

THE GLOBAL DIMENSION OF THE CURRENT ECONOMIC CRISIS AND THE BENEFITS OF ALTERNATIVE DISPUTE RESOLUTION

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The Conference on the Economic Crisis and Conflict Resolution, sponsored by the Saltman Center for Conflict Resolution at the University of Nevada Las Vegas, William S. Boyd School of Law, concerned the application of mediation and other forms of cost-effective dispute resolution to specific dimensions of the domestic economic crisis—namely foreclosure and bankruptcy. Among other relevant themes, the conference also examined cost-effective dispute resolution in community mediation, online technology, and dispute-wise organizations. An economic downturn, however, does not respect borders. The current economic crisis is no exception. Thus, I turn our attention to the global dimension of the current economic crisis, which, like its domestic counterpart, calls for innovative strategies and approaches to conflict prevention, management, and resolution.

I. THE GLOBAL ECONOMIC CRISIS

The international business community has experienced dramatic growth in international trade and investment since World War II and particularly over the last three decades, following the opening of Asian markets.¹ A steady rise in cross-border disputes has accompanied the expansion of international trade and investment.² So too, has a burgeoning international legal infrastructure for supporting, managing, and resolving cross-border disputes.³

The disputes arising from international business transactions have grown increasingly complex and expensive to resolve.⁴ Moreover, in the current global economic downturn contractual agreements have grown increasingly dif-

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¹ The Honourable J.J. Spigelman, Chief Justice of New South Wales, Address to the 16th Inter-Pacific Bar Association Conference: Transaction Costs and International Litigation (May 2, 2006) (transcript available at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman020506).

² *Id.*

³ *Id.* Spigelman contrasts the “coherent international system for resolving commercial disputes by arbitration” to the “complex, incoherent ‘jungle’ of diverse provisions for international litigation.” *Id.*

⁴ *Id.*

difficult to perform and contract breach appears exceedingly common.⁵ Thus, cross-border disputes and their transaction costs have inevitably escalated, even as the parties tighten their belts and practice increased restraint to weather the crisis.⁶ Within this framework, traditional dispute resolution becomes unmanageable, a relic of the gilded age when wealthy parties wielded power and leverage in the international domain.

The theme of “non-performance in international commercial contracts” addressed at a recent conference in Moscow in June 2009, points to the failure of international businesses investing in developing markets to anticipate the impact of an economic downturn on their local partners, in this case in Russia.⁷ Conference organizers advocated for consideration of many models of commercial relations and called for new strategies to resolve commercial disputes in view of current economic conditions, where non-performance and breach of contract may be inevitable.⁸ Why, for example, are contract revision and renegotiation not more common options when economic conditions change the terms of contract performance?

This Article will analyze systems of conflict prevention, intervention, and resolution of relevance to the international business community. This Article will move top-down, from the most formal and costly dispute resolution procedures to the most informal and cost-effective mechanisms. Simultaneously, it advocates for a bottom-up approach that begins with informal prevention and intervention and ends only with formal dispute resolution. In this way, this Article examines the way things are, even as it advocates for how things should be.

II. TRANSACTION COSTS OF INTERNATIONAL LITIGATION

Parties who choose to resolve their cross-border disputes through international litigation take on enormous risks—in monetary costs, duration of time, representation in foreign courts, unpredictability of outcome, problems of enforcement, and long-term impact to business relationships.⁹ In a presentation entitled *Transaction Costs and International Litigation*, the Chief Justice of New South Wales, Australia notes many of these and other costs of international litigation:

- Additional layers of complexity.

⁵ See, e.g., Nicola Berkovic, *More Arbitration Work as Credit Crisis Deepens*, AUSTRALIAN, Jan. 23, 2009, at 27; Dennis Eng & Albert Wong, *Trade Arbitration Cases up 40 Percent as Disputes Rise Amid Global Crisis*, S. CHINA MORNING POST, Nov. 20, 2008, at A3. Both articles point to an increase in trade disputes arising from contract performance.

⁶ Spigelman, *supra* note 1.

⁷ *The International Commercial Arbitration Court: Conferences and Seminars*, CHAMBER COM. & INDUSTRY RUSSIAN FED’N, <http://www.tpprf-mkac.ru/en/collaboration-/confsem> (last visited Mar. 1, 2011); *The International Commercial Arbitration Court: 4-5 June 2009*, CHAMBER COM. & INDUSTRY RUSSIAN FED’N, <http://www.tpprf-mkac.ru/en/component/content/article/415> (last visited Mar. 1, 2011).

⁸ *The International Commercial Arbitration Court: Conferences and Seminars*, *supra* note 7.

⁹ Spigelman, *supra* note 1.

- Additional costs of enforcement, indeed uncertainty about the ability to enforce contractual rights.
- Risks arising from unfamiliarity with foreign legal process.
- The risk of unknown and unpredictable legal exposure.¹⁰

Indeed, international litigation can easily cost hundreds of thousands of dollars in legal fees, discovery costs, production and translation of documents, and appeals.¹¹

The long-term costs from legal exposure, while more difficult to measure quantitatively, may be more harmful than the monetary risks. Long-term costs include revelation of trade secrets, fractured business relationships, and loss of business reputation. Unlike arbitration and mediation, judicial proceedings do not preserve confidentiality of communications.¹² A legal dispute concerning trade secrets may require the revelation of those trade secrets, especially in “civil law” jurisdictions where *in camera* proceedings are unknown.¹³ Similarly, international judicial proceedings and their outcomes occur in the public domain—risking collateral damage to business reputations and relationships.¹⁴

Moreover, cultural, linguistic, jurisdictional, and legal issues arise with representation in foreign courts and knowledge of foreign legal processes. Perhaps most significantly, and in contrast to the international legal framework for arbitration, international treaties and bilateral agreements do not exist—except in rare cases—to guarantee the enforcement of foreign judgments.¹⁵ The United States is not a party to any treaty providing for the recognition and enforcement of foreign judgments.¹⁶

¹⁰ *Id.*

¹¹ See, e.g., Peter Sherwin et al., *Proskauer on International Litigation and Arbitration*, PROSKAUER, <http://www.proskauerguide.com/arbitration/19/I> (last visited Mar. 1, 2011).

¹² INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 4 (J. Stewart McClendon & Rosabel E. Everard Goodman eds., 1986).

¹³ Albert Golbert, *The Strange Logic of Japanese Management*, 02889-12 CHUO KORON KEIEI MONDAI 273, 273-74 (1978) (Japan). This Article contains a description of the manner in which a trade secret can be lost through efforts to protect it when civil law requires public disclosure.

¹⁴ INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK, *supra* note 12, at 4.

¹⁵ *Id.*; see also Spigelman, *supra* note 1.

¹⁶ Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT'L LAW. 187, 190 (1989) (“An international dispute is not at an end simply because litigation before a national court has resulted in a judgment and the parties have exhausted all appeals. Judgments entered by foreign courts are not entitled to automatic enforcement by American Courts under the ‘full faith and credit’ clause of the United States Constitution and foreign courts do not automatically accord such treatment to judgments rendered by American courts. Recognition and enforcement of foreign judgments depend on notions of comity and fairness that are often vaguely and inconsistently articulated.”). See *Hilton v. Guyot*, 159 U.S. 113, 118 (1895). When the EEC (now EU) was negotiating the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1998 O.J. (C 27) 1 (consolidated version), the United States sought to reach a similar treaty with the United Kingdom. These efforts ultimately failed as the United Kingdom would not agree to enforce “treble damage” judgments (arising from anti-trust and RICOH adjudications), and the United States would not sign a treaty without it. This was the only serious effort on the part of the United States to negotiate such a treaty. Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 291, 297-98 (1991).

Given the enormous transactional costs associated with international litigation, and the increased risks to the health and viability of international businesses in today's compromised economic environment, why would any party choose this path of traditional dispute resolution? International litigation may arise out of the absence of an effective dispute resolution clause in an international agreement. In other cases, however, parties may deliberately opt for the resolution of disputes through litigation in a given jurisdiction. The following clause taken from the international agreement of an American-Canadian joint venture, for example, provides solely for litigation:

Section 1.1 Governing Law.

Section 1.2 The law of the State of Delaware shall govern all questions concerning the construction, validity, interpretation and enforceability of this Agreement, without giving effect to any choice of law or conflict of law rules or provisions (whether of the State of Delaware or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of Delaware. The Partners hereby irrevocably and unconditionally submit in any legal action or proceeding arising out of or relating to this Agreement to the exclusive general jurisdiction of the courts located in New York City, New York and, in any such action or proceeding, consent to jurisdiction in such courts and waive any objection to the venue in any such court.¹⁷

This joint venture agreement contains no other dispute resolution provisions to prevent, manage, or resolve disputes arising out of the contract or its performance.

In the given example, when a dispute did eventually arise, one party to the joint venture bought out the other party for the value of the enterprise *rather than submit to costly litigation*.¹⁸ Thus, in the absence of a more comprehensive system for dispute prevention and resolution, consideration of the transaction costs of international litigation may ultimately be approached from a simple cost-benefit analysis: what are the costs of litigation versus the costs of concession to avoid litigation?

III. INTERNATIONAL COMMERCIAL ARBITRATION

Several alternatives to litigation—and litigation avoidance in the form of concession—exist for the resolution of international business disputes. On a continuum from formal to informal—though ideally, businesses would move, conversely, along a continuum from informal to formal—these include: arbitration; conciliation and mediation,¹⁹ informal negotiation and problem solving, conflict prevention, and collaborative business and law.

This Article begins with international commercial arbitration because it is the most frequently used alternative to litigation and because it exists within a

¹⁷ American-Canadian Joint Venture Agreement (on file with author).

¹⁸ *Id.*

¹⁹ Conciliation and mediation are two names for the same or nearly identical process. I will use them interchangeably in this Article. For a more in-depth discussion of perceived differences and similarities in the international commercial realm, see Rebecca Golbert, *A Comparison of International Commercial Arbitration and Conciliation Acts*, 18 CAL. INT'L L.J. 17, 21-22 (2010).

highly developed legal framework of international law, rules, and enforcement. The International Centre for Dispute Resolution (ICDR), which identifies itself as the largest provider of international dispute resolution services in the world, provides the following data on its international dispute resolution proceedings for the last five years:

TABLE 1. ICDR CASELOAD FIGURES²⁰

Caseload	2005	2006	2007	2008	2009
International	580	586	621	703	836

Although the ICDR data combines arbitration and mediation, one can safely assume that the majority of ICDR cases involved arbitration.

The Model Law on International Commercial Arbitration (Model Arbitration Law), adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL), created a uniform legal and procedural framework for international arbitration proceedings.²¹ The Model Arbitration Law was subsequently adopted as a national statute by numerous countries and incorporated into five U.S. state statutes.²² The Model Arbitration Law and its domestic statutory equivalents resolve several key problems inherent in international litigation by returning control of the dispute resolution process to the parties and their representatives.²³ Moreover, the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),²⁴ whose provisions are incorporated into the Federal Arbitration Act (FAA),²⁵ ensures international enforcement of arbitral awards among the 144 signatories to the New York Convention.

The emphasis on and preference for arbitration within the international dispute resolution community rely on significant merits of international arbitration over international litigation. First, the confidentiality of international arbitration proceedings—and, frequently, of arbitral awards—contrasts sharply

²⁰ Personal Correspondence with Christian Alberti, Assistant Vice President, Int'l Ctr. for Dispute Resolution.

²¹ G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18 2006), available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/a61-33-e.pdf>.

²² The California International Arbitration and Conciliation Act (California Act) became law on March 7, 1988. CAL. CIV. PROC. CODE §§ 1297.11-.432 (West 2007). The Ohio Act on International Commercial Arbitration and the Oregon International Commercial Arbitration and Conciliation Act followed the California Act in 1991. OHIO REV. CODE ANN. §§ 2712.01-.91 (West 2006); OR. REV. STAT. ANN. §§ 36.450-.558 (West 2003 & Supp. 2010). The North Carolina International Commercial Arbitration and Conciliation Act and the Texas Act on the Arbitration and Conciliation of International Commercial Disputes followed in 1997. N.C. GEN. STAT. §§ 1-567.30-.87 (West 2000 & Supp. 2010); TEX. CIV. PROC. & REM. CODE ANN. §§ 172.001-.215 (West 2005).

²³ INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK, *supra* note 12, at 3.

²⁴ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/1958_NYC_CTC-e.pdf.

²⁵ 9 U.S.C. § 201 (2006).

with the public nature of international judicial proceedings.²⁶ Confidentiality helps to preserve intellectual property, including trade secrets, and to preserve business relationships and reputations. Second, parties whose countries are signatories to the New York Convention will likely have their arbitral award recognized and enforced, making arbitration the obvious choice where the enforcement of cross-border contractual rights would otherwise be problematic.²⁷

Third, the Model Arbitration Law and the international institutions promoting arbitration emphasize party autonomy in all realms of the arbitration process.²⁸ Party autonomy extends to the location of arbitration proceedings, the choice of party representation in arbitration, the selection of arbitrator(s), the choice of substantive and procedural law, the rules governing the arbitration, the language of documents and proceedings, and the logistical framework for hearings.²⁹ Of course, effective party autonomy in the arbitration process assumes a comprehensive and clearly articulated arbitration agreement or the ability to negotiate such arbitration provisions post-dispute. However, such optimal conditions often do not exist.³⁰ For example, a flimsy arbitration clause, lacking in clarity, may frustrate rather than facilitate party autonomy. Disputes may arise over the meaning and intent of key provisions. More generally, the benefits of international arbitration enumerated here *rely* on an effective arbitration agreement whose validity cannot be challenged.³¹

Despite its significant advantages over litigation, international arbitration has certain disadvantages. Most significantly, the transaction costs of international arbitration continue to rise and mimic litigation costs, growing more and more prohibitive, particularly in the current economic downturn.³² Like international litigation, international arbitration proceedings are becoming increasingly complex and may require extensive discovery, production and translation of documents, and expert witnesses.³³ In the case of a poorly written arbitration agreement, the parties may resort to costly court procedures to clarify and enforce certain provisions, entangling arbitration with—rather than disentangling it from—the judicial system. Lengthy proceedings may be further complicated by the logistics of coordinating international travel for hearings for the parties, counsel, and arbitrator(s).³⁴ Costs and duration only increase when parties select a panel of three arbitrators rather than a sole arbitrator.³⁵

While the duration and costs of any arbitration proceeding may vary, ICDR arbitrations are typical. The ICDR places the average length of its proceedings at twelve months; the ICDR fee schedule indicates its provider fees

²⁶ INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK, *supra* note 12, at 4.

²⁷ *Id.*

²⁸ *Id.* at 3; *see also* JACK J. COE, INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT 59 (1997).

²⁹ INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK, *supra* note 12, at 3; COE, *supra* note 28, at 59.

³⁰ COE, *supra* note 28, at 56.

³¹ *Id.*

³² *See* Sherwin et al., *supra* note 11.

³³ *Id.*

³⁴ *Id.*

³⁵ COE, *supra* note 28, at 169.

based on the amount of the claim in dispute.³⁶ For example, the initial filing fee and final fee add up to \$14,200 for a claim between \$5,000,000 and \$10,000,000.³⁷ However, those fees do not cover the arbitrator compensation and expenses, travel costs, legal fees, and costs of discovery, documents, witnesses, or additional court procedures.³⁸ With these additional expenses, the costs of an arbitration proceeding can escalate quickly.

Of course, as a colleague pointed out with a retort of “not necessarily” in response to each one of my critiques of arbitration, a well-crafted arbitration clause can enhance party autonomy to limit the excesses of current arbitration procedures and thereby produce a more cost- and time-effective arbitration process. Moreover, institutional providers have begun to focus on the barriers to effective international arbitration and to draft documents that limit the use of extensive discovery and other costly and time-consuming tactics derived from litigation.³⁹

Notwithstanding efforts to promote efficiency in international arbitration, arbitration remains the *most* formal and time-consuming, and the *least* collaborative of ADR processes. In theory, recourse to arbitration indicates that all other methods of negotiation, problem solving, and dispute intervention have been explored and have failed. And yet, most international agreements do not offer more informal methods but continue to provide for arbitration as the sole method of dispute resolution.⁴⁰

IV. EXPANDING THE DEFINITION OF INTERNATIONAL ADR

In the current global economic downturn, it is fundamental to challenge the over-reliance on arbitration within the international ADR infrastructure. At the minimum, international businesses, when faced with disagreements, should begin with the less formal and more collaborative processes of conciliation and mediation. Ideally, the definition of international ADR should be expanded

³⁶ See Personal Correspondence with Christian Alberti, *supra* note 20; *International Dispute Resolution Procedures*, AM. ARB. ASS'N, <http://www.adr.org/sp.asp?id=33994#standard> (scroll down to “Standard Fee Schedule”) (last visited Mar. 1, 2011).

³⁷ *Id.*

³⁸ *See id.*

³⁹ *See, e.g.*, DEBEVOISE & PLIMPTON L.L.P., PROTOCOL TO PROMOTE EFFICIENCY IN INTERNATIONAL ARBITRATION 1 (2010), available at <http://www.debevoise.com/arbitration-protocol/> (follow “View the Protocol” hyperlink); INT'L CHAMBER OF COMMERCE, TECHNIQUES FOR CONTROLLING TIME AND COSTS IN ARBITRATION (2007), available at http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf; INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, GLOBAL RULES FOR ACCELERATED COMMERCIAL ARBITRATION 3 (2009), available at <http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20%20Rules/Global%20Rules%20for%20Accelerated%20Commercial%20Arbitration.pdf>; INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION 3 (2009), available at <http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20%20Rules/CPR%20Protocol%20on%20Disclosure%20of%20Documents%20and%20Witnesses.pdf>.

⁴⁰ Similarly, institutional providers continue to focus primarily on international commercial arbitration. *See, e.g.*, *Commission on Arbitration*, INT'L CHAMBER COM., <http://www.iccwbo.org/policy/arbitration/id2882/index.html> (last visited Mar. 1, 2011); Int'l Ctr. for Dispute Resolution, *International ADR*, AM. ARB. ASS'N., <http://www.adr.org/icdr> (last visited Mar. 1, 2011).

significantly beyond mediation and arbitration to include informal negotiation and problem solving, conflict prevention, and collaborative business and law.

A. *Mediation and Conciliation*

An expanded definition of international ADR should, at the minimum, place greater emphasis on mediation and conciliation. Mediation generally occurs earlier in the course of an international dispute.⁴¹ Less formal than arbitration, mediation affords greater party control of the process and outcome and is thus more collaborative.⁴² The mediator facilitates the parties' conversation, but the parties craft the resulting agreement.⁴³ Thus, mediation generally leads to more creative solutions and greater party satisfaction.⁴⁴ It is also more cost and time-efficient.⁴⁵ All of these factors make mediation more favorable to the preservation of business relationships and the improvement of cross-cultural business communications.

Like arbitration, international mediation and conciliation proceedings operate within a highly developed international and domestic legal framework. This framework promotes confidentiality, the stay of judicial and arbitral proceedings during the course of mediation, and immunity for parties and mediators in an effort to foster a conducive environment for mediation for the parties, representatives, and mediators.⁴⁶ For example, confidentiality provisions protect mediation communications and documentation; however, the level of confidentiality protection depends on the legal framework chosen to govern the mediation.⁴⁷

Mediation and conciliation appear as options for international dispute resolution offered by institutional providers such as the ICDR, the International Chamber of Commerce (ICC), and the International Institute for Conflict Pre-

⁴¹ See, e.g., Int'l Ctr. for Dispute Resolution, *Guide to Drafting International Dispute Resolution Clauses*, AM. ARB. ASS'N., at 2-3, <http://www.adr.org/si.asp?id=4945> (last visited Mar. 1, 2011).

⁴² KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 26-27 (3d ed. 2004).

⁴³ *Id.*

⁴⁴ *Id.* at 28.

⁴⁵ *Id.*

⁴⁶ See statutes cited *supra* note 22.

⁴⁷ The California Act § 1297.371 offers strong confidentiality protections, later modeled in other U.S. international arbitration and conciliation statutes. CAL. CIV. PROC. CODE § 1297.371 (West 2007). The UNCITRAL Model Law on International Commercial Conciliation (Model Conciliation Law), adopted in 2002, provides much weaker confidentiality protections in Article 9. G.A. Res. 57/18, art. 9, U.N. Doc. A/RES/57/18 (Jan. 24, 2003), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/538/98/PDF/N0253898.pdf?OpenElement>. The Uniform Mediation Act (UMA) incorporates the Model Conciliation Law through amendment but affords greater standards of privilege. See NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, *UNIFORM MEDIATION ACT* prefatory note, §§ 4-6, 8 (2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>. The superior UMA confidentiality provisions thus override the confidentiality provisions of the Model Conciliation Law, unless parties who opt for the Model Conciliation Law through the UMA explicitly request (in writing or electronic record) the narrower protections of the Model Conciliation Law. For more in-depth discussion of the confidentiality protections of international mediation and conciliation—comparing the confidentiality provisions of the California Act with those of other U.S. states, the UMA, and the Model Conciliation Law, see Golbert, *supra* note 19, at 23-25.

vention and Resolution (CPR).⁴⁸ Nevertheless these institutions continue to promote arbitration as the primary method for resolving international business disputes.⁴⁹ Indeed, the ICDR offers no separate breakdown of its mediation cases, suggesting that the distinction remains insignificant.

While offering significant advantages to arbitration, mediation remains a formal process of dispute resolution. Recourse to mediation, like arbitration, suggests that the dispute has escalated, that the original contract provisions failed to clarify the misunderstanding, and that direct negotiation between the parties and their counsel failed to resolve the problem or conflict. Moreover, while international mediation remains more cost-effective than arbitration or litigation, the transaction costs of international mediation continue to rise, along with the complexity of disputes being handled through mediation. Prohibitive costs include the fee schedules of institutional providers,⁵⁰ the compensation and expenses of mediators, legal fees for representation, and the logistics and travel costs of setting up international mediation proceedings.

International enforcement of mediated settlements also remains problematic. The ICC thus emphasizes the voluntary nature of mediation and other “amicable” and “non-binding” dispute resolution techniques under the heading of ADR, in contrast to “binding” arbitration.⁵¹ The Model Conciliation Law offers weak provisions on enforcement.⁵² The California Act’s chapter on conciliation claims for a written agreement arising out of conciliation “the same force and effect as a final award in arbitration.”⁵³ This concept that international conciliation agreements be treated as arbitral awards, enforceable by the New York Convention, has yet to be challenged or upheld in the courts.⁵⁴

Frequently the first option in a two-tiered dispute resolution clause (mediation then arbitration),⁵⁵ mediation remains insufficient. Any such framework that prioritizes dispute resolution over prevention and intervention is unsatisfactory in today’s international business environment, where time matters, economic pressures mount, and ongoing communication and relationship building are paramount.

⁴⁸ For more information on ICDR mediation, see <http://www.adr.org/sp.asp?id=28819>. For more information on ICC mediation, see <http://www.iccwbo.org/court/adr/>. For more information on CPR services, inclusive of mediation, see <http://www.cpradr.org/Home.aspx>.

⁴⁹ See, e.g., *supra* note 40 and accompanying text.

⁵⁰ The ICDR appears to charge the same fees for arbitration and mediation, based on the amount of the claim. See Personal Correspondence with Christian Alberti, *supra* note 20.

⁵¹ These ICC distinctions between ADR and arbitration are available at the ICC website, *ICC ADR—A Wise Precaution*, INT’L CHAMBER COM., <http://www.iccwbo.org/court/adr/id4592/index.html> (follow “Expertise,” “Dispute Boards,” and “Docdex” hyperlinks) (last visited Mar. 1, 2011). The ADR heading is 85 percent mediation. Personal Correspondence with Mathilde Zitaldurand, Int’l Chamber of Commerce (June 2010).

⁵² Article 14 of the Model Conciliation Law defers to the enacting state for the method of enforcement. G.A. Res. 57/18, *supra* note 47, art. 14.

⁵³ See CAL. CIV. PROC. CODE § 1297.401.

⁵⁴ For further discussion on enforceability, see Golbert, *supra* note 19, at 25.

⁵⁵ See, e.g., Int’l Ctr. for Dispute Resolution, *supra* note 41, at 2-3.

B. Informal ADR—Continuum of Conflict Prevention and Resolution

International businesses need a greater array of tools to negotiate and problem-solve in cross-border and cross-cultural commercial relations. What are the alternatives to formal dispute resolution in the current economic downturn? Parties to an international agreement sometimes begin the resolution of a dispute with direct negotiation between business executives and/or their counsel. Negotiation may be the first of a three-step approach, as in the “CPR International Model Multi-step Dispute Resolution Clause”—negotiation, then mediation, and finally arbitration if necessary.⁵⁶ This framework, however, assumes direct negotiation *to resolve a dispute*. Examine the following language of CPR’s model clause:

The parties shall attempt to resolve any Dispute promptly by negotiation between executives who have authority to settle the Dispute and who are at a higher level of management than the persons with direct responsibility for administration or performance of this Agreement. Any party may give another party written notice of any Dispute (“Notice”).⁵⁷

While negotiation is clearly a more informal mechanism than mediation or arbitration, the language of the clause suggests a formal process—and one that is not necessarily collaborative—complete with written notice of the “Dispute.” When direct negotiation between executives fails, the parties move on to formal dispute resolution with a third-party neutral.

But what if we shift the entire weight of the international ADR framework from conflict resolution to conflict prevention? What if we shift from reliance on formal mechanisms to greater dependency on informal mechanisms for anticipating and addressing problems in the performance of an international contract? A continuum from informal to formal and from conflict prevention to conflict resolution would explore a wider array of conflict prevention and early intervention tools before resorting to established methods for the resolution of a dispute. The LA Center for International Conciliation and Arbitration (CICA)⁵⁸ is an international ADR organization in transition; it seeks to implement a new paradigm for international ADR, based on a greater focus on informal and preventative strategies in international business relations.⁵⁹

⁵⁶ *CPR International Model Multi-step Dispute Resolution Clause*, CPR, <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/635/CPR-Model-Clauses-and-Sample-Language.aspx> (last visited Mar. 1, 2011).

⁵⁷ *Id.*

⁵⁸ Information on CICA is largely based on personal knowledge and correspondence with Albert Golbert, Founder of CICA.

⁵⁹ CICA’s new mission reads: “To provide information and resources to facilitate international commercial dispute prevention and resolution.” CICA aims to develop a website and programs that reflect its new mission and shifting paradigm. This is unquestionably a paradigm shift for international businesses, law firms, and dispute resolution providers, who tend to think of dispute resolution as separate and distinct from contract negotiations, rather than as an integral and flexible part of contract negotiation and implementation. Business executives and their lawyers frequently insert a model ADR clause into the international agreement, designating a pre-determined method (or two- or three-step method) of formal dispute resolution in the case of a dispute. In the context of construction disputes, Michael Pappas advocates for greater flexibility in the selection of ADR methods, rather than the “one size fits all” approach.” Michael Pappas, Essay, *A Flexible Framework for the Prevention and Resolution of Construction Disputes*, at 7, <http://www.abanet.org/dispute/essay/construc->

Established in 1986,⁶⁰ CICA's founders drafted the California Act with the aim to make California, and Los Angeles in particular, a hospitable place for the resolution of international business disputes.⁶¹ For more than a decade, CICA conducted international arbitrations under the procedural framework of the California Act and its own adaptation of the UNCITRAL Arbitration Rules.⁶² It also offered workshops on drafting effective arbitration clauses. Despite the cutting-edge conciliation chapter of the California Act—that became a model for other international conciliation acts—CICA conducted few if any international conciliation proceedings.

Today, in a more competitive climate of international dispute resolution, dominated by large institutional providers, CICA is undergoing a transformation of its organizational mission in an effort to complement the work of other ADR centers and address unmet needs in international commercial relations. Its new mission would cast CICA as a resource center and clearing house, educating local and international businesses about effective conflict prevention, intervention, and resolution. It would make referrals to other international dispute resolution centers only when informal strategies have been exhausted and disputes have escalated to a formal level. What does such a resource center/clearing house look like in the realm of international ADR? CICA programmatic goals and strategies for local and international businesses would ideally include:

1. Building dispute design into every step of the international business process from the start of business communications to the end of business relations;
2. Training businesses to think about conflict prevention first, dispute resolution second;
3. Training businesses to negotiate international contracts with conflict prevention and intervention in mind, rather than a fixed and narrow model of dispute resolution;
4. Training businesses in international and cross-cultural communication, negotiation, and problem solving—noting the significance of cross-cultural communication skills in averting and avoiding cultural and linguistic misunderstandings;

tiondisputes.pdf (last visited Mar. 1, 2011) (2004 honorable mention winner in the graduate student division of the Boskey Essay Competition). Pappas' comments are relevant to international business negotiations.

⁶⁰ Initially established as the Los Angeles Center for International Commercial Arbitration, it became known as the Center for International Commercial Arbitration in Los Angeles. In its new formation, reflecting the shift from an emphasis solely on arbitration, it has filed a fictitious name change to become the LA Center for International Conciliation and Arbitration. The Board of Directors acknowledges that this name change imperfectly reflects its new mission; however, it allows for continuity of the acronym "CICA."

⁶¹ Albert S. Golbert & Daniel M. Kolkey, *California's New International Arbitration and Conciliation Code*, L.A. LAW., Nov. 1988, at 46, 47.

⁶² The UNCITRAL Arbitration Rules, adopted in 1976, provide model procedural rules for the conduct of ad hoc and administered international arbitration proceedings. G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976). For the original rules, see UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES (1976), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html. For the 2010 revised version of the rules, see UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES (2010), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>.

5. Working with lawyers and businesses on collaborative approaches to international business transactions, drawing from collaborative law and business models;
6. Building models of problem solving into contract performance—noting that problems of contract interpretation and implementation are almost inevitable but their resolution is not;
7. Modeling flexible and multi-tiered ADR clauses, emphasizing direct negotiation and problem solving, informal third-party consultation and early intervention—such as the role of an Ombudsman—followed by mediation, then arbitration;
8. Building a panel of experts—including informal third-party neutrals, international mediators and arbitrators; and
9. Collaboration with other international ADR centers, to establish a smooth continuum of options from dispute prevention to dispute resolution.

In its process of reimagining its mission in the current international economic climate, the Board of Directors of CICA seeks clear definitions and models of conflict prevention and early intervention. It also strives to identify a more comprehensive framework for designing dispute prevention and resolution systems and agreements. At the Conference on the Economic Crisis and Dispute Resolution, Michael Colatrella spoke about the elements of a “dispute-wise” organization in the domestic context; these elements include problem-solving, early intervention, and negotiation.⁶³ His “dispute-wise” model prioritizes informal, collaborative, and cost-effective mechanisms.⁶⁴ It addresses both internal and external conflict prevention and resolution systems—that is, within and between organizations.⁶⁵ Colatrella argued that a “dispute-wise” business is far more cost-effective in the current economic climate.⁶⁶

Borrowing Colatrella’s terminology, how can CICA train international businesses to become “dispute-wise”? How should CICA define and model the many terms of informal and preventative ADR; namely, “conflict prevention and early intervention,” “informal negotiation and problem-solving,” “collaborative business and law,” and “cross-cultural communication”? How should CICA adapt primarily domestic models to the international arena—an arena that is frequently more complex due to the layering of cultures, languages, legal systems, and business environments and expectations? In short, how can CICA help international businesses to develop effective strategies that anticipate potential sources of conflict and implement preventative and problem-solving techniques? And how far back in the process does such a dispute prevention model go?⁶⁷

⁶³ Michael T. Colatrella, Jr., Assistant Professor, McGeorge School of Law, Cutting the Cost of Conflict by Creating a Dispute-Wise Organization, Presentation at the William S. Boyd School of Law Conference on Conflict Resolution and the Economic Crisis (Feb. 13, 2010).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ This last question has plagued discussions among the Board of Directors of CICA.

V. ADAPTING MODELS OF DISPUTE PREVENTION AND EARLY INTERVENTION
TO THE INTERNATIONAL CONTEXT

Definitions and models of dispute prevention and early prevention exist in a number of specific commercial arenas, primarily domestic and, most significantly, in the construction industry.⁶⁸ The construction industry and international business have many overlaps—multiple parties, complex negotiations, complex disputes that can become very expensive to resolve, and the long-existing use of and preference for arbitration. Despite the preference for arbitration, the construction industry has moved to the forefront of ADR innovation in developing models and frameworks to anticipate and avoid disputes before they arise and to address them quickly and collaboratively when they do.⁶⁹

This Article will examine three particular models of prevention and intervention prevalent in the construction industry—Assisted Negotiations, Partnering, and Dispute Resolution Boards.⁷⁰ It appears, for example, that the ICC has adapted Dispute Resolution Boards to the international context.⁷¹ This Article will also explore CPR's Early Case Assessment Toolkit, a new and flexible approach to evaluating and managing disputes in the early stages. Finally, this Article will briefly address cross-cultural communication strategies and collaborative law approaches, which must be incorporated into any international dispute prevention framework.⁷²

The Construction Industry's Guide to Dispute Avoidance and Resolution, published by the American Arbitration Association (AAA),⁷³ offers resources and services to encourage parties to design and implement "appropriate dispute avoidance and resolution processes" and clauses for inclusion in contracts.⁷⁴

⁶⁸ See, e.g., Am. Arb. Ass'n, *The Construction Industry's Guide to Dispute Avoidance and Resolution 2* (2007), available at <http://www.adr.org/si.asp?id=3839>; Pappas, *supra* note 59, at 1.

⁶⁹ See AM. ARB. ASS'N, *supra* note 68, at 2; Pappas, *supra* note 59, at 1-2.

⁷⁰ I want to thank Becky Jacobs, a fellow participant on my panel at the Conference on Conflict Resolution and the Economic Crisis, for the initial suggestion that I take a look at partnering agreements in the construction industry as an effective dispute prevention mechanism.

⁷¹ For a brief description of ICC Dispute Boards, see *What Are ICC Dispute Boards?*, INT'L CHAMBER COM., http://www.iccwbo.org/court/dispute_boards/id4527/index.html (last visited Mar. 1, 2011).

⁷² David Allen Larson, another participant at the Conference on Conflict Resolution and the Economic Crisis, suggests that Online Dispute Resolution (ODR) and Technology Mediated Dispute Resolution (TMDR) offer significant opportunities for early and cost-effective intervention in international business disputes. Larson's presentation explored the use of robots and technology in dispute resolution in general. Their application in international dispute resolution merits further exploration as to potential benefits and pitfalls. David Larson, Professor, Hamline Univ., *Using Technology to Resolve Disputes More Efficiently and Effectively*, Presentation at the William S. Boyd School of Law Conference on Conflict Resolution and the Economic Crisis (Feb. 13, 2010). For example, while technology could eliminate the time and expense lost by international travel, it could also exacerbate linguistic and cultural misunderstandings that face-to-face meetings could avert or resolve. I do not explore TMDR or ODR further in this Article but consider them fundamental tools of future international ADR approaches.

⁷³ AM. ARB. ASS'N, *supra* note 68.

⁷⁴ *Id.* at 6.

The guide places Assisted Negotiations, Partnering, and Dispute Resolution Boards in its section on “On-Site Dispute Management Services.”⁷⁵ It notes that these processes should occur “in the early stages of a project.”⁷⁶

A. *Assisted Negotiations*

The section “On-Site Dispute Management Services” begins with a discussion of Assisted Negotiations, described as “facilitated negotiations in which a neutral helps the parties structure their own negotiation” and in which “a mediator or facilitator may participate in an informal manner to assist in direct party-to-party discussions.”⁷⁷ The informal manner of intervention differentiates early Assisted Negotiations from later mediation proceedings involving more formal third-party intervention. It is worth noting that in current international practice, a third-party intervention is rarely informal or consultative but signals the escalation of conflict to formal levels.⁷⁸ In contrast, multinational corporations are increasingly using an organizational ombudsman to intervene informally, impartially, and confidentially in the management of internal conflicts.⁷⁹ Ombudsmen, mediators, and facilitators could serve a similarly informal and confidential role in the early stages of cross-border misunderstandings, disagreements, and disputes.

B. *Partnering and Partnering Plus*

Partnering begins in the pre-planning stages of a construction project and provides a collaborative framework for anticipating, identifying, and addressing risks and problems that could derail the project.⁸⁰ The Construction Industry’s Guide defines Partnering as “a commitment by all stakeholders to achieve goals and objectives agreed upon prior to a project’s commencement.”⁸¹ In partnering workshops, a skilled facilitator guides the project’s stakeholders in discussions about goals, agendas, potential risks, appropriate methods of conflict avoidance, and management.⁸² The workshops culminate in “a joint agreement signed by the workshop participants that sets forth their goals and expresses their commitment to the project.”⁸³

⁷⁵ *Id.* at 9-14.

⁷⁶ *Id.* at 9.

⁷⁷ *Id.*

⁷⁸ *See, e.g.*, Int’l Ctr. for Dispute Resolution, *supra* note 41, at 2-3.

⁷⁹ *See, e.g.*, *Corporate Governance: Ombudsman*, COCA-COLA ENTERS., <http://ir.cokecce.com/phoenix.zhtml?c=117435&p=irol-govombudsman> (last visited Mar. 1, 2011); Office of ICANN Ombudsman, *Creating Dialogue, Affirming Fairness*, ICANN, <http://www.icann.org/ombudsman/> (last visited Mar. 1, 2011).

⁸⁰ AM. ARB. ASS’N, *supra* note 68, at 9.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 10. This commitment of stakeholders, articulated in a joint agreement, to work collaboratively toward mutual project goals shares similarities with Collaborative Law (particularly Collaborative Family Law), in which the parties and lawyers sign a participation agreement, before negotiations begin to resolve conflicts and achieve settlement outside the judicial system. *See, e.g.*, *Collaborative Law Offers a No-Court Alternative*, CINCINNATI ACAD. COLLABORATIVE PROFESSIONALS, <http://www.collaborativelaw.com/> (last visited Mar. 1, 2011). Partnering agreements, however, while emphasizing commitment to the shared goals of the project, do not necessarily make a commitment to out-of-court settlements.

Partnering Plus expands the traditional Partnering model with certain innovative design elements produced during partnering workshops at various phases of the construction project.⁸⁴ Deliverables include a Risk Management Plan, Pre-planning Partnering, Communications Plan (means and methods of communication between parties and public), Partnering, Construction Document Review, Identification of Risks to Project Success (referring to environmental and public impact), Dispute Escalation Chart (detailing a step-negotiation process beginning at lower levels of authority and slowly moving up the chain of command), and Refinement of On-Site Dispute Resolution Techniques to Meet Special Needs.⁸⁵ As the AAA notes, Partnering Plus is “project-specific” and aims to “provide effective techniques for resolving conflicts as they arise on a ‘real-time’ basis.”⁸⁶

Several key aspects of Partnering and Partnering Plus are relevant to a more general framework of dispute prevention and clearly transferable to the international business realm. Of particular relevance to any project, transaction, or business deal is the involvement of an experienced facilitator in guiding discussions with stakeholders in the pre-planning and planning stages of a construction project, long before the emergence of disagreements or the need for dispute intervention.⁸⁷ As noted above, in international business relations, third-party intervention often arrives much later in the process, after a dispute has escalated to formal dispute resolution.⁸⁸ If third-party intervention were to begin in the early contract negotiations among the parties, two positive outcomes could emerge. First, an impartial facilitator would be intimately acquainted with the parties, subject matter, and contract and more capable of averting and addressing problems arising in “real-time.”⁸⁹ Second, and perhaps more significantly, the parties, lawyers, and facilitator would have more thoroughly considered potential risks and obstacles to the success of the international agreement and identified ways to address and resolve them. For example, they could generate a risk management plan, partnering agreements, a dispute-escalation chart, and on-site dispute resolution techniques to establish a multi-faceted program of dispute avoidance and resolution. Partnering builds

Nonetheless, the aim of a partnering agreement is certainly to avert disputes or resolve them early and effectively, which de facto means out-of-court.

⁸⁴ AM. ARB. ASS’N, *supra* note 68, at 10-11.

⁸⁵ *Id.*

⁸⁶ *Id.* at 10. Thomas Stipanowich also describes the significance of addressing disputes in “real-time” by taking a “thin-slicing” approach to conflict. See generally Thomas J. Stipanowich, “Thin-Slicing” and Conflict Management: “Real Time” Strategies for Relational Conflict (Dec. 3, 2010) (unpublished manuscript), available at <http://www.mediation-utrecht.eu/sites/mediation-utrecht.eu/files/thomas-j-stipanowich-thin-slicing-and-conflict-management.pdf>.

⁸⁷ AM. ARB. ASS’N, *supra* note 68, at 9-11.

⁸⁸ See, e.g., Int’l Ctr. for Dispute Resolution, *supra* note 41, at 2-3.

⁸⁹ AM. ARB. ASS’N, *supra* note 68, at 10; Stipanowich, *supra* note 86. This begs the question: do the facilitators in partnering workshops intervene at later stages of the process? Pappas’ proposal of a “convenor” seems to fill such a role: “A convenor—a neutral third-party expert advisor—assists the project team in implementing the system, and provides continuity throughout the duration of the project.” Pappas, *supra* note 59, at 7. The concept of the “convenor” thus combines elements of Partnering and Dispute Resolution Boards.

dispute design into all phases of a project but particularly emphasizes the earliest stages of dispute prevention.⁹⁰

C. DRB's

Dispute Resolution Boards (DRBs) have existed since the 1970s and are widespread in construction.⁹¹ The presence of the DRB is usually established in the contract documents.⁹² A panel of three neutrals, appointed by the parties, forms the DRB and participates in the project team (for smaller projects a Single Dispute Resolver may perform the functions of a DRB).⁹³ "They attend periodic meetings, review essential project documents and assist in the identification and resolution of issues and potential problems."⁹⁴ Similar to a partnering facilitator, the members of the DRB thus become intimately familiar with the parties, the contract, the subject matter, and potential sources of conflict. The DRB reviews disputes at an informal hearing and then generally presents a non-binding recommendation or decision.⁹⁵ Interestingly, in contrast to mediation and arbitration, DRB recommendations are not considered confidential but "are generally admissible in future proceedings—such as arbitration or litigation—if the issue is not resolved at the DRB level."⁹⁶

To an outside observer, the DRB appears to have the flavor of early non-binding arbitration, with a three-person tribunal that issues a decision. However, in contrast to non-binding arbitration, the DRB intervenes earlier and more informally and plays a more comprehensive role in the project.⁹⁷ Among the list of benefits of DRBs noted by the Dispute Resolution Board Foundation, the following are particularly significant:

- The DRB is organized at project initiation before any disputes have arisen.
- The DRB keeps abreast of job developments by means of periodic review of relevant documents and regular site visits.
- The DRB's fees and expenses are shared among the parties.
- An informal but comprehensive hearing is convened promptly.⁹⁸

The admissibility of DRB recommendations as evidence in subsequent arbitration or litigation is also cited as a positive element, most likely because it contributes to the success of DRBs in settling the dispute.⁹⁹ However, the admissibility of DRB recommendations is more problematic from the perspective of openness and trust-building among the parties.¹⁰⁰ DRB members are also protected from personal or professional liability relating to their DRB

⁹⁰ AM. ARB. ASS'N, *supra* note 68, at 9-11.

⁹¹ *Id.* at 12.

⁹² *Id.*

⁹³ *Id.* at 12, 14.

⁹⁴ *Id.* at 12.

⁹⁵ *Id.*

⁹⁶ *Id.* Is the admissibility of DRB decisions at future proceedings positive or negative? It certainly contrasts sharply with the confidentiality protections of mediation and arbitration.

⁹⁷ *See id.*

⁹⁸ *Id.* at 13.

⁹⁹ *Id.*

¹⁰⁰ Confidentiality of communications is generally a highly valued element of mediation and arbitration proceedings.

duties.¹⁰¹ The California Act in its conciliation chapter similarly offers protection from liability for the conciliator in his or her professional activities.¹⁰² Finally, it is interesting to note that the AAA maintains a separate roster of qualified DRB neutrals with expertise in DRB processes and in construction and related fields.¹⁰³ Related to DRBs and Single Dispute Resolvers, an On-Site Neutral may function as a mediator or facilitator to assist the parties at the job site with the management and resolution of problems on a day-to-day basis. Like DRBs, the On-Site Neutral is intimately involved in the project from the start; unlike DRBs, he or she does not render decisions or recommendations.¹⁰⁴

The ICC also provides for Dispute Boards under the framework of the ICC Dispute Board Centre, which publishes Dispute Board Rules and model clauses for international parties to adopt.¹⁰⁵ However, the ICC does not administer Dispute Board proceedings; it only plays a subsidiary role—it may be called upon to review challenges to Dispute Board decisions.¹⁰⁶ Thus, the ICC knows that parties have adopted ICC Dispute Board Rules and model agreements but has little other data on the use of Dispute Boards in international business. Mathilde Zitaldurand of the ICC confirms that the predominant use of ICC Dispute Boards remains in the field of construction.¹⁰⁷ International businesses in a number of other industries would benefit from the appointment of a Dispute (Resolution) Board and/or an On-Site Neutral at the initiation of an international agreement—to attend meetings, review documents and communications, assist in identification and resolution of problems before and as they arise, and make prompt recommendations in case of dispute.

D. *Early Case Assessment Toolkit*

The Early Case Assessment (ECA) Toolkit, published by CPR in 2010, offers another approach to early intervention and management of disputes.¹⁰⁸ ECA is an internal process of assessment and fact-finding that does not involve all the stakeholders to a dispute. According to the CPR definition the CPR Early Case Assessment model “calls for a team working together in a specified time frame to gather the key facts of the dispute, identify the key business concerns, assess the various risks and costs the dispute poses for the company, and make an informed choice or recommendation on how to handle the dispute.”¹⁰⁹ The emphasis of ECA is not on Early Case Resolution (ECR) per se, but on informed decision making based on the facts at hand.¹¹⁰ ECA allows

¹⁰¹ AM. ARB. ASS'N, *supra* note 68, at 13.

¹⁰² CAL. CIV. PRO. CODE § 1297.432 (West 2007).

¹⁰³ AM. ARB. ASS'N, *supra* note 68, at 13.

¹⁰⁴ *Id.* at 14.

¹⁰⁵ *What Are ICC Dispute Boards?*, *supra* note 71.

¹⁰⁶ *Id.*

¹⁰⁷ Personal Correspondence with Mathilde Zitaldurand, *supra* note 51.

¹⁰⁸ INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, CPR EARLY CASE ASSESSMENT TOOLKIT (2010), available at <http://www.cpradr.org/Portals/0/Home/CPRECAToolkit2010.pdf>.

¹⁰⁹ *Id.* at 1.

¹¹⁰ *Id.*

the assessment team to customize its response to a given dispute and thereby select the most appropriate method of management and resolution.¹¹¹

CPR intends for ECA to be “a flexible tool that may be adjusted” as a case unfolds and as business concerns change.¹¹² CPR identifies numerous benefits to implementing Early Case Assessment:

- Enhanced, early case analysis
- Enhanced, early risk identification and analysis
- Enhanced, early evaluation of potential end-game solutions
- Enhanced ability to gauge business needs and solutions, and improved client relations
- A reduction in legal costs and expenses
- A reduction in settlement and resolution costs
- A reduction in the “claim-through-resolution” cycle time¹¹³

Again using Colatrella’s terminology, ECA contributes to the formation of a “dispute-wise” organization.¹¹⁴ As noted, ECA is an internal process of case analysis and assessment, which allows businesses to make more informed decisions about appropriate handling of disputes. ECA is primarily focused on self and client interest—what are the risks, how do they impact the business and client, what are possible outcomes and resolutions, and what costs are involved.¹¹⁵ ECA “arises from the mandate of in-house legal departments to better and more effectively manage litigation, in terms of outcome and cost, and to do so with a better calculation of the business interests and objectives implicated by that litigation.”¹¹⁶ Given the ECA focus on internal perspectives of the dispute, CPR’s language of “managing litigation,” and the litigation mindset prevalent in many in-house legal departments, the ECA model *alone* does not achieve a paradigm shift from formal dispute resolution to informal dispute prevention. However, if used in tandem with other methods of dispute prevention and intervention, ECA could facilitate an approach to conflict prevention and management that interweaves internal processes of informed and confident decision making with collaborative methods of negotiation, problem solving, and informal third-party intervention.

E. Cross Cultural Communication

Cross-Cultural Communication entails more than learning *what a culture does or how it thinks* or studying models of culture to achieve “cultural competence.”¹¹⁷ Often, cross-cultural communication is reduced to classificatory

¹¹¹ *Id.*

¹¹² *Id.* at 2. A flexible and customized approach is also one of the goals of Partnering/ Partnering Plus and DRBs. See generally AM. ARB. ASS’N, *supra* note 68, at 9-11. Pappas advocates a flexible approach to ADR through use of a convenor and convening session to tailor the ADR procedure to the given dispute. Pappas, *supra* note 59, at 7, 11.

¹¹³ INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION, *supra* note 108, at 2.

¹¹⁴ Colatrella, *supra* note 63.

¹¹⁵ INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION, *supra* note 108, at 2.

¹¹⁶ *Id.*

¹¹⁷ The term “cultural competence” has been applied in the area of medicine and public health, and more recently organizational management, to ensure improved service delivery to diverse communities. While raising cultural awareness, the educational framework of cultural competence, at times, risks simplifying and essentializing culture. See, e.g., *Cul-*

comparisons: high versus low cultures, collectivist versus individualist cultures, concepts of linear or circular time, differing customs of hospitality, cultural preferences for direct or indirect negotiations, and social harmony and saving face in Asian cultures as opposed to a preference for conflict and direct confrontation in the West.¹¹⁸ Of course, some knowledge of local cultural practice and preference is always helpful. However, cultural knowledge is not generally quantifiable; it is an interpretive process in search of meaning,¹¹⁹ attuned to the reality that culture is dynamic and cultural differences affect intercultural communication and understanding.

Cross-cultural communication thus requires thinking about culture and language as a more fundamental part of the international business process at every stage. Culture enters the picture before, during, and after contract negotiations. Culture affects worldviews, expectations, and goals underlying the business relations and negotiations. It frames the emergence, identification, and significance of conflict.¹²⁰ Significantly, it shapes the preference for differing methods and processes of conflict resolution.¹²¹ Differences in language may exacerbate cross-cultural misunderstandings emerging out of interpretations of a contract or its performance. Culture, language, and linguistic and cultural differences should find voice in a flexible dispute resolution system, where the parties, lawyers, and third parties constantly check for shared meaning and establish open channels of communication to clarify misunderstandings. In short, cultural difference should be built into the dispute systems design.¹²²

F. Collaborative Law

Collaborative Law (also known as Collaborative Divorce or Collaborative Practice) is a model drawn from Collaborative Family Law.¹²³ It is commonly used in cases of amicable divorce. Collaborative lawyers agree to work collaboratively to find resolution and keep a dispute out of the court system. The

tural Competence, TRANSCULTURAL NURSING, <http://www.culturediversity.org/cultcomp.htm> (last visited Mar. 1, 2011); Mark A. King et al., *How Is Cultural Competence Integrated in Education?*, CTR. FOR EFFECTIVE COLLABORATION & PRACTICE, http://cecp.air.org/cultural/Q_integrated.htm#def (last visited Mar. 1, 2011); *Toolkit 2: Cultural Competency*, OFFICE FOR INSTITUTIONAL EQUITY, http://www.duke.edu/web/equity/cultural_competency.pdf (last visited Mar. 1, 2011).

¹¹⁸ Geert Hofstede, in particular, has championed the quantitative comparison (indeed scoring) of national cultures based on certain cultural dimensions. The Hofstede model of dimensions of national cultures includes Power Distance, Uncertainty Avoidance, Individualism versus Collectivism, Masculinity versus Femininity, Long- versus Short-Term Orientation, and Indulgence versus Restraint. See also *Dimensions of National Cultures*, GEERT HOFSTEDÉ & GERT JAN HOFSTEDÉ, <http://www.geerthofstede.nl/culture/dimensions-of-national-cultures.aspx> (last visited Mar. 1, 2011). See generally GEERT HOFSTEDÉ ET AL., *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND* (3d ed. 2010).

¹¹⁹ CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5 (1973).

¹²⁰ See, e.g., DAVID W. AUGSBURGER, *CONFLICT MEDIATION ACROSS CULTURES: PATHWAYS AND PATTERNS* 17 (1992).

¹²¹ See *id.* at 21-23.

¹²² For a more in-depth discussion of culture and conflict resolution, see Rebecca Golbert, *An Anthropologist's Approach to Mediation*, 11 *CARDOZO J. CONFLICT RESOL.* 81 (2009).

¹²³ For a brief description of Collaborative Family Law, see *Collaborative Law Offers a No-Court Alternative*, *supra* note 83.

parties and lawyers sign a “participation agreement” before marriage and divorce negotiations proceed.¹²⁴ If the parties do not reach settlement through collaborative means, the collaborative lawyers excuse themselves and transition the parties to trial lawyers in preparation for judicial proceedings.¹²⁵

International lawyers and businesses could also take a collaborative oath and establish a joint agreement to work through contractual problems and resolve international disputes outside the judicial framework. A participation agreement could form part of an international dispute systems design including Partnering, Dispute Resolution Boards, and other informal prevention and intervention methods, that, if taken together, would provide multiple channels of negotiation, problem solving, and third-party intervention before a dispute could ever reach the courts.

VI. CONCLUSIONS

The LA Center for International Conciliation and Arbitration (CICA) remains a work in progress. In its newly crafted mission, it will advocate the need for international businesses to rethink their approach to conducting business and problem-solving inevitable differences with business partners in the current economic downturn—often before such differences grow into *Disputes in need of resolution*.

CICA also aims to become a resource center—alternatively, a think tank or incubator—for sifting through available dispute prevention and resolution models and developing *best practices* to educate international businesses on effective and flexible dispute systems designs. Such designs would be heavily weighted toward informal and collaborative methods of dispute prevention, intervention, and management—including improved cross-cultural communication and negotiation skills, informal third-party roles, and an incremental approach to conflict. Similarly, CICA would further explore and adapt domestic models of dispute prevention and intervention—including Partnering, Dispute Resolution Boards, On-Site Neutrals, ECA, and Collaborative Lawyering—in and to the international context. While focused on *best practices*, CICA fully acknowledges that some disputes may ultimately require more formal methods of dispute resolution.

CICA’s innovative approach to international ADR builds on the common sense truth that international businesses aim to save their underlying agreement and preserve their business relationships *wherever possible*. This is all the more the case in a global economic crisis, where business partners and opportunities grow more limited and the risks of financial and emotional loss in a protracted dispute widen. A flexible design for dispute prevention and resolution can accommodate changes on the ground quickly and creatively, including revision or renegotiation of an international contract when economic conditions have changed the terms of contract performance. Astoundingly, prevailing international ADR approaches remain focused on formal dispute resolution

¹²⁴ *Id.*

¹²⁵ *Id.*

mechanisms that accentuate differences over shared needs and interests and ultimately force parties to take a gamble on the loss of the international relationship and agreement.