SHAPING THE FUTURE OF INTERNATIONAL DISPUTE RESOLUTION
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Use of iPads at delegate tables

Private (to moderators)

Public (direct to screen)
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
What category below best describes you? (Only one choice possible)

1. **USER**: User of IDR services (e.g., business person or in-house counsel) - 18%
2. **ADVISOR**: Advisor to users of IDR services (e.g., external lawyer or expert) - 28%
3. **PROVIDER**: Provider of IDR services (e.g., ADR Institution, ADR Neutrals) - 38%
4. **EDUCATOR**: e.g., Educator/trainer/academic - 8%
5. **OTHER**: e.g., judges, policy makers, legislators, regulators, etc. - 9%
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)?

1. Very Satisfied
2. Satisfied
3. Neither satisfied nor dissatisfied
4. Dissatisfied
5. Very Dissatisfied

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?

1. **Speed**: securing the earliest possible outcome
   - 6%
2. **Expense**: cost containment
   - 23%
3. **Certainty**: risk reduction and control of outcome
   - 32%
4. **Efficiency**: focusing on the key issues in the dispute
   - 17%
5. **Enforceability** of outcomes or awards
   - 5%
6. **Relationships**: preventing conflict escalation whenever possible
   - 14%
7. **Confidentiality**
   - 1%
8. **Other** (please indicate using your iPads)
   - 2%
**SHAPING THE FUTURE**

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

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**Key**
1. Speed: securing the earliest possible outcome  
2. Expense: cost containment  
3. Certainty: risk reduction and control of outcome  
4. Efficiency: focusing 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, Q2: Why is mediation used so seldom?

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

1. One of the parties is not familiar or experienced with mediation 50%
2. ADR organisations, courts/tribunals and/or arbitrators do not encourage its use enough 6%
3. It is difficult to find mutually acceptable, competent and suitable mediators 3%
4. External counsel do not propose mediation often enough 19%
5. Mediated settlement agreements are difficult to enforce 5%
6. Proposing mediation is perceived as a sign of weakness 11%
7. Other (please indicate using your iPads) 5%
### Session 1, Qu 2: Why is mediation used so seldom?

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

1. The approach of the external lawyers appointed
2. The approach of the neutrals appointed
3. The approach of the ADR institution or court appointed
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 (please indicate using your iPads)
### Session 1, Qu 3: Effective use of ADR

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**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
Mediation is generally best used:

1. As early as possible, pre-action if possible  
   [56%
2. As soon as initial pleadings have been filed by all parties  
   [10%
3. After completion of discovery or disclosure steps  
   [2%
4. Just before trial  
   [0%
5. When the issues are sufficiently developed, whenever that may be  
   [31%
6. Rarely, only in appropriate cases  
   [1%
7. Never  
   [0%
### Session 1, Qu 4: When should mediation be used?

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

1. Court jurisdiction only 20%
2. Arbitration only 20%
3. Expert Determination 2%
4. Mediation mandatory before court jurisdiction 22%
5. Mediation mandatory before arbitration 27%
6. Other (please indicate using your iPads) 9%
### Session 1, Qu 5: Typical IDR clauses

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**Key**
- 1. Court jurisdiction only
- 2. Arbitration only
- 3. Expert Determination
- 4. Mediation mandatory before court jurisdiction
- 5. Mediation mandatory before arbitration
- 6. Other
**What category below best describes you?**

(Only one choice possible)

1. **USER**: User of IDR services (e.g., business person or in-house counsel)
   - 17%

2. **ADVISOR**: Advisor to users of IDR services (e.g., external lawyer or expert)
   - 24%

3. **PROVIDER**: Provider of IDR services (e.g., ADR Institution, ADR Neutrals)
   - 42%

4. **EDUCATOR**: e.g., Educator/trainer/academic
   - 8%

5. **OTHER**: e.g., judges, policy makers, legislators, regulators, etc.
   - 10%
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
IDR institutions have been providing innovative solutions to respond proactively to users’ needs.

1. Agree 27%
2. Neutral 40%
3. Disagree 32%
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Session 2, Qu 1: IDR Service Providers & Innovation

**Key**
1. Agree
2. Neutral
3. Disagree

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<td>3. 62%</td>
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<td>27%</td>
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Arbitration institutions and tribunals should always explore in a first meeting what other forms of dispute resolution may be appropriate to resolve this case.

1. Agree 66%
2. Neutral 16%
3. Disagree 18%
Session 2, Qu 2: Exploratory 1st meetings on forms of IDR

**Key**
1. Agree
2. Neutral
3. Disagree
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.

1. Agree  45%
2. Neutral  18%
3. Disagree  37%
### Session 2, Qu 3: Mediation as an automatic “opt-out” option

#### Key
1. Agree
2. Neutral
3. Disagree

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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)?

1. Yes 50%
2. Neutral 20%
3. No 30%
Session 2, Qu 4: Cost sanctions

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<th>2. Neutral 7%</th>
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**Key**
1. Yes
2. Neutral
3. No
Mediators, conciliators and arbitrators should be certified and held accountable to transparent standards of conduct that are set and applied by professional IDR bodies.

1. Agree 62%
2. Neutral 14%
3. Disagree 24%
### Session 2, Qu 5: Certification & Codes for all IDR neutrals

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**Key**
1. Agree
2. Neutral
3. Disagree
ADR providers should always collect feedback on neutrals, and provide users with appropriate summaries based on this feedback.

1. Agree
2. Neutral
3. Disagree

67% 19% 15%
### Session 2, Qu 6: Access to user feedback on all IDR neutrals

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**Key**
1. Agree
2. Neutral
3. Disagree
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)

- Least Evaluative
  - Least Structured
  - Least Formal

- Most Evaluative
  - Most Structured
  - Most Formal

NEGOTIATION

MEDIATION
  (Subjective interests)

EARLY NEUTRAL APPRAISAL

CONCILIATION
  (Objective norms/positions)

EXPERT EVALUATION

ARBITRATION

LITIGATION

Consensual
  Parties in control
  Future-oriented

Adversarial
  Third party in control
  Past-oriented

Source: J. Kalowski, JOK Consulting
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Starting the process: Four different types of IDR

A. Facilitative
   Non-Evaluative
   Mediation

B. Directive
   Non-Evaluative
   Arbitration/Conciliation

C. Facilitative
   Evaluative
   Conciliation

D. Directive
   Evaluative

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.

Source: Based on L. Riskin “The New Old & New New Grids”
Case study: An IP Dispute

“clockwise” = ✓ v. “anti-clockwise” = ❌

INFRINGING:
The dancer turns CLOCKWISE

NOT-INFRINGING:
The dancer turns ANTI-CLOCKWISE

Plaintiff: IP owner

Defendant: EU Distributor

Source: N. Kayahara
In which quadrant would you want to start this IDR process?

1. Quadrant A (SW)  
   - Facilitative (process)  
   - Non-Evaluative (subject matter)  
   - 30%

2. Quadrant B (NW)  
   - Directive (process)  
   - Non-Evaluative (subject matter)  
   - 35%

3. Quadrant C (SE)  
   - Directive (process)  
   - Evaluative (subject matter)  
   - 15%

4. Quadrant D (NE)  
   - Directive (process)  
   - Evaluative (subject matter)  
   - 11%

5. Not sure  
   - 6%

6. Other (please indicate on iPad)  
   - 1%
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#### Session 3, Qu 1 SPINNING LADY Case: Where to start?

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#### Key
1. Quadrant A (SW) 2. Quadrant B (NW) 3. Quadrant C (SE) 4. Quadrant D (SW) 5. Not sure 6. Other
“Mediation”: 60 states divided by a common word?

**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.

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

---

[Shaping the Future of International Dispute Resolution Convention](#) | Oct. 29, 2014
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

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

Are 2 brains better than 1?

Source: J. Lack & B. Sambeth Glasner
SHAPING THE FUTURE

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?

1. Yes: A and C (South) 8%
2. Yes: B and D (North) 11%
3. Yes: A and B (West) 10%
4. Yes: C and D (East) 6%
5. Yes: A and D (SW-NE) 20%
6. Yes: B and C (NW-SE) 10%
7. Yes: but in the same quadrant 15%
8. No 20%
Session 3, Qu 2: “Co-mediation”?

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**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

Source: J. Lack
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
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?

1. Yes: if there is a written agreement providing for this in advance 27%
2. Yes: only if no caucuses have occurred 8%
3. Yes: only if information received in caucus is ignored 5%
4. Yes: only if all information provided in caucus is disclosed 1%
5. Yes: if either Party can “opt out” before the neutral acts as an arbitrator (e.g., sign a waiver) 26%
6. No, a mediator should never act as an arbitrator 33%
### 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

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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?

1. You can only settle cases when opposing parties meet physically (regardless of the value)  
   - 7%
2. I am not familiar with an effective ODR technology platform I could rely on  
   - 23%
3. My advisors are not sufficiently familiar with ODR or do not trust the technology  
   - 10%
4. IDR institutions do not promote ODR and do not provide a validated ODR technology platform  
   - 6%
5. The other party will not accept ODR  
   - 6%
6. I do not know any neutrals capable of handling an entire process using ODR  
   - 4%
7. Other (please use your iPads)  
   - 5%
8. I would definitely use ODR in this case, I cannot see any obstacles.  
   - 37%
SHAPING THE FUTURE

Session 3, Qu 4: Use of Online Dispute Resolution (“ODR”)

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**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.
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.

1. Agree 73%
2. Neutral/no opinion 13%
3. Disagree 14%

(* = using a recognised institution or certified mediator)
**Session 3, Qu 5: An UNCITRAL Convention on Settlements**

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<td>1. No 80%</td>
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<td>3. No 0%</td>
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**Key**
1. Yes
2. Neutral / No opinion
3. No
**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*
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.

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Session 4, Qu 1a: “Cooling Off” periods (Wolf von Kumberg)

**Key**
1. Yes
2. Neutral
3. No

**USER**
1. 67%
2. 17%
3. 17%

**ADVISOR**
1. 31%
2. 31%
3. 38%

**PROVIDER**
1. 61%
2. 25%
3. 14%

**EDUCATOR**
1. 86%
2. 14%
3. 0%

**OTHER**
1. 63%
2. 38%
3. 0%
There should be an investor-state dispute resolution clause in the Transatlantic Trade and Investment Partnership Treaty (TTIP), which provides for mediation.

1. Yes 76%
2. Neutral 14%
3. No 10%
### SHAPING THE FUTURE

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

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**Key**
1. Yes
2. Neutral
3. No
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.

1. Agree 60%
2. Neutral 23%
3. Disagree 17%
Session 4, Qu 2: Financial Services? (Hywel Jenkins)

Key
1. Agree
2. Neutral
3. Disagree
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.

1. Agree 72%
2. Neutral 11%
3. Disagree 17%
Session 4, Qu 3: Intellectual Property Disputes (Toe Su Aung)

Key
1. Agree
2. Neutral
3. Disagree
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)

1. Agree 84%
2. Neutral 9%
3. Disagree 6%
Key
1. Agree
2. Neutral
3. Disagree

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

1. Agree 57%
2. Neutral 18%
3. Disagree 25%
Session 4, Qu 5: State-funded mediation (A. Wareing)

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**Key**
1. Agree
2. Neutral
3. Disagree
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.

1. Agree 45%
2. Neutral 9%
3. Disagree 46%
### Session 4, Qu 6: Ex aequo et bono in IDR? (Dirk Reiner Martens)

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

1. Agree 72%
2. Neutral 14%
3. Disagree 15%
Session 5, Qu 1: An IDR platform to express user needs?

**Key**
1. Agree
2. Neutral
3. Disagree

**USER**
1. Agree: 73%
2. Neutral: 27%
3. Disagree: 0%

**ADVISOR**
1. Agree: 56%
2. Neutral: 31%
3. Disagree: 13%

**PROVIDER**
1. Agree: 65%
2. Neutral: 12%
3. Disagree: 23%

**EDUCATOR**
1. Agree: 75%
2. Neutral: 0%
3. Disagree: 25%

**OTHER**
1. Agree: 83%
2. Neutral: 0%
3. Disagree: 17%
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?

1. Yes 79%
2. Neutral 13%
3. No 9%
Session 5, Qu 2: A 2015 series of IDR Pound Conferences?

**Key**

1. Yes
2. Neutral
3. No
Mediators should be used in negotiations of international contracts even when there is no dispute.

1. Agree 51%
2. Neutral 18%
3. Disagree 31%
### Bonus Qu: Use of mediation in deal-making (no dispute)

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