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ICC International Centre for ADR

ICC-IAM Roundtable: Co-Mediation in International Commercial Disputes

9 February 2021, online

Thierry Garby

Avocat honoraire, Mediator, Arbitrator, France

ICC's biggest educational event was hosted online for the first time in 2021. Running from 5-11 February, the 16th ICC Mediation Competition involved the participation of 450+ professional mediators, mediators trainers, academics and students from around the world. The traditional roundtable for professionals was co-organised with the International Academy of Mediators (IAM). For more information, please visit <http://www.iccwbo.org/ICCMediationWeek>.

Alya Ladjimi (Manager, ICC international Centre for ADR, Paris) had suggested that this roundtable would discuss co-mediation. Several of us expressed doubts: co-mediation is supposed to be more for interpersonal disputes like family or neighbourhood disputes and not for international commercial ones. Nevertheless, we started to enquire within the global IAM membership about the use of co-mediation. The results were quite surprising, and we were thrilled to present them to the professionals who intervened in the ICC Mediation Competition.

After a few words of introduction by Ms Ladjimi,

Michel Kallipetis QC (Mediator, United Kingdom; President-Elect of the IAM) briefly described the IAM – a professional organisation consisting of highly successful and trained mediators from all over the world that adheres to the highest practice and ethical qualifications. IAM is highly respected for its education programs, which include internationally acclaimed speakers and cutting-edge mediation techniques.

Hélène de Kovachich (Administrative Judge, Quebec; Founder, Clinique de médiation, McGill University, Montréal), an attorney and mediator who became a judge in the Administrative Tribunal of Quebec and the President of this tribunal, thought of using mediation in the disputes brought before the tribunal. The mediation scheme she created is quite unique. Hélène explained that the Administrative Tribunal is composed of 97 judges and that a bench is composed of two judges: one has a legal training whereas the other one has expertise in the field of the dispute. There would probably be a lot to say about tribunals made of an even number of judges as well as about the inclusion of experts among the judges. Anyway, it seems to be successful in Québec and to be very well accepted.

Since the 'Act respecting administrative justice'¹ specifies that judges act as mediators,¹ the mediation system was based on the same parity: the judges will co-mediate the dispute in proceedings brought before the Immovable Property Division and Economic Affairs Division, and Territory and Environment Division. This proved to be very successful too. Hélène identified some keys to that success: (i) the proper training of the judges; (ii) their joint preparation for each mediation; (iii) they also carefully choose the cases subject to co-mediation.

It is a three-step process:

1. Pre-mediation session: The judges hold a short conference call with all the parties to learn about the issues that the parties wish to discuss.
2. A letter is sent to all the parties to confirm the timetable for the joint session, along with the consent form to participate, to be signed by the parties.
3. Co-mediation session: if an agreement is reached, it is also signed by the judges and it is enforceable as a decision of the Tribunal.

Hélène described the reasons for the success in the following words: experts from different professions have different perspectives; parties have needs and expectations as they face judges/mediators from various professional background; it accelerates the process; it is conducive to creating a climate of trust; it encourages open conversations; it facilitates joint sessions; the judges' interactions can be seen by the parties as a model of collaboration and possibly influence the level of cooperation amongst the parties; and it allows the use of a wider range of techniques.

1 <http://legisquebec.gouv.qc.ca/en/showDoc/cs/J-3>

If there is no agreement reached by the parties the hearing of the trial will be set at a later date and it will proceed in front of a new bench to preserve the confidentiality aspect of the co-mediation process. Many of us were most intrigued and thought of paying a visit to Montréal to shadow one of these co-mediators.

Mary McLain (Founder, McLain Mediation; Attorney, Mediator, San Francisco) explained that most mediators on the West Coast do not use co-mediation as they do not use joint sessions and prefer an evaluative approach with shuttle diplomacy. As she does use joint sessions, Ms McLain's experience of co-mediation is mainly in family and employment matters. In addition to her practice as a mediator, Ms McLain teaches in a number of Californian universities. When she teaches The Mediation Clinic, collaborating among law schools, Superior Courts and Federal agencies (Fair Housing, Labor and Employment), she includes a co-mediator approach.

When asked about the pros and cons, Ms McLain found that different perspectives can be helpful, perhaps one mediator is more comfortable with the brainstorming phase or financials, while another better at developing rapport. She also explained that co-mediators can give one another feedback and capture content that the other mediator missed; it is the most effective mentoring experience, when paired with a more experienced mediator or one with a different mediation style. Downside, co-mediators could provide mixed messages and confusion to the process or the parties.

Jody Sin (Solicitor; Vice-chair, Hong Kong Mediation Council) and **Tat Lim** (Dispute Resolution Lawyer, International Mediator, Maxwell Mediators, Singapore) intervened together and, though they belong to totally different jurisdictions, their experiences are rather similar. In both jurisdictions, co-mediation is provided for in statutory law and it is used as a training technique. In Singapore, it mostly develops in family and medical disputes to reflect gender or technical differences. Ms Sin and Mr Lim both insisted that it is most important that both mediators have suitable personalities and styles.

In addition to Ms McLain list of advantages, Ms Sin and Mr Lim stressed the following:

- > co-mediation allows shared responsibility and division of labour between mediators, especially when the dispute needs to be mediated within a limited time;
- > it brings in additional resources and energy (two minds) to the mediation;

- > it allows matching mediators to the parties and their advisors e.g. gender, age, attributes, and expertise;
- > it enables a more intensive and thorough preparation, where each mediator can focus on different aspects of the process;
- > co-mediators can provide modelling of behaviour to the parties such as co-operation, respect, and courtesy;
- > co-mediators can contribute multiple ideas, dynamics and skills, enhancing creativity and ability to solve problems.

As far as disadvantages are concerned, they found that: there are risks of negative role modelling; co-mediation may lead to additional expenses and time and logistical issues regarding availability and preparation; one mediator may be overly dependent on the other; or that other problems such as laziness or disrespect may occur.

Claude Amar (Partner, Mediation & Resolution, Paris) was not able to connect to this online session, but I tried to convey his testimony of using co-mediation within the IAM mentorship program. Here is a summary of what he had to say:

Four years ago, I realised that the next generation of mediators will not have a professional background as they want to become mediator after finishing their studies. I wanted to replace such professional career with a strong mediation practice, and I put in place a three-year mediation mentorship program.

They are not shadowing me; they are acting as co-mediator from day one. I always insist that they take the floor whenever they feel like it. Two reasons for that: (i) it is part of their training and (ii) not coming out, always has a disturbing effect on me as I hear a second inner voice which tells me that I may have missed something without saying what!

This approach is also rewarding for me: (i) The debriefing session is a gift. Their questions as well as our follow-up discussions are enlightening; (ii) I take lessons from their stance and their style, as I always insist that they have to develop their own.

Obviously, this session offered new perspectives to many attending mediators and Alya Ladjimi, in her closing remarks, explained that the ICC International Centre for ADR considers recommending co-mediation in appropriate cases.