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ICC International Centre for ADR

Webinar: 'Now Is the Right Time for ICC Mediation!' *('La médiation ICC, c'est maintenant !')**

28 May 2020

The very first ICC ADR webinar took place on 28 May 2020 and was attended by over 200 participants representing almost 50 countries. The webinar, which covered a wide range of topics on mediation, was moderated by **Laetitia de Montalivet** (ICC Director, Arbitration and ADR, Europe) with the participation of **Alya Ladjimi** (Manager, ICC International Centre for ADR) and **Martin Hauser** (Commercial mediator, Rechtsanwalt (Munich), Avocat honoraire (Paris).

I. What is a commercial mediation and what are the advantages of an ICC Mediation?

The discussions kicked off with a reminder from **Alya Ladjimi** that the ICC Mediation Rules (the 'Mediation Rules') are included in the same booklet as the Arbitration Rules. Both are available on the ICC's website and on the new ICC DRS APP.

While the Mediation Rules do not define mediation, such a definition can be found in the Mediation Guidance Note. The Note defines mediation as 'a flexible settlement technique, conducted privately and confidentially, in which a mediator acts as a neutral facilitator to help the parties try to arrive at a negotiated settlement of their dispute. The parties have control over both the decision to settle and the terms of any settlement agreement'.

She further underlined several advantages of ICC Mediation:

- ICC Mediation is efficient: the average duration of an ICC mediation is less than four months from the date of the filing of the Request for Mediation until the termination of the proceedings.
- ICC Mediation is cost-effective: In 2019, the average total cost of the proceedings (excluding attorney's fees) was approximately US$ 14 000. This is low considering that the sums at stake in certain cases reached hundreds of millions of dollars. In ICC Mediation, the costs of the proceedings are not primarily based on the amount in dispute –as is the case with ICC Arbitration. That being said, the amount in dispute is one of the factors taken into account by the Centre in calculating the costs of the proceedings.
- ICC Mediation is confidential: Article 9 of the Mediation Rules contains an express obligation of confidentiality. Notwithstanding the default confidentiality provision of Article 9, the parties are free to enter into a confidentiality agreement to further particularize their obligations.
- ICC Mediation is often successful: In more than 50% of cases, parties reach a settlement upon the first meeting with the mediator. In addition, a number of cases also settle after the termination of the ICC Mediation proceedings. Even when it does not entirely resolve a dispute, mediation acts as a 'filter' for a subsequent procedure because it allows the parties to better understand their claims, which in turn may result in savings of time and costs. Unsurprisingly, therefore, as many as 90% of ICC Mediation users indicate that they are willing to include an ICC mediation clause in their future contracts.
- Finally, ICC Mediation as an institutional mediation provides a reassuring framework for the parties. The Mediation Rules - like all the other ICC Rules - aim at ensuring transparency, efficiency and fairness of the dispute resolution process. By choosing the ICC ADR Centre's mediation services, the parties benefit from its expertise in the administration of international disputes. In addition, just like the Secretariat of the ICC Court of Arbitration, the ADR Centre monitors the financial aspects of the cases and aims to meet the parties' expectations by selecting the best independent and specialized multilingual international mediators through the ICC international network and its National Committees.

* This report is an edited transcript of selected extracts of the webinar. The full webinar is available in French at https://www.youtube.com/watch?v=TVMrBXPzSIM

II. Why mediation works and why the use of mediation can be accelerated in the current pandemic?

In response to **Laetitia de Montalivet**'s questions, **Martin Hauser** referred to different examples drawn from his experience.

A. Why does mediation 'work', or, as an Indian lawyer once asked, 'what is the magic of mediation'?

Often, when a party asserts a right, it immediately causes the opposition of the other party. The conflict escalates and provokes increasingly strong emotions in both parties.

By way of illustration, Mr Hauser took the example of two sisters arguing over a piece of fruit. 'This orange is mine!', would argue one sister; 'No, you're wrong! This orange is not yours; it is mine!' would respond the other, without either sister making any progress towards a solution. He also cited an international dispute between two patentees who were claiming for years before courts in France and abroad the patent filed by the other in his country, both relating to the same invention.

For this reason, the concept of '*Principled Negotiation*' developed at the famed Harvard Program on Negotiation (*Fisher/Ury, Getting to Yes, negotiating agreement without giving in, Boston 1981*) does not focus on 'legal positions', but seeks instead to explore the underlying 'interests' of the parties. The distinction between position and interest is at the heart of contemporary mediation.

Psychologists, such as Marshal Rosenberg, the founder of the 'Non-Violent Communication' movement (who had studied with 'humanistic psychology' founder Carl Rogers), believe that each human being has the same 'basic needs'. Accordingly, mutual understanding is better served when individuals express their 'interests' and 'needs', rather than abstract legal 'claims'.

Mr Hauser further explained that the parties should look to their underlying interests, not their claimed positions: Going back to the example of the conflict between the two sisters, this would translate as follows: '*What do you want to do with this orange?*', the first sister should ask. By asking that question, the first sister might learn that her sibling enjoys orange juice, while she only wishes to have the zest to make an orange cake. Similarly, in the example of the patent claims, exploring the interests of the two parties allowed them to agree in two minutes that each keeps its patent in its own country, whereas they were fighting for years in courts over their legal positions as to who is the legitimate owner of the patent in each country.

In such a situation, while the parties' 'legal positions' (i.e. ownership over the orange) are completely incompatible, their 'interests' could be satisfied fully. This outcome is referred to as a 'win-win' situation.

Of course, nothing prevents parties from using that principle in their negotiations (i.e. without the help of a mediator), but anecdotal evidence suggests that it is often difficult for them to do so because they are personally involved in the dispute. It is easier for a neutral third party who is 'distant' from the dispute, to deal with the parties' emotions and to structure debates. Through the use of 'caucusing', the mediator is also able to ask each party – separately – questions aimed at allowing that party to become aware of its 'interests', while ensuring total confidentiality (without which the parties would not disclose their 'commercial interests').

B. Why can recourse to mediation be accelerated in the current pandemic?

The pandemic, and the resulting anxiety that all of humanity shares, brings people together. The economic challenges are immense.

However, this apparent 'rapprochement' does not mean that there are no more conflicts, no more commercial disputes, and that we now live in a 'la-la land', in total empathy towards each other.

The opposite is true. There are already, and there likely will be, more commercial disputes than before the crisis. However, conflict as such is not necessarily negative. For one thing, it allows people to 'get things done'.

Nevertheless, the question arises, as to how to resolve conflict. By consensus between the parties, or by a decision imposed by a third party? A judicial or an arbitral decision rarely pacifies a conflictual relationship, and does not always lead to the spontaneous execution of the decision, unlike a mediated settlement agreement which the parties have negotiated themselves with the help of a mediator.

In this context, a mediator with intercultural competence will be able to take into account the parties' cultural differences so that each of them feels heard.

Despite its obvious advantages, Mr Hauser further noted that users of dispute resolution services have not yet massively appropriated mediation as a means

of conflict resolution. This may be due, in part, to two obstacles. The first one is psychological, and the second cultural:

1. The psychological obstacle

Traditionally, parties involved in a commercial dispute, have it decided by a state court or an arbitral tribunal, in a combative spirit, in order to gain a victory over the other party. Often, they are guided by overly optimistic perceptions of their legal position. This results in a 'win-lose' outcome, which contrasts with the 'win-win' of mediation.

Human beings would, so the theory goes, be preprogramed by a drive to win. This would explain why they would find it difficult to familiarize themselves with the idea that, in mediation, *both* parties are likely to win.

However, it has been shown that one party's aggressive drive to win can also be assuaged when the other party expresses some form of 'recognition'. In the current health crisis, there appears to often be, between co-contracting parties, some measure of 'mutual recognition' with each side accepting that the other has made efforts to mitigate the consequences of the pandemic.

Also, through their 'cognitive capacities', human beings channel over time their impulses regarding the future management of conflicts with a motivating effect in favour of mediation. The crisis will certainly accelerate this development, since the parties are aware that the cause of the dispute is a common and external element, and that it is not the fault of one or the other party.

Such 'recognition' will also facilitate, within the mediation process, the development of options to resolve the dispute. These options could take into account the little visibility that the parties have today on the development of the crisis, the opening of borders, means of transport, administrative measures to be taken, etc. The parties may provide in their agreement to meet again with the mediator within regular periods of time, except in emergencies, to take stock of the situation.

2. The cultural obstacle

Traditionally, commercial disputes are settled, in perfect verticality, by a state or arbitral tribunal whose decision is binding on the parties.

However, at a time when innovation is accelerating, with internet use and cross-border trade exploding, the expectations of economic players have changed. A strong demand for horizontality has emerged from a greater degree of individual autonomy.

The present crisis calls for a return of the executive, of verticality, but with a certain distrust. We are collectively affected by the pandemic. Everyone experiences and becomes aware of their respective autonomy, responsibility towards others and we talk about 'spirit of solidarity', a certain 'fraternity', 'collective humility' and 'responsibility'.

Trade players are aware that the disputes arising from the crisis have their origin in the general change in the balance of contracts, due to a change in circumstances which could not have been foreseen at the time of its formation. A priori, no party is at fault but contractual adaptations are necessary. To this extent, Article 1195 of the French Civil Code, codifying the 'doctrine of frustration of purpose' (or theory of unforseeability, *théorie de l'imprévision*), literally invites the parties to take the initiative and renegotiate their contract. If there is no agreement, it is the judge who can review it for them, but who knows better than the parties themselves their true interests and needs?

State courts will be overwhelmed. Arbitral tribunals are going digital, in accordance with the ICC COVID-19 Guidance Note of 9 April 2020, but these formal procedures, which must respect the adversarial principle, are cumbersome.

Mediation appears to be a good alternative to resolve emergency situations. The procedure is flexible and can be quickly put in place with the use of videoconference without any formality other than the agreement of the parties.

III. What are the sectors that would be affected by the crisis and in which the parties could use mediation to resolve their disputes?

Alya Ladjimi observed that international trade is certainly affected by the pandemic with most sectors concerned, such as construction, energy, transportation, tourism and textiles.

She further noted that the complexity of the dispute(s) may vary from one case to another, from very simple disputes which require only a few hours of mediation to more complex or very technical disputes, based on several contracts, involving more than two parties and sometimes even state entities.

This being the case, many actors in international trade that are already using ICC Mediation process are expected to continue to use it in the upcoming months. In fact, the number of new ICC Mediation cases has remained stable since the start of the crisis. Only time will tell what the repercussions of the pandemic will be.

IV. What types of litigation could arise from the current health crisis?

Martin Hauser started by noting that the crisis is unprecedented. Trade players are aware that the disputes arising from the crisis are due to a change in circumstances, which were not foreseeable at the time of conclusion of the contract by the parties which are not at fault *a priori.*

That said, this finding alone cannot resolve contractual disputes. Adaptations are required where obligations cannot be met on time, or cannot be performed at all. A recourse to mediation instead of litigation or arbitration to resolve the disputes or in the conduct of their business, be it in the fields of activity or in the type of litigation, can be encouraged or noted.

In his view, five types of disputes which arise from the pandemic and the resulting lock-down measures could be subject to mediation:

1. The 'catastrophe of payment terms': late payments are increasing and raise questions relating to debt rescheduling, issues of late penalties, and bankruptcy proceedings to be avoided.

2. Delay or non-performance of delivery by suppliers impacting distribution networks with the cascading chain of contracts.

3. Delay or late deliveries of the goods which are finally refused by customers and can no longer be sold (e.g. textiles, durable goods such as refrigerators or cars, and oil, due to the drastic fall in prices).

4. Non-performance of contracts exists in various sectors, other than construction or energy for example; to name a few, the sectors of tourism, entertainment, insurance, fashion, commercial real estate and the mobility sector.

5. Disputes over allocation or justice (in German, '*Gerechtigkeitskonflikte*'). They could, among other things, relate to:

> the relationship between the generations facing the health crisis and its economic consequences;

> priority access or not to vaccines and medicines against COVID-19, patents, etc.

V. How can the parties start an ICC Mediation today and what are the different scenarios offered to the parties?

Alya Ladijmi shared a number of remarks to the question raised by Laetitia de Montalivet.

1. If there is already an ICC Mediation clause in the parties' contract – as it is in most of ICC Mediation cases - it suffices to set in motion said clause when the need arises. It is also possible for the parties to sign a subsequent mediation agreement, or to introduce a joint mediation request which formalizes their agreement on ICC Mediation (joint requests are rarely seen in other dispute resolution procedures). Finally, it is possible to initiate mediation without a prior agreement of the parties, which means that a party can make an offer with the intermediary of the Center to another party to have an ICC procedure. This possibility is provided by Article 3 of the Mediation Rules. In one case for instance, a State has accepted an offer of ICC Mediation from an investor when the bilateral investment treaty did not include an ICC Mediation clause.

2. The parties can also choose to have an *ad hoc* mediation with ICC acting as appointing authority. The role of the Centre will be limited to appointing the mediator, the costs of which will be lower than in an administered procedure. One should also know that the appointment of a mediator is free of charge for the parties to an ongoing ICC Arbitration (Article 3, Appendix II of the Rules for the Appointment of Experts). The parties obviously need to agree on such an appointment.

3. In general, it is possible for the parties to have an ICC Mediation prior or during an arbitration or national court proceedings. The ICC Arbitration and Mediation Rules allow under certain conditions the transfer of funds from an ICC arbitration case to an ICC Mediation case and

vice versa, and parallel proceedings may be suspended or not depending on the parties' agreement.

In addition, the parties may agree to have mediation on the basis of an expert report or following a decision rendered by a Dispute Adjudication Board or a Combined Dispute Board within the period of 30 days following the notification of the decision. They may also agree on mediating on the basis of an arbitral award when they face difficulties enforcing it.

4. This being said, it is advisable to include mediation clauses in contracts being negotiated, and for the parties to consider the consequences of pandemics like the current COVID-19 one. Parties can use ICC model clauses provided for in the Mediation Rules, such as Model Clause D that is encountered the most in ICC cases. It imposes the obligation to have first an ICC Mediation for a determined period at the expiration of which arbitration may be commenced. Parties can however consider including in their contracts mediation windows throughout the arbitration proceedings, for instance after the Terms of Reference are established, after a hearing is held, or a partial award is rendered.

VI. In these times of health crisis, how to organize a mediation session? How to hold mediation sessions while maintaining social distancing?

Martin Hauser shared his experience in this effect and started to note that until the crisis, it was common ground that the parties met in person for one or more mediation meetings. It may have happened that representatives of a party, who were retained abroad, participated by videoconference and telephone.

With the crisis, the successive closing of borders and the 'confinement' of populations, meetings in person became impossible overnight.

The mediations in progress continued by videoconference, and the new mediations were also set up by videoconference. Some mediators were able to quickly familiarize themselves with this new tool. In this respect, interactions with U.S. colleagues were helpful. Many of them were a step ahead of continental Europeans, having used videoconferencing for mediations for a long time on account of the size of the country.

Since then, mediation using videoconference has proven to work. Some differences with in-person mediation should be highlighted:

Videoconferencing allows to see some body language, gestures, facial expressions, and to hear each other, the variation in tone, volume and pauses.

However, what is missing, is the feeling of the energy in the meeting room, the reaction of the other participants in the room when someone is talking. Mediators and parties try to compensate this lack of other senses, such as 'touch' and 'smell', by scrutinizing the more or less small video windows of all the participants in a mediation meeting which are open on the videoconference screen.

The process however is tiring, hence the recently created expression of 'Zoom Fatigue'!

Zoom has proven to live up to the moment, at least technically speaking. Unlike its competitors, Zoom permits the creation of break-out rooms or 'caucuses' with great ease.

The mediator may allow the parties, at their request, to meet internally in a break-out room where they can safely and confidentially consult with their representatives. The mediator can go from room to room and join each group, like 'in real life'.

For security and confidentiality reasons, this software also allows users to configure it in such a way that each participant is welcomed, not directly in the 'virtual plenary room', but in a 'virtual waiting room'. After 'ringing' upon his/her arrival, the mediator lets the participants in, one by one, and assigns them at the same time to their break-out rooms.

Meetings by videoconference have the advantage of saving time and money for travelling for each participant. The availability of the parties and their lawyers, but also of the mediator, is clearly increased accordingly. Where before participants could only find a meeting date more than three months ahead, experience shows that it is now possible to organise at least short weekly online meetings using videoconferencing.

Since videoconference mediations are far more tiring, even though it remains useful to plan an entire mediation day, it is helpful to cut into sections of one hour and a half to two hours, followed by a break of thirty minutes, where all remain connected, but mute their microphone and suspend their cameras.

Insofar as everyone remains stuck in front of their screen, there is also a lack of the 'sharing experience' that we know of in-person meetings: sharing a coffee, cookies, a meal, joint drafting on the flipchart, shaking hands when an agreement is reached, etc.

So far, he has only been able to use three substitutes:

At the beginning of an online mediation session, he shares with the parties through the 'screen sharing' function an attendance sheet with a reminder of the confidentiality clause in form of a Word file and invites them to request, in turn, control of his document in order to sign it with their laptop-mouse in front of each other. The good atmosphere is guaranteed, despite the conflict. It makes them laugh when they see the sometimes adventurous signatures of other participants, the necessity to erase them with the electronic eraser before giving it a new try.

He also shares a 'board' (flipchart) which makes it possible to note, as in a meeting room, the themes of which they wish to speak.

Finally, when an agreement is reached, and in the absence of physical contact in the form of shaking hands or hugging, he suggests that everyone go get a glass, to have a drink together.

The signing of an agreement to be drawn up by counsel is not unique in these times of health crisis: as a general rule, each party signs a copy. The two copies will be scanned and then exchanged between the lawyers by email, with a copy to the mediator. Then, the originals will circulate for signature.

The mediator has a particularly important role in the preparation of mediation meetings by videoconference: Even more than usual, preparation with the parties' lawyers is key, in order to familiarize themselves with the mediation process in addition to the digital tools and build rapport.

He also regularly offers technical caucuses with each party before the online mediation meeting, in order to get to know each other, test the sound and the image, and thus reassures everyone about the conduct of the upcoming mediation meeting using videoconferencing.

Finally, it is useful to exchange cell phone numbers before any online mediation meeting.

A mediator should also know how to improvise when a technical incident occurs: If a person is disconnected and can no longer join the videoconference meeting, except by telephone, without image, what to do?

In the United States, some mediators are assisted by computer specialists who are responsible exclusively for the computer-assisted operation of the videoconference mediation meeting. It may also be a future profession in Europe, because the parties will no doubt adopt videoconferencing. Instead of getting up at 5 am, jumping on a plane to arrive with difficulty in a European capital at around 11:30 am, in order to participate in a mediation meeting, they will want to repeat the experience of online mediation using videoconferencing.

Mediation being a voluntary process, each party could end it at any time. This has rarely happened in face-to-face meetings, perhaps because of the trip everyone has made, but also because of the physical presence of the other party representatives. In videoconferencing, all that one has to do is to press the 'exit button' to leave the meeting. This remains however to be seen as he has not seen this either, but for the time being, there is not yet any hindsight to fully appreciate this possibility.

Videoconferencing also differs from an in-person meeting, since the parties will not be seated together, on each side of the table with the mediator between them. They will all be mixed on each other's screens, and not in the same order but this can prove beneficial for resolving disputes, since there are no longer two 'fronts'. On a video screen, all participants 'sit in the same boat'. Let's remember that in mediation the mediator regularly invites the parties, at least intellectually, but some also physically, to put themselves in the place of the other! We have only little hindsight to appreciate the effect of this technical phenomenon.

Finally, in videoconference mediation, ensuring confidentiality is more complex. There are three levels of confidentiality:

First, the confidentiality in a plenary mediation session. Classically, there is confidentiality between those participants in a mediation room who negotiate behind 'closed doors'. In videoconference, there are no such 'closed doors' and a person could hide in the same room with a party, without the knowledge of the other and without being visible on the video screen. In addition, some software like Zoom offer recording of exchanges. Unless the parties agree, the mediator must configure the software so that recording of conversations and chat is made impossible for all participants.

Second, as a particular confidentiality obligation for the mediator who hears from either side in caucuses, be it in a physical or virtual break-out room, he is not

allowed to report anything he has heard to the other party, unless otherwise authorised by the parties. Videoconferencing does not add any particularity.

Finally, a third level of confidentiality is linked to the platform which is used for the videoconferencing. As a precaution, it is recommended not to transfer files via the chat functions, etc., but to exchange them, if necessary, by email outside the videoconference system. In addition, the press has reported a number of irregularities regarding the use Zoom made of information gathered as well as the level of security of encryption. It is said that the recent Zoom version 5.02 largely takes these considerations into account.

In conclusion, he believed that mediation is entering a new era:

- The use of mediation will be accelerated by the health crisis and its economic consequences;
- The parties and their lawyers will make conclusive experience of mediation using videoconferencing;
- This will result in a change of dispute resolution culture increasingly through mediation.

Finally, **Alya Ladjimi** underscored the importance of alternative dispute resolution mechanisms in the current crisis; ADR mechanisms have quickly adapted to a situation of complete blocking on a global level. The vast majority of ICC procedures continued virtually, with a very few suspended. Mediation is certainly one of the most flexible and effective modes; with the help of a mediator, parties decide for themselves how, and under which conditions, to resolve their dispute. The use of this mechanism can only be encouraged.