

## Webinar Post-Event Report

Prepared by Ms. Tay Hui Lyi & Mr. Samuel Teo (SIMI Consultant)



**CROSS-BORDER MEDIATION: THE NEW WAY FORWARD FOR BUSINESSES**

18 November 2021, 7.30 pm GMT +8 / 1.30 pm CEST

## 1 OVERVIEW

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### 1.1 Event Summary

This online webinar marked the second and latest instalment in the ICC Malaysia webinar series on mediation. The first webinar – “*Mediation & Business: Global Perspectives for Business in Resolving Cross-Border Commercial Disputes*” – was held in July 2021.

A recording of the webinar may be viewed [here](#).

#### **Moderator:**

- **Prof. Joel Lee** (Chairman of Singapore International Mediation Institute (SIMI))

#### **Panellists:**

- **Ms. Josephine Hadikusumo** (Director & Principal Mediator of *Asia Mediation Centre* (AMC))
- **Ms. Ana Maria Maia Gonçalves** (Founder & President at *Instituto de Certificação e Formação de Mediadores Lusófonos* (ICFML))
- **Prof. Law Wai Hung Francis** (Chairman of *International Dispute Resolution & Risk Management Institute* (IDRRMI))
- **Mr. Claude Amar** (President of *Institut Français de Certification des Médiateurs* (IFCM))

Prepared by the Singapore International Mediation Institute ([www.simi.org.sg](http://www.simi.org.sg)).

## 2 PRE-EVENT REGISTRATION

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Signups were open from 1 November 2021 till the morning of the event, for a total of 18 days. Through promotion on various platforms, a total of **134** signups were received.

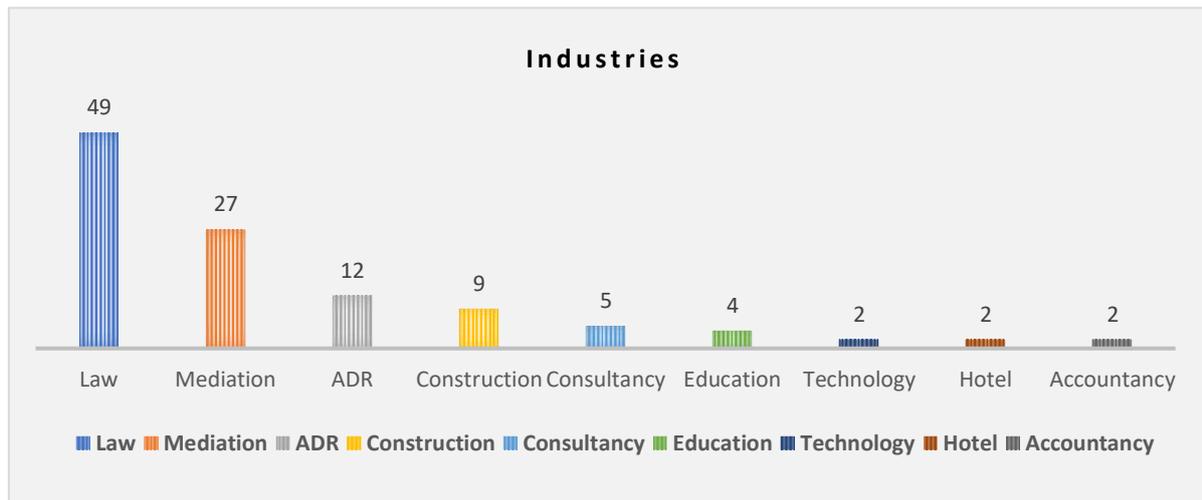
### 2.1 Country of Origin

Participants who signed up for the Webinar hailed from 26 different countries, with a substantial number of sign-ups originating from Singapore, India, Brazil and Hong Kong.

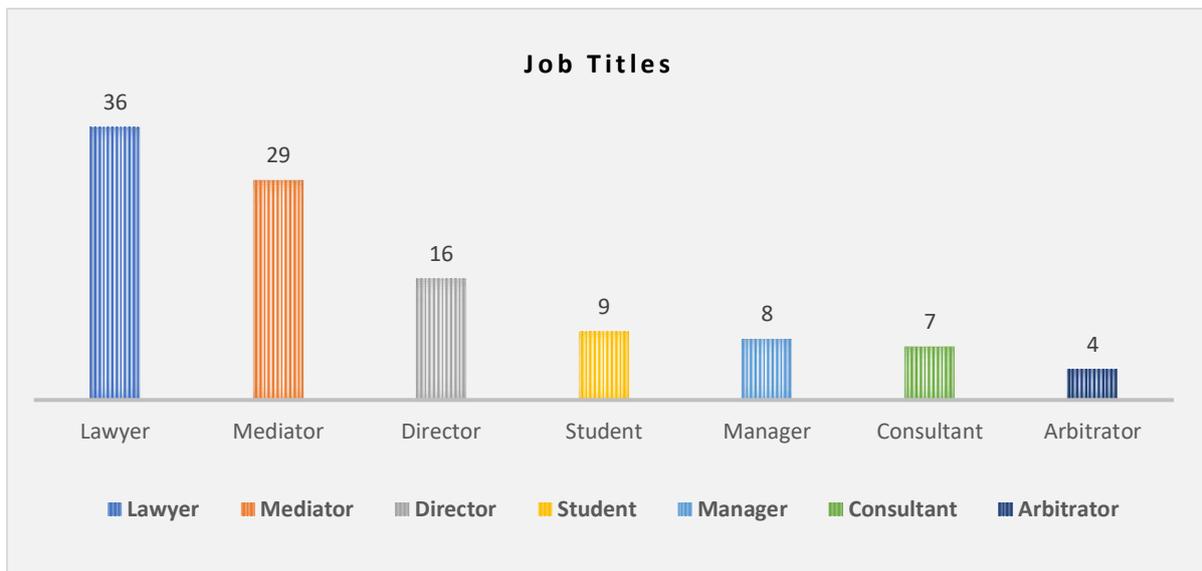
Australia	4
Bangladesh	1
Brazil	17
Brunei	2
China	4
Czech Republic	1
France	2
Germany	1
Greece	1
Hong Kong	16
India	21
Indonesia	2
Italy	1
Malaysia	6
Morocco	1
Russia	1
Nigeria	2
Pakistan	1
Philippines	1
Saudi Arabia	1
Singapore	36
Sri Lanka	1
Switzerland	2
Turkey	1
United Kingdom	4
United States	4
<b>Total</b>	<b>134</b>

## 2.2 Industries, Organisations, Titles

The registrants also came from various different industries. Even though majority of the registrants came from the Legal, Mediation and Alternate Dispute Resolution industries, there were also individuals from areas such as Construction, Consultancy, Education, Technology, Hotel and Accountancy.



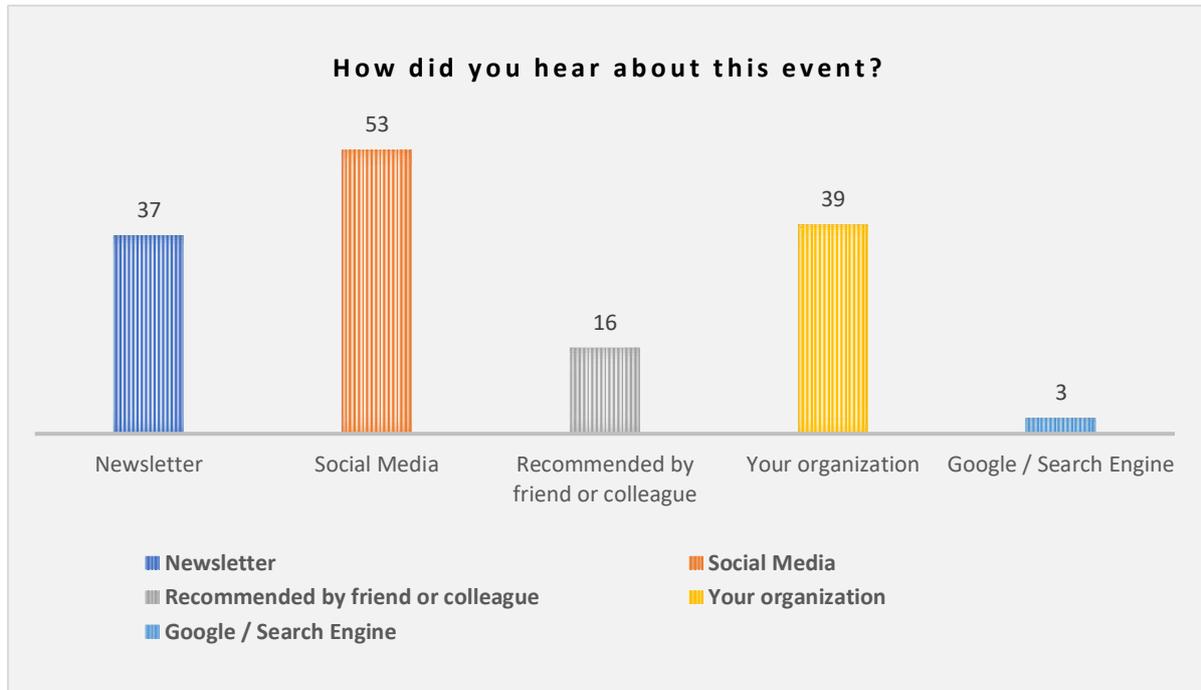
Majority of the registrants were Lawyers and Mediators, but there were also individuals outside the legal industry, such as a substantial number of Directors, Students and Managers. Many individuals also held multiple job titles, such as Lawyer, Mediator and Arbitrator.



A wide range of organisations and companies were represented. Notably, a significant number of individuals came from ICFML and IDRRMI and various law firms.

## 2.3 Publicity

When asked how they heard about this webinar, most registrants indicated that they heard it through Social Media. Many also heard of the webinar through Newsletters and their respective Organisations, indicating that these were effective means channels of publicity.



### 3 WEBINAR DISCUSSION

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Prof. Lee started by introducing (or re-introducing to some) the concept of mediation – a process of dispute resolution that is facilitated by a neutral third party, the mediator. The mediator has no power to impose a decision on the parties. Instead, his/her role at the mediation is to facilitate a resolution of the dispute via agreement between those parties. Essentially, mediation empowers parties to make their own commercial decisions with regard to the disputes that they face in the course of doing business. Prof. Lee stressed that one important and valuable aspect of mediation is its confidentiality.

#### Overview of Enforcement of Mediation Settlement Agreements

Addressing a misconception that users of mediation commonly held, that mediation is non-binding, Prof. Lee shared that notwithstanding that it is possible for parties to fail to settle a dispute through mediation since the mediator cannot impose an outcome on them, the statistics reveal that parties come to an agreement in most cases anyway. Additionally, once parties have signed a mediated settlement agreement, that agreement is binding, and can be enforced by the parties. On this topic, Prof. Lee posed the question to the panellists on how a mediated settlement agreement can be enforced in the jurisdictions and legal traditions that they operate in.

Ms. Hadikusumo stated that in common law jurisdictions, a mediated settlement agreement can be enforced like any other contract. On top of that, certain countries have legislated for mediated settlement agreements to be converted to, and enforceable as court judgements or arbitral awards. The Singapore Mediation Convention also provides an additional route for the enforcement of international commercial settlement agreements resulting from mediation.

Chiming in, Mr. Amar confirmed that the enforcement processes mentioned previously were equally applicable in France. Ms. Gonçalves highlighted that in the Portuguese speaking countries, like Brazil (that has their Mediation Act, and their new Civil Procedure Code), mediated settlement agreements will be enforceable as an extrajudicial execution instrument. Essentially, this means that parties can execute their agreement right away after obtaining it. She shared that in the EU, the applicable provisions on cross-border enforcement of settlement agreements were found in each individual member state. Prof. Law shared that the experience in Hong Kong has been that over 98% of mediated settlement agreements were performed by the parties, with only the remaining 2% seeking enforcement in the courts. In mainland China, the parties in domestic disputes prefer to get their settlement agreements endorsed by the courts, to guarantee the enforceability and workability of their agreements.

### Utility of the Singapore Mediation Convention

Prof. Lee then asked the panellists to share their thoughts on how the Singapore Mediation Convention has changed the game for mediation of cross-border commercial disputes.

Prof. Law started by sharing that just as how the New York Convention (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards) has made it easier to enforce arbitral awards in jurisdictions which were not the arbitral seat, users of mediation appreciate the potential of the Singapore Mediation Convention to do the same for mediated settlement agreements.

Ms. Hadikusumo added that the reason the Singapore Mediation Convention was such a game-changer was because notwithstanding the universally known advantages of mediation, the main stumbling block for the mass adoption of mediation in cross-border disputes had been the enforceability of agreements arising from mediation. She raised the example of parties who had a dispute over a contractual breach – they would naturally be worried that the mediated settlement agreement was just another contract that parties must trust will be honoured. With the Singapore Convention, the issue of enforceability was addressed, which made mediation a viable and commonsensical alternative to arbitration. Ms. Gonçalves went further to express that with the Singapore Mediation Convention, mediation had a high chance of becoming the default option to resolving international commercial disputes, an option that business-minded parties must consider seriously because of the numerous advantages.

### Advantages of Mediation versus Other Forms of Dispute Resolution

Directing the discussion towards the question of why business users should choose mediation over other methods of dispute resolution, Prof. Lee invited Mr. Amar to kick-off the conversation. Mr. Amar echoed the advantages raised by the other panellists earlier about the cost-effectiveness of mediation and potential time savings, and shared that mediation also has the added benefit of helping parties gather more information about each other, engender trust and resolve underlying seeds of conflict. He shared an experience of mediating with French and American parties, where despite initial cultural differences and loss of confidence in the partnership, parties were able to rebuild their trust after an honest sharing about their past experiences and feelings. Prof. Lee commented that mediation allowed for the airing of interpersonal aspects of the business relationship and the resolution of the conflict on that level, instead of just addressing legal considerations only.

Ms. Gonçalves shared that this was especially important for business users because oftentimes, there were multiple levels of consideration for commercial disputes e.g., business considerations, legal considerations, which all must be addressed. Furthermore, after undergoing the process of mediation and rebuilding trust in their partnership, parties emerge with a stronger relationship, having understood, and appreciated each other's perspectives. Ms.

Hadikusumo agreed that relationship preservation is one of the main crown jewels that mediation can afford business users. Parties usually just want the dispute to go away, but not the relationship, because of reasons such as the difficulty of finding another highly specialised partner, or the hope of preserving ongoing relationships with other subsidiaries in the same multi-national corporate group. Lastly, Mr. Law summarised that mediation is unique because of the collaboration that is fostered through the process, which other methods fail to achieve.

### *Increasing the Adoption of Mediation*

Building on the discussion, Prof. Lee asked if the panellists had any comments on why mediation is not being used regularly, in light of the above conversation on the benefits of mediation. Ms. Gonçalves opined that the reason could be that mediation has only recently gained traction among the legal profession, with universities now even offering curriculum that teach alternative ways of resolving disputes, and legal practitioners signing up for courses to understand such modes of alternative dispute resolution. Ms. Hadikusumo agreed that the main reason would be the lack of awareness of mediation despite its long history and expressed that more must be done to raise awareness. She shared a recent initiative from Malaysia, the Covid-19 Temporary Measures Act, which aimed to help alleviate the financial and economic impact of Covid-19. Under the Act, parties who are impacted by Covid-19 and have contractual disputes may seek recourse to mediation with state sponsored mediation centres, which will be paid for or subsidised by the government.

Acknowledging the slow adoption of mediation, Mr. Amar drew a parallel to developments in negotiation – while interest-based negotiation has been around for 30 odd years, most negotiators are still in an arm-wrestling position. Mr. Law also stressed the importance of having proper case management processes for mediation, much akin to court directions in court proceedings. He shared that in some of the centres that are part of the Alliance for Mediation Standards,<sup>1</sup> there are existing case management processes for mediation, which will be particularly important for clients who are unfamiliar with mediation.

### *Appropriate Cases for Mediation; When Mediation Should Take Place, etc*

Next, Prof. Lee posed the question of what kinds of disputes should be sent to mediation, and at what stage of the dispute. Dealing with the question in three parts – (1) what kinds of cases should go for mediation, (2) when this should happen, and (3) who should go for mediation – Ms. Hadikusumo shared that save for criminal cases, nearly every case should be considered for mediation. As to when this should happen, while parties can technically bring up the matter for mediation anytime, the difficulty often lies in getting the other party to agree to mediate the

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<sup>1</sup> The Alliance for Mediation Standards consist of the Asian Mediation Centre (AMC), the Instituto de Certificação e Formação de Mediadores Lusófonos (ICFML), the Institut Français de Certification des Médiateurs (IFCM), the International Dispute Resolution & Risk Management Institute (IDRRMI), and the Singapore International Mediation Institute. This is following an MOU that was signed between these organizations in April 2021.

dispute without an existing dispute resolution clause. To deal with this, she urged business users to consider mediation right from the onset of the business relationship by inserting mediation into dispute resolution clauses. Lastly, she shared that mediation is especially appropriate for micro, small and medium enterprises, because it is a voluntary process, all parties have some measure of control over the outcome, and in the hands of a skilled mediator, can be a level-playing ground for all disputants, and save time and costs.

In response to Prof. Lee's follow-up question on whether there are ways to go for mediation even without an existing dispute resolution clause, Ms. Gonçalves shared that there are indeed many different ways to do so – either by direct invitation to participate in ad-hoc mediation, or for one party to go through a private chamber of commerce (e.g. the International Chamber of Commerce (ICC)) and request for the institution to approach the other party to suggest mediation. Mr. Law added that in many places, even without the inclusion of mediation in the dispute resolution clause, the courts will suggest for the parties to go for mediation first. In Hong Kong, there is the “Mediate First” pledge, so the court will suggest parties to mediate first in civil proceedings. This practice can also be observed in mainland China. Furthermore, another way is for parties to refer the case for mediation through mutual agreement.

On the side issue of whether parties who suggest mediation first will appear weak, Mr. Law considered that parties should bear in mind that mediation allows for a win-win outcome, where all parties are able to achieve their needs and wants through mediation. Therefore, suggesting mediation is really suggesting a way to maximise the value of outcomes for all parties, and parties need not worry that that displays weakness. Mr. Amar also shared that this issue has been discussed a lot at the French Academy of Mediation, and the conclusion was that it stems from a misunderstanding of what mediation is. Mediation should be understood as a recognised and organised process in its own right, and not just as an alternative to more established or conventional dispute resolution processes, which makes going to mediation an intelligent choice, as opposed to one that shows weakness.

### *Selection of a Mediator and the Importance of Mediation Standards*

To kickstart the discussion on professional mediation standards, Prof. Lee asked the panelists to comment on how parties should select a mediator that is appropriate for their dispute. Mr. Amar shared that the chief quality of a good mediator should be the ability to think out of the box – the ability to see things another way than the way presented to him/her. A good mediator also should not be afraid of emotions, and must understand the energy contained in these emotions, and be able to direct these energies towards mutual understanding. Mr. Amar also stressed the difference between one who is merely trained in mediation, versus one who is accredited or certified in mediation. Mere training was not sufficient to ascertain a mediator's ability, whereas accreditation just meant that someone was on the roster of a mediation service provider, and certification referred to a public statement by an independent body that such person can perform good mediation services.

Mr. Law touched on what traits parties can look out for when selecting a mediator. First, some mediators specialise in certain types of disputes, so parties can narrow down the list of mediators based on the type of dispute that they are facing. Next, parties can also look to the mediator's qualifications, including educational or professional qualifications in the field of dispute resolution, or accreditation and certification as a form of assurance by the accrediting or certifying body of the mediator's quality. This sentiment was echoed by Ms. Hadikusumo, who added that most centres have a feedback digest that parties can look at – reviews of the mediator from the users' perspective. Wrapping up this point, Ms. Gonçalves shared that in her experience, nothing is better than meeting the mediator before the mediation and choose a mediator who you believe can resolve your dispute, from a “human” perspective.

*Is there a universal standard of mediation?*

Considering the multitude of variations in the parties (e.g., culture, language, gender, needs) and types of disputes in every mediation, Prof. Lee challenged the panellists with the question of whether it is possible to have a universal standard that is applicable internationally. Mr. Amar, Ms. Hadikusumo and Mr. Law shared the view that there did not have to be equivalence in the culture or subject-matter expertise between the parties and the mediator for the mediator to be able to mediate the dispute effectively. That said, Ms. Hadikusumo added that there are some universal qualities that mediators should possess: process management skills; people management skills; the ability to be neutral; the ability to problem-solve; the ability to know ethically when conflicts of interests exist etc. Mr. Amar concluded this discussion with the assertion that the mediator's role is not to understand the technical aspects of the case to finally make a decision, but to ensure that the parties understand each other.

Finally, Prof. Lee asked Ms. Gonçalves to elaborate on the “universal disclosure protocol” in the works in the context of mediation. Ms. Gonçalves shared that the [Universal Disclosure Protocol for Mediation \(UDPM\)](#)<sup>2</sup> provides for six elements of disclosure at the start of a mediation: (1) Conflict of Interest; (2) Confidentiality; (3) General Process; (4) Role of the Mediator and Parties; (5) Technology; and (6) Impact of Venue. Therefore, any user of mediation can expect that the mediator will discuss and explain these six elements at the start of the mediation. Ms. Gonçalves opined that the adoption of the UDPM framework is an important step to making mediation mainstream worldwide, by giving certainty to future parties considering mediation, acknowledging and informing parties of cultural differences and influences, and promoting transparency about the mediation process.

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<sup>2</sup> An explanation of the Universal Disclosure Protocol for Mediation can be found at <https://www.mediate.com/articles/rainey-disclosure.cfml>. The text of the UDPM can be found at <https://universaldisclosureprotocolmediation.com/the-protocol/>.

### 3.1 Question & Answer Segment

The Q&A segment was well utilised by the participants, with a total of **10** questions being submitted. Examples of questions posed included:

*“Does mediation really work in David v Goliath cases? In my experience, they often begin well, but the end result is never that good for the “Davids” of the cases.”*

*“Is mediation a “safer” form of dispute resolution when one of the parties are Chinese, given the new “Chinese State Secrets” law as mediation may not require the same level of data disclosure you would expect in arbitration/litigation?”*

*“Should the mediation fail, have you ever failed to enforce the “Without prejudice” stance in the ensuing arb/litigation?”*

*“In which situations should you decide against mediation? Eg if the other party does not cooperate, mediation might only lead to delay without reaching a settlement.”*

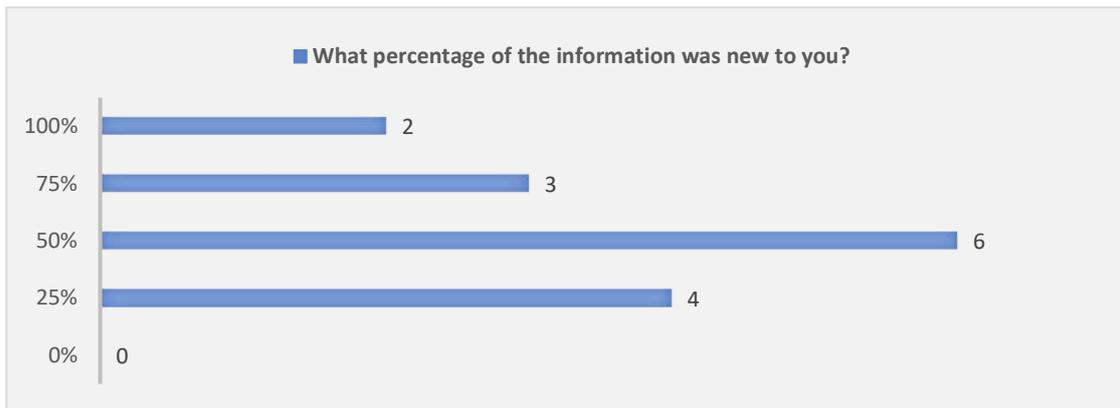
We invite you to listen to their answers to the questions from the [video recording](#) to the session here as well as to catch up on the responses to other questions not listed above.

## 4 POST-EVENT SURVEY

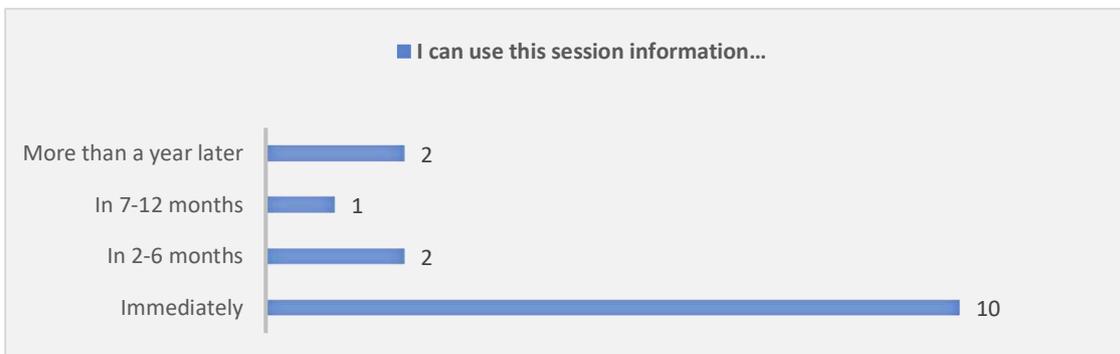
The webinar lasted from 7.30pm till 9.05pm and saw a total of **49** unique attendees. Upon the conclusion of the webinar, a feedback survey was carried out, with **15** responses received.

### 4.1 Webinar Topic Coverage

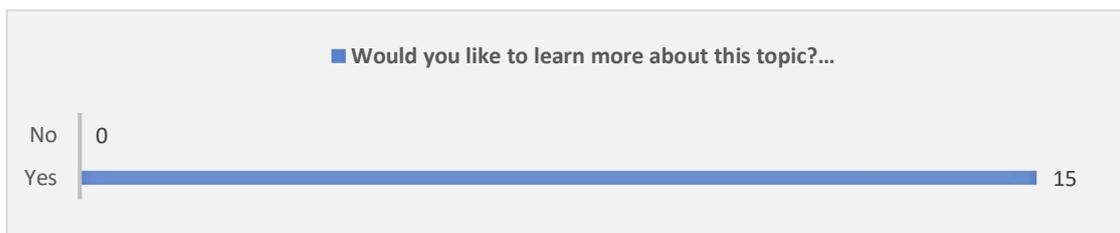
Respondents found that 25% to 100% of the information presented during the webinar was new to them, with most indicating that 50% of the information presented was new (40%).



All respondents agreed that *they would be able to use the information* from the webinar, with majority agreeing that they would be able to use the information ‘*immediately*’ (67%).

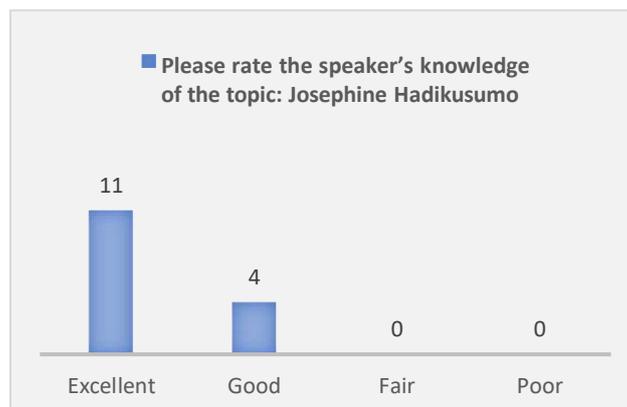
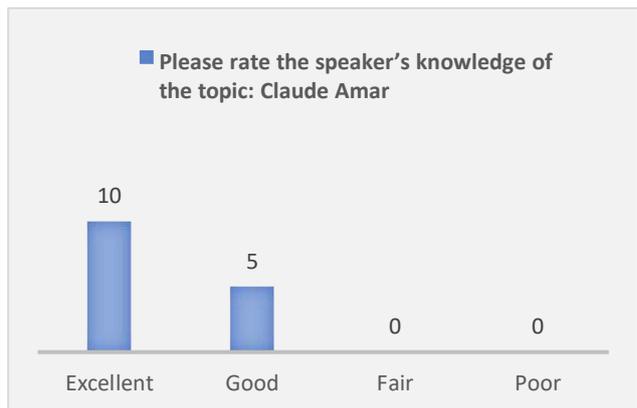
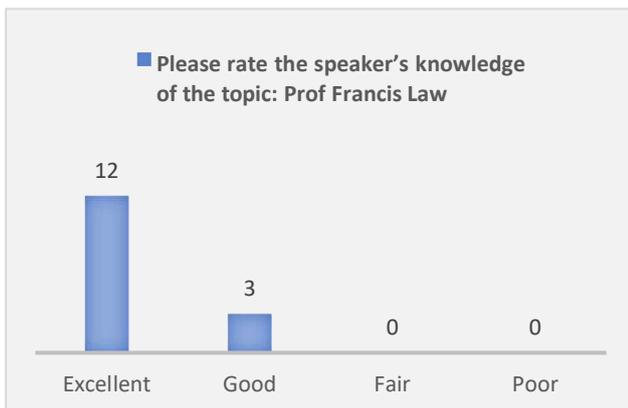
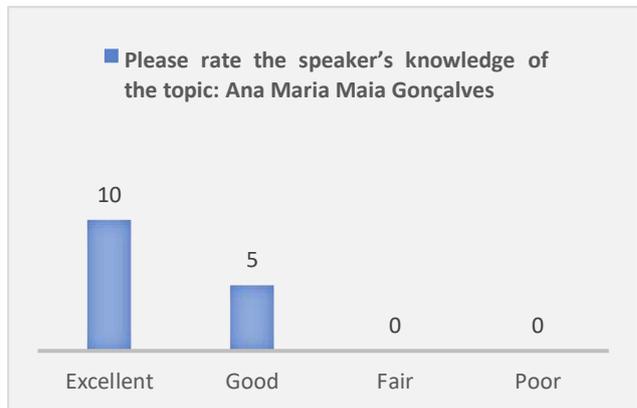
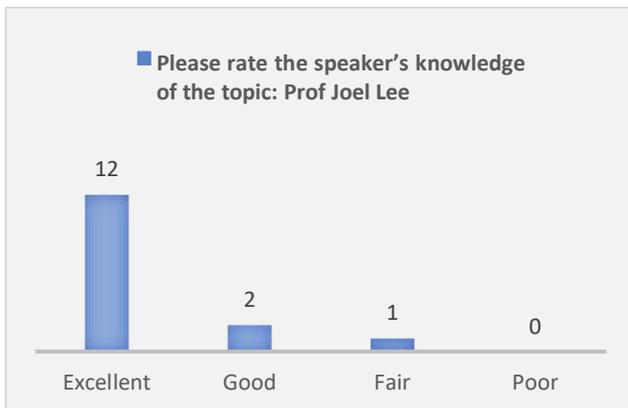


Lastly, almost all respondents remarked positively that *they would like to learn more about the webinar’s topic* (100%), indicating a high satisfaction towards the choice of webinar topic.



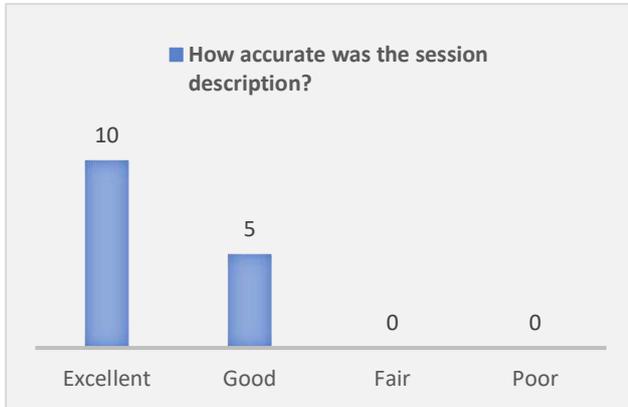
## 4.2 Review of Speakers

Overall, the speakers received significantly positive reviews. Almost all respondents indicated that all speakers had either ‘*Excellent*’ or ‘*Good*’ knowledge of the presented topic, with a strong majority indicating ‘*Excellent*’.



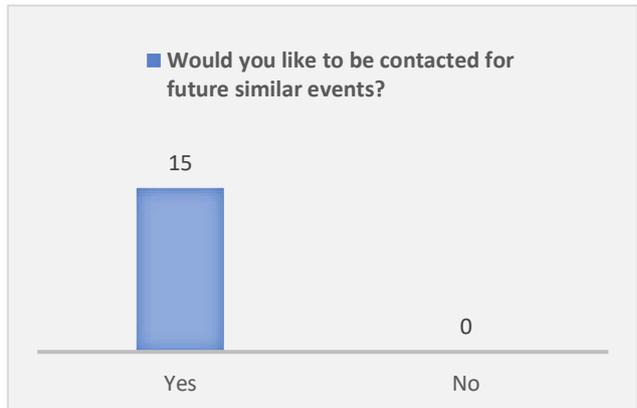
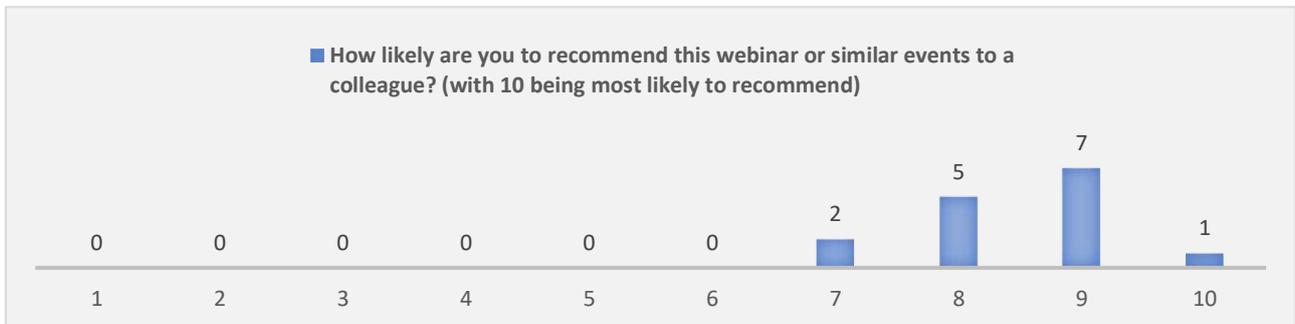
### 4.3 Webinar Experience

All respondents found the session description to be either ‘Excellent’ (67%) or ‘Good’ (33%), and all respondents found that the session was either ‘Excellent’ or ‘Good’ in comparison to their expectations.



Overall, the feedback for the webinar as a whole was well received. Respondents indicated their overall experience was either ‘Excellent’ (67%) or ‘Good’ (33%), with none indicating ‘Poor’.

Further, respondents also responded strongly that they would recommend this workshop to their peers and all showed a willingness to be contacted for future similar events, emphasising the webinar’s success.

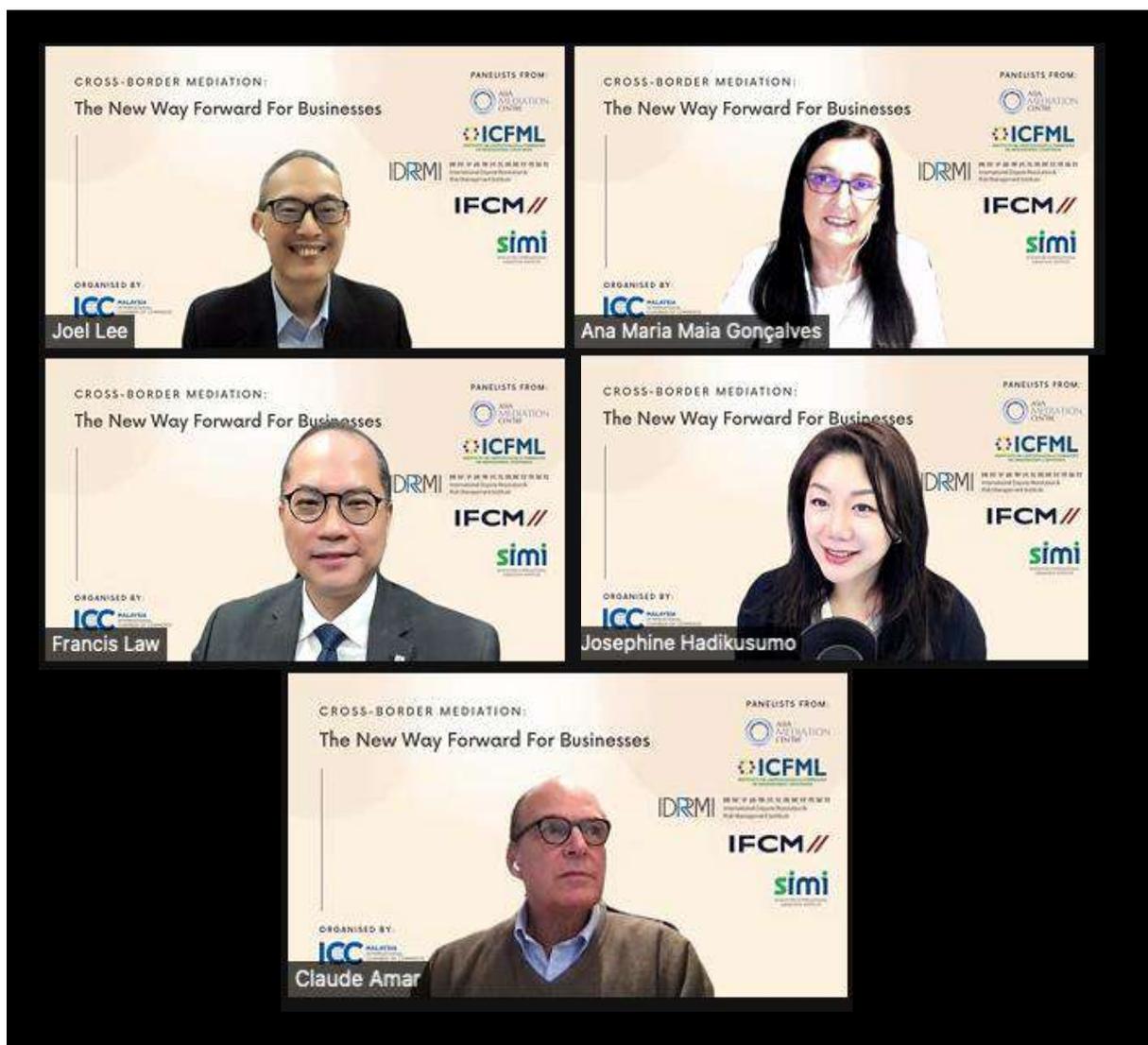


## 5 CONCLUSION

To conclude, while actual attendance did not match the number of sign-ups, the Webinar fulfilled its key objective of educating the audience about using mediation and mediators who were certified with appropriate qualities. This was going by the feedback and number of questions asked. In the words of a respondent, the webinar was “*well-moderated*” with a “*good flow of topics*” and the “*panellists are clearly very knowledgeable.*”

The team at SIMI would like to express our gratitude to Prof. Lee, Ms. Hadikusumo, Ms. Gonçalves, Prof. Law, and Mr. Amar, for sharing their time to participate in this webinar, and to all participants for joining us live for the session from around the world.

## 6 MEDIA



## 7 COLLATERAL

CROSS-BORDER MEDIATION:

# The New Way Forward for Businesses

Back by popular demand! Catch the latest instalment on how to navigate disputes painlessly in cross-border business. This webinar marks the second part of our series on mediation and will consist of a fireside chat with experts from 4 continents as well as multi-jurisdictional practitioners and end-users. If you have burning questions related to mediation, come join in the discussion!

**18 November 2021**  
7.30PM - 9.00PM (GMT+8) /  
12.30PM - 2.00PM (GMT+1) /  
7.30AM - 9.00AM (GMT-4)

**Prof. Joel Lee**  
Chairman of Singapore International  
Mediation Institute (SIMI)  
*Moderator*

**Josephine Hadikusumo**  
Director & Principal Mediator of  
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Chairman of International Dispute  
Resolution & Risk Management  
Institute (IDRRMI)

**ICC MALAYSIA**  
INTERNATIONAL  
CHAMBER OF COMMERCE

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CROSS-BORDER MEDIATION:

# The New Way Forward for Businesses

FEATURING EXPERTS  
COVERING 4 CONTINENTS



**PROF. JOEL LEE**

Moderator

Joel Lee is a Professor at the Faculty of Law, the National University of Singapore. Joel co-pioneered the teaching of Negotiation and Mediation in the Singapore Universities and has played a significant role in furthering the development of mediation in Singapore, not just in education but in practice. A graduate of Victoria University of Wellington and Harvard Law Schools, Joel is a partner with CMP-Cambridge (USA) and a principal mediator with the Singapore Mediation Centre.

**JOSEPHINE HADIKUSUMO**

Josephine Wan-Wen Hadikusumo currently serves as Director, Principal Mediator and Dispute Resolution consultant for the Asia Mediation Centre and is a member of the ICC Commission Task Force on Arbitration & ADR. She is concurrently Managing Partner in CJ Liew & Co, a Malaysia-based boutique law firm specializing in legal matters related to commercial and cross-border transactions, corporate compliance and conciliation.



**ANA MARIA MAIA GONÇALVES**

Ana Maria Maia Gonçalves has over 35 years of experience as a business leader in global organizations, educator, mediator and executive coach. She is the founder and president of the Institute for Certification and Training of Portuguese-speaking Mediators (ICFMI). Ana is a mediator on Global Mediation Panel of the Office of the Ombudsman for UN and a fellow of the NCTDR.

**PROF. LAW WAI HUNG FRANCIS**

Prof. Francis Law is the President of Hong Kong Mediation Centre, the Academy of International Dispute Resolution and Professional Negotiation (AIDRN), and another 6 Mediation, Arbitration and Advocates Institutes. Prof. Law is a mediator and arbitrator of over 30 regions / countries.



**CLAUDE AMAR**

Claude Amar is a registered architect, a hotel developer, a real estate asset manager and a mediator. He was trained as an architect (Ecole Nationale Supérieure des Beaux Arts, Paris), has studied Finance at INSEAD and Negotiation at Harvard (with Robert Mnookin's team). He was trained as a mediator by Gary Friedman, at the Centre for Mediation in Law in San Francisco.



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