

# THE GPC SAN FRANCISCO REPORT

Local findings from North America  
GPC Series 2016-2017  
An International Mediation Institute project  
Supported by the AAA-ICDR Foundation

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## GLOBAL POUND CONFERENCE SERIES 2016-17

INITIATED BY



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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 San Francisco event.

## MESSAGE FROM THE GPC SAN FRANCISCO LOC

The San Francisco Global Pound Conference was hosted at University of California, Hastings College of the Law on February 24, 2017 and brought together leading ADR providers, litigators, corporate counsel, local judiciary and academics to address the core questions posed in each Pound Conference event worldwide.

Those questions included: (1) What do parties want, need and expect with respect to access to justice and dispute resolution systems? (2) How is the market currently addressing parties' wants, needs and expectations? (3) How can dispute resolution be improved? (4) What action items should be considered and by whom to promote better access to justice?

The event began with a short opening address by **Hon. Rebecca Westerfield** (Ret.) of JAMS, and **Bruce Edwards** of JAMS, both of whom served as co-chairs of the Local Organizing Committee. **Daniel Bowling** delivered a convocation/invocation and **Sheila Purcell, Michael McIlwrath** and **Amal Bouchenaki** delivered welcoming remarks.

In addition to a robust discussion related to the Core Questions, a moderated program focused on changes in the practice of the mediator attendees and found that clients are substantially more sophisticated about mediation than was the case seen a decade before. Fewer cases start with meaningful joint sessions. Technology has begun to permeate the world – but only as a support, not a substitute for face-to-face encounters.

The participants agreed universally that the market in San Francisco was unique, in that it is a fully mature market in which commercial mediation was the norm, and that it had been for as long as anywhere in the country. While there may be other U.S. Markets that are equally invested in commercial mediation, San Francisco stood above its peer cities around the globe, and perhaps even in the US.

The day provided a welcome opportunity for many who had labored in the same field for decades to come together and reflect on what they had been through, how much had changed and how much change lays ahead.

*Local Organizing Committee  
GPC San Francisco*

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## EXECUTIVE SUMMARY

### KEY THEMES FROM THE SAN FRANCISCO GPC

San Francisco's commercial dispute resolution (DR) landscape is characterized by high-quality mediators providing fair and flexible options. There is a growing focus on de-escalation and pre-dispute processes as essential components of fair and timely outcomes. While the industry enjoys respect from the legal and business sectors, there is still a need for ongoing awareness and education for parties and lawyers to build trust in alternative dispute resolution (ADR) processes.



#### Strengths

- Availability of high-quality mediation professionals
- ADR is increasingly well-promoted and included in commercial contracts
- Flexible processes that are valued by lawyers and parties
- A growing appreciation of the benefits of pre-dispute processes
- Recognition of the importance of maintaining relationships when considering outcomes
- Strong focus on party self-determination
- Expansive vision for the future of commercial DR



#### Limitations

- Persistent misconceptions about ADR options
- Perception of provider bias and lack of impartiality, particularly with repeat players
- Ongoing tendency toward adversarial, 'winner takes all' approaches
- Balancing confidentiality with transparency/accountability
- Lack of avenues for appeal in arbitration, particularly given the ubiquity of arbitration clauses in commercial contracts
- Arbitration is now too similar to litigation
- Parties ordered into mediation by courts can be less receptive to compromise

## EXECUTIVE SUMMARY CONT'D



### Priorities for your jurisdiction

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Building awareness and understanding of ADR options through community and professional education

Incorporating more low-cost, flexible processes such as telephone pre-mediation coaching or informal joint meetings

Increasing diversity amongst mediators

Finding ways to ensure provider quality while respecting confidentiality and avoiding legislative oversight

Promoting collaborative approaches

Encouraging a cultural shift from litigation to problem-solving and compromise

Reviewing the current state of arbitration including the potential for stricter limits on discovery and the effect of arbitration clauses on the resolution of disputes

Leveraging the central role of lawyers when working towards the shared vision for commercial DR in San Francisco

## 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.

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### 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. Collectively, the suite of North American reports draws on data generated from 301 focus groups.

The San Francisco Report contains a synthesis of the findings from 10 open text questions answered by 30 focus groups spread across Sessions 1, 3 and 4. Data from Session 2 were not provided for analysis.

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 San Francisco Report offers insight into three areas of interest in commercial DR:

**Needs, Wants and Expectations:**

Parties' needs, wants and expectations in commercial DR in San Francisco

**Obstacles and Challenges:** The obstacles or challenges faced in commercial DR in San Francisco and the types of change required to overcome them

**Vision:** The vision for commercial DR in San Francisco 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

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

The approach taken draws directly on the responses provided by the focus groups and each of the three 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 San Francisco.



## NEEDS, WANTS AND EXPECTATIONS

This section offers a picture of parties using commercial DR in San Francisco. 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 San Francisco, less experienced parties often want more guidance, whereas the most dispute-savvy users may seek more autonomy through the process.

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

At this level, parties tend to take an all-or-nothing approach, typically seeking vindication, validation or confirmation they are correct. They are often outcome-focused and have an expectation that they will win. They may be seeking a sense of empowerment in pursuing their claim. They often want to achieve a win quickly and at low cost. Parties at this level are often unfamiliar with options and may envisage a litigation-like process that will bring their opponent to justice and may include some form of financial damages or compensation.

Those who have access to representation often rely heavily on their attorney to help them navigate the process and understand the likely outcomes. Parties may want to express anger or tell their story in the hope that someone will be able to provide a fair solution. When attempting to negotiate or mediate, parties at this level are more likely to be under-prepared and sometimes hastier to settle. This may be driven in part by parties' desire to seek closure.



## **Profile 2: Moderately experienced or sophisticated parties**

Parties have a better understanding of what is involved in DR and are beginning to want more control of the process. They are starting to have preferences about the neutrals they engage and feel confident that they do not always need a lawyer to resolve their disputes.

While the desire for financial remedy remains, parties are becoming increasingly aware of the importance of psychological satisfaction and are cognizant of the need to preserve or maintain relationships. They may still seek vindication and justice, but this is now balanced with other factors such as efficiency, cost-effectiveness and the desire to avoid 'buyer's remorse'. This shift in thinking may be due to the fact that parties are likely to be significantly more prepared when entering into negotiations/mediation. Even so, parties at this level may still seek guidance in evaluating the strengths and weaknesses of their case and may expect neutrals to be forthcoming with their point of view.

While fairness remains important, parties may want or expect neutrals to put the other party in their place. Confidentiality continues to be important, however parties may now have an interest in outcomes that establish precedents. This may go some way in assisting parties to achieve a greater sense of predictability. The drive for closure and finality remains, however parties are more conscious of the need to get a great deal that can be enforced.



### Profile 3: Highly experienced or sophisticated parties

Parties' needs, wants and expectations may vary depending on the context of the dispute. Dispute-savvy parties have the capacity to adapt or adjust their approach in order to pursue specific outcomes. Parties may attempt to control the process or manipulate the system to achieve their own ends. Delaying tactics and the strategic use of discovery may feature as part of this. In contrast, there is an appreciation for the role that cooperation plays in resolving disputes.

Parties at this level tend to value neutrals with specialist expertise in the subject matter of the dispute. Some parties may even expect mediators to draw on expertise to make proposals for resolution. Parties are more likely to see themselves as equal participants, working alongside the lawyers and neutrals to resolve the dispute. They are more likely to be highly prepared, with a clear sense of priorities and the strengths and weaknesses of both sides of the dispute. At this level, avoiding reputational damage is important and parties consider how their actions may be perceived by both internal and external stakeholders.

Parties do not want to be seen as 'easy targets' and the resolution reached needs to be perceived internally as a win. Parties will often seek resolution processes that are confidential, fair, efficient, predictable and final, with minimal disruption to business. They are often keen to avoid 'leaving money on the table'. Some suggest that parties who are ordered by the courts to participate in mediation may be less engaged or receptive to finding mutually agreeable solutions.

### 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.

## OBSTACLES AND CHALLENGES

This section describes the obstacles and challenges present in San Francisco'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.

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

There are several elements of the commercial DR landscape that are working well. First and foremost is the abundance of high-quality mediators who are operating within an environment where alternative dispute resolution (ADR) is promoted and routinely incorporated in commercial contracts. Flexibility of ADR processes is valued and there is a growing number of lawyers who are beginning to appreciate its benefits of ADR.

There is increasing appetite for de-escalation and pre-dispute processes alongside traditional mediation, giving parties viable options other than arbitration and litigation. The role of fairness, ethical standards and a focus on self-determination are perceived as key elements of an ongoing focus on high-quality mediation and mediators. Some believe it is important to reduce government involvement in mediator certification and that free market mechanisms are the most effective way to ensure high standards of practice.



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

One issue is a lack of understanding or misconception by lawyers and parties about ADR options. In terms of lawyer education, this may involve everything from general awareness to ‘upskilling’ around identifying party goals, customizing processes and drafting of dispute clauses to incorporate stepped ADR processes.

In terms of promoting increased uptake of ADR, there is divided opinion about whether making ADR mandatory or penalizing parties who refuse to mediate are appropriate strategies. The provision of low-cost, flexible processes — for example, telephone pre-mediation coaching or informal joint meetings — is perceived as a small-scale and achievable step that may go some way to increasing awareness and use of ADR.



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

One of the main causes for concern is the lack of diversity of mediators. In particular, there were concerns about the lack of gender and racial diversity. The lack of mediators with non-legal backgrounds was also highlighted. Challenges associated with implicit bias and impartiality were seen as difficult to address and some mediators are perceived as giving preferential treatment to frequent flyers. This was deemed particularly challenging to address due to the seal of confidentiality that prevents lawyer and mediator behavior from being examined.

The protections placed around confidentiality were seen by some as preventing proper transparency and/or accountability. There were calls for the introduction of strategies to ensure all mediators be trained, irrespective of their background, including lawyers and judges. This was seen as important to ensure quality processes that prioritize collaboration and problem-solving over the more traditional adversarial, winner-takes-all approaches.

## 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.

Developing mediator capacity to manage joint sessions rather than resorting to shuttle mediation was identified as a way of facilitating such a shift. It was also suggested that mediators may need additional tools for dealing with manipulation tactics used by counsel and parties who are resistant to engaging genuinely in the mediation process. There were calls for the introduction of mandatory mediation and/or increased court fees for high-end disputes to fund free mediation for low-income disputes.

Numerous challenges were identified in relation to the current state of arbitration. The lack of avenue for appeal prevented some from perceiving it as a satisfactory alternative to litigation. It was suggested that arbitration has become too similar to litigation and stricter limitations on discovery/motions are required. Some went even further, suggesting stopping the use of pre-dispute arbitration clauses. Overall, there is a general acceptance that any of the above would require major institutional and cultural shifts and may be extremely difficult to realize.



## Obstacles and challenges that appear impossible to change

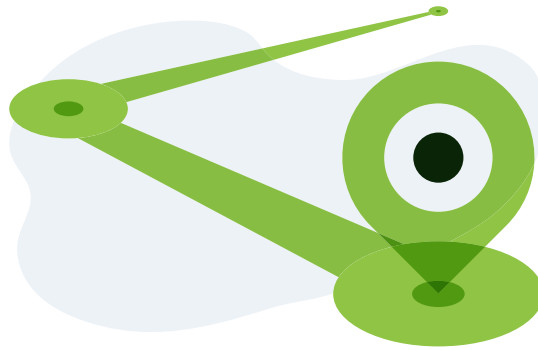
There was mixed opinion about the idea that some things are impossible to change. Some retain an optimistic outlook, advocating for the notion that change is always possible. Others disagree. Lack of political will to address legislative issues — for example, issues arising out of the Federal Arbitration Act — was seen as unlikely to shift.

Others highlighted the prioritization of competition and the laser-like focus on satisfying economic imperatives as inviolable. The overarching theme is the unshakeable nature of an adversarial mindset that values processes that characterize parties as either winners or losers. The drive to be right or prove the other wrong is perceived as part and parcel of the human ego and its thirst for control.

## VISION

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

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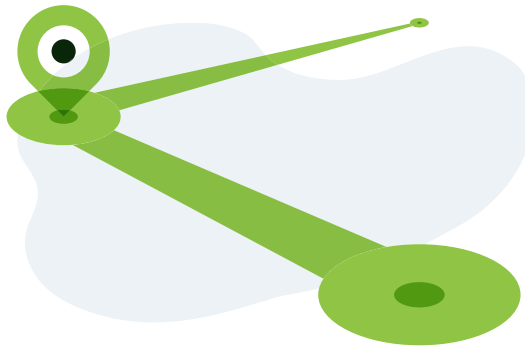


### **Vision for the future of commercial DR in the short term (1–5 years)**

There is an emphasis on education with a focus on educating the public on the basics of DR. Targeted programs for business, parties and advocates are prioritized. Law and business schools are starting to see the value in teaching ADR skills. The number of ADR options available to the community is growing, with mediation panels, ADR clinics, online dispute resolution (ODR) access points and court-sponsored programs becoming an increasing feature of the DR landscape. ADR training and mentoring programs continue to energize the field and ensure a growing number of mediators hold specialist expertise in business.

Data are becoming increasingly available to help inform future directions. As a result, ADR is becoming more efficient and accessible. Arbitration is a key feature of the landscape and there is increasing clarity about the role of voluntariness and consent to arbitrate. Enforcement of arbitral awards is available through UNCITRAL.

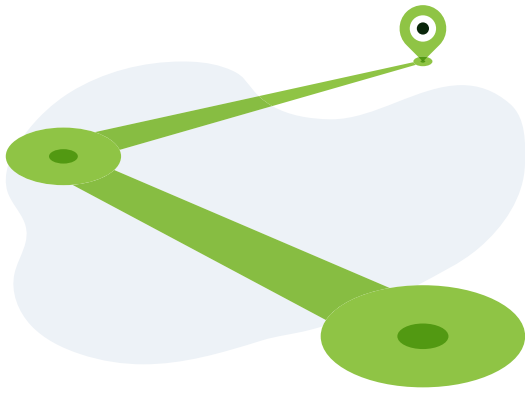




### **Vision for the future of commercial DR in the medium term (6–10 years)**

Ongoing education and leadership are at the heart of embedding DR into the cultural landscape. There is a strong focus on community education and outreach to assist the public develop the skills they need to resolve their own disputes. There is an expectation that political and corporate leaders model such skills by adopting a collaborative and problem-solving mindset.

Business and law schools routinely incorporate conflict resolution and implicit bias training into their curricula to promote reflective and non-adversarial practice. Advances in technology make ODR an increasingly functional and economical DR option.



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

Conflict resolution training is embedded into the curricula across school, college and community education. This has been enabled by ongoing, long-term funding designed to encourage the shift from litigation to collaboration as the preferred means of resolving disputes. DR professionals provide additional support by offering a range of pro bono services. Law reform has enabled the development of more affordable and efficient DR systems. An emphasis on quality has emerged which focuses on improving outcomes for parties — for example, arbitral awards, as well as the quality of the independent neutrals and/or advocates assisting parties to resolve their disputes.

### **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>.

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

