

# THE GPC MIAMI REPORT

Local findings from North America

GPC Series 2016-2017

An International Mediation Institute project

Supported by the AAA-ICDR Foundation

December 2019





## GLOBAL POUND CONFERENCE SERIES 2016-17

INITIATED BY



International Mediation Institute

### GLOBAL SPONSORS:

#### DIAMOND SPONSORS



#### PLATINUM SPONSORS



#### GOLD SPONSORS



#### SILVER SPONSORS



#### FOUNDER SPONSORS

Herbert Smith Freehills, Singapore International Dispute Resolution Academy, PWC, JAMS, AkzoNobel, BAC/BIC, Shell and ICDR.

The GPC Miami Report is Copyright © 2019 International Mediation Institute, Netherlands.

Project funded by the AAA-ICDR Foundation.

Authored by Emma-May Litchfield and Danielle Hutchinson, Resolution Resources, Australia.

The findings contained within this report do not necessarily reflect the opinions or views of IMI, AAA-ICDR, Resolution Resources or sponsors associated with the GPC Series 2016-17. Rather they are a product of the responses from delegates who participated in the GPC Miami event.

## MESSAGE FROM THE GPC MIAMI LOC

The Miami Global Pound Conference was hosted at the new University of Miami Alumni Center on April 6, 2017 and brought together over 75 attendees including ADR providers, litigators, multi-national corporations, local judiciary and academics.

As the Gateway to Latin America, Miami proved to be a fitting location to honor the groundwork laid by Dean Roscoe Pound and to reconsider the future of the modern ADR system within the immediate backdrop of one of the Western Hemisphere's most diverse workforces, business and finance capitals, leading arbitration venues, and sought out international destinations.

Introductory words of welcome were provided by the Local Organizing Committee Co-Chairs, *Hon. Cristina Pereyra-Alvarez (Ret.)* and *Hon. Scott J. Silverman (Ret.)* of JAMS, and University of Miami Law School Dean, *Patricia White*, with the lunch key note presentation delivered by *Christian Leathley*, Partner at Herbert Smith, Freehills.

The speaker roster for the Miami event read like a who's who of the Miami and Latin American legal community: *Anthony V. Alfano*, Vice President & General Counsel, Global Labor & Employment, Johnson Controls; *José I. Astigarraga*, Partner, Astigarraga Davis; *Jaime Bianchi*, Executive Partner, White and Case; *Kate Brown de Vejar*, Partner, Curtis, Mallet-Prevost, Colt & Mosle, LLP; *Victor Diaz*, Managing Partner, VM Diaz & Partners; *Francisco Escalante*, General Counsel, Sure Equity; *Hon. Joseph P. Farina (Ret.)*, JAMS, Retired Chief Judge 11th Judicial Circuit Court of Florida; *Dan Gelber*, Partner, Gelber Schachter & Greenberg; *Daniel E. González*, Partner, Hogan Lovells, US LLP; *Donald J. Hayden*, Partner, Berger Singerman; *Paul J. Hehir*, Associate Vice President of Litigation, Royal Caribbean International/Celebrity Cruises, Azamara Club Cruises; *Elizabeth M. Hernandez*, Partner, Akerman; *Michael J. Higer*, Partner, Berger Singerman, LLP, President-Elect, Florida Bar Association; *Carolyn Lamm*, Partner, White and Case, LLP; *Alvin F. Lindsay*, Partner, Hogan Lovells US LLP; *Joseph M. Matthews*, Arbitrator, Joseph M. Matthew P.A.; *Tonya J. Meister-Griffith*, Partner, Meister Law, LLC; *Marika Paulsson*, Director, International Arbitration Institute & Lecturer in Law, University Of Miami; *Luke Sobota*, Partner, Three Crowns; *Hon. Herbert Stern (Ret.)*, Partner, Stern & Kilvullen; *Liang-Ying Tan*, Associate, Herbert Smith, Freehills New York; *Eric P. Tuchmann*, SVP, General Counsel and Corporate Secretary, AAA; *Hon. Jack B. Tuter*, Judge, Civil Division of the 17th Judicial Circuit of Florida; and *Matthew Zimmerman*, Assoc. General Counsel, Dispute Resolution, MDVIP, Inc.

Organizational partners and sponsors which helped to ensure the success of Miami's Global Pound Conference included *Berger Singerman*, *Hogan Lovells*, *the University of Florida*, *Miami International Arbitration Society (MIAS)*, *the International Section of the Florida Bar*, *the International Section of the ABA* and *The Future of Arbitration Miami*.

*Hon. Cristina Pereyra-Alvarez (Ret.)* and *Hon. Scott J. Silverman (Ret.)* of JAMS  
Co-Chairs, Local Organizing Committee  
GPC Miami

## CONTENTS

Executive Summary . . . . .	3
How to use this report . . . . .	4
Local findings . . . . .	5
Needs, wants and expectations . . . . .	6
The market . . . . .	8
Obstacles and challenges. . . . .	10
Vision. . . . .	12
Methodology . . . . .	14
About the authors . . . . .	15
Notes . . . . .	16

## EXECUTIVE SUMMARY

### KEY THEMES FROM THE GPC MIAMI

Commercial dispute resolution (DR) in Miami is associated with strong ethical standards, access to a range of DR processes and knowledgeable practitioners. Party expectations are met on numerous levels thanks to a focus on a range of practices that prioritize early intervention and efficient resolution. Even so, the industry faces a number of challenges moving forward including an over-emphasis on discovery and excessive costs and delays.



#### Strengths

- High ethical standards
- Timely resolutions through early stage practices
- Arbitration and mediation helping to avoid trials and reduce the burden of discovery
- Proactive arbitrators who work collaboratively with parties
- Access to subject matter experts
- Vision for mentoring new lawyers
- Openness to technological solutions



#### Limitations

- Difficulty overcoming the litigious mindset
- Excessive costs and delays
- Substandard adjudicative processes including non-binding arbitration
- Issues with lawyer and provider competence
- Difficulty keeping costs low and quality high
- Lack of dispute resolution support for small business
- Lack of diversity among providers
- Overemphasis on discovery



#### Priorities for your jurisdiction

- Educating and promoting alternative dispute resolution (ADR) to both current and future practitioners
- Improving cost-effectiveness of DR processes
- Improving scheduling and venue selection practices
- Increasing the focus on preparation for mediation
- Increasing diversity among DR providers
- Reviewing the use of discovery for DR processes other than litigation
- Building capacity in providers working across adjudicative and non-adjudicative processes
- Harnessing the role that lawyers play in shaping the commercial DR landscape



## HOW TO USE THIS REPORT

Initiated by the International Mediation Institute (IMI), the GPC Series 2016-17 was a series of 28 conferences held in 22 countries across the globe. For further information about the GPC and its supporters, see The North America Report or the IMI website.

---

### Suite of Reports

A set of eight North American reports has been created as part of an IMI project funded by the AAA-ICDR Foundation. All the reports are available on the IMI website.

The complete suite of reports includes:

- The GPC North America Report
- The GPC Austin Report
- The GPC Baltimore Report
- The GPC Los Angeles Report
- The GPC Miami Report
- The GPC New York Report
- The GPC San Francisco Report
- The GPC Toronto Report

Together, these reports offer a picture of the commercial dispute resolution (DR) landscape in the North America region and include a series of actionable recommendations specific to the participating jurisdictions. The reports contain an analysis of responses to the questions posed to focus groups at each GPC event. The questions are available in the North America Report. Collectively, the suite of North American reports draws on data generated from 301 focus groups.

The Miami Report contains a synthesis of responses to 13 open text questions answered by 20 focus groups spread across Sessions 1-4.

Delegates in the focus groups identified themselves as belonging to a primary stakeholder group. The five stakeholder groups were:

**Parties:** end-users of DR, generally in-house counsel and executives

**Advisors:** private practice lawyers and other external consultants

**Adjudicative Providers:** judges, arbitrators and their supporting institutions

**Non-Adjudicative Providers:** mediators, conciliators and their supporting institutions

**Influencers:** academics, government officers, policy makers

The GPC Miami Report offers insight into four areas of interest in commercial DR:

**Needs, Wants and Expectations:**

Parties' needs, wants and expectations in commercial DR in Miami

**The Market:** The current market and the extent to which it is addressing parties' needs, wants and expectations in Miami

**Obstacles and Challenges:** The obstacles and challenges faced in commercial DR in Miami and the scale of change required to overcome them

**Vision:** The vision for commercial DR in Miami in the short, medium and long term

For a comprehensive overview and description of similarities and differences between cities, it is recommended you read this report in conjunction with The North America Report.

# LOCAL FINDINGS

---

The following part of the report provides detailed findings from the GPC Miami event.

The approach taken draws directly on the responses provided by the focus groups and each of the four sections is best read as a collective statement from those who participated.

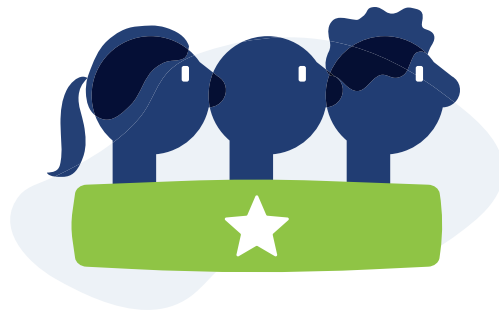
Each section also includes recommendations.

The recommendations are general in nature and can be used by businesses, advisors, providers, and influencers of policy as a stimulus or prompt for shaping the future of commercial DR in Miami.

## NEEDS, WANTS AND EXPECTATIONS

This section offers a picture of parties using commercial DR in Miami. Organized into three distinct profiles, each profile describes the needs, wants and expectations of parties based on their level of sophistication or experience in commercial DR. For example, in Miami, less experienced parties often want more guidance, whereas the most dispute-savvy users may want to be proactive in preventing disputes.

---



### **Profile 1: Inexperienced or unsophisticated parties**

At this level, parties are often looking for a cheap, fast win. They may seek to punish the other party or prove the rightness of their claim. Within this context, vindication plays a central role in motivating parties' behavior. For many parties, pursuing the dispute is a matter of principle. Because the parties lack experience and/or sophisticated dispute resolution skills, they may be wary and want guidance about the process and potential outcomes. Expectations around confidentiality or enforcement may need to be considered when external advisors are providing this guidance. Irrespective of the dispute process selected, parties expect it to be user-friendly, fair, predictable and final.





### Profile 2: Moderately experienced or sophisticated parties

Parties are becoming more pragmatic and have a strong focus on cost-effective, commercial solutions. They want greater flexibility and seek tailored processes that can accommodate creative solutions and/or maintain important business relationships. To this extent, they are starting to take a longer-term view and want to mitigate the risk of unintended consequences. Parties at this level do so by seeking an accurate evaluation of the risks associated with the dispute, including cost-benefit analysis and thorough budgeting. Within this context, confidentiality becomes increasingly important. These parties understand the role of compromise and are more amenable to early settlement discussions.



### Profile 3: Highly experienced or sophisticated parties

At this level, parties are pragmatic and commercially focused. They want greater control over the process to ensure that disputes do not disrupt everyday operations. Within this context, parties need/want less input from advisors but, when sought, input may have a greater focus on technical or procedural points. Parties are keen to find well-reasoned, cost-effective and timely resolution. This may involve parties taking greater control of discovery. It is also important that agreements be enforceable. At this level, parties are not shy of making strategic use of disputes, seeking to leverage settlements and business transactions. Dispute-savvy parties are likely to be proactive in preventing disputes. They have incorporated dispute clauses, stepped procedures or internal processes within contracts and corporate structures to minimize the likelihood of disputes escalating. In contrast, some highly experienced parties may have become conditioned to the adversarial mindset and may show resistance to more nuanced, sophisticated or dispute-savvy approaches.

## Recommendations

### General:

Use the different party profiles to develop action plans targeted to the needs, wants and expectations of parties in your local jurisdiction.

### Business:

Reflect on the approaches being taken by all of the parties at the negotiating table and consider leading the way by adopting a dispute-savvy mindset when developing your DR strategy.

### Lawyers:

Understand your clients so that you can respond to their needs and manage their expectations in a way that impacts positively on resolution rates and client satisfaction.

### Providers:

Understand the parties and modify processes to accommodate their needs. You can thereby target your services to your preferred market.

### Influencers:

Use your understanding of the typical range of needs, wants and expectations of parties in commercial disputes to systematically plan, implement or evaluate your policy agenda and reforms.

## THE MARKET

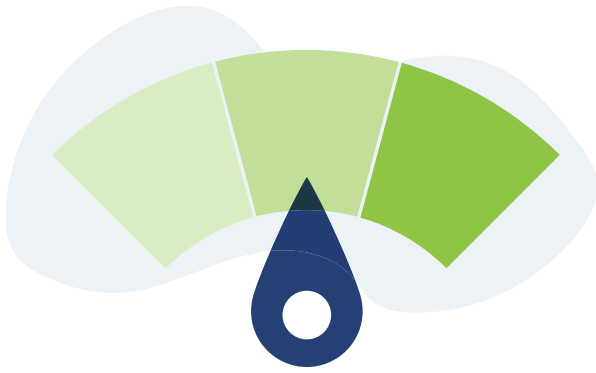
This section describes how the commercial DR market in Miami meets parties' expectations. Practices identified as problematic include those which result in excessive costs, time delays and lack of civility. In contrast, arbitrators who take a collaborative approach were identified as leading the field.

---



### **Current practices that fall below party expectations**

There are several commercial DR practices that fall below party expectations. Excessive costs, time delays and lack of civility are seen as highly problematic. From a procedural perspective, parties have a lack of control, but also receive little institutional guidance. In terms of DR processes, adjudicative processes including non-binding arbitration, and judge-supervised mediation, are identified as substandard. However, no reasons have been provided as to why this might be so. It was also stated that general competence of advisors/practitioners is an issue.



### Current practices that meet party expectations

The commercial DR market is meeting many of the needs, wants and expectations of parties. The use of early stage practices such as conferencing, case evaluations and mock hearings are identified as practices that were hitting the mark. Key to such processes is their ability to deliver timely resolution. Increased use of transparent billing so that parties have realistic cost expectations is also seen as effective. Both arbitration and mediation are identified as processes that are in accord with parties' expectations. The ability for parties to avoid traditional public trial discovery processes may have some part in this. The use of expert witnesses is also identified as meeting parties' needs. Finally, it was identified that, for practitioners to meet party expectations, they need to be interested and attentive to parties and their disputes. It was not identified whether this is current practice or an aspiration for minimum practice.



### Current practices that exceed party expectations

A few key practices were identified as going above and beyond party expectations. The main themes were the quality of the practitioners and the extent to which they facilitate the involvement of parties. Arbitrators who worked proactively and collaboratively with parties to identify options and find cost- and time-effective resolution were cited as the standout. Practitioners with specialist expertise are also seen as having the capacity to exceed expectations.

### Recommendations

#### General:

Consider the connection between the current market and parties' expectations.

#### Business:

Use your understanding to identify service providers who are best equipped to meet your expectations.

#### Lawyers and Providers:

Gain strategic advantage in the marketplace by identifying your preferred client base and tailoring your services to meet and/or shape their expectations.

#### Influencers:

Ensure the allocation of resources and policy agenda are driven by the market.

## OBSTACLES AND CHALLENGES

This section describes the obstacles and challenges present in Miami's current commercial DR environment and the scale of changes required to overcome them. The challenges range from those that may easily be addressed to more complex challenges that could be difficult to ever fully resolve.

---



### **Things that do not need to change**

It was suggested that there are elements of the current DR landscape that should remain in place. Ethical standards, such as independence and confidentiality, are key to the ways in which neutrals operate. Steps to increase diversity, reduce costs and promote conflict prevention are perceived as important features to continue to implement. The ability to access structured processes that are flexible and can draw on subject matter experts are strengths of the existing commercial DR environment.



### **Obstacles and challenges that can be overcome easily or with minor changes**

From a logistical perspective, simple steps such as better scheduling practices and venue selection can help create an environment more conducive to resolution. Another important step may be to encourage and facilitate improved preparation for mediation. This may be one of the less onerous strategies designed to address the perceived lack of commitment of parties to the mediation process.



### Obstacles and challenges that are difficult to change or would require major changes

The litigious mindset was identified as the major challenge for DR in Miami and something that would be very difficult to change. This includes the overemphasis on discovery and the tension between minimizing costs without compromising the quality of DR processes. Access to justice for small business is seen as a challenge. However, enforcement of awards and agreements is potentially problematic for businesses of all sizes. The perception of judicial reluctance to rule further complicates the landscape. Diversity and transparency are two features specifically identified as challenging. There is also an overarching concern regarding the panel selection process. Finally, the role of cultural difference was seen as a characteristic of DR that would be difficult to change.



### Obstacles and challenges that appear impossible to change

There were three main challenges that were identified as impossible to change. The immutability of human nature was named as the primary obstacle. Within this context, perceived greed, bias, stupidity and the extent to which emotions drive the process were all deemed realities that must be accepted. Secondly, the enduring presence of sovereignty-related issues was highlighted. Examples of these issues were not provided. Finally, it was suggested that a requirement for arbitrators and mediators to have subject-specific skills/experience in the areas in which they practise is perceived as unachievable.

### Recommendations

#### General:

Draw out and prioritize actions to meet the obstacles and challenges specific to your jurisdiction.

#### Business:

Use your understanding of the commercial DR landscape to facilitate greater levels of self-determination and make informed DR choices matched to the interests of your business.

#### Lawyers:

Recognize the central role that lawyers take in dispute resolution and find opportunities to effect changes that mitigate the challenges identified by your peers. (For more information about lawyers as agents of change see the Global Data Trends and Regional Differences report available on the IMI website.)

#### Providers:

Manage client expectations and assist them in navigating the commercial DR landscape.

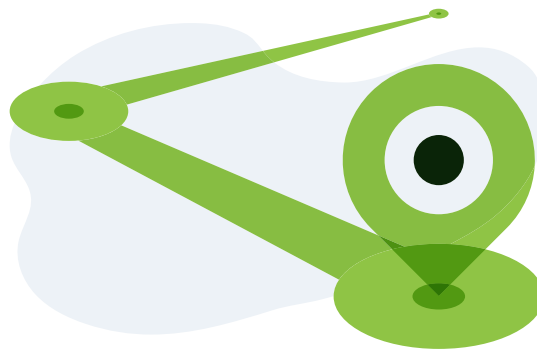
#### Influencers:

Create a realistic policy/reform agenda, identify the appetite for change and potential areas of resistance.

## VISION

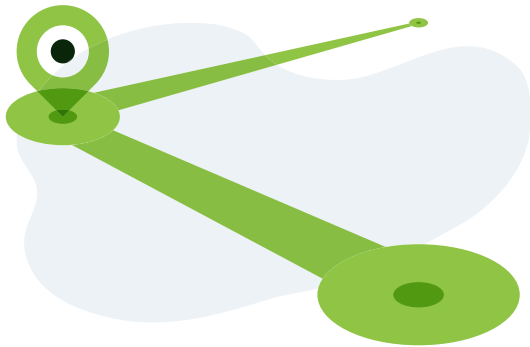
This section provides a roadmap for the future of commercial DR in Miami. It offers a short-, medium- and long-term framework for achieving the vision conceived at the GPC Miami event.

---



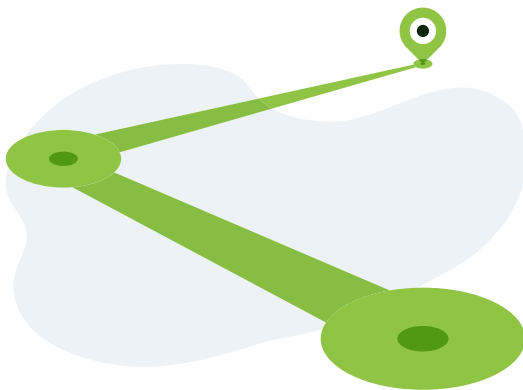
### **Vision for the future of commercial DR in the short term (1–5 years)**

In the early stages, there is a focus on improving cost-effectiveness. Technological solutions go some way towards achieving this. There is an increased role for UNCITRAL with the introduction of mechanisms to enforce mediated settlements. Alternatively, other institutional rules or escalation clauses play a useful role when generating DR agreements. Alternative dispute resolution (ADR) education is key. Opportunities for students to observe mediations or participate in ADR clerkships are a feature of a broader law school curriculum.



### **Vision for the future of commercial DR in the medium term (6–10 years)**

Education continues to play an important role. Ideally, there is increased diversity in the ADR professional community. Domestic legislation and international agreements provide support for ADR and see the emergence of specialized arbitration courts.



### **Vision for the future of commercial dispute resolution in the long term (>10 years)**

Education and promotion of ADR is accepted as the status quo. Legislative provisions and international protocols have embedded mechanisms to ensure the enforceability of mediated settlements. Costs are controlled and access to funding is available where needed.

### **Recommendations**

#### **General:**

Draw out the specific actions needed to realize the outlined vision for the future in your jurisdiction.

When doing this, you may want to consider the role of research and development, monitoring and evaluation, sub committees and think tanks, leadership and mentoring, training and education, change management, strategic planning, fundraising, partnerships and community engagement, lobbying and advocacy, development of standards and benchmarks, and dissemination of information.

Become informed about the direction in which commercial DR is heading and consider what impact the decisions you make today will have on your long-term goals and your capacity to meet the demands of the future.

Consider the role you want to play or the contribution you want to make to the future of commercial DR.

Harness the skills and efforts of the local DR community to achieve this vision.

Identify and prioritize resources required to achieve the vision in the short, medium and long term.

Build in accountability to ensure that your vision for the future is achieved.



## METHODOLOGY

A standardized set of 20 multiple choice questions (MCQ) and 13 open text questions (OTQ) was posed to focus groups at each GPC event. Typically, these questions were asked across four sessions corresponding to the four GPC Series themes previously described in the 'How to read this report' section. Delegates voted individually on the 20 MCQs and answered the 13 OTQs in focus groups. The analysis within the suite of North American GPC reports relates only to the OTQs.

The responses from each session were analyzed to form hypothetical constructs specific to each GPC event. These constructs draw directly from the words and phrases contained in the focus group responses and as such provide a local profile for each of the four GPC themes. These constructs/profiles constitute the local findings within each report. To assist local communities, each profile is accompanied by a set of recommendations. A local 'snapshot', in the form of an Executive Summary, was then generated as a way of drawing out the strengths, limitations and priorities for each jurisdiction. These summaries, along with the narratives and recommendations are provided in each local GPC Report.

The 26 profiles derived from the seven local events were used to conduct a comparative analysis across jurisdictions. This enabled the identification of similarities and differences across North America. A series of priority actions were generated in response to recurrent themes arising out of this comparison. The similarities and differences, priority actions and snapshots from each local event are contained within the GPC North America Report.

For a detailed description of the methodology, including academic references, please refer to the 'Methodology' section in the GPC North America Report.

## ABOUT THE AUTHORS



# RESOLUTION RESOURCES

advisors | practitioners | educators

Resolution Resources became involved with the GPC Series 2016–17 in 2015, when they were invited to join the GPC Executive and Academic Committees.

Drawing on their experience in psychometrics, evidence-based design, the development of professional standards in Australia and their experience as DR practitioners, their main role was to provide support and guidance on the content and structure of the 20 MCQs and 13 OTQs asked at each GPC event. Directors Danielle Hutchinson and Emma-May Litchfield subsequently facilitated the data collection sessions at the inaugural GPC Singapore Event and were commissioned by IMI to author the first GPC report, the Singapore Report.

To date they have been the only people in the world to analyze the data generated from the open-ended focus group questions. Their previous analyses of the GPC Singapore focus group data has contributed to a number of ground-breaking initiatives in Australia including: MyDRHub, a virtual dispute resolution triage hub; the development of quality assurance frameworks for Victorian Government mediators; and innovative training and education techniques for new and existing lawyers and mediators. For more information about Resolution Resources and the services they provide, see <http://www.resolutionresources.com.au/>.

For further information on how this report was developed or how to draw out specific actions based on the recommendations, contact <https://www.imimmediation.org/contact>.

## NOTES

[illegible]



For further information about the GPC, its supporters and reports, see <https://www.imimmediation.org/gpc>.

