

ICC Mediation Week, meeting the future generation of conflict savvy professionals

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In 2014 I attended the ICC (International Chamber of Commerce) Mediation Week in Paris, run by ICC's International Centre for ADR, for the first time, as an observer. In February 2018 I had the privilege to attend the 13th edition, this time contributing to the event as a mediator and a judge.

With great pleasure I comply with my valued colleague Roger Ritzen's request to reflect on the Mediation Week from the perspective of a participating professional from The Netherlands.

The Mediation Week is the ICC's largest educational event of the year. It comprises the International Commercial Mediation Competition (ICMC), the world's largest moot exclusively devoted to international commercial mediation, and the International Mediation Roundtable. The event brings together over 500 participants – professional mediators, academics and students – from around the world, providing a unique opportunity to share knowledge, discuss new developments and gain valuable insights on the latest techniques, strategies and trends in the field of mediation.

Before going into my experience as a professional participating in the ICC Mediation Week I would like to provide some background about the ICC and its prominent role in dispute resolution.

The ICC

The ICC was founded in the aftermath of the First World War, when no world system of rules governed trade, investment, finance or commercial relations. Acting on their conviction that the private sector is best qualified to set global standards for business, ICC's founders filled the gap, calling themselves 'The merchants of peace'. A very apt description in the context of this article, dispute resolution.

Today the ICC is the world's largest business organization, working to accelerate inclusive and sustainable growth to the benefit of all. With global headquarters in Paris, France, and a worldwide network of over six million members organised through national committees in more than 100 countries, the ICC works to promote international trade, responsible business conduct and a global approach to regulation through a mix of advocacy and standard setting activities – together with market leading dispute resolution services.

The ICC's dispute resolution services, its International Court of Arbitration and Centre for ADR

As early as 1923 the ICC established its International Court of Arbitration, which has become the world's leading arbitral institution. Since 1923, by administering arbitrations the ICC has been helping to resolve difficulties in international commercial and business disputes to support trade and investment. Arbitration is a flexible procedure that leads to a binding decision from a neutral arbitral tribunal, or, commonly, a settlement during the arbitration. Such a settlement may be reached by also using mediation, either preliminary, concurrently or successively to the arbitration. Awards are usually complied with, but can, if necessary, be enforced in more than 145 countries around the world under applicable enforcement regimes.

The administered dispute resolution services of the ICC have evolved to also include alternatives to arbitration such as mediation, expert appraisal, dispute boards and DOCDEX (Documentary Instruments Dispute Resolution Expertise). These alternative dispute resolutions services are provided by the ICC International Centre for ADR (Alternative Dispute Resolution), which is separated from the ICC International Court of Arbitration to preserve the full confidentiality of mediation and arbitration proceedings – whether they are concurrent or not. The services the Centre for ADR offers can be used separately, successively or even concurrently, also with arbitration. Companies and governments worldwide turn to ICC's services as an attractive alternative to litigation. The ICC's dispute resolution services are flexible to meet the diverse interests and needs of parties in different parts of the world and different sectors of the economy for neutral and reliable solutions that help save time and money.

The ICC provides mediation as a flexible settlement technique, conducted privately and confidentially, in which a mediator acts as a neutral facilitator to help the parties 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. Where successful, mediation results in an agreement that is contractually binding.

The ICC's prominent role in international dispute resolution makes Mediation Week a very noteworthy event.

What is the ICMC all about?

In 2014 the event surprised me no little. I had been in the mediation profession for a mere two years. Since I only came to observe, and being preoccupied with getting started in my new profession, I had not taken the time to prepare my attendance of the ICMC thoroughly. Until recently I had myself been focused on acquiring the required knowledge and skills and on being assessed by the Dutch Mediaton Federation (Mediators Federatie Nederland – MfN) and the Centre for

Effective Dispute Resolution (CEDR) in London. As a consequence I expected a competition between mediators, being assessed to establish who was the most skilled at mediating.

It turned out that the parties participating in the mediations were competing. They were assessed on their negotiating and problem-solving skills, as well as on their ability to make good use of the mediator and of the mediation process. So, not a competition between mediators on mediation skills at all. Rather it could be described as a competition between participants in mediation on who is the most 'reasonable' in every sense of the word. Who is most effective in resolving conflict through value-creating collaboration and dialogue, focusing on the parties interest, using the independent, impartial third party (the mediator) to make this process as effective as possible? A competition markedly different from litigation and arbitration moots, where participants engage in debate about facts and (legal) rights, aimed at convincing an independent, impartial third party decision maker (judge or arbitrator), a process primarily aimed at distributing damages resulting from a conflict rather than at trying to create value, or at least to creatively limit damages prior to distributing.

The parties participating in the mediations are made up of students from diverse backgrounds representing more than 30 countries throughout the world, who compete in mock mediation sessions to resolve international business disputes through mediation. This year 66 teams competed in around 150 sessions. The competition is open to students of every discipline –though each team is required to have at least one law student to take the role of legal counsel.

More than 130 mediators and mediation trainers give their time to the competition each year on a voluntary basis, to share their expertise and passion for mediation. They act as mediators, making use of their own experience in resolving cross-border disputes and/or take on the role of judges, assessing each team's performance. Others coach teams. The event allows students the occasion to put theory into practice and to interact with experienced mediators from all around the globe. This unique exchange is an opportunity for us professionals in the field of international commercial mediation to engage with a new generation of mediators and mediation users.

It also provides us with an invaluable opportunity to interact with each other. Prior to the ICMC, which lasts one week, the attending professionals meet at the ICC Mediation Roundtable, which was established in 2014 and has quickly become one of the most significant and valuable meeting points for ADR professionals worldwide. The gathering provides a dedicated platform to explore and examine the industry's latest trends and exchange experiences in an effort to further the development of mediation and its practices. Not only the Roundtable, but also working together as mediators, judges and coaches during the competition and socializing during the social events surrounding the competition affords us professionals to engage with each other, not rarely resulting in personal friendships spanning the globe.

The cases

The cases are written by mediators with extensive experience in international commercial litigation and mediation. They are quite extensive, complex and realistic. The judges know the confidential information of either side, to be able to assess how the parties handle this information. Both parties only know their own confidential information, and of course the general information. The mediator only knows the latter. This makes the way the cases unroll from the mediator's and the parties perspective very realistic. Mediation sessions last 2,5 hours, of which 1,5 hours for the actual mediation and 1 hour reserved for the judges to read the mediation plans, for scoring and for providing feedback to the teams from both judges and the mediator.

In contrast to real world mediations the students come very well-schooled and prepared in negotiation and mediation advocacy skills. In real-world mediations parties often need quite a bit of assistance from the mediator and the mediation process to be able to make the transition from a less effective distributive debate about factual and legal arguments on which they base their positions to a more effective collaborative and potentially value creating dialogue. In the real world parties and their legal counsel often are hampered by restricting attitudes, convictions and engrained habits relating to negotiating. The participants to the ICMC may be inexperienced, but their youth saves them from such attitudes, convictions and habits. And their thorough training and coaching for the ICMC affords them excellent skills and techniques.

So the role of mediator at the ICMC is relatively undemanding, since the parties do most of the work themselves, usually needing only very limited interventions, but nonetheless very enjoyable. It is hope-inspiring to see what could be possible in terms of value generation, not only in dispute resolution, but also in deal facilitation, if we would succeed in educating future generations of professionals to become as conflict savvy as early in their careers as the participants to the ICMC.

How are the participants judged?

Judging is more demanding, but no less interesting. One of the nice aspects of judging, apart from closely observing the usually very satisfying performances of the parties, is witnessing how colleagues from all around the world conduct their mediations, which is very inspirational.

The teams are judged on how well they perform as a party in a mediation. The judges focus on how well the participants safeguard their interest by working together effectively with the other party and with the mediator. The scoring sheets and instructions and guidelines for judges on scoring and providing feedback are quite extensive and comprehensive. Observing, on both sides, all the aspects and specific points which are judged to determine the score and to provide the teams with helpful feedback is quite taxing.

The whole conglomerate of criteria can nonetheless be condensed into a recipe for conducting complex commercial negotiations with the help of a neutral third party facilitator. The judges assess whether and how the participants:

- 1 prepare thoroughly, evidenced by a plan in writing for the mediation, addressing overall strategy, division of responsibilities and specific tactics, analysis of underlying interest on both sides, and analysis of what could be the best alternative to a negotiated agreement with each other (the 'BATNA' in technical terms) for both sides;
- 2 during the opening phase of the mediation present their position on facts, events and legal considerations clearly, while nonetheless showing genuine willingness to collaborate;
- 3 convey from the outset the willingness to engage in a dialogue (an open exchange of information and ideas) about the interests of both parties, rather than to revert to a debate (aimed at convincing each other) about rights, based on the legal arguments underpinning their positions;
- 4 convey and advance their interests effectively while still recognizing the interests of the other party, without sacrificing their own interest;
- 5 assess the strength of their negotiating positions by carefully considering, both for themselves and for the other party, what the best alternative could be to a negotiated agreement with each other (the 'BATNA' in technical terms);
- 6 use the strength of their negotiating positions by effectively asserting their BATNA, without falling into the trap of using it ineffectively as a weapon or a threat;
- 7 cooperate within their team by communicating effectively with each other, sharing responsibility appropriately and providing backup for one another;
- 8 ascertain the other parties interest by actively seeking relevant information, and by demonstrating active listening skills;
- 9 take the initiative to build a collaborative, problem solving relationship with the other party, also acknowledging cultural differences;
- 10 make appropriate decisions regarding whether to disclose sensitive confidential information, which may influence the balance of negotiating power;
- 11 use creativity in generating options, not just for their own interest, but also for the other parties interests, while withstanding the temptation of evaluating creative options too soon;
- 12 work with the mediator constructively, by appropriately making use of the mediators assistance and by responding to his/her interventions adequately;
- 13 make proper use of opportunities for a break or for a 'caucus', a private meeting between the mediator and just one of the parties and/or their counsel.

As you can imagine I am very much looking forward to the next edition of the ICC Mediation Week, which will be held in Paris from 8 to 13 February 2019.