Legal Studies Research Paper Series
Research Paper No. 2014-28

Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation

S. I. Strong

Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation

S.I. Strong*
Associate Professor of Law, University of Missouri
Senior Fellow, Center for the Study of Dispute Resolution

Table of Contents

I. Introduction

This document provides preliminary findings from a large-scale international survey regarding the use and perception of international commercial mediation and conciliation in the international legal and business communities. This information was gathered to assist the United Nations Commission on International Trade Law (UNCITRAL) and UNCITRAL Working Group II (Arbitration and Conciliation) as they consider a proposal from the Government of the United States regarding a possible convention in this area of law.[1] The data generated by this survey will be further expanded in the coming months and published in article form.[2] The forthcoming article will not only include additional analysis of the underlying data, it will also feature several normative proposals regarding the shape of any future international action in this area of law.[3]

Several matters have been excluded from this research project. For example, this study does not attempt to determine whether and to what extent mediation and conciliation are well-suited to resolve international commercial or investment disputes or what the cost of mediation

---

* D.Phil., University of Oxford; Ph.D. (law), University of Cambridge; J.D., Duke University; M.P.W., University of Southern California; B.A., University of California, Davis. The author, who is admitted to practice as an attorney in New York, Illinois and Missouri and as a solicitor in England and Wales, is Associate Professor of Law at the University of Missouri and Senior Fellow at the Center for the Study of Dispute Resolution. The author would like to thank Rafael Gely, John Lande, Michael McIlwrath, S. David Mitchell and Edna Sussman for insights regarding the construction of the survey and Resa Kerns for assistance in the technical aspects of survey creation and distribution. All errors of course remain the author's own.

[1] *See* Proposal by the Government of the United States of America: Future Work for Working Group II, U.N. Doc. A/CN.9/822 (June 2, 2014) [hereinafter Proposal].

[2] A citation to the final work will be provided when it is available.

[3] The author has already provided several normative suggestions in a previously published work. *See* S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J. L. & POL'Y 11 (2014) [hereinafter Strong, ICM].

and conciliation might be in the international commercial or investment context.[4] Furthermore, this preliminary report does not discuss the growing amount of scholarly literature concerning international commercial mediation and conciliation, although those matters will be addressed in the article that is forthcoming.[5] Instead, this document focuses exclusively on the presentation of

[4] Numerous commentators have attempted to identify the types of disputes that are particularly amenable to mediation and conciliation, particularly in the domestic context. *See* INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION (CPR), ADR SUITABILITY GUIDE, *available at* http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Tools/ADR%20Suitability%20Screen.pdf (last visited Nov. 11, 2014); Strong, ICM, *supra* note 2, at 16-24. For example, some researchers have concluded that 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 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.

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). Although no empirical studies have considered whether and to what extent these observations extend to international commercial disputes, there does not appear to be anything about international commercial or investment disputes that makes mediation or conciliation categorically inappropriate in those cases. *See* Jacob Bercovitch & Allison Houston, *The Study of International Mediation: Theoretical Issues and Empirical Evidence*, *in* RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION 11, 14 (Jacob Bercovitch ed., 1996); Thomas Gaultier, *Cross-Border Mediation: A New Solution for International Commercial Settlement?*, 26 INT'L PRACTICUM 38, 44-51 (2013); Strong, ICM, *supra* note 2, at 16-24; Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation Into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 71, 77 (2013).

[5] A citation to the forthcoming work will be provided when it is available. A number of scholars have called for a new international treaty in this area of law. *See* Laurence Boule, *International Enforceability for Mediated Settlement Agreements: Developing the Conceptual Framework*, 7 CONTEMP. ASIA ARB. J. 35, 65 (2014); Chang-Fa Lo, *Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements*, 7 CONTEMP. ASIA ARB. 119, 135 (2014); Strong, ICM, *supra* note 2, at 29-38; Bobette Wolski, *Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research*, 7 CONTEMP. ASIA ARB. J. 87, 110 (2014). There is also a considerable body of scholarship concerning mediation and conciliation in the domestic realm.

the underlying empirical data so as to assist national and international actors in their current deliberations at the United Nations.

The discussion proceeds as follows. First, Section II describes the methodology of the study, including its purpose, goals and research parameters. Next, Section III provides basic information on the demographics of the study participants so as to put the substantive responses into context. Section IV provides a preliminary analysis of survey data concerning current practices and perceptions, while Section V offers a preliminary analysis of information relating to future concerns in this area of law, including a possible international convention on international commercial mediation and conciliation. Section VI then provides a number of concluding thoughts and highlights some forthcoming normative issues.

All of the information provided in this document is as accurate as possible, given the preliminary nature of the analysis. However, it should be noted that in some cases the reported percentages do not add up to 100%. This phenomenon occurs as a result of rounding the raw data up or down to the nearest percentage point. Any deviations that occur are quite small (in the range of 1-2%) and only arise on rare occasion.

II. Methodology

The last decade has seen a number of empirical studies in the area of international law, including various studies focusing on international commercial and investment arbitration.[6] This

[6] *See, e.g.*, TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH (Christopher R. Drahozal & Richard W. Naimark eds., 2005); Bercovitch & Houston, *supra* note 4, at 16 (studying mediation in the context of militarized conflicts); Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523 (2005); Christopher R. Drahozal, *Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration*, 22 ARB. INT'L 291 (2006); Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1 (2007); Susan D. Franck, *Empiricism and*

phenomenon suggests that international commercial mediation and conciliation can form the basis of an empirical study, if the methodology complies with "best practices" in social science research.[7]

One of the most fundamental precepts of empirical research holds that any good study must be designed with a particular research question in mind. In this case, the research was designed to discover more about the use and perception of international commercial mediation and conciliation in the international legal and business communities. Although there are numerous studies concerning domestic forms of mediation and conciliation as well as additional studies relating to international arbitration, there is no known empirical research that focuses exclusively on international commercial mediation and conciliation.

One of the core goals of this research was to discover and describe current behaviors and attitudes relating to international commercial mediation and conciliation. This information was sought through questions concerning

---

International Law: Insights From Investment Treaty Dispute Resolution, 48 VA. J. INT'L L. 767, 792 (2008) [hereinafter Franck, Empiricism]; Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L.J. 211 (2012); Tom Ginsburg & Gregory Shaffer, *How Does International Law Work?: What Empirical Research Shows, in* OXFORD HANDBOOK OF EMPIRICAL LEGAL STUDIES 753, 754 (Peter Cane & Herbert Kritzer eds., 2010); William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531, 533-34 (2000); Loukas Mistelis, *International Arbitration--Corporate Attitudes and Practices – 12 Perceptions Tested: Myths, Data and Analysis Research Repor*t, 15 AM. REV. INT'L ARB. 525 (2004); S.I. Strong, *International Litigation – Arbitration, in* ENCYCLOPEDIA OF LAW AND ECONOMICS (Jürgen Georg Backhaus ed., 2014). The School of International Arbitration at Queen Mary, University of London, has been particularly active in the area of international commercial arbitration and has conducted a number of studies that have adopted a research methodology that is somewhat similar to that which is used in the current project. *See* Queen Mary, University of London, Research at the School of International Arbitration, http://www.arbitration.qmul.ac.uk/research/index.html (last visited Nov. 14, 2014) [hereinafter QMUL Studies] (containing details regarding five different empirical studies concerning international arbitration).

[7] *See* MATTHIAS SCHONLAU ET AL., CONDUCTING RESEARCH SURVEYS VIA E-MAIL AND THE WEB 5-18 (2002) (discussing studies on research methodology conducted by the RAND Corporation); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 54 (2002).

- the extent to which mediation and conciliation are currently used in the international commercial context;
- the means by which mediation and conciliation are initiated in the international commercial context;
- the reasons why parties do or do not use mediation or conciliation in international commercial disputes;
- the methods of encouraging parties to use mediation and conciliation in the international commercial context; and
- the types of international commercial disputes that are either are or are not amenable to mediation and conciliation.

However, this research project is more than merely descriptive in nature. Instead, this study attempts to help inform the current debate about whether UNCITRAL should adopt a new international treaty concerning international commercial mediation and conciliation by gathering information about a number of issues that are relevant to that exercise. Some of the core inquiries in this regard focused on

- the future of international commercial mediation and conciliation;
- the need for an international convention addressing international commercial mediation and conciliation; and
- the shape of any future convention addressing international commercial mediation and conciliation.

The methodology chosen to investigate these issues involved an anonymous online survey made available to private practitioners, in-house counsel, government officials, neutrals and legal academics from around the world.[8] The survey was aimed at a broad range of

[8] The survey was made anonymous for several reasons. First, participants in international commercial mediation and conciliation are often bound by an ongoing duty of confidentiality, and requiring respondents to identify themselves might have been seen as a breach of the duty to keep mediation and conciliation proceedings confidential. Second, many of the respondents were lawyers, and allowing anonymous responses avoided concerns about possible breaches of the attorney-client privilege. Third, many of those working in the field of international dispute resolution monitor their public statements carefully so as to avoid anything that might bar them from representing a client or acting as a neutral in a future dispute, so allowing anonymity likely resulted in a higher degree of candor from participants. Anonymity also seemed an acceptable methodological choice based on studies which suggest that allowing respondents to participate on an anonymous basis can increase sample size while also diminishing the likelihood of certain types of measurement errors. *See* SCHONLAU ET AL., *supra* note 7, at 16.

participants because decisions regarding the selection of a dispute resolution mechanism are typically made by the party to the dispute (which would include both corporate and state entities) in collaboration with inside and outside counsel. As a result, it was important to obtain data from each of these various groups. Furthermore, the world of international dispute resolution is relatively fluid, with individual participants transitioning seamlessly between academia, private practice, corporate employment, government employment and neutral status over the course of their professional careers. Limiting participation to a single group of professionals would have excluded a great deal of highly significant information, thereby skewing the survey results.[9]

The study also considered it important to reach participants from all over the world, since international commercial mediation and conciliation is by definition international in scope. Anecdotal evidence suggests that the perception and use of different dispute resolution mechanisms can vary significantly across different geographic regions, and it is important to identify these disparities so as to understand both present practices and future possibilities in this area of law.

The survey consisted of thirty-four questions in total, although the use of conditional branching (skip logic) meant that not every participant was provided with an opportunity to answer each of the thirty-four questions.[10] The survey was entirely voluntary, and respondents were allowed to bypass individual questions or even abandon the survey.[11]

[9] Furthermore, it is possible to filter the data to allow analysis of certain subsets of participants.
[10] Conditional branching, also known as skip logic, automatically directs survey participants to different series of questions, depending on how participants respond to certain preliminary questions.
[11] While surveys that allow participants to skip individual questions can experience certain types of non-response errors, this technique increases the likelihood that respondents will continue on with the survey after facing a difficult question and avoids skewing the data by forcing participants to select a response with which they are uncomfortable. *See id.* at 16-18 (discussing the effect non-response errors can have the quality of the data). Allowing participants to abandon the survey is consistent with the need to respect the participant's personal autonomy, a key ethical principle in human subject research.

Of the thirty-four questions, twenty-seven required participants to choose among a selection of pre-existing answers, with four of those questions allowing participants to explain their answer in a written text box.[12] Seven questions asked participants to provide responses in their own words. All questions were in English, which was considered appropriate given the widespread use of English in the field of international commercial dispute resolution.[13] The survey remained open for responses from 8 October 2014 through 31 October 2014.[14]

Although the research question at issue here could have been addressed through various types of empirical methodologies,[15] a survey appeared to be the optimal model for several

[12] Questions with pre-existing answers followed several different patterns. Some questions were binary (requiring a "yes" or "no" answer) or ternary (requiring an answer of "yes," "no" or "maybe") in nature; some were categorical, which required participants to choose one alternative among several (as in cases where participants were asked to choose their primary form of employment or identify their home jurisdiction); and some were based on the Likert scale, which required respondents to select an opinion from a range of alternatives (such as strongly agree, agree, neither agree nor disagree, disagree, and strongly disagree, and including both positive and negative response options). Other questions with pre-existing answers asked participants to rank all available options or rank a certain number of their top choices from a list of possible alternatives. Ranking questions typically offered participants all or the most common alternatives discussed in the scholarly literature on that particular issue. Ranking questions also typically provided respondents with a follow-up opportunity to identify any additional answers that were not mentioned among the ranked alternatives.

[13] *See* Ignacio Gómez-Palacio & Garrett Epps, *International Commercial Arbitration: Two Cultures in a State of Courtship and Potential Marriage of Convenience*, 20 AM. REV. INT'L ARB. 235, 244-45 (2009) (noting that English is the predominant language in the field of international commercial arbitration). However, the use of English as the survey language effectively narrowed the survey population from all participants in international commercial dispute resolution (the population of inference) to all participants in international commercial dispute resolution who spoke English (the target population). *See* SCHONLAU ET AL., *supra* note 7, at 13. This distinction could result in sampling errors, since it is not currently known whether and to what extent the opinions of non-English-speaking participants in international commercial dispute resolution differ from the opinions of English-speaking participants in international commercial dispute resolution with respect to the matters addressed in the survey. *See id.* at 15.

[14] Experts in survey design believe that at least a ten day response period is necessary in most internet and web-based surveys. *See* SCHONLAU ET AL., *supra* note 7, at 28. Here, the study was open for twenty-three days. Although the study may have attracted more participants if it had been open longer, the study size is adequate. *See infra* note 24.

[15] *See* Michael Heise, *The Importance of Being Empirical*, 26 PEPPERDINE L. REV. 807, 834 (1999) (discussing the need for and types of empirical legal research); Richard K. Neumann, Jr., & Stefan H. Krieger, *Empirical Inquiry Twenty-Five Years After the Lawyering Process*, 10 CLINICAL L. REV. 349, 353 (2003) (outlining various types of empirical research in law). For example, one way to reach this information might be through the use of directed or non-directed interviews. Such studies may indeed be

reasons. First, there is a dearth of empirical work available regarding international commercial mediation and conciliation, and a survey is often the best way to begin empirical research in a particular field.[16] Furthermore, a survey allows the collection of data from a large number of participants who have very diverse backgrounds and who come from many different countries, thereby improving the broad applicability of the inferences to be gained from the research. Use of a survey also allows inquiries on a relative wide range of related subjects and provides a benchmark for later, more in-depth studies in specific areas of interest. Furthermore, surveys have been used in a number of highly regarded empirical studies concerning international arbitration[17] and have been accepted as a sound method of gaining qualitative empirical data in other areas of international law.[18]

The survey instrument was made publicly available through a website whose address was distributed to the international legal and business communities through various blogs, periodicals and list serves aimed at specialists in international commercial dispute resolution. Invitations to participate were directed toward potential respondents in all regions of the world and with a wide range of backgrounds, including academia, government, private practice and business.

Although electronic surveys can be problematic in situations where potential participants find it difficult to access the website in question,[19] those types of concerns did not exist in the current study because the target population was extremely likely to have easy access to both

---

undertaken in the coming months. However, one problem of directed or non-directed interviews is that the results can devolve into mere anecdotal evidence if the study is not construed properly. *See id.* at 380; *see also* Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1343 (2002). Case studies are another means of studying social phenomenon, although that particular methodology can have "ideographic consequences" that do not exist in nomothetic research. Bercovitch & Houston, *supra* note 4, at 14.

[16] *See* SCHONLAU ET AL., *supra* note 7, at 9.

[17] *See* QMUL Studies, *supra* note 6.

[18] *See* Franck, Empiricism, *supra* note 6, at 785.

[19] Lack of computer access can create coverage errors in the data. *See* SCHONLAU ET AL., *supra* note 7, at 14-15, 29.

computers and the internet.[20] Other potential problems could have arisen with respect to the lack of control over the ultimate distribution of the survey,[21] although website distribution methods have been considered appropriate in cases where, as here, the population in question is electronically connected and is otherwise hard to reach.[22] Finally, some concerns about the validity of the research could be raised by virtue of the fact that the participants were self-selected. However, several studies have concluded that "self-selected respondents give higher-quality responses than randomly selected respondents,"[23] which suggests that the research method used in the current study is appropriate.

III. Demographics of Participants

The survey yielded 221 responses from a wide range of participants.[24] Most respondents (35%) came from private practice, although a significant proportion (28%) indicated that they worked

[20] In fact, internet surveys may be particularly appropriate in cases where access to computers is not a problem, since the accuracy associated with electronic means of data collection can minimize concerns regarding data validation, skip pattern errors and transcription. *See id.* at 30.

[21] For example, some people have suggested that surveys with uncontrolled distribution methods can be problematic because there is no way to verify that all respondents come from the target population. *See id.* at 35. Other potential issues involve malicious or repeat responders. However, in this case, the survey software precluded the possibility of repeat takers, and the subject matter of the survey was not one that would likely attract persons intent on skewing the results. *But see id.* (suggesting that sophisticated users can overcome survey software intended to block repeat responses).

[22] *See id.* at 34 (discussing the usefulness of convenience surveys). While it is possible to identify specific known populations within the world of international commercial dispute resolution – for example, neutrals listed with certain dispute resolution providers, private practitioners at certain law firms known to be active in the field, or in-house counsel at Fortune 500 or Fortune 1,000 firms – this study was intended to glean information from a broader and more representative range of participants, including the rising number of generalist practitioners working in the field of international commercial dispute resolution. *See* S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. INT'L ARB. 119, 129-30 (2009) [hereinafter Strong, Sources].

[23] *See* SCHONLAU ET AL., *supra* note 7, at 32; *see also id.* at 17 (suggesting that the difference in the levels of candor may be particularly marked for "surveys on sensitive topics or for surveys that contain sensitive questions," as is arguably the case here, where confidentiality is a concern); *see supra* note 8 (discussing confidentiality).

[24] The sample size appears appropriate, given the novelty of the subject matter. Indeed, other international surveys have generated fewer responses and have still been considered valid. *See*

primarily as neutrals (arbitrators, mediators or conciliators) or academics (20%). A smaller number of participants indicated that they worked as in-house counsel (7%) or in other forms of employment (10%), which included work as judges, in government, in multiple types of types of employment (for example, as both a private practitioner and a neutral) and in institutional settings (such as an arbitral institution).[25]

A majority of survey participants were extremely experienced in dispute resolution, with 56% of the respondents indicating that they had 15 or more years of experience in the field. The remaining participants were relatively evenly distributed in terms of experience. Thus, 14% of the respondents indicated that they had between 10 and 14 years' experience in dispute resolution, 15% had between 5 and 9 years' experience and less than 15% reported less than 5 years' experience.

The survey attracted participants with a range of both domestic and international experience. When asked to identify how much work they had done in the last three years relating to international commercial dispute resolution (which was defined as including litigation, arbitration, mediation and conciliation in the international commercial context), 17% of respondents indicated that they worked on international matters 81-100% of the time. Approximately 14% of respondents indicated that they worked in international commercial dispute resolution 61-80% of the time, 11% worked in the field 41-60% of the time and 21% worked in the field 21-40% of the time. Interestingly, the largest group of respondents (37%)

SCHONLAU ET AL., *supra* note 7, at 36 (discussing one international electronic survey that only generated 80 responses from 14 countries on 4 continents, with 40% of the respondents coming from one country); Mistelis, *supra* note 6, at 534 (involving 103 participants); *see also* SCHONLAU ET AL., *supra* note 7, at 85-86.

[25] Those who responded "other" to this question were asked to state their primary form of employment.

indicated that between 0-20% of their work over the last three years involved international commercial dispute resolution.

Some observers might find the fact that more than one-third of the respondents did not have extensive personal experience with international dispute resolution to be problematic. However, that outcome was both expected and welcomed for two reasons. First, the world of international commercial dispute resolution is no longer restricted to a limited number of specialists located in a small number of firms in a few key cities.[26] Globalization has resulted in the diversification of the world of international commercial dispute resolution, and an increasing number of generalists are now becoming involved in matters that once would have been resolved entirely by specialists.[27] Since generalists will have a voice in how international commercial disputes are resolved in the future, it is both useful and appropriate to include such persons in the current survey.

Second, in many countries the only people with significant experience in mediation and conciliation are those who practice primarily, if not exclusively, in the domestic realm. Although there are some significant differences between domestic and international commercial disputes,[28] domestic experiences with mediation and conciliation provides a useful starting point for discussions about mediation and conciliation in the international commercial context. Furthermore, domestic laws regarding mediation and conciliation will both influence and be influenced by any international convention that may be adopted in this field. As a result, it is appropriate to permit specialists in domestic forms of dispute resolution to participate in this study.

---

[26] *See* Strong, Sources, *supra* note 22, at 129-30.
[27] *See* S.I. Strong, *Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration,* 2012 J. DISP. RESOL. 1, 8.
[28] *See* Bercovitch & Houston, *supra* note 4, at 14; Strong, ICM, *supra* note 2, at 16-24.

Geographic distribution of the participants was largely skewed toward the United States, with 35% of the respondents coming from that one jurisdiction.[29] The next highest proportion of respondents (11%) came from the United Kingdom. Although this phenomenon could be explained on the basis of language fluency, there are other possible rationales, including the fact that the United States and the United Kingdom are both home to a large number of specialists in international commercial arbitration (a field that is closely related to international commercial mediation and conciliation) as well as a relatively large number of experts in domestic mediation and conciliation.[30] The remaining respondents came from all over the world, including 27% from Europe (excluding the United Kingdom),[31] 13% from Asia,[32] 7% from Latin America,[33] 4% from the Middle East,[34] 2% from Oceania[35] and 2% from other regions.[36]

Half of the respondents (51%) indicated that they had been personally involved in at least one international commercial mediation or conciliation in the last three years, which was defined as including any matter for which the respondent had prepared, even if the mediation or conciliation was cancelled before actual proceedings began. The other half of the respondents

[29] This phenomenon does not necessarily invalidate the study. *See* SCHONLAU ET AL., *supra* note 7, at 36 (discussing one international electronic survey where 40% of the respondents came from one country).
[30] Two of the other leaders in international commercial arbitration, France and Switzerland, showed more modest participation rates (3.7% each). *See* Jan Paulsson, *Arbitration Friendliness: Promises of Principle and Realities of Practice*, 23 ARB. INT'L 477, 477-78 (2007) (noting the three most important jurisdictions in the field of international commercial arbitration are England, France and Switzerland).
[31] The European participants (excluding the United Kingdom) came from Austria (0.9%), Belgium (0.9%), Croatia (0.5%), Czech Republic (0.5%), France (3.7%), Georgia (0.9%), Germany (2.8%), Greece (4.7%), Hungary 0.9%), Italy (1.9%), the Netherlands (1.9%), Norway (0.5%), Poland (0.5%), Portugal (0.9%), Romania (0.5%), Spain (0.9%), Sweden (0.5%) and Switzerland (3.7%).
[32] The Asian participants came from China (1.9%), India (2.3%), Indonesia (0.9%), Japan (0.5%), Malaysia (0.5%), Mongolia (0.5%), Pakistan (0.9%), the Philippines (0.5%), Russia (0.5%), Singapore (1.4%), South Korea (1.4%), Taiwan (0.5%), Uzbekistan (0.5%) and Vietnam (0.5%).
[33] The Latin American participants came from Brazil (3.3%), Colombia (0.9%), Costa Rica (0.5%), Ecuador (0.5%), El Salvador (0.5%), Guatemala (0.5%) and Mexico (0.9%).
[34] The Middle Eastern participants came from Bahrain (0.5%), Iran (0.9%), Israel (0.9%), Lebanon (0.5%), Saudi Arabia (0.5%) and Turkey (0.5%).
[35] The Oceanian participants came from Australia (1.4%) and Fiji (0.5%).
[36] The remaining participants came from Canada (1.4%) and Nigeria (0.9%).

(49%) had not been personally involved in an international commercial mediation or conciliation during the preceding three years.

Although some people might object to allowing persons without recent experience in international commercial mediation and conciliation to participate in a study of this kind, the mixed nature of the subject pool is neither surprising nor unwelcome. The study was designed with the expectation that not all participants would have recent personal experience with international commercial mediation or conciliation, since the opportunity to be involved in such matters depends on a number of factors that are outside a single person's control. Furthermore, participants without recent personal experience in international commercial mediation and conciliation can nevertheless provide important insights into their own and others' perceptions of the procedure and can provide information about usage rates based on their observations.

However, some questions are best answered by those with personal experience. Therefore, the study controlled for differing levels of experience by directing some questions only to those respondents who had recent personal experience with international commercial mediation or conciliation and asking slightly different questions of those respondents who did not have any recent personal experience in the field. In other cases, the survey asked a question of all participants, but the subsequent analysis filtered the responses by reference to the subjects' level of experience with international commercial mediation and conciliation. The following discussion will identify those areas where distinctions based on experience have been made.

IV. Preliminary Analysis of Survey Data – Current Practices and Perceptions

This study was constructed with two aims in mind. The first goal was to discover and describe current behaviors and attitudes relating to international commercial mediation and conciliation so

as to set a benchmark for further analysis in this field. Conditional branching (skip logic) was used to determine whether and to what extent perceptions of international commercial mediation and conciliation varied depending on the amount of personal experience the respondent had with those procedures. However, no attempt was made to study causality (i.e., whether use of international commercial mediation or conciliation resulted in certain perceptions regarding the device or whether certain perceptions regarding international commercial mediation or conciliation preceded use of the procedure).

A number of questions concerning current beliefs and behaviors were directed at all participants, regardless of the extent of their recent personal experience with international commercial mediation or conciliation. Although it is possible to filter responses to these questions based on the respondent's direct experience with international commercial mediation and conciliation, it was not always deemed necessary to do so.

All of the findings discussed in this section are preliminary in nature, although the results are in many cases extremely informative. Further analysis on a number of issues can be found in a forthcoming article.[37]

A. How and When Are Mediation and Conciliation Currently Used in the International Commercial Context?

1. Numbers of Proceedings

The first matter to be addressed by the survey involves the extent to which mediation and conciliation are currently being used by international commercial actors. This issue was addressed through a question that was directed only to those respondents who indicated that they had been involved in or prepared for at least one international commercial mediation or

[37] A citation to the final work will be provided when it is available.

conciliation in the last three years and asked how many international commercial mediations or conciliations the respondent had been involved with during that time period, either as a party, counsel or neutral.[38]

The response to this question was in many ways unsurprising. A significant majority of respondents to this question (63%) had been involved in a relatively small number of mediations or conciliations (meaning one (20%), two (13%) or three (30%) proceedings in the previous three years). Of the remaining respondents, 14% indicated that they had been involved in four to nine proceedings in the previous three years, 12% indicated that they had been involved in ten to fifteen proceedings in the previous three years and 9% indicated that they had been involved in twenty or more international commercial mediations or conciliations in the previous three years.

This data suggests that international commercial mediation and conciliation are still relatively rare, although some individuals have a great deal of experience with the procedure. Interestingly, this phenomenon suggests that international commercial mediation and conciliation may be developing along the same path as international commercial arbitration. At one time, international commercial arbitration was extremely rare, with a significant expansion in the number of proceedings only occurring after the adoption of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in 1958.[39] Furthermore, the practice of international commercial arbitration began with a small "insiders'

[38] In addition to providing information about the frequency of international commercial mediation and conciliation in the target population, this question also allowed later responses to be filtered based on the respondents' level of expertise with the procedures in question.

[39] *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]. Although statistical evidence regarding the number of arbitral proceedings conducted in any given year is difficult to obtain due to the confidential nature of international commercial arbitration, "the International Chamber of Commerce's International Court of Arbitration received requests for 32 new arbitrations in 1956, 210 arbitrations in 1976, 337 arbitrations in 1992, 452 arbitrations in 1997, 529 arbitrations in 1999, 599 arbitrations in 2007 and 759 in 2012 – a roughly 25-fold increase over the past 50 years." GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 93 (2014).

club" of specialists and has only recently begun to expand to include general practitioners.[40] Finally, in some countries, the use of commercial arbitration began at the domestic level before spreading to the international sphere,[41] while in other jurisdictions, the rising use of international commercial arbitration triggered interest in and use of domestic arbitration.[42] While it is still too early to say whether international commercial arbitration and mediation will ever become as popular as international commercial arbitration, that outcome may be possible if the two procedures can be placed on a level playing field.[43]

All of the respondents who indicated that they had experience with more than twenty international commercial mediations or conciliations over the last three years were employed as neutrals, with one exception.[44] However, not all of these highly experienced respondents specialized in international commercial disputes. Instead, the amount of international experience was evenly distributed, with 29% of these participants indicating that over the last three years they had been involved in international commercial matters 81-100% of their time, 29% indicating that they had spent 61-80% of their time involved in international commercial matters

[40] *See* Strong, Sources, *supra* note 22, at 129-30.
[41] For example, "[a] study of domestic commercial arbitration in the mid-20th century United States concluded that a substantial percentage of U.S. commercial disputes were arbitrated (rather than litigated)." BORN, *supra* note 39, at 93 (citing Soia Mentschikoff, *The Significance of Arbitration – A Preliminary Inquiry*, 17 LAW & CONTEMP. PROBS. 698, 698 (1952) (noting in 1952 that "preliminary inquiry suggests that if we lay aside first the cases in which the government is a party and second the accident cases, then the matters going to arbitration rather than to the courts represent 70 per cent or more of our total civil litigation")); *see also* John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 227 (2000) (suggesting commercial lawyers support mediation). *But see* Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss With Sticky Defaults: Failure in the Market for Dispute Resolution Services?* 7 CARDOZO J. CONFLICT RESOL. 83, 90 (2005) (citing a survey conducted by the American Arbitration Association (AAA) in 2003 indicating that "only 7% of companies use mediation very frequently and 17% use it frequently – compared to 35% occasionally, 25% rarely, and 16% not at all. . . . Tellingly, many respondents attribute this use of ADR to court-mandated mediation programs (63% of respondents mentioned this as a reason for using mediation)").
[42] *See* BORN, *supra* note 39, at 60-61.
[43] *See* Strong, ICM, *supra* note 2, at 28 (discussing inequalities between the two procedures).
[44] The one person who was not primarily employed as a neutral worked as in-house counsel.

and 29% indicating that they had spent 41-60% of their time involved in international commercial matters. A smaller percentage (14%) of respondents indicated that only 21-40% of their work over the last three years had been international in nature.

Interestingly, most of the people (43%) who had been involved with twenty or more international commercial mediations or conciliations came from the United Kingdom. Others with experience in twenty or more international commercial mediations or conciliations came from Italy (14%), Lebanon (14%), Switzerland (14%) and the United States (14%).

2. How Proceedings Arise

The survey also asked those who had been personally involved in at least one international commercial mediation or conciliation in the last three years to identify how such proceedings were most likely to arise, in the respondent's experience. The vast majority of respondents indicated that international commercial mediation or conciliation was most likely to arise pursuant to a contractual mandate, either through a standalone pre-dispute mediation agreement or a pre-dispute multi-tier (step) dispute resolution clause. Standalone mediation provisions were named as the top ranked choice 30% of the time, while tiered dispute resolution clauses were named as the top ranked choice 29% of the time. Furthermore, standalone mediation provisions were named as the second ranked choice 21% of the time, while tiered dispute resolution clauses were named as the second ranked choice 35% of the time.

Respondents also ranked other possible means of initiating international commercial mediation or conciliation. Voluntary adoption of the procedure post-dispute pursuant to a

suggestion by counsel was identified as the third most likely option,[45] while voluntary adoption of the procedure pursuant to company policy was the next most likely option. The least likely methods of adopting international commercial mediation or conciliation were pursuant to judicial mandate and pursuant to a suggestion by a party, although the intensity of the polling data suggested that judicially mandated mediations and conciliations are particularly rare in the international commercial context.[46]

This question was directed only at respondents with personal experience in international commercial mediation and conciliation because the intent was to determine actual behavior regarding the initiation of international commercial mediation and conciliation rather than mere beliefs about common practices.[47] However, the relatively high number of respondents who had only been involved in only one, two or three international commercial mediations or conciliations over the last three years makes it likely that some of the responses to this question were based on observation or belief rather than direct experience.[48] While this factor could be seen as diminishing the usefulness of the study results, the overwhelming number of responses regarding contractually mandated mediation and conciliation would seem to overcome any concerns about the validity of the data on those two points. Similarly, the strength of the survey results regarding judicially mandated proceedings suggests that this information should be

[45] This alternative was selected as the first most likely option by 20% of the respondents. Although this number is smaller than figures relating to contractually mandated mediation and conciliation, the popularity of this choice nevertheless suggests that counsel's opinion can be very influential in decisions relating to the selection of a dispute resolution procedure.

[46] For example, 36% of the respondents ranked judicially mandated proceedings as the least likely to arise, while 23% of the respondents ranked proceedings pursuant to party suggestion as the least likely to arise.

[47] This emphasis was strengthened by the structure of the question, which specifically asked participants to speak about their own individual experience. Later questions provided participants with the opportunity to provide information about their general perceptions. *See infra* notes 80-81 and associated text.

[48] *See supra* note 38 and associated text.

considered valid, even if some of the responses were based on observation rather than experience, since the intensity of that selection was relatively high.

Information regarding the manner in which international commercial mediation and arbitration is initiated is important for several reasons. First, this data demonstrates one way in which international proceedings may differ from domestic proceedings.[49] This phenomenon suggests that academics and practitioners should exercise caution before concluding that research regarding domestic forms of mediation and conciliation necessarily applies to cross-border disputes.

Second, these results suggest that those involved in drafting any future conventions relating to international commercial mediation and arbitration should focus primarily (though not necessarily exclusively) on proceedings that have been initiated pursuant to a pre-dispute contract between the parties. In so doing, drafters may want to consider how the international community facilitates other types of contract-based dispute resolution mechanisms, including both arbitration agreements and forum selection provisions.[50] Drafters may also want to take into account the fact that standalone mediation and conciliation provisions and tiered dispute resolution clauses appear to arise in nearly equal numbers. This phenomenon could require some innovative drafting in any new convention that is developed in this area of law, since the two

[49] For example, many domestic mediations and conciliations take place under the shadow of judicial mandates, at least in some countries. *See* James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law,* 54 ARK. L. REV. 171, 172 (2001).

[50] *See* Hague Convention on Choice of Court Agreements, *opened for signature* June 30, 2005, 44 I.L.M. 1294; Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 14, 1979, 1439 U.N.T.S. 87 [hereinafter Montevideo Convention]; Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, 14 I.L.M. 336 [hereinafter Panama Convention]; European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 349 [hereinafter European Convention]; New York Convention, *supra* note 39. Pre-dispute contractual provisions are perhaps the most popular means of initiating international commercial arbitration, although a post-dispute agreement (*compromis*) is also possible. *See* GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 37 (2010).

types of provisions can give rise to somewhat different challenges with respect to enforcement[51] and few, if any, existing conventions consider the special nature of tiered dispute resolution processes.[52]

B. What Affects Parties' Decision to Use International Commercial Mediation or Conciliation?

The next issue raised by the survey involves the reasons why parties use international commercial mediation or conciliation in international commercial disputes. This question was also directed only to respondents who had indicated that they had personal experience with at least one international commercial mediation or conciliation in the last three years, based on the desire to identify actual business practices as opposed to beliefs or observations. However, the relatively low number of respondents who indicated that they had been personally involved in a significant number of international commercial mediations or conciliations in the preceding three years suggests that at least some of the responses to this question were based on observation or belief rather than direct experience.[53] Nevertheless, this information can still be considered useful, based on the intensity of the responses.

The question specifically asked participants to state why, in their experience, parties used mediation or conciliation in international commercial disputes. In their responses, subjects were

[51] *See* Strong, ICM, *supra* note 2, at 11, 32-34 (discussing possible methods of addressing the various underlying concerns).

[52] For example, courts and arbitral tribunals struggle in both the investment and commercial context to determine whether multi-tiered dispute resolution clauses create preconditions to arbitration and who is to decide whether that condition precedent has been met. *See* BG Group PLC v. Republic of Argentina, 134 S.Ct. 1198, 1207 (2014); George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1, 43 (2012). In the investment realm, this issue is often framed as one of jurisdiction versus admissibility. *See* Andrea J. Bjorklund, *Case Comment*, Republic of Argentina v. BG Group PLC, 27 ICSID REV. 4, 7 (2012); Jan Paulsson, *Jurisdiction and Admissibility, in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 601, 617 (Gerald Aksen et al. eds., 2005).

[53] *See supra* note 38 and associated text.

required to rank a number of pre-existing alternatives that scholars specializing in domestic forms of mediation and conciliation have identified as relevant to parties' decision whether to use consensual methods of dispute resolution.[54]

The most highly ranked of these options was the desire to save costs (ranked number one by 36% of the respondents), followed closely by a desire to save time (ranked number two by 28% of the respondents). Both of these selections were unsurprising, given the survey's emphasis on commercial disputes.

The third most highly ranked option involved a desire for a more satisfactory process, although the same percentage of people (19%) also chose this item as the fifth most highly ranked option. The fourth most highly ranked option (21%) focused on a cultural disinclination toward litigation or arbitration,[55] and the fifth most highly ranked alternative (26%) involved the desire to preserve an ongoing relationship.

This data is intriguing for several reasons. First, proponents of mediation and conciliation often claim that one of the primary benefits of mediation and conciliation involves the ability to preserve an ongoing relationship.[56] However, this feature was only the fifth most important reason why parties used mediation or conciliation in international commercial disputes, in the experience of respondents who had been involved in at least one international commercial mediation or conciliation in recent years. This result suggests a potential difference

[54] Possible responses included a cultural disinclination toward litigation or arbitration, a desire for a more satisfactory process, a desire to preserve an ongoing relationship, a desire to save costs, a desire to save time, the complexity of the dispute, the simplicity of the dispute, the expertise of the neutral and the possibility of a creative (non-litigation-oriented) remedy.

[55] It is possible that this latter choice may have been more popular if the survey had attracted a higher response rate from Asian nations, which are often said to reflect this particular mindset. *See* Shahla F. Ali, *Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the* West, 28 REV. LITIG. 791, 796-97 (2009). However, that hypothesis will have to be tested in later studies.

[56] *See* Gaultier, *supra* note 4, at 44-54; Lande, *supra* note 41, at 212.

between mediation and conciliation in the international commercial context and mediation and conciliation at the national level.

Scholars specializing in domestic forms of mediation and conciliation have also suggested that consensual methods of dispute resolution may be particularly beneficial in cases involving complex questions of law or fact.[57] However, the complexity of the dispute was ranked as the sixth most important reason to use mediation or conciliation in the international commercial context, while the simplicity of the dispute was ranked as the seventh most important reason. The relatively low ranking of these options suggests that size and complexity of the dispute are not primary motivating factors for international commercial parties weighing the relative merits of different dispute resolution alternatives.[58]

The least important reasons for using mediation and conciliation in the international commercial setting involved the expertise of the neutral and the possibility of a creative (non-litigation-oriented) remedy. This latter result is particularly noteworthy, since it goes against conventional wisdom suggesting that parties prefer mediation or conciliation because they can obtain results that would not be possible in adjudicative procedures such as litigation or arbitration.[59]

The survey then invited participants to identify any other reasons why parties might use mediation or conciliation in international commercial disputes.[60] The vast majority of respondents indicated that no additional rationales existed. However, some participants stated

[57] *See* Lande, *supra* note 41, at 212; *see also* Gaultier, *supra* note 4, at 44-54. However, the author has suggested elsewhere that the types of complexities found in international commercial disputes may bode against the use of mediation or conciliation. *See* Strong, ICM, *supra* note 2, at 19.
[58] The data showed very little difference between these two options. For example, complexity of the dispute was ranked as the seventh most popular option by 27% of the respondents, while simplicity of the dispute was ranked as the seventh most popular option by 24% of the respondents.
[59] *See* Gaultier, *supra* note 4, at 47.
[60] This question used an open text box so that respondents could write in their answers.

that mediation or conciliation might be used in order to "save face" or when there were concerns about confidentiality. Other participants indicated that parties might use mediation or conciliation in cases involving a risk of loss in a litigated or arbitrated outcome or if there were concerns about the neutrality of the venue. Still other respondents noted that some courts require parties to attempt mediation before they may proceed in court and that some types of disputes (such as those involving intellectual property) are non-arbitrable.[61] Although these types of individual responses are useful in identifying other potential rationales for international commercial mediation and conciliation, they should not be given undue weight, since they did not reflect the same degree of adherence or intensity seen in the replies to the ranked alternatives.

The survey then asked participants the opposite question, namely why parties might avoid mediation and conciliation of international commercial disputes. Respondents were again offered a number of pre-existing options and asked to rank their top five choices.[62]

This question was directed to all participants in the survey, regardless of whether the respondent had any personal experience with international commercial mediation or conciliation

[61] This latter observation suggested that some participants believed that matters that were non-arbitrable would nevertheless be amenable to mediation or conciliation. However, it is by no means clear that an issue that is considered non-disposable and therefore non-arbitrable could in fact be resolved through mediation or conciliation. This is an issue that will have to be further developed and researched in jurisdictions that embrace the notion of non-disposable rights.

[62] The question limited the ranking exercise to the top five alternatives because the list of possible options was quite long. Possible selections included concerns about finding an effective mediator or conciliator, concerns about how to conduct a mediation or conciliation effectively, concerns about revealing litigation strategy or evidence, concerns about the cost of the process, concerns about the international enforceability of an agreement to mediate or conciliate, concerns about the international enforceability of a settlement award arising out of mediation or conciliation, concerns about the time of the process, counsel's concerns about earning income on the dispute, counsel's lack of experience with mediation or conciliation, cultural preferences for litigation or arbitration, lack of a desire to preserve ongoing relationship and lack of experience with mediation or conciliation. These options were culled largely from the literature on domestic mediation and conciliation, although a few alternatives were new and were intended to target issues relating to international commercial dispute.

in the last three years.[63] However, there were significant differences in the responses depending on whether the person answering the question had any recent personal experience with international commercial mediation or conciliation.[64]

Those respondents who had been involved with at least one international commercial mediation or conciliation within the previous three years chose the parties' lack of experience with mediation or conciliation as the most likely reason why parties did not pursue mediation or conciliation in the international commercial context, with counsel's lack of experience with mediation or conciliation coming in as the second most highly ranked option. This group of survey respondents also stated that concerns about revealing litigation or arbitration strategy was the third most likely reason why parties would avoid mediation or conciliation in international commercial disputes, with concerns about finding an effective mediator or conciliator coming in as the fourth most popular option. The data did not clearly identify which option should be ranked in fifth place.

Respondents who had not been personally involved in at least one international commercial mediation or conciliation in the three years prior to the survey answered this question very differently. According to this group of participants, the most important reason why parties do not use mediation or conciliation in the international commercial context is

[63] The rationale behind this approach stemmed from the fact that parties who had not been involved in an international commercial mediation or conciliation in the last three years might nevertheless have been involved in a decision not to participate in such proceedings.

[64] This phenomenon raises the question of whether the respondents' personal experiences with international commercial mediation or conciliation cause a change in perception, or whether the perceptions exist prior to the personal experience. The answer to that question is beyond the scope of this survey. *See supra* note 37 and associated text (discussing limits of inferences regarding causality). However, some differences may also be attributed to the fact that the survey asked participants with personal experience in international commercial mediation and conciliation to provide responses based on their experience. As a result, some of the differences between the two groups may therefore be attributable to differences between belief and behavior. Further research will be required to parse out the nuances of this issue.

because of a cultural preference for litigation or arbitration.[65] This outcome is somewhat surprising, given that this option was not among the top five choices identified by persons with recent personal experience in international commercial mediation and conciliation.

What is perhaps even more surprising is the fact that none of the remaining options can be clearly identified as the second, third, fourth or fifth most popular choice of the respondents answering this question. Instead, the most common answer for all of the other options was "N/A" (not applicable), which is the answer that respondents were to select for any alternative outside of their top five choices. Because participants had to select this option affirmatively (the software system did not insert "N/A" automatically), the only conclusion that can be drawn from the data is that persons who do not have recent personal experience with international commercial mediation or conciliation have widely disparate views as to why parties choose not to mediate or conciliate their international commercial disputes.

All respondents were given the opportunity to identify any additional reasons why parties do not use mediation or conciliation in international commercial disputes.[66] A majority of participants who had recent personal experience with international commercial mediation or conciliation indicated that they had no additional rationales to suggest. However, the few members of this group who did provide additional rationales as to why a party might avoid international commercial mediation or conciliation mentioned a lack of trust, either with respect to the process, the mediator or the other party; concerns about the cost of a procedure that did not lead to a final, binding resolution; and the perceived strength of a particular party's claim.

[65] Approximately 20% of participants identified this option as their first choice, which suggests a moderately high level of intensity. *See* Daphna Lewinsohn-Zamir, *Identifying Intense Preferences*, 94 CORNELL L. REV. 1391, 1434, 1437-38, 1442 (2009) (noting ranking is among the various methods of identifying intensity of preferences and suggesting that this method creates little incentive to lie while also demonstrating respect for respondents).

[66] This question used an open text box so that respondents could write in their answers.

Respondents in this group also noted that some parties might believe that raising the possibility of mediation or conciliation could be seen by their counterparts as a sign of weakness.

A majority of participants who did not have any recent personal experience with international commercial mediation or conciliation also indicated that they had no additional rationales to suggest. One of the few additional responses to this question noted that parties might not need mediation or conciliation if they are able to negotiate a settlement on their own. Other answers indicated that some parties avoid international commercial mediation and conciliation because they do not fully understand how mediation or conciliation operate or because they are adamantly opposed to amicable settlements.

The preceding discussion suggests that any conclusions relating to reasons why parties avoid mediation or conciliation of international commercial disputes would be tentative at best. Furthermore, the small amount of reliable information that was gathered (namely that members of the international business and legal communities who had recent personal experience with international commercial mediation and conciliation believed that the two most important reasons why parties avoid mediation and conciliation were a lack of experience with the procedure by either the parties or counsel) would appear to be largely unhelpful for those involved in considering a new international instrument in this field, since the information suggests that the core problems in this field are primarily remediable only through the passage of time. However, it might also be possible to address some of these issues through increased education about the process and benefits of mediation and conciliation.[67]

Data relating to the reasons why parties choose international commercial mediation and conciliation was much clearer. According to the survey, the primary reason why international

[67] The concept of education is more complex than it seems. *See infra* note 76 and associated text.

commercial actors choose mediation and conciliation is to save time and money. This phenomenon suggests that the best way to encourage parties to use mediation or conciliation in international commercial disputes would be to ensure a process that is time- and cost-effective and publish hard data about time and cost savings throughout the international business and legal communities.[68]

C. How Can Parties Be Encouraged to Use Mediation and Conciliation in International Commercial Disputes?

The questions discussed in the preceding subsection allow certain indirect inferences to be made about how to encourage parties to international commercial disputes to use mediation or conciliation. However, this research project also attempted to generate data on this issue through more direct means. In particular, the survey expressly asked participants about various factors that would make parties more likely to use mediation and conciliation in international commercial dispute. Subjects were instructed to rank their selections from among a list of prepared alternatives.[69] Responses were again segregated, depending on whether the subject had been involved in at least one international commercial mediation or conciliation within the last three years.

---

[68] However, demonstrating the time- and cost-effectiveness of international commercial mediation and conciliation may be difficult. For example, empirical studies in the domestic realm suggest that "mediation actually decreases client costs in only about half the disputes in which it is used." *See* Strong, ICM, *supra* note 2, at 15-16 (citing empirical studies). *But see* Gaultier, *supra* note 4, at 45-46 (discussing possible savings of time and money).

[69] Participants were asked which of the following alternatives would be most likely to encourage parties to use international commercial mediation and conciliation: better information about the conduct of the procedure itself, better information about the cost of the procedure, more confidence regarding the enforceability of agreements to mediate or conciliate at the place where the procedure is to be conducted, more confidence regarding the enforceability of agreements to mediate or conciliate across national borders, more confidence regarding the enforceability of settlement agreements arising out of mediation or conciliation at the place where the procedure was conducted, more confidence regarding the enforceability of settlement agreements arising out of mediation or conciliation across national borders and more evidence of the effectiveness of the procedure (i.e., the likelihood of reaching a settlement).

The first group of responses came from those who had recent personal experience with international commercial mediation or conciliation. When asked to identify factors that might make parties more likely to use mediation or conciliation in international commercial disputes, 37% of the respondents in this group indicated that having more evidence of the effectiveness of the procedure (i.e., more evidence of the likelihood of reaching a settlement) would be the best means of increasing the use of mediation and conciliation in international commercial disputes. The second most highly ranked alternative focused on better information about the conduct of the procedure, while the third option involved better information about the cost of the procedure.[70]

When asked whether there were any additional factors that would make parties more likely to use mediation or conciliation in international commercial disputes, most respondents indicated that there were none.[71] However, several participants suggested that mediation and conciliation might be more widely used if there was a way for the parties to ensure confidentiality or for in-house counsel to convince outside counsel to try consensual means of resolving the dispute. Another respondent indicated that mediation and conciliation might be more popular if there was a way to initiate proceedings without one party looking weak.

[70] The remaining selections were, in decreasing rank order, the enforceability of agreements to mediate or conciliate at the place where the procedure is to be conducted; the enforceability of agreements to mediate or conciliate across national borders; the enforceability of settlement agreements arising out of mediation or conciliation at the place where the procedure was conducted; and the enforceability of settlement agreements arising out of mediation or conciliation across national borders. Although these questions were intended to trigger discussion about various legal issues that might be relevant to the debate about the need for a new treaty in the area of international commercial mediation and conciliation, they do not appear to have done so, perhaps because the reference was too indirect or because alternatives relating to efficiency, conduct and cost of the procedure are more commonly discussed by members of the international dispute resolution community. In either case, the rank order of the last four responses does not appear relevant to the current analysis. Fortunately, some of the questions that were posed later in the survey appear to have been more successful in addressing issues relating to how international public law can facilitate and support international commercial mediation and conciliation.

[71] This question used an open text box so that respondents could write in their answers.

Interestingly, the International Chamber of Commerce (ICC) has recently attempted to address this latter concern by adopting new mediation rules that allow the ICC to propose mediation in certain cases.[72]

The survey then posed the exact same question to survey participants who did not have any personal experience with international commercial mediation or conciliation in the last three years. Interestingly, this group of respondents ranked the listed options in precisely the same order as respondents who had recent personal experience with international commercial mediation or conciliation, although the two groups varied slightly in terms of the intensity of their selections.[73]

When asked whether there were any additional factors that might make parties more likely to use mediation or conciliation in international commercial disputes, the majority of respondents who did not have personal experience with these proceedings also indicated that there were no additional issues to consider.[74] However, the few people who provided supplemental information focused on slightly different issues than respondents with recent personal experience in the field did. For example, respondents without recent personal experience in international commercial mediation and conciliation expressed concerns about

[72] *See* ICC Mediation Rules, art. 3, effective Jan. 1, 2014, *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/ (last visited Nov. 11, 2014).

[73] Those respondents who did not have any recent personal experience with international commercial mediation or conciliation were slightly more strongly in favor of the top three choices (40%, 37%, 42% for the first, second and third ranked alternatives) than respondents who had some recent personal experience of the procedures (37%, 33% and 33%, respectively). The remaining options were ranked by respondents without personal experience in international commercial mediation or conciliation in the same order as respondents with personal experience in international commercial mediation or conciliation, but again with slightly more intensity overall (29%, 32%, 36% and 26% in the first group versus 36%, 33%, 32% and 32% in the second group).

[74] This question used an open text box so that respondents could write in their answers.

qualified neutrals being "frozen out" of the international market[75] and raised issues relating to the extent to which parties trust institutional providers of dispute resolution services.

The preceding analysis suggests that survey respondents across the board strongly believe that the three factors that are most likely to make parties use international commercial mediation and conciliation are better information about the effectiveness of the procedure (i.e., the likelihood that settlement will be achieved), better information about the conduct of the procedure itself and better information about the cost of the procedure. To some extent, this data could be interpreted as suggesting that the best way to encourage the use of mediation and conciliation in cross-border business disputes is through various educational initiatives.[76]

However, this data contains several important implicit presumptions. For example, better information about the effectiveness of mediation will only encourage mediation and conciliation if those procedures are, in fact, likely to produce settlements. Similarly, better information about the cost of international commercial mediation and conciliation will only encourage parties to adopt those procedures if they indeed are shown to be cost-effective in cross-border commercial cases.

---

[75] This issue was raised by a person who did not have recent personal experience with international commercial mediation or conciliation, which suggests that concerns about qualified neutrals being "frozen out" of the international sphere could be characterized as self-interested in nature. However, there have been concerns in the world of international arbitration about the lack of diversity among neutrals and the problems associated with a relatively small cadre of repeat arbitrators, so this comment could speak to a larger issue. *See* Benjamin G. Davis, *Diversity in International Arbitration*, 20 DISP. RESOL. MAG. 13 (Winter 2014).

[76] Education can take a variety of forms. For example, by merely debating the possibility of a new treaty in the area of international commercial mediation and conciliation, UNCITRAL is helping to inform the international legal and business communities about the existence and importance of consensual forms of dispute resolution in the international commercial context. Adopting an international instrument on this subject could also have some educational value, even if the instrument is not widely adopted at first. *See* Julius Stone, *On the Vocation of the International Law Commission*, 57 COLUM. L. REV. 16, 34-35 (1957) ("[B]alanced judgment is called for as between the inspirational and educational value of a code, even when it remains ineffectual, and the danger that abortive codification efforts will undermine existing levels of acceptance of customary international law without substituting anything as good.").

This analysis suggests that educational initiatives, though important, are not by themselves sufficient to foster international commercial mediation and conciliation. Instead, national and international bodies wishing to encourage international commercial mediation and conciliation must not only gauge the current effectiveness and cost-efficiency of those procedures but must also take any necessary steps to improve the procedure. Only then will parties be inclined to choose mediation or conciliation to resolve their cross-border business disputes.

D. What Types of International Commercial Disputes Are Amenable to Mediation and Conciliation?

Specialists in domestic dispute resolution have long recognized that although many issues can be resolved in mediation or conciliation, there are some matters that are better suited to litigation or arbitration.[77] Since selection of an appropriate dispute resolution procedure is one of the best ways to ensure a successful outcome,[78] it would be useful to identify which types of disputes are most amenable to international commercial mediation and conciliation.

For this question, the survey did not differentiate between respondents based on their personal experience with international commercial mediation or conciliation, although future

[77] Numerous guides are available to help parties identify the best dispute resolution procedure for any particular dispute. *See* CPR, *supra* note 4; ROBERT J. NIEMEC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 20-47 (2001); Jean-Claude Najar, *Corporate Counsel in the Era of Dispute Management 2.0*, 15 BUS. L. INT'L 237, 248 (Sept. 2014).

[78] *See* Thomas J. Stipanowich & J. Ryan Lamare, *Living With ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 30 (2014) (discussing the movement toward appropriate dispute resolution). "Success" in mediation and conciliation can be measured numerous ways. *See* Jeffrey J. Dwyan, *An Evaluation of the Effect of Court-Ordered Mediation and Proactive Case Management on the Peace of Civil Tort Litigation in Lake County, Indiana*, 2003 J. DISP. RESOL. 239; John L. Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 641 (2007) (noting various goals policy makers might have in developing an ADR system); Thomas J. Stipanowich, *ADR and "The Vanishing Trial,"* 10 DISP. RESOL. MAG. 7 (2004) (discussing 62 studies summarized by CAADRS).

analyses may investigate any distinctions in this regard through the use of various filtering techniques. Instead, the survey asked all participants to consider which types of international commercial disputes are best suited to mediation and conciliation and to rank their top five choices from among eleven alternatives.[79]

An overwhelming number of respondents (74%) identified disputes involving an ongoing relationship as their number one choice, which was consistent with positions taken by academics specializing in domestic forms of mediation and conciliation.[80] However, this response is somewhat inconsistent with results reported elsewhere in this study. For example, an earlier question asked participants with recent personal experience of international commercial mediation or conciliation why parties engaged in those procedures. In that case, respondents ranked the preservation of an ongoing relationship as only the fifth most popular reason for engaging in international commercial mediation and conciliation.[81] This discrepancy requires further analysis, although one explanation may be that perceptions of international commercial mediation and conciliation (which was the focus of the current question) do not necessarily match parties' actual behavior patterns (which was the focus of the earlier question).

The second most highly ranked alternative involved disputes with parties from countries or cultures that encourage mediation or conciliation, although the intensity of this selection was

[79] The eleven options included disputes involving an ongoing relationship, disputes involving more than two parties, disputes involving only two parties, disputes involving parties from countries or cultures that encourage mediation or conciliation, disputes involving large amounts of money, disputes involving small amounts of money, disputes involving intangibles, disputes involving non-monetary relief, disputes involving complicated factual or legal issues, disputes involving simple factual or legal issues and disputes with a high likelihood of parallel proceedings.

[80] *See* CPR, *supra* note 4, at 6; NIEMEC ET AL., *supra* note 77, at 20.

[81] *See supra* note 47 and associated text. When the data is filtered to allow only responses from participants with recent personal experience in international commercial mediation or conciliation, concerns about ongoing relationships still appear as the number one choice, albeit to a slightly lesser degree (69%) than when all responses are tallied together (74%).

not as high as with the first choice selection.[82] Respondents ranked disputes involving only two parties as their third option, again with a relatively low level of intensity.[83] Although the question asked respondents to rank their top five choices from among the various alternatives, the data did not clearly identify the fourth or fifth most popular options.[84]

Respondents were then asked to identify the types of international commercial disputes that are least amenable to mediation or conciliation. The survey provided participants with the same eleven options as in the previous question and asked subjects to rank their top five choices.[85] Interestingly, none of the available options clearly placed among the top five alternatives. Instead, the highest percentage of responses for every single option was "N/A," which had to be affirmatively chosen under the software system used in the survey.[86]

Although the "N/A" option had the highest percentage of votes in all cases, that selection was not clearly preferred in all instances. Indeed, "N/A" was only marginally (i.e., one to two percentage points) ahead of some other selections.[87] Although the data does not provide any insights at this stage, further analysis (such as the use of weighted voting) may yield some

[82] Only 23% of respondents chose this option as their second choice.
[83] Only 17% of respondents ranked this option as their third choice.
[84] For example, the option that obtained the most votes for fourth position involved disputes with parties from countries or cultures that encourage mediation or conciliation (15%). However, more people (23%) ranked disputes with parties from countries or cultures that encourage mediation or conciliation in second place. The attempt to identify the fourth and fifth place options was made even more difficult by the fact that disputes with parties from countries or cultures that encourage mediation or conciliation also received the highest number of votes (15%) for fifth place in the ranking exercise.
[85] *See supra* note 79 (outlining options).
[86] *See supra* note 65 and associated text (discussing the "N/A" alternative).
[87] For example, even though 19% of respondents indicated "N/A" for disputes involving more than two parties, 18% of respondents ranked those matters first, meaning those disputes were considered the least amenable to mediation or conciliation. Similarly, even though 18% of respondents used the "N/A" option for disputes involving complicated factual or legal issues, 16% of respondents ranked those matters first, meaning those disputes were considered the least amenable to mediation or conciliation.

helpful information.[88] However, even if these alternative analyses do not produce any firm data regarding the respondents' top five choices, the survey can nevertheless be considered useful, since the absence of any patterns can be interpreted to suggest that members of the international legal and business communities consider a variety of factors when deciding whether to use mediation or conciliation in cross-border business disputes and that no particular matter can be deemed to be categorically off-limits.

V. Preliminary Analysis of Survey Data – Future Considerations

Earlier, this document indicated that the current study had two aims. The first goal focused on discovering and describing current behaviors and attitudes relating to international commercial mediation and conciliation. Those matters were discussed in the preceding section.

The study's second goal was to help inform the current debate in the international legal community about the possibility of a new international convention concerning international commercial mediation and conciliation. In particular, this research project was designed to determine the views of the international legal and business communities on whether an international instrument in this area of law would be useful and if so, what shape that document should take. These matters are discussed in this section.

A. What is the Future of International Commercial Mediation and Conciliation?

The empirical evidence generated by this survey supports two separate tenets: first, that international commercial actors do not currently use mediation and conciliation as a routine

[88] For example, it may be possible to assign a particular weight to ranked answers and combine several categories so as to obtain a more holistic understanding of respondents' preferences. *See* Mistelis, *supra* note 6, at 543 (describing analytical methodology based on weighted rankings). If useful, that analysis will appear in a forthcoming article. *See supra* note 2 and associated text.

means of resolving their disputes,[89] and second, that most international commercial mediations and conciliations that do go forward are initiated pursuant to pre-dispute contractual agreements.[90] Combining these two principles suggests that the international business and legal communities could see an increase in international commercial mediation and conciliation in the coming years if the number of contracts that include dispute resolution provisions calling for mediation or arbitration as either a standalone or multi-tier procedure can be found to be on the rise.[91] This conclusion is quite important to the debate about a new convention in this area of law, since a potential increase in the number of international commercial mediations and conciliations would suggest a heightened need to establish a legal environment that is properly supportive of these procedures.

The best way to study the frequency of mediation or conciliation provisions in international commercial contracts would be to undertake a survey of transactional lawyers specializing in cross-border business deals, since those people would likely have the best and broadest understanding of contemporary drafting practices. However, transactional lawyers have been known to consult with their dispute resolution colleagues in matters relating to dispute resolution clauses,[92] which suggests that the target population for the current study might have some useful insights on these matters.

The survey attempted to reach these issues by asking how frequently respondents included or recommended including mediation or conciliation as part of a dispute resolution

[89] *See supra* notes 38 and associated text (discussing the number of international commercial mediations and conciliations respondents had been personally involved in over the last three years).
[90] *See supra* notes 45 and associated text.
[91] Of course, there would still be something of a time lag before usage rates increased, since there would likely be some delay between the time the parties agreed to engage in mediation or conciliation in the underlying contract and the time a dispute requiring mediation or conciliation arose.
[92] *See* Rona G. Shamoon, *Top 10 Mistakes to Avoid When Drafting Dispute Resolution Provisions*, 67 DISP. RESOL. J. 16, 17-18 (May-July 2012) (suggesting this sort of collaboration should happen more often).

clause found in an international commercial contract. As might be expected in a survey that included academics, neutrals, judges and government officials as well as private practitioners, just under half of the respondents (49%) indicated that this question was not applicable to them.[93]

Of the remaining 51% of the respondents, 19% indicated that during the last three years, they had, on average, included or recommended including a mediation or conciliation provision in an international commercial contract on ten or more occasions per year. Furthermore, 10% of respondents to this question indicated that they had included or recommended including a mediation or conciliation clause in an international commercial contract somewhere between four and eight times per year, while 22% of the respondents indicated that they had made between one to three recommendations per year on average. Although these numbers do not provide any insights into the comparative attractiveness of conciliation or mediation in international commercial matters,[94] the figures nevertheless appear to be relatively robust, particularly given that dispute resolution specialists are not routinely involved during the negotiation phase of a transaction.[95]

The survey also asked participants to indicate the kind of procedure they would prefer if they were to recommend or participate in mediation or conciliation of an international commercial dispute. A majority of respondents (55%) indicated that their choice would depend on the dispute. However, 32% of the respondents indicated that they would prefer an

[93] Respondents may have indicated "not applicable" because they do not normally assist with transactional matters (as would be the case with persons working primarily as academics or neutrals) or because they had not been asked to provide a clause relating to international commercial mediation or conciliation in the relevant time period, even though they occasionally provide advice on transactional matters. Further analysis of the data may shed some light on this issue.

[94] For example, the survey did not ask respondents to indicate how many opportunities they had to recommend mediation or conciliation per year or how many recommendations for mediation or conciliation had been rejected in favor of another type of dispute resolution mechanism. These numbers would have been useful in determining the relative frequency with which respondents were recommending mediation and conciliation and how responsive other parties were to these suggestions.

[95] *See id.* at 17-18.

administered proceeding using institutional rules of mediation and conciliation, 7% stated that they would prefer an ad hoc proceeding with no formal rule set and 5% stated that they would prefer an ad hoc proceeding using the UNCITRAL Conciliation Rules. The survey did not ask participants to explain their responses, although future research in this field may do so.

B. Is There a Need for an International Convention Addressing International Commercial Mediation and Conciliation, and If So, What Shape Should It Take?

Even before UNCITRAL decided to consider the possibility of an international convention addressing international commercial mediation and conciliation, commentators had called for a new international instrument in this field of law.[96] The survey therefore asked several questions relating to the need for international action relating to cross-border commercial mediation and conciliation so as to inform the scholarly and practical debate on this subject.

1. Gauging the need for a new international instrument in this area of law

When designing this survey, it appeared possible that some people might oppose a new international instrument in this area of law because they believed that national laws provide sufficient protection to potential parties. One way to test this latter assumption would be through a comparative doctrinal analysis of the domestic laws currently in force in various jurisdictions to see whether and to what extent they facilitated international commercial mediation and conciliation. However, useful information can also be gained through a survey of persons who are well-versed in issues relating to international commercial dispute resolution.

[96] *See* Boule, *supra* note 5, at 65; Lo, *supra* note 5, at 135; Strong, ICM, *supra* note 2, at 29-38; Wolski, *supra* note 5, at 110.

In fact, surveys can provide certain types of data, including evidence of party perception and practices, that doctrinal analysis cannot. This type of information can be very important to policymakers, since it can not only demonstrate whether and to what extent there is a disconnect between what parties may do and what they actually do[97] but can also suggest reasons why parties behave in a particular manner.[98] The more policymakers know about these issues the better, since the law can then be tailored to achieve the desired outcome.

The current study asked a number of questions that were intended to gauge the extent to which an international instrument is necessary in this area. These inquiries were broken into two separate series of questions, one relating to the beginning of the process (i.e., agreements to mediate or conciliate) and one relating to the end of the process (i.e., settlement agreements arising out of mediation or conciliation).

a. Agreements to mediate or conciliate

The first issue to consider involved possible difficulties associated with enforcing an agreement to mediate or conciliate an international commercial dispute. The inquiry began with a question that was intended to set the benchmark for further analysis and asked respondents to indicate how difficult it was to enforce an agreement to mediate or conciliate a domestic commercial dispute in the respondent's home jurisdiction. Approximately 14% of the respondents indicated

[97] Law and economics scholars often analyze this issue through the lens of sticky defaults. *See* Barendrecht & de Vries, *supra* note 41, at 83-84; S.I. Strong, *Limits of Procedural Choice of Law,* 39 BROOK. J. INT'L L. 1027, 1030 (2014); *see also* Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails,* 127 HARV. L. REV. 1593, 1595, 1647 (2014) (discussing sticky default rules in the context of behavioral law and economics theory, which is a growing field that emphasizes the combination of politics and psychology). The principle of sticky defaults suggests that if it is too costly or difficult to opt out of the existing default regime, parties will be less inclined to do so, even if they have a legal right to the alternate regime. Policymakers can affect party decision-making by altering the incentives to remain with the default regime.

[98] *See* Anne van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT'L L. J. 421, 428 (2014).

that it was impossible or very difficult to enforce such agreements, while 26% said it was somewhat difficult, 39% said it was easy, 12% said that the issue was largely untested and 7% said that they did not know.

However, the answers changed when the question focused on how difficult it was to enforce an agreement to mediate or conciliate an international commercial dispute in the respondent's home jurisdiction.[99] Here, the percentage of those indicating that it was impossible or very difficult to enforce an agreement rose to 19%, and the number of those indicating that enforcement was somewhat difficult went up to 30%. Only 20% of the respondents indicated that it was easy to enforce an agreement to mediate or conciliate an international commercial dispute in the respondent's home jurisdiction. Furthermore, 18% of the respondents indicated that the issue was largely untested, while 10% indicated that they did not know whether such an agreement would be enforceable.

The survey then asked how difficult it would be in the respondent's home jurisdiction to enforce an agreement to mediate or conciliate an international commercial dispute when the mediation or conciliation was to take place outside the respondent's home jurisdiction.[100] The perceived difficulty level rose yet again, with 26% of the respondents indicating that enforcement would be impossible or very difficult and 30% indicating that enforcement would be somewhat difficult. Only 7% of those responding thought it would be easy to enforce this type of agreement. Furthermore, 18% of the participants said that the issue was largely untested

[99] Participants were asked to assume for purposes of this question that the dispute involved commercial parties from two different countries and that the mediation or conciliation was seated in the respondent's home jurisdiction.

[100] Participants were asked to assume for purposes of this question that one of the parties to the agreement was based in the respondent's home jurisdiction.

in their home jurisdiction, with the same percentage of people saying that they did do not know how this issue would be handled in their country.

This data is very useful because it suggests that the international legal and business communities believe that it is more difficult to enforce agreements to mediate or conciliate international commercial disputes than it is to enforce agreements to mediate or conciliate domestic disputes. While the veracity of this belief would have to be tested through doctrinal analysis, perceptions about the enforceability of agreements to mediate or conciliate international disputes likely influence whether party is inclined to attempt mediation or conciliation in the international commercial context.

The survey then asked whether participants believed that the existence of an international convention regarding enforcement of an agreement to mediate or conciliate international commercial disputes would encourage parties in the respondent's home jurisdiction to use mediation or conciliation in international commercial disputes. Respondents were overwhelmingly in favor of this suggestion, with 68% stating that such a convention would encourage mediation and conciliation in their countries. Only 12% of respondents thought a convention would not encourage mediation or conciliation.

The survey also allowed respondents to respond to this question with "maybe," an option that was chosen by 20% of the respondents. Those who selected this alternative were invited to explain their reasoning in a separate text box. Interestingly, most of the responses to this question did not focus on uncertainty about whether a convention was needed in this area of law but instead discussed the speed with which such a convention could and would be adopted. For example, one respondent indicated that "[a]s with every convention, the effectiveness depends on how many states ratify/accede and how rapidly this is done. It will only help in disputes

concerning parties resident in a member state." Another person noted that "[i]t took decades before the NY Convention ever had an effect on parties choosing international arbitration, and I feel that the same time frame would be needed before a mediation convention would have a similar effect." However, "[c]onsidering New York Convention and UNCITRAL Model Law on Arbitration [a convention of this sort] seems to be very useful."

Other respondents indicated that a convention in this area of law might be useful "from a communication and perception perspective." One person who responded along these lines noted that a treaty addressing enforcement of agreements to mediate or conciliate international commercial disputes "would address one concern held by some parties. It is difficult to know how widespread that concern is, and hence to judge the likely impact of any such convention. I suspect the impact would be fel [sic] credibility and image of mediation than in terms of actual enforceability."

Respondents also recognized that the need for an international convention was to some extent tied to the strength of a particular jurisdiction's domestic law. Thus, one respondent noted that

> the mediation agreements that we provide all state that the mediation agreement itself is governed by English and Welsh law and thus this mediation agreement is extremely easy for an English court to rule on. I doubt any party would want to remove that governance of the agreement and so although an international convention would add additional protection the main protection would still be the fact that the agreement is governed by English and Welsh law.

However, parties from jurisdictions that offered little or no protection under domestic law saw more of a need for international protection. Thus, one respondent from Pakistan was very much in favor of an international instrument relating to enforcement of mediation and conciliation agreements precisely because there was little protection available as a matter of national law.

b. Settlement agreements

The study then turned to issues relating to settlement agreements. The questions in this series followed the same pattern as questions relating to mediation and conciliation agreements so as to allow a comparative analysis between the front end of the process (i.e., agreements to mediate or conciliate an international commercial dispute) and the back end of the process (i.e., settlement agreements arising out of international commercial mediation and conciliation).

The first question in this series was intended to provide a benchmark for further analysis and asked respondents to describe how difficult it was to enforce a settlement agreement arising out of a domestic commercial mediation or conciliation in the respondent's home jurisdiction. Only 4% of those answering this question indicated that enforcement would be impossible or very difficult in their home jurisdiction, while 18% indicated that it would be somewhat difficult. Most respondents (62%) indicated that enforcement of domestic settlement agreements was easy in their home jurisdiction. However, 11% of people stated that the issue was largely untested, while 5% of respondents stated that they did not know how these matters would be resolved.

The survey then asked how difficult it would be in the respondent's home jurisdiction to enforce a settlement agreement arising out of an international commercial mediation or conciliation.[101] The answers showed a marked increase in the perceived degree of difficulty of enforcement. For example, 9% of the respondents indicated that it would be impossible or very difficult to enforce an agreement to mediate or conciliate an international commercial dispute in the respondent's home jurisdiction. Approximately 28% of respondents indicated that

[101] Participants were asked to assume for purposes of this question that the settlement involved commercial parties from two different countries and that the mediation or conciliation was seated in the respondent's home jurisdiction.

enforcement would be somewhat difficult, while only 35% of the respondents thought that it would be easy to enforce a settlement agreement arising out of an international commercial mediation or conciliation seated in their home jurisdiction. Approximately 17% of the respondents indicated the issue was largely untested in their home jurisdiction, and 11% did not know how the matter would be resolved under domestic law.

The third question in this series asked respondents to indicate how difficult it would be in their home jurisdiction to enforce a settlement agreement arising out of an international commercial mediation or conciliation when the mediation or conciliation took place elsewhere.[102] The numbers rose yet again, thereby indicating an increase in the perceived level of difficulty. Thus, 15% of the respondents indicated that it would be impossible or very difficult to enforce these types of agreements, while 36% of the respondents stated that enforcement would be somewhat difficult. Only 14% of the respondents thought it would be easy to enforce a settlement agreement in their home jurisdiction when the settlement agreement arose out of an international commercial mediation or conciliation seated in another country. Approximately 19% of the survey participants indicated that this issue is largely untested in their home jurisdiction, and 17% of respondents did not know how these matters might be handled by their national courts.

Again, this information is very useful, since it suggests that the international business and legal communities believe that enforcement of a settlement agreement arising out of an international commercial mediation or conciliation is more difficult than enforcement of a settlement agreement arising out of a domestic dispute. While the survey only tests the perceptions of the respondents, widespread beliefs about the difficulty of enforcing a settlement

[102] Respondents were asked to assume for purposes of this question that one of the parties to the agreement was based in their home jurisdiction.

agreement arising out of an international commercial mediation or conciliation are very likely to affect a party's decision whether to pursue international commercial mediation or conciliation.

The final question in this series asked respondents to indicate whether they thought the existence of an international convention concerning the enforcement of settlement agreements arising out of an international commercial mediation or conciliation would encourage parties in the respondent's home jurisdiction to use mediation or conciliation. An overwhelming majority of respondents (74%) indicated that they thought an international instrument of this type would encourage mediation and conciliation, with only 8% of respondents taking the contrary view.

Interestingly, 18% of participants responded "maybe" to this question. These respondents were invited to explain their thought processes in a separate text box. The vast majority of answers to this question were exactly the same as those given in response to the earlier question asking whether adoption of an international convention relating to the enforcement of mediation and conciliation agreements would increase the likelihood that parties in the respondent's home jurisdiction would use mediation and conciliation; indeed, several entries simply said "see above."

2. Shape of a convention involving international commercial mediation and conciliation

This research project did more than measure respondents' views about whether an international convention in this area of law was warranted. The study also considered the scope of any future instrument in this field.

Survey participants were told that UNCITRAL is considering a possible new treaty involving international commercial mediation and conciliation and were then asked whether any instrument that was drafted in this area of law should (1) only address enforcement of

agreements to mediate or conciliate international commercial disputes (i.e., the beginning of the mediation or conciliation process); (2) only address enforcement of settlement agreements arising out of mediation or conciliation of international commercial disputes (i.e., the result of the mediation or conciliation process); or (3) address both agreements to mediate or conciliate international commercial disputes and settlement agreements arising out of mediation or conciliation of international commercial disputes. Each approach would obviously offer the international business and legal communities slightly different benefits.[103]

Survey participants were overwhelmingly (75%) in favor of a convention that addressed both the beginning and the end of the mediation or conciliation process. Of the other two options, respondents preferred an international instrument addressing settlement agreements arising out of an international commercial mediation or conciliation (19%) to an international instrument addressing agreements to mediate or conciliate international commercial disputes (6%).

The survey then asked participants to describe in their own words why they chose one option over another.[104] Although the responses were quite brief, they nevertheless provide a number of key insights into the international legal and business communities' thought processes.

The overwhelming support for a combined treaty meant that the vast majority of comments focused on reasons why any future instruments in this area of law should address both the beginning and the end of the mediation or conciliation process. Many of the respondents

[103] Commentators appear to favor an international instrument that addresses both the beginning and the end of the mediation process (i.e., agreements to mediate or conciliate as well as settlement agreements), which would be consistent with the approach taken in various treaties relating to international commercial arbitration). *See* Strong, ICM, *supra* note 2, at 32-38. However, the initial proposal by the Government of the United States for a new convention in this area law focused only on settlement agreements arising out of international commercial mediation or conciliation. *See* Proposal, *supra* note 1.

[104] This question used an open text box so that respondents could write in their answers.

were quite forceful, stating that a dual-pronged convention was "critical" and "a business imperative."

Usually it is impossible to gauge overall intensity for any particular proposition from an open-ended response model. However, in this case, a number of themes were repeated throughout the comments, even though respondents voiced their opinions in slightly different words. This phenomenon suggests that certain propositions enjoy widespread support in the international legal and business communities.

One principle that was enunciated by numerous respondents reflected the notion that addressing both the beginning and the end of the mediation process would "ensure effectiveness," "give [international commercial mediation and conciliation] more legitimacy," and "encourage more general acceptance." Thus, one respondent stated that if the proposed convention "does not address both issues, its practical effectivity is doubtful." This result would likely occur because, in the words of another participant, "[t]he enforceability of one without the other will fall short of providing the level of confidence needed for parties to embark in mediation or conciliation."

The core principles of efficiency, legitimacy and encouragement of mediation and conciliation were repeated elsewhere. For example, some respondents indicated that a dual-pronged approach to an international convention would "increase of the confidence of the parties to [sic] the efficiency of the process" and "broaden support for international mediation," since "both [the beginning and the end stages of mediation and conciliation] are connected." Not only would a multi-purpose convention "give more 'teeth' to mediation outcome[s]," but "[p]roviding for enforcement of [these] agreements may also improve the use of this dispute resolution method." Indeed, "[i]n cultures that are not yet used to mediation, adopting legislation that

encourage[s] at least a first meeting with a mediator helps develop an understanding of the process and its efficiency." Another participant was in favor of an instrument that addressed both the beginning and end stages of the mediation and conciliation process because "[c]oncerns that agreements to mediate or to comply with settlement are among the most significant reasons for avoiding mediation."

Another theme that was frequently repeated involved analogies between international commercial mediation and conciliation on the one hand and international commercial arbitration on the other. Thus, one respondent indicated that the proposed convention "should as far as possible be aligned with the regulations of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This will increase the 'recognition value' and will thereby decrease the sometimes existing reluctance of using ADR." Another survey participant noted that "[e]xperience [with international commercial arbitration] has show[n] that both components are equally necessary."

Not everyone who favored a dual-pronged approach believed that both elements were equally important. For example, one person stated that "[e]nforcement of settlement agreements is by far the more important, but it would be wasteful not to include agreements to mediate." However, this perspective was countered by a number of respondents who noted that both prongs were "self-evidently" necessary because "[a]bsent enforcement of agreements to mediate, it is very difficult to obtain agreement to participate." As a result, "[t]he Convention should comprehensively address both the issues rather than taking a piecemeal approach."

Some respondents took a more pragmatic view of the situation. For example, one person suggested that addressing both the beginning and the end of the mediation or conciliation process would be best, unless doing so would unduly delay the adoption of a convention on the

enforcement of settlement agreements, which was considered by that person to be the more important of the two procedures.

Although the vast majority of respondents thought that any international treaty in this area should address agreements to mediate or conciliate an international commercial dispute as well as settlement agreements arising out of an international commercial mediation, 16% of the survey participants thought that it would be best to focus only on settlement agreements arising out of international commercial mediation and conciliation. Persons falling into this category of respondents indicated that an international instrument concerning settlement agreements would be useful because there is "not much point in settling if you can't hold someone to it." However, these persons did not believe that a convention on international commercial mediation and conciliation should address agreements to mediate or conciliate a dispute because

> mediation requires the support of all parties to be successful. Unlike arbitration, which is an alternative to a court, mediators can only facilitate, not command or decide. The parties must do that for themselves. "Enforcement" of an agreement to mediation seems unlikely to be practicable. In [New Jersey], a court can order litigating parties to enter into "good faith mediation" but as a practical matter, if one party regards it as simply a barrier to be overcome, mediation cannot succeed.

While some respondents focused on whether it was theoretically or practically possible to force an unwilling person into mediation, other people simply denied the need for any assistance in this regard. Thus, one participant indicated that "[q]uestions regarding the enforceability of agreements to mediate are not, in my experience, a significant issue. By contrast, the enforceability of settlement agreement is."

Other respondents expressed concerns about whether a multi-purpose convention could be adopted on a widespread basis. For example, one participant stated that

> [e]nforcement of settlement agreements would provide a good incentive to undertake mediation or conciliation. However, enforcement of agreements to mediate or conciliate have attracted strong views by the courts in the jurisdictions

> that I'm familiar with, and this may be an issue on which different States have different (strong) opinions which may impede the widespread adoption of a convention.

The final set of rationales to consider are those enunciated by the small number of respondents (6%) who believed that any future work in this area of law should focus only on agreements to mediate or conciliate international commercial disputes and not on settlement agreements arising out of international commercial mediations or conciliations. In these cases, respondents appeared to believe that settlement agreements arising out of international commercial mediation and conciliation did not need any additional protection under international law because those agreements could be enforced under domestic law as commercial contracts or because the voluntary nature of settlement agreements precluded the need for any international enforcement mechanism.

When taken in their entirety, these comments provide very clear insights into the views of the international business and legal communities. Virtually all respondents believe that some type of international action is both necessary and useful in this area of law. Although a small minority of people prefer a single-purpose convention of one type or another, an overwhelming number of survey participants (75%) believe that any future work in this field should address both the beginning and end stages of international commercial mediation and conciliation. Not only is a dual-pronged approach seen by a vast majority of respondents as being consistent with the structure of various conventions relating to international commercial arbitration,[105] it is also seen as being the most likely means of increasing the use of mediation and conciliation in international commercial disputes.

[105] *See* European Convention, *supra* note 50; Montevideo Convention, *supra* note 50; New York Convention, *supra* note 39; Panama Convention, *supra* note 50.

C. Open-Ended Comments

The final question in the survey asked participants whether there were any other comments they would like to make about international commercial mediation or conciliation. The responses were almost universally in favor of further international work in this field, noting that this was a "great trend." Typical comments included statements like "[a] Convention such as the one being considered is long overdue and would make a dramatic positive difference to the growth of mediation (domestic & international) and to the reduction of cross-border litigation" and "I think the creation of a convention in this area of law would legitimize international commercial mediation and encourage its use." Similar sentiments were expressed by those who noted that "[a] Convention would be an excellent idea with little or no downside," "[t]his [is] the next level of the future," and "I am all for it and wish everybody else would, too." Only one person suggested that "we need more experience rather than more legal instruments."

Although respondents strongly supported efforts to adopt a new convention in the area of international commercial mediation and conciliation, survey participants recognized that the process of drafting an international instrument and winning widespread international adherence might be difficult at times. Nevertheless, most respondents seemed to be of the view that "it will gradually work."

Some respondents identified specific issues that might require special care when drafting. For example, several participants highlighted the ongoing debate about the meaning of the terms "mediation" and "conciliation."[106] As a result, one person noted that "[h]armonisation of the

[106] 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, 1009-1010 (2012); Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution,* 32 U. PA. J. INT'L L. 1, 10-11 (2010); Welsh & Schneider, *supra* note 4, at 84-85.

terms mediation and conciliation is needed before venturing into enforcement of settlement agreements. There is a lot of confusion about these two terms, they need to be treated as different. UNCITRAL must use 'Model Law on conciliation and mediation.'" Another respondent noted that any future conventions in this area "should not be seen as dominated by Anglo-Saxon legal principles."

Another theme that was repeated several times in the open comment section involved the recognition that international action alone would not be sufficient to make mediation and conciliation a standard means of resolving international commercial disputes. Thus, one person noted that "[a]side from international conventions there must be a massive information drive on the process an [sic] enforceability of settlement agreements." Another respondent stated that "[e]fforts should be done and actions should be taken for mediation and conciliation to become better known and for lawyers not to consider ADR as Alarming Drop in Revenue." Indeed, one person noted that "[p]eople still need to be deeply informed about the process. The main obstacle preventing its use comes from the parties lawyer [sic]."

VI. Conclusion

This survey of 221 members of the international business and legal communities has provided numerous important insights into the use and perception of international commercial mediation and conciliation. Analysis of the results of the study has shown that participants are strongly in favor of further international work in the area of international commercial mediation and conciliation, particularly with respect to a dual-pronged convention relating to the enforcement of agreements to mediate or conciliate international commercial disputes and the enforcement of settlement agreements arising out of international commercial mediation and conciliation.

Furthermore, data from the survey appears to suggest that international efforts in this area of law will not go to waste, given various indications that international commercial mediation and conciliation is on the rise.

Although this report has provided only certain preliminary findings, it is hoped that this research will nevertheless be useful to those who are considering the merits of a new international instrument in this area of law. Further recommendations, including those relating to possible language to be used in a convention on international commercial mediation and conciliation, can be found in the author's previous and forthcoming publications.[107]

[107] *See* Strong, ICM, *supra* note 2, at 32-38 (containing proposed language for a new treaty on international commercial mediation and conciliation); *see also supra* note 2 and associated text (regarding forthcoming works).