Global Pound Conference (GPC) Series 2016–2017

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The first session of the Global Pound Conference Series (GPC) was held in Singapore on 16 and 17 April 2016.

The intention of the organisers of the GPC is to convene conferences across the globe commencing in Singapore in 2016 and concluding in London in 2017 to provoke debate on the effectiveness of existing tools and techniques used in dispute resolution and to "stimulate new ideas and generate actionable data on what corporate and individual dispute resolution users actually need and want, both locally and globally".[1] The aim of the GPC being "to facilitate the development of 21st Century dispute resolution tools at domestic, regional and international levels".[2]

The conference was structured around four interactive sessions in which the following core questions were presented:[3]

- Access to justice and dispute resolution systems: what do users want, need and expect?
- How is the market currently addressing parties' wants, needs and expectations?
- How can dispute resolution be improved (overcoming obstacles and challenges)?
- Promoting better access to justice: what action items should be considered and by whom?

Shaping the future of dispute resolution and improving access to justice

The key note speech, "Shaping the future of dispute resolution and improving access to justice", was delivered by the Chief Justice of Singapore, Sundaresh Menon[4] in which reference was made to the 29th Annual Convention of the American Bar Association held in 1906 when Roscoe Pound delivered his paper on *The causes of popular dissatisfaction with the administration of justice*.[5] Menon CJ also referred to the foundational aim of the inaugural Pound Conference (held in 1976 in honour of Roscoe Pound): "to further the development of ideas to enhance access to justice by improving dispute resolution processes" and acknowledged that this concept remains as relevant today as it was in 1906 and 1976.[6]

Leading American jurists, judges and lawyers met at the 1976 Pound Conference held in St Paul Minnesota to discuss the causes and remedies of popular dissatisfaction with the administration of justice.[7] Professor Frank Sander delivered his paper on *Varieties of dispute processing* in which he devoted his primary attention to alternative ways of resolving disputes outside of the courts.[8] Professor Sander investigated two questions:[9]

> 1) What are the significant characteristics of various alternative dispute resolution mechanisms (such as adjudication by courts, arbitration, mediation, negotiation and various blends of these and other devices)?
> 2) How can these characteristics be utilized so that, given the variety of disputes that presently arise, we can begin to develop some rational criteria for allocating various types of disputes to different dispute resolution processes?

The answers to similar questions have been sought in the current round of conferences in the GPC. Assumptions as to who or which institutions are or should be the natural and obvious dispute resolvers, when concepts of access to justice and rights to such access are still moot, may not be resolved in the short term. Identifying reliable, consistent, comparable statistics about referral to and use of alternative dispute resolution (ADR) processes and the outcomes and impacts of the use of ADR are not readily available in all countries or jurisdictions whether the dispute resolution activity is within the courts, engaged by government agencies or in private ADR organisations.[10] As a result of this lack of comparable data, civil justice reform policy does not currently have a strong evidence base for the development of policies referrable to ADR. Hopefully, the current collection of data through the GPC will assist.

Menon CJ identified three major shifts in the global landscape which will impact upon dispute resolution:

- increased economic openness, mobility of labour and capital (p 3);
- increased cross-cultural convergence in transnational commercial dispute resolution (p 7); and
- increased recognition of access to justice outside the courtroom (p 10).

Menon CJ argued that these three major shifts should inform the manner in which we should approach the development of our dispute resolution mechanisms (p 11) by:

- equipping the legal system with a diversified range of appropriate dispute resolution options (p 12);

- rationalising a multiplicity of litigation across different courts and countries in transnational disputes (p 13);
- customising the approach of dispute resolution processes to each type of case (p 14); and
- courts should embrace the fact that different disputes call for different measures and be equipped or even redesigned to resolve disputes as appropriately as possible (p 15).

The theme, "Towards convergence, conversations and communications"[11] was developed in the key note address. Emphasis was placed on the harmonisation of the recognition and enforcement of court judgments (similar to the New York Convention operating for the enforcement of arbitral awards) such as through the Hague Convention on Choice of Court Agreements, currently operating in Mexico and all the member states of the European Union (save for Denmark).[12]

Also, Singapore has been active in working on developing "cross-court conversations" with judges from key commercial jurisdictions on issues relating to cross-border insolvency and developing an international cross-court network. For example, the recent establishment of the Singapore International Commercial Court (SICC) which is governed by a unique set of rules incorporating elements of international best practice such as the cross fertilisation of civil law and common law ideas (for example, modifications in the areas of discovery,[13] family law, the management of cross border disputes and the introduction of child representatives and also, the introduction of non-legal experts sitting with judges in specialised jurisdictions such as in medical negligence cases).[14] In addition, the conversation which has commenced encouraging a greater convergence in substantive law with a view to enhancing consistency in outcomes across jurisdictions may have the added benefit of reducing "forum shopping".[15]
Menon CJ opined:[16]

> … to further the development of ideas to enhance access to justice by improving dispute resolution processes — remains wholly relevant today as it was at the time of the first Pound Conference … We must continue to analyse the major shifts in the global landscape and to anticipate new movements, particularly those relevant to the resolution of legal disputes.

Inaugural Pound Conference 1976

The significance of the contribution of Professor Sander in his address to the inaugural Pound Conference held in 1976 cannot be under estimated.[17] The modern adoption of the idea of dispute resolution centres and the concept of the multi-door court emanated from his paper entitled, "Varieties of dispute processing". Professor Sander stated:[18]

> What I am thus advocating is a flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to differing processes (or combination of processes) … Alternatively one might envision by the year 2000 not simply a court house but a Dispute Resolution Center, where the grievant would first be channelled … to the process (or sequence of processes) most appropriate to (the) type of case. … Of one thing we can be certain: once such an eclectic method of dispute resolution is accepted there will be ample opportunity for everyone to play a part.

Singapore GPC session

At the Singapore session of the GPC the engagement of the audience was crucial for recording the views of the delegates/stakeholders for the purpose of compiling data for the preparation of a report at the conclusion of the GPC series. Four interactive sessions in which core questions were asked of the delegates was aimed at elucidating "how litigation, arbitration, mediation and other dispute resolution processes can help consumers achieve greater access to justice".[19] Below is a snapshot of the composition of the audience/consultation group and some insights into views about dispute resolution as it exists now in the Asia/Pacific region and in respect to the future development of ADR. Not all of the results or correlations emanating from the conference are noted below; however, the following results have been published.[20]

Stakeholder categories represented at the Singapore GPC

What was the stakeholder engagement at the GPC held in Singapore? Who was in the audience?

- 8% were parties or users of dispute resolution services;
- 23% were advisors;
- 22% were adjudicative providers;
- 24% were non-adjudicative providers; and
- 23% were influencers (researchers, educators, employee/representative of government, or any other person not in the above categories).

Delegates were asked to select one of the classifications and if they were involved in several categories then they were asked to choose the one in which they were primarily involved. Increasing the participation of parties or users of dispute resolution services in future GPC sessions would provide a more balanced consultation group.

Access to justice and dispute resolution systems — what do parties want, need and expect?

"Access to justice" is a complex ideal. The term "access to justice" may mean, for some, a narrow view, representing access to courts and/or tribunals in respect

to the rule of law. To others the term may include access to alternative dispute resolution processes or both. The acronym "ADR" may refer to "alternative dispute resolution", "appropriate dispute resolution" or "assisted dispute resolution". The definitions or terminology relating to ADR are not uniform and differ from jurisdiction to jurisdiction and may have overlays of cultural significance. In Australia, the definitions of ADR processes have been referred to in legislation which span substantive jurisdictions and court processes.[21] Hybrid ADR processes, such as med-arb may or may not have the same criteria included in their functions as their singular parts infer and the complexity of implementing hybrid processes may not be commonly understood. It is important to recognise that these fundamental definitional issues may skew the responses made by stakeholders from differing national backgrounds, cultural/religious heritage and legal frameworks.

The following are responses from stakeholder/delegates collated from the Singapore GPC Session in response to questions relating to access to justice and dispute resolution systems.

What outcomes do parties most often want before starting a process in commercial and/or civil dispute resolution?

- 35% financial (eg damages, compensation, and so on);
- 33% action-focused (eg prevent action or require an action from one of the parties);
- 17% psychological (eg vindication, closure, being heard, procedural fairness);
- 12% relationship-focused (eg terminate or preserve a relationship);
- 2% judicial (eg setting a legal precedent); and
- 0% other.

When parties are choosing which type(s) of dispute resolution process(es) to use, which of the following has the most influence?

- 33% advice (eg from lawyer or other adviser);
- 32% efficiency eg time/cost to achieve outcome);
- 17% predictability of outcome;
- 6% relationships (eg preventing conflict escalation);
- 6% industry practices;
- 5% confidentiality expectations; and
- 1% other.

When lawyers (whether in-house or external) make recommendations to parties about procedural options for dispute resolution, which of the following has the most influence?

- 32% the type of outcome requested by the party (eg money, an injunction, and so on);
- 29% familiarity with a particular type of dispute resolution process;
- 19% impact on costs/fees the lawyer can charge;
- 10% industry practices;
- 9% the party's relationships with the other party(ies) or stakeholders; and
- 0% other.

What role do parties want providers to take in dispute resolution processes?

- 35% where the parties initially do not have a preference but seek guidance from the providers regarding optimal ways of resolving their dispute;
- 20% where the providers decide on the process and the parties decide how the dispute is resolved;
- 16% where the providers decide on the process and how the dispute is resolved;
- 15% where the parties decide how the process is conducted and how the dispute is resolved (the providers just assist);
- 15% where the parties decide on the process and the providers decide how the dispute is resolved; and
- 1% other.

What role do parties typically want lawyers to take in dispute resolution processes?

- 36% speaking for parties and/or advocating on a party's behalf;
- 36% working collaboratively with parties to navigate the process. May request actions on behalf of a party;
- 12% acting as advisors and accompanying parties but not interacting with other parties or providers;
- 11% participating in the process by offering expert opinions, not acting on behalf of parties;
- 2% parties do not normally want lawyers to be involved;
- 2% acting as coaches, providing advice and not attending; and
- 1% other.

How is the market currently addressing parties' wants, needs and expectations?

The following are responses from stakeholders/delegates collated from the Singapore GPC Session in response to questions relating to how the market currently addresses parties' wants, needs and expectations. The parameters or definitions of "the market" were not

explored and may be best left as not to divert to an area in which little data is available with little development of the definition of "the market" in this context. If the focus is on dispute resolution and market forces, these initial questions may be useful in a comparative study of the information obtained from the many GPC sessions yet to be held.

What outcomes do providers tend to prioritise?

- 32% action-focused (eg prevent action or require an action from one of the parties);
- 25% financial (eg damages, compensation, and so on);
- 17% psychological (eg vindication, closure, being heard, procedural fairness);
- 14% relationship-focused (eg terminate or preserve a relationship);
- 9% judicial (eg setting a precedent); and
- 2% other.

How is the outcome of a commercial and/or civil dispute primarily determined (this was answered by reference to the delegate's own experience)?

- 33% by the rule of law: findings of fact and law or other norms;
- 29% by consensus: the parties' subjective interests;
- 28% by equity: general principles of fairness;
- 6% by status: deferring to authority/hierarchies;
- 4% by culture: based on cultural and/or religious norms; and
- 1% by other means.

What is achieved by participating in a non-adjudicative process (mediation or conciliation) (whether voluntary or involuntary — eg court ordered)?

- 28% reduced costs and expenses;
- 27% retaining control over the outcome;
- 19% improving or restoring relationships;
- 18% better knowledge of the strengths/weaknesses of the case or likelihood of settlement;
- 6% compliance (eg avoiding cost sanctions, meeting contractual obligations); and
- 3% tactical/strategic advantage (eg delay).

Who is primarily responsible for ensuring the parties understand their process options, and the possible consequences of each process before deciding which one to use?

- 31% external lawyers;
- 30% in-house lawyers;
- 12% adjudicative providers: judges and arbitrators or their organisations;
- 11% non-adjudicative providers: mediators and conciliators or their organisations;
- 9% parties (non-legal personnel); and
- 6% governments/ministries of justice.

Currently, the most effective dispute resolution processes usually involve which of the following?

- 31% combining adjudicative and non-adjudicative processes (eg arbitration/litigation with mediation/conciliation);
- 20% pre-dispute or pre-escalation processes to prevent disputes;
- 19% non-adjudicative dispute resolution methods (mediation and conciliation);
- 14% encouragement by courts, tribunals or other providers to reduce time and/or costs;
- 13% adjudicative dispute resolution methods (litigation and arbitration);
- 2% by technology to enable faster, cheaper procedures (eg Online Dispute Resolution, electronic administration, remote hearings[22]); and
- 1% other.

How can dispute resolution be improved (overcoming obstacles and challenges)?

The following are responses from stakeholders/delegates collated from the Singapore GPC Session in response to questions relating to improving dispute resolution processes/systems. Qualitative measures of what is better or can be improved were not explored in detail in this session.

What are the main obstacles or challenges parties face when seeking to resolve commercial and/or civil disputes?

- 35% financial or time constraints;
- 26% insufficient knowledge of options available to resolve disputes;
- 17% uncertainty (eg unpredictable behaviour or lack of confidence in providers);
- 14% emotional, social or cultural;
- 6% inadequate range of options available to resolve disputes; and
- 2% other.

To improve the future of dispute resolution and access to justice, which of the following processes and tools should be prioritised?

- 28% pre-dispute or pre-escalation processes to prevent disputes;

- 24% combining adjudicative and non-adjudicative processes (eg arbitration/litigation with mediation/conciliation);
- 15% encouragement by courts and tribunals or other providers to reduce time and/or costs;
- 15% non-adjudicative dispute resolution methods (mediation or conciliation);
- 14% technology to enable faster, cheaper procedures (eg Online Dispute Resolution, electronic administration, remote hearings);
- 3% adjudicative dispute resolution methods (litigation or arbitration); and
- 1% other.

Which of the following areas would most improve dispute resolution and access to justice?

- 33% legislation or conventions that promote recognition and enforcement of settlements, including those reached in mediation;
- 24% use of protocols promoting non-adjudicative processes before adjudicative processes (eg opt-out);
- 22% cost sanctions against parties for failing to try non-adjudicative processes (eg mediation or conciliation) before litigation/arbitration;
- 11% accreditation or certification systems for dispute resolution providers;
- 10% quality control and complaint mechanisms applicable to dispute resolution providers; and
- 1% other.

Which stakeholders are likely to be most resistant to change in dispute resolution practice?

- 44% external lawyers;
- 16% adjudicative providers: judges and arbitrators or their organisations;
- 16% parties (non-legal personnel);
- 13% in-house lawyers;
- 8% government/ministries of justice;
- 3% non-adjudicative providers: mediators and conciliators or their organisations; and
- 1% other.

Which stakeholders have the potential to be most influential in bringing about change in dispute resolution practice?

- 29% governments/ministries of justice;
- 26% adjudicative providers: judges and arbitrators or their organisations;
- 19% external lawyers;
- 9% in-house lawyers;
- 8% parties (non-legal personnel);
- 8% non-adjudicative providers: mediators and conciliators or their organisations; and
- 0% other.

Promoting better access to justice — what action items should be considered and by whom?

The following are responses from stakeholders/delegates collated from the Singapore GPC Session in response to questions relating to promoting better access to justice and the future of dispute resolution. A pragmatic view was taken in respect to this session with a focus on action items to be considered. The focus of this session was on innovation and trends.

Who has the greatest responsibility for taking action to promote better access to justice?

- 41% governments/ministries of justice;
- 29% adjudicative providers: judges and arbitrators or their organisations;
- 15% external lawyers;
- 8% non-adjudicative providers: mediators and conciliators or their organisations;
- 4% parties (non-legal personnel); and
- 4% in-house lawyers;
- 0% other.

To promote better access to justice, where should policy makers, governments and administrators focus their attention?

- 26% pre-dispute or early stage case evaluation or assessment systems using third party advisors who will not be involved in subsequent proceedings;
- 25% legislation or conventions promoting recognition and enforcement of settlements including those reached in mediation;
- 23% making non-adjudicative processes (mediation or conciliation) compulsory and/or a process parties can"opt-out" of before adjudicative processes can be initiated;
- 21% use of protocols promoting non-adjudicative processes (mediation or conciliation) before adjudicative processes;
- 4% reducing pressures on courts to make them more efficient and accessible; and
- 1% other.

What is the most effective way to improve parties' understanding of their options for dispute resolution?

- 27% education in business and/or law schools and the broader business community about adjudicative and non-adjudicative dispute resolution options;
- 20% requiring parties to attempt non-adjudicative options (ie mediation or conciliation) before initiating litigation or arbitration;
- 19% procedural requirements for all legal personnel and parties to declare they have considered non-adjudicative dispute resolution options before initiating arbitration or litigation;
- 19% creating collaborative dispute resolution centres or hubs to promote awareness;
- 15% providing access to experts to guide parties in selecting the most appropriate dispute resolution process(es); and
- 1% other.

To promote better access to justice, where should policy makers, governments and administrators focus their attention?

- 26% pre-dispute or early stage case evaluation or assessment systems using third party advisors who will not be involved in subsequent proceedings;
- 25% legislation or conventions promoting reconciliation and enforcement of settlements including those reached in mediation;
- 23% making non-adjudicative processes (mediation and conciliation) compulsory and/or a process parties can "opt-out" of before adjudicative processes can be initiated;
- 21% use of protocols promoting non-adjudicative processes (mediation and conciliation) before adjudicative processes;
- 4% reducing pressures on the courts to make them more efficient and accessible; and
- 1% other.

Which of the following have the most significant impact on future policy-making in dispute resolution?

- 36% demand for certainty and enforceability of outcomes;
- 31% demand for increased efficiency of dispute resolution processes, including through technology;
- 10% demand for increased uniformity and standardisation;
- 9% demand for processes that allow parties to represent themselves, without lawyers;
- 8% demand for increased transparency;
- 6% demand for increased rights of appeal/ oversight of adjudicative providers; and
- 1% other.

What innovations/trends are going to have the most significant influence on the future of dispute resolution?

- 33% greater emphasis on collaborative instead of adversarial processes for resolving disputes;
- 21% changes in corporate attitudes to conflict prevention;
- 17% harmonisation of international laws and standards for dispute resolution systems;
- 13% technological innovation (eg on-line dispute resolution);
- 13% enhanced understanding regarding how people behave and resolve conflict (eg brain and social sciences);
- 4% greater emphasis on personal wellbeing and stress reduction of parties; and
- 0% other.

Emerging issues

The emphasis of the core questions raised with the stakeholders/delegates at the Singapore GPC Session were formulated so as to elicit individual and consequently subjective responses. One can reflect upon the need for this primary data so as to gain knowledge of perceptions of dispute resolution processes as they currently stand and the impact on the future development of dispute resolution systems. However, in time, there will need to be an analysis of the distinction between the subjective data obtained and the broader context of the public interest and public institutions which have been created to provide access to justice and dispute resolution within civil justice systems.

Dispute resolution has been practised in informal and formal ways for millennia however what is of interest is the modern context in which this is being reformulated. The relevance of market forces and increased economic openness, mobility of labour and capital and cross-cultural convergence to the development of dispute resolution was raised in the opening address by Menon CJ. These issues and the current dynamic of the *in tandem* development of dispute resolution mechanisms inside and outside of the court room and the institutionalisation of ADR mechanisms will inform the manner in which we approach the future development of dispute resolution.

In this short article about the GPC it is not possible to elaborate on individual as compared to institutional responses. It is arguably premature. However some emerging issues for a future conversation include consideration of:

- the role of courts and tribunals in dispute resolution in the 21st century as public funds and resources are closely monitored;

- the extent "user-pay" philosophies are applied in some jurisdictions to dispute resolution systems and structures including courts and institutions involved in the administration of justice;
- the extent that courts and tribunals engage in the provision of ADR services;
- the ramification of mandatory referral to ADR;
- the extent of confidentiality and privilege attributed to ADR processes;
- the development of standards for the accreditation of ADR practitioners;
- ensuring consistency of the quality of the provision of ADR services provided;
- any need for review of the outcomes from differing ADR processes and by whom or which institutions;
- the immunity of ADR practitioners;
- the provision of ADR services in the broader context of the public interest;
- the extent to which transnational or cross-cultural influences affect the provision of ADR; and
- any need for a uniformity of approach and how this may be implemented.

Final report

Comparative views from diverse communities, whether reflective of the rules or mores of states and territories, cultures, legal professionals or other stakeholders is invaluable in understanding the underlying tapestry in which dispute resolution mechanisms are to be implemented in the future. The final report of the GPC Series collating the data collection obtained from different jurisdictions is due for publication at the end of 2017.

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Footnotes

1. GPC, globalpoundconference.org.
2. GPC, *Welcome*, globalpoundconference.org.
3. GPC, *Core questions*, globalpoundconference.org.
4. Sundaresh Menon CJ "Shaping the Future of Dispute Resolution and Improving Access to Justice" (paper presented at Global Pound Conference Series 2016, Singapore, 17 March 2016) www.supremecourt.gov.sg.
5. Roscoe Pound "The Causes of Popular Dissatisfaction with the Administration of Justice" (1906) 29 *Annual Report of the American Bar Association* 395 at 395.
6. Above n 4, p 3.
7. See GPC, *1976 Pound Conference,* globalpoundconference.org cited in above n 4, p 2.
8. Professor FEA Sander "Varieties of Dispute Processing" in A Leo Levin and RR Wheeler (eds) *The Pound Conference Perspectives on Justice in the Future* West Publishing Co, Minnesota 1979 p 66. See also, RT Shepard "Introduction: The Hundred-Year Run of Roscoe Pound" (2007) 82(5) *Indiana Law Journal* 1153.
9. Sander, above n 8, p 67.
10. Statement by the Law Council of Australia Expert Standing Committee on ADR, 2009.
11. Above n 4, p 17.
12. Above n 4, p 18 and HCCH, *Convention of 30 June 2005 on Choice of Court Agreements*, June 2005, www.hcch.net.
13. *Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union* [2014] OJ L 349/1.
14. Above n 4, p 20.
15. Above n 4, p 22. See also, Robert French CJ "Transnational Dispute Resolution" (paper presented at Supreme and Federal Court Judges Conference, Brisbane, 25 January 2016) www.hcourt.gov.au; "Convergence of Commercial Laws — Fence Lines and Fields (paper presented at Doing Business Across Asia — Legal Convergence in an Asian Century Conference, Singapore, 22 January 2016) www.hcourt.gov.au.
16. Above n 4, p 3.
17. Sander, above n 8, p 66.
18. Sander, above n 8 p 83–84. See also EB Gray "Creating History: The Impact of Frank Sander on ADR in the Courts" (2006) 22(4) *Negotiation Journal* 445; Professor FEA Sander and SB Goldberg, "Fitting the Forum to the Fuss: A User-friendly Guide to Selecting an ADR Procedure" (1994) 10(1) *Negotiation Journal* 49.
19. GPC, *Programme*, singapore2016.globalpoundconference.org.
20. GPC, *Results from GPC Series Singapore,* singapore2016.globalpoundconference.org.
21. See also, National Alternative Dispute Resolution Advisory Council *Dispute Resolution Terms* (September 2003) www.ag.gov.au.
22. See also, Professor Richard Susskind OBE FRSE "Online Courts and Online Dispute Resolution" (paper presented at The International Council of Advocates and Barristers World Bar Conference 2016, Edinburgh, 15 April 2016) wbc.advocates.org.uk.