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THE "THIRD OPTION": INTERNATIONAL COMMERCIAL MEDIATION

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I. INTRODUCTION

Mediation in the international context is a relatively recent phenomenon. As an Alternative Dispute Resolution (ADR) mechanism, third-party neutral mediation is firmly entrenched in the legal ethos and procedural rules of most common law jurisdictions—such as the United Kingdom, the United States, and Canada.[1] However, in the rest of the world, including many European, Latin American, and Asian nations with civil law traditions, mediation remains an elusive concept. Some commentators suggest this may be due in part to differences in systemic (*i.e.,* adversarial *vs*. inquisitorial)[2] and cultural (*i.e.,* mediation *vs*. conciliation) orientations,[3] as

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[1] *See* Ontario *Rules of Civil Procedure,* Rule 24.1.01-Mandatory Mediation, RRO 1990, Reg. 194, am. to O. Reg 8/07, available online at: <http://www.e-laws.gov.on.ca/DBLaws/Regs/English/900194a_e.htm> (date last accessed: July 23, 2007); *cf.* The Hon. Judge Edward A. Infante, United States Magistrate Judge, N. D. Cal., "Judicial Case Management In The Federal Trial Courts Of The United States Of America" (discussing judicial case management early assignment of cases to a court-sponsored Alternative Dispute Resolution Program, such as Mediation or Arbitration, pursuant to Rule 16 of the U.S. Federal Rules of Civil Procedure, available online at: <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/FederalCaseMgmt.pdf> (date last accessed: July 23, 2007)

[2] *See* Michael McIlwrath, Elpidio Villarreal, & Amy Crafts, *Finishing Before You Start: International Mediation* in INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE (Barton Legum ed.) (ABA INTERNATIONAL PRACTITIONER'S DESKBOOK SERIES, 2005) Chap. 6, pp. 41-47 at 42. [hereinafter "*Finishing Before You Start"*].

[3] For a concise discussion outlining the differences among arbitration, conciliation, and mediation, see Alessandra Sgubini, Mara Prieditis, & Andrea Marighetto, *Arbitration, Mediation and Conciliation: Differences and Similarities from an International and Italian Business Perspective,* (August 2004) available online at: <http://www.mediate.com/articles/sgubiniA2.cfm>. *See also* Linda C. Reif, *The Use of Conciliation or Mediation for the Resolution of International Commercial Disputes*, 45(1) CAN. BUS. L. J. 20 (June 2007); Rona R. Mears, *Cross-Cultural Mediation: Issues and Opportunities*. (Address before the Fifth Annual Texas Minority Counsel Program, October 24, 1997); and Steven K. Anderson,

well as the interplay of domestic, international, and/or transnational public policy.[4]

Nevertheless, the last half of the Twentieth Century has witnessed increasing regional economic integration and globalization trends. Domestic and international efforts at harmonization and unification,[5] particularly under the auspices of the United Nations Commission on International Trade (UNCITRAL)[6] and the Hague Conference on Private International Law,[7] have resulted in bilateral and multilateral treaties and conventions in the areas of private international law and public international law, giving rise to a modern *lex mercatoria.*[8] Parallel developments in international arbitration (the New York Convention[9] and the UNCITRAL Model Law on International Arbitration[10]) and international trade law (The

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NAFTA Mediation and the North American Free Trade Agreement, 55(2) AAA DISP. RES. J. 58 (May 2000); L.L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO THE HIGH COSTS OF LITIGATION 111 (1994), at 111-12, discussing evaluative-facilitative/narrow-broad forms of mediator orientations, *cited in* JULIE MACFARLANE, DISPUTE RESOLUTION: READINGS AND CASE STUDIES (2d ed.) (Toronto, ON: Emond Montgomery Publications Limited, 2003) at 301-305 [hereinafter "MACFARLANE: DISPUTE RESOLUTION"].

[4] For the distinction between international and transnational public policy, see Richard P. Kreindler, *Approaches to the Application of Transnational Public Policy by Arbitrators* 4 *J.W.I.* 2, 239-250 (2003), Audley Sheppard, *Public Policy and the Enforcement of Arbitral Awards: Should There be a Global Standard*? TRANSNAT'L DISP. MANAGEMENT, Vol. 1, Issue #01, Feb. 2004 available online at: <http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_67.htm> wherein the author suggests "that the concept of 'transnational public policy' or 'truly international public policy' is said to comprise fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality which are accepted by 'civilised nations.' "

[5] For an analysis of the conceptual distinction between harmonization and unification, see BRUNO ZELLER, CISG AND THE UNIFICATION OF INTERNATIONAL TRADE LAW (New York 2007).

[6] *See* the UNCITRAL website: <http://www.uncitral.org/uncitral/en/index.html>.

[7] *See* the Hague Conference on Private International Law available on line at: <http://www.hcch.net/index_en.php>.

[8] *See* Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria, in* LEX MERCATORIA AND ARBITRATION (rev. ed.) (Thomas E. Carbonneau ed., Juris Publishing 1998) at 173-194, available online at: <http://www.cisg.law.pace.edu/cisg/biblio/audit.html>.

[9] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded at New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 available at: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html>.

[10] For the text and explanatory materials on the UNCITRAL Model on International Commercial Arbitration, United Nations Document A/40/17, annex I (as adopted by the United Nations Commission on International Trade Law on June 21, 1985, available on-line at <http://www.uncitral.org/pdf/english/texts/arbitration/

United Nations Convention on Contracts for the International Sale of Goods (CISG),[11] reflect this trend toward harmonization, if not, unification, of international trade law.[12] While many international arbitral organizations have a distinguished and lengthy pedigree,[13] others, like the International Center for Settlement of Investment Disputes (ICSID)[14] or the World Intellectual Property Organization (WIPO),[15] albeit more recently created, are also highly reputed.[16] In most cases, these national and international

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ml-arb/06-54671_Ebook.pdf> and as incorporated in Ontario by the International Commercial Arbitration Act, R.S.O. 1990, ch. I.9 (as am.) (hereinafter the "ICCA").

[11] United Nations Convention on Contracts for the International Sale of Goods (CISG), April 11, 1980, S. Treaty Doc. No. 98-9 (1984), U.N. Doc. No. A/CONF.97/19, 1489 U.N.T.S. 3, incorporated by International Sale of Goods Act, R.S.O., ch. I-10 (1990) (Can.), available at: <www.e-laws.gov.on.ca/DBlaws/statutes/English/90i10_e.htm>. For links to other Canadian provincial CISG legislation, as well as related Canadian case law and academic commentary, see the CISG Canada website, (hosted by Osgoode Hall Law School, York University - member of the autonomous network of Convention websites), available at: <http://www.cisg.ca>; or <http://www.yorku.ca/osgoode/cisg>. The CISG is sometimes also referred to as the Vienna Convention.

[12] Currently, seventy countries representing three-quarters of the world's trade are CISG signatories. *See* <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>; and *see also*, <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>. *See also*, the UNCITRAL Model Law Guide, *infra*, note 18, at 13-14 which refers to the UNCITRAL Model Law as a tool for harmonizing legislation.

[13] The Permanent Court of Arbitration (PCA) has over one hundred Member States and was established in 1899 to facilitate arbitration and other forms of dispute resolution between States, *see* the PCA website: <http://www.pca-cpa.org/showpage.asp?pag_id=363>; *see also* Arbitration Institute of the Stockholm Chamber of Commerce website at: <http://www.sccinstitute.com/uk/Home/>; The London Court of International Arbitration (LCIA) website: <http://www.lcia-arbitration.com>; The International Court of Arbitration for the International Chamber of Commerce (ICA-ICC), <http://www.iccarbitration.org/>; and ICC, International Chamber of Commerce Rules of Optional Conciliation 1995, *reprinted in* 1995 ICSID REV. 10, at 158-161.

[14] ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention). It came into force on October 14, 1966. *See* the World Bank -ICSID website: <http://www.worldbank.org/icsid/index.html>.

[15] Based in Geneva, Switzerland, the WIPO Arbitration and Mediation Center was established in 1994 to provide Alternative Dispute Resolution (ADR) services, specifically arbitration and mediation, for the resolution of international commercial disputes between private parties. *See* the WIPO website: <http://www.wipo.int/amc/en/center/index.html>.

[16] For a list of arbitral organizations for the North American Free Trade Agreement throughout the U.S., Canada, and Mexico, see the NAFTA Secretariat website: <http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=867>.

dispute resolution institutions offer mediation procedures and pools of qualified mediators.[17]

In 1999, under the direction of UNCITRAL, a Working Group on International Arbitration and Conciliation was formed to draft a Model Law on international commercial conciliation, resulting in the adoption of the *UNCITRAL Model Law on International Commercial Conciliation* (the "*UNCITRAL Model Law*") on June 24, 2002.[18] In 2004, the Uniform Law Conference of Canada (ULCC) adopted a Federal Department of Justice proposal to create a Working Group to draft uniform legislation to implement the *UNCITRAL Model Law*. In August 2005, the report of the Working Group and the *Uniform [International] Commercial Mediation Act* ("*Uniform Act*") was adopted by the ULCC.[19] The term "conciliation" used in the *UNCITRAL Model Law* was changed to "mediation" to accommodate Canadian terminology.[20]

The *Uniform Act* provides uniform rules with respect to the mediation process to encourage the use of international commercial mediation and ensure greater predictability and certainty in its use. To avoid uncertainty resulting from an absence of statutory provisions, the *Uniform Act* addresses procedural aspects of mediation, including appointment of mediators, commencement, and termination of mediation, conduct of the mediation, communications between the mediator and other parties, confidentiality and admissibility of evidence in other proceedings as well as post-mediation

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[17] *Finishing Before You Start*, *supra* note 2, at 46.

[18] *See* UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002, available at: <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf> [the "UNCITRAL Model Law Guide"] which states in part:

> Article 1 − Scope of Application and Definitions
>
> …
>
> 3. For the purposes of this Law, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

For legislative history, (*Travaux préparatoires*) see <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_travaux.html>.

[19] The text of the Uniform Act is available on the ULCC website at: <http://www.ulcc.ca/en/poam2/International_Commercial_Mediation_Act_En.pdf>.

[20] *See* ULCC Briefing Note – Uniform International Commercial Mediation Act dated September 7, 2005 with annexed version of the Uniform Act, available online at: <http://www.ulcc.ca/en/poam2/International_Commercial_Mediation_Act_BN_En.pdf>. [hereinafter the "*ULCC Uniform Act Commentary*"].

issues, such as the mediator acting as arbitrator and the enforceability of settlement agreements.[21]

As Susan D. Franck notes:

> The rule of law is essential to those participating in the global economy. Without the clarity and consistency of both the rules of law and their application, there is a detrimental impact upon those governed by the rules and their willingness and ability to adhere to such rules, which can lead to a crisis of legitimacy. Legitimacy depends in large part upon factors such as determinacy and coherence, which can in turn beget predictability and reliability. Related concepts such as justice, fairness, accountability, representation, correct use of procedure, and opportunities for review also impact conceptions of legitimacy. When these factors are absent individuals, companies and governments cannot anticipate how to comply with the law and plan their conduct accordingly, thereby undermining legitimacy.[22]

Duncan Kennedy further observes that "when we use law strategically, we change it."[23] This article will consider whether International Commercial Mediation is a legitimate Dispute Resolution Mechanism ("DRM") alternative to litigation or arbitration and the effect of decision-making and behavioral biases, including the System Justification Theory, on the outcome of disputes.

II. TRADITIONAL DISPUTE RESOLUTION MECHANISMS IN THE INTERNATIONAL CONTEXT

In the context of international disputes, the parties may neglect the consequences of an unanticipated future breach of the international commercial agreement and the consequent remedies availing the aggrieved party. More often, however, sophisticated commercial parties will impute a DRM into an international commercial contract by including a non-exclusive or exclusive choice of forum clause.[24] Alternatively, the parties

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[21] Canada has taken a leading role in promoting the UNCITRAL Model Law: *see* Daryl-Lynn Carlson, *Worldwide Mediation*, Canadian Bar Association website (last accessed July 23, 2007): <http://www.cba.org/CBA/national/nov04/feature2.aspx>.

[22] *See* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions* 73 FORDHAM L. REV. 1521 (2005) at 1584-5, available on-line at <http://ssrn.com/abstract=812964> citing THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 30 (1995); and THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 49 (1990).

[23] David Kennedy, *Modern War and Modern Law* in 12 INTERNATIONAL LEGAL THEORY: A JUST WORLD UNDER LAW 55 (2006), at 75 (Baltimore, MD: ASIL - Interest Group on the Theory of International Law).

[24] *See* Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements* 36 VAND. J. TRANSNAT'L L. 1189 (2003). *See*

may insert an arbitration clause into the agreement containing, as a condition precedent, an obligation for both parties to attempt to settle any disputes on an *ad hoc* basis before proceeding to arbitration, or requiring the parties to mediate the dispute in a more formal setting, including pre-selecting an international mediator or international mediation facility.[25] They may also negotiate and execute a stand-alone arbitration agreement on similar terms. In either case, the *ex ante* choice of forum will pre-determine both the form (tactics) and the content (strategy) based upon the *lex fori* (the law of the forum). Finally, the parties may voluntarily decide to agree to mediate after litigation or arbitration has been initiated, albeit less likely once litigation or arbitration is initiated and legal positions become entrenched.

Since the enactment of the *ICCA*[26] and the *Arbitration Act, 1991*,[27] the law of Ontario encourages parties to submit their disputes to consensual dispute resolution mechanisms outside the traditional court system."[28]

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also Antonin I. Pribetic, *Strangers in a Strange Land*: *Transnational Litigation, Foreign Judgment Recognition, and Enforcement in Ontario,* 13(2) J. TRANSNAT'L L. & POL'Y 347 (2004).

[25] There are many international mediation institutions which provide specialist training and procedures for international mediation, including, *inter alia;* The Institute for International Mediation and Conflict Resolution available on-line at: <http://www.iimcr.org/>; International Mediation Institute available on-line at: <http://imimediation.org/>; International Mediation and Arbitration Center available on-line at: <http://www.imac-adr.com/admin.imac-adr.lawoffice.com/CM/Custom/Home.html>; and the Mediation Training Institute International available on-line at: <http://www.mediationworks.com/intl/index.html>. For an excellent reference text, see EILEEN CARROLL & KARL MACKIE, INTERNATIONAL MEDIATION-THE ART OF BUSINESS DIPLOMACY (The Hague: Kluwer Law International, 1999, reprinted 2000).

[26] *Supra* note 10.

[27] Arbitration Act, 1991, S.O. 1991, ch. 17.

[28] Onex Corp. v. Ball, [1994] O.J. No. 98 (S.C.J.). *See also* the recent Supreme Court of Canada decisions in *Dell Computer Corp. v. Union des consommateurs*, [2007] SCC 34 (S.C.C.) and *Rogers Wireless Inc. v. Muroff*, [2007] SCC 35 (S.C.C.) which recently reaffirmed the primacy of mandatory arbitration clauses as a means to preclude class actions in consumer sales contracts/contracts of adhesion and which further held that the legislative prohibition against mandatory arbitration clauses contained in the Quebec *Consumer Protection Act*, R.S.Q., c. P-40.1, s.11.1 had no retroactive effect. *See also* § 7 of the Ontario *Consumer Protection Act*, 2002, S.O., c.30, Sched. A. which reads:

> No waiver of substantive and procedural rights
>
> 7(1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary. 2002, c. 30, Sched. A, s. 7 (1).
>
> Limitation on effect of term requiring arbitration
>
> (2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that

Hence, arbitration, as an alternative to court-based dispute resolution, reflects the principles of party autonomy, foreseeability, and certainty in international commercial transactions, most recently lauded by Mr. Justice Le Bel as fundamental principles underlying Canada's role in the private international law order.[29] Under the *aegis* of jurisdiction (when can or

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> requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act. 2002, c. 30, Sched. A, s. 7 (2).
>
> Procedure to resolve dispute
>
> (3) Despite subsections (1) and (2), after a dispute over which a consumer may commence an action in the Superior Court of Justice arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law. 2002, c. 30, Sched. A, s. 7 (3).
>
> Settlements or decisions
>
> (4) A settlement or decision that results from the procedure agreed to under subsection (3) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning an agreement to which this Act does not apply. 2002, c. 30, Sched. A, s. 7 (4).
>
> Non-application of *Arbitration Act, 1991*
>
> (5) Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration. 2002, c. 30, Sched. A, s. 7 (5).

[29] *See GreCon Dimter Inc. v. J.R. Normand Inc. et al.*, 2005 SCC 46, [2005] 255 D.L.R. (4th) 257 at 269, [2005] 336 N.R. 347, [2005] J.E. 2005-1369 (S.C.C.) [cited to D.L.R.] where LeBel, J. notes:

> The recognition of the autonomy of the parties reflected in the enactment of art. 3148, para. 2 C.C.Q. [the applicable Quebec Civil Code statutory reference] *is also related to the trend toward international harmonization of the rules of conflict of laws and of jurisdiction. That harmonization is being achieved by means, inter alia, of international agreements sponsored by international organizations such as the Hague Conference on Private International Law and the United Nations Commission on International Trade Law ("UNCITRAL")*….
>
> Thus the wording and legislative context of art. 3148, para. 2 C.C.Q. confirm that in enacting the provision, the legislature intended *to recognize the primacy of the autonomy of the parties in situations involving conflicts of jurisdiction. Moreover, this legislative choice, by providing for the use of arbitration clauses and choice of forum clauses, fosters foreseeability and certainty in international legal transactions.* [Emphasis added.]

should the "court speak"?),[30] arbitration agreements and arbitration clauses represent a party-centric conduit and juridical filter for resolution of disputes within the spheres of private international law (involving individual non-State parties), and public international law (involving bilateral investor-State or multilateral-State-to-State parties).

Arbitration continues to predominate as a method of dispute resolution at the multi-State level and provides a sophisticated procedural mechanism for Canadian private parties to enforce their rights against foreign State actors. In January 1994, Canada, the United States, and Mexico established the North American Free Trade Agreement (NAFTA) forming the world's largest free trade zone. According to the Foreign Affairs and International Trade Canada website:

> The Agreement has brought economic growth and rising standards of living for people in all three [sic] countries. In addition, NAFTA has established a strong foundation for future growth and has set a valuable example of the benefits of trade liberalization.[31]

Canada has also entered into bilateral treaties with other countries, such as Chile,[32] Costa Rica,[33] and Israel.[34] Chapter Eleven of NAFTA contains provisions designed to protect cross-border investors and facilitate the settlement of investment disputes. For example, each NAFTA Member State must accord investors from the other NAFTA Member State national treatment (*i.e.,* non-discriminatory) and may not expropriate investments of those investors except in accordance with international law. Chapter Eleven permits an investor of one NAFTA Member State to seek monetary damages for measures of one of the other NAFTA Member States that allegedly violates those and other provisions of Chapter Eleven.[35]

Investors may initiate arbitration proceedings against the NAFTA Member State under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules") or the

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[30] *Jurisdiction*: [Middle English jurisdiccioun, from Old French juridicion, from Latin iūrisdictiō, iūrisdictiōn- : iūris, genitive of iūs, *law*; see yewes- in Indo-European roots + dictī, dictiōn-, *declaration* (from dictus , past participle of dīcere, *to say*; see deik- in Indo-European roots).] Dictionary reference available on-line at: <http://www.thefreedictionary.com/jurisdiction>.

[31] See <http://www.dfait-maeci.gc.ca/nafta-alena/menu-en.asp>.

[32] The Canada-Chile Free Trade Agreement (CCFTA) entered into force in July 1997 (available on-line at: <http://www.dfait-maeci.gc.ca/tna-nac/ccftabrochure-en.asp>.

[33] The Canada-Costa Rica Free Trade Agreement (CCRFTA) received Royal Assent on December 18, 2001.

[34] The Canada-Israel Free Trade Agreement (CIFTA) (see <http://www.dfait-maeci.gc.ca/tna-nac/cifta-en.asp>

[35] For a list of active NAFTA – Chapter 11– Investment Arbitration Cases in which Canada and the United States are parties, see <http://www.dfait-maeci.gc.ca/tna-nac/nafta-en.asp>.

Arbitration (Additional Facility) Rules of the International Center for Settlement of Investment Disputes ("ICSID Additional Facility Rules").[36] Article 1122 of NAFTA reads:

> Art. 1122-Consent to Arbitration
>
> 1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.
> 2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:
> (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;
> (b) Article II of the New York Convention for an agreement in writing; and
> (c) Article I of the Inter-American Convention for an agreement.[37]

The NAFTA Secretariat further recommends the following model mediation clause:

> If a dispute, controversy or claim arises out of or relates to this contract, or the breach, termination or validity thereof, and if either party decides that the dispute cannot be settled through direct discussions, the parties agree to endeavor to settle the dispute in an amicable manner by mediation pursuant to [identify rules]. If this mediation does not result in a settlement, then the dispute shall be resolved by arbitration pursuant to [a model arbitration clause]. [Alternatively, the parties may provide for litigation in a court specified by the parties.][38]

Under the auspices of the World Bank, the ICSID Convention represents an important vehicle for bilateral (investor/State) arbitrations. Canada signed the ICSID Convention on December 15, 2006. Pending ratification, Canada will join 144 other Contracting States who are parties to the ICSID Convention, including the United States, where the ICSID Convention has been in force since October 1966.[39] In a recent article, J. William Rowley notes:

> Resolving commercial disputes efficiently is vital in the modern business world. Until relatively recently, the burden of doing so fell on those national court systems that seemed to capture the bulk of such disputes. But economic liberalisation and technological change have been altering

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[36] *See* <http://www.worldbank.org/icsid/index.html>.

[37] *See* <http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=856>.

[38] *See* <http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=865>.

[39] *See* list of Contracting States on the World Bank- ICSID website at: <http://www. worldbank.org/icsid/constate/c-states-en.htm>.

> the global economy. In particular, business has responded to the fall of trade barriers by expanding abroad and forging cross-border partnerships and joint ventures of every description. The growing multiculturalism of business and trade alone would have jetpropelled growth in international arbitration. But, because of the uncertainties inherent in court processes and because, for most international transactions, no national court is likely to be acceptable to both sides, the stage was set for processes and institutions more suited to resolving transborder disputes.
>
> Unsurprisingly, the concept and number of international commercial arbitrations have grown enormously. And, with some 2,300 bilateral investment treaties now in place, the increase in investor/State arbitrations — especially those conducted under the auspices of ICSID — has been nothing short of extraordinary. In the last five years, ICSID has seen a 150 percent increase in the number of arbitrations filed over the total number of cases instituted in its first 35 years.[40]

Whether or not international commercial mediation will achieve general acceptance among international litigators, arbitrators, and the judiciary and reach critical mass (a "tipping point,") [41] depends on a variety of internal and external factors, the most important of which may be the incorporation of the UNCITRAL Model Law into the procedural law of the domestic legal system. As a corollary, to the degree that mediation is an accepted DRM, transposing the mediation culture to international commercial disputes seems relatively sublime. The contrary view is that, for countries that do not have a culture of mediation, the likelihood that practitioners and their clients will opt for *ad hoc* mediation is small due to uncertainty and fear of "losing face" due to the opposing party's and their counsel's lack of familiarity with the form, content, and process.

Another relevant factor in the analysis is the effect of cognitive biases on individual and group decision-making behavior. Psycho-social scientific literature and case studies over the past few decades have identified a series of cognitive biases (or cognitive illusions) to which all individuals are prone in any dispute resolution setting. For example, hindsight bias is the natural tendency of people to "overstate their own ability to have predicted the past and believe that others should have been able to predict events better than was possible." Psychologists call this tendency the 'hindsight bias.' It occurs because learning the outcome causes people to update their beliefs about the world. People then rely on these new beliefs to generate estimates of what was predictable, but they ignore the change in their beliefs that

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[40] J. William Rowley, QC, *ICSID at a Crossroads,* GLOBAL ARB. REV., Vol 1, Issue 1, (Sept. 2006) available on-line at: <http://www.mcmbm.com/Upload/Publication/JWRowley_ICSID_AtCrossroads_0906.pdf>.

[41] *See* MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A DIFFERENCE (New York: Bay Back Books/Little Brown & Company, 2000/2002).

learning the outcome inspired."[42] Egocentric biases occur when "[p]eople tend to make judgments about themselves and their abilities that are 'egocentric' or 'self-serving'." People routinely estimate, for example, that they are above-average on a variety of desirable characteristics, including…professional skills.[43]

Déformation professionnelle is the tendency to look at things according to one's own profession, omitting any broader point of view, a cognitive bias affecting lawyers, mediators, and judges, alike.[44] Most people exhibit an implicit and unconscious bias against members of traditionally disadvantaged groups. As Jolls and Sunstein observe: "A growing body of evidence, summarized by Anthony Greenwald and Linda Hamilton Krieger, suggests that the real work is probably full of … cases of 'implicit', or unconscious, bias."[45] The authors suggest a general strategy of "debiasing through law."[46]

Beyond individual cognitive biases, social identity and social dominance theories focus on self-interest, intergroup conflict, ethnocentrism, homophily, ingroup bias, outgroup antipathy, dominance and resistance. In the past decade, the Behavioral Realism School, led by Jost, Banaji and Nosek, *inter alia*, has delved further into "group justification" theories and has advanced a psychological theory of "system justification" which it defines as the "process by which existing social arrangements are legitimized, even at the expense of personal and group interest."[47] Simply put, maintenance of the *status quo*, in some cases, may overpower self-interest or group-identity.

By analogy, international commercial mediation may gain ascendancy as a DRM in one of three ways: first, gradual acceptance through industry custom and usage among international commercial parties; second, development of a "global *jurisconsultorium*"[48] among the international

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[42] Guthrie, Chris, Jeffrey J. Rachlinkski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001), at 799 (citations omitted).

[43] *Id.*, at 811-112.

[44] *See* James B. Taylor, *Law School Stress and the "Deformation Professionelle,"* 27 J. LEGAL ED. 251 (1975).

[45] Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 [2006] at 970 (citing Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945[2006] at 955-956). *See also* Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105 (2004).

[46] *Id.*

[47] *See* John T. Jost, Mahzarin R. Banaji & Brian A. Nosek, *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25:6 POLITICAL PSYCHOLOGY 881-919; Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice,* 94 CALIF. L. REV. 1119 (2006).

[48] "A global *jurisconsultorium* on uniform international sales law is the proper setting for the analysis of foreign jurisprudence." Vikki Rogers & Albert Kritzer, "A Uniform International Sales Law Terminology*"* in Schwenzer, I. / Hager, G., eds*.,*

commercial bar, arbitrators, jurists, and academics; and, third, timely accession, ratification, and implementation of the UNCITRAL Model Law into domestic legal systems.

Many readers are familiar with the Canada-U.S. Softwood Lumber dispute in which the U.S. refused to recognize or comply with three NAFTA Arbitral awards in Canada's favor, ultimately leading to further rounds of negotiations and a tentative new softwood lumber deal.[49] The Honorable David Emerson, Minister of International Trade, recently issued the following statement on the United States requesting consultations with Canada under the Softwood Lumber Agreement:

> The Softwood Lumber Agreement was negotiated with the view of continued cooperation and open dialogue between Canada and the United States. The United States has requested that we consult on federal and provincial government forestry programs and the interpretation of the surge mechanism….
>
> Given the complexity of the Agreement, we expected that such administrative issues would arise. For this reason, the Agreement contained a new framework to allow for a full exchange of views. This is a good opportunity for Canada and the United States to once again work closely and to work through our disagreements in a constructive manner….
>
> I have spoken to the U.S. Trade Representative, Ambassador Susan Schwab, and we have directed our officials to plan for a meeting to take place within the next twenty days….

Festschrift für Peter Schlechtriem zum 70. Geburtstag, (Tübingen, J.B.C. Mohr / Paul Siebeck, 2003) pp. 223-253, available online at: < http://cisgw3.law.pace.edu/cisg/biblio/rogers2.html>. *See also* Camilla Baasch Andersen, *The Uniform International Sales Law and the Global Jurisconsultorium*, 24 J. L. & COM. 159 (2005), also available online at: <http://www.cisg.law.pace.edu/cisg/biblio/andersen3.html> noting the use of the term:

> to denote the need for cross-border consultation in deciding issues of uniform law. It is an excellent descriptive term for the phenomenon of meeting of minds across jurisdictions in the shaping of international law. However, the term *jurisconsultorium* also lends itself well to the formation of such law in a scholarly *jurisconsultorium.* In essence, this article will examine the genesis of the CISG and the scholarly *jurisconsultorium* from which it sprang, and the need for practitioners (*i.e.*, judges, arbitrators and legal counsel) to extend the j*urisconsultorium* in practice to ensure uniformity.

[49] A copy of the legal documents pertaining to the Softwood Lumber Consolidated Proceedings is available online at: <http://www.state.gov/s/l/c14432.htm>. *See also* <http://www.international.gc.ca/ eicb/softwood/pdfs/Agreementamending-en.pdf>.

> The Softwood Lumber Agreement came into force on October 12, 2006. The Agreement creates a stable, predictable trade environment for Canadian producers. It revoked U.S. countervailing and anti-dumping duty orders, returned to Canadian exporters over $5 billion in duties collected by the United States since 2002, and safeguarded the provinces' ability to manage their forest resources. It is a seven-year agreement with an option to renew for two additional years. [50]

By contrast, in *United Mexican States v. Karpa,*[51] Marvin Feldman, a U.S. citizen, submitted a claim on behalf of CEMSA, a registered foreign trading company and exporter of cigarettes from Mexico, in April 1999. CEMSA alleged that the denial of benefits of a law that allowed certain tax refunds to exporters breached Mexico's obligations under Chapter Eleven of NAFTA. The NAFTA Arbitration Tribunal rendered its final decision on December 12, 2002 in which it was found that Mexico had violated its national treatment obligations under NAFTA. Mexico brought an application for statutory review to set aside the arbitral decision in the Ontario Superior Court of Justice.[52] Chilcott, J. dismissed the application to set aside the arbitral award, which the Court of Appeal for Ontario also affirmed.[53]

Quaere: Would the Softwood Lumber dispute have been resolved more quickly if U.S. and Canadian government representatives and their respective counsels opted to mediate the international dispute privately? One possible explanation for escalation of the Softwood Lumber dispute may be that the U.S. government was subject to implicit bias and perceived Canada as a "disadvantaged" party both in terms of political and economic power, where the legal issues did not translate into strong lobbying interests or active public interest.

Alternatively, the U.S. government may have sought to maintain the *status quo* under the "system justification theory." Generally, party autonomy, contractual primacy, comity, reciprocity, and politico-legal systemic factors all favor deference to arbitration as a "legal means to a political end." Conversely, for the United States, "final and binding" arbitration is neither "final" nor "binding" in cases involving powerful lobby

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[50] *See*<http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication_id=385017&Language=E&docnumber=52>.

[51] United Mexican States v. Karpa [2003] O.J. No. 5070, [2003] O.T.C. 1070 (S.C.J.) per Chilcott, J.

[52] The NAFTA Arbitration Tribunal (arbitral seat) was in Ottawa, Ontario at the International Centre for Settlement of Investment Disputes (Additional Facilities), which is why the application for statutory review to set aside the arbitral decision was within the Ontario court's jurisdiction.

[53] United States of Mexico v. Karpa [2005] 74 O.R. (3d) 180, [2005] 248 D.L.R. (4th) 443 (Ont. C.A.) per Doherty, Armstrong and Lang, JJ.A. It does not appear as though Mexico sought leave to appeal to the Supreme Court of Canada (QuickLaw search).

interests which exert influence over domestic policy and affect voting patterns for congressional or senatorial incumbents.

More directly, the U.S. can exert economic power over both Canada and Mexico, in varying degrees. However, it is far less likely for the U.S. to flout bilateral or multilateral treaty obligations involving private, rather than national, interests. Hence, treaty-level mediation, as an adjunct to arbitration, is a further dispute resolution alternative in resolving disputes between private parties, or, in more limited circumstances, disputes involving foreign States, such as investor-State disputes.[54]

III. INTERNATIONAL COMMERCIAL MEDIATION AS AN ALTERNATIVE DRM

The following is an overview of the pros and cons of selecting international commercial mediation as an alternative DRM to litigation or arbitration.

(1) International Commercial Mediation-Positive Factors

The following are positive factors militating in favor of international commercial mediation as an effective dispute resolution mechanism (DRM):

1. The parties are from jurisdictions that have well-defined legal systems, trade usages, and customs which incorporate mediation as a viable alternative or complement to litigation or arbitration;
2. The parties are either:
   (a) multinational corporations or involved in international commercial trade; or
   (b) States or State-owned commercial enterprises;
3. The parties' commercial relationship is governed by an international commercial agreement which includes a forum selection/exclusive jurisdiction clause or an arbitration clause or is subject to bilateral or multilateral treaties or conventions;
4. There is a relative equality of bargaining power;
5. The parties have a long-standing business relationship that they wish to maintain (s*tatus quo*/system justification theory), or have a prior litigation/arbitration history;
6. The parties have complementary legal systems, or allegations of political or judicial corruption or bias are palpably absent;[55]

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[54] *Cf.* C.H. Brower II, *Investor-State Disputes under NAFTA: The Empire Strikes Back*, 40 COLUM. J TRANSNAT'L L. (2001) *reproduced in* MACFARLANE: DISPUTE RESOLUTION, Chap. 6, NAFTA Chapter 11 Arbitrations, *supra* note 3.

[55] It is noteworthy that one of the narrow defenses to enforcement of foreign (international) arbitral awards and/or recognition and enforcement of foreign judgments is the public policy defense, which allows a defendant to raise allegations of bias of the arbitrator or arbitral panel, or political/judicial bias or corruption. *See* Antonin I. Pribetic, *Thinking Globally, Acting Locally*: *Recent Trends in the*

7. The factual dispute and legal issues are relatively straightforward.

(2) International Commercial Mediation-Negative Factors

The following are negative factors which may militate against international commercial mediation as a DRM:

1. The international commercial dispute involves multiple, non-privity claims (*e.g.,* third party claims, class action, anti-corruption,[56] or antitrust allegations,[57] *etc*.);
2. The international commercial dispute includes concurrent claims framed in contract or tort, as well as claims for equitable remedies (*e.g.,* breach of trust/fiduciary duty, fraudulent misrepresentation) or extraordinary remedies (*i.e.* injunctive relief — Worldwide Freezing Orders [extra-jurisdictional *Mareva* injunctions], *etc*.), which may, or may not, be justiciable or enforceable in the defendant's jurisdiction (*e.g.,* contempt orders, penal laws, revenue laws, specific performance, *etc*.);
3. Either or both parties raise *ad hominem* or reputational claims against individual principals, directors, or management;
4. The parties each seek to establish a legal precedent, a domestic public policy shift, or change in local, regional, national or international industry practice;
5. The parties are neither risk-averse (*i.e.,* goodwill or industry reputation is less important that ego-centric, ingroup or system justification biases) nor cost-averse (*e.g.,* substantial psychological investment or significant financial resources);

Recognition and Enforcement of Foreign Judgments in Canada, in ANNUAL REVIEW OF CIVIL LITIGATION 2006, Archibald, Mr. Justice Todd L. And Echlin, Mr. Justice Randall (eds.) (Toronto: Carswell, 2007) pp. 141-199 at 169-175. (Hereinafter PRIBETIC-THINKING GLOBALLY, ACTING LOCALLY).

[56] *Finishing Before You Start, supra* note 2 at 44.

[57] *Cf*. Keith L. Seat, *What Every Antitrust Lawyer Should Know About Alternative Dispute Resolution,* November 6, 2003 Presentation at the ABA 2003 Administrative Law Conference, available online at: <http://keithseat.com/documents/WhatEveryAntitrustLawyerShouldKnowAboutADR.pdf>. In the landmark Microsoft antitrust case, referring to the appointment of Judge Richard Posner, head of the U.S. Court of Appeals in Chicago, to mediate the dispute, CNET reported that the referral to "voluntary mediation" was:

> "Unprecedented," said Georgetown University law professor Bill Kovacic. "Never in the history of the U.S. antitrust system has a federal district judge enlisted the help of a federal court of appeals judge to mediate settlement discussions. This is a mark of genius. This is truly a judge thinking 'outside the box.' " *See* <http://news.com.com/2100-1001-233326.html>.

6. Intangible factors or implicit biases represent skewed perceptions and reframing of issues. For example, in a bilateral investment treaty dispute, a State or governmental agency may raise issues of sovereignty[58] or geo-political factors which may frustrate the prospects of mediation, or a governmental official may fear recriminations if decisions are made against the "national interest."[59]

(3) Criteria for Selecting an International Mediator

The issues of mediator independence, neutrality, and perceived fairness are commonly shared personal, societal, and juridical values for a successful resolution of an international dispute. The following criteria should be considered by counsel when selecting an international mediation institution and/or international mediator:

A. History and Experience

1. How long has the institution conducted or administered international mediations?
2. How many international disputes has the institution been involved in?
3. From which countries have mediated disputes originated?
4. Has the institution handled disputes similar to the international commercial agreement/contract at issue?

B. Mediator Selection

1. Have the parties designated the mediator, or have they deferred the selection to the institution's discretion?
2. Does the roster of potential mediators reflect individuals from a variety of countries and legal and/or industry backgrounds?
3. Does the institution automatically select mediators from a neutral jurisdiction, or only at the request of one or both of the parties? Are the parties able to select mediators not on the institution's roster?
4. Does the institution have mediators with expertise in litigation and/or arbitration for the type of international commercial dispute?

C. Conduct of the Mediation

1. Does the institution have an established set of rules or procedures?

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[58] *See*, *e.g.,* the U.S. Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2898 (1976), codified at 28 U.S.C. §§ 1602-1611, (effective date January 19, 1977); Pub. L. No. 94-583 § 8; or the Canadian (Federal) State Immunity Act, 1985 R.S.C., S.18 (as am.)

[59] *See* discussion of cognitive biases at notes 40–48 *supra*.

2. If so, do the rules or procedures permit flexibility in the mediation process, including the availability of "caucusing" or "shuttle diplomacy"?
3. Do the rules provide for specific time limits for some or all aspects of the mediation process? If so, are these time limits strictly observed or largely ignored?
4. Does the institution limit any mediation procedures selected by the parties?
5. Are the institution's rules or procedures clear and neutral to both parties?

D. Cost

1. What are the administrative fees charged by the mediation institution? If the institution also conducts international arbitrations, are the fees and expenses proportional to international mediations? Are the fees and expenses fixed or are they variable, based on the quantum of the dispute?
2. Are mediators paid fees based upon amount of time spent; a *per diem* rate; or based upon the quantum of the dispute?
3. Are there local qualified mediators on the roster in order to reduce travel and accommodation expenses?

E. Services Offered by the Institution

1. How large is the institution, including mediators and administrative staff?
2. Is the administrative staff experienced in international disputes?
3. Does the institution have translators or access to translation services, if required?

F. Professional/Ethical Considerations

1. What is the mediator's reputation in the international commercial litigation or arbitration community?
2. What is the international mediator's orientation: is it facilitative or evaluative? Is it narrow or broad?
3. Is the mediator a practicing lawyer subject to professional rules of conduct governing his or her conduct as a mediator?[60]
4. Do both parties regard the international mediator as "neutral" or "unbiased"?

[60] *See* Canadian Bar Association, Code of Professional Conduct, Adopted by Council August 2004 and February 2006 (Ottawa, ON: CBA, 2006) Chap. XXI, pp. 123-124.

5. Have the parties jointly electing the mediator by *ex ante* or *ex post* written agreement?

IV. OVERCOMING SYSTEM JUSTIFICATION BIAS — THE UNIFORM ACT

If litigation or arbitration represents the *status quo*, the UNCITRAL Model *Law* offers a potential new DRM for international commercial disputes. The UNCITRAL Model Law has already been ratified in a few countries. According to UNCITRAL, legislation based on the UNCITRAL Model Law has been enacted in Hungary (2002), Croatia (2003), and Nicaragua (2005).[61] Uniform legislation influenced by the UNCITRAL Model Law and its guiding principles has been prepared in the United States[62] and enacted in Illinois, Iowa, Nebraska, New Jersey, Ohio, and Washington State.[63] In Canada, the Uniform Act has been implemented in Nova Scotia.[64]

Generally, the Uniform Act implements most of the provisions of the UNCITRAL Model Law, albeit with some notable exceptions discussed below. Articles 1-3 define the scope and applicability of the Uniform Act. Article 1(1) is based on paragraph 1(1) of the UNCITRAL Model Law which contains a purpose clause (not commonly used in Canadian federal or provincial jurisdictions) with a stated purpose "to facilitate the use of mediation to resolve [international] commercial disputes.[65]

The parenthetical use of the term "international" allows jurisdictions to apply the UNCITRAL Model Law to either (i) international mediations, or (ii) both international and domestic mediations.[66] If the latter is chosen, the implementing jurisdiction may simply delete the terms [international] in the title and sub-section 1(1), as well as delete sub-sections 1(4) and 1(5) of the Uniform Act.[67] Pursuant to Article 1(4), mediation is "international" if:

> 4) …at the time of the conclusion of an agreement to mediate,
> (*a*) the parties have their places of business in different States; or
> (*b*) the State in which the parties have their places of business is different from the State in which a substantial part of the

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[61] For a list of Contracting States, see the UNCITRAL website: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html>.

[62] Uniform Mediation Act, adopted in 2001 by the National Conference of Commissioners on Uniform State Law. *See* Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation-Worldwide*, 80 NOTRE DAME L. REV. 553 (2005), fn. 11.

[63] *Op cit.*

[64] *See* Commercial Mediation Act, S.N.S. 2005, c. 36 (as am.)

[65] Uniform Act, Art. 1.(1) *supra* note 19.

[66] UNCITRAL Model Law Guide, *supra,* note 18, at pp. 22-23; citing (A/CN.9/506, ¶ 16; A/CN.9/116, ¶ 36).

[67] *See* ULCC Uniform Act Commentary, *supra* note 20, at p.1 and Commercial Mediation Act, S.N.S. 2005, c. 36 (as am.).

> obligations of the commercial relationship is to be performed or with which the subject-matter of the dispute is most closely connected. [68]

According to the UNCITRAL Model Law Guide, the term "commercial":

> …should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.[69]

Moreover, while the UNCITRAL Model Law is restricted to international and commercial cases, the "State enacting the Model Law may consider extending it to domestic, commercial disputes, and some non-commercial ones…."[70] The principle of party autonomy is reflected under Article 1(2) which allows the parties to exclude or modify any provisions of the Uniform Act to meet their needs, except Articles 2 and 5(4).[71] Article 1(3) defines mediation as "a collaborative process in which parties agree to request a third party (a mediator) to assist them in their attempt to try to reach a settlement of their commercial dispute. A mediator does not have any authority to impose a solution to the dispute on the parties."[72]

Article 1(6) is a potentially problematic provision. It reads as follows:

> Application
>
> 6) This Act does not apply to [insert provincial mandatory mediation program references].

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[68] Uniform Act, Art. 1(4). The meaning of "international" is based on paragraph 1(4) of the UNCITRAL Model Law. *See also* Article 1.(5) which refers to the parties' "place of business" derived from paragraph 1(5) of the UNCITRAL Model Law. *Cf.* CISG Articles 1(1) (Sphere of Application) and Article 10 (Place of Business), *supra* note 11.

[69] *See* UNCITRAL Model Law Guide, *supra* note 18, at p. 1, fn. 1.

[70] *Id*., at 16.

[71] Uniform Act, Art. 1.(2), *supra* note 19, which is based on paragraph 1(7) and Article 3 of the UNCITRAL Model Law. *Cf.* CISG, Art. 6, *supra*, note 11.

[72] Uniform Act, Art. 1(3). *Cf.* the definition of "conciliation" in the UNCITRAL Model Law, *supra* note 19.

The ULCC Commentary makes the following recommendation:

> **Comment:** This article is based on paragraph 1(9) of the UNCITRAL Model Law. *Jurisdictions with existing mandatory mediation systems, for example, the Ontario Mandatory Mediation program, may want to exclude the application of the uniform act.* [Emphasis added.]

The problem with this recommendation is that it fails to contemplate the interplay between the Ontario Mandatory Mediation program — specifically, Rule 24.1.1, which does not differentiate between domestic and international litigation — and Rule 17.06, which allows a foreign (non-resident) defendant to challenge the plaintiff's choice of Ontario, but does not explicitly exclude participation in mandatory mediation as a form of consent-based jurisdiction (*i.e.*, submission or attornment).[73] For example, in lieu of any statutory or procedural exceptions, a foreign (non-resident) party that contemplates making a preliminary challenge based upon the Ontario court's lack of jurisdiction *simpliciter*, but otherwise participates in a mandatory mediation session before the Ontario court has definitively ruled on jurisdiction, may be held to have submitted or attorned to the Ontario jurisdiction.

As such, unless the Ontario rules are amended to address this potential conflict of laws issue, a foreign (non-resident) defendant is well-served to include an express reservation/non-waiver of rights clause in the international mediation agreement, stipulating that voluntary submission to international mediation (or domestic mandatory mediation) does not constitute submission or attornment to the Ontario court's jurisdiction.[74]

Article 2 contains mandatory rules from which the parties cannot derogate from, exclude, or modify.[75] Article 2(1) expressly provides that the Uniform Act is based on the UNCITRAL Model Law and must be interpreted with consideration given to its international origin, the need to promote uniformity, and the observance of good faith.[76] Article 2 also

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[73] *See* Rule 17.02 (Service Outside Ontario Without Leave); Rule 17.06 (Motion to Set Aside Service Outside Ontario) and Rule 21.01(3)(a) (Determination of an Issue Before Trial- to Defendant-Jurisdiction) of the ONTARIO RULES OF CIVIL PROCEDURE, *supra* note 1; and s.106 of the COURTS OF JUSTICE ACT, R.S.O. 1990, ch. C.43, § 106 (Stay of Proceedings). *Cf.* Rule 24.1.03(d) which further defines a "defence" as "a notice of motion in response to an action, other than a motion challenging the court's jurisdiction…" but otherwise does not cross-reference Rule 17.

[74] For a more in-depth analysis, see Pribetic, *Thinking Globally, Acting Locally*, *supra* note 55, at pp. 147-152.

[75] Uniform Act, Article 2(4).

[76] Uniform Act, Article 2 is a mandatory provision found in many other international instruments, such as the CISG (Art. 7(1) and 7(2); the UNCITRAL Model Law on Electronic Commerce (Art. 3(1) and 3(2), available online at: <http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf>; the UNCITRAL Model Law on Cross-Border Insolvency (Art. 8), available online at:

contains key interpretative provisions. Article 2(2) stipulates that recourse may be had to (a) the Report of the United Nations Commission on International Trade Law on its thirty-fifth session, and (b) the UNCITRAL Model Law Guide,[77] Article 2.(3) states that any questions arising during a mediation not covered by the Uniform Act shall be settled in conformity with the general principles on which the UNCITRAL Model Law is based.[78]

Article 3(1) specifies that a mediation commences on the date the parties submit their dispute to mediation. Articles 3(2) and 3(3) delimit the terms for rejection of an invitation to mediate and termination of mediation, the latter of which occurs when the parties reach a settlement agreement or the mediator or any party makes a unilateral declaration of termination. [79]

Articles 4-11 cover default procedural aspects of the mediation in lieu of the parties' *ex ante* agreement, or to supplement any mediation agreement procedures, in this context acting as a supplement to their agreement. Article 4(1) addresses the appointment of the mediator by the parties, while Article 4(2) facilitates the recommendation or appointment by a third party, such as the appointed mediation institution, which must appoint a person who is both impartial and independent.[80] Article 4(3) directs an appointed mediator to disclose any potential conflicts "without delay" or "any circumstances that are likely to give rise to justifiable doubts about their impartiality or independence." [81]

Articles 5 and 6 deal with the conduct of mediation and settlement proposals. Article 5(1) reinforces the principle of party autonomy in that the parties are free to agree to the manner in which the international mediation is to be conducted and/or they may agree to follow a set of existing rules.[82] Communications between the mediator and the parties is provided for in

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<http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf>; and the UNCITRAL Model Law on Electronic Signatures (Art. 4(1) and 4(2), available online at: <http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf>.

[77] Uniform Act, Article 2(2) is similar to Article 14 of the ULCC Uniform Act on the UNCITRAL Model on International Commercial Arbitration, available online at: <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1i6>.

[78] Uniform Act, Article 2(3) is based on paragraph 2(2) of the UNCITRAL Model Law.

[79] Uniform Act, Article 3(1) is based on paragraph 4(2) of the UNCITRAL Model Law; Article 3(2) is based on paragraph 11 of the UNCITRAL Model Law.

[80] Uniform Act, Article 4(1) is based on paragraphs 5(1) and (2) of the UNCITRAL Model Law; Article 4(2) is based on paragraphs 5(3) and (4) of the UNCITRAL Model Law.

[81] Uniform Act, Article 4(3) is based on paragraph 5(5) of the UNCITRAL Model Law. *See also*, Article 9 which prohibits a mediator from also acting as an arbitrator, or *vice versa*, in a dispute or related dispute from the same contract or legal relationship between the parties and is derived from Article 12 of the UNCITRAL Model Law.

[82] Uniform Act, Article 5(1) is based on paragraph 6(1) of the UNCITRAL Model Law. According to the ULCC Uniform Act Commentary, *supra* note 20, at p. 6.

Article 5(3) and facilitates "caucusing" or "shuttle diplomacy."[83] Articles 5(2) and 5(4) refer to the treatment of parties, the latter of which imposes a mandatory minimum standard of procedural fairness on the international mediator which may neither be excluded nor modified.[84] Article 6 enables the international mediator to make proposals for settlement at any stage of the mediation.[85] Article 7(1) allows for communication between the international mediator and the parties, unless either of the parties expressly requests non-disclosure.[86] Article 7(2) contains a confidentiality provision and lists exemptions to disclosure, including a novel exception for claims relating to mediator misconduct and reads as follows:

> *Confidentiality with respect to third parties*
>
> (2) With respect to third parties, all information relating to a mediation must be kept confidential unless
> (*a*) all the parties agree to the disclosure;
> (*b*) the disclosure is required under the law;
> (*c*) the disclosure is required for the purposes of carrying out or enforcing a settlement agreement; or
> (*d*) *the disclosure is required for a mediator to respond to a claim of misconduct*.[87] [Emphasis added.]

Article 8 particularizes the type of information which is non-admissible in an arbitral, judicial, or administrative proceeding; including, invitations or refusals to mediate; documents prepared solely for mediation purposes; views expressed or suggestions made during a mediation session; statements or admissions made by a party during mediation; settlement proposals made by the mediator; the fact a party expressed a willingness to accept a

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[83] Uniform Act, Article 5(3) is based on paragraph 7 of the UNCITRAL Model Law.

[84] Uniform Act, Article 5.(2) is based on paragraph 6(2) of the UNCITRAL Model Law; Article 5.(4) is based on Article 3 and paragraph 6(3) of the UNCITRAL Model Law; see *ULCC* Uniform Act Commentary, *supra* note 20, at p. 7.

[85] Uniform Act, Article 6 is based on paragraph 6(4) of the UNCITRAL Model Law.

[86] Uniform Act, Article 7(1) is based on Article 8 of the UNCITRAL Model Law.

[87] Uniform Act, Article 7(2) is based on Article 9 of the UNCITRAL Model Law. *Cf.* Rule 24.1.14 of the ONTARIO RULES OF CIVIL PROCEDURE, *supra*, note 1, which provides a generic form of confidentiality protection and reads:

> CONFIDENTIALITY
>
> 24.1.14 All communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions. O. Reg. 453/98, s. 1.

settlement proposal made by a mediator; or the fact that a party terminated the mediation.[88]

Article 8(2) provides the following exceptions to non-admissibility: a) information required under the law; b) for purposes of implementing or enforcing a settlement agreement; or c) for a mediator to respond to a claim of misconduct.[89]

The case for implementing the UNCITRAL Model Law and Uniform Act is strengthened by one Canadian legal commentator's criticism that the Ontario Mandatory Mediation Program fails to protect confidentiality in mediation, wherein the author notes:

> Lawyers and mediators often tell parties participating in mediation that the process is confidential. But that advice may be incorrect if given during the course of a mediation conducted as part of Ontario's mandatory mediation program. Indeed, lawyers and mediators need to be particularly careful with their advice respecting other parties' obligations of confidentiality now that the Court of Appeal in *Rogacki v. Belz* [2003), 67 O.R. (3d) 330, 232 D.L.R. (4th) 523, 41 C.P.C. (5th) 78 (C.A.)], has found that the rule which governs the procedure for mandatory mediation in the province does not create an enforceable guarantee of confidentiality. [*Id.*, at 11.].[90]

The remaining provisions of the Uniform Law address post-mediation issues to avoid resulting uncertainty in lieu of statutory provisions governing these issues. Article 10(1) provides that parties to a mediation may agree not to proceed with arbitral or judicial proceedings before mediation is terminated, however, an arbitrator or court may permit the proceedings if "necessary to preserve the rights of any party or…otherwise necessary in the interests of justice."[91] Finally, Article 11 allows for enforcement *via* registration of a settlement agreement "as if it were a judgment of that court." According to the ULCC, this provision is:

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[88] Uniform Act, Article 8(1) is based on paragraphs 10(1), 10(2), and 10(3) of the UNCITRAL Model Law.

[89] Uniform Act, Clauses 8(2)(a) and (b) are based on paragraph 10(3) of the UNCITRAL Model Law. Clause 8(2)(c) is similar to Article 7(2)(d) above. *See also* Articles 8(3) and 8(4) which further clarify subsections (1) and (2) and are based on paragraphs 10(4) and 10(5) of the UNCITRAL Model Law.

[90] Paul Dollak, *The Myth and Reality of Party Confidentiality in Ontario's Mandatory Mediation Program*, 29(2) ADV. Q. 125 (2004).

[91] Uniform Act, Article 10(1), is based on Article 13 of the UNCITRAL Model Law. However, according to the ULCC Uniform Law Commentary, at page 10, it "goes further as it deals with the power of a court to permit the continuation of a proceeding and not only its commencement. Examples of where proceedings could be allowed include proceeding for *ex parte* or *intra parte* interim measures such as an injunction." *See also* Article 10(2) which provides for continuation of the mediation agreement, notwithstanding commencement of arbitral or judicial proceedings.

> "…intended to be read in conjunction with existing procedures of the court and available defences to recognition and enforcement under contract law, fraud, public policy, *etc.* Some jurisdictions may wish to codify or refer to specific procedures or available defences. In Quebec, the mediation agreement falls under the concept of "transaction" (articles 2631 – 2637 of the Civil Code of Quebec). A mediation agreement would be recognised and enforced by way of homologation which already exists for arbitral proceedings (articles 946-946.1 of the Quebec Code of Civil Procedure). [This provision is to be read in conjunction with the common law and with the civil law of Quebec. An application may be contested and defenses such as fraud and unconscionability apply.][92]

V. CONCLUSION

In the context of international commercial mediation, existing private international law and public international law treaties and conventions — notably in the fields of international arbitration and international trade law — reflect the systemic *status quo.* Yet, cognitive psychology offers insights on how cognitive biases may be overcome by savvy international commercial parties and experienced legal counsel; both of which should recognize the cost-saving benefits of mediating, rather than arbitrating or litigating an international commercial dispute.

Furthermore, behavioral realism may suggest why Western (common law) legal systems favor litigation and/or arbitration over mediation as dispute resolution mechanisms for international disputes. In particular, the "system justification theory" questions the validity of the rational actor model in the legal context, including trial advocacy, jury selection, and corporate governance models. It also suggests that maintenance of the institutional *status quo* by various actors within the legal system — litigants, lawyers, jurists, legal academics — reinforces the perceived legitimacy of the system in which these actors operate.

Legal values, like political, social, economic, or religious values do not exist in a vacuum. Rather, they develop through a coherent set of precedents based upon the doctrine of *stare decisis,* but allow flexibility through public policy analysis, unification, and harmonization of international trade law and recognition of generally recognized rules, principles and policies (*i.e.,* substantive and procedural justice, fairness, accountability, the opportunity to be heard,[93] and independent judicial

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[92] Uniform Act, Article 11 is based on Article 14 of the UNCITRAL Model Law. *See* ULCC Uniform Act Commentary, *supra* note 20, at 11.

[93] Justice Frankfurter in Caritativo v. California 357 U.S. 549; 78 S. Ct. 1263; 2 L. Ed. 2d 1531; 1958 U.S. LEXIS 670 (U.S.S.C.) in his oft-quoted dissent noted:

> *Audi alteram partem* -- hear the other side! -- a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause of the Fourteenth Amendment, against State governments,

review) developed by private and public international law, including customary international law. As such, the UNCITRAL Model Law and its Canadian variant, the ULCC's Uniform Act, offer a legitimate, cost-effective and timely "third option" to arbitration or litigation in the international commercial context.

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and every branch of them -- executive, legislative, and judicial – whenever any individual, however lowly and unfortunate, asserts a legal claim.

See also Porto Seguro Companhia de Seguros Gerais v. Belcan S.A. [1997] 3 S.C.R. 1278, (1997) 153 D.L.R. (4th) 577, (1997) 220 N.R. 321 (S.C.C.).