# YCAP AND CJCA INTERVIEW OF MAREK KRASULA

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**James Plotkin (JP): Welcome. My colleague Özge Yazar and I, James Plotkin, have the pleasure of interviewing Marek Krasula. Marek is the Director of Arbitration and ADR in North America for the ICC International Court of Arbitration. Marek, thank you for joining us today.**

Marek Krasula (MK): My pleasure, it's great to be here.

**JP: If we can start off just a little bit broad, how did you start working at the ICC International Court of Arbitration?**

MK: It's an interesting story. I finished my LLM back in 2010 and I was wondering what my next steps were going to be. As any student knows well, the first step that you usually take is networking with people and seeing what they did when they started off their careers. I happened to bump into a fellow Canadian in DC who I had seen a few times in Ottawa and is very well-known, Meg Kinnear. Meg is the Secretary General of ICSID. She invited me for coffee at her office and gave me her perspective on where I should be looking as a Canadian. She had looked at my CV and said, "Marek you speak three languages, Polish, French and English, so you may be an asset to the ICC. Have you considered a career within an arbitral institution?" At that point I had not. So that evening I looked at the ICC Careers website. It turned out that they were looking for someone who spoke French, English and an Eastern European language. That was a great coincidence. About a week later I was hired as a deputy counsel in Paris at the ICC headquarters. And that's where my career began.

I think there's a lesson here. It's how much practitioners are willing to help younger practitioners by giving them advice to move ahead with their careers. I'm happy that Meg chose to pay it forward. I'm not even sure if she remembers our coffee or our

conversation, but I'm happy she chose to sit down with me because she's one of the reasons why I'm here today.

**Özge Yazar (OY): In your experience, how does a counsel's experience in litigation translate to arbitration? Do you find that lawyers who mainly argue in court have a different style than those who practice arbitration exclusively?**

MK: I think many of the same skills that are required of litigators are essential to succeeding in arbitration.

That said, lawyers who are unfamiliar with the arbitration process tend to treat arbitrations as if they are court proceedings. That's not necessarily the best fit for arbitration. In arbitration you see cross-border disputes where you need to be attuned to the reality of there being parties from different nationalities, from different legal cultures, clients speaking different languages, and arbitrators and opposing counsel who may not be from your jurisdiction.

A sign that they may be unfamiliar with the process and they're actually kind of replicating practices from court is they will say "Your Honor" both in writing and orally. They're going to request direct examination of witnesses. Of course, we know in arbitrations direct testimony is in the form of written witness statements and hearings are usually focused on cross-examinations. What else that I've seen over the years are documents being filed that look like court pleadings, not necessarily like memorials, requests for depositions, interrogatories, and so forth. I know you're listening to this and you're probably shocked, but yes it happens. Extensive discovery, motion practice, and nominations of former judges as arbitrators. I think that's what you'll see more from litigators participating in arbitrations and less from arbitration practitioners.

**OY: Is there a difference between experienced counsel and less experienced counsel in how they go about conducting arbitration proceedings?**

MK: Something that has worked well in the litigation world, and now we're seeing more of in arbitration, is dispositive motions. We're encouraging parties to consider dispositive motions for unmeritorious claims. I think that is a good import from litigation which saves time and costs, and narrows the issues. This is a good element that litigators have brought into the arbitration world. It's something that now even exists in the ICC Note on the conduct of arbitration under the ICC Rules. It gives guidance to tribunals to consider these procedural options that perhaps folks were hesitant to use before.

My suggestion to a party would be watch out when you choose attorneys that are going to represent you in an arbitration. You don't want to be engaged in a time-consuming litigation process because you chose specifically not to be there – you chose to be in arbitration. Clients need to focus hard in choosing the right counsel for an arbitration.

**OY: What issues have you seen from institutional side about which counsel should be attuned?**

MK: The obvious one for us at institutions is at the drafting stage. If you're counsel in a case, or if you are making recommendations whether to insert an arbitration clause into a contract, pay attention to that clause.

Don't insert a boilerplate clause into your contract. Go to the website of whichever institution you're considering and look at its model clauses. Make sure that when you're referring to that institution, it's clearly spelled out and that there's a clear reference to its rules. Make sure that the intended scope of your arbitration clause is also clear because if you don't check these boxes, you're going to turn your process into something very

time-consuming, expensive, and probably quite disruptive. Consider what you want out of the process, what will be most appropriate before the dispute arises.

Another thing I would say to counsel is to streamline your submissions. I think a lot of arbitral tribunals are exhausted by having to read 200- or 300-page submissions with multiple exhibits. Distill it to what you think is most important for your tribunal to know. When you are writing your submissions, keep in mind that you want to be able to help your tribunal write a good award. It may sound very basic, but a lot of counsel get that wrong. Make sure all of your submissions are supported by the applicable law, and by the evidence.

To give you a concrete example, I see many submissions where a party just says that we request interest on X amount. They give the tribunal absolutely no guidance on what basis to provide for interest. What would be the interest rate? When would it start running and when should it end? This creates a lot of awkwardness. A lot of tribunals then have to get back to counsel with questions because they're unable to decide on the issue.

**JP: What has the ICC done recently to increase access to justice through its process, not only self-represented arbitration participants, but also for smaller entities that may be able to afford counsel if they want but are of lesser means in prosecuting their claims or defending/responding to claims?**

MK: Here it’s almost impossible not to talk about the ICC Expedited Procedure Rules which apply automatically to cases that are below a certain threshold. As of 2021, that threshold is US $3,000,000. In 2017, when we had come up with these Rules the threshold was lower, it was US $2,000,000. I think that is a testament to the fact that this process functions.

Remember the guiding principle behind arbitration, at least ICC Arbitration, is that the time the cost should be proportional

to the amount at stake. There's really no reason for a case that is below $2 or $3 million to take two years to be resolved. SMEs want to move on with their businesses. They want to get back to doing business and I think this has been a solution to an enduring problem in arbitration, which is time and costs.

We made these rules automatic, and I think SMEs welcome it. Of course, parties are able to object. There may be certain small disputes that are not appropriate for Expedited Procedure Rules, and the ICC Court can, for example, decide that a case, even though it's below the threshold, will not proceed under those expedited provisions. We made them mandatory because there's conflicting priorities between parties, counsel and the arbitrators. Unless you made them mandatory, it's unlikely that folks would have chosen the expedited process.

I think that has definitely worked out and, if I remember my numbers correctly, about 67% of awards have been rendered within the promised time limit of six months. Last time I looked at the numbers we had over 260 cases already proceeding under those rules, both automatically and also through an opt-in process, because again they apply automatically to certain cases, but you also have a good set of cases where both parties agreed to opt-in specifically to get the rules to apply to cases that are bigger than the threshold amount that I mentioned. We've even seen a case that was something like US $100 million proceed under the expedited provisions. The encouraging aspect of this process is that also about a fourth, so 25% of expedited cases are on an opt-in basis. Parties are consciously choosing to use them to resolve their disputes.

**JP: Are there further plans from the ICC perspective to enhance access to not only anonymized awards but even procedural orders and other tools for parties?**

MK: Yes, and we often forget, but we've been doing that over a few years now. We've been publicizing anonymized or extracts of procedural orders, and for those who are interested,

you can go to the ICC Dispute Resolution Library online (IC-CDRL.com). There's a search engine that allows you to get exactly what I was mentioning, extracts, examples of procedural orders that have dealt with particular issues. Also, the ICC was publishing summaries of certain decisions that were taken regarding challenges to arbitrators and things like that, and again, an anonymized version. But those things take time and resources. We're trying to do it more frequently, and to be more systematic about it, so that information is more readily and quickly available to parties who want to get a better sense of what is going on. Also, let's not forget the rule of law, so parties have precedents for their own cases.

**OY: Now that we have you here from an institutional perspective, we also want to ask about diversity. My first question is, has the ICC observed that its users find diversity important and if they do, what's the diversity that they find important? Is it the arbitrators? Is that the apparatus of the ICC itself? What do you think?**

MK: I think diversity and inclusion are really at the core of the work of the ICC as a whole and really in all of its forms: racial, ethnic, gender, generational, geographic, and we can come back specifically on each of these elements after. Initiatives on sexual orientation and disability were also recently launched. I think diversity and inclusion are essential to maintaining, we touched upon it before, the legitimacy of arbitration as a method of dispute resolution for the community. Users demand that arbitration reflects their actual community and that we ensure that their values are actually reflected in the service that we are providing. So those things really go hand in hand.

Some of you may know this, or perhaps not, but in 2021 we had the most diverse ICC Court in history. We had 195 members drawn from 120 countries with women in the majority and with greater representation from Africa than ever before. I think that is a huge accomplishment and, we have gender parity on the ICC Court. I've seen the real effects over the years of putting women

in power and how that has resulted in more diverse appointments over time. That's definitely a concrete result.

I mentioned the ICC Court but also let's talk about the ICC Secretariat. It's a very diverse group. We manage cases from all over the world. 70% of the Secretariat are women; 30% are men. We come from 30 different countries. We speak 33 different languages. I think that is also a reflection of how diverse this institution is.

Let's talk briefly about the arbitrators themselves, coming from 92 countries in 2020. Of course, many of them still come from Europe and North America generally. I think that's something that needs to change in the future. 23.4% were women serving as arbitrators in ICC cases.

Let's touch upon the generational aspect to the ICC Court. The Court generally appoints arbitrators who are younger than parties propose. I think the average age of party nominees is about 56 years old. The average age for Court appointments is 50-51 years old.

Sometimes parties ask us to produce lists of individuals that they can then strike and rank. So definitely diversity in all its forms is considered when producing names for such lists. Furthermore, we have this rule that usually we will not appoint, unless in exceptional circumstances, a single individual more often than once a year. That helps greatly to increase and diversify the pool of arbitrators so there are no repeat players in the process. I can also mention, because we don't have a roster, we rely a lot on national committees. There are guidelines also on diversity of candidates nominated by national committees.

An interesting fact here. 75% of arbitrators in ICC cases are nominated by the parties or jointly nominated by the co-arbitrators when it comes, for example, to the president of the tribunal. So, the ICC court only intervenes in 25% of cases where we have to make an appointment. I mean there's a lot that we can do but

the vast majority of the appointments are done by the parties, so there's a lot to be done on the party-side too.

**OY: It does sound like ICC is doing a lot to increase the different types of diversity, but do you find that the users ever demand a type of diversity, whether it be from a gender perspective or nationality or other things?**

MK: Absolutely, I think that's part of the conversation with the users. You will often hear from the users that they want the lists to reflect their own identities and the nature of global business now. Global business is a diverse environment or at least getting more diverse than it used to be. Users expect the same from arbitral institutions when they have a roster, or when they provide a list of potential arbitrators for consideration for a case. Users are making those demands and we have to be able to respond to those demands.

**JP: So just to close out, as you know, there's always a hot issue in arbitration. What do you think the next big hot button issue in international arbitration is going to be?**

MK: I won't be very original with this answer. As you all know, there are lots of different arbitration service providers and there are some international commercial courts out there also open to resolving international commercial disputes. So, there's really a race to the top. Some people may think this is kind of a race to the bottom.

We can offer the cheaper, quicker service, but the race is really kind of upwards: who can provide the best quality services? And that ties in with what needs to be our focus going forward. It's one that you mentioned before: the need to focus on SMEs. They are a huge and important part of the global economy that have been really affected by the COVID-19 pandemic as courts are backlogged. They are looking to arbitral institutions to provide solutions and we want them to go back to doing business. It's really important that we communicate to them. We can help

them with low and medium sized disputes. It is not to say that we shouldn't be focusing on big disputes, we should, but the pie is much bigger than that. So, we have to look at how we improve the arbitration process.

Let's not just focus on arbitration. Let's also focus on dispute avoidance mechanisms, mediation and dispute boards. Things that we already offer at the ICC, but we need to talk a bit more about them.

Expedited procedures, we talked about it before, and that's something also this needs to be highlighted. We have developed this huge amount of procedural redundancy in how we structure arbitrations. You know how procedural order number one is put together, how the procedural timetable is done. We need more innovation in the process, and I think it needs to be reinvented to make it more aligned with the needs of users of arbitration.

**JP: That's quite right, and I think that's all very consistent with the notion of arbitration as a flexible dispute resolution process where the cloth can be cut to fit the dispute. On that note Marek, thank you very much on behalf of myself, Özge, YCAP and the CJCA. This has been a really great experience. We thank you for your time.**

MK: Thank you for having me.