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Access To Justice—The Road Ahead: What Is The Role Of The Lawyer/Advisor And Education?

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ACCESS TO JUSTICE—THE ROAD AHEAD:
WHAT IS THE ROLE OF THE LAWYER/ADVISOR
AND EDUCATION?

By Deborah Masucci¹

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INTRODUCTION

In 2016, the International Mediation Institute² (“IMI”) launched the Global Pound Conference³ (“GPC”) to engage a modern conversation about commercial dispute resolution globally with the goals to learn how disputants practice dispute management and resolution today, what is needed in the future, and how should dispute resolvers change to meet the demands of the marketplace. From March 2016 through July 2017, thirty events are scheduled in twenty-five countries worldwide to gather information that would answer these questions. During each event, the same twenty questions are posed. Five stakeholder groups are represented in the events and can

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2. The International Mediation Institute is a not-for-profit public interest initiative committed to driving high competency standards for the practice of mediation globally. *See* INTERNATIONAL MEDIATION INSTITUTE, www.imimmediation.org (last visited Apr. 13, 2017).

3. For more information on the Global Pound Conference, see GLOBAL POUND CONFERENCE, www.globalpoundconference.org (last visited Apr. 13, 2017).

be categorized as parties,⁴ advisors, adjudicative providers, non-adjudicative providers, and influencers.⁵ The opportunity to compare and contrast information gathered on the same topics from different cultures and legal systems is unprecedented. In the end, there will be robust information collected to guide what is the future of dispute resolution. This Essay focuses on the events held in 2016. While the results might change as more data is collected, there are clear trends in the current data that are consistent with information reported in other published surveys.

In the same time frame, IMI published its 2016 International Mediation and ADR Survey⁶ – a census of conflict management stakeholders and trends in dispute resolution that provides insights of stakeholders regarding mediation and appropriate dispute resolution awareness. Much of the information provided in these two endeavors overlap and can be seen as a harbinger of what to expect when the GPC series concludes. As stated above, this Essay focuses on a few questions⁷ and the trends that seem to be coming to light from these initiatives. The first Part will discuss the role of lawyer/advisors: who is driving the demand for intelligence on dispute resolution, who is most responsible for the selection of the course traveled, and what qualifications prepare the lawyer/advisor to serve this important role? The second Part of the Essay will discuss the role of the courts and governments in expanding alternative dispute resolution processes and access to justice. This section also discusses the importance of, and desire for, more and better education.

4. Parties include business managers and in-house counsel.

5. Government officials are included in “influencers.”

6. See INT’L MEDIATION INST., 2016 INTERNATIONAL MEDIATION & ADR SURVEY: CENSUS OF CONFLICT MANAGEMENT STAKEHOLDERS AND TRENDS (2016), https://imimmediation.org/private/downloads/rU11KF-oKnpwHisL_IPYA/2016_Biennial_Census_Survey_Report_Results.pdf [hereinafter IMI Survey Report].

7. The data from the GPC referenced in this Essay is taken from a report of the aggregate results for the seven events held in 2016. The information can be found at GLOBAL POUND CONFERENCE, CUMULATED DATA RESULTS MARCH-DECEMBER 2016 (2016), http://www.globalpoundconference.org/Documents/Aggregated%20Data%20Report%20GPC_28Dec.pdf?mkt_tok=eyJpIjoiTXpJeFlqQXdPVFJtTkrVMCIlnQiOiJlYzlmOEwxTko0Mk1VK1Rkc3RZY1BDd0MrOVBPXY2WUNleDBQRkpoR2pUSFZuc0lJWtJxaE5xOFhvRDczSGdRWnFyV2dT2hDXC9td0hxaUF3RnhYT1BsS2sydmg1ZWdUd3d3MzI4ekNsbkFRMDR4dIA5dXBzNjZk1o5SGVTdlgifQ%3D%3D [hereinafter Aggregate GPC Results].

I. THE ROLE OF LAWYER/ADVISORS⁸

Lawyer/advisors play an influential role in assisting clients in choosing the best dispute resolution mechanism to meet their resolution goals and guiding them through the process. Dispute resolution⁹ is most effective when the parties are integrally involved in strategic decision-making to select the process to secure the best results for their business. Who is most responsible for ensuring that parties involved in commercial dispute resolution understand their process options? Parties answered that in-house counsel should be primarily responsible, while lawyer/advisors answered that external lawyers should serve this role.¹⁰ The answer to this question demonstrates a disconnect between parties and their lawyer/advisors. The answer may also reflect the tactic by many global companies to hire in-house counsel who are experts in the field of alternative dispute resolution¹¹ (“ADR”) so they can collaborate with and guide the business about their ADR options. When asked which role parties involved in commercial disputes typically want lawyers (i.e., in-house or external counsel) to play in the dispute resolution processes, the parties voted the top two choices as: lawyers should collaboratively work with the parties to navigate the process, and lawyers should speak or advocate on behalf of the parties.¹² On the other hand, lawyer/advisors voted to say that they are most effective when advocating or speaking for parties.¹³

The current data shows that lawyers want to have a stronger role in the ADR process than what the clients want them to have. Lawyers

8. The term “lawyer/advisor” is used throughout this Essay because in many jurisdictions globally, the person advising a party about alternative dispute resolution processes is not required to be a lawyer. IMI established criteria for mediation advocate/advisor certification that recognizes jurisdictional differences. See the Nomenclature section for IMI Mediation advocate/advisor criteria at *Competency Criteria for Mediation Advocates/Advisors*, INT’L MEDIATION INST., <https://imimediation.org/mediation-advocacy-criteria> (last visited Apr. 20, 2017).

9. “Dispute resolution” covers the full spectrum of adjudicative and non-adjudicative processes that a party might use to resolve a dispute.

10. See Aggregate GPC results, *supra* note 7, at session 2, question 4.

11. ADR includes processes other than court litigation such as mediation, arbitration, and early neutral evaluation, to name a few. ADR processes may be used during the course of court litigation, but a judge is not making a decision about the dispute.

12. See Aggregate GPC results, *supra* note 7, at session 1, question 5.

13. *Id.*

should be more aware of the expectations of their clients, especially since it appears that retaining control over the outcome is one of the three top results parties seek to achieve by participating in a non-adjudicative process.¹⁴ This is all the more important because the data also shows that external lawyers are the most resistant to change¹⁵ and arguably, using ADR.

Another aspect in this discussion is understanding what clients seek when determining their dispute resolution path. The responses from the GPC questions indicate that when parties involved in a commercial dispute are choosing the type of dispute resolution process to use, the top goal is efficiency.¹⁶ Further, parties seek reduced costs and expenses by participating in a non-adjudicatory process, whether through mediation or conciliation.¹⁷ This result is consistent with responses provided by corporate counsel who expressed their opinion that counsel in an arbitration proceeding should cooperate better to achieve settlement, including the use of mediation during the course of an arbitration.¹⁸ Parties also look to combining adjudicative and non-adjudicative processes as the most effective method,¹⁹ as well as a priority to improve dispute resolution in the future.²⁰

II. LAWYER/ADVISORS ARE RESPONSIBLE TO HELP CLIENTS CHOOSE THE CORRECT ADR PROCESS

The results show that lawyer/advisors, whether inside or outside counsel, are jointly perceived as primarily responsible for ensuring that parties involved in commercial disputes understand their process options,²¹ and the possible consequences of each process before deciding which one to use. This shows us that in order to have an increased use of ADR in the future, lawyer/advisors of today must

14. *See id.* at session 2, question 3.

15. *See id.* at session 3, question 4.

16. *See id.* at session 1, question 2.

17. *See id.* at session 2, question 3.

18. *See* WHITE & CASE, 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION 31, http://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf.

19. *See* Aggregate GPC results, *supra* note 7, at session 2, question 5.

20. *See id.* at session 3, question 2.

21. *See id.* at session 1, question 3.

have a strong and thorough understanding of ADR in order to have the knowledge and capacity to advise clients on the best dispute resolution process to use.

Despite the strong predictable increase in mediation training in the next five years, there continues to be a high desire for mediation training criteria and qualifications to become more standardized. We are looking at a future where ADR professionals must meet strong training and qualification requirements. With parties being more informed of their dispute resolution options, and an increased acceptance of ADR, we see an increased need for ADR professionals, whether neutrals or lawyer/advisors, to be continuously trained about the nuances of dispute resolution processes. Demand for neutrals and lawyer/advisors to comply with competency criteria could elevate ADR to a primary career option.

In July 2013, IMI launched its Mediation Advocacy Competency Certification criteria.²² The certification criteria were established to assist clients to identify advocates who are knowledgeable and skilled in negotiation and dispute resolution processes. In fact, one of the criteria of “General Knowledge” is an understanding of a party’s procedural options to resolve a dispute, the advantages and disadvantages of the different processes available, and the best timing to trigger each process.²³ The general knowledge criteria for mediation advocates parallels the general knowledge criteria for mediators and the principle that an effective advocate understands not only the mediation process, but the entire dispute resolution spectrum. An empirical study of decision-making published in 2008 provides evidence that lawyers who are trained in mediation exhibit a lower decision error rate when making recommendations about settlement than lawyers not trained in mediation skills.²⁴ Offering such a

22. See *IMI Mediation Advocacy Competency Certification*, INT’L MEDIATION INST., <https://imimmediation.org/imi-mediation-advocacy-competency-certification> (last visited Apr. 13, 2017).

23. See *Competency Criteria for Mediation Advocates/Advisors*, annex 1, INT’L MEDIATION INST., <https://imimmediation.org/mediation-advocacy-criteria> (last visited Apr. 13, 2017).

24. See Randall L. Kiser, Martin A. Asher, & Blakeley B. McShane, *Let’s Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiation*, 5 J. EMPIRICAL LEGAL STUD. 551, 586-89 (2008).

mediation certification process provides advocates with a competitive advantage over others in the field and elevates the profession.

III. WILL DISPUTE RESOLUTION EDUCATION EXPAND?

Governments/ministries of justice have a primary responsibility for taking action to promote better access to justice in commercial dispute resolution. Governments across the globe must take measures to create more awareness amongst lawyer/advisors to increase available education about ADR and its benefits, and require lawyer/advisors to have a better understanding of situations when ADR is best suited for their clients. This is especially important as business grows cross border and inevitable disputes arise. In his “Opening Remarks” during the first GPC event in Singapore, Chief Justice Sundaresh Menon talked about the inevitability of the increase in cross-border disputes and the need to be prepared to address the challenges that will arise. He recognized the role of governments in educating disputants but specifically parties who infrequently are in court about their process options, emphasizing “appropriate” dispute resolution.²⁵ The Chief Justice announced the establishment of the Singapore International Dispute Resolution Academy²⁶ (“SIDRA”) as a thought leader in Asia for promoting appropriate dispute resolution and supporting cross-pollination of best practices. Will other regions be far behind? The courts played an integral role in the advancement of ADR in the United States during the twentieth century.²⁷ Similarly, civil justice reform was occurring in Great Britain in the form of the Wolf Reforms²⁸ and the European Union adopted the Mediation Directive in 2008.²⁹ These are just a few examples of past court driven initiatives supporting ADR, but isn’t more needed today?

25. See Deborah Masucci, *The Global Pound Conference: The Journey to Determine the Needs of Users has Started*, 9 NYSBA N.Y. DISP. RESOL. LAW. 27, 28 (2016).

26. See SINGAPORE INTERNATIONAL DISPUTE RESOLUTION ACADEMY, <http://www.sidra.academy/> (last visited Apr. 13, 2017).

27. See Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations* 19 HARV. NEGOT. L. REV. 1, 3 (2014).

28. Hazel Genn, *What is Civil Justice For? Reform, ADR, and Access to Justice*, 24 YALE J. L. & HUMAN. 397, 2-3 (2012).

29. Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, 2008 O.J. L 136/3.

Measures must be taken to reach out to the government sector to proactively promote dispute resolution, and to develop a sense of understanding and acceptance with the judiciary of the value and importance that ADR plays in the pursuit to easy and efficient access to justice. As noted above, governments and the courts play a pivotal role in educating the public at large and the legal community about the benefits of integrating alternative dispute resolution processes into the dispute resolution spectrum. However, despite the programs instituted by the courts and governments to integrate ADR into the judicial process, there is still much more work to be done.

Education is the most effective way to improve parties' understanding of their options resolving commercial disputes. Participants of the GPC ranked education in business and law schools as the most effective way to improve parties' understanding of their options for resolving commercial disputes.³⁰ There has been a marked expansion of course offerings in law schools on the topics of negotiation, mediation, and arbitration. This expansion is partly a nod to the growth of mediation and arbitration to resolve legal disputes, and also acknowledges that these skills are necessary for lawyer/advisors to meet the needs of their clients. Negotiation is a daily part of a lawyer's life whether employed in-house or as outside counsel.³¹ Negotiation, though, is a daily part of a business manager's life. The skill of the front-line business manager to negotiate serves to reduce and manage conflict within the organization, whether internally or with external customers, vendors, or business partners. That skill could effectively deescalate conflict before it raises to the level of a legal dispute, thus preserving resources for profitable business activities.

There is definitely strong interest in more and better quality of education about dispute management and resolution throughout the world. Educators perceive large student interest in mediation, but students generally show disappointment in the fact that course offerings are either rare or only offered as a secondary course related to the more primary course on arbitration. Even in North America

30. See Aggregate GPC results, *supra* note 7, at session 4, question 2.

31. See Cathy Cronin-Harris, *Why Take ADR Courses in Law School*, 3, AM. BAR ASS'N (Mar. 2008), http://www.americanbar.org/content/dam/aba/directories/dispute_resolution/0177_croninharris_why_take_adr_classes.authcheckdam.pdf.

where courses are widespread, the criticism is about the quality and focus of the courses.³²

Outside university circles, interest in training courses is set to increase in the next five years.³³ The quickest expected growth areas are Asia, the Middle East, and Australia/New Zealand. This idea was reinforced when responders attending GPC events were asked what is the most effective way to improve parties' understanding of their options for dispute resolution. Measures are already being taken around the world to include dispute resolution in the curriculum in law schools. Education in business and/or law schools and the broader business community about adjudicative and non-adjudicative processes was the first choice in majority of answers.³⁴

CONCLUSION

This Essay only scratches the surface as we look at the data being collected from the GPC. There are trends now, but will they continue in the same direction as more events are held throughout the world? There are disconnects between the stakeholders, yet there is also a symbiotic relationship between disputants, lawyer/advisors, and governments/judiciaries that needs to be strengthened as the dispute resolution landscape evolves. Understanding the goals of disputants and aligning the stakeholders to meet those goals is the path to be traveled. Education is the fulcrum that all of these partners should work on so that new entrants into the field can be effective. Education should not be limited to lawyers but expanded to include business schools and other settings. Best practices should be shared and barriers to entry into the field should be leveled while ensuring high standards for the practice of dispute resolution.

32. See IMI Survey Report, *supra* note 6, at 40.

33. See *id.* at 41.

34. See Aggregate GPC results, *supra* note 7, at session 4, question 2.