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## One-on-One With Deborah Masucci, Chair of the International Mediation Institute on the Global Pound Conference

*Deborah Masucci (https://www.debmasucciadr.com/)is a full time arbitrator and mediator appointed in over 125 matters including employment, debt recovery, breach of contract and professional fee disputes. She is a global expert in alternative dispute resolution and dispute management, with emphasis on strategic and effective use of mediation and arbitration.*

**What is the Global Pound Conference Series?**
In 2014, the International Mediation Institute (IMI) determined that there was a need for actionable data on what users of mediation, arbitration or other dispute resolution services need from the processes. In fact, every alternative dispute resolution conference was primarily populated with mediators and arbitrators talking to each other but very little corporate/user participation. As a result, IMI launched the Global Pound Conference Series (GPC) in 2015 to determine the views of stakeholders in commercial dispute resolution services: users, providers of dispute resolution services – mediators, arbitrators, and judges and ministries of justice – as well as academics. The GPC first wanted to elicit views on the types of services currently being provided, whether the services met the disputants' needs and how they saw the future of the field.

**Where did the name Global Pound Conference come from?**
The series was named to honor Roscoe Pound who was a reforming dean of Harvard Law School. He convened the original Pound Conference held 40 years ago to address the causes and dissatisfaction with the administration of justice in the United States. The initial Pound Conference led to the establishment of Open Door Courthouse Programs and eventually the boom of mediation. The GPC Series was meant to expand its focus from domestic to global access to justice.

**How many events were held and where were they held?**
There were 28 events in 24 countries plus online voting for people who were not able to attend an event in person. The events were disbursed geographically from North America, Africa, Asia, the Middle East, Western Europe and Central/South America.

**What information was gathered?**
There were four categories of questions. The first series of questions asked what users want and need from the dispute resolution and management processes. The second asked whether ADR processes met these expectations. The third sought information on how the processes can be improved, and the fourth asked for actionable direction and who should be responsible for making the action a reality.

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# U.S. Supreme Court Holds That Employers Can Enforce Class Action Waivers in Employment Agreements

*By Karl S. Myers*

In a decision that could significantly alter the employment agreement landscape, the United States Supreme Court recently held in *Epic Systems v. Lewis* that class action waivers in such agreements are enforceable.

The plaintiffs in *Epic* were employees who signed employment agreements providing that employee-employer disputes had to be resolved in individualized arbitration proceedings – i.e., "one-on-one" arbitration. Class or collective actions by a group of employees against an employer were forbidden. The employees nevertheless filed class actions in federal court, alleging Fair Labor Standards Act violations. They took the position that the 1935 National Labor Relations Act (NLRA) permitted them to file class actions, regardless of the terms of the employment agreements. The employers, on the other hand, argued that the 1925 Federal Arbitration Act (FAA) mandated enforcement of the arbitration agreements.

In recent years, the Supreme Court has repeatedly held that the FAA requires arbitration agreements to be enforced strictly on their terms. The *Epic* decision is no exception. In a 5-4 ruling written by Justice Neil Gorsuch, the Court held the employment agreements were enforceable. The Court rejected the employees' position that the NLRA permitted the class actions in spite of the FAA's mandate. According to the Court, broad FAA language requires enforcement of agreements to arbitrate, including those precluding class actions that would otherwise be allowed under the NLRA. The Court explained that the NLRA's language did not indicate an intention to override the sweeping dictates of the FAA.

Should employers react to *Epic* by including class action waivers in every employment agreement? Not so fast. For one thing, the impact of *Epic* is not all-encompassing, as certain employment disputes are not susceptible to class treatment, due to their individualized nature. Additionally, certain governmental agencies and regulatory bodies, including the U.S. Equal Employment Opportunity Commission, prohibit arbitration agreements that interfere with the agency's right to investigate and sue employers. In many jurisdictions, enacted and pending legislation in response to the #MeToo movement seeks to limit an employer's ability to require an employee to agree to mandatory arbitration of certain employment disputes. There also is the risk that negative employee or customer reactions may result if broad arbitration agreements are imposed that might be seen as excessively harsh in curtailing employees' rights. It is also worth noting that a series of individual arbitration proceedings could be more costly than a single class action. Arbitration clauses also typically lack a right of appeal, and thus an employer could be left with no recourse as to an unfavorable arbitration ruling. These factors, among others, show that *Epic's* holding should be treated as one among a mosaic of factors to be considered in carefully crafting an employment agreement's arbitration clause.

Ultimately, however, there is no doubt that the *Epic* decision is a decisive ruling in favor of employers seeking to limit or eliminate their exposure to class actions filed against them in the federal and state courts. ■

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**How was the information gathered?**
Attendees at live events input their responses to the four sets of questions through an application on their phones or iPads. After voting on each set of questions, panels representing different stakeholders engaged in vigorous debates, usually with active participation from the audience, highlighting the differing views expressed by stakeholder groups, commenting on the results, what it meant to them and their own views on the topics.

**Who participated in the events?**
Over 4,000 people participated in all the events. About 54 percent were men and 46 percent were women. Attendees can be broken down into five distinct stakeholder groups. The first group is the end users of dispute resolution services. At the GPC events, these were mainly in-house counsel from companies of various sizes. The second group are advisors. These are outside counsel, experts or nonlegal advisors. The third group is comprised of adjudicators such as arbitrators, judges and their supporting institutions. The fourth group includes mediators, conciliators and their supporting organizations. Finally, the fifth group are influencers across the policy field to include academics and government officials. The answers to the questions can be sorted by group to compare and contrast the answers.

**Why is the information gathered important to global companies?**
More and more, commercial parties find they are involved in international trade even if that was not their original market. The information gathered from the GPC can help companies navigate the different dispute management and resolution systems throughout the world. But the GPC data does not just help companies that are global. It also improves the ability of all dispute resolution providers – including ADR institutions and judicial bodies that are purely local – to understand and meet what users want, and this benefits all commercial parties. This is one of the things that makes the GPC truly unique. Providers of dispute resolution services (and even some that purport to be international) typically have only a vague perception of how similar services are offered or perceived outside of their main markets. As a judge participating at the Florence, Italy event commented, "It is incredible to be able to compare the data gathered here, and how we are perceived, with results from around the world. We've never been able to do that before."

**What are the major findings?**
There were four major themes that can be drawn from the answers that are particularly relevant to corporations. First, efficiency is the key priority of users when choosing the type of dispute resolution process to use. This means that they are more interested in the time and cost to use a process rather than whether the process was confidential or the predictability of the outcome based on using a particular process. The second is that users expect greater collaboration in dispute resolution from their advisors to their adversaries. Too often lawyers are focused on being gladiators. Clearly, users believe that their advisors can still be strong and collaborative but not necessarily combative. Third, there was clear evidence that there is a global interest in using predispute tools such as escalation clauses and dispute management processes that prevent and avoid disputes. This is coupled with a strong global interest in combining adjudicative and nonadjudicative processes such as med/arb. This response shows a high level of sophistication among users in the field. Finally, in-house lawyers were generally seen as the key drivers of change and innovation to deal with disputes while outside counsel were seen to be the major obstacle. This is a very broad statement, of course, since in some countries government ministries were seen as the key drivers, and as there are many outside counsel who are powerful agents of change, but the responses clearly show that around the world more leadership from lawyers and their law firms would be welcome.

**Where can I read more about the Series?**
If you want to read detailed information about the GPC, you can go to the website at https://www.globalpound.org/ (https://www.globalpound.org/).

**What is next?**
IMI is endeavoring to continue the conversation. As a result, the Global Pound Conference Series has evolved to become the Global Pound Conversation. On the GPC website, you can see the consolidated answers to the questions that were posed at all of the events including the online voting. IMI also received a grant from the AAA/ICDR Foundation to dig deeper into the data and information gathered at each of the events and develop a report targeting the North American events.

IMI is fundraising for other regional reports and will keep the conversation going through its blogs and other social media. We hope you will join in the conversation. ■