



HERBERT  
SMITH  
FREEHILLS



International Mediation Institute



# Shaping the Future of International Dispute Resolution

Transcripts of chats generated during the  
convention from 15 tables and 10 moderator iPads

Guildhall London, 29 October 2014

***The Chatham House Rule & Access Rules:***

*All of the information generated during this convention is publicly available. Neither the identity, nor the affiliation, of any participant may be revealed. Anyone wishing to publish any data that follows may do so freely, provided they promptly send a copy of their publication to [shapingIDR@imimmediation.org](mailto:shapingIDR@imimmediation.org) and permit IMI to republish it free of charge on its website three (3) months after its first date of appearance or at any later date.*

Supported by Crystal Interactive [www.crystal-interactive.co.uk](http://www.crystal-interactive.co.uk)

## Table of Contents

1	<b>Ask a Question</b> .....	3
1.1	List of all Questions Asked .....	3
2	<b>Make a Comment</b> .....	5
2.1	Session 1 (09:30-11:00).....	5
2.2	Session 2 (11:30-12:45).....	9
2.3	Session 3 (13:45-15:00).....	12
2.4	Session 4 (15:00-16:15).....	13
2.5	Session 5 (16:45-18:00).....	16

# 1 Ask a Question

## 1.1 List of all Questions Asked

1. How do the panellists value the quality of their external counsels' advice to and their accompanying them in ADR proceedings, namely in mediation? - Table 12
2. A lot of discussion appears to relate to large disputes. Does the panel see any value in the application technology / innovation to manage smaller issues (eg: client / customer complaints) in essence turning negative customer experiences into positive ongoing relationships? - Table 11
3. What are techniques used to convince the other party to mediate. - Table 2
4. Is the speaker talking about disputes between insurer and insured or between insured and a third party, or both? - Table 2
5. Fairness: How can one improve this concern or enhance it other than "standards" set for mediators for example? - Table 2
6. What about appropriateness in certain cultures - mediation/face time etc. - Table 1
7. How important are venue and applicable law? - Table 12
8. What about dispute "prevention" or "avoidance" that the speaker suggested? What does that mean to users? Thoughts? - Table 2
9. What is the viewpoint of panellists on mandatory mediation? - Table 1
10. Are the results of these votes available for us afterwards? - Table 9
11. ADR is a portmanteau term embracing expert determination, EDR, adjudication, arbitration (all of which have been around for centuries so are not 'alternative') as well as mediation. Can this group decide to ditch ADR for the more focused term, mediation. Please? - Table 11
12. Is it not true that the courts will often direct the parties to mediate or attempt to mediate rather than litigate? - Table 8
13. How are Jackson reforms pushing mediation? - Moderator B
14. Are there any types of disputes not suitable for mediation? - Table 2
15. To what extent do users use in-house counsel rather than external counsel during mediation. - Table 8
16. Is there any reason that mediation is only brought up to the management and litigation team when the dispute arises? Why mediation is not used in making agreements, mergers and acquisitions, joint ventures, etc. - Table 2
17. Non mandatory mediation before arb. or litigation - Table 8
18. Statistics suggest that settlement rates in "mandatory mediation" countries (where there is a first discussion on mediation process options) are the same as where it is purely voluntary. Any comments? - Moderator H
19. "Mandatory mediation" means that parties are obliged to attend a first session, but it remains voluntary in that they are always free to leave at any stage once the first session has begun. - Moderator H
20. Where are the women on this panel? - Table 3

21. Interesting to observe an all male panel. Is this a reflection of the ADR business, do we think?  
- Table 1
22. We should perhaps be careful, this is not about what 'people' want. It is rather about what a select group of users might prefer; which is valid, but might not work for businesses of all types and individuals - Table 3
23. Question to speaker: In your example where you said you were not a typical neutral from your country and that you did not settle at 50%, what was the final result? Did you settle above 50%? - Table 3
24. The speaker said "technology is at heart of progress in international dispute resolution". How do service providers use technology in the "arbitrators' contract" with parties to collect data to provide feedback on accountability of arbitrator ,e.g., on jurisdiction objections, interim measures, tracking initially established deadline? Professor Catherine Rogers initiated the Arbitrator Intelligence project to provide more transparency on arbitrators. To what extent do service providers support her Arbitrator Intelligence initiative? - Table 6
25. Why can't the institutions ask parties about other processes: just give them an explanation of options and some case studies of how to do things differently? - Moderator J
26. Are we involving the audience sufficiently? - Moderator G
27. Question for speaker: did your organisation wish to make more dramatic changes in 2012 but it was users (i.e., in-house counsel) who held them back? How was that user feedback obtained? - Moderator H
28. Does the panel suspect that, if institutions encouraged early systematic mediation in the arbitration process, that law firms would stop incorporating those institutions in dispute resolution clauses in their clients' contracts? - Table 6
29. What would be the most challenging obstacles facing government when they are required to take decisions with regard to refer government disputes to mediation. - Table 4
30. Why was Rule 9 of the AAA rules calling for compulsory mediation (but with a unilateral opt-out option) in parallel with arbitration added only for domestic cases? Why is it not an international provision in the ICDR rules as well? - Moderator H
31. How can advisers be sure when a mediation is successful during the life of an arbitration that arbitrators will endorse the clients' decision and adopt it as an enforceable award? That is key as otherwise clients will be fearful they may duplicate costs later. Will institutions insist on a review of the settlement?
32. Not all terms of a mediated settlement could be made into an award if it is extra to their contractual remit (eg future work, statement of regret etc). What then? What do providers advise the parties to do? Get an award re the payment terms and leave other terms within settlement? - Table 6
33. Is the question about certification only about mediators or also about arbitrators? - Moderator H
34. GE counsel Mike McIlwrath and Roland Schroeder wrote an 2010 article on evaluating arbitrators mentioning IMI mediator assessment work and Catherine Rogers' arbitrator database project and attached an arbitrator questionnaire developed at the request of the late Professor Thomas Waelde, founder of OGEMID, for parties to assess arbitrators at the conclusion of proceedings. They recommended institutions adopt Waelde questionnaire. Do institutions use this assessment mechanism? - Table 6

35. Surely any competent mediator should be able to adapt his style to whatever the parties need at any particular stage of the mediation. - Table 9
36. Re Qu 35: The question is not necessarily the mediator's ability to adapt his or her style. What if the mediator starts off with his/her preferred style and the parties or their counsel do not feel free to adapt to their preferred style? Does this not happen often when there is an assumption that the mediator will control the process? Should these issues not be discussed first? - Moderator H
37. Please address the issue of adapting mediation techniques to technology and vice versa - Table 9
38. Question for moderator: It would be great to reflect on some of these themes from your organisation's realistic perspective. Do you mind sharing? - Table 2
39. Would you mediate with hostage takers? - Table 8
40. Which commissioner's responsibility will B2C ODR be? - Table 12
41. What do we exactly mean by an ISDR clause? - Table 7

## 2 Make a Comment

### 2.1 Session 1 (09:30-11:00)

1. Good morning everybody. Happy interactive Convention ! The Organising Committee - Moderator J
2. Have we become complacent about the use of ADR, and has it lost some of its flexibility and cost-efficiency? - Moderator J
3. ADR too expensive? Supply and demand-free zone? - Moderator A
4. How can we promote consistency in the global approach to ADR? - Moderator B
5. Other: quality of outcome, with cost containment and speed - Table 6
6. The morning vote shows a split satisfaction rating. Many are satisfied, but is this influenced by the higher number of providers in the room today (38%)? We should try and re-vote on this same questions at the end of the day, so that we can track the satisfaction ratings taking into account the views of the 18% of users present and compare them to those of other stakeholders. - Moderator J
7. Certainty is not the same as "predictability". Another word missing in the vote was "fairness" - Moderator J
8. Speed and efficiency not necessarily the same thing - Moderator B
9. Global businesses value things differently - Moderator B
10. Do fears of regulation play a role? - Table 4
11. Fairness is important and one of the major problems is an imbalance in all litigation and dispute resolution methods. They favour the resource heavy and sophisticated. We need to find ways of resolving disputes that are available to all and that do not rely on teams of lawyers and massive legal budgets. - Table 14
12. There is a stinking gap between users (33% ranking expense and certainty as most important) and providers, (44% ranking certainty as most important and only 15% expense). It

- is also interesting to note that providers don't rank certainty as highly as users (20% vs 33% for users) - Moderator J
13. Damn typos! Meant "striking" and not "stinking", but an interesting twist by Apple spellcheck! :-)- Moderator J
  14. Another key factor: Respect to what is lost . - Table 11
  15. Industry seems to welcome having mandated or regulated mediation requirements. It creates a buffer to try and sort things out first directly with complainants. - Moderator J
  16. In-house counsel may have difficulties in persuading parties to mediate. - Moderator B
  17. Why should I use an ADR mechanism if it is not enforceable? I believe users look towards enforceability of the ADR outcome. - Table 4
  18. How effective are mediation settlement enforcement orders within the EU at addressing enforcement concerns? - Moderator B
  19. We would like to compliment the moderator's tie. - Table 2
  20. Is the reason why mediation is more difficult than arbitration because users are responsible for the outcome? With litigation or arbitration, third parties are responsible for determination and users can blame them if outcome is unsatisfactory - Table 6
  21. To what extent do inefficiencies or lack of empowerment of management make decisive negotiations difficult and hamper early resolution - especially in remote jurisdictions? - Table 4
  22. User appetite for flexibility and opportunity to create process that fits parties' needs. - Moderator B
  23. Need for global system of mediator certification accessible by users. - Moderator B
  24. The discussions so far work on the premise that there are legitimate arguments on both sides to justify mediating. What views does the panel have where a party without strong - or any-arguments looks to try to mediate simply to put the counterparty at risk of costs sanctions if it refuses? - Table 4
  25. Users own the solution - Table 6
  26. Not so much that external counsel don't propose ADR but that they advise against it or resist early use of it - Moderator A
  27. When it comes to enforcement it is possible under the SCC rules to ask the mediator to write an arbitral award of the actual settlement. In this way the award becomes enforceable - Table 10
  28. It seems that there is a gap between advisors and providers. Are providers focusing sufficiently on users as opposed to advisors? - Moderator H
  29. With a question that asks for "most important" only, you cannot draw conclusions about relative importance of multiple factors. Please don't draw the conclusions you want! - Table 10
  30. External counsel in England and Wales have a duty to advise on ADR and risk serious costs consequences for their client from unreasonable stance. - Moderator B
  31. How important is outside counsel's proficiency in mediation to the choice of counsel? Will IMI's mediation advocacy competency help? - Table 4

32. Interesting to note that 60% of users think that in-house counsel do not do enough to promote mediation, but this reflects the approach of senior management (which users only rank as 7% factor) but other stakeholders rank between 21-38% importance. Are sufficient efforts being made to educate non-legal in-house executives? - Moderator H
33. The reason that the approach of senior management is important is because to approach ADR early means that you sometimes have to make calls on the basis of imperfect information. You need to work in an environment that allows you and encourages you to make judgment calls rather than dotting i's and crossing t's - Table 14
34. Are the users who feel 60% that the skills and approach of in-house counsel determine efficacy of ADR and the senior management that everyone else feel are the determining factor? - Table 7
35. How do you convince a senior manager to use mediation when they are convinced they are better settlement negotiators and don't need help? - Table 4
36. Do company in-house counsel have the ability to exercise pressure and take the lead in big disputes? It seems that insurers may perceive big cases as being handled by external and not internal counsel. - Moderator H
37. How do you convince senior management to use mediation when they perceive that litigation is a remote risk and the company has a good track record of relationship with customers (few litigations)? - Table 7
38. When insurers outsource a case to outside counsel and outside counsel have a financial interest in higher billable arbitration than lower cost mediator, what incentives are there for insurer to save costs for its insured? - Table 6
39. The suggestion that mediation becomes a regulated profession is anti competitive through the eyes of an English lawyer. There are real differences between the approach of civil law countries and common law jurisdictions. A good adviser in house or external knows a range of mediators just as we know a range of advocates and expert witnesses etc, we have the responsibility to select the right person - Table 11
40. It would be interesting to know the split of answers outside of the UK - the maturity of ADR markets is still very variable among countries - Table 5
41. Why so few female mediators? Why do lawyers choose male mature white men? The evidence is that this is not the grouping which has the best negotiation and people skills - Table 11
42. Surely the case and strategy must drive the question of when to use mediation, not a general principle. - Table 10
43. External lawyers are also driven by the preference of the clients for choice of dispute resolution and are often reluctant to make mediation mandatory - Table 9
44. Should mediation be mandatory? - Moderator B
45. Another significant difference: advisors and providers seem to think you need to have a certain knowledge of the case. Users don't. Even more interestingly, 66% of users seem to be in favour of mandatory mediation (whether before litigation or arbitration). - Moderator H
46. Why is there a strong provider view that mediation should wait until issues are sufficiently developed? Is there a reality that users are missing? I.e. mediation doesn't work early? - Table 14

47. In the reinsurance sector in particular arbitration has become as expensive and at times more expensive than litigation so mandatory mediation as a first step is a no brainer - Table 8
48. Excluding England's users, how often do you manage to refer a dispute to mediation, when it was not chosen in the Dispute resolution clause? - Table 5
49. Advisors seem to have a unique view of national court litigation as being the preferred route for dispute resolution. There is a clear gap here between advisors as opposed to users and providers when it comes to international dispute resolution. - Moderator H
50. If the agreement is executed then a mandatory mediation clause is clearly by consent of the parties. - Table 13
51. Our businesses are very diverse so our businesses tailor the IDR clause to the business needs. As a result we use many different clauses. - Table 4
52. It seems that the panellists and users in the audience are very interested in learning how things work in different companies and industries and organisations. Would it be useful to have such conversations on a regular basis? - Table 2
53. Does the advisors' reluctance for mandatory mediation pre litigation or arbitration reflect a concern that this can be exploited by counterparties as a delaying tactic? - Table 10
54. The use of the expression "ADR" is confusing and needs to be used much more carefully? - Table 15
55. Sometimes cultural differences will have an impact on the preferences for ADR processes. Being open minded on these differences may generate partly or gradually some more consensus to reach practical solutions. - Table 9
56. Key concerns for users when choosing a dispute resolution mechanism were shown to be speed and expense, followed by efficiency. A major barrier to mediation for delegates is lack of familiarity and experience with the process. The desire for flexibility and bespoke mediation solutions was voiced and some reservations expressed in terms of mandatory clauses. But without mediation clauses will there be struggle to bring counterparties to the table? - Moderator I
57. Diversity of views characterised session 1. Different attitudes to external counsel, different attitudes towards desirability of ADR clauses. Interesting gap between educators' interests and those of the market. Interesting gap between expectations and offerings from providers. Much to debate. - Moderator A
58. Lots of comment and debate already. 38% neither satisfied or dissatisfied with IDR at the start of the day, it will be interesting to see if the view is the same at the end of today's convention. Certainty and cost saving most important factors in IDR for users, for advisers, efficiency features higher. Fairness and predictability are other factors identified. Users desire flexibility and there is a desire to create processes specific to the particular dispute. Some feel a global system of certification of mediators worldwide is needed which is accessible by users. Others, particularly external lawyers, feel they have sufficient knowledge to advise on mediator choice. Providers think external counsels aren't promoting mediation enough. Users consider the role of in-house counsel to be key. Skills of in-house counsel are important in driving the process forward and shaping relationships. Some enforceability concerns. Everyone agrees mediate early, but users favour mediation pre-action. Diverging opinions on whether mediation should be mandatory. Mandatory mediation clauses may help where parties are unfamiliar with the process. - Moderator B



## 2.2 Session 2 (11:30-12:45)

1. Are suggestions that mediators and mediation advocates should be certified supported by users or are they driven by the mediation industry out of self-interest and fees? - Table 11
2. What about advisors who are also providers? - Table 9
3. Do we only look to middle aged men for 'innovation' as the panel make up suggests? - Table 11
4. We seem to have lost a user! :-(. It is particularly important that we hear THEIR views. One question is whether this conference and ADR is of interest to them? If so, why are so few proportionally represented today? - Moderator H
5. We have 101% attendance! - Table 11
6. Rounding up error? - Moderator H
7. It's interesting that all speakers are male. In terms of providers and the field more generally, should we be looking for more gender balance in our leaders to assist the development of innovation - Table 14
8. And how many are non-lawyers? - Moderator H
9. ADR is not a primary concern of in-house counsel? This would appear to be supported by the fact that only 17% of the people in this room are users. The perception from the previous panel (by users themselves) was that in-house counsel apathy/inexperience with mediation was one of the most important reasons why mediation is used so seldom. This is a question worth pursuing in the future, and it would be good to see associations of corporate counsel participating more visibly to such events so that their views of all of this could be understood better. - Moderator H
10. Is there too much innovation and poor party choice? - Moderator B
11. Disruptive Innovation?! - Table 2
12. Just an observation on the panel - was it specifically planned that all panellists were supposed to be male? - Moderator J
13. Please be more respectful. There is nothing inherently bad about being male or inherently good about being female. Perhaps we should look to the quality of their comments and not the nature of their gender. Perhaps they will return the same courtesy to you. (BTW - almost all of these speakers are white -- but that is another matter isn't it. LOL - Table 13
14. How can an institution change a culture in a jurisdiction where lawyers do not want to go to mediation because of lack of experience and/or fear of not charging the same amount of money for the law firm that arbitration would do? Where to start? Who to approach? - Table 10
15. Re 14: change their lawyers - Table 11
16. Interesting point to apply behavioural economics to increase use of mediation. Who should do the "nudging" and how should it be done? - Table 7
17. It would have been interesting to know what providers have for Africa, the emerging market that cannot be ignored and where international companies are moving into. - Table 13
18. Why don't you, the providers, agree and publish a common international lexicon/ primer for ADR Processes and disseminate to all your contacts? Many businesses struggle with the

- terminology, the sheer proliferation of processes, where they seek simplicity and clarity! That doesn't have to fetter process choice. - Moderator J
19. Oh and the primer would help some of the arbitration community, emphasis on some, realise there is life beyond arbitration. - Moderator J
  20. Agreed and common standard... IMI? - Table 2
  21. Re 18. Most large law firms do exactly that. Am not at Herbert Smith Freehills but their information is excellent - Table 11
  22. Judges refer to mediation in many jurisdictions, why not institutions just because there is an arbitration clause? - Table 4
  23. So, it seems as though in-house counsel are disinterested or generally uninformed about mediation and other forms of ADR (present company excepted) but the providers are unwilling to change anything or make any radical innovations (e.g., combining ADR services) without clear leadership coming from them (as the "users"). Can there be any incentive to innovate in this scenario, or will things always stay the same? What could change this dynamic? - Moderator H
  24. We know that most cases settle, why can't providers neutrally ask whether the parties will consider mediation? That's not a view of the merits of the case. - Table 4
  25. Developing the point about behavioural economics, how many mediation promoters have sought to apply the learning from modern understanding of what drives change, e.g. the Tipping Point, Wilful Blindness, Thinking Fast and Slow, and all the other material on cognitive biases? - Moderator G
  26. Might have been a good idea to invite a strategy consultant to this panel to have more critical thinking and creativity rather than status quo descriptions by the usual institutions. - Table 12
  27. Can we vote on something? Anything? - Moderator J
  28. There needs to be some operational function to terms such as "thoughtful approach to litigation", "dispute management" or "dispute avoidance". Such concepts lack legal determinacy.... The fall back will always mean that providers market their services. - Table 2
  29. What is change architecture? - Table 11
  30. Is this discussion really the extent of innovation in the field? I hope not - Table 14
  31. This panel discussion underlines the distance between users and their advisers demonstrated by voting results so far - Table 11
  32. Reputation is what counts in business practice - Table 4
  33. On top of certification what we should seriously discuss is an international professional development scheme guaranteeing that younger mediators will not only be trained in theory but also will have the chance to practice - Table 5
  34. Re 32: Why? - Table 13
  35. Question: how many users and advisers choose mediators through institutions? Most in our experience, as surveys confirm, choose based on recommendations and experience and approach directly. If their lawyers don't know a range of mediators they are using the wrong lawyers - Table 11
  36. Finally... A solid recommendation about global standardisation from a speaker. IMI could be a solution... - Table 2

37. Certification may at least give parties a starting point from which they can then seek views from others' personal experience. - Moderator B
38. Bluntly, no one around our table has been listening for a long while. - Table 11
39. Won't certification increase rigidity and decrease flexibility? Certain stereotypes of mediators likely to be perpetuated: background. Education; gender; socio economics and cultural context. - Table 1
40. Can we please move on with the votes now? We are out of time and it would be nice to know what the room and users think. - Moderator H
41. Re 39: Agreed. One of the best mediators I have ever known is not a lawyer didn't go to the right schools but had all the right qualities to be a top mediator. - Table 15
42. Certification can be a good thing but it can also be used by the entrenched to create barriers to entry by the historically excluded. On the whole mandatory certification is not a good thing! - Table 13
43. Trip advisor for mediators? - Moderator B
44. What do you think of the new arbitrator intelligence project that Catherine Rogers has initiated to collect awards filed in courts all over the world and to develop a feedback form that will be available to members so newcomers to the ADR field will have access to information about neutrals and level the playing field? - Table 5
45. To the users: what specific innovation would you like providers to implement that does not exist? - Table 7
46. Fascinating that advisors are so opposed to opt-out mediation, but users and providers are more in favour than against. - Moderator H
47. No surprise - Table 2
48. Surely because there will be an inference drawn from opt out, which may not be fair in the context of the dispute - Table 1
49. As a point of reference, in NY you need a license to be a dog groomer but not a mediator or arbitrator - Table 5
50. Trip advisor for dog groomers? - Table 2
51. The questions assume mediator appointments are through institutions, which is increasingly rare in the UK - Table 11
52. Session 2 raised the idea that in-house counsel need to make ADR a strategic imperative rather than nice-to-have. If, as identified in the last session, lack of exposure to mediation is such a deterrent perhaps more needs to be done to raise awareness? While education was discussed on the live feed, panellists commented that parties don't always make good choices and 'encouraged mediation' (levels of 'mandatory' to be discussed) with the power of suggestion at institutional levels could benefit users, which sentiment regarding the role of institutions and tribunals was echoed in the votes. On qualifications of arbitrators and mediators, certification as a mark of quality was shown to be important across the board. - Moderator I
53. Summary of session 2: Diverging opinions between the providers on the panel as to what innovation should mean. "Change or die" in a continually changing trans-national market place or too much innovation in the options and the need to guide users so that they make the best choices. The key to innovation may be understanding the needs of users, but some felt

there was too much apathy from users to drive innovation. Controversy over mandatory mediation: some argued that if mediation clauses are agreed, then mediation is not really mandatory. Debate over the role of institutions at the start of a dispute: does proposing ADR options weaken their neutral position? 66% felt that arbitral tribunals should explore ADR at the first meeting. Nearly half the audience agreed with automatic mediation that parties can opt out of, notably only 27% of advisers were in favour. Half also supported costs sanctions for arbitration panels where parties unreasonably refuse to engage in ADR. 92% of users were in favour of mediator accountability, with 78% wanting feedback too. However 2/3 of users did not feel IDR providers are offering innovative solutions. Lots of food for thought. - Moderator B

### 2.3 Session 3 (13:45-15:00)

1. Please define "evaluative" here, it's used in different ways - Table 11
2. Judging by the quality one must repeat the question as to where were the women. From a supporter of frank feedback. - Table 11
3. I find the stark categorisations (e.g. "crossing" from facilitative to evaluative) to be misleading. In practice these are shades of grey, and much more nuanced than that. - Table 9
4. I would want to start wherever the parties agree to start - Table 7
5. Question for moderator: Can we get on with something more relevant please? - Table 9
6. What we should have been told before we vote is: do those involved know it's an illusion? - Table 12
7. It sounds like there is an element of this that is purely cultural in that you get used to and comfortable with the process that you are most used to. - Table 14
8. Surely any good mediator has both evaluative and facilitative skills on both substance and process - difficult then to pair opposites unless you agree which role either will take? - Table 15
9. Do in-house counsel think there would be a benefit from using the guided choice tool to shape the process at the outset of a dispute? Would it prompt you to consider options you may not otherwise have considered? - Moderator B
10. If you have a clear view of your preference in terms of mediation approach there seems little point in combining mediators with a different approach. That seems to be a recipe to make everyone dissatisfied with the process. - Table 14
11. A similar project to assess levels and timing of settlement of court cases and whether mediated is being considered in English High Court. By collecting simple reports by solicitors - Table 11
12. With the difficulties in just getting plain vanilla mediation accepted, should we really be looking at these complicated approaches that appeal to a very limited audience? - Table 1
13. Let's hear from the other panellists please - Moderator J
14. Cheer up, speaker - Table 4
15. Building a process might be assisted by taking guidance from mediations which have or have not progressed well, asking why and then using experience to build the next IDR. Can we have examples please that we can actually learn from? - Table 11
16. How many users are in the room now? - Table 15

17. Are you sure the Crystal Interactive system is working correctly? - Table 13
18. Definitely a neutral SHOULD NOT act as Arbitrator, otherwise he could use info provided to him during mediation against either party, just by natural human process. - Table 11
19. It looks as though a majority of them would favour combining ADR neutrals over swapping hats, but how often are processes ever combined? Are these unnecessary complications or are they really useful for international disputes? Are international disputes different from domestic disputes in this context? - Moderator H
20. Only if there is a telephone call included - Table 9
21. There appears to be an appetite for ODR, but a need for education about the options. - Moderator B
22. Indeed, ODR can only grow - Table 2
23. Re ODR there are multiple platforms currently being used by at least one provider org. Need for more education here. - Table 5
24. In B2B disputes a settlement reached by consensus is rarely not observed. So maybe users don't see the enforcement stage as a problem regularly? - Moderator J
25. At least one user agrees! But supports the enforcement work just in case.... - Moderator J
26. Why should this particular type of contract - because that is what a mediated settlement agreement is - be treated any differently than other contracts where lots of time, costs and efforts have been invested by the parties (such as M&A agreements)? - Table 12
27. The mere existence of such a convention will be a very useful tool to promote the use of mediation and bring trust for the process. We are talking about the end of the process but if we look at the beginning it seems to be so helpful. - Table 2
28. Some jurisdictions such as Jordan have a provision in their mediation laws that any mediated agreement shall be ratified by a judge and this renders it as an enforceable judgement. - Table 4
29. Session 3 summary: third session delved into the different ways you can think about mediation: whether facilitative or directive; evaluative or non evaluative. Most people in the room were for mediation proper as opposed to conciliation. A vote showed the room - many of which are experienced in co-mediation - is open to the idea of combining neutrals. Process design presents many different ways providers can tailor processes to users' needs. However, delegates were wary of mediators and arbitrators 'swapping hats'. Attitudes to use of tech - ie virtual solutions - to resolve disputes was overwhelmingly positive, thanks to the weigh in from providers and educators. Users were more reserved but it seems ODR will only grow with confidence in it. There was a strong reaction in favour of a UNCITRAL convention on settlements - interestingly to promote mediation itself. - Moderator I

#### **2.4 Session 4 (15:00-16:15)**

1. State investment dispute provisions are absolutely critical: Canada-EU, TTIP the TPP are all-transnational trends of the future but conciliation and mediation mechanics process are not clear. - Table 2
2. Qu 1a: "encouraged"- by whom? - Table 8
3. No matter how many times it's described, for the life of me I can't see the difference between conciliation and mediation?? - Table 1

4. If you use mediation in investor state who will represent the 'people' of that state around the table? Their views and buy-in could be critical? Civil servants or elected politicians? - Table 3
5. Cooling off periods: number 1 question from my clients is "how do we drive this forward", not how do we do we let 2 months pass. What is going to happen during the cooling off?
6. How does this interface with the step DR clause?" - Moderator J
7. Should not the Q. @ Session4 Qu 1a be split as (1) If the Mediated Agreement is enforceable; and (2) If it is not enforceable? - Table 3
8. How long a cooling off period? - Moderator I
9. One reason that treaty obligations are important for investor-state disputes is that for a state to suggest "talks" of any kind is often a much bigger step than it is for a business. Hence the pretext of a treaty obligation is useful. - Table 9
10. "The State" and those who represent it is at the core of how disputes need to be resolved-- this unfortunately extends beyond investor/state to humanitarian and peacekeeping mediation. Although a long term solution, education remains the hope. - Table 2
11. Why does encouragement need to be express? Good advisors will encourage settlement negotiations throughout a long trial process anyway. - Table 4
12. That current situation is a "heating up" period. Mediation could genuinely allow for cooling off, and the whole difference between mediation and conciliation here is that mediation focuses on jointly building a flexible process for a satisfactory outcome that is not necessarily norms-based, whereas the current conciliation process is evaluative and only drives competitive and positional negotiation behaviour between the parties. - Moderator H
13. Get a move on! Still five speakers and only twenty minutes! - Table 9
14. As an adviser I have seen too many clients be frustrated by cooling off periods and very few disputes settle at that stage. But clients who choose to agree a cooling off period are almost always able to settle then. So I am sceptical at enforced cooling - Table 11
15. Who are you? We can't see you. - Table 2
16. Apparently the government of Slovenia had an enlightened period where all governmental and regulatory agencies were REQUIRED to attend a mediation if a national requested it in a domestic dispute with the state. The only exception to mediating was if there were substantive issues of national security or public order. This led to a period where everything could be mediated with the state. Unfortunately a change in government led to a change in that policy. Would such a national policy be interesting? I believe the Netherlands may also allow for mediation in some fields that are not normally handled by mediation (e.g., tax disputes). - Moderator H
17. Dealings with the FCA and other FS regulators tend to be more collaborative, with information gathering naturally leading to DR - the parties come to the table for settlement talks at the right stage in the process. These talks are rather like a mediation, but without a neutral - Table 2
18. Thanks, I think this is a real opportunity for mediation to ease the regulatory burden. The process may be somewhat constrained but if it helps accelerate and smooth the process that's valuable. - Moderator J
19. There seems to be some confusion regarding mediation vs. conciliation in ADR with financial authorities. Add to that confusion regarding the presence of an "ombudsman" whose role and



- powers are confusing to those not familiar with them. (Is the ombudsman evaluative or non-evaluative and what investigation rights does the ombudsman have?) - Moderator H
20. Having mediated quite a few disputes between regulators and regulated entities, I find the problems to which the speaker rightly refers are not that difficult in practice. - Table 9
21. FSA as it was formerly called was one of the founding members of the Commercial Mediation Group for users and advisers in commercial disputes. Other regulators expressed support behind the scenes. See the flyer on your tables for further info - Table 11
22. I agree entirely. The fact that they are there usually means that they are committed to the process - Table 9
23. Re 20, the difficulties can be accommodated, but you have to get the FI, the advisors, third parties and the FCA to convene the process. Multiple stakeholders = multiple potential objections to be overcome. - Moderator J
24. Oh dear. Alarming Drop in Revenue. Yes it's an issue, but panel 1 told us how to deal with this.... Instruct lawyers who "get it" in the jurisdiction. If they don't exist, in house counsel have to sort this out and tell them what to do. - Moderator J
25. Message to moderator: we are concerned that this session is running out of time and we may not get to vote on these issues. Could we move to the votes, please? - Moderator H
26. When access to the mediation facility is down a dark street in a foreign country, does mediation with a counterfeiter sound like such a good idea? - Table 4
27. Mediation is a perverse result in the typical piracy case. They win by engaging with the rights owner. - Table 6
28. Commercial solicitors focus business on deep relationships with clients. Clients like solutions not problems so where mediation cuts through a dispute the client is happy and the relationship thrives. As we saw earlier it's not solicitors who keep clients away from mediation, indeed we spend a lot of unpaid time trying to persuade them towards it. - Table 11
29. Tell us about Mali: can you mediate with terrorists about manuscripts? - Table 2
30. Infringements and criminal actions require immediate procedural actions that have an impact on the business ... Mediation could have major impact on the business itself with economic risks. The question is where would mediation the process lead and is it really more effective than normal procedures? - Table 4
31. What's the transferable learning from art law for B2B? Not getting it. - Moderator J
32. Maybe creativity of solutions. - Moderator B
33. What language was used when mediating the dispute between Zurich and St. Gallen? What was the key to success? - Table 13
34. Mediation with terrorists happens a great deal. Land, art, rights and freedoms are discussed and thankfully sometimes settled through patience and determination - Table 11
35. Send the marbles back to Greece and allow all UK citizens free access to the Parthenon - Table 10
36. Will the British Museum soon be empty? - Table 7
37. The Scottish Laird who nicked them should compensate the Greeks. - Table 4
38. He didn't nick them. He paid the ruling government; he paid for their removal and arranged their removal whilst under fire from a hostile army. - Table 11

39. This can be mediated outside in the traditional manner... - Moderator G
40. The pub? - Moderator J
41. Is quality of state-supported mediation an issue? - Table 5
42. Who pays the mediator ... or does she work for free? - Table 1
43. The Government has, of course, increased the fees to access the Employment Tribunal considerably. Has this fact also made free mediation more attractive? - Table 4
44. Are those mediators providing a pro-bono service or are they paid and by whom? - Table 7
45. Not sure why the taxpayers' money should be used for a free mediation service outside of the employment sphere. - Table 1
46. The users are serial defendants! - Moderator J
47. "Ex aequo et bono" translates into English as "shits lose". - Table 9
48. Consensual result is different from fair result - Table 2
49. Fairness is subjective and there may be substantial cultural differences. - Moderator B
50. I would be concerned on the use of the word "always". I would say it should be decided on an ad-hoc basis - Table 7
51. We need to address cultural differences when addressing mediation challenges - Table 4
52. Afternoon summary: the general theme from session 4 seems to be that you can still use mediation for different types of disputes where there may appear to be barriers to the process. Creativity of mediation solutions is important. Positive votes for mediating regulatory, IP and art disputes. Surprising support for arbitrators reaching decisions only on what is fair and equitable. See comment No. 29 in Session 3 for a great summary of that session. - Moderator B
53. Will we be able to ask any questions? - Table 11

## 2.5 Session 5 (16:45-18:00)

1. One key to unlock the door to greater and better use of mediation is the sharing of information: of process, mediators, etc. the Commercial Mediation Group in the UK represents users and their advisers, to facilitate that sharing. See flyers on tables and literature table and if you are a global corporate or UK law firm, make sure you join, it's free! - Table 11
2. There is a need for a true common culture between all stakeholders of IDR and that includes - like with any culture - common language, norms, values and rituals and even symbols and heroes. Or, said differently, there is no strong in-group feeling between us. This is the prerequisite of a better education of users. Having a common vocabulary is an issue - if we do not have one, how can we convince new users to join us? - Table 5
3. Question: Do associations like the Association for Corporate Counsel meet to discuss and promote ADR amongst themselves? - Moderator H
4. It's not so much about users telling providers what they need, but much better education of users and advisers? - Moderator G
5. Isn't one of the reasons there is a disconnect between advisors and users about the use of ADR because ADR means aggressive decline in revenues? - Table 4



6. Prevention but not avoidance please :-) - Table 5
7. Our junior associates are falling over themselves to be involved in mediation. The biggest challenge is finding enough clients willing to mediate often enough. There is a gap between perceptions in this room and junior lawyer interests! - Moderator J
8. Should users adopt alternative fee arrangements that incentivise advisors to use mediation? - Table 4
9. Do in house counsel always want to slash their legal spend, or might there be symbiotic relationship with outside counsel so the legal dept. budget doesn't shrink? - Table 1
10. The key is simplification. In-house counsel don't have time to listen to huge details on esoteric issues. Let's take today's learning and distil and simplify it to practical advice. That will help change behaviour. - Moderator J
11. There is no room for tinkering when comprehensive reform is needed.... Roscoe Pound - Table 2
12. Re international pound conference: Yes but look at comments re Agenda - Table 9
13. Who is willing to sponsor? - Table 2
14. Get real about deal mediation. It is currently a step too far. Let's focus on improving that which is realistically attainable - Moderator J
15. That is simply not true. It is a different utilisation of this important skill/profession. - Table 2
16. Would need very different format for any future conference...much more engagement needed with and among the audience - Moderator G