



Confronting Chaos, Embracing Conflict Global Webinar Series Highlights From the Second Installment



By **Ranse Howell**

On February 9, 2021, JAMS, the Weinstein International Foundation and the Union Internationale des Avocats (UIA) launched the second installment of our Confronting Chaos, Embracing Conflict Global Webinar Series, with a focus on Latin America. Similar to the first webinar in the series, which had participants from 54 countries, this regionally focused presentation had participants from 35 countries, including

11 in Latin America. Over 160 participants joined from nearly 30 partner organizations and institutions, which demonstrates the interest in collaborative alternative dispute resolution (ADR) within the region.

Keynote Address — “Consider the End Game: It Is Not Always Worth the Fight”

This was delivered by Elisabeth Eljuri, an international practitioner who has served as head of Latin America for a global law firm and general counsel for Sierra Oil & Gas, who spoke about the business imperative of collaborative dispute resolution. While this is something that JAMS and many in the ADR community have been promoting for years, even before the emergence of COVID-19-related disputes, Eljuri’s business experience within the region supported the need for rethinking how we approach effective dispute resolution. In particular, Eljuri asserted that businesses will need to be “flexible, resilient and adapt to change.” Adapting to change was the theme of the keynote. In my own experience working with teams in conflict and crisis, too often organizations fail to change how they approach relationships with key stakeholders. I agree with Eljuri that in order to provide solutions to businesses, we must first understand their needs, concerns and challenges. This is more relevant now, as businesses are emerging from mandated closings into a new, unrecognizable world where systems and processes have adapted, and new norms have to

be created. Also, the mechanisms of dealing with commercial conflict and identifying solutions may need to be adapted in order to ensure survival for all.

Panel One: Collaborative ADR Solutions

This was moderated by Hernando Otero, mediator, arbitrator and lecturer of American University in Washington, D.C., who shared his experiences as a neutral in Latin America. In a poll of webinar participants, 84% believe that there will be an increase in the use of existing dispute resolution mechanisms, through formal or informal processes, as a result of COVID-19. So while the focus of the discussion was not on COVID-19 or COVID-19-related disputes, the impact that the pandemic has on practice and need could not be ignored.

Macarena Letelier Velasco, executive director of the Santiago Arbitration and Mediation Center in Chile, spoke about the center’s success in resolving disputes arising from the pandemic via an innovative mediation program that was introduced through government endorsement and the Chilean Chamber of Commerce’s support. Over 1,000 pro bono mediations were offered to micro, small and medium-sized enterprises that had claims of \$120,000 or less. These were conducted online and were effective in providing relief for many parties. This is one way that institutions have adapted their products and services to meet business needs.

Mariana Souza provided some background on the use and availability of arbitration and mediation in Brazil. Like many civil law countries, Brazil has a law on both arbitration and mediation; however, their use and suitability is dependent on support from the government. Souza posed two questions: How much government support is necessary, and when does this become counterproductive for adoption and use by the broader legal and commercial community? Mediation is seen by many as a valuable mechanism for many disputants; however, it is often linked to the court. Therefore, there needs to be greater awareness of the use of mediation and non-adjudicative processes,

something that has increased as many jurisdictions have introduced a range of ADR processes.

The Singapore Convention on Mediation was briefly discussed, and while there have been many signatories to it, the true value is not in the mechanism itself, but rather the exposure and legitimization of something that has been widely used to settle cross-border disputes (mediation). What was excellent about this panel, and the panel that followed, is that we were able to hear from businesses and those that advise them.

M. Cristina Cárdenas, partner at Reed Smith in Miami, spoke of the need for greater sophistication and broader options in dispute processes. In order for parties to understand what is available, legal advisors must understand all of the mechanisms available, their suitability and how to draft these in their contractual agreements. However, I have found that there is a lot of misunderstanding regarding the importance of a robust and forward-looking contract clause. Parties need to consider not if there is a dispute but when. Any goodwill and trust developed during the negotiation and drafting stages will often be eroded when individuals look to the contract for a solution when the contract terms have been breached and find that it does not provide adequate direction. Another thing that was mentioned was the need to prepare, negotiate and identify options so that when a dispute does arise, there are available options beyond litigation. While mediation or arbitration may not be suitable for every case, they should be considered as part of the dispute management process.

Panel Two: The Business Case for ADR

This was moderated by Gary Birnberg, international mediator and arbitrator at JAMS, who repeated the focus of the webinar and declared that collaborative ADR is the future of dispute resolution. The panel identified the business case for ADR, something that I believe is often missing from the discussion. We heard from two representatives from global companies who have experience with international disputes with stakeholders. One company that has realized the potential of successful dispute management is AXA Mexico, under the direction of Javier Oroz Coppel. The company went from being litigation-focused to successfully settling more than 14,000 cases, across a broad range of claims. This is the sort of proactive engagement that companies should be considering as they work through their own challenges. For example, in the U.K., a recent Supreme Court decision favored the holders of business interruption insurance. While the insurance companies are looking to minimize their exposure, there is still benefit in maintaining relationships and ensuring the solvency of their clients. Oroz Coppel mentioned that it is essential that businesses adopt an ADR culture because not only will this help resolve commercial conflicts, it will also become something that clients/customers recognize as valuable.

Diego Faleck, mediator of large disputes and disasters in Brazil, spoke of his experience as a mediator in Brazil and the range of disputes

that he has been able to help settle. Again, he demonstrated the business need and focus of ADR, and rather than concentrating on the theoretical possibilities of mediation, he identified its practicality, speed and efficiency, as well as its usefulness in maintaining relationships and providing a way forward.

Patricia Garcia from VINCI Airports spoke of the challenge that companies like hers face when they have agreements with State entities. While arbitration is an established mechanism for dispute resolution, mediation faces many challenges. This is something that has been raised by many others: When dealing with the State, the challenge is authority and the willingness to reach agreement. When agreements have been reached, there is often a concern about who needs to provide final approval. Therefore, an integrated ADR system can help with the management of claims. However, this can only be achieved by careful consideration of all of the potential options; thus, diligent drafting and robust advice from outside counsel is always preferred.

Regarding how external counsel might work with clients, we heard from Claudia Benavides, partner and head of the Latin America DR practice at Baker McKenzie, about how all ADR processes should be client-focused and not process-driven. Benavides listens to the needs of her clients. As dispute resolution professionals, we understand the power of listening, and when this is supported by legal advisors, that provides a great opportunity for value creation rather than value claiming.

Networking Session

The webinar concluded with an opportunity for networking and connecting. The moderators of the breakout rooms presented a series of questions based on some of the themes that emerged during the webinar.

Conclusion

The webinar series is designed to bring together individuals who are supportive of a range of ADR mechanisms because of their experience and who are able to demonstrate the business case through their individual practices and those of others. We hope to continue the dialogue with this group, and we look forward to the next webinar in the series, which will focus on the Asia-Pacific region.

If you have any questions or comments, or would like to receive any additional information about JAMS or anything that was mentioned in this article, please contact us at global@jamsadr.com.

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