have yet to ratify the ICSID Convention. In this situation, ICSID will invite the state to give its consent to mediation of the dispute under the ICSID mediation rules.

It was an accumulation of the above factors – namely, the willingness of the parties to amicably settle the dispute, the recognition of mediation as an effective settlement means, and the availability of the ICSID platform and scope to invite states' consent to mediation – that led UAE investor ETA Star to resort, on 3 January 2025, to rule 6.1 of the ICSID Mediation Rules and request that ICSID invite Angola to participate in the mediation of the dispute.

Mediation is also an effective way to give effect to the cooling-off periods of bilateral investment treaties, which, at present, are rarely effectively used in practice to bring about amicable settlement of the dispute. ETA Star's mediation against Angola, commenced under Rule 6.1 of the ICSID Mediation Rules, was pursuant to a cooling-off notice issued on 24 October 2024 under the Angola-UAE BIT.

It is difficult, in the context of the cooling-off period and in light of the above precedents, for state officials accountable for public funds to refuse an invitation to mediate to mitigate the risks of a treaty dispute.

Finding suitable mediators to effectively facilitate settlement is the most essential part of resorting to mediation. All users of arbitration – parties, counsel and arbitrators – have experienced at least one case that they believe could and should have settled at the outset, or during the arbitration, had the right mediator or mediators been found.

However, the uncertainty and time delays involved in identifying mediators, and creating an effective dynamic with multiple mediators, at times block the referral to mediation.

Above all, the parties have to find mediators with experience, not only of fulfilling the adjudicative function but of representing both investors and states. Only mediators with such a background will have the required empathy to the interests of both sides and ability to comprehend the human, factual and legal differences between them, enabling them to assess their reasonable entitlements and advance solutions to narrow down the issues and settle the dispute amicably.

Our platform

It was the sense of enormous waste and loss of opportunity arising from parties' failure to effectively use the cooling-off periods of investment treaties that drove our decision to create our own standing mediation platform.

The platform created and launched by Derains & Gharavi may be used for investment disputes as well as commercial disputes. Its use can be proposed by investors to states, in cooling-off notices under investment treaties, or by states in their response to such notices. Or the parties can agree to its use in parallel to an investment or commercial agreement, or in a post-dispute commercial agreement.

The platform offers mediation by our two founding partners, who have been working hand in hand for over 15 years and both have a balanced track record of representation and nomination as arbitrator by diverse parties. They can act separately or together, or with a third mediator from within or outside the firm.

The mediator or mediators will facilitate the settlement of merely part of the dispute, or the dispute in its entirety, or assist in narrowing down the differences between the parties, depending on their mandate and the level of active assistance required.

The proceedings will be pursuant to the firm’s own ad hoc mediation rules, which were created with attention to practical considerations of form and substance.

The rules contain provisions that are specific to investment disputes and contemplate the potential involvement in the process of interested or related parties. They offer all-in-one or more comprehensive, confidential phases of mediation that can be concluded months before an arbitration starts or in parallel to arbitration proceedings, whether suspended or ongoing.

The launch of the standing platform operating under its own set of rules was inspired by industry developments and needs and the desire to support arbitration and dispute resolution rather than by any commercial ambitions. It forms part of the firm’s support services, separate from its core legal practice.

Part of the proceeds will be used to support athletes and recognised charitable organisations that promote emancipation via sports, in line with the firm’s sports practice and social agenda.

In embarking on this initiative, we call for the creation of further platforms to enable parties and other arbitration users to choose from an array of diverse options, which will be in the interest of business, arbitration and the dispute resolution community.

The launch also pre-empts the creation, soon to be announced, of a standing arbitration tribunal platform, inspired by the desire to address imperfections and needs of the arbitration industry.

By Hamid Gharavi

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