



# ICC Dispute Resolution Bulletin

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## 13th World Chambers Congress in the Centenary Year of the ICC Court – Achieving Peace and Prosperity through Multilateralism

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Organised by ICC and its World Chambers Federation, the World Chambers Congress is the largest and the only international forum that enables chamber leaders and professionals to share best-practices, exchange insights, develop networks, address the latest business issues affecting their communities and learn about new areas of innovation from chambers around the world. The 13th World Chambers Congress addressed some of the most significant global issues of our time, and particularly ‘Achieving peace and prosperity through multilateralism’. Rafael Rincón, Sara Nadeau-Seguin and Daniela Walteros report on two of the panels addressing dispute resolution and ICC Dispute Resolution Services (‘ICC DRS’) more specifically.

**Sara Nadeau-Seguin**

*Partner, Teynier Pic, Paris*

### Keeping Business Moving: The Role of Dispute Resolution Services in Preventing Disruptions and Supporting Business Operational Continuity

Moderator **Alexander Fessas** (Secretary General, ICC International Court of Arbitration – ‘ICC Court’) and panellists **Alison Pearsall** (Senior Group Counsel, Veolia, Paris), **Tuuli Timonen** (Director of Patenting Licensing, Nokia, Helsinki) and **Martin Hauser** (International Commercial Mediator, Munich) discussed dispute avoidance mechanisms as a means of minimising business disruption. The panellists shared their views and experience on mediation, its benefits, and its challenges in the business environment and addressed issues relating to the ideal timing of triggering a mediation proceeding.

**Alexander Fessas** introduced the panel, noting the increasing acknowledgment of the benefits of dispute prevention methods as a mechanism to lower business disruption, as opposed to court litigation and arbitration. Although any conflict is disruptive to business, Mr Fessas remarked that leaving a dispute unattended until it reaches a boiling point before courts or tribunals will necessarily involve a bigger expenditure of time and human resources, generating excessive costs.

#### When to mediate: The timing and benefits of avoiding litigation

The speakers addressed the benefits of avoiding litigation through mediation proceedings in three moments: when concluding a deal, when a conflict emerges and during arbitration or court proceedings.

First, Ms Timonen highlighted the advantages of resorting to a deal facilitator during the negotiation of contracts. As a neutral third party, a deal facilitator can help bridge the gap between different cultural backgrounds, expectations, and styles the parties might have, overcoming roadblocks more efficiently.

Mr Hauser echoed the importance of the support of a **neutral third party** during the closing of a deal in order to understand the parties’ **individual interests and needs**. In this context, both Ms Timonen and Mr Hauser agreed that private sessions held between one of the parties and the mediator are extremely helpful to uncover the flexibility of each party allowing them to reach a common ground.

Second, panellists also discussed mediation as a tool when a conflict emerges. Mr Hauser set as a golden rule that parties always try to **mediate if negotiation fails**, except when the goal is to have a landmark decision. Specifically in the field of **intellectual property rights and innovation**, Mr Hauser indicated two reasons to endorse such rule:

1. Mediation allows for an interest-based negotiation, which is effective in business sectors where economic interest and market power are of the essence.
2. The emotions underlying ownership and creation can be duly addressed by a mediator, whereas courts or a tribunal typically provide parties with a purely objective analysis of the law.

Finally, the speakers were asked whether they found it beneficial to resort to mediation when an arbitration proceeding is already pending. In this regard, Mr Hauser encouraged **mediation in parallel to arbitration**, emphasising that the previous exchange of briefs during contentious proceedings make parties more prepared for mediation, allowing them to identify their interests and sensitive points with more clarity. Ms Pearsall added that mediation might be short and only comprise some of the issues within the parties' claims.

Moreover, Ms Timonen stated that an arbitrator's suggestion that parties refer to mediation is usually welcome. When the idea is brought up by a neutral party as the arbitrator, it avoids the reluctance that parties might have of taking the initiative because of the fear of showing a weak position.

### The current challenges of mediation and the road to development

As well as the fear of showing a weak position, Ms Pearsall identified, in view of her experience as an in-house lawyer, other factors that might lead to a setback in regard to mediation. In this regard, she mentioned the perception of parties that mediation increases the cost of the dispute, the lack of external support of counsel, the absence of personal experience within the business and the perception of businessmen that they are capable of negotiating independently.

In order to overcome these challenges, Ms Pearsall suggested the adoption of a **series of measures within companies**, such as incorporating mediation as an internal company policy, pointing out, in each case, the costs that might be saved in avoiding arbitration

or court proceedings and presenting a financial outlift to external counsel so that they are aligned with the company's goals. Ms Pearsall also encouraged internal trainings and the creation of an inhouse network of people who have mediation experience. Another idea she suggested is to present mediation as a means for the parties to **retain control over the conflict** as opposed to handing it to external counsel.

### Tailoring the proceedings

When it comes to picking the right mediator, Ms Timonen shared her preference for choosing professionals that do not have an in-depth connection to the business sector of the conflict, so as to avoid preconceived ideas on the subject matter of the dispute. Ms Timonen also highlighted as desirable characteristics the willingness of the mediator to dedicate his or her time, giving the parties the feeling that they are being heard, as well as the flexibility of shifting to a more directive role when needed.

On the other hand, Ms Pearsall stated the importance of finding a mediator who knows the technical aspects of the business and underlined the challenge of reaching a common ground between the parties in the appointment of a mediator when arbitration or court proceedings are ongoing. As such, Ms Pearsall noted that the ICC International Centre for ADR ('ICC ADR Centre') is an excellent starting point to search for the right kind of professional. In addition, Ms Timonen pointed out that ICC ADR Centre is well prepared to tailor mediation proceedings according to each parties' needs, by testing claims before a dispute, modulating expedite proceedings, amongst several other formats<sup>1</sup>.

### Rafael Rincón and Daniela Walteros

*Respectively Partner and Associate, Rincón Castro Abogados, Bogota*

## The Power of Agreed Rules: How Arbitration Promotes Peace and Prosperity

One of the sessions of the World Chambers Congress was devoted to the role of arbitration in fostering peace and prosperity through the voluntary acceptance of agreed rules. The session was moderated by **Claudia Salomon** (President, ICC Court) and the speakers who participated included **Justin D'Agostino** (CEO, Herbert Smith Freehills, Hong Kong; Member, ICC Executive Board); **Michael McIlwrath** (Founder, MD Disputes, Florence; Chair, ICC Governing Body for Dispute Resolution Services; and **Diana Akiol** (Partner, Walder Wyss, Geneva).

The panellists discussed the importance of consensual dispute resolution, the benefits of a rules-based global economy, and how arbitration can promote international business transactions, including transactions with states and state-owned entities or enterprises.

<sup>1</sup> For more information, visit [www.iccadr.org](http://www.iccadr.org) and download the [ICC Guide 'Effective Conflict Management' and Report 'Facilitating settlement in International Arbitration'](#)