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ICC Mediation Week

10th ICC Mediation Roundtable for Professionals

Paris, 10 February 2023

Angela Herberholz

Accredited Mediator; Founder, Herberholz Mediation, Paris

Reaching its 18th edition, the ICC International Commercial Mediation Competition gathered 250+ students and coaches with 47 teams from 27 countries, as well as 120+ professional mediators and academics from across the world and numerous volunteers, sponsors and observers. During this ICC Mediation Week, ICC held its 10th Mediation Roundtable for Professionals to foster an interactive dialogue focused on the challenges faced by mediators in today's world, and the potential for further innovation and development within the field. The next edition of the ICC International Commercial Mediation Competition will take place on 5-10 February 2024.

Introduction

This ICC Mediation Roundtable for Professionals (the 'Roundtable') at the ICC Headquarters in Paris was a resounding success. The Roundtable was planned and delivered by the ICC International Centre for ADR¹ in close cooperation with external professionals specialising in conflict management, namely **Eleni Charalambidou** (Negotiations and Conflict Management Specialist, Accredited Mediator, Cyprus/Greece), **Angela Herberholz** (Accredited Mediator; Founder, Herberholz Mediation, Paris), **Tat Lim** (International Mediator, Maxwell Mediator; Managing Partner, Aequitas Law LLP, Singapore), **Jawad A. Sarwana** (Director of Training, Pakistan Mediators Association) and **Martin Svatoš** (Head of the ADR Centre Charles University, Czech Republic).

The event was designed to engage each of the 100 professionals in lively discussions around key topics. Each participant had the opportunity to join each of the four topical deep dives, exchange with peers and share their own experiences.

1. **'Ripeness of a dispute for mediation'** focusing on the timing of mediation and when it is appropriate to initiate the process.
2. **'Institutional mediation, how to improve the offer?'** addressing the challenges and opportunities of institutional mediation, particularly in terms of improving the quality and effectiveness of mediation services.

3. **'What do we mediators fear the most?'** exploring the emotional and psychological challenges mediators face when dealing with conflict situations; and
4. **'Let's talk about money'** assessing the practical aspects of mediation, including fees, billing, and payment structures.

1. 'Ripeness of a dispute for mediation'

During the Roundtable moderated by Martin Svatoš. Participants engaged in identifying specific ways to recognise when a case is ready to be solved through mediation. While there was general agreement that the mediator's style, culture settings, and type of dispute play a role, there was disagreement among the participants regarding early *versus* late entry of a mediator.

The 'early-entry proponents' argued that an early mediator entry may help resolve the case before it escalates, while the 'late-entry proponents' argued that the case is easier to resolve when the parties reach a mutually-hurting stalemate.

A third group, the 'it-depends proponents', argued that the individuality of the situation and parties' negotiation qualities call for an individual approach.

The discussion also touched on the idea of mediation serving as an accelerator for dispute ripeness,² with some participants suggesting that the presence of a mediator can help a dispute become solvable, much like an avocado ripening in specific milieus.

1 <https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/>.

2 See also ICC Guide on Effective Conflict Management and Report on Facilitating Settlement (ICC Commission on Arbitration and ADR, 2023) on how to efficiently use ADR techniques to avoid escalation, resolve disputes and reduce the cost of unavoidable disputes.

2. 'Institutional mediation, how to improve the offer?'

The discussion, moderated by Tat Lim, centred on the value proposition(s) of institutional mediations, from the perspective of a neutral and considering the needs of counsel and parties, what participants liked and disliked about institutional mediations, and brainstorming ideas on how institutional mediation can and should be improved.

The participants listed the qualities of institutional mediations that are appreciated, including the assurance of the quality of the mediators chosen by the institution, quality case management and support, transparent fees, enhanced mediation and arbitration practitioner interaction, and the ability to assist users in prescribing mediation in a contract.

Participants also listed the characteristics of institutional mediations that they disliked, including lack of flexibility and party autonomy, groupthink, (high) institution fees, slow mediator payments, lack of transparency in the appointment process, turf wars among mediation institutions, and commoditizing mediation (i.e. a perception that mediations administered by mediation institutions seem identical with little or no distinction or difference in the services offered by the different institutions).

Improvements suggested by participants include streamlining and making transparent the process of appointing mediators, increasing mediator fees, creating more value for users, innovation of process, services and platforms, offering promotional rates for parties involved in arbitration to mediate their cases, and faster, more affordable, and more transparent mediation.

The exchange showed that while institutional mediation has provided and can continue to provide value to mediation users and practitioners, it also highlighted the need for institutions to address their shortcomings and constantly improve their processes to meet the evolving needs of mediation users and practitioners.

3. 'Mediators, what do you fear the most?'

During his session moderated by Jawad A. Sarwana, two groups discussed different aspects of fear for mediators.

Group A discussed the nature of fear, when it arises, and whether it is a strength or weakness. Fear is a primal emotion that alerts us to the presence of danger or the threat of harm, whether that danger is physical or psychological. While fear can be a natural emotion and a survival mechanism, it can also be highly personalised,

and some people may have a negative reaction to it. However, confronting and acknowledging our fears can be life-changing and liberating.

In Group B, the discussion focused on the framework for handling fear for mediators, before and during mediation sessions. The first step is to acknowledge one's fear and focus on breathing to calm the body's alarm bells. By bringing attention to the present moment, examining the issue triggering the fear, and seeking guidance and support from others, mediators can overcome their fears and make coherent decisions.

From this vantage point, examine the issue: Is it really what you initially thought it to be? What was it about this issue that triggered your fear? Is this issue what you are really afraid of, or is there something else behind it, something deeper? Having fears does not mean one is unprofessional, and it is important to move past labels and seek a deeper understanding of oneself.

4. 'Let's talk about money'

The purpose of the workshop, moderated by Eleni Charalambidou, was to exchange experiences, best practices and cautionary tales regarding the mediator's remuneration. The discussion was organised around two main topics: fixed fee or hourly rates, and cautionary tales regarding dos and don'ts.

During the workshop, the majority of the mediators expressed their preference in models that combine different remuneration policies. The participants were asked to vote on their preferred charging method. While the results showed that there is no single perfect charging method, mediators show some preference to methods that compensate them for their time, compared to methods that do not take into account working hours.

The participants were asked to vote which of the following four charging methods would be their preferred one, if they had to choose only one. The number of votes follows each method: (i) per hour: 32%; (ii) per day/half day: 28,2%; (iii) assessing each case *ad hoc*: 21,8%; (iv) fixed fee based only on the value of the case: 18%.

An intriguing ethical question emerged from the discussion, which was whether mediators should charge a success fee. During the workshop, participants shared that each jurisdiction treats this question differently, and many were concerned about the ethics of such a policy and the level to which it might affect the parties' perception of neutrality.

Regarding cautionary tales, the most common problem that mediators mentioned in terms of their remuneration was the difficulty to collect fees after the process has finished or canceled by the parties. To resolve this issue, several best practices were suggested, such as having another colleague or the institution contact the clients to present all fees and arrange the payment, clearly communicating and paying all fees in advance, pre-paying a deposit in addition to the expected fees, and charging a cancellation fee in case parties cancel after a specific date.

The workshop also presented several challenges related to the mediation market, including the difficulty to disconnect the mediation market from the legal market in terms of fees or added value of a good mediator, especially in jurisdictions where the number of mediations is low. In addition, clients in relatively new mediation markets may tend to negotiate fees, as they are not accustomed to paying for that new service. Experienced mediators advise having a consistent and clear policy rather than negotiating fees.

Furthermore, some participants noticed that when parties pay by the hour, they tend to value the mediator's work more and make a bigger effort to resolve their issue. However, according to other participants, companies which are parties to commercial mediations often want to know the total amount (fixed fee) at the beginning.

Key takeaways

Every year, the Roundtable during the ICC Mediation Week and International Commercial Mediation Competition provides a platform for continued dialogue and exchange among professionals working in this area.³ Takeaways from the 10th ICC Mediation Roundtable included:

- 1. Ripeness of a dispute for mediation.** While there was some disagreement on early vs. late entry of a mediator, the discussion emphasised the importance of recognising when a case is ready to be solved through mediation. Mediation can accelerate dispute ripeness and help prevent escalation.

- 2. Institutional mediation.** Participants appreciated the quality assurance of the mediators chosen by the institution, quality case management and support, transparent fees, and the ability to assist users in prescribing mediation in a contract. However, improvements are needed, such as increasing mediator fees, creating more value for users, innovation of process, services and platforms, offering promotional rates for parties involved in arbitration to mediate their cases, and faster, cheaper, and more transparent mediation.
- 3. Mediators' fears.** Fear can be a natural emotion and a survival mechanism, but it can also be highly personalised. The discussion emphasised the importance of acknowledging and confronting fears, as well as seeking guidance and support from others.
- 4. Mediation and money.** It is important to address money issues upfront in mediation to avoid difficulties down the line. Mediators need to understand the parties' financial needs and interests, and help them explore creative solutions that meet everyone's needs.

Mediators around the world share the same ethical concerns; however, depending on the jurisdiction, the law of one country may tolerate or even encourage policies that are strictly prohibited in another (e.g. mediator's bonus; mediator's proposal etc). The 'one day' mediation model for instance – the norm in certain jurisdictions for specific types of disputes – is not encountered often in many other jurisdictions and the process is usually broken down in sessions taking place in different days.

Participants also demonstrated the importance of ongoing education and collaboration in the field of conflict management, noting that institutions have the resources to bring mediators together for collaboration and collective learning.

The 18th ICC Mediation Competition was kindly

sponsored by: *Clifford Chance, Cardoso Law of School, Mediator Academy, J.S. Held, CEDR, FSM (Federation of Swiss Mediators), Mediation and Resolution, CME, Resolve, ADR ODR International, CONSENSUS GmbH and JAMS.* For sponsorship opportunities, please visit <https://iccwbo.org/become-a-member/partnership-and-sponsorship-opportunities/>.

³ For reports of past editions of the ICC Mediation Roundtable, see J. Lawrence, 'ICC Mediation Week: Roundtable on Multiparty Mediation', *ICC Dispute Resolution Bulletin*, issue 2022-1; T. Garby, 'ICC-IAM Roundtable: Co-Mediation in International Commercial Disputes', *ICC Dispute Resolution Bulletin*, issue 2021-2; addressing the new Singapore Convention and how emotion (of both mediator and the parties) can influence a mediation, see M. Armes, '15th ICC Mediation Competition – Professionals Roundtable', *ICC Dispute Resolution Bulletin*, issue 2020-1.