INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

MEDIATING COMMERCIAL DISPUTES: HOT TOPICS AND PRACTICAL TIPS

Litigation / Arbitration Commission

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GENERAL REPORT

General Reporters:

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Introduction

Overview over the Working Session and General Report

Mediation is a form of dispute resolution which is highly developed as a tool in a litigator's toolbox in some countries, notably in England and the USA. But mediation is growing in many other countries and it is interesting to note that it is possible to mediate disputes in countries with such different legal systems all around the world, with the basic definition of mediation remaining unchanged everywhere: that is, that parties agree to have a neutral third party, a mediator, facilitate discussions and negotiation between them with a view to reaching a binding settlement of their dispute outside of the court/arbitration system. In our report, we want to look in particular at the mediation procedure, the role of the mediator, mediation legislation and at the question how the relationship between state courts and mediation nowadays works in the various countries.

National Reporters

We have been able to collect the following National Reports:

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Many thanks for the great contribution and hard work from all the National Reporters!

Mediation Procedure

1. What is the typical mediation procedure in your country?

The mediation procedure depends, in several countries, on the type of mediation (voluntary mediation, mandatory mediation previous to judicial proceedings, court-annexed mediation) and on the nature of the dispute that ought to be resolved.

Although it is difficult to identify one typical mediation procedure common to all countries, several principles seem to be recurrent :

- Consent and will of the parties: in order for a mediation procedure to have a chance to result in a settlement, parties must be willing to participate. The process must be voluntary even when the procedure is suggested by a judge.
- Intervention of a neutral third-party : the mediator
- Share of information : mediation procedure, identity of the parties, position and interests of the parties,
- Search of a possible solution to the dispute with the help of the mediator,
- If a settlement is reached, drafting and signature of an agreement.

2. Is mediation popular in your country? Why? Why not?

The popularity of mediation across the countries from which we received a national report seems to be mixed.

The low popularity of mediation in several countries could be explained by different reasons including a misinterpretation of its aim.

In Italy for example, despite the effort of the legislator to increase the recourse to mediation, it remains quite unpopular. The reasons behind this lack of success is explained as followed :

a. "*Poor knowledge about mediation and about the key role that a mediator can play in assisting the parties to settle a dispute; this is valid for both parties and their lawyers;*

b. *Unwillingness to reveal or show any weakness and impotency to the counterparty, refraining to disclose interests and facts during the proceedings;*

c. *Misleading and false idea of the mediation as being remote from the exercise of the jurisdictional function by the State Courts and, therefore, useless."*

This unpopularity is also explained by the idea that mediation would cost more than regular legal proceedings.

These (mis)conceptions were confirmed in Sweden where the question of the unpopularity of mediation was investigated.

In the USA however, mediation seems to be quite popular in several fields such as commercial disputes, class actions, personal injury cases. The fears hindering the popularity of mediation in other countries do not seem to be affecting it in the USA.

The recourse to mandatory mediation proceedings before the introduction of legal proceedings seems to increase the unpopularity of mediation (f.i. Switzerland). However, when the recourse to mediation is simply suggested and encouraged by the courts, it seems to have a positive effect on its popularity (f.i. Latvia, Switzerland, England).

3. How does mediation differ from arbitration/state court proceedings in your country?

The main differences between mediation and arbitration / state court proceedings are :

- The role of the third party: the mediator is to act as an impartial third-party in order to guide and assist the parties through the process of mediation toward a mutually agreeable settlement while an arbitrator is expected to act more like a judge. A judge can impose a solution to the parties unlike a mediator. The mediator is not bound by any claim or legal grounds for the dispute unlike the arbitrator and the judge. In mediation proceedings, it is the parties' own responsibility to solve a conflict/dispute while in court proceedings this responsibility is passed to a judge.
- The nature of the process: mediation is a self-determined and flexible process and the parties and the mediator can freely agree on the form and the outcome of the process. It is based on the consent and voluntarism from both parties who are not bound to their prayers/positions leaving therefore room for creativity and (broad) adjustments of the parties' positions. Mediation is comparable to a negotiation. Arbitration and court proceedings are more adversarial.
- The nature and the binding character of the decision : the decision reached during a mediation procedure is not mandatorily linked to the rules of substantial law applicable to a dispute. Furthermore, it is not enforceable in the way an award or a court decision is. It is similar to a contract between the parties. An arbitration award is enforceable in a court of law.
- The confidential nature of mediation : unlike state courts proceedings, mediation as well as arbitration are private and confidential.
- Costs : Court proceedings are usually more costly than arbitration procedures which are more costly than mediation proceedings.

4. **In your country, what are the typical disputes where mediation works? When does mediation not work?**

   It appears the success of a mediation procedure does not necessarily depend on the nature of the dispute. It is however noted that, in some cases, the nature of the dispute will have impact on the success of the mediation procedure. For example : big complex disputes may be easily resolved through mediation in some countries (USA, England) but not in other countries (Lichtenstein) where smaller disputes may have a chance to result in a settlement through mediation.

   The chances of a successful mediation procedure is more related to the attitude and the interests of the parties rather than to the nature of the dispute.

   The process has more chances to succeed if it is voluntary and not mandatory and if the parties have a long duration relationship they want to maintain. The confidential nature of mediation might also suit the parties when they don't want to attract press or public attention through court hearing.

5. **What psychological aspects need to be taken into account in your country like negotiation tactics and cultural aspects?**

   Psychological aspects to be taken into consideration are not necessarily bound to the cultural origin of the party.

   Some countries shared a few cultural aspects that might be useful during a mediation procedure :

   - Latvia : "*people are rather closed and it might be hard for the mediator to get them fully engaged in the process and share their opinion, also because mediation is a relatively unknown process yet."*

   - Switzerland: "*one must be aware that although it is a small country, the differences can be huge, in particular between the German and French part of the Country*"

   - Italy : "*Mainly, the high litigiousness and the will to prevail over the counterparty. A mediator shall thus take these aspects into account and help the parties to overcome such cultural limits in order to reach a successful settlement."*

   - England : it is referred to the website 'Leadership Crossroads' which produced an article itself referring to a book about national negotiation traits by Lothar Katz. Many cultural aspects of negotiation in Britain are discussed in this article and book which lead to precious advices resulting from the cultural particularities in Britain.

6. **Is there a particular style/approach to mediation in your country? Do mediators tend to approach mediations in a neutral/facilitative way (acting as an intermediary between negotiating parties) or do they adopt an evaluative approach (expressing views/opinions as to merits and/or likely outcomes)?**

   The majority of the reports refer to the facilitative and the evaluative styles used in mediation stating that both styles exist in their countries, sometimes in the same mediation (USA). However, the facilitative style seems to be more common in the majority of countries. The recourse to an evaluative approach will usually follow on from a request from the parties.

   In the USA however, both types of mediators exist and it seems to be the lawyer's role to choose a mediator with a neutral or aggressive style depending on the interest of his client and the advantage he would get from one style of mediation or the other.

Mediator

7. **How is the mediator chosen/appointed in your country? Is there a list?**

   In all countries parties are able to choose their mediator. In some countries parties can choose a mediation provider who then nominates the mediator from their list, or supplies the parties with a list of mediators to choose from. In other countries, notably Argentina and Sweden, mediation is compulsory prior to Court proceedings in the case of the former and sometimes intervenes to order a mediation in the case of the latter. In those cases the court can appoint the mediator (but the mediator is never the same person as the judge who heard the case).

   As to lists, in most countries there are mediation providers or institutions who have lists of mediators registered with them. In some countries (eg England, Sweden and Switzerland) it is not necessary to have a mediation qualification, but in practice most mediators do. In the USA, in Argentina, in Liechtenstein and in Spain in order to be registered as a mediator you have to have done a special training course from a "duly accredited" institution. In Latvia there is a distinction between a 'mediator' and a 'certified mediator' who has to have done a special course and passed an exam. Similarly in Sweden and in England it is possible to receive training and become an 'accredited mediator' but it is not necessary to do this to take appointments as a mediator.

8. **Who is an eligible mediator? What hinders a mediator from accepting a mediation?**

   In most countries mediators must fulfil the following requirements:

   (a) they must be in full possession of their civil rights;

   (b) they must not be in a position of conflict; and

   (c) they must have a civil liability insurance policy.

   In some countries (Spain, USA, Argentina, Liechtenstein) it is a requirement also that mediators must have completed a specific training course given by a "duly accredited" institution.

   In Italy, as well as the above 3 criteria, eligible mediators must either:

   (a) hold a bachelor degree or is registered to a professional bar (eg chartered accountants, architects, engineers etc); or

   (b) have attended a two year training course provided by a mediation institution and have joined during that time at least twenty mediations as a trainee mediator

   In Latvia, there are no requirements for mediators, but "certified mediators" must have a degree and must have done the course and passed the exam set by the "certified mediator" institute created under the auspices of the Mediation Law. Those who hold that qualification then get on the "certified mediator list" which is the list used by the Courts when they refer disputes to mediation.

9. **Can a lawyer mediate in your jurisdiction? Does he need training to be eligible?**

   In all countries a lawyer can mediate but in some countries (see above response to question 8) there are extra requirements before a lawyer can be a mediator.

10. **Can a Judge/Court be a mediator in your jurisdiction? If so, are there separate mediation sessions or can a mediation also occur within State Court Proceedings?**

    In England, Spain, Italy, Argentina, Liechtenstein, Latvia judges cannot be mediators.

    But in the, USA and Sweden judges can be mediators as long as it is not the same person as the trial judge and in England and the USA it is common for retired judges to work as mediators.

    In Argentina and Switzerland a judge can hold something called an instruction hearing which is not a mediation but the judge discusses the matter in an informal manner, goes through the facts and tries to persuade the parties to reach agreement before the main hearing. The judge speaks openly without any binding effect on

the parties. This would be unheard of in jurisdictions such as in England and the USA.

Mediation legislation / Relationship between State Courts and Mediation

11. Is there any state law regulation of mediation or mediators in your country? If so, what are the fundamental principles of such law?

Most countries have national mediation legislation. In the case of the European Member States, it is influenced by the Mediation Directive 2008/52/EC and also the 2002 UNCITRAL Model Law on International Commercial Conciliation.

The majority of countries focus on a general code of mediation procedure whereas the emphasis in the USA lies in the certification processes for mediators existing in many federal and state courts. These courts have implemented at least basic rules or guidelines governing the behaviour of mediators. Those rules provide minimum requirements to be met before a person may be deemed a court mediator. These rules set forth education and experience requirements on a points system.

Similar to the situation in the USA, in Liechtenstein there is a law on civil mediation which does not state anything regarding the content of civil mediation proceedings, but rather regulates the conditions on how to become a registered mediator.

In Spain, besides the Royal Law-Decree implementing the Mediation Directive 2008/52/EC, also former regulations stemming from the Autonomous Communities (Comunidades Autónomas) exist, but concerning commercial mediation and conciliation, the Royal Law-Decree stands as the only applicable Spanish law. In spite of its general scope of application, the Spanish legislation excludes from its material scope of application the mediation in criminal matters, the mediation concerning public administrations, the mediation in labour relations and consumer mediation.

In Italy, since 2010 the Mediation Act provides a set of rules on mediation. Mediation should for example be carried out before specialized and independent mediation providers, listed in a public registry managed by the Italian Ministry of Justice. Mediation may also be provided as an online dispute resolution service. At the acceptance of the mandate, lawyers shall mandatorily inform their clients of the possibility to have recourse to mediation to solve their dispute.

In England and Wales, there is no current state control of training, appointment or performance of mediators. There is no regulating body and neither are there any statutory qualifications to mediate.

In Switzerland, law distinguishes between conciliation and mediation. Although both terms refer to a process involving a neutral, the degree of compulsion

imposed on the process and involvement of the neutral significantly differ between the two processes. Conciliation is, as a rule, the mandatory preliminary phase in judicial proceedings in civil matters. It is conducted before the state-appointed conciliation authority according to the procedural rules. Mediation, on the other hand, is an extrajudicial dispute resolution process. The consent of all parties involved is required.

In Sweden, various national acts contain provisions dealing with mediation. For example under the Co-Determination in the Workplace Act, the National Mediation Office can appoint a mediator in negotiations regarding a collective bargaining agreement after consent from the parties. The Act on Mediation in Certain Copyright Disputes is applicable when parties who are negotiating about certain agreements, such as e.g. license agreements, cannot come to an understanding with regards to the content of such agreements. There are certain mediation procedures in connection with rental disputes.

To sum up with respect to mediation legislation, there are still significant differences regarding the existing laws on mediation. Most legislation focus on the procedural aspects of mediation, whereas few just provide principles for the mediators, but not for the procedure itself. The situation is also non-uniform with respect to mediation proceedings being mandatory (e.g. as requirement for later court proceedings) or being completely voluntary.

12. Do the Courts encourage or impose mediation, or impose sanctions for failure to explore mediation, or is it a purely voluntary process?

If Courts encourage or impose mediation, or impose sanctions for failure to explore mediation mainly depends on the character of mediation being either purely voluntary or mandatory before formal court proceedings can be initiated.

In Spain, none of the parties can be forced to sustain a mediation procedure. Nevertheless, Spanish legislation encourages the parties to mediation. First, an agreement to mediate is enforceable in the sense that parties have to start a mediation procedure before going to court and the law grants to the party willing to start the agreed mediation a right to stay judicial or arbitral procedure until mediation has finished. Second, although mediation procedure ends if a party fails to attend the preliminary information session, lack of appearance of the parties is not confidential information so it can be brought to the attention of judicial or arbitral courts.

Also in Italy, the mediation attempt is provided as mandatory by law. The Judge may generally refer parties to explore the possibility to mediate their pending dispute before a mediation provider. Should a party miss the first mediation meeting with no serious reasons, the Judge may consider this behaviour as a probative element against that party and can penalise it charging a fee.

In England, Courts are increasingly encouraging mediation at an early stage. The Allocation Questionnaire that parties must complete before a case goes to court requires legal representatives to confirm that they have explained to their clients the various ADR options. Highlighting the importance of mediation the court in the case of Halsey v Milton Keynes General NHS Trust (2004)[1] decided that "all members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR". A court may also order a stay of proceedings on its own initiative if it considers it would be valuable to permit the parties time to mediate, and can impose costs sanctions where it considers that a party has unreasonably refused to attempt to mediate.

In the USA similarly, most courts actively encourage mediation, and in many jurisdictions, courts require the parties to mediate before their case can proceed to trial, and even go so far as to appoint a mediator for the case if the parties cannot themselves agree upon a mediator. Most federal courts in the United States require the parties to hold a scheduling conference early in the case in order to propose a timeframe for the case, and those jurisdictions require the parties to agree upon a deadline by which mediation must have taken place and been concluded. Mediation has evolved in the United States from a purely voluntary process to one that is very much intertwined and part of the litigation process itself. Courts usually do not enter monetary or other sanctions for failure to have mediated, but the "sanction" is often a court's refusal to allow the parties to proceed to trial without having first mediated.

Also in Argentina, the failure to comply with the mandatory mediation procedure disables the plaintiff to file for Court procedure. Though there are certain exceptions to this mandatory mediation requirement, such as pressing matters (e.g. preliminary measures, stay orders, assets assignment, etc.) or legal disputes involving federal, state or local public agencies, practically all private law legal issues must comply with the regulated mediation procedure.

To the contrary in Latvia, the mediation is a purely voluntary process and it shall be used only with a mutual agreement of all the parties involved in the dispute. However, court-annexed mediation regulation includes some tools for the judge/ court to encourage the parties to use a mediation. The invitation to use mediation shall be included in the court correspondence, when it resends the copy of the claim to the parties. However, the parties are free to choose whether they are interested to use the mediation or not. The judges do not have an option to impose mediation to the parties or impose any sanctions for failure to explore mediation.

Parties to a dispute may certainly be incentivized to at least run a mediation procedure irrespective of the later outcome or even be obliged to participate to mediation proceedings. In the end, they seem, however, mostly to have the

[1] Halsey v Milton Keynes General NHS Trust Court of Appeal (Civil Division) [2004] EWCA Civ 576

freedom to abstain from mediation for good reasons respectively not to be obliged to accept a proposed mediation settlement if they seek a court settlement of a dispute. In some countries, they nevertheless risk sanctions to be imposed by a court for having failed mediation.

13. Is an agreement reached during mediation enforceable? Does it need to be confirmed by a Court? What would be the consequences of said confirmation?

An important impact has the enforceability of a mediation settlement. Different approaches can be seen and a settlement can be directly enforceable, only enforceable upon confirmation by a court or just be considered as a contract between the parties stipulating the terms and conditions of a settlement.

In Spain, the parties may include the terms of the agreement resulting from mediation in a public deed, thereby constituting an enforceable title. A foreign agreement resulting from mediation that has not been declared enforceable by a foreign authority will only be enforceable in Spain upon its formalization in a public deed before a Spanish Notary Public.

In Italy, an agreement reached during mediation is enforceable should it comply with the requisites provided by the Mediation Act. The agreement should be executed by the parties and their lawyers, and the latter should also verify and certify that the agreement complies with mandatory rules of law and public order.

In England, a settlement agreement entered into at a mediation governs the contractual relationship between the parties and is therefore enforced as a contract. If proceedings are already on foot, the parties usually seek a court order to stay those proceedings on a permanent basis, append the confidential settlement terms. That way, if the settlement agreement is breached, the proceedings can continue again without needing to be restarted.

In the USA, agreements reached during mediation are enforceable in principle, and generally such agreements do not have to be confirmed by a court. The overriding factor on enforceability is, however, whether the parties intended to be bound to an enforceable agreement or had merely reached consensus on some deal points while intending to be bound only later when a comprehensive agreement is reduced to writing. Circumstances in which court approval of a settlement may be required include settlements reached in cases pending in bankruptcy court, where court approval is mandatory, or class actions, in which a settlement must be approved by a court. Further consequences of requiring court approval or confirmation of a settlement mean that any such settlement will not be confidential, as the terms are required to be disclosed in court filings that are made part of the public record.

In Argentina, once the settlement agreement is executed, it is enforceable like any Court ruling. Labor law disputes mediation agreements, however, must be approved first by the Ministry of Labor (as guarantor of labor rights) to be

enforceable. Also, family law matters (involving minors) are subject to Court`s approval.

In Liechtenstein, whereas a settlement agreement in one of the former compulsory mediation hearings has been enforceable without any further confirmation by the court, there is no such possibility in the still in force voluntary civil mediation proceedings. If the parties find a solution to settle their dispute in such a proceeding they have to conclude a settlement before court in order for the settlement to become enforceable.

In Switzerland, the final settlement agreement reached through mediation (judicial or non-judicial) typically takes the form of a binding contract. In the context of judicial mediations, the settlement agreement may be ratified by the competent conciliation authority or by the courts upon the parties' joint request. The parties may also elect to record the agreement reached through judicial or non-judicial mediation in the form of an official record issued by a notary public, which is then enforceable in the same way as a court decision.

The enforceability is still handled differently in the respective countries depending on their national mediation legislation. Hence, in particular a foreign party to a mediation procedure should carefully assess the possibility to enforce a settlement respectively the additional effort and time it may take should the other party to a settlement agreement not fulfill the agreement voluntarily.

14. Are the mediation proceedings confidential? Is it possible for a party to submit in court elements revealed during the mediation proceedings? How?

As a matter of principle, mediation is confidential and a party may not disclose any elements that have been revealed during the mediation proceedings, unless the parties have agreed otherwise. What parties disclose to mediators individually is also confidential and cannot be shared with other parties without the disclosing party giving the mediator specific permission to share those disclosures with the other party. In general, there is also the duty not to submit any information or declaration rendered or collected during the mediation in any legal proceedings, no witness testimony can be held on the same facts subject to mediation, and the mediator cannot be called as witness in this respect.

These general principles differ in the various countries. In England: for example, mediation proceedings are conducted on a "without prejudice" basis, meaning that submissions made in an attempt to reach settlement will not usually be admissible in later court proceedings relating to the same subject matter. Exceptions may, however apply where the other party behaves with what is called "unambiguous impropriety", amounting to serious misbehavior.

Similarly in the USA, the only possible exception to this strict confidentiality rule would be when a party has commenced an action seeking discipline of the mediator

for improper conduct, at which time it may be necessary to disclose the mediator's actions during the mediation process.

In Switzerland, mediators are under the obligation to testify in criminal proceedings on facts learnt in the mediation being excluded from confidentiality. Although this question remains controversial under Swiss law, attorneys acting as mediators cannot refer on their duty of professional secrecy to refuse to give evidence in criminal proceedings, as such duty only covers the attorneys' core activity and does not extend to their activity as mediators.

Likewise in Latvia, the mediators and the participants of mediation (including the counsels, observers, interpreters etc.) are forbidden to serve as witnesses to the court regarding the information they have learned during the mediation process.2 The only exceptions to this principle applies regarding the disclosure of such information in order to ensure public order, especially protection of children rights and interests or to prevent the life threats and threats to health, freedom or sexual abuse.

Hence, it can be summarized that as a matter of principle, mediation proceedings are commonly confidential and there is also the obligation to keep the proceedings and learned facts confidential in potential later court proceedings. Nevertheless, there are countries having exceptions to this rule where legal positions of higher importance are affected.

Conclusions

15. What are the pros and cons of mediation?

There are some general pros and cons similar in many counties such as:

Pros:

- Flexibility, in particular the ability to take into account commercial aspects,
- Creative solutions,
- Confidential and private character of mediation,
- May save time and money,
- Allows for the maintaining of the business relationship,
- Eliminating litigation risk,
- Active participation in the mediation process and control the outcome,

- Choice over the selection of a competent mediator.

Cons:

- May be expensive, time-consuming and futile,
- Gives opportunity to abuse procedure to delay a final dispute resolution if not proceeded seriously,
- No precedent-setting,
- Fear that mediation will expose the client's hand or strategy.

Depending on the mediation legislation and protection of settlement agreements, there are some aspects viewed differently in countries. In Spain for example the lack of procedural and constitutional protection is criticized. Depending on the respective country, mediation is perceived as slow and expensive The USA for example highlight that mediation may be costly, futile and emotionally challenging. Switzerland on the other side speaks of expeditious proceedings and low formalities. In Italy mediation is perceived rather positive in contrast to ordinary litigation: It is efficient and fast dispute resolution method. Further, mediation may even provide for some fiscal and tax benefits. In England, a high rate of settlement is assumed. Although there are no hard statistics on success rates in mediation, most experts say that 75-85% are successful.

16. Is the mediation practice in your jurisdiction influenced by other countries' mediation practices?

Mediation in EU Member States is influenced by the EU Mediation Directive providing for a certain standard in the Member States. It is often read that mediators are trained abroad influencing their mediation practices. The USA considers itself one of the leaders in mediation and certainly influences the mediation practices in other countries. Mediation in Switzerland its modern form first appeared in the French part of Switzerland under the influence of its development in the United States and Canadian Quebec. When setting up the law on civil mediation in Liechtenstein, certainly Austrian law served as a model.

17. Are costs of mediation perceived to be high/low in your country? Who pays for the mediation?

Although perceived by the parties as costly in some countries (e.g. Italy, Latvia), mediation proceedings are usually less costly than court proceedings, except for a few exceptions (f.i. Italy where the administrative fees for mediation are higher than the administrative fees for litigation).

However, in the end, all participants seem to agree to say that mediation is less costly given the shorter duration of mediation proceedings (compared to court proceedings) and the lower participation of a lawyer assisting the parties.

Usually, the costs will be divided equally between the parties unless otherwise agreed.

18. Are there current mediation trends in your country?

Mediation itself seems to be growing more popular in most countries.

19. Do you use any other forms of Alternative Dispute Resolution ('ADR') in your country? If so, please give a brief description of each of those.

The most used alternative Dispute Resolution is arbitration, an out-of-court dispute settlement method where an independent arbitrator makes a binding award to finalise the dispute. The following ADR have been referred to in the national reports :

- Conciliation: Comparable to mediation since it is aiming to build a positive relationship between the parties of the dispute by involving an impartial third-party. The difference with mediation is the role of the "conciliator" who is more proactive role in the actual resolution of the dispute.

- Negotiation: Negotiations usually take place on a without prejudice basis. Parties can negotiate to seek agreement on matters in dispute without the presence of a third party.

- Negotiation by means of the lawyers' assistance (specific to Italy): This form of ADR is characterized by a formal covenant executed in writing by the parties who commit to cooperate *bona fide* and fairly to settle their dispute amicably, with the assistance of their attorneys-at-law.

- Early neutral evaluation (England) : In this mechanism, the disputing parties appoint an independent third party to produce a non-binding opinion on the merits of either the whole case, or a particular issue within it. The third party will consider the facts of the case as well as applicable law. The non-binding opinion is often produced in the hope that it can assist subsequent negotiations or settlement between the parties.

- Executive tribunal (England): A representative of each party makes a formal presentation of their case to a panel of senior executives for the parties in dispute, as well as an independent chairperson. The panel will then discuss the dispute, with the chairperson usually acting as a mediator between the senior executives.

- med-arb / arb-med (England): This is a mechanism comprising a combination of mediation and arbitration. In med-arb, if mediation is unsuccessful in whole or in part, the parties can agree for the mediator to take on the role and responsibilities of an arbitrator, to enable them to produce a final and binding award on unresolved matters.

- Expert determination (England) : An expert will evaluate a specific issue within their expertise and then provide an opinion which is contractually binding on the disputing parties. This is an informal process.
- Adjudication (England): This is a method of ADR often used in the construction industry. An adjudicator will normally decide on disputes as they occur during the course of a contract. Usually an adjudicator's decision is deemed to have interim binding effect, meaning it is binding subject to the parties agreeing to alter its effect or to seek to determine the issue in litigation or arbitration.

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