

5-15-2020

## Global Dispute Resolution Conference: Reflections, Trends, and Continued Development

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### Recommended Citation

Alexine Carr and Sukhsimranjit Singh, *Global Dispute Resolution Conference: Reflections, Trends, and Continued Development*, 20 Pepp. Disp. Resol. L.J. 252 (2020)

Available at: <https://digitalcommons.pepperdine.edu/drlj/vol20/iss3/1>

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# GLOBAL DISPUTE RESOLUTION CONFERENCE: REFLECTIONS, TRENDS, AND CONTINUED DEVELOPMENT<sup>1</sup>

## I. INTRODUCTION

The Global Dispute Resolution Conference brought together scholars, students, attorneys, and professionals from across the country. Co-hosted by Pepperdine's Straus Institute for Dispute Resolution and Prince Mohammad Bin Fahd University, the event drew perspectives from a wide range of cultures, areas of ADR, and career experiences. Grouped into two full days with distinct focuses, the conference covered topics from commercial ADR to the significance of history, culture, and faith. To open the discussion, Professor Muamar Salameh of PMU spoke to the audience on the importance of accepting the global differences in legal systems within international dispute resolution. His remarks were followed by Pepperdine's President Jim Gash, who highlighted the need for compassion and actively willing the good *of* the other *for* the other as global parties work together to find common ground. This paper provides highlights of the major dispute resolution topics and trends addressed throughout the conference, as well as key takeaways for the continuous development of the field.

## II. TOPIC ONE: ASCENDING TOGETHER: A VISION OF GLOBAL COLLABORATION AND COEXISTENCE

To maintain legitimacy, the dispute resolution field must be mindful of a range of biases. The Conference opened with an intentional discussion on how often

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<sup>1</sup> Co-authored by Alexine Carr (MPP Candidate, Pepperdine University) and Sukhsimranjit Singh (Managing Director, Straus Institute for Dispute Resolution and Associate Professor of Law and Practice, Pepperdine University)

ignored biases are to the world of dispute resolution.<sup>2</sup> The first category of these biases is inward focused, involving the *unconscious bias* present in dispute resolution when working with parties from different faiths and cultural heritages.<sup>3</sup> The second bias is outward focused, concerning preconceived notions held by legal professionals and clients alike about the consequences of resolving a conflict outside of the conventional court system.<sup>4</sup>

### A. *Unconscious Bias*

Maintaining open-minded and culturally fluent ADR professionals is critical in today's globalized world. Unfortunately, we learn that even today, the ADR profession lacks diversity.<sup>5</sup> Challengingly, when working across international borders, a sense of an in/out group or particular social belonging may influence both procedure and outcome. In the case of arbitration, failure to be mindful to the unique cultural circumstances present can risk a decision that disadvantages the party an arbitrator's biases disfavor.<sup>6</sup> Across dispute resolution literature, studies of bias have focused on gender, race, nationality, and social class, all themes woven throughout the conference's presentations and Q&A dialogue.<sup>7</sup> Though connotated negatively, it must be noted that biases are fundamentally a function of the human faculty to reason and are thus inevitable.<sup>8</sup> It is a common misconception that because attorneys and ADR professionals are well-educated individuals, unconscious bias is easily retractable.<sup>9</sup> Rather, minimizing the risk of unconscious bias takes active awareness and self-reflection.<sup>10</sup> Consequently, framing unconscious biases as "blindness" that arbitrators can work to acknowledge recognizes the challenge while contributing to a more productive conversation.<sup>11</sup>

<sup>2</sup> Ransie Howell, JAMS Director of International Relations, first introduced the idea of the lack of training in implicit bias to the Conference. Mr. Howell is pursuing his Ph.D with focus on implicit bias from the University of Sussex Business School.

<sup>3</sup> Cayla R Teal et al., *Helping Medical Learners Recognise and Manage Unconscious Bias Toward Certain Patient Groups*, 46 MED. EDUC. 80, 80 (Jan. 2012) ("For the last 30 years, developments in cognitive sciences have demonstrated that human behaviour, beliefs and attitudes are shaped by automatic and unconscious cognitive processes.").

<sup>4</sup> See generally John Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973).

<sup>5</sup> F. Peter Phillips, *Diversity in ADR More Difficult to Accomplish than First Thought*, 15 DISP. RESOL. MAG. 14 (2009). See also Marvin E. Johnson & Homer C. La Rue, *The Gated Community, Risk Aversion, Race, and the Lack of Diversity in Mediation in the Top Ranks*, 15 DISP. RESOL. MAG 17 (2009).

<sup>6</sup> Karen Mills, *Cultural Differences and Ethnic Bias in International Dispute Resolution: An Arbitrator/Mediator's Perspective*, 4 (2008) TRANSNAT'L DISP. MGMT. (July 2008).

<sup>7</sup> See *id.*; sources cited *supra* note 5.

<sup>8</sup> Karen Steinhauser, *Everyone is a Little Bit Biased*, AM. B. ASS'N (Mar. 16, 2020), [https://www.americanbar.org/groups/business\\_law/publications/blt/2020/04/everyone-is-biased/](https://www.americanbar.org/groups/business_law/publications/blt/2020/04/everyone-is-biased/).

<sup>9</sup> Lucy Reed, *The Psychology of the Decision-Making Process: Comments on Conscious and Unconscious Bias*, 17 ASIAN DISP. REV. 205 (2015).

<sup>10</sup> *Id.*

<sup>11</sup> Edna Sussman, *Arbitrator Decision Making: Unconscious Psychological Influences and What You Can Do about Them*, 24 AM. REV. INT'L ARB. 487 (2013).

Three categories of blinders are most important to consider, particularly in arbitration where the arbitrator's decision has direct consequences: informational blinders, cognitive blinders, and attitudinal blinders.<sup>12</sup> *Informational* blinders refer to the phenomenon that once an arbitrator is made aware of potential evidence, it may profoundly alter their decision, even if the evidence is deemed unreliable.<sup>13</sup> *Cognitive* blinders impact the way arbitrators perceive information, from how descriptions of individuals are framed to the influence of anchoring numbers in settlements awarded.<sup>14</sup> *Attitudinal* blinders are the byproduct of an arbitrator's cultural upbringing, and may result in decision making not based on fact, but rather on consistency with the arbitrator's beliefs and expectations.<sup>15</sup> In any of these situations, a better outcome may be achieved by being taught to look for blinders and re-consider how they may impact the arbitrator's mindset, particularly in situations involving cross-cultural disputes.

While strides have been made in the creation of diversity training programs, such as the American Arbitration Association's company-wide training curriculum<sup>16</sup> now required of all AAA employees, it is yet to be determined what the long-term implications of such programs will be. Because reducing the impact of bias is a continuous process requiring constant commitment of individual arbitrators, ongoing initiatives may be more impactful.

In addition to increasing diversity programming for those already in the field, it is worth considering efforts to diversify the field itself. For example, in a study of all ICCA arbitrators, it was found that 82.4% were men and were 17.6% women.<sup>17</sup> Similarly, the AAA roster presently includes less than 25% women and minorities.<sup>18</sup> As the ADR field continues to develop, it is important to similarly develop the professional base from which it stems.

### B. Bias Toward ADR

With ADR as a field that grows at different speeds in various international areas, changing the mindsets of both courts and clients who may benefit from the services it

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<sup>12</sup> Edna Sussman, *What Lurks in the Unconscious: Influences on Arbitrator Decision Making*, 32 ALTERNATIVES 149, 149–155 (2014).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Our Shared Commitment to Diversity and Inclusion*, AM. ARB. ASS'N, <https://www.adr.org/DiversityInitiatives> (last visited June 22, 2020).

<sup>17</sup> Susan D. Franck et al., *The Diversity Challenge: Exploring the Invisible College of International Arbitration*, 53 COLUM. J. TRANSNAT'L L. 429 (2015).

<sup>18</sup> *Our Shared Commitment to Diversity and Inclusion*, *supra* note 16.

offers becomes essential.<sup>19</sup> ADR is not to be seen as a competitor to the conventional court system, but rather as a compliment.<sup>20</sup>

Courts and ADR professionals alike must work together to ensure those seeking legal solutions are fully aware of the range of procedures available to them. In so doing, there is mutual benefit.<sup>21</sup> For the court systems, willingness to pursue and encourage ADR reduces a backlog of cases, meaning parties can have their conflicts addressed in a timelier fashion.<sup>22</sup> It helps court systems focus on cases that can't be resolved amicably.<sup>23</sup> For ADR systems, this offers an increased opportunity to prove through action that dispute resolution is a practical, legitimate, and useful means of solving problems.<sup>24</sup> ADR is a means where parties can also gain satisfaction by preserving relationships.<sup>25</sup>

Illustrated in a simple analogy, Dr. Mimi Zou presented the paradox in a gravitation toward conventional legal methods. In the United States, people tend to prefer stoplights to roundabouts. One might infer that this is a result of greater usage of stoplights, leading to familiarity which shapes preference. In terms of reducing accidents and improving traffic flow, it turns out that roundabouts are actually more effective. Similarly, though people may be inclined to favor litigation out of familiarity or a perceived greater legitimacy, arbitration or mediation may offer better outcomes.

Encouraging the use of dispute resolution is partially contingent upon developing relationships different stakeholders in conflict. One of them is clients. Another is the court system, while others are the Judiciary and the legal fraternity.<sup>26</sup> Even for international firms, having a physical presence that allows for relationship building and development of cultural fluency can be beneficial.<sup>27</sup> Dr. Hamed Merah, GDR Conference Panelist and CEO of the Saudi Center for Commercial Arbitration (SCCA), spoke on the importance of cultural centers that can help bridge the gap between local needs and international relationships. Within his role at SCCA, Dr. Merah has worked to develop institutional ADR within Saudi Arabia through a series of initiatives designed to make arbitration attractive to both foreign investors and

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<sup>19</sup> For example, the push for alternative dispute resolution mechanisms to become more widely used in the U.S. adjudication system began in the 1970s—though arbitration and mediation already existed prior to this.

Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 333–35 (2005).

<sup>20</sup> *Id.* at 329.

<sup>21</sup> *Why Do Courts Use ADR?*, RESOL. SYS. INST., <https://www.aboutrsi.org/resource-center/why-do-courts-use-adr> (last visited June 23, 2020).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 108–26 (2002).

<sup>27</sup> See, e.g., *Physical vs. Mobile: Should Your Law Firm Have a Physical Presence?*, U.S. LITIG. SUPPORT SERV. (Sep. 20, 2017), <https://uslitigationsupportservices.com/physical-vs-mobile-law-firm-physical-presence/>.

national businesses. Over the course of 10 years, allowing for gradual development and shifts in perspectives, SCCA strives to reduce the cases filed to judicial facilities.

From a global perspective, there is reason to be optimistic about the practice of ADR. Ms. Kimberly Taylor, Esq. Senior Vice President and Chief & Operating Officer noted that JAMS had over 10,000 mediations and 4,000 arbitrations around the world. This optimism extends to ADR in emerging countries, as it is easier to implement in the absence of legacy systems.

### III. TOPIC TWO: THE EVOLVING WORLD OF COMMERCIAL DISPUTE RESOLUTION

Dispute resolution continues to evolve globally—from international initiatives like the Singapore Convention<sup>28</sup> to the introduction of highly sophisticated technology and artificial intelligence. Covered by experts in both realms, the GDR Conference described the relevance of present initiatives and future objectives to align modern ADR with the demands of the commercial disputes.

#### A. *Singapore Convention*

An important discussion at the conference addressed the recent Singapore Convention, which represented a victory for the legitimate recognition of mediation in the same way the New York Convention did for arbitration.<sup>29</sup> Interestingly, though there has been a push for the development of ADR across Europe, few European nations signed the convention. Of the nations comprising the 46 total signatures, 24 were from Asia.<sup>30</sup> Panelist Aloysius Goh, CEO of *Sage Mediation*, related the conversation to the innovative, hyper-competitive, and young workforce in Asia—there is a rapidly growing middle class and space for alternative dispute resolution. Though many Asian nations were in support of the convention, they serve as evidence that the method of mediation must take into account cultural preferences.<sup>31</sup> Asian culture tends to value the long-term relationships of the parties over monetary compensation and prefers a non-adversarial approach. Straus Institute's Associate Dean, Mr. Thomas Stipanowich, echoed this by encouraging a focus on a deliberate and reflective approach to mediation as opposed to the present

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<sup>28</sup> U.N. Comm'n on Int'l Trade Law, U.N. Convention on International Settlement Agreements Resulting from Mediation, UNCITRAL (Mar. 2019), [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation\\_convention\\_v1900316\\_eng.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf).

<sup>29</sup> See Ashutosh Ray, *Is Singapore Convention to Mediation What New York Convention is to Arbitration?*, KLUWER ARB. BLOG (Aug. 31, 2019). Latest information on the Convention can be obtained at <https://www.singaporeconvention.org/> (last visited April 11, 2020)—including the video proceedings of the entire convention.

<sup>30</sup> See Eunice Chua, *The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution*, 9 ASIAN J. INT'L L. 195 (July 2019).

<sup>31</sup> See Marc Galanter & Jayanth K. Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy in India*, 55 HASTINGS L.J. 789 (2004).

structure-oriented focus. He also reminded the audience that ADR does not always fit into one bucket; multiple approaches in conflict management ranging from “litigation” to “arbimmediation” were discussed.<sup>32</sup>

The Singapore Convention was an important step in raising awareness about international mediation.<sup>33</sup> At present, it opens a dialogue for examining current mediation techniques and trends. *Does the trend toward keeping cases in caucus align with the goals of mediation?* This question was asked of a panel with Professor Lela Love, Director, Benjamin N. Cardozo Dispute Resolution Program. Professor Love referred to this practice as the “death of dialogue,” stating that if one does not get the parties involved together, the true essence of mediation is lost.<sup>34</sup> The panel discussed that a possible explanation for this phenomenon lies with the perception held by some lawyers that a caucus will “get the deal done,” but statistically, there is no significance between the ability of a caucus to expedite a case over a dual session approach.<sup>35</sup> A joint session may be preferable for achieving a lasting solution.

### B. Technology and AI

Undoubtedly, technology is transforming the way the legal field functions. In this light, the ability of ADR to operate outside of the conventional court system offers tremendous leeway for integrating new technological methods.<sup>36</sup> Through the use of blockchain technologies such as *smart contracts* and *distributed ledgers*, ADR practitioners have more opportunity than ever to use technology in the creation of an agreement algorithmically compliant with the facts of a dispute.<sup>37</sup> In such an application, the component of human connection between the neutral and each party remains central, but the fallibility of human reason is supplemented by tools to track and prioritize the process.<sup>38</sup>

Under the umbrella of AI, two primary branches are relevant to dispute resolution. The first, *knowledge-based systems*, are programmed to grasp reason deductively through information in the context of coded rules.<sup>39</sup> The second, *machine learning*, is an inductive form of AI capable of deriving conclusions without

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<sup>32</sup> See Thomas J. Stipanowich & Veronique Fraser, *The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay between Mediation, Evaluation and Arbitration in Commercial Cases*, 40 *FORDHAM INT'L L.J.* 839 (2017).

<sup>33</sup> See Ray, *supra* note 29.

<sup>34</sup> Professor Love discussed the need for the training to listen. See Lela P. Love, *Training Mediators to Listen: Deconstructing Dialogue and Constructing Understanding, Agendas and Agreements*, 38 *FAM. & CONCILIATION CTS. REV.* 27 (Jan. 2000).

<sup>35</sup> See Gary L. Welton, Dean G. Pruitt & Neil B. McGillicuddy, *The Role of Caucusing in Community Mediation*, 32 *J. CONFLICT RESOL.* 181 (Mar. 1988).

<sup>36</sup> See Main, *supra* note 19, at 342.

<sup>37</sup> Jeremy Barnett & Philip Treleaven, *Algorithmic Dispute Resolution—The Automation of Professional Dispute Resolution Using AI and Blockchain Technologies*, 61 *COMPUTER J.* 399 (Mar. 2018).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

explicit programming.<sup>40</sup> In both instances, it is predicted that the integration of powerful AI will not only yield more accurate judicial decisions, but it will significantly expedite the time it takes such decisions to be reached.<sup>41</sup> When conflicts can be resolved quickly, costs for the parties decrease, and ADR professionals are better positioned to help more individuals.

Paul Rafferty, Esq., an accomplished California litigator with experience in AI and autonomous vehicles, spoke on the necessity of keeping ADR ahead of the game as technology advances. In describing a hypothetical situation whereby two autonomous vehicles collide, causing the death of a passenger, Rafferty challenged the group to consider the legal implications of what happens when a human life is lost, but no one is to blame. With this scenario, the AI technology itself could present rationale for the calculation it made that unfortunately resulted in and/or failed to prevent the collision. In future years, such situations will not seem as distant future realities. Thus, it is prudent to consider them in present discourse. Additionally, it is worth noting that science in the new age of ADR is not limited to AI. The ability to utilize brain technology for the purpose of coding human emotion and advising proper responses during arbitrations and mediations is nearing a reality.

#### IV. TOPIC THREE: CHALLENGES AND OPPORTUNITIES IN COMMERCIAL ARBITRATION AND COMMERCIAL MEDIATION

In order for ADR to have a lasting influence, particularly in the policy sphere, it is essential that governments view it as legitimate. This can be more difficult in countries like Saudi Arabia where international standards do not align with Sharia law.<sup>42</sup> In areas where ADR does align with policy, it may be useful for cases that involve time-sensitive issues. In any situation, tailoring arbitration to the country in which it is practiced is a necessary step. While countries do not necessarily need to change their arbitration methods, it is essential that parties get what is advertised in order to preserve the integrity of the practice. Dr. Mimi Zou, the Fangda Career Development Fellow in Chinese Commercial Law at The University of Oxford, reiterated that arbitrators must use their experience to focus attention on designing an efficient and effective process early on.

Because different notions of justice can complicate the success of international mediations, determining how justice is to be defined is prudent. Frequently, justice is thought of as having both philosophical and economic definitions, both of which factor into a working legal definition of justice.<sup>43</sup> From a philosophical standpoint, it seems contradictory that justice as a concept is malleable; one argument posed during the conference asserted that the definition of justice can change. This viewpoint may

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> MOHAMED M. KESHAVJEE, ISLAM, SHARIA & ALTERNATIVE DISPUTE RESOLUTION: MECHANISMS FOR LEGAL REDRESS IN THE MUSLIM COMMUNITY 6 (2013).

<sup>43</sup> WOJCIECH SADURSKI, GIVING DESERT ITS DUE: SOCIAL JUSTICE AND LEGAL THEORY 9 (1985).



be challenged by asking: does the concept of justice itself change, or does the means by which it is achieved change? A significant distinction, this is important to consider because justice is perceived as a fundamental human right. If a fundamental right can change in its meaning, it seems to not really be fundamental at all.

The practices of mediation and arbitration face some logistical concerns. Conversely, they also offer several advantages. Firstly, without including mediation in pre-dispute arbitration clauses, it may be a challenge to organize the parties. Secondly, it may be difficult to reconcile the confidentiality of mediation or arbitration with the push for transparency in investor-State disputes. While such cases have previously been handled under the conditions of privacy associated with commercial arbitration, in recent years the United Nations Commission on International Trade Law (UNCITRAL) has enacted new standards for transparency in treaty-based, investor-State disputes.<sup>44</sup> Additionally, for arbitration, poor case administration by the institution may prove to be a challenge. Instead of spending considerable amounts of time on procedural issues, Arif Ali, co-chair of Dechert's International Arbitration Practice, noted that arbitrators should focus on clarifying evidencing issues. One particular area which showcases the benefits of mediation is the entertainment industry. Because the shelf-life of many entertainment disputes is short, mediation provides a means to finding an efficient solution.<sup>45</sup> Beyond the efficiency of using ADR to resolve entertainment disputes, arbitration offers several practical benefits over traditional legal methods.<sup>46</sup> Notably, an ADR approach affords the parties greater confidentiality and opportunity to select a neutral with niche expertise.<sup>47</sup> This is valuable because cases taken to court result in a public record (not the case in arbitration), and it can prove time consuming to educate judges and jurors on the nuances of a complex entertainment field for which they have little to no familiarity.<sup>48</sup>

## V. TOPIC FOUR: THE EVOLUTION OF DISPUTE RESOLUTION IN THE US AND SAUDI ARABIA

### A. *Saudi Arabia*

International arbitration has made strides in Saudi with the passage of the 2012 Saudi Arabian Arbitration Law, creation of the Saudi Center for Commercial

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<sup>44</sup> N. Jansen Calamita & Ewa Zelazna, *The Changing Landscape of Transparency in Investor-State Arbitration: The UNCITRAL Transparency Rules and Mauritius Convention*, 2016 AUSTRIAN Y.B. INT'L ARB. 271 (2016).

<sup>45</sup> Anveksha Padhye, *Mediation as an Effective ADR Mechanism*, MEDIATE (Mar. 2019), <https://www.mediate.com/articles/padhye-mediation-effective.cfm>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Jeffrey Grubman, *Taking Advantage of ADR in the Entertainment Industry*, MEDIATE (June 2013), <https://www.mediate.com/articles/GrubmanJbl20130624.cfm>.

Arbitration, and signings of both the New York and Singapore Conventions.<sup>49</sup> Next steps will involve continuing to build credibility, developing outlets for mediation, and defining boundaries/values between the nation and the international market. Within the nation, a mediation equivalent known as *Sulh* is both accepted and widely practiced, having deep roots in Islamic faith-based tradition.<sup>50</sup> Because of this religious tie and emphasis on using *Sulh* to help parties realign with values of the faith, extending use to the international community will involve adaptation when used between parties of different faiths.<sup>51</sup> The Saudi Center for Commercial Arbitration, established in 2014, has a close partnership with the ICDR and a roster of over 200 arbitrators of different specialties from around the world.<sup>52</sup> In January of 2019, a royal decree was passed to encourage governmental disputes to be handled via arbitration with prime minister approval.<sup>53</sup> Because prior Saudi laws date back 88 years and the new arbitration law has been in place for less than a decade, it will take time to both practically and culturally change the system.<sup>54</sup>

When panelist and CEO of SCCA, Dr. Hamed Merah, visited Vienna and noticed an absence of Arab students at the International Commercial Arbitration Moot due to a language barrier, he took the initiative of introducing a new moot arbitration in his students' native language. Not only does this show initiative on behalf of Saudi citizens to make arbitration accessible to those who wish to practice, but it brings to light a barrier that Saudi faces on an international level. To make international arbitrations a reality, it is likely that an emphasis on streamlining spoken languages will be necessary. In fact, linguistic diversity is one of the largest challenges to implementing international arbitration, as parties may either not speak the same language or have the same level of proficiency in a given language.<sup>55</sup> From a local lens, developing ADR opportunities in different languages can help to regionalize mediation.

Though arbitration in Saudi Arabia has developed significantly as of recent, dilemmas in deciding how female and non-Muslim arbitrators should be viewed by the Saudi judicial system remain unsolved.<sup>56</sup> Dr. Amer Tabbara raised the question:

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<sup>49</sup> Faris Nesheiwat & Ali Al-Khasawneh, *The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia*, 13 SANTA CLARA J. INT'L L. 443, 444, 465 (2015); see Ray, *supra* note 29.

<sup>50</sup> Doron Pely, *Where East Not Always Meets West: Comparing the Sulha Process to Western-Style Mediation and Arbitration*, 28 CONFLICT RESOL. Q. 427 (2011).

<sup>51</sup> *Id.*

<sup>52</sup> *About SCCA*, SAUDI CTR. FOR COM. ARB., <https://sadr.org/about-scca?lang=en> (last visited June 23, 2020).

<sup>53</sup> Ibrahim Amir, *Arbitrating with Saudi Governmental Bodies: Modifying the 56-Year-Old Practice*, KLUWER ARB. BLOG (Feb. 11, 2020), [http://arbitrationblog.kluwerarbitration.com/2020/02/11/arbitrating-with-saudi-governmental-bodies-modifying-the-56-year-old-practice/?doing\\_wp\\_cron=1592942716.2894859313964843750000](http://arbitrationblog.kluwerarbitration.com/2020/02/11/arbitrating-with-saudi-governmental-bodies-modifying-the-56-year-old-practice/?doing_wp_cron=1592942716.2894859313964843750000).

<sup>54</sup> *Id.*

<sup>55</sup> Fernando Dias Simões, *The Language of International Arbitration*, 35 CONFLICT RESOL. Q. 89–109 (Jan. 2017).

<sup>56</sup> Thomas R. Snider et al., *Commercial Arbitration: Saudi Arabia*, GLOBAL ARB. REV., <https://globalarbitrationreview.com/jurisdiction/1005806/saudi-arabia> (last updated May 21, 2019).

Is Saudi better off to align with international standards, or to continue with their existing religious law that will result in the exclusion of many people and potentially limit opportunities for international arbitration? It follows that the international ADR field should be prepared to answer: Is a fundamental part of ADR lost when restrictions based on gender and religion are imposed? Striking a balance between appropriate cultural respect and desire for a consistent international standard is an important ethical consideration that must be made as ADR continues to evolve.

### *B. United States*

While the market for ADR is now successful, previous legislative complications posed problems for its credibility.<sup>57</sup> Maria Chedid, Partner at Arnold & Porter, spoke on her five-year process spent restoring the value of California as a seat for international arbitrations after California's Birbrower decision left uncertainty as to whether foreign individuals not admitted to the State Bar of California could legally arbitrate in the state.<sup>58</sup> In July of 2018, Senate Bill 766 was incorporated into California's Code of Civil Procedure, ruling that: "...an individual who is not admitted to practice law in California but who is a member in good standing of a recognized legal profession in the United States or a foreign jurisdiction and is subject to effective regulation and discipline by a duly constituted professional body or public authority to provide legal services in an international commercial arbitration or related proceeding" is permitted.<sup>59</sup>

## VI. TOPIC FIVE: LATEST DEVELOPMENTS IN CROSS-BORDER MEDIATION

To ask how cross-border mediation has developed in recent years, it is first essential to clarify what is meant by "cross-border." For panelist and Hamline School of Law professor Ken Fox, a conflict crosses a border when at least one of the parties is domiciled in another country. He views it as something both legal and cultural and sees it prudent to develop a market for ADR which benefits nations, parties, and ADR specialists alike. For nation states with an interest in preserving judicial sovereignty, an established system of ADR promotes legitimacy in the legal process.<sup>60</sup> For parties who may use ADR, this protects them from becoming subjected to unknown standards or unpredictable processes.<sup>61</sup> To develop this sort of system, a "carrots and sticks" approach may be necessary, at least in the initial

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<sup>57</sup> Dixon Q. Dern, *California's Birbrower Decision Is Laid to Rest*, AM. B. ASS'N (Oct. 25, 2018), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2018/california-birbrower-decision-is-laid-to-rest/>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See Main, *supra* note 19, at 355–56.

<sup>61</sup> *Id.* at 356–57.

phases.<sup>62</sup> Essentially, this means using both rewards and punishment to achieve the end goal.<sup>63</sup>

The EU has a 2008 Mediation Directive to promote mediation, though this directive is not mandatory.<sup>64</sup> Instead, the Directive is a voluntary agreement formally implemented by twenty-six EU Member States aiming to increase mediation awareness, promote mediations in cross-border disputes, and supply a congruent framework between EU Member States.<sup>65</sup> Some countries, such as Italy, have resisted implementation out of fear on behalf of attorneys worried mediation might act as a threat to their profession.<sup>66</sup> The Singapore Convention also excludes court-mandated mediation.<sup>67</sup> To clarify, mediation acts as an umbrella term; it encompasses a multitude of approaches. Fox believes this matters because with broad interpretation comes an injection of a mediator's own social views about conflict. When social views diverge, mediation risks neutrality as its goals will naturally align more closely with one party over the other. It is also worthwhile to note that while mediations focus on conflict in the past, for parties it is a struggle of the present. At the center of mediation is party self-determination.<sup>68</sup> To truly represent the interests of the parties, it is important to know whether the culture of each party sees this self-determination as an individual or community matter.<sup>69</sup>

## VII. TOPIC SIX: FAITH, HISTORY, CULTURE, AND DISPUTE RESOLUTION

In any discussion involving cross-cultural interactions between people, multiculturalism offers an opportunity for multidimensional dialogue. Effective ADR practitioners may begin by working to develop an understanding of other cultures, as well as how their own culture is viewed through the lens of others. According to Dr. Sukhsimranjit Singh, Managing Director of the Straus Institute, this understanding often comes with the willingness to first step out of one's own culture. In some ways, this conference was an opportunity for those involved to get out of their own culture through observation, listening, and active discourse.

During a conversation on faith, Arif Ali used a Muslim saying which translates to *may peace be unto you*. In using this idea as moral navigation in ADR, it may be said that the objective of a case is in peace, and the means is in forgiveness. It also

<sup>62</sup> Ray Williams, *A New Look at the "Carrot and Stick" Approach to Motivation*, FIN. POST (Nov. 25, 2013), <https://business.financialpost.com/executive/careers/a-new-look-at-the-carrot-and-stick-approach-to-motivation>.

<sup>63</sup> *Id.*

<sup>64</sup> Steven Friel & Christian Toms, *The European Mediation Directive—Legal and Political Support for Alternative Dispute Resolution in Europe*, 2 BLOOMBERG L. REP. – ALTERNATIVE DISP. RESOL. (2011).

<sup>65</sup> *Id.*

<sup>66</sup> Ashley Feasley, *Regulating Mediator Qualifications in the 2008 EU Mediation Directive: The Need for a Supranational Standard*, 2011 J. DISP. RESOL. 333 (2011).

<sup>67</sup> See Ray, *supra* note 29.

<sup>68</sup> Jacqueline Nolan-Haley, *Self-Determination in International Mediation: Some Preliminary Reflections*, 7 CARDOZO J. CONFLICT RESOL. 277, 278–80 (2005).

<sup>69</sup> *Id.*

involves a certain inclusiveness between the principle and the procedure.<sup>70</sup> A statement was made that we gain success by seeing the success of others, speaking to the importance of collaboration and the mutually beneficial relationships it can produce.

Dr. Singh posed the questions, “Who are we when we go home? Who do we say we are?”<sup>71</sup> Answering these questions genuinely and with authenticity can help construct a clearer identity from which to handle conflict. It is at the boundary between the familiar and the unknown that we come to know ourselves as people. Our arrival at this intersection is a place we are primed to encounter difference, and so too locate our identities. Without this sense of rootedness, resolving external conflict poses a challenge.

The conference audience was encouraged to place the nuances of stories over those of facts. While in principle, a story is telling of a person’s viewpoint, there is a case to be made that the two are equally important and must be considered as a collective.<sup>72</sup> Facts inform stories, and stories inform facts.<sup>73</sup> The relationship between the two is endlessly tangled, and to prioritize one over the other is to consciously leave out an element of a narrative which may alter the construction of the greater picture.<sup>74</sup> Another piece of advice offered at the conference was to let others fill the space around you instead of filling it yourself. This is not only a feature of humility, but a willful decision to the commitment to noticing the things that others might look past.

In a story told by Peter Robinson, the idea that personal connection and willingness to offer kindness to others can have beneficial outcomes became clear. This story features the grocery store, Sprouts, and a decision made to send a kind apology and a gift card after receiving notice that customers had incurred minor injuries in the store. After this policy was implemented, a dramatic drop in litigation rates occurred. After telling the story and connecting it to ADR, Robinson asked the conference quorum: “do you want to maximize your fees, or your relationship with that person?” Extending beyond ADR, this mindset is an opportunity to consider how our words and actions may impact relationships and professional goals in the long term.

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<sup>70</sup> *Id.*

<sup>71</sup> Dr. Singh discusses these questions in his professional identity TEDx Talk: Made in India. TEDx Talks, *Made in India | Sukhsimranjit Singh | TEDxRGNUL*, YOUTUBE (Aug. 20, 2018), <https://www.youtube.com/watch?v=KdfLzZi7s6k>.

<sup>72</sup> See, e.g., Society for Personality and Social Psychology, *Facts and Stories: Great Stories Undermine Strong Facts*, PHYS.ORG (Aug. 19, 2019), <https://phys.org/news/2019-08-facts-stories-great-undermine-strong.html>.

<sup>73</sup> *See id.*

<sup>74</sup> *See id.*

### A. *Is conflict a bad thing?*

In a discussion on the implementation of compulsory mediation within Italy and Sweden, Dr. Federico Fusco posed the question, “Is conflict really a bad thing?” From this perspective, Fusco explored how differences in social value (which are prone to trigger conflict) are determinants of whether mandatory mediation will be successful. Ultimately, his assessment offers rationale for why compulsory mediation succeeded in Italy but fell short of expectations in Sweden.

In one sense, Fusco’s assertion that conflict perhaps *isn’t* bad insofar as it is used as a lens through which to determine what different people care about is reasonable. Put simply, conflict is a value-identifier. In another sense, the denotation of the word *conflict* assumes a point at which different values clash, complicating striking a balance between that which is important to each party. Thus, perhaps what truly matters is found in how that clash, often a difference in social value, is handled and ultimately resolved.

The idea that conflict may be a force for growth and personal development is explored in a paper on the unexpected benefits of conflict resolution by Susan Raines.<sup>75</sup> In a study conducted through dispute resolution professionals, Raines finds that out of conflict came “broadened thinking, increased awareness of the needs and perspectives of others, and improved willingness to address hard issues” for the neutral.<sup>76</sup> Additionally, the professionals studied reported profound shifts in their clients’ outlooks and ability to move forward with their lives when afforded the opportunity to reconcile disagreements.<sup>77</sup> Consequently, a productive process for resolving conflict is not only beneficial for clients, but also for ADR professionals. Conflict offers an opportunity to recognize and develop an appreciation for social values, while conflict resolution helps these social values to peacefully co-exist.

## VIII. CONCLUSION

The Global Dispute Resolution Conference proved that there is room for a diverse range of thinkers and approaches to conflict resolution within the global ADR sphere. Precisely, it is this diversity of thought and approach which is needed to continue developing the field both internationally and from within. Through mindfulness of the obstacles, biases, national values, history, technology, and other factors pose in the creation of an effective cross-border ADR platform, dispute resolution professionals may continue to offer a valuable alternative to litigation. Not to be viewed as a detriment, but rather as an opportunity, the development phase

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<sup>75</sup> Susan S. Raines, *Becoming the Change We Wish to See: The Unexpected Benefits of Conflict Resolution Work*, 35 CONFLICT RESOL. Q. 319 (Jan. 2018).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

of international commercial mediation and arbitration allows for strategic innovation and establishment of an effective standard.