

What Have We Learned From The Global Pound Conferences?

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In the forty years since new visions and challenges for the administration of American justice were offered at the 1976 Pound Conference, a Quiet Revolution has altered the landscape of public and private dispute resolution around the world. (See *Living the Dream of ADR*). Recently, a series of day-long meetings styled as the Global Pound Conferences, conducted in cities worldwide, offered diverse stakeholders an opportunity to register perspectives on the current state and future of commercial dispute resolution. Each gathering brought together in-house lawyers and clients, external lawyers and consultants, providers of dispute resolution services, educators, government servants and others in order to elicit perspectives and encourage dialogue on dispute resolution, public and private.

The prime artefacts of the "Global Pound" are recorded perceptions of 2,878 individuals polled during conferences at one of twenty-eight venues, or who responded to an online poll. These individuals were mainly dispute resolution professionals, outside counsel, consultants, educators and other individuals who derive a livelihood from the resolution of conflict. However, fifteen percent identified as "parties"—commercial users of dispute resolution services; in reality, they were primarily in-house counsel. Though business clients and corporate counsel are notoriously difficult to convene or poll, their perspectives as users and consumers of dispute resolution services are naturally of exceptional value.

In the interest of efficiency and simplicity, the organizers took some shortcuts in polling. Participants were lumped into five broad groupings, which meant that the responses of public judges were lumped together along with those of private arbitrators and representatives of provider organizations under the umbrella of "adjudicative providers." Those playing multiple roles, including dispute resolution professionals or institutions engaged in adjudicative as well as non-adjudicative activities, were required to self-identify by a single primary activity.

Some of the questions and answers were subject to multiple interpretations, or so broadly framed as to embrace a range of possible circumstances. Respondents were limited to ranking their top three choices among a range of answers, and to rank those choices in order of priority; it was not possible to accord equal rank to selected responses.

Despite these limitations, the Global Pound Conference poll leaves us with a number of general impressions about current dispute resolution practice, and raises several tantalizing prospects for future evolution. As you read the following summary, please be aware that in tabulating results for each question, respondents' top-ranked answers were accorded 3 points, their second-ranked answers were given 2 points, and third choices were given 1 point. The published data for each question lists answers in order of the total number of points they received. In addition, each answer received a "percentage ranking" based on the percent of the total possible points that a particular answer received.

1. Efficiency and cost-effectiveness are a primary concern in commercial dispute resolution, and will drive future policy-making.

According to Pound participants, efficiency—that is, the time and cost entailed in resolving a dispute outcome—was the most influential factor in choosing among dispute resolution processes (with a 61% ranking for the entire group, and 65% for "parties" (mainly in-house counsel). Financial or time constraints were the primary obstacle or challenge faced by parties in the resolution of disputes (with a 59% ranking). In addition, reduced costs and expenses (with a 50% ranking among all respondents and 49% for commercial parties) ranked first among the perceived achievements of mediation or conciliation.

Participants expected demand for increased efficiency of dispute resolution processes, including through technology, to have the most significant impact on future policy-making in commercial dispute resolution. This factor received a 64% ranking among all participants and 65% among parties. (However, reflecting an abiding tension among the priorities of commercial parties, 52% of those polled saw the demand for certainty and enforceability of outcomes as a key influencer in the future.)

2. Party control is a priority.

Next to reducing costs and expenses, permitting parties to retain control over the outcome was viewed as the important result of mediation and conciliation (as reflected in the votes of 46% of all participants, and 38% of business parties / in-house counsel). Control over process and outcome is a common theme of comments by corporate counsel.

3. Improved or restored relationships are often a goal.

Although the poll indicated that parties tend to come to dispute resolution wanting damages or or injunctive relief, a sizable minority (a 28% of all participants, and 33% of parties) indicated that parties may be looking to mend or end a relationship. Relational concerns were sometimes an important factor in selecting dispute resolution processes; thirty-nine percent of participants thought improved or restored relationships were among the most likely achievements of mediation or conciliation.

4. Advice from counsel, guidance from dispute resolution providers and educational programs are all potential sources of information on process choices.

Insufficient knowledge of available options for the resolution of commercial disputes is another primary obstacle or challenge for participants (with a 52% ranking among all those polled). Lawyers, external and in-house, were most often viewed as having responsibility to ensure parties understand process options and their potential consequences; external lawyers received a 59% ranking, in-house lawyers 55%. "Lawyer advice" was also a key factor in the selection of dispute resolution options, with a 58% ranking among all participants, and 46% among parties. More cynically, the group identified the impact on costs and fees lawyers can charge as among the top three influences on lawyer advice-giving (with a 40% ranking). The view that the primary role of lawyers was "working collaboratively with parties to navigate the process" predominated with a 60% ranking.

When asked what role parties involved in commercial disputes envisioned for providers of dispute resolution services, sixty-one percent of participants indicated that parties prefer to "seek guidance from the providers regarding optimal ways of resolving their dispute." The question lacks clarity, however, and the "guidance" referred to might refer to mediators' affirmative directions on dispute resolution options, a "fleshing out" of arbitration procedures facilitated by arbitrators, or even menus of procedural options on websites of institutional providers.

When asked which methods would be most effective in improving parties' understanding of their options for resolving commercial disputes, most participants (64%) pointed to educational programs in business or law schools or the broader business community.

5. Outcomes reflect an interplay between rule of law, consensus/party interests, and general concepts of fairness.

Participants indicated that the top three factors determining the outcome of a commercial dispute were consensus (based on the parties' subjective interests) (63% ranking), findings of fact and legal or other norms (58% ranking), and general principles of fairness (49% ranking). These diverse determinants arguably reflect, or explain the common resort to, approaches in which parties move back and forth between adjudication and negotiation during the course of resolving a dispute—exemplified by Mark Galanter's term "litigation."

6. The most effective approaches may rely on multiple processes.

Pound participants viewed combinations of adjudicative and non-adjudicative processes, such as mediation and arbitration or mediation and litigation, as the most effective process option. (It was ranked by 49% of participants and 50% of parties). This is perhaps a reflection of the common practice of negotiating (with or without a mediator) against the backdrop of adjudication. Combinations of approaches were also perceived as one of the highest priorities for the future by 50 percent of commercial parties and 45% of all participants.

7. Pre-dispute or pre-escalation processes, collaboration and conflict prevention are emerging trends in managing commercial conflict.

Along with combinations of adjudicative and non-adjudicative processes, business parties viewed "pre-dispute or pre-escalation processes to prevent disputes" as the most effective process for addressing commercial disputes. (50% of parties identified each approach.) Commercial parties saw these approaches as the top priority for the future (55%), as did participants generally (51%).

Participants expected "greater emphasis on collaborative instead of adversarial processes" and "changes in corporate attitudes to conflict prevention" to be the most significant influences on the future of commercial conflict resolution (with rankings of 57% and 51%, respectively).

8. Governments and ministries of justice have the greatest potential to influence change; outside counsel are most resistant to change.

Participants viewed governments and ministries of justice as most likely to influence change in commercial dispute resolution (41% ranking)—a logical choice given the importance the leading role governments and court systems have played in promoting mediation. Although commercial parties / in-house counsel, outside counsel and adjudicative providers each ranked themselves as potentially the most influential stakeholders, it should be noted that corporate counsel are often in a particularly advantageous position to influence process choices (including consensual private approaches) on the company and transactional level.

Participants perceived external lawyers (67%) and adjudicators (judges and arbitrators) (39%) as most resistant to change.

Conclusion

It remains to be seen how much influence the Global Pound Conferences will have on the pace or direction of change. However, the extant data from GPC polling offer considerable fodder for discussion and debate regarding trends in conflict management.