

Key messages on investment disputes

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Contact person:	Insurance Europe's economics and finance department	E-mail:	ecofin@insurancееurope.eu
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Insurance Europe welcomes the European Commission's initiative to explore solutions to address concerns emerging from recent experience with cross-border public sector investments. The insurance industry represents Europe's largest institutional investor, with almost €10tn of assets under management. A significant amount of these is invested in long-term assets such as infrastructure, and often on a cross-border basis. The EC initiative is therefore extremely relevant for the industry.

In response to the various questions raised by the EC, Insurance Europe provides below its high-level views on how the EC initiative could help support increased cross-border investment in Europe.

There should be no sudden and retroactive changes of local investment frameworks. Legal certainty and adequate grandfathering rules are key for cross-border (long-term) investors.

In recent years, (re)insurers witnessed unfortunate violations of investor rights in relation to long-term investments in infrastructure or renewable energy. Examples include retroactive reductions in feed-in tariffs and retroactive taxation of photovoltaic plants in Spain, the Czech Republic and Italy in 2014, as well as the 90% reduction of the usage fees for the Gassled pipeline network in Norway in 2016.

As a consequence, some (re)insurers decided to refrain from further investing in markets where they have incurred losses on their investments due to retroactive changes to legislation without grandfathering rights.

Insurance Europe believes it is key that investors are able to rely on the fact that relevant investment conditions will continue to exist after the time of the investment decision. In the event of (retroactive) changes to the legal framework, adequate grandfathering rules must ensure legal certainty.

Mediation and arbitration should be seen as two different procedures which are necessary and suitable to achieve different objectives. The appropriateness of each depends on the concrete case.

Arbitration may be better suited for resolution of some disputes than mediation. Insurance Europe supports the development of a European framework for investment arbitration.

Infringements of investors' rights often occur through (retroactive) changes in legislation. Arbitration is likely to be the more appropriate measure for solving such investors' rights violations. Often, public authorities see no need for meditation on the applicability of the contested law because the law has already been through the legislative process with sufficient opportunity for prior analysis.

Investor protection arbitration is likely to be more suitable for solving investment disputes and avoiding an imbalance of power between public authorities and private investors. Arbitration tribunals with binding dispute settlement mechanisms already play an important role in international economic relations. Hence, Insurance Europe supports the development of a European framework for investment arbitration.

The possibility of using **mediation** as a resolution mechanism can be useful as a means of preventing disputes from arising in the first place and from escalating, especially in instances where the law is not clear. Nevertheless, and as mentioned above, in practice infringements of investors' rights often result from the introduction of legislation and in such cases mediation would not represent a desirable solution. Insurance Europe supports the development of a European framework for mediation.

The insurance industry supports the development of a harmonised European mediation as well as arbitration framework.

Insurance Europe believes that introducing harmonised dispute settlement mechanisms and means of avoiding (retroactive) changes in the regulatory framework across member states can have a significant impact on private investments.

Any harmonisation initiative should take individual and existing frameworks into consideration.

At a minimum, a harmonised **mediation** framework should foresee:

- **Efficient procedures:** resources required both in terms of costs and time should be limited
- **Broad scope:** There should be no restrictions on the scope of disputes for mediation between investors and public authorities. The parties should be free to elect any dispute between investors and public authorities (foreign / domestic investors and member state / home country) to be suitable for mediation.
- **Enforceable results:** where mediation is successful, the mediation procedure should end with a concrete, enforceable result
- **Independent mediators:** mediators should be independent and freely selected by the parties
- **Sufficient flexibility:** regarding matters such as venue and language of procedure
- **Free escalation:** At all times of the mediation procedure before its completion, parties should be able to transfer the dispute to judicial proceedings, upon request from one party and without necessary consent from the other

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