

# Kluwer Mediation Blog

## ADR Rules of the International Chamber of Commerce (ICC): a flexible way in the use of ADR settlement techniques

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In a previous post I had noted the absence of better inter-connection between the ICC ADR Rules (available at <http://www.iccwbo.org/court/adr/id4452/index.html>) and the new ICC Arbitration Rules (available at <http://www.iccwbo.org/court/arbitration/id4424/index.html>) although the latter now open the door, at an early stage of the arbitration proceedings (*i.e.* the Case Management Conference: Art. 24 para. 1 of the ICC Arbitration Rules), for considering the possibility to settle the dispute other than by a decision of a judicial nature.

It is worth pointing out here again that ICC arbitration is generally considered as independent and distinct from mediation. In its Foreword, the ICC ADR Rules clearly states that ICC ADR, as an amicable method of dispute resolution, should be distinguished from ICC arbitration. Not denying that these may be complementary, the ICC considers each of these methods as alternative means of resolving disputes (as compared to traditional Court litigation), but arbitration is usually viewed as the consequence of the “failure” of disputants to reach settlement in mediation.

Such a restrictive approach seems contradictory when examining more in depth the ICC ADR Rules.

Article 5(1) of the ADR Rules provides that after the Neutral has been selected, a discussion shall take place between the Neutral and the parties in order to seek an agreement on the settlement technique to be used for the resolution of the dispute and to define the specific procedure to be followed. Such a provision is not unique as compared to other institutional rules providing for mediation. For instance, the Rules for Commercial Mediation of the Swiss Chambers of Commerce (see Art. 16 para. 5 of these Rules, available at <https://www.sccam.org/sm/en/rules.php>) do provide for other “resolution tools” such as expert determination on one or more particular issues of the dispute, the submission of last offers or arbitration.

The Guide to ICC ADR explains that a wide range of settlement techniques can be used pursuant to its Rules. These include:

- mediation;
- neutral evaluation;
- any other settlement technique; or
- a combination of settlement techniques.

Article 5(2) sets forth that in the absence of an agreement of the parties on the settlement technique to be used, mediation shall be used.

The Guide to ICC ADR gives the following definition of mediation:

*“For the purpose of these Rules, mediation is the settlement technique in which the Neutral acts as facilitator to help the parties try to arrive at a negotiated settlement of their dispute. The Neutral is not requested to provide any opinion as to the merits of the dispute.*

*To facilitate an amicable settlement, the Neutral generally holds joint meetings with all of the parties present and may also hold separate meetings, often called caucuses, with each of the parties alone. These meetings permit the Neutral to create an atmosphere appropriate for negotiations, obtain useful information, identify the interest of each party and help the parties find common grounds for the resolution of their dispute. Any oral statements or written documents provided to the Neutral by one party during a separate meeting or otherwise will not be conveyed to the other party unless the first party has explicitly authorized the Neutral to do so.”*

Interestingly, emphasis is made in this definition on the possible use and benefit of holding separate meetings (caucuses). It should not be overlooked that joint meetings can also enable participants to the mediation to identify, altogether, their respective interests and needs, with a view to attempt to define, respectively reach, common grounds.

As far as the neutral evaluation technique is concerned, the ICC Guide defines it as a non-binding opinion or evaluation concerning one or more matters such as:

- an issue of fact;
- a technical issue of any kind;
- an issue of law;
- an issue concerning the application of the law to the facts;
- an issue concerning the interpretation of a contractual provision;
- an issue concerning the modification of a contract.

Although not provided for in the ICC ADR Rules themselves, the ICC Guide to ADR sets out that “the parties may agree contractually to abide” to the Neutral’s evaluation. This means that they can provide in a signed agreement that the Neutral’s evaluation shall be binding upon them, such an agreement having thereby the value of a quasi-judicial decision.

Mini-trial is the settlement technique in which a panel is constituted comprising the Neutral, as a facilitator, and a manager of each of the parties to the dispute. Each manager should in principle have the authority to bind the party that selected him or her and should not have been directly involved in the dispute. Each party presents its position to the panel in a concise and brief manner, after which, depending upon the situation, the panel seeks a solution acceptable to all of the parties or express an opinion on the positions of each side. Like neutral evaluation, the parties may agree contractually that the Neutral’s opinion, as the case may be, shall be binding upon them.

Besides the fact that the parties, in consultation with the Neutral, may agree upon any appropriate ADR settlement technique that would help them to resolve their dispute amicably, a combination of settlement techniques may be used in the conduct of the ICC ADR proceedings. For example, the Neutral may be asked to give his or her opinion on a specific issue in the course of the mediation. The case may be, although such an opinion would not bind the parties, the latter may agree contractually that it would do so.

Another example in this respect is the request from the parties to the Neutral for the latter to provide an opinion, contractually binding or not, on the scope of the clause setting out the settlement of the dispute by ADR before entering in settlement negotiations.

Considering the above, it is worth pointing out the hybrid form that ICC ADR proceedings may sometimes take. The two examples just mentioned combine evaluative and non-evaluative powers on the part of the Neutral. In said combinations, the Neutral, acting as Mediator, can also act as a quasi-Arbitrator when providing an opinion contractually binding, even if said opinion concerns only a small part of the dispute.

In view of the variety of ADR settlement techniques that are offered by the ICC and their possible combinations, a real flexibility is offered to its potential users, no doubt with a view to provide efficient and cost-effective solutions in the settlement of their business disputes.

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