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ALTERNATIVE DISPUTE RESOLUTION IN INFRASTRUCTURE DISPUTES

- Srishti Vasandani[1]

'Alternative dispute resolution' (ADR) denotes a variety of methods and procedures employed to settle a dispute without resorting to the conventional trial process. Their origins date back around 3,800 years to the belligerent kingdoms in present-day Syria. Nonetheless, the last five decades have witnessed the worldwide implementation of Alternative Dispute Resolution (ADR). This is partially a response to the anticipated delay in securing a resolution via arbitration or litigation, as well as the substantial expenses associated with both processes. The feverish economic environment induced by COVID-19 has elicited a fresh emphasis on Alternative Dispute Resolution (ADR) as a method for expeditiously and economically resolving conflicts. Disagreements frequently occur in the infrastructure sector due to the complexity, scale, and participation of several stakeholders in the projects being executed. Conventional methods of conflict resolution, such as litigation and arbitration, can prove to be time-consuming, costly, and adversarial. Consequently, they may exacerbate business relationships and extend project timelines. In addressing issues within the infrastructure industry, alternative dispute resolution (ADR) techniques provide an effective and collaborative approach. This chapter analyses various alternative dispute resolution (ADR) methods, their advantages, and their potential integration into legal frameworks to enhance dispute resolution.

A diverse array of stakeholders participates in the development of infrastructure projects. The stakeholders comprise government agencies, consultants, engineers, and contractors, including subcontractors. A multitude of issues, including but not limited to delays, cost overruns, contractual ambiguities, design faults, and unforeseen site conditions, may lead to disputes. Consequently, these disputes may delay project timelines, escalate costs, and foster antagonistic relationships, thereby complicating future collaboration. Alternative dispute

[1] Student at Amity Law School, Noida

resolution (ADR) offers a more amicable and commercially viable method for resolving conflicts. It facilitates the resolution of disputes while preserving corporate relationships and assuring project continuity. The significance of alternative dispute resolution (ADR) in the infrastructure sector is widely recognised. Various jurisdictions have integrated alternative dispute resolution (ADR) into their legal frameworks, either requiring or promoting its application in construction contracts. Industry-standard contracts, such as those established by FIDIC, NEC, and JCT, include provisions for alternative dispute resolution (ADR) to facilitate the swift resolution of problems without engaging in lengthy and costly litigation. This chapter aims to deliver an exhaustive overview of alternative dispute resolution (ADR) methods, encompassing their use in infrastructure matters, along with the benefits and challenges associated with their implementation.

This chapter examines the application of Alternative Dispute Resolution (ADR) in addressing conflicts within the worldwide construction and infrastructure sector. We provide a comprehensive analysis of the six primary options, evaluating their respective strengths and drawbacks both individually and in relation to arbitration and litigation. We commence with the non-binding procedures that facilitate the parties in achieving consensus: negotiation, mediation, early neutral appraisal, and the mini-trial. We subsequently examine the primary temporary binding processes: contractual and statutory adjudication. [4] The utilisation of dispute boards in various forms constitutes a method of contractual adjudication and is addressed in a distinct, devoted chapter. Ultimately, we examine an ADR approach that yields a binding resolution: expert determination.

NEGOTIATION

This is the most straightforward form of Alternative Dispute Resolution. Disputing parties may attempt to negotiate a settlement at any moment, regardless of any contractual provisions between them. Negotiation may occur informally by email, telephone, or in-person interactions. It may also be conducted in a more official manner, with the involvement of legal counsel and other third parties, such as specialists. The process may occur at any phase of the conflict and might be expedited according to the parties' preferences. Negotiation may occur between two or several parties. Negotiation is generally conducted in a private and secret manner. In circumstances governed by English law, talks are typically subject to the 'without prejudice' principle. The parties maintain authority over the outcome by determining the acceptability of the proposed terms, providing directions, and approving any agreement

made. Numerous standard form construction contracts and other agreements for extensive or protracted projects incorporate dispute resolution mechanisms. These rules explicitly stipulate those negotiations may escalate through multiple tiers of management. These provisions are incorporated in nearly all construction contracts. Dispute escalation clauses typically commence with a meeting among site representatives, followed by discussions including directors, finance officers, or other senior executives, all aimed at resolving the problem. This is an effective approach for elevating the argument to the attention of upper management. It enables senior decision-makers to perform a more impartial assessment of the issue, hence enhancing the probability of achieving a resolution. If the negotiation succeeds, the probability of the parties maintaining their relationship is heightened. Conversely, negotiation may serve as a tactic for delay. The lack of a neutral mediator can reduce the probability of achieving a resolution, especially in intricate disputes or when numerous parties are engaged. In a well-established sector such as construction and infrastructure, where stakeholders can identify and mitigate risks, it is reasonable to expect that the parties will reach a resolution by direct negotiation.

MEDIATION

An unbiased mediator assists the parties in achieving a fair resolution. The mediator is unable to impose a resolution. Mediation can be arranged at any time, in any location, and with expedience. The parties select a mediator. Mediation does not necessitate legal proficiency. Numerous initiatives seek to create universal, professional mediation standards for mediators and advocates. Mediation rapidly adjusted to COVID-19, recognizing the convenience of virtual meetings.[2] A mediation lacks a predetermined structure. It may occur via internet platforms, telephonically, or face-to-face. The COVID-19 pandemic resulted in numerous online or hybrid mediations, which have persisted post-pandemic. A hybrid mediation may consist of certain individuals participating online while others are present at a single location, or all participants convening at one place with some engaging online. The mediator's designation and contractual provisions often establish the framework. Mediation in England is confidential and governed by the 'without prejudice' principle. Mediation is effective in both bilateral and multilateral disputes.

[2]**Ronald E. M. Goodman,***Conciliation, Mediation and Dispute Resolution*, 90 **Proc. Ann. Meeting (Am. Soc'y Int'l L.)** 75–78 (1996), available at http://www.jstor.org/stable/25659010 (last accessed Apr. 5, 2025).

Mediation can be facilitative, evaluative, or transformative. All sides can express their opinions. Facilitative mediation involves the mediator helping the parties reach agreement. A mediator helps parties focus on the dispute's fundamental concerns and find their own solution. The mediator does not evaluate each party's viewpoint or predict the outcome if a judge or other final decider decides. Evaluative mediations give parties an assessment of the merits or anticipated results. Unless agreed upon, these views are not binding. In transformative mediation, the mediator aims to change the parties' relationship from combative to collaborative. The mediator usually helps the parties assess their position relative to each other rather than deciding the disagreement. Transformative mediation is nearly often done in combined sessions, unlike the other two.

Agreement on mediation type. They can change tactics throughout mediation. Facilitative mediations overwhelm evaluative ones. Youngest of the three is transformative mediation. Many places don't require mediation. The Ministry of Justice said in September 2023 that minor claims disputes must be mediated, however English and Welsh judges cannot order construction dispute parties to mediate. In England and Wales, mediation is encouraged. Even if a party can recover their own costs, an unreasonable refusal to mediate will be considered for expenses. Wales and England support court orders for compulsory mediation, but none have been made in building disputes. However, several nations mandate civil dispute mediation or ADR. Mediation is global, as shown by the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (an American Arbitration Association division), and regional institutions like the Hong Kong International Arbitration Centre and the Singapore Mediation Centre. The EU strongly pushes mediation. The EU Mediation Directive promotes Member State mediation. EU law handles international civil and commercial matters. Mediation is prevalent in building, infrastructure, and energy ADR. A impartial third-party mediator helps parties resolve this structured but informal dispute. This technique is more collaborative and cheaper than litigation or arbitration, but it has downsides. Efficiency is a key mediation benefit. Mediation takes a day or two, but court or arbitration hearings can take years. This helps in construction conflicts, as delays can harm projects, stakeholder relationships, and party solvency. Speeding up settlement saves parties a lot on legal bills and other expenditures.

Maintaining business/commercial contacts is another benefit. In the construction sector, contractors, subcontractors, and clients generally work together for years, and these connections are vital to company strategy. Litigation can ruin these ties. However, mediation

encourages cooperation and provides parties control over finding a solution. This is crucial in conflicts when parties must collaborate on ongoing tasks. Mediation offers more flexibility. Mediators allow parties to create creative solutions to their problems, unlike court judgements or arbitral awards, which usually limit remedies to money. [3]A settlement may include project timing revisions, alternate payment arrangements, or future work on specific terms. Settlements on ongoing projects often contain additional KPIs to ensure both parties are satisfied with the work and relationship. Another advantage is confidentiality. Mediation, like adjudication, is private and keeps the conversations and settlement private. This is especially beneficial in construction disputes, when numerous parties may want to avoid public litigation's reputational damage or business risk. The fundamental benefit of mediation is a speedy and affordable settlement. It appears to work well based on data. Mediation minimises commercial relationship terminations. Mediation lets parties choose their own solution and accept more outcomes than courts or arbitrators can.

Mediation is difficult despite its benefits. The voluntary nature of mediation is a major drawback. Parties must participate in some form of ADR by Pre-Action Protocol for Construction and Engineering Disputes 2nd edition (the Pre-Action Protocol) if they want to file a claim, but they are not required to reach an agreement. Other ADR methods may be better for them. If one party refuses to discuss or compromise, mediation may fail, leaving the conflict unsolved. Such cases may require adjudication, litigation, or arbitration, which adds expense and time. Unfortunately, mediation does not result in a binding ruling unless the parties agree. Unlike court or arbitration, which issue binding judgements or awards that can be enforced. Thus, mediation may fail, forcing parties to spend more time and money on the disagreement. The mediator's abilities and experience can affect mediation success. A mediator with construction experience is vital in construction disputes, which often entail complex technical and contractual concerns. Mediation without industry expertise may slow the process and diminish the likelihood of an acceptable resolution. To reach a compromise in multi-party disputes, the parties must choose a mediator who can handle this dynamic.

The fundamental drawback of mediation is that the settlement agreement is only contractually binding, not court-enforceable. Parties must honour the deal for it to be enforceable. If not, the parties may need to sue to enforce the settlement agreement or settle the matter. The UN

[3]**LafiDaradkeh,***Solution by Negotiation and Determination by Arbitration in Arab World Construction Disputes: Comparative Study between FIDIC Rules of 1987 and FIDIC Rules of 1999*, 30 **Arab L.Q.** 395–409 (2016), available at http://www.jstor.org/stable/26396204 (last accessed Apr. 5, 2025).

Convention on International Settlement Agreements Resulting from Mediation, the Singapore Mediation Convention, addresses this apparent vulnerability. It took effect on September 12, 2020, and currently has 56 signatures. The US and China are the world's two largest economy, as are other Asian economies. The Convention and UNCITRAL Model Law on International Commercial Arbitration attempt to streamline and harmonise cross-border enforcement of mediated commercial settlement agreements. Mediation can be costly, especially for smaller parties or enterprises, yet less so than litigation. Parties may also use mediation to discover the other side's case without settling. Combined ADR procedures like 'arb-med-arb' are gaining popularity. Here, parties officially start arbitration and immediately ask a lone arbitrator to submit the issue to mediation. A procedural order to mediate stays the arbitration. If mediation works, the tribunal awards an enforceable consent award. If mediation fails, the dispute returns to the tribunal, which usually continues without much time or money. The Singapore International Mediation Centre and Singapore International Arbitration Centre adopted this integrated ADR method. It might be included into a contract or agreed to after a dispute. [4]

EARLY NEUTRAL EVALUATION

Early neutral evaluation (ENE) involves parties hiring a neutral third party to evaluate their claims without binding them. It offers a confidential evaluation of the disagreement by an unbiased, renowned, and often informed source. ENE has no set method, and the building contract may outline its basic components. ENE is usually 'without prejudice'. It could involve facts, technicalities, legalities, or a mix. A magistrate, attorney, or specialist may evaluate. Many professional groups keep sanctioned evaluator registries. Except as agreed upon, the assessment is secret and non-binding. ENE may promote direct settlement or be followed by other ADR. ENE can quickly, authoritatively, and impartially evaluate a claim without the costs of arbitration or litigation. It can be especially helpful when the parties have very different views on success and minimal understanding of litigation risks. It can clarify parties' litigation expectations and estimate likely outcomes. It clarifies issues for alternative dispute resolution. ENE may not be suitable for conflicts involving oral testimony on factual issues. It is unlikely to help in complex situations since the preparations may be too expensive for a non-binding conclusion. It could escalate the situation and impede discussions. The Technology and Construction Court (TCC) and business courts in England

[4] **Alena L. Vasilyeva,** *Practices of Topic and Dialogue Activity Management in Dispute Mediation*, 19 **Discourse Stud.** 341–358 (2017), available at https://www.jstor.org/stable/26377660 (last accessed Apr. 5, 2025).

and Wales rarely use judicial ENE, where judges evaluate[5]. In The Sky's the Limit Transformations Ltd. v. Mirza, High Court Judge Stephen Davies suggested a cheaper way to resolve lower-value domestic home renovation contract disputes. He suggested 'a stay for mediation upon receipt of the report and questions.' If the parties decline mediation and the judge thinks it unsuitable to impose mediation, another TCC judge will order early neutral evaluation.

MINI-TRIAL

A mini-trial, or executive tribunal, is a non-binding and flexible kind of alternative dispute resolution (ADR). Each party presents its case, usually via legal representation, to a mini-trial panel. The panel often consists of a senior executive from each party and a neutral third party who may act as a mediator or counselor. The executives representing the parties often have not engaged in the dispute and must possess sufficient authority to settle the issue. A mini-trial aims to quickly evaluate the merits and deficiencies of each party's argument. The parties or their legal representatives provide succinct and generally informal presentations to the panel, which is authorized to ask questions. Documents, including witness statements and expert testimonies, may be shared prior to the hearings. Following the submissions from each party, the panel will commence talks. The neutral's role on the panel is generally to provide guidance on legal and evidentiary matters during the presentations and to apprise the parties of the possible litigation outcome if they fail to reach an agreement during the mini-trial. The neutral party may act as a mediator between the two senior executives. The mini-trial method enables senior executives to assess the legal arguments of both parties and thereafter negotiate a settlement from an informed perspective, without relying on further judicial processes or remedies. [6]It remains an uncommon form of alternative dispute resolution, even in the United States, where it originated in the 1990s. It is considered more suitable than mediation in numerous cases or when it is beneficial to engage senior executives who have not previously been involved in the issue.

ADJUDICATION

Adjudication is mostly utilized in disputes within the construction and infrastructure industries. Parties have routinely reached agreement on contractual adjudication. Statutory

[5]**Joshua D. Rosenberg & H. Jay Folberg,***Alternative Dispute Resolution: An Empirical Analysis*, 46 **Stan. L. Rev.** 1487–1551 (1994), available at https://doi.org/10.2307/1229164 (last accessed Apr. 5, 2025).
[6]**Malcolm Sher et al.,***Other Forms of Dispute Resolution*, 32 **GPSolo** 58–63 (2015), available at http://www.jstor.org/stable/24632528 (last accessed Apr. 5, 2025).

adjudication was instituted in England and Wales in 1996 to encourage its utilization in disputes related to construction contracts, functioning as a swift and efficient mechanism to improve cash flow during ongoing projects. The technique has been executed in various jurisdictions, though not uniformly. In England and Wales, statutory adjudication permits parties to a construction contract to adjudicate a disagreement 'at any moment' by referring it to the appointed adjudicator. The procedure is accelerated. Unless extended by the referring party or by mutual agreement, the adjudicator must provide a ruling within 28 days, which remains binding until resolved through litigation or arbitration. The core principle of adjudication is 'pay now, dispute later,' where the efficiency and cost-effectiveness of the process are often perceived as undermining reliability or options for appeal. In this context, it may be regarded as a fundamental form of justice. A ruling may be maintained despite factual or legal errors, remaining binding only until a conclusive determination by a court or arbitral panel. The process generally remains confidential until judicial enforcement action is later pursued. This is executed using a concise methodology in England and Wales. The parties maintain the right to settle their issue via litigation or arbitration. There is a consensus among experienced TCC judges and textbook authors that, at least in England and Wales, adjudication generally resolves the core dispute in most cases. The adjudicator's decision is declared conclusive as it stays uncontested thereafter.

Adjudication offers substantial advantages to the parties, chiefly due to its required promptness, cost efficiency relative to litigation or arbitration, and the issuance of an interim finding that may be perceived by the parties as a de facto final resolution. It is available to any party engaged in a construction contract for any disputes that emerge under that contract, including after termination. The adjudicator's authority is specified for each dispute, and the parties may appoint a technically skilled adjudicator or an attorney, if appropriate. It has been successfully embraced by the construction industry in England and Wales, and its international allure is growing. At the 54th session of UNCITRAL in July 2021, a working group proposed the enhancement of UNCITRAL Rules to include international business adjudication, reflecting an increased global interest in this popular form of alternative dispute resolution (ADR). [7]

EXPERT DETERMINATION

[7]**Kim A. Lambert,***Fundamentals of Alternative Dispute Resolution*, 11 **Franchise L.J.** 99–103 (1992), available at http://www.jstor.org/stable/29541518 (last accessed Apr. 5, 2025).

Expert determination is a procedure wherein a disagreement is sent, by mutual consent of the parties, to one or more independent experts who render a decision on the issue. The parties generally concur that the expert's determination shall be conclusive and obligatory, excluding a few specific conditions, like fraud, bias, or a significant deviation by the expert from the provided instructions. The expert is authorised and entitled to utilise their own specialised expertise. In contrast to a judge or arbitrator, the expert does not provide decisions exclusively based on the submissions and evidence presented to them. Absent a requirement from the parties, the expert is not obligated to furnish justifications for his or her opinion. An expert determination is a private procedure. It is especially appropriate for arguments over valuation or those that entail technical concerns. Expert findings are wholly contingent upon and governed by the agreement between the parties. There exists no legal foundation or regulation governing the process. Numerous institutions establish their own regulations that may be integrated into the contract, ranging from the ICC to smaller multinational entities like the Resolution Institute in Australia and New Zealand.

The primary benefits of the process are its relative speed and cost-effectiveness compared to litigation or arbitration, as well as the ability for the parties to establish their own procedures. It permits parties to directly consult the expert without the necessity of a judge or arbitrator, who may ultimately depend on the expert for guidance in making a decision. The primary drawback of expert judgement is that if the expert arrives at erroneous conclusions, the parties possess minimal grounds of appeal. Furthermore, it is generally inappropriate for factual disagreements, which are prevalent in construction conflicts.

ADR COMPARED WITH LITIGATION IN CONSTRUCTION DISPUTES

Regardless of the industry sector, resolution necessitates communication and a readiness to compromise. ADR can facilitate both. The aforementioned mechanisms provide the parties in a commercial dispute the chance to articulate their comprehension of the issue to one another and, if desired, to pursue an impartial assessment by a third party of the merits and deficiencies of their respective viewpoints. Aside from adjudication and expert judgement, these consensual ADR processes can yield innovative commercial solutions unattainable through litigation and arbitration. [8]Alternative Dispute Resolution (ADR) is characterised by its privacy, confidentiality, expediency, flexibility, and relative cost-effectiveness. The

[8]**Dwight Golann& Marjorie Corman Aaron,***Dispute Resolution: Safe and Impartial Evaluation Can Be Effective in Mediation*, 38 **GPSolo** 70–71 (2021), available at https://www.jstor.org/stable/27348486 (last accessed Apr. 5, 2025).

adaptability of ADR was especially shown during the global COVID-19 pandemic. Parties consented to remote interactions among themselves and with neutral facilitators, such as mediators, due to national and international constraints on gatherings and mobility. Even if ADR does not produce a settlement, it can assist the parties in clarifying and delineating the disagreement, thereby reducing resolution costs. ADR enables the parties to cooperate in seeking a resolution, thereby maintaining the commercial relationship. A straightforward illustration of the recognition of the benefits of ADR is that numerous courts globally provide ADR as a supplement to their trial procedures, either as a prerequisite for litigation or as an alternative for the parties involved. Court-annexed mediation is notably widespread, and several countries' courts provide judicial early unbiased evaluation. Nonetheless, ADR is not appropriate for all conflicts. Some intricate conflicts will require a comprehensive trial procedure involving disclosure, witness testimonies, and expert reports. There are instances where a significant legal concept must be resolved to address the fundamental dispute. Disputes related to construction and infrastructure are often factually and technically intricate. They can produce complex legal issues pertaining to specific contract forms. They often entail numerous stakeholders, complicating the attainment of consensus for the successful utilisation of ADR. These issues may ultimately require resolution by judges and arbitrators. Litigation and arbitration have addressed the difficulty of resolving disputes in building and infrastructure. Both have used procedural improvements to facilitate expedited and earlier hearings at a reasonable and appropriate cost. In response to the demand for judges and arbitrators possessing industrial expertise, specialised commercial courts are being established globally, notably in Singapore, Amsterdam, Paris, Frankfurt, Brussels, Dubai, and several regions in China. Nevertheless, ADR ought to be more appealing to the building and infrastructure sectors as a method of risk management. Disputes in this industry can incur significant costs for litigation and arbitration due to the often-extensive documentation and the reliance on expert testimony, often spanning various disciplines and involving numerous parties. Typically, individuals engaged in a building project from the beginning contemplate suitable dispute avoidance and resolution methods specific to the project, which are subsequently integrated into the contract among the parties. Numerous prevalent standard forms in this field, such as the International Federation of Consulting Engineers (FIDIC) suite and the New Engineering Contract series, provide provisions for Alternative Dispute Resolution (ADR). Following the covid-19 pandemic, the substantial economic benefits derived from the prompt and efficient resolution of disputes should be especially appealing to this industry sector. It can determine solvency vs insolvency. We may soon arrive at a

juncture where the building and infrastructure sector ceases discussions on ADR, and conflict resolution evolves into a cohesive entity.