

2-1-2007

Honolulu: Geneva of the Pacific?

Robert K. Wrede

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/drlj>



Part of the [Commercial Law Commons](#), [Dispute Resolution and Arbitration Commons](#), [International Law Commons](#), [International Trade Law Commons](#), [Other Law Commons](#), and the [Transnational Law Commons](#)

Recommended Citation

Robert K. Wrede, *Honolulu: Geneva of the Pacific?*, 7 Pepp. Disp. Resol. L.J. Iss. 2 (2007)
Available at: <https://digitalcommons.pepperdine.edu/drlj/vol7/iss2/3>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Honolulu: Geneva of the Pacific?

Robert K. Wrede, J.D., LL.M.

I. INTRODUCTION¹

Simply stated, this paper proposes revitalization of a long dormant Hawaiian legislative plan to create a state-of-the-art facility in the Aloha State specializing in avoiding, managing and resolving international commercial conflicts using methods other than traditional litigation. The paper's premise is that a mid-Pacific facility specializing in the use of non-litigation methods for dealing with Pacific Rim transnational commercial disputes would both enhance Pacific Rim commerce, in general, and posture Hawaii as a major player in that valuable and rapidly growing sector of global affairs.²

THE 1988 HAWAII INTERNATIONAL ARBITRATION, MEDIATION, AND CONCILIATION ACT

In 1988, Hawaii enacted highly progressive legislation intended by its drafters to enhance the Aloha State's stature as a player in Pacific Rim

¹ This paper reflects information gathered, and opinions formed, during almost 40 years of active litigation, mediation and arbitration practice (including a number of pro hac vice admissions and appearances in Hawaii over the past 15 years, involving both court proceedings and major arbitrations); extensive interviews of ADR and litigation practitioners and service providers, clients and academics, in Hawaii, elsewhere in the United States and abroad; LL M. studies at Pepperdine's Straus Institute for Dispute Resolution; two Straus Institute-sponsored study tours of international dispute resolution facilities - one to London and Geneva, the other to Hong Kong, Beijing and Guangzhou; many years of active practice as a neutral -- principally in the area of commercial dispute resolution; and employment as an advocate in several major international arbitrations. The author is currently a neutral panel member for Dispute Prevention & Resolution, Inc. and Hawaii International Dispute Resolution Group, LLC, in Hawaii, and ADR Services, Inc., in Los Angeles, among others. The views expressed in this paper (right, wrong or indifferent) are solely the responsibility of the author.

² See, e.g., JACK J. COE, JR., INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT § 1.2.1 (1997) (examining the acknowledgment of recent explosive expansion of transnational trade and the importance of effective dispute resolution); TIBOR VARÁDY, JOHN J. BARCELÓ III & ARTHUR T. VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE v (3d ed. 2006) (identifying arbitration as "the dominant method of settling international trade disputes").

commerce by creating a Hawaiian Center for International Commercial Dispute Resolution.³ The legislation, now almost two decades old, was the work of a blue-ribbon panel of Hawaiian lawyers, judges, politicians, businessmen, academics, and specialists in the emerging field of “alternative dispute resolution,” the term now generally applied to non-litigation approaches to conflict resolution (“ADR” for short.)⁴

A major objective of this trend-setting legislation was to make Hawaii, particularly Honolulu, the Pacific Rim counterpart of Geneva, Switzerland, as the acknowledged center of alternative dispute resolution in the Pacific, thus giving rise to the sobriquet “Geneva of the Pacific.”⁵

The proponents of the legislation, entitled the Hawaii International Arbitration, Mediation, and Conciliation Act (hereafter the “Hawaii ADR Act” or, simply, the “Act”),⁶ were convinced that the relatively recent explosive growth of transnational trade around the Pacific Rim called for the creation of a state-of-the-art facility in Hawaii dedicated to promoting and facilitating non-litigation methods for dealing with transnational commercial disputes, which they quite justifiably believed would position Hawaii as a more prominent—even pivotal—player in Pacific Rim trade.⁷

The legislative findings and declarations of purpose that introduce the Act make clear that its drafters appreciated not only the economic potential

³ Hawaii International Arbitration, Mediation, and Conciliation Act of 1988, HAW. REV. STAT. §§ 658D-1-9 (2005).

⁴ Jeffrey W. Juliano, *Hawaii's Bid to be an International Alternative Dispute Resolution Forum*, XXII HAW. B.J. 67 (1989); see also, David F. Day & Keith W. Hunter, *International Mediation: The Internationalization of Business Relationships in the Pacific*, HAW. BAR NEWS, Apr. 1992, at 18. David Day is an experienced international ADR practitioner and adjunct professor at the University of Hawaii College of Business Administration and its William S. Richardson School of Law. *Id.* Keith Hunter is a popular mediator in Hawaii and the founder and chief executive officer of Dispute Prevention & Resolution, Inc., the leading provider of ADR services in Hawaii. *Id.*

⁵ HAW. REV. STAT. § 658D-1 through D-9. The phrase “Geneva of the Pacific” appears to have been coined to describe the hoped-for effect of the Act by former Hawaii Supreme Court Chief Justice Herman Lum in a November 1986 speech prepared for a Program on Conflict Resolution at the University of Hawaii at Manoa. Juliano, *supra* note 4, at 68 n.6. Use in this paper of the buzz-word “Geneva of the Pacific” simply adopts the phrase, coined and used by others, to make shorthand reference to the objective of making Honolulu a popular venue for international commercial dispute resolution. Moreover, reference to the “Pacific Rim” is intended to include everything within the geographical extent of the “Pacific Basin,” including the many island jurisdictions which dot the Pacific.

⁶ As contemplated in the legislation, and clearly understood by knowledgeable ADR practitioners, alternatives to litigation include avoiding or minimizing conflict in the first place by appropriate pre-dispute planning, to include drafting competent contract provisions providing for the use of ADR should conflicts arise. Unfortunately, just as prenuptial agreements are seldom considered by blissful couples on the brink of matrimony, businessmen frequently fail to consider the need for effective conflict resolution provisions on the brink of promising commercial relationships, despite the risk of conflict inherent in any business transaction.

⁷ HAW. REV. STAT. § 658D-2 (2005).

[Vol. 7: 2, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

offered by the “rapid expansion” of Pacific Rim trade, but also the “inevitability” of commercial conflict fueled by increased transnational trade and the importance of ADR in dealing with such conflict. Moreover, the Act’s proponents clearly understood the desirability of creating and operating an international center—with a corresponding, supportive legislative scheme – to both encourage and facilitate the use of ADR in the avoidance, management, and resolution of such disputes.⁸

The legislature’s findings in the introduction to the legislation expressed these insights with clarity:

The legislature hereby finds and declares that:

(1) The rapid expansion of international business, trade, and commerce among nations in the Pacific region provides important opportunities for the State of Hawaii to participate in such business, trade, and commerce;

(2) There will inevitably arise, from time to time, disagreements and disputes arising from such business, trade, and commercial relations and transactions that are amenable to resolution by means of international arbitration, mediation, conciliation, and other forms of dispute resolution in lieu of international litigation;

(3) It is the policy of this State to encourage the use of arbitration, mediation, and conciliation to reduce disputes arising out of international business, trade, commercial, and other relationships;

(4) It is declared that the objective of encouraging the development of Hawaii as an international center for the resolution of international business, commercial, trade, and other disputes be supported through the establishment of certain legal authorities as set forth in this chapter.⁹

In pursuit of these legislative objectives, the Act established a statutory regime that is simultaneously supportive of ADR in dealing with international commercial disputes with a minimum risk of judicial intervention, while also providing access to judicial assistance to deal quickly and effectively with serious departures from established ADR norms or parties’ agreements.

⁸ § 658D-2, *supra* note 7. As contemplated in the legislation, and clearly understood by knowledgeable ADR practitioners, alternatives to litigation include avoiding or minimizing conflict in the first place by appropriate pre-dispute planning, to include drafting competent contract provisions providing for the use of ADR should conflicts arise. Unfortunately, just as prenuptial agreements are seldom considered by blissful couples on the brink of matrimony, businessmen frequently fail to consider the need for effective conflict resolution provisions on the brink of promising commercial relationships, despite the risk of conflict inherent in any business transaction.

⁹ *Id.*

The Act also provides for the creation of an independent, nonprofit educational corporation “to facilitate the resolution of international business, trade, commercial, and other disputes . . . by means of arbitration, mediation, conciliation, and other means as an alternative to the resort to litigation.”¹⁰

Unfortunately, as is often the case with cutting-edge concepts, aside from a brief, unsuccessful initial effort to create and operate the contemplated Hawaiian Center for International Commercial Dispute Resolution (“HCICDR”), the project has yet to gain traction.

This paper suggests that the Hawaii ADR Act expressly acknowledges an opportunity whose time has come (indeed has significantly increased in importance along with the growth of Pacific Rim trade) and proposes that bringing to fruition the Act’s legislative objective to create such a facility needs only the combined organizational efforts of business, legal, academic and political interests in Hawaii to make Honolulu truly the “Geneva of the Pacific,” as the venue of choice for the non-litigation resolution of cross-border Pacific Rim commercial conflicts.

The paper will first discuss at some length why ADR has come to provide methods of choice in avoiding, managing and resolving transnational commercial disputes, and will then briefly discuss a number of the obvious advantages Hawaii enjoys as a logical potential site for the trend-setting international commercial dispute resolution facility contemplated by the drafters of the Act.

THE “FLATTENING” OF THE WORLD¹¹

Few would dispute that the recent trend toward lower national trade barriers, the collapse of the Iron Curtain, the decline of Maoism (and the resulting emergence of the Peoples Republic of China as a major global economic

¹⁰ *Id.*

¹¹ THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (Farrar, Straus and Giroux eds. 2005). Thomas L. Friedman coined the buzz-phrase “The World Is Flat” in his best-selling book to describe the global economic impact of the recent convergence of technology and world events that has resulted in the globalization of trade and a concomitant collision of vastly different social, commercial and legal cultures that characterizes the opening of the third millennium. *Id.* at 3-47. Friedman argues, quite persuasively, that the convergence of internet-based communications and data management technology, a significant global trend toward democratization, and enhanced worldwide transportation and distribution capabilities have synergistically interacted to promote the rapid growth of international trade. *Id.* at 48-175. Friedman perceives this as involving the production of goods by each trading nation in which it has a comparative cost advantages, which it then trades for goods produced in nations they are better suited to produce – thus, at least theoretically, stimulating increased global trade, and creating a concomitant rise in global income which, in turn, achieves the ultimate economic goal of everyone getting the best goods at the lowest price, worldwide. *Id.* at 225-36.

[Vol. 7: 2, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

force), and the availability of increasingly rapid, convenient and inexpensive international travel and shipping, coupled with the incredible data collection, storage, access, analysis and communication capabilities now offered by emerging digital technologies and the internet, have combined synergistically to drive astonishing recent growth in global trade, a trend that shows little sign of abating in the foreseeable future.¹²

As Thomas Friedman so persuasively observed in his 2005 best seller, *The World Is Flat, A Brief History of the Twenty-First Century*, global trade has expanded explosively in recent years, largely as a result of the synergistic convergence of significant changes in political and social attitudes with startlingly rapid technological advances mentioned above.¹³

This “convergence” has also brought starkly different and rapidly altering social, philosophical, political and economic systems into increasingly close proximity and interdependence, thus simultaneously creating great economic opportunity and activity, but also correspondingly and significantly elevating the potential for and actuality of international commercial conflict.¹⁴

It is hardly surprising that the recent explosive expansion of increasingly complex cross-border trade (in many cases involving participants with significantly different social, legal and economic views) has spawned a corresponding increase in transnational commercial conflict. This upsurge in conflict, in turn, has created a concomitant demand for cost-effective, predictable, and expeditious methods for avoiding, managing and resolving such conflict.

Unfortunately, traditional national legal systems have often proven disappointingly inadequate to deal with this expanding need, simply because most, if not all, of them are antiquated, unresponsive, expensive, frustrating, time-consuming, unpredictable, and unsatisfactory.

¹² *Id.* at 48-172.

¹³ *Id.* at 173-200.

¹⁴ David F. Day, *ADR Skills and Executive Decision-Making*, HAW. B. J. 5 (Sept. 2005).

A knowledgeable international lawyer and proponent of ADR, Day recently described the challenges attendant to globalization in the following terms:

[I]n the international arena, senior executives, managers, and lawyers with global interests have faced exponential growth in the challenges of cross-border and cross-cultural deal-making and management of global teams, subsidiaries, and partners in the far-flung regions of the world – all in the attempt to enhance the overall organizational competitiveness in an era that Bill Gates described as ‘Business at the Speed of Thought’.

Id.

Our American courts — with their unique reliance on juries and adversarial procedures (a system grounded firmly on feudal notions of trial by combat or ordeal) — are no exception.¹⁵ Justice Alex Kozinski, writing for a unanimous panel of the United States Court of Appeals for the Ninth Circuit, ruling on an appeal from the District of Hawaii, had the following to say about lawsuits: “[t]hey are clumsy, noisy, unwieldy and notoriously inefficient. Fueled by bad feelings, they generate much heat and friction, yet produce little that is of any use. Worst of all, once set in motion, they are well-nigh impossible to bring to a halt.”¹⁶

Suffice it to say that traditional litigation in national courts, whether in this country or abroad, frequently proves to be unacceptably expensive, unpredictable, time-consuming and frustrating to international businessmen, whatever their domicile or the domicile of their trading partners. Moreover, judgments from the courts of one nation are frequently difficult or impossible to enforce in other national courts.¹⁷

¹⁵ In a recent article in the *California Lawyer*, a former federal prosecutor, decrying the recent "precipitous decline" in Federal trials (discussed *infra*), wrote (perhaps somewhat tongue-in-cheek):

[Most lawyers] rationalize not going to trial, even in cases where they should. After all, good lawyers are expected to counsel caution. They are paid to assess risk and advise ways to limit it. No one knows what a jury, or a judge, will do. Trials are expensive, time-consuming, difficult, and unpredictable. Think hard enough about it, and you would have to be crazy to even engage in one. Experience makes all of us less likely to look for fights. Spend time in court and you realize trials are generally a sport for the young and callow, or the old and unwise.

Jonathan Shapiro, *The Right to Fight, America Needs More Trials*, CAL. LAW. 32 (2006). What many Americans -- lawyers and non-lawyers alike -- fail to appreciate is that few other countries share America's common-law traditions (most have civil law, or similar systems) and no other country relies upon juries in civil litigation -- composed of laymen or otherwise -- anywhere near as pervasively as America does.

¹⁶ *Blackburn. v. Goettel-Blanton*, 898 F. 2d 95, 99 (9th Cir. 1990) (involving \$133,000 in billings to recover \$6,654 in damages).

¹⁷ Reasons for the widespread and growing dissatisfaction with traditional litigation among global business interests, and the corresponding move to the use of arbitration and, by inference, mediation as the commercial dispute resolution methods of choice are cogently summarized in the following introductory passages from a recent article by international business consultant Rachel Youngman:

Since the latter part of the 20th century, economic and trade liberalization has significantly altered the way in which business is conducted. Businesses operating across many jurisdictions now do so within a complex legal and regulatory environment. So, not surprisingly, there has been a marked increase in the number of disputes involving more than one jurisdiction. Yet, businesses have shown increasing reluctance to be subject to too expensive and time-consuming litigation, often involving the unfamiliar systems and different procedures of national courts, and with the probability that in most international disputes the same court will not be acceptable to all parties. Thus, businesses and their legal advisers have increasingly sought alternative methods to solve trans-border disputes and, in doing so, a significant proportion is turning to international arbitration.

The advantages that arbitration affords are numerous. The system provides for confidentiality, speed, country neutrality, relative cost-effectiveness and flexibility. Some of these advantages were supported by a survey carried out a couple of years ago by the American Bar

[Vol. 7: 2, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

This growing dissatisfaction with traditional litigation has spawned a corresponding demand for simpler, more affordable and more readily enforceable alternatives for dealing with the conflicts that inevitably accompany commerce, domestic or international.

Transnational Pacific Rim Trade

The problems (and, for that matter, opportunities) attendant to transnational trade, including the pressing need for ways to expeditiously, affordably and predictably resolve the resulting commercial conflicts, are at least as pressing around the Pacific Rim as they are elsewhere in the world.

The Pacific Rim is the most economically dynamic region in the world, rapidly overtaking Western Europe as the principal source of international trade with the United States, and just as rapidly increasing the volume of trade among Asian and Latin American countries. Pacific Rim countries currently account for more than a third of the world's population (about 2.6 billion people), approximately 60% of the world's Gross Domestic Product (\$19.254 billion) and about 47% of global trade.¹⁸ The Peoples Republic of China economy is expected to overtake the United States to become the world's largest economy within the next decade or so.

Furthermore, sociological, legal, political and economic differences among Pacific Rim nations are frequently more pronounced than those between the United States and the nations of Western Europe,¹⁹ which, along with America's Western Hemisphere neighbors Canada and Mexico, have traditionally dominated international trade with the United States.²⁰

In short, the recent explosive expansion of Pacific Rim transnational trade and the significant, deep-seated cultural differences among the nations engaged in that trade have combined to create an increasingly pressing need for dispute resolution mechanisms around the Pacific Rim that offer simplic-

Association, which showed 76% of business lawyers finding arbitration faster than lawsuits and 56% of trial lawyers finding it less expensive.

Rachel Youngman, *Bridge over Cultural Water*, INT'L BAR NEWS 35 (2006).

¹⁸ Tadao Chino, President, Asian Development Bank, Address to 37th Annual Meeting of the Board of Governors, August 2004. http://www.adb.org/Documents/Periodicals/ADB_Review/2004/vol136-4/default.asp (follow "President's Address" hyperlink).

¹⁹ See generally BRUCE E. BARNES, CULTURE, CONFLICT AND MEDIATION IN THE ASIAN PACIFIC (2006) (discussing the cross-cultural problems, opportunities, and conflict resolution systems in selected Pacific Rim jurisdictions).

²⁰ U.S. Census Bureau Foreign Trade Statistics, Top Trading Partners, <http://www.census.gov/foreign-trade/statistics/highlights/top/top0411.html> (last visited Mar. 6, 2007).

ity, affordability, speed, predictability and reflect a special sensitivity to Pacific Rim cross-cultural issues. To satisfy these needs, Pacific Rim business interests are increasingly turning to ADR as the preferred means of dealing with cross-border commercial disputes.²¹

There is good reason for this: ADR in one form or another has generally been perceived as superior to traditional litigation in achieving more expeditious, cost-effective, and “user-friendly” resolution of domestic and international commercial disputes, alike.²² Moreover, ADR satisfies the special sensitivity of Pacific Rim commercial disputes to cross-cultural issues.

WHY IS ADR GAINING COMMERCIAL ACCEPTANCE WORLDWIDE?²³

Although the use of non-judicial means to avoid, manage and resolve commercial disputes (or, for that matter, any civil conflict) is hardly new, the term “alternative dispute resolution” and its acronym “ADR” are of relatively recent American coinage. Its growing popularity in dealing with both commercial and other disputes, both in America and elsewhere around the globe, is generally attributed to “a high degree of frustration with the costs,

²¹ See, e.g., Day & Hunter, *supra* note 4, at 18-22.

²² Dissatisfaction with the American justice system has been expressed throughout the last century, perhaps best characterized by Roscoe Pound's 1906 address “The Causes of Popular Dissatisfaction with the Administration of Justice.” Reiterating Pound's 1906 expressions of dissatisfaction in his 1984 State of the Judiciary Address, Chief Justice Warren Berger, a vigorous ADR advocate, observed:

The entire legal profession: lawyers, judges, law teachers has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers . . . of conflicts. For many claims, trials by adversarial contest must in time go the way of the ancient trials by battle and blood . . . *Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.*

Warren E. Burger, Annual Message on the Administration of Justice at the Midyear Meeting of the American Bar Association 13 (Feb. 12, 1984) (emphasis added). Nor was Dean Pound's 1906 criticism of litigation novel. Indeed, Abraham Lincoln, a trial lawyer of considerable ability and distinction, is reputed to have said, “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time . . .”

²³ See JACQUELINE M. NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL* (2d ed. 2001) (giving a concise synopsis of ADR); Catherine Cronin-Harris, *Symposium on Business Dispute Resolution: ADR and Beyond: Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847 (1996) (discussing the emergence, growth, a current popularity of commercial ADR); see also, John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137 (2000); Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution”*, American Bar Association Symposium on the Vanishing Trial (2004). One South African attorney, writing in the April 1998 edition of the South African Journal *De Rebus* observed: “With particular reference to the English-speaking world; notably in the United States of America, Canada, Australia and the United Kingdom, the practice of ADR has taken such a foothold that it can quite fairly be described as an avalanche if not a juggernaut.”

[Vol. 7: 2, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

the delays and trauma often associated with traditional [government-funded litigation] procedures.”²⁴

To paraphrase United States Supreme Court Chief Justice Warren Berger, a vigorous supporter of ADR: for many engaged in transnational commercial conflict, traditional litigation is simply too costly, too painful, too destructive, and too inefficient to satisfy their dispute resolution needs, around the Pacific Rim and beyond.²⁵

Enter ADR; a process which offers a rich toolbox of techniques crafted to effectively cut through form to reach substance and efficiently deliver affordable conflict resolution. But just what exactly is “ADR?”²⁶

The term “ADR” in current usage is generally viewed as encompassing both adjudicative and non-adjudicative procedures. Adjudicative ADR, generally called “arbitration,” is basically private, simplified, and hopefully, expedited quasi-litigation. The decision-making power is vested in a presumably neutral third-party, who is usually chosen by the parties and whose decision is binding.

In arbitration, or “adjudicative” ADR, resolution comes in the form of a generally binding, appeal-proof judgment rendered by a neutral, or group of neutrals, to whom the disputants have granted the power to decide their dispute.²⁷ Thus, although clearly an alternative to traditional litigation, arbitration differs from the various other forms of ADR in that it most closely re-

²⁴ JAN PAULSON, THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR CLAUSES IN INTERNATIONAL CONTRACTS 107 (2d rev. ed. 1999).

²⁵ Berger, *supra* note 22.

²⁶ Youngman, *supra* note 17, at 35. Most forms of ADR hark back to antiquity, existing in both Eastern and Western cultures. Arbitration’s roots in the Western world can be found in ancient Greece. No less an authority than Aristotle acknowledged, long ago, one among many subtle but important distinctions between litigation and arbitration, noting, “[f]or an arbitrator goes by the equity of the case, a judge by the law, and arbitration was invented with the express purpose of securing full power for equity.”

Arbitration’s equitable underpinnings make it especially attractive to parties seeking to avoid the pitfalls frequently inherent in hyper-technical legal systems, since—according to one international business consultant—“impartiality and fairness make the system of arbitration as important in a modern international business culture as it was in the time of the ancient Greeks.” Youngman, *supra* note 17, at 35.

²⁷ BLACK’S LAW DICTIONARY 112 (8th ed. 2004). Arbitration is “a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.” *Stockwell v. Equitable Fire & Marine Ins. Co.*, 25 P.2d 873, 875-76 (Cal. App. 1933). “Arbitration is ‘the submission for determination of disputed matter to private unofficial persons selected in manner provided by law or agreement.’” *Id.* See also *In re Curtis – Castle Arbitration*, 30 A. 769 (Conn. 1894). (The award or decision granted in an arbitration is substitution for the judgment of a court).

sembles traditional litigation. However, arbitration is conducted in private, and generally in a simpler, cheaper, more expedited fashion.

On the other hand, non-adjudicative ADR includes a variety of processes referred to by frequently ill-defined terms (such as mediation, conciliation, settlement conferences, early neutral evaluation, etc.), all of which are characterized by the retention of the ultimate power to resolve the dispute by the parties; if there is no agreement, then there is no resolution.²⁸

Markham Ball, a Senior Fellow at the International Log Institute, and director of its International Arbitration and Alternative Dispute Resolution programs, recently described the distinction between adjudicative and non-adjudicative ADR processes as follows:

There is a fundamental difference [] between arbitration and other forms of ADR. ADR procedures such as mediation, mini-trials, neutral evaluation or fact-finding and the like are intended to facilitate negotiations between disputing parties. They are designed to settle disputes by bringing the parties into agreement, generally through the intermediation of a neutral Arbitration has a different function. Arbitration resolves disputes when the parties cannot agree. Like litigation, it is a tie-breaker, to be used if, and only if, the parties cannot settle their differences by agreement.²⁹

Thus, in non-adjudicative ADR, disputes are addressed in consensual, informal, confidential proceedings. These proceedings take the form of direct, unassisted discussions between the parties (“negotiation”) or in “facilitated” negotiation (“mediation” or “conciliation”) involving neutral, usually expert outsiders chosen by the disputing parties for their special subject matter or procedural expertise. Theoretically, the neutral’s function is to en-

²⁸ CEDR, The Centre for Effective Dispute Resolution in London, the leading provider of mediation training and services in the UK, defines mediation as follows: “Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.” Center for Effective Dispute Resolution, *Glossary of Terms*, at <http://www.cedrsolve.com/index.php?location=/services/mediation/default.htm> (last visited Apr. 15, 2007). CEDR defines conciliation as:

A process where the neutral takes a relatively activist role, putting forward terms of settlement or an opinion on the case. However, there is no international consistency over which process, mediation or conciliation, is the more activist and mediation is increasingly being adopted as the generic term for third-party facilitation in commercial disputes.

Id. The terms “mediation” and “conciliation” seem essentially interchangeable in modern usage. If there is a real difference, (and not just a semantic distinction) mediation would seem to involve a process in which the neutral simply facilitates communication between or among the parties, while conciliation would involve active evaluation and substantive input by the neutral, to include outcome predictions, the proposal of alternative resolutions, and so forth.

²⁹ Markham Ball, *International Arbitration: The Fundamentals*, INT’L LAW INST. (June 2005), available at http://www.ili.org/images/books/intl_arb_fundamentals.pdf.

[Vol. 7: 2, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

hance communication between the parties and their advisors and minimize inter-party conflict (generally referred to as “facilitative” mediation). In many cases, neutrals may offer their own perspective on the relative merits of the parties’ respective positions, propose creative solutions (“remedies”) that may not be available in formal litigation, and frequently seek to encourage settlement by introducing their own appraisal of the risks of litigating and the benefits of settling the dispute (“evaluative” mediation).³⁰

In either case, ADR is largely controlled by the disputing parties (“party autonomy”). It is intended to bring the dispute to an affordable, expeditious and acceptable resolution, without the risk of lengthy and expensive trial and appellate procedures or, worse yet, the need to retry the entire matter.

THE CASE FOR ADR³¹

What is it that frequently makes ADR more attractive than traditional litigation to those seeking to resolve international commercial disputes?

In the first place, parties from different countries are frequently loath to submit to foreign courts, in unfamiliar proceedings involving strange lawyers, unknown languages, unfamiliar substantive laws and procedures, and real or perceived xenophobic social and judicial bias. Similar concerns often make potential litigants unwilling to submit their disputes to the courts of a third, arguably neutral, jurisdiction, even in the unlikely event that courts in the neutral jurisdiction would allow their use to resolve a truly “foreign” dispute. Simply stated: being forced to unwillingly litigate in a foreign land, under strange, inconvenient and potentially hostile circumstances, most likely with a relative stranger as lead counsel, is perceived by many (perhaps most) potential commercial litigants as highly undesirable.

Second, court proceedings in most jurisdictions are open to public scrutiny. This almost guarantees public disclosure of potentially embarrassing facts or competitively sensitive information, notwithstanding the best efforts of counsel to protect it.

Third, litigation everywhere (the United States included—probably as a prime example) tends to be time-consuming, expensive, and highly unpre-

³⁰ Although well outside the scope of this paper, an active debate over the relative merits of “facilitative” versus “evaluative” mediation styles has engaged ADR academics and practitioners alike for the last decade or so. See generally, Leonard L. Riskin, *Decision-making in Mediation: The New Old Grid and the New Grid System*, 79 NOTRE DAME L. REV. 1 (2003).

³¹ See generally, *id.* (The literature is chock full of lists comparing the costs and benefits of traditional litigation with various forms of ADR); COE, *International Commercial Arbitration*, *supra* note 2, at §1.8.2 (discussing a representative summary of litigation attributes).

dictable. This is not only at the trial level but also on appeal, which almost always tends to prolong, significantly, the agony of litigation, and may even involve being forced to try the case all over again.

Finally, and perhaps most importantly, it is frequently difficult to effectively enforce national court judgments in foreign jurisdictions where an opponent may well have its only attachable assets and may also be the beneficiary of xenophobic judicial bias. This frequently renders both the pursuit and the enforcement of national court judgments expensive, unpredictable, and illusory.

By contrast, arbitration is a confidential, flexible process that allows parties considerable control over how the proceeding will be conducted. It permits the choice of familiar counsel as well as the power to select neutral, expert decision-makers to bring both procedural and substantive expertise to the process. Arbitration allows the power to choose or even create the procedural rules and substantive law to be applied. In addition, the process gives parties the choice of language or languages to be used, the timing of the proceeding, the extent of permissible discovery and motion practice, the physical location and amenities of the arbitral site, confidentiality and limited public access, and a host of other procedural and substantive details, most of which the parties would have no power to control in any national court.

Similarly, mediation, conciliation and various other combinations and permutations of non-adjudicative consensual dispute resolution, in addition to providing the parties with considerable control over conduct of the proceedings, also leave to the parties the ultimate power to settle a matter as, when and how they see fit. While this option also exists in traditional litigation, it is seldom exercised until significant time, effort and money have been expended.

As with arbitration, conciliation/mediation and the various other forms of non-adjudicative ADR rely heavily on the use of neutral and presumably knowledgeable outsiders—usually experts either in the dispute resolution process, the substantive issues involved, or both. Their function is to facilitate communication between the parties; to encourage creative, non-adversarial problem-solving; to encourage the establishment of an atmosphere of mutual respect and understanding; to nurture the creation or rehabilitation of positive relationships between or among the disputants; to direct the efforts of the parties toward satisfaction of the real interests driving the conflict; and to assist in the crafting of creative settlements that traditional courts would be powerless either to fashion or impose.

Moreover, both arbitration awards and negotiated or mediated settlements cast in the form of arbitration awards, with some limited exceptions,

are far more enforceable in foreign jurisdictions than are national court judgments.³²

To summarize, disadvantages of formal litigation for one or both parties to a transnational dispute may include (1) The threat of being hauled unwillingly into a strange and inconvenient foreign court; (2) exposure to unfamiliar foreign procedural and substantive requirements;³³ (3) use of a strange language in a strange setting; (4) the need to retain unknown local litigation counsel (a highly important, but frequently overlooked benefit of ADR is the power of the parties to use lawyers as their lead advocates with whom they are familiar and who are schooled in the details of their client's businesses, rather than essentially unknown local counsel); (5) the very real risk of judicial xenophobia, local favoritism, or both;³⁴ (6) exposure to unpredictable,

³² United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958 (hereafter the "New York Convention"), to which there are currently over 130 signatory countries worldwide. The convention obligates signatory nations to enforce arbitration agreements and to honor and summarily enforce arbitral awards properly rendered in the other signatory nations, enforcement generally unavailable for the judgments of foreign national courts.

³³ See generally, BARNES, *supra* note 19. As with jurisdictions worldwide, Pacific Rim countries exhibit wide diversity in their legal systems, including common-law jurisdictions such as the United States, Hong Kong, Australia and New Zealand, civil law regimes such as the People's Republic of China (German civil code) and the Philippines (Portuguese civil code), as well as unique variations such as the Japanese version of the German civil code. Even among jurisdictions with similar judicial systems, significant procedural and substantive differences exist. *Id.*

³⁴ While xenophobic bias faced by foreign business interests in the Peoples Republic of China does not necessarily reflect judicial attitudes about foreigners elsewhere around the Rim, the following observations about anti-foreigner bias in China warrant consideration:

[T]he Chinese arbitration process remains protective of local interests, does not allow foreign parties to fashion an agreement that balances Chinese and foreign interests, and carries little weight in enforcing awards against a Chinese party. The arbitration process is "stacked against" foreigners due to the lack of choice of forum, lack of an independent arbitral board, and the requirement that the Chinese rules be followed. Enforcement of a Chinese award against a foreign party will likely be successful in foreign courts, but the Chinese courts will most likely refuse to enforce an award in favor of a foreign party. If the Chinese party to an arbitration agreement does not voluntarily participate and comply with an award, the arbitration agreement can be a no-win situation for a foreign party transacting business with a Chinese entity.

Charles K. Harer, *Arbitration Fails to Reduce Foreign Investors' Risk in China*, 8 PAC. RIM. L. & POL'Y J. 393, 394-95 (1999).

The point here is that the PRC judicial regime currently stacks the deck against foreign interests, unlike regimes found in Hawaii or other Pacific Rim jurisdictions which take a neutral, hands-off approach to privately conducted dispute resolution proceedings. Hence, the choice of situs for an ADR proceeding can be extremely important, both in terms of avoiding unwanted judicial intervention and increasing prospects for enforcement. In simple fact, the enforcement of arbitration awards in PRC courts continues to be highly unpredictable, even for PRC claimants.

expensive, and time-consuming judicial review; (7) significant, and frequently insurmountable, enforceability hurdles; and (8) exposure of embarrassing, privileged or confidential matter to public scrutiny.

On the other side of the coin, the advantages of ADR to at least one, and most likely both, of the parties to a transnational commercial dispute would usually include some or all of the following: (1) economy (ADR administered by experienced neutrals and service should be considerably less expensive than litigation, although there is considerable room for debate on this topic); (2) expedition (properly managed ADR is also usually – and should be – more streamlined than conventional litigation); (3) expertise (cross-cultural/subject matter/procedural: Parties get to choose their neutrals or, absent agreement, have them chosen by a neutral third party based not only on their neutrality, but also in consideration of their procedural and substantive expertise, cross-cultural competence, and linguistic abilities, as appropriate); (4) unimpaired right to choose counsel (no duty to employ/use local counsel); (5) neutrality (minimal risk of being home-towned); (6) party participation/control (parties play a major role in selecting neutrals and establishing procedural and substantive rules, such as the permissible scope of discovery, motion practice, the introduction of evidence, arbitrator's/mediator's powers, etc.); (7) minimization of hostile climate (consensually selected language, system, locale, scheduling); (8) facilitate communication/venting/relationship development; (9) confidentiality (protect sensitive or embarrassing facts/trade secrets/financial data); (10) avoidance of harmful or embarrassing precedent; (11) relationship preservation/rehabilitation more likely; (12) flexibility (process, scheduling, situs, discovery, remedies); (13) finality (limited or no appeal/severely limited judicial involvement); (14) international enforceability (the New York Convention renders arbitration awards summarily enforceable in over 130 countries);³⁵ (15) availability of judicial compulsion/legal process as needed throughout the proceeding (court orders available to preserve perishable or “migratory” assets pending decision, compel testimony/ witness attendance/compliance with arbitral orders).

Concededly, ADR cannot be all things to all users and practitioners, and its advantages and disadvantages will vary significantly according to the circumstances of each dispute and the parties' objectives. Moreover, lists of

As to domestic ADR, Shanghai – China's largest city, with over 17 million residents – just announced plans to open alternative dispute resolution centers in every district court by the end of September, following the success of the mediation program established in 2003 in the Changning district court in Shanghai. See *Mediation to Resolve More Cases*, <http://www.ShanghaiDaily.com> (last visited July 28, 2006).

³⁵ See COE, *supra* note 2, at § 1.8.2(5).

[Vol. 7: 2, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

perceived benefits will differ significantly according to the lens through which the processes are being viewed.³⁶

Suffice it to say, however, that the combination of party autonomy “control,” confidentiality, process flexibility, breadth and a variety of available remedies, access to linguistic, cross-cultural, procedural and substantive expertise; the ability to accommodate differing social, legal, and economic systems; and enhanced enforcement capabilities frequently combine synergistically to make ADR the only sensible conflict resolution game in town, especially when Asian cultures are involved, with their strong cultural preference for non-confrontational, private, consensual dispute resolution.³⁷

EMPIRICAL AND CIRCUMSTANTIAL SUPPORT FOR ADR

Nobel laureate Milton Friedman once observed that the best way to test an economic theory is to compare its predictions with reality.³⁸ Does the reality of the marketplace support the theoretical superiority of ADR over traditional litigation?

³⁶ Thomas J. Stipanowich, *Why Businesses Need Mediation*, in BETTER SOLUTIONS FOR BUSINESS: COMMERCIAL MEDIATION IN THE EU (CPR Institute for Dispute Resolution, Inc. ed., 2004), available at <http://www.cpradr.org/EICPR/WhyBusinessesNeedMediationTomS.pdf>. A recent, well-documented chapter from a 2004 publication by the prestigious CPR Institute for Dispute Resolution Inc. (from the perspective of this well-known provider of ADR services) lists the following potential benefits of mediation:

1. Control by the parties over process and product, as contrasted with the risks and uncertainties of litigation or arbitration.
2. Customization of the process for managing and resolving the dispute.
3. Confidentiality.
4. Communications enhanced.
5. Cultural, cross-border bridge.
6. Commercial realities considered.
7. Cost savings, cycle time reduction.
8. Creative, durable solutions.
9. Continuing relationships maintained, enhanced.
10. Cost and risk low as compared to potential benefits.

Id.

³⁷ Juliano, *supra* note 4, at 69 (“Asian societies have a strong preference for non-confrontational, private dispute resolution.”); see also BARNES, *supra* note 19, at v (“Asia is truly the home of consensus as a primary way of viewing the resolution of problems. Pacific Islanders also have a strong cultural affinity to consensus-based processes.”).

³⁸ Edward W. Younkins, *Mises, Friedman and Rand: A Methodological Comparison*, (Jan. 15, 2005), available at <http://www.quebecoislibre.org/05/050115-19.htm> (“Friedman argues that, as in the natural sciences, theories should be accepted provisionally or rejected only on the basis of the degree of correspondence of the predictions of a theory with the factual evidence obtained.”).

One piece of reality which, at least by implication, evidences the trend toward the use of ADR, rather than traditional litigation in resolving serious civil disputes in this country is the precipitous decline of jury verdicts at the very time both the filing of civil lawsuits and the use of ADR are growing by leaps and bounds.³⁹

This trend was acknowledged by the chair of the ABA Litigation Section in the section's Winter 2004 Journal:

[O]ur federal courts actually tried fewer cases in 2002 than they did in 1962, despite a fivefold increase in the number of civil filings and more than a doubling of the criminal filings over the same time frame. . . . In 1962, 11.5 per cent of federal cases were disposed of by trial. By 2002, that figure had plummeted to 1.8 percent.⁴⁰

According to the author of this article (which represents but one in a veritable avalanche of scholarly commentary inspired by Professor Marc Galanter's November 2004 ABA paper on "vanishing trials"), in the twenty-two states for which data is available, civil jury trials currently represent a minuscule 0.6 percent of total civil dispositions.⁴¹

The author goes on to discuss the following possible causes of the precipitous decline in jury trials: identifying the pressure to settle created by the explosion in new civil case filings; an emerging judicial attitude that lawyers have failed to do their jobs properly if they have not achieved settlement; the expense in time, money and emotional capital expended getting to trial; the rise in summary judgments; and—not surprisingly—the trend toward "privatization" of dispute resolution.⁴²

Ironically, as the author readily acknowledges, one of the principal attributes of ADR—confidentiality—makes it difficult to accurately quantify either the growth of its popularity or its cost relative to litigation. Nevertheless, the significant decline in the number of civil cases that actually go to verdict, at least in the United States, and the contemporaneous growth in use of ADR services (evidenced at least in part by the recent proliferation of organizations delivering such services, both here and abroad) provide market-

³⁹ In the past 10 years alone, federal civil trials have fallen by more than half, with less than 2% of all federal civil cases now going to trial. In fact, fewer federal cases now end up being tried than in 1962. The same precipitous decline has occurred in state civil cases. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 3 (2004).

⁴⁰ Patricia Lee Refo, *The Vanishing Trial*, 30 A.B.A. SEC. LITIG. 1, 2 (Winter 2004), available at http://www.abanet.org/litigation/journal/opening_statements/04winter_openingstatement.pdf.

⁴¹ *Id.* In California, which has between the 7th and 9th largest Gross Domestic Product among the nations of the world, only 0.8% of all civil cases currently go to a court or jury verdict. Judicial Council of California, 2005 Statistics Report, available at <http://www.courtinfo.ca.gov/reference/documents/csr2005.pdf>.

⁴² Refo, *supra* note 40.

[Vol. 7: 2, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

place confirmation that ADR has become the conflict resolution option of choice, at least in a commercial setting.

From a totally pragmatic perspective, it is undeniable that a wide range of knowledgeable commercial interests now regularly include ADR provisions in their contracts whether they involve employment, credit cards, the securities industry, consumers, insurance, sales, construction, medical services, or a wide range of other transactions.

While proponents of traditional litigation may argue that ADR is not always as cheap, efficient, or effective as its adherents claim, it is difficult to ignore the undeniably explosive recent growth in the use of ADR in both domestic and international commercial settings.⁴³

Since it seems likely that commercial conflict probably grows in rough proportion to the growth of commercial activity, and commercial activity continues to grow at a vigorous pace both domestically and internationally, it seems sensible to conclude that means other than traditional litigation are being used increasingly to cope with that expanding conflict.⁴⁴

One possibility, of course, is that commercial interests are either simply walking away from conflict or resolving the conflict themselves. That supposition, however, ignores the recent global proliferation of ADR providers and practitioners, its emergence as an independent field of graduate and post-graduate study in such prestigious educational institutions as Harvard, Pepperdine, Willamette and the University of Missouri at Columbia (among others), and the numerous articles that now regularly appear in the popular and professional press extolling the virtues of ADR and its rapidly growing

⁴³ In an April 2004 presentation during a two-day Global Dispute Resolution Research Conference, held at the Hague Peace Palace, the President and General Counsel of the Global Center for Dispute Resolution Research acknowledged the increasingly important role arbitration is playing in trans-border commerce:

A number of common threads run through all these discussions. The most apparent is that international arbitration, with the steady increase in the international commerce, is moving from the margin into the mainstream of cross-border commerce. It is a key strategy for multinational corporations that seek to business in countries whose legal systems have not matured to a manageable level, or simply wish to avoid the burdens of navigating existing legal systems.

J. Warren Wood, III, *From the Margin to the Mainstream*, Presentation to the Global Dispute Resolution Research Conference, at the Hague Peace Palace (April 24, 2004); *but see*, Lou Whiteman, *Arbitration's Fall From Grace*, In House Counsel, Law.Com, July 13, 2006. <http://www.law.com/jsp/ihc/index.jsp> (search "Whiteman" and follow "Arbitration's Fall From Grace" hyperlink).

⁴⁴ *See generally*, The World Trade Organization, International Trade Statistics 2005: World Trade in 2004, Overview, http://www.wto.org/english/res_e/statis_e/its2005_e/its05_overview_e.pdf (last visited Apr. 15, 2007).

popularity in the business sector, and otherwise. Moreover, proliferation of organizations that train users and providers of ADR services also provides persuasive evidence of ADR's growing popularity.

Despite the inherent difficulty of gathering truly accurate data about ADR's growing popularity, there are a number of empirical studies that evidence the increasing popularity of both arbitration and mediation in the business community. For example, surveys of corporate counsel conducted by the CPR Institute in 1997 and 2002 reflected "wide usage of ADR processes by businesses," and concluded that "ADR processes are well established in corporate America, widespread in all industries and for nearly all types of disputes"⁴⁵

Persuasive empirical evidence of the potential savings offered by ADR may be found in a landmark study released in November 2005 by the Federal Mediation and Conciliation Service ("FMCS"), which determined that the use of mediation in labor negotiations and work stoppages in the United States led to \$9 billion in savings to businesses and workers alike between 1999 and 2004, with an average annual saving of \$1.3 billion to labor and management.⁴⁶ Significantly, the savings quantified in the study were limited to those arising from a reduction in the duration of work stoppages or preventing them entirely. (The study did not attempt to quantify avoided costs of diverted management time, legal expenses or other collateral costs of work stoppages caused by the underlying conflict resolution.)⁴⁷

Highlights of the FMCS report include: annual savings of \$80.7 million in retained company profits, \$640.5 million in retained employee wages, and \$781.8 million in retained wages of employees in other companies.⁴⁸ Early mediation showed an 84.4 percent reduction in the length of a work stoppage, resulting in annual savings of \$217.9 million; without FMCS mediation the cost to the economy for work stoppages would have been 71 percent higher, (\$21 billion instead of \$12 billion) and would have impacted 4.2 million workers instead of 2.4 million; work stoppages would have been 61 percent higher without FMCS mediation; mediation avoided an estimated 1,265

⁴⁵ Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution" and Conflict Management Systems*, 1 J. EMPIRICAL LEGAL STUD. 843 (2004). Thomas Stipanowich, currently Academic Director of Pepperdine University School of Law's Straus Institute for Dispute Resolution (then the President and CEO of the CPR Institute for Dispute Resolution), prepared for the Symposium on The Vanishing Trial, sponsored by the Litigation Section of the American Bar Association, San Francisco, December 2003.

⁴⁶ EMPLOYMENT POLICY FOUNDATION, *IMPACT MEASURES OF FEDERAL MEDIATION AND CONCILIATION SERVICE ACTIVITIES 1999-2004* at 7 (2005), available at http://fmcs.gov/assets/files/Public%20Affairs/2005%20Documents/FMCS_Activities_MainFinal_color.pdf.

⁴⁷ *Id.*

⁴⁸ *Id.* at 7.

[Vol. 7: 2, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

work stoppages over the six-year period resulting in savings of \$1.3 billion annually to business, workers and ancillary companies; and, a mediator's involvement prior to a contract's expiration reduced work stoppages by 84 percent.⁴⁹

Anecdotal, but clearly informed, acknowledgments of the increasing popularity of ADR in an international commercial context also evidence its perceived superiority over traditional litigation. For example, one-third of a blue-ribbon panel of businessmen, lawyers and politicians in attendance at a groundbreaking international meeting of top-ranking European corporate and legal leaders convened by the CPR Institute for Dispute Resolution at The Hague Peace Palace, forecast that "widely practiced commercial mediation would have a substantial positive impact on stimulating international commerce and European economic growth."⁵⁰ This event was attended and headlined by some of the top luminaries in the European legal world, representatives of major multinational corporations and most of the 50 largest law firms in the world. Significantly, ninety percent of the attendees expected the future impact to be beneficial, and also viewed the increased use of mediation in dealing with corporate conflicts (rather than litigation) as "phenomenal."⁵¹

Similarly, comments made in early 2005 by top European officials and representatives of the American Bar Association's Section of International Law expressly acknowledged the growing preference of commercial interests for ADR over traditional litigation. This preference is also reflected in a series of surveys conducted by or involving PricewaterhouseCoopers ("PWC") to assess the popularity and growth potential of ADR in dealing with commercial disputes.

A 1998 report on research by a joint team from PWC, Cornell University, and the Foundation for the Prevention and Early Resolution of Conflict

⁴⁹ Although the subject matter of the FMCS study involved only the use of mediation in the field of industrial relations, it seems reasonable to assume that this experience, coming as it does from the field of labor/management relations – which was the first sector of commerce to espouse ADR – correlates more or less with other commercial activity, including global trade, so long as parties have the foresight to intelligently use mediation to avert or diminish the adverse economic impact of commercial conflict or, if that fails, to use arbitration to resolve such conflicts without resorting to traditional litigation.

⁵⁰ Wood, J. Warren, III, *From the Margin to the Mainstream*, Presentation to the Global Dispute Resolution Research Conference, at The Hague Peace Palace (Apr. 24, 2004); see also Press Release, CPR Institute for Dispute Resolution, Top European Leaders Anticipate Increased Use of Commercial Mediation Will Stimulate International Commerce/European Economic Growth, (Nov. 22, 2004), <http://www.cpradr.org/pressroom/press10.pdf> (last visited Apr. 15, 2007).

⁵¹ Press Release, *supra* note 50.

(PERC), entitled *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by US Corporations*, summarizing a survey of ADR use among 1000 of the largest US corporations reported that 87% of American corporations had used mediation and 80% had used arbitration to resolve commercial disputes in the preceding three years.⁵² Over 84% reported that they were likely to use mediation in the future, while 71% said the same about arbitration.⁵³ The primary participants in the survey were general counsel and chief litigators for the surveyed companies.⁵⁴

In May of 2006, PricewaterhouseCoopers released a follow up report (entitled *International Arbitration: Corporate Attitudes and Practices 2006*) which summarizes interviews of general counsel, heads of legal departments and other counsel to top-tier international corporations with significant involvement in cross-border transactions, gathered in an attempt to further assess emerging attitudes toward the use of arbitration to resolve transnational commercial dispute rather than traditional litigation.

The conclusions of the PWC study, which was conducted by Loukas Mistelis, Professor of Transnational Commercial Law at the Centre for Commercial Law Studies at the University of London, are quite striking:

- A significant majority of corporations engaged in cross-border trade prefer international arbitration to resolve their disputes.
- The advantages of international arbitration are perceived to “clearly outweigh” the disadvantages.
- A clear corporate dispute resolution policy provides an important strategic advantage when negotiating dispute resolution clauses for cross-border contracts.
- Well-crafted international arbitration clauses give corporations a tactical advantage in the event a dispute arises.
- Over three quarters of the surveyed corporations opt for institutional, as opposed to ad hoc, arbitration. (Top ranking ADR providers cited by the responding lawyers were the International Chamber of Commerce, the London Court of International Arbitration, and the American Arbitration Association/International Centre for Dispute Resolution.)
- As directly pertinent here, there is widespread support for regional arbitration institutions. A sizable number of respondents supported the development of strong regional arbitration institutions.

⁵² See David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR By U.S. Corporations* 11 (1998), available at <http://digitalcommons.ilr.cornell.edu/icrpubs/4>.

⁵³ *Id.* at 31.

⁵⁴ *Id.* at 7.

[Vol. 7: 2, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

- The tactical significance of the seat of arbitration is not fully appreciated.
- Corporations overwhelmingly favor the finality of arbitration awards. 91% of respondents rejected using an appeals mechanism in international arbitration.
- Corporations seek arbitrators with established reputations in the international arbitration community. Industry expertise and regional experience are increasingly desirable attributes for international arbitrators.
- Corporations seek specialists in international arbitration rather than their usual external litigation counsel.
- International arbitration is considered as expensive as transnational litigation for medium and small cases. In larger, more complex cases, international arbitration may represent better value.
- There is a demand for education concerning the tools and tactics of international arbitration.

The outlook for international arbitration is extremely positive. Ninety-five percent of the participating corporations expect both to continue using international arbitration and that there will be an increase in arbitrated cases.⁵⁵

ADR: THE COMMERCIAL DISPUTE RESOLUTION METHODS OF CHOICE

In short, it seems clear beyond honest debate that commercial interests worldwide have come to recognize that, in many cases, some form of ADR, not traditional litigation, provides the most satisfactory approach to commercial dispute resolution currently available.⁵⁶

Focusing specifically on the Pacific Rim, in addition to other attractive aspects of ADR, Asian societies (which obviously constitute a preponderance of our Pacific Rim trading partners) harbor a strong preference for non-confrontational, confidential, collaborative methods for managing conflict—

⁵⁵ Loukas Mistelis, PricewaterhouseCoopers, *International arbitration: Corporate attitudes and practices*, 15 AM. REV. INT'L ARB. 525, (forthcoming 2007-08) currently available at <http://www.pwc.com/arbitrationstudy>.

⁵⁶ While some commentators continue to dispute the growing tide of adherents who claim that ADR is generally superior to traditional litigation, the literature abounds in discussions of why ADR's use and popularity are expanding so explosively. See, e.g., Catherine Cronin-Harris, *Symposium on Business Dispute Resolution: ADR and Beyond: Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847. See also CPR Institute for Dispute Resolution, Inc., *Why Businesses Need Mediation: Better Solutions for Business: Commercial Mediation in the EU*.

precisely what ADR provides. As the knowledgeable authors of the previously cited Hawaii Bar News article on international mediation wrote:

The Pacific business community . . . prefers a different philosophy of dispute resolution than the combative nature of a 'trial.' In the vast majority of Asian societies, the philosophical attitude towards dispute resolution is one of conciliation, and not trial by combat. Consistent with cultural mores, 'disputants' in most Asian countries tend to use dispute resolution mechanisms that 'save face' and maintain or even improve ongoing business relationships.⁵⁷

This strong cultural preference for conciliatory problem-solving, combined with the skepticism, if not outright horror, with which many non-Americans view American litigation—relying, as it does, on the judgment of individuals with little or no knowledge of either the procedural or substantive issues involved in the dispute, and which many foreigners view as frequently resulting in outrageously inflated compensatory and punitive damage awards—make ADR especially attractive to many, if not all, of our nation's Pacific Rim trading partners.⁵⁸

WHY HAWAII?⁵⁹

Given the existence of experienced and already well-established ADR providers around the Rim, and elsewhere around the world for that matter,⁶⁰

⁵⁷ Day & Hunter, *supra* note 4, at 21; *see also* BARNES, *supra* note 19 (an extensive discussion of the importance of "face" in selected Pacific Rim Asian cultures).

⁵⁸ The authors of the article cited immediately above describe Pacific Rim attitudes about American courts as follows: "The common view of the US courts by non-Americans in the region is that they are cumbersome, often bogged down with the morass of paperwork, arcane rules of discovery, and the seemingly never-ending motions practice." Day & Hunter, *supra* note 4, at 20.

⁵⁹ For a highly informative discussion of Hawaii's unique cross-cultural conflict resolution attitudes and resources, *see* BARNES, *supra* note 19, at ch. 12.

⁶⁰ Major ADR providers currently serving the Pacific Rim include: the International Chamber of Commerce International Court of Arbitration (Est. 1923, Paris); the China International Economic and Trade Arbitration Commission (CEITAC, Est. 1956); the Hong Kong Arbitration Centre (HKIAC, Est. 1985); the Singapore International Arbitration Centre (SIAC, Est. 1991. In February 2006 SIAC announced a joint venture with the American Arbitration Association's 10 year old international division, the International Centre for Dispute Resolution, to form ICDR-Singapore); the Australian Centre for International Commercial Arbitration (ACICA, Est. 1985); the British Columbia International Commercial Arbitration Center (BCICAC, Est. 1986); the Japan Commercial Arbitration Association (JCAA, Est. 1950 based on German Code of 1890); the Korean Commercial Arbitration Board (KCAB, Est. 1966); JAMS (Est. 1979. In 2005, JAMS announced a joint venture with London's well-known Centre for Effective Dispute Resolution (CEDR) to add international scope to JAMS' already a highly profitable California ADR business); the Taiwan Commercial Arbitration Association (TCAA, Est. 1998); the Kuala Lumpur Regional Centre of Arbitration (Malaysia, KLRCA, Est. 1978); the Vietnam International Arbitration Centre (VIAC, Est. 1993); the Badan Arbitrasi Nasional Indonesia (BANI, Est. 1977); the Indian Council of Arbitration (ICA, Est. 1965); the British Columbia International Commercial Arbitration Centre (Est. 1986); the American Arbi-

[Vol. 7: 2, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

why is it reasonable to suggest that - given appropriate support from the governmental, academic, professional commercial, and academic sectors in Hawaii—Honolulu could and should become “the Geneva of the Pacific” for the resolution of cross-border commercial disputes?

Most of Hawaii’s physical and geographical attributes are obvious. Many are internationally renowned: First among them (in the shopworn real estate mantra) is “location, location, location.” Hawaii is centrally located in the Pacific: 2400 miles from California; 3900 miles from Japan, and 5300 miles from the Philippines.⁶¹ Moreover, the state is well served by frequent flights by major international airlines from airports all around the Rim.

Second, Hawaii is globally recognized for its spectacular natural beauty, year-round sunny climate, limitless recreational facilities, and its benign “aloha spirit.”

Third, Hawaii’s cultural diversity is unique. Over a third of its residents are of mixed race and ethnic background, with no ethnic group making up a majority of the state’s population.⁶² This demographic and cultural diversity provides considerable promise of a historically based cross-cultural sensitivity, as well as ready access to a broad range of linguistic resources. Moreover, the Hawaiian preference for conciliation rather than confrontation mirror those prevalent in Asian cultures.

Hawaii also provides ADR-friendly, cutting-edge legislative and judicial regimes that both encourage the use of arbitration and mediation by maxi-

tration Association’s international division, the International Centre for Dispute Resolution (ICDR, Est. 2001); Dispute Prevention & Resolution, Inc. (DPR, Est. 1995); Hawaiian International Commercial Dispute Resolution Group, LLP. (Honolulu, Est. 2005). Well established European centers, such as the London Court of International Arbitration, the Chartered Institute of Arbitrators International Arbitration Centre and the Stockholm Chamber of Commerce (among others), also regularly deal with Pacific Rim commercial disputes but obviously are less readily accessible to Pacific Rim residents than facilities located around the Rim.

Some of the named facilities provide logistical and administrative support; all provide lists of competent neutrals; most offer compliance with international (UNCITRAL) arbitration practices, and some promise minimum judicial intervention and maximum party autonomy, although this latter promise may, in some cases, be somewhat illusory. Moreover, a number of the organizations also provide physical amenities, some of which are quite elegant. *See, e.g.*, Jack J. Coe, Jr. *Taking Stock of NAFTA Chapter 11 in Its 10th Year: An Interim Sketch of Selected Themes, Issues and Methods*, 36 VAND. J. TRANSNAT’L L. 1313, 1392 (2003) (§ 3 Interactions with Domestic Arbitral Regimes).

⁶¹ Aloha State Almanac, available at <http://www.aloha-hawaii.com/almanac>.

⁶² *Id.*; see also BARNES, *supra* note 19, at 28-29. (“Hawaii is America’s most culturally Asian state, with over a 2/3 majority of its population having the Asian ethnicity.”). Moreover, he writes, “Hawaii has a quarter-century of being among the US leaders in institutionalizing ADR in the adoption of mediation in more than a dozen types of conflicts.” *Id.*

mizing judicial support for such processes, while posing a minimum risk of judicial second-guessing or interpretive intermeddling.⁶³

Not surprisingly, Hawaii regularly has been “ahead of the curve” in the adoption and implementation of ADR-friendly legislation. The Hawaii ADR Act, for example, was the fourth—and some would argue most progressive—piece of state legislation dealing with international dispute resolution. The Act was also the first state legislation to provide for the creation of a facility especially designed to promote and facilitate the use of ADR. Furthermore, Hawaii was the third state to adopt the new Revised Uniform Arbitration Act—once again playing a leadership role in adapting existing legislation to the evolving dispute resolution landscape caused by increasing dissatisfaction with traditional litigation and the rapid technological advancement and the emergence of the global marketplace.⁶⁴

Unfortunately, the proposed Center for International Commercial Dispute Resolution never really gained traction, for reasons which may well have included the withdrawal from Hawaii of the American Arbitration Association, which had been engaged to administer the Act through an operating agreement.

Whatever the reason for Hawaii’s unrealized dream of creating such a facility (the wisdom of which has only increased since its 1988 origin), it seems obvious that the time to bring this concept to fruition is now!

CONCLUSION

In his excellent 1988 Hawaii Bar Journal article analyzing the Hawaii International Arbitration, Mediation, and Conciliation Act, cited at the outset of this paper, Jeffre Juliano expressly acknowledged Hawaii’s potential to become the “Geneva of the Pacific”:

With the coming of the Pacific Century, Hawaii is making a move to position itself at the forefront of modern international alternative dispute resolution sites. With all of its beauty, ethnic diversity, growing international economy, and modern technological support services, Hawaii

⁶³ *Douglass v. Pfleuger Haw., Inc.* 135 P.3d 129, 139-41 (Haw. 2006) (citing *Lee v. Hefel*, 911 P.2d 721, 722 (Haw. 1996)). As the Hawaii Supreme Court has reiterated with some regularity, “We emphasize the importance of utilizing alternative methods of dispute resolution in an effort to reduce the growing number of cases that crowd our courts each year.” *Id.* As to arbitration, the Hawaii Supreme Court “has long recognized the strong public policy supporting the Hawaii’s arbitration statutes . . . to encourage arbitration as a means of settling differences and thereby avoiding litigation.” *Bateman Constr., Inc. v. Haitsuka Bros., Ltd.* 889 P.2d 58, 61 (Haw. 1995).

⁶⁴ American Arbitration Association, *RUAA and UMA Legislation from Coast to Coast* (Aug. 31, 2005), <http://www.adr.org/sp.asp?id=26600> (last visited Apr. 15, 2007). Hawaii also has a trend-setting mediation program administered by the Mediation Center of the Pacific, which was established in 1976.

[Vol. 7: 2, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

should prove to be the geographical preference for Pacific rim parties involved in international alternative dispute resolution.⁶⁵

Juliano was right. Hawaii undeniably offered in 1988, as it does now, an easily reached, centralized location; a sophisticated international commercial economy; broad cultural and ethnic diversity; an ADR-friendly demographic, legislative and judicial environment; the ready availability of or access to exceptional professional resources and technical support; and an exceptionally hospitable social and physical environment - all of which (if properly housed, logistically supported, and aggressively marketed) should be more than sufficient to create a significant, well-warranted preference for Hawaii as the venue of choice for the competent, cost-effective resolution of Pacific Rim commercial disputes.

But Juliano also recognized that something more than convenience, cross-cultural resources, enabling legislation and a benign environment was (and remains) necessary to accomplish the legislative purposes of the Act.

Before Hawaii's vast potential can be realized, the current move to become a leader in international alternative dispute resolution should be strengthened. A greater knowledge of the HIAMCA and the Center among the international business and legal communities would facilitate Hawaii's introduction as a future leader in international alternative dispute resolution.⁶⁶

Despite the considerable thought and effort already invested by so many in pursuit of the Act's objectives—that “strengthening” in the effort to make Hawaii a leader in international commercial dispute resolution has not occurred, and the “vast potential” acknowledged by Juliano and the Act's authors has not been realized.

Yet the “vast potential” persists and, indeed, seems clearly to have increased significantly, just as the global demand for international commercial ADR has expanded so significantly in recent years.

It now remains for appropriate interested parties in Hawaii to breathe life into the currently moribund pursuit of the legislative objective of creating, supporting, marketing and effectively operating the posited, but as yet unrealized, Hawaii Center for International Commercial Dispute Resolution, in the hope of making Hawaii the leader in international alternative commercial dispute resolution in the Pacific.

Admittedly, the task of achieving that objective is daunting. Numerous well-equipped and competent ADR facilities already exist, both around and

⁶⁵ Juliano, *supra* note 4, at 73.

⁶⁶ *Id.*

outside the Pacific Rim. Moreover, several earlier efforts to capitalize on the emerging Pacific Rim ADR market have failed or are only marginally successful.⁶⁷

Nevertheless, it does not seem unrealistic to believe that Hawaii's unique physical, cultural, legislative and professional resources, combined with a well conceived, marketed and operated Center for International Commercial Dispute Resolution, as contemplated in the 1988 Act, would successfully attract, retain and profitably serve a wide spectrum of Pacific Rim business interests as their venue of choice for learning about and using ADR to avoid, manage and resolve cross-border commercial differences.

⁶⁷ These and other "barriers to entry" for such an effort were considered in some detail by a discussion group composed of academics, practicing lawyers and neutrals, including several participants in the drafting of the Act, convened by the Hawaii IDR Group LLC to coincide with the August 2006 American Bar Association convention in Honolulu. The group generally acknowledged the desirability of pursuing the project, while nevertheless recognizing the need for careful, detailed planning for the effort, including preparation of a comprehensive business plan, before moving forward.