

# ICC Commission on Arbitration and ADR

## Executive Summary | Commission Meeting Paris

Salons Hoche, Paris | Tuesday, 28 March 2023 | 10:00-16:30 CET

### 1. Welcome and Opening

On behalf of the entire Steering Committee, Ms Melanie van Leeuwen, Commission Chair, warmly welcomed to the Commission Meeting 700 Delegates from around the globe including 350 members participating in person in Paris and a further 350 registered Delegates connecting remotely.

The agenda (Doc. No. 420-729) and Executive Summary of the 29 October 2022 meeting (Doc. No. 420-728) were both adopted.

### 2. Report from the Secretary General

Mr Alexander G. Fessas (Secretary General of the ICC International Court of Arbitration and Director for ICC Dispute Resolution Services) gave an overview of the main findings of last year's statistical reports and then provided updates regarding the work of the Secretariat.

In 2022, there were 710 cases that were registered including 695 submitted under the ICC arbitration rules. There were 1670 pending cases at the end of 2022. 34% of ICC cases were multiparty cases and 30% of cases involved parties from the same country.

### 3. Turning Swords into Plowshares

Ms Claudia Salomon (President of the ICC International Court of Arbitration) shared her thoughts on the Court's Centenary in 2023 and how swords can be turned into plowshares meaning to transform tools of destruction into tools to benefit humankind. A summary of the speech can be obtained upon request by contacting the Commission Secretariat.

### 4. Task Force "ADR and Arbitration"

Ms Aisha Nadar (Commission Vice Chair), Ms Victoria Orlowski (President of the ICC Standing Committee of the ICC International Centre for ADR) and Mr Pierrick Le Goff (Task Force Member) presented the work of the Task Force ("TF") on ADR and Arbitration.

1. Doc No. 420-732 submitted for approval.

Recalling the TF's main objective '*to assist in the efficient resolution of disputes for ICC users through the study and analysis of how different ICC ADR services are currently being used*', Ms Nadar explained that the TF structured its work into four Tracks: Track 1 "Decision Trees &

Protocols”; Track 2 “ADR Services”; Track 3 “Settlement in Arbitration”; and Track 4 “National Courts and ADR”. Alongside these four Tracks, the TF also held a series of virtual open-mic sessions for in-house counsel only. The TF produced three main outputs:

(1) An ICC section: *Recommendations to ICC*, which was approved at the Commission Meeting in Miami on 29 October 2022.

(2) A section on Effective Conflict Management which explains and gives guidance to users and their external counsel on how (ICC) ADR tools and techniques can be used to prevent and resolve disputes before and after arbitration has commenced.

(3) A section addressed to a wide audience of arbitration and ADR practitioners, arbitrators and mediators as well as users and their in-house counsel on how to facilitate settlement in international arbitration.

As part of the second input, the TF prepared a pre-action risk assessment tool, which was submitted to the Commission for approval and presented by Mr Pierrick Le Goff. The tool focuses on cost-benefit analysis and facilitates a risk-reward analysis before commencing a dispute resolution procedure around three pillars: (1) a cost estimate assessment (2) quantum analysis and the expectation of the damage compensation for the cost involved in a dispute and (3) the unquantifiable cost.

Ms Nadar explained that these two last inputs were approved by the Commission as one document with the working title ‘Recommendations to users and their external counsel’ at a special approval Commission Meeting on 12 December 2022. The work of the TF will be published and presented by ICC in two separate publications to better reflect that they are addressed to two different audiences. As such, and subject to further approval from the ICC Executive Board, the TF’s publications will be:

- ‘Effective Conflict Management’ (with the Pre-Action Risk Assessment tool as an appendix) – and will be referred to as the ‘Guide’.
- ‘Settlement Facilitation in International Arbitration’ – and will be referred to as the ‘Report’.

Ms Victoria Orłowski then presented a proposal for an additional Recommendation to ICC in relation to the ‘standing mediator’, which was raised when the drafters were finalising the text of the recommendations for the users and external counsel after its approval on 12 December 2022. This additional proposed recommendation, submitted to the Commission for approval, would be added to the previous 13 ‘Recommendations to ICC’ that were approved in Miami in October 2022. Ms Orłowski explained that during the work of the TF, a standing mediator was suggested as a tool for assisting parties in carrying out the terms of any settlement agreements they may reach. A standing mediator does not currently fall within the ICC’s offering under the ICC Mediation Rules, which specifically provides that when there is a settlement agreement, the mediation should end. Ms Orłowski explained that no other institution currently offers this service. By adding a standing mediator to the services of the ICC International Centre for ADR, it would further expand ICC’s ability to meet the needs of businesses, as well as state and state entities, to prevent and solve disputes. Introducing new innovative services would contribute to ICC’s objective to be the one-stop shop in dispute resolution and continue to provide thought leadership.

The Commission proceeded with the voting procedure on Document 420-732:

- The Commission approved the Pre-Action Risk Assessment Tool: with 88.7% in favour, 5.9% against and 5.4% abstained.
- The Commission approved the additional recommendation to ICC regarding the standing mediator with 75.61% in favour, 13.17% against and 11.22% abstained.

## **5. Task Force “Addressing Issues of Corruption in International Arbitration”**

Ms Caline Mouawad (Commission Vice Chair), Mr Xavier Andrade (Track Coordinator), Mr Patrick Beaten (Track Coordinator), Mr Vladimir Khvalei and Mr José Feris (Task Force Co-Chair) presented the Task Force (“TF”) and the Outcome Working Session on ‘Red Flags and Indicators’ (Doc. No. 420-731).

Ms Mouawad explained that the TF aims to explore existing approaches to allegations or signs of corruption in disputes and articulate guidance for arbitral tribunals on how to deal with issues of corruption. The TF structured its work into ten tracks: Track 1 on “Define the Scope of Work of the Task Force”; Track 2 “List of issues within the scope”; Track 3 “Red Flags”; Track 4 “Award Review”; Track 5 “NC Survey”; Track 6 “Survey to Arbitral Institutions”; Track 8 “Burden & Standard of Proof”; Track 9 “Arbitrators”; and Track 10 “Parallel Proceedings”.

The document ‘Outcome Working Session on Red Flags and Indicators’ (No. 420-731), summarising the discussions at the specially dedicated Commission Working Session on 12 November 2022 on Working Document of Track 3, was circulated to the Commission. This Working Document examines the use of red flags in commercial and investor-state arbitration and proposed a specific methodology to identify, validate, and assess red flags with the aim of establishing a tool to deal with red flags in a balanced and fair manner.

The Task Force is scheduled to meet on 16 May 2023 to discuss the work of Track 8, Track 9 and Track 10.

## **6. Task Force “Disability Inclusion in International Arbitration and ADR”**

Mr José Feris, (Commission Vice Chair), Mr Simon Maynard (Task Force Co-Chair), Mr Todd Weiler (Task Force Co-Chair) as well as Professor Albert-Jan van den Berg (Awareness Ambassador) presented the work of the Task Force on Disability Inclusion in International Arbitration, which led to the preparation of the Guide to Disability Inclusion in International Arbitration and ADR (Doc. No. 420-730 submitted to the Commission for approval.

The Commission proceeded with the voting procedure and approved the Guide to Disability Inclusion in International Arbitration and ADR (Doc. No. 420-730) with an overwhelming majority of 94% in favour, 3.4% against and 2.6% abstained.

## **Concluding remarks**

Finally, Ms Melanie van Leeuwen presented the concluding remarks, recalling that the next Commission Meeting would be held in Paris on 27 October 2023.