ISSN : 1875-4120
Issue : (Provisional)
Published : July 2023

Transnational Dispute Management
www.transnational-dispute-management.com

Young-OGEMID Author Interview Dr Anna Howard (Book: EU Cross-Border Commercial Mediation: Listening to Disputants) by V. Muntean

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Young-OGEMID Author Interview Dr Anna Howard (Book: EU Cross-Border Commercial Mediation: Listening to Disputants)

Dr Anna Howard, Guest Lecturer, University College London, Research Fellow, Singapore International Dispute Resolution Academy & Founder, Anna Howard Mediation

EU Cross-Border Commercial Mediation: Listening to Disputants (Wolters Kluwer 2021)

Moderator: Professor. S.I. Strong

Interview reporter: Victoria Muntean[*]

Introduction

Young-OGEMID (YO) is pleased to hold the second instalments of its newly launched series: the author interview. The second virtual online interview took place from May 22 to May 27, 2022, and it featured Dr Anna Howard whose research focuses on mediation and investor state dispute settlement. Dr Howard is a Guest Lecturer at University College London, Research Fellow at the Singapore International Dispute Resolution Academy and the Founder of Anna Howard Mediation. Before moving into academia, Dr Howard practised EU competition law at Freshfields Bruckhaus Deringer and Fieldfisher.

Dr Howard joined Professor Strong to discuss her latest book *EU Cross-Border Commercial Mediation: Listening to Disputants*, which was published by Wolters Kluwer in January 2021.[1]

An Overview of the Book

Dr Howard opened the interview by providing the following overview of her book:

Dr Howard: My book opens with the words of one of the in-house counsels I interviewed as part of my research: "*The fundamental problem about mediation is that it's a good idea and nobody uses it*." My book tries to unpack this paradox. It explores why, in spite of the European Union's considerable and consistent efforts to promote the use of cross-border mediation, its usage appears to remain stubbornly low. My book examines this issue through the lens of users of dispute resolution processes, in particular senior in-house counsel of multinational companies which operate across the EU. The research to date in this field has tended to be quantitative research and my research sought to build upon that body of research by gaining detailed insights or "thick description" (Clifford Geertz) through qualitative research and in particular interviews. My choice to conduct qualitative research was also inspired by the elicitive approach of the mediator John Paul Lederach which is "a philosophy of interaction with people in settings of conflict".

After analysing the EU's efforts to promote the use of cross-border mediation including the EU Mediation Directive 2008/52/EC, my book examines the empirical research which has been conducted by the European Commission and Parliament on how to improve the directive and,

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[1] https://law-store.wolterskluwer.com/s/product/changing-the-frame-framing-the-changes/01t0f00000J4qNR

more broadly, the empirical research on cross-border commercial mediation. It then explains my choice to conduct qualitative research and my research methodology. After providing key information on the interviewees and their organisations, my book then turns to consider the key findings which emerge from the interviews, including new insights into why parties do, and do not, use mediation. While some of these findings are specific to the EU cross-border context, others are of broader relevance to mediation in general. I find Chapter 8 particularly interesting as, based on the interviewees' insights, it reveals some intriguing reasons regarding why parties do not use mediation.

The book argues that the EU's understanding and promotion of mediation as an alternative to litigation is too narrow and that this sole focus has meant that certain barriers to the use of mediation have been missed by the EU in its efforts to promote mediation. In light of the interviewees' recognition of the key role that negotiation plays as a cross-border commercial dispute resolution process together with their framing of mediation as assisted and extended negotiations, novel obstacles to the increased use of mediation emerge. These include, for example, a scepticism as to what mediation can add to negotiation, an associated concern about being regarded as having failed for having been unable to resolve the dispute in unassisted negotiations, and a reluctance to maintain responsibility for the resolution of the dispute. Understanding mediation as an extension of the negotiations which parties are already doing invites a fundamental shift in the way in which mediation is promoted. An awareness of the barriers to the use of mediation which emerge from an understanding of mediation not simply as an alternative to litigation but as assisted and extended negotiations leads to a recognition of what is being *asked of* disputants in pursuing mediation which differs to the EU's promotional approach of emphasising what mediation enables disputants to *avoid* (i.e. litigation). A shift in the way in which mediation is promoted which recognises and responds to what is being *asked of* disputants when they select mediation may resonate more deeply with disputants and respond more fully to their concerns and needs.

Questions

Dr Eva Litina – The Enforceability of Mediation Agreements

I wonder about your findings regarding the role of the enforceability of agreements resulting from mediation. Would you consider that the ratification of the Singapore Convention by the EU could contribute to the efficiency of mediation and promote its use?

Dr Howard: On the topic of the enforceability of agreements resulting from mediation, when I asked the interviewees the open question of why they did not use mediation for their EU cross-border commercial disputes, it was interesting that none of them identified the lack of a direct enforcement mechanism (as is provided, for example, by the Singapore Convention) as a reason for not using cross-border mediation.

One of the recommendations to improve the EU Mediation Directive was to provide a direct enforcement mechanism for EU cross-border mediated settlement agreements (drawing on what were then proposals for the Singapore Mediation Convention). At the end of the interviews, I shared this proposal with the interviewees and asked for their thoughts on it.

Two key themes emerged in the interviewees' responses to this proposal. The first theme that emerged was that enforcement was not a problem in practice: the interviewees explained that

they did not see the need for such a mechanism as they had not experienced problems of compliance with their EU cross-border mediated settlement agreements. For example, one interviewee explained "enforceability is not a practical issue". Another said, "*If you have done it [mediation], your view will be there's no need*". And another described such a mechanism as "*a solution in search of a problem*."

The second theme was that those who welcomed the proposal for a direct enforcement mechanism, welcomed it to the extent it was needed – i.e. a qualified yes. For example, one interviewee said: "*Enforcement is a good point to the extent that people had problems of enforcement, they would clearly want a degree of confidence. We haven't had any problems*."

Returning to your question on whether the ratification of the Singapore Convention[2] by the EU could contribute to the efficiency of mediation, the interviewees' insights suggest that there is not an efficiency issue as they had not experienced problems of compliance with their mediated settlements agreements. This is a qualitative finding, and I would be very interested to explore this further in quantitative research. On the issue of whether ratification could promote mediation's use, the interviewees' insights suggest that for those who have experience of mediation they have not had problems of compliance with their mediated settlement agreements so ratification may not further encourage them to use mediation. However, for those who do not have experience of mediation and may be concerned about levels of compliance with mediated settlement agreements, ratification may give them some reassurance and therefore promote the use of mediation. I would add though that I wonder whether enacting a direct enforcement mechanism could inadvertently send out the message that there is a problem in practice regarding compliance with mediated settlement agreements and whether this might deter potential users of cross-border mediation from opting for mediation.

Earvin Delgado, MCIArb – Solutions to Promote the Use of Mediation

So far in the discussion, it seems that there is really not much of a 'negative impact' in the event that the European Union (EU) ratifies the Singapore Convention. Having a complimentary and uniform mechanism for settling agreements between European and international parties seems to be something positive.

My question is, could the requirement of mandatory mediation be a plausible solution to promote the use of mediation in the region? I understand that the EU Mediation Directive allows it but does not require it. Or given how enforcement is generally not seen as a challenge for European crossborder settlements, would enacting financial incentives be an effective way to promote more practitioners to use mediation?

Dr Howard: Mandatory mediation has been one of the proposals to enhance the EU Mediation Directive and encourage the greater use of mediation in the EU. As I consider in Chapter 2 of my book, given the specific cross-border scope of the directive, its jurisdiction under Article 65 of the Treaty establishing the European Community (now Article 81 of the Treaty of the Functioning of the European Union) and the fact that some EU Member States have only implemented the directive for cross-border mediation and not for domestic mediation (they could choose whether to also apply the principles of the directive to their domestic disputes), the suitability of mandatory mediation for cross-border mediation in particular must be

[2] United Nations Convention on International Settlement Agreements Resulting from Mediation. Text available online <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf>

considered. In Chapter 2 of my book, I identify a number of reasons why a proposal for mandatory mediation is more problematic for cross-border compared to domestic disputes, and I'll address a few of these here.

First, and on a practical note, in order for mediation to be mandated it must first reach the realm of the court (e.g., the court would require parties to mediate before filing a dispute with the court). This reliance on the courts to direct parties to mediation appears to be more problematic in the cross-border context, and in particular for cross-border commercial disputes which are the focus of my book, as international arbitration is recognised as being the most popular dispute resolution method for cross-border commercial disputes (see for example empirical research by the Singapore International Dispute Resolution Academy and by Queen Mary University of London). If corporate parties largely rely on arbitration rather than the courts for the resolution of their cross-border commercial disputes, a system of mandatory mediation with the assistance of the courts may not be particularly effective at increasing the use of cross-border commercial mediation.

Secondly, a proposal to mandate cross-border disputes may be problematic in light of its consistency with Article 6(1) of The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which guarantees the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In *Rosalba Alassini v Telecom Italia SpA*,[3] the Court of Justice of the European Union noted that compatibility of a mandatory mediation procedure with Article 6(1) of the ECHR was dependent on a number of conditions, including that the procedure does not "result in substantial delay for the purposes of bringing legal proceedings" and that the costs for such a procedure are not "significant". If the EU were to mandate mediation across all Member States, there would be a considerable challenge in ensuring that the multitude of mandatory cross-border schemes across the various EU Member States did not result in substantial delay nor significant costs in order to be compatible with Article 6(1) ECHR. For example, in those EU Member States where the court systems are efficient (such as Germany), a mandatory mediation scheme may breach Article 6(1) ECHR given that it would be easier to establish that mandatory mediation resulted in "substantial delay" relative to the efficiency of the court proceedings. This is particularly relevant for cross-border mediations which may well be more time-consuming than domestic mediations.

Thirdly, even if forms of mandatory mediation were not to be in breach of Article 6(1) ECHR, they might breach individual Member State's constitutions. For example, in Romania in 2014 a requirement to simply attend a mediation information session was held to be unconstitutional. In order for mandatory mediation to be an effective way to increase the use of cross-border mediation in the EU, it would have to apply in all of the EU Member States from which parties may engage in cross-border dealings.

In short, mandating mediation for cross-border disputes (which is the scope of the EU Mediation Directive) appears to raise more challenges than for domestic disputes. And there is of course the more philosophical point which applies equally to cross-border and domestic disputes on whether mandatory mediation would depart from mediation's core principle of voluntariness.

[3] Cases C-317/08 to C-320/08, *Rosalba Alassini v Telecom Italia SpA* [2010], European Court Reports 2010 I-02213

Regarding your question on whether financial incentives may promote the use of mediation, what type of financial incentives do you have in mind?

Victoria Barausova – Compulsory Mediation

Regarding compulsory mediation, as far as I am aware, only five EU Member States introduced it when implementing the Directive. I wonder if, as part of your research, you had an opportunity to speak to any disputants who had the experience of being compelled to mediate or whose decision to do so was initially driven by the wish to avoid cost-related or other sanctions. If so, in their perception, did this fact have any implications on the progress/success of such mediations, as compared to instances where it was initiated on a purely voluntary basis?

Dr Howard: None of my interviewees stated that they had experience of being compelled to mediate nor did they identify the wish to avoid cost-related or other sanctions as a reason for deciding to mediate so unfortunately, I cannot answer your excellent question.

However, my interviewees did provide some interesting insights into being compelled to mediate though not in the typical sense of court-ordered mediation. When discussing dispute resolution clauses as a trigger for the use of cross-border mediation, some interviewees described a general reluctance to include a mediation clause in dispute resolution clauses. Two prominent reasons emerged for this reluctance:

1. A clause prescribing mediation would be counter to the consensual nature of mediation as it would, in effect, force parties to mediate. While entry into the mediation clause would of course be consensual, mediation for the specific dispute which were to arise would not be consensual as it would have been prescribed under the general dispute resolution clause. As one interviewee explained in this context, "*We would never require mediation. By definition it's consensual*". And another explained, again talking about dispute resolution clauses: "Our dispute resolution clause has escalation clauses … I am not for mandatory mediation. Both parties have to be willing. I am not sure that it works if it is required."
2. Mediation might not be appropriate for all disputes arising from the contract. For example, one interviewee explained: "*I don't think [mediation] is always appropriate. That is why I wouldn't want a compulsory mediation step in a contract*."

In contrast, interviewees described the prevalence of negotiation clauses in their companies' dispute resolution clauses. This suggests that they do not have the same concerns about being forced into the similarly consensual process of negotiation nor that the similar process of negotiation may not be appropriate for the disputes which may arise. It is interesting that there appears to be a reluctance to make assisted negotiation (i.e. mediation) a formal requirement in dispute resolution clauses which is not seen for unassisted negotiation.

Prof. S.I. Strong

Thanks very much for the very interesting discussion so far. While I hope the ongoing conversations continue, I do have a number of questions for you.

In your initial post, you discuss the barriers to increased use of mediation, and I was wondering if you considered the role that status quo bias - meaning a cognitive distortion that favors the existing scenario (in the world of dispute resolution, that means litigation), even in the face of empirical evidence that suggests the new proposition (here, mediation) - might be affecting the use or perception of mediation in cross-border European matters. I discuss the status quo bias in the context of international arbitration in my article, "Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration"[4] and it would appear to have some merit in the mediation world.

Dr Howard: I am delighted that you have asked this question as I am very interested in how cognitive biases might affect parties' decisions of whether to use mediation. In my concluding chapter (Chapter 9), I note that while there has been a lot of attention on how cognitive biases may affect parties during the mediation process, far less attention has been given to how cognitive biases may affect parties' decisions of whether to enter into mediation.

The data from my interviews did not lead me to consider status quo bias in particular but my data did suggest that other cognitive biases may be affecting the use of mediation. At pages 210 – 211, I explain that given the interviewees' reasons for not using mediation of their scepticism as to what mediation adds to negotiation and their associated fear of being regarded as having failed for not having been able to resolve the dispute through unassisted negotiations, the cognitive biases of overconfidence (the inclination to overestimate the likelihood that we are right), loss aversion (the tendency to attach greater weight to future losses than to gains) and anticipated regret (the inclination to anticipate the painful emotion of regret) appear relevant. The role which these, and other biases, may play in affecting the use of mediation is an issue which I would like to explore further. As Tim Hicks explains in his excellent book Embodied Conflict, The Neural Basis of Conflict and Communication,[5] "*Understanding the neural basis for resistance that parties may experience [to mediation] can help third parties pay more attention to what may be needed to bring parties to the table and to help them participate effectively once they are at the table*."(p. 153) More work is needed on examining the biases at play when parties are choosing whether to use mediation.

Prof. S.I. Strong

This is great - we are in "violent agreement" as one of my colleagues says!

One problem we have with overcoming the bias against mediation is the absence of any empirical evidence describing the success rate of mediation in international commercial disputes (an exercise that would require definition of "success in mediation," which is itself a tricky issue). Did you find any such studies in your research? I have to admit I have not read your book in its entirety, but if you have sources, it would be great to learn

[4] Strong S, 'Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration', *University of Illinois Law Review* 533 (2018). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2931137

[5] Hicks T, *Embodied Conflict, The Neural Basis of Conflict and Communication* (Routledge 2018)

about them. As a follow-up, do you have any interest in doing such research in the future? You seem to be interested and adept at empirical work, so it seems logical!

Dr Howard: That is an excellent point about the difficulty of defining "success in mediation". Qualitative research with users of mediation would be a great way to explore the meaning of "success" from their perspective. I think it is too simplistic to equate success with settlement, as tends to be the case; it may be that some settlements are not "successful" and conversely that some mediations which do not result in settlement are successful (for example if they provide a forum where parties can be heard and can hear the other). Rather than simply focus on the outcomes, I think it's important to explore from the users' perspective what a successful mediation process looks like to them.

I didn't come across any empirical studies specifically on the success (or settlement) rate of mediation in international commercial disputes. An important measure of success seems to be whether parties were satisfied with their mediation and there are some studies on domestic mediation on user satisfaction (see for example Nadja Alexander, Global Trends in Mediation (Wolters Kluwer 2006)[6] at 12 and 16-17 for a useful summary of domestic studies which suggest high levels of user satisfaction with mediation.

And in response to the final part of the question, I'd be very interested in doing empirical research on "success" in mediation, particularly with a focus on international commercial mediation and through qualitative research. The challenge of course, which you raise in question 8 below, is the difficulty of finding willing participants.

Prof. S.I. Strong

I think that a better understanding of what "success" is (and the fact that it may not be settlement of the whole dispute) is really important, and one that some researchers are trying to address, although primarily in contexts other than (international) commercial mediation. When we were negotiating and contemplating proposing the Singapore Convention (I was involved with those early discussions with the US State Department, before it brought its proposal to UNCITRAL) we saw a lot of people from other settings (family law, consumer law, etc.) bringing up issues that were really not applicable in the commercial setting. This is really a ripe area for research, especially empirical research (that's a tip to all you prospective PhDs out there who are looking for a doctoral project!).

A concept that is closely related to status quo bias is that of defaults. As a matter of dispute system design, litigation acts as the default, meaning that if the parties (or the court) do not choose another mechanism, litigation will ensue - see "Defining the Litigation Default," 37 Civil Justice Quarterly 463 (2018) from the English perspective.[7] Do you think the EU Mediation Directive does enough to offset the pulling power of the legal default toward litigation? Other than mandating mediation - a prospect you identified as problematic in response to Earvin's email due to art. 6(1) of the European Convention on Human Rights as well as national law - do you see any way to adjust the default

[6] Alexander N, *Global Trends in Mediation,* (Wolters Klower Mediation Blog, 2006). Available at: https://law-store.wolterskluwer.com/s/product/global-trends-in-mediation-second-edition/01t0f00000J3aRc

[7] Strong S.I., Defining the Litigation Default (March 9, 2018). *37 Civil Justice Quarterly* (2018 Forthcoming), University of Missouri School of Law Legal Studies Research Paper No. 2018-18, Available at SSRN: https://ssrn.com/abstract=3137114

mechanisms in cross-border civil dispute resolution to improve both the perception and use of mediation?

Dr Howard: The participants in my research offered some insights which are relevant to the issue of how the pulling power of the legal default toward litigation might be offset. They explained that in order to increase their use of mediation they would like more data on the outcomes of the mediations (here we return to your earlier point about the need for research into the "success" of mediation) and insights on who is using mediation and which mediators are being used (see page 176 of my book). For example, one interviewee said "*A big challenge in adopting mediation is knowing how well trusted that route is*." And another said: "*We would like insight into real cases that are resolved." I therefore argue that the EU's recommendation to build upon the EU Mediation Directive with the creation and maintenance of "national registers of mediation proceedings*"[8] (European Parliament Resolution of 12 September 2017, [2018] OJ C337/2, para. 11) could play an important role in encouraging parties to use mediation if these registers show that mediation is being used, by whom and to what effect (see pages 202-203). Of course, the confidentiality of mediation raises issues for the collection and publication of data in these registers. However, given the general satisfaction expressed by my interviewees who had used mediation, the frustration expressed by some of them regarding the limited use of mediation and their own efforts to encourage the use of mediation, users of mediation may be willing to contribute to such a register if the information on their mediations could be presented in a sufficiently general, though still useful, manner.

Another point which is relevant is that the interviewees explained that after they have tried negotiation they do not see the point in mediating (which in essence is assisted negotiation) so would then go straight to court (or arbitration). As one of the interviewees explained: "*People will think that because we went through a period of running though the internal process [of negotiation] that the only alternative is court*."(see pages 162-165). I therefore argue that more research is needed on the added value of mediation to unassisted negotiation (there is a lot of theory on this but a lack of empirical work, as I discuss in my book). I also argue that the EU's recommendation on increasing awareness of mediation's advantages in terms of time and cost savings compared to litigation needs to go further to include data on the advantages of mediation compared to negotiation (page 165). That is another area ripe for further empirical research. Interestingly, one of my interviewees described his experience of higher compliance rates with mediated settlements agreements compared to negotiated settlement agreements. That seems an important issue for further quantitative research. Being able to convey the value which mediation can add to unassisted negotiation in a tangible, rather than theoretical, manner could nudge parties away from going straight to the default of litigation after negotiations and encourage them to attempt mediation as the next step.

Prof. S.I. Strong

Again, this underscores the need for more education and more research into what mediation is and how it can assist even those who are themselves adept at negotiation. Agree completely!

It seems to me that a lot of the bias against mediation stems from what I call the influence of the sovereign prerogative - ie, the notion that the state has to be involved in a dispute

[8] European Parliament Resolution of 12 September 2017, [2018] OJ C337/2. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017IP0321&rid=4

resolution process for it to be considered legitimate. Did you see any difference in perception between the use or perception of mediation conducted by judges vs. mediation conducted by private parties? Do you think the use of judicial mediation could get past any of the art. 6(1) or national law problems with mandated mediation? Of course, judicial mediation often does not comply with best practices in mediation, so it is perhaps an imperfect comparison, but it would at least get past the problem of a purely private mechanism.

Dr Howard: None of my interviewees described experience with mediation conducted by judges so unfortunately no themes emerged in my research on the distinction between mediation conducted by judges compared to mediation conducted by private parties.

On compatibility with Art 6(1) ECHR, I am doubtful that mediation by judges rather than private parties would necessarily get around the difficulties:

- Presumably, if a judge were to conduct the mediation and that mediation did not result in a resolution so the parties continue in the court process, a new judge would need to be appointed to hear the case (as the judge in her mediator role would be privy to information arising in the mediation which could influence her ruling). If this were not the case and the same judge who served as mediator then continued in her role as judge, I think parties would be reticent to participate fully in the mediation in case information shared in the mediation may then influence the outcome of the court ruling. If a new judge has to be appointed after the "failed" mediation, depending on the efficiency of the relevant court system, this could "*result in substantial delay for the purposes of bringing legal proceedings*" and therefore be problematic for compliance with Art 6(1) under *Rosalba Alassini*.[9]
- On national law problems associated with mandated mediation i.e. breaching individual member state's constitutions, in the example I provided earlier of the requirement to attend a mediation information session being unconstitutional in Romania, one of the reasons identified by the court was that this would impose an unreasonable burden on litigants.[10] While the involvement of a judge could potentially make access to this process quicker, I am not sure whether that would be sufficient to reduce the burden on litigants sufficiently to make the requirement constitutional.

Prof. S.I. Strong

Yes, I'm against the med-arb model of judicial assistance as well - I think you absolutely need a different person for each process. Still, I can't think of any other way to get past the "sovereign prerogative" issue other than by getting judges involved during part of the process... Maybe something that other people on the listserv can chime in on. Any ideas out there?

I don't think it's been raised in the string yet, but did you see any differences in use, perception or practice across the common law-civil law divide? It was something that was discussed a bit during the negotiation of the Singapore Convention, but I'm not sure

[9] *Rosalba Alassini. v. Telecom Italia SpA* (C-317/08)

[10] European Parliament. A Ten-Year-Long Mediation Paradox. When an EU Directive Needs to be More … Directive (2018) PE 608.847, P10. Available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf

whether it came out in your study. Your breakdown of respondents on p. 47w (my pagination in ebook form seems a bit odd, so apologies for confusion) seems to suggest a nearly 50-50 mix of common law and civil law respondents. If your study did show any differences across the common law-civil law divide, could you outline some of the differences for us?

Dr Howard: I didn't address the common law-civil law distinction in my questions (there were so many questions to ask and such little time unfortunately), and I didn't analyse my data through that lens. I suspect that it would be very difficult, and perhaps even impossible, to cut my data according to that distinction given the type of interviewees who took part in my study. They were senior in-house counsel working in international companies and therefore many had a mixture of experience in both civil and common law countries. Some were civil lawyers based in common law jurisdictions and others were common law lawyers based in civil law jurisdictions, while others appeared to have experience working in a variety of common and civil law jurisdictions. It would therefore have been tricky to attribute their insights either to a common law or civil law approach.

Interviewees did, however, provide some insights on general distinctions across the EU. A notable theme was that there seems to be greater awareness and use of mediation in the UK compared to the rest of the EU (I did my research when the UK was part of the EU) (see pages 177-178). For example, one interviewee explained: "*I see a clear difference on the one hand between the UK and the rest of the EU. I see that mediation is already much more developed and used in the UK.*" (page 177). Another explained the scepticism with which a proposal to mediate was viewed by his counterparts: "*I had experience outside of the UK in France. We suggested it [mediation]. There was a cross-border issue. The other side had virtually never heard of mediation. They thought it was a fast trick we were trying to play on them. In the UK everyone knows it. It was viewed with scepticism in that instance*." It therefore seems that in the EU's efforts to promote the use of mediation, there may be more work to be done in raising awareness in some countries compared to others.

Prof. S.I. Strong

Thanks - I didn't see any common law/civil law comparisons in your book, but I did hear about them at UNCITRAL, although there is a significant amount of anecdotal information that civil law systems can benefit from mediation just as much as common law ones. The sticking point seems to be education and perception. I would note that many Asian nations that can be classified as civilian do use mediation, formally or informally, so it may be that the pushback to mediation from civil law nations is more of a European thing. Do our listserv members agree? How about Latin American countries? Does anyone know where they stand?

Moving to process, I see that you publish the interview script in Appendix 2 of your book, which is very useful, since there may be people on this listserv who are contemplating doing empirical work in the area of mediation or similar processes. What lessons did you learn from the process? How would you have changed your interviewing process or participant-generation process if you had to do all over again?

Dr Howard: If I could go back and do my research again, I would include fewer questions in my interview guide with most of these being open questions. I found that some of the richest insights came when I asked open questions and allowed the interviewees plenty of time to

speak uninterrupted (mediation skills, such as active listening, can be very useful when conducting in-depth interviews). I tried to cover too much in my earlier interviews. As the interviews progressed, I learnt to focus on the keys themes of why they did and did not use mediation and to really listen to where the interviewees were going with their answers and allow the interview to go in that direction.

Regarding the participant-generation process, I am not sure how I would have changed that, particularly to try to make the process quicker and more successful. It certainly took many months and hundreds of emails to get participants for my research. I think I would now take reassurance from the fact that a lengthy and unpredictable process is unfortunately to be expected when you are doing empirical research, and perhaps particularly so in the case of cross-border dispute resolution, so I would be more patient. One lesson I will heed is the strong preference expressed by one of my interviewees (who was a very busy senior in-house counsel) to take part in an interview rather than a survey. I had initially set out to do both quantitative and qualitative research, assuming that the quantitative research would be much more popular as it would be quicker. Surprisingly, it proved easier to get participants for my qualitative research and I therefore then focused solely on that type of research. It seemed that people were keen to give detailed insights and in their own words.

Prof. S.I. Strong

That's interesting - I did both a survey and semi-structured interviews in my study but ran them separately. I also found that I was getting the same answers to my questions after about 10 (I ended up doing 20, like your 21). While that was good in that it supported the fact, I was asking the right questions in both the survey and the interviews, it did suggest the need to branch off into other areas. Empirical research always has a tension between confirming the known/anticipated and delving into new areas!

Another process-oriented question comes from your methodology chapter. You say (p 47b) that you had the generous support of in-house counsel associations and social networks. I find that striking compared it to the assistance (or lack thereof, in most cases) provided by arbitral institutions and judicial education networks when I was doing semi-structured interviews on my book on legal reasoning[11] (helpfully titled Legal Reasoning Across Commercial Disputes: Comparing Judicial and Arbitral Analyses (OUP 2020)). How did you contact these organizations? Did they attempt to impose any conditions on the use of your research, such as approving it in advance? (As you can tell, that's what I was dealing with....)

Dr Howard: I spent a lot of time searching for the details of relevant in-house counsel associations and social networks, and some were suggested by colleagues from my previous career in legal practice. Ultimately, it was the kindness of a stranger which helped me to reach in-house counsel across the EU. I had reached the stage where I was about to give up after many months and hundreds of emails when I received a wonderfully warm response from a senior person in an in-house counsel organisation who offered to seek approval to share my survey with the members of the organisation. The condition for circulating my survey was that I would share my research findings with the organisation. My survey was then circulated but there was a very low participation rate. Encouraged by that stranger's kindness, I persisted and

[11] Strong SI, *Legal Reasoning Across Commercial Disputes: Comparing Judicial and Arbitral Analyses* (OUP, 2020)

then found a directory of in-house counsel and continued to send emails, though changed my focus to interviews only. That approach was – surprisingly - more popular than a request to take part in a survey.

Prof. S.I. Strong

Interesting. I feel better! And yes, it just takes one helpful person to open the door....

I see that despite the cooperation of the in-house counsel group, you still received very few responses, at least initially. Do you have any ideas on how to overcome the lack of interest? I have struggled with the same issue elsewhere, and I do think that our community is dealing with survey fatigue (which may roll over to interviews). On the arbitral/judicial side, I thought about trying to create a neutral research organization that would help ensure research requests were not too onerous and were well-considered (ie, not just random surveys that were not sufficiently scholarly), but that of course has its own problems. I do see a huge issue in not getting proper and unfettered access to the persons who are best-suited to drive change through empirical processes.

Dr Howard: You have captured so well the greatest challenge which those of us who are doing empirical research face. How do we encourage the participation of those who may be able to offer the richest insights? In the dispute resolution field, many of those whom we will be trying to reach lead very busy lives with many commitments on their time. It's not surprisingly that they may be reluctant to take part in empirical research, particularly given the many requests they probably receive. I think the type of research organisation you describe is an excellent idea to facilitate the sharing of expertise and experience, and also encouragement which empirical researchers certainly need at times.

In addition to ensuring that surveys are well-considered and not too onerous, I would add that the covering email is very important. It should be succinct and compelling, stating the key overarching question which the research seeks to address and what the contribution of the research may eventually be. If participants know the key aim of the research and what it might lead to, they may be more willing to participate.

In addition, my view is that those of us who are conducting empirical research have a responsibility to ensure that the experience is a positive one for participants so that they are not discouraged from continuing to take part in research. It's very important to keep your word both about how you will conduct the process and how you will use the data (including ensuring confidentiality if that is what you have promised the participants). For example, in my first email communication with prospective participants, I asked for twenty minutes of their time to conduct the interview. When I was doing the interview, at twenty minutes I invited the interviewees to either finish the interview or continue (all agreed to continue). I sensed that they appreciated that I had not assumed that they would continue to speak beyond the stated duration of the interview. If we can make the experience for those who do generously participate in our empirical research as positive as possible, they are more likely to continue to give their time to other research projects.

Prof. S.I. Strong

We (all) should really think about what that sort of research institution should look like - I do think it would be of great assistance to empirical research. Another way is to have a researcher or institution (like QMUL) create a positive "brand" that will trigger people and institutions to participate in empirical research. I think when people get the invitation to participate in the QMUL annual studies, they are more likely to do so than when they receive a random invite from an unknown source. QMUL has shown itself to be a legitimate, objective research body in this regard and to be focused on research questions of interest to the industry. Lessons to be learned there....

I think that's enough for the moment, but I might have more questions for you later!

…

Prof. S. I. Strong

Thanks, Anna, for your detailed and thoughtful answers! I've put a few responses below yours in the email below. I agree using a hard copy is much easier for pinpoints, but my library only had an online copy. I think I should do a virtual symposium sometime on the difference in how people read/use materials depending on whether they are electronic or hard copy - there are actually some shocking studies about how the nature of legal research has changed since we moved away from books (I am the last generation that learned book research, including for case law)....

One of the things I was going to put into my comments below (but now can't remember where I was going to put it) involves the degree to which legal efforts like EU legislation and the Singapore Convention help legitimatize mediation by reflecting it in law, even if there is not yet a formal "need" to enforce settlement agreements. In other words, legislation helps drive the positive perception of mediation, even if mediation is not required. (I think this was in response to the discussion on defaults/mandated mediation). Did you get the feeling that the existence of the EU legislation did help with legitimation efforts?

More below!

Dr Howard: Thank you, Prof. Strong. I'd be very interested in that type of symposium as someone who – and here I am giving away my age – did her undergraduate studies (though not in law) at a time when hard copies were predominantly used, and essays were handwritten.

Returning to mediation and your question below, I agree that legislation can play an important role in legitimising mediation and more generally in raising awareness of mediation (from my interviewees' insights it seems that there continues to be a significant lack of awareness of mediation or a misconception of what it is, at least in the EU). However, none of the interviewees explained that the existence of the EU Mediation Directive made mediation more legitimate for them. Surprisingly, many of them had not heard of the EU Mediation Directive which suggests that we need to think about how we raise awareness of important legislative developments in mediation.

The interviewees identified a couple of other points which appear relevant to increasing mediation's legitimacy:

- First, interviewees identified the need for an EU-wide body dedicated to the provision of cross-border mediation in the EU which could assist parties with their mediations, including in identifying good mediators. For example, one interviewee explained: "*We keep quoting the EU directive. That doesn't actually do anything. What you need is something that says we want to do this, this is where you go. There needs to be something like the IMI but with a more formalised role that they can go to. Like SIMC in Singapore. That does international mediation stuff. There is somewhere in Asia where you have a point of contact where everything can go through. You don't have that in Europe*."
- Secondly, interviewees explained that in order to increase their use of mediation they would like more information on the usage of mediation and the outcomes. As one interviewee said: "*A big challenge in adopting mediation is knowing how well trusted it is*." Of the interviewees who had experience of mediation, they tended to be satisfied with it. It seems therefore that an important way of further legitimising mediation is to raise awareness of the experiences of those who have used it.

Many thanks for your comments, and kind words about QMUL, below.

Naghmeh Javadpour – Psychological Barriers in the Use of Mediation

I believe that one of the barriers in using mediation while being aware its benefits (as you mentioned these barriers comprehensively in your book), is that in terms of reluctance or fear from entering into mediation process or facilitated negotiation, I noticed that sometimes the fear from entering into mediation process in companies is that top managers and legal managers sometimes feel that if they refer the disputes to mediation (in cases where there is no clause or mandatory mediation obligations), they may be labelled as the ones who are Compromising the rights of clients. Also, they feel that proposing mediation in these scenarios, may be considered as their weakness in terms of the dispute. In other words, it seems that psychological understanding seems to have a role in this issue. Could you please express your views in this regard based on your interviews?

Dr Howard: I think you are correct that there are strong psychological drivers at play which affect parties' decisions on whether to use or propose mediation.

Your observation that senior managers may be reluctant to enter into mediation for fear of being regarded as having compromised their company's legal rights is similar to a theme which emerged in my interviews of managers' reluctance to enter into mediation for fear that they would be criticised (by those not in the mediation) for reaching an unsatisfactory outcome. For example, one interviewee explained: "*A lot of management saying if I go to mediation and then settle I might get shot at for agreeing a bad deal. If I let it get ruled by the court I can say that they got it all wrong. I'm kind of exculpated.*" (page 158). Interestingly, that interviewee then added that he takes the risk of being criticised as "*it [mediation] is the best solution for the company*." This takes me back to Prof. Strong's earlier identification of the need for more research on "success" in mediation. If there were more data of this type, this may go some way to address the reluctance to use mediation based on concerns about outcomes.

On your second point that parties are reluctant to propose mediation as that may suggest weakness in their case, the issue of weakness emerged in my interviews though not specifically regarding weakness of the case but rather weakness of the individual. One interviewee explained: "*One of the obstacles is that people are reluctant to be the first person to suggest it – makes me look weak – it's a weird Mexican stand-off. For the judge to suggest it saves face for the parties*."(page 155).[12] The concern that a party who proposes mediation could be regarded by their counterparty as weak was also identified in Prof. Strong's excellent research "*Realizing Rationality: An Empirical Assessment of International Commercial Mediation*" (2016) 73 Washington & Lee Law Review 1973, at p. 2035. Interestingly, another interviewee in my research offered a different view, at least as regards the UK context: "*I think that a willingness to mediate is not relied on by the other side as a sign of weakness*." I'd be interested to explore whether there are similar concerns about either the proposer or the proposer's case being regarded as weak regarding proposing negotiation which my interviewees identified as their preferred method of resolving cross-border commercial disputes. Mediation is after all, as the interviewees described, a form of assisted and extended negotiation. It seems that when a third party is brought in to assist parties with their negotiations, they are more reluctant to engage in this type of negotiation.

Dr Piotr Wilinski – Mediation as a "Black Box"

I was always curious of mediation, but for some reason it continues to be somewhat a black box to me. I am reading a discussion with great interest and was wondering if you could please elaborate on the following topics (and my advance apologies if I missed the answer in your previous interventions).

1. **Naghmeh referred to psychological drivers which seems to me intuitively strong. In the context discussed they mostly refer to the role a person in the company. I was wondering if were able to identify also cultural drive(r)s in approach to mediation (which would be likely linked with Professor Strong's reflection on cognitive biases). Based on your empirical studies/interviews did you notice the (conclusive) difference between different European interviewees (e.g. depending on the nationality) in their approach to a cross-border mediation?**
2. **Second question is somewhat linked to the first one, yet goes beyond the (explicit) scope of your research that is constrained to the analysis within the EU. I imagine, however, that during your research you came across that the approach(es) towards the mediation may be somewhat different outside the EU. Would this matter for the EU parties? Namely, would their approach towards mediation also change when dealing with non-EU parties (crossborder)?**
3. **Finally, I imagine that when the dispute arises, external counsel may (or may not) get involved. What influence would they have in the choice of disputants and the way the mediation is perceived? In your view, would/should/are the EU efforts to promote mediation be somewhat tailored to this audience?**

[12] Strong, S.I., *Realizing Rationality: An Empirical Assessment of International Commercial Mediation* (February 24, 2016). Washington and Lee Law Review, 2016 (Forthcoming), University of Missouri School of Law Legal Studies Research Paper No. 2016-07, Available at SSRN: https://ssrn.com/abstract=2737462

Dr Howard: I'm delighted to hear that you are curious about mediation. I think mediation continues to be, as you describe, a "black box" for many and hopefully conversations like these shed more light into that box.

1. Starting on a general note on differences across EU countries (though not specifically on differing approaches to mediation based on nationality), interviewees expressed differing levels of awareness and usage of mediation across the EU. A key theme which emerged in the interviews was that there is greater awareness and use of mediation in the UK compared to the rest of the EU (I did my research when the UK was part of the EU) (see pages 177-178). For example, one interviewee explained: "*I see a clear difference on the one hand between the UK and the rest of the EU. I see that mediation is already much more developed and used in the UK.*" (page 177).

   An interesting insight on national culture emerged in my interviews regarding the importance of dispute resolution clauses as a trigger for the use of mediation for cross-border commercial disputes. One of the interviewees explained that his company had not used mediation for its EU cross-border commercial disputes because of "cultural issues on the other side." When I asked him to elaborate on what he meant by "*cultural issues*" he explained that the other party, which was German, had a formal and fixed approach and would not use mediation because the contract did not provide for mediation (p.144). It seems that dispute resolution clauses may play a heightened role in encouraging the use of mediation for cross-border disputes compared to national disputes where, in the absence of a mediation clause in the contract, suggestions to mediate may be more likely to be accepted.

   Lastly, there was another interesting insight on culture, though not specifically on national culture but rather on company culture. Interviewees identified that mediation requires disputants to take responsibility for the resolution of the dispute and that can serve as a barrier to the increase in the use of mediation (i.e. they prefer to send the dispute to court or arbitration to be determined by a judge or arbitrator which relieves them of this responsibility). One of the interviewees provided a fascinating insight into how company culture could encourage managers to assume the responsibility required when opting for mediation. He associated mediation with an "entrepreneurial" culture. He explained: "*I have an insight for you. I think the usage of mediation, will be much more usage if there is a general change – and I see that coming – in a change in company culture. Resolving by mediation rather than nonconsensual methods requires a certain amount of accountability and let's say a certain management type … If moving to a company culture which is more entrepreneurial … in my industry … they … try to avoid responsibility for conclusions. Once it's more entrepreneurial there will be more mediation."* (pages 160-161). I think this is a powerful and novel way to frame mediation: mediation as entrepreneurial.

2. As I asked the interviewees specifically about their EU cross-border disputes, unfortunately there is little data in the interviews about the approach to mediation outside of the EU. However, one of the interviewees did explain that in the US the use of mediation (and arbitration) is more common. This suggests that it be may be easier for EU parties (and indeed others) to propose mediation to US parties.

3. When I asked about the triggers for the use of mediation, the interviewees identified two key triggers: (1) the dispute resolution clause in the contract; and (2) ad hoc suggestion by in-house counsel (after the dispute has arisen). Interestingly, the interviewees attributed both of these triggers for the use of mediation to in-house counsel's efforts, explaining that in-house had negotiated and drafted the dispute resolution clauses or suggested the use of mediation once the dispute had arisen (see pages 141 -147). The people I spoke with worked in large companies with large in-house teams so this finding will be specific to these types of companies. For smaller companies which do not have in-house teams, external counsel are likely to have greater influence on both the choice of and attitude towards dispute resolution processes, including mediation. While the theme of the influence of external counsel in the disputants' choice of whether to use mediation did not emerge in my interviews, there is literature on this. For example, Bryan Clark in *Lawyers and Mediation* looks at the attitudes of lawyers (including external counsel) to mediation and their impact in a number of countries.[13] And see also Julie Macfarlane, *The New Lawyer: How Clients are Transforming the Practice of Law*.[14] On your last point, while external lawyers are a very important audience for the EU in its efforts to promote the use of mediation, in my view the most important audience are those who ultimately choose whether or not to use mediation i.e. the disputants themselves. They will be the key drivers of change.

Daniel Nicholas P. Pakpahan, S.H., ACIArb – Mediation Styles

One key question I would like to ask is whether the general aversion or inclination to mediate may be attributed to each person's predisposition of how a mediation process looks like, i.e., the particular style of mediation that one is more familiar with?

I am talking about the distinction between facilitative mediation and evaluative mediation, does this distinction matter to commercial parties such as your interviewees who are positioned to decide whether to mediate or not? (I will not delve into the dichotomy, more on that here).[15] I was thinking of a situation where commercial parties avoid mediation because they were only exposed to one style of mediation which does not suit them, therefore leading them to make a general presumption of what mediation is without knowing of other ways to conduct mediation.

Furthermore, do you perhaps see a prevalence of one style of mediation over the other in a particular jurisdiction and could this be linked to a specific legal culture? I recall having a conversation with practitioners in Indonesia about mediation and I generally get the feeling that most of them understood mediation as necessarily an evaluative process, i.e., providing recommendation and actively encouraging parties to settle. A similar answer arose in a conversation with my colleague from Hong Kong, a government official dealing with dispute resolution policies, who thinks that evaluative mediation seems to be more straightforward and less protracted than facilitative mediation (which I think more aptly captures the idea of assisted and extended negotiation). However, I have received training in the past from mediators from UK and Singapore (being promotors of facilitative

[13] Clarke B, *Lawyers and Mediation* (Springer 2012)
[14] Macfarlane J, *The New Lawyer: How Clients are Transforming the Practice of Law* (2nd edn, UBC 2017)
[15] Quek D, District Judge, Primary Dispute Resolution Centre, Subordinate Courts of Singapore, Facilitative vs Evaluative Mediation – Is There Necessarily a Dichotomy? (2012). Available online: https://v1.lawgazette.com.sg/2013-01/648.htm

mediation), who highlighted the advantage of a facilitative mediation to better preserve neutrality compared to evaluative mediation; disputing parties should not have the image that mediators are merely concerned with how to make parties settle as quickly as possible (ties in with Prof. Strong's earlier comment on how "success" in a mediation ought to be defined).

Do you think that increasing awareness of the different styles of mediation can somehow assist us in transforming the mediation v. litigation framing and changing the reference point to negotiation as suggested in your book?

Dr Howard: I agree that if parties have experience of a particular form of mediation (e.g. evaluative or facilitative) which wasn't suitable for them/or their dispute, they may well be reluctant to continue to use mediation even if of a different type. This once again emphasises the need for more education and awareness of what mediation is and the differing forms it may take.

While my interviewees did not raise the distinction between the differing types of mediation, and conveyed an understanding of mediation as facilitated mediation, I think the differing types of mediation raises a challenge in the cross-border context given that parties may have different expectations of how the mediation will be conducted. As I identify in my book, drawing on the excellent and comprehensive *EU Mediation Law Handbook* (edited by Nadja Alexander, Sabine Walsh and Martin Svatos),[16] there are disparate approaches to mediation across the EU, though facilitative mediation appears to be most common. If one party were from a country where the usual approach is facilitative mediation (e.g. Austria) and another were from a country where a more evaluative process is common (e.g. Estonia), they will have different expectations of the mediation process and may well be reluctant to engage with a type of process with which they are unfamiliar. Therefore, particularly in the cross-border context it is important for parties when proposing mediation or including it in dispute resolution clauses to be very clear on the type of mediation they have in mind.

On your second question, while there will be a variety of types of mediation within a jurisdiction, varying for example across sectors and types of disputants, I suspect that a particular form (e.g. facilitative or evaluative) of mediation tends be prevalent across individual jurisdictions. In the jurisdiction of England and Wales, I would say that the facilitative model of mediation is most commonly used.

As you identify, legal culture is likely to influence the type of mediation used; context and indeed culture will affect the nature of the process. Indeed, the flexibility and adaptability of mediation is one of its key characteristics. I wonder whether an adversarial legal culture may be more likely to foster evaluative mediation, and a collaborative legal culture more likely to foster facilitative mediation (on collaborative lawyering see Julie Macfarlane's book I mentioned earlier*: The New Lawyer: How Clients are Transforming the Practice of Law*. And other forms of culture, beyond legal culture, are also likely to influence the prevalence of a particular type of mediation, though that's too vast a topic to try to tackle here.

In response to your final question, the arguments I make in my book about promoting mediation with a focus on the relationship between mediation and negotiation relate primarily to the

[16] Alexander N et al., *EU Mediation Law Handbook: Regulatory Robustness Ratings for Mediation Regimes* (Wolters Kluwer, 2017)

facilitative form of mediation (which was how the interviewees described their understanding of the mediation process) and not to evaluative mediation. On a more general note, I think increasing awareness of the different forms of mediation can only be beneficial so as to enable disputants to make informed choices about the type of process which is most suitable for them and their disputes**.**

Alexander Stonyer-Dubinovsky

Congratulations on your research and the publication of your book.

It would be interesting to know if you found any jurisdictions where the opinion of mediation was noticeably different from others in the EU. On this topic, could you please express your views on the following:

1. **Do you think that disputes that arise in certain EU jurisdictions are more likely than others to progress to mediation?**
2. **Piotr referred to EU parties dealing with non-EU parties. Expanding on this, are there any interesting regional or cultural trends you noticed in this respect?**

Dr Howard: Thank you for your questions below and my apologies for my slow reply. I have just found your email in my junk folder.

Regarding your first question on the use of mediation across EU jurisdictions, a key theme which emerged in my research was that there appears to be greater use and awareness of mediation in the UK compared to other countries in the EU (I did my research when the UK was still part of the EU). For example, one in-house counsel explained: "*If we look at the EU, the actual use [of mediation] is limited. I see a clear difference on the one hand between the UK and the rest of the EU. I see that mediation is already much more developed and used in the UK*." You may also find the European Parliament's Rebooting Report[17] helpful which identifies countries in the EU with the estimated greatest number of mediations (UK, Germany, Italy and the Netherlands) and those with the estimated lowest number of mediations (Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Greece, Latvia, Lithuania, Luxembourg, Malta, Portugal and Sweden) (see page 6 of the report).

Regarding your second question on trends regarding non-EU parties, as my research focused on cross-border mediation within the EU there were very few insights on cross-border mediation involving parties outside of the EU. However, one of the interviewees did explain that in the US parties will "frequently" use mediation (and arbitration). This suggests that it may be easier for EU parties (and indeed others) to use mediation with US parties.

[17] EP Directorate-General for Internal Policies. Policy Department Citizens' Rights and Constitutional Affairs, (2014) '*Rebooting' the Mediation Directive Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU.* Available at: https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf

Naimeh Masumy

Thank you so much for the fruitful discussion thus far.

I have two questions concerning the barriers to increased use of mediation, and I would like to get your views on the future prospect of using mediation for resolving disputes that involve multiple stakeholders and public policy attributes.

1. **It appears that the resistance to mediation stems from the lack of clear distinction between mediation and other dispute resolution mechanisms that involve building a positive relationship between the parties of the dispute. For instance, the terms "conciliation" and "mediation" are often used interchangeably in some jurisdictions. I suppose this is partly due to the overlapping features of these two concepts (especially concerning the practice of evaluative mediation or facilitative conciliation). In addition, a great deal of uncertainty surrounds the discretion an assessor enjoys when he/she assists the parties in understanding their interest and encouraging dialogue between them. Do you think the fact that mediation is not as procedurally detailed as other ADR mechanisms, leaving considerable flexibility for the assessor, discourages parties from considering this dispute settlement method viable?**
2. **Building on Professor Strong points concerning the perception or practice across the common law-civil law divide, I am curious if the inquisitorial nature of adjudicators under the civil law system will facilitate the implementation of mediation within the legal construct of the EU countries that have attributed broad power to adjudicators, in general, to serve the role of fact-finder and fact interpreter, by conducting their enquiries into issues related to the facts of the disputes. Additionally, do you think those disputants coming from the common law system would view such a mechanism as lacking important procedural components such as document production and cross-examination and, therefore, inept in resolving disputes involving technical or highly complex issues?**
3. **Finally, do you think the evolving nature of mediation would make this ADR mechanism apt to address commercial disputes involving public policy considerations? If so, do you think that would allow for the greater recognition of this system within the legal framework of the EU Mediation Directive?**

Dr Howard:

1. I think the perception that there isn't a procedure/process in mediation may deter some from using mediation and this point is relevant to a key theme which emerged in my research that parties do not use mediation as they do not see the point in mediating if they have already negotiated (i.e. their view is that mediation cannot add anything to their own unassisted negotiation efforts – see pages 162 -175 of my book). For example, one of the interviewees explained: "*More often the opponent is not willing to enter into a mediation. It's: we're so great at negotiating that we don't need a mediation … I hear it and feel it all the time. I find it irrational*." (p. 164)

   Incidentally, and taking a step back, I should add here that when I asked the interviewees the open question of what your preferred method of dispute resolution

for EU cross-border commercial disputes was, many looked at me as though I had asked a very obvious question and responded with negotiation. If therefore disputants are comparing mediation with negotiation, a perception that mediation does not have a detailed procedural/process may lead them to question what mediation could possibly add to their own negotiation efforts and therefore to jump over that step and go straight to arbitration or litigation.

Again, this raises the need to raise awareness of what mediation is, and is not, and to further explore, as Prof. Strong identified, the "success" of mediation and particular in comparison to unassisted negotiation. The process of mediation, and the various steps in that process, can enhance the negotiation process (as suggested, for example, by one of the interviewees who identified a higher compliance rate with mediated settlements agreements compared to settlement agreements arising from unassisted negotiations). I have recently trained as a community mediator and was reminded of the importance and impact of process in mediation (for more on the mediation process see for example Christopher Moore's The Mediation Process)[18].

Finally, on the flexibility of the mediator, I think flexibility is an important skill for a mediator while working within the mediation process, though that flexibility must not go too far e.g. moving into a different model of mediation (from facilitative to evaluative) unless with the clear consent of the parties.

2. While the inquisitorial nature of the civil law system may provide a helpful backdrop to the reception of mediation, a fundamental shift is still required as mediation (and here I am focusing on facilitative mediation) requires the parties themselves (and not their advisors) to explore the facts and interpret them as they try to find a resolution. Anecdotally, I recall when training as a mediator how hard it was to switch off the part of my brain which had been trained as a lawyer to find the relevant facts and use them to propose solutions). As my friend and mediation mentor John Sturrock QC once wonderfully put it: "*the power of mediators lies in their powerlessness*."

   On the second point, I would return to the point above about the interviewees' insights on their preference for the use of negotiation for their EU cross-border commercial disputes. The lack of such procedural components in negotiation does not seem to deter parties from using that method of dispute resolution. For example, one interviewee said "*The vast, vast majority [of disputes] are negotiated out. Negotiation if by far our preferred method of dispute resolution*." However, when such negotiations fail, the perceived lack of procedure/process in mediation may well lead parties to doubt what mediation could add to negotiation (as considered above).

3. Yes, I think mediation (and I am again focusing on facilitative mediation) can offer a valuable process to addresses disputes - and not only commercial disputes - involving public policy considerations as it can offer a structured and collaborative process for dialogue between those interested in, and affected by, those considerations. The characteristics of mediation are being used, for example, in

[18] Moore CW, *The Mediation Process Practical Strategies for Resolving Conflict (4ht ed.)*, (Jossey-Bass, 2014)

Citizen Assemblies which allow for the involvement of the public in shaping public policy (see for example this article by John Sturrock on Citizen Assemblies in Scotland).[19] And these processes are of course a great opportunity to raise awareness of mediation and its value, which as we have identified earlier continues to be much needed.

Michael McIlwrath – Mediation Styles, Psychological Perception of Mediation, Mediation Requirements

To this excellent discussion, I thought you and the others might enjoy a few points from my own experiences:

1. **Mediation style (evaluative/facilitative/transformative, etc): not only do I agree with the point about legal cultures influencing the styles, I think the traditions can be so strong that it can be difficult even to agree on an operating definition of "mediation". When we were organizing the Global Pound Conference, it took us months to come up with a survey of 20 questions that could be asked in countries all around the world about the use of different dispute resolution mechanisms. In defining "mediation," we already had a problem with the name. In some countries, it's a "false friend" (for example, at the time here in Italy, a "mediatore" was and still is, a real estate broker). "Conciliation" was used in some places to refer to an evaluative form of mediation. And many other issues…. So we tried instead to settle on "binding" vs "nonbinding" procedures. From this we got a backlash from certain mediation groups, especially in Australia, who felt this was a disservice to mediation that reinforced a misunderstanding vs arbitration, since a successful result is an agreement, which is binding. "Consensual" was also a problem since every book on arbitration begins with the phrase, "arbitration is a creature of consent…" (To see how this played out, I encourage anyone with interest to look up the questions and/or reports of the GPC, available on the IMI website. IMIMediation.com)**

2. **Perception of weakness: aside from counting myself as someone who always believed the contrary, ie, you offer to negotiate or mediate because you are confident in your side (to say nothing of the value of maintaining a position of reasonableness), I've always felt this perception misses the key point, which is, "who cares?" Honestly, in over 22 years as a lead in-house litigation lawyer, I've never seen any negative impact from having offered to mediate, whether accepted or rejected. I suspect this misperception of being the first to offer mediation (which is the same silly myth about being the first to make an offer in negotiations) is attributed to what the Herbert Smith 2007 study referred to as the difference between "non users" or "ad hoc" users of mediation, vs those who are systemic users, the latter tending to also have a systemic approach to conflict resolution. Those who are rarely exposed to mediation tend to be more timid about proposing it, which I suppose is not surprising and is probably true of most things in life!**

[19] Sturrock J, *Citizens Assembly – and Kindness*, (Wolters Kluwer Mediation Blog January 29, 2020) Available at: https://mediationblog.kluwerarbitration.com/2020/01/29/citizens-assembly-and-kindness/

3. **Mediation requirements in clauses. When I started as an in-house lawyer in 1999, we made maybe one mediation for every 20 or so arbitrations. When I left last year, our rate was closer to a 1:1 ratio, ie, one mediation for every arbitration. I attribute this mainly to the inclusion of a mediation step requirement in contracts. When you do not have some forcing mechanism, the chances of reaching mediation are quite low and require extraordinary circumstances and/or extraordinary efforts just to get there.**

Dr Howard: Your reference to the point about legal cultures from Daniel's earlier email reminded me of an excellent book I should have mentioned: Kevin Avruch, *Culture and Conflict Resolution*.[20] Avruch's detailed examination of culture explains that it is not homogenous, single-level nor stable (p. 105). That makes me wonder how changes in our legal cultures, and influences from other cultures, may be affecting the use of mediation. There's another idea for yet more research!

On your point about the importance of including a mediation clause in contracts, that was echoed by the people I spoke with. It seems that you were successful in getting those clauses into your company's contracts. My interviewees conveyed mixed experiences. One explained: "*The contract negotiation stage: there we are still behind. I say let's have a mandatory step in the contract. It's 2 step: mediation followed by arbitration or litigation. It's not that easy to get in. There's resistance. On a superficial level mediation is accepted but if I turn it into contractually binding there is more resistance*." (p. 144). Another who seemed to have more success in getting a mediation clause into his company's contracts explained how he used to send data published by the World Intellectual Property Organisation which compared experiences of mediation, arbitration and litigation to convince the other party to include the mediation clause (p.142). Again, this highlights the important role which data can play in promoting the use of mediation, and the need for more such data which has been a common theme in these discussions.

Prof. S.I. Strong

I don't know if any of you have ever watched the PBS series, 'Inside the Actors Studio,' but the long-time host, James Lipton, used to conclude the formal interview with a series of questions he said were based on those asked by French talk-show host Bernard Pivot. Pivot's questions were themselves based on a questionnaire developed by Marcel Proust. After some debate with colleagues, I decided not to ask the Lipton questions of our authors (lawyers being somewhat more reticent than actors), but have instead come up with our own list of questions that are in the same spirit. These questions will be asked of all our interviewees.

To that end, I ask Anna to answer the following questions:

1. **What is your favourite word?**
   Dr Howard: Saudade: this is a Portuguese word which I cannot do justice to in translation. It means a bittersweet longing for/missing of someone or something which is far away or gone. It reminds me of my Brazilian grandmother who was very wise, strong and intelligent.

[20] Avruch K, *Culture and Conflict Resolution* (USIP 1998)

2. **What is your least favourite word?**
   Dr Howard "It is incumbent upon…" Pompous and wordy (sorry, for being indulgent with a phrase rather than a word).
3. **Which fictional hero do you consider your own personal hero?**
   Dr Howard: The mole in Charlie Mackesy's beautiful *The Boy, the Mole, the Fox and the Horse*.[21] He is very wise and doesn't take himself too seriously.
4. **Which historical figure do you identify most with?**
   Dr Howard: The remarkable women who were the first women to study at The Queen's College, Oxford University[22] when the College allowed the admission of women in 1979 (I continue to be surprised about how recent this is). I have had the privilege to meet some of these women. They were determined, resilient, and perhaps daunted by the environment, as I was when I studied there as an undergraduate just 16 years later.
5. **What sound or noise do you love?**
   Dr Howard: The sound of Brazilian Portuguese
6. **What sound or noise do you hate?**
   Dr Howard: My puppy barking at 3 am in the morning.
7. **What profession other than your own would you like to attempt?**
   Dr Howard: Dancer
8. **What profession would you not like to do?**
   Dr Howard: Anything in IT
9. **What is your own personal motto?**
   Dr Howard: Rather than a motto, I have a question which I frequently ask myself from Mary Oliver's wonderful poem "The Summer Day": "*Tell me, what is it you plan to do with your one wild and precious life?*"
10. **What do you hope your colleagues will say about you when you retire?**
    Dr Howard: She was generous, kind and had integrity.

It has come time to formally close our interview of Dr. Anna Howard and to give her a big virtual round of applause for taking the time to discuss her book, EU Cross-Border Commercial Mediation, with us. Check back on the very first email for information about a discount if you are now interested in purchasing the book.

You are welcome to continue the discussion with Anna on- or offline, but now, please join me in thanking her for sharing her knowledge with us!

Dr Howard: Thank you for your excellent questions and comments. It's been a pleasure to be part of Young-OGEMID's author series. My thanks to Prof. Strong for the invitation.

[21] C Mackesy, The Boy, the Mole, the Fox and the Horse (Ebury Press 2019)
[22] Available at: https://www.queens.ox.ac.uk/join-our-networks/the-queens-womens-network-qwn/#