

# SHAPING THE FUTURE OF INTERNATIONAL DISPUTE RESOLUTION



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## Use of iPads at delegate tables

The diagram illustrates the user interface for an iPad application used at delegate tables. On the left, a large iPad screen displays a menu with two main options: "Ask a question" (Private) and "Make a comment" (Public). Below these are logos for Herbert Smith Freehills, City of London, International Mediation Institute, idrgroup.org, and CEDR. Two red arrows point from the "Ask a question" and "Make a comment" buttons to two detailed screenshots of the respective screens.

**Ask a question screen:** This screen is titled "Ask a question" and includes a "Home" button. It instructs users: "Please enter any questions here. Questions are private and will not be shared with the wider group." There is a text input field labeled "Add new item...", a "Submit" button, and a highlighted cyan box containing the text "Private (to moderators)". A sample comment "1 Test hello" is shown below.

**Make a comment screen:** This screen is titled "Make a comment" and includes a "Home" button. It instructs users: "Please enter any comments here. Comments are public and can be seen by all participants." There is a text input field labeled "Add new item...", a "Submit" button, and a highlighted cyan box containing the text "Public (direct to screen)". A message at the bottom states "There are no items to display".

## How to use your keypad

- Simply press the button that corresponds with the option you wish to vote for.
- If you press the wrong button or change your mind, don't worry just press again. The only vote that will register is your last vote.
- All responses are anonymous

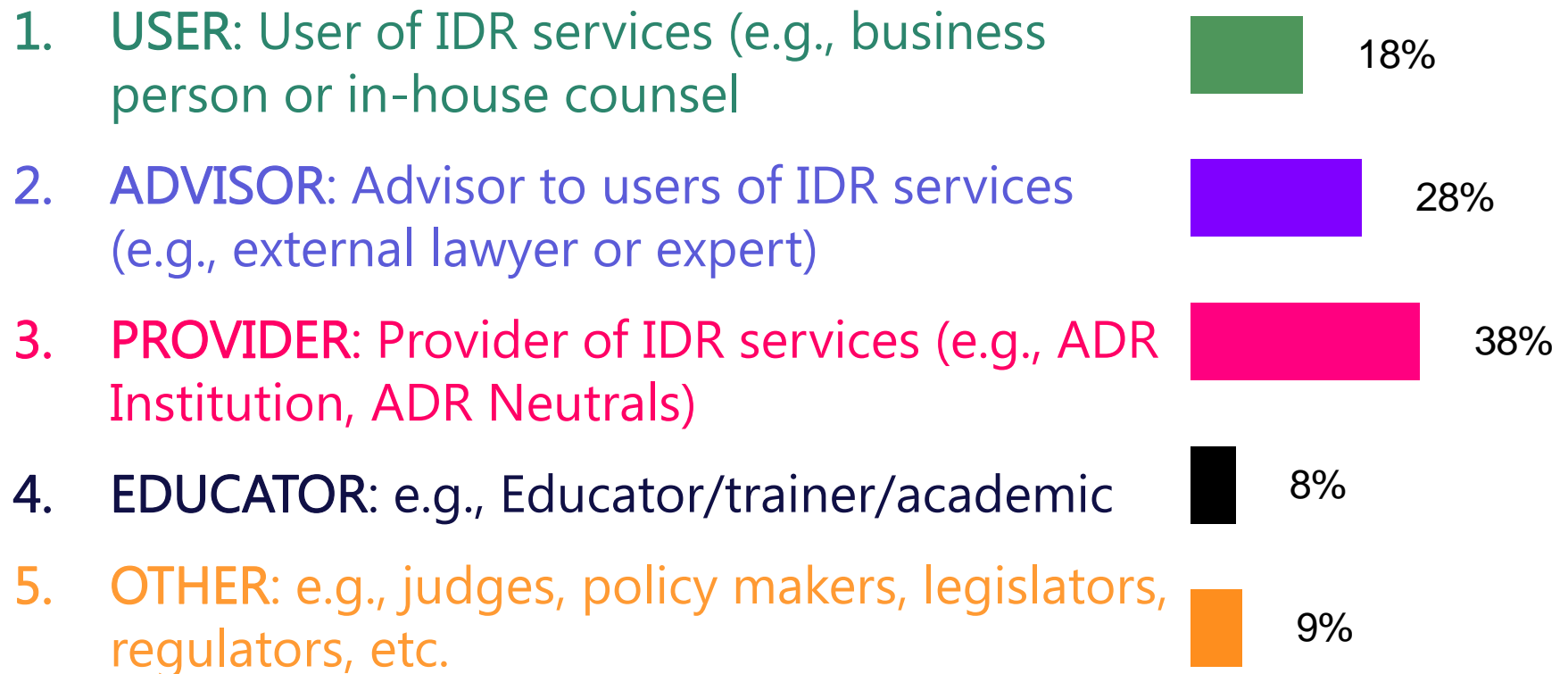


**PLEASE KEEP YOUR KEYPADS  
WITH YOU THROUGHOUT THE DAY**



## Demographics: Your identification for today's voting (>150 delegates)

What category below best describes you?  
(Only one choice possible)



## Icebreaker question (test question)

What category below best describes your level of satisfaction with current IDR proceedings in general (e.g., litigation, arbitration, mediation and conciliation etc. as currently practised)?



**NB. This data is NOT broken down by user:provider:advisor etc. The convention suggests more data on this question is needed.**

## Session 1 (9:30-11:00 am)

### *International Dispute Resolution: What do Users need?*

Moderator: Alexander ODDY, Partner, Herbert Smith Freehills

Panel:

Joanne CROSS, Assistant General Counsel, Dispute Resolution, BP plc

Tracey POLLOCK, Executive Counsel, GE Corporate

Isabelle HAUTOT, Chair of CCIAG & General Counsel International, Orange

Helen DODDS, Head of Legal, Dispute Resolution, Standard Chartered Bank

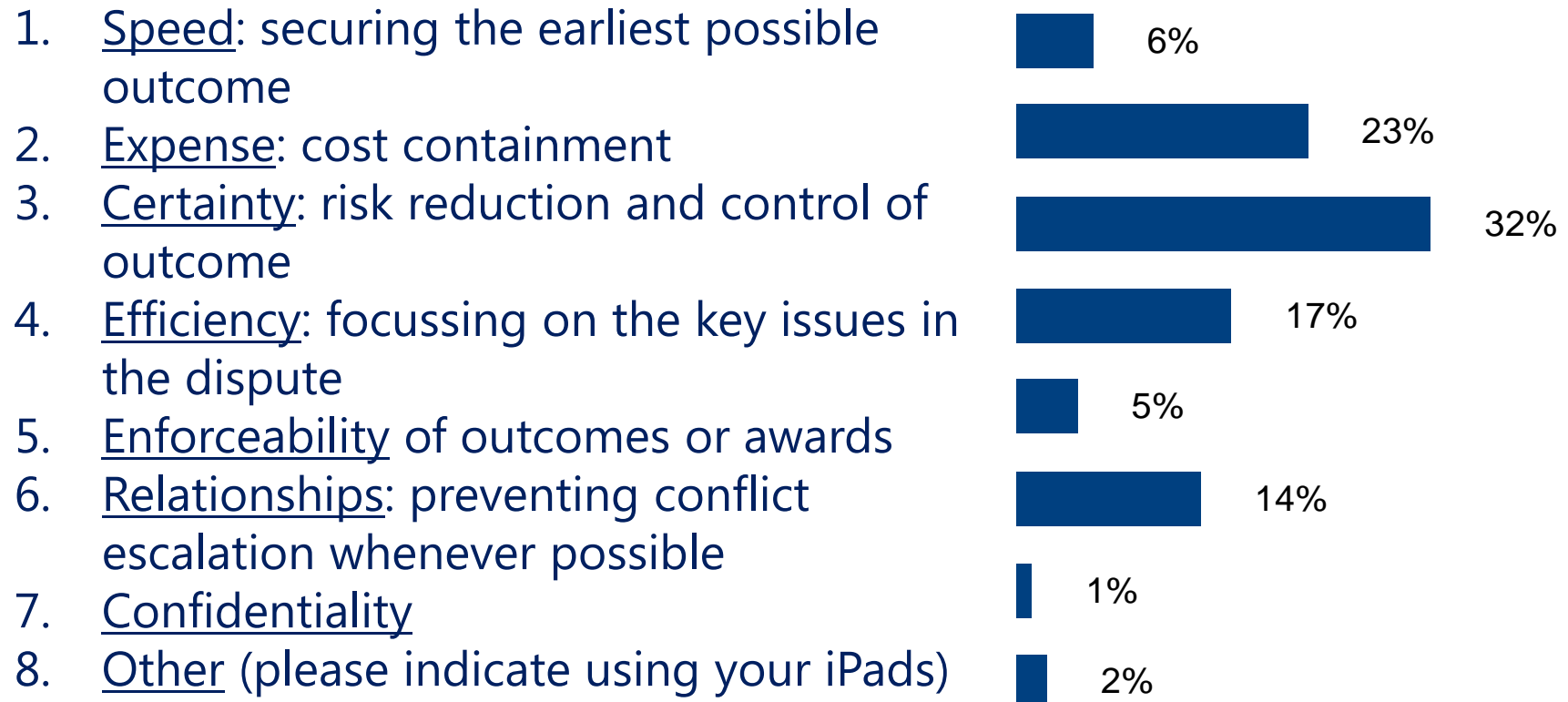
Robert IVENS, Head of Legal, Marks and Spencer plc

John PYALL, Head of Facilitated Claims Unit, Munich Re

*Interactive Q&A and proposition voting*

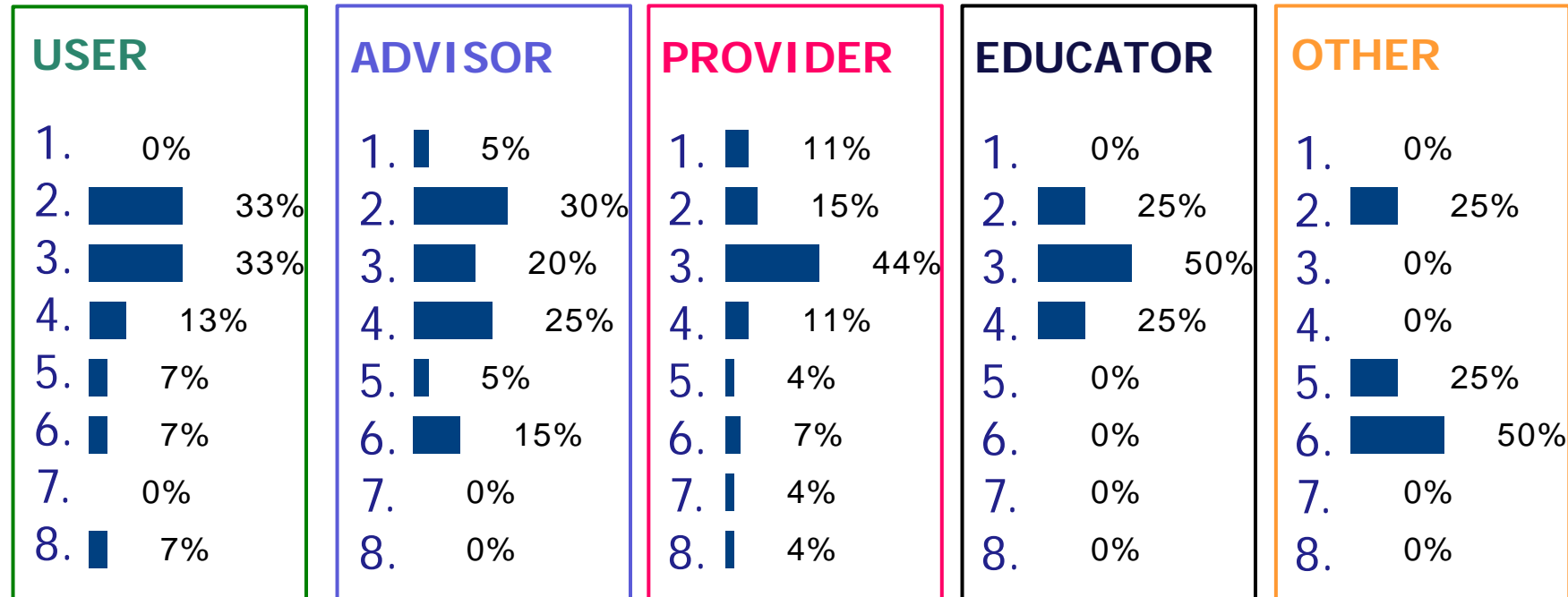
## Session 1, Qu 1: Key factors in selecting an IDR process

If you had to pick one only, which of the following factors is generally the most important in IDR?





## Session 1, Qu 1: Key factors in selecting an IDR process

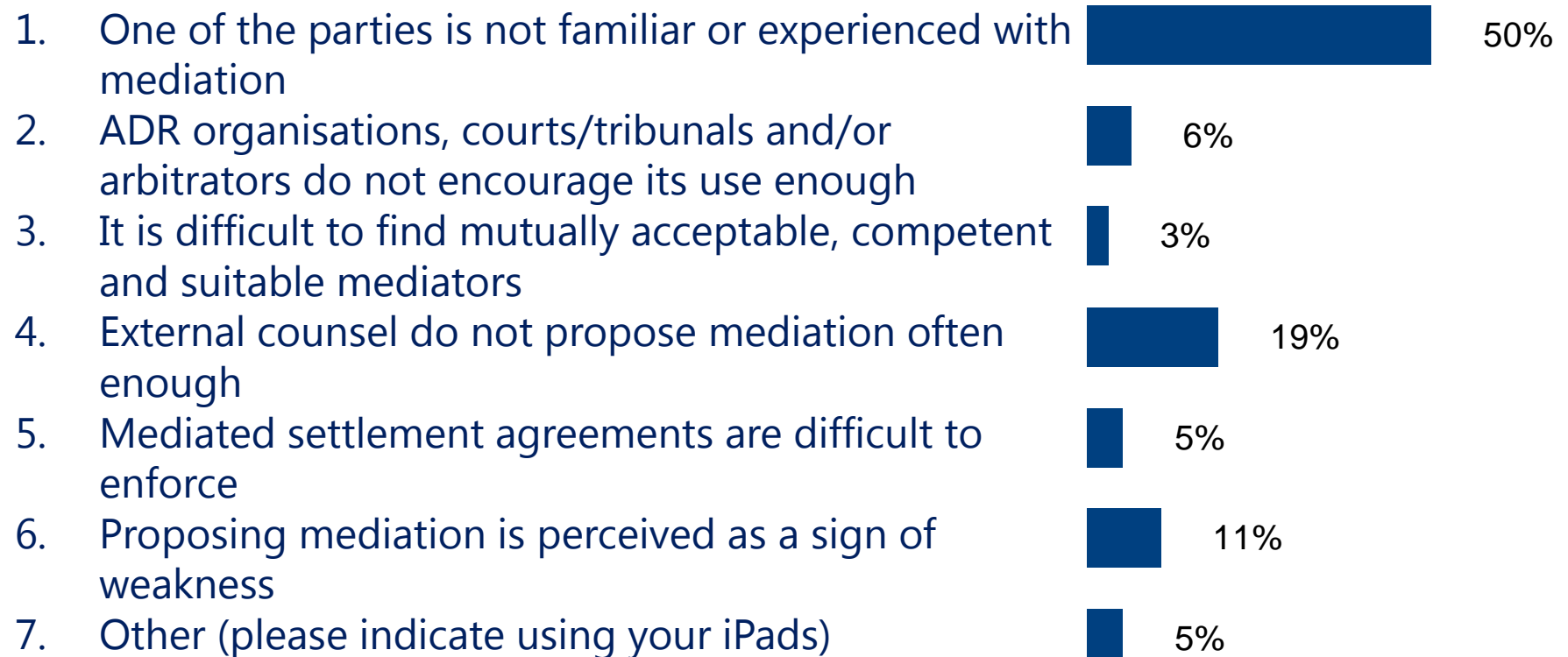


### Key

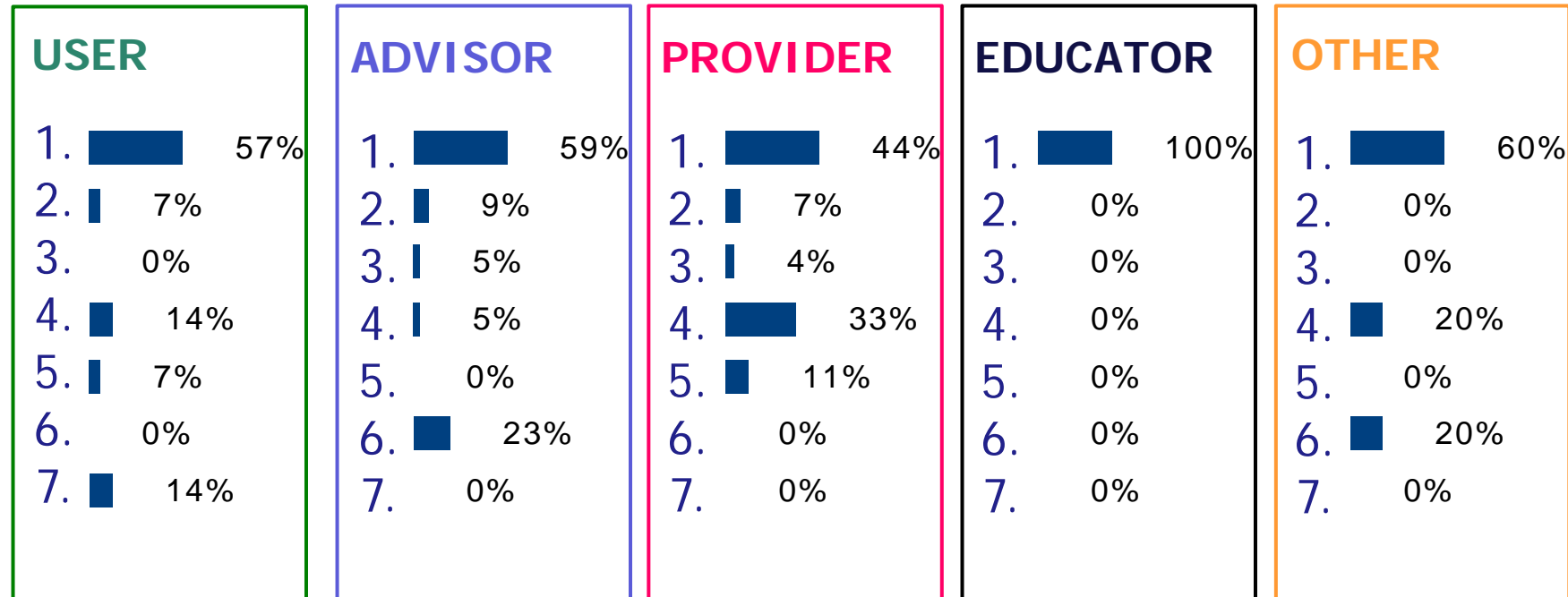
1. Speed: securing the earliest possible outcome 2. Expense: cost containment  
 3. Certainty: risk reduction and control of outcome 4. Efficiency: focussing on the key issues in the dispute 5. Enforceability of outcomes or awards 6.  
 Relationships: preventing conflict escalation whenever possible 7. Confidentiality  
 8. Other

## Session 1, Qu 2: Why is mediation used so seldom?

If you had to pick one only, what is the main challenge to using mediation in IDR?



## Session 1, Qu 2: Why is mediation used so seldom?

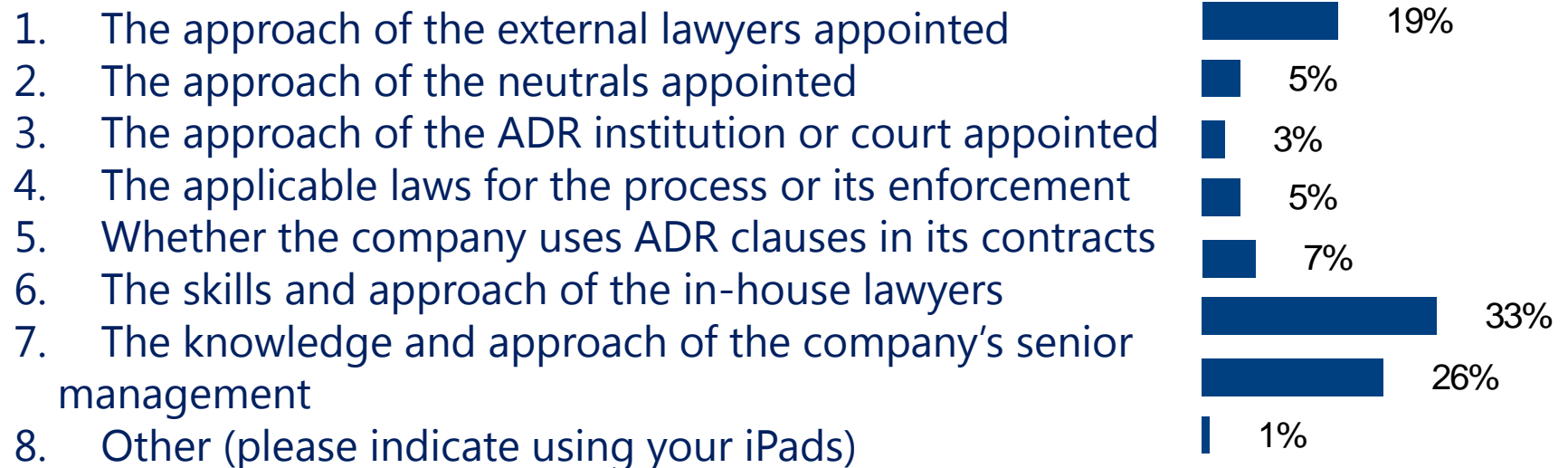


### Key

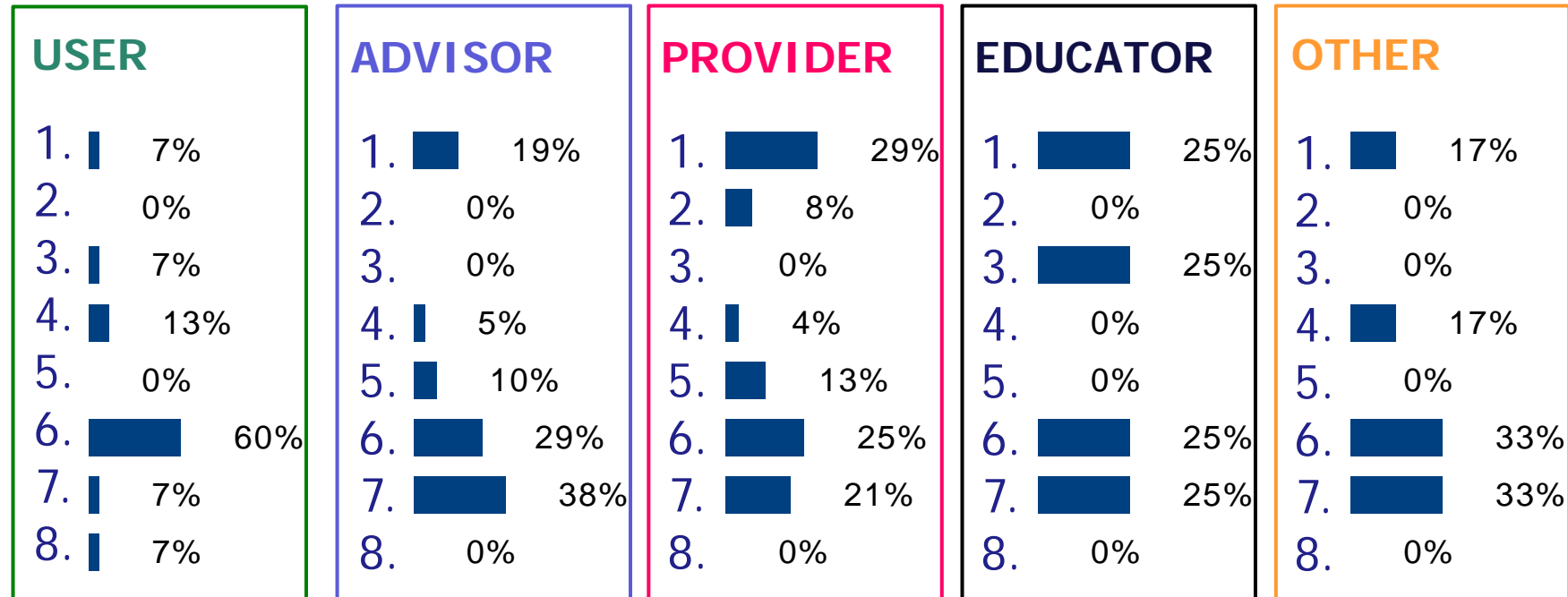
1. One of the parties is not familiar or experienced with mediation 2. ADR organisations, courts/tribunals and/or arbitrators do not encourage its use enough 3. It is difficult to find mutually acceptable, competent and suitable mediators 4. External counsel do not propose mediation often enough 5. Mediated settlement agreements are difficult to enforce 6. Proposing mediation is perceived as a sign of weakness 7. Other

## Session 1, Qu 3: Effective use of ADR

The most important factor in influencing how effectively a company uses ADR is:



## Session 1, Qu 3: Effective use of ADR

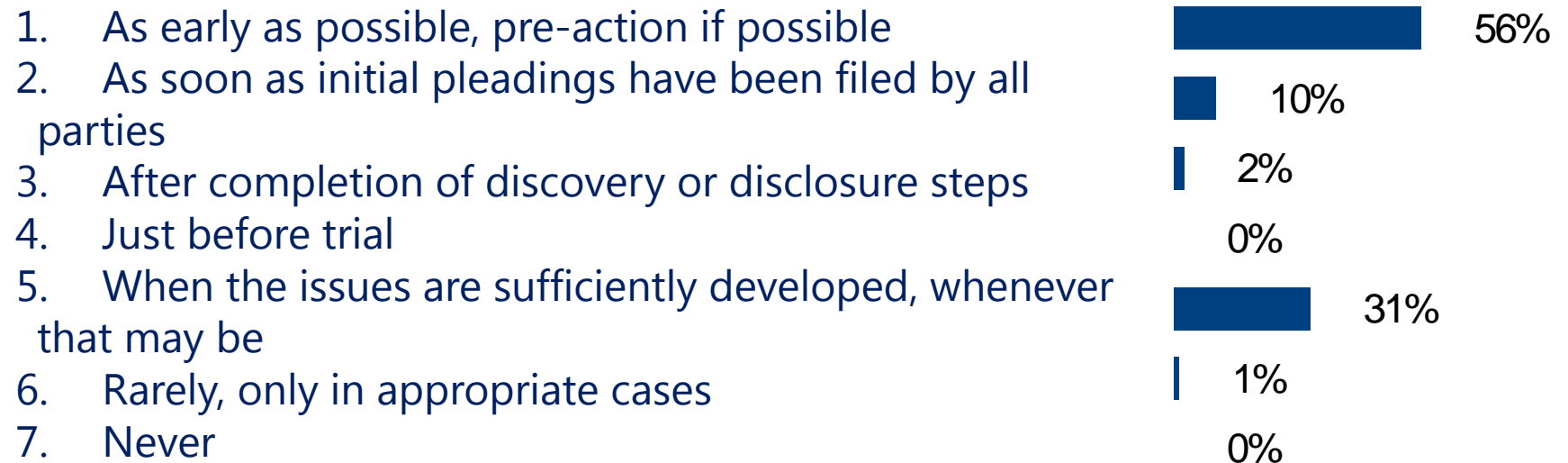


### Key

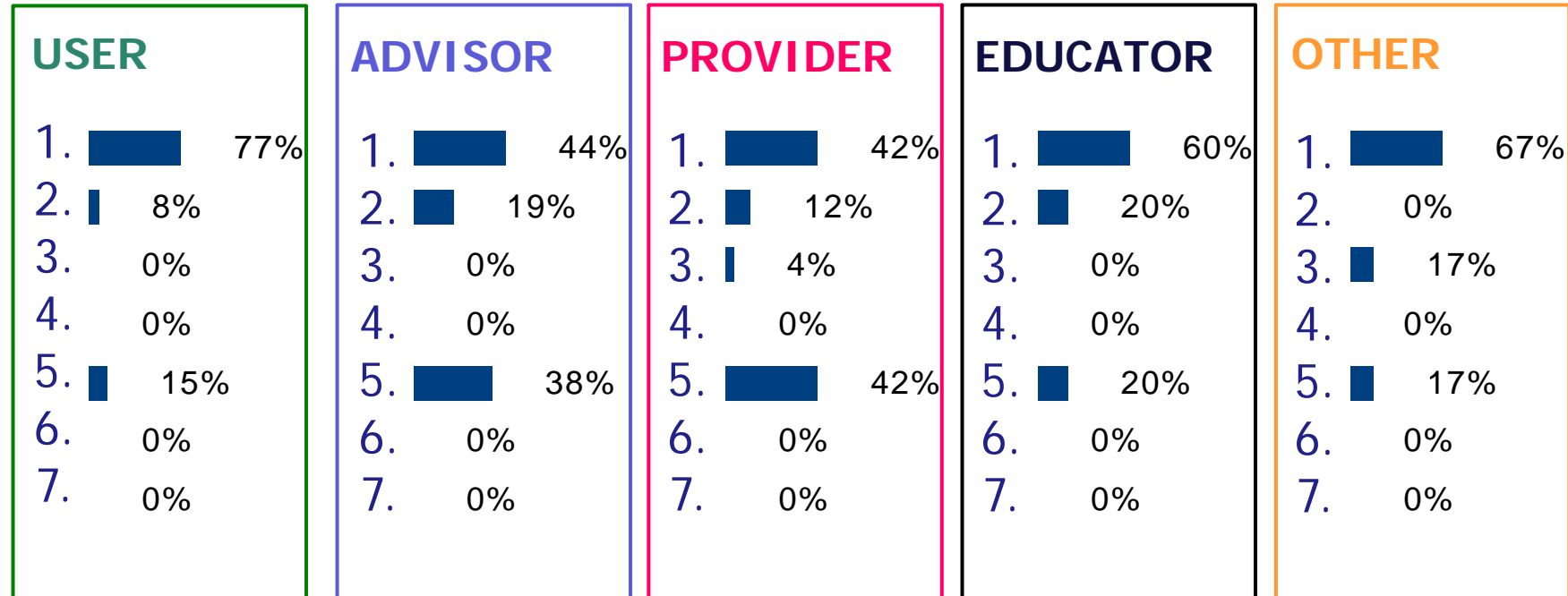
1. The approach of the external lawyers appointed 2. The approach of the neutrals appointed 3. The applicable laws for the process or its enforcement 4. The applicable laws for the process or its enforcement 5. Whether the company uses ADR clauses in its contracts 6. The skills and approach of the in-house lawyers 7. The knowledge and approach of the company's senior management 8. Other

## Session 1, Qu 4: When should mediation be used?

### Mediation is generally best used:



## Session 1, Qu 4: When should mediation be used?

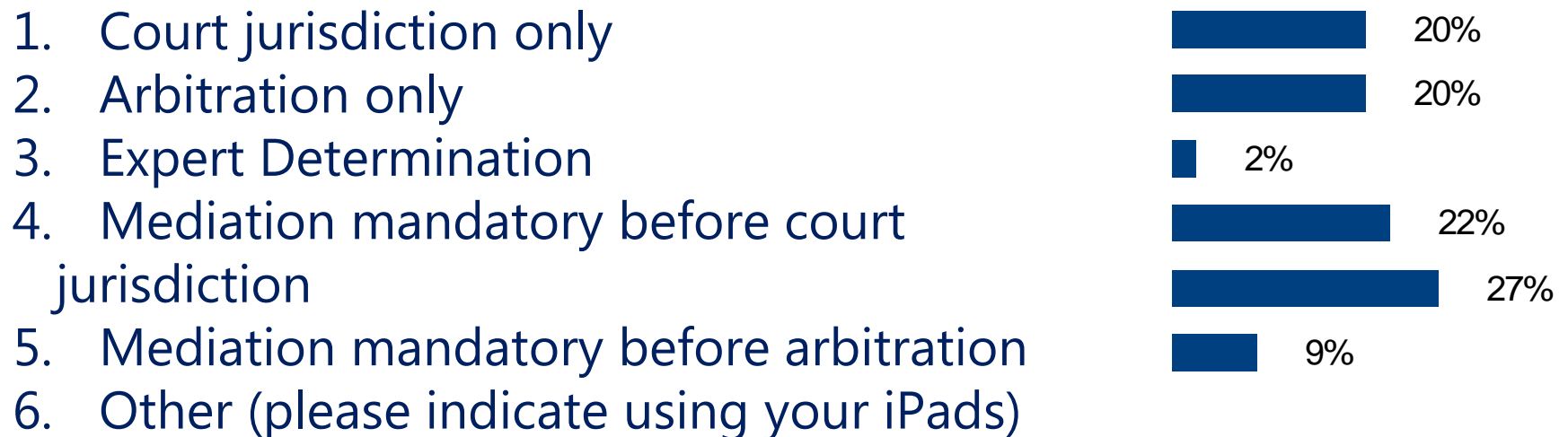


### Key

1. As early as possible, pre-action if possible 2. As soon as initial pleadings have been filed by all parties 3. After completion of discovery or disclosure steps 4. Just before trial 5. When the issues are sufficiently developed, whenever that may be 6. Rarely, only in appropriate cases 7. Never

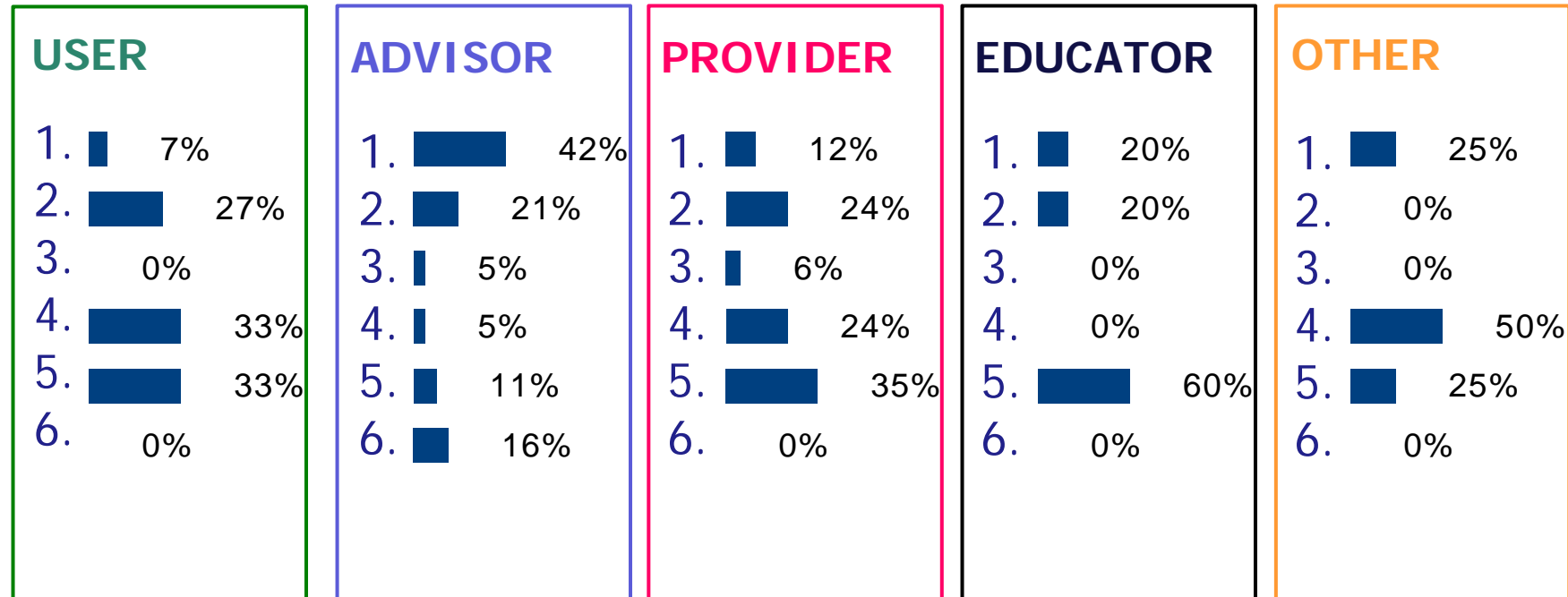
## Session 1, Qu 5: Typical IDR clauses

What dispute resolution clauses do you and your colleagues typically include in your commercial contracts?





## Session 1, Qu 5: Typical IDR clauses

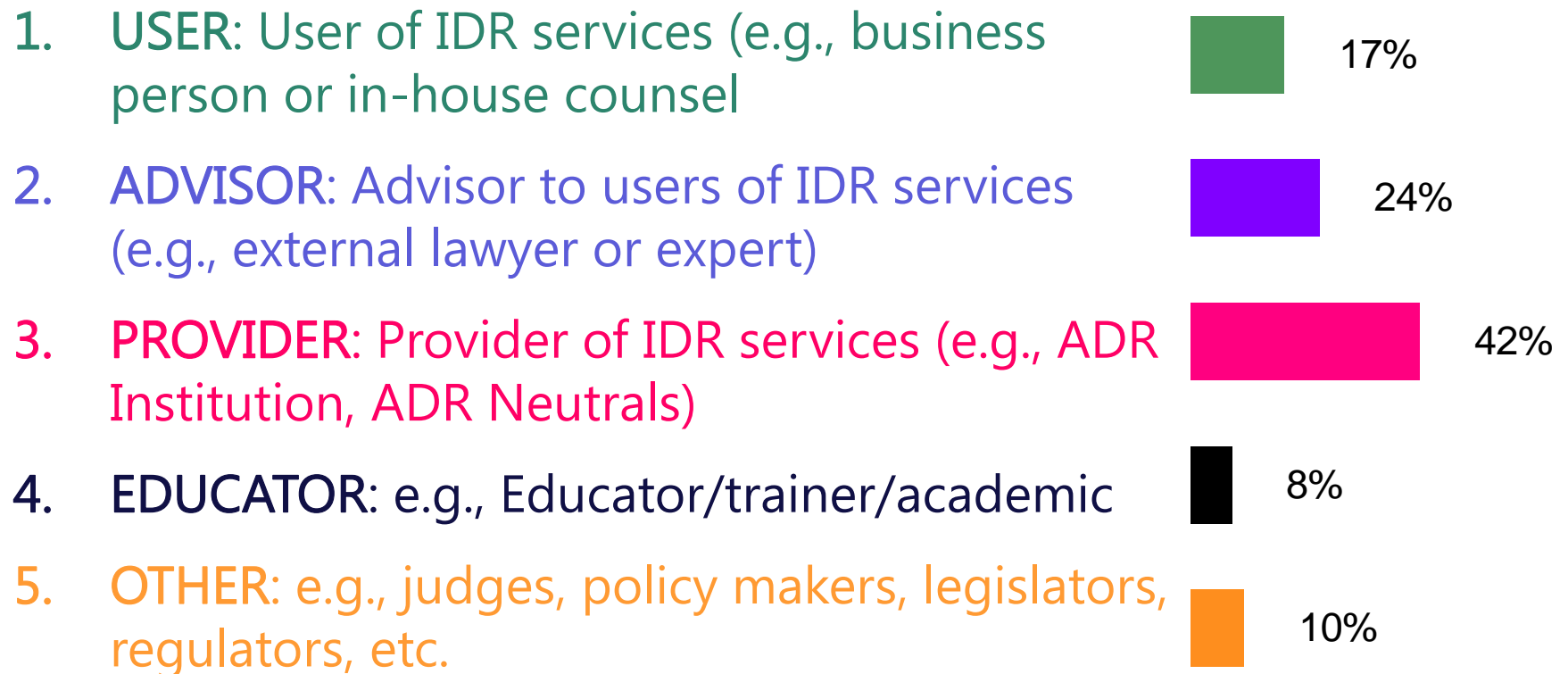


### Key

1. Court jurisdiction only 2. Arbitration only 3. Expert Determination 4. Mediation mandatory before court jurisdiction 5. Mediation mandatory before arbitration 6. Other

## Repeat Demographics: Your identification for today's voting (>150)

What category below best describes you?  
(Only one choice possible)



Session 2 (11:30 am -12:45 pm)

## *Innovations in IDR : What are Service Providers offering?*

Moderator: William K. SLATE II, Chair, ICCA Users Committee, Past Pres. AAA

Panel:

Mark APPEL, Senior Vice President, ICDR

Karl MACKIE, CBE, Chief Executive, CEDR

Yu JIANLONG, Vice-Chair and Secretary General, CIETAC

Andrea CARLEVARIS, Secretary General, ICC International Court of Arbitration

Noah HANFT, President & CEO, CPR Institute

Johan GERNANDT, Former Chair, Stockholm Chamber of Commerce

Matthew RUSHTON, Deputy Managing Director, JAMS International

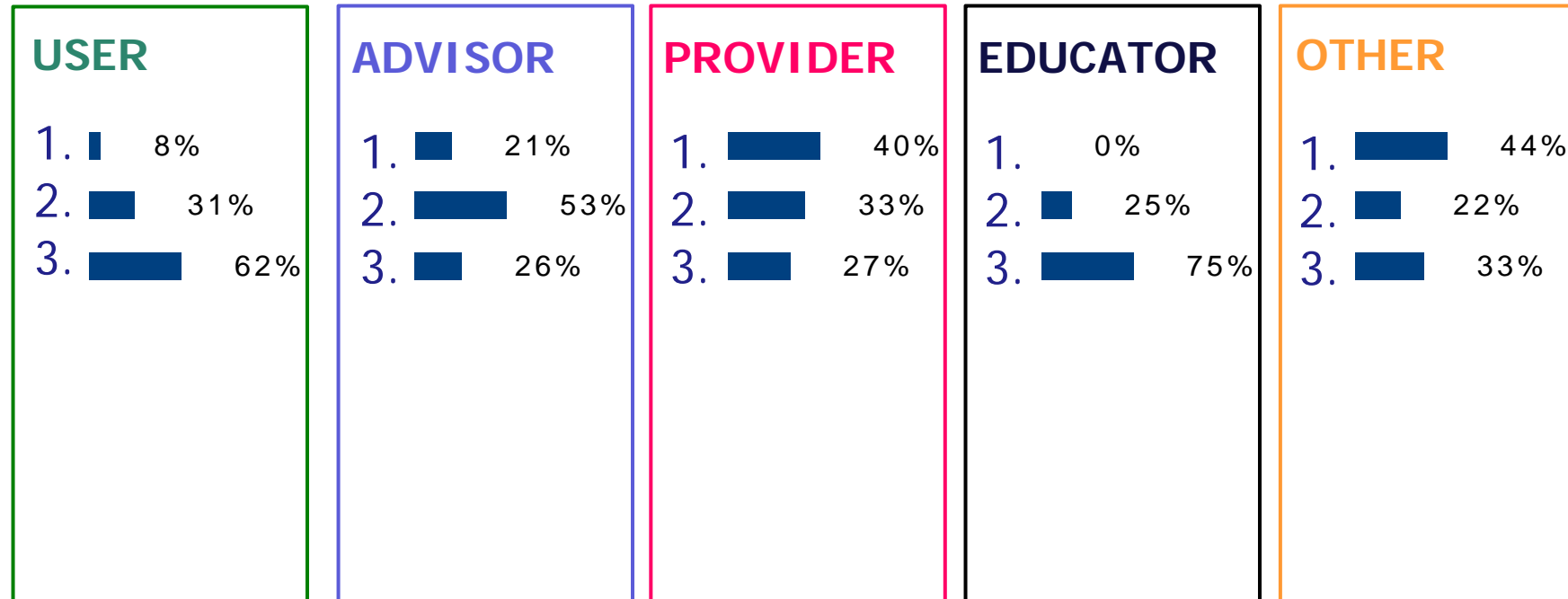
*Interactive Q&A and proposition voting*

## Session 2, Qu 1: IDR Service Providers & Innovation

IDR institutions have been providing innovative solutions to respond proactively to users' needs.



## Session 2, Qu 1: IDR Service Providers & Innovation

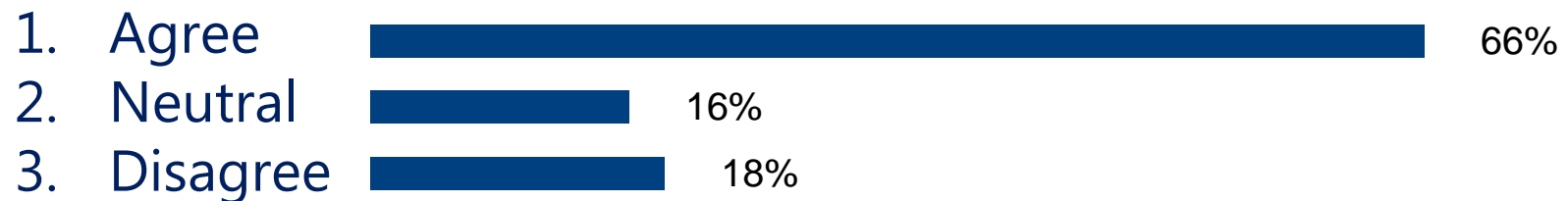


### Key

- 1. Agree
- 2. Neutral
- 3. Disagree

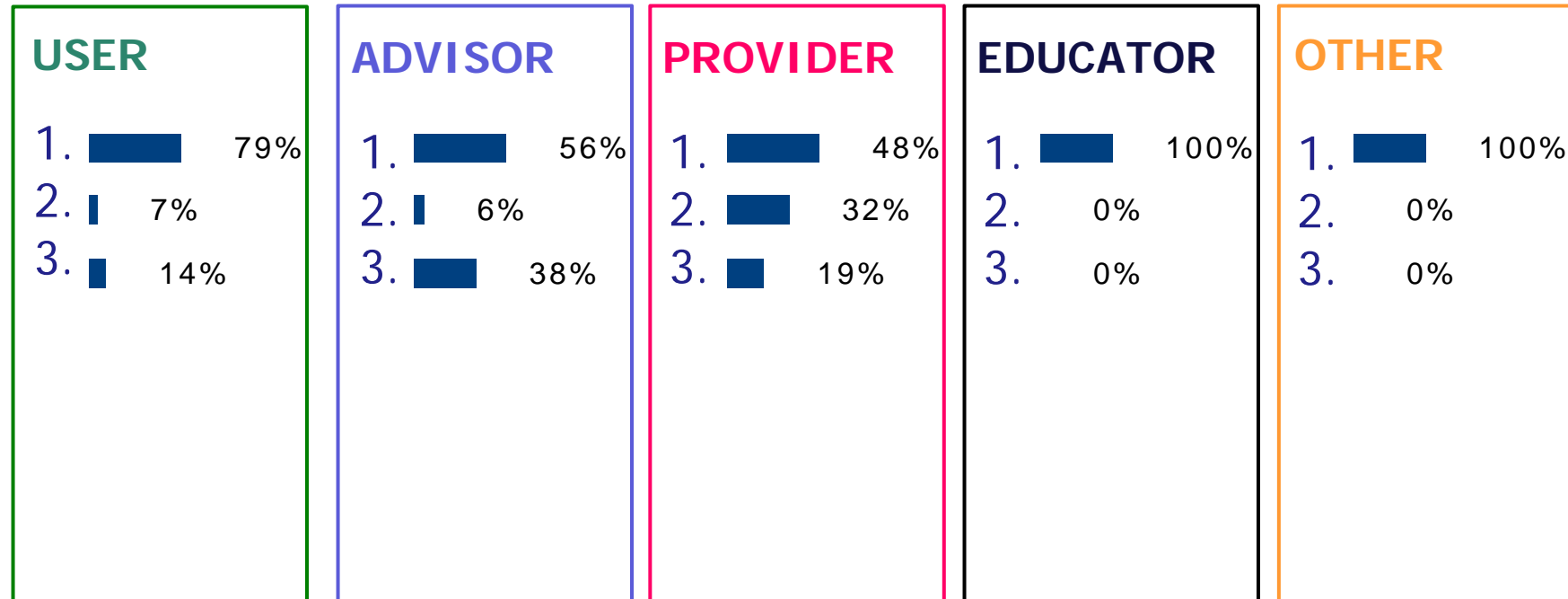
## Session 2, Qu 2: Exploratory 1<sup>st</sup> meetings on forms of IDR

Arbitration institutions and tribunals should always explore in a first meeting what other forms of dispute resolution may be appropriate to resolve this case.



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## Session 2, Qu 2: Exploratory 1<sup>st</sup> meetings on forms of IDR

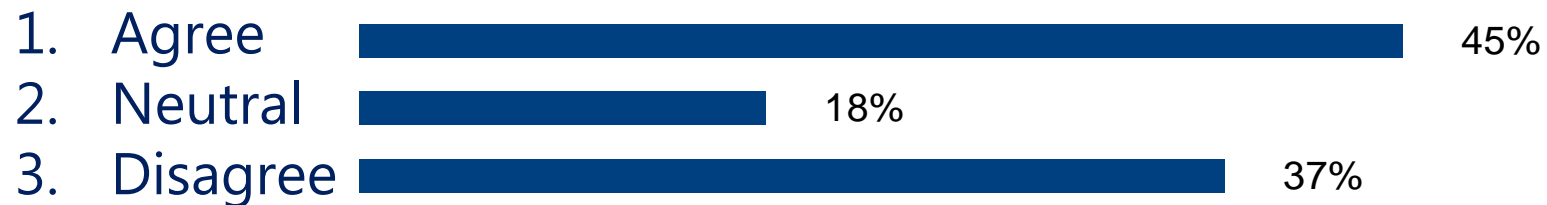


### Key

- 1. Agree
- 2. Neutral
- 3. Disagree

## Session 2, Qu 3: Mediation as an automatic “opt-out” option

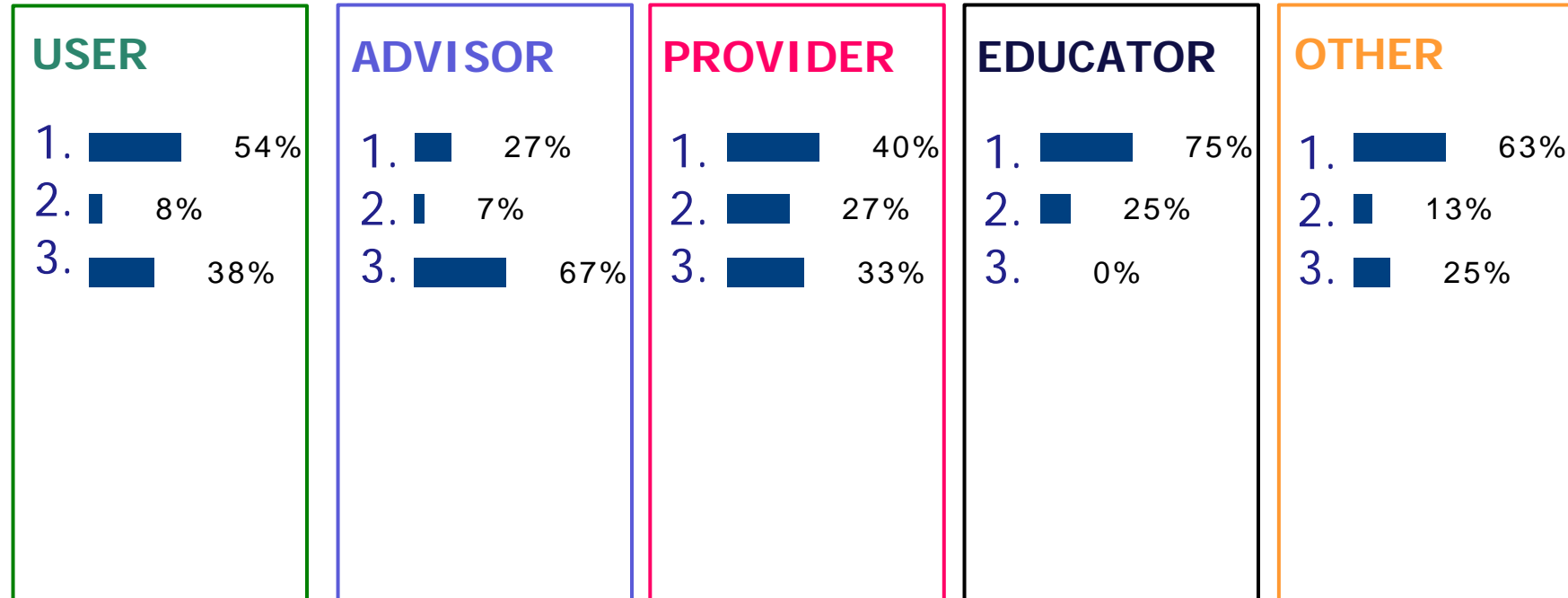
Whenever the amount in dispute exceeds a minimal value, arbitration institutions and the courts should automatically initiate a mediation process (from which any party can opt out) in parallel with the legal or arbitration proceedings.





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## Session 2, Qu 3: Mediation as an automatic "opt-out" option

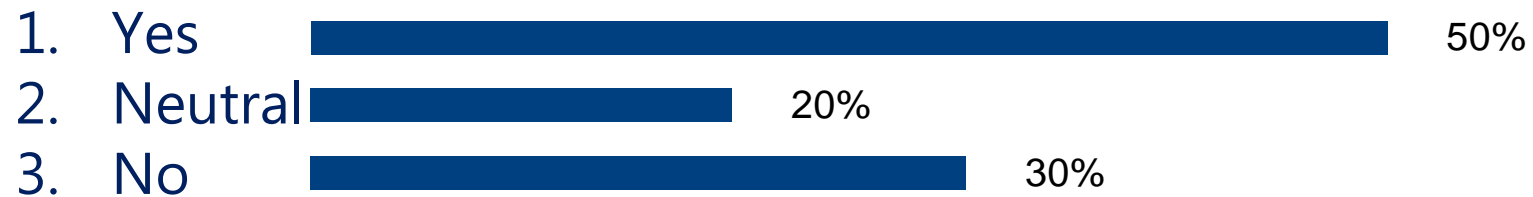


### Key

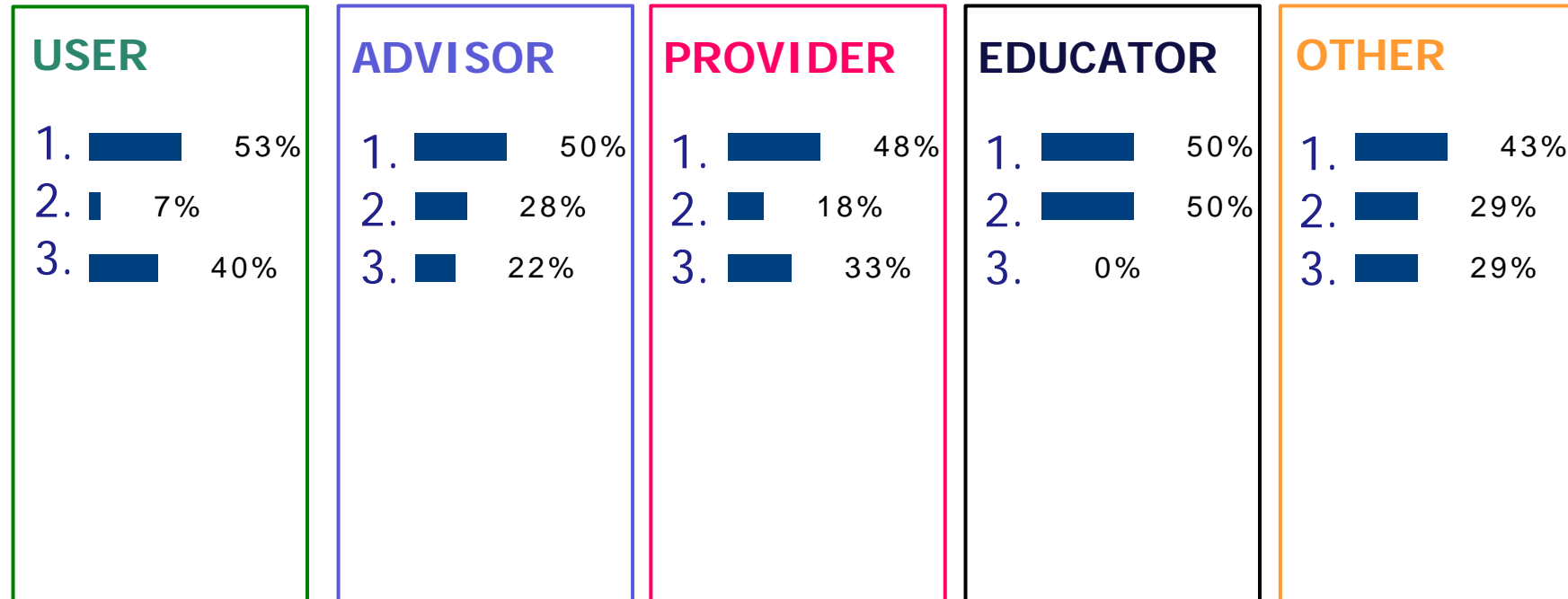
- 1. Agree
- 2. Neutral
- 3. Disagree

## Session 2, Qu 4: Cost sanctions

Should an arbitral tribunal be empowered to award cost sanctions if a party has not justified its refusal to mediate (even if it is the winning party)?



## Session 2, Qu 4: Cost sanctions

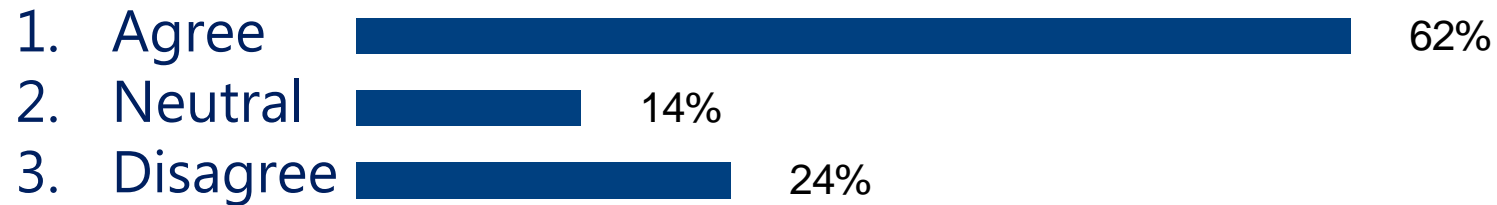


### Key

- 1. Yes
- 2. Neutral
- 3. No

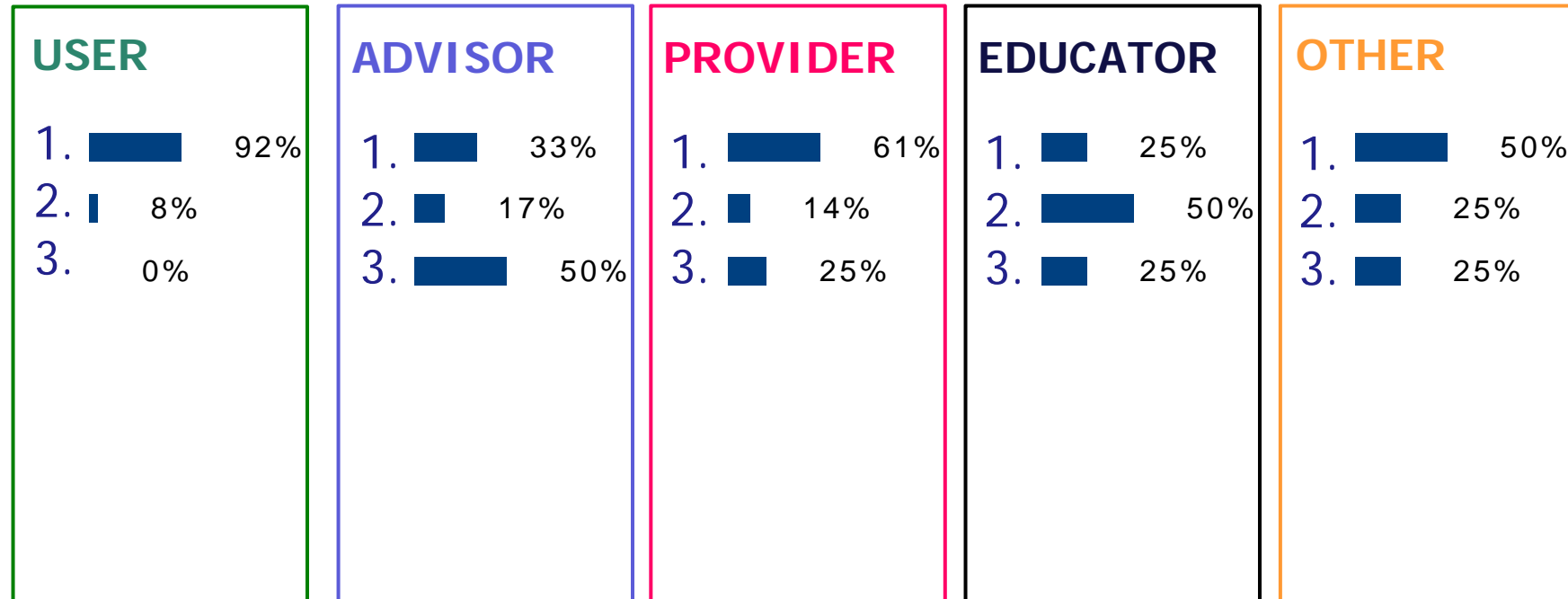
## Session 2, Qu 5: Certification & Codes for all IDR neutrals

Mediators, conciliators and arbitrators should be certified and held accountable to transparent standards of conduct that are set and applied by professional IDR bodies.



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## Session 2, Qu 5: Certification & Codes for all IDR neutrals

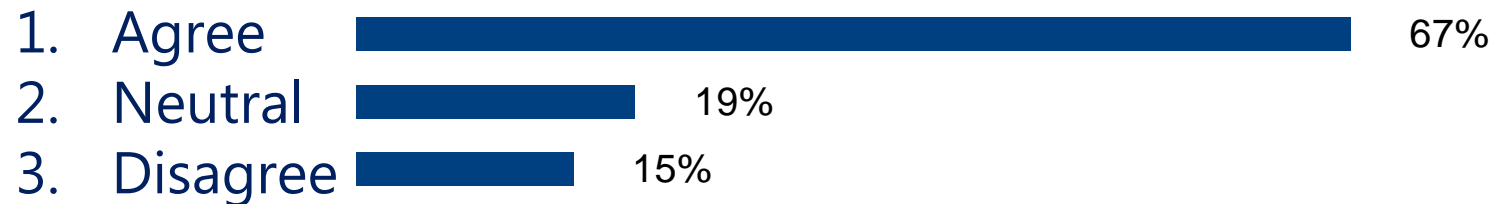


### Key

- 1. Agree
- 2. Neutral
- 3. Disagree

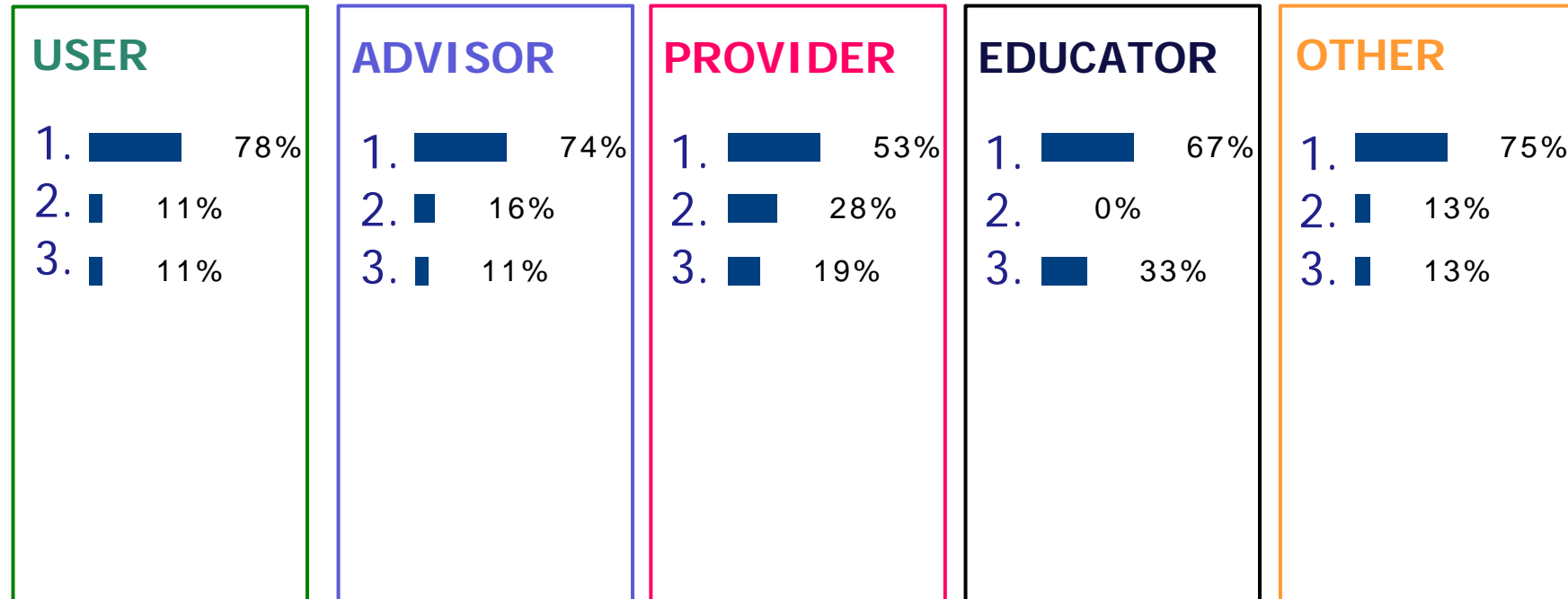
## Session 2, Qu 6: Access to user feedback on all IDR neutrals

ADR providers should always collect feedback on neutrals, and provide users with appropriate summaries based on this feedback.



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## Session 2, Qu 6: Access to user feedback on all IDR neutrals



### Key

- 1. Agree
- 2. Neutral
- 3. Disagree

Session 3 (1:45-3:00 pm)

*Expanding the Use of Mediation: Process Design (Options, Technology, Hybrids & Enforcement)*

Moderator: Eileen CARROLL QC (Hon), Deputy Chief Executive, CEDR

Panel:

Jeremy LACK, Guided Choice IDR: Starting the process

François BOGACZ, Quality & combining neutrals

Edna SUSSMAN, Hybrid neutrals and swapping hats

Nick WENBAN-SMITH, Online Technology and IDR

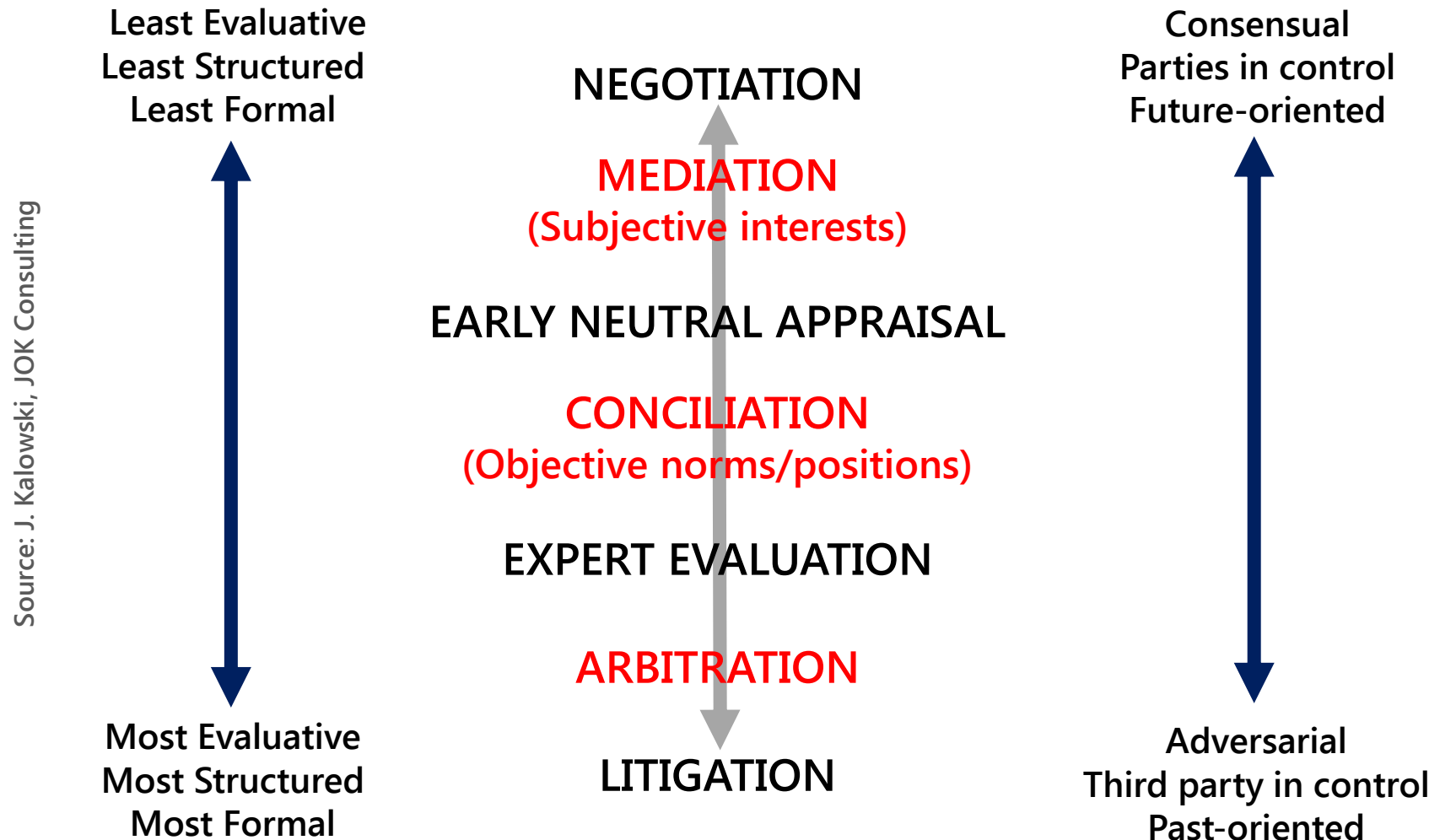
Diana WALLIS, UNCITRAL Convention on enforcement of mediated settlements

*Interactive Q&A and proposition voting*

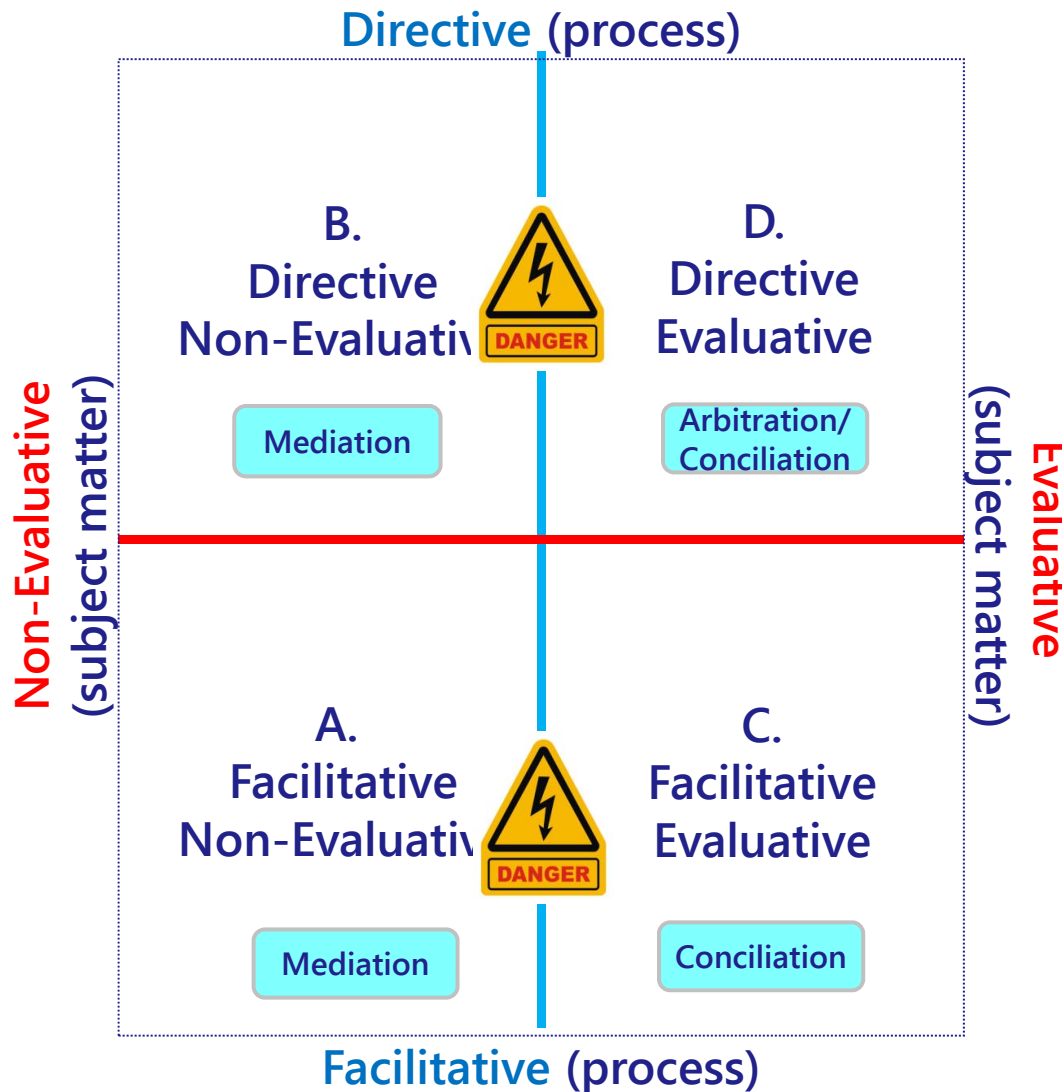


# SHAPING THE FUTURE

The process as part of the problem (definitions for today)




## Starting the process: Four different types of IDR



Source: Based on L. Riskin "The New Old & New New Grids"

**The impact of process on outcome:**

 = The appointment of an evaluative neutral can change the behaviour of the parties, driving competitive/adversarial behaviour ("out-of-group") instead of collaborative/cooperative behaviour ("in-group"), if the parties and their advisors start to seek coalition-building with the neutral.

# SHAPING THE FUTURE

## Case study: An IP Dispute ("clockwise" = ☑ v. "anti-clockwise" = ☒)

**INFRINGING:**  
The dancer turns  
**CLOCKWISE**



Plaintiff: IP owner



Source: N. Kayahara

**NOT-INFRINGING:**  
The dancer turns  
**ANTI-CLOCKWISE**

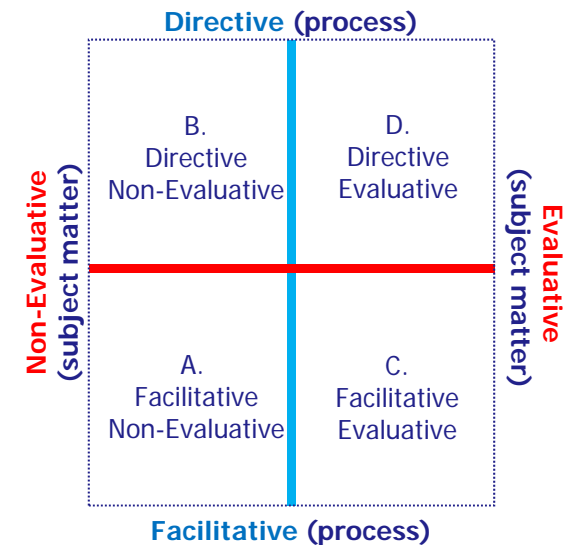
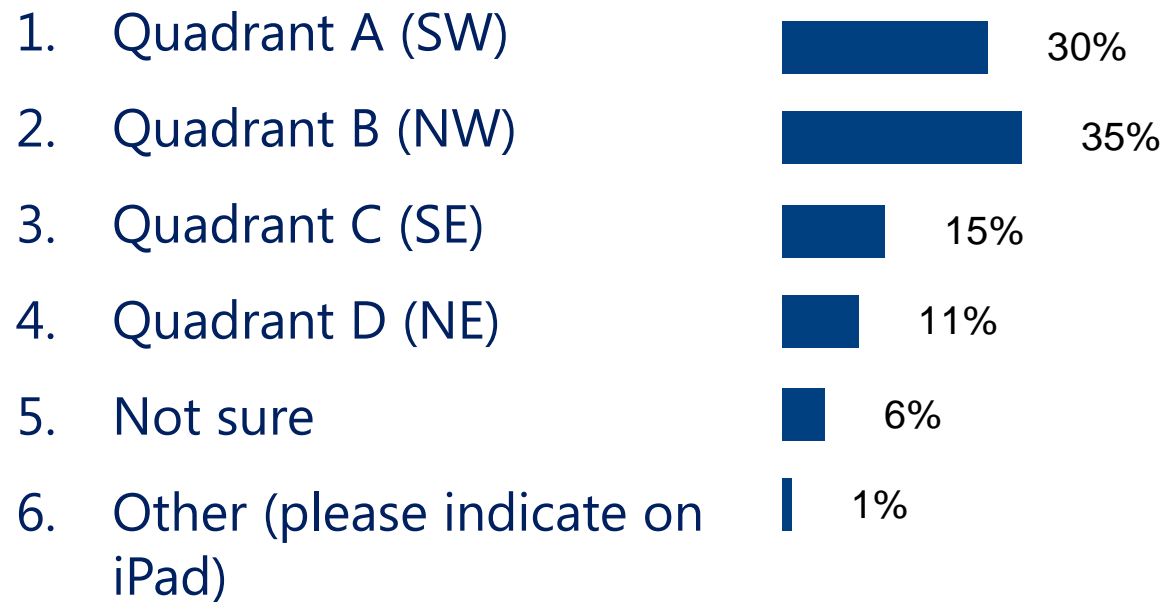


Defendant: EU Distributor

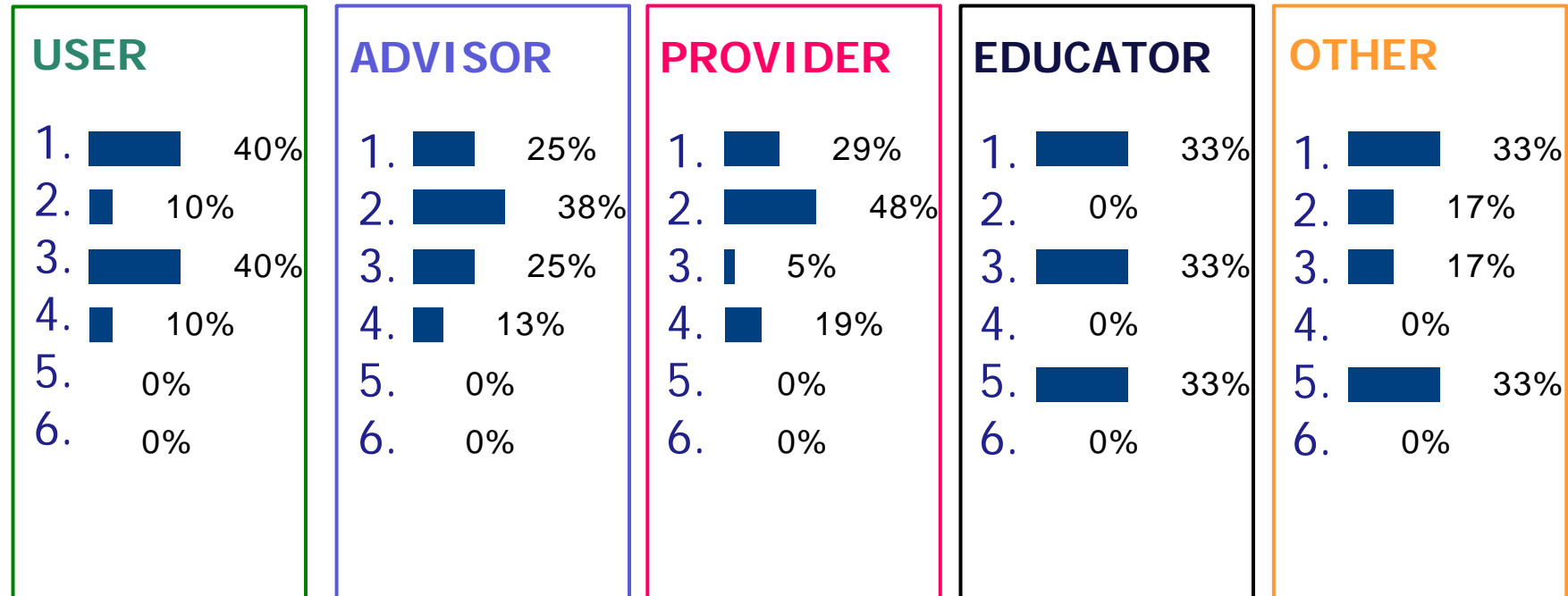


## Session 3, Qu 1 SPINNING LADY Case: Where to start?

In which quadrant would you want to start this IDR process?



## Session 3, Qu 1 SPINNING LADY Case: Where to start?

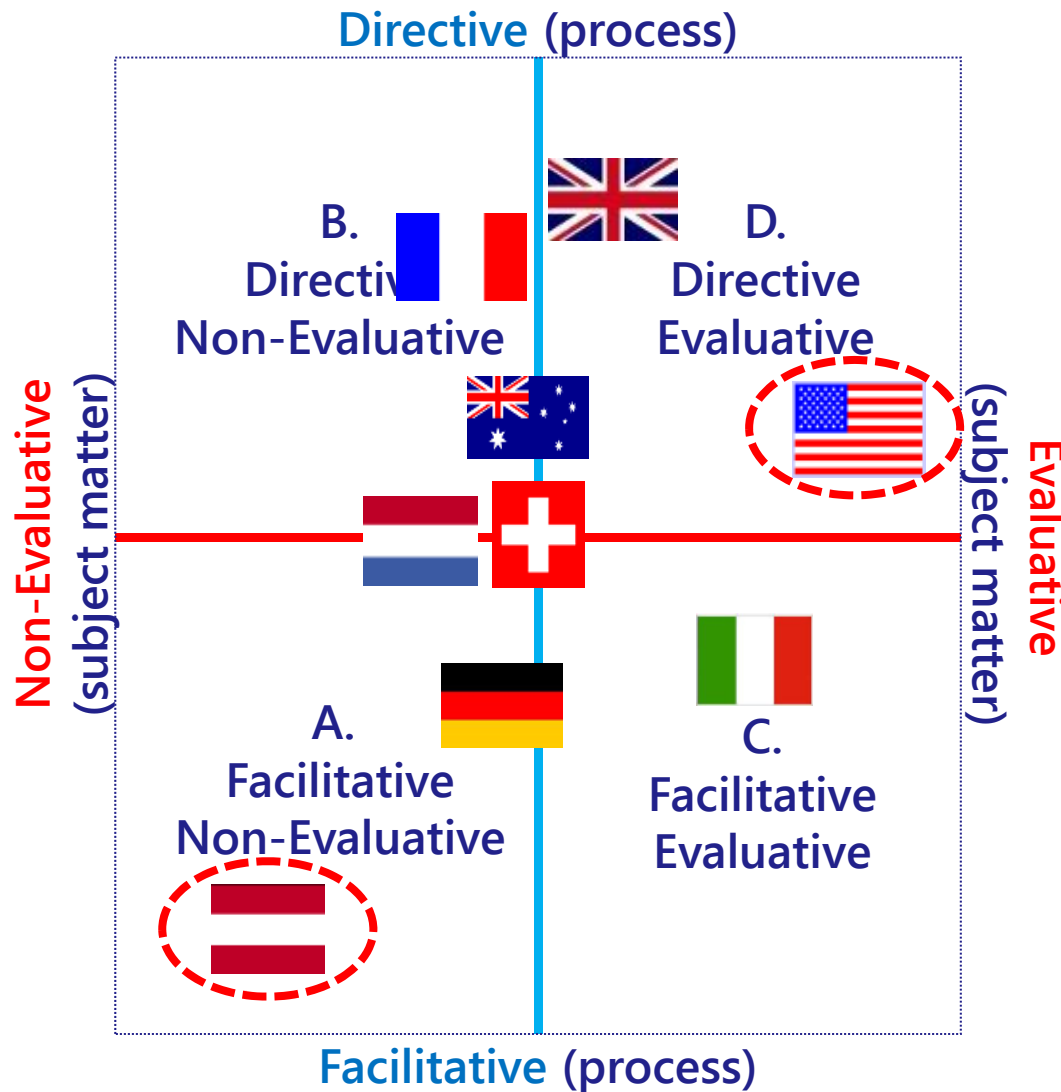


### Key

1. Quadrant A (SW) 2. Quadrant B (NW) 3. Quadrant C (SE) 4. Quadrant D (SW)  
 5. Not sure 6. Other

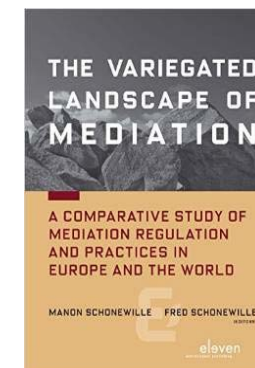
# SHAPING THE FUTURE

“Mediation”: 60 states divided by a common word?



Source: L. Riskin + M. Schonewille & J. Lack

NB. It is impossible to generalize and dangerous to stereotype. The parties and the co-mediator should be aware that different models can exist (even within the same country). It is useful in IDR to use mediators who can move around and work in all quadrants.



## Consider Combining Neutrals in IDR cases

- 2 equal peers: A + B (anti-coalition insurance)
- A = non-evaluative, B = evaluative? (+/- binding?)
- Joint sessions only if B = evaluative + binding?
  - Sparring partner & support
  - Shadow advisor / coach



Are 2 brains better than 1?

### 1. Equivalent Mediators (= efficiencies)

1. Shared process skills and competencies
2. Multi-tasking /splitting the team for multiparty disputes

### 2. Different Mediators (= specificity)

1. Substantive v. Procedural
2. Evaluative v. Non-Evaluative
3. “Good Cop” v. “Bad Cop”

### 3. Mixed approaches & Models (= diversity)

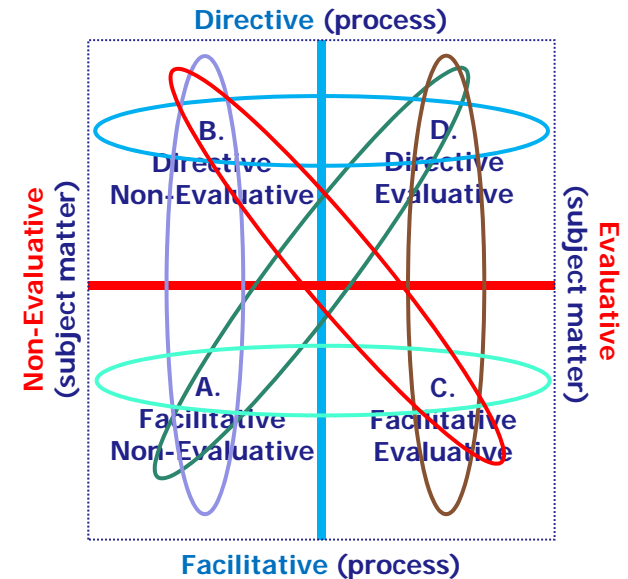
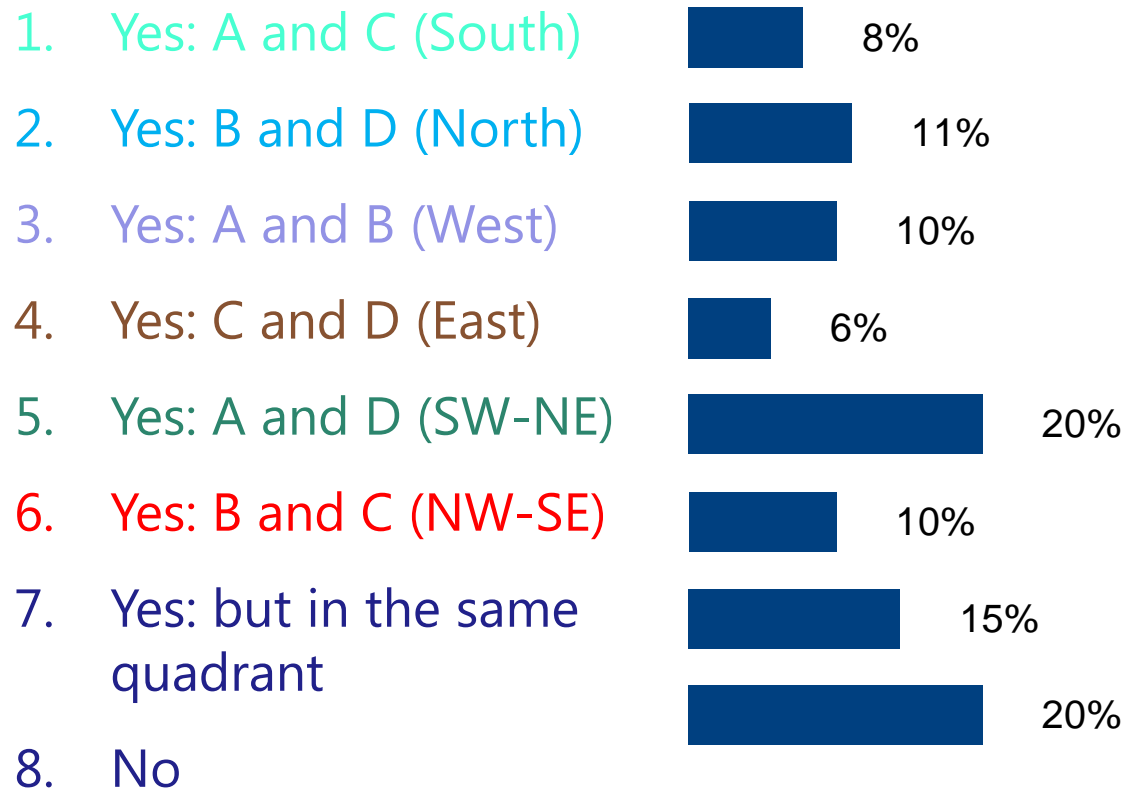
1. Random mix
2. Cultural Mix
3. Professional Mix
4. Gender Mix

- Higher settlement rates
- Greater satisfaction

Source: J. Lack & B. Sambeth Glasner

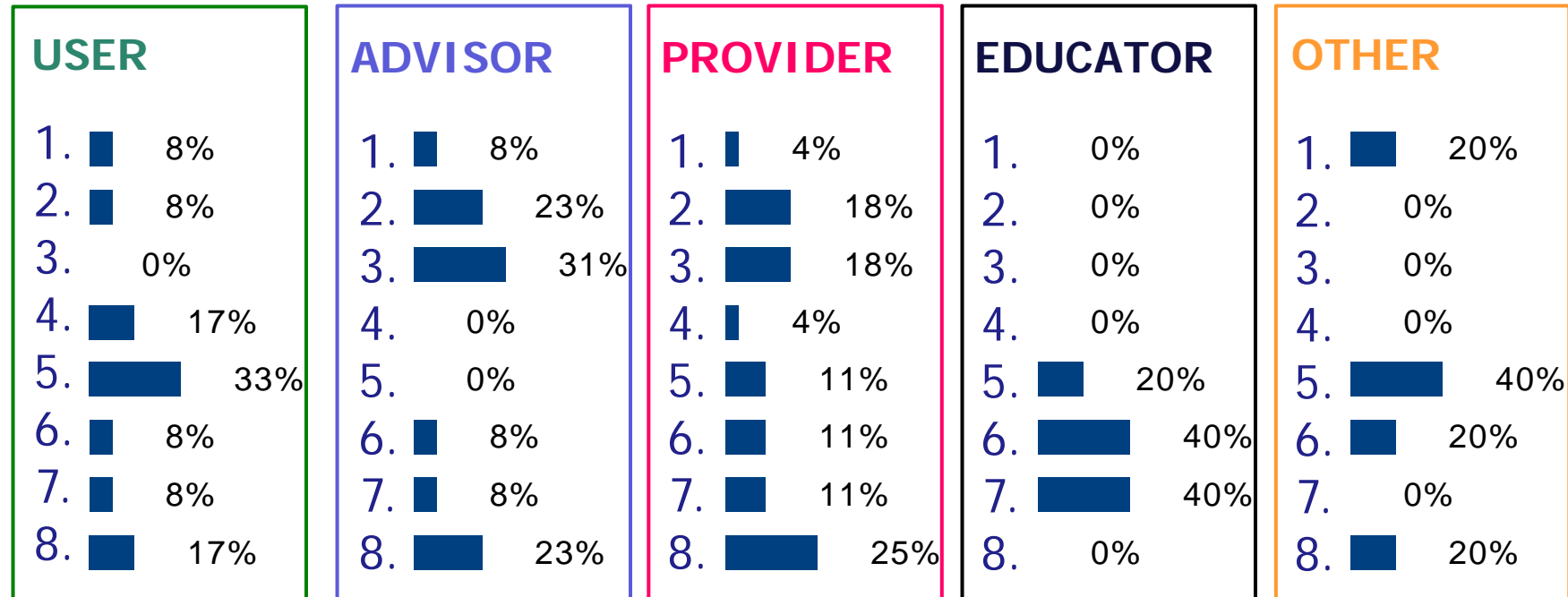
## Session 3, Qu 2: "Co-mediation"?

Assuming the value of the dispute is more than US\$ 1,000,000, would you consider using two neutrals in different quadrants?





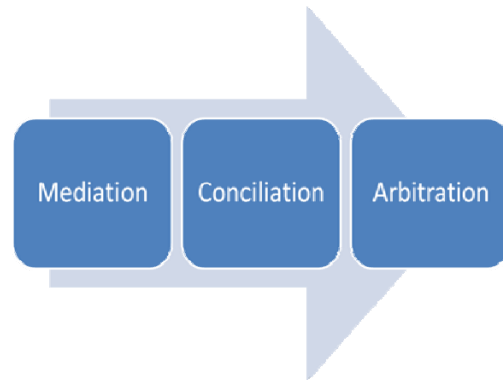
## Session 3, Qu 2: "Co-mediation"?



### Key

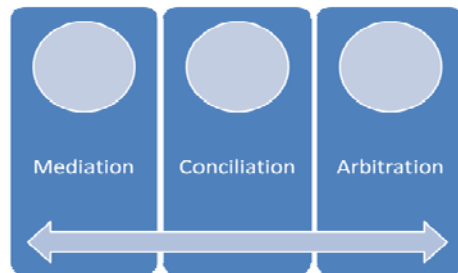
1. Yes: A and C (South quadrants) 2. Yes: B and D (North quadrants) 3. Yes: A and B (West quadrants) 4. Yes: C and D (East quadrants) 5. Yes: A and D (SW-NE quadrants) 6. Yes: B and C (NW-SE quadrants) 7. Yes: but in the same quadrant 8. No

## Process Design & Combining Processes for IDR?



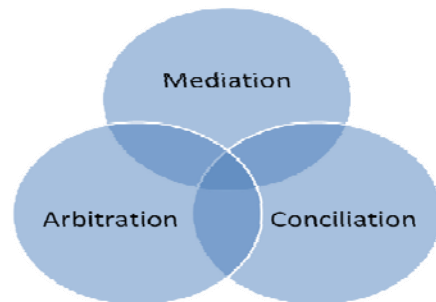
### Sequential

- Med-Arb
- Arb-Med
- Windows
- Arb-Med-Con-Med-Arb
- Consent awards



### Parallel

- Med//Arb
- Carve-outs
- Shadow mediation
- Partnering



### Integrated

- MEDALOA
- Dispute Boards
- Combined Neutrals
- ??? (3 question marks)

### Factors

- Parties
- Certainty of outcome
- Costs
- Time & deadlines
- Applicable law(s)
- Languages
- Skill sets
- Venue & distances
- Institutional rules
- Nationalities/cultures
- Counsel
- Neutrals (roles & no.)
- Availabilities
- Advisors & Experts
- Confidentiality
- Discovery
- Implementation
- Enforcement

## SHAPING THE FUTURE

Can the same neutral “switch hats” in sequential ADR? 2 reactions:



**It can sometimes be done,  
with proper precautions in place.**

Source: J. Lack

## Some User Perspectives

### PROS

- Neutral sees the whole picture
- More flexible
- Less time
- Less money
- Better outcomes?
- Greater freedom to innovate
- Greater control over process by users



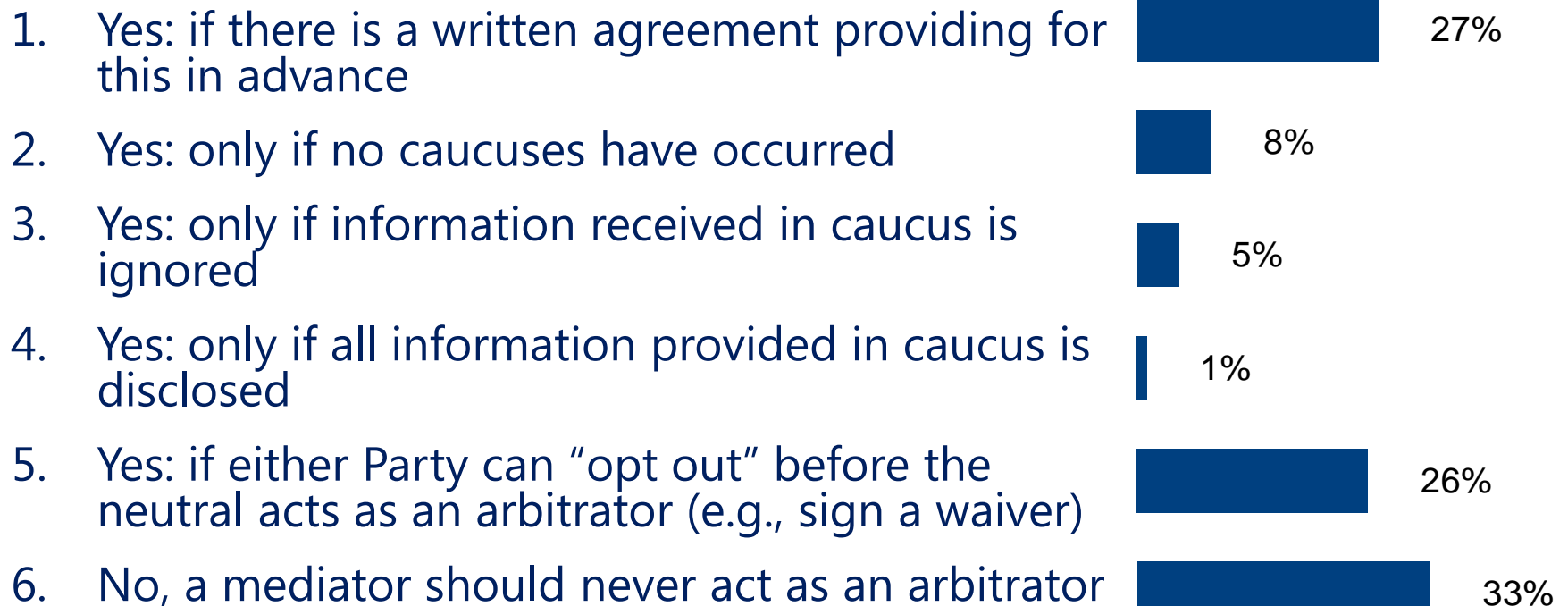
### CONS

- Confusion of roles
- Will relevant caucus information be shared?
- Can the other party respond to it first?
- Will the neutral be influenced by other information heard in caucus?
- Can a party opt-out?
- Less certainty of enforceability?

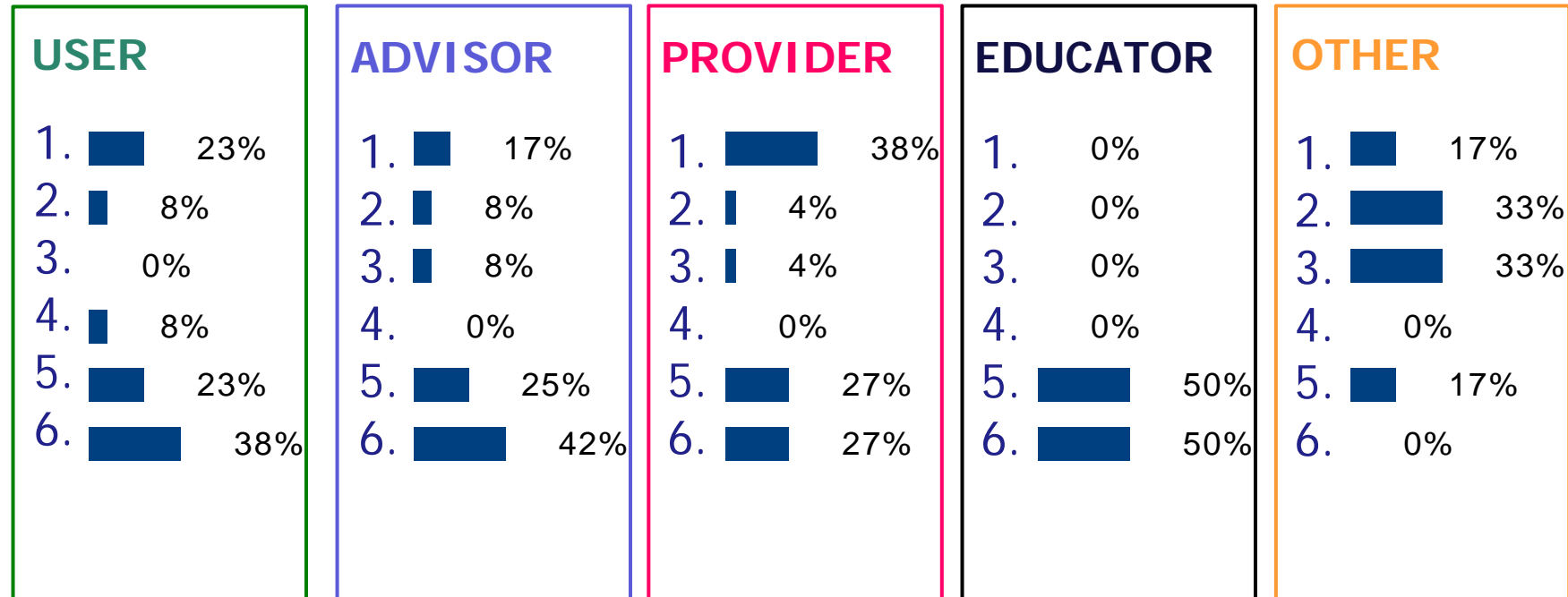
Source: J. Lack

## Session 3, Qu 3: MED-ARB & "Swapping hats"?

Assuming the value of the dispute is less than US\$ 300,000, would you consider using the same neutral to "swap hats", acting first as a mediator and then as an arbitrator if the parties don't settle?



## Session 3, Qu 3: MED-ARB & "Swapping hats"?

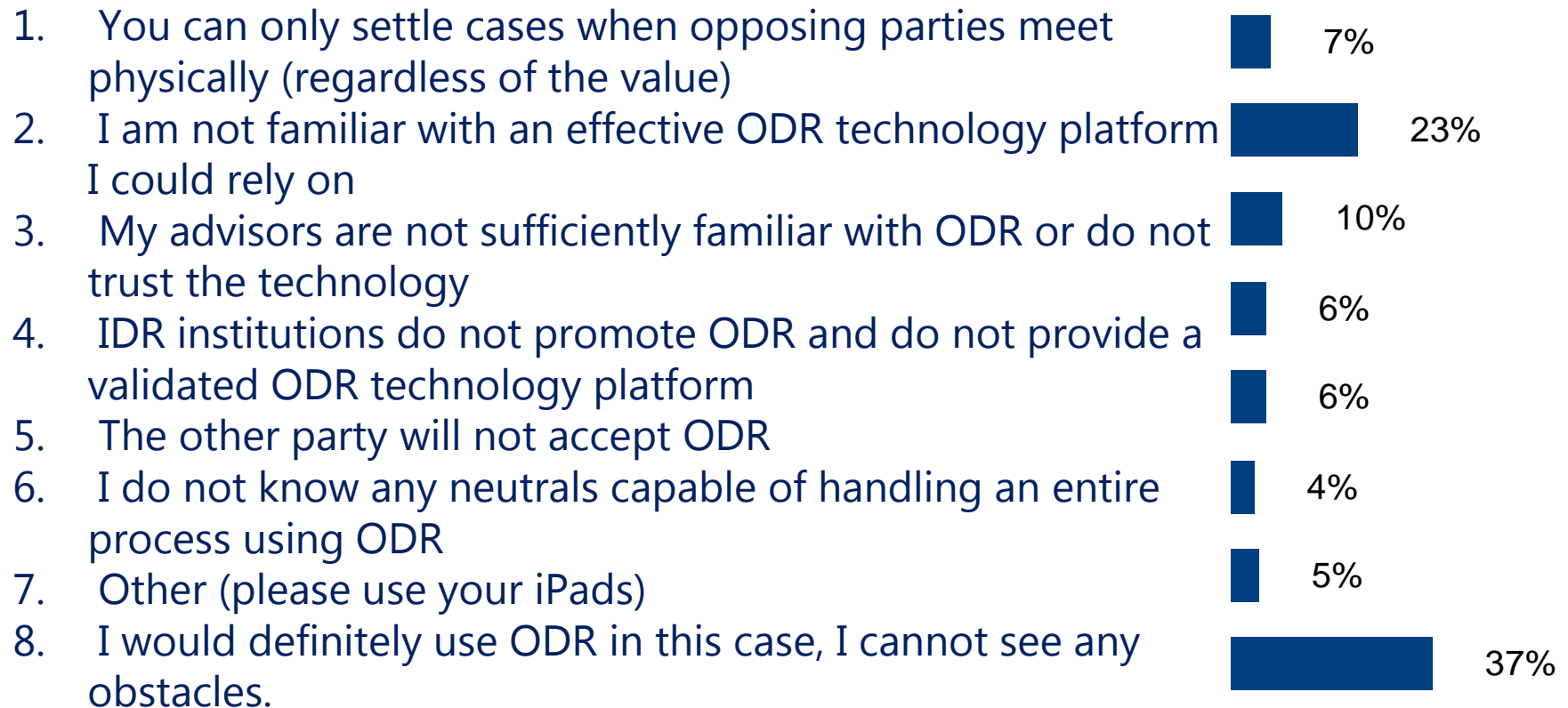


### Key

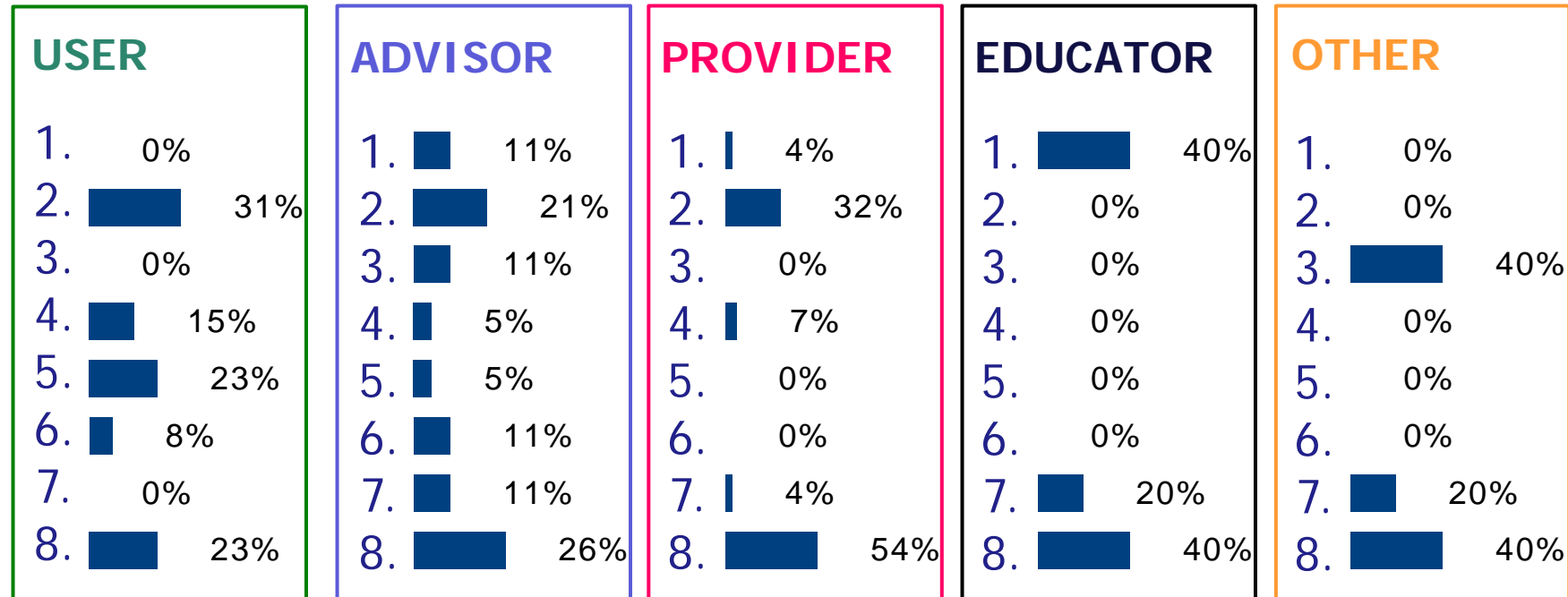
1. Yes: if there is a written agreement providing for this in advance 2. Yes: only if no caucuses have occurred 3. Yes: only if information received in caucus is ignored 4. IDR institutions do not promote ODR and do not provide a validated ODR technology platform 5. Yes: if either Party can "opt out" before the neutral acts as an arbitrator (e.g., sign a waiver) 6. No, a mediator should never act as an arbitrator

## Session 3, Qu 4: Use of Online Dispute Resolution ("ODR")

Assuming the value of the dispute is less than US\$ 50,000, what would be the main obstacle for you to consider resolving it solely by ODR?



## Session 3, Qu 4: Use of Online Dispute Resolution ("ODR")



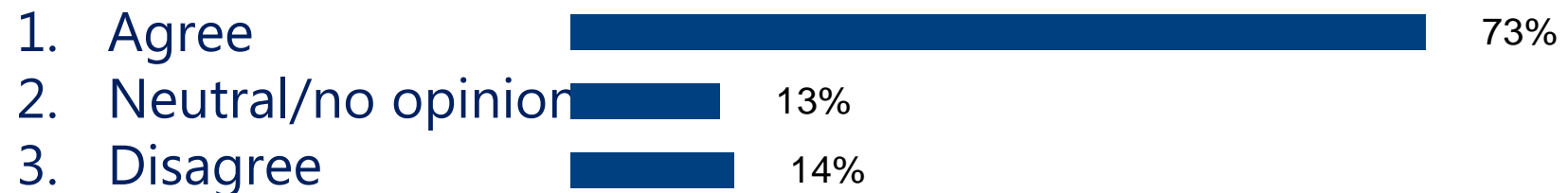
### Key

1. You can only settle cases when opposing parties meet physically 2. I am not familiar with an effective ODR technology platform I could rely on 3. My advisors are not sufficiently familiar with ODR or do not trust the technology 4. IDR institutions do not promote ODR and do not provide a validated ODR technology platform 5. The other party will not accept ODR 6. I do not know any neutrals capable of handling an entire process using ODR 7. Other 8. I would definitely use ODR in this case, I cannot see any obstacles.



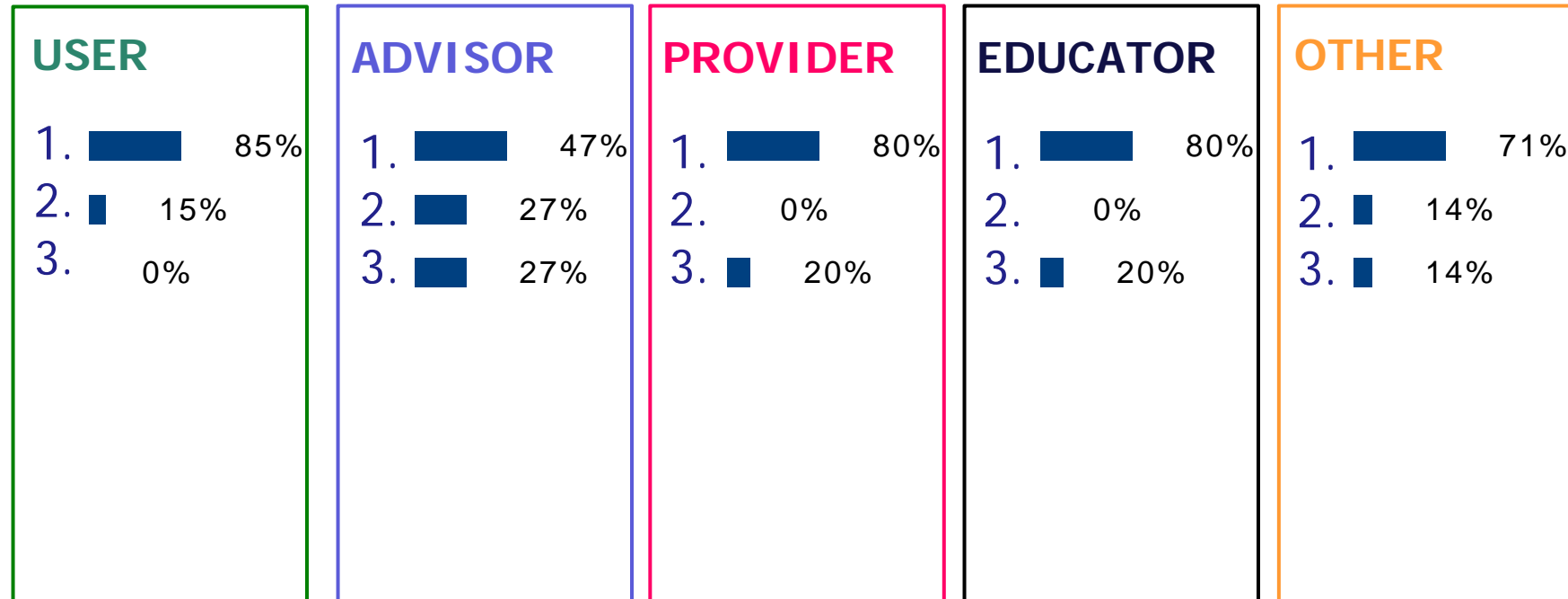
## Session 3, Qu 5: An UNCITRAL Convention on Settlements

An international convention is needed to ensure that any mediated\* settlement agreement reached in this case could be automatically recognised and enforced in all signatory countries.



(\* = using a recognised institution or certified mediator)

## Session 3, Qu 5: An UNCITRAL Convention on Settlements



### Key

- 1. Yes
- 2. Neutral / No opinion
- 3. No

Session 4 (3:00-4:15 pm)

*Using Mediation in Diverse Fields - Overcoming Obstacles*

Moderator: John STURROCK QC, Chief Executive, Core Solutions

Panel:

Art Law: Prof. Marc-André RENOLD, University of Geneva

Investor-State: Wolf VON KUMBERG, Associate GC, Northrop Grumman

Sports: Dirk-Reiner MARTENS, Founder of FIBA's Basketball Arbitration Tribunal

Trademarks & IP: Toe Su AUNG, Elipe, immediate past President of INTA

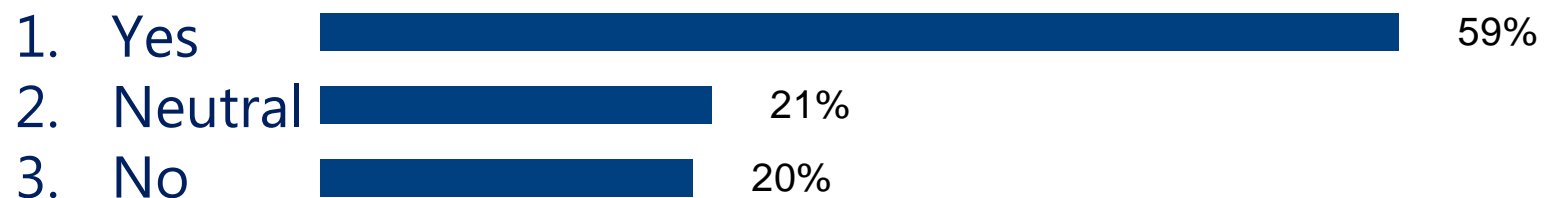
Banking & Financial Services: Hywel JENKINS, Partner, Herbert Smith Freehills

Labour: Andrew WAREING, COO, ACAS

*Interactive Q&A and proposition voting*

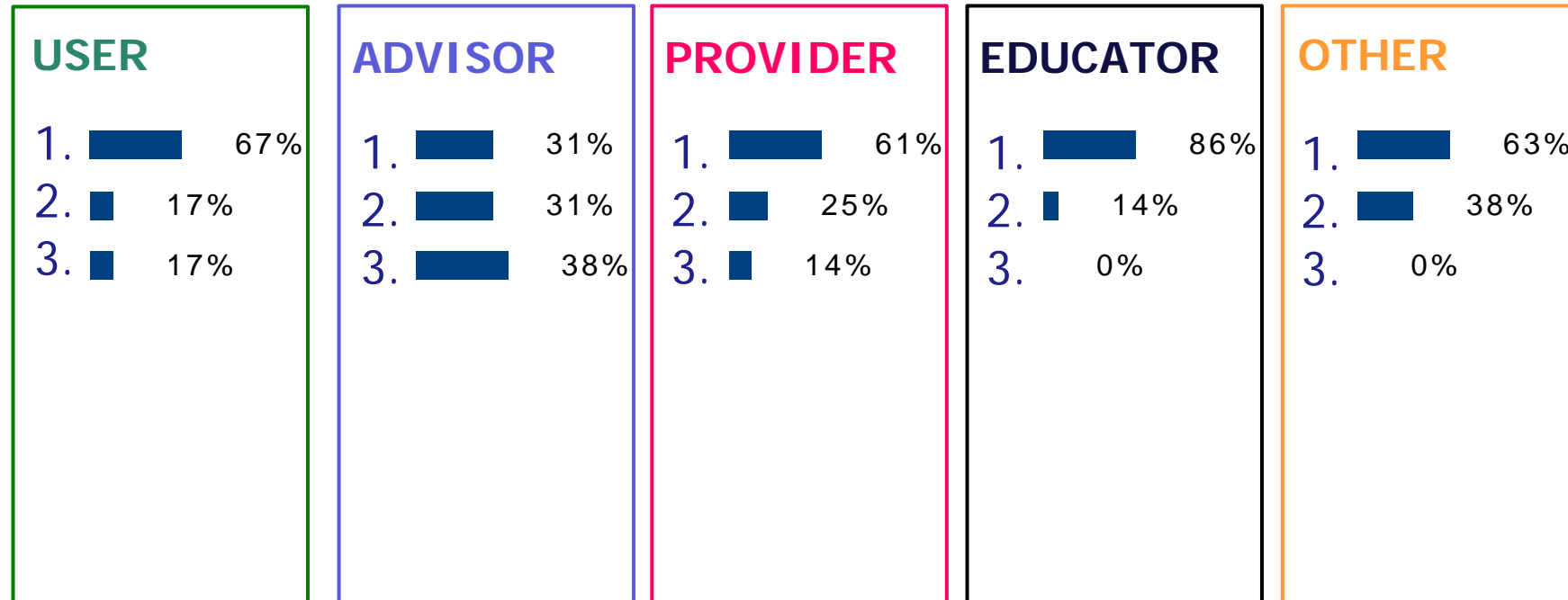
## Session 4, Qu 1a: "Cooling Off" periods (Wolf von Kumberg)

Parties in major international disputes should be encouraged to use "cooling off" periods (similar to those in investor-state disputes) to make a good faith effort to settle using a mediator.



# SHAPING THE FUTURE

## Session 4, Qu 1a: "Cooling Off" periods (Wolf von Kumberg)



### Key

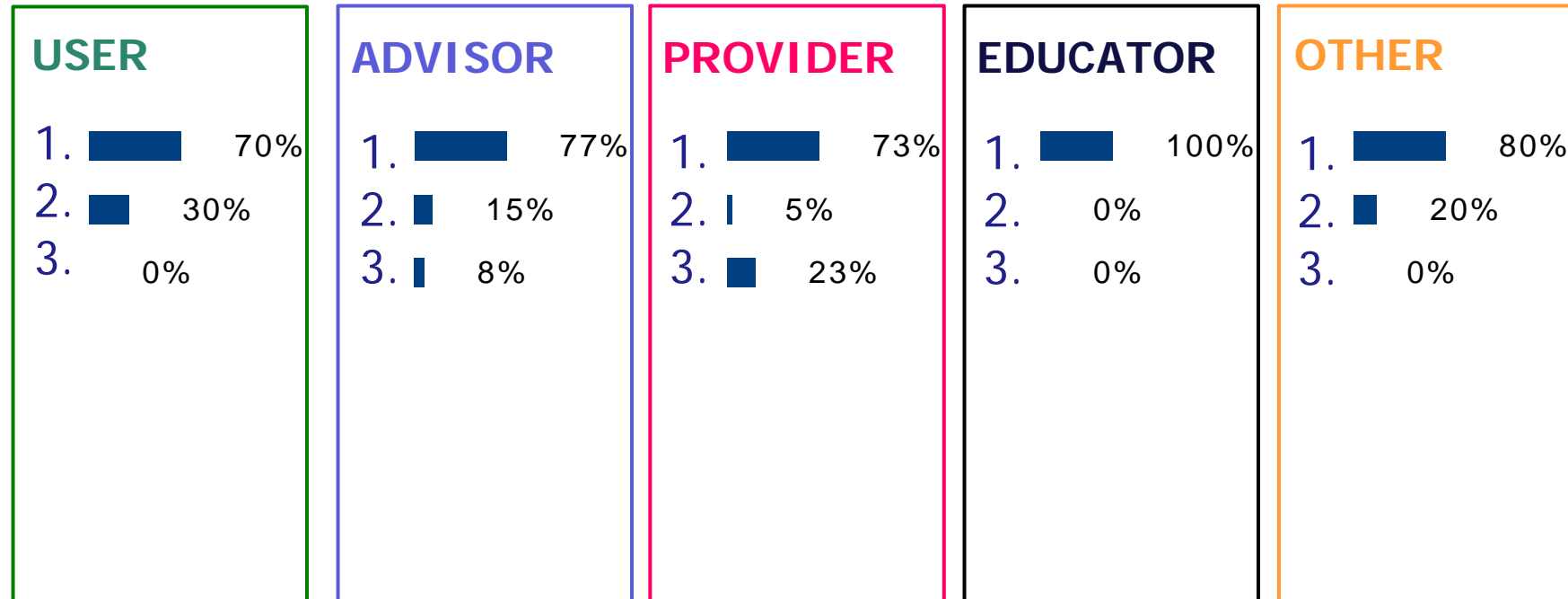
- 1. Yes
- 2. Neutral
- 3. No

## Session 4, Qu 1b: Transatlantic IDR clause (Wolf von Kumberg)

There should be an investor-state dispute resolution clause in the Transatlantic Trade and Investment Partnership Treaty (TTIP), which provides for mediation.



## Session 4, Qu 1b: Transatlantic IDR clause (Wolf von Kumberg)

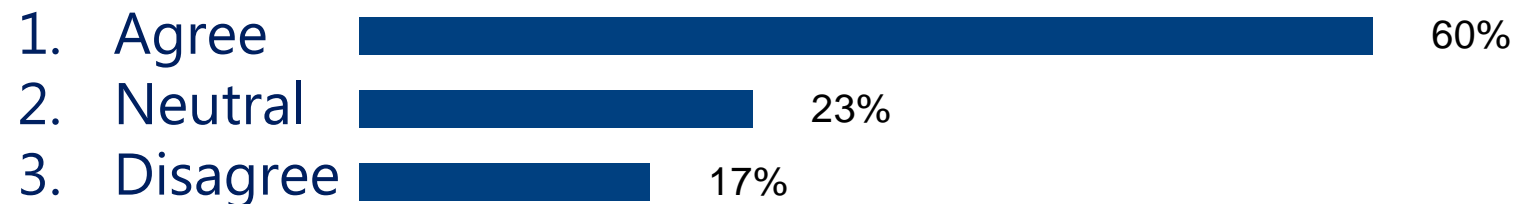


### Key

- 1. Yes
- 2. Neutral
- 3. No

## Session 4, Qu 2: Financial Services? (Hywel Jenkins)

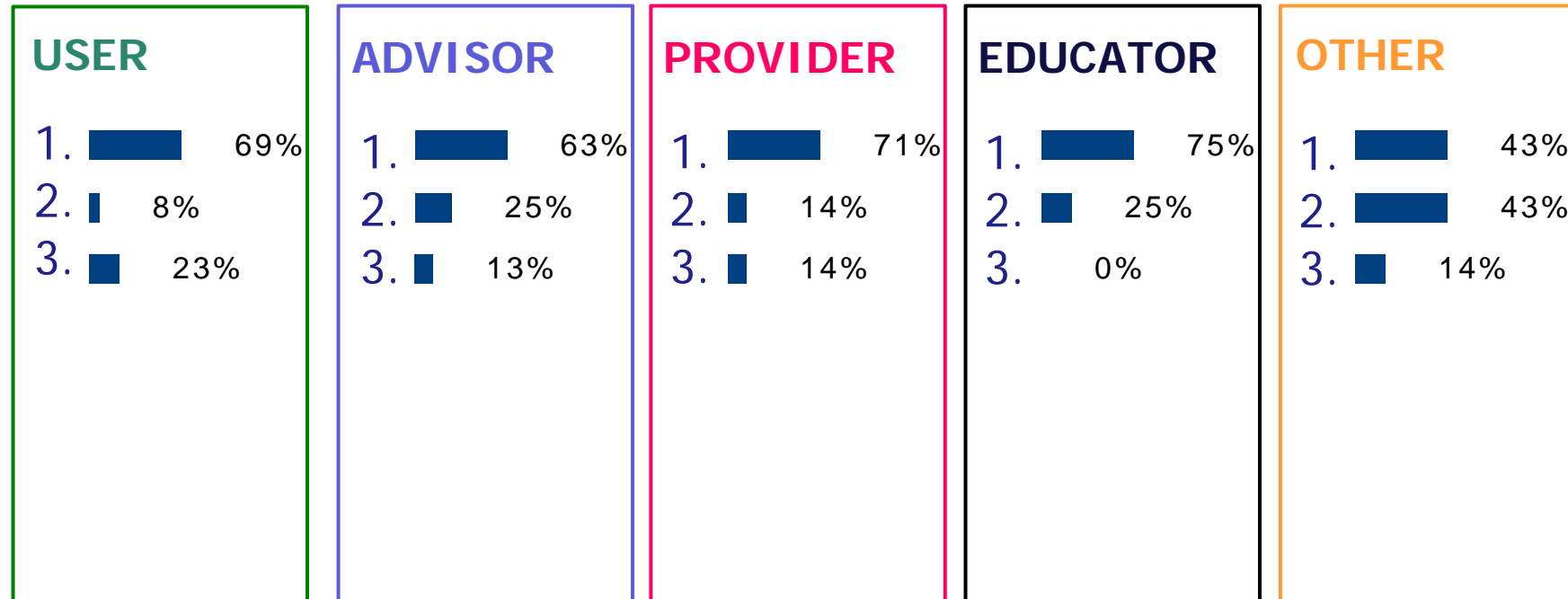
Regulators and other public authorities are often subject to statutory and other constraints that can create difficulties when mediating disputes involving such bodies. However, these difficulties can generally be accommodated.





# SHAPING THE FUTURE

## Session 4, Qu 2: Financial Services? (Hywel Jenkins)

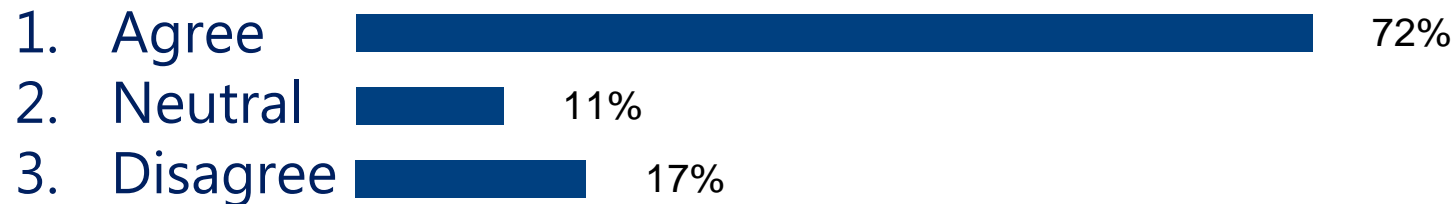


### Key

- 1. Agree
- 2. Neutral
- 3. Disagree

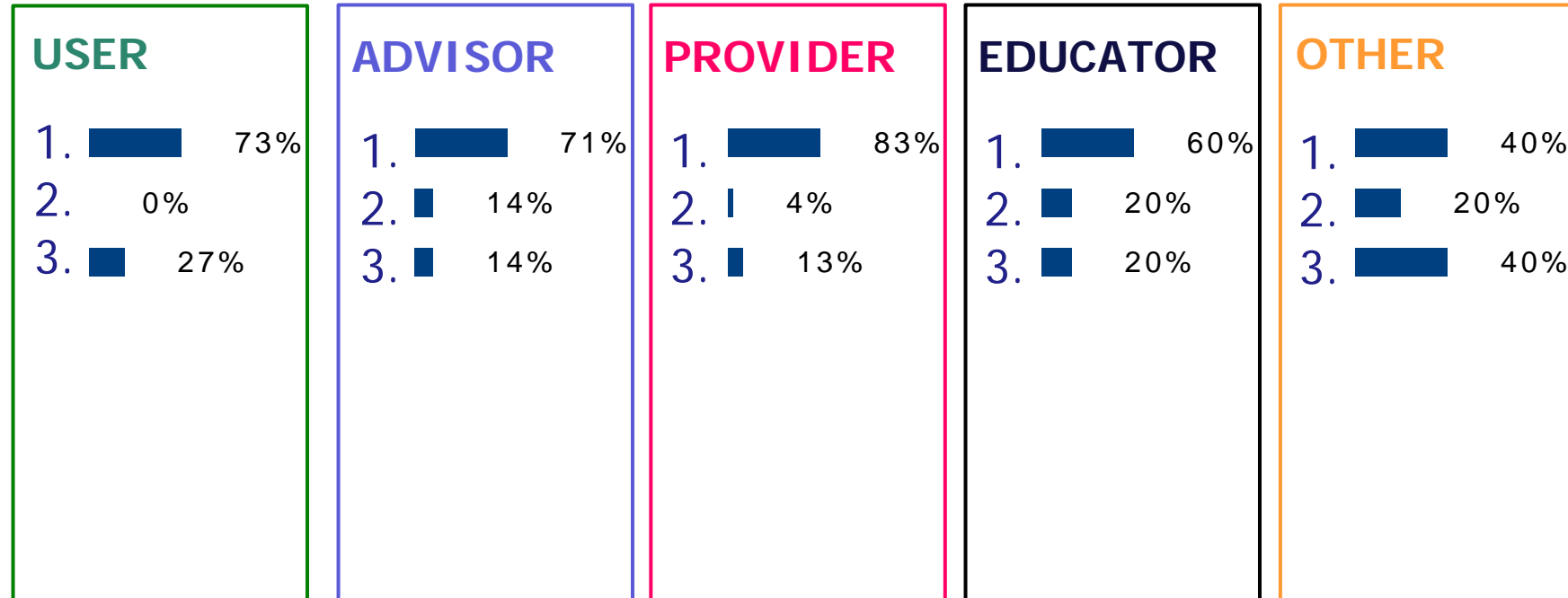
## Session 4, Qu 3: Intellectual Property Disputes (Toe Su Aung)

Although importance is often placed on taking strong legal action as a means of deterrence against counterfeiters, pirates and other parties that infringe Intellectual Property rights, it is nevertheless possible to mediate successfully with such parties.



# SHAPING THE FUTURE

## Session 4, Qu 3: Intellectual Property Disputes (Toe Su Aung)



### Key

- 1. Agree
- 2. Neutral
- 3. Disagree

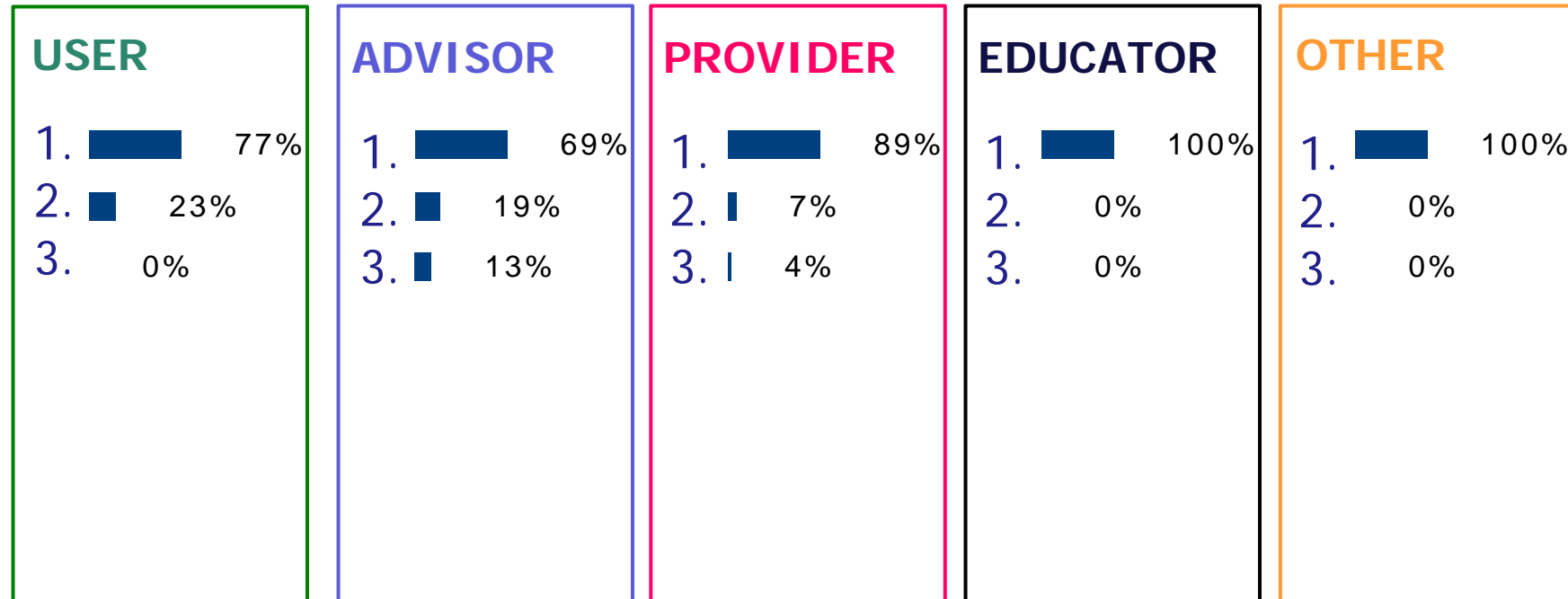
## Session 4, Qu 4: Mediation & Art Law (Marc-André Renold)

Mediation should be tried first in all international disputes involving issues of national heritage (where the work of art in question is considered to be of national importance)



# SHAPING THE FUTURE

## Session 4, Qu 4: Mediation & Art Law (Marc-André Renold)

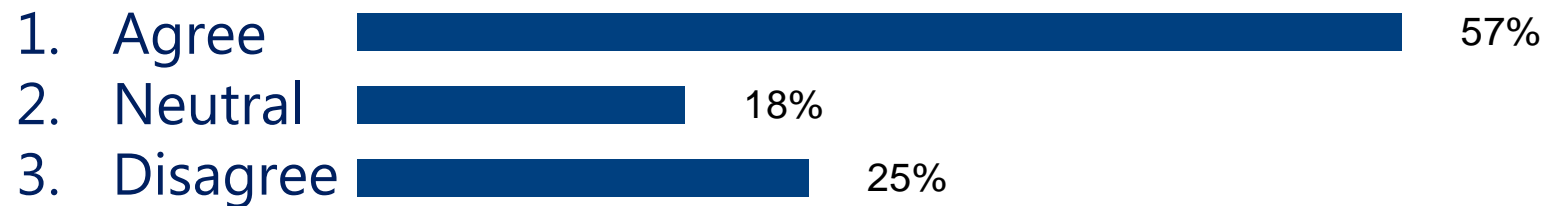


### Key

- 1. Agree
- 2. Neutral
- 3. Disagree

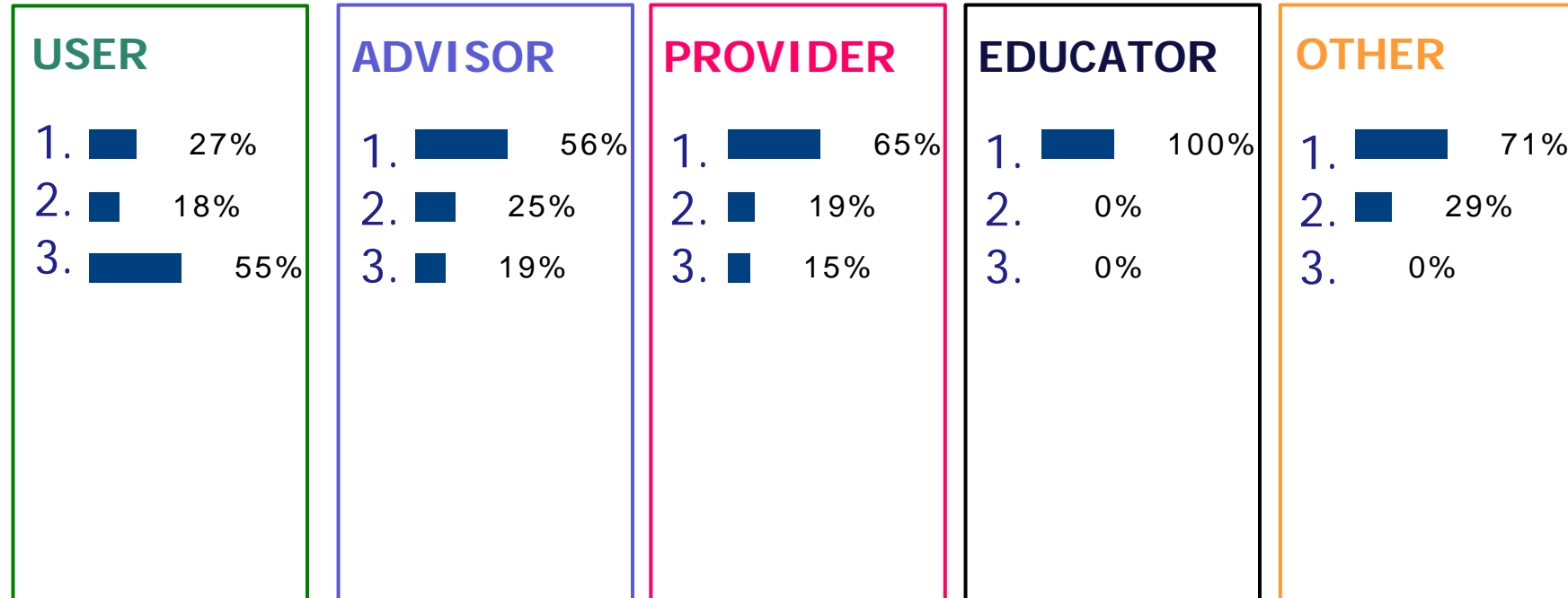
## Session 4, Qu 5: State-funded mediation (A. Wareing)

The UK experience of providing state-funded mediation in employment disputes suggests that governments should provide free mediation in a much wider range of disputes.



# SHAPING THE FUTURE

## Session 4, Qu 5: State-funded mediation (A. Wareing)

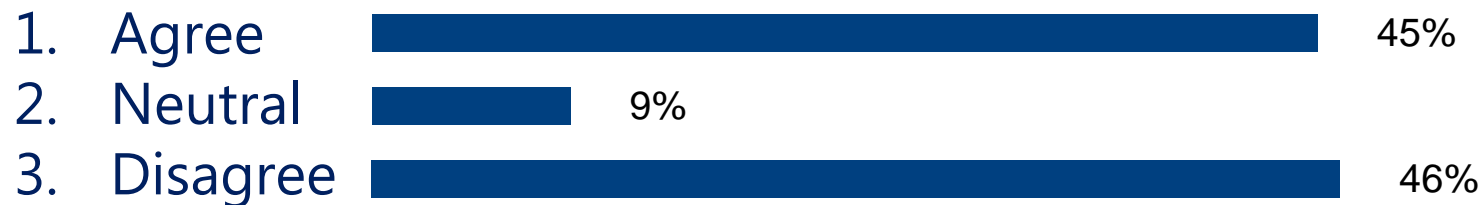


### Key

- 1. Agree
- 2. Neutral
- 3. Disagree

## Session 4, Qu 6: Ex aequo et bono in IDR? (Dirk Reiner Martens)

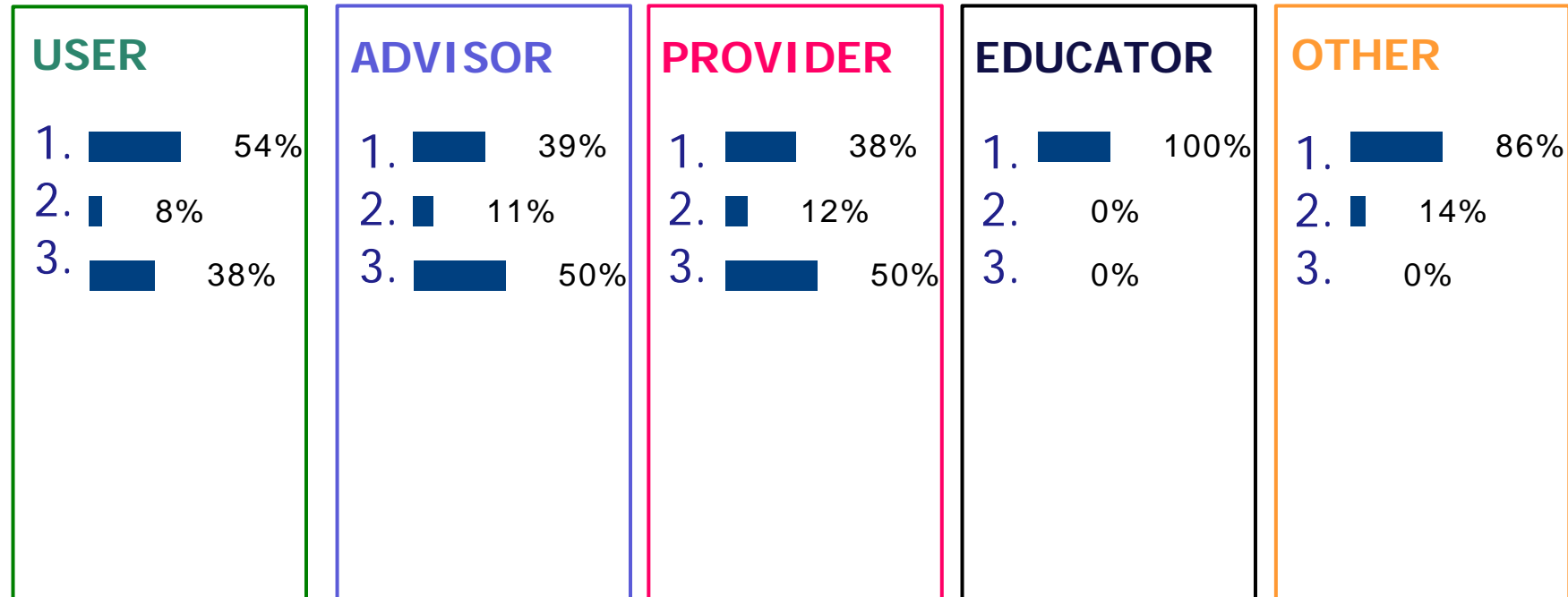
In international disputes, arbitrators should always be empowered to make binding decisions based solely on what is fair and equitable (possibly ignoring applicable laws), unless the parties expressly agree otherwise.





# SHAPING THE FUTURE

## Session 4, Qu 6: Ex aequo et bono in IDR? (Dirk Reiner Martens)



### Key

- 1. Agree
- 2. Neutral
- 3. Disagree

Session 5 (4:45-6:00 pm)

*The Future of IDR : What can we conclude?*

Moderator: Michael LEATHES, Director IMI

Panel:

Sven DUMOULIN, General Counsel, AkzoNobel NV

Abhijit MUKHOPADHYAY, President - Legal, Hinduja Group

Sir Alan WARD, Chair, Civil Mediation Council

Cyril DUMOULIN, Senior Legal Counsel, Global Litigation, Shell International

Ulrich HAGEL, Senior Expert Dispute Resolution, Bombardier Transportation

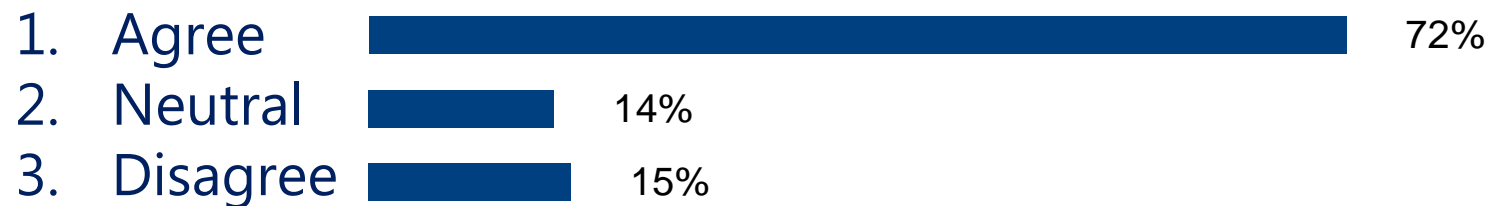
Kristin MCFETRIDGE, Chief Counsel Portfolio Products and Standards, BT plc

Jacqueline MINOR, Head of Representation in the UK, European Commission

*Interactive Q&A and proposition voting*

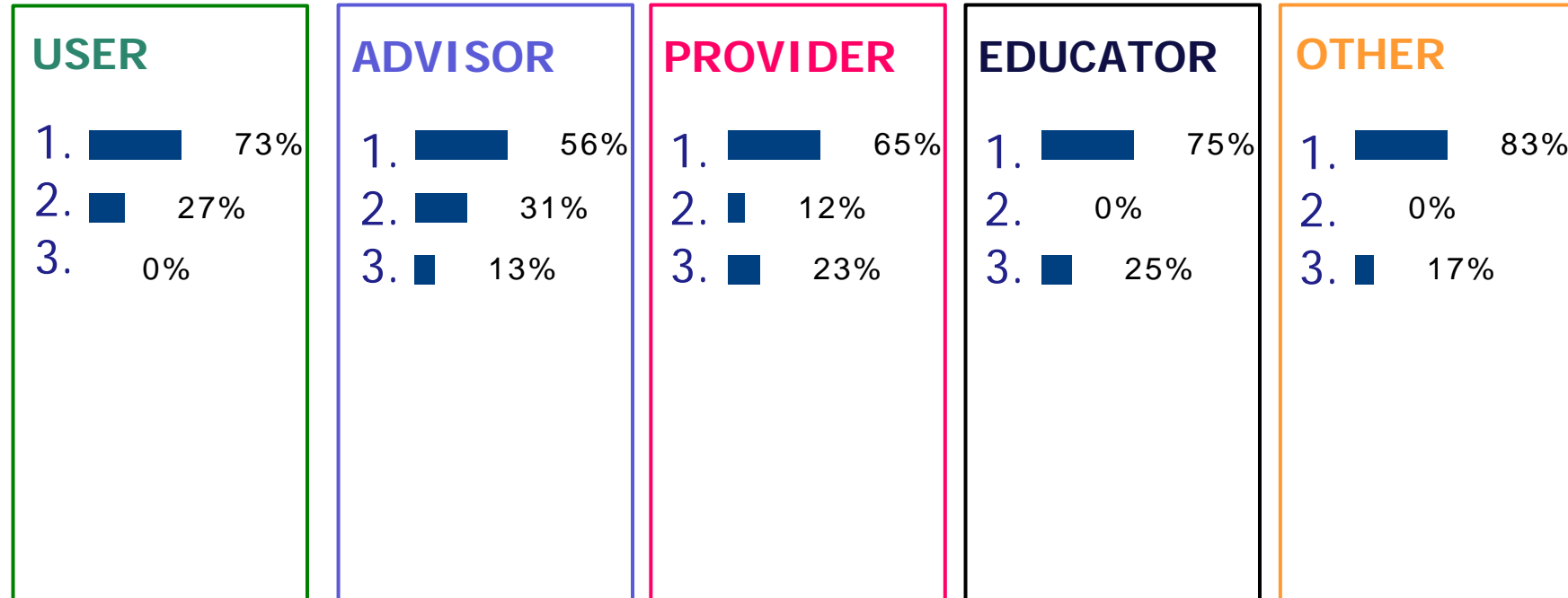
## Session 5, Qu 1: An IDR platform to express user needs?

An international platform needs to be created and adequately funded that enables users to express their IDR needs clearly.



# SHAPING THE FUTURE

## Session 5, Qu 1: An IDR platform to express user needs?



### Key

- 1. Agree
- 2. Neutral
- 3. Disagree

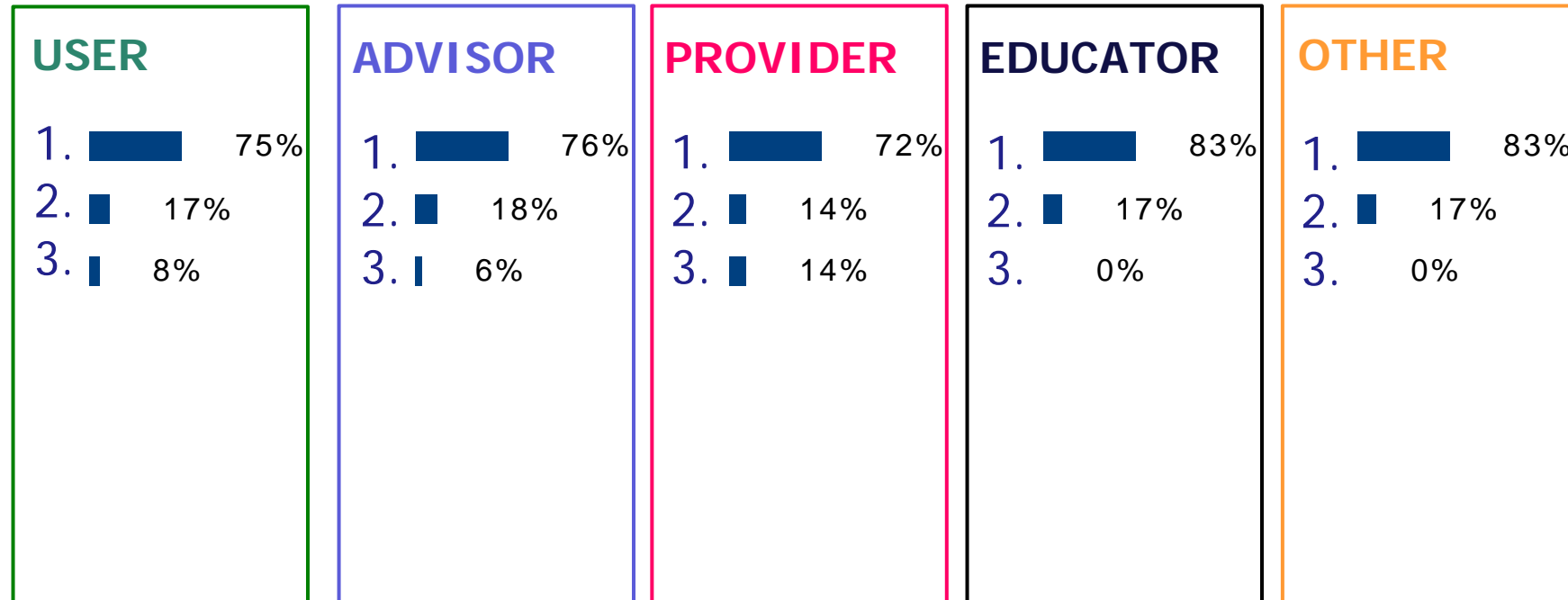
## Session 5, Qu 2: A 2015 series of IDR Pound Conferences?

Should we set up a series of international “Pound Conferences” around the world, based on this London Guildhall Convention, but adapted to local and regional circumstances?



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## Session 5, Qu 2: A 2015 series of IDR Pound Conferences?

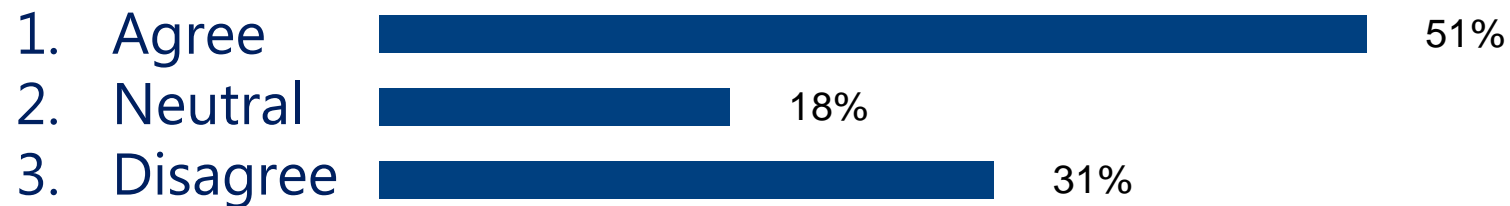


### Key

- 1. Yes
- 2. Neutral
- 3. No

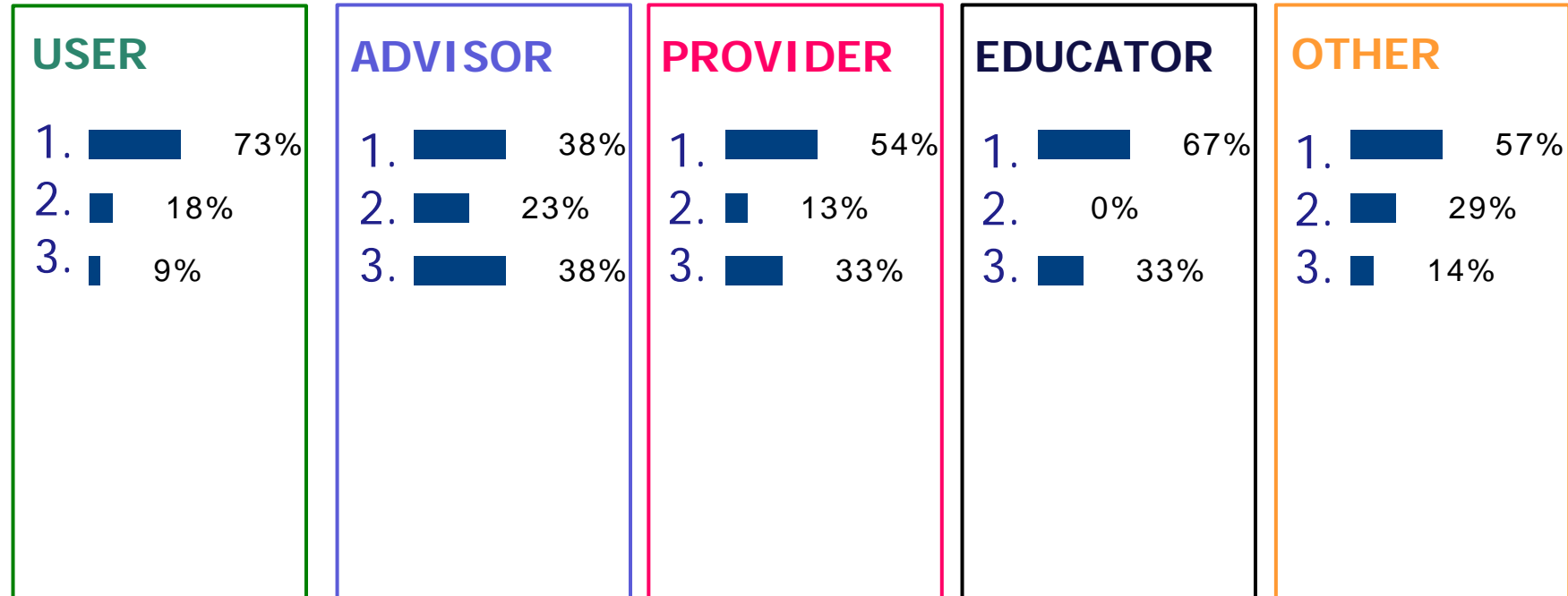
## Bonus Qu: Use of mediation in deal-making (no dispute)

Mediators should be used in negotiations of international contracts even when there is no dispute.



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## Bonus Qu: Use of mediation in deal-making (no dispute)



### Key

- 1. Agree
- 2. Neutral
- 3. Disagree



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