FECHA DE RECEPCIÓN: 15/07/2020
FECHA DE APROBACIÓN: 08/11/2020

ADR a comparative study in common law jurisdiction – How does North America compare with the rest of the world

ADR un estudio comparativo en la jurisdicción de derecho consuetudinario: cómo se compara América del Norte con el resto del mundo

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Abstract:
In this document, the author will provide a general description of ADR in common law jurisdictions, but with a particular emphasis on how ADR is practiced in North America (for this document, it refers to the countries of EE. USA and Canada). Also, will focus on the way ADR is implemented in North America and compare this with the way ADR is implemented in England the largest common law jurisdictions outside of North America. In that sense, as the reader may know, most legal jurisdictions in North America are common law.

Resumen:
En este documento, el autor proporcionará una descripción general de ADR en jurisdicciones de derecho anglosajón, pero con un énfasis particular en cómo se practica la ADR en América del Norte (para los propósitos de este documento, se refiere a los países de EE. UU. Y Canadá). Además, se centrará en la forma en que se implementa ADR en América del Norte y comparará esto con la forma en que se implementa ADR en Inglaterra, las jurisdicciones de derecho común más grandes fuera de América del Norte. En ese sentido, como el lector sabrá, la mayoría de las jurisdicciones legales en América del Norte son de derecho común.

Keywords:
Alternative dispute resolution (ADR) - Mediation- Adjudication - Comparative Analysis - Common Law

Palabras claves:
Mecanismos alternativos de resolucion de conflictos (MARC) – Mediación – Adjudicacion - Analisis Comparativo - Common Law.

Summary:

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1. Introduction:

Abraham Lincoln is famously quoted as having said

> "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.
>
> Never stir up litigation. A worse man can scarcely be found than one who does this(….)"[1]

And he could have been writing for today. This statement embodies the thought process that has led to the development of ADR in North America and the rest of the common law areas. This paper will focus on the way ADR is implemented in North America and compare this with the way ADR is implemented in England the largest common law jurisdictions outside of North America.

Today lawyers always must consider forms of alternative dispute resolution (ADR) and to try to help the parties to find a cost-effective solution for their dispute. In this paper, I am going to give an overview of ADR around the common law jurisdictions but with a particular emphasis on how ADR is practiced in North America (for this paper I am referring to the USA and Canada). As the reader will know most North American legal jurisdictions are common law.

One of the main reasons why ADR is now considered an important thing to consider is because the risks and the cost of taking a matter to court are inevitably higher than settling the claim for a reduced value. Of course, there is always the chance that you are going to win your court case, however, there is no guarantee. There is always a chance that the issues are black and white. Almost always though there are grey areas which means you cannot guarantee success.

To put that into context Abraham Lincoln's statement, a statement which has echoed throughout discourse on ADR, if a party has a $10,000,000 claim and legal costs are $5,000,000 on both sides then the losing party, if they lose outright, will end up, in many jurisdictions, with a bill of $20,000,000. This is a risk that many companies and individuals simply cannot take.

Abraham Lincoln says in the quote above that "There will still be work enough". Indeed, many lawyers would say that there is more work where there is a settlement. This statement is even more accurate in the construction context.

Before looking at the forms of ADR used in various common law jurisdictions in this paper it is important to have in mind the various forms of ADR referred to under that umbrella.

2. What does ADR mean?

There is no one definition of ADR indeed it is generally considered in the USA that ADR includes arbitration whereas in England arbitration is considered alongside court as a form of litigation. The English view might best be summarized by Brown and Marriott who define ADR as:

> "A range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party"[2].

The English Civil Justice Council published in November 2018 the final report of the CJC ADR Working Group titled "ADR and Civil Justice". This paper described ADR techniques as follows:

> "The types of ADR technique we are considering lie along a spectrum between fully evaluative techniques like arbitration and wholly facilitative techniques like negotiation and mediation. That spectrum would run roughly as follows:
>
> – Negotiation and round table meetings (least evaluative)
>
> – Mediation
>
> – Conciliation and ombudsmen

1 Abraham Lincoln "Notes for a Law Lecture" 1 July 1850. http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm
2 Henry Brown and Arthur L. Marriott, *ADR Principles and practice* (London: Sweet & Maxwell,1993),26.

– Judicial Early Neutral Evaluation/Private Early Neutral Evaluation (JENE/PENE) (we propose dropping the first "E" for the rest of this report, as this process can be used at any stage of a dispute)
– Arbitration (most evaluative)"[3]

The one twist here is that today in England Adjudication which is a form of dispute resolution akin to a short arbitration would now be considered amongst the forms of ADR.

There are, however, many common themes in the definition of ADR central to these is mediation.

2.1. Mediation

Mediation is the most common form of ADR used in common law jurisdictions. Unlike, many civil law jurisdictions where there is a history of using what is called MedArb in the common law there is no understanding of this. Mediation is a facilitative form of dispute resolution where the independent third party, who often has only a limited knowledge of the issues and facts and limited knowledge of the parties tries to find a solution that is acceptable to all parties. Unlike MedArb mediators are rarely the final tribunal.

Mediation is a voluntary process, although in England[4] mediation is increasingly a requirement of the court process (but technically not mandatory). See for example Part 44.2 of the Civil Procedure Rules 1998. This sets out the court's power to change the normal order for costs and one of these CPR 44.2.4(b) is the conduct of the parties which would inevitably include a refusal to mediate. See also section 7 of the TCC Guide[5] and the related English legal case of Halsey v Milton Keynes[6]. The TCC Guide states the following:

"7.1 General

(i)7.1.1 The court will provide encouragement to the parties to use alternative dispute resolution ("ADR") and will, whenever appropriate, facilitate the use of such a procedure. In this Guide, ADR is taken to mean any process through which the parties attempt to resolve their dispute, which is voluntary. In most cases, ADR takes the form of inter-party negotiations or a mediation conducted by a neutral mediator. Alternative forms of ADR include early neutral evaluation either by a judge or some other neutral person who receives a concise presentation from each party and then provides his or her own evaluation of the case. The parties are advised to refer to the ADR Handbook.

(ii) 7.1.2 Although the TCC is an appropriate forum for the resolution of all IT and construction/ engineering disputes, the use of ADR can lead to a significant saving of costs and may result in a settlement which is satisfactory to all parties.

(iii) 7.1.3 Legal representatives in all TCC cases should ensure that their clients are fully aware of the benefits of ADR and that the use of ADR has been carefully considered prior to the first CMC".

The TCC guide goes on to talk about the potential cost consequences of a failure to mediate within the English courts. Paragraph 7.4.1 of the TCC guide below:

7.4.1 Generally. At the end of the trial, there may be costs arguments on the basis that one or more parties unreasonably refused to take part in ADR. The court will determine such issues having regard to all the circumstances of the particular case. In Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 WLR 3002, the Court of Appeal identified six factors that may be relevant to any such consideration:

– the nature of the dispute.
– the merits of the case.
– the extent to which other settlement methods have been attempted.
– whether the costs of the ADR would be disproportionately high.

3 Civil Justice Council, *ADR and Civil Justice – Final Report,* (November,2018) paragraph 3.2. https://www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADR-Report-FINAL-Dec-2018.pdf

4 See the CJC final report for the courts view on mediation and encouraging the process.

5 HM Courts & Tribunals Service, *The Technology and Construction Court Guide, 2nd Edition, updated 9 February 2015.* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819807/technology-and-construction-court-guide.pdf

6 [2004] EWCA Civ 576 (11 May 2004)

- whether any delay in setting up and attending the ADR would have been prejudicial.
- whether the ADR had a reasonable prospect of success.

This case is the subject of extensive discussion in Civil Procedure, Volume 2, at Section 14. See also PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288, [2014] BLR 1, particularly concerning silence in the face of a request to mediate.

While the courts in England determined that a party could not be forced to mediate they could decide to refuse a successful party its legal coats and order that it pay the other parties legal costs as a form of punishment. The English Courts have also determined that in certain circumstances a party who unreasonably delays mediation may be subject to cost sanctions if successful at the trial[7].

The picture is slightly different in different common law jurisdictions. For example, mediation is compulsory for a defined class of cases in Ontario, some give discretion of referrals to a judge, Florida. As you have seen above mediation can be forced on parties in England via the cohesion of failing to recover your legal costs. In some other country's ADR has been invested in heavily. As part of the Civil Justice Council research in preparation for its final report it published an interim report in October 2017[8] records at paragraph 4.16 the percentages of cases as reported to the CJC by one mediation body in the UK's as follows:

Commercial Contract	45%
Professional negligence	42%
Intellectual Property	5%
Construction	2%
Insurance	3%
Employment	2%
PI/Clin Neg	1%

2.2. The process of mediation

The process of mediation, due to its voluntary nature, is flexible and allows the parties to decide how they are going to best use the process. Traditionally, in England and many other common law jurisdictions, the costs of mediation were not recoverable, in recent times these costs are becoming potentially recoverable as the process has become bedded down.

While the process is flexible and voluntary it has become increasingly formulaic in many common law jurisdictions. The process generally consists of a series of submissions, all marked without prejudice, which set out the parties positions on the issues in the case.

Once the mediator has read the papers a meeting is organized between the parties. It usually starts in the morning with a plenary session and following this one to one meeting between the mediator and the parties and very occasionally meetings with the parties, even meetings without the legal representative present. Once this is all taking place the parties go into separate rooms are rarely if ever see the other side again unless or until the mediators have found a way to settle the case. If, the agreement is reached between the parties then draw up heads of terms preferably a settlement agreement at the mediation, and sign there and then. The mediation has the flexibility in how the case is settled and this does not simply have to be a case of one party making a payment to another there could be any number of alternatives including some work or giving money to charity, anything.

In England, mediation is the dominant form of ADR outside of the construction industry. Construction is by its complex nature prone to disputes and the TCC has for a long time encouraged mediation. Research carried out in 2009 showed that at the time cases in the TCC settled in a ratio of 2:1 in mediation over going to trial[9]. It has been recognized by many commentators that mediation is used heavily in construction to resolve disputes once the dispute has reached the stage of litigation. To put this in context the number of cases referred to the TCC in a total of around 300-400 a year which includes IT cases in the 3 months preceding the writing of this paper 20 judgments were handed down in the TCC of which approximately 5

7 *Nigel Witham Limited v Robert Smith and Jacqueline Isaacs (Nº 2)* [2008] EWHC 12 His Honour Judge Peter Coulson

8 Civil Justice Council, *ADR and Civil Justice – Interim Report (*October 2017)

9 The Centre of Construction Law and Dispute Resolution, King's College London and The Technology and Construction Court. "Summary Report of the Final Results". *The Use of mediation in Construction Disputes*, edited by Gould and others (7th May 2009). https://www.core-solutions.com/core/assets/File/Mediation-in-Construction-Disputes.pdf

were to do with substantive legal issues applying to a construction. In the last year recorded, April 2018 to April 2019 there was 1905 adjudication recorded as having adjudicators nominated to resolve disputes[10].

Mediation is now also referred to as a method of dispute resolution in construction contracts, see for example the JCT 2016 Design and Build Contract[11] clause 9.1 which asks the parties to give serious consideration to the use of mediation to resolve the dispute.

3. Dispute boards and adjudication

The author has put dispute boards and adjudication together under the one heading. The reason for this is that Adjudication is a form of dispute resolution used in England and several other common law jurisdictions under English Law Dispute Boards are illegal as they would prevent the right to refer a dispute at any time to adjudication. Dispute Boards do have much in common with the English system of Adjudication and therefore the author has put them together.

Adjudication as noted above is an increasingly common form of ADR, particularly for construction. In England, Adjudication arose from the Latham Report[12] in 1994 which was then put into law by the Housing Grants Construction and Regeneration Act 1996 which is subsequently been amended by the Local Democracy Economic Development and Construction Act 2009. Unlike mediation adjudication in England is a statutory right and you may therefore go to adjudication whenever there is a dispute between the parties. Unlike in other jurisdictions, for example, each of the Australian states and Ontario in Canada all has forms of adjudication, in England any dispute that may be resolved. In these other countries, it is normally only money disputes that are resolved. Adjudication has found any traction in the United States yet.

There is a sizeable canon of case law on adjudication in the jurisdictions where adjudication has applied for some time. The process of adjudication while being an evaluative process is also intended to facilitate the smooth movement of money through the construction supply chain and to support the construction industry. The process has been described as inquisitorial which is alien to the common law adversarial approach but has become the single most used form of dispute resolution in England. In the last year of records, there were 1905 adjudicator appointments, and these are just the adjudication where the contract does not provide for a specific individual to be the adjudicator.

Adjudication has often been described as a quick and dirty form of dispute resolution, the process is described in more detail below, and has been adopted by the construction industry as the preferred method of ADR as the result is quick, if not always precise, far faster than even mediation, is relatively speaking low cost and leads to a quick and enforceable decision. Adjudication is a statutory form of ADR in England and has been strongly supported by the courts. Attempts to treat it as being like Arbitration or Court where rules of natural justice apply and the smallest anomaly can make a decision challengeable. The courts have rejected virtually all attempts to do this and guidance has been given by the court[13].

3.1. Dispute Boards

There are generally two different types of dispute boards, standing dispute boards which are established as part of the original contractual framework, and ad hoc dispute boards which are formed as and when there are disputes. They may also be referred to as Dispute Boards or Dispute Adjudication Boards the term has become largely interchangeable. There have been hybrid versions of these, for example, the London Olympics 2012 which had a panel of nominated adjudicators across the whole series of Olympic delivery contracts, but generally, they fall into one of these two camps.

This board is generally formed of three members with appropriate skills and are agreed upon between the parties before being appointed. If they are part of a Standing Dispute Board then usually, they visit the site regularly whenever there are any disputes. If they are part of an ad hoc dispute board then they may visit the site as part of the process to resolve the dispute. The great advantage of using a standing dispute board is that the board members get to know the project and therefore it is easier for them to make decisions. They will get to know quite early on the characters and the issues that arise on the site.

10 Adjudication Society, *Report Nº 18* (December 2019)
11 The Joint Contracts Tribunal Design and Build Contract (2016) clause 9.1
12 Sir Michael Latham, *Constructing the Team*, (London: HMSO,1994*)*. https://constructingexcellence.org.uk/wp-content/uploads/2014/10/Constructing-the-team-The-Latham-Report.pdf
13 See also *Sir* Peter Coulson, *Coulson on Construction Adjudication,* 4th edition (UK: Oxford University Press, December 2018)

Several other forms of ADR are less well known but worthy of careful consideration.

4. Expert Determination

This form of ADR along with early neutral evaluation is probably the least well-known of the forms of ADR. Expert termination also is interesting as under some common law jurisdictions the use of the term expert fundamentally changes the nature of the role of the dispute resolved. In England, the impact of the use of Expert is to make the determination of the Expert final and binding on the parties and incapable of challenge. It is easier to challenge arbitrators, adjudicators, or mediators, or anybody else in their decision-making process. Under English law expert determination is legally binding as the power of the expert derives from the contract rather than from statute. There are some cases which confirm this, see, for example, the case of Barclays Bank PLC v Nylon Capital LLP[14] which approved of the deserting judgment of Hoffman LJ in Mercury Communications Ltd v The Director-General of Telecommunications[15] where he said:

> "So in questions in which the parties have entrusted the power of decision to a valuer or other decision-maker, the courts will not interfere either before or after the decision. This is because the court's views about the right answer to the question are irrelevant. On the other hand, the court will intervene if the decision- maker has gone outside the limits of his decision making authority.
>
> One must be careful about what is meant by 'the decision-making authority'. By a 'decision-making authority', I mean the power to make the wrong decision, in the sense of a decision different from that which the court would have made. Where the decision-maker is asked to decide in accordance with certain principles, he must obviously inform himself of those principles and this may mean having, in a trivial sense, to 'decide' what they mean. It does not follow that the question of what the principles mean is a matter within his decision-making authority in the sense that the parties have agreed to be bound by his views. Even if the language used by the parties is ambiguous, it must (unless void for uncertainty) have a meaning. The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority. Ambiguity in this sense is different from conceptual imprecision which leaves to the judgment of the decision-maker the question of whether given facts fall within the specified criteria"[16].

This, therefore, shows expert determination is final and binding save where the expert has gone outside the remit of their instruction. Expert Determination, like adjudication, has no formal process which gives it flexibility. There is some guidance from organizations such as the Academy of Experts in England[17] but for something that can have such a permanent effect on a party it is surprising to find that the rules are not more prescriptive. It is perhaps for this reason and the prevalence of other forms of ADR that Expert Determination is incredibly rare and resistant from the courts as well.

Early neutral evaluation is another form of ADR as essentially you are asking experts, quite often in charge, to give an indication based upon parts of the papers and hearing some submissions what their likely view is going to be at a trial. It is something that is approved of in the TCC guide and indeed there is a section straight after refusing to mediate.

The TCC Guide sets out at paragraph 7.5 the following in respect of ENE[18]:

> "7.5 Early Neutral Evaluation
>
> 7.5.1 An early neutral evaluation ("ENE") may be carried out by an appropriately qualified person, whose opinion is likely to be respected by the parties. In an appropriate case, and with the consent of all parties, a TCC judge may provide an early neutral evaluation either in respect of the full case or of particular issues arising within it. Unless the parties otherwise

14 [2011] EWCA Civ 826, [2012] Bus LR 542
15 [1994] CLC 1125
16 [1994] CLC 1125 at p1140
17 See the Academy of Experts Rules for Expert Determination (2008)
18 See page 33 in The Centre of Construction Law and Dispute Resolution, King's College London and The Technology and Construction Court (TCC). "Summary Report of the Final Results". *The Use of mediation in Construction Disputes*, edited by Gould and others (7th May 2009), 33. https://www.core-solutions.com/core/assets/File/Mediation-in-Construction-Disputes.pdf

agree the ENE will be produced in writing and will set out conclusions and brief reasons. Such an ENE will not, save with the agreement of the parties, be binding on the parties.

7.5.2 If the parties would like an ENE to be carried out by the court, then they can seek an appropriate order from the assigned judge either at the first CMC or at any time prior to the commencement of the trial.

7.5.3 The assigned judge may choose to do the ENE himself. In such instance, the judge will take no further part in the proceedings once he has produced the ENE, unless the parties expressly agree otherwise. Alternatively, the assigned judge will select another available TCC judge to undertake the ENE.

7.5.4 The judge undertaking the ENE will give appropriate directions for the preparation and conduct of the ENE. These directions will generally be agreed by the parties and may include:

– a stay of the substantive proceedings whilst the ENE is carried out.

– a direction that the ENE is to be carried out entirely on paper with dates for the exchange of submissions.

– a direction that particular documents or information should be provided by a party.

– a direction that there will be an oral hearing (either with or without evidence), with dates for all the necessary steps for submissions, witness statements and expert evidence leading to that hearing. If there is an oral hearing the ENE will generally not last more than one day.

– a statement that the parties agree or do not agree that the ENE procedure and the documents, submissions or evidence produced in relation to the ENE are to be without prejudice, or, alternatively, that the whole or part of those items are not without prejudice and can be referred to at any subsequent trial or hearing.

– a statement whether the parties agree that the judge's evaluation after the ENE process will be binding on the parties or binding in certain circumstances (e.g. if not disputed within a period) or temporarily binding subject to a final decision in arbitration, litigation or final agreement."

As can be seen from this very useful explanation of the process it is very different from mediation or any other form of ADR. The purpose is to give a clear indication of where the case is going and to help, facilitate, the settlement of the dispute without significant legal costs being incurred. This has not been taking up that often as a form of ADR but there are cases where it has been very successful.

Sometimes it is the case that mediations will turn into early neutral evaluations if the parties agree to this. This has also been quite successful in common law jurisdictions in settling disputes.

5. ADR in common law jurisdictions, how successful

The evidence points to varying degrees of success in a settlement. A lot of this may be caused by the nature of the disputes that are being mediated. The range is somewhere between 40 and 80% of cases that go through mediation settle at the mediation. As recorded in the paper The use of Mediation in Construction Disputes the ratio of mediation settling disputes in court is 2:1. There are however mediators who believe that virtually all cases that they have mediated on either settle on the day of the mediation or settle shortly thereafter. A lot depends upon the type of dispute as to whether courts will essentially make mediation mandatory, the Civil Justice Council final report recommended that mediation was not made compulsory. In England, while mediation may not have been made mandatory it has, for smaller claims, become essentially mandatory as the courts will require you to go to mediation and if mediation does not happen then the court will look for an explanation'. As can be seen from the comparison with Canada the Canadian approach is more prescriptive and pushes parties in many types of dispute towards mediation.

To give some examples from various parts of the common law jurisdictions and in particular, North America let's have a look at Canada. In 1999 Ontario introduce mandatory mediation for civil, non-family actions, with a provision for the parties to opt-out of filing a motion[19]. Parties in all cases had to undergo mediation within 90 days of filing the first defense. This has been a permanent fixture in Ontario since 2001. Ontario has generally been considered to be at the forefront of these steps and they are also the only problems that have adjudication.

19 Rule 24.1 of the Civil Procedure Rules of Ontario

In the United States of America Congress in 1990 passed the Civil Justice Reform Act which encourages Federal District Courts to develop programs using ADR. The alternative dispute resolution act 1998 required 94 districts in the US to authorize the use of ADR in civil actions in their districts. It did not prescribe exactly what form of ADR had to be followed as it allowed each district to make its own decision. What was fundamental to all of this was that there would be a "neutral Facilitator" available to all parties[20]. By 2011 more than one-third of all schedule courts had authorized multiple forms of ADR and all of the 94 districts of Federal Court had authorized at least one form of ADR.

The first US state to make mediation compulsory was California in 1981 but that was only in respect of separating couples. The US state with the most extensive court mediation ADR system in Florida. In 1987 trial judges were given authority to refer any civil case to mediation or arbitration "if the judge determines the action to be of such a nature that mediation could be a benefit to the litigants or the court". It has been estimated that more than 100,000 cases in Florida have been diverted from court to mediation each year. Under the Florida rules civil procedure, the first mediation session must take place within 60 days of the court referral. There is some possibility for the parties to agree that mediation should not apply that there is only a very small window for making this application.

In Ohio, local courts can write local rules to manage their courts. Also, in Ohio lawyers are required to suggest alternative dispute resolution to their clients. This allows for the growth of a deal in Ohio.

The first set of model standards of conduct for mediators was prepared in 1995 and revised in 2005. The American Arbitration Association in conjunction with the American Bar Association Section of dispute resolution and the Association for conflict resolution drafted these rules. Florida as seems always to be the case leads the way in creating formal mediator standards at a state level.

What is perhaps the most striking about all of this is the interventionist nature of the court. The US states have taken a far more interventionist approach to the encouragement of mediation than has been done in England for example in England only uses the threat of having to pay the other sides legal costs if you lose. Of course, in the US most states do not have that option as cost recovery is only allowed in contract cases. The clear comparison being that England takes a less prescriptive and less compulsive approach to the requirement for use of ADR.

As was the case in the United States in several countries there have been attempts to make mediation mandatory. In Ontario, they required mediation to take place and that improved the rate assessments are 41% in 2007/08 to 46% in 2011/2012[21]. This however was related to family disputes, but it was so successful that it found its way to the English courts and specifically the Central London County Court mediation scheme. It has been found that the courts in England could not force a party to mediate because it would be a breach of the Human Rights Act 1998 as in force in the United Kingdom. Also, as confirmed by the Civil Justice Council final report in December 2018 the present judicial view in England is that mediation or other forms of ADR should remain voluntary. The approach of the courts to smaller value claims, below £40,000, remains that where ever possible the parties should meditate but they will not be forced to mediate.

A few words on the costs of mediating. Mediation is an increasingly expensive form of ADR. In some countries, they have introduced discounted mediation and for things like family cases, it is fairly cost-effective. For commercial disputes, the costs of mediating have grown considerably. It is very easy for mediation to cost in the region of $20,000 for the day. Mediators fees are costing up to $10,000 a day although often less and then you have the legal costs. These increasing costs should be put against the cost of going to trial where the cost could be many hundreds of thousands of dollars.

6. Adjudication

Adjudication is not a system used in the United States of America or the majority of Canada. One Canadian province, Ontario, does have Adjudication in the form of the Ontario Construction Act which came into force on the 1st of October 2019. Unlike its English cousin, on which it was modeled, the Ontario set of rules is designed, specifically, for use with all valuation disputes. The procedure followed in Canadian adjudication is that the Construction Act provides for prompt payment provisions and if these are not followed then the parties have the right to go to adjudication. There is one Authorised Nominating Authority known as

20 Thomas J. Stipanowich, "ADR and the "vanishing trial": The growth and impact of "Alternative Dispute Resolution", *Journal of Empirical Legal Studies*, 2004, vol. 1 (3),(November 2004): 849. https://doi.org/10.1111/j.1740-1461.2004.00025.x

21 See the research on family mediations by Joan B. Kelly 'Family mediation research: Is there empirical support for the field?' *Conflict Resolution Quarterly*, vol. 22 (1–2), (2004):29.

the Ontario Dispute Adjudication for Construction Contracts. As in England, certain types of contracts are excluded and in the case of the Ontario construction at these are public-private and alternative finance and procurement contracts ("AFP") if the contract is one of these then the construction does not apply. The Canadian approach mirrors that of the other common law jurisdictions which have introduced adjudication as the process is linked to rules to promote prompt payment.

As was noted above there are other countries that have adjudication most notably the Republic of Ireland, Australia where all of these states of Australia have separate rules, New Zealand, Singapore, and Hong Kong.

It is accepted that there are no prescribed rules on how to conduct an adjudication, it is accepted that the decision may contain errors and it is accepted that the decision will not be as complete as might be expected from a judge or arbitrator. This does not mean that the adjudicator has carte blanche to make whatever decision they think fit as there are still chances that a court will find that an adjudicator has been biased or has followed a poor procedure making the decision unenforceable. In most jurisdictions where there is adjudication, the adjudicator is not liable for their actions giving them freedom from suit which is important to maintain their independence.

The other thing that Adjudication has in common around the common law jurisdictions is that it is a fairly cost-effective and low-cost way of resolving a dispute. In most jurisdictions, the cost of the adjudication is not recoverable beyond the adjudicators' fees selves. Increasingly, systems are being brought into place to reduce the cost of adjudication, see for example the Ontario Construction Act.

In the United States, dispute boards are the norm for resolving disputes. The best-known foundation for organizing dispute board is a Dispute Resolution Board Foundation, founded in 1996, although its records are said to go back to 1982. The DRBF is a global organization that helps with the promotion and appointment of dispute board members across the world. It had its start in the US.

Dispute boards have their origins in the mid-1970s in the United States they have been a phenomenal success in the United States they are being used on all types of construction projects across the country and figures from 2005 suggest that 98% of display boards lead to final settlement. DRB's were originally conceived for tunneling and still apply to the vast majority of tunneling contracts in the US. They are particularly common in civil engineering projects as they are across the globe. They are bees have spread as far as the Middle East and Southeast Asia as well as eastern Europe and South America. Based on the author's research it appears that the very first DAB was for the Eisenhower Road tunnel in Colorado in 1974. Anecdotally tunneling has been the source of several different forms that is as it is also the source of adjudication as Adjudication was first conceived and used on the channel tunnel, a tunnel between England and France.

It would be appropriate at this juncture just take a moment to discuss the differences in the titles as they will seem very similar as you have both Dispute Review Boards and Dispute Adjudication Boards they are very similar similarly constituted simply set up under the contract but they do have differences as DRB's are non-binding and the DAB's tend to be binding. On a review of the excel spreadsheet available on the DRBF website, you can see that there are many thousands of DRB's. The main country for DRB's remains the United States. It is, in many ways, the only common law jurisdiction to make use of diabetes. All the other major common law jurisdictions have headed down the path started by the United Kingdom with adjudication. It's maybe a cultural reason, in that the United States tends to be a more planned country than all the other common law jurisdictions were something else that lends itself to adjudication and the other jurisdictions.

7. Conclusion

Trying to pull all the threads of this together and going back to the title of this paper "ADR a comparative study in common law jurisdiction – How does North America compare with the rest of the world" not possible to consider North America as a single area. Canada has headed down the path of adjudication for construction disputes while in the United States dispute boards are the pre-eminent method of alternative dispute resolution.

Meditation on the other hand is used throughout the common-law world. Meditation is very popular throughout the common world and 18 that started in the United States. The idea of reducing costs is one that has taken a very solid foothold across all common law jurisdictions and has led to the adoption of a mediation. Mediation has many attractive features including the ability to break down the issues, have face-to-face meetings, really analyze the weaknesses and strengths of a party's case, and bring all of this together while having the pressure of time playing on you as you try to resolve the dispute.

In the construction industry, there is in all jurisdictions but certainly, in England of the need to use ADR, and in England the ADR of choice is adjudication. Mediation is only really used when a dispute has got to the point where it needs to be finally resolved the clear data from the number of court cases, there are approximately 400 cases, about a third are final determination of an issue, issued in the TCC each year while there are between 1500 and 2000 adjudication every year meaning, even allowing for a similar number of arbitrations, that only 10% of construction disputes that go to adjudication or are not resolved on an interim basis end in a final determination. The success of adjudication as a form of ADR in English construction is such that an interim decision in about 90% of cases ends up being the final determination. When looking at North America and comparing with England there is no similar provision, excluding the Ontario example, and ADR is primarily Dispute Boards and Arbitration as the form of ADR.

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