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Beyond International Commercial Arbitration? The Promise of International Commercial Mediation

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I. INTRODUCTION

International commercial arbitration has long been the preferred means of resolving complex business disputes in the cross-border context.[1] However, the international corporate community has become somewhat disenchanted with that particular mechanism because of concerns about rising costs, delays, and procedural formality.[2] As a result, parties are looking for other means of resolving international commercial disputes. One of the more popular alternatives is mediation.[3]

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1. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 68 (2009).

2. *See* WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE 3–27 (2d. ed. 2012); S.I. Strong, *Increasing Legalism in International Commercial Arbitration: A New Theory of Causes, A New Approach to Cures*, 7 WORLD ARB. & MEDIATION REV. 117, 117–18 (2013) [hereinafter Strong, *Increasing Legalism*].

3. *See* Jacqueline Nolan-Haley, *Mediation: The "New Arbitration,"* 17 HARV. NEGOT. L. REV. 61, 66–67 (2012) [hereinafter Nolan-Haley, *Mediation*]. International commercial mediation can arise either through the use of standalone agreements or multitiered (step) dispute resolution provisions created either before or after the dispute arises. *See* Neil Andrews, *Connections between Courts, Arbitration, Mediation and Settlement: Transnational Observations*, 10 IUS GENTIUM 249, 264 (2012); Paul E. Mason, *What's Brewing in the International Commercial Mediation Process: Differences from Domestic Mediation and Other Things Parties, Counsel and Mediators Should Know*, 66 DISP. RESOL. J. 64, 66 (Feb.–Apr.

Although the number of recent developments in the field may make international commercial mediation sound as if it is a novel concept, the idea of using consensus-based mechanisms to resolve transnational business disputes is not new.[4] In fact, mediation and conciliation[5] were often the preferred means of resolving international commercial conflicts in the first half of the twentieth century.[6] It was only in the years following World War II that arbitration became the more popular method of addressing cross-border business disputes.[7]

The reason for this shift in emphasis is unclear, since institutional support for consensus-based dispute resolution remained in effect throughout the twentieth and early twenty-first century. For example,

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2011). International commercial mediation could also arise as the result of a court-mandated mediation program. *See id.*

4. *See* Harold I. Abramson, *Time to Try Mediation of International Commercial Disputes*, 4 ILSA J. INT'L & COMP. L. 323, 323 (1998); Steven J. Burton, *Combining Conciliation with Arbitration of International Commercial Disputes*, 18 HASTINGS INT'L & COMP. L. REV. 637, 637 (1995).

5. There has been a great deal of debate over the years about the difference between the terms "mediation" and "conciliation." *See* Jacqueline M. Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?*, 37 N.C. J. INT'L L. & COM. REG. 981, 1009–10 (2012); Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution*, 32 U. PA. J. INT'L L. 1, 10–11 (2010); Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation Into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 71, 84–85 (2013). Both conciliation and mediation can take place in the context of public international (state-to-state) disputes and private international disputes. *See* Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 FORDHAM INT'L L.J. 578, 582–83 (1991). Although some experts identify certain differences in the procedural processes used by the third party neutral, with conciliation being more evaluative than "pure" mediation, most people have now concluded the two terms are basically synonymous. *See* UNITED NATIONS, UNCITRAL MODEL LAW ON INT'L COMMERCIAL CONCILIATION WITH GUIDE TO ENACTMENT & USE 11 (2004), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf [hereinafter UNCITRAL GUIDE]; Thomas Gaultier, *Cross-Border Mediation: A New Solution for International Commercial Settlement?*, 26 INT'L L. PRACTICUM 38, 42 n.25 (2013); Howard M. Holtzmann, *Recent Work on Dispute Resolution by the United Nations Commission on International Trade Law*, 5 ILSA J. INT'L & COMP. L. 425, 426 (1999); Nolan-Haley, *supra*, at 1009–10. That is the approach that will be adopted herein. However, the debate continues, and some people may be hesitant to adopt conciliation, even if they are in favor of mediation.

6. *See* Eric A. Schwartz, *International Conciliation and the ICC*, 10 ICSID REV.—FOREIGN INVESTMENT L.J. 98, 99 (1995).

7. *See* Reif, *supra* note 5, at 614–15; Schwartz, *supra* note 6, at 99, 107 (noting fewer than fifty-five requests for conciliation or mediation with the International Chamber of Commerce (ICC) from 1988 to 1994, as compared to over 2,000 requests for ICC arbitration).

one of the world's leading private dispute resolution providers, the International Chamber of Commerce (ICC), has had rules on international commercial conciliation and mediation continuously in place since 1923, with the most recent version having gone into effect on January 1, 2014.[8] The United Nations Commission on International Trade Law (UNCITRAL)[9] has had its own set of rules in place since 1980 ("UNCITRAL Conciliation Rules"),[10] although those provisions have not been adopted by private parties nearly as often as UNCITRAL's rules on international commercial arbitration ("UNCITRAL Arbitration Rules") have.[11] Thus, the preference for arbitration cannot be the result of a lack of institutional or structural support, at least at the level of individual disputes.

However, there may be larger factors at play. For example, international commercial arbitration has undoubtedly benefitted from the extensive system of international treaties designed to promote international commercial arbitration in the years following World War II.[12] International commercial mediation, on the other hand, has

8. *See generally* INT'L CHAMBER OF COMMERCE, MEDIATION RULES (in effect Jan. 1, 2014), *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/; Reif, *supra* note 5, at 614–15; Schwartz, *supra* note 6, at 99.

9. UNCITRAL was created to promote the harmonization of international commercial and trade law so as to encourage international commercial activity. *See* Establishment of the United Nations Commission on International Trade Law, G.A. Res. 2205 (XXI), U.N. GAOR, 6th Comm., 21st Sess., 1497th plen. mtg. (Dec. 17, 1966).

10. *See* Conciliation Rules of the United Nations Commission on International Trade, U.N. GAOR, 35th Sess., 81st plen. mtg. at 260, U.N. Doc. A/35/52 (Dec.4, 1980), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf [hereinafter UNCITRAL Conciliation Rules]; Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide*, 80 NOTRE DAME L. REV. 553, 572 n.90 (2005). Although the UNCITRAL Conciliation Rules have not been widely adopted by private parties, the rules have been critically well received and have formed the basis of a number of different institutional rules on mediation and conciliation. *See* Holtzmann, *supra* note 5, at 425–26; William K. Slate II et al., *UNCITRAL (United Nations Commission on International Trade Law), Its Workings in International Arbitration and a New Model Conciliation Law*, 6 CARDOZO J. CONFLICT RESOL. 73, 94 (2004).

11. UNCITRAL initially promulgated its arbitration rules in 1976 but revised them in 2010. *See* UNCITRAL Arbitration Rules, G.A. Res. 31/98, UNCITRAL, 31st Sess., Supp. No. 17 at 34, U.N. Doc. A/31/17 (Apr. 28, 1976), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf [hereinafter UNCITRAL Arbitration Rules 1976]; UNCITRAL Arbitration Rules, G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Jan. 10, 2011), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf [hereinafter UNCITRAL Arbitration Rules 2010].

12. *See infra* notes 77–79 and accompanying text.

primarily existed as a form of "soft law."[13] Another issue may be a cultural predisposition towards adjudicative means of dispute resolution, at least in Western legal systems.[14] While many scholars may prefer consensus-based methods of dispute resolution, there may be something about international commercial disputes that leads parties and practitioners to prefer arbitration.[15]

In any event, the issue is now back at the forefront of scholarly and practical debate.[16] Empirical studies have suggested an uptick in commercial actors' commitment to consensual forms of dispute resolution,[17] which may signify a more serious indicator of potential change. The World Bank, in conjunction with the International Finance Corporation (IFC), is attempting to promote international commercial mediation, while courts in some jurisdictions have taken

13. *See* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 594–99, 624–25 (2008); Andrew Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 222 (2010).

14. *See* Gavan Griffith & Andrew D. Mitchell, *Contractual Dispute Resolution in International Trade: The UNCITRAL Arbitration Rules (1976) and the UNCITRAL Conciliation Rules (1980)*, 3 MELB. J. INT'L L. 184, 186–87 (2002); *see also* Abramson, *supra* note 4, at 323; Julie Barker, *International Mediation—A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOY. L.A. INT'L & COMP. L.J. 1, 8–9 (1996); Cymie Payne, *International Arbitration*, 90 AM. SOC'Y INT'L L. PROC. 244, 253 (Mar. 27–30, 1996).

15. *See* Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 83.

16. *See* Andrews, *supra* note 3, at 249; John M. Barkett, *Avoiding the Costs of International Commercial Arbitration: Is Mediation the Solution?*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2010, 359, 364 (Arthur W. Rovine ed., 2010); Deason, *supra* note 10, at 572–91; Gaultier, *supra* note 5, at 38; William A. Herbert et al., *International Commercial Mediation*, 45 INT'L LAW. 111, 111–23 (2011); Mason, *supra* note 3, at 66–70; Nolan-Haley, *Mediation*, *supra* note 3, at 66–67; Jernej Sekolec & Michael B. Getty, *The UMA and the UNICTRAL Model Rule: An Emerging Consensus on Mediation and Conciliation*, 2003 J. DISP. RESOL. 175 (comparing the UNCITRAL Model Conciliation Law and the Uniform Mediation Act); Eric van Ginkel, *The UNCITRAL Model Law on International Commercial Conciliation: A Critical Appraisal*, 21 J. INT'L ARB. 1, 1–65 (2004); Welsh & Schneider, *supra* note 5, at 77–78.

17. However, these studies concentrate primarily on domestic disputes. *See* John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 161–65 (2000); Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Companies*, HARV. NEGOT. L. REV. (forthcoming), *available at* http://ssrn.com/abstract=2221471. Indeed, one of those studies noted that arbitration was far more likely to be chosen in cases involving international disputes, and specifically excluded international disputes from the conclusions of the study. *See id.* at *11 n.98, *36–37 n.237.

an increasingly strict view of the parties' obligation to mediate.[18] A number of well-respected multinational corporations,[19] most notably General Electric[20] and Siemens,[21] have advocated early dispute resolution strategies that include mediation.

While these initiatives suggest that consensus-based dispute resolution mechanisms are becoming increasingly institutionalized,[22] some potential difficulties nevertheless remain.[23] One area of concern arises out of the fact that the current interest in international commercial mediation appears to be based on the presumption that mediation will be faster, easier, and less expensive than other forms of international dispute resolution, including international commercial arbitration.[24] However, it is unclear whether and to what extent this presumption is defensible.[25] For example, some empirical research suggests that mediation actually decreases client costs in

18. *See* PGF II SA v. OMFS Co. 1 Ltd., [2013] EWCA (Civ) 1288 [1, 54–55] (Briggs, L.J.), [2013] W.L.R. (D) 405 (CA) (Eng.) (denying costs to a party because of its "unreasonable refusal to recognize a request to mediate").

19. Over 4,000 domestic and international corporations have signed the CPR Corporate Policy Statement on Litigation, which advocates alternative means of dispute resolution. *See Corporate Pledge*, INT'L INST. FOR CONFLICT PREVENTION & RESOL., http://www.cpradr.org/About/ADRPledges/CorporatePledgeSigners.aspx?page1839=14 (last visited Feb. 23, 2014).

20. *See* MICHAEL A. WHEELER & GILLIAN MORRIS, GE'S EARLY DISPUTE RESOLUTION INITIATIVE (A), HARVARD BUSINESS SCHOOL 2–4 (June 19, 2001) (discussing General Electric's domestic dispute resolution strategy, based on the Six Sigma approach); MICHAEL A. WHEELER & GILLIAN MORRIS, GE'S EARLY DISPUTE RESOLUTION INITIATIVE (B), HARVARD BUSINESS SCHOOL SUPP. 801-453 (June 2001) [hereinafter WHEELER & MORRIS, INTERNATIONAL] (discussing the internationalization of General Electric's dispute resolution strategy).

21. *See* Walter G. Gans & David Stryker, *ADR: The Siemens' Experience*, 51 DISP. RESOL. J. 40, 41 (Apr.–Sept. 1996) (discussing cultural influence of German parent company).

22. *See* CYRIL CHERN, INTERNATIONAL COMMERCIAL MEDIATION 29 (2008); *see also* Lande, *supra* note 17, at 216–17 (discussing the benefits of "institutionalizing" new practices).

23. For example, not all jurisdictions view mediation in the same light. *See* WHEELER & MORRIS, INTERNATIONAL, *supra* note 20, at 4 (noting early dispute resolution techniques developed in the United States do not necessarily apply outside the United States).

24. *See supra* note 2 and accompanying text.

25. Studies regarding corporate interest in mediation do not appear to have provided subjects with statistical evidence on the actual cost and success rate of commercial mediation and instead focus on participants' perceptions of mediation processes. *See* Lande, *supra* note 17, at 165; Stipanowich & Lamare, *supra* note 17, at *10 (discussing "perceptions that mediation offered potential cost and time savings," but providing no hard data on the scope and nature of the alleged savings of time and money). *But see* Lande, *supra* note 17, at 177–79 (discussing participants' personal experiences with ADR). Furthermore, these studies were primarily conducted in domestic settings. *See supra* note 17.

only about half of the disputes in which it is used.[26] Savings of time and money may be even less likely to occur in international commercial matters, where there is a tendency for counsel to conduct mediations like "mini arbitrations."[27]

Therefore, the question arises as to whether and to what extent international commercial mediation can serve as an adequate substitute for international commercial arbitration and, in particular, whether it can live up to the promise of delivering quick, inexpensive, and informal dispute resolution. To answer that question, this Article focuses on three separate issues. First, the discussion considers the unique characteristics of international commercial disputes to determine whether such matters are amenable to mediation. Second, the Article determines what incentives to use international commercial mediation might exist if savings of time, cost, and procedural formality are taken out of the equation. Third, the analysis describes how public international law might be used to support the development of international commercial mediation.

II. THE UNIQUE CHARACTERISTICS OF INTERNATIONAL COMMERCIAL DISPUTES

Experts agree that not every dispute is suitable for mediation.[28] However, mediation may be appropriate when

(1) there is potential for preserving an ongoing relationship,
(2) the main issue is determining damages and there is not a

26. *See* Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 672 (2002); *see also* Lande, *supra* note 17, at 186. *But see* Schwartz, *supra* note 6, at 108–10 (discussing costs of ICC conciliation versus ICC arbitration).

27. Schwartz, *supra* note 6, at 112 (noting commercial mediations can be highly legalistic); *see also supra* note 2 and accompanying text. This trend towards increased formality may arise over time, as a particular dispute resolution process becomes more mature. *See* Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 40–41 (1999).

28. *See* Barry Edwards, *Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs*, 18 HARV. NEGOT. L. REV. 281, 295–303 (2013); Nolan-Haley, *Mediation*, *supra* note 3, at 63–64; *see also* INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION (CPR), ADR SUITABILITY GUIDE (2001), *available at* http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Tools/cpr%20suitability%20guide.pdf.

> critical dispute about liability or an issue of principle, (3) there is not a need for legal precedent (such as an early case in a set of related claims that would be relevant to later cases), (4) there is a lot at stake, (5) it makes sense to settle for less than the cost of defense, (6) the case is complex, especially if it involves technical expertise, (7) the case needs a creative solution, (8) a party needs emotional catharsis of having a "day in court" that he or she might not get in traditional negotiation or court itself, (9) all the parties are represented by counsel, or (10) the parties pay their own attorney's fees.[29]

This data is of course very useful to parties and counsel as they consider their dispute resolution options. However, it is unclear whether and to what extent this information is applicable to international commercial disputes, since the research was conducted in other contexts.[30]

Case studies suggest that parties and counsel involved in international commercial disputes may not behave in precisely the same manner as parties and counsel in other types of matters.[31] For example, it has been said that parties in international commercial disputes are often unable to set aside their adversarial inclinations.[32]

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29. John Lande & Rachel Wohl, *Listening to Experienced Users*, 13 DISP. RESOL. MAG. 18, 19 (2007); *see also* Frank E.A. Sander & Lukasz Rozdieczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to A Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 1–2 (2006).

30. *See* Lande & Wohl, *supra* note 29, at 18. While some studies concerning the popularity of mediation in commercial contexts appear to exist, that is not precisely the same as studies measuring success rates. *See* DAVID LIPSKY & RONALD SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 23 (1998), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1003&context=icrpubs (discussing international commercial usage); David Lipsky & Ronald Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 136–37 (1998); Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People—A Forced Rank Analysis*, 30 INT'L BUS. LAW. 203, 203–09 (2002); Stipanowich & Lamare, *supra* note 17; *see also* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH (Christopher R. Drahozal & Richard Naimark eds., 2005).

31. *See* WHEELER & MORRIS, INTERNATIONAL, *supra* note 20, at 4.

32. *See* Schwartz, *supra* note 6, at 113.

As a result, in international commercial cases

> [w]here . . . a great deal is at stake for the parties, where the issues are complex, or where there is not at least a minimal level of trust, conciliation [or mediation] will pose much greater difficulties and may well come to resemble an adversarial proceeding, without the benefit of a binding decision at the end of the process.[33]

Questions therefore arise as to whether international commercial disputes reflect certain unique characteristics that affect either the mediation process or outcome.[34]

Interestingly, scholars and practitioners have already identified several ways in which international commercial mediation might be distinguishable from domestic mediation. The most well-known of these features involves the difficulties associated with mediating across cultural boundaries. Although cross-cultural concerns are certainly worthy of discussion,[35] these issues do not seem to be unique to international disputes. Instead, "domestic mediators are increasingly likely to be involved in disputes between people who represent distinctly different ethnic, racial, or national origin cultures."[36] Furthermore, experienced and knowledgeable mediators appear entirely capable of overcoming disparities in the parties' cultural backgrounds.[37] Therefore, the cross-cultural nature of international commercial mediation does not seem to be either unanticipated or unduly problematic.

However, there is another feature of international commercial disputes that has not received nearly as much attention. Experts have suggested that "[i]nternational commercial mediations are often more

33. *Id.* at 119.

34. *See* Herbert et al., *supra* note 16, at 111–23; Mason, *supra* note 3, at 64–65.

35. A growing number of commentators have considered these matters. *See* Abramson, *supra* note 4, at 325–26; John Barkai, *What's a Cross-Cultural Mediator to Do? A Low-Context Solution for a High-Context Problem*, 10 CARDOZO J. CONFLICT RESOL. 43, 52–87 (2008); Gaultier, *supra* note 5, at 50–54; WHEELER & MORRIS, INTERNATIONAL, *supra* note 20, at 4.

36. Barkai, *supra* note 35, at 43.

37. *See* Abramson, *supra* note 4, at 275; Barkai, *supra* note 35, at 87–89; Gaultier, *supra* note 5, at 53–54.

complex with more participants than their domestic counterparts,"[38] which raises a number of concerns, since there is a significant amount of debate as to whether complexity constitutes a bar or an incentive to mediation.[39]

To some extent, the outcome may depend on what is meant by the term "complexity." In the international context, "complexity" can include concerns about choice of law (including the application of mandatory law), cross-border regulatory issues, jurisdictional matters, extraterritorial application of evidentiary or other privileges, and enforcement of the final awards or judgments. Each of these factors may affect the parties' willingness to engage in international commercial mediation in a slightly different manner. Although it is impossible to consider each of these elements in detail due to space limitations, it is useful to consider one key feature that is often overlooked—namely, the nature of the underlying contractual relationship between the parties.[40]

At one point, international commercial disputes were relatively simple, involving only two parties and a single contract.[41] Although these sorts of relationships still exist, empirical studies suggest that multiparty and multicontract transactions are becoming increasingly prevalent in the international realm.[42] Furthermore, not all of these transactions are the same. For example, it is possible to distinguish

38. Mason, *supra* note 3, at 66; *see also* Brunet, *supra* note 27, at 53–54.

39. *See* Joseph P. Stulberg, *Questions*, 17 OHIO ST. J. ON DISP. RESOL. 531, 534 (2002); *see also* Edwards, *supra* note 28 at 295–97; Mark J. Heley, *Mediation of Construction Cases Using "Blind Negotiations": Can Providing Less Information Generate Better Results?*, 34 WM. MITCHELL L. REV. 273, 274 (2007); *see also supra* notes 29–34 and accompanying text.

40. *See, e.g.*, Loukas Mistelis, *International Arbitration—Corporate Attitudes and Practices—12 Perceptions Tested: Myths, Data and Analytical Research Report*, 15 AM. REV. INT'L ARB. 525, 586 (2004) (citing empirical studies suggesting "[t]he need to improve the framework for multiparty, multicontract and multiclaim disputes"). Non-contractual claims can also arise in international commercial disputes, but those will likely fall within a broad pre-dispute dispute resolution provision contained in a commercial agreement.

41. The continuing fascination with simple, bilateral contractual relationships explains the prevalent belief in "folklore" arbitration, which does not bear much resemblance to the reality of contemporary international commercial arbitration. *See* Brunet, *supra* note 27, at 40–41.

42. *See* Christopher R. Drahozal, *Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration*, 22 ARB. INT'L 291, 300 (2006) ("Of the cases filed with the ICC in 2004, 31 percent were multiparty disputes. The average number of parties in a multiparty case was 5.24 (although the 10 cases with more than 10 parties—including one with 81 respondents—no doubt pulled up the average).").

between (1) single contract multiparty relationships, (2) multicontract multiparty relationships (which reflect a number of different nuances[43]) and (3) multicontract bilateral relationships.[44]

At one time, these sorts of complex transactions were believed to arise primarily—if not exclusively—in construction[45] and insurance law.[46] However, similar sorts of complex contractual arrangements now exist in a variety of fields, including international project finance,[47] capital markets,[48] securities,[49] energy,[50] derivatives,[51] and sovereign debt.[52] Multifaceted contractual relationships are also

43. For example, some multiparty relationships—such as those in the construction or insurance/reinsurance realm—can be described in terms of a vertical string, while other relationships—such as those relating to a société coopérative—can be characterized as reflecting a hub-and-spoke arrangement. *See* S.I. STRONG, CLASS, MASS, AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW ¶¶ 3.34–3.36 (2013).

44. *See* BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS 101 (2005); John Gilbert, *Multi-Party and Multi-Contract Arbitration*, *in* ARBITRATION IN ENGLAND WITH CHAPTERS ON SCOTLAND AND IRELAND 455, 455–81 (Julian D.M. Lew et al. eds., 2013); Fritz Nicklisch, *Multi-Party Arbitration and Dispute Resolution in Major Industrial Projects*, 11 J. INT'L ARB. 57, 59–60, 71 (1994); Martin Platte, *When Should an Arbitrator Join Cases?*, 18 ARB. INT'L 67 nn.18–20 (2002).

45. *See* Charles Molineaux, *Moving Toward a Construction Lex Mercatoria: A Lex Constructionis*, 14 J. INT'L ARB. 55, 57 (1997); John Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, 114 PENN ST. L. REV. 119, 168–77 (2009) (discussing the International Federation of Consulting Engineers (FIDIC) standard terms).

46. *See* Dennis A. Cammarano, *Impacts of the Supreme Court Decision in* Regal-Beloit: *Exporting Import Litigation*, 85 TUL. L. REV. 1207, 1213–14 (2011) (discussing insurance and reinsurance arbitration involving the Bermuda Form); Chris Harris, *Liability Insurance in International Arbitration: The Bermuda Form*, 21 ARB. INT'L 249, 249 (2005) (book review).

47. *See* Mark Kantor, *Dear Corporate Partner*, 21 MEALEY'S INT'L ARB. REP. 1, 2 (Mar. 2006) [hereinafter Kantor, *Dear Corporate Partner*]; Rachel Bowen, Note, *Walking the Talk: The Effectiveness of Environmental Commitments Made by Multilateral Development Banks*, 22 GEO. INT'L ENVTL. L. REV. 731, 746 (2010).

48. *See* Jonathan R. Rod, *Current Trends in Financing International Resource Projects, in International Resources Law: Today's Oil, Gas and Mining Projects*, 44A ROCKY MTN. MIN. L. SPEC. INST. III.A.2 (Mar. 1997).

49. *See* Peter B. Oh, *Tracing*, 80 TUL. L. REV. 849, 869–70 (2006) (discussing a series of interlocking brokerage contracts involving beneficial owners of securities, brokers, depositories, and perhaps other intermediaries).

50. *See* Dewey J. Gonsoulin, Jr., et al., *Representing Clients in International Energy Projects*, 50 HOUS. LAW. 10, 11 (2012).

51. *See* Dan Wielsch, *Global Law's Toolbox: Private Regulation by Standards*, 60 AM. J. COMP. L. 1075, 1086–87 (2012) (discussing arbitration involving the International Swaps and Derivatives Association (ISDA) master agreement).

52. *See* Ambiente Ufficio S.p.A. v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (Feb. 8, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw1276.pdf (involving 90 claimants); Abaclat v. Argentine

common in shareholder[53] and joint venture agreements.[54] Indeed, few, if any, areas of commercial law are immune from the creep of contractual complexity.

The situation is further complicated by the fact that many multiparty disputes arise out of what initially looks like a purely bilateral contract. However,

> [i]n completing an international transaction, at least five principal contracts or agreements need to be made, namely, the contract of sale ([l]egal relationships between buyer and seller of goods), the contract of carriage ([l]egal relationships between shipper and carrier of the goods), the contract of insurance ([a]rrangements for the insurance of those goods sold and carried), agreement of payment ([f]inancial arrangements for international transaction) and agreement of dispute settlement ([m]ethod for dispute resolution).[55]

Although a dispute may initially appear to arise under only one of those contracts, various factual or legal issues may implicate one or more of the other contractual relationships.[56] The choice then becomes whether to address all of the relevant concerns at a single time, in a single forum, or hear them separately, with the attendant risk of inconsistent outcomes and increased time and energy spent on dispute resolution processes.

Multicontract and multiparty disputes have caused a number of concerns for arbitration,[57] and some of these factors could be problematic for mediation as well. However, recent commentary has moved away from the traditional view that multiparty disputes are not

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Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), http://italaw.com/documents/AbaclatDecisiononJurisdiction.pdf (involving 60,000 claimants); STRONG, *supra* note 43, ¶¶ 2.121–2.142.

53. *See* T.M. Lennox, *Transfer of Obligations*, 2 MELB. J. INT'L L. 209, 214 (2001).

54. *See* Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L. J. 727, 756–57 (2010); Jane Knowler & Charles Rickett, *The Fiduciary Duties of Joint Venture Parties—When Do They Arise and What Do They Comprise?*, 42 VICTORIA U. WELLINGTON L. REV. 117, 119–20 (2011).

55. Zhen Jing, *Insurer Beware!—Circumstances in Which the Insurer May Lose His Subrogation Rights in Marine Insurance*, 43 J. MAR. L. & COM. 129, 130 n.4 (2012).

56. *See* Kantor, *Dear Corporate Partner*, *supra* note 47, at 10.

57. *See* Strong, *Increasing Legalism*, *supra* note 2, at 122–27.

well suited for mediation and instead takes the view that there is nothing about multiparty matters that cannot be resolved through good mediation procedures.[58] However, caution is nevertheless advised, since mediators may need to adjust techniques that were initially developed for use in bilateral matters. For example, neutrals in multiparty matters may need to

> 1. Spend extra time in pre-negotiation and needs assessment. . . .
>
> 2. Use opening statements by participants as an opportunity for each person to share initial positions and be understood. . . .
>
> 3. Actively seek common ground early, not to minimize areas of difference, but to clarify them. . . .
>
> 4. Recognize that several levels of negotiation need to occur[,] [including] [c]ross-group discussion [relating to the] substantive negotiation [and] within-group communication [to address] psychological and procedural needs in conflict. . . .
>
> 5. Whenever possible, have subgroups form that break down old coalitions. . . .
>
> 6. Be sensitive to the tension between being (social cohesiveness) and doing (task effectiveness) within the group. . . .
>
> 7. Be especially sensitive to the role of moderates and extremists within the meeting[,] [where] [m]oderates are defined . . . as those who demonstrate flexibility in negotiation [and] . . . [e]xtremists . . . are those who rigidly hold on to a minority position [and] . . . narrowly define the agenda and

58. A growing number of authorities discuss how a multiparty mediation might optimally proceed. *See generally* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS—PRACTICAL SOLUTIONS FOR RESOLVING CONFLICTS 427–41 (2003); 2 COMPLEX DISPUTE RESOLUTION: MULTI-PARTY DISPUTE RESOLUTION, DEMOCRACY AND DECISION-MAKING (Carrie Menkel-Meadow ed., 2012) [hereinafter MULTI-PARTY DISPUTE RESOLUTION]; Jeff Kichaven, *A Tool for Multi-Party Insurance Litigation Mediation with "Additional Insureds,"* IMRI (April 2008), http://www.irmi.com/expert/articles/2008/kichaven04.aspx; Rodney A. Max, *Multiparty Mediation*, 23 AM. J. TRIAL ADVOC. 269 (1999).

> often sabotage efforts by others (even in their own camp) to negotiate. . . .
>
> 8. Continue to be vigilant regarding your neutrality throughout the process. . . .[59]

Multiparty mediations also give rise to a number of structural problems that are qualitatively different than those which exist in bilateral disputes.[60] For example, the concept of Pareto-efficiency, which is central to the identification of a reasonable resolution of a bilateral dispute, is inapplicable in the multiparty context.[61] Conversely, multiparty disputes generate concerns about group decision-making dynamics that do not exist in two-party conflicts.[62]

Multiparty negotiation and, by extension, multiparty mediation often face three challenges that are absent in two-party proceedings.

> First, as the number of parties increase, the likelihood that coalitions will emerge also increases. Coalitional behavior can make it difficult to reach agreement in complex problem-solving situations as subgroups seek to form either "winning" or "blocking" coalitions. Second, as the number of parties at the table increases, the task of managing the conversation becomes more complicated. Coordinating a problem-solving

59. *Guidelines for Mediating Multi-Party Disputes*, U. WIS.–MADISON, OFF. OF HUM. RESOURCE DEV., https://www.ohrd.wisc.edu/home/HideATab/FullyPreparedtoManage/Conflict Resolution/Over view/MultiPartyDisputes/tabid/225/Default.aspx (last visited Feb. 27, 2013).

60. *See generally* MULTI-PARTY DISPUTE RESOLUTION, *supra* note 58; Peter Kamminga, *Overcoming Barriers to Using Mediation in Multi-Party Disputes*, EUR. ASSOC. OF JUDGES FOR MEDIATION (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298874; *see also* INTERNATIONAL MULTILATERAL NEGOTIATION: APPROACHES TO THE MANAGEMENT OF COMPLEXITY (I. William Zartman ed., 1994); Bruce Money & Chad Allred, *An Exploration of a Model of Social Networks and Multilateral Negotiations*, 25 NEGOT. J. 337, 337–56 (July 2009); LEIGH L. THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR 221 (2009), *reprinted in* MULTI-PARTY DISPUTE RESOLUTION, *supra* note 58, at 123–38.

61. *See* Robert M. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 159 J. INST. & THEORETICAL ECON. 199 (2003), *reprinted in* MULTI-PARTY DISPUTE RESOLUTION, *supra* note 58, at 3, 13–22 (suggesting that "sufficient consensus" may be the optimal outcome in multiparty matters).

62. *See* Lawrence Susskind et al., *What We Have Learned about Teaching Multiparty Negotiation*, 21 NEGOT. J. 395 (2005), *reprinted in* MULTI-PARTY DISPUTE RESOLUTION, *supra* note 58, at 25, 26; Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000), *reprinted in* MULTI-PARTY DISPUTE RESOLUTION, *supra* note 58, at 65, 68, 69.

> dialogue (i.e., who gets to speak, what information is shared, how written summaries of what has been agreed to are prepared, and how those not at the table are kept informed) requires not just process management skill, but legitimacy in the eyes of all the stakeholders. Finally, as the number of parties increases, the analytical challenges facing the stakeholders—especially as they try to examine and evaluate offers and counteroffers—increase exponentially. Representatives involved in multiparty negotiation must focus not just on what they want or do not want, but also on the changing nature of "their next best option" given what others at the table might conclude without them.[63]

These factors suggest that mediation of many international commercial disputes may never constitute the kind of quick, easy, and inexpensive dispute resolution process that many commercial actors now envision.[64] However, that does not mean that international disputes are inappropriate for mediation; it may simply mean that parties will have to find another rationale that justifies the use of mediation in complex, multiparty matters.

III. MOTIVES FOR USING INTERNATIONAL COMMERCIAL MEDIATION

If the complexity of the underlying contractual relationships in international commercial transactions reduces the likelihood of quick, informal, and inexpensive mediations, then the next question is whether there are any good reasons to choose mediation in the cross-border business context. Initially, the prospects do not appear promising, at least if the analysis focuses on rationales commonly

63. Lawrence E. Susskind & Larry Crump, *Editors' Introduction—Multiparty Negotiation: An Emerging Field of Study and New Specialization*, *in* 1 MULTIPARTY NEGOTIATION: COMPLEX LITIGATION AND LEGAL TRANSACTIONS xxv, xxv (Lawrence E. Susskind & Larry Crump eds., 2008).

64. *See* David A. Hoffman, *Mediation, Multiple Minds, and Managing the Negotiation Within*, 16 HARV. NEGOT. L. REV. 297, 302 (2011) (suggesting that mediation of some kinds of complex disputes may take months, even years); *see also supra* note 17 and accompanying text. *But see* Gaultier, *supra* note 5, at 45 (suggesting that "a commercial mediation will take about one day," with international matters perhaps taking two days).

enunciated in the bilateral context, since commentary in that field often emphasizes the benefits of speed, informality, and lack of expense.[65] While experts in two-party mediation recognize that consensus-based procedures offer some additional advantages (such as the preservation of ongoing relationships or the creation of a resolution that would not be available through adjudication), those attributes may not be as important to parties who are primarily focused on savings of time and money, or who may be concerned about the various disadvantages of mediation.[66]

Another means of analyzing this issue is to consider the growing body of literature on multiparty mediation to see whether that research generates some additional ideas as to why commercial parties would want to engage in international mediation.[67] The difficulty with this approach is that most studies of multiparty mediation focus primarily on ethnic conflicts in the interstate context and community disputes involving public lands.[68] Although these

65. *See* Gaultier, *supra* note 5, at 45–47 (discussing standard perceived benefits of mediation); *see also id.* at 49–54 (discussing the disadvantages of mediation, particularly in a cross-border context). The cost of mandatory "cooling off" or negotiation periods can be astronomical. *See* Mark Kantor, *Negotiated Settlement of Public Infrastructure Disputes*, *in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WÄLDE 199, 214 (Todd Weiler & Freya Baetens eds., 2011).

66. *See* Gaultier, *supra* note 5, at 45–54; Lande, *supra* note 17, at 212 (listing items of importance to parties and counsel).

67. *See supra* notes 58–63 and accompanying text.

68. *See, e.g.*, Chester A. Crocker et al., *Multiparty Mediation and the Conflict Cycle*, *in* HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD 19, 33–39 (Chester A. Crocker et al. eds., 1999) (discussing multiparty mediation in the Balkan conflicts of the 1990s); Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 26 (2004); Carrie Menkel-Meadow, *When Litigation is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, *in* 3 MULTIPARTY NEGOTIATION: COMPLEX LITIGATION AND LEGAL TRANSACTIONS 56, 57–58 (Lawrence E. Susskind & Larry Crump eds., 2008) (discussing domestic public interest litigation); Lawrence Susskind & Connie Ozawa, *Mediating Public Disputes: Obstacles and Possibilities*, 41 J. SOCIAL ISSUES 145 (1985), *reprinted in* MULTI-PARTY DISPUTE RESOLUTION, *supra* note 58, at 373, 373–87; Michael R. Fowler, *The Increasingly Complicated World of International Mediation*, 18 OHIO ST. J. ON DISP. RESOL. 977, 979–1001 (2003) (reviewing HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD (Chester A. Crocker et al., eds. 1999)). Although multiparty mediation can occur in other contexts (such as class actions or civil rights disputes), the literature tends not to focus on the multiparty nature of these matters. *See* Richard D. Fincher, *Mediating Class Action Litigation Involving the EEOC: Insights for Employment Mediators and Counsel*, 67 DISP. RESOL. J. 19, 37–38 (2013); Eric D. Green, *Re-examining Mediator and*

matters provide very useful information concerning how multiparty mediations might proceed, these types of cases are less helpful in describing why commercial entities should enter into mediation since the underlying disputes have little in common with business concerns.[69] For example, ethnic conflicts and community disputes often involve moral, political, or religious elements that are absent from commercial matters.[70] These sorts of value- or structure-based disputes may derive particular benefits from mediation, while commercial disputes may focus primarily on monetary concerns that are adequately addressed by adjudication.[71]

Parties involved in ethnic and land-based disputes may also find certain types of mediation, such as transformative mediation, particularly beneficial.[72] Although these techniques may be helpful in resolving some kinds of commercial disputes, parties involved in a business relationship may be less likely to seek out that type of process.

Therefore, existing studies of multiparty mediation do not appear to provide any additional reasons why commercial parties would want to take their international disputes to mediation. However, there is another type of procedure to consider as potentially analogous to international commercial mediation, namely, international commercial arbitration.

Much of the current discontent with international commercial arbitration is tied to the belief that the process has become too slow, expensive, and legalistic.[73] However, these concerns have not caused

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Judicial Roles in Large, Complex Cases: Lessons from Microsoft and Other Megacases, 86 B.U. L. REV. 1171, 1176 (2006).

69. Different types of disputes often generate different types of dispute resolution strategies. *See* MOORE, *supra* note 58, at 64–65 (discussing the "circle of conflicts," which includes conflicts of interests, structure, values, relationships, and data, as well as ways to address each concern).

70. *See id.*; Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89, 101 (2004–2005).

71. This is not to say that purely monetary (or interest-based) conflicts cannot be addressed creatively through mediation. *See* MOORE, *supra* note 58, at 64–65.

72. *See* Robert J. Condlin, *The Curious Case of Transformative Dispute Resolution: An Unfortunate Marriage of Intransigence, Exclusivity and Hype*, 14 CARDOZO J. CONFLICT RESOL. 621, 621 (2013).

73. *See* BORN, *supra* note 1, at 1746; UNCITRAL GUIDE, *supra* note 5, at 18; Brunet, *supra* note 27, at 40–47; Slate et al., *supra* note 10.

parties to abandon arbitration in favor of litigation. Instead, arbitration continues to be the preferred method of dispute resolution for parties engaged in cross-border transactions.[74] This phenomenon suggests that commercial parties can be motivated by factors other than savings of time and money, and raises the question of whether those features also exist (or can be made to exist) in international commercial mediation.

Conventional wisdom suggests that international commercial arbitration is superior to international litigation because arbitration (1) allows parties to tailor the procedural rules used to resolve the dispute, which often results in the harmonization of civil law and common law procedural practices; (2) offers a neutral dispute resolution process, since no party is subject to the potential biases of a national court; (3) permits parties to choose the substantive law that governs the dispute, which increases the predictability of the transaction; and (4) allows parties to select an expert decision maker who may have particular skills and attributes relevant to the dispute at hand.[75] These features would appear equally applicable in international commercial mediation and thus could provide some motivation for parties to choose mediation.

However, many people believe that the key benefit of international commercial arbitration relates to the easy enforceability of arbitral awards.[76] Over the last fifty years, the international legal community has established a highly effective system of treaties and other mechanisms that promote the recognition and enforcement of foreign arbitral awards.[77] As a result, arbitral awards are far easier to

74. *See* BORN, *supra* note 1, at 68–71.

75. *See id.* at 65–84.

76. *See id.* at 76–78.

77. *See id.* The most successful of these instruments, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) has been ratified or adhered to by 149 states parties. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]; *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts /arbitration/NYConvention_status.html (last visited Jan. 3, 2012); *see also* Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention), May 14, 1979, 1439 U.N.T.S. 87; Inter-American Convention on International Commercial Arbitration (Panama Convention), Jan. 30, 1975, O.A.S.T.S. No. 42, 14 I.L.M.

enforce internationally than court judgments, since there is no similar network of treaties relating to the enforcement of foreign judgments.[78] A strong pro-enforcement policy also exists with respect to arbitration agreements, which are given a high degree of respect in many jurisdictions.[79]

International commercial arbitration is therefore distinguishable from both international litigation and international mediation with respect to enforceability issues.[80] Furthermore, the experience of international commercial arbitration suggests that mediation may be more attractive to parties if international mediation and settlement agreements are as easily enforceable as international arbitration agreements and awards. Once the playing field is leveled with respect to enforceability, then the parties would be free to choose their dispute resolution mechanism based solely on process considerations (i.e., a preference for consensual over adjudicative processes or vice versa).[81] The question, therefore, is how to create an international legal regime that supports the enforcement of commercial mediation as effectively as the web of international treaties that currently supports commercial arbitration.

336; European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 349; BORN, *supra* note 1, at 91–109; William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 257 (2006). Because the various conventions are relatively similar, this discussion will focus solely on the New York Convention. *See* New York Convention, *supra*.

78. *See* BORN, *supra* note 1, at 76–78; S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. (forthcoming 2014) (discussing the difficulties of enforcing foreign judgments).

79. *See, e.g.*, New York Convention, *supra* note 77, art. II; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985); JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 7-61 to 7-62 (2003).

80. Differences are often what drive decisions. *See* Peter B. Rutledge, *Convergence and Divergence in International Dispute Resolution*, 2012 J. DISP. RESOL. 49, 50–52 (undertaking a law and economics analysis of party preference in international commercial dispute resolution). At this point, there are no international treaties concerning the enforcement of mediation agreements or settlement agreements arising out of a mediated dispute. Instead, such issues are determined by local law. *See infra* note 82 and accompanying text. Unfortunately, national legal standards regarding mediation vary widely, and the numerous gaps and inconsistencies in this field have led to serious concerns about the enforceability of both mediation agreements and settlements arising out of a mediation. *See infra* notes 111–12 and accompanying text.

81. *See* Rutledge, *supra* note 80, at 49–50.

IV. USING PUBLIC INTERNATIONAL LAW TO PROMOTE INTERNATIONAL COMMERCIAL MEDIATION

At this point, most research and reform initiatives concerning mediation appear to focus on either the process of mediation itself or on questions of domestic law.[82] However, if international commercial mediation is to achieve the same level of success as international commercial arbitration, then scholars and practitioners must turn their attention to questions of public international law.

Some efforts have been taken in this regard, although most of the research to date appears to have been conducted in the context of disputes arising under international investment treaties.[83] However, "this work is being done on an ad hoc basis and does not consider dispute resolution systematically."[84] Thus, it would likely be more productive if international commercial mediation were considered in a more orderly manner, perhaps in the context of a study framed by dispute systems design (DSD) theory.[85]

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82. *See* van Ginkel, *supra* note 16, at 58 (noting the value of the Model Conciliation Law is that it "is the first real effort to put together a comprehensive conciliation act that covers virtually all relevant issues (a) to set minimum standards for the internal aspects of conciliation and (b) to regulate the aspects of conciliation that relate to contemporaneous or subsequent court, arbitral, or similar proceedings").

83. *See* Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 180 (2007); Spain, *supra* note 5, at 19–27; Welsh & Schneider, *supra* note 5, at 77.

84. Franck, *supra* note 83, at 181.

85. *See id.* at 177–78 (noting dispute systems design "is not a dispute resolution methodology itself" but instead reflects "the intentional and systematic creation of an effective, efficient, and fair dispute resolution process based upon the unique needs of a particular system"); *see also* NANCY H. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES (2013). DSD theory has been used in a wide variety of situations, including international investment arbitration, international law, international mass claims processes, federalism, and the rule of law. *See* Lisa Blomgren Bingham, *Reflections on Designing Governance to Produce the Rule of Law*, 2011 J. DISP. RESOL. 67, 76–78 (2011); Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51, 54–60 (2009); Franck, *supra* note 83, at 177–78; Francis E. McGovern, *Dispute System Design: The United Nations Compensation Commission*, 14 HARV. NEGOT. L. REV. 171, 176 (2009); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 23, 130 (2011); Spain, *supra* note 5, at 46–47.

Notably, DSD does not promote a particular methodology or process. Instead,

> [t]he objective of DSD is to design better dispute resolution systems. It does so by (1) analyzing parties' patterns of disputing to diagnose the current system, (2) designing methods to manage conflict more effectively with practical principles, (3) approving and implementing the design architecture, and (4) testing and evaluating the new design to make appropriate revisions prior to disseminating the process to the rest of the system.[86]

Full DSD analyses are extremely rigorous and beyond the scope of an Article such as this.[87] Nevertheless, it is possible to discuss certain constituent elements of a DSD study so as to facilitate future work in this field. Indeed, this Article has already provided a preliminary evaluation of one aspect of a DSD study; namely, "parties' patterns of disputing to diagnose the current system" of international commercial dispute resolution.[88]

One of the core features of a DSD analysis involves the identification of practical methods of "manag[ing] conflict more effectively" so as to create a legal architecture that is responsive to the needs of the relevant stakeholders.[89] This technique may be particularly useful to law and policymakers seeking to understand how best to use public international law to help support the development of international commercial arbitration. In particular, reformers can consider whether and to what extent the techniques used to promote international commercial arbitration can be applied to international commercial mediation.

Interestingly, there are already a number of key structural similarities between international commercial arbitration and international commercial mediation. For example, both systems are

86. Franck, *supra* note 83, at 178.

87. A full DSD analysis requires consideration of "at least eight initial variables," including "function, metaphor, authority and funding, size and similarity, organization and implementation, eligibility criteria, damage methodology, and compensation." McGovern, *supra* note 85, at 176.

88. Franck, *supra* note 83, at 178; *see also supra* notes 42–56 and accompanying text.

89. Franck, *supra* note 83, at 178.

the subject of a variety of detailed procedural rules adopted by both private institutions[90] and quasi-public bodies such as UNCITRAL.[91] UNCITRAL has also promulgated various model laws concerning both international commercial arbitration and international commercial mediation, thereby helping to ensure consistent national treatment of both procedures.[92]

These mechanisms have been very effective in promoting international commercial arbitration.[93] However, mediation has not enjoyed the same level of success. While this result could be the result of an inherent preference for adjudicative rather than consensual forms of dispute resolution in this area of practice,[94] the failure of international commercial mediation could also be attributed to the absence of any multilateral or bilateral treaties supporting the enforcement of mediation and settlement agreements.[95] Indeed, this is

90. A variety of private arbitral institutions, including the International Chamber of Commerce (ICC), the American Arbitration Association (through its international arm, the International Center for Dispute Resolution (ICDR)), and the London Court of International Arbitration (LCIA), offer rules on both international commercial arbitration and international commercial mediation or conciliation. *See* Barkett, *supra* note 16, at 365–82.

91. *See* UNCITRAL Conciliation Rules, *supra* note 10; *see also* UNCITRAL Arbitration Rules 2010, *supra* note 11; UNCITRAL Arbitration Rules 1976, *supra* note 11.

92. *See* Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law, G.A. Res. 57/18, U.N. GAOR, 57th Sess., U.N. Doc. A/Res/57/18, (Jan. 24, 2003) [hereinafter Model Conciliation Law]; UNCITRAL Model Law on International Commercial Arbitration, U.N. Comm'n on Int'l Trade Law, 18th Sess., U.N. Doc. A/40/17, Annex I (June 21, 1985), revised by Rep. of the U.N. Comm'n on Int'l Trade Law, 39th Sess., June 17–July 7, 2006, GAOR, 61st Sess., U.N. Doc. A/61/17, Annex I, Supp. No. 17 (2006) [hereinafter Model Arbitration Law]; *see also* BORN, *supra* note 1, at 115–21, 1782–83; LEW ET AL., *supra* note 79, ¶¶ 2-38 to 2-41, 3-11. The UNCITRAL Model Arbitration Law is the more widely adopted of the two provisions, since it has been adopted in nearly 100 states and territories in either its original or amended form, as compared to the Model Conciliation Law, which has only been adopted in thirteen countries and eleven U.S. states, plus the District of Columbia. *See Status: Model Law on International Commercial Conciliation*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html; *Status: Model Law on International Commercial Arbitration*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html; *see also* UNCITRAL GUIDE, *supra* note 5; Deason, *supra* note 10, at 572; Gaultier, *supra* note 5, at 42–43; van Ginkel, *supra* note 16, at 1–65.

93. *See* BORN, *supra* note 1, at 91–109; LEW ET AL., *supra* note 79, ¶¶ 2-34 to 2-41.

94. *See* Schwartz, *supra* note 6, at 112–13. *But see* Hensler, *supra* note 15, at 83 (suggesting scholarly bias against adjudicative mechanisms).

95. Although international commercial arbitration relies primarily on a few highly effective multilateral treaties, the world of international investment arbitration suggests that a highly integrated system of bilateral treaties could also be effective. *See* CAMPBELL

the one area where international commercial arbitration and international commercial mediation differ most radically. As such, the next step in encouraging international commercial mediation would appear to involve the use of public international law to create one or more international treaties supporting the use of mediation in cross-border commercial disputes.[96]

Questions logically arise as to what elements should be included in an international convention on international commercial mediation. Experience in the arbitral realm suggests that simplicity is key.[97] Therefore, drafters of any proposed treaty on international commercial mediation should likely limit themselves to two basic elements that are also reflected in the key conventions on international commercial arbitration: enforcement of the agreement to engage in a particular type of dispute resolution process and enforcement of the end product of the dispute resolution process.[98]

A. Enforcement of a Mediation Agreement

First, any convention on international commercial mediation should address the enforceability of an agreement to mediate.[99] The content of this duty likely can be described relatively simply, although it would be useful to consider what constitutes rejection or termination of mediation, since there is a considerable amount of

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MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES ¶ 1.08 (2007) (describing the field of international investment arbitration as a "patchwork quilt of interlocking but separate bilateral treaties"); José E. Alvarez, *A BIT on Custom*, 2 N.Y.U. J. INT'L L. & POL. 17, 17 (2012); *see also supra* note 77 and accompanying text.

96. Interestingly, some proponents of mediation caution against increased standardization, based on fears that the process may become too popular too soon. *See* Lande, *supra* note 17, at 226–27. However, the experience in international commercial arbitration suggests that procedural diversity can be retained, despite the standardization of enforcement mechanisms. *See* LEW ET AL., *supra* note 79, ¶¶ 3-9, 3-18.

97. *See* New York Convention, *supra* note 77; BORN, *supra* note 1, at 95–96; ALBERT JAN VAN DEN BERG, THE NEW YORK CONVENTION 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 9–10 (1981).

98. *See* BORN, *supra* note 1, at 95–96; VAN DEN BERG, *supra* note 97, at 9–10.

99. This feature correlates to provisions in conventions on international commercial arbitration concerning the enforcement of arbitration agreements. *See* New York Convention, *supra* note 77, art. II.

debate about that particular issue, especially in the context of multitiered (step) dispute resolution clauses.[100]

Notably, it may not be necessary for the international community to identify entirely new language concerning the enforcement of an agreement to mediate, since experience in the arbitral realm suggests that the system works better if national and international law are consistent.[101] Drafters could therefore turn to the Model Conciliation Law for inspiration, since that instrument includes some very good language concerning the enforcement of an agreement to mediate as well as provisions relating to the rejection or termination of an offer to mediate.[102]

For example, Article 4(2) of the Model Conciliation Law indicates that

> [i]f a party that invited another party to conciliate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.[103]

The identification of a firm deadline creates a useful default mechanism and ensures that a recalcitrant party does not hold the other party hostage to a particular process.

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100. *See* BORN, *supra* note 1, at 841–49 (discussing whether mediation is a condition precedent (precondition) to arbitration).

101. Increased consistency leads to increased predictability. *See* UNCITRAL GUIDE, *supra* note 5, at 13; *see also* Model Arbitration Law, *supra* note 92, Explanatory Note to 1985 version, ¶ 47 (noting the text of the New York Convention and the Model Arbitration Law were meant to mirror one another); BORN, *supra* note 1, at 115–21; William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1243 (2003).

102. *See* Model Conciliation Law, *supra* note 92, arts. 4(2), 11, 13; UNCITRAL GUIDE, *supra* note 5, at 29–31, 48–49, 53–54. Although the Model Conciliation Law has helped harmonize national treatment of this issue to a certain degree, the model language has not been widely adopted and there is still a great deal of diversity regarding whether and to what extent a mediation agreement can be enforced. *See* Model Conciliation Law, *supra* note 92; UNCITRAL GUIDE, *supra* note 5, at 14–15, 17; *see also supra* note 92.

103. Model Conciliation Law, *supra* note 92, art. 4(2).

Article 11 addresses potential problems that might arise after mediation proceedings are formally initiated. This provision states that

> [t]he conciliation proceedings are terminated:
>
> (a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;
>
> (b) By a declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;
>
> (c) By a declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or
>
> (d) By a declaration of a party to the other party or parties and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.[104]

Article 13 of the Model Conciliation Law specifically addresses what is the most problematic situation for many parties, namely, a multitiered dispute resolution clause. This provision indicates that

> [w]here the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings.[105]

104. *Id.* art. 11.
105. *Id.* art. 13.

B. Enforcement of a Settlement Agreement

Second, any new convention on international commercial mediation should address the enforceability of a settlement agreement that arises out of a mediation.[106] Some people may believe that enforcement of settlement agreements should not be a primary concern in an international instrument of this type, since mediation is a consensual dispute resolution mechanism that would likely lead to the parties' living up to their agreements voluntarily. However, parties do in fact fail to live up to their agreed obligations, which suggests that enforcement mechanisms are needed.[107] Numerous authorities suggest that parties should include a dispute resolution provision in their settlement agreements as a matter of best practices,[108] since post-settlement disputes appear to be on the rise, at least in some sectors.[109]

The desire for a legally protected right to enforce a settlement agreement may be particularly high in the commercial context, since businesses often worry about worst-case scenarios, however unlikely, and want legal assurances as opposed to merely precatory language. Indeed, the existence of a legal right to enforcement has been found to be necessary (or at least useful) to the spread of international commercial arbitration, even though international arbitration has a very high voluntary compliance rate.[110]

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106. This feature correlates to provisions in conventions on international commercial arbitration concerning the enforcement of arbitral award. *See* New York Convention, *supra* note 77, art. V.

107. *See* Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 376–77 (1994); Margaret Graham Tebo, *A Learning Experience*, 5 No. 27 ABA J. E-Report 2 (July 7, 2006) (discussing case where the American Bar Association (ABA) failed to live up to the terms of a consent decree).

108. *See* Court Rules, 255 F.R.D. 215, 276 (2009); Daniel Beebe, *Settlement Agreements 101—Practice Tips for Every Lawyer*, 53 ORANGE COUNTY LAW. 30, 34 (Oct. 2011).

109. *See* Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 600 (2005) (speaking in the context of class actions); Peter N. Thompson, *Enforcing Rights Created in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 512–13 (2004) (discussing court-annexed mediation).

110. *See* NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 11.02 (2009); Michael Kerr, *Concord and Conflict in International Arbitration*, 13 ARB. INT'L 121, 128 n.24 (1997).

The need for convention language relating to the enforcement of settlement agreements is particularly acute, given the amount of controversy surrounding the question of whether and to what extent settlement agreements are currently enforceable in the international realm. For example, some authorities have suggested that settlement agreements are enforceable under conventions relating to international commercial arbitration.[111] However, there are a significant number of concerns about that interpretation of the various treaties, particularly in cases where the parties do not have a pre-existing arbitration agreement or where mediation is a precondition to arbitration.[112]

In terms of content, the best practice again may be to have international standards mirror national standards so as to follow the example of international commercial arbitration.[113] Some relevant language exists in the Model Conciliation Law, and drafters could consider adopting that provision so as to guarantee a certain degree of consistency between national and international law.[114] However, the language is relatively sparse and simply states that

> [i]f the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable . . . [*the enacting State may insert a description of the method of*

111. *See* Gaultier, *supra* note 5, at 48; Christopher Newmark & Richard Hill, *Can A Mediated Settlement become an Enforceable Arbitration Award?*, 16 ARB. INT'L 81, 81–87 (2000); Brette L. Steele, Comment, *Enforcing International Commercial Mediation Agreements as Arbitral Awards under the New York Convention*, 54 UCLA L. REV. 1385, 1391–92 (2007).

112. *See* Newmark & Hill, *supra* note 111, at 81–87 (noting that although numerous arbitral rules and arbitration laws permit the entry of a consent award in situations where the parties settle their dispute during the pendency of an arbitration, there still needs to be an arbitration before those rules and laws apply).

113. *See* New York Convention, *supra* note 77; Model Arbitration Law, *supra* note 92; LEW ET AL., *supra* note 79, ¶ 2-40. Numerous problems have arisen in the United States because the Federal Arbitration Act (FAA) does not mirror international standards. *See* Park, *supra* note 101, at 1242–43; S.I. Strong, *Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty and Statutory Interpretation in International Commercial Arbitration*, 53 VA. J. INT'L L. 499, 527–39 (2013).

114. *See* Model Conciliation Law, *supra* note 92, art. 14; *see also* UNCITRAL GUIDE, *supra* note 5, at 55–58.

> *enforcing settlement agreements or refer to provisions governing such enforcement*].[115]

This provision is potentially problematic because it gives enforcing courts no real guidance as to what procedural or substantive standards should apply to the enforcement of settlement agreements. Although conventions on international commercial arbitration allow for some variation in enforcement procedures based on local practice, those instruments nevertheless provide national courts with a useful practical standard of behavior by identifying an exclusive list of the grounds upon which an arbitral award may be denied recognition and enforcement.[116] The international legal community may need to identify similar standards in the mediation context so as to provide commercial parties with the type of consistency that they desire.

When debating this issue, drafters may wish to consider some potentially useful language from the European Union's 2008 directive concerning mediation in cross-border disputes.[117] Article 6(1) of that instrument states that

> Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.[118]

Although this provision provides a starting point for further analysis, the language is relatively weak and subject to variations

115. Model Conciliation Law, *supra* note 92, art. 14.

116. *See* New York Convention, *supra* note 77, arts. III, VII(1), V; S.I. Strong, *What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflicts between the New York Convention and the Federal Arbitration Act*, 48 STAN. J. INT'L L. 47, 74–78 (2012) (discussing the "more favorable national law" provision).

117. *See* European Parliament and the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters Directive 2008/52/EC, 2008 O.J. (L 136) 3.

118. *Id.* art. 6(1).

based on national law. Therefore, this may be an area where drafters will be required to create new standards from scratch.

V. CONCLUSION

Interest in international commercial mediation appears to be growing, both in the United States and elsewhere. However, it is unclear whether potential participants have taken the differences between domestic and international commercial disputes fully into account. Some features, such as the size and complexity of cross-border business matters, are particularly important to consider because they may negate the supposition that mediation can reduce the time, cost, and formality associated with the resolution of international commercial disputes.

If international commercial actors are only concerned about saving time, cost, and complexity, then international commercial mediation may never become as popular as proponents may hope, since mediation does not appear to be superior to arbitration in these regards. However, there may be other reasons why multinational businesses would want to engage in mediation.

This Article has suggested that businesses may be more likely to choose international commercial mediation over international commercial arbitration and litigation if mediation agreements and settlement agreements were as easily enforceable as arbitration agreements and arbitral awards. If this hypothesis is correct, then it may be necessary to adopt an international enforcement regime similar to that which applies in international arbitration.

This Article has made a few suggestions regarding how an international treaty on commercial mediation might be shaped. These recommendations are very preliminary, and experts in both public international law and mediation will doubtless need to make numerous adjustments as any future instrument is drafted.[119]

119. For example, drafters would need to find a way to protect various principles of procedural justice, so as to avoid abusive mediation settlements. *See* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 15–16; Nolan-Haley, *Mediation*, *supra* note 3, at 70 n.52; Welsh & Schneider, *supra* note 5, at 84 (discussing whether the International Bar Association (IBA) Rules for Investor-State Mediation adequately protect procedural

However, this discussion has focused primarily on whether and to what extent it is even necessary to adopt an international agreement in this area of law, so hopefully any shortcomings regarding content-based analyses will be forgiven.

When considering how public international law can and should interact with mediation, it is perhaps interesting to note certain differences between the way recommendations for international involvement arose in mediation versus arbitration. In arbitration, the catalyst for a multilateral treaty arose out of a desire to obtain easy recognition and enforcement of the end product of the proceeding (i.e., the award).[120] Enforcement of elements arising at an earlier stage of the parties' relationship (i.e., the arbitration agreement) was only considered necessary as a means of fostering a legal environment that could and would generate enforceable arbitral awards.[121]

In mediation, temporal concerns are reversed. Parties involved in mediation are more concerned with enforcing the initial agreement (i.e., the mediation agreement) than they are with the end product (i.e., the settlement agreement). This emphasis on the early stage of the parties' relationship may arise because of a presumption that a consensual form of dispute resolution will result in voluntary compliance with the agreed outcome. However, the lessons of arbitration should not be forgotten, and those involved in drafting any future convention on international commercial mediation should recognize that the ability to create a legal environment that enforces one aspect of the parties' relationship (in this case, the mediation agreement) may require equal attention to be paid to what might otherwise be seen as an ancillary matter (in this case, the settlement agreement).[122]

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justice). This goal is achieved in the context of international commercial arbitration by allowing objections to enforcement based on various core procedural issues, and it may be that a similar mechanism could be devised for settlement agreements arising out of a mediated dispute. *See* New York Convention, *supra* note 77, art. V.

120. *See* Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1059, 1063 (1961).

121. *See* BORN, *supra* note 1, at 95, 97.

122. *See* Quigley, *supra* note 120, at 1063.