

# THE GPC NORTH AMERICA REPORT

Regional Trends and Local Differences  
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

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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 GPC events across North America.

## MESSAGE FROM IMI

The International Mediation Institute is delighted to present the GPC North America Report—a comparative analysis and recommendations based on open text questions asked at GPC events in the USA and Canada. We are grateful to the AAA-ICDR Foundation for their support in this endeavour.

The GPC Series was unique undertaking, of unprecedented scale and ambition. The idea of conducting a standardized survey of thousands of stakeholders engaged in dispute resolution at interactive events, both in-person and online, was conceived by IMI in 2014. The concept gained traction and was developed throughout 2015, becoming reality between March 2016 and July 2017. The GPC Series consisted of 28 events in 22 countries across the globe and was supplemented by on-line participation.

By focusing on the needs of corporate and individual users of civil and commercial dispute resolution services, the GPC Series prompted a much-needed global conversation about how conflict can and should be managed in the 21st Century.

The present report is a 'deep dive' into the qualitative data generated at GPC events in Austin, Baltimore, Los Angeles, Miami, New York, San Francisco, and Toronto. It highlights trends and differences between these locations, while allowing for actionable local and regional recommendations. This is particularly relevant in the era of the Singapore Convention and increased demand for the professionalization of mediation practice. It will facilitate improved conversations between users and dispute resolution professionals about the evolution of dispute management and resolution practice. Readers can compare and contrast the conclusions here with the practices in other regions by studying the results of polling from GPC events.

We invite you to learn more about the Global Pound Conference and join the ongoing conversation at [www.imimediation.org](http://www.imimediation.org).



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## MESSAGE FROM THE AAA-ICDR FOUNDATION

The AAA-ICDR Foundation has been honored to support the work of the GPC Series 2016–17 and the International Mediation Institute.

The following report and the conversation generated by the GPC Series will continue to inspire thought leadership in the field of alternative dispute resolution (ADR). The GPC Series exhorts us all to look for opportunities where access to ADR and innovation in ADR methodologies can lead to significantly improved outcomes. In prior years the GPC Series provided rich context to discussions in our field by polling thousands of stakeholders in jurisdictions around the world engaged in dispute resolution using standardized questions. The result was the start of a global conversation about how management of conflict can be improved to offer greater user satisfaction. The following report, with its focus on responses generated in North America, will continue to facilitate this essential discussion among users of litigation, arbitration, conciliation, and mediation.



**Edna Sussman, Esq.,**  
Chair of the AAA-ICDR Foundation

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## EXECUTIVE SUMMARY

The GPC Series 2016–17 was the largest undertaking of its kind in the history of commercial dispute resolution (DR).

This report offers a comparative analysis of GPC events across North America. In doing so, it provides the commercial DR community with a framework for understanding the players and processes, identifying trouble spots and optimal states, and monitoring progress over time.

Importantly, this report highlights the unique features of each city, bringing to the surface the similarities and differences between jurisdictions. These findings have generated an unambiguous set of priorities for the North American dispute resolution (DR) community. The call to action is as follows:



### Top priorities

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1. Include ADR as a mandatory part of law school curricula and continuing legal education (CLE) for lawyers and judges and investigate options for inclusion of ADR in business schools.
2. Increase diversity of ADR providers.
3. Develop principles for proportionate discovery.
4. Conduct a systematic review of arbitration in the US, with specific reference to complexity, timeliness, cost and access to justice.
5. Develop a strategic plan to manage the growing influence of mediation in commercial DR.
6. Change the nomenclature from alternative/appropriate dispute resolution (ADR) to dispute resolution (DR) with a view to embedding a party-centric approach to dispute resolution.

## ABOUT THE GPC SERIES 2016–17

Initiated by the International Mediation Institute (IMI), the Global Pound Conference (GPC) Series 2016–17 was a collection of 28 conferences held in 22 countries across the globe. The GPC generated considerable data using methods not previously considered, in ways not previously possible, and at an unprecedented scale across the globe.

The GPC took its name from the 1976 Pound Conference in St Paul, Minnesota, USA. It was named in honor of Roscoe Pound, the Dean of Harvard Law School in the 1920s and 30s and thought leader of his time. The 1976 conference, and especially a presentation by Professor Frank E. A. Sander, prompted many changes in the US justice system. This included the rise of the idea of ‘fitting the forum to the fuss’, commonly referred to as the ‘multi-door courthouse’ and the popularity of processes such as mediation and arbitration. His closing remarks heralded the need for better data on the processes and players within the justice system so that trouble spots and optimal states could be identified, and progress monitored.

Drawing on this legacy, the main purpose of the GPC was to generate conversation and collect actionable data that could be used to shape the future of commercial dispute resolution (DR) and access to justice. The data were designed to be captured live at each conference using software developed specifically for the GPC Series. The delegates voted individually on 20 multiple choice questions (MCQs) and answered 13 open text questions (OTQs) in focus groups.

The entire DR industry was represented at the conferences, including lawyers, experts, chambers of commerce, academics, judges, arbitrators, mediators, conciliators, policy makers and government officials. Significantly, commercial parties who use DR processes were also represented. By including parties and seeking their input, the GPC Series 2016–17 heralded the shift toward an inclusive, party-centric approach to dispute resolution.

For further information about the GPC and its supporters, see the IMI website.

\* Levin, A. L., & Wheeler, R. R. (Eds.). (1979). *The Pound Conference: Perspectives on Justice in the Future: Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*. West Publishing Company.

## HOW TO USE THIS REPORT

A set of eight North American reports has been created as part of an IMI project funded by the AAA-ICDR Foundation. Together, these reports not only paint a picture of the commercial DR landscape but also provide a comprehensive baseline for commercial DR in North America. This can be used as a frame of reference for measurement over time. All the reports are available on the IMI website.

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The complete suite of reports includes:

- 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
- The GPC North America Report

Each city report presents an analysis of findings from the local GPC event and a series of actionable recommendations. The suite culminates in The GPC North America Report, which compares the similarities and differences in commercial DR across jurisdictions. All the reports contain an analysis of responses to questions posed to focus groups at each GPC event. The questions can be found in the GPC Questions section in this report. Collectively, the suite of North America reports draws on data generated from 301 focus groups.

The reports offer insight into four areas of interest in commercial DR in North America:

**Needs, wants and expectations:** Parties' needs, wants and expectations

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

**Obstacles and challenges:** The obstacles and challenges faced, and the scale of change required to overcome them

**Vision:** The vision in the short, medium and long term

To gain a deeper understanding of the origins of the findings and priorities outlined in this report, read in conjunction with local reports. For more information about the unique approach of the GPC Series 2016–17, see the *Methodology* section of this report.

# COMPARATIVE FINDINGS

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This section of the report outlines the regional trends and local differences in commercial DR across North America and recommends top priorities for the region. It highlights the overarching themes that have emerged across jurisdictions. Specifically, it compares the characteristics of parties of DR, identifies how the market responds to their needs, describes obstacles and challenges facing commercial DR and presents the vision for the future. For more information about recommendations and priorities for each jurisdiction, please refer to the corresponding local report.

# OVERARCHING THEMES FROM ACROSS THE NORTH AMERICA REGION

The following overarching themes emerged in response to the questions posed to focus groups at each GPC event:

- **Practitioners**

Across the North America region, there are many highly skilled practitioners who add significant value to the commercial DR landscape.

All jurisdictions agree that ADR needs to become a mandatory part of law school curricula and that there should be training available for lawyers, judges and in business schools.

**Recommendation**

Commence action to include ADR as a mandatory part of law school curricula and continuing legal education (CLE) for lawyers and judges and investigate options for inclusion of ADR in business schools.

- **Diversity**

Greater diversity of DR practitioners is required on a number of levels. Specifically, racial and gender diversity, increasing the number of providers with a non-legal background, and facilitating the generational shift toward a more collaborative and problem-solving DR culture. Strategies to increase diversity must extend to providers and advisors operating across mediation, arbitration and litigation.

**Recommendation**

Increase diversity of DR practitioners, specifically mediators, arbitrators and lawyers.

- **Mediation**

Mediation is becoming increasingly influential and valued by parties because it can accommodate commercially flexible outcomes, whether used alone or part of a combination of processes such as mediation and litigation or med-arb. Given the extent to which mediation now features in DR it has become mainstream.

**Recommendation**

Develop a strategic plan to manage the growing influence of mediation in commercial DR.

- **Discovery**

Discovery is routinely disproportionate to the stage of the dispute or type of DR process. This has the potential to prevent parties from achieving early resolution and/or de-escalating the dispute.

**Recommendation**

Develop principles for proportionate discovery. These principles would provide guidance on the need and extent of discovery based on the type of DR process selected and/or the stage of the dispute. The aim of these principles would be to ensure that parties do not incur unnecessary delays or expenses, particularly where there is potential for the dispute to be resolved in the early stages. This supports the possibility of timely and cost-effective practices.

- **Arbitration**

Respondents at all events in the United States—i.e. not including Canada—said that arbitration has become too expensive, complex and lengthy.

**Recommendation**

Conduct a systematic review of arbitration in the US including:

- the complexity
- the cost and timeliness
- the strengths and weaknesses of arbitration as an alternative to litigation
- the impact on access to justice; and
- drawing on successful models for arbitration found in other jurisdictions.  
For example, arbitration is perceived as working well in Canada

In addition, the following emerged incidentally from the responses provided by the focus groups.

The use of the term 'ADR' no longer serves us. Specifically:

- **Nomenclature**

*Alternative dispute resolution:*

The distinction between defining 'DR' as litigation and 'ADR' as alternatives to litigation is increasingly irrelevant because litigation is no longer the default. Mediation and arbitration are now so widely accepted and embedded that they stand independently alongside litigation as legitimate options for resolving disputes.

*Appropriate dispute resolution:*

Conversely, referring to ADR as 'appropriate' DR is problematic because it is understood to exclude litigation, a process which may be appropriate in some circumstances.

*Dispute resolution:*

Dispute resolution (DR) is an inclusive term that incorporates all DR process options and as such is used in this report unless specifically noted. Importantly, this shifts the focus away from specific DR processes and instead prioritizes matching and/or modifying processes to accommodate the goals of parties and the context of the dispute. It is both more inclusive and more focused on needs of the parties. By including parties in data collection, the GPC series took a vital first step in heralding this shift in the meaning of DR. Note that despite the increasing irrelevance of the distinction, ADR in this report refers to DR processes that are not litigation.

**Recommendation**

Change the nomenclature from alternative/appropriate dispute resolution (ADR) to dispute resolution (DR) to reflect the cultural shift occurring within commercial DR, and the need to place parties at the center of the process—i.e. a party-centric approach to DR. Draw on the suite of GPC North America reports to help facilitate this transition.

## NEEDS, WANTS AND EXPECTATIONS

This section offers a picture of the needs, wants and expectations of parties in North America based on their level of sophistication or experience in commercial DR.

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It is now apparent that parties' desires and behaviours are largely predictable and form a continuum that is consistent across jurisdictions. For example, less-experienced parties typically have unrealistic expectations and need guidance, whereas the most dispute-savvy users often want to work collaboratively and seek practitioners who are experts in the subject matter of the dispute.

### Regional Trends

Typical characteristics of inexperienced or unsophisticated parties:

- Parties are focused on winning and often have a winner-takes-all approach. They may be primarily focused on obtaining a monetary award in their favor or a punitive cost for their opponent. Often this is connected to seeking a sense of justice, vindication or validation for feeling wronged. Parties may equate 'fair' with 'winning'.
- Parties want to be heard, whether it is an opportunity to tell their story or vent their frustrations. For many, they simply want the result to be final and the issue to go away.
- Parties often hold unrealistic expectations about what commercial DR can achieve. For example, they expect a low-cost and quick outcome and/or they misunderstand the role of DR practitioners.
- Many parties need guidance from practitioners and may rely heavily on counsel. This can extend to wanting the provider or practitioner to make the decision for them.

Characteristics of the most dispute-savvy parties:

- Parties consider the broader commercial picture. They seek to mitigate risk, are willing to compromise and account for business relationships.
- Parties seek more control over the process. They may want to be active participants and often want a role in the design of the process and generating options for resolution. They seek neutrals and practitioners with subject matter expertise, and the experience and flexibility to provide guidance tailored to the parties' needs and the nuances of their dispute.
- Parties are more informed about the process. They have developed realistic expectations about the prospect of success and weigh up the strengths and weaknesses of their case. They may choose specific processes to meet certain goals. For example, they may choose mediation if they are seeking to preserve a business relationship or use a combined process such as med-arb to maximize efficiency.
- Parties may continue to seek to minimize costs and maximize the potential for a speedy resolution, but it is with a strategic view to increasing efficiency and use of resources.
- Parties are open to seeing innovative and creative ways to resolve their dispute.

Confidentiality, predictability and fairness are important to parties across the dispute-savvy spectrum.

### Local Differences

- The main difference among jurisdictions is where local parties tend to sit on the dispute-savvy continuum.
- Unlike other cities, New York and Toronto identified that even their least experienced parties saw the value in maintaining relationships.
- Austin and Baltimore noted that some parties see DR processes as an opportunity to meet emotional or psychological needs.
- San Francisco and New York said that although dispute-savvy parties are strategic and account for relationships and reputation, they may manipulate the system by withholding information or making strategic use of discovery as a delaying tactic. This highlights the tension between developing a more collaborative mindset and the realities of working within the existing adversarial system.
- Although parties in Los Angeles may be willing to compromise, they may also be aware of their alternatives to a negotiated agreement. This was the only city that explicitly identified that some parties may be willing to walk away from a negotiation or mediation where they know that the merit of their case is strong.
- New York was alone in citing that parties may recognize the benefit of engaging in coaching or other pre-session strategies and tend to look for opportunities to use their resources efficiently.
- Miami, San Francisco and Baltimore all identified a capacity to enforce outcomes as important to parties.

## THE MARKET

This section compares how the commercial DR market meets parties' expectations across North America. In some jurisdictions, practices identified as problematic include those that fail to assist parties in understanding or adequately preparing for the DR process. In contrast, expert lawyers and/or practitioners who have the flexibility to facilitate solutions that account for non-financial interests were identified as leading the field. \*

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### Regional Trends

- The extent to which current commercial DR processes meet parties' expectations is heavily dependent on the capacity of practitioners, including lawyers, to understand parties' goals and the context of the dispute. The greater their capacity to do this, the more likely it is that these practitioners can provide targeted advice about options for resolving the dispute, including the process or combination of processes most likely to de-escalate the dispute and/or enable outcomes consistent with parties' goals. These practitioners are shifting toward a party-centric approach to DR.
- Practitioners within the commercial DR market who provide scope for collaboration and creative problem-solving tend to exceed parties' expectations. In taking a flexible approach, these practitioners have the capacity to remain responsive to parties' non-financial/non-legal interests where they arise and provide opportunities for parties to maintain relationships where desired.
- Mediation has become mainstream within the commercial DR landscape. Mediation, as a stand-alone process, is gaining increasing legitimacy. Further, parties who elect to pursue litigation or arbitration often expect to attempt mediation at some point in the process. As a result, mediation is becoming the most ubiquitous DR process.
- Commercial arbitration in the US has become too complex and routinely fails to meet parties' expectations in delivering a timely and cost-effective alternative to litigation.
- Within commercial DR in the US, the use of discovery in mediation and arbitration has become disproportionate and is undermining the potential for mediation and arbitration to meet parties' expectations in providing efficient, timely and cost-effective options for resolving disputes.

Please note, no data were supplied for New York or San Francisco for this section.

### Local Differences

- Each jurisdiction has developed unique practices that give that area a specific flavor. There is scope for jurisdictions to learn from each other to ensure they meet parties' expectations.
- Toronto stands alone in its overarching satisfaction with commercial arbitration. It also highlighted growth in the use of med-arb, which has resulted in arbitration becoming increasingly perceived as the routine 'best alternative to a negotiated agreement' (BATNA). Miami highlighted that arbitrators who work collaboratively with parties were seen as standout.
- Miami noted some challenges faced by parties when making use of hybrid processes in the current commercial market. It drew on the example of judge-led mediation which requires the DR provider to 'switch hats'. There is a negative impact on parties where a judge unexpectedly switches back into judge mode during a mediation.
- Austin identified several unique practices within the current market that meet or exceed parties' expectations. Specifically, Guided Choice typically surpasses expectations, as does the provision of lunch. Evaluative mediation, options for online dispute resolution (ODR) and structured case management were all identified as current practices that typically meet parties' expectations.
- Unlike other cities, Los Angeles cited achieving a sense of vindication through obtaining an enforceable outcome as a practice that typically exceeds parties' expectations. It also identified access to third party funding as a practice that often went beyond expectations.
- Baltimore specifically cited lawyers skilled at advocacy within mediation as typically exceeding parties' expectations.
- Baltimore and Los Angeles were unique in noting that parties' expectations of commercial DR were often exceeded where the process resulted in their gaining a deeper understanding of the dispute from both their own and the other party's perspectives.

## OBSTACLES AND CHALLENGES

This section compares the obstacles and challenges present in commercial DR across the North America region. While each jurisdiction faced unique challenges, they were unanimous in identifying negative aspects of human nature and an entrenched adversarial culture as major challenges facing commercial DR across the North America region.

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### Regional Trends

- Conflict can bring out the worst in people and this is an inevitable part of human nature. Irrational behaviors, thirst for control, fear, lack of trust, greed and stupidity were noted as common and reflect the complexity of emotions that can arise when people are in dispute.
- While a range of DR options is available, parties are often not aware of what these processes are and the extent to which they can be adapted to the needs of their dispute. Los Angeles, New York, San Francisco and Toronto suggested that this lack of awareness extended to many legal practitioners and that can exacerbate parties' ability to access the most appropriate DR process or combination of processes to resolve their dispute.
- All cities within the United States again identified an overemphasis or disproportionate focus on discovery in mediation and/or arbitration. It was argued that discovery must be limited or staged in some way so as to prevent parties from using it to create unnecessary delay and/or exploit financial limitations of opposing parties.
- One of the biggest challenges identified was the entrenched adversarial culture in commercial DR and the litigious mindset of many seasoned lawyers. Despite an increasing shift toward a more collaborative and problem-solving approach, the 'old boys' network' is still perceived as dominating the commercial DR landscape, which continues to incentivize an adversarial culture. This mindset is sometimes shared by parties and can be perpetuated by public perceptions of litigation. Baltimore, New York and San Francisco highlighted the importance of increasing diversity as a mechanism to reduce the prevalence of 'Rambo' lawyers and increase trust in ADR process.
- Confidentiality and self-determination were typically cited together as important features of the current commercial DR landscape. Miami and Baltimore were the only exceptions to this pattern, with Miami specifying confidentiality only.

### Local Differences

- Toronto, New York and Los Angeles identified the lack of mandatory ADR instruction in law schools as a current challenge facing commercial DR. However, the scope of change required to achieve this varied, with Toronto and New York identifying it as major change, whereas Los Angeles suggested it would require only minor change.
- Arbitration was identified as a major challenge by Baltimore, Los Angeles, New York and San Francisco. Common among jurisdictions is the idea that arbitration is drifting toward litigation and is becoming increasingly complex, lengthy and expensive. This was perceived as particularly problematic in Baltimore, New York and San Francisco, where pre-dispute arbitration clauses and/or mandatory arbitration for consumers impacts parties' access to justice—specifically, where they are required to navigate highly complex processes, are locked out of class actions and have no right of appeal. In contrast, Toronto identified institutionalized arbitration and arbitration clauses as features of their commercial DR landscape that should not change.
- While training and accreditation was a theme that emerged across Baltimore, New York, San Francisco and Toronto, there was mixed opinion about the role of mediator accreditation. Baltimore and San Francisco were clear that free-market mechanisms were the best way to ensure flexibility and high standards of practice, whereas New York and Toronto suggested that accreditation was important and that further work on developing high quality training and clear standards should continue, especially where it might build trust in ADR.
- Baltimore identified two major challenges with mediation—the lack of enforceability of mediated/negotiated agreements and the inherent lack of transparency with confidential processes. In San Francisco, the seal of confidentiality was highlighted as problematic to the extent it prevents examination of mediator and lawyer behaviors.

## VISION

This section compares the vision for the future of commercial DR identified at North America GPC events across the North America region. While there are differences in the pace and scope of the vision across jurisdictions, common themes include embedding ADR into law school curricula and the need for government to support ADR initiatives to ensure quality.

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### Regional Trends

- Education in ADR across law and business schools and for existing legal professionals, including the judiciary, will be an important part of the landscape. This includes education for the broader community, including business (in particular, business leaders), parties and schools. It was suggested that it become mandatory in law schools.
- There is a shift toward more collaborative and problem-solving approaches to commercial DR, whether it is in the use of collaborative processes or the way that parties work together within DR processes.
- A more holistic approach to DR continues to evolve. The vision for the future sees practitioners working together to facilitate efficient, transparent and accessible DR. This will include a systematic review of current structures and processes to ensure they allow for a more integrated approach. Technology will play an increasingly important role.
- There is a call for an increase in the diversity and quality of ADR providers across North America.
- Government support and resourcing will facilitate the adoption of ADR within the justice system. This will include the introduction of policies, regulation and/or legislative protocols that ensure high quality DR.

### **Local Differences**

- The main thematic difference among jurisdictions is the pace and scope of the vision for the future.
- San Francisco, Toronto, Austin and New York place a high priority on ongoing research into DR, particularly the establishment of a strong evidence base to guide understanding of best practice.
- New York, Toronto and Baltimore lead the way in terms of innovation. They share a party-centric vision for the future of DR. This is very much in keeping with Frank E. A. Sander's vision of 'fitting the forum to the fuss'. These cities recognized that this requires innovation in triage mechanisms that can match the needs of parties and their dispute to the most appropriate process or combination of processes.
- Baltimore, Los Angeles and New York share their vision for the increased status of ADR providers. They saw the potential for them to be viewed as highly skilled professionals and even be held in equal standing to legal professionals.

# LOCAL SNAPSHOTS

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The following section provides the Executive Summaries from the seven local North American GPC reports. For a more complete picture of individual jurisdictions, refer to the corresponding city report available on the IMI website.

## The popularity of mediation is having a significant impact on commercial DR in Austin.

There is a growing number of qualified and proficient practitioners available and parties are turning to them to facilitate processes where they can feel heard and identify non-legal perspectives on their dispute. Despite the availability of innovative and flexible approaches, detailed knowledge about the full range of DR options is not widespread. Education and collaboration both within and across legal and business communities are key to consolidating any shift away from traditional adversarial processes.



### Strengths

- Trust in mediation
- Experienced, optimistic and persistent mediators
- Commitment to confidentiality in mediation and arbitration
- Focus on creative problem-solving
- Openness to innovation e.g. ODR, Collaborative Civil Law, Guided Choice, mediator as process master
- Value placed on pre-dispute processes and party self-determination
- Practitioners who provide scope for relationships to be salvaged



### Limitations

- Adversarial and positional approach entrenched within legal and corporate sectors
- Arbitration failing to provide a timely, efficient and cost-effective alternative to litigation
- Low quality or passive arbitrators
- Discovery that is disproportionate or used as a delaying tactic
- Lawyers who don't enable parties to prepare adequately for their given process
- Mediators who are unprepared, uncommunicative or add little value
- Lack of opportunity to promote early resolution/collaborative processes



### Priorities for Austin

- Creating DR awareness campaigns with a focus on party self-determination
- Promoting skill development in dispute prevention and resolution across the legal, business and wider communities
- Educating attorneys about early intervention and assisting parties to engage in ADR through CLE and State Bar Associations
- Increasing the number and profile of skilled ADR professionals
- Developing rigorous and transparent ADR standards
- Creating mentoring schemes and hands-on experiences in ADR
- Identifying opportunities for early intervention and collaborative approaches

## BALTIMORE SNAPSHOT

Commercial DR in Baltimore is characterized by a generational shift toward the use of ADR supported by a strong contingent of practitioners with specific subject matter expertise.

Successful outcomes are associated with creative approaches employed by mediators, who work actively with parties to clarify goals and minimize time and costs. However, while there is a growing focus on relationship management and problem-solving, ongoing inflexibility and 'one size fits all' processes frustrate those looking for more sophisticated approaches to resolving their disputes.



### Strengths

Fair and transparent practices allow parties to be well-informed and to feel heard

The generational shift toward ADR is welcomed

The range of flexible DR options available

Lawyers who account for parties' psychological needs

Skilled mediators with subject matter expertise

Mediators who employ goal-appropriate mediation models

Highly prepared practitioners who are tenacious in assisting parties to work through impasses

Judicial willingness to enforce arbitral awards

Lawyers who are skilled at advocacy within a mediation context



### Limitations

Lack of knowledge around DR alternatives leads to unrealistic expectations

Perceived mediator bias or failure to add value to process

Complex and institutionalized arbitral processes with limited transparency or avenues for appeal

Passive providers who are unable to contain parties or prevent them from causing unnecessary delay

Lawyers and providers who focus on the 'bottom line'

Limited focus on the role of self-determination

Failure to manage hybrid processes that require providers to 'switch hats'

Rambo lawyers



### Priorities for Baltimore

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- Developing strategies to raise awareness of ADR, with a focus on promoting its accessibility
- Developing mechanisms for matching parties and their disputes with the most appropriate DR forum, e.g. DR Hubs
- Improving the quality and diversity of mediators, including specialist training for providers that offer hybrid processes
- Encouraging the use of dispute clauses in commercial contracts to promote negotiation, compromise and the use of ADR options
- Reviewing arbitration to reduce complexity and minimize unnecessary delays
- Developing strategies to remove financial, linguistic and cultural barriers to DR
- Advocating for the mandatory inclusion of ADR as part of the litigation process
- Encouraging collaboration between lawyers, parties and DR practitioners to create flexible processes matched to the needs of parties and their dispute
- Advocating for the inclusion of ADR as part of the mandatory curriculum in law schools

## LOS ANGELES SNAPSHOT

Parties who play an active role in resolving disputes are a feature of commercial DR in Los Angeles. Lawyers as advisors are highly valued, as are providers who can think outside the box.

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Early intervention strategies, such as conflict coaching and early case assessment, are becoming increasingly popular due to their capacity to facilitate timely and cost-effective solutions. Despite the growing appetite for ADR, an adversarial mindset remains entrenched and there is a sense in some quarters that ADR is not a serious option. Effective communication about the full range of DR processes available to parties is seen as key to realizing Los Angeles' desire to embed ADR within the commercial landscape. Continuing education for the legal sector, business sector, and the wider community is a major priority for those promoting the uptake of ADR practices.

## LOS ANGELES SNAPSHOT CONT'D



### Strengths

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- Skilled, proactive practitioners with subject expertise
- Adaptable and flexible processes, including non-adversarial options
- Awareness of the benefits of early assessment
- Focus on importance of non-financial interests and relationship-building
- Parties who feel empowered and involved
- Confidentiality, impartiality and fairness as priorities
- A culture of creative problem-solving
- Availability of third-party funding
- No regulation or accreditation required for providers
- Lawyers and providers who can bridge wide gaps in parties' understanding



### Limitations

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- Expense and complexity of arbitration
- Discovery dragging out time and expense
- Misuse of mediation as means of discovery
- Lack of lawyer knowledge about DR
- Lawyer self-interest manifesting as a tendency toward litigious approaches
- Dominance of 'old boys' network
- Parties not informed about the range of DR processes available to them
- Unprepared, overcommitted or biased providers
- Providers who are unable to effectively 'switch hats'
- Mediation not taken seriously as a DR process in its own right



### Priorities for Los Angeles

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- Building DR knowledge and skills for the legal profession and the general community through awareness campaigns, educational programs, volunteer-led community mediation and advertising for DR services
- Building stronger links between ADR practitioners and lawyers through State Bar Associations and professional development events
- Embedding ADR into law school curricula and continuing legal education programs
- Enabling ADR providers to develop specialized areas of practice
- Encouraging the standardization of DR clauses to promote ADR in the first instance
- Developing incentives for lawyers to take non-litigious approaches where possible
- Examining barriers to justice such as the expense and complexity of arbitration and the misuse of mediation
- Strengthening the quality and diversity of mediators, including specialist training for providers engaged in hybrid processes
- Investigating scope to increase small claims thresholds and provide additional resourcing linked to pre-discovery, ADR resources and early access to ADR practitioners
- Continuing the use of arbitral panels composed of three members to mitigate effect of outlier members

## MIAMI SNAPSHOT

Commercial 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 resolution through early stage interventions
- Realistic cost expectations through transparent billing
- 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 Miami

- Educating and promoting 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

ADR has a strong presence in New York’s commercial DR landscape, with many corporations employing such processes to avoid litigation.

The negative perception of ADR is shifting, with legal and business sectors discovering its value to their bottom line. Consequently, self-determination and problem-solving are starting to become an important part of New York’s commercial DR culture. The continued resistance to concepts such as mandatory mediation and the inclusion of DR clauses in contracts reflects the ongoing uncertainty about provider quality, concern over the lack of provider diversity and the embedded adversarial nature of traditional approaches. The call to establish evidence-based models of best practice has the potential to inform the push for improved mediation training and mediator accreditation. It may also add value to both new and existing ADR education programs for lawyers, members of the judiciary, business professionals and parties.



### Strengths

- ADR considered a legitimate alternative
- DR mechanisms regularly incorporated into commercial contracts
- Access to a range of high-quality, specialist practitioners
- Commercial disputes routinely resolved using non-adjudicative processes
- Increased focus on problem-solving
- Practitioners that emphasize the role of confidentiality and self-determination
- Informed parties who are able to drive the process and select their preferred arbitrator and/or mediator
- Openness to non-binary outcomes and lawyers who can think outside the box
- Corporations embedding ADR as specialist area within their organizational structure



### Limitations

- Highly complex, time-consuming and expensive adversarial processes
- Reluctance by legal sector to prioritize non-adversarial options
- Inadequate details on available DR processes, e.g. knowledge about the defining features of each option
- Disproportionate role of discovery in DR process
- Lack of mandatory training and accreditation for providers
- Lack of diversity of practitioners
- Inflexibility of processes, e.g. little scope for arbitrators to promote settlement
- Lack of hard data on what works
- Increased incidence of cost shifting



### Priorities for New York

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Advancing ADR training and education for lawyers, members of the judiciary, business professionals and parties, and specifically promoting it as a component in law school curricula and bar exams

Exploring ways to incentivize early resolution

Redefining the 'zealous lawyer' to include a greater emphasis on problem-solving and insight into the circumstances where non-adversarial options may prove valuable to clients

Implementing mediation training and accreditation, including a focus on promoting diversity

Developing principles for proportionate discovery, e.g. staged discovery processes

Identifying 'best practice' and sharing evidence-based case studies

Increasing use of technology such as online dispute resolution (ODR) and dispute resolution platforms that can assist parties and lawyers to identify the best DR process for a dispute

Investigating options to reduce the complexity, cost and time of adversarial processes, particularly arbitration

Investigating options for enforceability of international mediation agreements

## SAN FRANCISCO SNAPSHOT

San Francisco's commercial DR landscape is characterized by high-quality mediators providing fair and flexible options.

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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 ADR processes.

# SAN FRANCISCO SNAPSHOT CONT'D



## 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



## Priorities for San Francisco

- 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 toward the shared vision for commercial DR in San Francisco

In Toronto, commercial DR has a strong focus on striking the balance between providing predictable and transparent DR structures and providing enough flexibility to adapt to the needs of a dispute.

Defining features of this landscape are the institutionalization of arbitration, the introduction of mandatory mediation, and expert practitioners who work hard to ensure parties are well-informed and have realistic expectations. While hybrid approaches are proving to be both popular and successful, calls for greater communication, collaboration and diversity are perceived as fundamental drivers toward increased understanding of DR processes and improved party satisfaction.



## Strengths

- Flexible and adaptable processes including the use of hybrid models
- Consideration of both legal and non-legal interests, including the importance of relationships in business
- Parties' openness to mediation forming part of their DR processes
- Access to third-party neutrals who are both independent and experts in their field
- Institutionalization of arbitration and the use of mandatory mediation
- A focus on confidentiality and party self-determination
- An emerging focus on capacity building through conflict coaching and guidance on negotiation strategies
- High-quality training available to alternative dispute resolution ADR providers



## Limitations

- Existing adversarial, zero-sum mind-sets in legal sector contributing to the lack of confidence in ADR
- Lawyers' and parties' lack of knowledge about the range of DR processes available and the ways that they can be adapted to meet parties' needs
- Difficulty finding the most suitable DR professional for a dispute
- Lack of diversity and inconsistent quality of providers
- Hybrid providers who are not explicit when switching hats
- Lack of clear standards and accreditation for ADR providers
- Lack of trust between parties preventing early exchange of documents and therefore early resolution
- Business models that incentivize adversarialism

## TORONTO SNAPSHOT CONT'D



### Priorities for Toronto

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Developing social media marketing campaigns and educational programs on DR for schools, community, universities, business and ongoing professional development

Investigating the practicalities of making ADR a mandatory component of the curriculum in law schools

Promoting opportunities for early resolution and building parties' capacity to resolve disputes independently

Increasing the use of well drafted and staged DR clauses in commercial contracts

Shifting legal focus to the needs of parties and a more long-term, holistic approach to resolution

Reducing costs of and increasing access to DR services through the use of online platforms

Enlisting government and political support for ongoing research into DR and the development of evidence-based best practice guidance materials

Establishing hubs where disputes can be triaged to find the most suitable DR process and/or practitioner

Increasing diversity among providers

Investigating options for business models that incentivize non-adversarialism and/or de-incentivize adversarialism

## METHODOLOGY

The GPC Series 2016–17 was the largest international research project in the history of commercial DR. It was primarily conceived of as an opportunity for members of the commercial community to come together and engage in dialogue about shaping the future of commercial DR across the globe. What sets the GPC methodology apart from previous DR initiatives was its attempt to capture the collective wisdom emerging from these conversations as they were taking place.

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The GPC was designed to work within a standard conference format, while allowing scope for each event to take on its own local flavor. It is essential to emphasize that the GPC was not designed as a solely academic research endeavor. The methodology used did not attempt to replicate the conditions typically seen within a controlled data collection environment, nor meet the thresholds for saturation. Even so, the data collection and analysis draw heavily on well-established research principles commonly applied within the field of psychometrics and the development of professional standards. It is the first time this particular cross-disciplinary approach has been attempted in DR, and it has the potential to revolutionize our understanding of commercial DR through its creation of reliable measures that can be used to assess the current state of DR and monitor its progress over time.

\* Psychometrics is a field of study concerned with the theory of psychological measurement. The field is concerned with the objective measurement of skills and knowledge, abilities, attitudes, personality traits and educational achievement. It makes sense to apply the field to this research to establish a reliable and valid baseline that can be used to provide an objective measure of progress and change for the future of commercial DR.

## 1. Data Collection

### 1.1. Questions

A standardized set of 20 multiple choice questions (MCQs) and 13 open-ended text questions (OTQs) was asked at each event. The questions were designed to stimulate and focus discussion on four themes considered over four sessions during the conference:

**Session 1—Needs, wants and expectations:** Parties' needs, wants and expectations in commercial DR

**Session 2—The market:** The current market and the extent to which it is addressing parties' needs, wants and expectations

**Session 3—Obstacles and challenges:** The obstacles and challenges faced in commercial DR and the scale of change required to overcome them

**Session 4—Vision:** The vision for commercial DR in the short, medium and long term

Delegates voted individually on the 20 MCQ and answered the 13 OTQ in focus groups. The analysis in the suite of eight North American GPC reports provides findings and recommendations emerging from the 13 OTQs. Unlike the results from the MCQs that were provided in real-time at each event and subsequently analyzed in The Global Trends Report and other publications, these findings in the North American GPC reports are the product of the written responses of delegates during focus group discussions. This is the first time there has been an analysis of these responses for North America. No MCQs have been analyzed in these reports. See 'GPC Questions' section in this report for a copy of the OTQs.

### 1.2. Participants

Participants at each GPC event were self-selecting. The event was open to anyone interested in attending and there was no limit imposed on the number of participants. Participants were required to register and pay to attend. Registration fees were comparable with those for similar conferences. As a high priority was placed on gathering the views of parties, some local organizing committees (LOCs) actively recruited parties and may have offered to waive their registration fees. Otherwise, each event was promoted in a similar manner to comparable events.

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

**Parties:** end-users of dispute resolution, generally in-house counsel and executives—also referred to as 'users' in this report

**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 and policymakers

### 1.3. Focus groups

Participants were invited to participate in focus groups conducted across the four sessions. The total number of focus groups held is unknown, as data from Session 2 (The market) in San Francisco and New York were not provided for analysis. However, it is possible to say that at least 301 focus groups were held across the eight events. The break down for each event is as follows:

<b>Event</b>	<b>Number of focus groups for which data were provided for analysis</b>	<b>Sessions for which data were provided for analysis</b>
<b>Austin</b>	53	All 4 sessions
<b>Baltimore</b>	60	All 4 sessions
<b>Los Angeles</b>	31	All 4 sessions
<b>Miami</b>	20	All 4 sessions
<b>New York</b>	65	Sessions 1, 3 and 4
<b>San Francisco</b>	30	Sessions 1, 3 and 4
<b>Toronto</b>	42	Sessions 1, 2, 3. One question missing in Session 4
<b>Total</b>	<b>301</b>	

#### 1.3.1. Composition of focus groups

Participants were invited to self-select into focus groups of approximately four to six people. Typically, groups formed based on proximity, i.e. they joined with those who were sitting at the same table or, if the event was held in a lecture theatre, in the seats within their immediate vicinity. No attempt was made to dictate the composition of the focus groups. As such, groups were likely to have been both heterogenous and homogenous. The defining feature of the groups was participants' shared experience and interest in commercial DR.

### 1.3.2. Focus group process

At each event, focus groups typically occurred toward the middle of each session and following participants' completion of the corresponding set of MCQs and before a panel discussion on the results of the MCQs. One limitation of this placement was that some participants may have perceived the focus groups as a time-filler rather than an important data collection process in its own right.

The time provided for group discussion was highly variable and dependent on the structure of each local event and whether the event was keeping to schedule.

Focus groups were facilitated en masse, usually by the emcee of each local event. Once focus groups had discussed questions, each group was asked to nominate one member of the group to enter their collective response into the corresponding text box located in the online platform. Delegates were also free to enter individual responses.

Following the successful trial of this process at the inaugural GPC Singapore event, instructional material on how to replicate the process was provided to each LOC and emcee. This material included information on the electronic data collection platform, the importance of encouraging groups to discuss each question actively before entering a group text response, strategies for groups to record divergent views, and the importance of groups avoiding comparative terms (e.g. good example, better example and best example) as the only means of distinguishing responses within a session.

This use of open-ended questions and a 'loose' (Kamberelis & Dimitriadis, 2013) process was designed to maximize participants' sense of control and encourage group-based responses informed by the interactions and conversations of participants. This allowed for the data collection process to sit comfortably alongside the non-research aims of the GPC Series.

## 2. Data Analysis

### 2.1. Phases of comparative legal analysis

There are three phases in comparative legal analysis. The first phase is the descriptive phase. It provides a description of the norms and concepts of the area in question. The local GPC reports form the descriptive phase of the comparative analysis of the North American events. The second phase is the identification phase. This phase identifies the similarities and differences of the norms and concepts that are the subject of the comparison. The GPC North America Report constitutes the identification phase of the comparative analysis of the North American events and identifies similarities and differences across jurisdictions. The third phase is the explanatory phase under which accounts for the divergences and resemblances (Kamba, 1974).

#### 2.1.1. The seven local GPC North American reports

The local GPC reports form the descriptive phase of a comparative analysis of the North American events.

The qualitative responses from the focus groups held at each local event were examined to identify themes, patterns, ideas and topics emerging out of each jurisdiction. These concepts were synthesized into a series of four hypothetical constructs describing each jurisdiction's collective understanding of the four session themes.

1. Needs, wants and expectations
2. The market
3. Obstacles and challenges
4. Vision

The hypothetical constructs or profiles make use of the words and phrases provided by the focus groups within each jurisdiction.

Given the one-off nature of the GPC events, it was not possible to create empirically derived constructs (Hutchinson et al, 2014). However, the four locally generated hypothetical constructs from each event provide a strong foundation for understanding parties and their experience of the current market, informing research, enhancing knowledge, stimulating innovation and monitoring progress across North America.

The 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 profiles and recommendations, are provided in each local GPC Report.

### 2.1.2. The GPC North America Report

The 26 profiles generated from the seven local GPC events were hand-coded to identify similarities and differences across jurisdictions. The themes and priorities provided in the GPC North America Report represent data which achieved theoretical saturation across the local reports. A series of priority actions was 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.

### 2.1.3. Future research

The final explanatory phase of comparative analysis was beyond the scope of the GPC Series and as such is outside the scope of the GPC North America Report. It is recommended that the North American DR community consider building on the findings within these reports to complete the final phase of comparative legal analysis. An example of this research might include explaining the causes for similarities and differences between jurisdictions.

## Conclusion

The suite of North American GPC Reports offers a contribution to shaping the future of commercial DR across the North American region. Through this innovative, cross-disciplinary methodology, it provides the North American commercial DR community with a valid and reliable framework for understanding the players and processes, identifying trouble spots and optimal states and monitoring progress over time.

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## 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 analysis of the GPC Singapore focus group data has contributed to a number of groundbreaking initiatives in Australia, including: MyDRHub, a virtual DR 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>.

## The open text questions (OTQs) posed to delegates in focus groups at every GPC Series 2016–17 event

### **Session 1: Access to justice & dispute resolution (DR) systems: what do parties want, need and expect?**

Discussion 1.6: Party needs and expectations in commercial DR

Party needs and expectations in commercial DR

Please use this session to discuss with your neighbours the ways in which parties' wants, needs and expectations change as they become more familiar with DR processes. Based on these discussions please write at least one (1) point in each box below:

1. Describe what inexperienced parties typically want or expect from commercial DR.
2. Describe what parties typically want or expect when they become more experienced with commercial DR.
3. Describe what highly experienced/ sophisticated parties typically want or expect from commercial DR.

### **Session 2: How is the market currently addressing parties' wants, needs and expectations?**

Discussion 2.6: Party expectations and current practice in commercial DR

Please use this session to discuss with your neighbours the relationship between parties' expectations and current practices. Based on these discussions please write at least one (1) point in each box below:

1. Describe the current commercial DR practices that fall below party expectations.
  2. Describe the current commercial DR practices that meet party expectations.
  3. Describe the current commercial DR practices that exceed party expectations.
- Word Cloud: What words would you use to describe what can be done to exceed parties' expectations in commercial DR?

### **Session 3: How can dispute resolution be improved? (overcoming obstacles and challenges)**

Discussion 3.6: Obstacles and challenges in commercial DR

Please use this session to discuss with your neighbours the types of obstacles or challenges faced in commercial disputes and the extent of change required to address them. Based on these discussions please write at least one (1) point in each box below:

1. Describe the things that don't need to change in commercial DR.
2. Describe the obstacles and challenges in commercial DR that can be overcome easily or with minor changes.
3. Describe the obstacles and challenges in commercial DR that are difficult to change or would require major changes.
4. Describe the obstacles and challenges in commercial DR that appear impossible to change.

### **Session 4: Promoting better access to justice: what action items should be considered and by whom?**

Discussion 4.6: Promoting better access to justice in commercial DR: what action items should be considered and by whom?

Please use this session to discuss with your neighbours a vision for the future of DR, including innovations and reforms that you think are likely to promote and/or improve access to justice. Based on these discussions please write at least one (1) point in each box below:

1. Describe the short-term measures for achieving this vision for commercial DR (1–5 years)
2. Describe the medium-term measures for achieving this vision for commercial DR (6–10 years)
3. Describe the long-term measures for achieving this vision for commercial DR (>10 years)

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

