

Global Pound Conference Series Singapore 2016 (17-18 March 2016):
Shaping the Future of Dispute Resolution & Improving Access to Justice

Closing Plenary: Analysis and Discussion of Data Generated During the Four Interactive GPC Core Question Sessions

To close the Singapore GPC event, all stakeholders' views on dispute resolution were analysed at the end of the conference and discussed by a group of experts representing all stakeholder groups. It is intended that the conclusions generated during this Singapore launch event will start a chain of discussions about practical measures that can be taken to implement real changes both in daily practices, and in long term policies, to improve access to justice for all disputants in the 21st century and to spot new trends.

Speakers:

- **Michael Leathes (Interviewer)**, Co-Founder, International Mediation Institute (User)
- **Professor Nadja Alexander**, Principal, Conflict Coaching International (Provider & Educator)
- **Josephine Hadikusumo**, Regional Legal Counsel (Asia), Texas Instruments (User)
- **Michael Hwang S.C.**, Senior Counsel and Arbitrator (Advisor)
- **Joanna Kalowski**, Director, Joanna Kalowski and Associates (Provider)
- **Associate Professor Joel Lee**, Chairperson, Singapore International Mediation Institute (Educator)
- **Michael McIlwrath**, Global Chief Litigation Counsel (Litigation), GE Oil & Gas and Chair, Global Pound Conference Series (User)
- **Alexander Oddy**, Partner and Head of ADR, Herbert Smith Freehills LLP (Advisor)
- **Joseph Tirado**, Lawyer & ADR Neutral (Advisor & Provider)

Summary of Discussion by Panelists:

1. To kick-start the closing plenary, Mr Jeremy Lack, the GPC Series Coordinator, raised the overarching issue of removing the “Status-Quoism”. Five key areas of discussion were highlighted in a [mind map](#) he created, including (i) Party/Advisor Axis, (ii) Influencers, (iii) Promotion, (iv) Enforcement and (v) Change Drivers, followed by concluding remarks which were given by each member of the panel.
2. On point (i), the “Party/Advisor Axis”:
 - 2.1 Mr Leathes first posed two thought-provoking questions to the panel: Who are the worst enemies? Is it true, in their personal opinions, that counsel is the worst enemy of the client?
 - 2.2 Ms Hadikusumo highlighted that the nature of the relationship could be adversarial given the financial incentives in the event that a case is litigated. There is a thus need to align the varying interests. She further mentioned that an in-house counsel could actually be in the driver’s seat.
 - 2.3 An Advisor disagreed. He viewed that the client’s best interests are always the top priority. He highlighted the different degrees of client sophistication and emphasised that teamwork is key. He further mentioned that in-house counsel could be their own worst enemy. In response to the moderator’s queries, he indicated that discrepancies in the GPC data did not necessarily suggest a disagreement.
 - 2.4 A Provider suggested that it was a strategic choice versus a legal choice, and queried whether our parties are actually “the enemy”. The question is truly how to get people to work

collaboratively. He mentioned an ICC publication on effective in-house case management, such as segmenting a case and working on it segment by segment.

2.5 The Educators placed emphasis on relationships. They suggested that this may depend on the legal culture, corporate culture and law department culture, and emphasised the need to view it systemically. They also highlighted the issue of competing Key Performance Indicators (KPIs) such as fees and metrics.

2.6 Mr Leathes suggested that early case assessment systems could be employed to avoid these issues, and he referred the audience to the example of the OLE case assessment form on the International Mediation Institute (IMI) website.

3. On point (ii), “Influencers”:

3.1 The first branch was about the topic of mindsets.

3.1.1 Assoc. Prof Lee highlighted how education could bring about changes and how he is optimistic about the situation in Singapore. He highlighted that new law programmes are creating a new generation of lawyers. There is also a new generation of “new think” partners in law firms. Some counsel are weary of the “old” adversarial model. Prof. Alexander referred to NADRAC (Australia) data on the effect of ADR training, which suggested that while ADR did change the mindsets of large firms, it did not quite change the mindsets of small firms. More work remains to be done in this area.

3.1.2 An Advisor shared that Lord Wolf’s reforms had profoundly transformed professional mindsets in the UK. ADR has now become part of the norm of the legal profession.

3.1.3 Ms Kalowski added that the courts indeed played a key role in changing mindsets. If judges supported ADR, lawyers would also be more likely to support ADR. Nonetheless, some cases should be decided by adjudication, especially groundbreaking ones. He cited the example of native title precedents, which should not have been mediated, as precedents were needed in such cases.

3.1.4 In response to a query regarding which party is the best assessor of the appropriate dispute resolution process, it was mentioned that judges can send cases to mediation and this would not affect their neutrality.

3.1.5 In considering mediation versus adjudication, it was mentioned that there is a tendency to view it as a question of either/or. Prof. Alexander raised the cultural aspect to these perspectives. She highlighted how the facilitative role of Chinese arbitration may seem perplexing when viewed through the lens of the western concept of “due process”. There is thus a differing way of thinking as compared to, for example, Hong Kong with regards to the arbitration process. There are often differing cultural mindsets regarding the role of the arbitrator. Chinese judges, for example, may be more open in mixing both mediation and adjudication, while German arbitrators also act as settlement neutrals (conciliators).

3.2 In relation to arbitration,

3.2.1 Mr Tirado highlighted that some companies preferred litigation to arbitration as they could obtain an earlier initial case assessment. He asked the panel to imagine the situation in which under the arbitral procedural order, number 1 on the list of steps contains a mediation discussion step.

3.2.2 Assoc. Prof. Lee highlighted that an arbitrator should not necessarily suggest taking a case to mediation. The next stage in this process is to change mindsets. This could be possible if arbitrators stated that parties should discuss the possibilities of mediation as this was their standard procedural order. In such a situation, the arbitrator is not abdicating duties, but rather, exploring mediation in parallel to the arbitration process. Obtaining the consent of

all parties is not a huge challenge. Due process concerns may upset lawyers, but this is ultimately a professional reflex. One related concern that might arise was whether a non-appealable judgment may be affected if an arbitrator was unhappy with the failure to mediate. The question was how one could guarantee against this danger, given the non-voluntary nature of the process.

3.3 Some views from the audience on the topic of Influencers:

3.3.1 One member of the audience highlighted his disappointment in the USA with regards to legal education. He opined that it had not changed mindsets or lawyers' behaviour. Many maintained the view that they had "to play the game in the firm", and that the reality of billable hours and billings was a contradiction.

3.3.2 In response to this concern, Assoc. Prof. Lee expressed a more optimistic perspective. He noted that there was a new generation of students visible in mediation and arbitration moots such as the ICC in Paris and the Vis Moots. He highlighted that students were surpassing seasoned practitioners, and that there were a sizable number of students who wanted to mediate and were fascinated by it.

3.3.3 Ms Hadikusumo opined that demand would affect supply and that the market would decide what it wants, like any other business or product. However, some clients would need to know the available options, while influencers and educators have to tell clients what they need.

3.3.4 Prof. Alexander commented that there was an article about the "Californication" of legal systems. As legal systems affect how litigation is practiced, there may exist a unique trend in the U.S. that was not replicated elsewhere. The U.S. may thus have unique cultural issues.

3.3.5 A question was posed regarding what the role of an arbitrator should be. Arbitrators have been viewed to play an important role in helping a party to think through the discovery process. Instead of a merely passive role, arbitrators had an extreme role as a "muscular" arbitrator, and clear messages should be given regarding cases via discovery requests and case management.

4. On point (iii) regarding "Promotion":

4.1 Ms Kalowski highlighted the need for the local legal culture to be receptive to ADR. She opined that the new generation of students would understand and appreciate it, and that it would become the norm in time. Further, to promote ADR, a collaborative approach to selling processes matters.

4.2 An Advisor agreed. Referring to the procedural order example raised earlier regarding including mediation in arbitration procedures, he shared that in the UK Courts, mediation was regularly included as part of court procedures. This suggested that the adjudicative providers (e.g. judges and arbitrators) had important roles to play in the promotion of ADR.

4.3 Ms Hadikusumo mentioned that arbitration and mediation could be used even when there was no conflict. This was all about risk management.

4.4 An Educator opined that innovation was necessary. A high level of innovation existed everywhere. This was evident from the Arb-Med-Arb rules, which exist despite its administrative and mechanical nature because it makes sense. She shared that it was challenging to innovate in a world where everyone is trying to avoid the risk. For example, when sales people entered into contracts, they do not want to have to concede points in the negotiation, and were primarily concerned with negotiations over prices. A suggestion was made to offer

mediation or “opt-out” provisions to continue to pick users up as this had been statistically proven to be effective. This was a form of using the “nudge theory” to promote ADR.

4.5 Almost everyone raised their hands in agreement to Mr Leathe’s question on whether they think ADR is insufficiently promoted.

4.6 Assoc. Prof. Lee further commented that the ground must be ready as there is a difference between transplanting and growing. We should not simply do something in Singapore because it had been previously done in the UK or the U.S.

4.7 Some views from the audience:

4.7.1 During the Question and Answer segment, the topic of promotion and hybrids (for example, Arb-Med/Arb-Med-Arb) were raised. An audience member shared that Australia had allowed a new hybrid, and highlighted huge increases in the use of a hybrid ADR process that was once promoted by the local legal establishment. There was an emphasis on the role of education in promoting these new models.

4.7.2 A Provider from China commented that she had tried to promote mediation. However, she highlighted that when complaints were received, the enforceability of the mediation agreement was often of concern. Parties preferred arbitration to mediation since there was no mediation equivalent to the New York Convention for Arbitral Awards. Enforcement was a real issue for Small Medium Enterprises. She further opined that mediation was often not conducted through normal face-to-face methods but through email and telephone calls, which suggested a flexible approach to the use of mediation. She also remarked that there was possibly a need for more alternatives as to how mediation can be used.

5. On Point (iv) regarding “Enforcement”:

5.1 In response to a query on whether enforcement is an obstacle to enforcement, Mr Oddy mentioned that this would depend on local national laws. He pointed out that an EU Directive has resolved this issue for the EU. In Singapore, the Singapore International Mediation Centre had adopted the Arb-Med-Arb protocol and the mediation agreement would be registered as an arbitral award. This thus provided access to the New York Convention. Assoc. Prof Lee agreed that SIMC has a good arb-med-arb procedure, and that enforcement is not an issue in certain jurisdiction. In reality, there is a high rate of compliance with mediated settlements. Mr McIllwrath added that the IMI had a committee advising UNCITRAL on this matter.

5.2 Mr Loong, from the audience, questioned whether this was even an issue given that there was a higher rate of compliance with mediation agreements. Moreover, parties who arrived at a mediated settlement arguably seldom reneged on the deal. Mr McIllwrath responded that there was often a disconnect between users and providers in this respect.

5.3 A member of the audience asked whether consent awards converting mediation into arbitral awards could be the future solution. It was further mentioned that Singapore’s Arb-Med-Arb protocol could be the solution and would help increase the use of mediation. The value of a Convention for Mediation was that it would address the fear factor, even if it were not objectively needed.

6. On Point 5 regarding “Change Drivers”:

6.1 Prof. Alexander suggested that we continue to look for incentives for change while keeping flexibility that is consistent with mediation. Innovation will require connecting the dots with time, with flexibility coupled with regulatory changes.

6.2 Assoc. Prof. Lee thought that education was a key driver, both of the lawyers and the users. Users should be educated about the benefits of ADR to their various industries (such as the

- medical industry, business people, and architects), as they would start using ADR once they increase in their level of sophistication. In relation to education in law schools, one or two courses were insufficient exposure. Everyone should be exposed if possible, though resources may be limited at times.
- 6.3 Ms Hadikusumo raised the challenge to providers to sell users a product that they would need, or a service that was attractive to their internal clients. She appealed for a product or service which could aid her before a dispute reaches the courts.
 - 6.4 Mr McIlwrath highlighted that comparative information and data was driving change. The use of technology was underestimated, and it would likely play an overwhelming role and become the future of professions.
 - 6.5 Mr Tirado was in favour of pre-lawsuit procedural requirements, such as providing information early and cost sanctions. A modern protocol should be developed, which would promote the early exchange of information and encourage the use of mediation.
 - 6.6 Mr Oddy brought up the need for better data to inform users. Costs sanctions have also been applied by the courts very successfully.
 - 6.7 Ms Kalowski highlighted the crucial need of not neglecting people and relationship-building. If we are successful in establishing a discussion process which makes users confident of compliance, enforcement will no longer pose an obstacle.
 - 6.8 Mr Hwang S.C. mentioned that when the time is right, the industry should proceed to identify more areas which have a higher probability of success if mediation were to be employed, such as the construction industry. If the right areas could be identified, the next step would be to obtain the courts' support, which could take the form of mandatory mediation.
 - 6.9 Mr Leathes thought that the future lay in deal-making.
 - 6.10 A member of the audience suggested that arbitrators should be trained in mediation as well as arbitration, in order to be able to combine the two in the same dispute. Another member stressed that influencers and educators play a key role. The educators were arguably changing the world, laying the foundations necessary for bigger and better buildings. There was a need to recognise and celebrate the builders of Noah's Ark in ADR, and mediators and arbitrators should be allowed to work as a team.
 - 6.11 In conclusion, it was mentioned that we have to "be the change you want to see in the world". The whole purpose of the GPC has been to provoke that change.

Summarised by Singapore International Mediation Institute (SIMI):

- Associate Professor Joel Lee
- Assistant Professor Dorcas Quek Anderson
- Kelly Zhang
- Walter Seow
- Jun Jin Sei
- Lim Shen-nen