Current Developments in International Mediation and Arbitration

Success in business requires dispute resolution solutions that provide process fairness and confidence in recovery. International arbitration has long been a popular option, and international treaties provide an avenue to enforce awards. There is also increasing interest and new developments in enforcement of mediated agreements in the international arena. A panel of seasoned arbitrators, mediators and practitioners will cover the latest in ADR practice, comparing processes used in the US, EU and UK, with a focus on some innovations in New Jersey to enhance mediation.

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The Beatles, Bruce and U2. It's All Rock n Roll to Me: Looking at ADR in the US, Ireland, and the UK

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Introduction

The construction industry is ripe for disputes among various stakeholders, including contractors, design professionals, and developers. Effective dispute resolution mechanisms are crucial for managing conflicts that arise across diverse legal environments. Alternative dispute resolution ("ADR") procedures, including mediation, arbitration, conciliation, and adjudication, offer flexible and efficient solutions to contract disputes, often bypassing traditional legal avenues for redress. These procedures can vary significantly between jurisdictions. This paper examines and compares the ADR practices in the United States ("US"), the United Kingdom ("UK"), and the European Union–and more specifically Ireland (collectively the "EU"), highlighting their distinctive features, statutory frameworks, and procedural nuances. By exploring these differences, the paper aims to provide an understanding of how various jurisdictions address ADR, and the similarities and differences between them.

These differences reflect the unique legal traditions and policy priorities of each jurisdiction. For instance, the UK's focus on rapid dispute resolution in construction, the US's strong pro-arbitration stance, and the EU's varied approaches across its Member States all provide different tools and challenges for resolving construction disputes. The UK stands out with its mandatory statutory

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adjudication for construction disputes, while neither the US nor most EU countries have an equivalent. Additionally, the UK adjudication procedure is designed for rapid resolution (28 days), which is faster than typical arbitration or mediation in the US or EU. The US courts are generally more willing to enforce arbitration agreements and less likely to intervene in the process compared to some EU countries.

The EU has attempted to harmonize some aspects of ADR (e.g., Directive 2008/52/EC, the "Mediation Directive"),[1] although there's still significant variation between member states. Likewise, the EU issued Directive 2013/11/EU (the "ADR Directive")[2] for alternative dispute resolution for consumer disputes, which the UK implemented the provisions of the ADR Directive with Alternative Dispute Resolution for Consumer Disputes Regulations 2015.[3] The EU's Mediation Directive came into force in 2008, applying to cross-border civil and commercial disputes involving parties from EU member states. (An EU Directive is a legislative act that sets out a goal that EU countries must achieve, however, it is up to the individual countries to devise their own laws on how to reach these goals.)[4] As a result of Brexit, the provisions of the Mediation Directive (relating to confidentiality, enforcement, and limitation) no longer apply to cross-border mediations taking place in the UK. The US, despite being a federal system, has a more unified approach due to the US's Federal Arbitration Act[5] ("FAA") preempting conflicting state laws.[6]

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[1] Directive 2008/52/EC. https://eur-lex.europa.eu/eli/dir/2008/52/oj
[2] Directive 2013/11/EU. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0011
[3] *See Id.*
[4] https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en
[5] 9 USC § 1-15.
[6] The scope of the FAA's applicability and preemptive effect is set forth in 9 USC § 2, which broadly covers: "A written provision in any … contract evidencing a transaction involving commerce…." This has been interpreted to mean any contract "affecting commerce" or "within the flow of interstate commerce." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). Further, the contract does not need to mention the FAA for it to be applicable and preempt the selected state law. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

The UK

The UK has several types of ADR comprising a multi-tiered system, similar to the US. As discussed below, parties are encouraged to start with mediation/conciliation, early neutral evaluation ("ENE"), expert determination, and finally adjudication or arbitration. The UK's rules for ADR are flexible and follow the Court's Rules of Civil Procedure, namely the Civil Procedure Rules 1998, Part 26 ("CPR").[7] There are also some construction specific rules, such as the Pre-Action Protocol for Construction and Engineering Disputes ("Pre-Action Protocols").[8] The Pre-Action Protocols apply to all construction and engineering disputes (including professional negligence claims against architects, engineers and quantity surveyors).[9] The Scheme for Construction Contracts (England and Wales) Regulations 1998[10] provides detailed rules for adjudication when the parties haven't agreed on their own procedure.[11] And last, the Late Payment of Commercial Debts (Interest) Act of 1998, § 20 is similar to the pre- and post-judgment interest one party might pay in disputes in the US, specifically in construction payment disputes.[12] UK case law has significantly shaped construction arbitration practice. For instance, *Carillion Construction Ltd v. Devonport Royal Dockyard Ltd.* established the principle of limited court intervention in adjudication decisions.[13]

Mediation/Conciliation

[7] https://www.legislation.gov.uk/uksi/1998/3132/part/26
[8] https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_ced
[9] *See* § 1.1.
[10] The Scheme provides default provisions for construction contracts in situations where the parties have not used a written contract. The Scheme is also referred to as Part II of the Construction Act.
[11] https://www.legislation.gov.uk/uksi/1998/649/contents/made
[12] https://www.legislation.gov.uk/ukpga/1998/20/contents
[13] *Carillion Construction Ltd v. Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358. http://www.adjudication.co.uk/archive/view/case/251/carillion_construction_ltd_v_devonport_royal_dockyard_ltd_[2005]_ewca_civ_1358/

Like in the US, mediation is voluntary and confidential, aiming for a negotiated settlement with the help of a mediator. The CPRs encourage parties to consider mediation, though it remains non-mandatory. There is no set procedure for a mediation, but typically, it will start with the parties exchanging case summaries and important documents a few days before the mediation itself. The mediation starts with the mediator explaining the ground rules and allowing all parties to present their positions. Thereafter, the mediator 'shuttles' between the parties with a view to finding (and with prior authorization, sharing) common ground and possible solutions. If a settlement is achieved, the parties sign legally binding terms (with legal assistance if required).

While mediation is voluntary, the courts in England and Wales strongly encourage disputing parties to submit to mediation (or some other form of ADR). Cost sanctions are imposed for an unreasonable refusal to commit to ADR.[14] Conciliation is often used interchangeably with mediation, and it is available, but it is not as central to the dispute resolution process as adjudication in construction disputes. The Construction Industry Council's scheme provides a framework for its use.[15]

Early Neutral Evaluation (ENE)

The purpose of ENE is to encourage settlement discussions, and it is a potential way to resolve disputes without going to court. Parties in dispute appoint an independent evaluator to assess the strengths and weaknesses of each side's case. This neutral, expert viewpoint is then intended to form a starting point for negotiations to settle the disagreement.

The Court of Appeal of England and Wales ruled that the Court has the power pursuant to CPR Part 3, 3.1(2)(m) to order early neutral evaluation, even in circumstances in which one party had

[14] *See Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576. https://www.bailii.org/ew/cases/EWCA/Civ/2004/576.html

[15] https://www.cic.org.uk/admin/resources/cic-model-mediation-agreement-and-procedure-first-edition-11th-june-2019.pdf

not consented to its use.[16] In England and Wales, the court's power to order ENE is included within The CPR,[17] and in some states of the United States it is also within the court's power. ENE doesn't result in a final or binding decision, and the evaluator does not decide legal issues or advocate a way of resolving future matters.

The parties themselves can appoint an evaluator on a private basis. He may be an experienced King's Counsel, or another professional with an appropriate level of knowledge of the issues. Since 2015, it's been possible for those in dispute to pursue ENE through the Technology and Construction Court ('TCC') and the Commercial Court. In both cases, this involves asking a judge to act as the evaluator.

Below is a brief outline of the approach each court takes when dealing with a case by way of ENE:

- The TCC – The court is generally accommodating to the parties: the judge will deal with either an entire dispute, or a portion of a more wide-ranging dispute, depending on the wishes of the parties. The parties can also decide between themselves the extent the ENE will bind them.
- The Commercial Court – The time to raise the possibility of ENE in the Commercial Court is at the case management conference. If it's approved, the nominated judge will issue directions on how the ENE is to be conducted. When the evaluation is made it will be supported by a brief explanation, which is often communicated orally to the parties.

Expert Determination

[16] *See Lomax v. Lomax* [2019] EWCA Civ 1467.
[17] *See* Part 3 (3.1(2)(m))

The expert determination procedure shares similarities to adjudication as to the speed of the process. However, the determination of the expert is generally binding on the parties, in contrast to mediation. Expert determination is when an independent technical expert makes a binding decision on a technical issue in a dispute (unless the parties agree in advance that the expert's decision isn't binding). Where it is possible to agree to an expert determination process after a dispute has arisen, it will generally be included as a clause in the agreement between the parties as part of the ADR arrangements. The expert determination procedure may be set out in the agreement or dictated by the expert appointed.

Expert determination has no basis in statute. While this offers great flexibility, it also means the parties and the expert have few legal rules to fall back on when there is a problem with procedure, or if the expert needs to take some measure not anticipated in the contract. One of the reasons businesses choose this process as a method of resolving disputes is because it offers finality. The decision of the expert is binding on the parties. The courts also tend to treat expert determinations as binding.

Adjudication

Adjudication is a unique and compulsory form of dispute resolution used in the construction industry. The process is found under the Housing Grants, Construction and Regeneration Act of 1996 (the "Construction Act").[18] The Construction Act allows any party to a construction contract in the UK to refer a dispute, at any time, to a 28-day procedure where the matter will be decided by an independent adjudicator.[19] Apart from a few exceptions, all construction contracts in the UK must

[18] Housing Grants, Construction and Regeneration Act of 1996. https://www.legislation.gov.uk/ukpga/1996/53/contents
[19] *See Id.*

provide for adjudication as a first instance of a formal dispute resolution procedure.[20] Because of the distinct nature of the construction industry, adjudication is the ADR form used most commonly. If there is no mention of adjudication in your contract, then it will be classed as an *implied term*.[21]

Adjudicator's decisions are "temporarily binding." The parties must abide by them, unless or until the dispute in question is finally determined either by a decision of a court, in adjudication, or in settlement. It is therefore referred to as a "pay now, argue later" principle that results in a quick decision as a dispute might be holding up a particular building project or causing other issues for one party to the contract. By accepting the adjudicator's jurisdiction and decision, the parties can continue to carry on work.

[20] *See Id.*
[21] *See* Note 12 (Scheme).

Key Stages in Adjudication	
1. Dispute must have materialized"	Firstly, it's necessary for a claim to have been made under the contract, and for the dispute to have materialized. In practice, this is a relatively low bar – if a claim is made, and is rejected with or without detailed explanation, that will usually be sufficient to fulfil the requirement of there being "a dispute" which is capable for reference.
2. Notice of Adjudication	This is the first significant document in the adjudication process. It puts the other party on notice and sets out the parameters of the dispute, as well as detailing the relief that is being sought.
3. Appointment of Adjudicator	After notice has been sent, the referring party will take steps to get the adjudicator appointed. The contract will sometimes name a particular adjudicator, but more often it will provide that one of the Adjudication Nomination Bodies will nominate an adjudicator to act.
4. Jurisdiction Challenge	At this stage, the responding party may wish to challenge the appointment of the adjudicator, on the basis that they do not have the jurisdiction to proceed. Common challenges include arguments that the contract falls outside the scope of the Construction Act, where the dispute has not materialized, where the dispute has already been determined, or where there have been defects in the appointment process.
5. Referral	Once the adjudicator has been appointed, and within 7 days of the Notice of Adjudication, the referring party must then send its Referral, containing all the submissions and evidence (from witnesses and any relevant expert) on which it relies.
6. Response	It is then over to the responding party to prepare its response, which again contains all of its submissions and evidence. The responding party will have a very tight time period within which to do so, normally having a deadline of 7 or 14 days from when the referral was sent.
7. Further Submissions	The extent and timescales for further submissions are then at the discretion of the adjudicator. Normally the referring party will get a chance to put in a Reply to the Response, and beyond that there may be further rounds of submissions (known as a Rejoinder and Surrejoinder).
8. Further Steps	The adjudicator will then make directions as to whether or not they would like to convene a meeting of the parties. Typically though, the adjudicator may direct specific questions to one or both of the parties, and prepare a list of issues during the latter stage of the submissions. The adjudicator will then send it to the parties for their agreement or any comments.
9. Decision Issued	Either within 28 days of the referral or such extended timeframe as may have been agreed with the parties, the adjudicator will issue their written decision.

Chart 1[22]

[22] https://www.ts-p.co.uk/insights/how-construction-disputes-can-be-resolved-adjudication/

Arbitration

The primary statute governing arbitration in the UK is the Arbitration Act of 1996 ("AA 1996").[23] This comprehensive act covers both domestic and international arbitration and is considered one of the most modern arbitration laws globally. Scotland, which has a separate legal system within the UK, has its own Arbitration (Scotland) Act of 2010.[24] This act is more closely aligned with the United Nations Commission on International Trade Law ("UNCITRAL Model Law" or "Model Law")[25] than the English Arbitration Act.

Before the Arbitration Act of 1996, English arbitration law was scattered amongst several statutes (including the Arbitration Acts 1950 and 1979), as well as case law. The law was structurally confusing and inaccessible. There was no clear statement of the principles underlying arbitration law, and as such there was a desire to set out in clear and positive terms the principles that informed English arbitration law. There was also a desire to harmonize English arbitration law with the laws of other countries as much as possible. This was achieved by sourcing many of the principles and provisions of the AA 1996 from the UNCITRAL Model Law.

Arbitration is the judicial determination of a dispute by an independent third party called an arbitrator. It is not technically a form of ADR as the way arbitration works is that the parties to the dispute will participate in a procedure leading to a hearing and a third party will make a binding judgment, known as an arbitration award. The third party may be a single arbitrator, or a panel of arbitrators, similar to the US.

[23] https://www.legislation.gov.uk/ukpga/1996/23/contents
[24] https://www.legislation.gov.uk/asp/2010/1/contents
[25] UNCITRAL Model Law 1985 (Amended 2006), is designed to assist States in reforming and modernizing their laws on arbitral procedure. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration

Unlike other forms of ADR in the UK, you can't take legal action in court after receiving a final and binding decision via arbitration, save in exceptional circumstances. AA 1996 provides a comprehensive framework for arbitrating in the UK. Unlike many jurisdictions, it allows for appeals on points of law unless excluded by agreement.[26]

Comparison Between Adjudication and Arbitration		
	Adjudication	**Arbitration**
Length of proceedings	Adjudication is fast – it's a process that takes 28 days from start to finish (longer if agreed between the parties.	Arbitration has a much more judicial "feel" about it and can take months or years to run its course.
Consideration of issues	The adjudication process may not fully examine all the issues to hand because of the compressed timescale in which it operates.	Arbitration allows for a fuller examination of the issues, i.e., if you are involved in a particularly complex dispute involving several parties and issues
Legal fees	Adjudication costs can be much lower than the costs of arbitration because it's quicker and usually involves a standalone issue of dispute. With the adjudication process each side usually bears its own costs.	Arbitration is a more formal process with each side presenting a case, disclosing different categories of evidence, and going through several procedural steps so may be more costly. Arbitration has the possibility of recovering legal costs from the other side.
Outcomes	Adjudication usually results in a monetary award, or a remedy dictating timescales within which a contractual element must be performed.	An arbitrator has a much broader range of legal remedies at his disposal than an adjudicator.

Chart 2[27]

[26] *See* Section 69 of the Arbitration Act.
[27] https://harperjames.co.uk/article/guide-to-adjudication-in-construction-disputes/#section-16

The EU

The EU presents a more complex picture due to the lack of any unified arbitration statutes or laws governing all Member States. While Member States generally follow similar principles, there can be significant variations. While not strictly arbitration statutes, certain EU regulations and directives impact arbitration practice. For instance, the Brussels I Regulation (recast)[28] explicitly excludes arbitration from its scope, leaving it to national laws and international conventions. The Unfair Terms in Consumer Contracts Directive[29] affects how arbitration clauses in consumer contracts are treated across the EU. Member States universally recognize the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention").[30] Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters, encourages member states to implement mediation practices, including confidentiality and the enforceability of mediated agreements. An example is the French Civil Code, Articles 131-1 to 131-15,[31] and the Legislative Decree No. 28/2010 in Italy which mandates mediation for certain disputes.[32] Each EU member state has its own arbitration laws, though many have based their laws on the UNCITRAL Model Law on International Commercial Arbitration. Adjudication practices are variable and less centralized compared to the UK.

In many EU countries, International Federation of Consulting Engineers ("FIDIC")[33] contracts are common in international projects, which often include Dispute Adjudication Boards ("DAB") as a step before arbitration, similar to ENE and expert determination in the UK.

[28] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32012R1215
[29] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993L0013
[30] https://www.newyorkconvention.org/english
[31] Decree No 2015-282 of 11 March 2015
[32] https://www.camera-arbitrale.it/en/mediation/italian-mediation-system-decree-28-2010.php?id=372
[33] https://www.fidic.org/

Conciliation is recognized and can be part of the broader mediation framework established by EU directives, though its prevalence and application vary by member state.

Ireland

The approach to ADR in Ireland is similar to the UK and the US. A multi-tiered approach is common in construction disputes, utilizing mediation, conciliation, adjudication, and arbitration. Expert determination is also used where the issue is technical in nature. The Construction Contracts Act 2013 ("Construction Act") provides for statutory adjudication of payment disputes arising under certain construction contracts.[34] Otherwise, parties are generally free to agree in contract how their disputes will be resolved.

Mediation

The Mediation Act 2017 (which came into force on 1 January 2018)[35] aims to further promote mediation as an attractive alternative to court proceedings. Parties must advise their clients to consider mediation and to provide information about the process and if a party refuses to consider it, costs for litigation can be considered. The process and procedure of mediation is almost identical to the UK and the US.

Expert Determination

The process is again very similar to the UK. The decision of the expert is final, which is similar to arbitration and litigation, but the expert is given much more of a free reign to make that decision without the need for a fixed procedural framework to negotiate through.

[34] https://www.irishstatutebook.ie/eli/2013/act/34/enacted/en/html
[35] https://www.irishstatutebook.ie/eli/2017/act/27/enacted/en/html

Adjudication

Adjudication is provided for in the Construction Act. The primary function of the Construction Act is to solve payment issues between the parties. Similar to the UK, it is designed to be a quick process that can resolve the issue in a private and confidential way while they can continue their working relationship during the term of the contract. Generally, it is used to protect the subcontractor from the non-paying general contractor. The Construction Act has statutory procedures that provide that once the work has been completed and invoiced for, the contractor has 28 days to pay. If not, the claimant can serve notice that an adjudication is being sought and that the parties should nominate an adjudicator and start the process. Mirroring the UK, within 28 days the adjudicator must make a decision (unless that is an extension of 28 days is granted by both parties).

The fundamental difference between the UK and the Irish legislation is that the latter only permits *payment* disputes to be referred to adjudication. Section 6(1) of the Construction Act states, "A party to a construction contract has the right to refer for adjudication in accordance with this section any dispute relating to ***payment*** arising under the construction contract (in this Act referred to as a 'payment dispute')(emphasis added)."

Conciliation

Conciliation, as a specific process in the Irish public sector construction industry, is a widely used method for the avoidance and resolution of disputes and is generally governed by procedures issued by Engineer Ireland ("Conciliation Procedures") and the disputing parties' contract. Conciliation was introduced in the Fourth Edition of the Irish Conditions of Contract for Works of Civil Engineering Construction. In preparation for the Fourth Edition of the Irish Conditions, Engineers Ireland published a procedure for the conciliation process in 1994, which was subsequently revised as the Conciliation Procedure 2000. In 2007, the introduction of a suite of Public Works

Contracts published by the Office of Government Procurement provided for conciliation with a binding recommendation. Engineer's Ireland revised the procedures in the Conciliation Procedure 2013.[36]

Conciliation under the currently used Conciliation Procedures contains a hybrid dispute process of both facilitative and adjudicative elements. The Conciliation Procedures provide for a process whereby parties attempt to settle their dispute with the assistances of a facilitative third-party neutral (the "Conciliator"). Conciliation, however, specifically not mediation under the Irish Mediation Act 2017. If the parties fail to resolve their disputes after such facilitated negotiation, the parties submit the dispute for evaluation by the Conciliator for a "recommendation." The recommendation is binding on the parties, unless rejected by either party within a specified time period (generally two weeks). If the recommendation is rejected by either party, no binding contract is formed, and the parties can resort to arbitration or litigation.

Arbitration

Arbitration is preferred to court litigation in construction disputes and arbitration clauses are often included in construction contracts. The Arbitration Act 2010[37] (as amended)(the "Arbitration Act") applies to all arbitrations commenced after 9 June 2010, and the UNCITRAL Model Law has the force of law in Ireland (subject to the 2010 Act). The Irish courts are historically very supportive of arbitration. Article 19 of the Model Law confirms that the parties are entitled to set their own procedures for the arbitration. Similar to the UK and the US, arbitration is essentially a form of litigation behind closed doors. The outcome is as binding as a court case.

[36] https://www.engineersireland.ie/LinkClick.aspx?fileticket=gnmj8BlOuAI%3D&portalid=0&resourceView=1
[37] https://www.irishstatutebook.ie/eli/2010/act/1

Ireland's Commercial Court was established in 2004 as a dedicated forum for the resolution of domestic and international commercial disputes.[38] While not necessarily construction specific, these courts and judges have particular experience and expertise in commercial law matters, including arbitration, securities, insolvency and restructuring, insurance and intellectual property, among others.

The US

In the US, commercial arbitration existed in the early Dutch and British colonial periods in and around present-day New York City. Colonials and citizens, convinced that lawyers threatened protestant Christian harmony, avoided lawyers and courts alike; instead preferring to use their own mediation processes to deal with disputes. Today the US may be known for its propensity for litigation, but the US has one of the world's most advanced and successful systems for settlement through ADR. With the exception of government contracts, which are governed by statutes, questions involving private construction contracts are typically governed by state contract law. Therefore, construction contracts specify the laws of a particular state (as opposed to the laws of the United States) as the governing law. Although state contract law is broadly similar among the states, there is a wide variety of nuances that vary from state to state. The courts consistently uphold arbitration agreements (e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)). The Uniform Mediation Act,[39] adopted by less than a third of the states, attempts to provide a consistent framework for parties to use; but, as discussed earlier, the US's federal system can allow for each state to individualize their procedures. The American Arbitration Association ("AAA") developed (with input from the National Construction Dispute Resolution Committee) the AAA Construction Rules and Mediation Procedures

[38] https://www.courts.ie/commercial-court

[39] https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=45565a5f-0c57-4bba-bbab-fc7de9a59110&LibraryFolderKey=&DefaultView=&5a583082-7c67-452b-9777-e4bdf7e1c729=eyJsaWJyYXJ5ZW50cnkiOiI5ZWE3MDI0OC1lNjNhLTQ3NGItYjEzNy1hMTk1Nzg5YTg0ZjEifQ%3D%3D

in cooperation with the American Institute of Architects. AAA has a construction 'fast track' arbitration procedure to limit the time and cost of hearings.

Mediation/Conciliation

Conciliation is very similar to mediation, although less formal. While mediation may entail regular meetings between the parties, conciliation may be as informal as a telephone call. Moreover, conciliation usually assumes that the parties have already achieved some form of reconciliation and that the relationship has been mended, requiring only that the details of the matter be resolved. Conciliation is not commonly used in construction disputes. Disputes typically proceed through mediation and/or arbitration.

Mediation is often required by contract or court order before proceeding to litigation or arbitration and is the least adversarial form of ADR. The mediator helps the parties identify real issues, frame the discussion, and generate options for settlement. The goal of mediation is to provide a "win-win" resolution, enabling both parties to obtain a satisfactory remedy. Mediators come from a number of different backgrounds, but most are practicing attorneys, familiar with the underlying subject matter of a conflict. Mediation can be utilized at all stages of a dispute, whether before or during trial or throughout the appellate process.

Of all the types of ADR, mediation has emerged as the primary ADR process in the federal district courts. Most federal jurisdictions offer some form of mediation, and many require it. Mandatory mediation either requires parties to engage in mediation in certain cases or creates disincentives for parties to decline it. Even when parties are not required to engage in mediation, courts may nonetheless have incentives to encourage mediation, such as imposition of costs or the leveling of sanctions on parties that opt-out, similar to the UK and Ireland.

ENE / Expert Determination

Rarely used as a stand-alone ADR procedure in the US. However, certain aspects are incorporated into mediations and arbitrations. Many times, mediators and arbitrators are selected for construction disputes more for their subject matter expertise than their legal expertise, essentially acting as the expert. AAA will provide a 'Project Neutral' selected as someone who is familiar with construction practices and procedures to act as a mediator or advisor issuing non-binding opinions throughout the project. Several experts are generally used when arbitrating construction disputes, such as delay, cost, and technical. These experts are generally not brought in as neutrals or for determinative outcomes, but rather as a part of the mediation or arbitration procedure.

Arbitration

Arbitration is similar to the UK and Ireland and is generally conducted by a single arbitrator or a panel of three. Parties to arbitration must agree on applicable rules of procedure, and the amount of discovery allowable. The AAA provides a framework specific to construction disputes that provides for these types of preliminary considerations between the parties. Similar to the UK, arbitration is closer to litigation than it is to other forms of ADR; and typically, arbitration is used in situations where the parties cannot agree on the facts of a dispute or the conflict is purely monetary. Arbitration is also regularly utilized in cases in which a matter is highly technical, requiring an expert decision. The arbitrators are essentially the "experts", but they routinely rely on expert opinions from the parties. Arbitration proceedings are often much more formal than other forms of ADR, mirroring adversarial, court-like proceedings. Where the parties have previously contracted for arbitration, decisions are binding.

New Jersey

By Court rule and statue, ADR is part of the fabric of New Jersey's system of dispute resolution. What follows is a short summary of some of the ADR processes used in New Jersey.

Complementary Dispute Resolution NJ Court Rule 1:40

When the New Jersey Supreme Court first enacted rules governing court annexed ADR in 1992, it chose to call the processes "Complementary" as opposed to "Alternative" Dispute Resolution, believing the process should be considered as an "integral part of the judicial process" and not just an alternative.

Rule 1:40 describes several processes, such as summary jury trials, mini-trials and early neutral evaluation, which can be employed by a court short of a trial, but the process used most often is traditional mediation. Under Rule 1:40-4 a Court may require parties "to attend a mediation session," and it is now rare the matter that is not sent to mediation. Parties are free to engage private mediators, but court appointed mediators agree to provide two hours of services without compensation. Getting on the court's mediator roster requires meeting the experience and training requirements laid out in the Court Rules. Mediators need not be admitted to practice law. The mediation process is confidential.

New Jersey has a well-developed statutory framework for ADR as provided in NJSA 2A:23. The statutes cover two mechanisms for arbitration, provisions for mediation and collaborative law. Of particular relevance in the international setting is statute providing for the ability of parties to enforce mediated agreements in international disputes. The arbitration and international statutes, and the mechanism for utilizing the international statute are briefly reviewed below.

Alternative Procedure for Dispute Resolution NJSA 2A:23A-1 et seq

This law is unique to New Jersey and provides for an ADR process which combines features of arbitration and litigation.

Parties can agree to submit to this alternative procedure either before or after a dispute arises. The process is overseen by an umpire, who is appointed either by agreement of the parties or by the court. The umpire has broad powers to conduct the proceedings, including setting schedules, issuing subpoenas, and ruling on evidence. With the exception of interrogatories, which require permission of the umpire, discovery is governed by the rules applicable in the trial courts and will include document production and depositions.

ADR hearings are less formal than court trials and the rules of evidence do not apply. They do allow for presentation of evidence and arguments, but "the umpire shall proceed so that the informality of the proceedings is assured". The umpire must make a decision within 30 days after the hearing closes, unless extended by agreement. The decision must be in writing and include findings of fact and conclusions of law. The umpire's decision is considered final and binding, subject to being vacated by a court on grounds similar to that which applies to arbitration awards, i.e., corruption, fraud or misconduct, partiality of the arbitrator or an arbitrator exceeding their powers. However, unlike arbitration, an umpire's award may also be set aside where the umpire committed "prejudicial error by erroneously applying law to the issues and facts presented for alternative resolution."

Arbitration Agreements, Generally NJSA 2A:23B-1 et seq.

This statute governs arbitration agreements in general and is based on the Revised Uniform Arbitration Act. It addresses arbitration agreements, appointment of arbitrators, arbitration proceedings and arbitration awards. While arbitration agreements are valid and enforceable under New Jersey law, and arbitration awards can be confirmed by a court and a judgment entered, questions have been raised recently about the enforceability of arbitration agreements in contracts involving

consumers.[40] For a detailed and through judicial examination of New Jersey law on the confirmation and vacating of arbitration awards, see the concurring opinion of then Chief Justice Robert Wilentz in *Perini v Greate Bay*[41] and Justice Wilentz' s majority opinion in *Tretina Printing v. Fitzpatrick*.[42] Justice Robert Clifford's concurrence in *Tretina* is a refreshingly candid reversal of the position Justice Clifford took in *Perini*.

International Arbitration, Mediation, and Reconciliation: NJSA 2A:23E-1 et seq.

The International Arbitration, Mediation, and Conciliation Act, NJSA 2A:23E is the most recent addition to the statutory framework in the New Jersey. It provides a mechanism for the enforcement of mediated settlements in international disputes. With the increased interest in and attention to hybrid ADR processes, utilizing a combination of arbitration and mediation modalities, the enforceability of mediated agreements in international disputes is a key consideration in selecting a dispute resolution protocol.

The Section specifies that an arbitration, mediation, or conciliation is international if:

a) Parties have places of business in different countries, or

b) The place of arbitration, mediation, or conciliation is outside the country where parties have their places of business, or

c) A substantial part of the obligations of the commercial relationship is to be performed outside the country where parties have their places of business.

[40] Atalese v. US Legal Services Corp., 219 N.J. 430 (2014)
[41] Perini Corp. v Greate Bay, 129 N.J. 479 (1992)
[42] Tretina Printing v Fitzpatrick Assoc., 135 N.J. 349 (1994)

This section incorporates by reference the UNCITRAL Model Law on International Commercial Arbitration, Commercial Mediation, and International Settlements Agreements Resulting from Mediation. It provides that the Model Law governs all international commercial arbitrations in New Jersey, except where modified by this chapter. Parties who agree to arbitrate, mediate, or conciliate in New Jersey are deemed to have consented to the jurisdiction of the courts of New Jersey for the purposes of Section E. Any application to a court under this section shall be made to the Superior Court in accordance with the Rules of Court. Section 23E mandates that in interpreting this chapter, consideration must be given to its international origin and the need to promote uniformity in its application. Section 23E is specifically designed for international commercial disputes and a 'harmonization' between the New Jersey Court Rules and the international standards widely recognized in the UNCITRAL Model Laws. The section covers multiple forms of ADR (arbitration, mediation, conciliation) in international contexts and establishes clear rules for jurisdiction and venue in international disputes.

The section applies to disputes involving: (a) at least one non-U.S. resident; (b) U.S. residents dealing with property located outside the U.S.; (c) contracts involving performance or enforcement outside the U.S.; and (d) disputes with some relation to foreign countries. It is important to note that the statute does not limit its coverage to residents of, or businesses incorporated in, New Jersey. Any U.S. resident can submit their cross-border disputes.

The law provides for the establishment of a non-for-profit administrator of the statute. Currently, GMXC Resolutions[43] is the only such provider. GMXC Resolutions was created specifically to administer and resolve cross-border commercial disputes under the New Jersey International Arbitration, Conciliation and Mediation Act.[44] GMXC Resolutions follows the

[43] https://www.gmxcresolutions.com/
[44] https://legiscan.com/NJ/text/S602/id/1537090

mandates of the Act to provide a hybrid dispute resolution process where, if mediation is successful, it will result in an enforceable Consent Arbitration Award under an international United Nations Treaty known as the New York Convention (more formally, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards). This Treaty has been signed by 172 countries.[45]

[45] https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2

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