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The next new things – latest and future developments in Appropriate Dispute Resolution (ADR) & ADR catalysts

Dispute resolution professionals and stakeholders are bracing for changes in the field of Appropriate Dispute Resolution (ADR).¹ These include greater use of “mixed mode” proceedings combining amicable and non-evaluative processes (e.g., mediation) with evaluative and adjudicative processes (e.g., expert determinations, litigation and arbitration), greater uses of AI and technology, improved ways of selecting ADR-Neutrals², and new ways of financing ADR proceedings. There continues, however, to be a “mediation paradox”: companies prefer mediation but resort in practice to litigation or arbitration more, despite growing dissatisfaction with such processes on their own. A new generation of service providers is appearing, acting as catalysts to facilitate access to ADR. This chapter explores unmet needs and trends in ADR, identifying some of the barriers hindering the adoption of mediation. It discusses innovative tools from a new generation of service providers (e.g., Mundi Mediatores), addressing these issues and focuses on ways to reduce obstacles and key procedural drivers to better promote the use of ADR. The paper also emphasizes faster, cheaper, and better outcomes by addressing disputants’ needs and interests earlier, accompanied by new ADR funding models (e.g., InnovADR, based on a “no settlement, no fee” economic model, which differentiates itself from litigation funding).

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1 In this chapter the term “Appropriate Dispute Resolution” (ADR) is used rather than “Alternative” or “Amicable” dispute resolution. This is because the use of ADR is increasingly mainstream and can include evaluative and adjudicative forms of mediation (e.g., conciliation and arbitration), sometimes in combination with non-evaluative and non-adjudicative processes (“mixed modes”). We also concentrate on commercial disputes in business-to-business ADR settings unless otherwise specified.

2 In this chapter the term “ADR-Neutrals” is used to refer to any professional dispute resolution experts who are independent, impartial, and neutral. This term includes mediators, conciliators, neutral evaluators, arbitrators and judges.

Keywords: AI, ADR, ADR-Neutrals, technology, cross-border, dispute resolution funding, diagnostics, process design, mixed-mode processes, barriers, catalysts, key drivers, hybrids, trends, opportunities

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I Introduction to the next new things in ADR

As an industry, ADR (Appropriate Dispute Resolution) is maturing and evolving fast. ADR-Neutrals are increasingly sophisticated and specialized, tackling complex cases, and developing nuanced ADR techniques. Research and practice, however, show that client users still have many unmet needs, particularly in cross-border and commercial dispute settings. Focusing on 4 key recent changes it should be possible to greatly impact dispute resolution services world-wide and help bridge the gaps between what users want (demand) and what is currently being provided (supply). These 4 key changes are

- a) A growing interest in mixed modes,
- b) Embedded use of technology (e.g., new insights from neurosciences) and AI in diagnostics and process design,

- c) The ability to initiate mediations more easily and to better identify and select optimal ADR-Neutrals for each case, and
- d) New ways of funding ADR (e.g., “ADR funding”, as opposed to “litigation funding”).

These changes address 10 trends arising from unmet user needs in ADR.

A Global alignment

Users and providers of ADR services around the globe are beginning to discuss and align on changes that are needed. The Global Pound Conference (GPC) series initiated by the International Mediation Institute (IMI) in 2016-18³ identified greater efficiency, more cooperation (as opposed to adversarial behaviour), mixed mode processes, and a growing recognition of in-house counsel as drivers for change around the world.⁴ These four drivers were identified as universal core changes that users would like to see. Discussions building on the findings of the GPC series are leading to a global alignment by all ADR stakeholders on what changes are needed domestically and internationally to resolve cross-border conflicts in a growingly interdependent but also fragmented planet, where access to justice often takes too long, is too expensive or both.

B Growing international interest in mixed mode mechanisms

Since the appearance of the GPC results, the theme of mixed-mode approaches and combining evaluative or adjudicative ADR proceedings (e.g., arbitration) with non-evaluative or non-adjudicative ADR proceedings (e.g., mediation) are increasingly of interest. This is true for small disputes as well as large scale international or investor-state disputes. Users indicate that the preservation of business relationships and the relative procedural flexibility offered by mixed mode mechanisms (e.g., mediation together with arbitration) are increasingly important factors that they consider when choosing combined mechanisms over standalone ADR proceedings for resolving both domestic and international disputes. This has led to the creation of new international mixed mode taskforces and new initiatives by leading ADR institutions that are discussed in more detail in Section II.

3 The Global Pound Conference, (GPC Series) convened more than 4,000 people at 28 conferences in 24 countries across the globe in 2016 and 2017. Those delegates – and hundreds more who contributed data online – voted on a series of 20 Core Questions to gather data to inform the future of dispute resolution and came up with these 4 trends. For the summary report providing these 4 trends, available at https://imimediation.org/wp-admin/admin-ajax.php?juwpfisadmin=false&action=wpfd&task=file.download&wpfd_category_id=909&wpfd_file_id=35507&token=&preview=1 (27 November 2023); for the raw data, see https://imimediation.org/wp-admin/admin-ajax.php?juwpfisadmin=false&action=wpfd&task=file.Download&wpfd_category_id=907&wpfd_file_id=35505 (27 November 2023).

4 Global Pound Conference series 2016-2017.

C Subject matter vs. process expertise of ADR-Neutrals

There are increasing gaps between user expectations and user satisfaction, especially with respect to whether ADR-Neutrals should have subject matter and/or process expertise. In a recent international survey,⁵ industry-specific knowledge (i.e., subject matter expertise) and procedural expertise were ranked equally in importance (at 89%) for selecting mediators and arbitrators. Experience was ranked even higher, at 97% for selecting arbitrators and at 94% for selecting mediators. However, only 56% of respondents were satisfied with the expertise of the arbitrators and mediators who had been selected (a 33% gap) and 72% of respondents were satisfied with their experience (a 41% gap for arbitrators selected and a 38% gap for mediators selected). For client users, expertise and experience of arbitrators or mediators were ranked as 100% in importance, but satisfaction ratings in this respect were significantly even lower for arbitrators: 62% for industry/issue-specific knowledge (a 58% gap) as compared to 77% for experience (a 23% gap).⁶ The majority of users, especially in cross-border cases, are increasingly favouring ADR-Neutrals who have both subject matter and procedural expertise, and who can act evaluatively and non-evaluatively, depending on the topics being discussed and when users might desire receiving evaluative input on them. Even when a facilitative style of mediation is sought, experienced mediators having subject-matter expertise relevant to the field seem to be more appreciated by users.⁷ Users thus seem to prefer ADR-Neutrals who can be flexible and proactive in using their subject-matter and procedural expertise. While one ADR-Neutral may not have it all, this leads to new considerations of combining ADR-Neutrals (e.g., hybrids led by experienced mediators working with experts, arbitrators or adjudicators).

5 Singapore International Dispute Resolution Academy (SIDRA) and Singapore Management University, SMU SIDRA Dispute Resolution survey Report 2022 (SIDRA 2022), available at <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey-2022/index.html?1> (27 November 2023).

6 Singapore International Dispute Resolution Academy (SIDRA) and Singapore Management University, SMU SIDRA Dispute Resolution survey Report 2022 (SIDRA 2022), 22, available at <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey-2022/index.html?1> (27 November 2023); Unfortunately, there is no information in the SIDRA 2022 survey comparing client user ratings to overall respondent ratings when it comes to the selection of mediators, however, unlike the information provided in the survey regarding the selection of arbitrators.

7 Singapore International Dispute Resolution Academy (SIDRA) and Singapore Management University, SMU SIDRA Dispute Resolution survey Report 2022 (SIDRA 2022), available at <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey-2022/index.html?1> (27 November 2023); ZAM/ACB Onderzoek naar kansen en belemmeringen voor zakelijke mediation, onder advocaten, bedrijven en rechters in Nederland. A survey into opportunities and impediments for business mediation in The Netherlands (ZAM-ACB 2018).

D Diversity of ADR-Neutral(s) & Personality profiles

In addition to being more demanding when it comes to expertise and experience, users want to know more beforehand about what they can expect from an ADR-Neutral or a panel. Gender, nationality and greater cultural diversity in the pool of mediators and arbitrators are areas where improvements are sought, and many ADR centres are seeking to expand the diversity of their panellists.⁸ This means obtaining more information about ADR professionals, their backgrounds and personalities. How ADR-Neutrals are likely to interact (with one-another and the parties' representatives) is an increasingly important consideration. Dispute resolution stakeholders are progressively seeking greater diversity in the choice of the persons they can hire as ADR-Neutrals, as well as different practice models enabling greater efficiency while improving working relations. Currently only 39% of users are satisfied with the size and expertise of ADR-Neutral panels proposed to them and only 56% are satisfied with the information provided about each ADR-Neutral proposed.⁹ According to 49% of users, their levels of comfort would increase further if they knew how to find a competent and trustworthy ADR-Neutral.¹⁰ Very few know, however, how to use existing databases and tools that are available to do so.

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- 8 Singapore International Dispute Resolution Academy (SIDRA) and Singapore Management University, SMU SIDRA Dispute Resolution survey Report 2022 (SIDRA 2022), 24-25, 40-41, available at <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey-2022/index.html?1> (27 November 2023); Client Users viewed diversity of gender (67%) and legal system or background (67%) as their highest priority while external counsels placed greater emphasis on diversity of ethnicity (71%), gender (57%) and nationality (57%).
- 9 Some more data from the SIDRA study that illustrate a discrepancy between user needs and what they experienced in practice:
- a) The dispute resolution experience of a mediator: 89% find this important, 56% satisfaction,
 - b) Industry/issue specific knowledge of mediator: 94% find this important, 72% satisfaction,
 - c) Size and expertise of panel of mediators: 61% find this important, 39% satisfaction,
 - d) Availability of information about panel of mediators: 78% find this important, 56% satisfaction,
 - e) Cultural familiarity of panel of mediators: 72% find this important, 50% satisfaction.
- 10 Barometer of dispute resolution in Belgium 2022. A large-scale survey of the Belgian population; Stefan Rutten, University of Antwerp, Barometer of dispute resolution in Belgium: residents' attitudes to and experiences with handling disputes, October 2022, available at <https://www.ie-net.be/sites/default/files/Enqu%C3%AAte%20UAntwerpen%20conflictoplossing%20in%20Belgi%C3%AB%202022.pdf> (27 November 2023).

E Uptake of new technologies and ODR

It is increasingly commonplace for online dispute resolution (ODR) to be used in courts as well as in arbitration and mediation proceedings. Videoconferencing technology is constantly improving, and users and their counsel seem to be embracing the greater use of ODR to reduce legal spendings and increase efficiency. This also coincides with a new trend of greater climate-awareness and the desire to reduce the carbon imprint of dispute resolution proceedings, both in terms of travel and disclosure of documents. Data rooms are increasingly being used to analyse large quantities of electronic information, and new technologies and services are being offered to assist disputants and ADR-Neutrals to manage information online and assess settlement possibilities. Users seem to value e-discovery, automated negotiation tools, analytics for the appointment of ADR-Neutrals, and tools for predicting the outcome of a claim, even if they may remain sceptical about them.¹¹ ADR-Neutrals are well advised to learn about and stay abreast of such technological advancements and services. They should be prepared to discuss and be willing to allow for them, especially when it comes to virtual/online proceedings.

F Relationships are increasingly valued

While costs and time have always been key drivers for resolving commercial disputes, relationships are emerging as a new key driver and consideration. The value of a relationship (including reputations) is increasingly important and can significantly affect the legal positions a party is willing to take in a commercial dispute.¹² This is something that cannot be taken into consideration in litigation or arbitration proceedings insofar as relationships are not part of the legal syllogism (FACTS + LAW = OUTCOME) that tribunals have to focus on. Including mediation or amicable negotiation as part of process design allows this procedural need to be included earlier on, introducing a cooperative as opposed to adversarial tone.

11 Singapore International Dispute Resolution Academy (SIDRA) and Singapore Management University, SMU SIDRA Dispute Resolution survey Report 2022 (SIDRA 2022), 57-63, available at <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey-2022/index.html?1> (27 November 2023).

12 General Counsel NL Dispute Resolution Survey 2023 (GCNL 2023), available at: <https://www.generalcounsel.nl/gcn-dispute-resolution-survey/> (27 November 2023); 2023: 67% of the Chief Legal Officers researched in this Dutch study said that the commercial value of the relationship with the opposing party was leading the decision of the (legal) position the company takes. In the first edition of this study carried out 2 years ago (with the name: General Counsel NL Litigation Survey 2021) this was 57%. In the SIDRA 2022 study on page 6 the majority of the respondents identified preservation of business relationship (users 94%), confidentiality (users 89%) and speed (users 83%) as the top three 'important' or 'absolutely crucial' factors for opting to use international commercial mediation to resolve disputes.

G The shift from adversarial to collaborative advocacy

User data has shown for many years that disputants wish their external counsel to be more collaborative. As far back as 2013, 85% of users wanted their legal counsel to be trained in mediation skills.¹³ In practice, however, lawyers are widely perceived as an impediment to the use of mediation to resolve disputes.¹⁴ Lawyers are usually trained to be adversarial, however, and often also view themselves as the greatest obstacle to a greater uptake of commercial mediation. As a result, nearly half of the users in a recent survey said they prefer their legal counsel not to be present in mediations.^{15,16} The concern seems to be more about whether lawyers understand their role in mediation: acting as supportive advisors to their clients, as opposed to protagonists, who advocate and do all the speaking. The experience of most experienced commercial mediators is that seasoned mediation advocates who understand their role in mediation often play a crucial role in helping their clients to settle disputes amicably. Not only by benchmarking and beating what can be achieved through litigation or arbitration, but also in moving away from positional rhetoric to genuine discussions that focus on better solutions that meet the disputants' future needs and interests. Good mediation advocates can help their clients understand their best, worst and probable alternatives to a negotiated settlement¹⁷ and compare them to interest-based solutions that look to the future. They are often also best equipped to help the disputants to understand the costs, time and likely risks of litigation or arbitration proceedings. Skilled mediation advocates understand the possible consequences of "winning" on the disputants' subjective needs or interests and how victory on positions may in fact be a form of defeat. Mediation advocacy skills is another trend that many ADR training centres are focusing on.

13 International Corporate Users ADR Survey from 2013 of the International Mediation Institute (IMI) (IMI 2013) and results from the GPC, available at <https://imimediation.org/2013/04/06/imi-adr-users-survey-results/> (27 November 2023).

14 Ibid: With the statement "In my experience lawyers are often an impediment to the mediation process" only 20% of users disagree, 37% are neutral, 43 % agree. This is also the outcome of other studies like SIDRA 2022, ZAM-ACB 2018, and Global Pound Conference series.

15 48% of the users, ZAM-ACB 2018. The reason for this was not researched sufficiently, and other motivations (such as reducing legal fees) could also explain these results.

16 As mediators we find it a missed opportunity if lawyers are potentially not part of a mediation process because our experience is that with mediation-savvy lawyers in the room the quality of the mediation process and outcome dramatically improves. This gap could be filled by making mediation advocacy skills a normal subject in legal studies and by encouraging all lawyers to take a mediation skills or mediation advocacy course, and professionalize even more by becoming an IMI Certified Mediation Advocate. Lawyers are well advised to learn and apply mediation skills. A good place to start is implementing the mediation advocacy criteria of IMI; available at <https://imimediation.org/orgs/competency-criteria-mediation-advocates-advisors/> (27 November 2023).

17 The disputants' "BATNAs", "WATNAs" and "RATNAs": Best, Worst or Reasonable Alternative to a Negotiated Agreement.

H A greater shift towards Corporate Social Responsibility

A further need and trend is the move towards greater awareness of corporate social responsibility principles in ADR, including Environmental, Social and Governance (ESG) factors, which are increasingly used by investors to evaluate and measure the sustainability and societal impact of an investment in litigation or arbitration.¹⁸ This concept has gained prominence for investing in companies that are responsible not just to their shareholders, but also to the environment, society, and the broader stakeholder ecosystem. Together with the United Nations Sustainable Development Goals (SDG),¹⁹ corporations and investors are increasingly considering how litigation is handled on some of the world's most pressing global challenges, including poverty, inequality, climate change, environmental degradation, peace, and justice. The intention is to address these issues and ensure a better and more sustainable future for all. While COVID may have been the reason many ADR-Neutrals started working more online, ESG and SDG values have promoted continued discussion and greater use and consideration of how to resolve disputes in a more environmentally and socially responsible manner. This has also led to new initiatives such as Green Pledges for arbitrators and mediators that a new generation of ADR Neutrals are embracing.²⁰

I The growth of third-party funding and new ADR funds

Given the rising costs of commercial litigation and arbitration, access to justice has become unaffordable in many jurisdictions. This has led to a worldwide growth in third party litigation funds, who invest in litigious proceedings. These funds operate by backing a plaintiff with a strong case and paying their litigation fees, in exchange for receiving a part of the damages if the plaintiff wins. In a 2022 SIDRA survey, the majority of the respondents understood the concept of litigation funding and how it works but have not used it.²¹ While litigation funds who support one party's claim against another are increasingly common, there are no ADR funds yet that specialize in mediations or that align their interests with all of the disputants as opposed to one party. ADR funds that seek to convene and bring all of the essential disputants together are now emerging. They invest in collective settlement processes and amicable outcomes that are

18 ESG is set of practices (e.g., policies, procedures, metrics) used to assess business practices and performance on sustainability and ethical issues and a framework that organisations can use to limit negative impact or enhance positive impact.

19 SDG is a set of 17 global goals established by the United Nations General Assembly in 2015 as part of the 2030 Agenda for Sustainable Development.

20 See: The Pledge for Greener Arbitrations (<https://www.greenerarbitrations.com/about>) and the World Mediators Alliance on Climate Change, available at <https://womacc.org/> (27 November 2023).

21 SIDRA 2022: 60% indicate they understand its applications and how it works, but have not used it. 20% indicate they have used it; Singapore International Dispute Resolution Academy (SIDRA) and Singapore Management University, SMU SIDRA Dispute Resolution survey Report 2022 (SIDRA 2022), available at <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey-2022/index.html?1> (27 November 2023).

not to the benefit or detriment of any one party. This is a new field that is likely to evolve and is described in more detail in Section III.4 on ADR catalysts.

J Disclosure protocols vs. codes of conduct

There has been a tendency for professional associations of lawyers, arbitrators, and mediators to set codes of conduct or rules of professional behaviour when practising ADR, which set norms that may be appropriate in some jurisdictions but not others. Mindful of the cultural diversity and differences that exist within the mediation world, IMI decided to allow for diversity rather than impose one set of cultural rules for training or certifying mediators. Qualifying Assessment Programs are required to be transparent and consistent in their varying approaches. The result is that Austrian, Australian, Chinese, Dutch, French, German, Italian, Singaporean, Swiss, UK and US commercial mediators (who come from countries with significantly varying norms) often have very different approaches to mediation. While some focus on outcomes and reaching settlements, others focus on the quality of dialogues and relationships, and yet others focus on the process itself and compliance with different steps in a process. In a dispute involving parties from several countries, it may not be possible to appoint a single mediator or a team of co-mediators who are regulated by widely varying codes of conduct (e.g., some being allowed or even required to be evaluative and make proposals, and others being prohibited from doing so). One way of avoiding this problem is the adoption of a Universal Disclosure Protocol for Mediation (UDPM), a recent initiative launched by several leading international mediation organisations,²² which adapts to the cultural preferences of the parties and ensures that all disputants and the mediator(s) have a congruent understanding of the particular mediation process(es) to be used in each case. This ensures that the parties have full self-determination when entering into a mediation process, including how the process will be handled. It avoids norms that may be invisible, constrictive, and inherent in certain national codes of conduct, to protocols. The UDPM is an important first step in a new generation of ADR standards, whereby each mediation process and the procedural obligations of the ADR-Neutrals can be adjusted to better clarify the needs and interests of the participants in each case.

These 10 trends reflect unmet user needs that the ADR community needs to embrace. The rest of this chapter will focus on new initiatives and service providers seeking to provide faster, cheaper and better access to justice, while fulfilling the user's needs, especially for cross-border commercial disputes.

22 The initiative is a response to an initial paper presented by Ana Maria Gonçalves and Daniel Rainey at a Singapore Convention opening event in 2019, and described in: Ana Gonçalves/Francois Bogac/Daniel Rainey, Create a Universal Code of Disclosure, article 4.4, 4th Key Professionalism in: Michael Leathes (ed.), Seven Keys to Unlock Mediation's Golden Age, mediate.com 2020.

For more information about the UDPM and its supporters, see <https://universaldisclosureprotocolmediation.com/> (27 November 2023); The initial presentation took place at "Mediation: A New Era (MANE) Forum," organised by the Singapore International Dispute Resolution Academy, Singapore International Mediation Centre, Singapore International Mediation Institute and Singapore Mediation Centre on 6 August 2019.

II The growth of mixed modes: combining adjudicative and non-adjudicative processes

It has been well known for several years that adjudicative and non-adjudicative processes are fundamentally compatible and complementary.²³ A “mixed mode” or “hybrid” process combining the two can offer a good mix between the users’ desire for evaluative input, with self-determination and greater control over the outcome to a dispute without having to abandon the certainty of reaching an outcome. Such practices align fully with user expectations and are likely to continue to be further on the rise in the future.

Mixed modes, provide new challenges. They require taking into consideration procedural precautions to prevent a mediation from adversely affecting the recognition and enforceability of an arbitral award under the New York Convention (e.g., by ensuring that information heard by a mediator or conciliator in a caucus is never shared with an arbitrator, or that an arbitrator is appointed when there is still a dispute, case, or controversy to be resolved). They may be combined sequentially, in parallel or as integrated processes using separate ADR-Neutrals, possibly even with the same ADR-Neutral “swapping hats” at different stages of the process in some cases.²⁴ A new, flexible, systematic, and structured way of doing so is needed to better address user needs and expectations.

In addition to the time and cost savings, and better relations that can be gained by combining such processes, there are additional benefits to designing bespoke mixed mode processes, especially for complex international commercial disputes.²⁵ The data from the GPC Series mentioned at the beginning of this chapter led to the creation of an international “Mixed Mode Taskforce”.²⁶ The

23 Renate Dendorfer-Ditges/Jeremy Lack, *The Interaction Between Arbitration and Mediation: Vision v Reality*, *Dispute Resolution International*, 1 (2007) 1, 73-98; available at http://lawtech.ch/wp-content/uploads/2022/06/jl_2007_The_Interaction_Between_Arbitration_and_Mediation-1.pdf (27 November 2023).

24 While “swapping hats” may seem risky, it can be very appropriate in certain cases, provided it is done with complete information and an understanding by the parties and ADR-Neutral(s) of the risks of doing so. The Taskforce’s Working Group 5 lead by Tom Stipanowich and Mordechai (Moti) Mironi focused precisely on these issues, and readers are encouraged to read this report in its entirety at <https://imimediation.org/download/12416/mixed-mode/1E0bOOOnSmDMj-PMasVgPxAWQN6lgaFXyF/WG%205%20-%20Draft%20working%20paper,%20August%206%202021.pdf> (27 November 2023).

25 Jeremy Lack, *Appropriate Dispute Resolution (ADR): The Spectrum of Hybrid Techniques Available to the Parties*, Chapter 17 in: Jean-Claude Goldsmith/Arnold Ingen-Housz/Gerald Pointon, *ADR in Business, Practice and Issues Across Countries And Cultures*, Alphen aan den Rijn 2011, available at http://lawtech.ch/wp-content/uploads/2022/06/Ingen-Housz-9789041134141_Chapter-17-J-Lack.pdf (27 November 2023); For a recent book exploring combinations of mediation and arbitration, see: Dilyara Nigmatullina, *Combining Mediation and Arbitration in International Commercial Dispute Resolution*, Routledge 2018, available at <https://www.taylorfrancis.com/books/mono/10.4324/9781351068642/combining-mediation-arbitration-international-commercial-dispute-resolution-dilyara-nigmatullina> (27 November 2023).

26 The Mixed Mode Taskforce is a tri-partite group of international professionals from over 50 countries, convened by the International Mediation Institute (IMI), the

first report of this Taskforce can be found on IMI's website.²⁷ 5 key procedural drivers were identified for better diagnosing, designing and resolving commercial disputes: (1) costs, (2) time, (3) relationships, (4) the desire for self-determination and (5) enforceability. These concepts are certainly not new, but were seldom coupled with diagnostic services, process design or a flexible structure for discussing and implementing mixed mode processes.

Following up on the work of this taskforce, several leading ADR organisations are now offering mixed mode advisory and diagnostic services, implementing the taskforce's recommendations in a systematic and structured way. ADR institutions such as AAA/ICDR, CPR, ICC, JAMS, SIAC & SIMC, the Swiss Arbitration Centre and WIPO are now demonstrating that mediation and arbitration can be used in combination in many cases, whether sequentially or in parallel, and some of these centres are even providing ARB-MED-ARB and MEDALOA²⁸ combinations and have already revised their rules to enable broader combinations of mixed mode processes. WIPO has been offering "Good Offices" consultations for many years, helping IP disputants to assess what cases could benefit from the various dispute resolution procedures offered and possible ways of combining them. While this process was well established, it was not provided in a consistent or systematic manner. More recently, CPR set up a new pilot program for resolving disputes based on the findings of the Mixed Mode Taskforce and guided choice mediation concepts.²⁹ Using the key procedural drivers as a basis for discussion, a Process Design Facilitator is appointed to clarify the disputants' procedural needs and interests early on, and to optimize the possibilities for resolving their dispute amicably. This program recognizes that many parties involved in disputes may not have fully considered their options on how best to resolve their conflict or what their procedural needs would likely be when they signed a contract and inserted a pre-set ADR clause. When attempts to negotiate fail, parties and their advisors tend to resort to traditional and adjudicative approaches without further discussion. In July 2023, the ICC's Arbitration and ADR Commission issued a new report and guide to drive thought leadership in dispute prevention and resolution, which echoes the

College of Commercial Arbitrators (CCA), and the Straus Institute for Dispute Resolution at the Pepperdine School of Law. Its work was broken down into seven working groups, whose composition and work product can be found at <https://imimmediation.org/about/who-are-imi/mixed-mode-task-force/> (27 November 2023).

27 Reported in May 2021. See IMI, Mixed Mode Task Force, available at <https://imimmediation.org/about/who-are-imi/mixed-mode-task-force/> (27 November 2023).

28 MEDALOA is a mixed mode ADR process standing for "Mediation and Last Offer Arbitration" (sometimes referred to as "Baseball Arbitration"), whereby if the parties are stuck with respect to final settlement, each proposes a final settlement offer to the other, and the mediator "swaps hats" and can choose between these final offers.

29 In May 2022; See <https://www.cpradr.org/news-publications/press-releases/cpr-launches-pilot-program-to-resolve-business-disputes/>; For more information about Guided Choice mediation, see <http://lawtech.ch/wp-content/uploads/2022/06/P.-Lurie-J.-Lack-Dispute-Resolution-Interational-Guided-Choice-ADR-October-2014.pdf> (27 November 2023).

recommendations of the Mixed Mode Taskforce.³⁰ These recent developments are a sign of more things yet to come. Newcomers to this field are Mundi Mediatores and InnovADR, new ADR catalyst concepts, which are described in Section III. Neither of them is an ADR provider and they do not compete with existing service providers. Rather, they are designed to work in a complementary way with ADR services providers, providing new services to lower some of the hurdles that still exist.

III The appearance of “ADR Catalysts”: new business models addressing the mediation paradox

The Merriam-Webster dictionary defines a catalyst as “an agent that provokes or speeds significant change or action”.³¹ New business models are beginning to appear in the ADR landscape that are building on the trends and developments described in Section I above. These are not services offered by traditional ADR centres that administer mediation or arbitration proceedings, but a new generation of service providers that seek to address and lower key activation hurdles that are preventing a greater uptake of mediation. These providers operate by lowering these hurdles and simplifying access to mediation and more appropriate ways of resolving disputes, thus improving access to justice.

A Mundi Mediatores: Aligning supply and demand

Mundi Mediatores is a new “ADR catalyst” service provider. It addresses the mediation paradox by lowering hurdles preventing a greater use of mediation and by acting as an ADR-Neutrals broker that connects supply and demand in ADR by meeting user needs. The 5 key hurdles the organisation has identified are:

- a) user engagement,
- b) process diagnostics,
- c) process design,
- d) budgets and
- e) neutral selection & implementation.

The organisation is a global entity that works closely with the international ADR community, and in particular IMI - the leading international institute for setting professional standards for mediators worldwide. Mundi Mediatores seeks to act as a catalyst by lowering these five hurdles and simplifying access to mediation and mixed mode processes. It works in ad-hoc proceedings and also collaboratively with traditional ADR providers (e.g., AAA/ICDR, CPR, CEDR, CMAP, ICC, JAMS, NAI, SIMC, WIPO, etc.) and a new generation of ADR funding partners (e.g., InnovADR, see III.2), to help disputants find faster, cheaper and

30 Co-chaired by Chiann Bao and Christopher Newmark, the report and guide were issued in July 2023, available at <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/new-report-and-guide-to-drive-thought-leadership-in-dispute-prevention-and-resolution/> (27 November 2023).

31 Merriam Webster, Dictionary, available at <https://www.merriam-webster.com/dictionary/catalyst#> (27 November 2023).

better ways of resolving commercial disputes (especially complex or international disputes).

Unlike traditional case managers or ADR centre administrators, Mundi Mediators does not administer cases, have its own procedural rules or recommend its own ADR-Neutrals. Its services include access to experienced mediators who act as process facilitators to help question, inform and set up ADR processes. They identify and convene key disputants early on and assist them in setting up, diagnosing, designing, budgeting ADR processes, and selecting the most competent and suitable ADR-Neutral(s) for each case. A shortlist of ADR-Neutrals is available from any accredited ADR institution, as long as they are IMI certified (or qualified). The appointments and final choices are made by the parties themselves – leaving the parties with full autonomy. This ensures early engagement, dialogue, procedural alignment, and a mutually acceptable process.



I. The MM-RapiDR™ Scan

8 key drivers to determine what type of ADR-process might work best.¹

These 8 procedural drivers give an indication for the most suitable process or combined processes to resolve your case.

1 COST: How important to you are the costs you will need to pay for resolving this conflict (including legal fees, experts' fees, neutrals' fees, etc.)? (For example, are you operating on a limited budget?)
 NOT at all important 1 2 3 4 5 Very important

2 TIME: How important to you is the time it will take to resolve this conflict? (For example, is resolving it as quickly as possible or as slowly as possible important to you?)
 NOT at all important 1 2 3 4 5 Very important

3. CONTROL OF OUTCOME: How important to you is control over the OUTCOME of the dispute? (For example, ensuring the outcome is business-oriented you can agree to, or something a tribunal can decide based on legal principles that you cannot control, but provides certainty of an outcome?)
 Guaranteed outcome most important 1 2 3 4 5 Control over | acceptable outcome most important

4. CONTROL OF PROCESS: How important to you is control over the PROCESS by which the dispute will be resolved? (For example, flexibility in deciding what documents or evidence needs to be provided, when and where to meet, etc. or having all these factors decided by a tribunal?)
 Procedure decided by a tribunal is most important 1 2 3 4 5 Control over process and flexibility are most important

5. REPUTATION: How important to you is the possible impact on the disputants' reputations?
 NOT at all important 1 2 3 4 5 Very important

6. RELATIONSHIPS: How important to you are relationships (with the other party or third-party stakeholders involved in the dispute)?
 NOT at all important 1 2 3 4 5 Very important

7. ENFORCEABILITY: How important to you is enforceability of the outcome? (For example, do you need it to be enforceable in any particular countries?)
Very important 1 2 3 4 5 **NOT** at all important

8. CONFIDENTIALITY: How important to you is CONFIDENTIALITY of the existence of the dispute itself and any INFORMATION that may need to be exchanged to resolve this process?
 NOT at all important 1 2 3 4 5 Very important

The 8 key drivers that are central to Mundi Mediatores' philosophy to diagnose and design customized processes are:³² (i) costs; (ii) time; (iii) control of outcome; (iv) control of process; (v) reputations; (vi) relationships; (vii) enforceability; and (viii) confidentiality. A proprietary MM-RapiDR™ scoring system is used to provide a consistent, structured, and flexible way of working with one or more disputants to help them.³³

The organisation helps to identify IMI-certified and qualified mediators who not only are experienced, competent and diverse but who are best-suited to each case, possibly working with other ADR-Neutrals (e.g., experts, conciliators and arbitrators). Mundi Mediatores has endorsed the UDPM and the Mediation Green Pledge, seeking to incorporate ESG and SDG standards into its services, working with top ADR experts in its international advisory board. It is able to help large, sophisticated disputants and law firms to diagnose and design bespoke ADR proceedings in large multi-million-dollar disputes, as well as small businesses and entrepreneurs to find cheap and quick solutions. This includes knowing which ADR-Neutrals are comfortable working online, have the right cultural skills, and have the experience and expertise to handle disputes with multinationals, governments or many parties, as well as start-ups.

The parties are encouraged to select mediators not only based on their experience and expertise but also in terms of their cultural “fit” and personalities. This personalized approach is complementary to but significantly different from what case managers in ADR provider centres or administering institutes do: generally working with a predetermined series of rules or lists of preferred ADR-Neutrals.

In addition to helping the parties design and implement optimal ADR processes, working collaboratively with a broad range of ADR institutions and ADR-Neutrals, Mundi Mediatores can help the parties plan a budget to finance their disputes by working with other ADR catalysts like InnovADR.

B InnovADR: ADR funding on a “no settlement, no fee” basis

According to a market research study³⁴ the litigation funding investment market worldwide was valued at US\$ 15.8 billion in 2022. It is projected to grow annually at about 9% per year between 2023 and 2028. This growth is led by growth in

32 They are built on the 5 key drivers identified by the IMI Mixed Mode Taskforce.

33 Assessment of the MM-RapiDR scan, If most of your replies are in:

- 1, 2 or on the left side of the scale: likely best options: arbitration, litigation, mediation
- 4,5 or on the right side of the scale: likely best options; negotiation, or mediation.
- 3 (combined with 2 and 4): likely best options: mixed mode procedures.

Answers in the lower range of the scale (e.g., 1-2 points) can also be combined with answers on the higher end of the scale (4-5 points) to provide mixed mode processes.

34 Globe Newswire, Global Litigation Funding Investment Market is poised to touch USD 24.3 billion by the end 2028, driven by increasing awareness about litigation financing, available at <https://www.globenewswire.com/en/news-release/2023/8/9/2721731/0/en/Global-Litigation-Funding-Investment-Market-is-poised-to-touch-US-24-3-billion-by-the-end-2028-driven-by-increasing-awareness-about-litigation-financing.html> (27 November 2023).

the legal services sector, surges in legal fees, the rising costs of commercial litigation and arbitration, and lucrative reports of new investment opportunities by investing in disputes as a new form of hedge fund arbitrage. As the sector expands and the number of intricate legal cases requiring third party funds will rise, the demand for litigation funding will continue to increase. The surge in legal fees and the appeal of using litigation funding as a revenue source are driving more claimants to seek litigation finance. This growing interest from both disputants and investors is unveiling new avenues for investment opportunities in dispute resolution, contributing significantly to the market's growth. These growing amounts of funds that are investing in litigation, so far have had little impact on ADR save for the field of arbitration. This is because the investment model of these funds usually requires large investments (e.g., a minimum of US\$ 3-5 million and only in very select cases), where investors are willing to back one or more plaintiffs' claims at the expense of the defendants. The interests of these investors are aligned solely with those of the plaintiffs, insofar as they wish to extract as much money as possible from the defendants, have the costs of the litigation they paid for reimbursed, and increase their internal rates of return based on the percentage of damages they will be able to claim out of a tribunal's award. These funds are often closed funds (e.g., 5-7 years) and time-sensitive.

InnovADR³⁵ is a new ADR catalyst based in Switzerland that provides a new model for ADR financing that is very different from litigation funding. Building on key drivers similar to those used by Mundi Mediators, it seeks to help disputants overcome the mediation paradox by adding an additional financial incentive: paying for the costs of the ADR-Neutrals itself, on a "no settlement, no fee" basis, in a way that benefits all of the disputants equally. The goal of ADR funding is to assist all of the parties equally, whether they are defendants or plaintiffs, and not only one party at the expense of another.

Its approach involves first identifying and convening all of the disputants who are essential for resolving a commercial dispute, and enabling diagnostics and process design to occur, but using an automated online process to assist in the early stages of process diagnostics and design. It provides online tools to help disputants consider whether ADR could be good for them, and to design appropriate dispute resolution proceedings (including mixed modes) that the fund will finance, by paying upfront the fees of the ADR-Neutrals the parties have agreed to work with. These can be institutional proceedings as well as ad-hoc. It analyses the likelihood of a case settling and charges only if a case settles. Its fees are capped at 1/3 of the anticipated costs of going to trial, thus ensuring considerable savings for all parties.

While the costs of ADR may be low and the money to be invested in a mediation may not be too difficult to raise, InnovADR helps to overcome many of the psychological barriers that may be preventing earlier use of mediation in many cases. Typical for such obstacles are: (1) the fear of appearing weak or too eager to settle by proposing mediation; (2) the belief that it is premature to seek settlement talks before significant discovery has taken place (e.g., to better assess the strengths and weaknesses of each case before negotiating); (3) overconfidence

35 For more information see www.InnovADR.com (27 November 2023).

in the parties' and their counsel's negotiation skills, and an assumption that mediation is unlikely to add anything when previous attempts to negotiate failed; and (4) that the other parties in a given case are in such bad faith, too stubborn or irrational that mediation will not work. By initiating the process and offering a "no settlement, no fee" service, InnovADR acts as a catalyst to overcome these obstacles, generating trust in the process by putting its money where its convictions lie: the possibility of faster and cheaper access to justice, with better outcomes.

InnovADR's systems allow for cases to be opened by anonymous stakeholders who are not parties to the dispute but are affected by it, as well as parties who wish to "save face" for everyone, for example by treating all of the parties as "respondents" as opposed to "claimants" or "requesting parties". The fund itself contacts and asks the parties confidentially whether they will consider using ADR funding as a way to convene the disputants to discuss their procedural needs and interests early on, in a way that entails no risks or loss of face for any of the parties. The parties can accept InnovADR's invitation conditional on the other disputants agreeing to do so as well. This usually involves hiring a qualified and suitable mediator (e.g., an IMI-qualified/certified mediator) to help in each case. Additional ADR-Neutrals can be brought in to provide expert assessments or to provide an arbitral consent award.

In any event, the interests of the fund are aligned with those of all the parties collectively, as InnovADR only recuperates its costs and can only charge a success fee if all of the parties are satisfied with the settlement they have reached. The fund uses a proprietary online Application Form and Due Diligence Questionnaire to identify the risks of non-settlement, educate the disputants as to their options, and generate an ADR score that automatically calculates what amount of money is likely to be needed, the risk profile of the case not settling and the return on investment to be requested in each case. Working with Mundi Mediators, it can help disputants find the best ADR-Neutrals that are optimal to each case in addition to paying their fees. InnovADR's automated online system includes artificial intelligence (AI) to analyse the likelihood of settlement based on past data and the fund's proprietary scoring system. The application allows new prognosticators and patterns to be detected, which correlate with higher settlement rates, enabling greater integration of new technologies and findings from brain and social sciences, factoring in for cultural preferences and automated personality profiles to help assess how the participants and the ADR-Neutrals may optimally interact and work together to resolve the dispute. By funding ADR proceedings and helping to design bespoke proceedings using optimal ADR-Neutrals, InnovADR can help the disputants build better working relationships, providing incentives for cooperation as opposed to adversarial behaviour based on a "no settlement, no fee" basis that aligns all of the participants' interests while avoiding any conflicts of interest.

C Additional technology and AI Catalysts

Technology and legal tech are continuously on the rise. Many evaluative tools exist and are being used to harness the disruptive powers of AI. According to ChatGPT, several platforms and tools already existed prior to September 2021 to assist disputants and dispute resolution professionals to predict and visualise possible outcomes, negotiate settlements and reach mutually acceptable outcomes. Examples include:

- a) **Brainspace**:³⁶ This e-discovery platform seeks to identify and deliver electronic information that can serve as evidence in legal cases, and by predictive coding and other analytic tools to potentially highlight trends and outcomes in similar previous cases.
- b) **CaseText**:³⁷ This is a legal research platform that uses AI to provide answers to legal queries, predict legal outcomes, and suggest relevant statutes or case law.
- c) **DoNotPay**:³⁸ While primarily known as a „robot lawyer“ to help users with small claims court matters, traffic tickets, and other bureaucratic tasks, it represents a wider trend towards automating legal processes and can potentially be used in the context of other disputes.
- d) **Juro**:³⁹ This platform is more on the contract management side, but it can indirectly contribute to avoiding or settling disputes by providing clarity on contractual terms.
- e) **Kira**:⁴⁰ This is AI software that is primarily used for contract analysis, however by extracting and analysing provisions from contracts rapidly, it can help in due diligence and other transactional work, which can feed into dispute resolution processes.
- f) **Lex Machina**:⁴¹ This software provides legal analytics to predict the behaviours and outcomes in litigation. Lex Machina seeks to analyse the history of judges, lawyers, parties, and to forecast litigation outcomes.
- g) **Litify**:⁴² This platform provides a suite of tools for law firms, including intake, case management, and insights that could inform settlements.
- h) **Picture it Settled**:⁴³ This is a predictive analytics tool that uses data from past negotiation processes to predict the parties' future moves in a financial negotiation. It is specifically designed for negotiations in litigations and commercial disputes and assists negotiators to understand likely trajectories and endpoints, providing visual graphics and planning scenarios.
- i) **Tyler Technologies**:⁴⁴ Initially designed as an ODR platform under the name MODRIA, it has become more of an online mediation/expedited arbitration

36 Reveal, available at <https://www.revealdata.com/brainspace> (27 November 2023).

37 Casetext, available at <https://casetext.com/> (27 November 2023).

38 DoNotPay, available at <https://donotpay.com/> (27 November 2023).

39 Juro, available at <https://juro.com/> (27 November 2023).

40 Kira, available at <https://www.kirasystems.com/> (27 November 2023).

41 Lex Machina, available at <https://lexmachina.com/> (27 November 2023).

42 Litify, available at <https://www.litify.com/> (27 November 2023).

43 Picture it settled, available at <http://www.pictureitsettled.com> (27 November 2023).

44 Tyler Technologies, available at <https://www.tylertech.com/products/online-dispute-resolution> (27 November 2023).

tool. The data it collects can potentially be used for predictive purposes as well.

While it is possible to simply view such platforms as new technologies for resolving disputes, they can also be viewed as ADR catalysts. Each application can be involved in a different way to help overcome any obstacles that may be identified early on. While AI is clearly on the rise including for dispute resolution purposes, its future is more certain when viewed as a tool for catalysing ADR disputes. External counsel may be reluctant to use products that were not designed by them, but they can be integrated into the fold of legal and dispute resolution technologies to address some of the gaps identified by early-stage diagnostics and process design. New augmented and virtual reality (AR/VR) applications may also help track and interpret non-verbal behaviours such as eye tracking, body language, voice monitoring or facial expression software in the context of negotiations. An example is IMOTIONS⁴⁵, a technology which can measure physiological and neural signals to better understand emotional and non-verbal signals during negotiations. It may entail greater use of personality and behavioural predictors that were designed for sales or teambuilding (e.g., CrystalKnows⁴⁶) to assess the probable behaviours of participants or ADR-Neutrals in a conflictual situation and to give advice on how to adapt to the conflict resolution styles of other participants or in the selection of ADR-Neutrals. Other new analytical tools such as MyDRHub⁴⁷ and TRAMM developed by Resolution Resources in Australia⁴⁸ are also suggesting that it may be possible to better predict which cases are likely to settle, and which processes are likely to require adjudicative outcomes. These approaches to early case assessment are seldom used in the private sector. With the rise of AI chatbots, such as ChatGPT, Google BARD, Microsoft BING, Chatsonic etc., important changes can be expected in the ADR landscape, but the industry as a whole tends to lag behind when it comes to embracing changes, despite the possible emergence of more sophisticated catalytic tools in the future. It is incumbent on the ADR community as a whole, however, to keep track of developments in this field and to consider how they may be best used to facilitate access to appropriate forms of justice in faster, cheaper and better ways.⁴⁹

45 IMOTIONS, available at <https://imotions.com/> (27 November 2023).

46 Greg Skloot, Using DISC to Resolve Conflict, available at <https://www.crystalknows.com/blog/resolve-conflict> (27 November 2023).

47 See <http://mydrhub.com/mydrhub> (27 November 2023).

48 Rosemary Howell, Mining Frank Sander's Legacy – Triage And More In A Bold Australian Experiment, Kluwer Blog, available at <https://mediationblog.kluwerarbitration.com/2019/05/22/mining-frank-sanders-legacy-triage-and-more-in-a-bold-australian-experiment/> (27 November 2023).

49 Francois Bogacz/Jeremy Lack, Embrace and integrate relevant new technologies, article 5.2. 5th Key Technology in: Michael Leathes (ed.), *Seven Keys to Unlock Mediation's Golden Age*, mediate.com 2020, available at: <https://mediate.com/5th-key-technology-embrace-and-integrate-relevant-new-technologies/> (27 November 2023); Jeremy Lack/Ana Gonçalves/Daniel Rainey, Take Advantage of ODR's Full Potential, article 5.1. 5th Key Technology, in: Michael Leathes (ed.), *Seven Keys to Unlock Mediation's Golden Age*, mediate.com 2020, available at <https://mediate.com/5th-key-technology-take-advantage-of-odrs-full-potential/> (27 November 2023).

In the meantime, while there is increasing discussion about AI being able to replace judges and arbitrators, it seems that the softer skills required in mediation, which include active listening, effective interpersonal communication, negotiation, and constructive problem-solving, are likely to remain primarily human-associated services, at least for the next two decades. Mediation cannot (yet) be fully converted to algorithms. It is a social, emotional, psychological, and legal process that requires a knowledge of human behaviour, psychology, social and brain sciences, emotions, group heuristics, etc. As a result, mediation is likely to continue to be a process that needs humans.⁵⁰ While AI is likely to enhance ADR, it is unlikely to replace ADR-Neutrals seeking to combine amicable dispute resolution strategies with adjudicative systems, and many promising synergies lie ahead. So, investing in learning mediation skills is a good move to make their business future proof for any dispute resolution professional.

IV Conclusion

Peter Drucker once said the best way to predict the future is to create it. Current developments in the field of ADR indicate certain changes are likely and a new generation of ADR catalysts can help overcome the mediation paradox and provide better access to justice. These include a growing interest in mixed mode dispute resolution processes, greater use of embedded technologies and AI in the diagnostics and design of ADR proceedings, and the use of process facilitators to convene and engage with parties and help design and implement bespoke proceedings that are tailored to the procedural needs and interests of the parties in each case. New ADR catalysts such as Mundi Mediators and InnovADR can work cooperatively to help disputants, their advisors and ADR centres to overcome obstacles to the use of mediation, and to diagnose and design processes using key drivers to identify and select optimal ADR-Neutrals for each case. This includes new ways of funding ADR proceedings, working with all of the parties on a “no settlement, no fee” basis.

While dispute resolution professionals have been slow or reluctant to innovate in the past, a convergence of factors suggest that some of the traditional barriers to ADR will be lowered and overcome, ushering in a new generation of complementary dispute resolution services, tools and software as described in this chapter. They reflect a new, user-centric and catalytic approach to ADR, helping disputants to achieve faster, cheaper and better outcomes that all dispute resolution professionals should be aware of.

50 Francois Bogacz/Jeremy Lack, Embrace and integrate relevant new technologies, article 5.2. 5th Key Technology, in: Michael Leathes (ed.), Seven Keys to Unlock Mediation’s Golden Age, mediate.com 2020, available at <https://mediate.com/5th-key-technology-embrace-and-integrate-relevant-new-technologies/> (27 November 2023).

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