

## INTERNATIONAL ARBITRATION

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*Edgard Muñoz discusses the key discussion points from the 2022 ICC PANARB convention in Panama with take-aways for the practitioners and arbitrators in the International Arbitration industry.*

## Key Discussion Points from the 2022 ICC PANARB Convention in Republic of Panama



### ABOUT THE AUTHOR

**Edgard Muñoz** serves as the partner in charge of the Litigation Department of Sucre, Arias & Reyes. He focuses on Corporate Law, Administrative Law and Litigation. He has extensive experience advising transnational companies in civil and commercial matters and his specialty is procedural law.

He speaks Spanish and English, and, in addition to being an IADC member, he is a Member of Colegio Nacional de Abogados de Panamá.

### ABOUT THE COMMITTEE

The International Arbitration Committee serves all members involved or interested in international arbitration as in-house and outside counsel and/or as arbitrators. This extends to actions for or against the enforcement of arbitral awards in their jurisdiction and actions aiming at setting aside arbitral awards. Members publish newsletters and journal articles and present educational seminars for the IADC membership-at-large, offering expertise on drafting arbitration provisions, choosing arbitral institutions and rules, and the do's and don'ts in international arbitration. The Committee presents significant opportunities for networking and business referrals. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



**James B. Glennon**  
Vice Chair of Publications  
Foran Glennon Palandech Ponzi & Rudloff PC  
[jglennon@fgppr.com](mailto:jglennon@fgppr.com)



**Azusa Saito**  
Vice Chair of Publications  
Nishimura & Asahi NY LLP  
[a.saito@nishimura.com](mailto:a.saito@nishimura.com)

*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

During the conference of the ICC International Court of Arbitration in Panama, called ICC PANARB, held every two years, participants recognized internationally in arbitration met and discussed several topics of interest. However, I would like to highlight the following topics: applicability of Alternative Methods of Dispute Resolution (ADRs) in the new ways to make business and to face the current financial challenges as well as the carrying out of workshops related to the efficient management of hearings, preparation, and efficient defense of cases.

Regarding the first topic, about the applicability of ADRs in the new ways to make business, colleagues Mauricio Paris from Costa Rica, Belisario Castillo from Panama, Javier Jaramillo from Ecuador, and Javier Fernandez – Samaniego, we were reminded that the purpose sought by international arbitration and ADRs is to provide a service to meet global businesses' needs. This becomes important, considering that each day, given the new technologies, disputes are cross-border, with multiplicity of parties from different states. This requires knowing the situation and perspective of each of the parties, as well as the realities we face today.

**Artificial Intelligence (AI) is here.** It is something we must face, and our profession is not exempt from this new reality. However, AI should not be seen with fear, as it is a useful tool to improve processes. Companies that provide predictive analysis services for legal departments are used

more every day. Lex Machina, Arbilex, Lex Predict, etc. are examples of those companies providing predictive technology services for legal use. These technologies are being used for cases where the parties in dispute are not required to be represented by attorneys or deal about matters that are not very complex. Matters related business as usual (BAU) operations in an organization or in a business relationship, as well as matters about consumer's rights and internal employment disputes are example areas where new technologies could be used to resolve disputes. In these cases, data protection is a fundamental topic that has an impact in the right of defense, especially when it involves parties from European countries. Data processing and the rules for data protection apply in the framework of arbitration proceedings and ADRs. It is necessary to check if the parties have entered into an agreement or clauses providing for data handling, as well as how and when they shall be notified if there has been a data access breach.

**The panelists even wondered about whether or not arbitration would be the new way to resolve disputes in the Metaverse.** While it is expected to replace what we know today as the internet, without any doubt its development is yet to be seen, as well as the role that arbitration and ADRs will have in such technology.

"Smart contracts", related to Blockchain technology and the use of cryptocurrency are also another technology that is here to stay and where the use of ADRs and

arbitration are being used to resolve disputes. International trade requires functionality and viability. Although, in principle, the “code is the Law” in these types of technologies, ADRs are being used to resolve disputes when there are circumstances where the functioning parameters, constraints and programming problems do not allow resolving the dispute between the parties. In these circumstances it is foreseeable that arbitration might also have a role.

Likewise, the use of computer platforms for the resolution of disputes is more common every day. Mediation processes by electronic means are being used (e-mediation.) Countries such as Argentina and Spain have regulated the online mediation process. Platforms such as “Mediar Online 2.0” to conduct mediations by electronic means are available.

Regarding the applicability of ADRs to face the current financial challenges, colleagues Gaela Gehring Flores from the United States and United Kingdom; Francisco Gonzalez de Cossio from Mexico; Rodrigo Bordachar Urrutia from Chile; and Susana Hidegevi from Colombia talked about the current situation in all of our countries and the international market. Challenges such as climate change, disruptive technology, the effects of the pandemic, cryptocurrencies, armed conflicts, social tension, and the level of indebtedness, both at public and private level, are uncertainties that we are going through. But at the same time these pose challenges that require innovation to resolve

disputes, looking for a way to prevent them or accomplish reasonable agreements for both parties.

The panelists concluded that technology in arbitration is here to stay and that it has been well accepted. However, technology poses some challenges. In these changing times, we have to ask ourselves how to minimize uncertainty and therefore all alternatives have to be considered. Not only litigious, but also other dispute resolution methods such as mediation and conciliation. While traditionally the advantages of arbitration about being a neutral means to resolve disputes, as well as the advantage at the time of executing international awards, for many companies the possibility of preserving the business relationship is one of the most important advantages versus the traditional way of resolving controversies. It is necessary to consider the latter and exploit this advantage.

Due to the fact that in these times we have to focus more on what the client needs, we have to help clients in today’s world to be able to find solutions and it involves recommending the use of alternative methods to resolve disputes consistent with the specific reality of each client and each business relationship, as a way to preserve the business relationships when viable.

Therefore, international organisms have recommended the more frequent use of mediation and conciliation as mechanisms to look for solutions to address the problems we are facing.

Panelists indicated that the attorney shall focus on the needs of the client and select a proper dispute resolution means, which involves looking beyond arbitration.

The panelists shared their experiences in different regimes created in the Republic of Colombia and Chile to look for solutions in insolvency proceedings for companies in trouble. Especially, they highlighted the fact that in Latin America countries a major sector of their economies comprise small and medium-sized companies. Hence, it is especially important to try to preserve these sources of employment and economic activity. For this reason, Colombia explored mediation to resolve entrepreneurial internal conflicts at the level of boards of directors and/or shareholders, as well as in human resources matters. The experience showed that ADRs are valuable, as they help in seeking more effective solutions and focus on the needs of users.

Also, some experiences were shared in relation to mediation in collection proceedings giving some interesting examples about online mediation processes where agreements were reached with many debtors with a very positive outcome.

On the other hand, workshops related to the efficient management of hearings, preparation and efficient defense of cases had the participation of Irma Rivera from Colombia and Diego Brian Gosis from the United States, both experienced in international arbitration from the point of

view of the trial lawyer as well as the arbitrator.

In these workshops arbitrators and trial lawyers shared their experience from their points of view in arbitration proceedings.

For efficient hearing management, panelists emphasized that prior preparation is necessary regarding the practical aspects related to the different roles and the objectives to accomplish, in order to seek that the decision may resolve the dispute and for the award to survive a revision or a motion for annulment, that is, for it to be enforceable.

**From the point of view of arbitrators, the preparations prior to the hearing about the disclosure of information are fundamental.**

It is necessary to think about how to design the hearing based on the type of conflict, to create a road map or design to understand where the controversy is headed. The importance of the mission statement or minutes establishing terms of reference was also emphasized, which allows understanding very important aspects regarding the controversy. It is necessary to have a match between what the parties seek and the programming of the time in which the hearings will be conducted, in order to guarantee careful listening of each one. The need to distribute the work between the arbitrators was also highlighted and facilitates efficient communication. **In summary, the following was outlined: (i) previous work to know the litigation, (ii) use time effectively to program hearings, (iii)**

**use tools to design what the case consists of, and (iv) avoid procedural errors.**

From the perspective of the attorneys, it was said that in many cases the trial lawyers find disputes already set out or predetermined between the parties, which have already chosen the type of Tribunal to be accessed; however, some strategic issues were outlined such as a careful revision of the arbitration agreement in order to contemplate the possibility of varying the type of proceedings according to the complexity of the litigation. Another aspect to consider is regarding the determination of the applicable language both in testimonial evidence as well as the documents of the contract. It was said that the manner in which documents would be submitted is important, as in many cases files are not physical but digital. Hence, it is necessary to consider issues such as the metadata of the digital documents, being this information a factor to consider. Now, usually the procedural orders define how the documents shall be submitted. Another aspect to consider is what kind of documents are at disposal and which ones you need at the time of submitting the case. The attorney may subdivide the types of documents in evidentiary documents about the merits of the claims or positions, of damage quantification and documents related to the jurisdiction.

During the hearing, from the perspective of the arbitrator, it is necessary to have control of the times, so it may flow properly. It is also important to facilitate arbitrators'

participation and means to ask questions. Likewise, it is important to give equal opportunities to the parties. One subject to consider is the interaction of the arbitrators during the hearing and within the panel. It was discussed by the panel that it's important to consider the reality we are living in, where virtual hearings are more frequent every day and involve different form of communication.

From the point of view of the trial lawyer, during the hearing it is necessary to keep in mind what is the purpose sought during the hearing and how to pose the case in an organized manner, calculating well the times of witnesses' presentation, organizing them according to importance, considering whether they are witnesses that prove the merits or the jurisdiction. Likewise, it was considered important to take into account the order in which witnesses will be presented, as per the procedural orders. The hour in which the witness intervenes is another factor to consider, as the mood can be a factor that has an impact on the way one expresses, the testimony he will give, as well as whether it is necessary to consider the logistics at the time of presenting the witnesses. It is also necessary to make short-term decisions about objecting to questions or not, and when an objection can be made, as it must be considered not to abuse the patience and good will of arbitrators. Regarding the presentation of allegations, it is always a good idea to use audiovisual methods and presentations. However, the language factor at the time of making presentations is something to consider,

especially in these times when hearings are conducted virtually in many cases. **It must be evaluated to make the presentation in a language understandable for all members of the arbitration panel.**

After the hearing and the allegations phase is completed, from the point of view of the arbitrator the topics of discussion are closed and, in many cases, according to the panelists, the analysis of these topics begins with the drafting of the projects of the award. Meetings are held to align the points of view of the members of the panel of arbitrators and the facts are reviewed during the proceedings, seeing if the initial purposes of the proceedings, the topics that stood out and that were understood as the core of the case were proven or not during it. In this phase, confidentiality is important.

From the point of view of the attorney, during the deliberation phase some tactical issues may arise such as the appearing of new elements of evidence or that any of the parties cease to exist or becomes incapable. These situations may force you to make some decisions. Likewise, during this phase it is necessary to decide on the need to locate evidence about grounds that could serve for a possible annulment of the award. In some cases, it happens that the panel of arbitrators even requests additional hearings or the presentation of documents to answer specific questions to try to align the facts with the submitted evidence.

Also, during this phase, the possibility of finding assets against which the possible award may be enforced should be analyzed.

In my opinion the meeting was a success. It emphasized the importance of helping clients according to their needs and today's circumstances, provided useful information about new technologies applicable to legal services. It was also a good opportunity to gather information about new challenges for lawyers in general and reviewing good practices for conducting cases, especially during arbitration hearings.

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