What We Have Learned from the Global Pound Conference

Practitioners, Parties, and Scholars Look Ahead

How Dispute System Design Can Help

The View from Asia-Pacific
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From the Chair

By Benjamin G. Davis

This issue of *Dispute Resolution Magazine* celebrates the remarkable achievement called the 2016-2017 Global Pound Conference (GPC) series and presents some highlights of these discussions and dialogues among a wide variety of dispute resolution stakeholders. Under the auspices of the International Mediation Institute and 40 years after the Pound Conference of 1976, the GPC series has given the world an opportunity to examine aspects of commercial dispute resolution in a combination of both local and virtual venues. I cannot overstate the importance of these efforts at both international and intra-national dialogue, particularly in today’s complex times. Strengthening the theoretical and empirical understanding of our field can only help all of us become more responsive to users and their needs in a manner that assures that justice is served — and lets users and practitioners alike see that this has been accomplished.

Even as we reflect on the current GPCs and the future of dispute resolution, we should take a moment and reflect on the vast contributions of Professor Frank Sander of Harvard Law School, who died in February. I suspect that just about everyone in our field in the United States, and many others all around the world, have a Frank Sander story. My own dates to 2000, when I was looking for a position in academia and returned to Harvard Law School to practice my “job talk,” one of the Byzantine hazing rituals that form part of the appointment process for law teaching positions. I had attended Harvard Law but had not taken a class from Professor Sander. Nevertheless, he took time out of his busy schedule to listen to me, ask the kinds of questions that I could expect during my interviews, and help me understand the difference between the law school recruitment process and what I had experienced in other professional settings.

I also honor Professor Roger Wolf, long-time Co-chair of the ABA Section of Dispute Resolution Committee on Mediator Ethical Guidance, from the University of Maryland’s Francis King Carey School of Law, who died recently. His work in the Section was always top-notch, and his trailblazer and peacemaker roles in developing dispute resolution in Maryland from the early 1980s forward were crucial.

Professor Sander’s and Professor Wolf’s foundational work helped generations of users and practitioners in conflict prevention and peaceful dispute resolution. On behalf of the Section of Dispute Resolution, I thank them both for their work and extend our sincerest condolences to their families. Our field will be forever indebted to them.

Honoring such great dispute resolution academicians and practitioners encourages us to keep in mind that each of us contributes to the strength of the national and international edifice of dispute resolution. In early February of this year, in a short article for the Maadhyam International ADR Summit held in New Delhi (as a nod to the rapid development of our field, the article was titled “Ancient History”), I was permitted to share my good fortune in witnessing Fali Sam Nariman and other remarkable Indian practitioners during the early 1990s working for the adoption of the Indian Arbitration and Conciliation Act of 1996, an extraordinary achievement. All of us who do this work today stand on the shoulders of Fali Sam Nariman, Roger Wolf, Frank Sander, and many others who have come before us. We hope to honor their work through our own, and we hope to make sure that everyone who seeks to contribute can find a place in the sun for their work. That is certainly what we are trying to do in the Section.

By the time this *Dispute Resolution Magazine* comes to you digitally or in print, we will be celebrating the Section’s 25th anniversary year and heading toward (or even attending) the 20th anniversary Spring Conference, which will run from April 4 to April 7, 2018, in Washington, DC. I hope that those participating take the occasion to do what I’ve tried to do in this column: share stories about those who
have left us and talk about what each of us can do to strengthen the edifice of dispute resolution. If you see any Section leaders at the conference, please make sure to say hello and tell us what you would like the Section to be doing this next year. Do not be shy.

If you have a good idea, I’ll be happy to share it with others in this space in my one remaining column as Chair.

Now, putting my money where my mouth (or my computer?) is, as an example and a means of encouraging scholarship, I pass along information and relay a researcher’s request for help.

Stacie I. Strong, a Professor of law at the University of Missouri who specializes in public and private international law, comparative law, and jurisprudence, is inviting people with experience as arbitrators or judges in national or international commercial disputes to complete an anonymous electronic survey that is part of an international empirical research project entitled “Survey on Legal Reasoning in Commercial Disputes” (IRB #2010449C). The survey is being conducted through the Center for the Study of Dispute Resolution at the University of Missouri School of Law, where she is a senior faculty member.

If you would like to participate in this survey, paste this URL into your browser surveymonkey.com/r/commercial-dispute-strong. Completing the survey should take about 20 minutes, and participation is anonymous. The survey will remain open until just before midnight Central Daylight Time on May 1, 2018. If you have any questions about this project, contact Professor Strong at strongsi@missouri.edu.

25/20, Baby! Here we are!

Benjamin G. Davis is a Professor of Law at the University of Toledo College of Law, where he teaches on topics ranging from contracts to international arbitration. He can be reached at ben.davis@utoledo.edu or on Twitter @bengriffdavis.

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Anyone closely connected to dispute resolution can probably point to the event that most of us believe sparked the revolution that created our field: the Pound Conference in St. Paul, Minnesota, in 1976. Named for Roscoe Pound, the legal scholar, teacher, and reformer who served as Dean of Harvard Law School in the 1920s and 1930s, the conference had the rather ambitious title “Agenda for 2000AD — The Need for Systematic Anticipation.” (This was actually the second so-called Pound Conference; the first one, at a 1906 meeting of the American Bar Association, featured a speech in St. Paul by Pound called “The Causes of Popular Dissatisfaction with the Administration of Justice.”)

The 1976 conference, and especially a presentation by Professor Frank Sander of Harvard Law (former Chair Emeritus of the Editorial Board of this magazine), prompted many changes in the US justice system, including the creation of the “multi-door courthouse” and the popularity of processes such as mediation.

The decades that followed the 1976 Pound Conference were full of promise, excitement, and growth, a time of “letting a thousand flowers bloom." Dispute resolution flourished in the United States, supported by court programs, case law, statutes, and even presidential executive orders (such as two signed by President Clinton requiring agencies and certain government counsel to make use of dispute resolution processes other than litigation). Beyond US borders, the movement spread through initiatives such as the
The Global Pound Conference series: by the numbers

- **29** events held in **24** countries
- **4** interactive sessions at each Global Pound Conference event divided the day into four separate sections:
  1. Access to justice and dispute resolution systems: what do users want, need, and expect?
  2. How is the market currently addressing parties’ wants, needs, and expectations?
  3. How can dispute resolution be improved? (Overcoming obstacles and challenges)
  4. Promoting better access to justice: What action items should be considered and by whom?
- **20 core questions** were divided among the four sessions at each event; attendees voted on the questions and discussed the results during each session
- More than **2400** people attended the local events
- **732** people participated online and voted
- More than **200** organizations supported the GPC series as global or local supporters
Woolf Reforms, which embedded dispute resolution in the civil justice system of England and Wales.

But as with many movements, eventually the momentum slowed. By 2014, almost 40 years after Professor Sander’s thought-provoking speech in St. Paul, the growth of mediation was stalling and some users were disenchanted about its effectiveness. Providers believed — and spoke often about — the many missed opportunities and the public’s poor understanding of the value of dispute resolution. What was needed, some said, was a “Big Bang” to shake up and expand the industry.

In the International Mediation Institute (IMI), the non-profit organization that aims to develop global professional standards for dispute resolution practitioners, observers noted that although a plethora of conferences focused on dispute resolution were available, most of those attending were providers who were just talking to each other. In addition, stakeholders around the world seemed fragmented, and despite many surveys about dispute resolution, there was little reliable, comparative, and actionable information that could help providers really understand what parties need and want to help them resolve their disputes on the local, national, or transnational level.

In October 2014, leaders at the IMI, with several partners, decided to sponsor a London meeting with the goal of gathering information about the future of the field, an event they hoped might be the first of similar meetings around the world: a Global Pound Conference (GPC) series. That meeting was a great success, and organizers set up a group to support future events to collect information from the user side of dispute resolution. This was, everyone believed, a timely opportunity to reassess the dispute resolution landscape and ask stakeholders everywhere what they think needs to change.

The original goal was to hold four meetings, but that soon blossomed to 15 and then 29 events in 24 civil-law and common-law countries in sophisticated and developing markets. To ensure that core information would be collected in a consistent way that also recognized differences in culture and opinions and allowed for some flexibility, organizers brought together major sponsors and created a uniform blueprint and technology for each local organizing committee. At each event, held between March 2016 and July 2017, five basic kinds of stakeholders — business leaders and inside counsel; outside counsel or advisors; academics; members of the judiciary and governments; and dispute resolution providers — were asked the same 20 questions. Anyone who could not attend in person was encouraged to vote online. The series was promoted through a website, articles, and blogs, and more than 3,000 people participated across the globe. The website had more than 333,000 page views and 8,100 unique visitors.

The series provided an almost-overwhelming amount of data, and in this issue we look at that data and some of the lessons learned from this “Big Bang” global conference series. Thomas D. Barton and James P. Groton, two experienced practitioners and observers, take a step back and analyze the voting results from the GPC. Three other experienced practitioners and scholars, Lela Porter Love, Lisa Blomgren Amsler, and Mansi Karol, look at how the GPC findings suggest that Dispute System Design can help us change the structure of what we do. Anita Phillips, based in Hong Kong, tells us more about how GPC participants in Asia-Pacific envision the future of dispute resolution there. A final short article looks at how we can carry this important conversation forward.

The GPC series was a truly remarkable collaborative, future-focused effort, one that at last attempts to incorporate the thoughts of users into workable blueprints. We hope this issue helps you understand where we are — and how we can create a bright future for our field.

— Deborah Masucci
A member of the GPC organizing committee and guest editor for this issue of Dispute Resolution Magazine ■
Forty Years on, Practitioners, Parties, and Scholars Look Ahead

The votes are in: focus on preventing and limiting conflicts

By Thomas D. Barton and James P. Groton

During the 40 years since the Pound Conference at which Harvard Law School Professor Frank Sander first suggested that some conflicts could be resolved in ways other than traditional litigation, alternative methods to address legal and business problems have been refined and reinvented in an evolving explosion of creativity. Thousands of talented dispute resolution professionals, lawyers, and community participants have been attracted to the practice of dispute resolution techniques such as mediation, arbitration, and other processes. From small claims court cases to billion-dollar multinational arbitrations, countless disputes have been resolved respectfully, efficiently, and often amicably using a variety of dispute resolution techniques.

Nevertheless, users of dispute resolution services and professionals in the field acknowledge that resolving conflict can still take an inordinate amount of time, require considerable costs, and even in some cases intensify hostilities. That recognition was part of the impetus for the 2016-2017 Global Pound Conference (GPC) series, the results of which we hope will spark new tools and practices toward averting and de-escalating conflicts.

By the conclusion of the Global Pound Conference process, thousands of delegates and participants had voted on 20 core questions that sought their views on dispute resolution, and online voting at the conclusion of the onsite conferences supplemented the data. The delegates represented all major stakeholders: parties (users of dispute resolution services, including business leaders and inside counsel); advisors (including outside lawyers); providers of dispute resolution services; and two kinds of influencers (academics and members of the government or the judiciary).

This enormous and ambitious undertaking was aimed at understanding how to best serve people in conflict. Future generations may look back on the 1976 Pound Conference and the Global Pound Conference series and recognize their enabling role in a movement away from power-based adversarial confrontation toward the search for solutions based in human consent, shared interests, mutual regard, and strong relationships.
The overall GPC voting results
Across the globe and consistently among all participant groups, the GPC voting results and other answers to questions supported the following conclusions:

- Dispute resolution should be conceived and practiced earlier in the trajectory of risks that can develop into conflict, escalating from differences of opinion to arguments, aggression, and finally formal dispute resolution efforts;
- Where possible, risks should be understood and addressed in advance so that problems never arise; and
- Where prevention fails, steps should be initiated to de-escalate, contain, or provide “real-time” ad hoc resolution of conflicts so that formal dispute resolution can be avoided.

Detailed voting results
The questions asked during the third session of the Global Pound Conference were focused on learning how dispute resolution can be improved. Question 3.2 asked specifically “To improve the future of commercial dispute resolution, which of the following processes and tools should be prioritized?”

- Adjudicative dispute resolution methods (litigation or arbitration);
- Combining adjudicative with non-adjudicative processes (e.g. arbitration/litigation with mediationconciliation);
- Encouragement by courts, tribunals, or other providers to reduce time and/or costs;
- Non-adjudicative dispute resolution methods (mediation or conciliation);
- Pre-dispute or pre-escalation processes to prevent disputes;
- Technology to enable faster, cheaper procedures (e.g. Online Dispute Resolution, electronic administration, remote hearings).

The GPC Cumulative Data Results from the 29 conferences’ show that “Pre-dispute or pre-escalation processes to prevent disputes” was the top choice among all alternative processes. Under the GPC system for ranking preferences, this pre-dispute/pre-escalation choice received a score of 3363, with the closest alternative receiving a relatively distant 2929. In the “cross-sorting” of voting results, the pre-dispute/pre-escalation alternative was the top choice of parties, advisors, and influencers — every stakeholder except the two provider groups (adjudicative and non-adjudicative) — and even for them, the pre-dispute/pre-escalation choice received secondmost votes.

This outcome of the “how can we improve” question correlates well with the response to a key question in the fourth session devoted to the general subject of what action items should be considered and by whom. This final — and perhaps most significant — question in the survey asked “what innovations/trends are going to have the most significant influence on the future of dispute resolution?” The option “Changes in corporate attitudes to conflict prevention” received a score of 2959, second to the strongly compatible alternative “Greater emphasis on collaborative as opposed to adversarial processes for resolving disputes,” which received 3361 points. These two alternatives were the consistent number 1 and number 2 choices across every stakeholder group.

Future generations may look back on the 1976 Pound Conference and the Global Pound Conference series and recognize their enabling role in a movement away from power-based adversarial confrontation toward the search for solutions based in human consent, shared interests, mutual regard, and strong relationships.
History of prevention efforts

These preferences for collaborative pre-dispute processes are not new. During the 1950s, the lawyer and legal scholar Louis M. Brown called for the development of “Preventive Law.” Since that time, research and practice have moved, particularly in the construction industry, toward finding and developing methods for preventing and de-escalating conflict. As far back as a decade ago, a group of dispute resolution thought leaders predicted that the field’s next frontier would be the “anticipation of conflict” — thinking ahead.

The advantages of anticipating and averting problems have percolated even longer through time-honored adages such as “a stitch in time saves nine” and “an ounce of prevention is worth a pound of cure.” These life maxims are not hollow: in many aspects of life, preventing a problem is almost always more effective, efficient, and relationally respectful than waiting for cost or injuries and then trying to fix both the problem and the damage it has inflicted.

Why, then, are we only now seeing early intervention tools as the most pressing need for the dispute resolution community? Perhaps today’s robust calls for prevention and de-escalation are the product of the experiences, successes, and acknowledgement of the limitations of the 40-year dispute resolution movement. During that period, dispute resolution professionals have been exposed to thousands of problems within a variety of organizations, transactions, or domestic relationships, problems that have then escalated beyond the parties’ capabilities of self-resolution. Reflecting on these escalations may have prompted dispute resolution providers to uncover the root causes of the problems and imagine steps that might have been taken at an earlier stage to avert or defuse the conflict. This same exposure has probably alerted the dispute resolution community to see how frequently the same kinds of problems — identical or slightly camouflaged — seem to recur and to recognize the potential value of methods to prevent and de-escalate conflict.

As a result of the voting on the GPCs core questions — the attitudes and preferences it reveals, the training it may ultimately facilitate, and the creativity it may inspire — prevention and de-escalation may now become more central to the future of dispute resolution and to the work of practitioners.

Challenges in training professionals in prevention skills

The advantages of anticipating and averting problems have percolated even longer through time-honored adages such as ‘a stitch in time saves nine’ and ‘an ounce of prevention is worth a pound of cure.’

To satisfy the urgings of the dispute resolution community for a new collaborative approach to resolving conflict, tools for prevention and de-escalation must be identified, refined, and widely trained. These techniques are not necessarily intuitive, nor do they fit easily with the mentality or procedures ingrained in lawyers (who now make up such a large portion of the dispute resolution community) by their formal legal education. That relative unfamiliarity with the ideas and needed skills may also have contributed to the delayed recognition of their value for dispute resolution practice. At the outset of the dispute resolution movement, arbitration and mediation were arguably more comfortable methods for lawyers than prevention and de-escalation. Indeed, ideas about the origins of disputes within systems of relationships, and how to make early interventions to avert or stem the problems, remain rare within legal education.

Lawyers are traditionally trained, especially in the formative first year, by reading appellate judgments. Inside virtually every appellate court report, the damage has been done. The roles of lawyers and judges are essentially reactive and post hoc: they gather evidence to reconstruct a moment of potentially blameworthy behavior. They assess responsibility and calculate compensatory damages. Rarely is a case subjected to an “autopsy” in which the root causes of the dispute are investigated. Equally rarely is an afterthought imagined, with some idea of how the litigation process itself may have affected the parties’ future interpersonal or business relationships, or their individual well-being. To the 1L student learning to “think like a lawyer,” legal problem-solving is almost
exclusively portrayed through events that have already happened, in a past tense where cold, immutable historical facts were mapped onto the elements of legal rules to determine binary issues of liability.

**Some prevention tools**

Fortunately, the past four decades have produced a wealth of dispute prevention and resolution tools that enable problem-solving in the present tense: parties are now being taught how to steer the conversation away from blame for past events toward finding immediate common ground and moving forward. Letting loose of the past and of any need to vindicate legal rules permits the parties to emphasize “What can we do, right now, that will be most constructive?” or ask “How can we focus principally on fixing the problem, rather than fixing the blame?”

The challenge of the GPC voting results, and next step for the dispute resolution community, is to refine and train for tools that operate in the future tense so that dispute resolution professionals can:

- Discern risks or frictions well ahead of their clients’ perceptions;
- Help parties understand the root causes of those risks; and
- Suggest interventions that could at least limit those risks and perhaps even transform potential problems into positive opportunities.

These goals are realistic; they are an extension of the effective counseling and neutral advising that many dispute resolution professionals now offer. Nor do they imperil the livelihood of dispute resolution professionals. Rather, they suggest a broader skill set and expansion into roles more like a designer than a repair person.

Fortunately, many in our field have made a strong start. Practical and successful preventive and de-escalation methods have been well described, and their underlying concepts and implications well explored, in a variety of materials generated in the United States and in Europe (under the banner of “Proactive Law.”) Construction industry leaders have collaborated over several decades to develop effective tools to “keep the peace” on construction projects. As a result, this sector enjoys widely adopted techniques to deal with the high risks that emerge from high-capital, deadline-driven, multi-party, and intricate projects. Building on this experience and others in international settings and US labor relations, in a resource titled The Negotiator’s Desk Reference, Christopher Honeyman, Andrea Kupfer Schneider, and James P. Groton (one of the authors of this article) have summarized and analyzed various methods. They categorize the techniques as “Problem Prevention;” “Problem Solving;” and “Dispute De-escalation and ‘Real-Time’ Resolution.”

Space limitations prohibit more than a simple listing of these tools, but their cataloguing below reveals their diversity and practicality.

The Problem Prevention tools include pre-dispute agreements to engage in:

- Good, open communications;
- Realistic allocation of risks;
- Joint initial analysis of potential problems;
- Incentives to parties to encourage cooperation; and
- Efforts to establish a partnering relationship.

Problem-solving tools include pre-dispute contract clauses that are useful to avert problems or facilitate quick negotiation methods to keep threats contained:

- Notice and cure agreements
- Covenants of good faith and fair dealing
- Agreements that encourage rational behavior
- Agreements to encourage the sharing of basic information
- A variety of ongoing “in-house” problem-solving tools such as:
  - Appointing an ombuds

The challenge of the GPC voting results, and next step for the dispute resolution community, is to refine and train for tools that operate in the future tense . . .
• Charging dispute transaction costs against the budget of the department in which the dispute arose, to internalize awareness of the financial impacts where problems are permitted to escalate
• Instituting sensible document production and retention policies as well as memos to internal files that memorialize good-faith efforts to prevent or resolve problems
• Creating crisis management policies and checklists
• Conducting periodic legal audits and feedback mechanisms to help foresee problems

Finally, several possible dispute de-escalation and “real-time” resolution tools may be agreed upon at the pre-dispute stage:

• Negotiations
• Step Negotiations
• Use of a “Standing Neutral”
• Standing Arbitrator
• Standing Mediator

The general themes of these future-tense tools are to “think ahead” thoughtfully, with as much understanding as possible of the relationships and environments that form the context for problems and disputes; enhance communications and share information through as many channels as feasible, establishing early warnings and good feedback loops to analyze and take responsibility for problems as they arise; and encourage empathy and fairness in dealings, because trust and mutual accommodations can ward off many disputes or unnecessary adverse consequences. Finally, the authors urge people to establish standing relationships with experts in the field of the enterprise (who could include dispute resolution professionals) whose simple presence in projects may, as proven in the construction industry with standing neutrals, paradoxically instill a sense of self-reliance and collaborative problem-solving.

Where next?

On the more distant horizon are novel efforts to enhance prevention and goal-seeking uses of the law itself. Lawyers and information designers have collaborated in a series of “Legal Design Jams” to promote comprehensibility, self-help, and stronger compliance with legal requirements. The hoped-for results — backed by some early verification — are that making law more genuinely accessible to its ultimate users will advance its functionality as well as its cultural acceptance.

A second set of initiatives seeks prevention and de-escalation from a completely different perspective: by automating various legal operations and generating open-sourced, fair-minded modules of common legal activity that can then be embedded as computer-readable “prose objects” into contracts. These coded clauses execute various real-world operations seamlessly, once contractual parameters are electronically verified. An indelible record of unfolding transactions can then be reliably stored and shared through public-ledger block-chain technology.

With information from the voting on the core questions at Global Pound Conference meetings all around the world, these and other dispute prevention and resolution methods — in practice as well as design — will continue to evolve, at a pace of innovation that may now accelerate. We are indebted to the Global Pound Conference initiative and to the rich data it has generated to help guide the future.
Endnotes
2 Votes on the multiple-choice questions were weighted. The first choice scored 3 points, second choice 2 points, and third choice 1 point.
4 Louis M. Brown, PREVENTIVE LAW (1950).
5 Christopher Honeyman et al., The Next Frontier is Anticipation: Thinking Ahead about Conflict to Help Clients Find Constructive Ways to Engage Issues in Advance, 25 ALTERNATIVES TO THE HIGH COST OF LITIGATION 99 (2007).
7 Reflections and research on the impact of legal system encounters on personal well-being is one general theme of Therapeutic Jurisprudence. See generally http://law2.arizona.edu/depts/upr-intj/.
13 James P. Groton et al., Thinking Ahead [Chapter 70], in THE NEGOTIATOR’S DESK REFERENCE (Christopher Honeyman & Andrea Kupfer Schnider eds., 2017).
15 Gerlinde Berger-Walliser et al., From Visualization to Legal Design: A Collaborative and Creative Process (54 AMER. BUS. L. J. 347 (2017); Thomas D. Barton et al., Visualization:

16 “Legal Design Jams” were originally created by Information Designer Stefania Passera. See Margaret Hagan, Legal Design Jam: A Sketchnote, Open Law Lab (Oct. 26, 2013), http://www.openlawlab.com/2013/10/26/legal-design-jam-sketchnote/.
Dispute System Design Can Help

To bring about the future envisioned by GPC participants, we need to change the structure of what we do

By Lela Porter Love, Lisa Blomgren Amsler, and Mansi Karol

The Global Pound Conference (GPC) was a historic series of meetings around the world involving knowledgeable stakeholders in commercial dispute resolution, and the aggregated data from the 29 events in 24 countries reveals an emerging consensus about how we can improve commercial dispute resolution. Participants want methods to help them prevent and de-escalate conflict and combine both non-adjudicative and adjudicative processes to resolve it. They want business schools and law schools to train their graduates to provide and use commercial dispute resolution with these features.

What we have learned from the GPC, in short, is that commercial dispute resolution practitioners need to offer multiple steps and processes to users for appropriate cases. And this means using Dispute System Design.

Overview of an emerging consensus between users and providers

The results of the global voting for the GPC suggest several areas of alignment between users and providers. To improve future commercial dispute resolution, GPC participants who are users or providers agree that:

- Combining adjudicative and non-adjudicative processes creates the most effective dispute resolution process.
- Developing pre-dispute and pre-escalation processes is a priority.
- Educating future practitioners in business and law schools — as well as the wider business community — about commercial dispute resolution is the most effective way to improve understanding of dispute resolution options.

Table 1, on the following page, reflects the aggregated vote totals for the two top-choice answers for three key GPC selected questions related to this consensus.
Table 1: Aggregated votes of all Global Pound Conference delegates on three selected questions

<table>
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<th>Currently, the most effective commercial dispute resolution processes usually involve which of the following?</th>
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<tbody>
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<td><strong>Most popular answer:</strong> Combining adjudicative and non-adjudicative processes (e.g. arbitration/litigation with mediation/conciliation)</td>
</tr>
<tr>
<td><strong>Second-most popular answer:</strong> Non-adjudicative dispute resolution methods (mediation or conciliation)</td>
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<table>
<thead>
<tr>
<th>To improve the future of commercial dispute resolution, which of the following processes and tools should be prioritized?</th>
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<tbody>
<tr>
<td><strong>Most popular answer:</strong> Pre-dispute or pre-escalation processes to prevent disputes</td>
</tr>
<tr>
<td><strong>Second-most popular answer:</strong> Combining adjudicative and non-adjudicative processes (e.g., arbitration/litigation with mediation/conciliation)</td>
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<tr>
<th>What is the most effective way to improve parties’ understanding of their options for resolving commercial disputes?</th>
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<tr>
<td><strong>Most popular answer:</strong> Education in business and/or law schools and the broader business community about adjudicative and non-adjudicative dispute resolution options</td>
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<tr>
<td><strong>Second-most popular answer:</strong> Procedural requirements for all legal personnel and parties to declare they have considered non-adjudicative dispute resolution options before initiating arbitration or litigation</td>
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Dispute System Design and GPC participants’ emerging consensus

As part of the Pound Conference in St. Paul, Minnesota, in April 1976, Frank Sander, the Harvard Law School Professor whose “multi-door courthouse” speech many cite as the beginning of our field, advocated “fitting the forum to the fuss.” Later, he and Professor Stephen Goldberg of Northwestern Law identified critical factors for that undertaking, such as the nature of the case, the relationship between the parties, the relief sought by the plaintiff, and the size and complexity of the claim. Since any conflict, issue, dispute, or case submitted to an institution for managing conflict will be governed by a system of rules, processes, steps, and forums, that system becomes critical to the successful resolution of the matter. Authors and scholars William Ury, Jeanne M. Brett, and Goldberg called this Dispute System Design (DSD).

Effectively, GPC participants’ emerging consensus calls for changes in the DSD for commercial dispute resolution. International commercial arbitration provides a stable DSD for conflict arising out of international commercial transactions. However, for the question regarding the most effective processes, GPC participants’ first and second choices involve new steps — either combining arbitration as an adjudicative process with non-adjudicative processes (including mediation) or using non-adjudicative processes alone. While there is no question that GPC participants already use these processes, the focus on a combination is a new emphasis.

Similarly, GPC participants’ first choice for another question regarding how to improve future commercial dispute resolution also calls for innovations in DSD; they prefer pre-dispute and pre-escalation processes to prevent disputes, together with combining adjudicative and non-adjudicative processes.

For still another question in a later session, GPC participants reflected on how to improve understanding of commercial dispute resolution options. While their first choice entailed improving education in business and law schools, their second choice is also a DSD move. However, it is one that arguably applies to the larger context within which adjudicative processes like arbitration and litigation occur: the courts. By inserting a requirement that legal personnel and parties declare they have considered non-adjudicative alternatives before they initiate arbitration or litigation, the GPC participants effectively suggest changing the DSD for courts supervising adjudicative processes.
These structural changes already exist to some extent in various national contexts, as *Dispute Resolution Magazine* recently explored in its Fall 2017 issue focusing on dispute resolution in the United States and Europe. The GPC results have also prompted further study on DSDs that combine processes.

**Design choices for combining adjudicative and non-adjudicative processes**

Dispute System Design, specifically DSD that uses mixed modes of pre-dispute, pre-escalation, and dispute resolution processes, also can profoundly improve access to justice in the commercial arena.

In considering these choices, it is important to keep in mind the variety of cultural, national, and legal contexts in which commercial dispute resolution occurs. For example, depending on national context, the word “conciliation” may refer to a non-adjudicative or an adjudicative process. In the United States, it is often used to mean mediation; in Europe, it may refer to a process that resembles arbitration.

Combining two or more dispute resolution processes to address a dispute can be characterized as a mixing of modes. As practitioner Jeremy Lack writes, such combination of processes could be done “sequentially, in parallel or in combination” and typically would involve the use of both consensual and adjudicative approaches. So, for example, mediation might be used in combination with non-binding or binding arbitration to have the benefits of an interest-based party-driven proceeding and also have an evaluation or determination by an arbiter to inform the outcome or end the dispute with an award if the parties are unable to decide.

Examples of mixed modes include Arb-Med, Med-Arb, and hybrid combinations of neutrals in teams:

1. **Arb-Med:** This mixed process starts with arbitration where the neutral makes an award and instead of immediately announcing it to the parties seals it in an envelope and keeps it secret. Then the neutral (who could be the same or a different person) becomes the mediator, helping the parties come to a negotiated settlement. The parties agree beforehand that if they are unable to settle in mediation, the arbitrator’s award will be revealed and the parties will be bound by that outcome. This procedure has the advantage that the parties understand each other’s perspective and reasoning — as presented first to the arbiter — before they try to work out a consensual resolution. The parties are assured of finality to the resolution process but have the chance to reach a creative resolution themselves.

2. **Med-Arb:** This process, which has been called binding mediation, is the reverse of Arb-Med described above. Here the neutral begins as a mediator. If the parties cannot settle all issues in mediation, the neutral (or another neutral) steps in as an arbitrator and renders an enforceable decision on those issues. One concern with this procedure is the impact of private or caucus information shared with the neutral as mediator that might influence the neutral if he or she shifts to an arbitral role. This concern is eliminated if the arbitrator is a different person.

3. **Hybrid combinations of neutrals in teams:** Combinations of neutrals as a co-mediation team, a hybrid in which a mediator and conciliator or arbitrator work together, is useful in business relationships where there is need for facilitative and evaluative skills. The idea is to appoint a team of at least two neutrals, one of whom is a mediator (facilitative) and the other is a conciliator or an arbitrator (evaluative). The mediator works closely with the conciliator or arbitrator to optimize the chances of reaching an amicable settlement.
By using a combination of neutrals as a team, the parties can have the benefits of both. This model allows the parties to understand their adjudicative alternative while seeking a deal that maximizes value for everyone.5

There are dangers in mixed modes, and parties, their lawyers, and any neutrals involved should fully understand the procedures they use, their consequences, and the issues and opportunities that combining dispute resolution processes present.6 ADR provider organizations (for example, JAMS and the AAA) should carefully examine various mixed dispute resolution processes before offering them.

Through the combined efforts of the College of Commercial Arbitrators (CCA), the International Mediation Institute (IMI), and the Straus Institute for Dispute Resolution at Pepperdine School of Law, a Joint International Task Force on Mixed Mode Dispute Resolution has been formed to get started on this work. This group, whose report is due at the end of this year, has been examining and seeking to develop model standards and criteria for ways to combine different dispute resolution processes that may involve the interplay between public or private adjudicative systems (e.g., litigation or arbitration) with non-adjudicative methods that involve the use of a neutral (e.g., conciliation or mediation).7 The task force is organizing its work through six different working groups, assigning each to work on the topics of mediators using nonbinding evaluation or proposals; mediators setting the stage for dispute resolution processes (also called Guided Choice); mediators changing hats (Med-Arb, for example), arbitrators setting the stage for settlement (such as Arb-Med-Arb); consent awards and enforceability of mediated settlement agreements; and interaction between mediators and arbitrators.8 Each working group is gathering information on factors influencing mixing of modes, including national culture and legal traditions, the legal professions and local norms, practices in specific areas of conflict, and parties’ priorities in specific transactions or circumstances.9

Teaching dispute resolution in business and law schools

In another remarkable sign of consensus, GPC participants agreed on the need for better education about dispute resolution and management in both business and law schools around the world.10 As every successful manager knows, resolving conflicts before they end important relationships is just good business, and avoiding risks that can lead to a dispute is far more cost-effective and productive than counting on winning that dispute in court down the road. So it’s not a great leap to say that business leaders need to understand dispute resolution processes such as negotiation, mediation, arbitration, and litigation.11

In the 1990s, Professor Roy J. Lewicki of the Fisher College of Business at Ohio State University recognized the value of negotiation courses taught in business schools. The study of dispute resolution, he noted, was becoming an interdisciplinary field bridging the gap between business, law, and other disciplines.12 Today’s business schools need to adopt risk management and dispute resolution curriculum in the same way they do courses in risk assessment and compliance. A good risk management program should include training in the field of dispute resolution modalities. Negotiation and mediation classes will build the skills, knowledge, and experience that successful business decision makers will inevitably need.13 Dispute System Design should be part of all such courses.

Many law schools have expanded their course and clinic offerings on negotiation, mediation, arbitration, and collaborative law, all of which give students a platform to gain both theoretical understanding and get actual experience. In most American law schools today, dispute resolution courses tend to be structured along the lines of experiential learning. Students study negotiation, mediation, or arbitration theory and apply it to practice settings by representing live clients or participating in role-play simulations in small group

Dispute System Design, specifically DSD that uses mixed modes of pre-dispute, pre-escalation, and dispute resolution processes, also can profoundly improve access to justice in the commercial arena.
settings. To enhance the experiential piece, these courses generally require periodic or weekly journals where students reflect on their practice. These reflections help students analyze their strengths and weaknesses and provide an opportunity to hone their skills.\textsuperscript{14} Also, various national and international arbitration and mediation competitions provide a valuable cross-cultural opportunity for the future dispute resolution resolvers to polish their skills and build a network of global connections.\textsuperscript{15} The ICC International Commercial Mediation Competition in Paris and the Willem C. Vis International Commercial Arbitration Moot in Vienna and Hong Kong are two of the most illustrious, drawing students from around the world.

The advantages are many: as many professors and students know, dispute resolution courses enhance students’ communication and persuasive skills and problem-solving abilities. Students also learn to appreciate the role of perception and recognize human emotions at play in disputes. Thorough knowledge of these skills will help lawyers better understand the needs of their clients\textsuperscript{16} — and help them design better dispute systems for those clients.

But law schools can do more. Today dispute resolution programs with any depth are still limited to a cluster of schools that have focused on dispute resolution, and at many schools where mediation and related courses are electives, law students can get their degrees without learning anything about dispute resolution. Bar exams have very cursory coverage of dispute resolution, and such courses are not required for law school accreditation by the American Bar Association, so we have lawyers graduating who cannot effectively advise their clients on processes that may be mandatory (by contract or court rules) or just in the client’s best interest. We still hear lawyers and the press confusing arbitration and mediation. This is a hurdle we need to clear.

**Conclusion**

The GPC was a breakthrough event, a first-time international dialogue on improving commercial dispute resolution that involved knowledgeable and experienced stakeholders. It suggests we need to explore new dispute system designs that move commercial conflict management upstream, before it ripens into a case in mediation or arbitration, by looking at pre-dispute, pre-escalation, and non-adjudicatory processes combined with downstream adjudicatory ones. The field must explore how to combine processes with care.

The first Pound Conference was a 1906 speech delivered by Roscoe Pound, a Nebraska law professor, to a group of lawyers, judges, and academics in Minnesota during a meeting of the American Bar Association titled “The Causes of Popular Dissatisfaction with the Administration of Justice.” As we all know by now, the second Pound Conference of 1976 brought Frank Sander’s suggestion that litigation was not the only way to resolve many disputes. And the GPC, the third Pound Conference, has brought us a remarkable blueprint. Let’s build thoughtfully on the emerging consensus reflected in the GPC’s aggregate data so we do not need a fourth Pound Conference anytime soon.

In another remarkable sign of consensus, GPC participants agreed on the need for better education about dispute resolution and management in both business and law schools around the world.

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Endnotes
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6 Id. at 379.
11 David S. Weiss, Business Schools Need to Adopt more Conflict Resolution into their Curriculum, Corporate Mediation Journal (2017).
13 Weiss, supra note 11.
14 Cathy Cronin-Harris, Why Take ADR Courses In Law School, (March 2008), http://www.americanbar.org/content/dam/aba/directories/dispute_resolution/0177_croninhar-ris_why_take_adr_classes.authcheckdam.pdf.
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Asia-Pacific GPC participants want enforceable decisions and efficient processes

By Anita Phillips

Six Asia-Pacific cities hosted Global Pound Conferences (GPC): Singapore, which was the site of the GPC launch event in March 2016; Hong Kong, where participants met in February 2017; Chandigarh, India, and Bangkok, Thailand, where events were held in May 2017; Sydney, Australia, and Auckland, New Zealand, where participants met in May 2017.

Each conference addressed the demand side (commercial party perspectives); the supply side (what advisers and providers are delivering to commercial parties); the key obstacles and challenges to access to justice; and what action items need to be addressed and by whom. As at all the meetings in the series, participants voted as a stakeholder type: a party (in-house counsel); an adviser (a private-practice lawyer); a provider (a judge, arbitrator, mediator, or someone with an associated institution); and an influencer (an academic, a government official, or a policy-maker).

Outcomes

During the first session of each conference, delegates were asked to select the most important outcome for parties to commercial dispute resolution. In Hong Kong, all stakeholder types chose financial outcomes (e.g., damages, compensation) as the top priority. In other venues across Asia, parties (and sometimes other stakeholders) ranked action-based outcomes the most highly. This suggests some division in those jurisdictions between stakeholder groups, in particular what parties look for and what the market (generally advisers and providers) deem most important.
Interestingly, delegates in Oceania generally viewed “preserving relationships” as a low-priority outcome. In Hong Kong, delegates voted in a similar way, ranking “preserving relationships” well behind financial or action-based outcomes. At other conferences across the region, participants (usually at least parties) saw preserving relationships as more important, suggesting the potential for less adversarial attitudes to resolving conflict in those jurisdictions.

**Efficiency and collaboration**

In keeping with the global GPC data, Asia-Pacific delegates voted efficiency a high priority when assessing parties’ dispute resolution options. In Bangkok, however, advice from lawyers was thought to be more influential when assessing options, indicating a more traditional role between lawyer and client there. Elsewhere in Asia-Pacific, participants said that parties and lawyers working collaboratively was important, which could suggest greater scope for consensus-driven, party-centric processes such as mediation in those jurisdictions. However, familiarity with dispute resolution processes was also universally viewed as highly relevant when making choices, indicating a perpetuation of “the same old processes” (for example, litigation and arbitration). This seems to be a consistent concern unless parties and their lawyers are actively steered onto a different course (by escalation clauses or mandatory mediation schemes and rules). With mediation usage still lagging considerably behind litigation and arbitration in the region, there is clearly a preference by lawyers and their clients to stick to what they know. This trend is likely to limit the use of mediation unless and until parties and lawyers think they have to mediate.

**(Re)defining mediation success**

At the GPC gatherings, delegates were asked what they think is achieved by participating in mediation, including the possibilities of “reduced costs” and “improving/restoring relationships.” Surprisingly, these did not always score most highly in Asia-Pacific. In Chandigarh, India, parties thought it primarily helped them comply with court rules or contractual clauses providing for mediation; it is no coincidence that in most Indian states, as soon as a case is filed at court, the parties must select and pursue alternative dispute resolution (usually mediation). In Auckland, parties said that first and foremost, mediation helped them retain control of the outcome. Interestingly, in Hong Kong, parties said that “acquiring better knowledge about the strengths and weaknesses of the case or likelihood of settlement” was mediation’s most valuable feature. In Bangkok, parties also judged this to be the most important aspect of mediation (in a tie for first place with “improving/restoring relationships”).

These varied responses prompt the question: “why do disputing parties mediate?” The data appears to offer several answers, depending broadly on the environment and the sophistication of the parties. Experienced users of mediation often regard mediation as successful if they walk away knowing more about the opponent’s case, including what or who is driving the other party’s position. This, in turn, may assist in settling the dispute further down the line. Success is not just a binary question about resolution (or not) at the mediation: in choosing “acquiring better knowledge about the strengths and weaknesses of the case or likelihood of settlement,” parties in Hong Kong show sophisticated understanding about mediation’s benefits. A mediation can be “successful” if the parties gain more information so as to hone the issues.

**Desire for greater regulation**

When asked what would most improve commercial dispute resolution, the two top answers globally were: the use of protocols promoting non-adjudicative processes before adjudicative processes and legislation to promote the recognition and enforcement of settlements. Regionally, votes by participants in Asia focused on legislation or conventions to aid enforcement, scoring this far higher than the use of protocols promoting non-adjudicative processes. In contrast, voters in Oceania (like those in North America and the United Kingdom) strongly preferred protocols to promote non-adjudicative processes.

Regarding enforcement, the near-universal experience in practice is that parties follow through on agreements reached at mediations. Examples of parties suing to enforce the contract (the settlement agreement) are rare. Indeed, at GPC events in Asia,
party panellists were hard pushed to think of cases where this had been an issue.

A mediated settlement agreement, the product of a negotiated settlement, has a far greater chance of being honored than an imposed court order. Perhaps the key point in Asia is that enforcement of mediated settlement agreements could help to elevate the status and credibility of mediation. UNCITRAL’s proposal of a New York-style Convention on the mutual recognition and enforcement of international commercial settlements reached through conciliation/mediation is likely to be welcomed. This may enhance the robustness of mediation and help it to be perceived as a truly global option with underlying universal recognition. This could be valuable, whether or not the underlying issue it is intended to cure is a barrier in practice. Systems that recognize outcomes internationally reassure parties embroiled in cross-border disputes that the outcome will be simple to enforce. This is being put in ever sharper focus as China’s Belt and Road Initiative, one of the most ambitious pan-regional investment and infrastructure projects ever conceived, gathers pace. Complex, international multi-party Belt and Road projects will no doubt lead to a range of disputes, for which quick and confidential resolution will often be at a premium. This represents a huge opportunity for mediation and other dispute resolution processes. China is currently advancing mediation as a key part of its Belt and Road dispute resolution proposals.

The role of technology

At all GPC meetings, delegates were asked which of a range of underlying demands will have the most significant impact on future policy-making in commercial dispute resolution. All regions except for Asia chose efficiency in processes, including through technology, and by a significant margin in the common-law regions (including Oceania). In Asia, again, the leading choice was the demand for certainty and enforceability of outcomes (which scored a little ahead of the demand for efficiency through technology).

GPC delegates recognize the role technology has to play in dispute resolution, in particular in achieving much sought-after efficiencies (see Table 1). For example, software tools now manage the huge amount of electronic data in major investigations and discovery exercises, e-filing at courts is increasingly commonplace, and full-blown virtual courts have sprung up in many jurisdictions, including China. Online dispute resolution (ODR) has the capacity fundamentally to change the way disputes are resolved over the next decade. Mediation is well-suited to ODR, and we are seeing major regions, including Asia, Europe, and North America, embrace greater use of ODR in the context of mediation. This is in many ways a natural progression: ADR seeks to move the dial away from formal processes and tribunals such as litigation and arbitration. ODR takes this a stage further, by moving dispute resolution from a fixed to a virtual place.

Who is resistant to change?

When delegates were asked to choose which stakeholder is most resistant to change in dispute resolution, the vast majority of delegates in Singapore and Hong Kong selected external lawyers — a result seen at other GPC events globally. Elsewhere in Asia and in Oceania, however, the results were less stark. Participants found external lawyers to be the most resistant to change in all

Table 1: Which of the following will have the most significant impact on future policy-making in commercial dispute resolution?

<table>
<thead>
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<th>Demand</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>Demand for increased efficiency of dispute resolution processes, including through technology</td>
<td>41%</td>
</tr>
<tr>
<td>Demand for certainty and enforceability of outcomes</td>
<td>33%</td>
</tr>
<tr>
<td>Demand for increased transparency</td>
<td>9%</td>
</tr>
</tbody>
</table>

Aggregated answers from all delegates across all GPC events.
locations except Sydney (where governments/ministries of justice were the top choice). It is clear that external lawyers play a vital role in dispute resolution. They sit at the fulcrum of most commercial disputes, interfacing with other stakeholders (clients, the courts, and institutions). Critically, they advise and drive process options. External lawyers, therefore, shoulder considerable responsibility to ensure that they themselves are well versed in dispute resolution options, advising appropriately not only at the point of dispute but also at the contracting stage when, oftentimes, the contract terms favor one or other dispute resolution process (typically litigation or arbitration).

**Who is responsible for change?**

Voters in Asia-Pacific said that the stakeholder with the greatest responsibility to effect change in dispute resolution policy is governments or ministries of justice. The one exception was Chandigarh, India, where adjudicative providers (such as judges and arbitrators) were judged by parties and external lawyers to shoulder the primary burden, a notable difference because at virtually every other GPC event, governments/ministries of justice was the top choice by all stakeholder groups. It could be that the significant judicial discretion exercised by Indian courts influenced the decision of parties and lawyers to choose adjudicative providers.

**Dispute clauses**

Across Asia-Pacific, parties indicated that pre-dispute clauses in contracts may have an important role to play in steering dispute resolution in the future. That parties see the value of such clauses is indicative of a change in approach. Escalation clauses may play more of a role outside sector-specific contracts in the future. We are certainly seeing a push for tiered escalation of disputes in the context of the Belt and Road Initiative. A universal dispute escalation clause has been proposed for adoption in all Belt and Road contracts, providing for “good offices” escalation, followed by mediation, and failing this, arbitration. It is worth noting that another global preference discernible from the GPC data is to combine adjudicative and non-adjudicative dispute resolution processes. That this is being proposed for a major regional project such as the Belt and Road Initiative is encouraging and shows policy mapping to party preferences.

**Themes**

A number of themes evolved from the voting at GPC events in Asia-Pacific. In Asia there was a clear desire for enhanced regulation of mediation compared to Oceania. At first blush, one might conclude that this is a simple result of civil-law versus common-law preferences, but only one of the Asian countries to host a GPC event, Thailand, has a civil-law system. Hong Kong, India, and Singapore are all common-law jurisdictions. The reason appears to be more complex: enhanced regulation around enforcement would help promote mediation as a process, particularly in the context of commercial cross-border disputes.

In Oceania, there appears to be more appetite for (a) front-loading in terms of protocols and clauses promoting ADR and (b) collaboration between parties and lawyers. This accords more with the data from the other GPC conferences.

Pulling the strands together regionwide, enforceable decisions and efficient processes emerge as the most important factors for the future of commercial dispute resolution. Parties are likely to engage more in informal processes driven by commercial, cultural, and business needs that require a negotiated settlement. Technology is likely to assist in any transition from formal to informal processes.

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Now what?

Several projects are already putting the Global Pound Conference philosophy into real-world practice

By Deborah Masucci

Now that the Global Pound Conference (GPC) series is over, how can we put its philosophy into practice?

In April of 2016, the International Mediation Institute (IMI), the College of Commercial Arbitrators, and the Straus Institute of Dispute Resolution at Pepperdine School of Law set up a joint task force and charged it with examining and developing model standards and criteria for ways of combining different dispute resolution processes in public and private settings — an area that GPC participants identified as one of the ways to improve the future of dispute management and resolution. As Lela Porter Love, Lisa Blomgren Amsler, and Mansi Karol note in their article in this magazine (see page 15), the task force is organizing its efforts through six working groups and its report is expected by the end of 2018.

A report developed after the Singapore event covered not only the 20 GPC questions but the discussion of ideas. In Australia, the Department of Justice and Regulation Victoria has drawn on the findings from the open-text questions to develop its new Triage, Resourcing, and Modality Matrix. While currently a pilot, this new tool helps intake officers match the best process for disputants accessing the services at the Dispute Settlement Centre Victoria. The tool also enables data to be captured to identify priorities for dispute resolution practitioner training and/or service delivery options based on the nature of the clients seeking help from the center. The intake and evaluation component of a new department will also use the intake process to enhance its online dispute resolution platform that will be rolled out during 2018. This project also stimulated interest in the Behavioral Insights Unit, which used the model to stimulate conversation more broadly within the Department of Justice and Regulation Victoria. Discussions highlight the
potential for the application of the GPC methodology across different contexts.

Further, in 2017 the RMIT University in Melbourne integrated findings from the Singapore Report into its Negotiation and Dispute Resolution courses within its Master of Laws and Juris Doctor program. In particular, the findings are being used to help students develop an understanding of client-centric models of dispute resolution practice and the challenges faced by the justice system. These considerations are important for students as they reflect on their emerging “lawyer identity.”

The United Nations Commission on International Trade Law (UNCITRAL), through its Working Group II, has been working on a mechanism to enforce cross-border mediation settlements. At its 68th Session, held in February 2018, delegates agreed to a Convention and Model Law that will be finalized in June 2018 for consideration by the UN Assembly. Adoption of the Convention and Model law is a major advancement — and another outgrowth of one of the findings of the GPC that legislation is an important way to advance the future of the field.

This year, IMI received a grant from the AAA/ICDR Foundation to do a deep dive into the results and discussions collected during the North America events. This project will massage the information collected and encourage local operating committees to pursue activities that will have a lasting impact in local communities. Similarly, the data collected from the more than 3000 participants in the 29 events has been collected and shared on the Global Pound Conference website (globalpound.org). Researchers and those who are simply curious are invited to analyze the data and help advance the learning from the conference series.

The GPC energy has ignited a new initiative — the Global Pound Conversation, an attempt to recast the series as a conversation and keep the rich and vibrant discussions going. You can participate at http://globalpound.org. By inviting ideas and reflection, we hope new and exciting processes will be cross-cultivated and continue to inspire us all.

Deborah Masucci is a global expert in alternative dispute resolution and dispute management with emphasis on strategic and effective use of mediation and arbitration. She serves as an independent mediator. The panels she serves on and other affiliations can be found at www.debmasucciadr.com. She is a past Chair of the Dispute Resolution Section of the American Bar Association and current Co-Chair of the International Mediation Institute. She was a member of the GPC Central Organizing Committee and its Executive Committee. She can be reached at dm@debmasucciadr.com.
During a recent mediation, I knocked on the door of a caucus room where the insurance company’s lawyer was sitting. Not hearing an immediate response, I cautiously entered. The defense attorney was intently studying a piece of paper and writing what I assumed to be notes about his negotiation strategy and next moves.

The plaintiff, who had been hurt in a workplace accident, had opened the morning’s mediation with a settlement demand of $400,000, which I think everyone at the table believed was extremely high relative to the value of his case, and the defense had countered with an equally extreme initial counteroffer of $10,000. For more than two hours, working with the parties and their counsel in the two rooms where the plaintiff and defense had set up separate camps, I had explored interests, probed motivations, objectives, and concerns, reality-tested the parties’ positions, and spent considerable effort reflecting and reframing. Negotiations had brought the parties closer but still far apart: The plaintiff was down to $250,000, and the defense had increased its offer to $25,000.

As I approached the insurance company lawyer, I felt that the parties were making progress but the process was taking a long time, and it was clear that both sides needed to move to ensure the case would shift into a reasonable settlement range. Still, even as they exchanged numbers that didn’t seem to reflect their true assessment of settlement possibilities, I could sense that both sides had room to maneuver.

“Come in,” the defense attorney said, motioning for me to pull up a chair. “Sorry. I am busy working on my bracket.”

OK, I thought. Now we’re getting somewhere. He’s going to propose a conditional move — a bracket proposal — so that if the plaintiff lowers his demand to something considerably more reasonable, the defense will raise its offer to a number much closer to where the number needs to be to get this done.

“Let me ask you something,” he began. “Am I crazy to believe Wisconsin can take Villanova in the second round of the tournament? I mean, if they can get past ‘Nova and UVA, my guys will be in the Final Four. What do you think?”

As exciting as NCAA March Madness basketball can be, this was not the type of bracket I had in mind.
Making brackets work (with caveats)

During a presentation on mediation techniques not long ago, one of the speakers, a highly experienced mediator, largely dismissed the use of bracketing, a negotiation technique in which one party offers to make a move conditioned on a move by the other.1 Bracketing is basically an “if, then” proposition: if the other party moves his negotiating position to one number, then the first party will likewise increase (or decrease, as the case may be) her position consistent with the proposal. Parties typically use conditional bracketing as an alternative to, or in conjunction with, traditional negotiation offers and demands in an effort to kick-start deliberations and converge upon more realistic zones of potential agreement.

In fact, each of the speakers at that recent presentation — including another mediator and a litigator who frequently mediates as an advocate — agreed that brackets are basically a waste of time and never work as mediation tools. Having mediated two cases in the previous week that had resolved in part because of the parties’ skillful use of brackets, I found the speakers’ assessment surprising. I believe brackets can work every time they are used — provided that those employing them understand when and how to use these powerful deal-closing devices.

The warnings

A couple of caveats: First, by its nature, bracketing is a numbers-focused technique, most effective in cases with parties negotiating toward a monetary settlement. As mediators, we are trained to delve into the interests underlying parties’ stated negotiating positions, even when those positions are expressed in dollar amounts they would be willing to pay or accept to resolve a matter. We all know that money means different things to different people and that sometimes plaintiffs seeking monetary settlements are actually seeking to satisfy a deeper interest (such as security, respect, pride, understanding, a sense of fairness, or justice) for which money is merely a surrogate. However, as distasteful as this may be to acknowledge, frequently resolving a case requires simply finding a dollar amount that satisfies all parties involved. In other words, sometimes it really is about the money.

Additionally, timing is everything. Given an appropriate, dollar-focused negotiation scenario, I find bracketing to be most useful once parties have clearly staked out their positions. At this point, it can help them relinquish those initial stances that, after effective probing and questioning, I don’t believe reflect their ultimate monetary goals or best efforts to reach settlement. Occasionally, and for various reasons, negotiators get stuck in positions and simply need a nudge to free themselves and negotiate in a manner more reflective of their actual interests. I don’t advocate using bracketing in isolation; I consider it just one of many tools the effective mediator can use to avoid or break impasse. Sometimes the idea of bargaining with brackets comes from the parties themselves (usually ones who are experienced negotiators). Sometimes, when I think brackets could help, I might find out whether the parties understand them and suggest they give bracketing a try.

Finally, brackets are not necessarily evaluative. A facilitative mediator can work with brackets in a given case in a manner completely consistent with the overall philosophical approach. In this sense, bracketing is more about shaking up positional bargaining and helping parties approach their truer “bottom lines” and “top dollars,” whatever those might be, after the mediator has engaged the parties in thorough discussion and applied other tools to assist the parties navigate the mediation process.

How are brackets best used?

Let’s return to the mediation involving the workplace injury, the one in which after almost three hours the parties were still separated by a gap of $225,000 and the defense lawyer was more interested in discussing Final Four odds than negotiation tools.
“Listen,” I told the lawyer, “I’m all for being a contrarian when you’re trying to win a college basketball pool. But I was hoping you’d found a way to bracket these mediation positions so we can get this case settled.”

“I think my odds are better pulling for the Badgers,” the lawyer said, still clinging to his hopes for Wisconsin. “Brackets never work.”

I paused for a second or two. “Do you think what you’re doing now is working? We’ve been at this almost three hours.”

Another moment of silence followed. “OK. Fair point,” he said. “So, I’m listening. Do you think a bracket proposal is worth a try?”

“Absolutely. Let’s talk about it,” I replied, with more than a little optimism.

How, exactly, does bracketing work?

At certain points during negotiations, a bracket can serve as a useful alternative to a “straight” upward or downward positional move. In the workplace injury case, with negotiation positions at $250,000 and $25,000 and based on the pattern that had emerged over the previous hours, suppose the next likely moves were $240,000 and $30,000, respectively. That would represent some — but not much — progress.

Let’s say the defense instead proposed a bracket — essentially, a conditional proposal — by which the defense would increase its offer to $50,000 if the plaintiff would decrease her demand from $250,000 to $175,000 (i.e., a $175,000/$50,000 bracket). In the alternative, the defense might also propose that if the plaintiff chose to reject the bracket proposal, the defense would simply increase its offer to $30,000.

The mere existence of this first bracketed defense proposal indicates that the defense would be willing to settle the case for some figure between $175,000 and $50,000. That range would still leave a $125,000 gap to close before the parties could achieve any ultimate settlement, but as a mediator I would begin highlighting to the parties that the midpoint of the proposed range — $112,500 — shows significantly more promise than the parties’ erstwhile respective negotiating postures at $250,000 and $25,000. Then, once the proverbial lightbulb switches on and the parties realize that they’re actually much closer to success than they had perceived, everyone might be more optimistic and motivated to continue working toward a settlement that suddenly seems possible.

Why use brackets?

As I hope this anecdote illustrates, bracket proposals can help close gaps between negotiating parties that would otherwise be time-consuming, draining, or even insurmountable obstacles to settlement. Though brackets are not appropriate or necessary for every mediation, I am a strong proponent for a number of reasons. Brackets can:

• Help negotiating parties focus on ranges rather than hard numbers

My advice to parties is to focus on a target range instead of a specific number when setting monetary mediation goals. I believe this is the best approach for many reasons, but the basic rationale is that in most cases there is no objectively “correct” number. Just as there is no winner and no loser in mediation, in most every case there is no absolutely right number that solves a mediation. A more productive approach is to consider reasonable ranges on each side, taking into account uncertainties and risks that simply cannot be known or foreseen and looking for where the ranges might overlap. This exercise is akin to using a Venn diagram, seeking the zone of intersection among the parties’ different perspectives, and identifying a range that represents something reasonable to all. Brackets, of course, themselves represent ranges, and they tend to help negotiating parties look at their case value as a range of potential numbers instead of a single number. If the parties view their case through the lens of bracket ranges and consider the visual of a Venn diagram, they should find it
easier to see that where brackets overlap lies the possibility of settlement.

• **Be viewed as a symbol of good faith and a willingness to compromise**
  At the beginning of every mediation, I remind the parties that a successful process requires compromise on each side. Participants typically nod knowingly, implicitly agreeing and acknowledging that they will need to give and take if an agreement is to be possible. Some percentage of the time, though, the parties then proceed to dig in at a “bottom line” or “top dollar” and refuse to budge. Bracket proposals can be used to help illustrate, in a tangible manner, the very concept of compromise. By nature, a bracket proposal invites one party to move in exchange for the offering party also making a move (i.e., “If you will, I will.”). The party offering the bracket is directly conveying a good-faith willingness to push toward a middle ground and budge from his or her position. The other side receives the olive branch sent from the proposer and, even if he or she does not accept the bracket, the bracket has served various constructive purposes and presents a clear opportunity for a motivated party to compromise in return.

• **Help people take calculated risks and see the benefit of closing negotiation gaps**
  A curious set of insights frequently dawns on the parties once they expand their bargaining process to incorporate brackets. First, bracket proposals allow parties to step out of their negotiating comfort zones in a controlled, relatively cautious manner. Again, this is attributable to the contingent nature of these “if, then” proposals, which let the proposer suggest that she’ll move in conjunction with a move from the other side. By inviting the opposing party to move if that side would like to see a corresponding move by the proposer, the proposer at once shows a willingness to compromise and protects herself against a reluctant opposition. Particularly when a bracket proposal is made alongside a corresponding, less attractive “hard” move, this technique often makes self-evident what all of this article is here to say: bracket proposals frequently are preferable to the alternative, straight-number steps along the negotiation process. They can be persuasive tools on their own but, especially when viewed in direct comparison to the postures where the parties would otherwise find themselves, they are especially attractive.

• **Bring hope and vision to the negotiation process**
  Perseverance is a critical trait of successful negotiators, and sometimes parties are challenged to remain steadfast during negotiations that seem hopelessly at impasse. Bracket proposals can show opposing sides that they are actually much closer to settlement than either would otherwise think based on their bargaining positions. Hope, along with a vision of a possible resolution in the face of a stalemate, can help parties gather the strength to continue negotiating and break through process barriers that hinder their success.

• **Represent accurate, useful descriptions of the parties’ true positions**
  Bracket proposals help all of the parties — and the mediator — appreciate more accurately where the true potential settlement zone lies. Often, when parties are straining to see each other across the familiar negotiating playing field, they feel hopelessly apart in their case evaluations and have no idea whether they’ll ultimately find each other in the same ballpark or even the same ZIP code. As we well know, some parties come to mediation with a “litigation mindset” rather than truly embracing the bedrock principals of good-faith cooperation and mutual compromise, and they can tend to be more stubborn and argumentative, preferring stealth and subterfuge to frankness and openness about their bargaining strategies.
and settlement ranges. Brackets, strategically employed, can help answer this most basic question and ferret out where settlement might (and might not) be a realistic possibility.

Fortunately, brackets are built to allow for ongoing mystery, if not misdirection, within the negotiation zones they create. Unlike hard-number negotiation, brackets must embody the flexibility required to manage less collaborative parties or those who simply need more time to work through the negotiation process.

For a mediation to end in agreement, at some point the parties must reveal enough about their actual bargaining positions to let the other side (and the mediator) know whether the settlement ranges of the opposing sides overlap. Polished negotiators can use bracket proposals to flush out true settlement intentions, enhance engagement and cooperation, and effectively reach agreements.

- **Make negotiations more interesting**
  Don’t overlook this benefit. I can think of countless mediations during which I entered a room, presented a bracket proposal, and saw a party’s mood lift. During hours of small moves from each side, attorneys and their clients can become numb to the negotiation process, wearyly watching distant numbers ping-pong between caucus rooms. Sometimes attorneys and clients wind up disengaged, unfocused, and bored. Injecting a bracket proposal can be an instant cure for mediation fatigue.

- **Spark creativity**
  Utilizing brackets encourages negotiating parties, along with the facilitating neutrals, to tap into their creative minds. Bracket proposals require a deeper examination of the underlying numbers of a case, the respective bargaining positions of the opposing sides, and possible solutions to what might otherwise seem like hopeless back-and-forth negotiations.

- **Leverage the strength of the parties’ negotiating positions**
  This point, at first tricky to grasp, describes perhaps the most powerful effect of brackets.

As the case of the workplace injury illustrates, parties stuck at negotiating postures of $250,000 and $25,000 can quickly see that they are much closer to possible settlement than their numbers would otherwise suggest.

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**Leveraging Brackets:**

- The defense is “officially” offering $25,000.
- The plaintiff is demanding $250,000.
- The defense offers a bracket of $175,000/$50,000 (midpoint = $112,500).
- The plaintiff counters with a $200,000/$75,000 bracket (midpoint = $137,500).
- The “midpoint of the midpoints” is $125,000 (the midpoint of $112,500 and $137,500).
- The negotiation zone is between $137,500 and $112,500.

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**Why do some negotiators resist brackets?**

One of the more common rationales negotiators propound for not utilizing brackets is the refrain from the presentation echoed by the Final Four-fixated lawyer and others: they never work.

Another, more concrete, concern is that the other side will receive a bracket proposal, calculate the
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bracket’s midpoint, and assume that the proposer would like to settle the case at the midpoint figure. Well, shouldn’t we assume that the other side was already looking at midpoints, based on the parties’ pre-bracket numbers? That is, every numbers-based negotiation will have a midpoint at any given time, with the parties’ stated bargaining positions creating boundaries between which further negotiations will proceed. Midpoints can be used and interpreted in many ways, and they exist between opposing numbers whether or not a party has explicitly proposed a bracket.

Now, do I expect a party to accept a proposed bracket? No. In my experience, bracket proposals are rarely accepted outright by the party receiving the proposal; it happens, but far more brackets are rejected than accepted.

In the workplace injury case, assuming the plaintiff doesn’t accept the bracket proposal, among other options she might respond with a counter and: (a) propose a counter-bracket of, say, $200,000/$75,000 (i.e., “we’ll drop to $200,000 if you come up to $75,000); (b) reduce her demand to $240,000; or (c) respond with a hybrid proposal (we’ll drop to $200,000 if you come up to $75,000, or otherwise we’re at $240,000).

So why might brackets be rejected more often than they are accepted? Depending on what stage in negotiating a bracket is employed, a party might reject the bracket for the same reason she would reject any other offer: “accepting” feels too much like a concession, and negotiators typically hesitate to concede during a mediation session. More likely, the recipient will choose to reject the bracket and respond with a counteroffer.

But a rejected bracket is not a failed bracket. Even if the plaintiff responds with a “thanks, but no, thanks” that’s OK. The bracket remains a useful negotiation tool and serves as an effective, incremental step toward eventual settlement. A savvy negotiator can communicate a great deal to the other side by carefully choosing her bracket proposals. Likewise, an experienced recipient of a bracket proposal, even as she rejects such a proposal, can gain critical information relating to ultimate settlement ranges, the other side’s appetite for settlement, and how to proceed with her negotiation strategy.

**Conclusion**

Bracket proposals, though not useful in every mediation, can make the difference between impasse and successful negotiation results. Not every bracket is accepted outright, and that’s OK. For the savvy negotiator who understands not just how to use bracket proposals but how to interpret the responses they engender, brackets really do work — as opportunities to share information, provide insights, invite compromise, and generally move the parties closer to resolution.

**Endnotes**

1 Throughout this article, I use “bracket(s),” “bracketing,” and “bracket proposal(s)” interchangeably to refer to the technique by which a negotiating party or mediator suggests a conditional proposal that would shift the endpoints of the monetary range within which parties negotiate toward agreement. I recognize that some readers might attach nuance to these various terms and that others could be familiar with a different vernacular, but my focus here is on the technique itself and not its particular label.

Thus, for our purposes: “A ‘bracket’[or bracketing, or bracket proposal] is a conditional proposal in which a negotiator says: ‘We will go to X if you will go to Y.’ X and Y create a ‘bracket’ between which the offering party proposes to limit negotiations.” Michael D. Young & Marc E. Isserles, Overcoming Impasse at Mediation: Bargaining with Brackets, New York Law Journal, vol. 255, no. 25 (February 8, 2016).
On Professional Practice  By Sharon Press

What is impartiality in dispute resolution?

If you asked someone familiar with dispute resolution to list its hallmarks, she would probably put “impartiality” near the top. We all know that in dispute resolution, the neutral, the person who helps the parties, should have no vested interests or preconceived notions about how the dispute should be resolved. This is true for all kinds of dispute resolution processes: We expect impartiality of judges, arbitrators, mediators, and evaluators.

I contend, however, that the concept of impartiality in mediation is different from that in adjudicatory processes such as litigation and arbitration. This belief has grown out of my experience in Florida, where I was responsible for the state’s mediator grievance process and for reviewing complaints about mediators, and in Minnesota, where I now serve on the ADR Ethics Board that has jurisdiction over all “Rule 114 neutrals,” a term that includes mediators, early neutral evaluators, parenting time expeditors, and arbitrators.

Why does this difference matter? I find that using “impartiality” for very different concepts leads to confusion: for the parties, for the third-party neutrals, and for those responsible for enforcing ethical standards. (For the purposes of this article, I am setting aside the important but separate discussion about whether “impartiality” or “neutrality” is the better term to describe the ethical expectations for various dispute resolvers. That debate could easily fill another column.)

So let’s look at the concept of impartiality in relation to mediators, arbitrators, and judges.

Before reviewing the ethical standards, let’s consider the common perception related to the adjudicatory processes. Although there are exceptions to every rule, most people would agree that a judge, at least in theory, is an impartial trier of fact. In this context, I am referring to the ethical requirement that a judge listen to testimony and then impartially apply the law to the facts and render a decision. The judge’s ruling will undoubtedly favor one side over the other, but except in extraordinary circumstances, no one will claim that the judge was partial based on the outcome alone. Impartiality, as it relates to a judge or arbitrator, refers to the trier of fact’s ability to render a decision based exclusively on the facts presented and how the law applies to those facts.

Standard II of the Model Standards for Mediators adopted by the American Arbitration Association (AAA), the American Bar Association (ABA), and the Association for Conflict Resolution (ACR) defines impartiality as “freedom from favoritism, bias or prejudice” and includes the admonition that a mediator shall “conduct a mediation in an impartial manner,” “decline a mediation if the mediator cannot conduct it in an impartial manner,” and withdraw from a mediation if, at any time, the mediator is unable to conduct the mediation in an impartial manner. (I have italicized the word “conduct.”) Standard II addresses conduct on the theory that no one is truly neutral, that we are all the product of our own particular backgrounds, family situations, and circumstances. But a mediator is ethically bound to conduct herself in an impartial manner (free from favoritism, bias, or prejudice) and to remove herself from a mediation if she can no longer do so.

In contrast, the Code of Ethics for Arbitrators in Commercial Disputes, which was developed by the AAA and a special committee of the ABA, “establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators…” Canons I and II of the code focus on impartiality in relation to serving “independently from the parties, potential witnesses, and other arbitrators,” avoiding conflicts of interest, and disclosure of any interest or relationship “likely to affect impartiality or which might create an appearance of partiality.” It is helpful to note that the “appearance of partiality” is also tied to conflict of interest — including relationships involving the arbitrator’s family, household members, current employers, partners, or professional or business associates. Unlike the mediator ethical standards, which
focus on conduct, the arbitrator standards require an arbitrator to examine conflicts of interest and "serve independently."

Because many retired judges serve as mediators, we should also look at the Code of Judicial Conduct and the expectations the public has for judges in relation to impartiality. Three of the five Canons in the Code of Conduct for United States Judges, adopted by the Judicial Conference, are implicated in this discussion, with Canon 3 being the most on point. Canon 1 states: A judge should uphold the integrity and independence of the Judiciary; Canon 2: A judge should avoid impropriety and the appearance of impropriety in all activities; and Canon 3: A judge should perform the duties of the office fairly, impartially, and diligently. In terms of the judge’s adjudicative responsibilities, the Code states that “a judge … should not be swayed by partisan interests, public clamor, or fear of criticism.” Canon 3(A)(1). Further, “a judge should disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned…” Canon 3(C)(1). Here too, the code focuses on potential conflicts in the judge’s decision, with little focus on the judge’s conduct during a court proceeding.

The significant difference in these conceptions of impartiality relates to what I consider the unique foundational aspect of mediation — namely, the self-determination of the parties. In a mediation, as opposed to a court proceeding or an arbitration, the parties retain the ability to make a decision for themselves, so the concept of mediator impartiality can be fully understood only in relation to the impact the “neutral” has on party self-determination. This link between party self-determination and mediator impartiality means that in order to uphold the ethical provisions of conducting oneself in an impartial manner, free from favoritism, bias, and prejudice, a mediator must also consider how his actions serve to undermine or bolster one of the mediation participants. Stated another way, if the mediator suggests in a mediation that one participant is more trustworthy or has a better case, the participants could (and probably will) conclude that the mediator is no longer impartial and is exhibiting unethical favoritism toward one party. Because they will make the decision, arbitrators and judges do not have the same constraints. As long as they have not “pre-judged” the situation due to some conflict of interest, a judge or arbitrator can express skepticism about a participant’s statement or submission without running afloat of the ethical constraints.

In my work in Florida, I found that the most common complaints were that the mediator had not behaved in an impartial manner — specifically, that the mediator favored the other participant. Sometimes parties said they deduced this from subtle behavior (such as the mediator expressing surprise about a participant’s rationale), but sometimes the parties said it was blatant (such as the mediator telling a party that he was too poor to win in court). If a judge or arbitrator expressed surprise about a party’s reasoning or skepticism about someone’s ability to pay litigation bills, that probably would not be considered a violation of the constraints regarding impartiality. But if a party complained that a mediator had engaged in these same behaviors, the board charged with reviewing complaints would find the alleged statements or actions sufficient reason to require the mediator to respond to the charges.

So for mediators, “impartiality” means something very specific and very different from what we expect of decision-makers such as judges. My hope is that just noting this difference can be the beginning of important conversations, discussions that can help us define exactly what mediator impartiality is — what it looks like, and what it sounds like. We need to hone this definition, emphasize it in all our trainings, and examine it in our ethical standards.

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**Court Upholds Mandatory Mediation and Conciliation Provisions in Agricultural Dispute**

In *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.*, 3 Cal. 5th 1118 (Cal. Nov. 27, 2017), the Supreme Court of California rejected challenges to the compulsory interest arbitration provisions of the state’s mandatory mediation and conciliation (MMC) provisions in the Agricultural Labor Relations Act. Under the MMC process, if a mediation between an agricultural employer and a worker’s union fails to produce an agreement, the Agricultural Labor Relations Board (the Board) considers a contract proposed by the mediator and can set the prospective terms of the parties’ contract. The board imposed such a resolution, and Gerawan Farming appealed, asserting that the statutory scheme violates equal protection principles and due process principles and that the Board has no properly delegated legislative authority. A California Court of Appeals agreed, but the California Supreme Court rejected all three challenges. The court held that the MMC provisions were “not facially invalid on equal protection grounds because the legislature had a rational basis for enacting the statute to facilitate collective bargaining agreements between agricultural employers and employees.” The court disregarded the employer’s argument that the MMC provisions violate due process by forcing employers into arbitration without their consent. The court reasoned that the legislature has the power to regulate labor relations in the agricultural sector and compulsory interest arbitration was not unconstitutional in this instance. The court also held that the MMC provisions were not an improper delegation of legislative authority because improper delegation only occurs when (1) the legislature leaves the resolution of fundamental policy issues to others or (2) the legislature fails to provide adequate direction for the implementation of a policy. The court reasoned that the legislature made a policy determination that the MMC was necessary to ensure effective collective bargaining in the agricultural sector, and the MMC provided adequate direction for its implementation.

**Fourth Circuit Rejects Motion to Compel Arbitration, Citing Defendant’s Use of Arbitration as ‘Insurance’**

In *Degidio v. Crazy Horse Saloon and Rest. Inc.*, 2018 WL 456905 (4th Cir. Jan. 18, 2018), the Fourth Circuit affirmed a District Court’s rejection of a motion to compel arbitration. Degidio, an independent contractor, filed a putative class action in 2013, which alleged violations of the Fair Labor Standards Act. Crazy Horse filed an answer, which did not include a motion to compel arbitration, and discovery ensued. Near the close of discovery, in late 2014, Crazy Horse entered into arbitration agreements with its independent contractors. Under the terms of that agreement, the independent contractors waived their right to participate in class actions against Crazy Horse. Crazy Horse then filed a motion for summary judgment from the District Court. While the motion was still pending, in January 2015, Crazy Horse asked the court to compel arbitration for the contractors who signed the agreement. The District Court denied the motion to compel arbitration, and Crazy Horse appealed to the Fourth Circuit. In affirming the District Court, the Fourth Circuit held that Crazy Horse waived its right to enforce an arbitration agreement by “substantially utilizing the litigation machinery” of the courts rather than pursuing arbitration early in the litigation process. The court reasoned that the only possible purpose of the arbitration agreements was to give Crazy Horse an option to revisit the case in the event that the district court issued an unfavorable opinion. In other words, Crazy Horse did not seek to use arbitration as an efficient alternative to litigation; it instead used arbitration as an insurance policy in an attempt to give itself a second opportunity to evade liability.”
California State Law Applies in Dispute over Attorney’s Authority to Enter Settlement

In Hess v. Hanneman, 2017 WL 6027015 (S.D. Cal. Dec. 4, 2017), the District Court for the Southern District of California considered a motion to enforce a settlement agreement between parties who had engaged in prolonged settlement negotiations. Hess brought a lawsuit against the Chula Vista Fire Department for loss of income because the department failed to promote him to captain. The lawsuit was filed in September 2014. Mediation and negotiations were not conducted until August 2017, when the parties’ attorneys reached the basic terms of a settlement agreement. Once the formal settlement had been drafted, Hess refused to sign the agreement because he claimed he had not been properly informed of the negotiations being conducted between his (by then former) attorney and the defendant’s counsel. Hess asserted he did not agree to the terms his former attorney had agreed to and that his attorney acted without authority. Hess noted a difference between California state law, which requires a client’s specific authorization, and federal common law, which favors the presumption of an attorney’s ability to bind a client. The Ninth Circuit held that in the face of silence on the topic, in the interest of consistency between state and federal courts, the application of California state law should be applied to the question. The District Court acknowledged the presence of circumstantial evidence that Hess authorized the settlement, including the fact that the trial date (which Hess would have been aware of) had been vacated. Furthermore, the court noted, Hess’s attorney notified the settlement judge of the offer. The court reasoned that these acts would have been “highly unusual for a lawyer” if his client had not given him the authority to act. In an evidentiary hearing, the court reviewed contemporaneous text messages between Hess and his attorney at the time they reached the basic terms of the settlement. The messages, the court concluded, demonstrated that Hess was plainly disappointed in the terms but also that he was aware his attorney was negotiating on his behalf. The court concluded Hess had sufficiently authorized his attorney to enter into the settlement and granted the defendant’s motion to enforce the settlement agreement.

Ninth Circuit Considers Canons of Punctuation, Legislative Intent, and Precise Wording of Signature

A seaman died aboard a fishing vessel, and in Yang v. Majestic Blue Fisheries, LLC, 876 F.3d 996 (9th Cir. 2017), his widow filed a wrongful death action against the owners of the boat (Majestic Blue Fisheries) and the company that provided repairs and crew for the boat (Dongwon Industries). One family owns both Majestic and Dongwon, and Dongwon had sold the vessel to Majestic for $10 two years before the accident. The defendants both sought to compel arbitration, but the District Court compelled only the claims against Majestic. It noted that two months before the accident, the seaman had entered an employment contract containing an arbitration clause, but it was only signed by the seaman and by Dongwon “on behalf of Majestic Blue Fisheries, LLC.” The New York Convention requires that an arbitration agreement be in writing and that it “include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.” Convention Treaty Art II(2). The Ninth Circuit considered punctuation canons, commas’ relationships with antecedents and subsequent modifiers, contemporaneous foreign-language translations of the treaty, and the legislative history’s indications of the drafters’ intent. The court rejected Dongwon’s argument that the requirements apply only to separate arbitration agreements, not to arbitration provisions found within contracts. The Ninth Circuit further held that because Dongwon signed on behalf of Majestic and not on its own behalf, Dongwon was not a signatory and therefore could not compel arbitration.

Christopher Groesbeck, Chantal Guzman, Austin Smith, and Elise Williard are second-year law students at the University of Oregon School of Law and serve as law student editors for Dispute Resolution Magazine.
Frank E.A. Sander, the longtime Harvard Law School professor and pioneer in dispute resolution, passed away on February 25 at the age of 90. Professor Sander, who was born in Stuttgart, Germany, escaped Nazi Germany in 1938. A graduate of Harvard Law School, he clerked for US Supreme Court Justice Felix Frankfurter when the court decided Brown v. Board of Education. Sander served on the Harvard faculty for more than 45 years, wrote many books on dispute resolution, and co-founded the Program on Negotiation at Harvard Law School.

Frank Sander co-founded this magazine and championed it from its earliest days, and those of us who work on Dispute Resolution Magazine feel this loss very deeply. His name has been on the masthead for 24 years: after serving as the magazine’s founding Co-chair with Nancy Rogers (at Ohio State University Moritz College of Law), Professor Sander continued as Chair of the Editorial Board through 2012, when he became Chair Emeritus.

Throughout his long lifetime, Frank Sander was always generous with his knowledge and talent, taking time to talk with and help hundreds of people who were interested in his many passions, which included food and music as well as dispute resolution. Many colleagues, students, and others have spoken and written about how profoundly he influenced them, and in hopes of honoring this extraordinary and wonderful man, we offer a selection of tributes.

"There is a silly exercise in some arenas (athletics, arts, academe, etc.) in which one is called upon to declare who would be on 'The Mount Rushmore of...' whatever is being discussed. Every conceivable, credible construction of the Mount Rushmore of our field would include Frank Prominently. In whichever pose he wanted." — Michael Moffitt

On indisputably.org, sharing news of Frank Sander’s death

"It is a rare person who through his own thoughts and efforts can truly be said to have changed this country, and the world, for the better. Fewer still do it with humility and grace. Frank E. A. Sander is one such transformative figure, a man who for nearly 40 years has nurtured the field of dispute resolution that today is credited as being one of the most significant shifts in American law."

— Richard C. Reuben and Margaret L. Shaw

"Teacher, Mentor, Friend, Leader"
The Fall 2012 issue of Dispute Resolution Magazine, which was devoted to Frank Sander

"In the world of "soft" dispute resolution, Frank Sander has been a force. His intellectual leadership, his enthusiasm and his generosity have all been essential in moving the alternative dispute resolution movement from a snowball to an avalanche. ... In responding to skeptics, his passion for teaching and his personal good cheer were always evident — and nearly always disarming and effective. Those of us who shared time with him always learned from his example and were inspired to work with him to give alternative dispute resolution the integrity that would make it more effective and our justice system more complete."

— Ronald Olson

"Dedication to Collaboration and Integrity"
The Fall 2012 issue of Dispute Resolution Magazine
“Mentor, in Greek mythology, was the elder whom Odysseus entrusted with his son Telemachus when Odysseus left for the Trojan war. From this story has come the modern meaning of “mentor” as someone who shares experience, knowledge and wisdom with a less experienced colleague.

In so many ways, Frank Sander has been the mentor to the dispute resolution field. He has coached junior scholars as they navigated the shoals of academic hiring and advancement. He has counseled lawyers and other professionals who wanted to transition their careers into mediation or arbitration. And he has provided thoughtful advice and the steady hand of experience to many of the committees, commissions and organizations within our field.”

— David Hoffman & Michael Moffitt
“Frank Sander: Mentor to the Field of Dispute Resolution”
The Fall 2012 issue of Dispute Resolution Magazine

“He was very egalitarian. I don’t think he believed there was anyone who was above or beneath him. He really humanized Harvard Law School and he made it a more friendly place. He made it a place where it was more welcoming, where it was more mentoring. ...
The Quakers have a saying, ‘Let your life speak,’ and I think my dad was someone who, in a very quiet way, did speak.”

— Thomas H. Sander, Frank’s son
From an article in the Harvard Crimson

“Frank Sander’s 1976 speech at the Pound Conference on “The Causes of Popular Dissatisfaction with the Administration of Justice” is widely seen, particularly within the legal academy, as the “Big Bang” moment in the history of alternative dispute resolution. ... Like many profound observations, once articulated, Frank’s now seems obvious. Apples fall to the earth. The shortest distance between two points is a straight line. And litigation handles some kinds of disputes better than others.”

— Michael Moffitt
Before the Big Bang: The Making of an ADR Pioneer

“I’ve known few people who have combined brilliance and kindness in the way that Frank did so beautifully. He encouraged me at a point when I really needed it, and for that I will be forever grateful. Requiescat in pace.”

— Jennifer Brown
indisputably.org, February 27, 2018

“Frank’s approach to leading the magazine resembles his leadership in general, with one central effective ingredient being great dedication to efforts that can make a difference. ... He posed questions, such as: What are the major issues facing the field? What new challenges are on the horizon? Do we have something in the next issue for people who want to make a living working in the field?”

— Nancy Rogers
“Reflecting on Frank E. A. Sander’s Leadership Through His 18 Years Leading Dispute Resolution Magazine”
The Fall 2012 issue of Dispute Resolution Magazine
Section News

New York Times Columnist
Thomas Friedman to Receive
D’Alemberte-Raven Award

The American Bar Association Section of Dispute Resolution will present the 2018 D’Alemberte-Raven award to Thomas Friedman, a New York Times columnist.

The D’Alemberte-Raven Award, the highest honor given by the ABA Section of Dispute Resolution, is named for Robert D. Raven and Talbot D’Alemberte, both of whom were ABA Presidents and Dispute Resolution Section Chairs who shared a commitment to fostering the American Bar Association’s leadership in the area of dispute resolution. This award honors an individual or organization who has through service, research, and writing significantly contributed to the ongoing effort to resolving conflicts.

This award recognizes Friedman’s wide-ranging writings on foreign affairs and globalization, which have provoked both reflection and discussion. His contributions have helped us understand how we might navigate and respond to the evolving sources of conflict in an increasingly fast-paced, interdependent world.

The award will be presented during the opening plenary of the ABA Section of Dispute Resolution Spring Conference on April 5, 2018, at the Washington Hilton in Washington, DC.

Section of Dispute Resolution Awards Ceremony

At the Section of Dispute Resolution’s Spring Conference, Section Chair Benjamin G. Davis will preside over the awards ceremony honoring the national champion of the ABA Representation in Mediation Competition for law students. The winning team will be presented with the championship trophy, and all teams participating in the nationals will be recognized. Also, former Section of Dispute Resolution Chair Geetha Ravindra will present the John Cooley Lawyer as Problem Solver Award to the Divided Communities Project. The Chair will also recognize three individuals, Alyson Carrel, John Lande, and Harold Coleman, with the Section Chair’s award for distinguished service.

2019 Spring Conference
to be held in Minneapolis

Minneapolis is the site of the Dispute Resolution Section’s 2019 Spring Conference, which will be held at the Hyatt Regency Minneapolis from April 10 to April 13, 2019. Look for announcements about the spring conference program planning process soon after the 2018 Spring Conference concludes.

Keep in Touch
Through ABA Connect Communities

Coming soon, to a committee near you. … The ABA is rolling out a new technology, ABA Connect. This new platform allows committees and ABA groups to communicate and connect with each other more easily. Within the last few months the Section of Dispute Resolution has rolled out Connect communities for the Section’s Leadership and Reflective Practice groups, and in May 2018, we plan to roll out additional communities for groups that communicate on a regular basis. The Connect communities replace the old “List Serve” technology and provide a much more user-friendly platform for association activities.

Leadership Nominations are being Reviewed

Section Chair Benjamin Davis has convened a nominating committee to review nominations for Section officer and council positions. Nominations were due at the end of March. The nominating committee will recommend a slate of candidates for the open positions, and the candidates will be voted on at the ABA Annual Meeting in Chicago in August 2018. The new officers and council members will begin their terms immediately following the ABA Annual Meeting.

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FROM THE ABA SECTION OF DISPUTE RESOLUTION

Making Money Talk
How to Mediate Insured Claims and Other Monetary Disputes
J. Anderson Little
Learn how to deal with the peculiar problems of traditional bargaining through proven models and techniques that will help gain a better understanding of the dynamics of money negotiations, develop new tools to handle those challenges, and build a model of the mediation process that will serve as a roadmap when traditional bargaining is unavoidable.
List Price: $29.95 | DR Member Price: $26.96

Challenging Conflict
Mediation Through Understanding
Gary Friedman and Jack Himmelstein
This revolutionary book shows how through mediation parties can escape the trap of conflict rather than remain ensnared within its grasp at enormous cost to themselves and others. The authors demonstrate how mediators, and lawyers, can support parties to work together effectively in ways that deeply respect their humanity.
List Price: $37.95 | DR Section Member Price: $29.95

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