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A Comparative Analysis of Scotland and the United States' Alternative Dispute Resolution Systems

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Golden Gate University School of Law

A Comparative Analysis of Scotland and the United States'

Alternative Dispute Resolution Systems

A DISSERTATION SUBMITTED

TO

**THE COMMITTEE OF INTERNATIONAL LEGAL STUDIES
IN CANDIDACY FOR THE DEGREE**

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BY

Catherine Cary

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ABSTRACT

It is perhaps fair to suppose that before the earliest civilizations began, humans have traded or exchanged goods and services to either supplement what they possess, or acquire what they could not get through their own efforts. As is the case today, these exchanges often required entering into dealings that could inevitably prove contentious; thus, like all human relationships, disagreements often arose concerning the subject matter of agreements, and what was meant by certain terms of the agreement. Therefore, the question arises: how can such disagreements be resolved in a manner that is fair to all involved, and perhaps preserve the trade relationship?

Today's transactions and their disputes are quite sophisticated. Entrepreneurs, small businesses, and Fortune 500 companies, both domestic and international, are seeking alternative means to resolve disputes. In today's tough and seemingly unpredictable, economic times, the parties hope to resolve disputes by the least expensive and most convenient manner possible. The use of alternative dispute resolution, or "ADR," methods, systems, and mechanisms is especially important in the international realm, wherein much of the world favor alternative dispute resolution in lieu of litigation, which is more costly, potentially acrimonious, and therefore, divisive.

With International Commercial Arbitration and mediation as its focus, this dissertation conducts a comparative analysis of the alternative dispute resolution systems between the United States and Scotland. Scotland has a rich history of arbitration and sustains a thriving contemporary arbitration system, which is underutilized by United States business interests; however, United States practitioners should study the Scottish system, which can be invaluable to American legal and

business professionals who are considering international arbitration or mediation. The United States and Scotland have arbitration and mediation arrangements that share similar features that are reflective of the commonalities found in the US and the Scottish cultures; one such feature derives from the Common Law legal system upon which each is in part predicated; there are others, of course, which I will explain later in this work.

This work identifies and explains many of these features, while having enriched my knowledge of United States and Scottish ADR; for the reader, I hope his or her experience mirrors that of mine. The intended audience includes academics, law students, practicing lawyers, business professionals, and anyone desiring to study the increasingly important ADR.

* * *

TITLE

A COMPARATIVE ANALYSIS OF SCOTLAND AND THE UNITED STATES'

ALTERNATIVE DISPUTE RESOLUTION SYSTEMS

CATHERINE CARY

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EPIGRAPH

“Discourage litigation ... Persuade your neighbor to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees, expenses and waste of time.”

—Abraham Lincoln

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PREFACE

There are a number of features that appear unique to the human race; one being language capable of conveying not only concrete notions, but symbolic thought as well. Another is the knack to acquire things for various purposes, such as those items that are essential to survival, and others for their entertainment value perhaps, and still others for whatever reason the owner, or would-be owner, deems appropriate; therefore, as has been noted, since the beginnings of the earliest humans, we can guess that the species has, among themselves, traded or exchanged goods and services to supplement what they could not come by themselves through their own labor. Of course, to facilitate these dealings, the use of a highly intricate language was necessary, as well as a fair degree of trust. Thus, our early relatives forged trusted relationships to conduct these exchanges, and through these relationships, the “gentleman's handshake,” if we are considering Western cultures, was born, and in other parts of the world, parties might exchange bows, other hand gestures, or might sit down to round of eating and drinking to consummate an agreement.

However, like all human relationships, a disagreement about what they thought the relationship was about may arise between the parties. Where there has been a failure of “minds to meet,” parties to an agreement can interpret the terms of the relationship differently or the product was not quite what one of them expected or envisioned. How can this disagreement be resolved, if it can be, and is the relationship persevered?

Today of course, transactions can be as simple as one person agreeing to be a designated driver, and others merely consenting to that agreement, or a transaction can comprise layers of sophisticated terms and requirements that require professionals having expertise to sort through the matter. The types of disputes or disagreements

have also increased in sophistication; however, the same question asked above begs to be answered. How can disagreements be resolved, and if so, is the profession relationship persevered?

Litigation is often the form of dispute resolution that most often parties resort to in this era of business and social interactions. It is common to hear of one neighbor threatening to sue another over disputes ranging from minor boundary disputes or trespasses, or private nuisances, such as playing music into the late hour of the night. As a practicing attorney, I have found that many clients, before considering any other remedy, are quick to shout “Let's sue'em!” The media keeps us abreast of high profile cases on a daily basis. However, notwithstanding the “excitement” it so often generates, is litigation the only way to resolve a disagreement? No! Litigation is not the only means to resolve a disagreement. Through out the ages, rather than standing before a court, parties to a dispute have also used alternative means of dispute resolution systems, such as mediation or arbitration. Collectively, these alternate methods are called “Alternative Dispute Resolution”, or “ADR.”

Entrepreneurs, small business, and fortune 500 companies, both domestic and international are seeking alternative means to resolve disputes. In today's tough economic times, the parties hope to resolve the dispute in the least expensive manner possible. Frequently, ADR may be the key to a cost-effective resolution for both parties. However, there are those who dare to abuse the system and the use of ADR may cost more than they bargained for. This is a fact-based decision only the parties involved can decide; *i.e.*, to sue or to use alternative means to resolve the dispute.

The use of ADR methods, systems and mechanisms is especially important in the international realm of dispute resolution. It is with great ease today that parties to a business transaction can be multinational, multicultural, and bi-lingual. Although

most people prefer not to contemplate disputes, the use of ADR mechanisms can take into account the varying needs of the parties who may be of different nationalities, and, or cultures.

The type of relationship also can lend itself better to the use of ADR mechanisms versus litigation. As an Intellectual Property, Business and Franchise attorney, a complaint about the justice system by other practitioners is the lack of knowledge on the area of law the judge is hearing. Special rules pertaining to the international sale of goods may also be of some concern to parties in a dispute. The utilization of Alternative Dispute Resolution systems can insure, to a certain extent, that all those present have a working knowledge of the matter at hand.

By returning to academia to explore alternative dispute resolution practices and systems, I hope to enforce what I already believe, ADR can resolve disputes and be just as effective if not more than litigation. People, especially savvy business people, are turning to ADR to resolve business, marriage and other conflicts, amicably and hopefully either preserve their relationship, or at the very least, avoid extreme bitterness.

* * *

GENERAL INTRODUCTION

The main emphasis of this paper shall be a comparative analysis between the United States and Scotland, concerning International Commercial Arbitration, mediation and ADR systems or mechanisms. Scotland has a rich history of arbitration and sustains a thriving contemporary arbitration system, which United States business persons should consider when they conduct arbitration with foreign parties.

Although both Scotland and the United States are Western civilizations, their origins differ quite markedly. The United States, as a colony, declared its independence from the United Kingdom (then called “Great Britain) over two hundred years ago. During the 1600s, Scotland lost its battle for independence, however was still and remains so today a unique and separate part of the United Kingdom. The United States is a common-law country whose legal system derives from English Common Law. Scotland on the other hand, has a “mixed” legal system that contains elements of both Common Law and Civil Law.

The sections of this dissertation proffer questions that concern both Scotland and the United States; *i.e.*, how has Scotland's and the United States' past shaped their International Commercial Arbitration, mediation and ADR systems or mechanisms? What are the external and internal links to what disputants use today? Can this knowledge help disputants? What should disputants be aware of moving forward? These questions, and others, will be addressed as follows:

- This first chapter explores the definitions contained within the ADR systems. It discusses why we study ADR. Furthermore, this chapter

discusses the benefits and drawbacks of using ADR systems to resolve or even overcome conflict. This chapter provides concepts the reader can use throughout the paper.

- In chapter two, we begin by examining the cultural influences that set the stage for the study of ADR processes in the United States and Scotland. As we go through the past and current dispute mechanisms, we will notice that culture holds an important role. Culture inevitably can have an effect on how dispute resolution grows and what is preferred in today's global society.
- The third chapter explores the American and Scottish Law, mostly from a historical perspective. What comparisons can be made between the two countries historical legal growth? Is England considered as influencing both American and Scotts Laws? Since joining the United Kingdom, which we know of today, how has Scotland's way of crafting laws changed? Is there a path to independence for Scotland, like that of the United States? Both countries' legislative and legal systems are rich and diverse.
- Chapter four explores past ADR methods. Where did the dispute resolution options come from? What ADR mechanisms did the United States and American Colonies (or "Colonies") have? What ADR mechanisms did Scotland utilize during medieval times, prior to joining with the English Crown as well as post-unification? Since Scotland is part of the United Kingdom, what role did England play in Scotland's ADR history?

- Chapter five explores the use of ADR to resolve conflict, and discusses the benefits of arbitration and, or mediation, within the context of ADR systems both domestically and internationally. Comments and statistics on mediation and, or arbitration mechanisms are also discussed.
- The sixth chapter presents a comparative analysis of the use of confidentiality in the Scottish and American ADR systems, both in international dispute resolution as well as domestic. An analysis of treaties and international and domestic laws is presented, as well as laws that have either striven to cement the confidentiality requirement, or perhaps have even weakened confidentiality protections. How confidentiality can be an advantage in either mediation or arbitration is also addressed within this chapter. The use of confidentiality in ADR systems is so important that it is only fitting that a whole chapter be dedicated to it.
- In chapter seven, we look at international arbitration and mediation processes in both countries. This portion of the paper will not only explore international mediation and International Commercial Arbitration, but also domestic systems and laws. In particular, what does the mediation process look like? What is the anatomy of International Commercial Arbitration for comparatively in both Scotland and the United States? There is some discussion pertaining to what the Arbitration Scotland Act (“ASA”) 2010 offers International Commercial Arbitration. Further, this chapter explores numerous aspects of International Commercial Arbitration and mediation in both the American and Scottish systems.

- Chapter eight, the final chapter, briefly summarizes this work and synthesizes the analysis of the United States and Scotland's ADR systems. This chapter dares to discuss the option that perhaps can be an effective dispute resolution mechanism. The "perfect" resolution mechanism is impossible. Using ADR depends on many factors; however, I believe, that the information contained within this work can definitely assist disputants in selecting and utilizing an effective dispute resolution option.

Lastly, this paper meticulously explores the past and present ADR systems in Scotland and the United States, comments on the future of Scottish and American ADR as well as the impact this has on International Commercial Arbitration and Mediation. It is my humble desire that through this dissertation, readers not familiar with the ADR systems of Scotland and the United States will gain an appreciation of these respective systems; and for those readers already versed in this matter; it is my pleasure to present them information which might heretofore have been unknown to them. Perhaps I might dare to proffer that Scotland, as a neutral forum for disputes, should not be overlooked, or dismissed in today's increasingly global business climate.

* * *

CHAPTER I

ALTERNATIVE DISPUTE RESOLUTION SYSTEMS:

ARBITRATION AND MEDIATION

This first chapter presents various definitions of ADR, and explains why ADR merits our attention. It also discusses the benefits and disadvantages of using ADR systems to resolve or even overcome conflict, and establishes concepts that will enable the reader's journey through this work.

I. INTRODUCTION

The term of art, alternative dispute resolution or (ADR), is a string, word or phrase that has particular meaning to those who wish to resolve disputes without resorting to the traditional judicial system.¹ ADR systems were created to provide options to resolve disputes, other than by litigation, which can be costly, time consuming, and tending to induce undue hostility. A comparative analysis between Scotland and the United States of ADR processes highlights many similarities and differences in the manner that ADR arose within those nations, and its subsequent applications. Disputants within these

¹ *Term of Art*, THE FREE DICTIONARY.COM, available at <http://legal-dictionary.thefreedictionary.com/Term+of+Art>. (last visited Apr. 16, 2010). (Defining "term of art").

countries utilize methods, systems, or mechanisms to resolve their disputes by mutual agreement outside of the court system. The basic forms of ADR systems or mechanisms are *negotiation, mediation or conciliation, and arbitration*. In my opinion, ADR should bring to mind the idea, “an alternative to litigation.”

In the course of my research, I found people, myself included, asking the question, “What Is Conflict Resolution?”² This is an interesting question that should be addressed at the onset of this dissertation. Perhaps by being in the legal profession, the study of conflict resolution is imperative. Professor Dr. Christian N. Okeke,³ in his keynote introduction to the *20th Annual Fulbright Symposium on International Legal Problems, International Law In A Time of Change*, stated that a “lawyer is essentially a social engineer, a mediator between disputing parties and a manager of disagreements.”⁴ Therefore, a lawyer's role is that of a mediator in or the manager of conflict or dispute resolution.

Delving deeper into why we explore these mechanisms, the Association for Conflict Resolution (“ACR”) provides the reason we should study dispute or conflict resolution. The Association linked the answer with the ADR mechanisms we are studying, which is what grew out of the belief that there are better options than using violence or going to court. Today, the terms ADR and conflict resolution are used somewhat interchangeably and refer to a wide range of processes that encourage nonviolent dispute resolution outside of the traditional court system. The field of

² *FAQs about CR*, ASSOCIATION FOR CONFLICT RESOLUTION, available at <http://www.acrnet.org/Page.aspx?id=402&terms=grew+out+of+the+belief+that+there> (last visited April 12, 2014).

³ Director of the Sompong Sucharitkul Center for Advanced International Legal Studies.

⁴ Christian N. Okeke, Conference Report: The New Direction of Cotemporary International Law, Address at The 20th Annual Fulbright Symposium on International Law In A Time of Change (Golden Gate University School of Law 2010).

conflict resolution also includes efforts in schools and communities to reduce violence and bullying and help young people develop communication and problem-solving skills.⁵

Exploring alternative ways to resolve conflict is a worthwhile and fascinating subject, which may enhance communication, and problem solving skills, which in turn could preclude or mitigate conflict. The Association for Conflict Resolution (“ACR”) views the various “ADR” systems or mechanisms, not only as a means to resolve domestic and intra-national disputes to avoid all-out war, but also as a means of assisting school-aged children to resolve their conflicts and avoid unnecessary violence.

On an unprecedented scale, the world is “shrinking” and so are businesses transactions. On account of incredible advances in technology, national boundaries are much less “rigid” than before, and this change has enabled companies to take advantage of international trade.⁶ “As a result, the potential for conflict in the world of global business is expanding along with the growth in the magnitude, diversity, and complexity of its transactions.”⁷ Therefore, the need to resolve conflict without going to court can also be thought of as being on the rise.

Disputants have, therefore, found that ADR systems have distinct advantages over the traditional litigation processes. “When used wisely, ADR is far superior on average to what you typically get at the courthouse.”⁸ Tom Arnold in his article,

⁵ ASSOCIATION FOR CONFLICT RESOLUTION, *supra* note 2.

⁶ Jeswald W. Salacuse & Henry J. Braker, *Mediation In International Business*, in STUDIES IN INTERNATIONAL MEDIATION 213, 213 (Palgrave Macmillan, 2002).

⁷*Id.*

⁸ TOM ARNOLD, *FUNDAMENTALS OF ALTERNATIVE DISPUTE RESOLUTION: WHY PREFER ADR* 655, 667 (PLI Pat., Copyrights, Trademarks, & Literary Prop. Course, Handbook Series No. 376, 1993)

“Fundamentals of ADR: Why Prefer ADR?” points out the popularity of ADR systems. Arnold singles out evidence discovered in a study that was conducted on four ADR agencies: “the American Arbitration Association (AAA), the International Chamber of Commerce (ICC), the Judicial Arbitration and Mediation Service (JAMS), and [the] U.S. Arbitration and Mediation Service.”⁹ Arnold discovered that the total combined case load of the four ADR agencies was now at “150,000 disputes per year rate, involving over 360,000 parties.”¹⁰ Arnold hypothesizes that:

[L]ow value cases gravitate to other agencies so that of these, it is perhaps not irresponsible to guesstimate that perhaps seventy-five percent of them involve over \$100,000 at risk. Are all those 240,000 or so parties with over \$100,000 at risk, wrong? --Or do they know something we all ought to know?¹¹

The sheer volume of disputants utilizing the four ADR agencies listed above can be indicative of the times as well as the effectiveness of ADR processes. Throughout this paper, the effectiveness of “ADR” systems or mechanisms as well as costs will be addressed and compared.

As hard economic times have hit the United States as well as Scotland, more and more clients, lawyers, individuals and business owners alike are looking towards ADR systems or mechanisms. Those who contact a lawyer to handle some matter may be well aware of the prohibitive costs of litigation. As in the article, “The Sue Nation,”¹² the following suggestion is offered:

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Kenny Kemp, *The Sue Nation*, Herald Scotland, May 30, 2009.

[M]any of Scotland's leading corporate law firms report a marked rise in enquiries about commercial disputes.

However, a straw poll of some practitioners suggests that there is a new realism about what Scottish businesses can expect when they pick up the phone to the lawyers.

While the Sunday Herald has found there is a definite rise in the level of commercial disputes caused by the economic downturn, the legal eagles are far more active in seeking solutions before they hit the nuclear button of going to court...

[Furthermore, t]he recent reforms on commercial law in England and Wales suggest that the resolution of business disputes in Scotland is now much slower than it is south of the Border.¹³

Perhaps the slow court process encourages the use of ADR systems or mechanisms to resolve a dispute.

The International Institute for Conflict Prevention & Resolution, or CPR, defines alternative dispute resolution systems as a multi-step process which can utilize various dispute resolution mechanisms. The first stage, according to CPR is the “[n]egotiation [p]hase between executives with decision making authority who are at a higher level than the personnel involved in the dispute.”¹⁴ Then there is the “[m]ediation [p]hase to facilitate settlement by employing a skilled neutral, not to impose a solution, but to assist the parties in reaching agreement.”¹⁵ Then the last step is seeking “Final Binding Arbitration Phase in case the non-binding phases produce no settlement or Litigation if the non-binding phases produce no settlement and private binding

¹³ *Id.*

¹⁴ *CPR Model Clauses and Sample Language*, THE INT'L INST. FOR CONFLICT PREVENTION AND RESOL., available at <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/635/CPR-Model-Clauses-and-Sample-Language.aspx> (last visited Mar. 17, 2013).

¹⁵ *Id.*

arbitration is not selected.”¹⁶ The mediation and the arbitration stages of ADR systems will be discussed in this paper.

In Scotland and the United States, disputants prefer resolution of a dispute through alternative means over a more costly, lengthy, and sometimes uncertain litigation. One would think that finding the basic terminology for the various forms of ADR would be fairly easy. However, I have found that many people—at least within the United States—have derived their own definition of ADR. This does not include international norms and terminology of ADR, nor does it embrace Scotland’s terminology for the various forms of ADR. The terminology, although somewhat different, still has the same basic outcome or goal, resolution of a dispute through ADR systems or mechanisms. Therefore, the following sections define the terms “negotiation,” “mediation” or “conciliation,” and arbitration.

These terms and definitions are not meant to be a comprehensive list of the various ADR mechanisms, systems, or options that are available to disputants. The following discussion is offered so that the reader may become familiar with the terms necessary to navigate, analyze and compare the United States and Scotland’s ADR Systems.

II. NEGOTIATION

Negotiation is but one option in the scheme of ADR; however, this paper may not necessarily address this form. “The most basic form of ADR is negotiation: at its core, two people simply talk about a problem and attempt to reach a resolution both can accept.”¹⁷

¹⁶ *Id.*

¹⁷ JEROME T. BARRETT & JOSEPH P. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION – THE

There is “no single, universal model for negotiations;”¹⁸ however, many experts have identified two models from which we can learn. One form of negotiation is referred to as the “low context [model] . . . [which] is characterized by a verbal and explicit style of communication and is found in highly individualistic societies like the United States.”¹⁹ The other form of negotiation is labeled as the “high context [model] . . . [which] is associated with nonverbal and implicit communication more typical of interdependent, collectivist societies, such as Japan and other Asian countries.”²⁰ William Slate explains that these types of negotiation models are over-simplified, and serve no purpose in understanding negotiations in the realm of ADR systems.²¹

Society, geographical location, or culture can affect ADR systems such as the above defined models of negotiation. It would also seem that Scotland, would be very similar to the United States, and utilized the “low context” model in negotiations. For our purposes, as noted, the discussion on negotiations will not be a significant part of this paper; however, it is still interesting to note the similarities between the United States and Scotland's ADR systems.

Although, the resolution to the conflict can start out with negotiations between the parties, it can often be much more than resolving a dispute. Negotiations to resolve a dispute can be characterized as “a psychological interaction in which reality is defined

STORY OF POLITICAL, CULTURAL, AND SOCIAL MOVEMENT 1 (2004).

¹⁸ William K. Slate II, *Paying Attention to “Culture” in International Commercial Arbitration*, 59 DISP. RESOL. J. 96, 99 (2004). (“This paper is adapted from remarks Mr. Slate delivered on May 18, 2004, at the 17th ICCA conference in Beijing, China.”).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

more by the perceptions of the participants than by external criteria.”²² Seeking negotiations as an "ADR mechanism" is a psychological choice to keep in mind during this process. Thus a conflict can be more personal than one would think, probably more so when entering the negotiation process.

The book, *Getting to Yes, Negotiating Agreement Without Giving In*, emphasizes an interesting concept to keep in mind when studying the negotiation process that negotiators “are people first.”²³ The implicit notion here is that when negotiating “corporate and international transactions, one is dealing not with abstract representatives of the "other side," but with human beings.”²⁴ The other disputant, whom one might see as the enemy, really is a person that has human emotions like everyone.²⁵ It is interesting to keep in mind that the “human aspect of negotiation can either be helpful or disastrous.”²⁶ This would seem that the motto, “it's not personal, it's just business” would therefore not ring true in the face of the above statement. As humans, we bring our peculiar perceptions and experiences to the negotiation table and these can exert unpredictable influences on the ADR process culminating in either success, failure, or something in between these extremes.

There are advantages to negotiating a dispute rather than using another ADR mechanism or system; negotiating can agreement can be quicker, perhaps just a phone call away; there is no need to pay a third party to resolve this dispute, unless a party

²² Charles B. Craver, “*Value Claiming*,” EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT § 7.01 (Matthew Bender & Co, Inc., 2001).

²³ ROGER FISCHER & WILLIAM URY, GETTING TO YES, NEGOTIATING AGREEMENT WITHOUT GIVING IN 19 (Bruce Patton ed., Penguin Books, 1981).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

desires to hire an attorney. These advantages may be preferable depending on the situation. Once the conflict arises, the first to convey a resolution can facilitate the process of resolving the conflict. “There is a negotiation advantage to making the first proposal; you've defined the ballpark. You define the issues, and you provide a roadmap for resolving them.”²⁷

The CPR Institute for Dispute Resolution considers negotiation an “ADR mechanism” to utilize first when resolving disagreements between parties. The CPR stresses while trying to resolve a dispute that parties should keep in mind that what is before them is “a problem to be solved, not a contest to be won.”²⁸ The disputant’s energies “should first be made to reach agreement by unaided negotiation.”²⁹ The CPR tenets that were discussed above can guide the disputants through the negotiation process when resolving a dispute. Negotiation can be perceived as the first ring on the “ADR mechanism” or “ADR system” ladder. Keep in mind that the study of negotiations is about the “dynamics and skills for bargaining with opposing counsel either with or without your clients in tow. . .”³⁰ Negotiation should be the first technique used to resolve a dispute.

Negotiating a settlement may be preferable to court or some other form of “ADR” mechanism. The CPR views negotiations as the first mechanism to be tried

²⁷ Teddy Snyder, *Teddy Snyder on Settling a Workers' Compensation Case: Why, When, and How*, 2009 EMERGING ISSUES 3478 (2009).

²⁸ THE INT'L INST. FOR CONFLICT PREVENTION AND RESOL., CPR PROCEDURES & CLAUSES NON-ADMINISTERED ARBITRATION RULES 23 (2005), *available at* <https://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/2005%20Non-Administered%20Arbitration%20Rules.pdf>.

²⁹ *Id.*

³⁰ CATHY CRONIN-HARRIS, WHY TAKE ADR COURSES IN LAW SCHOOL 1 (2008), *available at* http://meetings.abanet.org/webupload/commupload/DR017500/sitesofinterest_files/Why_Take_ADR_Courses_In_Law_School_by_Cronin_Harris.pdf. (last visited Apr. 12, 2014).

during a dispute resolution process. Negotiators can arrive at a mutually agreed-upon resolution; however, if not, the disputants can turn to other types of “ADR” mechanisms.

Teachings that capitalize on “mutual gains bargaining [was] popularized by Fisher and Ury in *Getting to Yes*.”³¹ The “fundamental concepts stress objective standards, creativity, option development, respect for opponents and satisfying parties’ genuine underlying interests rather than their positions.”³² “Such exposure will expand your repertoire and allow you to negotiate with agility.”³³ “You’ll appreciate varying approaches people take to negotiation, discover ways to lessen competitive tendencies, become more conscious of options you can use rather than relying on raw intuition, appreciate the significant human elements impacting negotiation success, and learn the value of planning.”³⁴ “As you become familiar with the broad brush approaches, you’ll be enhancing the key skills below.”³⁵

III. MEDIATION AND CONCILIATION

Mediation as a concept has probably been around for quite some time.³⁶ Jerome and Joseph Barrett have hypothesized that “mediation started when two negotiators, realizing they needed help in this process, accepted the intervention of a third person.”³⁷

³¹*Id.*

³²*Id.*

³³*Id.*

³⁴*Id.*

³⁵*Id.*

³⁶ The exact date of when the concept of mediation began was not researched since it would go beyond the scope of this dissertation.

³⁷ BARRETT & BARRETT, *supra*, ch. I, note 17, at 1.

At first glance, I found no satisfactory definition for the term "mediation" other than my own background pertaining to this area of "ADR Systems." Upon further investigation, I found several discussions that are of some interest to this paper.

Within the United States, many state laws, regulations, and even cultures define mediation in unique ways. For example, the State of Utah sees mediation "simply defined as a facilitated negotiation."³⁸ By comparison, California also has its own definition of mediation within its evidence code. The California law describes the mediation process a third party neutral person or persons³⁹ known as a mediator⁴⁰ "facilitate[s] communication between the disputants to assist them in reaching a mutually acceptable agreement."⁴¹ California law also discusses the "mediation consultation,"⁴² which "means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator."⁴³ California law and mediators in California see the mediation process as "sacred." California law further promotes the mediation process by providing clear definitions and protections for this form of alternative disputant resolution process.

The American Arbitration Association ("AAA") could be deemed a look at how Americans define mediation. The AAA states that mediation is "a voluntary,

³⁸ Tamara A. Fackrell, *Utah Mandatory Domestic Mediation and Mediator Qualification*, 2008 EMERGING ISSUES 1291 (2007). (See Utah Code of Judicial Administration Rule 4-510, Utah Ethical Guidelines Rule 104, and Utah Code Annotated Section 78-31c-101 et seq. (new in 2006, known as the Utah Uniform Mediation Act)).

³⁹ CAL EVID. CODE § 1115 (West 2009).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

confidential extension of the negotiation process that guides parties toward a mutually agreeable settlement, while preserving the business relationship.”⁴⁴ Furthermore, the study of mediation also embodies the mediators role as an “. . . understanding of participants’ negotiating behavior and how mediator’s use negotiation skills to help parties settle differences at the mediation table.”⁴⁵ Thus, in the United States, many definitions seem to have made the leap from negotiation among the disputes, to a third party facilitating the continued negotiations among, or between the disputants.

The Scottish definition of mediation is very similar to that of the US; to the Scottish, mediation as “a process for handling disputes that assists the people involved to reach an agreement, working with an impartial independent mediator. The parties in dispute, rather than the mediator, decide the terms of any settlement.”⁴⁶ Both countries allow the parties to derive a solution rather than a neutral third party.

On an international level, the World Intellectual Property Association, Arbitration and Mediation Center also have a good definition of mediation. There are principal characteristics of mediation that can be seen where ever you are. One characteristic is that mediation “is a non-binding procedure controlled by the parties;”⁴⁷ another is that mediation is also deemed “a confidential procedure”⁴⁸ like arbitration or

⁴⁴ AMERICAN ARBITRATION ASSOCIATION, EMPLOYMENT MEDIATION, https://www.adr.org/aaa/faces/aoe/lee/employment/employmentmediation?_afLoop=3041745083400905&_afWindowMode=0&_afWindowId=u8q73y4bd_213#%40%3F_afWindowId%3Du8q73y4bd_213%26_afLoop%3D3041745083400905%26_afWindowMode%3D0%26_adf.ctrl-state%3Du8q73y4bd_258 (last visited Mar. 29, 2014).

⁴⁵ CRONIN-HARRIS, *supra*, ch. I, note 30, at 1.

⁴⁶ SCOTTISH MEDIATION NETWORK, MEDIATION INFORMATION PACKET 3 (2009), *available at* <http://www.scottishmediation.org.uk/downloads/MediationInformationPack.pdf> (last visited Mar. 29, 2010).

⁴⁷ *What is Mediation?*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, ARBITRATION AND MEDIATION CENTER, <http://www.wipo.int/amc/en/mediation/what-mediation.html> (last visited Mar. 29, 2014).

⁴⁸ *Id.*

other forms of ADR. “Mediation is an interest-based procedure”⁴⁹ that is quite unique to this form of ADR process. Again, mediation is seen as one where the parties resolve their dispute rather than acquiescing to the suggestions of the third party neutral.

To further define the term "mediation," author Cheri Ganeles has an interesting discussion on mediation that is helpful to our topic at hand. Cheri Ganeles argues that, “[if] a judge were to determine the dispute the verdict would indicate who was right. On the other hand, a mediator helps the parties to reach a mutually agreeable solution or reconciliation without focusing on fault.”⁵⁰ Furthermore, the “notion of no authoritative decision-making power distinguishes mediation from arbitration or litigation. It is a very attractive characteristic because it leaves the ultimate decision-making power in the hands of the parties themselves.”⁵¹ Irrespective of nationality, these characteristics of mediation seem to embody the same concept.

From the definitions thus far explained, mediation is a different ADR process than is arbitration. “The differences between mediation and arbitration all stem from the fact that, in a mediation, the parties retain responsibility for and control over the dispute and do not transfer decision-making power to the mediator.”⁵² Furthermore, in mediation, “any outcome is determined by the will of the parties.”⁵³ This outcome or resolution can “take into account a broader range of standards. . . an interest-based

⁴⁹ *Id.*

⁵⁰ Cheri M. Ganeles, *Cybermediation: A New Twist on an Old Concept*, 12 ALB. L.J. SCI. & TECH. 715, 719 (2002).

⁵¹ *Id.*

⁵² TIBOR VARADY ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION A TRANSNATIONAL PERSPECTIVE* 3 (Thomson Reuters 4th ed. 2009)(1999).

⁵³ *Id.*

procedure, whereas arbitration is a rights based procedure.”⁵⁴ Furthermore, taking into account business interests also means the parties can decide the outcome by reference to their future relationship, rather than the result being determined only by reference to their past conduct . . . naturally, in view of the differences mediation is a more informal procedure than arbitration.⁵⁵ Thus, mediation is a process in which the parties decide the resolution to their dispute, rather than the third party deciding for them.

The CPR further states that these options “remain available even while litigation or arbitration is pending.”⁵⁶ A “skilled and respected neutral third party can play a critical role in bringing about agreement,”⁵⁷ and if not, other dispute resolution avenues can be pursued. Ultimately, the use of mediation to resolve a dispute remains an option to the parties through the dispute process, even if the parties are in the appellate stage of civil litigation.

At least here in the United States, I appraise those seeking mediation of the following benefits and advantages:

- it is voluntary
- it is confidential
- it depends upon your resolution
- it is informal
- it is inexpensive
- it consumes less time than litigation
- it attempts to address everything
- it calls for creative problem solving
- it generally preserves relationships

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ THE INT'L INST. FOR CONFLICT PREVENTION AND RESOL., *supra*, ch. I note 28, at 23.

⁵⁷ *Id.*

- it produces no judgment – not on your credit report
- it is a win-win
- the parties are more likely to fulfill their agreement

These points may be, however, or may not be, what the parties are seeking. Furthermore, it “does not mean that the parties are willing to do exactly as the mediator says but they must be willing to listen and seriously consider his/her suggestions.”⁵⁸

Moreover, a mediator can mean many different things to the parties in a dispute that can make “mediation” the ideal ADR mechanism. The mediator can wear many hats to further dispute resolution during the mediation process.⁵⁹ Some examples of the role of the mediator are the “opener of communication channels, a legitimizer, a process facilitator, a trainer, a resource expander, a problem explorer, an agent of reality, a scapegoat, or a leader.”⁶⁰ Additionally, the mediator can be “all of these roles at various points throughout the mediation to help the parties facilitate a reasonable solution.”⁶¹ These roles that the mediator fulfills may be invaluable during the resolution process.

Depending on the context and your location, the term “conciliation” may be used in place of “mediation. Sometimes the “conciliation” can be interchangeable with the term “mediation,” and other times it can mean something other than mediation. For our purposes, mediation and conciliation will mean the same thing, unless otherwise noted in the text. Therefore, what is a universal definition for the term “conciliation?” The role of that of conciliator is that of an impartial, neutral, third party that enlists such

⁵⁸ Ganeles, *supra*, ch. I, note 50, at 720.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

principles as “objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.”⁶² Furthermore, a conciliator may, during any step of the dispute resolution process, “make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons.”⁶³ Use of conciliation may be the ADR system or mechanism that caters to the needs of the disputants.

Exploring all forms of “ADR systems” can help disputants find what fits their needs. Mediation and, or, conciliation can be the resolution process that fits the needs of the disputants. In some cases, mediation for example, is not always the answer. However, the use of a third party to facilitate communications between disputants so they can design a mutually agreed upon resolution to their dispute can be very beneficial, even if the whole dispute is not resolved.

IV. ARBITRATION

Another form of ADRs takes place “[i]f the third party was asked to make a decision or placed the decision in the hands of some arbitrary mechanism, the process was arbitration.”⁶⁴ Looking into the definition further, *Ballentine's Law Dictionary* defines "arbitration" in an interesting way, which is a “mode of settling differences through the

⁶² UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL CONCILIATION RULES 6, available at <http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf> (last visited Apr. 6, 2010).

⁶³ *Id.*

⁶⁴ BARRETT & BARRETT, *supra*, ch. I, note 17, at 1.

investigation and determination, by one or more persons selected for the purpose, of some disputed matter submitted to them by the contending parties for decision and award, in lieu of a judicial proceeding.”⁶⁵ This accurately describes the common notion of arbitration within the "ADR" processes.

Within the United States, federal and state laws define arbitration as well as domestic institutions for dispute resolution. The AAA domestic dispute resolution institution, defines arbitration as a, “time-tested, cost-effective alternative to litigation,”⁶⁶ in which parties submit their “dispute to one or more impartial persons for a final and binding decision, known as an "award.””⁶⁷ The AAA further states that the awards “are made in writing and are generally final and binding on the parties in the case.”⁶⁸ It seems arbitration, as defined herein, will be a preferred alternative to litigation for those who want an enforceable and binding award in hand. Furthermore, those seeking industry-specific arbitration procedures can request such through the AAA’s rules and procedures, which will be discussed further later in this work.

In the United Kingdom, Parliament has drafted legislation to govern or guide the usage of arbitration within its borders. The Arbitration Act of 1996 states that “the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.” The United Kingdom’s legislation has established safeguards that protect the public’s interest during arbitrations. The Arbitration Act of 1996 states that “the parties should be free to agree how their disputes

⁶⁵ BALLENTINE'S LAW DICTIONARY (3rd ed. 2010). (Ballentine's Law Dictionary used Crosby v State Board of Hail Ins. 113 Mont 470, 129 P2d 99 as its source of authority for this definition).

⁶⁶ AMERICAN ARBITRATION ASSOCIATION, *supra* note 43.

⁶⁷ *Id.*

⁶⁸ *Id.*

are resolved . . . [and] the court should not intervene except as provided by this Part.”⁶⁹ It seems that they have tried to enact laws that ensure the usage of Arbitration as a legitimate form of ADR mechanism or system in the United Kingdom.

There are a number of cultural developments that have made an impact on the use of arbitration, particularly US arbitration. With respect to the use of arbitration in the United States, the “pendulum [seems to be] swinging in the other direction . . . [and it has] gone virtually unnoticed . . . the growing impact of international norms on arbitration practices.”⁷⁰ A perfect example of this new phenomenon is found where the American Bar Association (“ABA”), in conjunction with the American Arbitration Association (“AAA”), adopted an “international neutrality standard for party-appointed arbitrators.”⁷¹ Furthermore, it is recognized that companies in the United States are “referring to the International Bar Association Rules of Evidence in the arbitration clause in their international contracts.”⁷² These examples are indicative of the influence that International Commercial Arbitration has on American ADR systems.⁷³

The CPR has a positive outlook on arbitration; it believes that a “well-conducted arbitration proceeding usually is preferable to litigation.”⁷⁴ Thus, it is the CPR’s belief that using arbitration should be appropriate at any stage of the dispute resolution process and should remain available to the parties.

⁶⁹ Arbitration Act 1996, ch. 23, § 1 (Eng.), available at *Arbitration Act 1996*, LEGISLATION.GOV.UK http://www.opsi.gov.uk/acts/acts1996/ukpga_19960023_en_1 (last visited Mar. 30, 2010). (discussing the general principles of the Arbitration (England) Act of 1996).

⁷⁰ Slate, *supra*, ch. I, note 18, at 99.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ THE INT’L INST. FOR CONFLICT PREVENTION AND RESOL., *supra*, ch. I, note 28, at 23.

A landmark treaty such as the “New York Arbitration Convention” or the “New York Convention,” [or the “Convention] is one of the key instruments in international arbitration.”⁷⁵ Many countries around the globe, from “Afghanistan to Zimbabwe [,] are signatories to the “New York Convention.”⁷⁶ In the case of the United States and the United Kingdom (Scotland is part of the latter), both are signatories to the New York Convention.⁷⁷ How disputants, parties or courts, interpret or apply the New York Convention, are applicable aspects when comparing the ADR systems of Scotland and the United States.

Arbitration, however, differs from mediation in several significant respects. A dispute through arbitration hinges on the fact that the resolution is handed down based on law and specifically predetermined standards and procedures.⁷⁸ In contrast, in mediation, the parties’ resolution can be of their choosing, so long as it is legal. Furthermore, in “an arbitration, a party’s task is to convince the arbitrator tribunal of its case. It addresses its arguments to the tribunal and not to the other side;”⁷⁹ whereas parties to a mediation need to convince each other that mediation is the best resolution to the conflict, rather than the involvement of a third party. Arbitration is, therefore, a more formal “ADR system” than mediation.

⁷⁵ NEW YORK ARBITRATION CONVENTION, <http://www.newyorkconvention.org/>, (last visited Apr. 16, 2010).

⁷⁶ *New York Convention Countries*, NEW YORK ARBITRATION CONVENTION, available at <http://www.newyorkconvention.org/new-york-convention-countries/contracting-states>, (last visited Apr. 16, 2010).

⁷⁷ *See Id.*

⁷⁸ TIBOR VARADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION A TRANSNATIONAL PERSPECTIVE 3 (Thomson Reuters 4th ed. 2009)(1999).

⁷⁹ *Id.*

The use of commercial arbitration to resolve business disputes has been the preferred mechanism rather than litigation. Disputants in commercial matters “as well as their legal counsel need always keep in the back of their minds that commercial arbitration is a legally sanctioned dispute resolution process”⁸⁰ and thus something that is not entirely separate from the legal justice system of either Scotland or the United States. Commercial Arbitration's, international or domestic,

[e]xistence is not simply predicated on the wishes of private parties desiring an avenue for dispute resolution. Commercial arbitration exists *because national law and national courts permit commercial arbitration* to exist if commercial parties have agreed to arbitrate a dispute before them or agreed to arbitrate a dispute that might occur in the future.⁸¹

Thus, the choice to use arbitration rather than another type of “ADR mechanism” is determined by a Country’s laws, judicial system, and treaties it enters into with other countries. Perhaps this can be said of any form of “ADR” processes.

The use of arbitration may be the “alternative dispute resolution” system or mechanism that fits the needs of the disputants. Having a third party relate something that the opponent may take umbrage upon is quite valuable. Furthermore, keeping the communications of the dispute resolution process confidential can be priceless. An enforceable and binding award in hand, will also give a disputant a certain amount of comfort at the end of this process.

V. SUMMARY

⁸⁰ ARTHUR J. GEMMELL, *WESTERN AND CHINESE ARBITRATION THE ARBITRAL CHAIN* 6 (University press of America, Inc. 2008) (2008).

⁸¹ *Id.*

There are various types of ADR systems parties can choose when desiring to resolve a conflict. As this recitation of ADR moves forward, the two types of mechanism discussed will be arbitration and mediation. However, the explorations of negotiation, mediation or conciliation, arbitration have created a foundation for ADR systems and mechanisms. These options help disputants find the system or mechanism that appropriate to situation regardless of whether they are Scottish or American.

* * *

CHAPTER II

HOW CULTURE IMPACTS ADR

In this chapter we examine the cultural influences that set stage for the study of ADR processes in the United States and Scotland. As we go through the past and current dispute mechanisms, we will notice that culture holds an important role. Culture inevitably can have an effect on how dispute resolution grows and what is preferred in today's global society.

I. INTRODUCTION

The discussion on comparative legal systems commences with an analysis of culture, and the people who have shaped the systems found within any given culture. With respect to ADR, it behooves us to remember that in general, people “hold different views of each other based on ethnicity, national origin or race.”¹ We must also be mindful that with modern technology, and international agreements, it is easier for international trade to flourish. Therefore, there is a greater need to have at least a passing understanding of other peoples, their cultures, and their customs and

¹ William K. Slate II, *Paying Attention to “Culture” in International Commercial Arbitration*, 59 DISP. RESOL. J. 96, 99 (2004).

expectations.² This is important to our comparison of ADR systems because to “facilitate the resolution of cross-cultural disputes, arbitrators and mediators should be aware of the cultural biases the disputing parties may have about each other.”³

The geographical locations that we are comparing are the United States of America or U.S., and Scotland. Both Scotland and the United State are rich in culture and heritage. Scottish society and culture is hundreds of years older than the United States. The United States has quickly made up for its late start and has become one of the World’s super powers. Both the United States and Scotland have contributed to our contemporary global culture. The societal and cultural comparisons are fascinating.

Compared to the United States, Scotland has been handing down its cultural traditions, generation after generation, for “close to a thousand years now, since the earliest days of the clans in the twelfth century.”⁴ Every generation of Scots has contributed heavily to Scottish culture and society. Like all societies, Scottish traditions are not untouched and left “sterile under glass and steel in a cold museum. They are vibrant, living things, constantly growing and evolving.”⁵ Winston Churchill once said that of “all the small nations of this earth, perhaps only the ancient Greeks surpass the Scots in their contribution to mankind.”⁶

² *Id.*

³ *Id.*

⁴ *Culture, History and Tradition*, SCOTLAND.ORG, available at <http://www.scotland.org/culture/history-and-tradition/scottish-traditions/> (last visited Jan. 31, 2012).

⁵ *Id.*

⁶ *Scots Contribution To Mankind*, TOUR SCOTLAND, available at <http://www.fife.50megs.com/scotland-ruled.htm> (last visited Jan 21, 2012).

The United States, of course, is not as old as Scotland.⁷ The United States can be seen as “both an old country and a new country.”⁸ Culture in the United States, and perhaps its “American values”⁹ have been created over the past three-hundred years. Successive “waves of immigrants”¹⁰ have affected and enriched American society over time.¹¹ It has been said that in the United States, “old ways [are constantly blended] with new ideas.”¹² One way to consider this is that although,

Americans are often open to new ways of thinking, they have a deep culture, and a deep sense of being American, one that is not always that easy to describe. Those who disagree, who believe the country has no true culture compared to the “older” civilizations of Europe, Asia and elsewhere, do not truly understand the United States.¹³

The United States, borrowing from its fore fathers, has created its own unique culture over three centuries.

The world is shrinking, metaphorically, and technology makes it easier to conduct our affairs internationally. Disputes arise, however; for instance, what is our role and that of Scotland in international commercial disputes? Can an ideal dispute resolution process be gleaned from the mechanisms that both the United States and Scotland employ? Doing a brief study of the people who created those systems, which

⁷ DANIEL MACINTOSH, HISTORY OF SCOTLAND (Edinburgh, 1821) (The Kingdom of Scotland spans approximately from 84 A.D. to 1707 A.D.).

⁸ *American Culture, Introduction*, LIFE IN THE USA, available at <http://www.lifeintheusa.com/culture/index.html> (last visited Jan. 31, 2012).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

we are comparing, will deepen our understanding and make our experience all the richer for it.

II. THE CULTURE OF THE SCOTS

The Scots are a powerful and instructive example of a people with spirit and know-how. Poets and academics alike have spoken of the Scots as a people that pride themselves on allowing everyone access to an education, irrespective of their background. Scotland is a very old culture or society. Although it is in the thick of modern society, it still retains its cultural past.

Scotland lies north of England, and occupies quite a large area of the island's mass. Scotland is part of the country we know as the United Kingdom. Please do not be confused that Scotland is not a separate country; it acts in a manner that makes Scotland its own unique system, separate from the English to the south. The majority of Scotland's population lives in the "waist from Glasgow to Edinburgh, Scotland's two largest cities."¹⁴ The rest of the country is much less urban, and more remote.

The largest city in Scotland is Edinburgh and is the hub for multiple aspects of Scottish life.¹⁵ Edinburgh is home to the Scottish Parliament¹⁶ and the seat of the Scottish government.¹⁷ Edinburgh is the center of the "Scottish legal system."¹⁸

¹⁴ *The People and Culture of Scotland*, HERITAGE OF SCOTLAND, available at <http://www.heritage-of-scotland.com/cult.htm> (last visited Jan. 31, 2012).

¹⁵ *Id.*

¹⁶ *How To Find Us*, THE SCOTTISH PARLIAMENT, <http://www.scottish.parliament.uk/index.aspx> (last visited Mar. 12, 2014).

¹⁷ HERITAGE OF SCOTLAND, *supra*, ch. II, note 14.

¹⁸ *Id.*

Edinburgh is also home to the Church of Scotland,¹⁹ as discussed below, as well as “the site of four universities, and Europe's largest financial center after London.”²⁰ The Heritage of Scotland site points out those industries such as banking, “insurance, finance, tourism, medicine, and other service industries have supplanted the engineering industries and traditional light [manufacturing] of printing and brewing,”²¹ and are the sources of Scottish income.

While conducting my research in Scotland, I was headquartered in Glasgow, which lies just west of Edinburgh. Glasgow is noted for being on the “banks of the River Clyde.”²² Glasgow was previously known for its shipyards.²³ The shipyards “once produced every kind of ship, and goods flowed to all parts of the world from its docks.”²⁴ Other industries such as iron and steel mills, “engineering works, machinery factories, chemical works, and textile mills,”²⁵ were also a major part of the Glasgow economy. However, competition with less expensive foreign markets made it cost prohibitive for these industries to continue in Glasgow and after World War II the Glasgow economy fell.²⁶ However, in the latter half of the twentieth century, Glasgow picked itself back up and rebuilt its economy.²⁷ Glasgow “promoted itself as a tourist

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ HERITAGE OF SCOTLAND *supra*, ch. II, note 14.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

centre and attracted investors,”²⁸ and was “designated a European City of Culture in 1990 and is viewed as a dynamic and cultured city.”²⁹

Scottish culture is fascinating. The Scotland.org comments that the “Scots can be dour but equally they can flash with inspiration.”³⁰ The Scots are a gregarious people; they enjoy socializing.³¹ For example, the Scots will gather in a “small group in the local pub, or at a Ceilidh (which means literally, a "visit").”³² Scottish humor tends to be “self-deprecating.”³³ For example, Scottish comedians have poked fun of their culture’s thriftiness and perpetuated the general belief that Scots are frugal.³⁴ There are many facets of Scottish culture that are fascinating, such as those herein listed.

There is, for example, a tradition of hospitality in Scotland.³⁵ This tradition of hospitality led to one Clan's down fall. It is said that Clan “MacDonald” freely gave hospitality to Clan “Campbell” Soldiers. Once the Campbell Soldiers received their orders, they slaughtered the MacDonald Clan.³⁶ With much less drastic results, I have

²⁸ *Id.*

²⁹ HERITAGE OF SCOTLAND, *supra*, ch. II, note 14.

³⁰ *Scottish Culture, the People of Scotland*, TOUR SCOTLAND, available at <http://www.fife.50megs.com/welcome.htm> (last visited Jan. 21, 2012).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ See HERITAGE OF SCOTLAND, *supra*, ch. II, note 14; and TOUR SCOTLAND, *supra*, ch. II, note 30.

³⁵ *Id.*

³⁶ See The Massacre of Glencoe, *ELECTRONIC SCOTLAND*, available at <http://www.electricscotland.com/history/glencoe> (last visited Feb. 29, 2012); The Contemplator's Short History of The Glen Coe Massacre, *CONTEMPLATOR.COM*, available at <http://www.contemplator.com/history/glencoe.html> (last visited February 29, 2012); *History of Glencoe*, *GLENCOE SCOTLAND*, available at <http://www.glencoescotland.com/p/v/history> (last visited Feb. 29, 2012); The Infamous Massacre of the MacDonalds by the Campbells, *MACDONALD.COM*, available at <http://www.macdonald.com/glen1.html> (last visited Feb. 29, 2012).

experienced Scottish hospitality myself. During the course of my research, knowledge was gladly given by many whom I encountered. If I had need of a place to stay for a while, such accommodation would have been given too, I am sure. The Scotts are truly a hospitable people.

Perhaps the most memorable feature of Scottish culture is the Clan system. Clans are “groups of families sharing a common ancestor. . . [many] Scots still feel strong kinship with their clan, and many Scottish traditions have their origins in that system.”³⁷ The geographical makeup of Scotland caused the separation of civilized groups into small groups of Highlanders, thereby leading to the creation of the clan system we know today.³⁸ “Each clan was ruled by a chief, and the members of a clan claimed descent from a common ancestor.”³⁹ The tartan, a plaid design, of the traditional kilt is probably what most people remember of the Highlanders.⁴⁰

Unlike the United States, Scotland has a national Church called “The Church of Scotland.”⁴¹ The Church of Scotland is Presbyterian.⁴² The “congregation of each Kirk (church) chooses its own minister after a trial sermon, and every member of the church has some share in its governance. In general, sermon and prayer occupy a larger place in the church service than ritual and music.”⁴³

³⁷ TOUR SCOTLAND, *supra*, ch. II note 30.

³⁸ HERITAGE OF SCOTLAND, *supra*, ch. II, note 14.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

Scotland also has other Christian religions. The predominate ones to note are the Roman Catholic Church and the Episcopal Church of Scotland. The Roman Catholic Church, “especially in the Greater Glasgow area,”⁴⁴ has many members that are “descended from Irish immigrants.”⁴⁵ It is also interesting to note that the English have also influenced Scotland's Episcopal Church for it “resembles the Church of England but is an independent body”⁴⁶ and not affiliated with the Episcopal Church of Scotland.⁴⁷

The Scots have long been known for embracing education and encouraging the pursuit of learning among its citizenry. The Heritage of Scotland website points out that the Scots' “history is full of people of humble birth who acquired university educations.”⁴⁸ Over the ages, Scotland has been noted for its premier universities and educational institutions. St. Andrews, which was established in 1410, is the oldest university in Scotland.⁴⁹ Education is free in Scotland, “primary through secondary school.”⁵⁰ Once Scottish students graduate from high school, they can go on to college at no cost.⁵¹

Crofters, known as tenant farmers, are something else that is notable about Scotland's history. Crofters' “houses are built of stone gathered from the hillsides and

⁴⁴ HERITAGE OF SCOTLAND *supra*, ch. II, note 14.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ HERITAGE OF SCOTLAND, *supra*, ch. II, note 14.

⁵¹ *Id.*

roofed with corrugated iron or a thatch of reeds and heather.”⁵² Eventually, Crofters were forcibly removed by their landlords in an action known as the “Highland Clearances.”⁵³ The plight of the Scottish Crofters is an integral part of part of Scotland’s rich and diverse history.

As mentioned *supra*, Scotland has often been heralded as an educated society that continues to contribute to the world; it has a long, rich and cultured past. It is quite fascinating to see how features influences, or even impacts, International Commercial Arbitration and mediation.

III. THE UNITED STATES: HOME OF THE FREE, LAND OF THE BRAVE

Elucidating the features of American culture is difficult when compared to the preceding discussion about Scotland. The United States' territory covers “the breadth of a continent.”⁵⁴ Since the US covers more territory, compared to Scotland, and the US is comprised of peoples from literary every sector of the globe, there is more opportunity for cultural diversity to set in.

The United States has a diverse culture and perhaps more so than that of Scotland. In the United States, there are numerous and varying cultures that thrive and even live side-by-side within⁵⁵ the “American life.”⁵⁶ Perhaps what should be most

⁵² *Id.*

⁵³ *Id.*

⁵⁴ LIFE IN THE USA, *supra*, ch. II, note 8.

⁵⁵ *Id.*

⁵⁶ *Id.*

remembered about the United States is that we are a supposed “melting pot” of cultures and peoples. The inscription on the Statue of Liberty, “Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed, to me: I lift my lamp beside the golden door.”⁵⁷ The statute, a gift from the people of France, stands on Liberty Island, the gateway into the United States for immigrants arriving from Europe, and elsewhere; this inscription is a very poignant.

The United States is quite a unique country. “What do you think about when you hear the words: The United States of America?”⁵⁸ Some people would recall the quote, "The land of the free, and the home of the brave." Many of us think of that quote, or quotes, from the song: "America The Beautiful," like "spacious skies" or "amber waves of grain."⁵⁹ Others view the United States differently; you are American if,

1. You believe deep down in the First Amendment, guaranteed by the government and perhaps by God.
2. You're familiar with David Letterman, Mary Tyler Moore, Saturday Night Live, Bewitched, the Flintstones, Sesame Street, Mr. Rogers, Bob Newhart, Bill Cosby, Bugs Bunny, Road Runner, Donald Duck, the Fonz, Archie Bunker, Star Trek, the Honeymooners, the Addams Family, the Three Stooges, and Beetle Bailey.

⁵⁷ EMMA LAZARUS, THE NEW COLOSSUS (1883). (The poem is engraved on the plaque of the Statue of Liberty).

⁵⁸ *American Culture*, AMERICAN FAMILY TRADITIONS, available at http://www.americanfamilytraditions.com/american_culture.htm (last visited Jan. 31, 2012).

⁵⁹ *Id.*

3. You know how baseball, basketball, and American football are played. If you're male, you can argue intricate points about their rules. On the other hand (and unless you're under about 20), you don't care that much for soccer.

4. You count yourself fortunate if you get three weeks of vacation a year.⁶⁰

One website shows an underlying aspect of the American Way. As Americans, “we expect to compete in every aspect of our lives.”⁶¹ However, the culture of the United States also assumes that all American citizens will be given an equal opportunity to succeed or make something of themselves.⁶² Interesting, the United States laws were founded on the assumption that its citizens have equal rights in the eyes of the law.⁶³

Furthermore, as a society, Americans expect a strong work ethic; work hard, and we, as a nation will go far. This belief permeates through our business relationships across the globe. Quality products are supposed to be indicative of a leading nation.⁶⁴

American business or American industries:

Sometimes we even find ourselves 'on the soap box' spouting expectations of our Nation's performance or the performance of American Industry not realizing that unless we each live up to these expectations, our Nation and our Industries cannot. Frequently, many of our competing interests and our strong desire to ensure Individual Freedom, result in extraordinary events taking place that can only be explained by the expression: 'Only in America'.⁶⁵

⁶⁰ Mark Rosenfelder, *The Metaverse*, ZOMPIST.COM, available at <http://www.zompist.com/amercult.html> (last visited Jan. 31, 2012).

⁶¹ AMERICAN FAMILY TRADITIONS, *supra*, ch. II, note 58

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

People of the United States take these values to the table whether it is a new relationship or during the course of an International Commercial Arbitration.

The United States, is for the most part, made up of “a nation of immigrants and as a result is a cultural mish-mash in every sense of the word.”⁶⁶ The website, *Kwintessential*, emphasizes that most American’s can trace their lineage to other cultures, be they of Europe, Latin America,⁶⁷ or elsewhere.

As mentioned above, most Americans can trace their lineage to multiple cultures. With that said, the “Scots have played a major part in the development of North America.”⁶⁸ The website *Tour Scotland* has estimated that “sixty-one percent of US Presidents had[sic] Scottish origins. Nine of the thirteen governors of the newly created United States of America were Scots.”⁶⁹ Those of Scottish decent seem to have had an important political role in building the United States.

It has been said that the twentieth century was the “age of documentation.”⁷⁰ Since it is so easy now to record our thoughts, “folklorists and other ethnographers have taken advantage of each successive technology, from Thomas Edison's wax-cylinder recording machine, invented in 1877, to the latest digital audio equipment, in order to record the voices and music of many regional, ethnic, and cultural groups, in the United

⁶⁶ *USA - Language, Culture, Customs and Etiquette*, KWINTESSENTIAL, available at <http://www.kwintessential.co.uk/resources/global-etiquette/usa.html> (last visited Jan. 31, 2012).

⁶⁷ *Id.*

⁶⁸ *Scottish Culture, Scots in North America*, TOUR SCOTLAND, available at <http://www.fife.50megs.com/welcome.htm> (last visited Jan. 21, 2012).

⁶⁹ *Id.*

⁷⁰ *About the American Folklife Center*, AMERICAN FOLKLIFE CENTER, available at <http://www.loc.gov/olklife/aboutafc.html> (last visited Jan. 31, 2012).

States and around the world.”⁷¹ Because of technology, we are now able to hear a folk song, for example, that has passed for decades from generation to generation. Folk songs can embody the essence of culture.

The United States has a rich history of material to preserve and learn from. The American Folklife Center⁷² has music samples that encompass the American experience. The preserved materials that the American Folklife Center has archived are also indicative of how rich the culture is in the United States:

Native American song and dance; ancient English ballads; the tales of "Bruh Rabbit," told in the Gullah dialect of the Georgia Sea Islands; the stories of ex-slaves, told while still vivid in the minds of those who endured one of the most harrowing periods of American history; an Appalachian fiddle tune that has been heard on concert stages around the world; a Cambodian wedding in Lowell, Massachusetts; a Saint Joseph's Day Table tradition in Pueblo, Colorado; Balinese Gamelan music recorded shortly before the Second World War; documentation from the lives of cowboys, farmers, fishermen, coal miners, shop keepers, factory workers, quilt makers, professional and amateur musicians, and housewives from throughout the United States; first-hand accounts of community events from every state; and international collections from every region of the world.⁷³

The sample of archived works that the American FolkLife Center holds shows that the United States has a multitude of cultures that comprise the American experience. Those who visit the United States may have learned a lot about its culture through the media.⁷⁴

⁷¹ *Id.*

⁷² The United States Congress established the American Folklife Center in 1976 as a means to catalogue, preserve, maintain and even educate the world about American folklife. It is housed in the United States Library of Congress. (See, About the American Folklife Center, AMERICAN FOLKLIFE CENTER, available at <http://www.loc.gov/folklife/aboutafc.html> (last visited on January 31, 2012)).

⁷³ *Id.*

⁷⁴ KWINTESENTIAL, *supra*, ch. II, note 66.

Movies and television can obviously distort the reality of American culture and traditions.⁷⁵ Visitors, however, expect Americans to be an informal and hospitable people.⁷⁶

Families tend to be small in the United States. Extended family members live somewhere else, on their own, and “often at great distances from their children.”⁷⁷ “Individualism is prized, and this is reflected in the family unit. People are proud of their individual accomplishments, initiative and success, and may or may not, share those sources of pride with their elders.”⁷⁸

Most American business men and women value a strong work ethic and conduct their affairs in a short and efficient amount of time. Perhaps, most Americans live by the mantra “Time is Money.”⁷⁹ It seems that time, at least in the United States, is a commodity that is always in short supply.⁸⁰ However, the country that coined the phrase obviously lives the phrase. People 'save' time and 'spend' time as if it were money in the bank. Americans ascribe personality characteristics and values based on how people use time. For example, people who are on time are considered to be “good” and reliable people, who others can depend on.⁸¹

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ KWINTESSENTIAL, *supra*, ch. II, note 66.

⁸¹ *Id.*

The United States legal culture has a close affinity with “other legal cultures.”⁸² The close connection that springs to mind is that which it shares with the English legal culture. However, the United States also has other legal cultures. The Spanish, French, Swedes and Dutch cultures all have had an important part in forming the United States legal culture that we know today.⁸³

Each of the original Thirteen Colonies had its “own legal system.”⁸⁴ “Each cultural group had brought in its own law”⁸⁵ For one reason or another, not all of the cultural influences are present in our current legal culture or system today. For example, the Swedish legal cultural seemed to have not survived or influenced the United States’ legal system today.⁸⁶ However, some “scholars have claimed to find a speck or two of Dutch legal influence surviving to this day.”⁸⁷

French and Spanish legal culture permeates US law even today. The French Napoleonic Code has “gained a more or less lasting foothold in Louisiana.”⁸⁸ Whereas California’s legal system has Spanish influences. A perfect example of this is present day law students learn California Community-Property. The community-property system is a throwback from Spanish law.⁸⁹ Therefore the bulk of our legal culture in

⁸² LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 19 (Touchstone, 3rd ed. 2005).

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸ FRIEDMAN, *supra*, ch. II, note 82.

⁸⁹*Id.*

the United States, “if not strictly native, is English, or comes by way of England, or is built on an English base.”⁹⁰

The United States has a very rich and numerous variety of culture to draw from. Whether it is the first people who populated these shores that affects us today, or the sheer vastness of the geographical area of the United States, we see the diversity of our society in our day to day lives. As earlier mentioned, pinning pigeon holing American culture is quite a difficult task. Hopefully, this snippet of American culture and its legal traditions allow a better grasp of the people we are discussing in this work.

IV. DO CULTURES CROSS-POLLINATE?

While in Scotland I had the opportunity to become friends with a member of my mother’s Clan, “Clan Cunningham.” My friend and colleague, Alex Cunningham, is a solicitor in Scotland. It seems that the Cunningham’s have a strong tradition of producing lawyers. Since he is familiar with both countries, I asked Mr. Cunningham his thoughts on American culture.

Mr. Cunningham told me that in “Scotland there is a perception that Americans are brash, vain and arrogant.” Mr. Cunningham visited the United States, “California in 2009 and Massachusetts and New Hampshire in 2010,”⁹¹ and he found Americans to be “mostly a friendly, modest and helpful race of people just like the Scots.”⁹² Mr. Cunningham also pointed out that the “big difference is the way that Americans marvel about our ancient buildings.”⁹³ Mr. Cunningham noted that although there was

⁹⁰*Id.*

⁹¹ Interview with Alex Cunningham, Scottish Solicitor (June 2011).

⁹² *Id.*

⁹³ *Id.*

civilization and culture in the Americas that go quite far back, the buildings have not lasted like those in those in Europe that were built with stone, not wood.⁹⁴

On his visit to the United States, Mr. Cunningham noticed a few things about the geographically as well as the American's day to day lives. He noticed, geographically, that the White Mountains of New Hampshire "are very similar in scenery to the Scottish Highlands, and Lincoln New Hampshire bears an uncanny similarity to Aviemore in the Scottish Highlands with the low rise shops which stock outdoor gear arrayed either side of the wide main street."⁹⁵ While visiting the United States, Mr. Cunningham conducted his affairs as he would have he been in Scotland. He states,

I went out to take pictures and ride on trams and trains in Boston, Massachusetts with fellow transport enthusiasts just as I would do here in Scotland. I went walking with friends on the coastline and eating out in harbor restaurants around Goleta and Santa Barbara just as I would have done at a Scottish coast in summer.⁹⁶

As a visiting Attorney to the United States, Mr. Cunningham visited courts in Los Angeles and in Santa Barbara, California. "They are remarkably similar to our Scottish Courts," he noted.⁹⁷

Mr. Cunningham noted, one difference, however, does loom large between Scotland and the United States; "through visiting [the] USA and through forum contacts, there are many more people in USA who prefer the single life."⁹⁸ This is not

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Cunningham, *supra*, ch. II, note 91

⁹⁸ *Id.*

necessarily so in Scotland. “It is much more common in Scotland to be partnered,”⁹⁹ Mr. Cunningham notes.

In sum, there appears to be many more similarities between the two cultures than there are differences. Thus, due to the cultural similarities, any new ideas gleaned from either country may be reliably accepted by the other and vice versa.

V. WHY IS CULTURE IMPORTANT?

Why study or be concerned about culture? The short answer is that due to the “recent growth in international trade,”¹⁰⁰ the need to understand cultures has arisen.¹⁰¹ Having a cultural understanding of the parties involved will help “facilitate the resolution of cross-cultural disputes”¹⁰²

In his address to the 17th Annual International Council for Commercial Arbitration conference in 2004, William K. Slate II points out that lawyers “often invoked ‘cultural differences’ to mean a clash of legal processes—such as the different procedures used in civil and Common Law countries . . . recently, “cultural differences” have been invoked by both civil and common-law practitioners to criticize—with some justification—the use by U.S. attorneys of litigation-style procedures in the arbitration forum that expand the time and costs of the arbitration process.”¹⁰³

⁹⁹*Id.* (Mr. Cunningham suggests for [Scottish] District Attorney information read Procurator Fiscal.)

¹⁰⁰ Slate, *supra*, ch. I, note 18, at 99.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 98.

Mr. William Slate, in his speech at the 17th Annual ICCA conference, further points out that “arbitrators and mediators should be aware of the cultural biases the disputing parties may have about each other.”¹⁰⁴ Culture can play an important role in negotiations, business transactions and how we resolve a dispute.

Dispute resolution between parties from different cultures can be “inherently more difficult . . . and thus are among the most intellectually exciting challenges in the field of dispute resolution.”¹⁰⁵ This statement can be especially true in International Commercial Arbitration, where parties of differing cultures are the norm rather than the exception. Mr. Slate states that having a working knowledge of the legal culture and being aware of the differences can assist the arbitrators in drafting “awards that the parties would respect, and also improve interactions between the arbitrators, counsel and the parties.”¹⁰⁶ Furthermore, by having “culturally informed decision makers”¹⁰⁷ present in a dispute “would not only give the parties confidence in international arbitration and ADR”¹⁰⁸ in general but it would also “enhance the prospects for the enforcement of arbitral awards by national courts.”¹⁰⁹ This understanding of two cultures, the United States and Scotland, is only a small part of International Commercial Arbitration. However, this cultural understanding can be priceless to the topic at hand.

¹⁰⁴ *Id.* at 99.

¹⁰⁵ *Id.* at 100.

¹⁰⁶ Slate, *supra*, ch. I, note 18.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 101.

Culture can shape the way we resolve disputes, if at all. Confucius, the ancient Chinese sage, “Human beings draw close to one another by their common nature, but habits and customs keep them apart.” These examples of culture shaping the contours of dispute resolution illustrate the importance of learning about our cultural differences.”¹¹⁰ Familiarity with the culture of the parties enables arbitrators to make informed choices. This awareness will assist arbitrators not to “trample on parties who are different from us. Doing so will make international arbitration more successful”¹¹¹ by providing “cross-cultural training for arbitrators and mediators so that they can determine whether an international arbitration or mediation needs to be adjusted or refined to bridge cultural gaps.”¹¹²

One thing that is occurring in the United States is the growing use of international culture and norms in arbitration.¹¹³ As William K. Slate stated in his address to the 17th annual ICCA Conference, the “most recent example is the new American Bar Association/American Arbitration Association Code of Ethics for Commercial Arbitrators . . . adopts the international neutrality standard for party-appointed arbitrators.”¹¹⁴ Mr. Slate further states that American businesses are inserting clauses into their contracts based on international, and not domestic principles.¹¹⁵ Mr. Slate concludes, and I agree, that these instances suggest the ADR mechanisms or

¹¹⁰ *Id.* at 100.

¹¹¹ *Id.*

¹¹² Slate *supra*, ch. I, note 18.

¹¹³ *Id.*

¹¹⁴ *Id.* at 98.

¹¹⁵ *Id.*

systems in the United States are now incorporating or influenced by “cultural elements in other parts of the world.”¹¹⁶

There also is a growing trend by society to create uniformity and a codified approach to arbitration in International Law. “While differences in conflict resolution processes have historically been discussed under the banner of “cultural differences,” we surely could all agree that “legal cultures” do not exist in an intellectual vacuum.”

¹¹⁷ Legal culture and law is developed by what we are, the society as a whole. Like the cultures we are discussing, American and Scottish values and history shape the legal system “Understanding these values has significant qualitative consequences for [both domestic and] international arbitration [,]”¹¹⁸ mediation and other forms of ADR mechanisms.¹¹⁹

At first glance, what language the arbitration would be conducted in would not raise any red flags.¹²⁰ However, language can cause problems in the resolution of the dispute.¹²¹ In a casual conversation with one of my colleagues in Scotland, he confirmed that there were accents and vocabulary issues during dispute resolution conversations. Similarly, in speaking with friends, family, or colleagues who have moved from one part of the United States to another, I have found that mannerisms and accents can be quite different; in some cases, difficult to understand, despite the fact we

¹¹⁶ *Id.* at 98.

¹¹⁷ *Id.*

¹¹⁸ Slate *supra*, ch. I, note 18

¹¹⁹ *Id.*

¹²⁰ Dr. Iur. Oliver Dillenz, *Drafting International Commercial Arbitration Clauses*, 21 SUFFOLK TRANSNAT’L L. REV. 221, 240 (1998).

¹²¹ *Id.*

are all Americans. As an arbitrator or a mediator, it seems that careful listening, or active listening, is a cultural key in the dispute resolution process.

The United Nations Commission on International Trade Law (UNCITRAL)¹²² has also addressed the issue of language in international commercial disputes. It is up to “the arbitral tribunal . . . [to] determine the language to be used in the arbitration unless the parties have agreed upon the language to be employed in the proceedings before the commencement of the arbitration.”¹²³ At an international level, versus domestic, an “ICC arbitrator determines the language which will be employed in the arbitration.”¹²⁴ It is the arbitrator, or arbitrators, that take into account the language of the contracting parties who are involved in the dispute.¹²⁵ Another example of how to determine language as a factor is when one uses the services of the London Court of International Arbitration; for example, the arbitration shall be that of the document containing the arbitration agreement, unless the parties have stipulated otherwise.¹²⁶ Although language can be a cultural factor in a dispute, it can be effectively handled.

Cultural awareness in business and disputes alike has not gone unnoticed. Research has been conducted by “psychologists, anthropologists and scholars in international diplomacy and business.”¹²⁷ This awareness has led business to “spend

¹²² The United Nations Commission on International Trade Law or UNCITRAL is a legal body or arm of the United Nations. UNCITRAL is unique in that this legal body strives to harmonize and even enhance international commercial laws, regulations, relationships and even dispute resolution processes. One example of this is the UNCITRAL Arbitration Rules, which were revised in 2010. (See <http://www.uncitral.org>, last visited May 12, 2014).

¹²³ Dr. Iur. Oliver Dillenz, *Drafting International Commercial Arbitration Clauses*, 21 SUFFOLK TRANSNAT’L L. REV. 221, 240 (1998).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Slate *supra*, ch. I, note 18, at 99.

hundreds of millions of dollars learning about nuances in language, societal values and taboos in foreign nations in which they plan to launch business enterprises.”¹²⁸

However, one author has noted that the International Commercial Arbitration community has:

made little or no effort to be culturally sensitive to the parties to International Commercial Arbitration. At most, we may note civil and Common Law differences in the arbitration process. But we largely consider cultural differences in people to be unimportant, if we consider such differences at all. Then we cram the parties' dispute into the same conflict resolution machine.¹²⁹

Differing legal traditions, “including the customs, usages and practices of a multicultural international business community,”¹³⁰ can cause conflict, and this is especially true for the types of issues that go through International Commercial Arbitration.¹³¹ It is said that the contemporary form of the law merchant is an efficient means to resolve business disputes in a modern society.¹³² “However, the significance of diversity in business practice is not always made clear in arbitration proceedings . . . and [nor] does the examination and cross-examination of witnesses invariably make those practices clearer.”¹³³ As is explained in Leon E. Trakman’s article, it is the arbitrator’s duty to take into account the legal traditions of the parties so as to draft

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Leon E. Trakman, “*Legal Traditions*” and *International Commercial Arbitration*, 17 AM. REV. INT’L ARB. 1, 39 (2006).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

awards that not only “comply with law, [but is also] fair to the parties.”¹³⁴ Legal traditions are as important during the rise of the law merchant as they are today.

Furthermore, one should be familiar with the dispute resolution process; at issue here is International Commercial Arbitration. The process that the parties use to resolve the dispute “may be perceived by some parties to be biased against them.”¹³⁵ Therefore, neutrals, facilitators, practitioners, arbitrators and mediators “need to be able to adjust the cultural impact of arbitration and mediation by offering a more dynamic process tailored to the parties in cross-cultural disputes.”¹³⁶ Starting out a discussion on comparative ADR systems or mechanisms, culture can be the key to understating.

It also would be beneficial to note the cultural similarities that could be present in arbitration. With the need to understand the cultures that are discussed herein, how are the United States and Scotland similar? For example, one’s personal space is “respected in the United Kingdom”¹³⁷ as it is in the United States. That is not necessarily so in other cultures around the globe. Generally, parties would not come close to someone during negotiations, for example, in either country. Another example that was listed in the article “Potential Culture Clash,” was that both the United Kingdom and the United States have a “let’s get down to business”¹³⁸ attitude. Both business cultures do not mind a little polite chit chat, but after all, the parties are there

¹³⁴ *Id.*

¹³⁵ Slate, *supra*, ch. I, note 18, at 99.

¹³⁶ *Id.*

¹³⁷ Neil Payne, *The Middle East - Potential Culture Clash, Part Three*, KWINTESSENTIAL, available at <http://www.kwintessential.co.uk/cultural-services/articles/culture-clash.html> (last visited Jan. 31, 2012). (The “four part article is taken from a speech given by Neil Payne at the reinsurance & Post Magazine conference held in London, November 2005”).

¹³⁸ *Id.*

to conduct business.¹³⁹ Perhaps the saying “it’s just business and it’s nothing personal” comes to mind. The United States and Scotland, vis à vis the United Kingdom, have similarities that would be recognized during International Commercial Arbitration. These cultural similarities could be of great use to the arbitrator or arbitrators.

In sum, studying culture as it pertains to International Commercial Arbitration can facilitate the arbitral process. It is also a means to make the parties comfortable, and as well, make the arbitral awards delivered to the disputants are understandable. Knowledge of the legal and society culture can facilitate the arbitrator’s or arbitrators’ role as well. The saying “knowledge is power”¹⁴⁰ has rarely been more applicable than as it now pertains to International Commercial Arbitration.

VI. REFLECTIONS AND CONCLUSION

As mentioned previously, a discussion on culture and comparing legal systems is a good framework from which to start. Many different societies have differing views on law, religion, and values – not to mention language. Our world is “growing smaller” [This is cliché-ish....can you re-word?] by the minute due to advancements in technology. More and more international disputes will therefore become a day-to-day reality. Facilitating cross-cultural arbitral disputes, and acquiring knowledge of legal traditions and culture, should be the goal of every arbitrator, attorney and party to a dispute.

* * *

¹³⁹ *Id.*

¹⁴⁰ SIR FRANCIS BACON.

CHAPTER III

SCOTTISH AND AMERICAN LEGAL SYSTEMS:

HISTORICAL PATHS TO

TODAY'S REALITY

This chapter explores the American and the Scottish law, generally from a historical perspective. What comparisons can be made between the two countries historical legal growth? Is the law of England thought to influence both American and Scottish law? Since joining the United Kingdom, we know of today, how has Scotland's way of crafting laws changed? Is there a path to independence for Scotland, like that of the United States?

I. INTRODUCTION

Both the United States and Scotland have had their fair share of influences and obstacles. The United States has grown from modest beginnings to being a super-power. The Scots are still citizens of the United Kingdom, which is an ally of the United States. One author claims that it is "not the country, but the heroic people inhabiting it, that has given Scotland its name in history and its influence on the world's

civilization.”¹ This can be said for its legal system, both historically and in modern times. Both countries can be seen as a strong voice historically and in the modern world.

The laws, throughout the years, have changed for both countries as well. Change in the United States can be seen from colonialism to independence; from the Civil War, 1861—1865, to the Civil Rights Movement, 1954—1964. The United States has seen monumental changes in its laws and how they view them. Historically, Scotland was an independent sovereignty and then joined with other sovereign nations. However, whether it is Scottish law or culture, Scotland continues to be independent and distinct part of the United Kingdom as a whole.

In order to understand the current ADR system, it is always helpful to look to the past. Where did the laws, or dispute resolution options, come from? In this case, how did the United States' legal system grow; how did that of Scotland, which is a much older country than the United States, began? These questions are intriguing; however, the following recitation only concentrates on the highlights and contrasts of both countries.

II. LEGAL HISTORIES COMPARED

Both the United States and Scotland have had humans living on its lands for centuries. To compare the legal systems of both countries that far back would be a vast work in and of itself. The first American Colony, Jamestown, Virginia² was established in

¹ *Scotland's Influence on Civilization Scotland's Place in History*, ELECTRICSCOTLAND.COM, available at <http://www.electricscotland.com/history/influence/chapter1.htm> (last visited Oct. 1, 2011). (These are excerpts from Rev. Leroy J. Halsey, D.D., LL.D., SCOTLAND'S INFLUENCE ON CIVILIZATION, CHAPTER 1 (Presbyterian Board of Publications, 1884)).

² *Jamestown: First English Colony in America*, SOCIAL STUDIES FOR KIDS, available at http://www_socialstudiesforkids_com/articles_ushistory/jamestown.htm (last visited Oct. 1, 2011).

1607.³ However, Scotland's feudal system predates Jamestown, Virginia. Since Scotland is much older than the American Colonies, it is therefore fitting to start the discussion with Scotland and its feudal past.

Scotland was first brought together “under the Kings of Scots”⁴ and was a “precocious mediaeval kingdom.”⁵ Scotland, from the 11th century onwards, “was a feudal kingdom, which involved the granting of land in return for services, such as produce from the land or military service, and the courts were presided over by local landowners.”⁶ Those that held positions in the feudal system had a role to play in its legal system as well. For example, “the monarch was in theory responsible for dispensing 'secular justice'.”⁷ Scotland was unique in that “criminal and non-criminal or civil justice, the task was actually delegated to local 'sheriffs'.”⁸ “Despite a background [in] Celtic law, in the twelfth and thirteenth centuries the Kings of Scots had copied feudal tenures and certain institutions of government from Anglo-Norman England, creating a Scottish Common Law.”⁹ That is where Scotland's legal system similarity to England ended for a time.

The church also had a role in Scotland's legal system. “The church courts applied canon law in various matters including family matters and the inheritance of

³ *13 Originals Chronology*, THE TIME PAGE, available at <http://www.timepage.org/spl/13timeline.html> (last visited Oct. 1, 2011).

⁴ John W. Cairns, *Attitudes to Codification and the Scottish Science of Legislation, 1600-1830*, 22 TUL. EUR. & CIV. L.F. 1, 6 (2007).

⁵ *Id.*

⁶ DEREK MANSON-SMITH, *THE LEGAL SYSTEM OF SCOTLAND 2* (Consumer Focus Scotland, 4th ed. 2008).

⁷ *Id.*

⁸ *Id.*

⁹ Cairns, *supra*, ch. III, note 4.

moveable property.”¹⁰ The church and its canon law arguably had an effect in the creation of the Scottish legal system or upon the Scots Common Law system. “The Church was also, in various ways, an important element in the rise of the medieval Scottish Common Law.”¹¹ The church’s influence and cannon law help produce a distinctive system of law in medieval Scotland.¹²

Scotland, unlike that of its neighbor to the south, “developed neither a central civil court (other than for certain purposes the Parliament) nor a secular legal profession.”¹³ Prior to the fifteenth century, the churches influence can be seen in the local courts of Scotland. One of the local courts was called “the Ecclesiastical.”¹⁴ The Ecclesiastical courts by the end of the twelfth century for example, had judges in “Aberdeen, Glasgow and St. Andrews known as ‘officials’, whose task [it] was to administer canon law in consistory courts held under Episcopal authority.”¹⁵ In “the later Middle Ages, the legal practice of Scottish secular courts came to be influenced by that of the ecclesiastic courts and the Canon law, so that legal concepts and practices of the jus commune were introduced.”¹⁶ These officials were “clergyman, and who as such had studied as Roman Catholic clergymen do to this day-the Canon Law, and who

¹⁰ MANSON-SMITH, *supra*, ch. III, note 6.

¹¹ *Id.*

¹² Hector MacQueen, *Expectations of the law in 12th and 13th century Scotland*, VOL LXX (3-4) TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS, 279, 279 (2002).

¹³ Cairns, *supra*, ch. III, note 4.

¹⁴ Wilson J. Dove, *The Reception of the Roman Law in Scotland*, 9 JURID. REV. 362, 363 (1897).

¹⁵ MacQueen, *supra*, ch. III, note 12, at 280.(Please note that the author sites his information from D.E.R. Watt, *Fasti Ecclesie Scoticanæ Medii Aevi*, St Andres 187, 223 (1969)).

¹⁶ Cairns, *supra*, ch. III, note 4.

probably knew also some Civil Law.”¹⁷ Appeals from the Ecclesiastical courts went to Rome during this time period.¹⁸

It should be further noted that “Scots law has its origins in the European civilian law systems, but has gradually developed similarities to the English Common Law approach, particularly the acceptance of judge-made law, or precedent, as a source of law.”¹⁹ Scotland, in its early medieval days, for a time lacked universities to train lawyers;²⁰ therefore, “Scots lawyers were educated in Europe, particularly in France, Germany, Flanders and the Netherlands, where Roman law was taught.”

Historically, Scotland’s legal profession had to seek their legal knowledge in unusual places. By 1600, two-thirds of the men”²¹ requesting admission to practice law “based their claim for admission before the court on a foreign university education in Civil and Canon law, at this period normally obtained in France.”²² Until approximately 1750, “[f]oreign study of law remained normal for most members of the Scottish bar, the Faculty of Advocates, . . . the universities of choice becoming those of the United Provinces in the later seventeenth century.”²³ While aboard, Scottish lawyers learned Roman law and this brought back this knowledge to their own country. Their knowledge, “now became the normal resource in deciding cases in the 1540s, although the court quickly started to develop its own case-law, usually described as

¹⁷ Dove, *supra*, ch. III, note 14.

¹⁸ *Id.*

¹⁹ MANSON-SMITH, *supra*, ch. III, note 6.

²⁰ *Id.*

²¹ Cairns, *supra*, ch. III, note 4.

²² *Id.*

²³ *Id.*

"practick."²⁴ Law students, historically, traveled abroad for legal knowledge that was quite diverse.

Pre-Union with England, Scotland was not at all like the American Colonies' legal systems. "Before 1707, Scotland was an independent state with its own Parliament with an important law-making function."²⁵ It is important to note that some "Acts of the original Scottish Parliament remain in force."²⁶ However, like all laws, the law is ever changing and some of the original Scottish Parliament Acts have become outdated or replaced.²⁷ The Scots had been around for centuries and a distinct legal system was in place long before the Union of 1707 took place.

Thus, these Roman law trained attorneys began to create a judiciary in Scotland as early as 1532.²⁸ The judicial branch in medieval Scotland was through the Lords of Council, and the Lords of Session primarily dealt with or was defined as handling "judicial business."²⁹ The "Lords of Council and Session were permanently reorganized as [the] College of Justice with a wide civil (that is, non-criminal) jurisdiction."³⁰ Jurisdiction in this context was the "right or authority to apply laws and administer justice; and the district or area over which this authority extends. The 15 judges of 'the Session' became Senators of the College of Justice who sat together in one court."³¹

²⁴ *Id.*

²⁵ MANSON-SMITH, *supra*, ch. III, note 6, at 5.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 2.

²⁹ *Privy Council Records*, THE NATIONAL ARCHIVES OF SCOTLAND, available at <http://www.nas.gov.uk/guides/privycouncil.asp> (last visited Nov. 2, 2011).

³⁰ MANSON-SMITH, *supra*, ch. III, note 6, at 2.

³¹ *Id.*

Furthermore, the “Faculty of Advocates and the Writers to the Signet evolved and were given the exclusive right to plead in court (as advocates) and to act as solicitors.”³²

Scotland seemed to embrace Roman law, or the law from the Continent. “To understand the reception of the Roman law in Scotland one must look upon it in the same way as the like reception was regarded upon the Continent, namely, as a purely intellectual movement, and as a purely voluntary act, not indeed of the people, but of a newly born legal profession.”³³ The key turning point in Scotland’s reception or adoption of “Roman law, occurred [during] the change by which the judicial power passed from the hands of persons of mere rank or position into the hands of trained jurists. It should be noted that “[p]rior to the *Regiam Majestatem*,” dating from the beginning of the fourteenth century, we seek in vain for even a trace of Roman law.”³⁴ Wilson, J. Dove, the author of *The Reception of the Roman law in Scotland*, does not think that prior to the adaption of trained jurists that Roman law in Scotland was as prevalent as some historians believe.³⁵ Roman law was, thus, only accepted and utilized once the Roman trained lawyers utilized it in their homeland’s legal system.

Across the Atlantic during the colonial period of the United States, it can be difficult to identify specific legal systems and laws like those of Scotland. The time frame for the American Colonies and post-independence existence extend over a long period of time. To put this matter into context, “One hundred and sixty-nine years went by between Jamestown and the Declaration of Independence. The same length of time

³² *Id.*

³³ Dove, *supra*, ch. III, note 14, at 362.

³⁴ *Id.* at 365.

³⁵ *Id.*

separates 1776 and the end of the Second World War.”³⁶ Thus the time frames of the American legal system and in particular the “colonial times were hardly a single, uniform period.”³⁷

The term “colonial law” did not have much meaning, nor was there any sense of legal commonality in the Americas.³⁸ When a colony was founded, the background of the colonists, industry or product that was produced, seeking religious freedom, and “at what time it was founded, all effected which laws that colony adopted. Approximately one hundred years separate the creation of the Massachusetts Colony and the creation of the Colony of Georgia.”³⁹ When the Colonies formed, it was with the English law, generally, that they might have had in mind. However, it “is not easy to say what part of English law was the immediate forebear of colonial law.”⁴⁰ The law in the former Colonies was quite varied.

Scotland's laws, compared to the disjointed colonial period legal system, can be seen as to have a single thread or legal system during the American time frame of the American Colonies. Scottish law was heavily influenced by other laws from the European Continent. The Roman trained lawyers reorganized the judiciary in the late Fifteenth Century prior to unification with England.

³⁶ FRIEDMAN, *supra*, ch. II, note 82, at 34.

³⁷ *Id.*

³⁸ *Id.* at 20.

³⁹ *Id.*

⁴⁰ *Id.*

III. ENGLISH INFLUENCE AND COMMON LAW

While Scotland and the Colonies were growing, back in the mother land, “English law did not stand still”⁴¹ either. Furthermore, during the development period of the Colonies and the United States, Scotland was a subject of the United Kingdom. Although the Act of Union took place, Scotland continued to forge its own laws, separate and apart for the most part from the United Kingdom. It suffices to say that “the colonies began their careers at different points in the process of [historical] legal development,”⁴² especially compared to that of Scotland’s legal development; whereas, despite English involvement, Scotland continued to choose its own legal system.

During the Colonial period of the United States, the Colonies should have been “subordinate to England. The law of the mother country was theoretically superior.”⁴³ However, that did not seem the case in actuality. “Even as a matter of theory, it was not clear which acts of Parliament and which court decisions were binding on the colonies.”⁴⁴ It seemed that the American Colonies could choose which laws to ignore, and which they would accept. “Their appetite was determined by requirements of the moment, by ignorance or knowledge of what was happening abroad, and by general obstinacy.”⁴⁵

Identifying English law throughout the colonial legal system is futile exercise. “New England deviated from standard English law more than the Southern colonies

⁴¹ *Id.*

⁴² FRIEDMAN, *supra*, ch. II, note 82

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

did.”⁴⁶ Although the Colonies argued with the English over such things as taxes, think along the lines of the Boston Tea Party, the reliance of English law continued to survive even after Independence.⁴⁷ “English law continued to be imported, in some quantity, when and as needed. Even today a thin, thin trickle remains, when and as needed.”⁴⁸ Thus, the Colonies seemed to be willing to adopt the English law when needed, they adapted that law in a manner to best suit their needs.

Unlike Scotland, England “resisted the reception of that modified, modernized form of Roman law which swept over much of the Continent.”⁴⁹ England went in a different direction and “Sir William Blackstone reduced to writing what he considered the essence of the royal Common Law.”⁵⁰ However, the Colonies did not have access to this book of royal Common Law “before the 1750s. They lacked a handy key to English law. Yet a key was desperately needed. The English Common Law is one of the world's great legal systems—but one maddeningly hard to know.”⁵¹ English law had a higher source of law other than codes, the English had judge made law.⁵²

However, one of the major gifts that the Colonies and the United States inherited from England was the concept of “Common Law.” “English law stood apart and still stands apart from most European systems of law.”⁵³ The Scot's law also differs from

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ FRIEDMAN *supra*, ch. II, note 82

⁴⁹ *Id.* at 21.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

that English law even though it is the same county. The difference from the English legal system is one of the reasons why Scottish law is s unique.

The Common Law concept, or judge-made law, is one that runs in the blood of courts systems in England. Common law has been “molded, refined, examined, and changed in the crucible of actual decision, and handed down from generation to generation in the form of reported cases.”⁵⁴ The judges should have made their decisions based on the ideals of the English people but in actuality their decisions were based upon what they had done in the past as well as pressure of the current state of the dispute resolution system.⁵⁵ English judge-made law is one that continues to be used to this day.

The Common Law courts in England go back centuries. The English Common Law courts “date back to 1215 and the signing of the Magna Carta. Common law embodies the principle that you can do anything whatsoever that you want to do, so long as you do not cause damage to another.”⁵⁶ Keep in mind that Common Law is the notion that statues and codes are a “prerequisite of constitutional judicial process” in the United States of today⁵⁷ Common law courts have been in existence for centuries and were imported to the British colonies.

The Common Law courts in England had a unique aspect that the United Sates did not have, one such being what were known in England as the royal courts.⁵⁸ The

⁵⁴ FRIEDMAN *supra*, ch. II, note 82.

⁵⁵ *Id.*

⁵⁶ Brent Emory Johnson, Common Law, Equity, And Admiralty, IN PURSUIT OF HAPPINESS (Jan. 29, 2007), *available at* <http://inpursuitofhappiness.wordpress.com/2007/01/29/common-law-equity-and-admiralty/> (last visited Oct. 16, 2011).

⁵⁷ *Id.*

⁵⁸ FRIEDMAN, *supra*, ch. II, note 82, at 25.

parties in these courts were not your average citizen, the litigants were “all drawn from the very top of British society—lords and ladies, landed gentry, high-ranking clergymen, wealthy merchants. Common law was an aristocratic law, for and of the gentry and nobility.”⁵⁹ In England, the:

masses were hardly touched by this system and only indirectly under its rule. There was law on the manor—law that controlled the common people and bound them to their betters. This was largely subterranean law and made little impact on the treatises. Law books were written at the seat of power: they dealt with the king's kind of law. Day-to-day law of the lower orders was barely chronicled.”⁶⁰

In other words, mere commoners could not utilize the courts, only the crème de la crème of society.

Moreover, the Common Law did not extend throughout Great Britain.⁶¹ The law of the royals covered “the capital, among expatriates and businessmen, while in the countryside, customary law was left largely to fend for itself. In England, too, in the Middle Ages, many local customs, like local dialects, survived alongside Common Law.”⁶² The rural areas had their own separate legal systems that applied to their respective areas. For example, while many a Jane Austin novel showed that the castle went to the eldest son, and the younger siblings were left wanting, that was not necessarily the law in Kent. The inheritance rules in Kent were “known as gavelkind tenure (abolished in 1925), land descended to all the sons equally.”⁶³ Thus when the

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

colonists immigrated to the Americas, they used the law with which they were familiar; “the local laws and local customs of their communities back home.”⁶⁴

It should be noted that Common Law is separate from the law of equity.⁶⁵ “The procedural law by which these different substantive bodies of law, Common Law and equity, are put into effect can be the same or different, and the courts can be the same or different.”⁶⁶ The English legal system, over time, created court specific jurisdiction. For example,

some courts had only common-law jurisdiction, such as the Court of King’s Bench and the Court of Common Pleas. Some courts had a fused jurisdiction, such as the Court of Chancery, which was primarily a court of equity, but it had a limited common-law jurisdiction in matters involving litigation against officers of the King. The Court of Exchequer, between the mid-sixteenth century and 1841, heard both common-law and equity cases with the jurisdictions and lawsuits being kept strictly separate.

Thus depending of the type of substantive law, the case fell under the English legal system; procedurally under English law, a specific court was the only place that could hear the case and make a ruling.

The separate court system of England had a lasting effect on the Colonial legal system. In Virginia, for example, “there were courts of chancery that had equity jurisdiction only”⁶⁷ and held this power until 2006. Other colonies and areas of the United States though had merged equity and Common Law claims; New York and

⁶⁴ FRIEDMAN *supra*, ch II., note 82

⁶⁵ W. Hamilton Bryson, *The Merger of Common-Law and Equity Pleading in Virginia*, 41 U. RICH. L. REV. 77, 77 (2006).

⁶⁶ *Id.*

⁶⁷ *Id.*

Texas are examples of this type of merger.⁶⁸ Keep in mind that the merged system “has been used in England and Wales since the Judicature Act of 1873.”⁶⁹ The merged system has been only been seen in the Federal Rules of Civil Procedure of 1938 in the United States.⁷⁰

The English court look and feel was imported to the Colonies. Keep in mind that the “colonial courts in the 18th century looked noticeably more English — partly by choice, partly because England was more serious about governing.”⁷¹

In the 18th century, an English element became, perhaps, stronger and more standardized. After the Revolution, the element of (current) English law became thinner and thinner as time went on. Diversity within England became a less and less important formative element. Diversity within the colonies and states was, however, always significant.⁷²

English Common Law did not have quite the presence in the colonial court system as one would think. Although Common Law court procedures and pleadings “were exceptionally intricate . . . [the] Colonial process never attained the heights, or depths, of the English Common Law.”⁷³ There was a “wide [range of] differences between colonies.”⁷⁴ Some colonies were more strict or conservative, as seen in the south, whereas Massachusetts was more informal in comparison.⁷⁵ Also, unlike our reliance

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ FRIEDMAN, *supra*, ch. II, note 82, at 48.

⁷² *Id.* at 36.

⁷³ *Id.* at 56.

⁷⁴ *Id.*

⁷⁵ *Id.*

on case law today, court decisions “did not easily pass from colony to colony. There were no printed reports to make transfer easy, though in the 18th century some manuscript materials did circulate among lawyers. These could hardly have been very influential. No doubt custom and case law slowly seeped from colony to colony.”⁷⁶ If no law existed, borrowing “statutes (even whole codes) was easier to do. Partly for this reason, some colonies had great apparent influence on the others—almost as great as the influence of the mother country.”⁷⁷ English Common Law principles had a limited place in the courts of the former American Colonies.

Note that in “the 18th century, for example, colonial law seemed to swing back toward English models. Even after the Revolution, American law appeared to become, in some ways, a bit more English.” Due to the reality of the American colonies day to day lives, the legal system of the “Puritan oligarchs of 1650 had no need of and no use for”⁷⁸ the laws of their mother country. However the legal systems that were developed could “not to be found in the colonial past; but some could be imported from abroad. Only England had a supply of law that American lawyers could use without translation; and England was itself in the process of social change.”⁷⁹

There are some differences between Scottish law and that of English law. For example, like the American legal system, the “English Common Law courts between the 12' and the 19' centuries, court cases had to be started by using particular forms of action, so that each type of claim had its own name, and had to be raised in a particular

⁷⁶ *Id.* at 92.

⁷⁷ FRIEDMAN *supra*, ch. II, note 82

⁷⁸ *Id.* at 33.

⁷⁹ *Id.*

way. Court action was not possible unless one of these forms of action was used, so there could not be a right without a legal remedy.”⁸⁰ The Scottish court had a similar court filing called “brieves” which then “gave way to a more flexible procedural form (called a 'summons') which could be adapted to fit any number of different types of claims.”⁸¹ Under the Scottish legal system of the time, as “long as there was a right there were few procedural barriers to obtaining a remedy, as long as the action had been raised in the right court.”⁸²

The *Regiam Majestatem*, one of the most notable medieval legal texts which just happen to be Scottish and also was “considered to be legislation.”⁸³ *Regiam Majestatem* is defined as “[t]he "most ancient and authentic book" of Scotland, "containing the rules of their Common Law.””⁸⁴ The *Regiam Majestatem* is definitely a notable Scottish codified legal text.

Scottish law also took into account equitableness concerns and made the “distinction between the strict letter of the law on the one hand, and the equitable discretion of judges to soften the rigours of the law on the other.”⁸⁵ However, Scotland's legal system was not like the English and American “practice of setting up equity (a right as founded on the laws of nature; moral justice) as a separate system, with its own

⁸⁰ MANSON-SMITH, *supra*, ch. III, note 6, at 3.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Cairns, *supra*, ch. III, note 4, at 12.

⁸⁴ BALLENTINE'S LAW DICTIONARY, *supra*, ch. I, note 65. (Please note that Ballentine's Law Dictionary is citing 1 Bl Comm 95).

⁸⁵ MANSON-SMITH, *supra*, ch. III, note 6, at 3.

rules and procedures and courts.”⁸⁶ Scotland did not use juries either like the American legal tradition, or that of England to decide the facts all civil cases.⁸⁷

Compared to Scotland, the colonies had a number of legal relics they brought with them to the American legal system. Early Americans still remembered “what might be called remembered folk-law”⁸⁸ Some of the American legal system was created or utilized to “cope with new, special problems of life in the settlements.”⁸⁹ Some of the elements of the working legal system were there because of “who they were”⁹⁰ such as the Puritan colonist that were here for religious freedom.⁹¹

IV. LEGAL TRADITIONS; SEPARATE AND SEPARATION

Traditions in the law are often thought of as being as strong in the United States legal system as are in that of Scotland. Some codes or regulations in American Law “can be traced back very far—the jury system, the mortgage, the trust, some aspects of land law.”⁹² Scotland's laws can be traced even farther back beyond when the colonies were first settled. The conditions and needs of a new organized colony differ from that of a bustling metropolis. Some aspects of the American Legal System are quite new. “The living law in a broad social sense, including tax law, traffic codes, and social-welfare

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ FRIEDMAN, *supra*, ch. II, note 82, at 35.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 17.

laws, contains some very recent accessions.”⁹³ Thus, the needs of a legal system differ considerably among colonies as well as countries.

Scotland was always separate from the United Kingdom in many ways. This separation includes Scotland's legal system as well. The United States, on the other hand, declared its legal independence from the British Crown in the “Declaration of Independence” on July 4, 1776. Therefore, the United States was not separate from England until after that time.

Some years later, after the colonies declared independence, the American “Fore Fathers” framed the US Constitution, setting out a working law of the land. “Written in 1787, ratified in 1788, and in operation since 1789, the US Constitution is the world’s longest surviving written charter of government.”⁹⁴ The words in the preamble read,

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America⁹⁵

These words are probably as “haunting” to Americans today as the day they were when first written; it embodies what Americans still strive to create, the aspiration of a perfect union. With that said, “England could make do with an unwritten constitution; the United States could not. Any fresh start demands codification.”⁹⁶ Thus begins the codification of law in the fledgling United States.

⁹³ *Id.*

⁹⁴ *Constitution of the United States*, UNITED STATES SENATE, available at http://www.senate.gov/civics/constitution_item/constitution.htm (last visited November 1, 2011).

⁹⁵ U.S. Const. pmbl.

⁹⁶ FRIEDMAN, *supra*, ch. II, note 82, at 90.

Early American codified law began to emerge once independence was declared from England. The first attempt to codify law is found in the *Articles of Confederation*.⁹⁷ But they proved unsatisfactory to powerful circles in the country. After the failure of the Articles, the federal Constitution was drawn up, and ratified in 1787.⁹⁸ Although the Articles of Confederation were not successful, they did set the stage for accepting some type of modern codified law.

The laws that were enacted or codified all have their own history.⁹⁹ An example of one State's history concerning its laws is Massachusetts; the "first Massachusetts codes rose out of political struggle in the colony. The desire for a code was, among other things, a desire to limit autocracy."¹⁰⁰ Another example in the Massachusetts Bay Colony was that there was limitless discretion and power that the judges or magistrates seemed to have.¹⁰¹ The colony's reaction to this was to create a code called the "Body of Liberties... [and in] 1648, a far more important and comprehensive code was adopted, the Laws and Liberties of Massachusetts."¹⁰² What is also significant is that these laws were a "collection of important legal rules, arranged alphabetically by subject."¹⁰³

When the Colonists overthrew British forces, some thought that the old British legal system should be thrown out as well. "The Common Law was badly tarnished;

⁹⁷ *Id.*

⁹⁸ *Id.* at 107.

⁹⁹ *Id.* at 91.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² FRIEDMAN *supra*, ch. II, note 82

¹⁰³ *Id.*

so was the reputation of the lawyers, many of whom had been Tories. It seemed to some men that new democratic states needed new institutions, from top to bottom, including fresh, democratic law.”¹⁰⁴ The United States had an affinity with the French. Some Scholars thought that the Napoleonic Code should be looked at and could use as guidance for drafting a working legal system to the fledgling United States. “In hindsight, the Common Law had little to fear. It was as little threatened as the English language. The courts continued to operate, continued to do business; they used the only law that they knew.”¹⁰⁵

During the fifteenth century, Scotland created a “central civil court progressively developed out of the King's Council, legal practice before which followed Romano-Canonical procedure and in which Canon lawyers tended to deal with much legal business.”¹⁰⁶ As mentioned previously, the College of Justice, or Court of Session, was created during this time period. “This Court adopted a version of Romano-Canonical procedure and, in its early years, had a bench dominated by Canon lawyers. At the same time, a recognizable, secular legal profession developed, both of general men of law and of pleaders well educated in the *jus commune*.”¹⁰⁷

Just as the Colonies were starting in the New World, “Lord Stair, Lord President of the Court of Session, and the first of the so-called 'institutional writers', published his institutes of the Law of Scotland.”¹⁰⁸ The Scottish legal system was written so as to be “a rational, comprehensive, coherent and practical set of rules deduced from

¹⁰⁴ *Id.* at 108.

¹⁰⁵ *Id.* at 109.

¹⁰⁶ Cairns, *supra*, ch. III, note 4.

¹⁰⁷ *Id.*

¹⁰⁸ MANSON-SMITH, *supra*, ch. III, note 6, at 3.

common-sense principles.”¹⁰⁹ Lord Stair, in his writings, was “guided by Roman law, canon law or the Romano-Germanic systems”¹¹⁰ as well as “reported Scottish decisions and statutes.”¹¹¹ It is safe to say that Lord Stair’s publication “was the foundation of modern Scots law.”¹¹²

V. POST AMERICAN INDEPENDENCE *VIS-À-VIS* JOINT SOVEREIGNTY AND ENGLISH INFLUENCE

Post-independence for the United States saw, in some ways, very little on the national stage during the 1800s with perhaps the exception of the abolishment of slavery.¹¹³ Change was ever present at the state level, however, the “literature of the law never gave the states their due.”¹¹⁴ The Civil War was the most critical threat to the American Legal System in its history. The Civil War “tore apart [the Country] along the jagged line between North and South.”¹¹⁵

The Civil War was fought on American soil. It was an unusually violent episode, and it did unusual violence to the ordinary administration of justice. It was also a constitutional crisis. It was followed by a period of martial law and domestic upheaval in the South. The war required enormous effort—armies had to be raised and equipped; unprecedented problems had to be solved. All this meant a dramatic escalation in the role of the national government. This too was reflected in many ways in every part of the law.¹¹⁶

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² THE STAIR SOCIETY, available at <http://www.stairsociety.org/stair.htm> (Last visited Jul. 12, 2011).

¹¹³ FRIEDMAN, *supra*, ch. II, note 82, at 177.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 337.

Post-independence for the United States was an interesting time that affected the legal traditions of modern times.

Within the Constitution, the Framers set up a unique system of “checks and balances,” their new form of government for which they were quite keen on. Black's Law Dictionary defines the term “checks and balances” as the “theory of governmental power and functions whereby each branch of government has the ability to counter the actions of any other branch, so that no single branch can control the entire government.”¹¹⁷ The legislative body issues laws, the executive branch utilizes them, and the judicial branch interprets them. The interpretations or case law is also used in the United States as law as well. The United States is also known as a federalist system.

Although the United States was embroiled in civil conflict, from 1861 to 1865, the young nation survived that challenge. The war did bring about significant changes to the Constitution, which “did not look much different, on paper, in 1900 from the way it looked in 1800. Three important amendments, the “Civil War Amendments: the thirteenth, fourteenth, and fifteenth”¹¹⁸ were added to the Constitution. Amendments to the United States Constitution do what amendments usually do, add another regulation to the existing law. With that said, the thirteenth, fourteenth, and fifteenth amendments to the United States Constitution made it richer by not only banning slavery only banning slavery but by adding both civil and legal protections for those who would have been disenfranchised to begin with due to either race or color.¹¹⁹

¹¹⁷ Black's Law Dictionary, 9th Ed. (2009).

¹¹⁸ FRIEDMAN, *supra*, ch. II, note 82, at 342.

¹¹⁹ See The United States Senate, Landmark Legislation: Thirteenth, Fourteenth, and Fifteenth Amendments, *available at*

The Scottish law is quite different from American law, or even the English law for that matter. While “the law of Northern Ireland [, part of the United Kingdom,] is closely modeled on English law, which applies in England and Wales.”¹²⁰ Whereas the law in Scotland is different due to Scotland's “its distinctive history and its relationship with other legal systems.”¹²¹ Although, a part of the United Kingdom, Scottish law has it distinct characteristics.

The United States on the other hand, created a national constitution to draw from as a source of law, as well as a three-branch governmental system. The three branches are the Legislative, the Executive and the Judicial, all of which are still extant, and fosters a legislative process that is unlike that of most nations of the world. The American legislative process will be discussed in more detail later along with the devolution of Scotland's process for creating laws.

From 1707 on, Scotland's legal system gradually began to change. English law “began to replace Roman law as the main external source of Scots law.”¹²² Legal Scholars “were less likely to study law in Europe and the practice stopped with the Napoleonic wars,”¹²³ and England began exercising a greater role in the court system of Scotland. “The House of Lords became the final court of appeal for Scots civil cases, and the English doctrine of judicial precedent, or subsequent cases being bound by decisions in earlier relevant cases, came to be more strictly applied.”¹²⁴

<http://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm> (last visited Mar. 12, 2014). See also *U.S. Const. amend. XIII – XV. [add to bibliography]*

¹²⁰ MANSON-SMITH, *supra*, ch. III, note 6, at 1.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 4.

¹²⁴ *Id.*

The Scottish Court of Session began taking its present form in the 1800s as well. The Scottish Court is divided into two parts; an Inner House and an Outer House. England's influence on the court system can be seen in how the Court of Sessions is divided.¹²⁵ In the “early 19th century . . . [two] Inner House Divisions were created to hear appeals from Outer House judges and these appeal decisions were followed by Outer House judges in later cases.”¹²⁶ In reality, Scottish Judges over time began to follow rulings made in the House of Lords “despite the fact that judges in the House of Lords were likely to be English lawyers.”¹²⁷ ¹²⁸“As Scotland's industrial, commercial and cultural experience began to grow more like that of England, it became obvious that English law was a more relevant source of law than Roman law.” The Scottish Court of Session emerged in the 1800s into what we see in today's modern times.

English law, although not precedent in Scotland, has some influence over Scottish law. Although decisions on appeal to the House of Lords are “not binding on Scottish courts, [they] is nevertheless usually regarded as persuasive if the case concerns principles that apply in both legal systems.”¹²⁹ Furthermore, Scottish court decisions do not bind the English courts “but they do consider them persuasive, especially if they interpret United Kingdom statutes.”¹³⁰ Although not precedential, the

¹²⁵ MANSON-SMITH, *supra*, ch. III, note 6, at 4.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

Scottish and English courts can glean certain legal understanding from each other's court decisions.

There are some differences between the English and Scottish legal systems; *i.e.*, Scotland's Civil Law rests upon a "more generalised rights and duties than in England."¹³¹ Furthermore, there continues to be a difference in both the laws concerning with rights or duties,¹³² "contrasted with the legal process that is court procedure."¹³³ The Civil Law in Scotland does have its differences from that of England.

As of 1707, the individual parliaments of Scotland and England were no more. Instead, a new parliament was formed, the United Kingdom's Parliament, comprised of "English, Scottish and Welsh members and peers... a new legal institution, sitting in the same premises as the former English Parliament,"¹³⁴ located at London at Westminster or Westminster Place. Like the United States Federal Laws, the "doctrine of sovereignty of Parliament, [ensures that] Acts of the United Kingdom Parliament were and continue to be absolutely binding on all courts, taking precedence over all other sources of law including the Common Law, except European Union law."¹³⁵ Furthermore, "any Act of the United Kingdom Parliament can repeal or amend statutes whether passed by the United Kingdom Parliament, the former Scottish or English Parliaments or the current Scottish Parliament."¹³⁶ Unlike the United States, the

¹³¹ MANSON-SMITH, *supra*, ch. III, note 6, at 4.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 5.

¹³⁵ *Id.*

¹³⁶ *Id.* at 5-6.

“courts cannot challenge the United Kingdom Parliament's power of repeal or amendment, except to the extent such an act is inconsistent with European Union law.”¹³⁷ Thus, the traditional law makers of Scotland, England and Wales became the united under the United Kingdom umbrella.

Historically, the 19th century not only witnessed some great changes, but turmoil as well. “The last quarter of the 19th century was a period of unrest throughout Britain, and the Highlands and Islands were no exception.”¹³⁸ The Highland Clearances started to happen in the 18th and 19th century, starting right after the United States declared their independence. Landowners were evicting their tenant farmers to make way for a more profitable enterprise; *e.g.*, sheep ranching, and in some cases deer parks where people could hunt wild deer for a fee.¹³⁹ Thus, after much strife, the government came up with a new law and commission to assist the Crofters in northern Scotland and on the islands. It was called the *Crofters Holdings (Scotland) Act 1886*.¹⁴⁰ This act still is in place today, although multiple amendments have been made over the years. Scotland in the 19th century experienced great changes as well as considerable upheaval.

VI. THE ACT OF UNION 1707

¹³⁷ MANSON-SMITH, *supra*, ch. III, note 6, at 5-6.

¹³⁸ Crofters Holdings Act, 1886, 1 (Scot.). (The original text of the Crofters Holdings Act, 1886 (Scot.) is available at <http://www.legislation.gov.uk/ukpga/Vict/49-50/29/contents> (last visited Oct. 16, 2011)).

¹³⁹ See these websites for more information on the Highland Clearances: MACLEAN.ORG, available at <http://www.maclea.org/clan-maclea-history/maclea-clearances-2.php> (last visited Oct. 16, 2011); and EDUCATION SCOTLAND, available at <http://www.educationscotland.gov.uk/scotlandshistory/jacobitesenlightenmentclearances/clearances/index.asp> (last visited March 16, 2014); and THECLEARANCES.ORG, <http://www.theclearances.org/> (last visited Oct. 16, 2011).

¹⁴⁰ Crofters Holdings Act, *supra*, ch. III, note 138.

A historical treaty known as the *Act of Union* in 1707,¹⁴¹ a relationship was formed by the joining of the Kingdom of Scotland and the Kingdom of England called Great Britain.¹⁴² The United Kingdom, as we know it today, was formed in 1801.¹⁴³ Therefore, from a historical stand point, Scotland, although not always an easy relationship, has been within the United Kingdom's fold for over three-hundred years.

Since time immemorial, the seat of legislative power for the United Kingdom, (also the “UK”), was in London, England. The legislative body of the United Kingdom is still in London, located at Westminster Abbey. Scotland’s relationship to the British Parliament and the United Kingdom has evolved over those three-hundred years as well. Scotland and England's Act of Union of 1707 provided for the “guaranteed . . . continuation of Scotland's legal and educational frameworks, as well as its church system. However, the Westminster Parliament maintained political control over Scotland, and a cabinet member, the Secretary of State for Scotland, was responsible for Scottish matters.”¹⁴⁴

Scotland and England had, however, fought many battles against each other before this union was formed. Perhaps some of the concessions granted in the Union of 1707 were done with their joint history in mind. It should be noted that England's union with Wales was “much closer . . . in administrative detail” than England’s union

¹⁴¹ HOUSE OF COMMONS INFORMATION OFFICE, SCOTTISH AND WELSH BUSINESS 2 (Factsheet P8 Procedure Series [Factsheet P8] 2007) (U.K.) *available at* <http://www.parliament.uk/documents/upload/P08.pdf>. (The “House of Commons Information Office Factsheets provide brief informative descriptions of various facets of the House of Commons. The Factsheets are divided into four series: Procedure, Legislation, Members/Elections and General.” *Available at* <http://www.parliament.uk/factsheets/> (last visited Apr. 29, 2009)).

¹⁴² UNION WITH ENGLAND ACT 1707, *available at* <http://www.legislation.gov.uk/aosp/1707/7/section/I> (last visited Jan. 29, 2014).

¹⁴³ NEW WORLD ENCYCLOPEDIA, *available at* http://www.newworldencyclopedia.org/entry/United_Kingdom, (last visited Apr. 12, 2014).

¹⁴⁴ HOUSE OF COMMONS INFORMATION OFFICE, *supra*, ch. III, note 141.

with Scotland.¹⁴⁵ However, it is often heralded that Wales did not experience as much anonymity from England as did Scotland when the latter united with England.¹⁴⁶

England, or the UK, incorporated Scotland into their parliamentary system with specific concerns and issues contained within their respective Acts of Union. As Scotland moved forward with England, their parliamentary system started to evolve. By keeping the specific concerns or issues in mind, the UK's parliamentary system evolved further and started the foundation for devolution as we see it today.

A. Definition of Devolution

Devolution is defined as “the transfer of power from a central government to subnational (e.g., state, regional, or local) authorities.”¹⁴⁷ In general, there is no guarantee that the devolution of a legislature will continue, and it can be repealed by the government at any time.¹⁴⁸ This differs greatly from that of a “federalist system” such as those of the United States and Canada. A federal system or “subnational government”¹⁴⁹ such as the United States is guaranteed in the constitution.¹⁵⁰

The devolution of the contemporary United Kingdom has a clear separation of legislative powers and responsibilities. The Cabinet ensures that if the legislative power has not devolved, it remains with the English Parliament, and they are “legally

¹⁴⁵ *Id.* at 3.

¹⁴⁶ *Id.*

¹⁴⁷ ENCYCLOPEDIA BRITANNICA, *available at* <http://www.britannica.com/EBchecked/topic/155042/devolution> (last visited Apr. 2, 2014).

¹⁴⁸ ECONOMICEXPERT.COM, *available at* <http://www.economicexpert.com/a/Irish:Home:Rule.htm> (last visited Apr. 22, 2009).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

competent to legislate on any subject, though where primary legislative responsibility for a matter has been devolved, it normally does so only by agreement of the devolved legislature.”¹⁵¹ Furthermore, United Kingdom’s Ministers

retain key responsibilities in the three parts of the United Kingdom with devolution and their departments continue to operate there. In particular there is a Secretary of State for each, who is a member of the UK Cabinet, supported by a territorial office (the Northern Ireland Office¹⁵², Scotland Office and Wales Office).¹⁵³

The United Kingdom has drafted clear methods or concise “devolution guidance notes (DGNs) [that] set out advice on working arrangements between the UK government and the devolved administrations.”¹⁵⁴ These DGNs, as well as the clear distinction between the devolved parts of the United Kingdom help in the understanding what is within the realm of the United Kingdom Parliament and that of the Scottish or Welsh Parliament.

In order to further understand the impact of the “Devolution Phenomenon,” a brief synopsis of English law and its Parliament is necessary. English law is not inscribed in a constitution, but only within acts or statutes published by the British Parliament. In contrast, the United States, has not only a constitution that establishes the “supreme law of the land,”¹⁵⁵ but it has statutes that are codified as law. By the

¹⁵¹ *Guidance Devolution of Powers to Scotland, Wales and Northern Ireland*, GOV.UK, available at <https://www.gov.uk/devolution-of-powers-to-scotland-wales-and-northern-ireland> (last visited Apr. 2, 2014).

¹⁵² Although there is an Office and a true intent to devolution of Northern Ireland, Northern Ireland does not have the economy that Scotland has within the UK. Northern Ireland does not have the Parliament and Executive powers comparable to what Scotland has within the UK.

¹⁵³ GOV.UK, *supra*, ch. III, note 151.

¹⁵⁴ *Guidance Notes*, THE MINISTRY OF JUSTICE, available at <http://www.justice.gov.uk/guidance/devolutionguidancenotes.htm> (last visited Apr. 22, 2009).

¹⁵⁵ Said law is subject to Supreme Court interpretation; this precedent is set forth in *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803).

practice of gathering other countries and territories into its fold, the “British constitution . . . reflects a venerable political tradition rather than revolution.”¹⁵⁶ Moreover, the British system of law is not based on a single formal written document (excluding the *Magna Carta*). If the “United States is undoubtedly the mother of constitutions,”¹⁵⁷ then “Great Britain may be known as the mother of parliaments.”¹⁵⁸

The evolution of the British Parliament is an interesting one. Historically, in the medieval or dark ages, “there was no clear line or distinction between important legislation and 'other forms of government action.’”¹⁵⁹ Thus, by the “fifteenth century, the consent of the Commons to a statute was regarded as necessary and in early Tudor times, the procedure for enactment took on something like its modern form.”¹⁶⁰ During the 17th century, and the parliamentary or legislative procedure for modern times was laid down and is still used today.¹⁶¹ The British Parliament grew or matured over centuries.

English law, as we know it today, is entirely based on a series of acts by Parliament with the only requirement being that the change occurs according to the rule making process.¹⁶² In sum, an “Act of Parliament creates a new law or changes an

¹⁵⁶ Michael Burgess, *Constitutional Change in the United Kingdom: New Model or Mere Respray?*, 40 S. Tex. L. Rev. 715, 719 (1999).

¹⁵⁷ Winston Roddick, QC, *Symposium on the Devolution of Wales: Devolution –The United Kingdom and the New Wales*, 23 Suffolk Transnat'l L. Rev. 477, 477 (2000).

¹⁵⁸ *Id.*

¹⁵⁹ P.F. SMITH, S.H. BAILEY & MICHAEL J. GUNN, *SMITH AND BAILEY ON THE MODERN ENGLISH LEGAL SYSTEM* 259 (3rd ed. 1996).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Roddick, *supra*, ch. III, note 157, at 478.

existing law.”¹⁶³ The proposed Act is in the form of a Bill that needs to be “approved by both the House of Commons and the House of Lords and formally agreed to by the reigning monarch (known as Royal Assent).”¹⁶⁴ Once the Act is implemented, it becomes law in the United Kingdom, and may apply to the country as a whole, or to only certain territories.¹⁶⁵ The series of Acts that make up English law is still found in the current British legal system.

The process of passing a bill is usually a time consuming procedure, which takes a while, especially if the matter is not all that important. Due to the pressures put upon “the Parliamentary timetable[,]... important clauses are not scrutinized”¹⁶⁶ by the House of Commons. In general, Parliament does not have time to discuss, in detail, every bill that crosses its agenda. Therefore, such bills on matters that pertain to Scotland may suffer the “guillotine” motion” to save time.¹⁶⁷ The best solution for the United Kingdom was to devolve the process of their legislation, and that is exactly what they continue to do at the time of this writing.

Another reason for the United Kingdom to devolve specific knowledge is that this is exactly what is required sometimes when drafting policies that affect a particular territory. Those that sit in Parliament “may not have the necessary knowledge to deal with the details of technical Bills,”¹⁶⁸ especially if it is an environmental bill that only pertains to the Scottish

¹⁶³ *About Parliament, How Parliament works, Making laws, Acts*, PARLIAMENT UK, available at <http://www.parliament.uk/about/how/laws/acts/> (last visited Apr. 2, 2014).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ SMITH ET AL., *supra*, ch. III, note 159, at 277.

¹⁶⁷ *Id.*

¹⁶⁸ TERENCE INGMAN, *THE ENGLISH LEGAL PROCESS* 232 (6th ed. 1996).

Highlands. If the bill just did not accomplish what it was promulgated to do, Parliament's laws are "supreme[, and] it is not possible for anyone to challenge the validity of a statute in the courts, even though it is unreasonable or its passage was produced by fraud or some other irregularity,"¹⁶⁹ as it is in the United States. "One of the distinct features of the constitution of the United Kingdom is the doctrine of Parliamentary sovereignty."¹⁷⁰ Thus, over the years the issues, which Parliament, the House of Commons, and parliamentary sovereignty have handled, have influenced the devolution process.

The next logical step is to examine how the new innovation of legislative assemblies in the Scottish Parliament fit in to the UK's scheme of rule making. The UK's reason for devolution of legislative power, as mentioned before, was to stream-line an over- burdened legislative process. Some also hoped that the devolution of the legislature would be the Parliament closer to the people. We ought to keep in mind, however, that the devolution process started several years ago with Tony Blair's new labor government. At that time, the government stated that it had "no intention to create a federal UK but in the specific context of a resilient aristocratic British constitutional culture both the process and the substance of the reform proposals for a new constitutional settlement were novel and far-reaching."¹⁷¹

One law review article states that the reason behind this momentous idea was that by devolution, even though the main thrust of reform may be different, the people would be closer to the government.¹⁷² Devolution "should not be seen as replacing Parliament but as supplementing it. Nor should devolution be seen as a break-up of the United Kingdom; its

¹⁶⁹ *Id.* at 225.

¹⁷⁰ *Id.* at 261.

¹⁷¹ Burgess, *supra*, ch. III, note 156, at 720.

¹⁷² *Id.* at 717.

purpose is to strengthen it by modernizing the machinery of government and thereby improving the quality of its democracy.”¹⁷³ The further devolution of Northern Ireland would be no exception to this premise.

By proceeding with the idea of “Devolution,” the United Kingdom made a dramatic departure from its usual norms. The novel idea is that the United Kingdom would be organizing itself into “regional territorial units.”¹⁷⁴ Apart from what the Scotland Act (1998) granted, specific legislative matters, known as “reserved matters,”¹⁷⁵ were saved for United Kingdom's Parliament at Westminster.

The Westminster Parliament will continue to hear these reserved matters, and as stated, will continue to be in their [it?] hands[What will be in whose hands? The pronouns are vague]. The Westminster Parliament’s reserved matters concerned such issues as defense, foreign policy, constitutional issues, immigration, abortion, telecommunications, employment, and of course the United Kingdom’s continued relationship with the European Union.¹⁷⁶ As far issues concerning Scotland, “[t]he UK Parliament . . . and the House of Commons retains the right to discuss Scottish and Welsh business.”¹⁷⁷ In other words, if it [Note: we use “it” to refer to government or business entities] desires to do so, Parliament still can debate Welsh and Scottish matters.¹⁷⁸ Within the “British constitutional culture

¹⁷³ Roddick *supra*, ch. III, note 157, at 481.

¹⁷⁴ Burgess *supra*, ch. III, note 156, at 715.

¹⁷⁵ HOUSE OF COMMONS INFORMATION OFFICE, *supra*, ch. III, note 141.

¹⁷⁶ Roddick *supra*, ch. III, note 157, at 478.

¹⁷⁷ HOUSE OF COMMONS INFORMATION OFFICE *supra*, ch. III, note 141.

¹⁷⁸ *Id.*

both the process and the substance of the reform proposals for a new constitutional settlement were novel and far-reaching.”¹⁷⁹

In the past, Scotland had representation in the British Parliament in the form of “Grand Committees.” The House of Commons Scottish and Welsh Business Factsheet notes that the “term Grand is of French origin and is a relic of the language used at court following the Norman Conquest. It is used in the parliamentary context to designate a large committee.”

¹⁸⁰ It has just been in the past ten years or so that Scotland is voicing its own concerns at home now rather than at Westminster. There are some arguments, as discussed herein, to have the grand committees or representations come to an end. That is not to say that the representation at Parliament is totally ceased with because of devolution, there is still a presence in Parliament today. [You might want to be consistent in capitalizing “Parliament.”]

Scotland was traditionally “over-represented” in the House of Common. They had two Committees to discuss such issues only relating to Scotland. The First Scottish Standing Committee that was established in 1948 listens to Government Bills at the Committee stage. A second Committee was established in 1962 only to hear Private Members' Bills.¹⁸¹ Each of these Committees is comprised of no fewer than “16 Members: the quorum is 17 or one third” of the total members.¹⁸²

Similar to those granted to sections of the of the Parliament of the United Kingdom, “Oral questions” are also presented to the Secretary of State for Scotland. This occurs about

¹⁷⁹ Burgess *supra*, ch. III, note 156, at 720.

¹⁸⁰ HOUSE OF COMMONS INFORMATION OFFICE *supra*, ch. III, note 141, at 4.

¹⁸¹ *Id.* at 6.

¹⁸² *Id.*

every four weeks, but before devolution, it was one hour in duration.¹⁸³ “Since devolution the time available to the Scotland Office (as it is now known) has been reduced to thirty minutes.”¹⁸⁴ The House of Commons is reconsidering the representation of Scottish/Welsh representation within its confines.

The House of Commons greatest fear is that by still debating Welsh/Scottish matters it would create something quite different. The House of Commons Information Office Scottish and Welsh Business stated that: “We consider that retention of the Grand Committees would give different Members different rights, and that this is undesirable.”¹⁸⁵ However, Rt Hon Margaret Beckett’s, the Leader of the House, response was that:

The Procedure Committee recommended that the operation of the Grand Committees be suspended during the experiment with sitting in Westminster Hall. We have always accepted that some adjustment to the procedures of those Committees would be necessary, but I am reluctant at this early stage to dispense with what is still a useful procedure.

There will continue to be important Welsh and Scottish matters that need to be debated in the House. Whether they are debated on the floor, in Westminster Hall or in a Grand Committee can depend on circumstances. I do not want to close off one option so soon and particularly before we have seen how the Westminster Hall experiment works. That experiment is designed is to provide time for additional debates on subjects that are not usually covered elsewhere. If part of that is taken up with debates that would otherwise be held in the Grand Committees, the scope for such additional debates will be restricted from the outset.¹⁸⁶

¹⁸³ *Id.* at 4.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 7.

¹⁸⁶ HOUSE OF COMMONS INFORMATION OFFICE *supra*, ch. III, note 141

As of this time, Westminster Parliament does not seem to have terminated the Grand Committees for Scotland. Suffice it to say that Scottish representation will be greatly reduced but is still in place as of today.

Scotland has its own Secretary of State, a position similar to that of a Senator or Congressmen in the United States. The Secretary of State, like a Senator or Congressmen, represents its constituency in the United Kingdom's Parliament. The Secretary of State for Scotland "is responsible for the smooth running of the Scotland's devolution settlement and acts as guardian of the Scotland Act, especially in relation to orders made under its authority."¹⁸⁷ The role of the Secretary of State is an important one as the devolution process evolves.

In the DGNs summarizes the roll that the Secretary of State is to play on behalf of Scotland. The Secretary of State for Scotland... represents Scotland in reserved matters within the Government."¹⁸⁸ Furthermore, Scotland's Secretary of State is "responsible for orders made under the Scotland Act, financial transactions between the Government and the Scottish Executive, certain elections in Scotland and some residual functions in reserved areas."¹⁸⁹ What is important is that the "Scotland Office is a distinct entity within the Department for Constitutional Affairs. Scotland Office officials report to the Secretary of State and the Parliamentary Under Secretary of State for policy purposes."¹⁹⁰ The role of the Scottish Secretary of State is vital to the devolution process.

¹⁸⁷ THE DEVOLUTION GUIDANCE NOTES, THE ROLE OF THE SECRETARY OF STATE FOR SCOTLAND (*DGN 3 2006*) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60979/role-secretary-state-scotland_20.pdf (last visited Apr. 2, 2014).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

Devolution for Scotland today was granted in the Scotland Act of 1998. “Scottish devolution is the delegation of power from the UK Parliament and UK Government to the Scottish Parliament and the Scottish Government, the executive branch for Scotland. This means decisions are made at a level closer to the people they affect.”¹⁹¹ For some time Scotland, historically, was “over-represented” in the House of Commons. The key difference peculiar to the Scottish Parliament, as compared to other types of legislative bodies, is that it has full legislative power over almost all matters that were originally within the Scottish Office.

The devolution created Scotland's very own Executive Branch known as the Scottish Government. Devolution also granted the Scottish Parliament the power to legislate on approximately sixteen types of matters. These included matters that the Scotland Parliament could hear and legislate on, such as issues involving education, Gaelic culture and language, agriculture, local governments, planning, police, environment concerns, tourism, sports, transportation, and economic development for the region.¹⁹²

The Scottish Parliament also has the power to vary taxation by three pence to the pound¹⁹³ and “set local, domestic and non-domestic taxation and will therefore be able to revise or replace the council tax.”¹⁹⁴ However, the Scottish Parliament has no legislative power over “savings and dividend income, nor will it be able to alter the value added tax (VAT), corporations tax on national insurance.”¹⁹⁵ It should also be noted that the Scottish

¹⁹¹ *How the Scottish Parliament Works*, THE SCOTTISH PARLIAMENT, at 4, available at <http://www.scottish.parliament.uk/vli/publicInfo/hspw/documents/HTSPW-Eng.pdf> (last visited Apr. 22, 2009).

¹⁹² *Id.*

¹⁹³ HOUSE OF COMMONS INFORMATION OFFICE *supra*, ch III, note 141, at 1.

¹⁹⁴ Burgess *supra*, ch. III, note 156, at 723.

¹⁹⁵ *Id.*

Parliament may hear and legislate on civil and criminal matters. This power, however, has not been granted to Wales.¹⁹⁶

Where does the new Scottish Parliament get the funding to perform their new duties? The Scottish Parliament funding is a “blocked grant” with “limited revenue raising powers.”¹⁹⁷ “This model is similar to that of New Zealand, Canada, South Africa, and Australia until the passing of the Statute of Westminster in 1931.”¹⁹⁸

Until their permanent building was completed, the Scottish Parliament formally met at the Church of Scotland Assembly Hall, the Mound, Edinburgh. In the Autumn of 2001, the Scottish Parliament started to meet in their new location at Holyrood, which “sits at the foot of Edinburgh's famous Royal Mile in front of the spectacular Holyrood Park and Salisbury Crags.”¹⁹⁹ “Each parliamentary session lasts four years from the date of the first meeting after a general election.”²⁰⁰ It was first conducted on May 12, 1999.²⁰¹

When the Scottish Parliament first began, they wanted to set out how Parliament’s practices and “identified four key principles on which these practices would be based.”²⁰² One is the sharing of the power between the people and the newly elected legislature and

¹⁹⁶ HOUSE OF COMMONS INFORMATION OFFICE *supra*, ch. III, note 141, at 3.

¹⁹⁷ Roddick *supra*, ch. III, note 157, at 481.

¹⁹⁸ *Id.*

¹⁹⁹ *About Holyrood*, THE SCOTTISH PARLIAMENT, *available at* <http://www.scottish.parliament.uk/vli/holyrood/> (last visited Apr. 22, 2009)..

²⁰⁰ THE SCOTTISH PARLIAMENT *supra*, ch. III, note 199, at 11.

²⁰¹ The Scottish Parliament, *Scottish Parliament Official Report*, at 1, (Vol 1. No 1. May 12, 1999), *available at* <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-99/or010104.htm#Col1> (last visited Apr. 29, 2009).

²⁰² *Shaping Scotland's Parliament*, THE SCOTTISH PARLIAMENT (Jan. 1999), *available at* <http://www.scottish.parliament.uk/vli/education/resources/learningResources/pdfs/higher-shaping-sp.pdf> (last visited Apr. 29, 2009).

Executive;²⁰³ the second is the accountability of the Parliament and Executive to the people;²⁰⁴ the third is there should be greater access to participate in the legislative process;²⁰⁵ the fourth and last ey principle is that there should be equal opportunities for all of Scotland’s people.²⁰⁶

The Scottish Parliament is comprised of 129 members known as “Members of Scottish Parliament, [or] MSPs.”²⁰⁷ The MSPs are elected; they comprised of a “Presiding Officer” and two “Deputy Presiding Officers” that are elected by Parliament.²⁰⁸ The Presiding Officer and Deputies have such duties as to chair the various types of Scottish parliamentary meetings and represent the Scottish Parliament when involved with other parliament/government organizations.²⁰⁹ Parliament’s legislative agenda will function “according to a set of rules and procedures called the Standing Orders.”²¹⁰

As earlier mentioned, the devolution of the British Parliament will have an impact within the European Community, and perhaps beyond. Within the Scottish devolution acts, the European Convention on Human Rights has been incorporated.²¹¹ Thus, Scotland will have to keep abreast of European Union Law as well as Customary International Law. This is something that providences or states in a federalist system will not have to contend with.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ THE SCOTTISH PARLIAMENT *supra*, ch. III, note 199, at 6.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Law Society Gazette, Vol. 96 No. 21, 23 (1999).

Thus, Scotland will have an impact within EU merely by its presence. The devolution of Scotland into a specialized Parliament and executive branch will be felt beyond the borders of the UK.

B. The Path to Secession

In recent years, the Scottish people are starting to question their allegiance to the United Kingdom. In particular, the question of the United Kingdom's sovereignty, or the continuation of that sovereignty is at issue. Professor Dr. Sophie Clavier indicates in her book review of *Contemporary Issues on Public International and Comparative Law: Essays in Honor of Professor Christian Nwachukwu Okeke*, "the degree to which nation states willing to redefine sovereignty from its absolute form to one of "shared" sovereignty as it is now the case in the EU."²¹² This is perhaps the case in the United Kingdom today. The United Kingdom has perhaps attempted to redefine its view on sovereignty in the continued growth of devolution of legislative powers.

However, at the time of this writing, actions were taken by Scotland to secede. On September 18, 2014, a referendum will be held in Scotland to ask one question: "Should Scotland secede from the United Kingdom with the word yes or no to check off?" Of course certain questions still abound whether Scotland is ready to stand by itself, just another nation with its own seat in the European Union. This vote is not one that will be examined here, nor its suspected outcome disclosed herein at this time. The world watches, waits, and wishes the best for the Scottish people during this time of change.

²¹² Sophie Clavier, *Contemporary Issues on Public International and Comparative Law: Essays in Honor of Professor Dr. Christian Nwachukwu Okeke*, 15 ANN. SURV. INT'L & COMP. L. 145, 150 (2009)(book review).

VII. SUMMARY

This was a brief legal history comparing Scotland and the United States' legal systems. With respect to both, English law may be considered a common influence only in certain aspects of both countries' histories. Regarding the development of its legal landscape, Scotland has been unique from the United States, and England. At one time, Scots were trained in European law; thus, familiarizing themselves with Roman law. The Colonies had multiple locations and needs when their laws were created. English law was partly useful to the American Colonies and helped shape the United States legal machine, even after the Colonies declared their independence from England. The following chapter explores ADR of the past.

* * *

Chapter IV

ALTERNATIVE DISPUTE RESOLUTION OF YORE

Chapter four explores ADR methods of the past. Where did the dispute resolution options originate? What ADR mechanisms did the American Colonies have, then later, the United States? What ADR mechanisms did Scotland utilize during medieval times, prior to joining with the English Crown as well as post-unification? Since Scotland is part of the United Kingdom, what role did England have in ADR history?

I. INTRODUCTION

It is worth our while to review the past in order that we may create a protocol for constructing a better ADR method. As far back as the Middle-Ages, maybe even earlier, there were numerous forms of both local and regional arbitration mechanisms that were utilized to resolve¹ “private law disputes.”² The United States and Scotland, one a fairly new country, and the other a much older one, both has unique and rich ADR mechanisms that have been improved over time. Beginning with Scotland, the following recitation presents the more significant highlights, and contrasts both countries historical ADR systems.

¹ GARY BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS 13 (Aspen Publishing, 2010).

² *Id.*

II. *LEX MERCATORIA: THE MEDIEVAL LAW MERCHANT*

Lex Mercatoria,³ or the Law Merchant, is an old and unique means to resolve conflict. Historically, merchants who traveled by ship needed to resolve disputes quickly and easily prior to setting sail from a port in which they had just been trading. Due to the “transient nature of the merchant class”⁴ a special means to resolve conflict had to develop.⁵ As a result, special customs and usage of this form of dispute resolution mechanism emerged among the merchants that were indigenous to the law of that forum.⁶

Lex Mercatoria, therefore, arose to accommodate the needs of international traders,⁷ and was derived from rules and business concepts of people of “many nations, and has become, more than any other branch of the law, international.”⁸ However, *Lex Mercatoria* is perhaps the most obscure concept in International Law⁹ that scholars encounter when studying this area of law. In Medieval Europe, “international trade was largely governed by transnational commercial law.”¹⁰ Since these merchants were of different backgrounds, the need to utilize ADR systems increased. ADR systems

³ See *Lex Mercatoria*, BALLENTINE'S LAW DICTIONARY *supra*, ch. I, note 65.

⁴ Stephen McAuley, *Achieving the Harmonization of Transnational Civil Procedure: Will the ALI/UNIDROIT Project Succeed?*, 15 AM. REV. INT'L ARB. 231, 231 (2004) (discussing *Lex Mercatoria*).

⁵ *Id.* at 231-232.

⁶ *Id.* at 231.

⁷ *Miller v. Miller*, 296 S.W.2d 684, 65 A.L.R.2d 589, 686 (Ky. 1956).

⁸ *Id.*

⁹ Jonathan Bellish, *Towards a More Realistic Vision of Corporate Social Responsibility Through the Lens of the Lex Mercatoria*, 40 DENV. J. INT'L L. & POL'Y 548, 551 (2012).

¹⁰ Henry Mather, *Choice of Law for International Sales Issues Not Resolved by the CISG*, 20 J.L. & COM. 155, 178 (2001).

were key to resolving disputes in the “fairest and most expeditious manner possible.”¹¹ In sum, this form of ADR focused on expediency, convenience, and common sense, rather than on the laws or dispute resolution procedures of a particular sovereign nation—perhaps becoming International Law itself.

From the Eleventh through the Twelfth Century, unprecedented commercial and economic growth arose thus leading to the need for ADR systems.¹² Medieval scholars say this growth spurred the need to apply Roman Civil Law in new ways.¹³ It was during this time that the Law Merchant was on the cutting edge of the then modern law by retooling older legal concepts and creating new and innovative bodies of law.¹⁴ The economic resurgence culminating in the Law Merchant during Medieval Europe led to an innovative mechanism for dispute resolution for Commercial Law.

Lex Mercatoria was flexible and not a one-size-fits-all dispute resolution mechanism in Scotland and across Europe, but similarities did abound. The “historical *lex mercatoria* was not a single, uniform, essentially private legal system”¹⁵ Mercantile customs and dispute resolution mechanisms were “rather *iura mercatorum*, the laws of merchants: bundles of public privileges and private practices, public statutes and private customs sheltered under the umbrella concept of merchant law by their association with a particular sort of supra-local trade and the people who carried it out.”¹⁶ For our

¹¹ Michael B. Lopez, *Resurrecting The Public Good: Amending The Validity Exception In United Nations Convention On Contracts For The International Sale Of Goods For The 21st Century*, 10 J. BUS. & SEC. L. 13, 136 (2010).

¹² Adam B. Weissburg, *Reviewing The Law On Joint Ventures With An Eye Toward The Future*, 63 S. CAL. L. REV. 487, 505 (1990).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Emily Kadens, *Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law*, 5 CHI. J. INT'L L. 39, 42 (2004).

¹⁶ *Id.*

purposes, the Medieval Law Merchant was an informal means to resolve disputes versus the formalized means to resolve disputes through the court system.¹⁷ Furthermore, this form of conflict resolution system was flexible because it addressed the needs of the merchants that transcended culture and forum.¹⁸ Scholars indicate that the ancient *Lex Mercatoria* was “not a body of mercantile laws”¹⁹ but was utilized by those “who understood the inefficiencies of traditional courts and mutually agreed to avoid those inefficiencies.”²⁰ *Lex Mercatoria* was an ADR system in and of itself, and stood apart from the medieval court system of the times that went beyond local or culture.

Eventually, *Lex Mercatoria* became a body of law and the harmonization of an ADR mechanism. The codification or unification of *Lex Mercatoria* and Commercial Law is quite old, its roots in Medieval Europe.²¹ The Law Merchant became the symbol for the “coalescence of commercial law into uniformity and harmonization, and the functional recognition by merchants trading in foreign jurisdictions of the ability to obtain a fair and impartial arbiter of, and perhaps most importantly, a neutral-merchant body of law.”²² On the other hand, *Lex Mercatoria* was not a “systematic law; it was not standardized across Europe; it was not synonymous with commercial law; it was

¹⁷ Trakman *supra*, ch. II, note 130, at 7.

¹⁸ Peter T. Leeson & Daniel J. Smith, *The Law Merchant and International Trade*, 61 FREEMAN 4 (2011) available at <http://www.thefreemanonline.org/features/the-law-merchant-and-international-trade/> (last visited Oct. 12, 2012).

¹⁹ Bellish *supra*, ch. IV, note 9, at 556. (citing J. H. Baker, *The Law Merchant and the Common Law Before 1700*, 38 CAMBRIDGE L.J. 295, 300, 303 (1979).

²⁰ *Id.*

²¹ Lopez *supra*, ch. IV, note 11, at 136.

²² *Id.* at 137.

not merely a creation of merchants without vital input from governments and princes.”²³ Since it was based on custom and usage, often times depending on the type of merchants involved, the process fit the needs of these international medieval traders.²⁴ Scholars point out that the *Lex Mercatoria* was codified and yet it was not uniform across mercantile trades. Despite this inconsistency, it seems that this form of ADR worked, and is still thought useful even today.

The use of *Lex Mercatoria* and the laws that arose from this form of dispute resolution processes were not like the Common Law that the United States and Scottish practitioners would have recognized. The fact is that this form of ADR arose from “the custom of a place or territory”²⁵ and was not subject to the law of the land as is the case of Common Law.²⁶ Merchants may have “traveled from fair to fair and from place to place, but in all places the same rules of law were administered and enforced in [a type of] commercial litigation.”²⁷ *Lex Mercatoria* was the product of the merchant classes creating new rules that not only “influenced older institutions and concepts,”²⁸ but also serving to facilitate and increase commerce.²⁹ The custom or need to resolve disputes outside the law became a necessity of medieval commerce.³⁰

²³ Kadens *supra*, ch. IV, note 15, at 40.

²⁴ Leeson & Smith *supra*, ch. IV, note 18.

²⁵ *The Bank of Conway v. B.H. Stary*, 51 N.D. 399, 408.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Weissburg *supra*, ch. IV, note 12, at 506.

²⁹ *Id.*

³⁰ *The Bank of Conway v. B.H. Stary*, 51 N.D. at 408 – 409.

Scholars have interpreted *Lex Mercatoria* as a movement that goes beyond state or national regulations and traditions. For example, Leon E. Trakman, who has written prolifically on the Law Merchant, states that the spirit of the Law Merchant is about “maximizing merchant autonomy and avoiding intrusion by nation states, including by state courts,”³¹ as well as despising state laws.³² What bound merchants to their agreements were the attributes they gave their contracts.³³ The sentiments that grew out of this disdain for laws and authority produced a merchant culture that valued a peer dispute resolution process based upon contract, as well as the customs of the Law Merchant across multiple borders and locations.

Lex Mercatoria was important to the development of ADR systems. The Law Merchant is “as crucial to the development of modern civil and arbitral law as any before or since.”³⁴ The same principles to resolve disputes were used time and again.³⁵ Thus, over time, a whole area of law and dispute resolution mechanism grew out of the “merchant-dispute-tested” ADR system. Bruce L. Benson states that these merchant disputes became the “Spontaneous Evolution of Commercial Law”³⁶ in the title of his

³¹Leon E. Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 UNIV. OF TORONTO L.J. 265, 300 (2003).

³² *Id.*

³³ *Id.*

³⁴ GEMMELL *supra*, ch. I, note 80, at 59.

³⁵Trakman *supra*, ch. II, note 130, at 7.

³⁶See Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, SOUTHERN ECON. J. 644-661 (Jan. 1989).

article. The continued use of these principles to resolve disputes among the merchants, or “*Inter Se*,”³⁷ led to a specific and enforceable set of commercial standards.³⁸

Historical legal scholarship indicates that the Medieval Law Merchant was not entirely outside of the court system of the day and should be mentioned here Emily Kadens states that scholars have overlooked the fact that merchants, “at least in northern Europe, also used a second sort of court—that of the town, the prince, or the Church, in other words, noncommercial courts.”³⁹ Ms. Kadens surmises that it was highly “unlikely that the merchants found themselves in these courts unwillingly,”⁴⁰ and the civil court was perhaps the best place to enforce their agreements in the first place.⁴¹ However, in the civil court system, it appears that the law applicable to the dispute differed from that of the Medieval Law Merchant.⁴² Therefore, use of the court system was certainly not unheard of during the time of the Medieval Law Merchant. Scholarly evidence suggests that in some cases, the local courts were also the best means of enforcing the rights or agreement between merchants.

Medieval Scotland, in some respects, was no different from Medieval England. In both countries, Merchants of the time created informal courts that were “established to settle disputes that arose out of commercial dealings in the fairs and markets held

³⁷*Inter se* is defined as “among or between themselves,” BALLENTINE’S LAW DICTIONARY *supra*, ch. I, note 65.

³⁸ LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 18 (1983). (Relying in part on CARLETON KEMP ALLEN, *LAW IN THE MAKING* 67 (7th ed. 1964)).

³⁹ Kadens *supra*, ch IV, note 15, at 64.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

throughout Europe.”⁴³ Neither country was immune to the law merchant informal courts or dispute resolution mechanisms.

Lex Mercatoria was considered a merchant court whose sole purpose was to resolve merchant disputes. In the merchant courts, merchant law would be applied and merchant judges would administer the “law in accordance with the customs and practices of merchants who used their services.”⁴⁴ Merchant courts were sought because a type of *merchant justice* would be handed out in this forum.⁴⁵ This justice was in response to the mercantile need for speedy, informal and fair justice, conceptualized as “*ex aequo et bono*.”⁴⁶ These merchant courts and judges do not look like the courts or judges of the Common Law courts of the past nor of today.

In England, the courts adopted the law merchant principles into its fold. From the 1500's, the Admiralty courts enlarged their jurisdiction⁴⁷ to cover or “embrace mercantile causes.”⁴⁸ Furthermore, law merchant issues were “enforced by customary commercial courts.”⁴⁹ “Contrary to the popular narrative, “mercantile customs were either local facts [to be proved as such] or they were of England,” and the speedy procedural aspects of the *Lex Mercatoria* were never adopted by English courts.”⁵⁰ This informal dispute resolution mechanism gradually influenced “the King's courts in the

⁴³ McAuley *supra*, ch. IV, note 4.

⁴⁴ Trakman *supra*, ch. II, note 130, at 6.

⁴⁵ Leon E. Trakman, *The Twenty-First-Century Law Merchant*, 48 AM. BUS. L.J. 775, 792 (2011).

⁴⁶ Trakman *supra*, ch. II, note 130, at 6.

⁴⁷ *The Bank of Conway v. B.H. Stary*, 51 N.D. at 409.

⁴⁸ *Id.*

⁴⁹ Weissburg *supra*, ch. IV, note 12, at 508-509.

⁵⁰ Bellish *supra*, ch. IV, note 9, at 556.

eleventh and twelfth centuries”⁵¹ but the significance of the mercantile courts lessened over time.⁵² Later in the Seventeenth century, Common Law courts “also began to incorporate *Lex Mercatoria* into Common Law.”⁵³ Thus the Common Law courts began to increase their jurisdiction over commercial transaction disputes.⁵⁴

Keep in mind that the law merchant was applied only to specific transactional disputes versus the class of people who were involved in the dispute.⁵⁵ The English Courts went on record as adopting the “principles of the law merchant.”⁵⁶ Common law judges perhaps saw the value of the law merchant and began to hear disputes that were under the jurisdiction of the Admiralty Court.⁵⁷ Law merchant principles were thus seen in the English court system.

It should also be pointed out that the merchant courts had its effect on English law. One scholar even points out that,

inter alia, an examination of the oldest English treatise on *Lex Mercatoria*, published in the late thirteenth century... states that the only difference between *Lex Mercatoria* and the Common Law are the speed of the process, the liability of pledges to answer, and the denial of wager of law as a means of establishing a negative... *Lex Mercatoria* did not create any new obligations, but was merely a convenient way to discharge pre-existing obligations.⁵⁸

⁵¹ McAuley *supra*, ch. IV, note 4, at 232.

⁵² *Id.*

⁵³ Weissburg *supra*, ch. IV, note 12, at 508-509.

⁵⁴ *The Bank of Conway v. B.H. Stary*, 51 N.D. at 409.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Bellish *supra*, ch. IV, note 9.

The Law Merchant rules and principles may have seemed “strange to those who are versed in the principles of common law, the provisions of the Law Merchant have been accepted in the English for many generations.”⁵⁹ Thus, “the law merchant gradually became a part of the legal system of England.”⁶⁰ These unique principles of *Lex Mercatoria* were what were adopted by English laws and statutes.

In Scotland, by the 1600s the use of the *Lex Mercatoria* was well advanced.⁶¹ One of the major figures incorporating the Law Merchant into Scott's law was Lord Mansfield,⁶² a Scotsman and a notable jurist that died in 1793.⁶³ Mansfield was “deeply versed in Roman and Continental law.”⁶⁴ He seemed to have a “sure touch for commercial cases.”⁶⁵ Furthermore, Lord Mansfield also made it clear that “*Lex Mercatoria* was not a separate body of law but part of English law.”⁶⁶ As a key judicial figure in Scotland, it was noted that “his decisions were sensitive and responsive to the merchant's needs and ways.”⁶⁷ The “famed British jurist Edward Coke, who "began to submerge mercantile law into... [Common Law] in 1608 declared that *Lex Mercatoria* was part of the English legal system,”⁶⁸ and that it could be seen in the courts both in

⁵⁹ Miller, 65 A.L.R.2d at 686.

⁶⁰ *The Bank of Conway v. B.H. Stary*, 51 N.D. at 409.

⁶¹ FRIEDMAN *supra*, ch. II, note 82, at 28.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Ralf Michaels, *Symposium, The Re-state-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209, 1232 (2005).

⁶⁷ FRIEDMAN *supra*, ch. II, note 82, at 28.

⁶⁸ Trakman *supra*, ch. IV, note 45, at 280.

civil procedure as well as in evidence.⁶⁹ By adding *Lex Mercatoria* principles to Common Law, commercial transactions become more nationalized, depending upon either the individual or the jurisdiction.⁷⁰ “In other words, the locus for commercial transactions was less on commercial expediency, through specialist merchant-arbiters applying a merchant-neutral body of law, but instead on jurists acting in accord with the historical, political, and economic developments and trends of the day in their domestic jurisdictions.”⁷¹ *Lex Mercatoria*, thus became the perfect conduit to promote merchant principles of dispute resolution in Scottish’s courts and law.

Furthermore, the merchant practices, or ways of resolving conflict assisted the growth of the law. These merchant practices helped English jurists learn to “handle the documents from which modern checks, notes, bills of exchange, and bills of lading are descended.”⁷² The law in England also changed to include the unique merchant means of handling or conducting commercial transactions which was recognized as being quite useful.⁷³ Thus, commercial transaction and commercial law took on some of the aspects that the merchant classes utilized.

The Law Merchant had its place in law and in dispute resolution mechanisms. Although the Law Merchant “lost its identity entirely and became wholly assimilated with the common law”⁷⁴ and the principles of the Law Merchant “were adopted into

⁶⁹ *Id.*

⁷⁰ Lopez *supra*, ch. IV, note 11, at 137.

⁷¹ *Id.*

⁷² FRIEDMAN *supra*, ch. II, note 82, at 28.

⁷³ *Id.*

⁷⁴ *The Bank of Conway v. B.H. Stary*, 51 N.D. at 409.

the common law by Lord Mansfield.”⁷⁵ The Law Merchant of course was still part of the law that pertained to “a certain class of transactions, and international in character.”⁷⁶ Although the Law Merchant's dispute resolution mechanisms and informal merchant courts began to wane over time,⁷⁷ the continued existence of “mercantile customs and practices,”⁷⁸ were still alive and well in the dealings of international commercial transactions.⁷⁹ Thus, the Law Merchant had its influence on more than just law.

Eventually, the Law Merchant became part of the codification of laws that addressed these types of disputes. “Despite the declining use of the mercantile courts in favor of the King's Courts,”⁸⁰ another interesting trend also began to emerge as well. “The road towards a unified law of commercial transactions is an ancient one. Arguably, the beginning movements towards codification were found in the *Lex Mercatoria* of medieval Europe.”⁸¹ The use of Procedural *Lex Mercatoria* began to be seen in Common Law and eventually *Lex Mercatoria* became part of the codified law⁸² as England started to create its own method to resolve disputes. It is interesting that as the special merchant courts declined, the Common Law started to come into its own as

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See TRAKMAN *supra*, ch. IV, note 38; McAuley *supra*, ch. IV, note 4; and Trakman *supra*, ch. II, note 130.

⁷⁸ McAuley *supra*, ch. IV, note 4, at 232.

⁷⁹ *Id.* at 231.

⁸⁰ *Id.* at 232.

⁸¹ Lopez *supra*, ch. IV, note 11, at 136.

⁸² McAuley *supra*, ch. IV, note 4, at 232.

it began to consider business transactions as being part of the Common Law.⁸³

Over time, *Lex Mercatoria*, did not take root in England as it did in the rest of Europe. One reason is that England, unlike Scotland, did not embrace Roman-based law, thereby, precluding continued use of the Law Merchant dispute resolution systems.⁸⁴ Again differing from Scotland, the English chose to adopt a civil dispute resolution system that was a “formulatory system of writs and precedents.”⁸⁵ Another reason is that English courts would only permit merchant customs in their court if the merchant customs “were 'certain' in nature, 'consistent with law,' and 'in existence since time immemorial.’”⁸⁶

To add another hurdle to the use of *Lex Mercatoria* in English courts, the judges “required that merchant custom be proven 'to the satisfaction of twelve reasonable and ignorant jurors.’”⁸⁷ Post-medieval judges in England were not as entranced with Commercial Law as were judges elsewhere around the world.⁸⁸ In sum, the Law Merchant dispute resolution system, or mechanism, was rarely used—if at all, in English courts—except upon the approval of twelve ignorant, yet satisfied, citizen jurors, would *Lex Mercatoria* have any use.

The Law Merchant influenced American Jurisprudence as well. The Honorable Joseph Story, a United States Supreme Court Judge and 19th Century Legal Scholar, made it clear that commercial disputes and laws were clearly based upon the Law

⁸³ FRIEDMAN *supra*, ch. II, note 82, at 28.

⁸⁴ Trakman *supra*, ch. IV, note 45, at 279.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

Merchant.⁸⁹ The European Law Merchants created the classical belief of good faith and fair dealing that is an important concept in today's United States' Commercial Law.⁹⁰ However, “[w]ith directness akin to Justice Story's enunciation of this 'general principle,' Justice Brandeis overruled the case in *Erie R Co v. Tompkins*.^{91,92}

Lex Mercatoria represents an independent mercantile spirit that is seen on the World Wide Web today. The “earnestly held faith in the freedom of merchants to engage in global trade”⁹³ is seen in today’s “technology-driven trade and in hostility towards states that purport to regulate speech and association, such as through the surveillance of data.”⁹⁴ The laws in the United States, for example, as well as international treaties, “have affirmed, in part, the accession of nation states to the autonomy of merchants engaged in global trade.”⁹⁵ I have found little else worth noting when it comes to the United States and *Lex Mercatoria*. Thus *Lex Mercatoria* seems to have been more influential in international commercial disputes and perhaps more in Scotland than in the United States.

As far as settling international commercial disputes, *Lex Mercatoria* certainly has its place as well. There is an International Law Merchant that takes advantage of the practical functions and practices of merchants.⁹⁶ *Lex Mercatoria* is the stepping

⁸⁹ *Id.* at 281.

⁹⁰ Lopez *supra*, ch. IV, note 11, at 137.

⁹¹ *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). (This case stands for how diversity jurisdiction is handled in United States Federal Civil Procedure matters).

⁹² Trakman *supra*, ch. IV, note 45, at 281.

⁹³ *Id.* at 300.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 283.

stone of modern International Commercial Arbitration.⁹⁷ This historical method of resolving conflict, the Medieval Law Merchant, is what influenced our current International Commercial Arbitration system or mechanism as to resolve dispute outside the national court system.⁹⁸ Furthermore, it is this tradition that the “modern international commercial arbitration has purported to ground itself in expeditious, low cost, informal and speedy mercantile justice”⁹⁹ thus making it a palatable method to resolve international commercial disputes. Of course, International Commercial Arbitration we use today is “decidedly more complex . . . compared to historical variants of dispute resolution like the Medieval Law Merchant.”¹⁰⁰ *Lex Mercatoria* can be seen as the root of modern International Commercial Arbitration.

The influence of the Law Merchant and the increase in the use of alternative means to resolve disputes is often times based upon treaties. *Lex Mercatoria* had its influence treaties, the use of international arbitration to “resolve disputes between investors and States”¹⁰¹ for example. The arbitration that is used in today’s society is “based on the *Convention on the Settlement of Investment Disputes between States and*

⁹⁷ Trakman *supra*, ch. II, note 130, at 5.

⁹⁸ *Id.* at 6.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 7.

¹⁰¹ Ignacio Gomez-Palacio, *International Commercial Arbitration: Two Cultures in a State of Courtship and Potential Marriage of Convenience*, 20 AM. REV. INT'L ARB. 235, 238 (Garrett Epps trans., 2009) (Quote taken from Footnote 12). (Please note the author further points out “ICSID Additional Facility Rules were issued at a later date. Regarding the increase in the use of international commercial arbitration, see Elena Helmer, *International Commercial Arbitration: Americanized, “Civilized,” or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 38 (2003). On ICC, AAA and London Court of International Arbitration statistics showing a definitive increase, see Christopher R. Drahozal, *Contracting out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 539 (2005) (quoting ICC statistics)” (Ignacio Gomez-Palacio, Garrett Epps, *Translator International Commercial Arbitration: Two Cultures In A State Of Courtship And Potential Marriage Of Convenience*, 20 AM. REV. INT'L ARB. 235 (2009)(Quote taken from Footnote 12)).

Nationals of Other States, adopted in Washington Oct. 14, 1966, which created the *International Center for Settlement of Investment Disputes (ICSID)*.¹⁰² Although this paper does not address ADR involving states, the Law Merchant had its influence on crafting ADR systems in treaties.

A certain “*jus commune*” surrounds International Commercial Arbitration today;¹⁰³ “a law common to merchants, again not unlike the medieval Law Merchant.”¹⁰⁴ This commonality or *jus commune* is “the codification of mercantile arbitration rules both within bi- and multilateral conventions, as well as in the rules of International Commercial Arbitration associations.”¹⁰⁵ Furthermore, there is a *jus commune* based on “trade usage,”¹⁰⁶ as well as common substantive law.¹⁰⁷ This legal tradition of *jus commune* “has created a mystique around international commercial arbitration, as a rough equivalent to a Law Merchant court.”¹⁰⁸ The Law Merchant and *jus commune* are still seen in today's International Commercial Arbitrations.

Lex Mercatoria had an effect on International Commercial Arbitration. The Medieval Law Merchant “reflects a legal tradition among merchants that [not only] predated . . . [but] had an impact upon modern international commercial arbitration”¹⁰⁹ as we know it today. As mentioned, merchants went to various fairs in which the

¹⁰² *Id.*

¹⁰³ Trakman *supra*, ch. IV, note 45, at 282.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Trakman *supra*, ch. II, note 130, at 6.

merchants were foreigners. What happened when a dispute arose between a buyer and a seller? Since merchants sailed to near and distant lands to trade their wares, so did *Lex Mercatoria*.

Lex Mercatoria spans several centuries of ADR thought and law. It was practiced in Medieval Europe and, for its time, was perhaps innovative. Scotland utilized the Law Merchant ADR concepts. *Lex Mercatoria* reached the New World, as well, and is echoed even in today's ADR systems in the United States. The Law Merchant has certainly left its mark on ADR systems.

III. THE EARLIEST RECORD OF ARBITRATION

It seems that the first recorded arbitration in history was between sovereign nations, a “dispute between the city states of Athens and Mytilene in 600 B.C.”¹¹⁰ I am happy to say that it “reached a successful conclusion.”¹¹¹ Arbitration continues to evolve and exists in many forms. Probably the most familiar form of arbitration, or commercial arbitration, from ancient times is the Medieval *Lex Mercatoria*, or Law Merchant, which deserved its own previous section. The concept of arbitration is quite old.

A. Domestic Arbitration

¹¹⁰ Jonathan I. Charney, *Chapter 1 Question of Theory: Article: Third Party Dispute Settlement and International Law* 36 COLUM. J. TRANSNAT'L L. 65, 89 (1997) (Quote taken from Footnote 8). (Although arbitration is used by nations as well as private actors, this dissertation is dealing primarily with private party disputes.)

¹¹¹ *Id.*

There has been a long-standing tradition of using arbitration in Scotland.¹¹² Furthermore, as illustrated in early scholarly writings, the United Kingdom, as a whole, is steeped in the arbitral traditions. For centuries, commercial disputes in the United Kingdom were resolved by arbitration. Although the United States is a relatively new country, arbitral mechanisms were prevalent in the Colonies, and as well after the Colonies became the “United States,” which still considers ADR the preferred method for settling commercial disputes.

The early Scots or the Celts had their own ADR systems in place. The Celts in Scotland utilized a type of arbitrator known as a “birtheamh, a person with legal knowledge”¹¹³ to resolve disputes. The exact role that the Birtheamh played during the dispute resolution process is unclear to us today.¹¹⁴ Unfortunately, there is not more to glean concerning the ancient Celt's ADR systems; just the fact that a form of arbitration took place in Scotland during that time.

However, over time, many forms of ADR systems developed in Scotland. In particular, the use of Arbitration became a long-established form of civil dispute resolution mechanism in Scotland.¹¹⁵ Arbitration, as a method to resolve disputes took hold in Scotland as early as the “13th century (see Hunter (2002))”¹¹⁶ and “survived into the 15th century,”¹¹⁷ and beyond. Arbitration, throughout the ages, became a dispute resolution mechanism used in Scotland.

¹¹² See Joanna Dingwall, *International Arbitration in Scotland: A Bold, New Future*, 13 INT. A.L.R. 4, 138 (2010).

¹¹³ STEVEN P WALKER, *THE RENAISSANCE OF SCOTTISH INTERNATIONAL ARBITRATION* 4 (2010).

¹¹⁴ *Id.*

¹¹⁵ BRYAN CLARK, *SCOTTISH LEGAL SYSTEM ESSENTIALS* 80 (Dundee University Press, 2nd ed. 2009).

¹¹⁶ *Id.*

¹¹⁷ WALKER *supra*, ch. IV, note 113.

Scotland's arbitration system may have evolved because of how Scotland, itself, evolved. An interesting thought put forth in *The Renaissance of Scottish International Arbitration*, by Steven Walker, is that unlike other countries throughout history, as may be the case with a conquered nation that has to accept the laws imposed on it by a colonial force—or a colonial force that has to force its will upon a a conquered land. Scotland did not have to enforce laws;¹¹⁸ therefore, Scotland's dispute resolution mechanisms evolved differently from those of countries or territories that had been colonized.¹¹⁹ Scotland did not have to enforce the laws as if it were a colony or colonial territory;¹²⁰ therefore, Scotland's dispute resolution mechanisms evolved differently from those of countries or territories that had been colonized.¹²¹ Because of this unique twist of fate, it enabled Scotland's dispute resolution processes to develop in two unique ways: one, due to the “growth of the clan system, dispute resolution was often carried out locally with a clan head as resolver;”¹²² and two, Scotland's dispute resolution mechanisms developed in its own way due to the “remoteness of many [highland] communities and the poor communications which then existed”¹²³ between the communities in the highlands. Scotland's remoteness and independence were contributing factors to the growth of its arbitration system.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ WALKER *supra*, ch. IV, note 113.

Medieval Scotland had two forms of arbitration mechanisms. The first form was to have a person, called an “Arbiter”¹²⁴ preside over the arbitration. The Arbiter would hear a case and make a decision resolving the conflict according to the black letter of the law, but not necessarily a decision based upon a reasoned written outcome.¹²⁵ The second form of arbitration in Medieval Scotland was an “equitable” form.¹²⁶ The equitable arbitration had an “Arbitrator”¹²⁷ that would determine the outcome of the case “*ex aequo et bono*.”¹²⁸ The Arbitrator would dispense a resolution that was fair and just, and that which conformed to such principles as equity and conscience.¹²⁹ The latter form of arbitration lasted until the 1800s when it became defunct.¹³⁰ Furthermore, the term “arbitrator” is no longer in use in Scotland,¹³¹ but domestically, “it is well understood.”¹³² The term that has survived is “arbiter.”¹³³

In the United Kingdom, rules surrounding arbitration dispute resolution mechanisms have been in place for centuries. In the South, England had established arbitral rules as early as the seventh century.¹³⁴ In the North, in Scotland, the *Regiam*

¹²⁴ *Id.*

¹²⁵ *Id.* at 5.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ In equity and good conscience, BALLENTINE'S LAW DICTIONARY *supra*, ch. I, note 65.

¹²⁹ BLACK'S LAW DICTIONARY 557 (West 6th ed 1990).

¹³⁰ WALKER *supra*, ch. IV, note 113, at 5.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *See Id.*

¹³⁴ MICHAEL AVRAMIDIS, COMPARATIVE ARBITRATION: A LOOK AT THE SCOTTISH AND ENGLISH SYSTEMS 15 (2010).

Majestatem,¹³⁵ which dates back from the early 14th century,¹³⁶ became the first recorded treatise on arbitration.¹³⁷ Although the North and the South of the United Kingdom had established arbitration rules, the Scottish *Regiam Majestatem*, enhanced their arbitration systems.

The *Regiam Majestatem* outlined what issues or conflicts that were arbitrable and those that were not.¹³⁸ Unfortunately, for the most part, the *Regiam Majestatem* did not address the needs of the arbitration process in a substantive form.¹³⁹ Interestingly enough, the *Regiam Majestatem* “does state that an arbitrator could deal with cases between husband and wife, or affecting personal liberty or any criminal cause; interestingly, a woman could be an arbitrator, although not until the very late 19th, even early 20th, century could she be a solicitor, chartered accountant or doctor!”¹⁴⁰ The use of arbitration to resolve conflict in commercial disputes of course is still used today in modern times; however, the *Regiam Majestatem* is a part of Scotland's history.

The arbitration process that developed in Scotland had a few unique qualities. There was no implied power to award damages by either a single arbiter or tribunal.¹⁴¹

¹³⁵ Hector MacQueen, *Laws and Languages: Some Historical Notes from Scotland*, 6.2 ELECTRONIC JOURNAL OF COMPARATIVE LAW (July 2002), <http://law.kub.nl/ejcl/62/art62-2.html> (last visited Sept. 1, 2012).

¹³⁶ AVRAMIDIS *supra*, ch. IV, note 132, at 4.

¹³⁷ Hew Dundas, *The Arbitration (Scotland) Act 2010: Converting Vision into Reality*, 76 ARBITRATION 1, 3–5 (2010).

¹³⁸ PROFESSOR FRASER DAVIDSON, HEW DUNDAS & DAVID BARTOS, *ARBITRATION (SCOTLAND) ACT 2010* 1 (W. Green 2010).

¹³⁹ Dundas *supra*, ch. IV, note 135, at 4.

¹⁴⁰ *Id.*

¹⁴¹ WALKER *supra*, ch. IV, note 113, at 6.

The power to award damages was only allowed or “conferred” to the tribunal “by clear and express language in the arbitration agreement.”¹⁴² Furthermore, simply stating that the tribunal had a “general power is insufficient”¹⁴³ to award damages. Thus, the laws or process further emphasize the voluntariness of arbitration historically and in the present day. The parties truly must want to arbitrate the dispute and have some type of outcome be handed down to them even if it is an award for damages.

Other points that were not covered by law pertaining to awards are the power to assess or award interest. There was historically “no express power given in law to award interest”¹⁴⁴ nor was there any implied power to do so.¹⁴⁵ The court in *Carmichael v. Caledonian Railway Co.*¹⁴⁶ confirmed that under Scottish law, except for a few exceptions, a party could not recover interest; those exceptions included the type of damage such as a loss of securities.¹⁴⁷ Thus it was left to the parties to state in their arbitration agreement that such power was given either expressly or implicitly.¹⁴⁸ Furthermore, historically there is “no express provision in Scots law for an arbiter to award expenses.”¹⁴⁹ It is noted that formerly an “Arbiter” was “considered to have an

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (Steven P. Walker cites *Aberdeen Railway Co v Blaikie Brothers* (1852) 15D (HL) 20).

¹⁴⁶ *Id.*

¹⁴⁷ WALKER *supra*, ch. IV, note 113, at 6. (Steven P. Walker cites *Farrans (Construction) Limited v. Dunfermline District Council*, 1988 SLT 466; 1988 SC 120, at p 469 (pp 124-125)).

¹⁴⁸ *Id.* (Steven P. Walker cites *Pollich v Heatley*, 1910 SC 469 at p 480; 1910 1 SLT 203 at p 207).

¹⁴⁹ *Id.*

implied power”¹⁵⁰ to award expenses.¹⁵¹ It is noted that formerly an “Arbiter” was “considered to have an implied power”¹⁵² to award expenses.¹⁵³ However “the modern position is that the power [to award expenses] is, in the first instance, a matter for construction of the arbitration agreement.”¹⁵⁴ Thus, modern law differs from historical arbitral laws or provisions.

Scotland’s arbitration laws, practices and procedures, like its culture and society, has been created over several centuries. Scotland’s domestic arbitral laws are a “mixture of ancient case law (dating back at least to 1207) and piecemeal statute (back to 1695) and is riddled with anomalies and uncertainties.”¹⁵⁵ Also, the Scot's arbitration law that developed around arbitration was mainly based on Common Law principles.¹⁵⁶

Scots arbitration law was predominately common-law based, with precedents spanning over 400 years (see Robert Hunter, *The Law of Arbitration in Scotland*, 2nd edn (Butterworths, 2002), p.12.4), together with piecemeal statutory fragments ... which was never formally repealed but which is likely to have fallen into desuetude; the articles of Regulation of 1695 art.25; the Arbitration (Scotland) Act 1894; the Administration of Justice (Scotland) Act 1972 s.3; the Arbitration Act 1975; the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 s.66 and Sch.7; the Civil Evidence (Scotland) Act 1988 and the Requirements of Writing (Scotland) Act 1995.¹⁵⁷

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ WALKER *supra*, ch. IV, note 113, at 6.

¹⁵⁴ *Id.*

¹⁵⁵ Rt Hon. Lord Dervaird, John D Campbell, Steven P Walker, & Hew Dundas, *Arbitration in Scotland – A New Era Dawns*, *S.L.T.* 2006 (taken from the abstract) (presented at XVth International Congress of Maritime Arbitrators, held in London 26th-30th April 2004), *available at* <http://www.inprisys.net/hosted/hrd/docabst.asp?docid=57> (last visited Sept. 21, 2012).

¹⁵⁶ DAVIDSON ET AL. *supra*, ch. IV, note 136.

¹⁵⁷ Dingwall *supra*, ch. IV, note 112, at fn. 4).

This is surprising considering the Roman influence on Scotland at its inception.¹⁵⁸ However, Scottish arbitration “could hardly be described as a dynamic system.”¹⁵⁹ Thus, Scotland’s arbitral system, laws and mechanisms appeared to be mixed. In some cases, the Scottish arbitration law was either difficult to interpret, or those desiring to use it, found it lacking in some respect.¹⁶⁰ To illustrate this latter point, one set of commentators went as far as to say that Scotland’s arbitration laws, up to modern times, bordered “on the dysfunctional.”¹⁶¹

The arbitral laws of Scotland were historically not codified and some of the traditional laws were problematic. Historically, none of the “statutory material represents any attempt to codify the law and this can only be determined by reference to the authorities, none of which are at all recent (the oldest being from the 14th century), and other sources dating back to the 16th century.”¹⁶² Furthermore, “Scots domestic arbitration law . . . is, regrettably, one of the most antiquated areas of law currently applicable in Scotland.”¹⁶³ Thus, it was necessary for Scotland to address the arbitral laws in modern times.

Arbitration existed in Scotland's mixed Civil and Common Law systems. Although “a number of statutory provisions do have a role to play, albeit largely on

¹⁵⁸ DAVIDSON ET AL., *supra*, ch. IV, note 136.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Hew R Dundas, *A Great Leap Forward*, THE MARITIME ADVOCATE, available at http://www.maritimeadvocate.com/arbitration/a_great_leap_forward.htm (last visited Apr. 4, 2012).

¹⁶³ *Id.*

the fringes of arbitral practice, such as the 25th Article of Regulation 1695, the Arbitration (Scotland) Act 1894 and the Administration of Justice (Scotland) Act 1972.”¹⁶⁴ Arbitration in Scotland historically was primarily a “flexible process”¹⁶⁵ and was “regulated by common law principles that have been established and refined by the courts over the centuries.”¹⁶⁶ Due to the influence of Common Law in Scotland, arbitral laws were scarce, and it was up to the parties to determine the arbitral procedures for the most part.¹⁶⁷

Over the centuries, Scotland has made several attempts to favor arbitration and enact laws that complement their arbitration systems. As Scotland became a notable trading nation, so did the need for creating an ADR system for trade-related disputes.¹⁶⁸ In 1427 Scotland enacted laws that “distinguished arbitration in burghs (effectively commercial arbitration) from other forms of arbitration.”¹⁶⁹ Scotland’s arbitration systems and laws have, therefore, matured over the centuries.

Scottish law eventually had to address some contentious points on the use of this form of ADR system in Scotland. “From 1650 to 1760, arbitration, particularly equitable . . . [arbitration, fell] into disarray, and the court system consequently became overloaded.”¹⁷⁰ Therefore, Article 25 was enacted to address the concerns of the courts

¹⁶⁴ CLARK *supra*, ch. IV, note 115.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Dervaird et al. *supra*, ch. IV, note 151.

¹⁶⁹ *Id.*

¹⁷⁰ WALKER *supra*, ch. IV, note 113, at 6.

and those that used arbitration. Thus, the Scottish Parliament enacted Article 25 of the Articles of Regulation 1695 to give some guidelines to arbitration.

Although Article 25 procedural guidelines for arbitration were needed, the new law had some disadvantages as well; for instance, the law was not in a language that was easily understood by the lay person;¹⁷¹ provisions set forth in the 1695 Regulation were written in an archaic language, which presented problems when applying the statute¹⁷² and were not favored by the plain English written laws of today; and scholars have indicate that “a number of fragments of legislation had appeared dealing with particular issues, usually not in an entirely satisfactory way.”¹⁷³ Thus, disputants who wished to use arbitration encountered deficiencies that the law did not address. Furthermore, even if the parties used arbitration, it was difficult to interpret Article 25 in a way to lend guidance to the arbitration process.

However, its shortcomings notwithstanding, this 1695 law is very fascinating. Article 25 “represents one of the rare areas of legal policy in Scotland in which an Act of the Old Scottish Parliament”¹⁷⁴ has a place in today’s arbitration systems;¹⁷⁵ the United States would be hard pressed to state the same. The Old Scottish Parliament’s Article was enacted so that disputants who had a “desire to avoid litigation,”¹⁷⁶ and who utilized this mechanism found that the arbitration was binding¹⁷⁷ and thus a

¹⁷¹ DAVIDSON ET AL. *supra*, ch. IV note 136.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ CLARK SUPRA, ch. IV, note 115.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

“legally enforceable process.”¹⁷⁸ The Act also set out standards for the drafting of arbitration awards, which would be exclusive.¹⁷⁹ Arbitration in Scotland historically was primarily a “flexible process”¹⁸⁰ and was “regulated by common law principles that have been established and refined by the courts over the centuries.”¹⁸¹ Even during medieval times, disputants had the desire to avoid the courts as well as have a binding and enforceable remedy.

The Act dealt with ways to determine or appoint an arbitrator. Of course the parties were free to choose their Arbitrator.¹⁸² The disputing parties were also able to submit under Article 25 two Arbitrators and then appoint a third party to be a type of umpire; the Scots call this third party an “oversman,” to make a decision if the two arbitrators cannot agree.¹⁸³ The oversman’s decision is final.¹⁸⁴ Thus, those wanting to appoint an Arbitrator referred to the Act and had the domestic law of the time to lend credence to the choice.

Once an award was approved, the ancient arbitration laws of Scotland allowed a party to appeal that award. However, the appeals were only under a limited set of circumstances.¹⁸⁵ The arbitration award was handed down “as is” and difficult to modify.

¹⁷⁸ *Id.*

¹⁷⁹ DAVIDSON ET AL. *supra*, ch. IV, note 136.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ WALKER *supra*, ch. IV, note 113, at 6.

However, the arbitration award could be modified by appeal or set aside an award for numerous reasons, such as the following:

Corruption, bribery or falsehood. These terms are found in the antiquated provisions of the 25th Article of Regulation 1695. In practice very few awards were overturned on this ground (*Morisons v Thomson's Trs* (1880)). Moreover, it has become clear that if an arbiter is negligent or makes an innocent error in making an award, then this will not fall within these grounds for appeal (*Adams v. Great North of Scotland Railway* (1891)).

The arbiter must not have any undisclosed conflict of interest in the proceedings (*Sellar v. Highland Railway* (1919), although any such conflict of interest may be waived by the disputing parties (*Tancred, Arrol & Co v. Steel Co of Scotland* (1890)).

The award is defective or has gone beyond the terms of its reference (*ultra fines compromissi*). Where an award is completely unintelligible or is in a form contrary to that which the parties specified then the court may reduce it. If the award is ambiguous but open to logical interpretation, then a court may place its own interpretation on it. The award must also exhaust the terms of the submission (*Donald v. Shiell's Executrix* (1937)). By contrast, the award must only pertain to the issues put before the arbiter for his determination. Any other issues resolved by the arbiter may be ignored by the parties.

Effective procedure. Where the arbitral procedure does not conform with that prescribed by the parties or fails to be carried out in accordance with principles of natural justice, the award may be reduced on those grounds.¹⁸⁶

Also, one could have an award set aside if the arbitration mechanism was not initiated pursuant to the laws of the time.¹⁸⁷ Despite any problems that the archaic language may have caused, the 1695 Act was still applied up until modern times.¹⁸⁸ These reasons

¹⁸⁶ CLARK *supra*, ch. IV, note 115, at 81.

¹⁸⁷ WALKER *supra*, ch. IV, note 113, at 6.

¹⁸⁸ *Id.*

that the Scottish Parliament allowed one to set aside an arbitral award, under Article 25, echo in today's laws as well. Scotland still has laws that go as far back as 1695 that refer to arbitration as a means to resolve disputes.¹⁸⁹

The use of arbitration in Scotland grew as the country grew. In particular, Scottish arbitration grew side-by-side along “with the growth of commerce.”¹⁹⁰ During the nineteenth century, one area of disputes that took advantage of arbitration was public works contracts.¹⁹¹ Arbitration became a major characteristic of these contracts that some say mirror the “development of liberal thought.”¹⁹² Over the centuries, many a contract in Scotland has relied on arbitration to resolve disputes.

The acceptance of arbitration by the judiciary had its place in arbitration history. Fearing that its continued use would weaken the English court system, the Common Law judicial system eventually became “hostile toward arbitration. Accordingly, it became routine for judges to avoid enforcing arbitration clauses in contracts.”¹⁹³ Unlike the United States, “the Scottish judiciary never exercised the same degree of control of arbitration as was the case in England until 1979.”¹⁹⁴ However, it cannot be said that the Scottish judiciary was entirely hands-off; the “freedom to decide according to equitable principles was removed by a House of Lords decision in 1835, and the Court held that an error of law on the face of an award was grounds for reduction (set-

¹⁸⁹ DAVIDSON ET AL. *supra*, ch. IV, note 136.

¹⁹⁰ Dundas *supra*, ch. IV, note 135.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Nima H. Mohebbi, *Back Door Arbitration: Why Allowing Non-signatories to Unfairly Utilize Arbitration Clauses May Violate The Seventh Amendment*, 12 U. PA. J. BUS. L. 560, 560 (2010).

¹⁹⁴ Dundas *supra*, ch. IV, note 135.

aside).”¹⁹⁵ Scottish courts also held that arbitral awards should be scrutinized and “supervision of awards was effectively exercised by strict interpretation of the related submission agreements.”¹⁹⁶ Thus, historically, Scottish Judges did not seem to be as harsh on arbitration, like neither the United States, nor its English neighbors to the south. However, Scottish Judges were not afraid to exercise judicial power when needed. The hostility towards arbitration in the United States, in Scotland, and in England is no longer the case, and is, thus, only a matter of historical interest.

It was nearly two-hundred years after the enactment of the 1695 Article 25, before the Scots enacted new arbitral laws or procedures. The Scottish Parliament enacted the Arbitration (Scotland) Act 1894, which was an attempt to modernize the 1695 Article 25.¹⁹⁷ The Arbitration (Scotland) Act 1894 was an example where statutes can expand on the Common Law.¹⁹⁸ In particular, the 1894 Act addressed what would happen if an arbitrator was not named.¹⁹⁹ The 1894 Act also enabled the courts to appoint an arbitrator if the disputing parties failed to select one.²⁰⁰ However, court intervention in Scotland does not seem to be favored over time, an issue that is later addressed later in this paper. Furthermore, the 1894 Act was also instrumental in following the common practice of designating “an arbitrator by reference to a particular society, group or firm (eg., the president of the Chartered Institute of Surveyors

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ DAVIDSON ET AL. *supra*, ch. IV, note 136.

¹⁹⁸ *Arbitration in Scotland*, INTERNATIONAL LAW OFFICE, (December 07 2000), available at <http://www.internationallawoffice.com/Newsletters/Detail.aspx?r=2746> (last visited Sept. 20, 2012).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

(Scottish Branch)).”²⁰¹ The 1894 Act helped set the tone for arbitral appointment in Scotland. Although Scotland did have this recent Arbitration Act compared to the older law, the Arbitration (Scotland) Act of 1894 still did not satisfactorily cover certain issues and was addressed later by the Arbitration (Scotland) Act of 2010.²⁰²

The Arbitration (Scotland) Act of 1894 was drafted to address the current state of arbitration of the time. The new Arbitration (Scotland) Act 1894 contained “only seven sections, it sought to deal with the unfortunate Common Law rule[s]”²⁰³ on arbitration that formed in Scotland. The Scottish Act of 1894 was only applicable under certain circumstances and as time went on, case law began to reveal that there were “many situations where the breakdown of contractual appointment procedures would leave the parties without recourse.”²⁰⁴ Thus, it was necessary to create other arbitral laws in 1950 and then with the Arbitration (England) Act of 1996 during the last century.²⁰⁵ Any ancient Scottish laws have either “been repealed or simply fallen into disuse prior to the passing of the 2010”²⁰⁶ Arbitration Act of Scotland. Fortunately, the 2010 Act dealt with the remnants of ancient Scottish Arbitration laws.

The United States had its own interest in arbitration. Historically, what we would deem as arbitration took place in what is called the “exceptional courts in some of the colonies.”²⁰⁷ For example, Quakers shunned litigation, and therefore actively

²⁰¹ *Id.*

²⁰² DAVIDSON ET AL. *supra*, ch. IV, note 136.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ FRIEDMAN *supra*, ch. II, note 82, at 45. (It should be noted that Friedman is citing (footnote “25”) JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? NON-LEGAL DISPUTE SETTLEMENT IN AMERICAN HISTORY 25-30 (1983). Friedman further comments that “But arbitration itself underwent a process

sought ADR.²⁰⁸ As early as 1682, the Pennsylvania Colonies incorporated ADR systems into their laws by allowing for disputants to appoint three “common peacemakers” to resolve their dispute.²⁰⁹ The Colonies saw arbitration as “facilitative,” which enabled disputants to submit the conflict to the common peacemakers rather than litigate in the civil courts system of the times.²¹⁰ The awards or judgments that were issued out of these arbitrations, conducted by the three common peacemakers, were deemed valid in the courts of the day.²¹¹ This was quite similar to modern arbitrations and the validity or enforceability of arbitral awards.

The utilization of peacekeeper panels or peacemakers was not unique. These peace keepers were seen by historians as a “Utopian strain in American law, or at least in popular legal culture.”²¹² The panel of neutrals was utilized in “Dedham, Massachusetts, for example, from 1636 on, where disputes were mediated by “three understanding men,” or by “two judicious men,” chosen by the disputants or by the community.”²¹³ Further, some tried to replace the traditional litigation or trial system “with arbitration proceedings in [colonies such as] South Carolina, Connecticut, and New Jersey.”²¹⁴ The courts in Colonial times tried to utilize arbitration. As early as

of “legalization” in the 18th century, according to the research of Bruce H. Mann, centering on Connecticut; Mann connects this process with the decline of communalism. Bruce H. Mann, “The Formalization of Informal Law: Arbitration before the American Revolution,” 59 N.Y.U. L. Rev. 443 (1984)”.

²⁰⁸ *Id.*

²⁰⁹ See Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039 (1998); and FRIEDMAN, *supra* note 158, at 45.

²¹⁰ Haagen *supra*, ch. IV, note 204, at 1049.

²⁰⁶ FRIEDMAN *supra*, ch II, note 82, at 45.

²¹² *Id.*

²¹³ *Id.* at 57.

²¹⁴ *Id.* at 45.

1680 in Kent County, Delaware, the courts approved of the arbitration of disputes. It is on record in 1680 that the disputants, “Peter Groendyk and William Winsmore, by ‘Joynt Consent,’ referred their differences to the court for resolution. It was a matter of ‘account of debt and Credit...’ [the court appointed] two Arbitrators to decide the case... [and if they do not agree, they must] choose a third person as an Umpire [to] make a final end thereof.”²¹⁵ Although this example above was an interesting type of arbitration, it shows. In part, the use of arbitration during American colonial times.

The Dutch Colonies also utilized arbitration as part an ADR mechanism. The Dutch, for example, in New York utilized arbitration because they were “frustrated with efforts to replicate wholesale European judicial institutions, turned to the election of a council of ‘arbitrators,’ which was in fact a form of judicial body whose jurisdiction appears in at least some cases to have been mandatory.”²¹⁶ During this time in New Amsterdam, this form of arbitration was also referred to as “true consensual arbitration.”²¹⁷ Similar to today’s arbitral procedures, the disputants either chose their arbitrators, or it was left to the courts to decide.²¹⁸ Although the courts appointed arbitrators for extremely important disputes, it was rare during this time period for appeals to take place concerning the arbitrators’ decision or award.²¹⁹ Some scholars have noted that once the “1664 hand-over of administration in New York to the English, the use of arbitration in commercial matters was one of the enduring features of

²¹⁵ *Id.* at 57.

²¹⁶ BORN *supra*, ch. IV, note 1, at 19.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

continuing Dutch influence.”²²⁰ The Dutch left an indelible impression on the United States ADR systems.

Historians have noted that historical figures in America have used Arbitration to resolve disputes. For example, the first President of the United States, George Washington, indicated that disputes among his heirs were to be arbitrated, and had an arbitration clause in his will.²²¹ This arbitration provision in President Washington's will was upheld by the Texas Constitution of 1845.²²² Another notable figure in American history, Abraham Lincoln, was an Arbitrator himself, who, as a new attorney, decided a boundary dispute between two farmers.²²³ The United States has many such historical incidents of arbitration by American historical figures.

Aside from historical figures using arbitration, commercial arbitration in the United States dates as far back as the 13th Century, thus predating the American Revolution.²²⁴ The driving motivation for arbitration in commercial matters during the growth of the American nation was the continued perception of businesses “that government courts of the period did not apply Commercial Law in what the merchant community considered to be a just and expeditious fashion.”²²⁵ Therefore, the use of alternative disputant resolution systems in the Colonies was pervasive.

²²⁰ *Id.*

²²¹ Donald R. Philbin, Jr., *Symposium, Commercial Law Developments And Doctrine: Part I. Developments In The Field: Litigators Needed To Advise Transaction Lawyers On Litigation Prenups* 56 THE ADVOCATE 36, 36 (2011).

²²² *Id.*

²²³ *Id.*

²²⁴ See Philbin *supra*, ch. IV, note 216, at 36; and BORN *supra*, ch IV, note 1, at 19.

²²⁵ Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 482 (1995).

To further the use of arbitration, US “[m]erchants and lawyers were successful, particularly in New York, in enacting legislation requiring courts to defer to arbitration.”²²⁶ The laws that favored the use of arbitration in commercial disputes helped New York become “not only . . . a financial center, but [also] the preferred source of Commercial Law.”²²⁷ An “early nineteenth-century commentator noted”²²⁸ that commercial arbitration dispute resolution systems set up by the New York Merchants led the way, and was adopted by other cities across the country;²²⁹ legislation to adopt commercial arbitration was not far behind.

The New York legislature, as early as 1791, “enacted a statute virtually identical to England’s 1698 Arbitration Act, providing for the enforcement of agreements to arbitrate future disputes where they had been made a rule of court.”²³⁰ In 1793, an arbitration clause was added to an American insurance policy that made it clear that arbitral legislation had a positive effect on how parties perceived the resolution of future disputes.²³¹ Other states also implemented some type of arbitration act that were similar to that of New York’s arbitral history, including such states as “New Jersey, Pennsylvania, Connecticut, Massachusetts, Delaware, Virginia, and Ohio.”²³² York was an admirable example of the use of commercial arbitration and ADR systems for the United States, and others followed its lead.²³³ Continued use and legislation

²²⁶ Philbin *supra*, ch. IV, note 216.

²²⁷ *Id.*

²²⁸ BORN *supra*, ch. IV, note 1, at 21.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

illustrates the preferences for arbitral ADR in the early Colonies, as well as, a few decades later, the United States. However, arbitration also had a similar fate in the New World as it had had in England. Despite the use of arbitration to resolve commercial disputes, both judicial and legislative “hostility to arbitration agreements emerged, as American courts developed a peculiarly radical interpretation of historic English Common Law authority.”²³⁴ It was tradition for “Anglo-American courts . . . [to refuse] to enforce arbitration agreements, jealously guarding their dispute resolution monopoly.”²³⁵ Thus, Arbitration was not embraced by Federal Law (as well as the judiciary) until the 20th Century,²³⁶ when US courts began to recognize arbitration.

In the United States, the current arbitral process assumes many forms, and is used in numerous types of disputes; *e.g.*, particularly consumer disputes. The arbitral dispute mechanism in consumer law evolved within “the context of a long history of successful dispute resolution”²³⁷ that took advantage of arbitration. Furthermore, there was an agreement between the parties to arbitrate, and they, therefore, chose to utilize this form of ADR.²³⁸

Over time, therefore, arbitration has become a permanent fixture of the United States' ADR systems, especially in American industries. From a historical standpoint,

²³⁴ BORN *supra*, ch. IV, note 1.

²³⁵ Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1380 (1990-1991). (Please note that the Author points out to see such sources as “*See Southland Corp. v. Keating*, 465 U.S. 1, 13-14 (1984); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406-07 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960); Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259 (1990).”).

²³⁶ BORN *supra*, ch. IV, note 1, at 19.

²³⁷ Edna Sussman, *Comments to the Consumer Financial Protection Bureau in connection with its review of Arbitration for Consumer Financial Products or Services*, 12 CARDOZO J. CONFLICT RESOL. 491, 492 (2011).

²³⁸ *Id.*

it has been said that “that the best and most useful, most successful arbitration procedures were introduced by industry.”²³⁹ One documented example of a successful arbitral dispute resolution system are found in the *Worth Street Rules* for the textile industry.²⁴⁰ The same ADR history can be found in the garment industry, construction, and other types of industries.²⁴¹ “By 1927, the American Arbitration Association's (“AAA”) *Yearbook of Commercial Arbitration* listed over 1,000 trade associations that had systems of arbitration.”²⁴² Industry specific ADR systems indubitably helped increased the popularity of arbitration in the United States.

The United States eventually codified its arbitration laws and procedures into the *Federal Arbitration Act*, otherwise known as the FAA. The FAA “took effect January 1, 1926 and has remained, up until the time of this paper, essentially unchanged.”²⁴³ There were multiple reasons why the FAA was necessary, but the following discussion gives a brief commentary of its enactment.

New York was considered the hub of arbitration in America, and thus had an influence on Federal Law. According to Cornell Law Professor, Theodore Eisenberg, “New York has openly sought to be an adjudication center for substantial business arrangements'. . . [i]n response to 'widespread judicial hostility to arbitration agreements.’”²⁴⁴ This type of judicial hostility as well as inconsistent treatment of state

²³⁹ Symposium, *New York Stock Exchange, Inc. Symposium on Arbitration in the Securities Industry: Welcoming Remarks (November 21, 1994)*, 63 FORDHAM L. REV. 1505, 1614 (1995). (Please note that this portion of the address was given by Judith Vladeck).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² Philbin *supra*, ch. IV, note 216.

²⁴³ Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1380 (1990-1991).

²⁴⁴ Philbin *supra*, ch. IV, note 216.

arbitration laws forced Congress to address these issues at the federal level.²⁴⁵ The beauty of enacting the FAA was to create “substantive rules for deciding whether to uphold an arbitration agreement, stay judicial proceedings, compel arbitration, and confirm, vacate or alter the award.”²⁴⁶ Therefore, the FAA was put in place to ensure that certain private arbitration agreements were accepted according to the wishes of the disputants.²⁴⁷ Congress codified the arbitration laws at the federal level and made arbitration a more uniform ADR system in the United States.

There is legislative history concerning Congress' thought processes when drafting the FAA;²⁴⁸ Congress, however, did not hold any hearings before it passed the FAA.²⁴⁹ As discussed above, it was noted that the FAA was based upon successful arbitration use of New York's ADR systems.²⁵⁰ Peter Rutledge explains that the legislative reasoning gives “some indication that it was designed primarily for inter-company disputes, but at least one snippet of the history expresses a belief that the bill will benefit individuals as well.”²⁵¹ Additionally, one of Congress' goals was to make the choice to use arbitration more accessible to the public as well as making “arbitration agreements enforceable only in the federal courts.”²⁵² In sum, a House Report concerning the proposed legislation stated that the “purpose of this bill is to make valid

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against The Arbitration Fairness Act* 9 CARDOZO J. CONFLICT RESOL. 267, 270 (2008).

²⁴⁹ *Id.*

²⁵⁰ See Philbin *supra*, ch. IV, note 216; and Rutledge *supra*, ch. IV, note 243.

²⁵¹ Rutledge *supra*, ch. IV, note 243.

²⁵² *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

and enforceable . . . agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or . . . admiralty, or which may be the subject of litigation in the Federal courts.”²⁵³ It was further noted that aversion to arbitration arose because the English courts jealously guarded their jurisdiction and the judiciary’s antipathy to arbitration became firmly rooted in English Common Law and transplanted to the American legal court system.²⁵⁴ Congress indicates that the courts’ precedent of arbitral aversion would only be overcome by legislation.²⁵⁵ Congress, therefore, gave some indications, as to the reasons for the enactment of the FAA.

In later years, the United States Supreme Court, in *Southland Corp. v. Keating*, highlights Congress’ challenges when enacting the FAA. The Supreme Court recognized that Congress had two problems to solve when drafting the legislation.²⁵⁶ One was the “old common-law hostility toward arbitration,”²⁵⁷ as previously mentioned. The second was that Congress had to take into account that some states within the union had their own arbitral laws that already favored arbitration agreements.²⁵⁸ The Supreme Court stated that to “confine the scope of the Act to arbitrations sought to be enforced in federal courts would frustrate what we believe Congress intended to be a broad enactment appropriate in scope to meet the large problems Congress was addressing.”²⁵⁹ The Supreme Court surmised that the FAA had

²⁵³ H.R. REP. NO. 68-96, at 3 (1924).

²⁵⁴ *Id.* at 1-2. (The court in *Kulukundis Shipping Co., S/A, v. Amtog Trading Co.*, 126 F.2d 978 (1942) discusses the attitude of the English courts towards arbitration).

²⁵⁵ *Id.*

²⁵⁶ *Southland Corp. v. Keating*, 465 U.S. at 13.

²⁵⁷ *Id.* at 14.

²⁵⁸ *Id.* at 13.

²⁵⁹ *Id.* at 14.

a “broader purpose”²⁶⁰ and that could be “inferred from the reality that Congress would be less likely to address a problem whose impact was confined to federal courts than a problem of large significance in the field of commerce.”²⁶¹ Thus, the United States Supreme Court set the stage for the continued, if not expansive, use of the FAA, and helped to modernize arbitration.

Both the United States and Scotland, from a historical perspective, have used arbitration to resolve disputes. It is quite fascinating that Scotland has laws dealing with arbitration, 1695 and 1894, and some aspects of those are in use today. ADR systems have a place in our past as well as in our future, on both national and international levels.

B. International Arbitration

Internationally, arbitration appears in many forms and is steeped in tradition in numerous locations across the globe. Presumably, for many thousands of years, in many societies, people would go to the local elder to have him or her resolve the dispute.²⁶² Arbitration, depending on the location, may or may not have looked very similar to what we use today. It is safe to say, however, that arbitration is not a new concept to International Law.

²⁶⁰ *Id.* at 13.

²⁶¹ *Id.* at 13.

²⁶² Interview with Justice Harry Low, Mediator and Arbitrator, Judicial Arbitration and Mediation Services, San Francisco, CA (June 25, 2012).

Despite the lack of written documentation, it seems that the use of International Arbitration during Medieval Europe was quite prevalent.²⁶³ The “tradition”²⁶⁴ to use arbitration to resolve disputes has multiple influences.²⁶⁵ For example, one's customary legal systems²⁶⁶ “versus contractual practices associated with commercial arbitration”²⁶⁷ tend to be a good example of the influences that arbitral practices face on an international level. Arbitration customs can also be influenced by the phenomenon of institutionalizing arbitration systems²⁶⁸ in the form of “international arbitration codes, laws and guidelines . . . [as well as] the manner in which commercial arbitration is practiced in a particular region or global community.”²⁶⁹ The arbitral tradition has been part of the international ADR systems for centuries.

In Scotland, international arbitration started to come into its own during the medieval period of Scotland's history, from the fifteen century forwards.²⁷⁰ Since Scotland “became a vigorous trading nation,”²⁷¹ the need to provide a dispute mechanism, such as arbitration to handle trade related disputes also arose.²⁷² Thus,

²⁶³ See Henry S. Fraser, *A Sketch of the History of International Arbitration*, 11 CORNELL L.Q. 179, 190-91 (1925-1926); and J. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 177-178 (1929).

²⁶⁴ Trakman *supra*, ch. II, note 130, at 5-6.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ WALKER *supra*, ch. IV, note 113, at 6.

²⁷¹ *Id.*

²⁷² *Id.*

Scotland became an International Commercial Arbitration center long before the current arbitration center was in place.

One notable international institution that arose to accommodate the use of arbitration to resolve a dispute is the *Permanent Court of Arbitration*, otherwise known as the PCA. The PCA “is an intergovernmental organization with over one hundred member states.”²⁷³ The PCA was created in 1899, over a hundred years ago, “to facilitate arbitration and other forms of dispute resolution between states”²⁷⁴ To this day, one can see [Is there an exhibit somewhere?] some of the arbitral awards given from the early 20th Century through the Hague Justice Portal²⁷⁵ as well as other interesting information.²⁷⁶

In fact, one such arbitral award, dates back to September 7, 1910, which was an arbitration between the United States and, at the time, Great Britain.²⁷⁷ Scotland was a part of Great Britain at that time. The issue that was sent to arbitration was to resolve a dispute over the interpretation of fishing in the North Atlantic pursuant to an 1818 treaty signed by the United States and Great Britain.²⁷⁸ Although, the PCAn is a

²⁷³ THE PERMANENT COURT OF ARBITRATION, *available at* http://www.pca-cpa.org/showpage.asp?pag_id=363 (last visited Apr. 4, 2012).

²⁷⁴ *Id.*

²⁷⁵ THE HAGUE JUSTICE PORTAL, *available at* <http://www.haguejusticeportal.net/> (last visited May 4, 2012).

²⁷⁶ *About Us, History*, PERMANENT COURT OF ARBITRATION, *available at* http://www.pca-cpa.org/showpage.asp?pag_id=363 (last visited Apr. 4, 2012).

²⁷⁷ *North Atlantic Coast Fisheries*, THE HAGUE JUSTICE PORTAL, *available at* <http://www.haguejusticeportal.net/index.php?id=6131> (last visited May 4, 2012).

²⁷⁸ *North Atlantic Coast Fisheries*, THE HAGUE JUSTICE PORTAL, *available at* <http://www.haguejusticeportal.net/index.php?id=5217> (last visited May 4, 2012). (This is the link to the actual award and discussion of the arbitration itself).

noteworthy as part of ADR history, it is an institution designed to handle only arbitral disputes between countries, and not between private parties.

The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, otherwise known as just the “New York Convention,” or “Convention,” is the seminal treaty, globally, in the field of International Commercial Arbitration.²⁷⁹ No one could have foreseen, fifty years after the New York Convention was enacted, that 144 nations would become signatories to this Convention.²⁸⁰ From a historical standpoint, and especially when discussing intentional ADR, the New York Convention is “one of the most successful and celebrated conventions in the history of International Law.”²⁸¹ Arbitration, due to its rich history, has over time become the “preferred dispute resolution mechanism in international disputes primarily because”²⁸² of the distrust to file suit in a foreign country and at the mercy of unfamiliar laws.²⁸³ The New York Convention, therefore, enables those that choose arbitration to enforce their award in²⁸⁴ “domestic courts across national borders.”²⁸⁵ This Convention is still used today to enforce foreign arbitration awards between signatory nations to the treaty.²⁸⁶

²⁷⁹ See the New York Arbitration Convention website for more details, *available at* <http://www.newyorkconvention.org/> (last visited May 4, 2012).

²⁸⁰ Stavros Brekoulakis, *Special Section on the 2008 Survey on Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards: Enforcement of Foreign Arbitral Awards: Observation on the Efficiency of the Current System and the Gradual Development of Alternative means of Enforcement*, 19 AM. REV. INT'L ARB. 415, 416 (2008).

²⁸¹ *Id.*

²⁸² Philbin *supra*, ch. IV, note 216.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ Stavros Brekoulakis *supra*, ch. IV, note 275.

It is explained that the New York Convention “has never ceased to fascinate the arbitration community.”²⁸⁷ Scholars say that this treaty “is arguably one of the most successful conventions in legal history. A steady stream of solid enforceable awards flow from the many worthy arbitration institutions serving the dispute resolution community.”²⁸⁸ This treaty has also had a “strong academic appeal”²⁸⁹ and was evidenced by the number of events discussing and celebrating the New York Convention 50th anniversary in 2008;²⁹⁰ thus making this Convention all the more important to discuss in a comparative International Commercial Arbitration dissertation. [Transition?]

Arbitration in the United States and in Scotland can be seen throughout history. Scotland had in place, over many centuries, laws that encourage and perhaps favored arbitration. However, there were of course some caveats to the use of arbitration in Scotland. The Colonies, however, clearly favored arbitration. Unfortunately, due to the United States Common Law past, it was not until the passing of the FAA that arbitration was finally a mainstream phenomenon. The following takes up the topic of “mediation,” a close relative of arbitration.

IV. THE ORIGIN OF MEDIATION

²⁸⁷ *Id.*

²⁸⁸ John Miles, *Some Procedural Challenges in Running an ICC Arbitration in Africa*, 15 IBA ARB. & ADR NEWS 2, 28 (2011).

²⁸⁹ Brekoulakis *supra*, ch. IV, note 275.

²⁹⁰ *Id.*

It is difficult to pinpoint the origin of mediation as a form of ADR.²⁹¹ Perhaps “[m]ediation has been in existence as long as there have been disputes.”²⁹² It is presumed that long ago disputing parties went to the village elder to have him or her assist in the resolution of the dispute.²⁹³ Jean-Louis Lascoux refers to mediation not as “history, [but as] stories.”²⁹⁴ It is often said that in ancient times, conflict was resolved with a sword,²⁹⁵ and that the “history of mediation was [actually] the history of diplomacy.”²⁹⁶ Thus, the use of mediation has a place in our history and in our ADR systems.

The use of mediation as an ADR mechanism, in which a neutral third party steps in to assist the parties resolve a dispute,²⁹⁷ “can be traced to the Middle Ages in European societies.”²⁹⁸ Scotland and the United Kingdom inevitably benefited

²⁹¹ See Evan R Seamone, M.P.P., *Bringing a Smile to Mediation’s Two Faces: How Aspiring Mediators Might Jump-Start Careers Immediately Following Law School*, UNIVERSITY OF IOWA COLLEGE OF LAW, available at <http://www.uiowa.edu/~cyberlaw/elp00/Evan/mediation/origin.html> (last visited May 17, 2012); and Douglas Lind, *On the Theory and Practice of Mediation: The Contribution of Seventeenth-Century Jurisprudence*, 10 MEDIATION Q. 119 (1992) (describing Johann Wolfgang Textor, SYNOPSIS OF THE LAW).

²⁹² THE FLORIDA BAR, FLORIDA EMINENT DOMAIN PRACTICE AND PROCEDURE §21.2 (7th ed. 2008).

²⁹³ Low *supra*, ch. IV, note 257.

²⁹⁴ Jean-Louis Lascoux, *History of Mediation*, WIKIMEDIATION, available at http://en.wikimeditation.org/index.php?title=History_of_mediation (last visited May 17, 2012). (The WikiMediation website, originally only available in French, is an international observatory of mediation that was initiated by mediators who were supported by the European Commission).

²⁹⁵ Erin Johnston, *A Short History of Mediation*, (March 29th, 2009) <http://cfrmediation.com/a-short-history-of-mediation/> (last visited May 17, 2012).

²⁹⁶ *Id.*

²⁹⁷ THE FLORIDA BAR, FLORIDA EMINENT DOMAIN PRACTICE AND PROCEDURE *supra*, ch. IV, note 287.

²⁹⁸ *Id.*

historically from this form of dispute resolution mechanism. It is interesting to note that mediation was considered “modern”²⁹⁹ even during medieval times.³⁰⁰

There are some scholarly texts about the subject of mediation. Some of the writings on mediation date as far back as 1680.³⁰¹ Johann Wolfgang Textor³⁰² wrote about mediation; he delineated the “essential international mediation standards”³⁰³ in the field of ADR systems. Historical writings on mediation can assist in the use of learning this form of ADR.

As in the area of arbitration and *Lex Mercatoria*, the merchant classes also played a role in the development of mediation as an ADR mechanism. In particular, the “maritime, silk, and fur industries”³⁰⁴ were trail blazers and often “looked to private channels to resolve their conflicts.”³⁰⁵ It is said that the merchants used third party neutrals to assist disputants to voluntarily resolve their dispute; the avoidance attorneys³⁰⁶ and the “courts has deep roots in many cultures.”³⁰⁷ These deep seated roots in the merchant classes made mediation a necessary part of ADR systems.

²⁹⁹ William G. Geddes, *From Athens to AMIC (Arbitration and Mediation Institute of Canada): the history of Alternative Dispute Resolution (ADR)*, (1997), available at <http://www.thefreelibrary.com/From+Athens+to+AMIC+%28Arbitration+and+Mediation+Institute+of+Canada%29%3A...-a030470491> (last visited May 17, 2012).

³⁰⁰ *Id.*

³⁰¹ See Seamone *supra*, ch. IV, note 286; and Lind *supra*, ch. IV, note 286.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ Harold Baer, Jr., *History, Process, and a Role for Judges in Mediation their Own Cases*, 58 N.Y.U. Ann. Surv. Am. L. 131, 131 (2001) (author notes that he is drawing from LINDA R. SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM* 5 (2nd ed. 1994).

³⁰⁵ *Id.*

³⁰⁶ James C. Melamed, *Select Observations, A Brief History of Mediation*, [MEDIATE.COM/INTEGRATING, PRESENTATION CENTER JAMES C. MELAMED](http://www.mediate.com/integrating/pg69.cfm), available at <http://www.mediate.com/integrating/pg69.cfm> (last visited May 17, 2012).

³⁰⁷ *Id.*

In Scotland, “mediation practice has historically remained modest.”³⁰⁸ Within Scottish ADR systems, mediation was present, but with certain caveats. Similar to the United States, which is discussed in more detail later, Scotland has only recently seen the utilization of mediation as a dispute resolution mechanism.³⁰⁹ There were some “barriers to mediation's development . . .”³¹⁰ in Scotland. These hurdles to mediation in Scotland included the “lack of recognized standards in the regulation and training of neutrals, ignorance of, and perhaps active resistance to, mediation on the part of both lawyers and disputing parties, and the fact that mediation can never guarantee settlement.”³¹¹ Thus, the preference to use mediation to resolve disputes has historically lagged in Scotland.

In the New World, however, mediation has long been an integral part of ADR systems. Mediation scholars have indicated that the “early U.S. model of mediation was based on the work of the Quakers,”³¹² who, for many years, rather than rely on litigation, used arbitration and mediation to resolve commercial disputes and also those arising within the marital context.³¹³

Other Colonies, however, did utilize mediation as well. For example, the New York Colony established the New York Chamber of Commerce to resolve merchant

³⁰⁸ CLARK *supra*, ch. IV, note 115, at 83.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *History of Mediation Definition and History of Mediation*, MEDIATION MATTERS (2011), available at <http://www.mediationmatterssd.com/mediationmatters/history.html> (last visited May 17, 2012).

³¹³ Daniel G. Brown, *Divorce and Family Mediation: History, Review, Future Directions*, 20 FAM. CT. REV. 2, 1-2 (1982).

disputes.³¹⁴ The use of mediation to resolve disputes was transferred from colonial law and yet exists in the laws of many US states.

Historically, immigrant communities in the United States utilized ADR mechanisms. New York is a good example where numerous immigrant communities relied upon ADR. For example, Chinese immigrants in New York “established the Chinese Benevolent Society to resolve disputes within the family and within the community by mediation.”³¹⁵ Jewish community immigrants within New York also established their own mediation association or forum.³¹⁶ Of course the ancient Hebrews had dispute resolution mechanisms that they brought with them to the New World, and the Jewish Conciliation Board in New York City was formally established in 1920.³¹⁷ Cross-culturally, mediation is firmly entrenched in our history, but it is only recently that mediation use goes beyond that which immigrant communities first used in the United States.³¹⁸

Many adventurous settlers of the United States had developed ADR mechanisms, such as mediation, early in the history and development of the Country.³¹⁹ Evan Seamone notes that “assuming that wise men and elders were mediators, granted their apparent partiality, town sheriffs, clergymen, and even pioneers like Charles Ingalls from the *Little House on the Prairie* television series actually practiced some

³¹⁴ Baer, *supra*, ch. IV, note 299.

³¹⁵ MEDIATION MATTERS *supra*, ch. IV, note 307.

³¹⁶ *Id.*

³¹⁷ Brown *supra*, ch. IV, note 308, at 1.

³¹⁸ See Joshua D. Rosenberg, *In Defense of Mediation*, 30 FAM. & CONCILIATION CTS. REV. 4 (1992).

³¹⁹ Seamone *supra*, ch. IV, note 286.

form of mediation.”³²⁰ However, scholars are reluctant to label these “influential members of the community . . . [as] professional mediators”³²¹ as we would see as part of today's ADR systems. It is of course understandable that the development of ADR systems during the growth of the United States would not only be unique, but formed out of necessity. The use of mediation, and perhaps the crux of this research, really came into its own in the United States during the 1970s, and going strong up until today.

There were two types of schools of thought as to how mediation should be used.³²² One was that mediation was an “extension of the legal system;”³²³ the other claimed mediation as a form of ADR mechanism that was a part of the legal system.³²⁴ From the 1970s on, those that favored mediation in the courts saw mediation as an opportunity to resolve issue; thus, only litigating a few before the courts.³²⁵ Florida, for example, is not only the first state to establish a statewide court mediation programs, but also took the lead in expanding such programs.³²⁶ Those who favored mediation apart from the civil legal system reasoned that the use of mediation to resolve disputes was “a process that could deliver better results than the adversarial system only because it was separate from the legal bureaucracy.”³²⁷ Evan Seamone surmises that these two schools of thought stem from Roscoe Pound’s scholarly writing that concerned

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ Seamone *supra*, ch. IV, note 286.

³²⁶ THE FLORIDA BAR, FLORIDA EMINENT DOMAIN PRACTICE AND PROCEDURE *supra*, ch. IV, note 287.

³²⁷ Seamone *supra*, ch. IV, note 286.

improving the United States' legal system.³²⁸ These schools of thought are both historical as well as modern in nature.

The latter half of the 20th Century gave rise to court and community board mediation to serve the community's dispute resolution needs. There was a need to resolve disputes without litigation, and civic minded citizens tried to provide those alternatives to costly litigation.³²⁹ As early as the 1970s, the Federal government gave money to communities to create “neighborhood dispute resolution centers to assist the state court systems with small claims matters.”³³⁰ This was also during the time that mediation was used to resolve family law issues.³³¹ Many of these community and court programs from the 1970s and 1980s are still in use today, although they will not be the focus of this paper.

At the international level, resolving disputes by litigation has decreased over the past several decades. The increase is due to the rise of international treaties between sovereign states that embrace and even make ADR an attractive dispute resolution mechanism compared to traditional litigation.³³² Historically, there was no group such as the United Nations or “International Law” that took advantage of mediation.³³³ Treaties can, of course, cover both public and private International Law. Again, public law is not the focus of this paper, and only covers disputes between private parties.

³²⁸ Seamone *supra*, ch. IV, note 286; and *see* Lind *supra*, ch. IV, note 286.

³²⁹ *Id.*

³³⁰ THE FLORIDA BAR, FLORIDA EMINENT DOMAIN PRACTICE AND PROCEDURE *supra*, ch. IV, note 287.

³³¹ *Id.*

³³² Johnston *supra*, ch. IV, note 290.

³³³ *Id.*

However, mediation has been in use at the international level, and can be seen in our treaties.

As previously mentioned, mediation to resolve disputes is quite old. Of course Scotland, and thus Medieval Europe, had mediation. From the Quaker Mediation to the use of mediation in the Wild West, many mediation dispute resolution mechanisms were seen in the New World, and eventually the United States. In both Scotland and the United States, mediation has experienced a renaissance from the 1970s to the present. International mediation is embedded in the treaties of the world. Mediation continues to have a place in the ADR systems of Scotland and the United States.

V. SUMMARY

Both the United States and Scotland have a fascinating history of ADR systems. *Lex Mercatoria*, or the Law Merchant, started business professionals on the track to using arbitration to resolve disputes outside of court. Furthermore, it set the tone for the need to have a special mechanism for trade or commercial related disputes that carried over into the new world, the United States, in particular. Eventually “the Law Merchant was created as an informal body of rules.”³³⁴ This new set of rules derived from both Civil and Common Law. However, there was no one group of people that maintained or kept track of this set of rules for this form of dispute resolution.

Other forms of ADR systems also emerged over the ages. This paper focuses only on arbitration and mediation. Both of these alternative disputant resolution mechanisms have a place in both Scottish and the United States legal history and laws. Scotland had codified arbitral laws as far back as the 1600s; in contrast, in the United States, individual states had arbitral laws before the Federal Arbitration Act

³³⁴ AVRAMIDIS *supra*, ch. IV, note 132.

was enacted. Information about mediation has been more difficult to obtain, but the past forty years have produced more academic literature discussing it. Mediation tends to be seen as a modern invention to some in both the United States and Scotland. Both arbitration and mediation mechanisms in Scotland and the United States have their place in history and are viable options used today.

* * *

CHAPTER V

BENEFITS AND STATISTICS

OF

ADR SYSTEMS

Chapter five examines the benefits of ADR in resolving conflict. The discussion weighs the benefits of arbitration and, or versus, mediation within the context of ADR systems both domestically and internationally. Comments and statistics on mediation and, or versus, arbitration mechanisms will also be discussed.

I. INTRODUCTION

Despite the less than favorable attentions that arbitration may have received in recent years, both the United States, and Scotland utilize arbitration. There are some doubts whether International Commercial Arbitration is still the faster, and less expensive dispute resolution process compared to litigation; however, there is no empirical data that can say for sure that International Commercial Arbitration is still faster and cheaper than litigation.¹ Mediation, in both countries, has its use and place in the ADR systems.

¹ Eric E. Bergsten, *International Commercial Arbitration*, in DISPUTE SETTLEMENT IN INTERNATIONAL TRADE, INVESTMENT AND INTELLECTUAL PROPERTY, at 15 (UNCTAD Course on Dispute Settlement in International Trade, Investment and Intellectual Property UNCTAD/EDM/Misc.232/Add.38 2005). Available at http://unctad.org/en/Docs/edmmisc232add38_en.pdf (last visited Oct. 21, 2013).

As mentioned previously, arbitration in international commercial disputes can be a perfect fit for disputants. The United States, Scotland, and the UNCITRAL Model Law all give parties a definition, or working framework as to how arbitration is defined. In addition to arbitration in international commercial disputes, mediation is also becoming a popular resolution mechanism.

With the invention of the Internet,² we have become not just a local community of businesses, but a global conglomerate as well. Global business is at an all-time high, more than at any other time in the history of the world.³ Numerous advances in technology have made it easier than ever before to conduct international business transactions.⁴ Alongside the increase in global business, is the increase in multi-national disputes.⁵ Furthermore, intentional business transactions or relationships are becoming more complex, which of course lead to more complex issues or disputes.⁶

² The creation of the “Internet can be traced back to 1958, when, in the shadow of the USSR's launch of the Sputnik satellite, the Advanced Research Projects Agency (ARPA) was established to research and develop new technology for the United States military. During the 1960s, computers became increasingly more standard and smaller, the first online networks were established and the ARPA network program began in 1966. Throughout the period there was great theorizing and excitement over the problems, components, and potential military and academic applications of computer networking.

The culmination of these efforts and developments came in October of 1969, when the first ARPANET (Advanced Research Projects Agency Network) host-to-host (meaning independent network-to-independent network) connection was established between the University of California at Los Angeles and the Stanford Research Institute. This first packet sharing connection between two networks became the cornerstone for what came to be known in the early ‘70s as the Internet. It was not long until the connection began to be used for email and in 1976, the first commercial email service, Comet, was established.” Daniel Mallia, *When Was The Internet Invented?*, HNN GEORGE MASON UNIVERSITY (2011), <http://hnn.us/article/142824#sthash.zQTT4rIF.dpuf> (last visited Oct. 17, 2013).

³ Winston Stromberg, III, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 LOY. L.A. L. REV. 1337, 1339 (2007). Available at: <http://digitalcommons.lmu.edu/llr/vol40/iss4/3>.

⁴ See David J. McLean, *Toward a New International Dispute Resolution Paradigm: Assessing The Congruent Evolution Of Globalization And International Arbitration*, 30 U. PA. J. INT’L L. 1087 (2009); Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 39 (2003); and Stromberg *supra*, ch V, note 3.

⁵ See McLean *supra*, ch. V, note 4

⁶ David W. Rivkin, 21st Century Arbitration Worthy Of Its Name, in LAW OF INTERNATIONAL AND BUSINESS DISPUTE RESOLUTION IN THE 21ST CENTURY, at 2 (Robert Briner et al. eds.,

Therefore, the need for International Commercial Arbitration, mediation and other ADR mechanisms has “quickly become a vital component of international business relationships.”⁷ Global business and complex international commercial disputes are now greater than ever before; thus, ADR mechanisms, such as arbitration and mediation, can fit the need to resolve complex international commercial disputes.

The good news is that a new dawn is opening on ADR systems. Arbitration and mediation are effective dispute resolution mechanisms in international commercial disputes. During the course of my research, I discovered that Mediation in Scotland is catching on slowly as a dispute resolution option. On the American front, I found that mediation is generally well thought of, but like all forms of ADR, there are disadvantages. There is, however, a “growing awareness [in Scotland] of mediation as a tool for managing differences at an early stage and before the matter escalates to a messy dispute.”⁸ Practitioners in Scotland have recognized the benefits of mediation and have progressively over the years suggested its use in conflict.⁹ To resolve commercial disputes in Scotland, resorting to arbitration, and not mediation, is the norm rather than the exception. On the other hand, International Commercial Arbitration is more of the norm in the United States. The use of arbitration to resolve domestic disputes both in the United States and Scotland, does seem to be statistically on the rise. To resolve international commercial disputes, both countries see advantages to either mediation, or arbitration.

2001) available at http://www.law.yale.edu/documents/pdf/21st_Century_Arbitration_Worthy_of_Its_Name.pdf (last visited Oct. 17, 2013).

⁷ Stromberg *supra*, ch. V, note 3, at 1340.

⁸ John Sturrock, *Reflections on Commercial Mediation in Scotland*, 73 *ARBITRATION* 1, 3 (2007).

⁹ *Id.*

Because of the confidential nature of both international mediation and commercial arbitration, gathering statistics on ADR can be challenging; however, one helpful method is to review the anonymous surveys that gauge the pulse of ADR systems, and which are conducted by scholars and ADRs professionals. Another way to gather statistics is study ADR institutions, which are an excellent source to ascertain what is happening with specific ADR mechanisms. Utilizing such statistical data can help enrich our discussion of international ADR systems.

Through statistical analysis, professional commentary, and scholarly writings, we can develop a picture of the benefits of ADR systems; additionally, discussing the advantages of ADR systems will greatly enhance the comparative analysis of Scottish and American ADR systems.

II. COMPARATIVE BENEFITS OF ADR SYSTEMS

Mediation and arbitration are ADR mechanisms used in international commercial disputes. On the downside, arbitration has perhaps gotten a bad reputation as a “surrogate for civil trial,”¹⁰ nonetheless is still a mechanism of choice now in the United States. Scotland has also seen arbitration decrease in use, but with new laws favoring arbitration, it has come back into vogue as far as dispute resolution mechanisms go.¹¹ The use of arbitration in the United States is still met with mixed sentiments, and primarily depends on choice of law. Like all types of dispute resolution options, there are pros and cons to any mechanism; however, despite negative commentary, both mediation and arbitration are apparently here to stay.

¹⁰ Thomas J. Stipanowich, *Arbitration: The “New Litigation?”*, 2010 U. ILL. L. REV. 1, 5 (2010).

¹¹ John Sturrock, *Civil and Commercial Mediation – a Scottish Perspective*, INT’L B. ASS’N LEGAL PRAC. DIV. MEDIATION NEWSL. October 2009, at 23.

As noted, mediation can be beneficial in international commercial disputes. Disputes brought before “mediation are often not at the stage of litigation”¹² and the choice to use mediation makes sense in international commercial disputes. In general, mediation in international commercial disputes is “without prejudice, informal and less adversarial than most other structured dispute resolution”¹³ mechanisms. Furthermore, the mediation mechanism in ADR systems allows the parties to preserve, reinforce and possibly strengthen their relationships.¹⁴ Additionally, employing mediation to resolve a dispute “provides the distinct advantage of allowing the parties to design their own resolution by means of a mutually agreed-upon solution.”¹⁵ Therefore, under these circumstances, the focus of mediation is on the parties’ needs rather than on what the law awards. Over all, unlike a more adversarial process, mediation can be tailored to fit the needs of the participants without fear or pressure.

From the Judiciary’s point of view here in the United States, ADR systems are being used more frequently. The Honorable Judith S. Kaye, formerly the Chief Judge of New York’s Supreme Court, saw “the enthusiastic welcome of ADR into the New York State court system.”¹⁶ In the private sector, Judge Kaye sees “the growth of arbitration . . . [and] the worldwide profusion of arbitrators, arbitrations, arbitral organizations and multiple bodies of rules but also to the evolution of arbitration as an

¹² Sturrock *supra*, ch. V, note 8, at 3.

¹³ Miryana Nestic Hammonds, *International Trade Disputes and the WTO Regime: What Happened to the Mediation Option?*, INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION 1 (2005), available at <http://www.cpradr.org/Portals/0/Across%20Borders/International%20Trade%20Disputes%20%E2%80%93%20The%20WTO%20Regime.pdf>

¹⁴ Kevin M. Lemley, *I’ll Make Him an Offer He Can’t Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287, 306 (2004).

¹⁵ *Id.* at 305 – 306.

¹⁶ Judith S. Kaye, *Junctures: In Life And In Law*, 20 AM. REV. INT’L ARB. 1, 1(2009).

exquisite specialty.”¹⁷ The United States Supreme Court has also noted that the use of International Commercial Arbitration has increased with the increased amount of global business or trade.¹⁸ Thus, commercial arbitration is on the rise and will be used both in the United States and of course Scotland as well.

In Scotland, the new Arbitration Act appears to be putting the brakes on this trend to disuse arbitration as a means to resolve a dispute. The new law corrects the wrongs that the former arbitration laws created. In 2009, in an address to the Scottish parliament by Jim Mathers MSP, Minister for Enterprise, it was Mr. Mathers’ hope that upon the passing of the new Arbitration (Scotland) Act, that the use of arbitration in Scotland would increase “markedly as a result of the reforms and modernization that the bill has introduced. We hope that, as a result, more international arbitration work will be attracted to Scotland and we will see a renaissance of Scottish arbitration.”¹⁹ Thus, Scotland is hopeful that the surge in arbitration use would be a result of the new modernized law.

For some time now, more and more disputants are dissatisfied with litigation; utilization of ADR systems may be the answer. This dissatisfaction is not just here in the United States, it is acknowledged in Scotland as well as around “the world that the traditional adversarial court system may not always be the best way to resolve a civil

¹⁷ *Id.*

¹⁸ *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

¹⁹ *Plenary, 18 Nov 2009, Arbitration (Scotland) Bill, Official Report Debate Contributions*, THE SCOTTISH PARLIAMENT, available at http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=4899&mode=html#iob_42819 (last visited Sept. 26, 2011).

dispute.”²⁰ The “growing awareness of the disadvantages of the court system”²¹ has subsequently led to increased interest in ADR”²² systems. In international commercial disputes, using arbitration to resolve a dispute “can be a perfect means of dispute resolution with many advantages in comparison to a conventional trial.”²³ The dissatisfaction of national court systems urges disputants to utilize ADR systems instead.

International ADR organizations, such as the International Chamber of Commerce (ICC), have also seen a steady increase over the long term of the number of cases filed for arbitration as well as the awards issued in these arbitrations International commercial arbitration “has exploded from its early acceptance in Continental Europe to virtually all nations and cultures.”²⁴ As we have seen earlier, globalization has helped to draft laws that include or encourage arbitration.

International commercial arbitration is generally viewed in a positive light; the “future of international arbitration is quite rosy.”²⁵ Savvy business people, although not wishing for it, prepare for conflict so it is not such a visceral shock when conflict occurs. Traditional methods of dispute resolution, such as filing in national court, have been replaced now with International Commercial Arbitration,²⁶ and to repeat,

²⁰ SARAH O’NEILL, SCOTTISH CONSUMER COUNCIL, POLICY REPORT CONSENSUS WITHOUT COURT ENCOURAGING MEDIATION IN NON-FAMILY CIVIL DISPUTES IN SCOTLAND 1 (2001).

²¹ *Id.*

²² *Id.*

²³ Dillenz *supra*, ch. II, note 120, at 250.

²⁴ Madge S. Thorsen, *The Whole Enchilada: Cultural Differences in International Arbitration*, MSBA ADR SEC. 1 (2007).

²⁵ Loukas Mistelis, *International Arbitration – Corporate Attitudes And Practices – 12 Perceptions Tested: Myths, Data And Analysis Research Report*, 15 AM. REV. INT’L ARB. 525, 584 (2004).

²⁶ See McLean *supra*, ch. V, note 4.

arbitration as a dispute resolution mechanism is often sought because it is significant advantages over traditional litigation.²⁷ There furthermore exists a “strong presumption favoring arbitration in international commerce.”²⁸ Arbitration also gives disputants certain predictability that may not be seen transnational litigation through time-honored enforcement mechanisms established by international treaties.²⁹

One of the advantages of arbitration is that a party can choose a person having specific knowledge of the relevant issue, to decide a dispute; for instance, intellectual property issues or commercial norms of a particular industry, require certain knowledge related to these issues.³⁰ In a national court, the parties to a conflict are at the whim of the court and can only hope that the judge hearing their case is knowledgeable in the area of law that governs the conflict.³¹ Therefore, when highly specialized disputes need a specialized panel, arbitration can provide the right forum for these types of disputes.

ADR can provide more than just a means to resolve a dispute. Mediation can not only craft a resolution upon the parties’ needs, but save a personal or business relationship as well. Arbitration, though perhaps perceived by some as the cousin of litigation, retains a niche in ADR systems. Arbitration, as repeatedly noted, is ideal for international commercial disputes, especially when expertise in the area of conflict is

²⁷ *Advantages of Arbitration*, SAC, available at <http://www.scottisharbitrationcentre.org/index.php/arbitration/advantages-of-arbitration> (last visited Sept. 23, 2011).

²⁸ *Mitsubishi Motors supra*, ch. V, note 18.

²⁹ *Id.*

³⁰ SAC *supra*, ch. V, note 27, available at <http://www.scottisharbitrationcentre.org/index.php/arbitration/advantages-of-arbitration> (last visited Sept. 23, 2011).

³¹ Edna Sussman & John Wilkinson, *Benefits Of Arbitration for Commercial Disputes* 4 (The Arbitration Committee of the ABA Section of Dispute Resolution Brochure Draft 2012).

needed. Below, we continue to discuss other points that make ADR systems preferable over traditional dispute resolution methods.

A. Location, Location, Location

Employing ADR is one way to overcome parties' fears of filing and having to appear in local courts. When it comes to international commercial disputes, filing a case in a forum with which one is not familiar, with can pose difficulties or disadvantages.³² Of course the way to circumvent the problems of filing in national court systems is to utilize some other form of dispute resolution mechanism, such as arbitration or mediation.

International commercial arbitration is a mechanism that helps disputants avoid uncertain, and, or untrusted, forums. The “driving force”³³ in International Commercial Arbitration looks as if it is the disputants need to avoid having their conflict resolved in a foreign judicial forum.³⁴ Disputants would use International Commercial Arbitration so as to avoid litigating in a specific jurisdiction where one party is unfamiliar with the local customs, laws, and procedures.³⁵

A second reason why International Commercial Arbitration is a preferred choice is that it allows multiply party disputants to circumvent the necessity to litigate in multiple locations, and often simultaneously.³⁶ A third reason to prefer International

³² See Stromberg *supra*, ch. V, note 3, at 1339.

³³ W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX INT'L L.J. 1, 2 (1995).

³⁴ *Id.*

³⁵ Rivkin *supra*, ch. V, note 6.

³⁶ Allen B. Green & William T. O'Brien, *International Arbitration and Multi-National Litigation of Commercial Dispute*, MCKENNA LONG & ALDRIDGE LLP 4 (2007); and Sussman & Wilkinson, *supra* note 782, at 1.

Commercial Arbitration is that there is an unknown element of whether a judgment obtain through litigation will be upheld in national courts compared to a treaty that supports international commercial arbitral award enforcement.³⁷ When it comes to disputes in foreign lands, International commercial arbitration eases these fears.

ADR systems make it the ideal choice due to fears of underdeveloped jurisprudence. The location of the arbitration is one way to “avoid concerns that may arise with respect to some judicial systems.”³⁸ Such factors, as a lack of jurisprudence, or an underdeveloped legal system is an effective deterrent disputants considering to litigate in that location.³⁹ Thus, local laws that maybe be perceived as “inadequate,” generally make it necessary that parties select ADR to resolve disputes.

In addition, International commercial arbitration, or mediation for that matter, can provide a neutral forum for disputes. Those in the global marketplace may fear corruption in the local courts,⁴⁰ thus making arbitration or mediation all the more appealing. Disputants may further fear that the local courts may have a national or even a cultural bias towards them if the plaintiff files suit in there verses utilizing mediation or arbitration. Arbitration is a bias-free dispute resolution process; thus “access to a neutral forum”⁴¹ is critical in international disputes in which arbitration allows more room for neutrality.⁴² The local or forum of the arbitration, for example, is one way to

³⁷ See Oscar Schachter, *The Enforcement Of International Judicial And Arbitral Decisions*, 54 AM. J. INT’L L. 1 (Jan., 1960). (Although quite an old treatise it does provide some interesting information on the enforcement of both judgments and arbitral awards.)

³⁸ Sussman & Wilkinson *supra*, ch. V, note 31.

³⁹ Roy L Martin & Steven P Walker, *A New Scottish Export – Scottish International Arbitration*, 18 COLUM. J. EUR. L. 3, 4 (2012).

⁴⁰ *Id.*

⁴¹ Edna Sussman, *The Proposed U.S. Arbitration Fairness Act’s Adverse Impact on International Arbitration: A Threat to U.S. Business*, 18 AM. REV. INT’L ARB. 455, 460 (2009).

⁴² *Id.*

ensure “an adjudicative setting in which bias is avoided and the rule of law is observed”⁴³ and mitigates the fears of the disputants.

A discussion on the location of a dispute resolution mechanism will not be complete without a comment on Scotland's new position as a center of International Commercial Arbitration. In the wake of the new arbitration act in Scotland and the opening of the Scottish Arbitration Center (“SAC”), it is the hope that Scotland will now be a premier destination for commercial arbitration.⁴⁴ The SAC offers numerous advantages to utilizing a Scottish forum for arbitration versus an arbitration set in another location, such as in England. Scottish commentaries have further noted the appeal of it being local is because the local courts “have always recognized the right of parties to agree to exclude the jurisdiction of the courts to inquire into the merits of their disputes and instead to refer any disputes to arbitration.”⁴⁵ This is important, especially if the parties want to seek arbitration to resolve their dispute rather than litigation. Furthermore, the recent efforts to create Scottish law that reflects the current times is also another aspect that makes Scotland an enticing locale as the seat of an arbitration.

Distrust in national laws and local courts can cause some concern when entering into a dispute resolution. Furthermore, the challenge or uncertainty of forcing a judgment in a foreign land can make litigation less appealing compared to ADR systems. Utilization of ADR systems can ensure neutrality and time-honored dispute resolution traditions that work. Taking advantage of Scotland as a location for

⁴³ Sussman & Wilkinson *supra*, ch. V, note 31, at 4.

⁴⁴ *News Release, The Scottish Government, SAC*, THE SCOTTISH GOVERNMENT (on file with author), March 17, 2011, available at <http://www.scotland.gov.uk/News/Releases/2011/03/17120931>.

⁴⁵ SAC *supra*, ch. V, note 27.

arbitration is also a good idea and may be more amenable to the parties' circumstances compared to other forums. Using ADR systems can, therefore, overcome the fear of litigation in local courts.

B. Flexibility and Self Determination

When self-determination and flexibility are desired, mediation or International Commercial Arbitration is the mechanism of choice. In fact, the flexibility of such resolution schemes is often the reason why ADR systems such as arbitration are sought.⁴⁶ Both mediation and arbitration in international commercial disputes are quite flexible and not as strict as litigation, both procedurally as well as the underlying atmosphere the parties may face verse an adversarial environment. Furthermore, parties can determine ahead of time if they will use ADR in international commercial disputes, and if so, which type. Thus, the flexibility and choice to partake in an ADR process versus traditional litigation provides a way to overcome a one-size-fits-all resolution process.

If mediation is the dispute resolution mechanism option, its use will allow the parties to determine their own outcome. Mediation is the essence of self-determination that allows the disputants to enter into talks, facilitated by a neutral party, so as to determine their own fate or settlement.⁴⁷ The contracting parties can favor any form of dispute resolution process such as mediation.⁴⁸ Furthermore, unlike arbitration, mediation has the “distinct advantage of allowing the parties to design their own

⁴⁶ See Gilles Cuniberti, *Beyond Contract – The Case for the Default Arbitration In International Commercial Disputes*, 32 FORDHAM INT'L L.J. 417, 418 (2009).

⁴⁷ Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 465 (2007).

⁴⁸ Hammonds *supra*, ch. V, note 13.

resolution by means of a mutually agreed-upon solution.”⁴⁹ The focus of mediation is determined by the parties’ needs rather than what the law awards under these circumstances.

Although still similar to an adversarial process, arbitration is not as rigid as traditional court procedures. For instance, the flexibility of arbitration allows for the arbitration itself, as well as the award, to be kept confidential if the disputing parties so desire.⁵⁰ Arbitration also allows the disputants and arbitrators to streamline the process:

The freedom to choose among procedural options suffuses nearly all aspects of arbitration, and the wide arbitration spectrum includes a considerably rich and diverse array of procedures . . . including the precise breadth of the arbitrator's jurisdiction/authority, the selection of the tribunal, the character of the hearing, and pre-and post-hearing procedure.⁵¹

The flexibility of arbitration can also encompass the ability to waive certain aspects of the arbitral process, such as “foregoing participation in a hearing,”⁵² or the agreement to have the arbitrator, or arbitrators, issue the “arbitral equivalent of a consent order—an award based on terms of settlement crafted by the parties.”⁵³ The flexibility of arbitration permits it to accommodate the needs of the parties as well as the forum within which it is set.

⁴⁹ See Lemley *supra*, ch. V, note 14, at 305 – 306.

⁵⁰ SAC *supra*, ch. V, note 27.

⁵¹ Stipanowich *supra*, ch. V, note 10, at 432.

⁵² *Id.*

⁵³ *Id.*

Fortunately, International Commercial Arbitration is recognized as a contractual dispute mechanism,⁵⁴ such that the parties have the flexibility to customize the process.⁵⁵ Disputants can predetermine such things as, language, law, forum, procedural rules, number of arbitrators and the like. Parties have the “freedom to structure their own”⁵⁶ procedure as long as it retains “key elements of arbitration (a third party neutral, finality, and a binding decision) for statutory protections to apply.”⁵⁷ Furthermore, since arbitration is such a flexible process, a party can contemplate strategies that save time and money and really home in on the issues that are part of the conflict to be resolved.⁵⁸ ADR provides parties the flexibility to write their own dispute resolution process beyond just choosing a forum for the dispute.

C. Time and Cost

ADR has often been thought of as a group of dispute resolution processes that can save disputants’ time and money versus the traditional litigation. Mediation is often heralded as saving both time and money to resolve disputes.⁵⁹ Arbitration, like mediation, has its own unique way of cutting dispute costs. The saying “time is money” is quite apropos when it comes to the dispute resolution process. Disputants have businesses

⁵⁴ Hong-lin Yu, *A Theoretical Overview of the Foundations of International Commercial Arbitration*, 1(2) CONTEMP. ASIA ARB. J. 255, 266 (2008).

⁵⁵ Stromberg *supra*, ch. V, note 3, at 1341-1342.

⁵⁶ STEPHEN K. HUBER & MAUREEN A. WESTON, *ARBITRATION: CASES AND MATERIALS* 7 (2nd ed. Supp. Matthew Bender & Company, Inc., 2010).

⁵⁷ *Id.*

⁵⁸ ICC, *Commission Report Controlling Time and Costs in Arbitration*, at 11 (2012). Please note that the International Chamber of Commerce’s report also has valuable information pertaining to the options or strategies to utilize during the arbitral process so that participants save both time and money.

⁵⁹ Bryan Clark & C. Dawson, *ADR and Scottish Commercial Litigators: A Study of Attitudes and Experience*, 26 C.J.Q. 228, 232 (2007).

to run and budgets to be kept; resolving their arguments in courts wastes their time and dampens their income. Thus, disputants should give ADR systems a chance when time and money are factors in resolving a dispute.

The atmosphere of litigation can lead to a delay in resolving a dispute. The litigation dispute mechanism often “highlights the conflict between the parties.”⁶⁰ Since the conflict is emphasized, it can compound the problems, thereby, leading to a dragged out dispute process.⁶¹ Litigation’s tone can be a factor in having a dispute resolved in a slow or not so expeditious manner.

Mediation can shorten the time to resolve a dispute. CORE Mediation in Scotland noticed that several mediations were resolved within one day.⁶² In Scotland, most commercial dispute “mediations are resolved in a day, some take two; some require innovative design and a series of meetings over time.”⁶³ Since mediation is an informal process, it is a faster and cheaper dispute resolution mechanism.⁶⁴ The mediation mechanism offers “significant savings in time and costs.”⁶⁵

Mediation can be less expensive compared to other forms of dispute resolution. In general, businesses and companies that seem to be in conflict with other companies

⁶⁰ O’Neill *supra*, ch. V, note 20.

⁶¹ *Id.*

⁶² *Benefits Of Mediation*, CORE SOLUTIONS GROUP (2010), <http://www.core-solutions.com/page/59-why-use-mediation> (last visited September 1, 2013). (CORE mediation or CORE Solutions Group was founded by John Sturrock QC, a well-known and respected mediator in Scotland. CORE’s mission is to help clients “find constructive, forward-looking and practical results” to resolve conflict (*Why Use Core*, CORE SOLUTIONS GROUP (2010), <http://www.core-solutions.com/page/59-why-use-mediation> (last visited Sept. 26, 2013)).

⁶³ Sturrock *supra*, ch. V, note 8, at 3.

⁶⁴ Kimberly R. Wagner, *The Perfect Circle: Arbitration’s Favors Become Its Flaws in an Era of Nationalization and Regulation*, 12 PEPP. DISP. RESOL. L.J. 159, 182 (2012).

⁶⁵ Hammonds *supra*, ch. V, note 13.

or business will seek out the services of “trained mediators early in the dispute resolution process”⁶⁶ so as to resolve the conflict without “spending vast resources on pre-trial court litigation tactics.”⁶⁷ In Scotland, the Scottish Consumer Council in 2001 issued a policy report that looked beyond the use of mediation in family law,⁶⁸ and stressed mediation in civil, “non-family,” disputes were a more cost effective way to resolve disputes.⁶⁹ The utilization of mediation can reduce the cost of resolving dispute.⁷⁰ Saving money can be an incentive to choosing mediation over litigation.⁷¹ Therefore, mediation as an ADR mechanism is sought when cost is a factor in resolving conflict.

Parties often seek a speedy resolution which is one reason why disputants turn to ADR mechanisms. As of 2011, the fastest recorded large complex energy arbitration, from filing to award, was finished in just under four months;⁷² however, the “speed and length of the process can vary depending on the particular needs of a case and the preparation by the parties.”⁷³ Expediting the dispute resolution process is a good reason to choose ADR systems to resolve disputes.

⁶⁶ NATIONAL ARBITRATION FORUM, BUSINESS-TO-BUSINESS MEDIATION/ARBITRATION VS. LITIGATION 1 (2005). Available at: <http://www.adrforum.com/users/naf/resources/GeneralCommercialWP.pdf>.

⁶⁷ *Id.*

⁶⁸ The use of mediation in family law disputes is quite popular in Scotland so now there is a need to encourage the use of mediation for other types of dispute such as commercial disputes.

⁶⁹ See O’NEILL, *supra*, ch. V, note 20, at 5 - 13.

⁷⁰ See Lemley, *supra*, ch. V, note 14, at 306.

⁷¹ See *Id.* (the information, for general purposes, is quite helpful).

⁷² ENERGY ARBITRATION CASES AND STATISTICS, AMERICAN ARBITRATION ASSOCIATION, (2012), available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004205 (last visited Jul. 29, 2013).

⁷³ *Id.*

Accelerating conflict resolution and lowering dispute costs are also integral to International Commercial Arbitration. The use of arbitration is an ideal way to shorten the time to resolve commercial disputes, whether multi-national or not. The arbitration can take place, the dispute resolved with an award issued, in “less time . . . [than] it takes to go through the whole litigation process.”⁷⁴ Traditionally, International Commercial Arbitration was deemed to be a more expedited conclusion compared to litigation.⁷⁵ It has also been said that the arbitration dispute resolution mechanism “supplements the traditional [dispute resolution] system, serving as a cost-effective alternative to lengthy delays and high-priced litigation.”⁷⁶ Commercial arbitration and International Commercial Arbitration assist in reducing the length of a dispute.

Compared to litigation, arbitration can be seen as a quicker and cheaper form of conflict resolution. A few of the ways arbitration keeps cost and time at a minimum is by allowing disputants to take witnesses out of order, after normal business hours, over the weekend, via video conferencing or by telephone.⁷⁷ Although rarely used, the arbitral proceedings can require expert witnesses to appear simultaneously, which is also called “tandem experts or 'hot-tubbing.’”⁷⁸ This is a technique that is used to “narrow . . . [or] harmonize the expert witness opinions”⁷⁹ and which can cut costs as

⁷⁴SAC *supra*, ch. V, note 27.

⁷⁵U.N. Conference on Trade and Development, Dispute Settlement International Commercial Arbitration, UNCTAD/EDM/Misc.232/Add.38 (2005), *available at* http://unctad.org/en/Docs/edmmisc232add38_en.pdf (last visited Oct. 21, 2013).

⁷⁶NATIONAL ARBITRATION FORUM *supra*, ch. V, note 66.

⁷⁷ Sussman & Wilkinson *supra*, ch. V, note 31.

⁷⁸ Neal M. Eiseman, John E. Bulman, & R. Thomas Dunn, *A Tale Of Two Lawyers: How Arbitrations And Advocates Can Avoid The Dangerous Convergence Of Arbitration And Litigation*, 14 CARDOZO J. CONFLICT RESOL. 683, 723 (2013).

⁷⁹ *Id.* at 723 - 724.

well as reducing the length of the arbitration. Another way to cut a dispute's duration, which of course can be done in arbitration, and that is unlike what is seen in national court systems, is to preclude the right to appeal, or limit the amount of appeals that is sought in the arbitration.⁸⁰ Although arbitration does have similar procedures that you would see in litigation, the sheer flexibility of arbitration can reduce both cost and time in resolving a dispute.

The choice of a dispute resolution forum as a means of lowering costs of a dispute is also important to keep in mind.⁸¹ Due to the anxiety of high costs and unnecessary delays, arbitration is preferred over resolving a dispute in a full-blown court case.⁸² Having arbitration in Scotland versus another location is a cost saving strategy. The cost of living in such cities as New York, or London in a 2009 report can be formidably expensive.⁸³ These cities happen to coincide with "the leading locations for international arbitrations."⁸⁴ Therefore, conducting arbitrations in Scotland "would be significantly less expensive than in other popular"⁸⁵ locales as previously indicated.

Domestically, both countries have options to resolve disputes outside the civil justice system within a frame work of an institutional setting. Scotland has recently founded its own arbitral institution, the SAC. In the United States, an example of a typical arbitral institution is the *American Arbitration Association* ("AAA"), which is "the largest and longest-standing national provider of business arbitration services . . .

⁸⁰ SAC *supra*, ch. V, note 27.

⁸¹ Sussman & Wilkinson *supra*, ch. V, note 31, at 1.

⁸² Stipanowich *supra*, ch. V, note 10, at 4.

⁸³ Dingwall *supra*, ch. IV, note 112, at 146.

⁸⁴ *Id.*

⁸⁵ *Id.*

relatively stable . . . [and] new opportunities for arbitration continue to appear . . . on the international scene.”⁸⁶ Both countries have taken advantage of forming arbitral institutions that can hear both domestic and international disputes.

III. ARBITRATION AND MEDIATION STATISTICS

Due to the private nature of these dispute resolution mechanisms, definitive statistics on International Commercial Arbitration or mediation is often difficult to quantify.⁸⁷ The following is a mix of statistical data from various sources. Some scholars and ADR professionals have surveyed the attorneys and participants of ADR systems. The other notable source of statistics is ADR institutions that quantify such data as the number of cases that the institution works with in any given year. Reviews of statistics ultimately indicate a continued use of ADR that shows no sign of waning, but perhaps only increasing.

There are some caveats to keep in mind as such pertains to statistical analysis of ADR; *i.e.*, In Scotland, arbitration is not looked upon as part of ADR systems like it is in the United States. Since an arbitration can be conducted privately, and “may be conducted ad hoc without ties to any arbitral institution, statistics are not available to confirm the anecdotal evidence”⁸⁸ that the use of arbitration is on the rise. Organizations such as the *Financial Industry Regulator Authority* (FINRA) and the *Bureau of Labor Statistics Occupational Employment and Wages* (“BLSOEW”) in the United States keep very valuable statistics in this field, but it is domestic statistics and

⁸⁶ Stipanowich *supra*, ch. V, note 10, at 6.

⁸⁷ See Craig *supra*, ch. V, note 33, at 14.

⁸⁸ *Id.*

not of much use for our analysis hereinafter. Otherwise, the statistical analysis from both Scotland and the United States is of value to our discussion on ADR systems.

A. Mediation Statistics

Mediation as a dispute resolution mechanism here and abroad does have some interesting statistical analysis. ADR in general has developed into a more stratifying process, and 80% in one survey attest to that.⁸⁹ Statistics on the use of mediation in Scotland, modest use in the areas of community and family mediation, and commercial mediation is slow to take, but is on the rise and should not be altogether disqualified as of yet.⁹⁰ Seeking to encourage mediation to occur prior to litigation, it is estimated that 40% of 130 mediations between January 2007 and January 2009 before CORE Mediation in Scotland occur prior to the court case being filed. The documenting of statistical analysis as it pertains to the number of successfully mediations conducted during any given time period. Although it is suggested that “success” can be defined in multiple ways, some statistics pertaining to commercial mediations in Scotland suggest an “overall 'success' rate appears to be constant . . . above 80 per cent, regardless of the stage”⁹¹ that the commercial dispute was in.⁹²

Statistics from private studies show the advantages of mediation in commercial disputes. One survey suggests that mediations in commercial matters indicate that 85% “end in written settlement agreement”⁹³ which should be considered as successful

⁸⁹ NATIONAL ARBITRATION FORUM *supra*, ch. V, note 66.

⁹⁰ See Bryan Clark, *Mediation and Scottish Lawyers: Past, Present and Future*, 13 EDIN. L.R. 252 (2009).

⁹¹ Sturrock *supra*, ch. V, note 8, at 3.

⁹² *Id.*

⁹³ AMERICAN ARBITRATION ASSOCIATION, A GUIDE TO AAA DISASTER RECOVERY CLAIMS MEDIATION PROCEDURES 1 (2011) available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004315.

meditations. Two Scholars, Bryan Clark and C. Dawson, conducted a study; they polled 134 people on the attitudes towards ADR in Scotland and the Scholars found some interesting outcomes.⁹⁴ They found that of those polled, 45.5% somewhat disagreed and 19.4 % strongly disagreed that Scottish “litigation is generally well adapted to the needs and practices of the business community;”⁹⁵ this finding suggests that over 50% frown upon commercial litigation in Scotland.⁹⁶ Other stats that resulted from the poll is that among 79.4 % of practitioners, reducing costs was relevant for their client, and 84.5% said that reducing the length of time of the conflict was also important. ⁹⁷

Some organizations both in the United States and Scotland have compiled some links to statistical data on mediation. A likely source for statistics in the United States is with the “state agencies which oversee court-connected and/or community-based mediation programs.”⁹⁸ It is our hope that this data may serve as the basis for studies designed to improve ADR practice and procedure.”⁹⁹ John Sturrock explains that although it may be difficult to actually pin point some hard numbers as it pertains to mediation, perhaps the increase in number of mediations is a good indication.¹⁰⁰ In the United States, the *United States Federal Courts Circuit Mediation Office* (“USFCCMO”) has maintained statistics including number of appeals brought into

⁹⁴ See Clark & Dawson *supra*, ch. V, note 90. (This paper gives a great account of their findings but generally discusses them in more of a broad sense).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Mediation*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, *available at* <http://www.ca9c.uscourts.gov/mediation/mediation.html> (last visited Jul. 20, 2013).

⁹⁹ *Id.*

¹⁰⁰ John Sturrock, *Reflections on Commercial Mediation in Scotland*, 73 *ARBITRATION* 1, 3 (2007).

mediation, number of appeals settled (both patent and non-patent) and success rates, for calendar years 2007 to the present.¹⁰¹ In 2012, the USFCCMO recorded an 85% success rate for non-patent mediations.¹⁰² In Scotland, CORE Mediation found that from 2005 to 2009 the percentage of mediations that did not end in resolution has steadily gone down.¹⁰³ Furthermore, the percentage of mediations in Scotland ending in a resolution has gone up steadily, just over 90%.¹⁰⁴ All these statistics bode well for mediation in Scotland, as well as in the United States.

B. Arbitration Statistics

Domestically in the United States, arbitration has been seen to be resolved a lot faster than litigation. Statistically, the average length of time for an arbitration (filing to award) before the AAA (2008) was 7.9 months.¹⁰⁵ Litigation, on the other hand, paints a different picture. The median time, from filing to termination of civil cases before various United States District Courts, can range from one year to thirty-eight months determined in 2011.¹⁰⁶ The numbers also show that if an appeal of the lower court's decision is filed, then add perhaps another four to nineteen months to finalize the

¹⁰¹ UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT *supra*, ch. V, note 98.

¹⁰² *Circuit Mediation Office Statistics 2012 Calendar Year (January 1, 2012 through December 31, 2012)*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (2012) available at http://www.ca9c.uscourts.gov/images/stories/the-court/statistics/mediationstats_Year_2012.pdf.

¹⁰³ Mediation trends see the graph “here” link for *CORE Mediation Trends*, CORE SOLUTIONS GROUP (2010), available at <http://www.core-solutions.com/view/article/69> (last visited Oct. 1, 2013).

¹⁰⁴ *Id.*

¹⁰⁵ Sussman & Wilkinson *supra*, ch. V, note 31, at 1.

¹⁰⁶ See *Table C-5 U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending September 30, 2011*, FEDERAL JUDICIARY, JUDICIAL BUSINESS OF THE U.S. COURTS (2011) available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>.

resolution of your dispute.¹⁰⁷ Roughly half of corporate counsels in business-to-business arbitrations are satisfied with the process versus litigation.¹⁰⁸ The increased arbitrations filed with the AAA can be seen as a positive trend in the United States towards the use of ADR,¹⁰⁹ thus, the perception that International Commercial Arbitration is a better form of dispute resolution, as is backed up by statistics. Survey results indicate that 80% of lawyers, and 83% of business people believe that arbitration is a more just or fair process compared to litigation.¹¹⁰

Studies show what key role arbitration plays in American ADR systems.¹¹¹ Some studies have “found that arbitration has the capacity to produce comparable -and at times superior - results to litigation.”¹¹² Furthermore, there is a showing that arbitration is becoming “more commonplace” as well as the “effectiveness of arbitration versus that of litigation.”¹¹³ The other interesting fact is that court case filings have gone down in certain US District Courts and in some cases as much as 50% between the years of 2011 and 2012.¹¹⁴

¹⁰⁷ *Id.*

¹⁰⁸ DOUGLAS SHONTZ, FRED KIPPERMAN, & VANESSA SOMA, RAND INSTITUTE FOR CIVIL JUSTICE, BUSINESS TO BUSINESS ARBITRATION IN THE UNITED STATES PERCEPTIONS OF CORPORATE COUNSEL 8 (2011) available at http://www.rand.org/pubs/technical_reports/TR781.html.

¹⁰⁹ Chul-Gyoo Park, *A Comparative Analysis of Arbitral Institutions and Their Achievements in the United States and Korea*, 15 AM. REV. INT'L ARB. 475, 480 (2004).

¹¹⁰ See Sussman & Wilkinson *supra*, ch.V note 31, at 4.

¹¹¹ Drew B. LaFramboise, *Note: Arbitrating the Great Writ: Resolving Federal Habeas Corpus Disputes Through Arbitration*, 25 OHIO ST. J. ON DISP. RESOL. 1023, 1043 (2010).

¹¹² *Id.* at 1043 - 1044

¹¹³ *Id.* at 1043.

¹¹⁴ Table C. *U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2011 and 2012*, FEDERAL JUDICIARY (2012). Available at: <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C00Sep12.pdf>.

Statistics can also be seen when it comes to the specialization of the complexity of the dispute itself. The complexity of the dispute itself also seemed to encourage use of arbitration in which over 50% Corporate Counsel arbitration to resolve business-to-business disputes that were complex in nature.¹¹⁵ Survey outcomes, and studies on disputants who choose arbitration, indicate that there is the belief that a panel of arbitrators comprehends the subject matter better than a lone judge.¹¹⁶

In some cases, surveys produce numbers that suggest time, as well as, money can be saved during arbitration over litigation. Previous research backs up “arbitration’s time-saving potential,”¹¹⁷ and is illustrated by approximately 60% of Corporate Counsel agreed that arbitration to resolve business-to-business disputes saves time compared to litigation.¹¹⁸ Other surveys have indicated that 90% viewed ADR as critical to controlling costs and 13% pointed out that the use of ADR systems have saved more than one million dollars when used to resolve conflicts.¹¹⁹ When comparing arbitration to litigation in construction disputes, “one attorney observed that while the results in the two cases were largely the same, ‘[a]rbitration led to a resolution in much less time overall and allowed the parties to customize the process to a complex construction case.’”¹²⁰ Statistically, time and money can support the choice to use arbitration over litigation.

¹¹⁵ SHONTZ ET AL. *supra*, ch. V, note 108, at 19.

¹¹⁶ Sussman & Wilkinson *supra*, ch V, note 31, at 4.

¹¹⁷ SHONTZ ET AL. *supra*, ch. V, note 108, at 8.

¹¹⁸ *Id.*

¹¹⁹ NATIONAL ARBITRATION FORUM *supra*, ch. V note 66, at 2.

¹²⁰ Drew B. LaFramboise, *Note: Arbitrating the Great Writ: Resolving Federal Habeas Corpus Disputes Through Arbitration*, 25 OHIO ST. J. ON DISP. RESOL. 1023, 1044 (2010).

Since international companies have seen the value of arbitration, approximately 90% of the contractual relationships they enter into utilize arbitration by inserting an arbitration clause in their agreement.¹²¹ Studies show that in transnational disputes by industry, over 50% prefer International Commercial Arbitration as a dispute resolution mechanism.¹²² Furthermore, an overwhelming amount of in-house counsel “strongly agreed”¹²³ that International Commercial Arbitration was appropriate or was “well-suited”¹²⁴ for the type of dispute that occurs within certain industries, such as financial (69%), energy (78%) and construction (84%).¹²⁵ International commercial arbitration in international business transactions is on the rise statistically.

Arbitral institutions have seen an increase in the number of both domestic and institutional arbitrations over a twenty year period. For example, the *American Arbitration Association* (“AAA”), with the AAA’s arm for international disputes called *International Center for Dispute Resolution* (“ICDR” and together “AAA/ICDR”) has seen an increase in arbitration cases filed. The AAA/ICDR saw a mere 302 international arbitrations filed in 1997, and the number has gone up to 994 International Commercial Arbitrations filed with the AAA/ICDR in 2011; a 100% increase statistically.¹²⁶ Since the *London Court of International Arbitration* (“LCIA”) is

¹²¹ Stromberg, *supra*, ch. V, note 3, at 1342-1343.

¹²² GERRY LAGERBERG & LOUKAS MISTELIS, INTERNATIONAL ARBITRATION SURVEY 2013: CORPORATE CHOICES IN INTERNATIONAL ARBITRATION INDUSTRY PERSPECTIVES 6 (Price Waterhouse Cooper 2013). Available at: <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>.

¹²³ *Id.* at 8.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See *Arbitral Institutions' Statistics For 2012*, PRACTICAL LAW (May 15, 2013) (the Practical Law article notes that the jurisdictions these statistics cover are: China, England, France, Hong Kong, International, Singapore, Sweden, United States, and Wales).

located in the United Kingdom it would be good to look at their stats as well. The LCIA saw an increase in domestic and international arbitrations going from twenty-one arbitrations filed in 1992 to 277 filed in 2012.¹²⁷ Scotland's recently opened arbitration center is expected to see these numbers as well. Because statistics show that the country will be among the ranks of those countries that provide quality International Commercial Arbitration, Scotland's arbitration future is bright.¹²⁸ Notable international arbitral organizations have seen a dramatic increase in the number of arbitrations filed.¹²⁹

The AAA/ICDR issued a press release discussing a 12% increase in their caseload between 2010 and 2011.¹³⁰ Senior Vice President, Richard Naimark of the AAA/ICDR notes a steady increase over a six year period. The AAA/ICDR saw an overall caseload increase; in particular, there were 621 administered cases in 2007 up to 994 administered cases in 2011.¹³¹ The AAA/ICDR has also shown an increase in intentional commercial arbitration in which at least one of the parties was European; the number went from 217 European parties in 2007 to 430 European parties in 2011.¹³² Nearly double European arbitral participation over a four year period.

Other arbitral institutions of interest are the *International Chamber of Commerce* (ICC) and the *International Centre for the Settlement of Investment Disputes*

¹²⁷ *Id.*

¹²⁸ Martin & Walker *supra*, ch. V, note 39, at 8.

¹²⁹ Cuniberti, *supra*, ch. V, note 46, at 418.

¹³⁰ *Press Release, International Centre for Dispute Resolution Achieves Significant Caseload Increase for 2011* INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, March 1, 2012.

¹³¹ *ICDR Statistics*, THE ICDR INTERNATIONAL ARBITRATION REPORTER (American Arbitration Association), vol. 3 Jul. 2012, at 2.

¹³² *Spotlight ICDR – Europe, Middle East and Africa*, THE ICDR INTERNATIONAL ARBITRATION REPORTER (American Arbitration Association), vol. 3 Jul. 2012, at 4.

(ICSID). These institutions have also seen a definitive increase in arbitral filings with both the ICC and the ICSID.¹³³ The ICC shows a definite increase in the number of arbitrations filed as well as the number of awards granted from 2005 through 2011/2012.¹³⁴ It should be noted that the ICSID saw just 2 international arbitrations in 1992 but it saw 50 in 2012 illustrating arbitrations used in investment disputes.¹³⁵ Thus, both organizations have more than doubled the number of arbitrations filed over a twenty year period.

IV. CONCLUSIONS OF ADR BENEFITS, DRAWBACKS & STATISTICS

In sum, arbitration and mediation, both dispute resolution mechanisms, are strongly entrenched within ADR systems. Upon reviewing the statistical analysis of ADR systems, there does not seem to be a waning of their use to resolve conflict. Despite the challenge of gathering hard numbers and facts, since ADR mechanisms, such as arbitration, tend to be both “confidential and decentralized”¹³⁶ we can still glean “anecdotal evidence that International Commercial Arbitration has exploded over the last forty years.”¹³⁷ Mediation is also gaining acceptance, slowly but surely. ADR systems and mechanisms are a positive form of dispute resolution, and can only continue to be utilized for years to come.

¹³³ Christopher R. Drahozal, *Contracting out of National Law: an Empirical Look at the New Law Merchant*, 70 NOTRE DAME L. REV. 523, 539 (2005). (discussing international commercial arbitration statistics).

¹³⁴ See INTERNATIONAL CHAMBER OF COMMERCE, STATISTICS (2012), available at <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/> (last visited Sept. 14, 2013).

¹³⁵ Drahozal *supra*, ch V, note 133.

¹³⁶ Cuniberti *supra*, ch. V, note 46, at 417 - 418.

¹³⁷ *Id.*

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Chapter VI

CONFIDENTIALITY AND ALTERNATIVE DISPUTE RESOLUTION SYSTEMS

The sixth chapter presents a comparative analysis of the use of confidentiality in the Scottish and American ADR systems, both in international dispute resolution as well as domestic. An analysis of treaties and international and domestic laws are discussed, as well, as laws that have either striven to cement the confidentiality requirement, or perhaps even weakened confidentiality protections. How confidentiality can be an advantage in either mediation or arbitration is also addressed. The use of confidentiality in ADR systems is so important that it is only fitting that a whole chapter be dedicated to it.

I. INTRODUCTION

The fact that an ADR mechanism is confidential is perhaps of the upmost importance in the Western world. Confidentiality has long been heralded as one of the advantages for the use of ADR mechanisms versus litigation to resolve disputes. In some cases, confidentiality is the main reason parties will select ADR over litigation.

Both mediation and arbitration can be effective ways to resolve conflict, but “confidentiality is essential to the parties and the issue at hand.”¹ Furthermore, confidentiality can help retain the “trade secrets and, in some cases, may even help to resurrect commercial relations.”² When it comes to protecting the parties and the issues of the conflict, *confidentiality* is the tool by which this is accomplished. American and Scottish dispute resolution cultures both believe that confidentiality can be essential in ADR systems.

The use of confidentiality in domestic or international arbitration and mediation can either be through contract (parties agree to keep quiet) or through law. Confidentiality can be seen in either an International Commercial Arbitration agreement³ or in an agreement to mediate. Modern statutes have also been enacted to protect the confidentiality provisions in ADR systems. Confidentiality, whether through statute or agreement, is part of the ADR systems in both the United States and Scotland.

II. THE ADR CONCEPT OF CONFIDENTIALITY

Confidentiality can be quite valuable to the resolution process. It has been said that confidentiality provides added value to ADR systems.⁴ In fact, “confidentiality is key

¹ Talibah Peugh, *Alternative Dispute Resolution: A Study Of The History And Function Of ADR Techniques As Mechanisms For International Peacekeeping*, 25 THUMARLR 139, 168 (Fall, 1999/Spring, 2000).

² Thomas H. Oehmke, *Arbitrating International Claims—At Home and Abroad*, 81 AMJUR TRIALS 1, § 9. Privacy and confidentiality (2010).

³ See BORN *supra*, ch. IV, note 1, at 80.

⁴ Rory Hogan, *ADR: adding extra value to law*, 78(3) ARB. 247, 247 (2012).

to... [a] successful”⁵ ADR systems in Scotland, in the United States, or across the globe.⁶ The European Legal Director and Assistant General Counsel at Northrop Grumman Corporation, Wolf Juergen von Kumberg, states sovereign nations “should be encouraged to embrace [ADR] because of the confidentiality aspect” that ADR system provide.⁷ Mr. von Kumberg has also noted that confidentiality is the unappreciated gift that arbitration provides in the dispute resolution process.⁸ Furthermore, the use of confidentiality of a dispute sets up an “environment that may be more conducive to reaching a settlement”⁹ in the first place without resorting to the courts. Confidentiality may be seen as an added benefit of ADR systems compared to litigation.

Several ADR mechanisms reflect the confidentiality aspect. One type of alternative dispute mechanism known as “mediation-last-offer-arbitration” allows for the dispute resolution process to be in a “confidential format.”¹⁰ Conciliation, another type of ADR mechanism, is like a “deal-mending mediation used occasionally in international business . . . [which is] confidential”¹¹ as well. These other forms of ADR mechanisms listed above also rely on confidentiality during the dispute resolution process.

⁵ Michele Zamboni, *Confidentiality In Mediation*, 6(5) INT. A.L.R. 175, 175 (2003).

⁶ *Id.*

⁷ Hogan *supra*, ch. VI, note 4, at 255.

⁸ Wolf Juergen von Kumberg, *From a User's Perspective: Are the Benefits More Theoretical Than Real?*, 66 DISP. RESOL. J. 76, 82 (2011).

⁹ Oehmke *supra*, ch. VI, note 2.

¹⁰ Thomas H. Oehmke & Joan M. Brovins, *The Arbitration Contract—Making it and Breaking it*, 83 AM. JUR. PROOF OF FACTS 3D § 17 (2010).

¹¹ See Jeswald W. Salacuse & Henry J. Braker, *Mediation In International Business*, IN *STUDIES IN INTERNATIONAL MEDIATION* 213, 213 -227 (Palgrave Macmillan 2002).

The encouragement of, and even protection of confidentiality in ADR systems is emphasized in Scotland and the United States. ADR systems depend upon either contract or the law to ensure that confidentiality is a part of the dispute resolution process.¹² Scotland and the United States ADR systems are not so different; *i.e.*, the requirement of “confidentiality” is in the laws as well as the day-to-day practice of International Commercial Arbitration and mediation. In addition, both the United States and Scotland are signatories to treaties that require the use and protection of confidentiality in international commercial disputes. There are also regulations that govern ADR systems both in the United States and Scotland that introduce confidentiality into the dispute resolution process.

There are examples of agreements that protect or encourage “confidentially” in ADR systems. Aspects of confidentiality, of course, can be seen in international treaties. For example, the discussions during the 2002 Thirty-Fifth Session of the United Nations Commission on International Trade Law concurred that confidentiality should be a part of the arbitral process.¹³ International treaties such as the Trade-Related Aspects of Intellectual Property Rights (or TRIPS) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards encourage confidentiality in the ADR process.¹⁴ In the United States, the State of New York Commercial Division

¹² Richard C. Reuben, *ADR And The Rule Of Law Making The Connection*, 16 DISP. RESOL. MAG. 4, 4 (2010).

¹³ Michael Fesler, *The Extent Of Confidentiality In International Commercial Arbitration*, 78(1) ARB. 48, 51 (2012).

¹⁴ See Agreement on Trade-Related Aspects of Intellectual Property Rights, U.S.-U.K., Apr. 15, 1994, 1869 UNTS 299; 33 ILM 1197 (1994) (Annex 1C of the Marrakesh Agreement establishing the World Trade Organization signed in Morocco); and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.S.-U.K., June 10, 1958, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).

ADR program provides that all ADR “proceedings remain confidential,”¹⁵ but this is not necessarily so from state to state, county to county, or local rules as it pertains to mediation. In Scotland, both legislation and court reform are in the works to address mediation, of which confidentiality is just a part of that reform.¹⁶ Of course, Scotland's new Arbitration Act clearly provides for confidential arbitral proceedings.¹⁷ The United States’ counterpart to the Scot’s Arbitration Act, the Federal Arbitration Act (“FAA”) has provisions for confidentiality.¹⁸ The statutes and treaties above are but a few legislative examples of the use of confidentiality in ADR systems.

Arbitration and confidentiality go hand in hand in international disputes. Queen’s Mary College in the United Kingdom conducted a survey that illustrates the belief that confidentiality is part of the arbitral process even when there is no language that indicates the same.¹⁹ However, it should be noted that the same survey showed that others believe that “in the absence of an express agreement of the parties, arbitration is not confidential.”²⁰ Unless stated otherwise, confidentiality in International Commercial Arbitration is perhaps the norm rather than the exception.

¹⁵ Ari Davis, *Moving From Mandatory: Making ADR Voluntary In New York Commercial Division Cases*, 8 CARDOZO J. CONFLICT RESOL. 283, 291 (2006).

¹⁶ See SAC, *Making Justice Work Court Reform (Scotland) Bill – A consultation paper Response from the SAC*, available at <http://www.scotland.gov.uk/Resource/0042/00425360.pdf>.

¹⁷ See The Arbitration (Scotland) Act 2010 (A.S.P. 1)

¹⁸ See Federal Arbitration Act, 9 U.S.C. §§ 1 – 307 (1925).

¹⁹ THE CENTER FOR TRANSNATIONAL LITIGATION, ARBITRATION AND COMMERCIAL LAW, CONFIDENTIALITY VS. TRANSPARENCY IN COMMERCIAL ARBITRATION: A FALSE CONTRADICTION TO OVERCOME, TRANSNAT’L NOTES, REFLECTIONS ON TRANSNAT’L LITIG. & COM. L., (2012), available at <http://blogs.law.nyu.edu/transnational/2012/12/confidentiality-vs-transparency-in-commercial-arbitration-a-false/>. (50% of corporations interviewed considered that arbitration was “confidential even where there is no specific clause to that effect in the arbitration rules adopted or in the arbitration agreement.” (See The Center for Transnational Litigation, Arbitration and Commercial Law, Confidentiality vs. Transparency In Commercial Arbitration: A False Contradiction To Overcome, TRANSNAT’L NOTES, REFLECTIONS ON TRANSNAT’L LITIG. & COM. L., (December 28, 2012).))

²⁰ *Id.*

The pitfalls of litigation is found wherever confidentiality is necessary during the dispute resolution process. Choosing arbitration over litigation can help disputants in high-tech cases protect information by requiring confidentiality to be employed in the arbitral process.²¹ Litigation opens up the dangers of information being disclosed and the parties would have to “persuade the judge to issue a confidentiality order pertaining to trade secrets and certain other confidential business information.”²² Furthermore, arguments about the limits of protecting confidential information in litigation may ensue as well as the “existence of a court case and the documents filed in court, including pleadings, motions, and briefs, usually will be subject to viewing by anyone who goes to the courthouse and view the court's file.”²³ Litigation, although a form of dispute resolution, has its drawbacks, such as the lack of confidentiality, thus making ADR systems the preferred choice when it comes to the resolution process.

III. CONFIDENTIALITY IN MEDIATION

Scottish author, Charlie Irvine, paraphrases Jane Austen by stating that “it is a truth universally acknowledged that mediation is confidential;”²⁴ this is pretty much the same belief no matter what country, Scotland, the United States, England, or Swaziland. It is often expressed that confidentiality is one of the most important aspects of mediation.²⁵ Furthermore, it is confidentiality that sets mediation apart from litigation.

²¹ Raymond G. Bender, Jr., *Arbitration - An Ideal Way to Resolve High-Tech Industry Disputes*, 65 DISP. RESOL. J. 44, 51 (2010).

²² *Id.*

²³ *Id.*

²⁴ Charlie Irvine, *Mediation confidentiality: limitations and a proposal*, KLUWER MEDIATION BLOG (Sep. 12, 2012), available at <http://kluwermediationblog.com/2012/09/12/mediation-confidentiality-limitations-and-a-proposal/> (last visited Nov. 1, 2013).

²⁵ Major Sherry R. Wetsch, *Alternative Dispute Resolution--An Introduction for Legal Assistance*

Confidentiality also has long been heralded as an advantage, and even the most important part of mediation as a form of ADR.²⁶ Confidentiality is definitely quite a noteworthy aspect of the mediation process.

In both countries, Scotland and the US, mediation mechanisms adhere to the rule that the mediation and communications during the mediation process are confidential. Confidentiality can be seen in virtually all mediation laws, whether it is federal, state, or local level in the United States, for example.²⁷ Furthermore, with the help of contract laws, the confidentiality of the mediation can also be preserved, especially if there are no laws on point to protect confidentiality of the mediation.²⁸ Both in Scotland and the United States, once the parties expressly agree to confidential mediation, from the first call to the mediation(s), confidentiality will be enforced.²⁹ The confidentiality of the mediation and the extent of confidentiality is probably the most talked about and debated issue of this form or dispute resolution whether in Scotland or the United States.³⁰ Both Scotland and the United States have codes, regulations, or laws that believe that mediation, whether domestic or international, are to be confidential in nature.

Attorneys, 2000 ARMY LAW 8, 11 (2000).

²⁶ Lemley *supra*, ch. V, note 14, at 316.

²⁷ MARK A BRAND, CATHY J DEAN, & RODNEY L LEWIS, *MEDIATION 2013*, UNITED STATES 2 (2013).

²⁸ Richard C. Reuben *supra*, ch. VI, note 12, at 7.

²⁹ Forrest S. Mosten, *Confidentiality in Mediation*, California Lawyer (Oct. 2011).

³⁰ See Mori Irvine, *Serving Two Masters: The Obligation Under The Rules of Professional Conduct To Report Attorney Misconduct In A Confidential Mediation*, 26 RUTGERS L. J. 155, 160 (1994); and Lemley *supra*, ch. V, note 14, at 313.

The use of confidentiality is of the utmost importance in both the United States and Scotland's mediation systems pertaining to international commercial disputes. Since mediation occurs during the height of an often times heated dispute, emotions can run high and some distrust is generally present during the resolution process.³¹ Therefore, confidentiality "is essential [in order] to create the kind of safe environment which will permit meaningful interaction between the parties."³² This safe environment that is created by the use of confidentiality will also promote an open and honest communication between the disputants.³³ Whether in Scotland or in the United States, invoking the use confidentiality in mediated disputes allows the parties to feel that they can speak their mind without fear that the mediator will disclose their personal business.³⁴ Furthermore, confidentiality also allows for "candid discussions"³⁵ in caucuses where just one of the parties is present with the mediator, outside the ear shot of the other disputant, whose input will also be deemed confidential as well.³⁶

Existing United Kingdom law provides a general right to confidentiality for statements made in the course of a mediation.³⁷ However, this right to confidentiality, an extension of the "without prejudice" rule, is restricted to parties³⁸ because the courts

³¹ Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Meditative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 950 (1997).

³² *Id.*

³³ Wetsch *supra*, ch. VI, note 25.

³⁴ SCOTTISH MEDIATION NETWORK *supra*, ch. I, note 46, at 10.

³⁵ Bullock & Gallagher *supra*, ch. VI, note 31.

³⁶ *Id.*

³⁷ See *Rush & Tompkins v. GLC* [1988] 3 All ER 737; Per Bingham MR, in *Re D [Minors]* [1993] 2 All ER 693 (Please note that the term mediation and conciliation interchangeably).

³⁸ BURNLEY & LASCELLES *supra*, ch. VI, note 37.

in the United Kingdom may still require or even compel the mediator to cease the confidentiality of the mediation and disclose what was communicated privately.³⁹

Certain states in the United States have contemplated exceptions to the confidentiality rules similar to the United Kingdom regulations with mixed results. One example where confidentiality is protected is in Utah, where confidentiality is required under the *Utah Uniform Mediation Act*. The Utah Court of Appeals upheld the confidentiality requirement and deemed it necessary so as to “ensure an open and candid mediation process;”⁴⁰ and an essential element for the mediation process to function properly.⁴¹ The Federal Courts in the United States, such as *California NLRB v. Macaluso*,⁴² have held that confidentiality is in the public interest in maintaining the perceived and actual impartiality of mediators, and moreover, outweighs the benefits derivable from any given mediator’s testimony. The United States domestic or regional laws have contemplated exceptions to the confidentiality rules similar to the United Kingdom’s regulations, but with mixed results.

Confidentiality has often been deemed an important aspect of the mediation dispute resolution mechanism. Some advocates go as far as to “believe that confidentiality is so important to [the] mediation . . . [process] that there should be sweeping protection preventing disclosure under all circumstances.”⁴³ Protecting the confidentiality of the mediation so as nothing occurring during the mediation process will be divulged, is more likely to ensure full disclosure by the parties. Thus, complete

³⁹ Hogan *supra*, ch. VI, note 4, at 247.

⁴⁰ Fackrell *supra*, ch. I, note 38.

⁴¹ *Id.*

⁴² *California NLRB v Macaluso*, 618 F. 2d 51 (9th Cir. 1980).

⁴³ Bullock & Gallagher, *supra*, ch. VI, note 31, at 951.

protection of the confidential mediation process is advocated so as to protect the ADR mechanism, as well as, enhance communications and encourage full disclosure.

An ancillary benefit to enacting laws that keep mediation confidential is increased mediation. By clarifying the extent of confidentiality, the admissibility of evidence derived from mediations legitimizes mediation as a form of dispute resolution.⁴⁴ Furthermore, this clarification within the Scottish dispute resolution systems would also ensure that Scotland would be complying with the requirements of the 2008 *European Directive on Cross Border Mediation*.⁴⁵ However, one scholar suspects that legislation that protects the outcomes of mediation, like that of its cousin, arbitration, would be more enforceable rather than just the confidentiality aspect of the process.⁴⁶ Keeping mediation communications confidential would have perceivable benefits within Scotland and the United States, and should increase the use of this form of ADR.

In the United States, a number of states protect the privacy of mediation communications, and discourage the submission of mediation communications to judicial bodies. Additionally, in the United States, some state laws have an aspect of privacy or confidentiality requirements that must be observed during the mediate dispute resolution.

Under the law of some states, in a court of law, a mediator would not be compelled to testify, or disclose information obtained during mediation.⁴⁷ Both Illinois

⁴⁴ Charlie Irvine, *The sound Of One Hand Clapping: The Gill Review's Faint Praise For Mediation*, EDIN. L.R. 2010, 14(1), 85, 91-92 (2012).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 3.

and California, for example, have laws that render mediation communications inadmissible in court.⁴⁸ Illinois' mediation laws have adopted the Uniform Mediation Act ("UMA"), which protects all "oral and written communications with the mediator at any time"⁴⁹ as confidential and privileged.⁵⁰ Illinois permits the courts to only hear such issues that pertain to enforcing a fully executed written settlement agreement or mediated settlement agreement that resulted mediation.⁵¹ California's legislators have placed in the California Evidence Code provisions protecting communications as well as disqualifying a mediator as a witness.⁵²

Unlike Scotland, the United States has a guideline, the UMA for using confidentiality in mediation. The UMA primarily addresses the use of confidentiality in mediations. It is the hope that the UMA would encourage confidentiality at the state level; however, when the UMA was drafted in 2001, at least twenty-five states had statutes that addressed the use of confidentiality in mediations.⁵³ However, at the Federal level in the United States, the UMA is only a guideline and does not necessarily make confidentiality mandatory. Like most uniform acts in the United States, it is the hope that states will adopt the proposed language either in part, or in its entirety. For the most part, the UMA set ups, and even encourages the use of confidentiality in mediation process.

⁴⁸ See Cal Evid Code §1115 - §1128 (2013); and BRAND ET AL. *supra*, ch. VI, note 27.

⁴⁹ BRAND ET AL. *supra*, ch. VI, note 27 , at 4

⁵⁰ *Id.*

⁵¹ BRAND ET AL. *supra*, ch. VI, note 27 at 5.

⁵² See Cal Evid Code *supra*, ch. VI, note 54: and BRAND ET AL. *supra*, ch. VI, note 27.

⁵³ *Id.*

Both Scotland and the United States have laws in place to protect the use of confidentiality in international or cross-border mediations. As briefly alluded to in 2008, the European Union (of which Scotland is a member) issued a Directive on Cross Border Mediation, to which EU members must adhere. Article 7, on confidentiality of mediation of the Directive on Cross Border Mediation, states that “mediation is intended to take place in a manner which respects confidentiality.”⁵⁴ Scotland’s adherence to this directive, and most recent law on cross-border mediation, states a “mediator of, or a person involved in the administration of mediation in relation to, a relevant cross-border dispute is not to be compelled in any civil proceedings or arbitration to give evidence, or produce anything, regarding any information arising out of or in connection with that mediation.”⁵⁵ The United States and Scotland both treat the use of confidentiality in international mediations as a necessity to that form of conflict resolution.

Confidentiality in mediation is an important element to address. When the opportunity presents itself, discussing what confidentiality covers and how it is defined is a good idea. Misconceptions by the parties may arise in international disputes as to how confidentiality is defined, or what it covers during the resolution process. A discussion explaining what confidentiality covers during the mediation, information, communications, as well as any documents that are exchanged during the mediation are covered by confidentiality and then should then set the tone of the mediation dispute

⁵⁴ Directive 2008/52, of the European Parliament and of the Council of May 21 2008 on certain aspects of mediation in civil and commercial matters, 2008/52/EC, 2008 O.J. (L 136) 3 *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>.

⁵⁵ The Cross-Border Mediation (Scotland) Regulations 2011 (A.S.P.). (Came into force on April 6, 2011. The Scottish Ministers enacted this regulation pursuant the legislative powers given by Section 2(2) of the European Communities Act 1972(a)).

resolution process.⁵⁶ The mediation itself is perhaps internationally recognized as “prima facie⁵⁷ ‘without prejudice’ and therefore [should be] protected [or recognized] by the rules of privilege.”⁵⁸ Ultimately, the mediation dispute resolution process is considered a private and confidential dispute resolution process.⁵⁹ Discussions of the use of confidentiality in mediation can be important even if the disputants believe that the mediation is a private and confidential dispute resolution process.

What is considered part of the confidential umbrella? The confidentiality protections in the United States not only covers the mediation itself when the disputes are before the mediator, but also the “caucuses”⁶⁰ or private meetings the mediator has with the individual disputants as well.⁶¹ Of course, the parties to the dispute can agree to waive the privacy or confidentiality of the mediation. As discussed, confidentiality would cover all information, knowledge, reports, documents, tangible items, disclosed or received from every person involved in the mediation. “Persons involved” means not only the disputants in the conflict, but also, participants, witnesses, mediator(s), and the like, which are usually obligated to preserve the confidentiality of the mediation. All information obtained during the mediation process will be kept confidential and no one who participated in the mediation will submit, or refer to, anything that was gleaned from the mediation in any other proceedings such as litigation or arbitration.⁶²

⁵⁶ Hogan *supra*, ch. VI, note 4, at 247.

⁵⁷ At first glance.

⁵⁸ Hogan *supra*, ch. VI, note 4, at 247.

⁵⁹ *Id.*

⁶⁰ Discussed further in the mediation procedure section of this dissertation.

⁶¹ Wetsch *supra*, ch. VI, note 25, at 12.

⁶² BRAND ET AL. *supra*, ch. VI, note 27.

Communications, ideas, documents and the like are part of the confidential umbrella of the mediation process.

In the United States, the Utah UMA considers communications during a mediation as “a confidential communication, in which the mediators, parties, attorneys, or third-parties involved cannot testify in future court proceedings regarding the mediation.”⁶³ Furthermore, the Utah Court of Appeals has “held that no party to the mediation could disclose any comments or information acquired during mediation or in mediation-related discussions.”⁶⁴ Mediators in Scotland and the United States can also rely on other avenues to protect the privacy or confidentiality of the mediated dispute resolution process. Furthermore, as it is the code of practice in Scotland, mediators “shall ensure that the parties understand. . . the obligation of confidentiality.”⁶⁵

There are also rules of evidence that can apply to protect the confidentiality of the mediation. In the United States, mediators not only rely upon the signed agreement to mediate, but also upon evidentiary exclusions as well so as not to be compelled to testify in subsequent arbitral or judicial proceedings.⁶⁶ In the United States, evidentiary exclusions can provide greater protections to the confidentiality of the mediation than either agreement or statute.⁶⁷ In international mediations, the mediator cannot be compelled to testify, nor can any documentation that the mediator received during the mediation process be submitted to any subsequent arbitral or judicial proceedings.⁶⁸

⁶³ Fackrell *supra*, ch. I, note 38.

⁶⁴ *Id.*

⁶⁵ SCOTTISH MEDIATION NETWORK, *supra*, ch. I, note 46, at 11.

⁶⁶ Bullock & Gallagher *supra*, ch. VI, note 31, at 951 – 952.

⁶⁷ *Id.*

⁶⁸ See Owen V. Gray, *Protecting the Confidentiality of Communications in Mediation*, 36.4 OSGOODE HALL LAW J. 637 (1998).

Furthermore, so as to protect the confidentiality of the mediation process, the disputants may not “rely on, or introduce as evidence in any arbitral, judicial or other proceeding.”⁶⁹ Confidential information disclosed to a mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the mediator.

Commentary, both in the United States and in Scotland, attempt to make a distinction between “confidentiality” and “privilege.” In the United States, when a communication is deemed confidential, “it may not be offered as evidence in proceedings in the same case.”⁷⁰ Whereas if the communication is labeled as privileged, “virtually any disclosure, in or out of court, is prohibited.”⁷¹ In Scotland, mediation practitioners sort out the difference by referring to confidentiality in which the

⁶⁹ MARTIN F. GUSY, JAMES M. HOSKING, & FRANZ T. SCHWARZ, A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES 319 (Oxford University Press 2011).

⁷⁰ Bullock & Gallagher *supra*, ch. VI, note 31, at 951.

⁷¹ *Id.* (It should be noted that the current law on confidentiality and privilege in the United States “raises a number of questions of which users may not be aware when choosing to mediate or on which they may require further clarification. Recent cases such as *Cumbria Waste Management v. Baines Wilson and Farm Assist v. Secretary of State for the Environment, Food and Rural Affairs* do provide some guidance. In the latter, Mr Justice Ramsey helpfully drew distinctions between without prejudice privilege and legal privilege, which can be waived by the appropriate parties to the dispute, and confidentiality which, whilst binding both the parties and the mediator, may be overridden by the court where it is necessary in the interests of justice to do so. He went on both to acknowledge calls for a separate head of “mediation privilege” whilst at the same time upholding a witness summons requiring the mediator in that case to give evidence as to the conduct of the mediation. Clearly this area is open for further debate.” Katie Bradford, Launch of the Commercial Mediation Group: Promoting the Interest of Users, *Kluwer Mediation Blog* (Apr. 17, 2012), *available at* <http://kluwermediationblog.com/2012/04/17/launch-of-the-commercial-mediation-group-promoting-the-interest-of-users/> (last visited November 1, 2013).

“Implied waiver provisions in Evid. Code § 910 et seq., by their plain language, are limited to the particular privileges enumerated therein, and none of these waiver provisions refer to mediation confidentiality rights or the statutory scheme governing these rights found in Evid. Code § 1115 et seq., 703.5. *Eisendrath v. Superior Court* (2003, Cal App 2d Dist.) 109 Cal App 4th 351, 134 Cal Rptr 2d 716, 2003 Cal App LEXIS 798.” Cal Evid Code § 1115 (2009). (*See* NOTES OF DECISIONS 1. Construction with Other Law 2. Particular Determinations, 1. Construction with Other Law.)

disputants promise not to share the mediation communications, whereas privilege is invoked when the law recognizes certain communications such as attorney-client communications.⁷² Furthermore, communications during the mediation process can be without prejudice, in that an offer to settle is not to be submitted to the court as long as this is agreed to in advance.⁷³ Privilege only exists so as not to compel a mediator to testify in court; it does not however, protect the disputants “*from each other.*”⁷⁴ One scholar and practitioner has noted that the confidentiality of mediation is perhaps more important to the mediator so as not to worry about being compelled to testify.⁷⁵ There are some distinctions between “confidentiality” and “privilege” that have been made through scholarly writings both in the United States and Scotland.

However, sometimes the courts have ruled that the mediator can be forced to testify, if it is in the interests of justice. This occurred in one case, in particular, to Scotland’s neighbors in the South, England and Wales, where a question of “duress” arose and it was in the interests of justice. The mediator was compelled to discuss what was said or done that would be considered duress in *Farm Assist Limited v. the Secretary of State for Environment, Food and Rural Affairs*.⁷⁶ Whereas here in the United States, both the California Supreme Court and the United States Federal Court for the Northern District of California have affirmed that any communications between the client and counsel during mediation is to remain confidential and may not be

⁷² Irvine *supra*, ch. VI, note 24.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See *Farm Assist Limited (in liquidation) v The Secretary of State for Environment, Food and Rural Affairs (No. 2) 2009 EWHC 1102 (TCC)*.

introduced, even if it is in for a legal malpractice suit.⁷⁷ However, one Judge in the United States has noted that while the confidentiality of the mediation is binding on the mediation and the disputants, it may be ignored if evidence needs to be submitted as to the conduct of the mediation by the mediator.⁷⁸ Although, the need to override confidentiality in the interest of justice is quite apparent in the English courts compared the Scottish courts, there is the few, yet far between courts in the United States that would agree with English judges.

Confidentiality in mediation is also important as to the type of dispute that is at issue. For example, disputants with intellectual property issues seek a speedy resolution without sacrificing secrecy; utilizing confidential mediation to resolve a dispute accomplishes these goals.⁷⁹ The use of confidentiality in ADR systems, such as the mediation, are especially important when the dispute concerns trade secrets, the “value of the trade secret derives from”⁸⁰ it remaining secret.⁸¹ The final outcome of the mediation can also be confidential, which is a benefit or advantage to the parties when choosing a form of dispute resolution.⁸² The types of issues in the mediated dispute may also dictate whether confidentiality is invoked or not.

⁷⁷ See *Benesch v. Green*, 2009 WL 4885215 (N.D. Cal. 2009), and *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011).

⁷⁸ Katie Bradford, *Launch of the Commercial Mediation Group: Promoting the Interest of Users*, KLUWER MEDIATION BLOG (Apr. 17, 2012), available at <http://kluwermediationblog.com/2012/04/17/launch-of-the-commercial-mediation-group-promoting-the-interest-of-users/> (last visited November 1, 2013). (See *Farm Assist v. Secretary of State for the Environment, Food and Rural Affairs*).

⁷⁹ Lemley *supra*, ch. V, note 14, at 313.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 316.

Irrespective of whether the forum lies in Scotland or the United States, mediation and confidentiality go hand-in-hand. Confidentiality can be important so that the parties can communicate during the mediation without fear of reprisal. Mediation's confidential nature is also seen as advantage to utilize this form of ADR mechanism. The concept of confidentiality is an integral part of the mediation dispute resolution process.

IV. CONFIDENTIALITY IN ARBITRATION

Like its cousin, "mediation," one of the assets or attractions of arbitration is that it is confidential.⁸³ Like domestic arbitration, the London Court of International Arbitration Rules recognizes that International Commercial Arbitration is confidential.⁸⁴ The Permanent Court of Arbitration's manual suggests that the arbitrations are confidential, unless agreed otherwise by the disputants.⁸⁵ Confidentiality or privacy is an important aspect of arbitration that often goes unnoticed.⁸⁶ One of the long heralded advantages of arbitration as a form of conflict resolution, versus litigation, is that the arbitration awards are also confidential.⁸⁷ Furthermore, the London Court of International Arbitration Rules particularly emphasizes that there is a "general principle to keep confidential"⁸⁸ the

⁸³ Jim Mather, *Arbitration Reform – An Opportunity for Scotland*, THE RESOLVER, Feb. 9, 2010.

⁸⁴ Bergsten *supra*, ch. V, note 1.

⁸⁵ James Harrison, *The Manual on International Courts and Tribunals*, 15(2) EDIN. L.R. 340, 342 - 343 (Mackenzie et al. eds., 2011).

⁸⁶ Kumberg *supra*, ch. VI, note 8.

⁸⁷ Fesler *supra*, ch. VI, note 13 at 49.

⁸⁸ LONDON COURT OF INTERNATIONAL ARBITRATION, ARBITRATION RULES, ART. 30, *available at* http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article30 (last visited Nov.12, 2013).

arbitration proceeding itself as well as the materials prepared for the arbitration, and the award that stems from the arbitration.⁸⁹ Undoubtedly, scholars, disputants, and practitioners alike, agree that confidentiality and privacy can be quite fundamental to International Commercial Arbitration and the arbitral dispute resolution process.⁹⁰ Apart from the other advantages enjoyed by the use of arbitration, confidentiality is perhaps an “underappreciated procedural advantage.”⁹¹ The confidential arbitral procedures seem to be what attracts disputants to International Commercial Arbitration.

Confidentiality and International Commercial Arbitration arguably go hand-in-hand. Notes on organizing arbitral proceedings, pursuant to the United Nations Commission on International Trade Law (“UNCITRAL”), show that it is “widely viewed that confidentiality is one of the advantageous and helpful features of arbitration.”⁹² Although, “[f]ew jurisdictions statutorily provide for confidentiality in arbitration,”⁹³ it is however, alive and well in arbitral rules of various institutions.⁹⁴ The UNCITRAL notes on organizing arbitral proceedings explain that it is “widely viewed that confidentiality is one of the advantageous and helpful features of arbitration.”⁹⁵ The International Arbitration Rules at the ICDR also convey the requirement that, unless

⁸⁹ *Id.*

⁹⁰ Marianne Roth & Tobias Brinkmann, *New Arbitral Legislation: English Arbitration Act 1996: The English Arbitration Act 1996 -- A Comparative Assessment*, 5 CROAT. ARBIT. YEARB. 49, 53 (1998).

⁹¹ Peter B. Rutledge, *Convergence and Divergence in International Dispute Resolution*, 2012 J. DISP. RESOL. 49, 60 (2012).

⁹² R. Caivano, *The Arbitration Agreement*, in DISPUTE SETTLEMENT IN INTERNATIONAL TRADE, INVESTMENT AND INTELLECTUAL PROPERTY (UNCTAD Course on Dispute Settlement in International Trade, Investment and Intellectual Property UN edmmisc232add39_en_0001 2005).

⁹³ Fesler *supra*, ch. VI, note 13 at 48.

⁹⁴ *Id.*

⁹⁵ Caivano *supra*, ch. VI, note 92.

otherwise agreed upon, confidentially is required by all during the proceedings; *i.e.*, required by the parties, the witnesses, the arbitrator or arbitrators, as well as those that administer the arbitration itself.⁹⁶ The field of International Commercial Arbitration strives to utilize the confidential element to the arbitral process, whether it is in either Scotland or the United States.

Conflict resolution can be quite different depending on whether arbitration or litigation is utilized to resolve the dispute. Keeping the disputant's privacy is not an option before courts in the United States or in Scotland. The disputant's dirty laundry is open to public and the media.⁹⁷ Furthermore, anyone can see the documentation that is filed with the courts as well as the decision; the good, the bad and the ugly.⁹⁸ If the parties wish to keep documentation confidential in a litigation, the parties would have to make a special request that the files be sealed; additional work for the parties and their lawyers.⁹⁹ Public scrutiny of the conflict and resolution may be what disputants fear most when choosing litigation over arbitration.

Undoubtedly, it is privacy, or the concept of confidentiality, that sets arbitration apart from litigation. It may be important to the disputants to resolve their dispute through private arbitration when a party's "integrity or the quality of their"¹⁰⁰ goods or services is questioned, particularly if "the claims lack merit."¹⁰¹ The advantage of arbitration over

⁹⁶ Bender *supra*, ch. VI, note 21.

⁹⁷ Oehmke *supra*, ch. VI, note 2.

⁹⁸ Bender *supra*, ch. VI, note 21.

⁹⁹ *Id.*

¹⁰⁰ Benjamin F. Tennille, Lee Applebaum, & Anne Tucker Nees, *Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases*, 11 PEPP. DISP. RESOL. L.J. 35, 62 (2010).

¹⁰¹ *Id.*

litigation is the fact that the parties might be able to keep the existence of the conflict private, thus, not revealing how it was resolved.¹⁰² Litigation leaves it to the court and the presiding judge's discretion to seal documents, or close a hearing to the public.¹⁰³ The worth of the form of dispute resolution depends on the need of the parties, the need for private resolution that is closed to public scrutiny versus open hearings, and opinions that make the public aware of the details and outcome of the dispute.¹⁰⁴ Therefore, the greatest apparent value to utilizing International Commercial Arbitration over litigation is the fact that the conflict resolution process is private or confidential; all "submissions, hearings, and deliberations in almost all international arbitrations, remain confidential."¹⁰⁵

Not only are the proceedings private or confidential, but the identity of the disputants and that of the arbitrators can also be kept confidential.¹⁰⁶ Some disputants do not mind being in the public eye to resolve disputes through litigation and court proceedings; arbitration, on the other hand, allows for a confidential agreement to be entered into so that the disputants' business reputations are not tarnished.¹⁰⁷ Perhaps ad hoc arbitration may be "arguably more confidential than institutional arbitration"¹⁰⁸ since institutions do sometimes post statistical analysis of their disputes. The use of confidentiality is an asset that arbitration has over litigation.

¹⁰² Caivano *supra*, ch. VI, note 92.

¹⁰³ Rutledge *supra*, ch. VI, note 97.

¹⁰⁴ Trakman *supra*, ch. IV, note 45, at 833.

¹⁰⁵ BORN *supra*, ch. IV, note 1, at 83.

¹⁰⁶ Oehmke *supra*, ch. VI, note 2.

¹⁰⁷ Bender *supra*, ch. VI, note 21.

¹⁰⁸ BORN *supra*, ch. IV, note 1, at 67.

Defining “confidentiality” in arbitrations can be a cumbersome matter. Both countries' legal systems, in the past especially, have struggled to define or determine the extent or role that privacy and confidentiality play in arbitration.¹⁰⁹ Of course it is interesting to note that the United States is a Common Law jurisdiction, and Scotland's is a blend of Common and Civil Law. The arbitral legislation under either Common or Civil Law systems has certainly been referred to as “chaotic.”¹¹⁰ In general, confidentiality is not protected by every nation's laws in either domestic or international commercial arbitration.¹¹¹ The lack of “uniformity in confidentiality laws amongst jurisdictions may have had some”¹¹² influence on the drafters of the UNCITRAL Model Law (the “Model Law”); however, explicit language addressing confidentiality of arbitrations is not found in the UNCITRAL Model Law.¹¹³ As the discussion has indicated, confidentiality and the privacy to resolve a dispute through arbitration is presumed but not necessarily certain. Thus, due to legislative uncertainty, practitioners urge disputants that if confidentiality is a necessity in their arbitral dispute resolution process, that necessity should be in writing.¹¹⁴ Relying on the statutory definition of confidentiality for arbitral processes may not have been ideal; a writing between the parties is the answer.

The types of issues that are the root of the conflict can lend themselves quite nicely to the use of confidentiality in the arbitration process. If intellectual property or

¹⁰⁹ Fesler *supra*, ch. VI, note 13, at 48.

¹¹⁰ *Id.*

¹¹¹ Kumberg *supra*, ch. VI, note 8.

¹¹² Fesler *supra*, ch. VI, note 13, at 50 – 51.

¹¹³ *Id.*

¹¹⁴ See Kumberg *supra*, ch. VI, note 8; and Caivano, *supra*, ch. VI, note 92.

employment issues are the focus of the dispute, both sides of the dispute would rather have privacy, and thus seek confidential arbitration over litigation.¹¹⁵ Recognizing the privacy benefits of arbitration, another commentator has said that “the most compelling reason for arbitrators in [the high-tech] arena is a concern for trade secrets.” Arbitration is preferred in intellectual property disputes so that the dispute is confidential and kept away from prying eyes or competitors.¹¹⁶ Commercial “relationships by their nature are private.”¹¹⁷ Arbitration, and its confidential nature, are an attractive form of dispute resolution when the “dispute is commercially sensitive.”¹¹⁸ Such information as pricing, development, the nature of the relationship, and the like, may be sensitive and thus the need to keep these matters confidential is essential in the dispute resolution process.¹¹⁹ The confidential nature of arbitration, and that it is conducted behind closed doors out of the public eye, can also preserve trade secrets.¹²⁰ Use of confidentiality may be of the utmost importance depending on the type of issues faced or information involved in the dispute.

In some instances, parties still may have access to confidential information or information that would otherwise be kept closed due to the arbitral process. In some high-tech disputes, for example, a party may request information from an earlier, confidential, arbitration; it is then up to the courts to balancing the expectation that

¹¹⁵ *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 – 1379 (11th Cir. 2005). (“See *Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 8 n. 4 (1st Cir.1999) (observing that both sides might desire confidentiality)”)

¹¹⁶ Arnold *supra*, ch. I, note 8.

¹¹⁷ Kumberg *supra*, ch. VI, note 8.

¹¹⁸ Mather *supra*, ch. VI, note 89.

¹¹⁹ Kumberg *supra*, ch. VI, note 8.

¹²⁰ Bender *supra*, ch. VI, note 21.

arbitration was confidentiality versus the party's need for the confidential arbitral information and whether it can be obtained elsewhere.¹²¹ In the United States, federal securities laws require publically traded companies to disclose "material financial risks or outcomes;"¹²² involvement in an arbitral proceed would certainly qualify as such.¹²³ Thus, information that would otherwise be kept closed due to the arbitral process, may be disclosed depending on the circumstances.

Arbitral rules and procedures have a component of confidentiality of the arbitral process.¹²⁴ Although confidentiality in the arbitral dispute resolution process is universally accepted, there is still very little in the form of national laws that require the confidentiality of the arbitration.¹²⁵ Several legislatures adopting the UNCITRAL Model Law have gone along with its example and have given a definition of "award" that includes decisions concerning provisional measures (see Sanders, *Arb. Int.* 1995, pp.15–16).¹²⁶ The same is the case in both Scotland's new arbitral laws and in some states' evidence or civil procedure codes in the United States.¹²⁷ Some legislators have worried about changes to customary arbitral procedures, the matter of confidentiality being one.¹²⁸ Also note that just because the parties may have agreed upon the use of

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Rutledge *supra*, ch. VI, note 97.

¹²⁵ Caivano *supra*, ch. VI, note 92.

¹²⁶ JEAN-FRANÇOIS POUURET & SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* (2nd ed, Sweet & Maxwell 2007). (Examples of United States individual state codes are s.1297.92 California Code of Civil Procedure; Ohio Rev. Code Ann. § 2712.01)

¹²⁷ *Id.*

¹²⁸ See William W. Park, *What Makes Arbitration International etc*, 13 *AM. REV. INT'L ARB.* 75, 140 (2002).

confidentiality in the arbitral process, they “cannot assume that all jurisdictions would recognize an implied commitment to confidentiality.”¹²⁹

On the far side of the dispute resolution spectrum, litigation does not necessarily give the disputants the chance to contractually anticipate that the dispute resolution process will be confidential.¹³⁰ One last caveat; when it comes to the confidentiality of arbitration, “participants in arbitration might not have the same understanding as regards the extent of confidentiality that is expected;”¹³¹ it is a good idea because the “arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.”¹³²

Scotland’s neighbor in the United Kingdom, England, did take a different stance on confidentiality in its Arbitration Act. England wanted to comply with the United Nations Commission on International Trade Model Law on International Commercial Arbitration as well as adopt several “important principles of English arbitration law”¹³³ that developed throughout the ages.¹³⁴ However, the English legislators felt it important to leave certain issues up to the courts still; thus, the privacy and confidentiality aspects of arbitration are left out of the English Arbitration Act.¹³⁵ The stance was that there was no adequate way to draft or incorporate exceptions to the confidentiality requirement into the English Arbitration Act.¹³⁶ There is opportunity

¹²⁹ Caivano *supra*, ch. VI, note 92.

¹³⁰ Rutledge *supra*, ch. VI, note 97.

¹³⁷ Caivano *supra*, ch. VI, note 92.

¹³² *Id.*

¹³³ Roth & Brinkmann *supra*, ch. VI, note 96, at 53.

¹³⁴ *Id.*

¹³⁵ Fesler, *supra*, ch. VI, note 13, at 50 – 51.

¹³⁶ *Id.*

for the English Arbitration Act to evolve through case law decisions; however, the Act will differ from the regular “English statutes”¹³⁷ nor follow the European concept of legislation either.¹³⁸ The Arbitration (England) Act 1996 has an interesting outlook on the arbitral process put into legislation.

Prior to 2010, Scottish laws were uncertain about the use of confidentiality in arbitration, but it was generally assumed that arbitral proceedings would be confidential.¹³⁹ In Scotland, confidentiality was implied, barring any express language to the contrary in the agreement to arbitrate.¹⁴⁰ Although it was assumed that arbitration was a confidential dispute resolution mechanism, there were no statutes or Scottish case law to support this belief.¹⁴¹ Before the new Scottish Arbitration Act, the use of confidentiality in arbitration had to be assumed or explicitly applied by the disputants in order for the parties to enjoy the advantages that confidentiality provides.

When Scotland began the discussion to reform their arbitral laws, the issue of “confidentially” was one of the topics that the Scottish Parliament and Scottish Arbitrators addressed. The Scottish Government used a questionnaire to get feedback concerning the proposed arbitral law. The results of the survey showed that most were in favor of a confidential component.¹⁴² Of course the outcome of the research illustrated that confidentially was an integral part of the arbitration process.¹⁴³ During

¹³⁷ Roth & Brinkmann *supra*, ch. VI, note 96, at 53-54.

¹³⁸ *Id.*

¹³⁹ Dundas *supra*, ch. IV, note 135, at 7.

¹⁴⁰ *See* Dingwall *supra*, ch. IV, note 112, at 138.

¹⁴¹ Dundas *supra*, ch. IV, note 135, at 7.

¹⁴² Interview with Hew Dundas, Scottish Solicitor, FCI Arb, DipIC Arb, CEDR, Accredited Mediator (June 2011).

¹⁴³ *See Arbitration*, SCOTTISH PARLIAMENT INFORMATION CENTRE (SPICE) BRIEFINGS (February 27,

the discussions among the Scottish Parliament, Jim Mather, the Scottish Minister for Enterprise, Energy and Tourism, encouraged the requirement of confidentiality in arbitral proceedings so as to bring Scotland's laws in line with current case law of the United Kingdom, as well as to do what few legislatures in the world have done; *i.e.*,¹⁴⁴ make it crystal "clear that arbitration is usually a confidential business."¹⁴⁵ The Scottish Government's research showed that confidentiality was not only encouraged, but perhaps fundamental to the arbitral process.

The language of the new Arbitration Scotland Act ("ASA") sets out clear confidentiality requirements. The ASA makes "confidentiality" the default versus an exception during the arbitration process.¹⁴⁶ The ASA places a duty on the arbitrator, or arbitrators, to explain confidentiality of the arbitration, unless otherwise agreed upon.¹⁴⁷ The new law allows injunctions to reinforce confidentiality as well as a breach of confidence action if confidentiality is circumvented.¹⁴⁸ Furthermore, if the arbitrated dispute should go escalate to court, the ASA also provides for anonymity of the disputants.¹⁴⁹ The language in the new ASA will perhaps make confidentiality an important part of International Commercial Arbitration, and therefore the norm rather than the exception.

2009) available at [www.scottish.parliament.uk/Research briefings and fact sheets/SB09-14.pdf](http://www.scottish.parliament.uk/Research%20briefings%20and%20fact%20sheets/SB09-14.pdf) (last visited Mar. 17, 2014).

¹⁴⁴ Mather *supra*, ch. VI, note 89.

¹⁴⁵ *Id.*

¹⁴⁶ See Dingwall *supra*, ch. IV, note 112.

¹⁴⁷ SCOTTISH PARLIAMENT INFORMATION CENTRE (SPICE) BRIEFINGS *supra*, ch. VI, note 149.

¹⁴⁸ Fesler *supra*, ch. VI, note 13, at 55.

¹⁴⁹ *Id.*

Traditionally, International Commercial Arbitration was between two business and they could settle their differences through a private and confidential process.¹⁵⁰ With the exception of enforcing the award in the courts, everyone that takes part in the arbitration process; disputants, witnesses, arbitrators, and the like, all understand that this process is confidential,¹⁵¹ “including its existence.”¹⁵² This new confidential default language in the statute will make it more likely that international businesses will utilize this new act so as to avoid any uncertainty whether confidentiality is applicable to the arbitral process or not.¹⁵³ The new ASA is especially important when disputant in an International Commercial Arbitration forget to provide for confidentiality of the proceedings and Scotland is the applicable law for this arbitration or dispute.¹⁵⁴

The applicability of confidentiality principles in arbitral proceedings was deemed one of the improvements the new ASA provided the growing body of global arbitral laws.¹⁵⁵ The Scottish legislature has enacted an arbitration act that signifies one of the “most comprehensive and flexible codification of confidentiality to date . . . [;] as effective as it is reasonably practical.”¹⁵⁶ This requirement confidentiality requirement under the ASA is especially important when the disputants come from differing jurisdictions that may, or may not utilize confidentiality in arbitration in the same way.

¹⁵⁰ Bergsten *supra*, ch. V, note 1.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Dingwall *supra*, ch. IV, note 112, at 143.

¹⁵⁴ Fesler *supra*, ch. VI, note 13, at 54.

¹⁵⁵ Mather *supra*, ch. VI, note 89.

¹⁵⁶ Fesler *supra*, ch. VI, note 13, at 55.

The Scottish courts are also weighting in on the Arbitration Scotland Act of 2010. The Scottish Outer House of the Court of Session is supporting Scotland's new Arbitration Act, and has indicated that it will not customarily "publish information which might identify parties to arbitration where court rulings are sought in connection with that arbitration."¹⁵⁷ Furthermore, the Court of Session clarified the use of confidentiality in the new ASA. The Scottish Outer House of the Court of Session in *Gray Construction Limited v. Harley Haddow LLP*¹⁵⁸

confirmed that although documents produced in relation to arbitration in Scotland are generally regarded to be confidential, [however] their disclosure can be ordered where the public interest and/or the interests of justice override the parties' interest in maintaining confidentiality... [and] the court was asked to consider the balance to be struck between these competing interests."¹⁵⁹

Gray Construction also illustrates the exception to the obligation of confidentiality.¹⁶⁰ Practitioners and scholars alike are interested in seeing how the Scottish Court stands on arbitration, International Commercial Arbitration and Scotland's Arbitration Scotland Act 2010.¹⁶¹ The Court of Session in Scotland is supporting Scotland's new arbitration laws.

Confidentiality and the concept of immunity may intersect when it comes to professional liability claims in International Commercial Arbitration stretches to other

¹⁵⁷ROB WILSON & VALERIE ALLAN, UNITED KINGDOM: ARBITRATION - CAN CONFIDENTIALITY BE OVERRIDDEN IN CERTAIN CIRCUMSTANCES? (CMS Cameron McKenna LLP 2012).

¹⁵⁸ See *Gray Construction Limited v. Harley Haddow LLP* [2012] CSOH 9.

¹⁵⁹ Wilson & Valerie *supra*, ch. VI, note 163.

¹⁶⁰ See *Gray Construction Limited v. Harley Haddow LLP*.

¹⁶¹ Wilson & Valerie *supra*, ch. VI, note 163.

aspects of the arbitration such as before and after the proceeding. When a claim is made against an expert's professional liability for acts during the arbitration, the requirements of confidentiality of the arbitration are therefore upheld and "may provide experts with de facto immunity in that potential claimants may be unable to establish the factual basis for a claim."¹⁶² For the most part, the extent of the confidentiality of the arbitration and its proceedings are unclear.¹⁶³ However, the extent of confidentiality has certain exceptions. Immunity claims against the arbitrators under the ASA is based on the Common Law practices.¹⁶⁴ The Arbitrator enjoys immunity with such exceptions as an act, or omission in bad faith.¹⁶⁵ Therefore, the concepts of confidentiality and immunity have specific meaning to International Commercial Arbitration.

The arbitral award also falls under the secrecy of the arbitration. Whether the resolution is through International Commercial Arbitration or a domestic arbitration, the arbitral award is generally considered private and confidential.¹⁶⁶ A final outcome to an arbitration, which is in writing, is confidential and may only be disclosed or "published" upon the acquiescence of the disputants.¹⁶⁷ The advantages of confidential arbitrations also apply to arbitration awards.

If arbitral awards are made public, it is generally for a reason such as statistical purposes, and then in only a specified manner. Ordinarily an award would be

¹⁶² Andrew Ross, *Expert witness Immunity: A Comparative Study*, 79 ARB. 62, 70 (2013).

¹⁶³ *Id.*

¹⁶⁴ Rob Wilson & Valerie Allan, *Arbitration In Scotland*, in CMS Guide to Arbitration Vol I (2012) available at http://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_SCOTLAND.pdf at 698 (last visited Mar. 17, 2014).

¹⁶⁵ *Id.*

¹⁶⁶ See BORN *supra*, ch. IV, note 1, at 83; and Trakman *supra*, ch. IV, note 45, at 833.

¹⁶⁷ Oehmke, *supra*, ch. VI, note 2, at § 41.

confidential; if the content of the award was to be disclosed, it would be “only a non-random sample... [and] without identifying the parties or the arbitrators involved.”¹⁶⁸ If arbitral awards are made public, it is generally for a reason such as statistical purposes, and then in only a specified manner.

Unfortunately, it is the enforcement of the award that may pose a problem to confidentiality and the privacy of the parties. One of the parties may either need to go to the courts to enforce the award, or for various reasons, wish to have the arbitral award set aside.¹⁶⁹ Generally, all private or confidential information that was either obtained or disclosed during the arbitration and relating to the award shall be kept confidential provided there are not any applicable laws that mandate the contrary.¹⁷⁰ The law in Scotland protects the veil of confidentiality, and only calls for the circumvention of it

¹⁶⁸ Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L J. 79, 108 (2000). (The author notes other materials that may be of interest: “Howard M. Holtzmann, Balancing the Need for Certainty and Flexibility in International Arbitration Procedures, in *International Arbitration in the 21st Century*, supra note 78, at 3, 7 n.10 (AAA International Rules “have undergone searching scrutiny by international arbitrators, practitioners and arbitration administrators to ensure that they embody provisions which contemporary practice calls for and with which both American and foreign attorneys are comfortable”) (quoting Michael F. Hoellering, *How to Draft an AAA Arbitration Clause 5-6* (unpublished paper delivered at Eighth ICSID/ICC/AAA Joint Colloquium on International Arbitration, Washington, D.C., Nov. 11, 1991)[.]

American Arbitration Association Task Force on the International Rules, *Commentary on the Proposed Revisions to the International Arbitration Rules of the American Arbitration Association* (describing work of task force in developing revisions to AAA International Rules), reprinted in Jack J. Coe, Jr., *International Commercial Arbitration: American Principles and Practice in a Global Context* 587 app. 24 (1997); Discussion Draft - Arbitration Rules of the LCIA (explaining that “permanent subcommittee [of the London Court of International Arbitration] has kept [the arbitration rules] under constant review, considering difficulties and criticisms that have arisen”), reprinted in Coe, supra, at 709 app. 33A). See, e.g., Coe, supra note 113, at 87; Lord Justice Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, in *Liber Amicorum for the Rt. Hon. Lord Wilberforce* 149, 179-80 (Maarten Bos & Ian Brownlie eds., 1987”).

¹⁶⁹ Bender *supra*, ch VI, note 21.

¹⁷⁰ John Fellas & John M. Townsend, 757 PLI/LIT 9, 445 (2007).

if it is in the public interest and in the interest or “administration” of justice.¹⁷¹ The courts in Scotland would thus balance the interests of justice versus the need for confidentiality first before disregarding the confidentiality of the arbitration and award.¹⁷² Lord Hodge, in the opinion of the 2012 *Gray Construction Limited v. Harley Haddow LLP* case, points out that when

it is necessary to recover documents which a party holds subject to an obligation of confidentiality in order to achieve the fair disposal of an action, the court will as a norm order the production of those documents.¹⁷³ Therefore, the litmus test in Scotland on when to dispense with the confidentiality of the arbitral award is “how can the court achieve a fair disposal of the action?”¹⁷⁴

The parties may need to rely on confidential information that is in either the award, or which is gained during the arbitration to enforce the award; if it is in the interest of justice, this disclosure may be perfectly acceptable.¹⁷⁵ Therefore, the disputants, when it comes time to enforce the award, should be prepared to answer this question: would access to this confidential information serve the best interest of justice in this matter?

V. SUMMARY

Confidentiality is utilized in both the Scottish and the American ADR systems. Disputants in both countries understand the distinct advantage as to the use of

¹⁷¹ *Santa Fe International Corporation v Napier Shipping SA* 1985 SLT 430, Lord Hunter at p. 432.

¹⁷² Wilson & Valerie *supra*, ch. VI, note 170.

¹⁷³ *Gray Construction Limited v Harley Haddow LLP* [2012] CSOH 92 Lord Hodge at 9, May 18 2012

¹⁷⁴ Wilson & Valerie *supra*, ch. VI, note 170.

¹⁷⁵ *Id.*

confidentiality in both mediation and arbitration to resolve international commercial disputes. Furthermore, to resolve international commercial disputes, confidentiality is the norm in either mediation or arbitration.

The use of confidentiality in domestic or International Commercial Arbitration and mediation can either be through contract or law. Regardless of the country you are in, Scotland or the United States, the element of confidentiality can be seen in either an International Commercial Arbitration agreements¹⁷⁶ or in the agreement to mediate international commercial disputes. Although it is rare for modern statutes to contain confidentiality provisions for ADR systems, both Scotland and the United States have made strides towards the inclusion of confidentiality requirements. Scotland's new Arbitration Act is, by far, more advanced than the United States arbitration laws, whereas the United States mediation laws are more advance compared to Scotland. Confidentiality, whether through statute or agreement, is alive and thriving in the ADR systems of the United States and Scotland.

* * *

¹⁷⁶ BORN *supra*, ch. IV, note 1, at 80.

CHAPTER VII

COMPARATIVE ALTERNATIVE DISPUTE RESOLUTION MECHANISMS—INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION

In Chapter seven, we shall examine international arbitration and mediation processes in both countries. This chapter explores international mediation and International Commercial Arbitration, but also domestic systems and laws. Particular areas of inquiry ask, what does the mediation process look like? What is the anatomy of International Commercial Arbitration for comparatively in both Scotland and the United States? Some discussions on the advantages the ASA of 2010 bring to International Commercial Arbitration. This examines numerous aspects of International Commercial Arbitration and mediation in both the American and Scottish systems.

I. INTRODUCTION

This portion of the dissertation is the nuts and bolts of this discussion. The organization of this discussion will entail a comparative analysis of arbitration to resolve conflict in international commercial disputes. However, the use of mediation to resolve international commercial disputes will also be emphasized when applicable; when appropriate, domestic mechanisms will also be discussed.

In general, both arbitration and mediation processes are utilized in Scotland and the United States; as well as a viable option to resolve disputes internationally. International commercial arbitration's acceptance is virtually across the globe.¹ To further drive acceptance of arbitration, the globalization of arbitral laws has also encouraged and perhaps even stream lined International Commercial Arbitration. It seems that mediation in Scotland is catching on slowly as an option in commercial disputes; perhaps mediation is utilized more in family law disputes. On the American front, I found that mediation is generally well thought of, but like all forms of ADR mechanisms, there are disadvantages. The choice to arbitrate a dispute was the norm rather than the exception in commercial disputes in Scotland. In the United States, the use of International Commercial Arbitration to resolve disputes had an advantage over resolving the dispute through the court system.² The following is an analysis of these two types of ADR mechanisms, International Commercial Arbitration and mediation.

II. STARTING THE DISPUTE RESOLUTION PROCESS

When faced with a conflict to resolve, disputants often ask, how do we resolve this? As echoed from previous discussions on this topic, both arbitration and mediation is voluntary. If even one party does not want to participate in the resolution process, there is no choice but to turn to the court for a resolution. However, if ADR systems are the choice, the parties can take advantage of these forms of resolution process, even before the dispute starts.

There are at least four possible ways parties can utilize arbitration to resolve their dispute. One way is that the parties agree to arbitrate future conflict through

¹ Madge S. Thorsen, *The Whole Enchilada: Cultural Differences in International Arbitration*, MSBA ADR SEC. 1 (2007).

² Dillenz *supra*, ch. II, note 120, at 250.

contract. The second way to choose arbitration is that at the time the conflict has occurred, the disputants still can mutually decide to use arbitration to resolve the conflict. A third way is that the parties either both belong to an organization that requires arbitration, or their dispute is required to be arbitrated by statute. The fourth possible avenue is that either disputants cannot determine the form of ADR to pursue prior to their court date, or they are encouraged by the judge to participate in the court's ADR program prior to taking up more court time. In the United States, this last method is called *Judicial Arbitration*.³ Thus, there are numerous ways to bring disputes to arbitration; it is perhaps preferred to make one of these choices sooner rather than later.

Keep in mind, however, that unlike litigation, ADR is a voluntary process. Whether it is domestic or International Commercial Arbitration, disputants must mutually agree to submit their dispute to arbitration,⁴ or to mediation. The United States has also provided for certain courts to provide for arbitration, but it is still up to the parties to choose that option, or follow through with the traditional court process.⁵ ADR systems are voluntary in nature; disputant cannot be forced to partake of these types of dispute resolution processes.

For the most part, when disputants enter into ADR systems, either in the United States or Scotland, domestic or international relationships, the choice to utilize this dispute resolution system is voluntary. Of course, because there is a dispute that could not be resolved without outside help, some disputants may not think the choice was

³ See http://www.sccourt.org/self_help/civil/adr/adr_jud_arb.shtml#what (last visited Mar. 21, 2014).

⁴ ELIZABETH PLAPINGER AND DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS A SOURCEBOOK FOR JUDGES & LAWYERS* 4 (1996).

⁵ *Id.*

voluntary; nonetheless, the choice to utilize ADR is voluntary, and this fact holds, regardless of the country, or whether the dispute is domestic or international.

Like other forms of ADR mechanisms, the choice to participate in mediation is voluntary and can be pursued at any stage of the dispute. Features of the mediation process are decided by the disputants, and some parts of the process may be directed according to the mediators' preference, or the jurisdiction of the dispute.⁶ Parties go to mediation willingly due the advantages that mediation can provide.⁷ There are schemes that are designed to make mediation compulsory depending on several factors that are not necessarily discussed here.⁸ For the most part, mediation is “voluntary and without prejudice.”⁹ Perhaps due to its voluntary nature, the outcome or resolution to the matter is not guaranteed; therefore, disputants fear that this voluntary submission to mediation is just an added stress or expense in a business relationship that may already be rife with turmoil and conflict.¹⁰ Regardless of the reasons disputants may pursue mediation, parties select this mechanism voluntarily; this is much unlike a lawsuit in which one party would force the other into litigation.

As is the case with mediation, disputants must enter into arbitration on their own accord and volition. “Arbitration, however, is a matter of private autonomy and all parties to the arbitration must consent.”¹¹ Perhaps some would say that it is imperative

⁶ J Dean Cathy & L. Lewis Rodney, *Mediation* 2013, United States.

⁷ Bryan Clark, *A time for change? The development of commercial ADR in Scotland*, S.L.T. 2003, 169, 171.

⁸ See Irvine *supra*, ch VI, note 50, at 85-92.

⁹ Clark, *supra*, ch VII, note 7, at 171.

¹⁰ *Id.*

¹¹ Dillenz *supra*, ch. II, note 120, at 245.

that “[e]very arbitration proceeding begins with the consensus of the parties to arbitrate”¹² the conflict versus any other form of dispute resolution process. Furthermore, ten courts in the United States have been granted the ability to provide arbitration to disputants so long as it is decided by the parties themselves.¹³ The “voluntariness” of arbitration is important in both domestic and international disputes as a means to resolve conflict.

If International Commercial Arbitration is the preferred ADR method, evidence of this choice must be in writing. The New York Convention, to which both the United States, and Scotland—via the UK, are signatories, has announced what an agreement to arbitrate in writing actually means.¹⁴ The Convention states that the writing can be as simple as an exchange of letters, or an arbitral clause in a contract.¹⁵ Furthermore, the Convention indicates that if there is a written agreement, and—unless the writing is found to void, inoperative, or incapable of performance, only one of the disputants has to initiate the arbitral process.¹⁶ Article 7 of the United Nations Commission on International Trade Law Model Law (“UNCITRAL Model Law”), adopted in 2006 by the Commission at its thirty-ninth session, stipulates several requirements an arbitration agreement should contain. Article 7 states that the “arbitration agreement shall be in

¹² *Id.*

¹³ PLAPINGER AND STIENSTRA, *supra*, ch VII, note 4, at 4. *See* 27 U.S.C. §§ 651–657.

¹⁴ *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 2, New York, 1958, 330 U.N.T.S. 38

¹⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 2, New York, 1958, 330 U.N.T.S. 38.

¹⁶ *Id.*

writing”¹⁷ and can be “recorded in any form”¹⁸ which is key in today's technological society. Also, arbitral writings can be even found in communications discussing the existence of the arbitration agreement that has not been denied by a disputant.¹⁹ One interesting aspect for the modern times is that the exchange of emails can be the equivalent of a written agreement to arbitrate a dispute.²⁰ The Model law states that the writing requirement is “met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.”²¹ The writing requirement is true in International Commercial Arbitration: however, this requirement can be easily met by other communication media, such as in an email.

The requirement to have a written arbitration agreement can, however, differ from that of the New York Convention or the UNCITRAL Model Law as discussed above. In Scottish law, however, there has developed no such writing requirement to initiate arbitration. Historically, under the old Scottish Laws, no writing was necessary, but the submission of the arbitration was in and of itself the sign that the parties agreed to go to arbitration.²² When referring to an arbitration agreement, section 4 of the ASA 2010 simply states that “[a]n “arbitration agreement” is an agreement to submit a present or future dispute to arbitration (including any agreement which provides for

¹⁷ UNCITRAL, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985 WITH AMENDMENTS AS ADOPTED IN 2006 4 (2008), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited Aug. 7, 2011).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Arbitration (Scotland) Act 2010 *supra*, ch. VI, note 17

arbitration in accordance with arbitration provisions contained in a separate document).”²³

In the United States on the other hand, the FAA requires an arbitration agreement to be in writing, although signatures are not necessary.²⁴ Furthermore, United States Federal Court has pointed out that “[a]lthough § 3 of the FAA requires arbitration agreements to be written, it does not require them to be signed.”²⁵ While certain laws in the United States vary on whether oral arbitral agreements are valid, the international rules do not allow for such a creature.²⁶ Regardless of which law is followed, it is probably a good idea to have the agreement in writing to arbitrate, if that is truly what the parties’ wish.

Drafting the arbitration clause in a contract or agreement at the onset takes care and careful consideration. United States arbitration clauses and contracts use what is called “boiler plate” language in the agreement. This can get create trouble if a conflict arises, and there was a choice to arbitrate the dispute. There are a lot of factors to consider when setting up the arbitral dispute resolution process such as where will it be held, who will be the arbitrators, what laws will apply, what language will be spoken, and the like.²⁷ Regardless of what form of arbitration the disputants choose, institutional or ad hoc arbitration provisions, the arbitration clause should accommodate their interests.²⁸

²³ Arbitration (Scotland) Act 2010 *supra*, ch. VI, note 17.

²⁴ The Federal Arbitration Act, 9 U.S.C. §3 (1990). *See Tinder v. Pinkerton Sec.*, 305 F.3d 727, 736 (7th Cir. 2002).

²⁵ *Tinder v. Pinkerton Sec.*, 305 F.3d 727, 736 (7th Cir. 2002).

²⁶ Dillenz *supra*, ch. II, note 120, at 246.

²⁷ *Id.* at 222.

²⁸ *Id.* at 224.

Whether one is in the thick of conflict or at the honeymoon stage of the relationship, making it clear whether to choose arbitration, or mediation should be made. Drafting a well-crafted agreement to utilize ADR mechanisms will obviously ease tensions when the conflict arises. However, if there is no agreement to arbitrate, it is imperative that what defines the International Commercial Arbitration process remain intact so the law is able to enforce its the benefits of this form of dispute resolution, as well as the outcome.²⁹

The Judicial Arbitration and Mediation Services (JAMS), is another organization that is both domestic in the United States, as well as international, that encourages parties to “carefully consider and decide on the procedures that will govern the resolution of any disputes that may arise in the course of the contractual relationship.”³⁰ Furthermore, the sample clauses contain such language as to either be quite broad, or very specific.³¹ This concept would be the same for the choice to utilize mediation. Making it a clear choice to utilize either arbitration or mediation in international commercial disputes can be done so long as material decisions are in writing and follow the prescribe process.

If one wishes to be proactive and designate a specific local for the arbitration to be conducted, the arbitration agreement or clause must clearly indicate the seat of the arbitration. The new SCA has anticipated the need for parties to incorporate a clause

²⁹ STEPHEN K. HUBER AND MAUREEN A. WESTON, *ARBITRATION: CASES AND MATERIALS* 7 (2nd ed. Supp. Matthew Bender & Company, Inc., 2010).

³⁰ JAMS CLAUSE WORKBOOK, *A GUIDE TO DRAFTING DISPUTE RESOLUTION CLAUSES FOR COMMERCIAL CONTRACTS*, Effective January 1, 2011, Pg 1.

³¹ *See generally Id.*

into their ad hoc arbitration agreements. The language or sample arbitration clause that that the SAC suggests is:

Any dispute or difference arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be determined by the appointment of a single arbitrator to be agreed between the parties, or failing agreement within fourteen days after either party has given to the other a written request to concur in the appointment of an arbitrator, by an arbitrator to be appointed by the SAC on the written application of either party. The seat of arbitration shall be Scotland. The language to be used in the arbitral proceedings shall be English.³²

Similar clauses can be found within the AAA, such as the “place of arbitration shall be [city], [state], or [country].”³³ The ICC provides that any or all disputes that are connected to “the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules,”³⁴ as another possible arbitration clause to add to the contract prior to a dispute even takes place. One last example is from the International Centre for Dispute Resolution has such language that any or all disputes will “be settled by arbitration under the UNCITRAL Arbitration Rules in effect on the date of this contract . . . [and the] appointing authority shall be the International Centre for Dispute Resolution . . . [and] administered by the International Centre for Dispute Resolution

³² *Model Clauses*, SAC, available at <http://www.scottisharbitrationcentre.org/index.php/model-clauses> (last visited Sept.23, 2011)

³³ AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, A PRACTICE GUIDE, 24 (2013). Available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540 (last visited Mar. 17, 2014).

³⁴ *Standard ICC Arbitration Clauses*, INTERNATIONAL CHAMBER OF COMMERCE, available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/> last visited Mar. 17, 2014).

under its Procedures for Cases under the UNCITRAL Arbitration Rules.”³⁵ If the parties wish to utilize arbitration to resolve their contractual disputes, these sample clauses provide contract drafters useful guidelines, and appropriate language. The language hopefully makes it clear that arbitration is to be sought rather than litigation, or some other form of conflict resolution.

The SAC comments on inserting their model clause into an ad hoc arbitration agreement. The use of this model clause in any ad hoc arbitral agreement will allow for the new Scottish Arbitration Rules to apply to the arbitration.³⁶ The Centre points out that the model clause they provide still allows the disputants to choose their arbitrator or arbitrators, as the case may be. However, the Centre has created an Arbitral Appointments Committee if the disputants cannot come to an agreement as to who or whom the arbitrators will be; this point will be later discussed.³⁷ The SAC model clause allows for disputants of ad hoc arbitration agreements to take advantage of the innovative arbitration laws in Scotland.

III. ARB-MED OR MED-ARB ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

The Med-Arb or Arb-Med format is a fairly new and dynamic form that should not be overlooked in ADR systems. The Med-Arb and the Arb-Med formats combine arbitration and mediation to resolve a dispute. These forms of ADR are utilized when

³⁵ DRAFTING DISPUTE RESOLUTION CLAUSES, A PRACTICAL GUIDE.17 (Amended & Effective Sept. 1, 2007).

³⁶ *Model Clauses*, SAC available at <http://www.scottisharbitrationcentre.org/index.php/model-clauses> (last visited Sept. 23, 2011)

³⁷ *Model Clauses*, SAC, available at <http://www.scottisharbitrationcentre.org/index.php/model-clauses> (last visited Sept. 23, 2011).

there is multiple and quite complex issues to be resolved.³⁸ The disputants will first attempt to resolve issues through mediation, and then any remaining issues will be resolved via arbitration.³⁹ The disputing parties may also grant the neutral party the authority to disclose the decision prior to the mediation, and if the disputants “fail to reach an agreement in the mediation, the initial arbitration award decides the dispute.”⁴⁰

Although Med-Arb is a well-recognized form of ADR, there can be both some advantages and disadvantages or issues that are particular to Med-Arb. As previously discussed, utilizing mediation in this type of format will encourage open and honest communications that assist in resolving a dispute.⁴¹ However, if the parties cannot reach an agreement, they know that their dispute will be resolved through arbitration; this knowledge could stifle the usefulness of mediation.⁴² Furthermore, traditional mediation allows the parties to walk away from the mediation at any time; however, the Med-Arb format precludes the parties from leaving the dispute resolution process.⁴³ Kevin Lemley, in the article, “I’ll Make Him an Offer He Can’t Refuse: A Proposed Model for ADR in Intellectual Property Disputes,” explains that disputants who would normally “reach an agreement in a true mediation may reach an impasse during the mediation phase of Med-Arb.”⁴⁴ Thus, the Med-Arb form of ADR may have some unintended draw backs when resolving a dispute.

³⁸ Lemley *supra*, ch. V, note 14, at 307.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 307-308.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Lemley *supra*, ch. V, note 14

In contrast, Arb-Med is a different format than Med-Arb. As the name suggests, arbitration is utilized first then the parties go to mediation. Of course there are pros and cons to this format as well. The disputants will attempt arbitration first, and if an award is issued, the mediation will then foster open communication between the parties.⁴⁵ The disputants who are “willing to talk freely in a true mediation will take the same approach during the mediation phase of arb-med. But, parties unwilling to talk freely in a true mediation now have a greater incentive to do so in the mediation phase of arb-med.”⁴⁶ Furthermore, since an arbitral award is already in place, “the parties have nothing to lose by trying to reach an agreement [and thus] arb-med fosters agreement between the parties better than med-arb.”⁴⁷ If Arb-Med is the ADR mechanism of choice, this could utilize the benefits of mediation better than the Med-Arb format discussed above.

IV. ARBITRABILITY

Often times, not all issues are resolvable through arbitration. In the United States, the *Prima Paint*⁴⁸ cases sets out what would be arbitrable. One of the parties in the *Prima Paint* cases declared that since there was “fraud in the inducement” when it entered into the contract, it could not go to arbitration to resolve the dispute but had to have the courts resolve the issue. The *Prima Paint* cases help cement the authority of the arbitrators to decide the “gateway” issues that underline the “important substantive questions in [the] arbitration, including unconscionability, fraud, and class

⁴⁵ *Id.* at 308.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 377 U.S. 395 (1967).

arbitration.”⁴⁹ The court stated if it was fraud in the inducement to arbitration, that is one thing, but the Federal Arbitration Act does not set aside claims of fraud in the inducement of a contract in general.⁵⁰ The *Prima Paint* court also upheld the rule that the parties can enter into a main contract and also enter into a separate arbitration clause, contract, or agreement to arbitrate that is definitely viewed as a completely separate agreement from the main contract.⁵¹ The United States Supreme Court' has determined that the issue of a time limitability rule is “a matter presumptively for the arbitrator, not for the judge.”⁵² Therefore, these court rulings indicate that the arbitration will hear issues pertaining to the contact and the courts will determine the validity of the agreement to arbitrate.

V. WHERE TO RESOLVE THE DISPUTE: LOCATION, JURISDICTION, AND INSTITUTIONS

In the United States, and Scotland, as parties try to determine whether to seek arbitration, the location and jurisdiction of the proposed arbitration may be a very important part of the decision-making process. The choice of location, jurisdiction and whether to go to an arbitral institution, versus an ad hoc arbitration, should be specified at the commencement of the relationship. As far as the location and even the jurisdiction of the arbitration are concerned, a neutral place should be sought so as to avoid the perception that this is some home-court-advantage sought by choosing that

⁴⁹ STEPHEN K. HUBER AND MAUREEN A. WESTON, *ARBITRATION: CASES AND MATERIALS* 7 (Matthew Bender & Company, Inc. Supp 2nd ed. 2010).

⁵⁰ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 377 U.S. 395, 404 (1967).

⁵¹ *Id.*, at 411.

⁵² *Karen Howsam, Etc. Petitioner v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 75 (2002).

locality.⁵³ Assistance in answering these important questions such as location, jurisdiction and or utilization of institution can be acquired through various dicta.

The choice to utilize an institution may be made quite easily under circumstances. Sometimes, institutional proceedings are utilized by default since the disputants may not be familiar with other forms of dispute resolution.⁵⁴ Furthermore, a particular arbitral institution may be chosen due to its illustrious reputation or due to the industry that the disputants are in.⁵⁵ Although the use of an arbitration institution may be stumbled upon, it is quite an acceptable option to resolve disputes internationally.

A. Location and Jurisdiction

Internationally, the seat of the arbitration is as important as any other decision the disputants can make. Some unintentional legal drawbacks or disadvantages may occur due to the choice of the arbitral seat; after all, an “arbitration does not proceed in a legal vacuum.”⁵⁶ Other ancillary considerations when choosing the location for the arbitration is the cost to the parties to travel there, getting documentation and witnesses to that location, as well as other considerations that can make one location a costly choice as compared to another.⁵⁷ Thus, when choosing the seat for an International Commercial Arbitration, it is important to weigh all the known factors of a particular location.

⁵³ Dillenz *supra*, ch. II, note 120, at 229.

⁵⁴ JULIAN D. M. LEW, LOUKAS A. MISTELIS, STEFAN KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 36 (Kluwer Law international 2003).

⁵⁵ *Id.*

⁵⁶ Dillenz *supra*, ch. II, note 120, at 227.

⁵⁷ *Id.*

When determining the seat of the arbitration, parties in an International Commercial Arbitration can rely on various sources to assist in this determination. In Scotland, the new Arbitration (Scotland) Act can assist parties on determining the local of the arbitration. The Arbitration (Scotland) Act of course encourages the location to be what the parties designate it to be or it can be, per the Arbitration (Scotland) Act, set by the Scottish courts.⁵⁸ If the parties utilize an institution, the institution's rules and regulations can also help determining the location. If the parted do not mutually agree as to the seat of the arbitration or if one of the parties objects to the location, the AAA can step in and make a binding and final decision and designate the seat of the arbitration.⁵⁹ Although, it is ideal that the disputants agree on the location of the arbitration, there are sources to ease the determination of the seat of the arbitration.

Rules and institutions can also provide guidance on choice of arbitral seat in International Commercial Arbitration. The United Nations Commission on International Trade Law provides for the arbitral tribunal to take into account the circumstances of the arbitration.⁶⁰ Article 13 of the American Arbitration Association's International Arbitration Rules suggest that if the seat of the arbitration cannot be determined by the parties, the administrator can "initially determine the place of arbitration, subject to the power of the tribunal to determine finally the place of arbitration within 60 days after its constitution."⁶¹ Institutional rules and other legal

⁵⁸ Arbitration (Scotland) Act 2010, *supra*, ch. VI, note 17, at § 3.

⁵⁹ *American Arbitration Association Commercial Arbitration Rules*, AMERICAN ARBITRATION ASSOCIATION, available at <http://www.adr.org/sp.asp?id=22440#R7> (last visited Sept. 12, 2011).

⁶⁰ United Nations Commission on International Trade Law Arbitration Rules, Place of Arbitration Article 18, 14 (2010). Available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (Last visited Mar. 12, 2011).

⁶¹ American Arbitration Association International Arbitration Rules, Place of Arbitration Article 13 (2010), available at http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_002008&_afLoop=1540407

authorities can assist disputants as to arbitral seat in International Commercial Arbitration.

B. Institutional Versus *Ad Hoc* Arbitration

Parties in a dispute can employ different methods to organize their arbitration. The parties can either have an ad hoc arbitration or an institutional arbitration. In a nut shell, the term “Ad Hoc” means that the parties shape the process of the arbitration to resolve their dispute. The other form of arbitration is where the parties, either domestically, or in international disputes, turn to an institution to decide the process of the arbitration, rules and the like. If the disputants agree to ad hoc arbitration, so be it; however, if communications break down, there are numerous institutions that can also assist the parties with their International Commercial Arbitration.

Ad hoc arbitration or institutional arbitration; that is the question. In fact, one of the first decisions to make when writing an arbitration agreement or clause is whether to utilize arbitral institutions or create an ad hoc arbitration.⁶² A couple of institutions in the United States spring to mind, either the AAA (American Arbitration Association), or the *Judicial Arbitration and Mediation Services*, or often referred to as JAMS.⁶³ Both institutions have the capacity to resolve international commercial

861848679&_afWindowMode=0&_afWindowId=125f47069f_85#%40%3F_afWindowId%3D125f47069f_85%26_afLoop%3D1540407861848679%26doc%3DADRSTG_002008%26_afWindowMode%3D0%26_adf.ctrl-state%3D125f47069f_141 (last visited Sept. 12, 2011).

⁶² Dillenz *supra*, ch. II, note 120, at 223.

⁶³ AMERICAN ARBITRATION ASSOCIATION, <https://www.adr.org/> (last visited May 1, 2013). (“The American Arbitration Association, based in New York, arbitrates both purely national and international cases. The AAA has a reputation for intra-American disputes, but also possesses a strong commitment to international commercial disputes, illustrated by the fact that it adopted special international arbitration rules. The AAA Rules are applicable if the parties have agreed in writing to arbitrate disputes under these Rules. The standard clause is comparatively short but sufficiently broad.” Dillenz *supra*, ch. II, note 120, at 223.

disputes.⁶⁴ Furthermore, the American Arbitration Association has an off shoot, or affiliate organization that solely handles international commercial disputes, the International Center for Dispute Resolution. Of course in Scotland there is the Scottish Arbitration Center.⁶⁵ There are a couple of options, either ad hoc or arbitration institutions, which disputants can choose to resolve their conflict.

However, once a route is determined, ad hoc arbitration versus utilizing an institution, it may not be so easy to switch between the choices. It may be “extremely difficult to switch from *ad hoc* arbitration to an institutional proceeding . . . [since an ad hoc] arbitration will often use the rules laid down in 1976 by the United Nations Commission on International Trade Law,”⁶⁶ which are very broad and may cause problems in the execution of the arbitration.⁶⁷ If an institution is employed, suggestions will be made but ultimately the institution can make these decisions for the parties when they are not able. As pointed out, the UNCITRAL Model Rules provide parties, who wish to have an ad hoc arbitration, some guidance as to which rules they can use. However, ad hoc arbitration is often the choice when the disputants cannot decide on which arbitral institution to submit their dispute.⁶⁸ In general, the disputants can create their own rules and procedures for their own arbitration.

The other choice is to submit the International Commercial Arbitration to an institution for arbitration and follow that institution’s rules and processes for all aspects

⁶⁴ INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, *available at* www.internationalarbitrationlaw.com/arbitral-institutions/icdr/ (last visited May 1, 2013).

⁶⁵ SAC, *available at* www.scottisharbitrationcentre.org/ (last visited May 1, 2013).

⁶⁶ Dillenz *supra*, ch. II, note 120, at 224.

⁶⁷ *Id.*

⁶⁸ JULIAN D. M. LEW, LOUKAS A. MISTELIS, STEFAN KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 35 (Kluwer Law international 2003).

of the arbitration, which can provide certain advantages. One advantage is the good will that the institution's name invokes.⁶⁹ A second known advantage is that established institutions are quite adept in all aspects of the arbitration, from determining the arbitrators to the issuance of the arbitration award.⁷⁰ The choice to resolve disputes before an international ADR institution does carry certain advantages over ad hoc arbitration.

With the issuing in of the recent Scottish Arbitration Act in 2010, a center was needed to be the focal point for Scotland's new law. The Scottish Ministers, which is at the time of this writing, the "legal name for the Scottish Government,"⁷¹ set up the SAC.⁷² The SAC was officially opened on March 17, 2011 "by Fergus Ewing MSP, the Minister for Community Safety."⁷³ The Scottish Ministers for saw that the SAC would be a non-profit company that works in conjunction with other similar non-profit stakeholders such as the Faculty of Advocates,⁷⁴ the Chartered Institute of Arbitrators

⁶⁹ JULIAN D. M. LEW, LOUKAS A. MISTELIS, STEFAN KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 36 (Kluwer Law international 2003).

⁷⁰ *Id.*

⁷¹ Andrew Mackenzie, Chief Executive, SAC.

⁷² More information on the SAC is *available at* www.scottisharbitrationcentre.org.

⁷³ *About, SAC, available at* <http://www.scottisharbitrationcentre.org/index.php/about> (last visited Sept. 23, 2011).

⁷⁴ The Faculty of Advocates is "a body of independent lawyers who have been admitted to practise as Advocates before the Courts of Scotland. Faculty records date as far back as 1532 when the College of Justice was established by an Act of the Scottish Parliament, though its origins are believed to predate that event." *About the Faculty of Advocates*, THE FACULTY OF ADVOCATES, www.advocates.org.uk/ (last visited May 1, 2013).

("CIArb"),⁷⁵ the Royal Institute of Chartered Surveyors ("RICS"),⁷⁶ and the Law Society of Scotland.⁷⁷ The new SAC is set up to hear and administer arbitrations, domestic or international disputants, using either the new Scot's Law or some other type of law. The SAC's facilities are state-of-the-art set in a historical part of Edinburgh, Scotland. The people that run or sit on committees of the new SAC have a diverse background and a passion for ADR. The SAC is an arbitral institution, located in Scotland, that disputant can submit to International Commercial Arbitration.

International business can take advantage of international ADR organizations that offer mediation or arbitration services or other ADR mechanisms. One such example is the World Intellectual Property Organization, or "WIPO," has an arbitration and mediation center that can assist disputants to resolve either domestic or cross-border intellectual property, technology, or domain name disputes out of national court systems.⁷⁸ The World Intellectual Property Organization has a Mediation and

⁷⁵ The Chartered Institute of Arbitrators is "is a leading professional membership organisation representing the interests of alternative dispute practitioners worldwide. With over 13,000 members located in more than 120 countries, CIArb supports the global promotion, facilitation and development of all forms of private dispute resolution." *Welcome to the Chartered Institute of Arbitrators (CIArb)*, CHARTERED INSTITUTE OF ARBITRATORS, <http://www.ciarb.org/> (last visited May 1, 2013).

⁷⁶ The Royal Institute of Chartered Surveyors is "an international professional body with over 100,000 members. We represent everything professional and ethical in land, property and construction. Our members are known as chartered surveyors and are recognised by the designation after their name: MRICS (Member), FRICS (Fellow) and AssocRICS (Associate). We regulate and promote the profession; maintain the highest educational and professional standards; protect clients and consumers via a strict code of ethics; and provide impartial advice and guidance." *Who we are*, ROYAL INSTITUTE OF CHARTERED SURVEYORS, <http://www.rics.org/uk/about-rics/who-we-are/> (last visited Apr. 5, 2014).

⁷⁷ The SAC legal designation is that of a non-profit company limited by guarantee. "A private company limited by guarantee is an alternative type of corporation used primarily for non-profit organisations (like the Centre) that require legal personality. A guarantee company does not usually have a share capital or shareholders, but instead has members who act as guarantors. The guarantors give an undertaking to contribute a nominal amount (typically very small) in the event of the winding up of the company." Andrew Mackenzie, Chief Executive, SAC.

⁷⁸ The World Intellectual Property Organization, IP Services Alternative Dispute Resolution, *available at* <http://www.wipo.int/amc/en/> (last visited Apr. 5, 2014).

Arbitration Center is notably there to assist “international companies mediate intellectual property issues . . . [and is now] widely recognized as particularly appropriate for technology, entertainment and other disputes involving intellectual property.”⁷⁹ Disputants from either the United States or Scotland can utilize mediation services through international ADR organizations.

The goals of arbitral institution have many facets. As previously mentioned, some well-known organizations in the United States are the AAA and the Judicial Arbitration and Mediation Services. The SAC goals are to encourage the use of arbitration in the “Scottish business community as an effective alternative to litigation,”⁸⁰ as well as a way to encourage increase the number of arbitrations under the new Arbitration (Scotland) Act.⁸¹ Developing the SAC into a fully serviced arbitration institution is a longer term objective.⁸² These are worthy goals, or mission statement that the SAC is aspiring to. It seems the ultimate goal for Scotland to have a place to hear International Commercial Arbitrations.⁸³ Scotland also has such industries that currently use arbitration to resolve disputes such as the construction and oil and gas industries. Scotland's rich legal traditions and cutting edge arbitral laws

⁷⁹ J Dean Cathy and L Lewis Rodney, *Mediation* 2013, United States.

⁸⁰ *About, SAC, available at* <http://www.scottisharbitrationcentre.org/index.php/about> (last visited Sept. 23, 2011)

⁸¹ Andrew Mackenzie, Chief Executive, SAC.

⁸² Transnational Dispute Management, email alert, Date: Thurs., Sept. 22, 2011 04:35:06 -0700, Subject: SAC unveils Arbitral Appointments Committee and new website. The SAC has unveiled its independent Arbitral Appointments Committee, and its new website *available at* (www.scottisharbitrationcentre.org).

⁸³ *About, SAC, available at* <http://www.scottisharbitrationcentre.org/index.php/about> (last visited Sept. 23, 2011)

make it an attractive “venue for arbitration on the global stage.”⁸⁴ It is the hope that the Centre will attract arbitrations from around the world.

VI. INTERIM RELIEF AND CONSOLIDATION

In the interest of time, economy or necessity, multiple claims or parties may be added to arbitration or a disputant may need interim relief. Although arbitration is quicker than litigation, waiting for the award can still aggravate the situation just as litigation would, an “interdict” as it is known in Scotland or an “injunction” in the United States.⁸⁵ Consolidating multiple claims or parties into one arbitration rather than holding multiple or mini arbitrations is also a good idea, especially if they are all part of a greater whole. Although international treaties do not always have interim relief, national arbitration laws, however, may provide some assistance if needed prior to the completion of the arbitration.⁸⁶ Furthermore, disputants can agree at the outset to “include disputes with a subcontractor who is not bound by a clause into the arbitral proceeding”⁸⁷ in construction matters. Sometimes, “courts have the power to order consolidation,”⁸⁸ if need be. Ultimately though, arbitration is a “matter of private

⁸⁴ *Id.*

⁸⁵ JOHN REYNOLDS & ALISON NEWSTEAD, GETTING THE DEAL THROUGH – ENFORCEMENT OF FOREIGN JUDGMENTS 2013, UNITED KINGDOM 145 (Mark Moedritzer and Kay C Whittaker, Shook, Hardy & Bacon International LLP, 2012) available at <http://www.shb.com/attorneys/ReynoldsJohn/EnforcementofForeignJudgments2013.pdf> (last visited Apr. 3, 2014).

⁸⁶ Dillenz *supra*, ch. II, note 120, at 237.

⁸⁷ *Id.* at 45.

⁸⁸ *Id.*

autonomy and all parties to the arbitration must consent.”⁸⁹ Thus, arbitration provides disputants the flexibility to agree to consolidate parties or claims.

VII. FOCAL POINTS OF ADR SYSTEMS

Both International Commercial Arbitration and mediation have numerous aspects or focal points that make them a unique form of conflict resolution. The mediation process is more flexible than arbitration; however, arbitration is not as rigid, compared to court procedures. Both Scotland and the United States also practice intentional commercial arbitration. The focal points for both International Commercial Arbitration and mediation are a fascinating comparison between the United States and Scotland.

Although both terms were defined broadly earlier in this paper, it is well worth a second look since the terms “arbitration” and “mediation” will be used quite often in the following sections. Mediation can be placed in the middle of the spectrum of dispute resolution mechanisms, and appears in many forms that will be addressed as needed to move the comparative analysis along. Arbitration, on the other hand, when compared to other dispute resolution mechanisms, is a more formal procedural means. “Arbitration is a private, informal process by which all parties agree, in writing, to submit their disputes to one or more impartial persons authorized to resolve the controversy”⁹⁰ and issuing either a non-binding or final and binding award. The commencement of a trial to resolve the dispute is the most formal of all the dispute resolution mechanisms.

⁸⁹ *Id.*

⁹⁰ AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, A PRACTICAL GUIDE 7 (2013) available at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540 (last visited Apr. 3, 2014).

The arbitration process in both Scotland and the United States are similar. The United States has a federal law and state laws from which arbitration can be continually developed and bolstered. As has been the case in the United States, Scotland has a robust arbitration system that is rooted in Common Law principles, which has been further developed and polished through precedent gleaned from court rulings or case law. Scotland has enacted legislation throughout the ages, “such as the 25th Article of Regulation 1695, the Arbitration (Scotland) Act 1794 and the Administration of Justice (Scotland) Act 1972,”⁹¹ which has also assisted in developing its arbitration system. In Scotland, the influence of Common Law principles allows the disputants to determine their own arbitral proceedings.⁹² The United States has a Federal Arbitration Act (“FAA”), as well as various applicable domestic laws. Arbitral procedures and legal authority are quite similar in both Scotland and the United States.

A. Arbitrator(s); Authority and Competence

Who should be allowed the role of arbitrator, or sit on a panel of arbitrators? This is an earnest question that merits careful deliberation.⁹³ The qualities of a modern arbitrator should be those of impartiality, neutrality, and independence.⁹⁴ Having an arbitrator or arbitrators that are neutral might likely enable them to make decisions that are “free of

⁹¹ *Id.*

⁹² *Id.*

⁹³ SCOTTISH ARBITRATION ACT *supra*, ch. V, note 27. (Keep in mind with the Scottish Arbitration Act, Scotland made a conscious effort to move away from the antiquated term “arbiters” and use the modern term arbitrators.)

⁹⁴ See OMAR E. GARCÍA-BOLIVAR, AAA HANDBOOK ON INTERNATIONAL ARBITRATION 3 (2001); and SAC *supra*, ch. V, note 27.

bias and pressure.”⁹⁵ The role of the arbitrator, or arbitral panel, is to “listen to the evidence presented by each side and render a decision in writing called an “award.” The arbitrator shall disclose to parties any conflict of interest or potential conflict that might affect his or her impartiality on the case.”⁹⁶ The role of the arbitrator should not be tainted by personal biases.

The disputants can generally appoint whomever they wish as an arbitrator, or however many arbitrators they think appropriate for the matter at hand. However, this feature is what makes arbitration unique; *i.e.*, disputants, if they so desire, can appoint someone who has specific knowledge or expertise on the matter to be resolved.⁹⁷ Although neutrality is required in all forms of arbitration, the professional qualifications of the arbitrator or arbitrators are also a “requirement in international investment and trade arbitration proceedings.”⁹⁸

The Scottish courts have a limited role in appointing arbitrators. Historically, there were no Common Law powers of the courts to appoint arbitrators. However, the Scottish Arbitration Act of 1794 allows the courts to step in under certain circumstances. One example is if one of the disputants does not agree on an arbitrator, or even refuses to appoint an arbitrator, the court can step in if there is no fail safe for the appointment of an arbitrator.⁹⁹ However, their neighbors to the south, had provisions for courts to appoint arbitrators in Arbitration (English) Act 1996.¹⁰⁰ Court

⁹⁵ OMAR E. GARCÍA-BOLIVAR, AAA HANDBOOK ON INTERNATIONAL ARBITRATION 3 (2001).

⁹⁶ <http://www.lasuperiorcourt.org/adr/ui/Info/arbitration.aspx?source=#2> (last visited Sept 30, 2011)

⁹⁷ BRYAN CLARK, SCOTTISH LEGAL SYSTEM ESSENTIALS 70 (2nd ed. 2009).

⁹⁸ GARCÍA, *supra*, ch. VII, note 95.

⁹⁹ Arbitration (Scotland) Act 2010, *supra*, ch. VI, note 17.

¹⁰⁰ Arbitration (England) Act 1996.

involvement in the arbitration process is what the Scottish legislators hoped to avoid and thus the creation of the new Scottish Arbitration Act of 2010 was aimed curbing court involvement.¹⁰¹

As an institution, the SAC has set up a committee to assist parties, or choose for them, an arbitrator, or arbitrators to resolve the parties' dispute. This committee is called the "Arbitral Appointments Committee," ("AAC")¹⁰² and is only summoned to appoint an arbitrator, or arbitrators.¹⁰³ As well as being independent of the SAC and its Board, the AAC has complete discretion to appoint appropriate arbitrators for both domestic or International Commercial Arbitration.¹⁰⁴ The independence of the AAC illustrates the impartiality or neutrality of the arbitrators. The AAC is gearing up for international arbitrations.

A principle or doctrine often heard in arbitration discourse is *competence-competence*, which is sometimes referred to as *Kompetenz-Kompetenz*. This doctrine enables the appointed arbitrators to not only consider any challenge to their right to hear the issues, as well as the power to conclude that the appointed arbitrators, do not have the authority to hear the matter.¹⁰⁵ It has been determined in practice that an arbitrator, or a panel of arbitrators, can determine their own competence to arbitrate a dispute. Although, this adds more time to the arbitral process, there is fail safe in place in which

¹⁰¹ Arbitration (Scotland) Act 2010, *supra*, ch. VI, note 17.

¹⁰² See the Transnational Dispute Management, *SAC unveils Arbitral Appointments Committee and new website. The SAC has unveiled its independent Arbitral Appointments Committee, and its new website* (www.scottisharbitrationcentre.org). (22 Sep., 2011) (The committee consists of a diverse group that is impartial. At the time that this paper was written, the Committee consisted of seven members of the new Arbitral Appointments Committee are from various backgrounds from around the world).

¹⁰³ SAC *supra*, ch. V, note 27.

¹⁰⁴ *Id.*

¹⁰⁵ INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, THE ICCA'S GUIDE TO THE INTERPRETATION OF THE 1957 NEW YORK CONVENTION 39 (2011).

disputants can ask the courts to review any conclusion that arbitrators have rendered. The New York Convention does not expressly endorse the competence-competence doctrine but does provide some semblance of the competence-competence doctrine to parties. The New York Convention enables disputants to let the arbitrators determine their own competence to hear the dispute.¹⁰⁶ To deny the power of the arbitrators to determine their own competence to hear the matter would delay the arbitral process and add an extra step to since the parties will have to ask the courts to determine first if the arbitrators are competent to hear the arbitral dispute or not.¹⁰⁷ The competence-competence principle allows arbitrators to determine their own authority to hear a dispute, and thus ensure the continued facilitation of the International Commercial Arbitration process.

B. Law and Procedure

The choice of law and procedure does not play the same role in mediation as it does in arbitration. Although, both countries have created domestic mediation laws, at this time mediation is not as prevalent as arbitration. United States mediation laws took time to evolve over time, and “attempts at uniformity developed in the late 1980s.”¹⁰⁸ In the United States, the legislature adopted the ADR Act of 1998, which provided for ADR programs, such as mediation in all civil actions, including bankruptcy.¹⁰⁹ Of course

¹⁰⁶ *Id.*

¹⁰⁷ The ICCA's guide to the interpretation of the 1957 New York convention, 39 (2011).

¹⁰⁸ J Dean Cathy and L Lewis Rodney, *Mediation 2013*, United States.

¹⁰⁹ The Alternative Dispute Resolution Act of 1998, 651 USC 28 (1998). (*See* http://www.epa.gov/adr/adra_1998.pdf (last visited Apr. 2, 2014))

there is the Uniform Mediation Act in the United States, of which state legislatures may adopt or incorporate into their laws.¹¹⁰

The Education (Additional Support for Learning) (Scotland) Act 2004, required “local authorities to have access to a mediation service.”¹¹¹ Mediation practitioner’s such as Charlie Irvine say that “the Scottish Parliament took the bold step”¹¹² of creating a mediation dispute resolution system for attorney-client disputes administered by the Scottish Legal Complaints Commission.¹¹³ Furthermore, a report of the civil courts in Scotland, often called the *Gill Report* since the review was headed by the Right Honourable Lord Gill, suggests that mediation should be used in the civil courts of Scotland, as well.¹¹⁴

The choice of law and procedure can make a difference in the arbitral process. Briefly touched upon in previous chapters, the parties have the freedom to choose the laws that are applicable to the arbitration. The parties in an International Commercial Arbitration have the freedom to choose the substantive law that will be applied to the arbitration, as well as the procedural law that will be employed.¹¹⁵ However, few disputants agree to abide solely by transnational law in International Commercial

¹¹⁰ See UNIFORMLAWS.ORG, *available at* <http://www.uniformlaws.org/ActSummary.aspx?title=Mediation%20Act> (last visited Jul. 3, 2014).

¹¹¹ Charlie Irvine, *Chairing the Network – Some Passing Thoughts*, SCOTTISH MEDIATION NETWORK (January 3, 2013), *available at* <http://www.scottishmediation.org.uk/uncategorized/chairing-the-network-%e2%80%93-some-passing-thoughts-charlie-irvine>. (See Legal Profession and Legal Aid (Scotland) Act 2007).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See SCOTTISH CIVIL COURTS REVIEW, SCOTTISH CIVIL COURTS REVIEW, A CONSULTATION PAPER (2007) *available at* [http://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/scccompleter-\(2\)7CDD54ABAE89.pdf?sfvrsn=0](http://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/scccompleter-(2)7CDD54ABAE89.pdf?sfvrsn=0) (last visited Apr. 3, 2014).

¹¹⁵ Dillenz *supra*, ch. II, note 120, at 231.

Arbitration.¹¹⁶ The use of transnational laws is to supplement the national laws rather than completely eradicating them from the arbitration.¹¹⁷ Keep in mind that just because the parties designate the arbitration to be in Scotland, does not necessarily mean that the substantive law of the arbitral dispute is Scottish law; the parties will have to actually state that Scottish law is the substantive law.¹¹⁸ However, if the parties add the SAC's model clause to their ad hoc arbitration agreement, the disputants may take advantage of the new Scottish Arbitration Rules.¹¹⁹ Disputants are at liberty to apply whatever laws they wish to in International Commercial Arbitrations.

Laws and treaties play an important role in International Commercial Arbitrations. Both the United States and Scotland have enacted laws to comply with the UNCITRAL Model Law on international arbitration.¹²⁰ Similar to the United States, the new Scottish Arbitration Act of 2010 allows the Scottish Ministers to make any changes to the Scottish Arbitration Act so as to comply with such treaties as the "UNCITRAL Model law, the UNCITRAL Arbitration Rules or the New York Convention,"¹²¹ or any other future treaties that affect the Scottish Arbitration Act.¹²² Looking at the UNCITRAL Model Law on International Commercial Arbitrations

¹¹⁶ Drahozal, *supra*, ch. V, note 133, at 539.

¹¹⁷ *Id.*

¹¹⁸ Arbitration (Scotland) Act 2010, *supra*, ch. VI, note 17, at § 3.

¹¹⁹ *Model Clauses*, SAC, available at <http://www.scottisharbitrationcentre.org/index.php/model-clauses> (last visited Sept. 23, 2011).

¹²⁰ See THE COMMONWEALTH SECRETARIAT, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION EXPLANATORY DOCUMENTATION PREPARED FOR COMMONWEALTH JURISDICTIONS (1991) available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/Model-Law-Arbitration-Commonwealth.pdf> (last visited Mar. 5, 2014).

¹²¹ SAC, *supra*, ch. V, note 27.

¹²² *Id.*

encourages that their definitions should cover all commercial relationships.¹²³ The UNCITRAL Model Law on International Commercial Arbitrations would cover all commercial relationships regardless whether there is an agreement in place.¹²⁴ Disputants can anticipate whether their arbitration will be international in nature, or purely a domestic arbitration. Furthermore, disputants can build the commercial relationship so as to comply with the UNCITRAL Model Law, thus creating an International Commercial Arbitration.

C. Presentations, Documents and Witness

The psychological, as well as, the procedural requirements to submit evidence and witnesses is a reality of any dispute resolution process, whether it is in small claims court or in a class action law suit. The presentation of documents or witness is not critical to the mediation process. Unlike arbitration, parties can submit whatever they like, and ask the mediator to keep the submission confidential. Also, it is not mandatory or required that witness participate, but if they do, they must comply with the same rules of the mediation as the parties do. Arbitration is no different; however; this forum provides an opportunity for parties to submit evidence, documents and witnesses to prove to the arbitrator, or arbitrators, that they should be the prevailing party. Therefore, the presentation of documents or witnesses is quite different from the arbitral process.

Although not as rigid as litigation's discovery procedures or rules of evidence, arbitration adheres to a certain formality in the presentation or submission of evidence

¹²³ INTERNATIONAL LAW OFFICE , *available at* www.internationallawoffice.com/ (last visited Aug. 7, 2013)

¹²⁴ *Id.*

and witness. In arbitration a party can request a certain set or class of documentation they wish the other side to provide.¹²⁵ Furthermore, depending on the procedural laws or rules that are used, the arbitrators can do certain things. In the United States, the arbitral discovery process is quite different than what International Commercial Arbitration provides for.¹²⁶ Although the UNCITRAL Rules are more restrictive compared to an arbitration conducted in the United States, the arbitrators still have the freedom to hear “witnesses, hold meetings at any place, and inspect goods, and other property or documents”¹²⁷ necessary for a well thought-out decision. Scotland does not confer any power to the arbitrator to compel witnesses to attend an arbitration nor compel the production of documents [awkward].¹²⁸ Historically, and even in the present day, parties must utilize the court’s power to order witness and the production of documentation.¹²⁹ In the United States, similar to the procedure in Scotland, documents or evidence can be compelled via the Federal Arbitration Act.¹³⁰ The limitations that would apply to such a request would be, 1) the request “only applies to arbitration in which the tribunal is seated within the jurisdiction of a US court,” and 2), the tribunal or arbitral panel makes the requests, not the disputants.¹³¹ Arbitration formalities provide interesting avenue for the submission of evidence and witness.

¹²⁵ NOUSSIA, KYRIAKI, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION, A COMPARATIVE ANALYSIS OF THE POSITION UNDER ENGLISH, US, GERMAN AND FRENCH LAW 40 (2010).

¹²⁶ Dillenz *supra*, ch. II, note 120, at 239.

¹²⁷ *Id.* at 227.

¹²⁸ JAMES CAMPBELL IRONS, ROBERT DUNDONALD MELVILLE, TREATISE ON THE LAW OF ARBITRATION IN SCOTLAND: WITH AN APPENDIX OF FORMS AND EXPERTS FROM STATUTES RELATING TO ARBITRATION 155, and 268 (1903).

¹²⁹ Arbitration (Scotland) Act 2010 *supra*, ch. VI, note 17, at § 45. (See also the discussions on this in IRONS ET AL. *supra*, ch. VII, note 128).

¹³⁰ The Federal Arbitration Act *supra*, ch. VI, note 18.

¹³¹ Shawn C. Conway and Nathan D. O’Malley, *Document Disclosure in International Construction*

VIII. FINALITY AND ENFORCEMENT

When utilizing ADR systems, parties on both sides of the conflict are mindful of how the resolution will be finalized or enforced. The enforcement of the mediation agreement is quite different than the enforcement of the arbitral award. The enforcement of mediations is different from that of arbitrations. In the United States, the law of contracts, for the most part, governs the agreement between the mediator and the disputants.¹³² In general, a domestic arbitral award in the United States may be more readily enforceable, as compared to a foreign judgment. Like all aspects of the utilization of ADR systems, research of the finality or enforcement of the outcome is necessary.

Although not quite satisfactory, litigation as the traditional form of conflict resolution, does produce a judgment. Once all appeals are exhausted—the finality of the conflict is achieved; however, making the judgment become reality, enforcement may not always be available. As of now; “there is no bilateral treaty or multilateral convention in force between the United States and any other country on reciprocal recognition and enforcement of judgments,”¹³³ thus making an argument to utilize arbitration instead. However, the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* can assist victorious litigants, just

Arbitration, 23 CONST. L.J. 2, 109 (2007).

¹³² See BRAND ET AL. *supra* ch. VI, note 27, at 9; and Edna Sussman, *The Final Step: Issues in Enforcing the Mediation Settlement Agreement*, publication forthcoming in *Contemporary Issues in International Arbitration and Mediation*, (Arthur W. Rovine ed., Martinus Nijhoff Publishers, The Fordham Papers 2008).

¹³³*Enforcement of Judgments*, TRAVEL.STATE.GOV, available at <http://travel.state.gov/content/travel/english/legal-considerations/judicial/enforcement-of-judgments.html> (last visited Apr. 2, 2014).

not in the United States.¹³⁴ Although it is not impossible to enforce foreign judgments in the United States, victorious litigants would have to rely on individual state laws to succeed.¹³⁵ Whereas, the courts in Scotland, and the other jurisdictions within the United Kingdom, “have historically recognized and enforced judgments of foreign courts with or without treaty obligations,”¹³⁶ Of course, there are differences in the United Kingdom and “Scots law is a distinct and separate system and there can be significant procedural differences”¹³⁷ when seeking the enforcement of a foreign judgment. The Court of Session in Scotland, where victorious litigants would request the “enforcement of judgments obtained”¹³⁸ Although litigation does produce a judgment, it is not as satisfactory as other forms of conflict resolution.

That is why, in the United States in particular, International Commercial Arbitration awards are more palatable than foreign judgments thanks to such treaties as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or the New York Convention. The New York Convention states that each of the signatory countries “shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which . . . may arise between them . . . concerning a subject matter capable of settlement by arbitration.”¹³⁹ The United States

¹³⁴ Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT’L L. 150, 150 (2013). (See Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (1971)).

¹³⁵ *See Id.*

¹³⁶ JOHN REYNOLDS AND ALISON NEWSTEAD, GETTING THE DEAL THROUGH – ENFORCEMENT OF FOREIGN JUDGMENTS 2013, UNITED KINGDOM 143 (Mark Moedritzer and Kay C Whittaker, Shook, Hardy & Bacon International LLP 2012) *available at* <http://www.shb.com/attorneys/ReynoldsJohn/EnforcementofForeignJudgments2013.pdf> (last visited Apr. 3, 2014).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6,

“ratified the New York Convention in 1970 and codified it as Chapter 2”¹⁴⁰ of the FAA. The New York Convention came into full force in the United Kingdom on December 23, 1975.¹⁴¹ The key to enforcing the arbitral award is that as long as the seat of the arbitration is a signatory to the New York Convention, and the country where that arbitration award is to be enforced is a signatory to that Convention and the Panama Convention, the award will be enforced.¹⁴²

There is no “similar treaty to which the United States is a party [that] makes judgments enforceable across national lines. . . [f]oreign judgments are enforced in the United States and U.S. judgments are enforced abroad only as a matter of comity.”¹⁴³ Arbitral awards that would be enforced by the New York Convention “are exempt from the requirement that the parties demonstrate an intention to have the award confirmed by court order.”¹⁴⁴ The conditions set forth under the New York Convention generally make it easier to enforce arbitral awards in other countries rather than court judgments.¹⁴⁵ The provisions for the enforcement of the New York Convention in the United States are found in the FAA, and only apply to “arbitration agreements and

1958, 21U.S.T. 2517, 330 U.N.T.S. 38 (1968).

¹⁴⁰ JEREMY WILSON AND WILLIAM LOWERY, CMS, CMS GUIDE TO ARBITRATION, VOL I, CHAPTER 19: ARBITRATION IN NEW YORK 522 (Torsten Loercher et al., 2012) *available at* http://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_NEW%20YORK.pdf (last visited Apr. 2, 2014).

¹⁴¹ *Jurisdictions, United Kingdom*, 1958 NEW YORK CONVENTION GUIDE, *available at* http://www.newyorkconvention1958.org/index.php?lvl=more_results&look_ALL=1&user_query=*%&autolevel1=1&jurisdiction=22 (last visited August 1, 2011).

¹⁴² John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 DISP. RESOL. J. 1, 2 (2003).

¹⁴³ *Id.*

¹⁴⁴ WILSON & LOWERY *supra*, ch. VII, note 140.

¹⁴⁵ SAC, *supra*, ch. V, note 27.

awards that relate to commercial relationships (as defined by federal law).”¹⁴⁶ The FAA further assists with the enforcement of arbitral awards in the United States by providing a “simplified procedures for non-domestic awards . . . [one] only need to make a motion to the relevant court for confirmation, supported by a ‘duly certified copy of the award’ (or the original), a ‘duly certified copy of the arbitration agreement’ (or the original) and a certified translation of these documents if they are in a language other than English.”¹⁴⁷ However, the FAA will not enforce any award that results from a forced arbitration if one of the parties to arbitration was forced to participate.¹⁴⁸ Furthermore, there are seven different grounds in which the New York Convention allows national courts to refuse to enforce an international award.¹⁴⁹ It is crucial to ensure that the parties are willing to participate in the mediation and have a clause in the agreement that clearly illustrates the parties intent to utilize arbitration so that any award that results from that arbitration is enforceable.

The limitation of appeals and prolonged court costs over arbitral awards is limited when enforcing an award. One of the heralded improvements of the Arbitration (Scotland) Act 2010, over the Arbitration Act 1996, or the English Act, is that the law is clear on the limitation of appeals.¹⁵⁰ The advantages that the new Scottish Arbitration Act has for those who wish to hold an arbitration utilizing Scot's law, are in the

¹⁴⁶ WILSON & LOWERY *supra*, ch. VII, note 140.

¹⁴⁷ *Id.* at 555.

¹⁴⁸ STEPHEN K. HUBER AND MAUREEN A. WESTON, *ARBITRATION: CASES AND MATERIALS* 7 (2nd ed. Supp. Matthew Bender & Company, Inc., 2010).

¹⁴⁹ WILSON & LOWERY *supra*, ch. VII, note 148.

¹⁵⁰ *See SAC supra*, ch. V, note 27. (The Arbitration (England) Act 1996, or the English Act, is still applicable to the rest of the United Kingdom.)

reduction of cumbersome and often unnecessary appeals in the courts.¹⁵¹ Like Scotland, the United States will uphold the arbitral award pursuant to the New York Convention in a court of competent jurisdiction, but the court only has a limited scope of reviewing the arbitral award.¹⁵² Furthermore, the New York Convention, the Federal Arbitration Act, and the Arbitration Scotland Act made it clear that appeals of an arbitral award are limited, and depending on which law is applicable, there are only limited causes for the appeal.¹⁵³ Furthermore, the Arbitration Scotland Act will also limit the “duration of the dispute and any associated liability”¹⁵⁴ that is part of the appeal of an arbitral award. If an award needs to be corrected since it has some consequential effect an aspect of that award or another award, the courts may then make the consequential correction of that particular arbitral award.¹⁵⁵

There are other requirements that are necessary to be present to make an arbitral award enforceable. Of course it is odd to think that a disputant may not know they are involved in arbitration, but it does happen; for an arbitral award to be enforceable, the adversarial party must be put on notice of the arbitration proceedings *per* the New York Convention.¹⁵⁶ Under the UNCITRAL Arbitration Rules the notice given to the other party concerning the arbitration must contain such information as the issue that is

¹⁵¹ See Arbitration (Scotland) Act 2010 *supra*, ch. VI, note 17.

¹⁵² To learn more on how United States Federal Courts have handled this issue, see *Encyclopedia Universalis S.A. v. Encyclopedia Britannica, Inc.*, 403 F.3d 85 (2d Cir. 2005).

¹⁵³ See The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 21U.S.T. 2517, 330 U.N.T.S. 38 (1968); Federal Arbitration Act 9 U.S.C. §§ 1-14; and Arbitration (Scotland) Act 2010 *supra*, ch. VI, note 17.

¹⁵⁴ SCOTTISH ARBITRATION CENTRE *supra*, ch. V, note 27.

¹⁵⁵ *Id.*

¹⁵⁶ Dillenz *supra*, ch. II, note 120, at 230.

involved as well as what agreement the arbitration will be referring to.¹⁵⁷ It should also be made clear at the outset that this arbitration is binding and final. The “English arbitral courts find special explicit ‘exclusion’ agreements desirable,”¹⁵⁸ and thus save time in reviewing the matter further.¹⁵⁹ Such arbitral rules as the UNCITRAL Arbitration Rules or the ICC Rules provide that arbitral awards are final; however, that is what makes arbitration so flexible, the disputants are still free to stipulate to something else other than a final arbitration award.¹⁶⁰ Other requirements such as “arbitral finality” and “notice” should be present even before the one of the disputants attempts to enforce the arbitral award.

IX. Alternative Dispute Resolution Systems Wrap-up

Chapter seven has provided an analysis of the both International Commercial Arbitration and mediation. The domestic laws and treaties that both the United States and Scotland, via the United Kingdom, adhere to, illustrate the commonalties between them for the most part. Mediation is of course is more flexible. Arbitration and international arbitration have a format or designated process that should be adhered to but again is flexible so as to fit the parties’ needs. Utilization of the new Scottish Arbitration Act is also desirable, and can be used for either domestic or International Commercial Arbitration. In this Chapter, the discussion of the process of International

¹⁵⁷ *Id.* (See UNCITRAL ARBITRATION RULES (AS REVISED IN 2010), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (last visited Apr. 2, 2014)).

¹⁵⁸ *Id.* at 227.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

Commercial Arbitration and mediation can assist in education disputants prior to making the choice to utilize ADR systems.

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CHAPTER VIII

CONVERSE AND ANTITHESIS OF SCOTTISH AND AMERICAN

INTERNATIONAL

COMMERCIAL ARBITRATION AND MEDIATION: A BLUEPRINT FOR

EFFECTIVE DISPUTE RESOLUTION

This final chapter briefly summarizes this work and synthesizes the analysis of the United States and Scotland's ADR systems. This chapter dares to discuss the option that perhaps there can be an effective dispute resolution mechanism. The "perfect" resolution mechanism is impossible. Using ADR depends on many factors; however, I believe, that the information contained within this work can definitely assist disputants in selecting and utilizing an effective dispute resolution option.

To resolve conflict without submitting to a traditional court system, there are various types of ADR systems that parties can choose. As discussed in chapter one, the explorations of negotiation, mediation or conciliation, and arbitration have created the foundation ADR systems. Although Scottish ADR practitioners do not include arbitration as part of ADR, Americans and thus this paper does include arbitration as an ADR mechanism and a viable option apart from litigation for parties in international commercial disputes. Once the conflict resolution options are discussed, the parties in an international commercial dispute can make an informed decision as to the right kind of resolution process that fits their needs.

One cannot study Scottish and American ADR systems without covering the culture of the people who shaped those conflict resolution mechanisms and systems. Scotland has been in existence for many centuries and has a rich history. The United States is relatively a young country but has risen to be a world super power in only the last few centuries. Unlike Scotland, the United States started out as a former colony to the British Crown before gaining independence. Although Scotland is now part of the United Kingdom of today, it was not always joined with them. On September 18, 2014, a referendum will be held in Scotland to ask the question should Scotland secede from the United Kingdom. Both the Scottish and American cultures are a part of western world traditions and are quite interesting.

A discussion of the legal history of American and Scotts Laws, chapter three, also helps shape the discussion of international commercial arbitration and mediation. Conceivably, there are more similarities than differences when comparing Scotland and the United States legal systems. Historically, England had a great influence on the United States as well as Scotland. Scotland, of course, had its own unique development apart from England and the United Kingdom. The one critical difference historically is that Scottish lawyers were originally educated in Europe and thus had their roots in Roman law which was not the case in the Colonies and the United States. The United States has clearly learned from and drew upon Common Law principles. The Colonies had multiple locations and needs when their laws were created. The continuing devolution of Scottish Parliament is also perhaps a sign of the times as Scotland marches towards independence themselves like that of the United States. English law could be of some use to the Colonies and it is still influencing the United States even after separation and Independence. Both of these legal histories, to the present day, have been quite fascinating.

Looking back in time at the history and growth of ADR, chapter four, *Lex Mercatoria* or the Law Merchant, are a noteworthy form of ADR. Perhaps the mother of arbitration, *Lex Mercatoria* is an ancient and flexible form of dispute resolution. Historically, merchants who traveled by ship needed to resolve disputes quickly and easily prior to setting sail from a port in which they had just been trading. The Law Merchant grew out of the need to accommodate international traders.¹ The Law Merchant or *Lex Mercatoria* symbolized a form of dispute resolution, that is familiar to merchants, utilizing an impartial arbiter that resolved the matter and the results were recognized by merchants.² The flexible and familiar *Lex Mercatoria* is a dispute resolution process that is still valuable to merchants today.

It is also interesting to note how the laws, concepts, and procedures of *Lex Mercatoria* or the Law Merchant took shape. The *Lex Mercatoria* concepts, laws, and procedures were derived from the rules and business concepts' of multiple nations and have become truly more "International" than any "other branch of the law."³ Scholars indicate that the ancient *Lex Mercatoria* was "not a body of mercantile laws"⁴ but was a conflict resolution mechanism or system utilized by those "who understood the inefficiencies of traditional courts and mutually agreed to avoid those inefficiencies."⁵ Eventually, *Lex Mercatoria* became a body of law and the harmonization of ADR systems. This form of dispute resolution paved the way for special conflict resolution

¹ *Miller supra*, ch. IV, note 7.

² *Lopez supra*, ch. IV, note 11, at 137.

³ *Miller supra*, ch. IV, note 7, at 686.

⁴ *Bellish supra*, ch. IV, note 9, at 556.

⁵ *Id.*

mechanisms in international commercial disputes that both the United States and Scotland utilize.

Chapter four further illustrates that both the United States and Scotland have a rich history of ADR systems. Scotland had codified arbitration laws as early as the 1600's. The Colonies, as well as individual States when the United States was born, had some form of ADR systems or mechanism but it really was the Federal Arbitration Act that brought American laws into modern times. As mentioned, mediation is a type of conflict resolution practice that tends to be more modern in nature in the United States and Scotland. Both arbitration and mediation mechanisms historically have their place in alternative disputant resolution systems.

Mediation and arbitration are ADR mechanisms used in international commercial disputes. On the downside, arbitration has perhaps gotten a bad reputation as a surrogate for litigation; nonetheless, arbitration is still a mechanism of choice. Although Scotland saw a decrease in the use of arbitration, the modern laws favoring arbitration has brought back arbitration into vogue as a viable dispute resolution process.⁶ The use of arbitration in the United States is still met with mixed sentiments, and primarily depends on the choice of law and procedure. Like all types of dispute resolution options, there are pros and cons to any mechanism. However, despite negative commentary, both international commercial arbitration and mediation are here to stay.

The ability to choose a dispute resolution process, the flexibility of that process, as well as the location of resolving that dispute, as discussed in chapter five, is what makes International Commercial Arbitration and Mediation an ideal form of dispute

⁶ Stipanowich *supra*, ch. V, note 10, at 4; and Sturrock *supra*, ch. V, note 11, at 23.

resolution. Avoidance of underdeveloped legal systems or corruption in local courts, while at the same time finding a neutral forum that fits the needs of the parties is sought after in international commercial disputes.⁷ The flexibility and choice to partake in an ADR process versus traditional litigation provides a way to overcome a resolution process. Disputants can structure their own resolution process as long as it retains the important elements of arbitration.⁸ This gravitation of savvy business people towards resolving disputes through International Commercial Arbitration⁹ is a great way to start the ideal ADR mechanism.

ADR systems can save time and money which is a definite benefit to utilizing this form of dispute resolution process compared to litigation. The atmosphere of litigation alone can lead to a delay in resolving a dispute. Sometimes disputes can be resolved through mediation within one day.¹⁰ Since mediation is an informal process, it is a faster and cheaper dispute resolution mechanism.¹¹ Arbitration is also preferred over litigating a dispute since high costs and unnecessary delays permeate court cases.¹² It has also been said that the arbitration dispute resolution mechanism “supplements the traditional [dispute resolution] system, serving as a cost-effective alternative to lengthy delays and high-priced litigation.”¹³ ADR systems can save time and money which is

⁷ Martin & Walker *supra*, ch. V, note 39; and Sussman *supra*, ch. V, note 41.

⁸ HUBER & WESTON *supra*, ch. V, note 56.

⁹ See McLean *supra*, ch. V, note 4; and *Mitsubishi Motors supra*, ch. V, note 18.

¹⁰ CORE SOLUTIONS GROUP *supra*, ch. V, note 62.

¹¹ Wagner, *supra*, ch. V, note 64, at 182.

¹² Stipanowich *supra*, ch. V, note 10, at 4.

¹³ NATIONAL ARBITRATION FORUM *supra*, ch. V, note 66.

a definite benefit to utilizing this form of dispute resolution process compared to litigation.

Through statistical analysis, professional commentary, and scholarly writings, we can see the benefits of ADR systems. Professional commentary, and scholarly writings are invaluable to the statistical analysis since ADR is confidential by nature and thus difficult to obtain arbitration and mediation statistics. In Scotland there were findings that suggest over 50% of the business community frowned upon commercial litigation as a means to resolve a dispute.¹⁴ On the flip side, there are findings in the United States that there is an 85% success rate for disputes, not covering patent issues, which were resolved through mediation.¹⁵ Arbitral statistics paint a similar picture in international commercial arbitration. Some studies have “found that arbitration has the capacity to produce comparable - and at times superior - results to litigation.”¹⁶ Approximately 90% of international contractual relationships have an arbitration clause in their agreement.¹⁷ Further studies show that over 50% of transnational parties prefer International Commercial Arbitration as a dispute resolution mechanism.¹⁸ ADR is a positive form of dispute resolution, and can deliver a better outcome than those traditional forms of dispute resolution such as litigation as witnessed by statistics, professional commentary, and scholarly writings.

Confidentiality is the perhaps the single important reason to choose an ADR mechanism. Both domestic and International Commercial Arbitration and mediation

¹⁴ See Clark & Dawson *supra*, ch. V, note 90.

¹⁵ UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT *supra*, ch. V, note 102.

¹⁶ LaFramboise *supra*, ch. V, note 111, at 1043 - 1044

¹⁷ Stromberg, *supra*, ch. V, note 3, at 1342-1343.

¹⁸ LAGERBERG & MISTELIS *supra*, ch. V, note 122.

are confidential in nature. Treaties and national laws have placed a high importance in confidential dispute resolution proceedings and have set ADR mechanism apart from traditional litigation. Parties in an international commercial dispute appreciate the advantages confidentiality provides. Furthermore, confidential proceedings are the norm rather than the exception in International Commercial Arbitration and Mediation. The use of confidentiality and its perception in ADR systems is so important, a whole chapter, chapter six, was dedicated to this topic.

Of course, confidentiality has long been heralded as one of the advantages of ADR thus making it an appealing conflict resolution process over litigation. It has been said that the use of confidentiality in international commercial arbitration, or mediation for that matter, is an “underappreciated procedural advantage.”¹⁹ Confidentiality in arbitration is also seen as a boon to domestic and international commercial arbitration. International commercial arbitration is “widely viewed that confidentiality is one of the advantageous and helpful features of arbitration.”²⁰ Insuring that the arbitration and mediation process is confidential sets these mechanisms apart from traditional court processes.

Confidentiality is quite useful in the mediation process. Advocates of mediation in Scotland and the United States believe that confidentiality is the key to a successful, mediated, resolution.²¹ Furthermore, confidential mediations give the parties the freedom to communicate “without fear of compromising their case before the courts.”²²

¹⁹ Rutledge *supra*, ch. VI, note 91, at 60.

²⁰ Caivano *supra*, ch. VI, note 92.

²¹ BRAND ET AL *supra*, ch. VI, note 27.

²² BURNLEY & LASCELLES *supra*, ch. VI, note 37.

A confidential mediation allows parties to communicate so as to create both an informal and candid environment.²³ These informal and candid communications assist the parties in resolving their disputes and an outcome that fits their needs.²⁴ Moreover, mediation's confidentiality element is quite attractive to those who hope to maintain or even grow a business relationship.²⁵ To sum up, confidentiality is important to mediated disputes in international commercial disputes.

An ancillary benefit to enacting confidential mediation laws is the increased use of mediation. The clarification of confidentiality, and the limitation of admissible evidence derived from mediation legitimizes the use of mediation in ADR systems.²⁶ Furthermore, this clarification in Scotland ensures that Scotland can comply with the requirements of the 2008 *European Directive on Cross Border Mediation*.²⁷ Keeping mediation communications confidential has perceivable benefits within Scotland and the United States.

Of course, there are some exceptions to confidentiality in mediation. The right to confidentiality in the United Kingdom is an extension of their "without prejudice" rule which is limited to the parties²⁸ because the courts in the United Kingdom may still require or even compel the mediator to cease the confidentiality of the mediation and disclose what was communicated privately.²⁹ The United States has contemplated

²³ BRAND ET AL *supra*, ch. VI, note 27.

²⁴ *See Id.*; and BURNLEY & LASCELLES *supra*, ch. VI, note 37.

²⁵ Hogan *supra*, ch. VI, note 4, at 247.

²⁶ Irvine *supra*, ch. VI, note 44, at 85, 91-92.

²⁷ *Id.*

²⁸ BURNLEY & LASCELLES *supra*, ch. VI, note 37.

²⁹ Hogan *supra*, ch. VI, note 4, at 247.

similar exceptions; confidentiality was a balancing act, will the testimony of a mediator outweigh the public interest in maintaining the perceived and actual impartiality of the mediator.³⁰ The United States state laws have similar confidentiality exceptions to the United Kingdom's regulations, but with mixed results.

As stated herein, confidentiality and International Commercial Arbitration arguably go hand-in-hand. UNCITRAL commentary clearly illustrates that confidentiality is commonly viewed as “advantageous and helpful... [feature] of arbitration.”³¹ Confidentiality is an integral part of various institutional arbitral rules despite “[f]ew jurisdictions [that] statutorily provide for confidentiality in arbitration.”³² The confidential nature of the process is a dynamic part of International Commercial Arbitration.

Although a vital member of the United Kingdom, it is fascinating to compare the different takes on confidentiality in both Scotland's and England's Arbitration Acts. English legislation did not define certain aspects of confidentiality in their Arbitration Act so as to allow for the courts to decide whether confidentiality will be circumvented.³³ English legislatures believed that there was no satisfactory way to craft language and incorporate exceptions to the confidentiality requirement into the English Arbitration Act.³⁴ Although, Scottish laws were uncertain about the use of confidentiality in arbitration prior to 2010, there still was a general assumption that

³⁰ *California NLRB v Macaluso*, 618 F. 2d 51 (9th Cir. 1980).

³¹ Caivano *supra*, ch. VI, note 92.

³² Fesler *supra*, ch. VI, note 13 at 48.

³³ *Id.*, at 50 – 51.

³⁴ *Id.*

arbitral proceedings were confidential.³⁵ The language in the new ASA sets out clear confidentiality requirements; “confidentiality” is the default rather than the exception to the arbitral process.³⁶ The new ASA clearly provides contingency plans for such issues when parties go to court or if they are unclear how confidentiality pertains to them.³⁷ Both Scotland and England address confidentiality differently in their Arbitration Acts.

Unlike litigation, ADR is a voluntary process. Whether it is domestic or an international commercial dispute, parties must mutually agree to submit their dispute to arbitration³⁸ or mediation. Mediation is a “voluntary and without prejudice”³⁹ dispute resolution mechanism. The AAA point out that mediation process is just a “voluntary, confidential extension of the negotiation process.”⁴⁰ A delightful side effect of voluntarily participating in mediation is that this could also preserve the parties’ business relationship.⁴¹ ADR systems are voluntary in nature; a disputant cannot be forced to partake of these types of dispute resolution processes.

The Scottish Arbitration Act of 2010 embodies not only innovation but clarification as well and was one of the motivating factors in writing this paper. The applicability of confidentiality in arbitral processes was one of the improvements of

³⁵ Dundas *supra*, ch. IV, note 135, at 7.

³⁶ See Dingwall *supra*, ch. IV, note 112.

³⁷ See SCOTTISH PARLIAMENT INFORMATION CENTRE (SPICE) BRIEFINGS *supra*, ch. VI, note 149; and Fesler *supra*, ch. VI, note 13.

³⁸ PLAPINGER AND STIENSTRA, *supra*, ch VII, note 4, at 4.

³⁹ Clark *supra*, ch VII, note 7, at 171.

⁴⁰ AMERICAN ARBITRATION ASSOCIATION *supra*, ch. I, note 44.

⁴¹ *Id.*

Scotland's new law which just added to the growing body of global arbitral laws.⁴² Scottish legislators hoped to limit court involvement through the new ASA which is quite innovative.⁴³ Furthermore, the ASA allows the Scottish Ministers to amend that Act so as to comply with future treaties and thus keep these arbitral laws fresh and up-to-date.⁴⁴ The utilization of this innovated Arbitration Act is desirable, and can be used for either domestic or International Commercial Arbitration.

The blue print for an international commercial dispute would utilize several concepts that this paper covers. Ideally, the dispute mechanism of choice would be binding International Commercial Arbitration. Then the arbitrator, or panel of arbitrators, can utilize mediation techniques to assist the parties in a resolution that fit their needs. So as not to compromise the impartiality of the arbitrator or panel, these mediation techniques, or quasi-mediation process, would differ from traditional mediation in that caucuses as used in mediation would not be present in this form of ADR. All parties would need to be in the presence of the arbitrator or panel of arbitrators. The arbitration would be conducted as any international commercial arbitration would be conducted; the presentation of evidence, witnesses, and the like would all be a part of this International Commercial Arbitration process. International Commercial Arbitration is flexible so that the arbitrator or panel can utilize the concepts or techniques or both arbitration and mediation to resolve the dispute. Depending on the procedural requirements of the arbitrator or panel, a well thought out award can still be had by the parties and then those resolutions that were previously agreed upon can

⁴² Mather *supra*, ch. VI, note 89.

⁴³ Arbitration (Scotland) Act 2010, *supra*, ch. VI, note 17.

⁴⁴ *Id.*

also be included in the final award. Thus, the ideal dispute resolution format would be to conduct an international commercial arbitration that contained some of the characteristics of mediation.

The goal of this dissertation was to meticulously explore the past and present ADR systems in Scotland and the United States, comments on the future of Scottish and American ADR as well as the impact this has on International Commercial Arbitration and Mediation. I hope that through this dissertation, readers can embrace the Scottish and American ADR systems and utilize these mechanism and techniques in international commercial disputes. Mediation is the most flexible of the ADR systems whereas arbitration or international commercial arbitration is more flexible than litigation in the dispute resolution continuum. Furthermore, both domestic laws of the United States and Scotland illustrate a commonalty when it comes to ADR. The most important thing to keep in mind is that both International Commercial Arbitration and Mediation will fit the parties' needs to resolve their dispute. As I have suggested in the paper, with Scotland's growing body of international ADR laws, Scotland as a location should not be overlooked as a neutral forum for either International Commercial Arbitration or Mediation in today's ever shrinking commercial world. It is my sincere wish that this paper has given the reader a keener understanding of Scottish and American ADR systems and its impact on International Commercial Arbitration and Mediation.

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BIBLIOGRAPHY

- 13 Originals Chronology*, THE TIME PAGE,
<http://www.timepage.org/spl/13timeline.html> (last visited October 1, 2011).
- About Holyrood*, THE SCOTTISH PARLIAMENT,
<http://www.scottish.parliament.uk/vli/holyrood/> (last visited April 22, 2009).
- About Parliament, How Parliament works, Making laws, Acts*, PARLIAMENT UK,
<http://www.parliament.uk/about/how/laws/acts/> (last visited April 2, 2009).
- About the American Folklife Center*, AMERICAN FOLKLIFE CENTER,
<http://www.loc.gov/folklife/aboutafc.html> (last visited on January 31, 2012).
- About the Faculty of Advocates*, THE FACULTY OF ADVOCATES,
www.advocates.org.uk/ (last visited May 1, 2013).
- About Us, History*, PERMANENT COURT OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=363 (last visited April 4, 2012).
- Adam B. Weissburg, Reviewing *The Law On Joint Ventures With An Eye Toward The Future*, 63 S. CAL. L. REV. 487 (1990).
- Advantages of Arbitration*, SAC,
<http://www.scottisharbitrationcentre.org/index.php/arbitration/advantages-of-arbitration> (last visited September 23, 2011).
- Agreement on Trade-Related Aspects of Intellectual Property Rights, U.S.-U.K., April 15, 1994, 1869 UNTS 299; 33 ILM 1197 (1994).
- Allen B. Green & William T. O'Brien, *International Arbitration and Multi-National Litigation of Commercial Dispute*, McKenna Long & Aldridge LLP (2007).
- AMERICAN ARBITRATION ASSOCIATION, <https://www.adr.org/> (last visited May 1, 2013).
- AMERICAN ARBITRATION ASSOCIATION COMMERCIAL ARBITRATION RULES, AMERICAN ARBITRATION ASSOCIATION <http://www.adr.org/sp.asp?id=22440#R7> (last visited September 12, 2011).
- AMERICAN ARBITRATION ASSOCIATION, A GUIDE TO AAA DISASTER RECOVERY CLAIMS MEDIATION PROCEDURES (2011) *available at* http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004315.
- AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, A PRACTICAL GUIDE (2013) *available at*

https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540 (last visited April 3, 2014).

AMERICAN ARBITRATION ASSOCIATION, EMPLOYMENT MEDIATION,
https://www.adr.org/aaa/faces/aoe/lee/employment/employmentmediation?_afLoop=3041745083400905&_afWindowMode=0&_afWindowId=u8q73y4bd_213#%40%3F_afWindowId%3Du8q73y4bd_213%26_afLoop%3D3041745083400905%26_afWindowMode%3D0%26_adf.ctrl-state%3Du8q73y4bd_258 (last visited Mar. 29, 2014).

American Culture, AMERICAN FAMILY TRADITIONS,
http://www.americanfamilytraditions.com/american_culture.htm (last visited January 31, 2012).

American Culture, Introduction, LIFE IN THE USA,
<http://www.lifeintheusa.com/culture/index.html> (last visited January 31, 2012).

Andrew Ross, *Expert witness immunity: a comparative study*, 79 Arb. 62 (2013).

Arbitration Act 1996, c. 23, § 1 (Eng.), available at Arbitration Act 1996, LEGISLATION.GOV.UK http://www.opsi.gov.uk/acts/acts1996/ukpga_19960023_en_1 (last visited March 30, 2010).

Arbitration (Scotland) Act 2010 (A.S.P. 1).

Arbitration in Scotland, International Law Office, (December 07 2000),
<http://www.internationallawoffice.com/Newsletters/Detail.aspx?r=2746> (last visited September 20, 2012).

Arbitration, Scottish Parliament Information Centre (SPICe) Briefings (February 27, 2009) available at [www.scottish.parliament.uk/Research/briefings and fact sheets/SB09-14.pdf](http://www.scottish.parliament.uk/Research/briefings%20and%20fact%20sheets/SB09-14.pdf) (last visited March 17, 2014).

Arbitral Institutions' Statistics for 2012, Practical Law (May 15, 2013).

Ari Davis, *Moving From Mandatory: Making ADR Voluntary In New York Commercial Division Cases*, 8 Cardozo J. Conflict Resol. 283 (2006).

ARTHUR J. GEMMELL, WESTERN AND CHINESE ARBITRATION THE ARBITRAL CHAIN (University press of America, Inc. 2008).

BALLENTINE'S LAW DICTIONARY (3rd ed. 2010) available at Lexis.com BTINES.

Benesch v. Green, 2009 WL 4885215 (N.D. Cal. 2009), and Cassel v. Superior Court, 51 Cal. 4th 113 (2011).

Benjamin F. Tennille, Lee Applebaum, & Anne Tucker Nees, *Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases*, 11 Pepp. Disp. Resol. L.J. 35, 62 (2010).

Brent Emory Johnson, *Common Law, Equity, And Admiralty*, IN PURSUIT OF HAPPINESS (January 29, 2007), <http://inpursuitofhappiness.wordpress.com/2007/01/29/common-law-equity-and-admiralty/> (last visited October 16, 2011).

BRYAN CLARK, *SCOTTISH LEGAL SYSTEM ESSENTIALS* (Dundee University Press, 2nd ed. 2009).

Bryan Clark, *Mediation and Scottish Lawyers: Past, Present and Future*, 13 EDIN. L.R. 252 (2009).

Bryan Clark & C. Dawson, *ADR and Scottish Commercial Litigators: A Study of Attitudes and Experience*, 26 C.J.Q. 228 (2007).

Cal Evid Code § 1115 - § 1128 (2013), and (2009).

Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005).

California NLRB v Macaluso, 618 F. 2d 51 (9th Cir. 1980).

Cassel v. Superior Court, 51 Cal. 4th 113 (2011).

Cathy Cronin-Harris, *Why take ADR Courses In Law School*, 1 (2008), available at http://meetings.abanet.org/webupload/commupload/DR017500/sitesofinterest_files/Why_Take_ADR_Courses_In_Law_School_by_Cronin_Harris.pdf. (last visited April 12, 2014).

Charlie Irvine, *Chairing the Network – Some Passing Thoughts*, Scottish Mediation Network (January 3, 2013), <http://www.scottishmediation.org.uk/uncategorized/chairing-the-network-%e2%80%93-some-passing-thoughts-charlie-irvine>.

Charlie Irvine, *Mediation confidentiality: limitations and a proposal*, Kluwer Mediation Blog (Sep. 12, 2012), <http://kluwermediationblog.com/2012/09/12/mediation-confidentiality-limitations-and-a-proposal/> (last visited November 1, 2013).

Charlie Irvine, *The sound Of One Hand Clapping: The Gill Review's Faint Praise For Mediation*, Edin. L.R. 2010, 14(1), 85 (2012).

Charles B. Craver, “*Value Claiming*,” *Effective Legal Negotiation and Settlement* § 7.01 (Matthew Bender & Company, Inc. 2001).

Cheri M.Ganeles, *Cybermediation: A New Twist On An Old Concept*, 12 ALB. L.J. SCI. & TECH. 715 (2002).

Christian N. Okeke, *Conference Report: The New Direction of Cotemporary International Law*, in *The 20th Annual Fulbright Symposium on International Law In A Time of Change* (Golden Gate University School of Law 2010).

Christopher R. Drahozal, *Contracting out of National Law: an Empirical Look at the New Law Merchant*, 70 *Notre Dame L. Rev.* 523 (2005).

Chul-Gyoo Park, *A Comparative Analysis of Arbitral Institutions and Their Achievements in the United States and Korea*, 15 *Am. Rev. Int'l Arb.* 475, 480 (2004).

Circuit Mediation Office Statistics 2012 Calendar Year (January 1, 2012 through December 31, 2012), United States Court of Appeals for the Federal Circuit (2012) available at http://www.cafc.uscourts.gov/images/stories/the-court/statistics/mediationstats_Year_2012.pdf.

CPR Model Clauses and Sample Language, The Int'l Inst. for Conflict Prevention and Resol., <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/635/CPR-Model-Clauses-and-Sample-Language.aspx> (last visited March 17, 2013).

Crofters Holdings Act, 1886, 1 (Scot.). (The original text of the Crofters Holdings Act, 1886 (Scot.) can be found at <http://www.legislation.gov.uk/ukpga/Vict/49-50/29/contents> (last visited October 16, 2011)).

Constitution of the United States, UNITED STATES SENATE, http://www.senate.gov/civics/constitution_item/constitution.htm (last visited November 1, 2011).

Culture, History and Tradition, Scotland.org, <http://www.scotland.org/culture/history-and-tradition/scottish-traditions/> (last visited January 31, 2012).

Daniel G. Brown, *Divorce and Family Mediation: History, Review, Future Directions*, 20 *Fam. Ct. Rev.* 2 (1982).

Daniel Mallia, *When Was The Internet Invented?*, HNN GEORGE MASON UNIVERSITY (2011), <http://hnn.us/article/142824#sthash.zQTT4r1F.dpuf> (last visited Oct. 17, 2013).

David J. McLean, *Toward a New International Dispute Resolution Paradigm: Assessing The Congruent Evolution Of Globalization And International Arbitration*, 30 *U. Pa. J. Int'l L.* 1087 (2009).

David W. Rivkin, *21st Century Arbitration Worthy Of Its Name*, in *Law of International and Business Dispute Resolution in the 21st Century* (Robert Briner et al. eds., 2001) available at http://www.law.yale.edu/documents/pdf/21st_Century_Arbitration_Worthy_of_Its_Name.pdf (last visited October 17, 2013).

DEREK MANSON-SMITH, *THE LEGAL SYSTEM OF SCOTLAND* (Consumer Focus Scotland, 4th ed. 2008).

Directive 2008/52, of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, 2008/52/EC, 2008 O.J. (L 136) 3 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>

Donald R. Philbin, Jr., *Symposium, Commercial Law Developments And Doctrine: Part I. Developments In The Field: Litigators Needed To Advise Transaction Lawyers On Litigation Prenups* 56 *The Advocate* 36 (2011).

Dr. Lur. Oliver Dillenz, *Drafting International Commercial Arbitration Clauses*, 21 *SUFFOLK TRANSNAT'L L. REV.* 221, 250 (1998).

Drew B. LaFramboise, *Note: Arbitrating the Great Writ: Resolving Federal Habeas Corpus Disputes Through Arbitration*, 25 *OHIO ST. J. ON DISP. RESOL.* 1023 (2010).
Douglas Lind, *On the Theory and Practice of Mediation: The Contribution of Seventeenth-Century Jurisprudence*, 10 *MEDIATION Q.* 119 (1992).

Douglas Shontz, Fred Kipperman, & Vanessa Soma, Rand Institute For Civil Justice, *Business to Business Arbitration in the United States Perceptions of Corporate Counsel* 8 (2011) available at http://www.rand.org/pubs/technical_reports/TR781.html.

Edna Sussman, *Comments to the Consumer Financial Protection Bureau in connection with its review of Arbitration for Consumer Financial Products or Services*, 12 *Cardozo J. Conflict Resol.* 491 (2011).

ECONOMICEXPERT.COM, <http://www.economicexpert.com/a/Irish:Home:Rule.htm> (last visited April 22, 2009).

EDNA SUSSMAN, *THE FINAL STEP: ISSUES IN ENFORCING THE MEDIATION SETTLEMENT AGREEMENT*, PUBLICATION FORTHCOMING IN *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION*, (Arthur W. Rovine ed., Martinus Nijhoff Publishers, The Fordham Papers 2008).

Edna Sussman & John Wilkinson, *Benefits Of Arbitration for Commercial Disputes* 4 (The Arbitration Committee of the ABA Section of Dispute Resolution Brochure Draft 2012).

Education Scotland

<http://www.educationscotland.gov.uk/scotlandshistory/jacobitesenlightenmentclearances/clearances/index.asp> (last visited March 16, 2014).

Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 *OHIO ST. J. ON DISP. RESOL.* 35 (2003).

Elizabeth Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts a Sourcebook for Judges and Lawyers* 4 (1996). See 27 U.S.C. §§ 651–657.

Emma Lazarus, *THE NEW COLOSSUS* (1883).

Emily Kadens, *Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law*, 5 Chi. J. Int'l L. 39 (2004).

ENCYCLOPEDIA BRITANNICA,

<http://www.britannica.com/EBchecked/topic/155042/devolution> (last visited April 12, 2014).

Energy Arbitration Cases And Statistics, American Arbitration Association, (2012), http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004205 (last visited July 29, 2013).

Enforcement of Judgments, TRAVEL.STATE.GOV,

<http://travel.state.gov/content/travel/english/legal-considerations/judicial/enforcement-of-judgments.html> (last visited April 2, 2014).

Eric E. Bergsten, International Commercial Arbitration, in *Dispute Settlement in International Trade, Investment and Intellectual Property*, at 15 (UNCTAD Course on Dispute Settlement in International Trade, Investment and Intellectual Property UNCTAD/EDM/Misc.232/Add.38 2005). Available at http://unctad.org/en/Docs/edmmisc232add38_en.pdf (Last visited October 21, 2013).

Erin Johnston, *A Short History of Mediation*, (March 29th, 2009)

<http://cfrmediation.com/a-short-history-of-mediation/> (last visited May 17, 2012).

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

Evan R Seamone, M.P.P., *Bringing a Smile to Mediation's Two Faces: How Aspiring Mediators Might Jump-Start Careers Immediately Following Law School*, University of Iowa College of Law,

<http://www.uiowa.edu/~cyberlaw/elp00/Evan/mediation/origin.html> (last visited May 7, 2012).

FAQs about CR, ASSOCIATION FOR CONFLICT RESOLUTION

<http://www.acrnet.org/Page.aspx?id=402&terms=grew+out+of+the+belief+that+there> (last visited April 12, 2014).

Farm Assist Limited (in liquidation) v The Secretary of State for Environment, Food and Rural Affairs (*No. 2*) 2009 EWHC 1102 (TC).

Federal Arbitration Act, 9 U.S.C. §§ 1 – 307 (1925).

GARY BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS (Aspen Publishing, 2010).

Gerry Lagerberg & Loukas Mistelis, *International Arbitration Survey 2013: Corporate Choices in International Arbitration Industry Perspectives* (Price Waterhouse Cooper 2013).

Gilles Cuniberti, *Beyond Contract – The Case for the Default Arbitration In International Commercial Disputes*, 32 Fordham Int'l L.J. 417 (2009).
GRAY CONSTRUCTION LIMITED V. HARLEY HADDOW LLP [2012] CSOH 9.

Guidance Devolution of powers to Scotland, Wales and Northern Ireland, GOV.UK,
<https://www.gov.uk/devolution-of-powers-to-scotland-wales-and-northern-ireland> (last visited April 2, 2014).

Guidance Notes, THE MINISTRY OF JUSTICE,
<http://www.justice.gov.uk/guidance/devolutionguidancenotes.htm> (last visited April 22, 2009).

Harold Baer, Jr., *History, Process, and a Role for Judges in Mediation their Own Cases*, 58 N.Y.U. Ann. Surv. Am. L. 131, 131 (2001).

Hector MacQueen, *Expectations of the law in 12th and 13th century Scotland*, vol lxx (3-4) Tijdschrift voor Rechtsgeschiedenis, 279 (2002).

Hector MacQueen, *Laws and Languages: Some Historical Notes from Scotland*, 6.2 ELECTRONIC JOURNAL OF COMPARATIVE LAW (July 2002),
<http://law.kub.nl/ejcl/62/art62-2.html> (last visited September 1, 2012).

Henry Mather, Choice of Law for International Sales Issues Not Resolved by the CISG, 20 J.L. & COM. 155 (2001).

Hew R Dundas, *A Great Leap Forward*, THE MARITIME ADVOCATE,
http://www.maritimeadvocate.com/arbitration/a_great_leap_forward.htm (last visited April 4, 2012).

Hew Dundas, The Arbitration (Scotland) Act 2010: Converting Vision into Reality, 76 Arbitration 1 (2010).

History of Glencoe, GLENCOE SCOTLAND,

<http://www.glencoescotland.com/p/v/history> (last visited February 29, 2012).

History of Mediation Definition and History of Mediation, Mediation Matters (2011)
<http://www.mediationmatterssd.com/mediationmatters/history.html> (last visited May 17, 2012).

House of Commons Information Office, Scottish and Welsh Business, (Factsheet P8 Procedure Series [Factsheet P8] 2007) (U.K.) available at
<http://www.parliament.uk/documents/upload/P08.pdf>.

How the Scottish Parliament Works, THE SCOTTISH PARLIAMENT, at 4,

<http://www.scottish.parliament.uk/vli/publicInfo/hspw/documents/HTSPW-Eng.pdf>
(last visited April 22, 2009).

How to Find Us, THE SCOTTISH PARLIAMENT,

<http://www.scottish.parliament.uk/index.aspx> (last visited March 12, 2014).

Hong-lin Yu, *A Theoretical Overview of the Foundations of International Commercial Arbitration*, 1(2) CONTEMP. ASIA ARB. J. 255 (2008).

H.R. REP. NO. 68-96 (1924).

ICC, *Commission Report Controlling Time and Costs in Arbitration* (2012).
ICDR Statistics, The ICDR International Arbitration Reporter (American Arbitration Association), vol. 3 July 2012.

Ignacio Gomez-Palacio, *International Commercial Arbitration: Two Cultures in a State of Courtship and Potential Marriage of Convenience*, 20 Am. Rev. Int'l Arb. 235 (Garrett Epps trans., 2009).

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION,
www.internationalarbitrationlaw.com/arbitral-institutions/icdr/ (last visited May 1, 2013).

International Chamber of Commerce, Statistics (2012),
<http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/> (last visited September 14, 2013).

INTERNATIONAL LAW OFFICE, www.internationallawoffice.com/ (last visited August 7, 2013).

Interview with Alex Cunningham, Scottish Solicitor, Glasgow, Scotland (June 2011).

Interview with Hew Dundas, Scottish Solicitor, FCI Arb, DipIC Arb, CEDR, Accredited Mediator, Edinburgh, Scotland (June 2011).

Interview with Justice Harry Low, Mediator and Arbitrator, Judicial Arbitration and Mediation Services, San Francisco, California (June 25, 2012).

James C. Melamed, *Select Observations, A Brief History of Mediation*,
Mediate.com/Integrating, Presentation Center James C. Melamed,
<http://www.mediate.com/integrating/pg69.cfm> (last visited May 17, 2012).

JAMES CAMPBELL IRONS, ROBERT DUNDONALD MELVILLE, TREATISE ON THE LAW OF ARBITRATION IN SCOTLAND: WITH AN APPENDIX OF FORMS AND EXPERTS FROM STATUTES RELATING TO ARBITRATION (1903).

James Harrison, *The Manual on International Courts and Tribunals*, 15(2) EDIN. L.R. 340, 342 - 343 (Mackenzie et al. eds., 2011).

Jamestown: First English Colony in America, SOCIAL STUDIES FOR KIDS,
<http://www.socialstudiesforkids.com/articles/ushistory/jamestown.htm> (last visited October 1, 2011).

Jean-François Poudret & Sébastien Besson, *Comparative Law of International ARBITRATION* (2nd ed, Sweet & Maxwell 2007).

Jean-Louis Lascoux, *History of Mediation*, WIKIMEDIATION,

http://en.wikimediawiki.org/index.php?title=History_of_mediation (last visited May 17, 2012).

Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 Tul. L. Rev. 1377 (1990-1991).

Jeremy Wilson and William Lowery, CMS, CMS Guide to Arbitration, Vol I, Chapter 19: Arbitration in New York 522 (Torsten Loercher et al., Torsten Loercher 2012) available at http://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_NEW%20YORK.pdf (last visited April 2, 2014).

Jerome T. Barrett and Joseph P. Barrett, *A History of ADR – the Story of Political, Cultural, and Social Movement* (2004).

Jeswald W. Salacuse & Henry J. Braker, *Mediation in International Business*, in *STUDIES IN INTERNATIONAL MEDIATION* 213, 213 -227 (Palgrave Macmillan 2002).

Jim Mather, *Arbitration Reform – An Opportunity for Scotland*, THE RESOLVER, February 9, 2010.

Joanna Dingwall, *International Arbitration in Scotland: A Bold, New Future*, 13 Int. A.L.R. 4, 138 (2010).

John Miles, *Some Procedural Challenges in Running an ICC Arbitration in Africa*, 15 IBA Arb. & ADR News 2 (2011).

John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 Disp. Resol. J. 1 (2003).

John Sturrock, *Civil and Commercial Mediation – a Scottish Perspective*, Int'l B. Ass'n Legal Prac. Div. Mediation Newsl. October 2009.

John W. Cairns, *Attitudes to Codification and the Scottish Science of Legislation, 1600-1830*, 22 Tul. Eur. & Civ. L.F. 1 (2007).

John Sturrock, *Reflections on Commercial Mediation in Scotland*, 73 Arbitration 1 (2007).

Judith S. Kaye, *Junctures: In Life And In Law*, 20 Am. Rev. Int'l Arb. 1, 1(2009).

Jonathan I. Charney, *Chapter 1 Question of Theory: Article: Third Party Dispute Settlement and International Law*, 36 COLUM. J. TRANSNAT'L L. 65, 89 (1997)

JOHN REYNOLDS & ALISON NEWSTEAD, GETTING THE DEAL THROUGH – ENFORCEMENT OF FOREIGN JUDGMENTS 2013, UNITED KINGDOM (Mark Moedritzer and Kay C Whittaker, Shook, Hardy & Bacon International LLP, 2012) available at <http://www.shb.com/attorneys/ReynoldsJohn/EnforcementofForeignJudgments2013.pdf> (last visited April 3, 2014).

Jonathan Bellish, *Towards a More Realistic Vision of Corporate Social Responsibility Through the Lens of the Lex Mercatoria*, 40 Denv. J. Int'l L. & Pol'y 548 (2012).

Joshua D. Rosenberg, *In Defense of Mediation*, 30 Fam. & Conciliation Cts. Rev. 4 (1992).

Katie Bradford, *Launch of the Commercial Mediation Group: Promoting the Interest of Users*, Kluwer Mediation Blog (April 17, 2012), <http://kluwermediationblog.com/2012/04/17/launch-of-the-commercial-mediation-group-promoting-the-interest-of-users/> (last visited November 1, 2013).

Kemp, Kenny, *The Sue Nation*, Herald Scotland, May 30, 2009.

Kevin M. Lemley, *I'll Make Him an Offer He Can't Refuse: A Proposed Model for ADR in Intellectual Property Disputes*, 37 Akron L. Rev. 287 (2004).

LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (Touchstone, 3rd ed. 2005).

LAW SOCIETY GAZETTE, Vol. 96 No. 21 (1999).

LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* (1983).

Leon E. Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 UNIV. OF TORONTO L.J. 265 (2003).

Leon E. Trakman, *"Legal Traditions" and International Commercial Arbitration*, 17 AM. REV. INT'L ARB. 1 (2006).

Leon E. Trakman, *The Twenty-First-Century Law Merchant*, 48 AM. BUS. L.J. 775 (2011).

London Court of International Arbitration, *Arbitration Rules*, Art. 30, available at http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article30 (last visited November 12, 2013).

Loukas Mistelis, *International Arbitration – Corporate Attitudes And Practices – 12 Perceptions Tested: Myths, Data And Analysis Research Report*, 15 Am. Rev. Int'l Arb. 525, 584 (2004).

MACLEAN.ORG, <http://www.macleans.org/clan-macleans-history/macleans-clearances-2.php> (last visited October 16, 2011).

Madge S. Thorsen, *The Whole Enchilada: Cultural Differences in International Arbitration*, MSBA ADR Sec. 1 (2007).

Major Sherry R., *ADR--An Introduction for Legal Assistance Attorneys*, 2000 ARMY LAW 8 (2000).

MARK A BRAND, CATHY J DEAN, & RODNEY L LEWIS, *MEDIATION 2013*, UNITED STATES (2013).

MARTIN F. GUSY, JAMES M. HOSKING, & FRANZ T. SCHWARZ, *A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES* (Oxford University

Mark Rosenfelder, *The Metaverse*, Zompist.com, <http://www.zompist.com/amercult.html> (last visited January 31, 2012).

Miryana Nestic Hammonds, *International Trade Disputes and the WTO Regime: What Happened to the Mediation Option?*, International Institute for Conflict Prevention & Resolution (2005). Available at: <http://www.cpradr.org/Portals/0/Across%20Borders/International%20Trade%20Disputes%20%E2%80%93%20The%20WTO>

Marianne Roth & Tobias Brinkmann, *New Arbitral Legislation: English Arbitration Act 1996: The English Arbitration Act 1996 -- A Comparative Assessment*, 5 *Croat. Arbit. Yearb.* 49, 53 (1998).

MEDIATION, AMERICAN ARBITRATION ASSOCIATION, <http://www.aaamediation.com/> (last visited March 29, 2010).

Mediation trends see the graph "here" link for CORE Mediation Trends, CORE SOLUTIONS GROUP (2010), <http://www.core-solutions.com/view/article/69> (last visited October 1, 2013).

Mediation, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, <http://www.cafc.uscourts.gov/mediation/mediation.html> (last visited July 20, 2013).

Michael Avramidis, *Comparative Arbitration: A Look at the Scottish and English Systems* (2010).

Michael Burgess, *Constitutional Change in the United Kingdom: New Model or Mere Respray?*, 40 *S. Tex. L. Rev.* 715 (1999).

Michael B. Lopez, *Resurrecting The Public Good: Amending The Validity Exception In United Nations Convention On Contracts For The International Sale Of Goods For The 21st Century*, 10 *J. Bus. & Sec. L.* 13 (2010).

Michael Fesler, *The Extent Of Confidentiality In International Commercial Arbitration*, 78(1) *Arb.* 48 (2012).

Michele Zamboni, *Confidentiality In Mediation*, 6(5) *Int. A.L.R.* 175, 175 (2003).

Miller v. Miller, 296 S.W.2d 684, 65 A.L.R.2d 589, 686 (Ky. 1956).

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444, 1985 U.S. LEXIS 129, 53 U.S.L.W. 5069, 1985-2 Trade Cas. (CCH) P66,669 (U.S. 1985).

Mori Irvine, *Serving Two Masters: The Obligation Under The Rules of Professional Conduct To Report Attorney Misconduct In A Confidential Mediation*, 26 Rutgers L. J. 155 (1994).

NATIONAL ARBITRATION FORUM, BUSINESS-TO-BUSINESS MEDIATION/ARBITRATION VS. LITIGATION (2005), available at <http://www.adrforum.com/users/naf/resources/GeneralCommercialWP.pdf>.

Neal M. Eiseman, John E. Bulman, & R. Thomas Dunn, *A Tale Of Two Lawyers: How Arbitrations And Advocates Can Avoid The Dangerous Convergence Of Arbitration And Litigation*, 14 Cardozo J. Conflict Resol. 683 (2013).

NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/United_Kingdom, (last visited April 12, 2014).

Neil Payne, *The Middle East - Potential Culture Clash, Part Three*, KWINTESSENTIAL, <http://www.kwintessential.co.uk/cultural-services/articles/culture-clash.html> (last visited January 31, 2012).

NEW YORK ARBITRATION CONVENTION, <http://www.newyorkconvention.org/>, (last visited April 16, 2010).

New York Convention Countries, NEW YORK ARBITRATION CONVENTION, <http://www.newyorkconvention.org/new-york-convention-countries/contracting-states>, (last visited April 16, 2010).

Nima H. Mohebbi, *Back Door Arbitration: Why Allowing Nonsignatories to Unfairly Utilize Arbitration Clauses May Violate The Seventh Amendment*, 12 U. Pa. J. Bus. L. 560, 560 (2010).

North Atlantic Coast Fisheries, THE HAGUE JUSTICE PORTAL, <http://www.haguejusticeportal.net/index.php?id=6131> (last visited May 4, 2012).

Noussia, Kyriaki, *Confidentiality in International Commercial Arbitration, A Comparative Analysis of the Position under English, US, German and French Law* (2010).

Oscar Schachter, *The Enforcement Of International Judicial And Arbitral Decisions*, 54 Am. J. Int'l L. 1 (Jan., 1960).

Owen V. Gray, *Protecting the Confidentiality of Communications in Mediation*, 36.4 OSGOODE HALL LAW J. 637 (1998).

Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039 (1998).

Peter T. Leeson & Daniel J. Smith, *The Law Merchant and International Trade*, 61 Freeman 4 (2011) available at <http://www.thefreemanonline.org/features/the-law->

merchant-and-international-trade/ (last visited October 12, 2012).

Peter B. Rutledge, *Convergence and Divergence in International Dispute Resolution*, 2012 J. Disp. Resol. 49 (2012).

Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against The Arbitration Fairness Act* 9 CARDOZO J. CONFLICT RESOL. 267 (2008).

P.F. SMITH, S.H. BAILEY & MICHAEL J. GUNN, SMITH AND BAILEY ON THE MODERN ENGLISH LEGAL SYSTEM (3rd ed. 1996).

Per Bingham MR, in *Re D [Minors]* [1993] 2 All ER 693

Plenary, 18 Nov 2009, Arbitration (Scotland) Bill, Official Report Debate Contributions,

Press Release, International Centre for Dispute Resolution Achieves Significant Caseload Increase for 2011 International Centre for Dispute Resolution, March 1, 2012.

Professor Fraser Davidson, Hew Dundas & David Bartos, Arbitration (Scotland) Act 2010 (W. Green 2010).

Privy Council Records, THE NATIONAL ARCHIVES OF SCOTLAND, <http://www.nas.gov.uk/guides/privycouncil.asp> (last visited November 2, 2011).

R. Caivano, *The Arbitration Agreement*, in Dispute Settlement in International Trade, Investment and Intellectual Property (UNCTAD Course on Dispute Settlement in International Trade, Investment and Intellectual Property UN edmmisc232add39_en_0001 2005).

Ralf Michaels, *Symposium, The Re-statement of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209, 1232 (2005).

Raymond G. Bender, Jr., *Arbitration - An Ideal Way to Resolve High-Tech Industry Disputes*, 65 DISP. RESOL. J. 44 (2010).

Release, The Scottish Government, SAC, The Scottish Government (on file with author), March 17, 2011, available at <http://www.scotland.gov.uk/News/Releases/2011/03/17120931>.

Richard Burnley & Greg Lascelles, Mediator Confidentiality – Conduct and COMMUNICATIONS *available at* http://www.cedr.com/library/articles/Mediator_confidentiality_SJBerwin.pdf (last visited December 17, 2013).

Richard C. Reuben, ADR And The Rule Of Law Making The Connection, 16 DISP. RESOL. MAG. 4 (2010).

ROB WILSON & VALERIE ALLAN, UNITED KINGDOM: ARBITRATION - CAN CONFIDENTIALITY BE OVERRIDDEN IN CERTAIN CIRCUMSTANCES? (CMS CAMERON MCKENNA LLP 2012).

Rob Wilson & Valerie Allan, *Arbitration In Scotland*, in CMS Guide to Arbitration Vol I (2012) available at http://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_SCOTLAND.pdf at 698 (last visited March 17, 2014).
Rory Hogan, *ADR: adding extra value to law*, 78(3) ARB. 247, 247 (2012).

Roger Fischer & William Ury, *Getting to Yes, Negotiating Agreement Without Giving In* (Bruce Patton ed., Penguin Books' 1981).

Roy L Martin & Steven P Walker, *A New Scottish Export – Scottish International Arbitration*, 18 Colum. J. Eur. L. 3 (2012).

Rt Hon. Lord Dervaird, John D Campbell, Steven P Walker, & Hew Dundas, *Arbitration in Scotland – A New Era Dawns, S.L.T.* 2006 (taken from the abstract) (presented at XVth International Congress of Maritime Arbitrators, held in London 26th-30th April 2004), available at <http://www.inprisys.net/hosted/hrd/docabst.asp?docid=57> (last visited September 21, 2012).

Rush & Tompkins v. GLC [1988] 3 All ER 737.

Sarah O'Neill, Scottish Consumer Council, Policy Report Consensus Without Court Encouraging mediation in non-family civil disputes in Scotland (2001).

SCOTTISH ARBITRATION CENTRE, www.scottisharbitrationcentre.org/ (last visited May 1, 2013).

Scottish Arbitration Centre, *Making Justice Work Court Reform (Scotland) Bill – A consultation paper Response from the Scottish Arbitration Centre*, available at <http://www.scotland.gov.uk/Resource/0042/00425360.pdf>
Scottish Civil Courts Review, Scottish Civil Courts Review, A Consultation Paper (2007)
available at [http://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/sccccomplete-\(2\)7CDD54ABAE89.pdf?sfvrsn=0](http://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/sccccomplete-(2)7CDD54ABAE89.pdf?sfvrsn=0) (last visited April 3, 2014).

Scots Contribution to Mankind, TOUR SCOTLAND
<http://www.fife.50megs.com/scotland-ruled.htm> (last visited January 21, 2012).

Scottish Culture, The People Of Scotland, TOUR SCOTLAND,
<http://www.fife.50megs.com/welcome.htm> (last visited January 21, 2012).

Scottish Culture, Scots in North America, TOUR SCOTLAND
<http://www.fife.50megs.com/welcome.htm> (last visited January 21, 2012).

Scotland's Influence on Civilization Scotland's Place in History,
ELECTRICSCOTLAND.COM
<http://www.electricscotland.com/history/influence/chapter1.htm> (last visited October 1, 2011).

SCOTTISH MEDIATION NETWORK, *MEDIATION INFORMATION PACKET* (2009), available at <http://www.scottishmediation.org.uk/downloads/MediationInformationPack.pdf> (last visited March 29, 2010)).

Shaping Scotland's Parliament, THE SCOTTISH PARLIAMENT (January 1999), <http://www.scottish.parliament.uk/vli/education/resources/learningResources/pdfs/higher-shaping-sp.pdf> (last visited April 29, 2009).

Sir Francis Bacon.

Sophie Clavier, *Contemporary Issues on Public International and Comparative Law: Essays in Honor of Professor Dr. Christian Nwachukwu Okeke*, 15 ANN. SURV. INT'L & COMP. L. 145 (2009)(book review).

Stavros Brekoulakis, *Special Section on the 2008 Survey on Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards: Enforcement of Foreign Arbitral Awards: Observation on the Efficiency of the Current System and the Gradual Development of Alternative means of Enforcement*, 19 AM. REV. INT'L ARB. 415 (2008).

Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Meditative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885 (1997).

Stephen K. Huber & Maureen A. Weston, *ARBITRATION: CASES AND MATERIALS* (2nd ed. Supp. Matthew Bender & Company, Inc., 2010).

STEPHEN K. HUBER AND MAUREEN A. WESTON, *ARBITRATION: CASES AND MATERIALS* 7 (2nd ed. Supp. Matthew Bender & Company, Inc., 2010).

Stephen McAuley, *Achieving the Harmonization of Transnational Civil Procedure: Will the ALI/UNIDROIT Project Succeed?*, 15 AM. REV. INT'L ARB. 231, 231 (2004) (discussing *Lex Mercatoria*).

STEVEN P WALKER, *THE RENAISSANCE OF SCOTTISH INTERNATIONAL ARBITRATION* (2010).

Southland Corp. v. Keating, 465 U.S. 1, 12 (1984).

Spotlight ICDR – Europe, Middle East and Africa, The ICDR International Arbitration Reporter (American Arbitration Association), vol. 3 July 2012.

Symposium, *New York Stock Exchange, Inc. Symposium on Arbitration in the Securities Industry: Welcoming Remarks (November 21, 1994)*, 63 FORDHAM L. REV. 1505 (1995).

Table C-5 U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending September 30, 2011, FEDERAL JUDICIARY, JUDICIAL BUSINESS OF THE U.S. COURTS (2011), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>.

Talibah Peugh, *Alternative Dispute Resolution: A Study Of The History And Function Of ADR Techniques As Mechanisms For International Peacekeeping*, 25 THUMARLR 139, 168 (Fall, 1999/Spring, 2000).

Tamara A. Fackrell, *Utah Mandatory Domestic Mediation and Mediator Qualification*, 2008 EMERGING ISSUES 1291 (2007).
TERENCE INGMAN, *THE ENGLISH LEGAL PROCESS* (6th ed. 1996).

Teddy Snyder, *Teddy Snyder on Settling a Workers' Compensation Case: Why, When, and How*, 2009 EMERGING ISSUES 3478 (2009).

The ADR Act of 1998, 651 USC 28 (1998).

The Bank of Conway v. B.H. Stary, 51 N.D. 399.

The Center for Transnational Litigation, *Arbitration and Commercial Law, Confidentiality vs. Transparency In Commercial Arbitration: A False Contradiction To Overcome, Transnat'l Notes*, REFLECTIONS ON TRANSNAT'L LITIG. & COM. L., (2012), available at <http://blogs.law.nyu.edu/transnational/2012/12/confidentiality-vs-transparency-in-commercial-arbitration-a-false/>.

THECLEARANCES.ORG, <http://www.theclearances.org/> (last visited October 16, 2011).

THE COMMONWEALTH SECRETARIAT, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION EXPLANATORY DOCUMENTATION PREPARED FOR COMMONWEALTH JURISDICTIONS (1991), available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/Model-Law-Arbitration-Commonwealth.pdf> (last visited March 5, 2014).

The Cross-Border Mediation (Scotland) Regulations 2011 (A.S.P.).

The Contemplator's Short History of The Glen Coe Massacre, CONTEMPLATOR.COM <http://www.contemplator.com/history/glenceoe.html> (last visited February 29, 2012).

The devolution guidance notes, THE ROLE OF THE SECRETARY OF STATE FOR SCOTLAND (DGN 3 2006) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60979/role-secretary-state-scotland_20.pdf (last visited April 2, 2014).

THE FLORIDA BAR, *FLORIDA EMINENT DOMAIN PRACTICE AND PROCEDURE* §21.2 (7th ed. 2008).

THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Term+of+Art> (last visited April 16, 2010).

The Infamous Massacre of the MacDonalds by the Campbells, MACDONALD.COM, <http://www.macdonald.com/glen1.html> (last visited February 29, 2012).

THE INT'L INST. FOR CONFLICT PREVENTION AND RESOL., CPR PROCEDURES & CLAUSES NON-ADMINISTERED ARBITRATION RULES (2005), *available at* <https://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/2005%20Non-Administered%20Arbitration%20Rules.pdf>.

The Massacre of Glencoe, ELECTRICSCOTLAND.COM, <http://www.electricscotland.com/history/glencoe> (last visited February 29, 2012).

THE NEW YORK ARBITRATION CONVENTION <http://www.newyorkconvention.org/> (last visited May 4, 2012).

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.S.-U.K., June 10, 1958, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).

The People and Culture of Scotland, HERITAGE OF SCOTLAND, <http://www.heritage-of-scotland.com/cult.htm> (last visited January 31, 2012).

THE PERMANENT COURT OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=363 (last visited April 4, 2012).

THE SCOTTISH PARLIAMENT, http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=4899&mode=html#iob_42819 (last visited September 26, 2011).

THE STAIR SOCIETY <http://www.stairsociety.org/stair.htm> (Last visited July 12, 2011).

Thomas H. Oehmke, *Arbitrating International Claims—At Home and Abroad*, 81 AMJUR TRIALS 1, § 9. Privacy and confidentiality (2010).

Thomas H. Oehmke and Joan M. Brovins, *The Arbitration Contract—Making it and Breaking it*, 83 AM. JUR PROOF OF FACTS 3d § 17 (2010).

Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 Nev. L.J. 427 (2007).

Thomas J. Stipanowich, *Arbitration: The “New Litigation?”*, 2010 U. Ill. L. Rev. 1 (2010).

TIBOR VARADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION A TRANSNATIONAL PERSPECTIVE (Thomson Reuters 4th ed. 2009) (1999).

Tom Arnold, *Fundamentals of ADR: Why Prefer ADR* 655 (PLI Pat., Copyrights,

Trademarks, & Literary Prop. Course, Handbook Series No. 376, 1993)

U.N. Conference on Trade and Development, Dispute Settlement International Commercial Arbitration, UNCTAD/EDM/Misc.232/Add.38 (2005), http://unctad.org/en/Docs/edmmisc232add38_en.pdf (last visited October 21, 2013).

UNCITRAL ARBITRATION RULES (AS REVISED IN 2010), *available at* <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (last visited Apr. 2, 2014).

UNCITRAL, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985 WITH AMENDMENTS AS ADOPTED IN 2006 4 (2008), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited Aug. 7, 2011).

UNIFORMLAWS.ORG
<http://www.uniformlaws.org/ActSummary.aspx?title=Mediation%20Act> (last visited July 3, 2014).

United Nations Commission on International Trade Law, UNCITRAL Conciliation Rules <http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf> (last visited April 6, 2010).

USA - Language, Culture, Customs and Etiquette, KWINTESSENTIAL, <http://www.kwintessential.co.uk/resources/global-etiquette/usa.html> (last visited January 31, 2012).

W. Laurence Craig, Some Trends and Developments in the Laws and Practice of International Commercial Arbitration, 30 TEX. INT'L L. J. 1 (1995).

W. Hamilton Bryson, *The Merger of Common-Law and Equity Pleading in Virginia*, 41 U. Rich. L. Rev. 77 (2006).

What is Mediation?, WORLD INTELLECTUAL PROPERTY ORGANIZATION, ARBITRATION AND MEDIATION CENTER, <http://www.wipo.int/amc/en/mediation/what-mediation.html> (last visited March 29, 2014).

Who we are, ROYAL INSTITUTE OF CHARTERED SURVEYORS, <http://www.rics.org/uk/about-rics/who-we-are/> (last visited Apr. 5, 2014).

Welcome to the Chartered Institute of Arbitrators (CI Arb), CHARTERED INSTITUTE OF ARBITRATORS, <http://www.ciarb.org/> (last visited May 1, 2013).

William G. Geddes, *From Athens to AMIC (Arbitration and Mediation Institute of Canada): the history of ADR (ADR)*, (1997) <http://www.thefreelibrary.com/From+Athens+to+AMIC+%28Arbitration+and+Mediation+Institute+of+Canada%29%3A...-a030470491> (last visited May 17, 2012).

William K. Slate II, Paying Attention to “Culture” in International Commercial

Arbitration, 59 Disp. Resol. J. 96 (2004).

William W. Park, *What Makes Arbitration International etc*, 13 Am. Rev. Int'l Arb. 75, 140 (2002).

Wilson J. Dove, *The Reception of the Roman Law in Scotland*, 9 JURID. REV. 362 (1897).

Winston Roddick, QC, *Symposium on the Devolution of Wales: Devolution –The United Kingdom and the New Wales*, 23 Suffolk Transnat'l L. Rev. 477 (2000).

Winston Stromberg, III. *Avoiding the Full Court Press: International Commercial Arbitration and Other Global ADR Processes*, 40 Loy. L.A. L. Rev. 1337 (2007). Available at: <http://digitalcommons.lmu.edu/llr/vol40/iss4/3>.

Wolf Juergen von Kumberg, *From a User's Perspective: Are the Benefits More Theoretical Than Real?*, 66 Disp. Resol. J. 76 (2011).

Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 Berkeley J. Int'l L. 150, 150 (2013).