International Mediation: An Evolving Market

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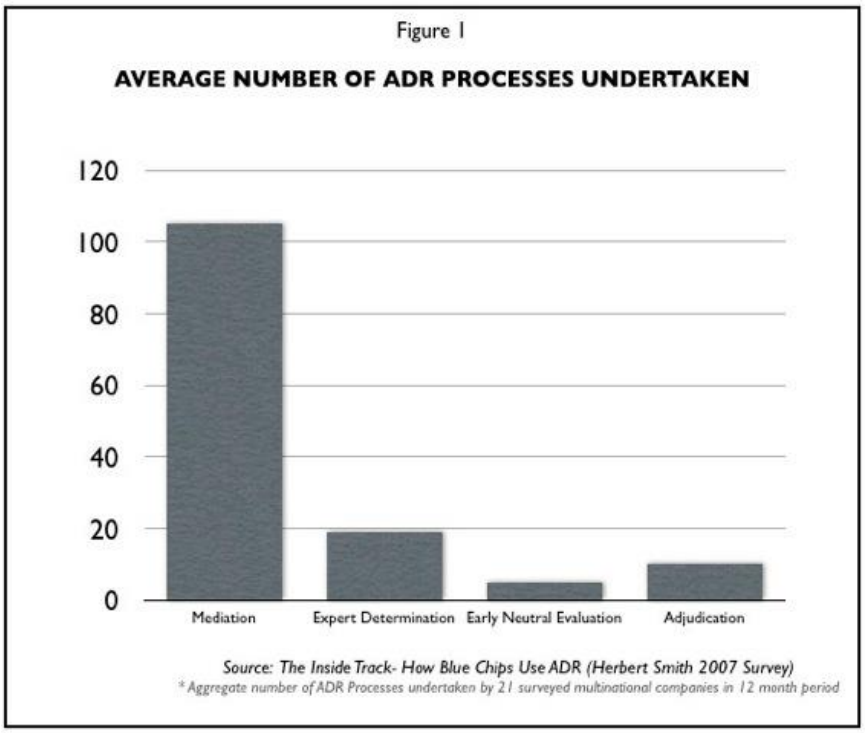
Introduction

Advocates of mediation claim that mediation is a more cost-effective and time-efficient process than arbitration to resolve international disputes. Since one would assume that companies will choose the fastest and cheapest way to resolve their disputes, it should therefore follow that the number of mediations should grow more than the number of arbitration cases in resolving international commercial disputes. This article tests that statement, attempts to confirm whether international mediation is useful to corporations, inquires on whether it is growing as the international resolution method of choice, and considers the reasons behind that growth.

Mediation has become the alternative dispute resolution (ADR) method of choice in the business community.[1] It is overwhelmingly chosen over other ADR methods across different jurisdictions as shown in the following graph.[2]

Figure 1



[1] The term "ADR" is used in this article for dispute resolution methods other than litigation and arbitration.

[2] HERBERT SMITH LLP, THE INSIDE TRACK: HOW BLUE-CHIPS ARE USING ADR, 6 (London UK, November 2007). This research is based on interviews with in-house lawyers at 21 leading multinational companies conducted by the Herbert Smith law firm in 2007.

Mediation has spread in the United States with the introduction of court-mandated mediation, there has been a sea-change in England on how ADR is used since the introduction of the Civil Procedure Rules in 1999[3] and there have been similar experiences in other common law jurisdictions such as Canada, Australia and New Zealand. Mediation organizations such as the International Institute for Conflict Prevention & Resolution (CPR) in the United States and the Centre for Effective Dispute Resolution (CEDR) in the United Kingdom[4] provide data indicating strong growth in mediation over the last decade in their domestic marketplaces. This article examines whether mediation has grown and overtaken arbitration as the dispute resolution method of choice in the international marketplace.

Time & Cost Advantages

There is no standard approach on what mediators charge in domestic or international mediation. Common methods are by the hour, by the day, or a fixed-fee that includes preparatory work. Parties usually split the cost of the mediator and facilities used to hold the mediation.[5]

An indication of international mediator costs is found in a 2008 survey by the Mediator Magazine[6] of the thirty top UK mediators that found costs for a high value, complex one-day mediation ranged from £3,500 to £8,000 (US$ 5,000 to US$ 12,000). Mediator rates can vary significantly from one mediator and jurisdiction to another.[7] The daily rates of top mediators are comparable to the rates charged by top arbitrators. The difference is the amount of time needed to get a successful resolution, which is a lot less for mediation. The average hearing time for mediation of even the most complex international commercial dispute is normally one or two days.[8]

The following well-known international arbitration institutions provide mediation that they administer as part of their dispute resolution services:

1) The International Chamber of Commerce (ICC) includes the ICC International Court of Arbitration (ICC Court) and ICC Dispute Resolution Services (ICC DRS). The ICC Court deals with arbitration cases filed pursuant to the ICC Rules of Arbitration and the ICC DRS deals with mediation cases filed pursuant to the ICC ADR (Amicable Dispute Resolution) Rules.

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[3] *See id.* at 4.
[4] *See* Figure 9 below.
[5] MICHAEL MCILWRATH & JOHN SAVAGE, INTERNATIONAL ARBITRATION AND MEDIATION: A PRACTICAL GUIDE ¶ 4-071 (Kluwer 2010).
[6] *The Price is Wrong*, The Mediator Magazine, (2008) *at* http://www.themediatormagazine.co.uk/features/10-survey/32-wrong
[7] MCILWRATH & SAVAGE, *supra* note 6, at ¶ 4-071.
[8] Correspondence with International Centre for Dispute Resolution and the International Chamber of Commerce (May 2010) (on file with author).

2) The International Centre for Dispute Resolution (ICDR), which is the international division of the American Arbitration Association. The ICDR administers both arbitrations and mediations.
3) The London Court of International Arbitration (LCIA), which primarily deals with international commercial arbitrations with some (mostly domestic) mediations.

The costs in ICC ADR proceedings are fixed regardless of the amount in dispute. The ICC sets the hourly rate of the mediator at the outset of the proceedings after consulting the mediator and the parties. The ICC ADR Rules require a non-refundable US$ 1,500 registration fee and cap the maximum amount for ICC's administrative expenses at US$ 10,000.[9] The ICDR does not charge a fee to initiate mediation. The cost of mediation is based on the hourly or daily mediation rate published on the mediator's ICDR profile. This rate covers both mediator compensation and an allocated portion for the ICDR's services. If the parties cancel the mediation, the ICDR charges a US$200 penalty fee plus any mediator time and charges incurred.[10] The LCIA charges a registration fee of £500 and an hourly charge of £100 to £200 plus expenses for administering the mediation. Mediators' fees are capped at £400 per hour.[11]

To get a sense of the advantages and disadvantages of mediation versus arbitration in international disputes, a high level comparison of the costs and time frames for the same dispute using either mediation or arbitration is provided below. Advocates of mediation often state that the cost and time advantages of mediation are self-evident. This case study looks at the numbers a bit more closely. After consulting a number of experienced in-house counsel and institutions, the table in Figure 2 below was prepared. These figures are not meant to be exact since actual costs and time frames will vary significantly between cases and will depend on how parties manage their particular case. The numbers simply attempt to show the scale of the differences in cost and time frames that parties will likely experience using either mediation or arbitration in resolving the same international dispute.

The case study uses a US$ 25 Million commercial dispute between an American company and a European company. The American company is the claimant with a New York law firm as its external counsel. The respondent European company uses a Paris based international law firm. The contract is in English and is governed by English law. The dispute resolution clause provides for an ICC administered arbitration with three arbitrators. The venue is London, UK. There are no stated parameters on procedural matters, including document production, rules of evidence, witnesses, etc. There is no mandatory mediation clause.

[9] ICC, *ADR Rules*, Appendix – Schedule of ADR Costs (in force as of 1 July 2001).
[10] ICDR, *International Mediation Rules*, M-17 (Amended & Effective September 1, 2007).
[11] LCIA, *Mediation Procedure*, Schedule of Mediation Fees & Expenses (effective 1 June 2003)

The parties now have a choice. Should they resolve their dispute using either arbitration or mediation? Mediation is strictly voluntary. They are not obligated to do so under their agreement. If they decide to mediate, they would do so in London similar to what their arbitration clause provides. They estimate that two days of mediation are needed to get the job done. Given the amount in dispute, they are prepared to pay the rate for a two day hearing and preparation time of a top-rated London based mediator.[12] Attending at the mediation for each party will be one internal counsel, one external counsel, one business manager and one operational person.

If the parties decide to arbitrate, the claimant's legal counsel wants to use a US litigation style approach with extensive discovery requests. The respondent's legal counsel wants to use a civil law approach for the arbitration. The parties compromise on procedural rules and document production requests somewhere between the Anglo common law and the European civil law approach. The resulting estimated costs are middle of the road estimates for an arbitration of this size and complexity. The numbers provided would be considered high if the arbitration was done with a strictly civil law approach; whereas, the use of full blown discovery and US litigation style would significantly increase the estimated numbers. The hearing is set for one week, thus limiting some of the arbitration costs.

Cost estimates are the total costs for both parties. Individual party costs would simply be half of what is quoted. The average times cited at the bottom of the table are meant to provide a sense of the time range parties can expect to resolve an international dispute of this size using either mediation or arbitration. They are not the time frames agreed upon by the parties in this particular dispute, which are stated in the assumptions column and which are the time frames used to make the cost estimates.

Figure 2

Arbitration vs. Mediation Comparison
US$ 25 Million Dispute – ICC Administration

Assumptions	Arbitration	Mediation
Facilitators	3 Arbitrators	1 Mediator
Internal Counsel per Party	1	1
External Counsel per Party	3 (1 Partner + 2 Assoc.)	1 Partner
Witnesses for both Parties	10 (6 fact + 4 expert)	0
Document Production	Moderate	None
Venue	London, UK	London, UK
Hearing Time	1 week	2 days

[12] *The Price is Wrong*, *supra* note 6.

Cost Items	Arbitration	Mediation
Institution	72,500	8,000
Arbitrators/Mediator	408,500	25,000
Internal Counsel	100,000	10,000
External Counsel	2,000,000	50,000
Facilities	5,000	2,000
Document Production	50,000	0
Witnesses	100,000	0
Travel	100,000	25,000
Total Costs	**US$ 2,836,000**	**US$ 120,000**
Average Time	**Arbitration**	**Mediation**
Hearing	1-3 weeks	1-2 days
Preparation	12-18 months	3-5 days
Overall Resolution Time	18-24 months	2-3 months

The resulting numbers are quite stark. The cost of the mediation would be less than 5% of what the arbitration would cost and the time frame for a mediated resolution would be between 10% and 15% of an arbitration. Companies that regularly use and actively promote mediation recognize this benefit; i.e., they experience greater savings in legal costs and less management time spent on dispute resolution through mediation.[13]

Success Rates

There is no comprehensive research on success rates of mediation in international disputes. There have been surveys in developed markets such as the UK and USA. The CEDR has surveyed mediators in its four audits of the UK marketplace where those mediators are presently handling annual volumes of 6,000+ cases. Its most recent survey[14] found that 75% of cases settled on the day of mediation with 14% settling shortly thereafter for an aggregate settlement rate of 89%.

The ICDR reports that their success rate appears to be comparable to US and UK domestic rates, roughly 70% settlement at the time of the session and an aggregate amount of 85% within a few weeks of the session. The success rate of ICC mediation cases is around 80% if the file is transferred to the mediator. Some ICC cases are terminated before the transfer of the file, either upon request of one of the parties or due to the non-participation of one party. The LCIA's number of mediation cases is too small to be statistically significant.[15]

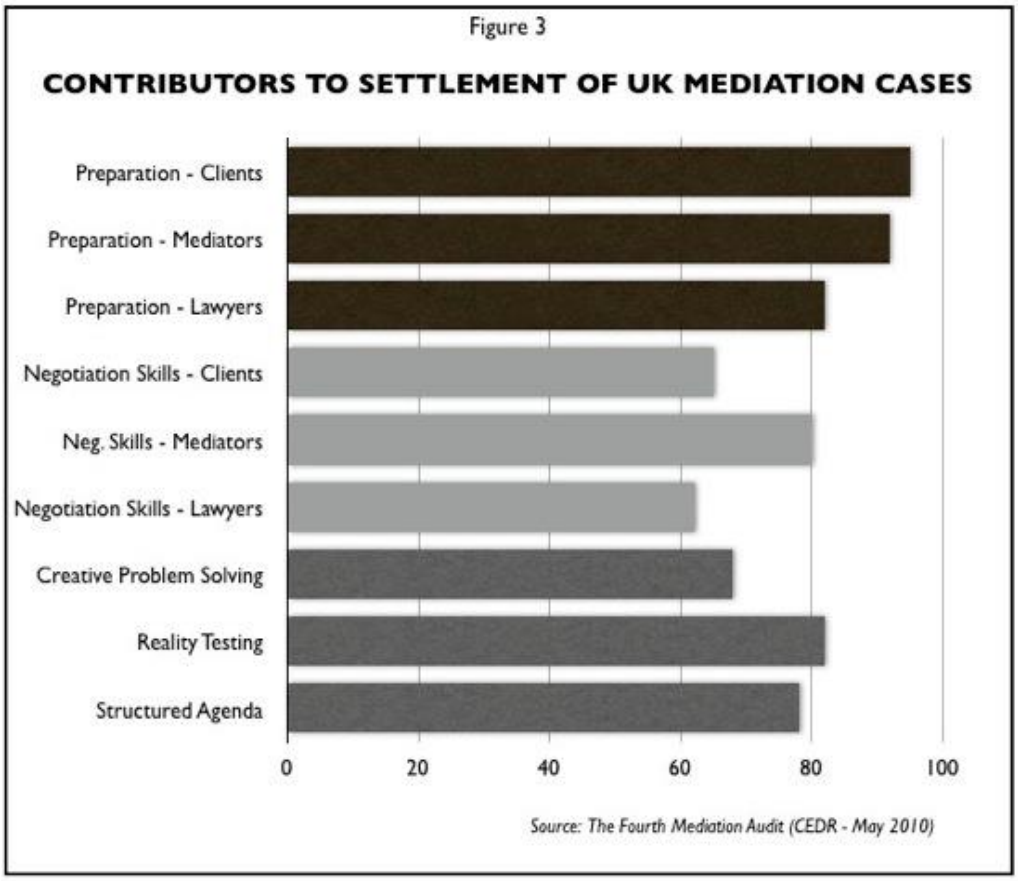
[13] HERBERT SMITH LLP, *supra* note 2, at 5.

[14] CENTRE FOR EFFECTIVE DISPUTE RESOLUTION [CEDR], THE FOURTH MEDIATION AUDIT: A SURVEY OF COMMERCIAL MEDIATOR ATTITUDES AND EXPERIENCE, 8 (London, UK, 11 May 2010).

[15] Correspondence with International Centre for Dispute Resolution, the International Chamber of Commerce and London Court of International Arbitration (May 2010) (on file with author).

As reported by experienced mediators, the primary factor for a mediation to succeed is preparation by clients, mediators and lawyers, in that order. This is illustrated in the results from the latest CEDR Audit.

Figure 3



The same study reports that the primary factors causing mediations to fail are intransigent parties, unrealistic expectations, fishing expeditions by one or more of the parties, and more recently, the usage of conditional fee agreements, which results in conflicts of interest between lawyers and client.[16] All of this indicates that companies that are serious about using mediation will have a higher success rate in resolving their disputes in mediation.

Given the time and cost savings along with the high success rates experienced in mediation, the obvious choice for the parties in the case study above would be to opt for mediation and not arbitration. But does that regularly happen in the real world of international business?

[16] CEDR, *supra* note 14, at 9.

Growth in International Mediation

There is limited data on the growth of international mediation. One of the few data sources comes from the three international arbitration institutions referred to above who offer administered mediation as part of their services. They are starting to see mediation gain interest and spread to NW Europe, a bit into Asia (particularly Singapore), Latin American and the Middle East, with little experience in Africa.[17] Their data may not capture the full extent of how much international mediation is used since many mediations are conducted on an ad hoc basis. However, it is the most comprehensive data on international mediation cases we can readily access and therefore provides the clearest picture of its growth.

The ICC DRS handles mediation cases ranging in amounts from US$ 100, 000 to over US$ 400 Million. Since 2001 about 20% of the cases filed pursuant to the ADR Rules were domestic and 80% were cross-border cases. The majority of parties come from West and North Europe, Asia and Latin America with little representation from the United States. In 2009, the ICC Court experienced an annual increase of about 20% for arbitration cases and the ICC DRS experienced an annual increase of more than 100% for its ADR cases. Those figures need to be put in perspective since the ICC DRS was starting from a relatively small annual caseload of 11 to 12 mediation cases between 2006 and 2008, whereas the ICC Court registered 663 arbitration cases in 2008. 88% of the cases filed pursuant to the ICC ADR Rules in 2009 were mediation cases, the remainder being neutral evaluation and non-binding ajudication.

The ICDR encourages parties in the early stages of their arbitrations to mediate on a parallel track to see if settlement is possible. Typically 8 – 10% of parties that initially file for an arbitration agree to do so, with high success rates. In the last couple of years there has been a small but growing number of cases filed solely as mediation. The ICDR's number of international mediation cases has remained relatively flat over the last five years; whereas, it's international arbitration caseload has increased by about 50% over the same period.

The LCIA neither encourages nor discourages mediation by parties to existing disputes, which it regards as outside the scope of the administering institution's role. It is for the tribunal to determine whether or not it is appropriate to propose a mediated settlement and at what stage of the arbitration. The majority of the handful of mediations referred to the LCIA are low-value domestic cases from the Mayor's & City of London Court Mediation Scheme, in which the LCIA acts as nominating authority only, with no

[17] Correspondence with International Centre for Dispute Resolution and the International Chamber of Commerce (May 2010) (on file with author).

feedback on the success or otherwise of the mediation. The LCIA's figures on mediation therefore have limited application to international disputes.[18]

Comparing mediation numbers is difficult since institutions count their numbers slightly differently. Some count the number of mediations requested, others the settlements reached.[19] Nevertheless, a multi-year analysis of their mediation caseload provides an indication of the trends in volume and growth. The caseloads for international arbitration & mediation for each of these three institutions[20] over the last five years were:

Figure 4
International Chamber of Commerce

Year	2005	2006	2007	2008	2009
Arbitrations	521	593	599	663	817
Mediations	6	12	12	11	24
Total Cases	527	605	611	674	841

Figure 5
International Centre for Dispute Resolution

Year	2005	2006	2007	2008	2009
Arbitrations	512	512	547	609	766
Mediations	68	74	74	94	70
Total Cases	580	586	621	703	836

Figure 6
London Court of International Arbitration

Year	2005	2006	2007	2008	2009
Arbitrations	118	130	126	215	272
Mediations	0	3	11	6	13
Total Cases	118	133	137	221	285

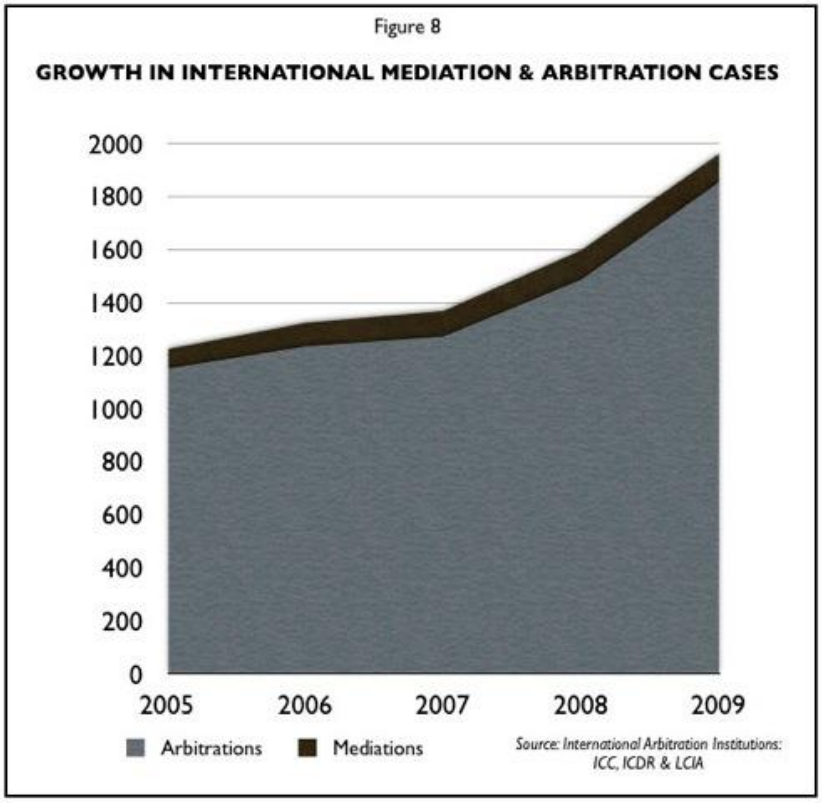
[18] Correspondence with International Centre for Dispute Resolution, the International Chamber of Commerce and London Court of International Arbitration (May 2010) (on file with author).
[19] Michael McIlwrath, *ADR: It's Not Just for Mediation Institutions Anymore*, 73 ARBITRATION 448 (November 2007).
[20] Data provided by the ICC, ICDR and LCIA (May-June 2010) (on file with author).

The aggregate numbers of international mediation and arbitration cases for these three institutions over the five year period were:

Figure 7
Combined International Institutional Arbitration and Mediation Cases

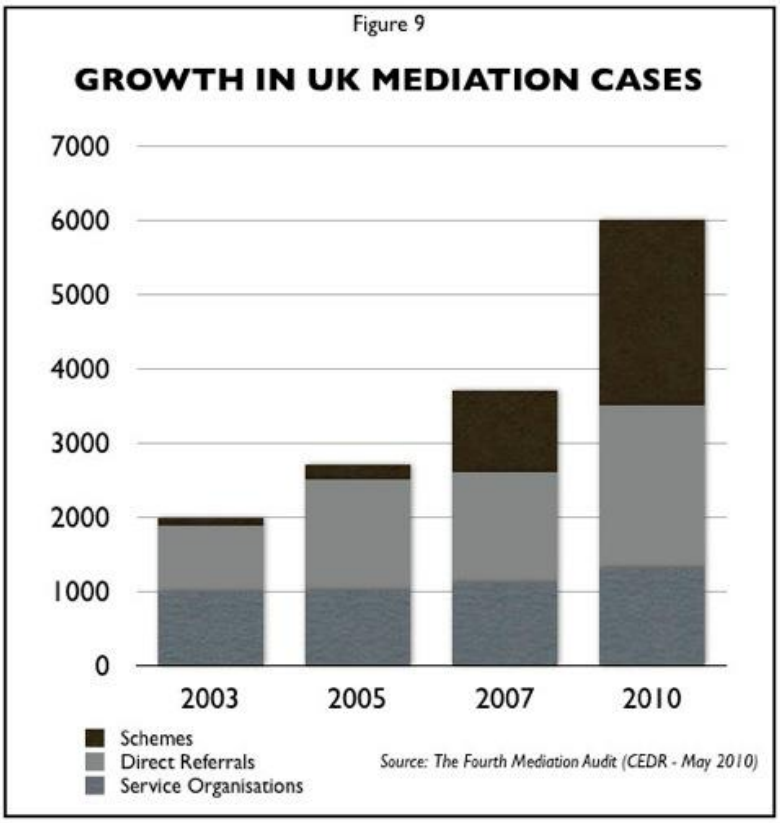
Year	2005	2006	2007	2008	2009
Arbitrations	1151	1235	1272	1487	1855
Mediations	74	89	97	111	107
Total Cases	1225	1324	1369	1598	1962

Based upon the above data, the following chart shows the growth in international arbitration and mediation for three of the major international commercial arbitration institutions in the world.



The above charts show a strong growth in international arbitration (60%) over the last five year period and a relatively strong growth in international mediation (45%) during the same period, but from a much smaller base resulting in only 33 more mediation cases per year. They also show that mediation has not overtaken arbitration as the dispute resolution method of choice in the international marketplace. Arbitration continues to dominate that market.

This data is helpful in providing an indication of the growth of international mediation but only captures part of the picture. This data is originating from institutions whose primary mandate is arbitration so they tend to emphasize arbitration over mediation and by their nature, many international mediations are self-administered rather than being administered by institutions. There is no data to support this last point, but this trend can be shown to be the case in domestic jurisdictions such as the UK:



This last graph shows little growth in institution administered mediations in the UK from 2003 to the present. There is a long term trend in the UK towards clients making direct referrals to mediators rather than working through service organizations.[21] Mediations in the UK that were self administered or ad hoc (i.e., the mediators got their assignment from direct client referrals) have risen by 30% since 2007 and more than doubled since 2003.[22]

If one extrapolates that experience to international commercial disputes, then the number of total international mediations would triple over the last five year period (institutional growth plus twice as many self administered). Even if we made that

[21] CEDR, *supra* note 14, at 3.
[22] *See id.* at 4.

assumption, the number of annual international mediations (both administered and ad hoc) would still be relatively small (approximately 15%) to the number of international disputes managed each year by the three major institutions. A more conservative approach would just compares the data recorded by the three institutions where mediation only makes up 5% of their present dispute resolution cases. Under either analysis, the conclusion is the same: international mediation at the present time is growing on a smaller and slower scale than international arbitration.

Evolving Market

If corporations have a positive experience with mediation in their domestic businesses, one would expect that they would transfer those dispute resolution practices to their international businesses. So far that appears to not have widely happened. Despite cost and time advantages along with high resolution rates experienced by parties using mediation, it has not grown significantly over the last five years and certainly has not surpassed arbitration as the international dispute resolution method of choice. There are probably a number of reasons why this has not happened.

Mediation has been a domestic success in common law jurisdictions. It has not yet experienced wide spread acceptance in other legal systems and jurisdictions. Companies experience more acceptance from counterparties in England & the USA when proposing mediation than they experience from counterparties in other jurisdictions.[23] Counterparties from non common law jurisdictions probably have little experience with mediation and are suspicious of a process originating from the United States and the United Kingdom. They probably assume that companies from those jurisdictions are attempting to escape litigation prone systems, and mediation is the process they are using to do so.

"In most places internationally, my biggest problem is the other side. We would like to try mediation but to them it is just not acceptable – it is not part of the culture. When I proposed mediation, I think I get slapped in the face four out of five times"

Senior Litigation Counsel, Industrial Company[24]

There also significant differences between the parties in international versus domestic mediations. There is a certain amount of homogeneity in the parties in a domestic mediation. They come from the same business culture, speak the same language, share the same values and are not located too far from each other. These elements change in international mediation. Differences in language, culture and values make it harder for mediation to work. There are greater distances separating the parties that make the logistics tougher. None of these are insurmountable obstacles. They just make the

[23] HERBERT SMITH LLP, *supra* note 2, at 34.

[24] *See id.* at 34.

workability of mediation that much harder when there is initial resistance to it because of the above factors.

Individual companies are championing the international spread of mediation. There is no particular industry sector using mediation more than others and there are widely divergent approaches and attitudes within industry sectors.[25] Some multinationals are committed to using mediation at the early stages of disputes, view all mediations as valuable learning experiences and do not consider unsuccessful mediations as wasted opportunities. Other organizations want maximum flexibility in how they resolve their disputes, do not see any need to consistently use mediation and view unsuccessful mediations as negative experiences discouraging its use.[26] This results in a case by case spread of mediation to other jurisdictions, which is a slow process.

International arbitration institutions are supporting the use of mediation by providing it as one of their services. And new organizations, such as the International Mediation Institute (IMI), are spreading the use of mediation in international business by establishing international professional standards for mediators, identifying and rating mediators on those standards, and simply educating the international business community on the benefits of mediation. Business will only use dispute resolution tools that they know and with which they are comfortable. That takes time and that is what is slowly happening.

The international spread of mediation has only occurred in commercial disputes. It has not taken hold in investment disputes with sovereign states. Neither the ICDR nor the LCIA report mediations for state investment disputes. Since the ICC ADR Rules came into force in 2001, about 10% of the ICC cases involved states or state entities but none are based on investment treaties. This situation makes sense since there is only downside for politicians and government bureaucrats in many developing nations to engage in mediation with foreign companies. The consequences for making settlements (whether through mediation or otherwise) in such situations are usually negative. It is much easier for them to have an arbitral tribunal make a binding decision on a dispute between a foreign investor and a government.

Conclusion

Mediation is proving to be a very good international dispute resolution tool for multinational corporations. It has clear advantages in saving time and costs. It has a high success rate once commenced. Given those significant advantages, one would think that the business community would always choose mediation over arbitration as the dispute resolution method of choice. That is not happening. There appears to be a more

[25] *See id.* at 10.
[26] *See id.* at 11, 12 & 14.

nuanced response. It is not an "either/or" choice for the business community. Corporations want flexibility in how they address and resolve their disputes and international mediation is simply one of those tools in that flexible approach.

Arbitration continues to grow in strength as the predominant international dispute resolution method, while mediation is slowly growing and finding a niche alongside the binding process of arbitration. Mediation will likely be successful when it is used wisely, but it is not about to quickly replace arbitration as the international dispute resolution method of choice. International mediation is probably best viewed as an adjunct rather than as an alternative to international arbitration. It is in this role that mediation will likely be most useful and most effectively used in the international business community.