

2020

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### Recommended Citation

Jacqueline Nolan-Haley, *International Dispute Resolution and Access to Justice: Comparative Law Perspectives*, 2020 J. Disp. Resol. ()

Available at: <https://scholarship.law.missouri.edu/jdr/vol2020/iss2/11>

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# International Dispute Resolution and Access to Justice: Comparative Law Perspectives

Jacqueline Nolan-Haley\*

## I. INTRODUCTION

My focus in this Article is on access to justice and international dispute resolution within the context of comparative law. Casting in broad terms, the field of international dispute resolution includes the rule of law, as well as formal and informal processes and procedures for resolving disputes. Access to justice is an essential principle of the rule of law. While there are a number of formal avenues for pursuing access to justice through international dispute resolution, from specialized tribunals to newly developed international commercial courts,<sup>1</sup> my primary interest goes beyond courts and the adjudication process to some of the consensual processes for the peaceful resolution of disputes. We live in a world of increasing transnational trade and economic globalization. Today, conflicts are both inevitable and costly, necessitating efficient and consensual methods of dispute resolution.

Article 33(1) of the United Nations (“U.N.”) Charter identifies several processes for the peaceful resolution of disputes, including negotiation, mediation, conciliation, and arbitration.<sup>2</sup> These are what we understand today as standard alternative dispute resolution (“ADR”) processes.<sup>3</sup> The four core ADR processes are promoted as vehicles for enhancing access to justice in legal systems that are often inaccessible to the general population.<sup>4</sup> ADR is offered as a complement to court systems,<sup>5</sup> and there is no end to the promises it offers. In Uganda, for example,

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1. Lucy Reed, *International Dispute Resolution Courts: Retreat or Advance?*, 4 MCGILL J. DISP. RESOL. 129, 132 (2017–2018) (arguing that we should be open to existing and new hybrids of domestic international commercial courts); Pamela K. Bookman, *The Adjudication Business*, 44 YALE J. INT’L L. (forthcoming 2020).

2. U.N. Charter art. 33, ¶ 1.

3. See generally, MARY ELLEN O’CONNELL, *INTERNATIONAL DISPUTE RESOLUTION: CASES AND MATERIALS* (2012); Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution*, 32 U. PA. J. INT’L L. 1 (2010); Hazel Genn, Reinhard Greger, & Carrie Menkel-Meadow, *REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS 15* (Felix Steffek & Hannes Unberath eds., 1st ed. 2013).

4. See, e.g., GILLIAN K. HADFIELD, *RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY* (2017).

5. European Law Inst. & European Network of Councils for the Judiciary, *The Relationship Between Formal & Informal Justice: The Courts & Alternative Dispute Resolution* 9 (2018), [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/ADR\\_Statement.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ADR_Statement.pdf) (stating to the extent permissible under the law of the Member State, Courts and Judges should seek to integrate ADR processes into the justice system, treating them as complementary systems).

ADR has been romanticized as a fix for broken legal systems<sup>6</sup> and a tool to help individual citizens achieve access to justice. Court-connected mediation in Ghana, revered as almost divine intervention, has been credited with “reuniting families, repairing marriages, saving children and securing their future.”<sup>7</sup>

To the extent that the term ADR has become synonymous with access to justice, there has been, in effect, a merger of ADR and access to justice. Multiple countries with different legal infrastructures<sup>8</sup> and regulatory frameworks claim that ADR is an “access-to-justice” provider.<sup>9</sup> Countries differ in the manner in which they accept the legitimacy of ADR as a means of providing access to justice. In some Latin American countries with weak judicial systems, ADR, particularly mediation, is considered not merely as a complement to achieving access to justice through the court system, but a substitute for it.<sup>10</sup> There has been widespread acceptance of court-connected ADR in the U.S., while Russian citizens resist ADR innovations in their judicial system.<sup>11</sup>

Access to justice scholars Mauro Cappelletti and Bryant Garth remind us that in examining the subject of access to justice and looking beyond courts, the study of other cultures is imperative.<sup>12</sup> Towards that end, this Article will first compare the ways in which different countries have responded to the ADR and access to justice movements, then take a look forward and offer some thoughts on future directions. The primary focus is on the United States, Europe, and parts of Africa. Given the contemporary crisis in providing access to justice,<sup>13</sup> comparative analysis

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6. Jacqueline Nolan-Haley, *Mediation and Access to Justice in Africa: Perspectives from Ghana*, 21 HARV. NEGOT. L. REV. 59, 75 (2015) [hereinafter Nolan-Haley, *Ghana*].

7. *Id.* at 86.

8. Hadfield, *supra* note 4, at 168–69, 283.

9. See Felix Steffek, *Principled Regulation of Dispute Resolution: Taxonomy, Policy, Topics, in REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS* 45 (Felix Steffek & Hannes Unberath eds., 2013) (arguing that “[i]ndividuals have a right of access to a framework that allows for just private resolution.”).

10. See Mariana Hernandez-Crespo, *From Noise to Music: The Potential of the Multi-Door Courthouse (Casas de Justicia) Model to Advance Systemic Inclusion and Participation as a Foundation for Sustainable Rule of Law in Latin America*, 2012 J. DISP. RESOL. 335, 368–69 (2012) (noting that “[i]n the Latin American context, there is a pale shadow of the law, meaning there is no practical recourse to the court system in many areas, and this affects processes such as mediation.”).

11. See, e.g., Kathryn Hendley, *Resistance, Indifference or Ignorance? Explaining Russians’ Nonuse of Mediation*, 32 OHIO ST. J. ON DISP. RESOL. 487 (2017) (stating that Russian litigants have given the “cold shoulder” to mediation).

12. See Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181, 185 (1978) [hereinafter Cappelletti & Garth, *The Newest Wave*]; see also Lawrence M. Friedman, *Is There a Modern Legal Culture?*, 7 RATIO JURIS 117, 130 (1994) (recognizing that “law reform is doomed to failure if it does not take legal culture into account.”).

13. Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS 49 (2019), [https://www.amacad.org/sites/default/files/publication/downloads/19\\_Winter\\_Daedalus\\_Sandefur.pdf](https://www.amacad.org/sites/default/files/publication/downloads/19_Winter_Daedalus_Sandefur.pdf) (observing that there is a “crisis of ‘unmet legal need.’”); see also ACTION COMMITTEE ON ACCESS TO JUSTICE IN CIVIL AND FAMILY MATTERS, *ACCESS TO CIVIL & FAMILY JUSTICE: A ROADMAP FOR CHANGE* iii (2013), [http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf) (stating that “there is a serious access to justice problem in Canada.”); Adrian A.S. Zuckerman, *Justice in Crisis: Comparative Dimensions of Civil Procedure*, in *CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE* 3 (Adrian A.S. Zuckerman ed., 1999) (arguing that there are three different dimensions of justice that compete and compromise in any system of justice). *But see* Hazel Genn, *What Is Civil Justice For? Reform, ADR, and Access to Justice*, 24 YALE J.L. & HUMAN. 397 (2012) (disputing the notion of a crisis in civil justice in the U.K.).

can provide us with models that will advance the project of removing barriers that impede access to justice.

In the following two Sections, I will discuss how access to justice and ADR have both evolved as global reform movements. In Section IV, I will consider how, as ADR processes have been woven into access to justice projects, there has effectively been a merger of the ADR and access to justice movements. Section V examines some of the similarities and cultural differences in how ADR and access to justice are linked, using the United States, the E.U., and Ghana as examples. Section VI looks forward to what we can expect from the ongoing merger of ADR and access to justice.

## II. THE ACCESS TO JUSTICE MOVEMENT

Defining access to justice is a challenging project. Scholars have attempted to locate the meaning of access to justice both within and outside the legal system. In the process of doing so, access to justice has also come to be associated with ADR.

### A. In General

Access to justice is a global reform movement that encompasses a wide range of meanings,<sup>14</sup> depending upon the lens of the observer. It can refer to various categories of interests such as the right of access to energy justice,<sup>15</sup> environmental justice,<sup>16</sup> or commercial justice.<sup>17</sup> It can mean the right of access to the courts,<sup>18</sup> to information,<sup>19</sup> or to legal counsel.<sup>20</sup> Beyond the legal system, some scholars look to the availability of problem-solving methods that do not require lawyers as a means of providing access to justice.<sup>21</sup>

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14. See, e.g., Trevor C.W. Farrow, *What is Access to Justice?*, 51 OSGOODE HALL L.J. 957 (2014) (finding ten distinct themes related to reforming access to justice); Sheila Greckol, *Access to Justice*, in ARBITRATION 2018: BOUNDARIES AND BRIDGES 31–32 (Timothy J. Brown et. al. eds., 2019) (noting that access to justice is not just about finding a lawyer, but also about actions taken for granted by many, such as taking the subway).

15. See, e.g., Aladdine Joroff, *Energy Justice: What it Means & How to Integrate it Into State Regulation of Electronic Markets*, 47 ELR 10927 (2017), [https://elpnet.org/sites/default/files/portfolio/energy\\_justice\\_-\\_what\\_it\\_means\\_and\\_how\\_to\\_integrate\\_it\\_into\\_state\\_regulation\\_of\\_electricity\\_markets.pdf](https://elpnet.org/sites/default/files/portfolio/energy_justice_-_what_it_means_and_how_to_integrate_it_into_state_regulation_of_electricity_markets.pdf).

16. See, e.g., ACCESS TO JUSTICE FOR A GREENER EUROPE, <https://www.clientearth.org/access-justice-greener-europe/> (last visited Mar. 22, 2020).

17. Reed, *supra* note 1, at 136.

18. *The Justice Index 2016*, NAT'L CTR. FOR ACCESS TO JUSTICE AT FORDHAM LAW SCH., <https://justiceindex.org/> (last visited Feb. 26, 2020) (describing the term “access to justice” as follows: “Justice depends on having a fair chance to be heard, regardless of who you are, where you live, or how much money you have. At minimum, a person should be able to learn about her rights and then give effective voice to them in a neutral and nondiscriminatory, formal or informal, process that determines the facts, applies the rule of law, and enforces the result.”).

19. Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217 (2007) (detailing the importance of the right to take pre-suit investigatory discovery to the access of justice).

20. See Task Force on Access to Justice and Alternative Dispute Resolution, *Access to Justice through Alternative Dispute Resolution White Paper*, A.B.A. SECTION OF DISPUTE RESOLUTION 1 (2015), [https://www.americanbar.org/content/dam/aba/images/dispute\\_resolution/publications/A2J\\_%20white\\_paper.pdf](https://www.americanbar.org/content/dam/aba/images/dispute_resolution/publications/A2J_%20white_paper.pdf).

21. Sandefur, *supra* note 13, at 54.

Access to justice is a topic of considerable contemporary interest in both public and private dispute resolution. It is used to advance a number of policy initiatives from third party funding of litigation<sup>22</sup> and online dispute resolution<sup>23</sup> to mediation of investor–state disputes.<sup>24</sup> In some countries, the concept of access to justice has become an institutionalized undertaking. In the United States, for example, at least forty states have access to justice commissions that coordinate efforts to improve the civil justice system.<sup>25</sup> They collaborate to bring together courts, the bar, civil legal aid providers, and other relevant stakeholders to work towards removing barriers to civil justice for low–income and disadvantaged people. The American Bar Association has devoted substantial energy to the project through its Resource Center for Access to Justice Initiatives.<sup>26</sup> Access to justice is also a high priority issue in Canada, evidenced by the Canadian Bar Association establishing an Access to Justice Committee to study needed areas of reform.<sup>27</sup> Building on earlier access to justice initiatives, Quebec passed a new Code of Civil Procedure reform in 2014 that requires parties to first pursue private resolution of their dispute before bringing it to court.<sup>28</sup> The primary private dispute resolution processes identified in the Code are negotiation, mediation, and arbitration.<sup>29</sup> Likewise, the European Commission is heavily engaged in supporting access to justice projects. The European Union, for example, issues Civil Justice Action grants and funds multiple access to justice undertakings.<sup>30</sup>

In the private sector, non–governmental organizations have been actively engaged in promoting access to justice projects in the commercial sector. For instance, in 2016–2017 the International Mediation Institute (“IMI”) initiated a Global Pound Conference and convened meetings in twenty–five countries to study issues related to access to justice for commercial disputes.<sup>31</sup> Participants had the

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22. See, e.g., Poonam Puri, *Financing of Litigation by Third–Party Investors: A Share of Justice*, 36 OSGOODE HALL L.J. 515 (1998); Maya Steinitz, *Whose Claim Is This Anyway? Third–Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011); Sasha Nichols, *Access to Cash, Access to Court: Unlocking the Courtroom Doors with Third–Party Litigation Finance*, 5 U.C. IRVINE L. REV. 197 (2015).

23. See, e.g., Ayelet Sela, *e–Nudging Justice: The Role of Digital Choice Architecture in Online Courts*, 2019 J. DISP. RESOL. 127, 128 (2019) (noting that online courts are designed to improve access to justice for self–represented litigants).

24. Nancy A. Welsh & Andrea K. Schneider, *Becoming “Investor–State Mediation”*, 1 PENN. ST. J. L. & INT’L AFF. 86 (2012).

25. Jason Tasher, *ABA Releases Report on Access to Justice Commissions in the U.S.*, A.B.A. J. (Sept. 14, 2018), [http://www.abajournal.com/news/article/aba\\_releases\\_new\\_report\\_on\\_state\\_access\\_to\\_justice\\_commissions](http://www.abajournal.com/news/article/aba_releases_new_report_on_state_access_to_justice_commissions).

26. See, e.g., RES. CTR. FOR ACCESS TO JUSTICE INITIATIVES, AM. BAR ASS’N, [https://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/resource\\_center\\_for\\_access\\_to\\_justice/](https://www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/) (last visited Mar. 22, 2020).

27. See, e.g., Canadian Bar Ass’n, *Reaching Equal Justice Report: An Invitation to Envision & Act* (Aug. 2013), [http://www.cba.org/CBAMediaLibrary/cba\\_na/images/Equal%20Justice%20-%20Microsites/PDFs/EqualJusticeFinalReport-eng.pdf](http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsites/PDFs/EqualJusticeFinalReport-eng.pdf).

28. Jean–François Roberge, *“Sense of Access to Justice” as a Framework for Civil Procedure Justice Reform: An Empirical Assessment of Judicial Settlement Conferences in Quebec (Canada)*, 17 CARDOZO J. CONFLICT RESOL. 323, 325 (2016).

29. *Id.* at 360 n.120.

30. For an example, see *ClientEarth Launches European Legal Guide to Protecting the Env’t*, CLIENTEARTH (Feb. 27, 2019), <https://www.clientearth.org/clientearth-launches-european-legal-guide-to-protecting-the-environment/>.

31. Deborah Masucci, *Access to Justice—The Road Ahead: What is the Role of the Lawyer/Advisor and Education?*, 40 FORDHAM INT’L L.J. 973, 973 (2017).

opportunity to compare and contrast data on the same topics from different cultures and legal systems.<sup>32</sup> The collected data demonstrates that lawyers would like to have a more robust role in ADR processes than clients want them to have, and there is a need for greater ADR education for lawyers and advisors.<sup>33</sup>

### B. Access to Justice Linked to ADR

Over forty years ago, Cappelletti and Garth expanded the notion of access to justice to include ADR processes.<sup>34</sup> Their voluminous comparative study identified three waves of reform within the world-wide access to justice movement: (1) making legal aid accessible for the poor; (2) providing legal representation for diffuse interests; and (3) promoting systemic reform of the judicial system through ADR processes.<sup>35</sup> Today, the boundaries of the third wave continue to evolve<sup>36</sup> with the expansion of ADR initiatives to include judicial mediation (particularly in common law jurisdictions)<sup>37</sup> and online dispute resolution (“ODR”).<sup>38</sup>

## III. THE ADR MOVEMENT

ADR is a global phenomenon that continues to expand in influence, particularly with regard to the mediation process. Few areas of public or private ordering have been exempt from its grasp. In the course ADR’s rise to success, however, the mediation process has generated criticism for failing to offer authentic access to justice.

### A. ADR—A Global Reform Movement

Over the past forty years, we have seen increased growth of global interest in ADR and, in particular, mediation and its various hybrids. Many countries have identified ADR—specifically, mediation—as the appropriate remedy for challenged court systems and a tool that will provide greater access to justice for its citizens.<sup>39</sup> Western organizations such as the United States Agency for International

32. *Id.* at 974 (noting that this opportunity was “unprecedented”).

33. *Id.* at 975–76.

34. Cappelletti & Garth, *supra* note 12, at 232–38.

35. *See id.*

36. *See* Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L.J. 115 (2010).

37. *See* Jean-François Roberge & Dorcas Quek Anderson, *Judicial Mediation: From Debates to Renewal*, 19 CARDOZO J. CONFLICT RESOL. 613 (2019); *see generally* NADJA ALEXANDER, INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES (2009).

38. *See* Ijeoma Ononogbu, *Online Dispute Resolution in Africa: Present Realities and the Way Forward*, in ALTERNATIVE DISPUTE RESOLUTION AND PEACE-BUILDING IN AFRICA 73, 73–93 (2014); *see* Amy J. Schmitz, *Measuring “Access to Justice” in the Rush to Digitize*, 88 FORDHAM L. REV. 2381 (2020) (arguing for caution with respect to the use of ODR, claiming that there is danger that the rush to digitization will ignore due process and transparency in the name of efficiency). Other scholars offer strong criticisms of ODR. *See* Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant or Drab*, 18 CARDOZO J. CONFLICT RESOL. 717 (2017) (criticizing ODR as a tool for providing access to justice).

39. *See, e.g.*, Mary Anne Noone & Lola Akin Ojelabi, *Ensuring Access to Justice in Mediation Within the Civil Justice System*, 40 MONASH U. L. REV. 528 (2014) (discussing Australia); *see also* KLAUS J. HOPT & FELIX STEFFEK, MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 9

Development (“USAID”) have devoted considerable resources to exporting ADR under rule of law programs.<sup>40</sup>

During this time, mediation has achieved an exalted status within the hierarchy of ADR processes. Some studies show that it is considered a preferred form of ADR.<sup>41</sup> With its core values of self-determination, confidentiality, and impartiality, mediation is thought to provide access to what some scholars refer to as “interest-based justice.”<sup>42</sup> It aims to increase this access with promises of efficiency through savings in cost and time, enhanced satisfaction through the exercise of party self-determination, protection of relationships, creativity, process flexibility, and informality.<sup>43</sup> All of these promises have led to a prominent role for mediation as an access to justice vehicle in the international dispute resolution landscape.

The U.N. favors mediation for its potential to contribute to the effective implementation of peace agreements by acting as a viable alternative to civil and criminal justice systems.<sup>44</sup> The World Bank promotes mediation as a method of managing and resolving workplace disputes.<sup>45</sup> Mediation is advanced as part of peacebuilding apparatus and in transitional justice settings.<sup>46</sup> The World Justice Center’s Rule of Law Index includes ADR processes in its Civil Justice Factors and measures the “accessibility, impartiality, and efficiency of mediation and arbitration systems that enable parties to resolve civil disputes.”<sup>47</sup>

More recently, the Singapore Mediation Convention established a framework for the recognition and enforcement of mediation settlement agreements arising from cross-border commercial disputes.<sup>48</sup> The Convention is expected to enhance

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(2013) (stating that “broader and better access to justice” is one of the main reasons for implementing mediation both in Europe and the wider world).

40. Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law?: Lessons from Abroad*, 56 DEPAUL L. REV. 569 (2007); Cynthia Alkon, *Lost in Translation: Can Exporting ADR Harm Rule of Law Development?*, 2011 J. DISP. RESOL. 165 (2011).

41. See Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637 (2014) (reporting that litigating parties prefer the mediation process to most adjudicative procedures ex ante).

42. The alternative to “interest-based justice” is “norms-based justice” available through a process such as conciliation. Manon Schonewille & Fred Schonewille, *The Variegated Landscape of Mediation: A Comparative Study of Mediation Regulation and Practices, in EUROPE AND THE WORLD* 41 (2014).

43. JACQUELINE M. NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL* 79, 80 (4th ed. 2013).

44. U.N. Secretary-General, *Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution*, U.N. DOC. A/68/811, 71 (June 25, 2012).

45. Edmund Mingle, *World Bank Promotes Mediation for Workplace Disputes*, ADR DAILY (Mar. 13, 2019), <https://adrdaily.com/world-bank-promotes-mediation-for-workplace-disputes/>.

46. Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, 5 HARV. NEGOT. L. REV. 339 (2000) (exploring the implementation of ADR programs in the broader rule of law context and examining aspects of implementing ADR programs in transitioning states). Some scholars have framed mediation and ADR as transitional justice. Michal Alberstein, *ADR and Transitional Justice as Reconstructing the Rule of Law*, 2011 J. DISP. RESOL. 124 (2011) (addressing the role of ADR in reconstructing the rule of law through the lens of the Transitional Justice Movement); Michael Hamilton & Dominic Bryan, *Deepening Democracy? Dispute System Design and the Mediation of Contested Paradises in Northern Ireland*, 22 OHIO ST. J. ON DISP. RESOL. 133 (2006) (demonstrating the contribution that dispute system design can make to the resolution of identity-based conflict).

47. *Civil Justice (Factor 7)*, WORLD JUSTICE PROJECT, <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017-2018/factors-rule-law/civil-justice-factor-7> (last visited Mar. 22, 2020).

48. Report of the U.N. Commission on International Trade Law Fifty-First Session, U.N. Doc. A/73/17 (2018); Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the*

opportunities for achieving access to justice. According to the International Mediation Institute, the signing of the Singapore Convention promises to be significant for international commercial and investment mediation, building on its “shared vision of access to justice worldwide.”<sup>49</sup> Many scholars hope that this Convention will do for mediation what the New York Convention has done for arbitration.<sup>50</sup> As global enforcement of mediation agreements increases through use of the Singapore Mediation Convention, third-party neutrals and lawyers will be challenged with practical questions raised by the influence of multi-cultural norms. Which norms and standards will be applied in enforcement decisions under the Convention?<sup>51</sup> What ethical codes for mediators will be applicable? The Model Standards of Practice for Mediators?<sup>52</sup> The European Code of Ethics for Mediators?<sup>53</sup>

Mediation is practiced in a number of different ways. At the Global Pound Conference,<sup>54</sup> stakeholders discussed how to improve commercial dispute resolution. One of the important insights that emerged from discussions was a sense that effective dispute resolution involved combining adjudicative with non-adjudicative processes.<sup>55</sup> Thus, in commercial dispute resolution, there are signs of a growing global interest in combining mediation with an adjudicatory process.<sup>56</sup>

### *B. Criticism of Mediation as an Access to Justice Tool*

There is no shortage of mediation critics. Some scholars find mediation a “troubling” solution for responding to access to justice challenges<sup>57</sup> and a failure in

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*Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1 (2019); S.I. Strong, *The Role of Empirical Research and Dispute System Design in Proposing and Developing International Treaties: A Case Study of the Singapore Convention on Mediation*, 20 CARDOZO J. CONFLICT RESOL. 1103 (2019).

49. *Singapore Convention Signed*, INT’L MEDIATION INST. (Aug. 7, 2019), <https://www.imimediation.org/2019/08/07/singapore-convention-signed/>.

50. See, e.g., Shouyu Chong & Felix Steffek, *Enforcement of International Settlement Agreements Resulting from Mediation Under the Singapore Convention*, 31 SING. ACAD. L. J. 448 (2019) (arguing that enforcement of international settlement agreements resulting from mediation will expedite access to justice).

51. See Report of the U.N. Commission on International Trade Law Fifty-First Session, U.N. Doc. A/73/17, at 52 (2018) (grounds for refusing relief).

52. Am. Arbitration Ass’n, Am. Bar Ass’n, & Ass’n for Conflict Resolution, *Model Standards of Conduct for Mediators*, AM. BAR ASS’N (Sept. 2005), [https://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.pdf](https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.pdf) [hereinafter Model Standards].

53. It may well be that we will see the development of transnational principles for ethics in cross-border mediation in the same way that policy makers are attempting to articulate transnational principles for the regulation of dispute resolution. See Steffek & Unberath, *supra* note 3, at 35.

54. See Masucci, *supra* note 31.

55. JACQUELINE NOLAN-HALEY, ELLEN E. DEASON, & MARIANA HERNANDEZ-CRESPO GONSTEAD, *GLOBAL ISSUES IN MEDIATION* 181 (2019).

56. See DILYARA NIGMATULLINA, *COMBINING MEDIATION AND ARBITRATION IN INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION* (2019).

57. See Ellen E. Deason et al., *ADR and Access to Justice: Current Perspectives*, 33 OHIO ST. J. ON DISP. RESOL. 303, 304 (2018); see also Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995).



terms of providing substantive justice based on legal rights.<sup>58</sup> They criticize the lack of public access to ADR processes,<sup>59</sup> the failure of court-connected ADR programs to provide access to justice,<sup>60</sup> the growth of mandatory arbitration in consumer and employment disputes,<sup>61</sup> and ADR's role as a source of "increase[ed] barriers to litigating."<sup>62</sup> In the view of these critics, the introduction of ADR in many non-functional and ineffectual court systems has, in fact, exacerbated problems of access to justice.<sup>63</sup> Other scholars have observed that parties who try to resolve their disputes today in the civil justice system do so in the shadow of the courts.<sup>64</sup> They find themselves drifting through an incoherent process that results in some form of "reluctant compromise," as ADR processes such as mediation fail to offer a real alternative to the court system.<sup>65</sup>

#### IV. MERGER OF ADR AND ACCESS TO JUSTICE

ADR processes are often promoted as vehicles for facilitating access to justice. Typical rhetoric promises greater satisfaction, greater efficiencies, and sometimes a better form of justice than that available in the traditional court system (which may not be trusted by the parties).<sup>66</sup> The comments of Russian judges regarding the introduction of mediation to Russia are illustrative—mediation, they claimed, would improve "the quality of justice and provide a reliable guarantee to citizens of access to justice within a reasonable time."<sup>67</sup>

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58. Genn, *supra* note 13, at 45. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Deason et al., *supra* note 57, at 318.

59. Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605 (2018).

60. ANNA NYLAND, *THE FUTURE OF CIVIL LITIGATION: ACCESS TO COURTS AND COURT-ANNEXED MEDIATION IN THE NORDIC COUNTRIES* 333 (Laura Ervo et al. eds., 1st ed. 2014).

61. There is a vast literature in this area. See generally, Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2804, 2804, 2808 (2015) (claiming that few who are cut off by the courts and required to arbitrate actually do so).

62. Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 196 (2003).

63. Mariana Hernández-Crespo, *A Systemic Perspective of ADR in Latin America: Enhancing the Shadow of the Law Through Citizen Participation*, 10 CARDOZO J. CONFLICT RESOL. 91, 114–15 (2008) (arguing that ADR has, in many courts, created three tiers of justice: private arbitration for those who can afford it; the justice system for those who have legal representation; and mediation centers for low income communities who can afford neither arbitrators nor lawyers).

64. See Hadas Cohen & Michal Alberstein, *Multilevel Access to Justice in a World of Vanishing Trials: A Conflict Resolution Perspective*, 47 FORDHAM URB. L. J. 3 (2019) (claiming that "reliable data regarding expected case disposition and outcome . . . are not made available to the parties. No systematic screening mechanism directs parties to holistic conflict resolution alternatives.").

65. *Id.*

66. In South Africa, for example, ADR promoters describe great success with ADR and access to justice. The IMI website reports, "[t]he structure of ADR in South Africa has enabled greater access to justice for the poor, the illiterate and in particular rural communities who often have difficulty navigating court proceedings, and may not trust the formal court system." Petrina Amperie, *ADR in South Africa: A Brief Overview*, INTERNET MEDIATION INST., <https://www.imimmediation.org/2017/12/09/adr-south-africa-brief-overview/> (last visited Feb. 26, 2020).

67. Hendley, *supra* note 10, at 471.

While ADR has been advocated with similar diction in most countries, i.e., mediation equals access to justice,<sup>68</sup> it has taken different forms and shapes from a regulatory perspective. This, in turn, has led to different levels of acceptance and usage by litigants. The following Sections briefly describe the development of ADR as an access to justice vehicle in the U.S., Europe, and parts of Africa.

### A. United States

The story of ADR's development in the United States has a rich political, cultural, and social history. The 1976 Pound Conference is often considered the beginning of the modern ADR movement that energized the concept of access to justice in the United States.<sup>69</sup> Former Chief Justice Warren Burger convened the conference and urged judges, public interest lawyers, and academics to find improved ways of dealing with disputes and crowded dockets. "Isn't there a better way?" he asked. The late Professor Frank Sander responded with a call for broadening the dispute resolution mechanisms that were available in the judicial system.<sup>70</sup> He proposed the idea of a multi-door courthouse where a variety of options including mediation, arbitration, and fact-finding or malpractice screening panels would be available to the parties.<sup>71</sup> The push was on for greater efficiencies, lower costs, and more party control over the outcome.<sup>72</sup> A surge of federal and state legislation establishing various ADR programs within court systems followed.<sup>73</sup>

The Civil Justice Reform Act of 1990 required every federal district court to develop a civil justice expense and delay reduction plan to help streamline dockets.<sup>74</sup> The statute was amended by the ADR Act of 1998, which required that all federal district courts establish an ADR program.<sup>75</sup> The Negotiated Rulemaking Act of 1990 authorized the use of negotiated rulemaking as an alternative to adversarial rulemaking in federal agencies.<sup>76</sup> The Administrative Dispute Resolution Act of 1990 required all federal agencies to develop policies on the

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68. See, e.g., European Parliament, *The Implementation of the Mediation Directive 29 November 2016*, EUROPEAN PARLIAMENT: DIRECTORATE-GENERAL FOR INTERNAL POLICIES 7 (2016) (stating "[m]ediation relieves overburdened courts and enhances citizens' access to justice by helping them resolve disputes without the enormous costs and prolonged trials and appeals that characterize court procedures.").

69. The full title was "Roscoe E. Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice." See Lara Traum & Brian Farkas, *The History and Legacy of the Pound Conference*, 18 CARDOZO J. CONFL. RESOL. 677, 679 (2017).

70. See Frank Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 131 (1976).

71. *Id.* at 131.

72. See generally Frank Sander & Mariana Hernandez-Crespo, *A Dialogue between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse*, 5 U. ST. THOMAS L. J. 665 (2008).

73. One scholar has characterized the institutionalization of ADR in the courts as a form of "co-optation": "The story of ADR in the U.S. is one of co-optation of what was to be a serious challenge to formalistic and legalistic approaches to legal and social problem-solving and is now highly institutionalized by its more formal use in courts." Carrie Menkel-Meadow, *Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-formal', in REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS* 419 (Felix Steffek & Hannes Unberath eds., 2013).

74. See Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471–82 (2020).

75. Alternative Dispute Resolution Act Of 1998, 28 U.S.C. §§ 651–58 (2020).

76. Negotiated Rulemaking Act Of 1990, 5 U.S.C. §§ 561–70 (2020).

voluntary use of ADR.<sup>77</sup> The work of the Uniform Law Commission<sup>78</sup> further enhanced the credibility of ADR processes as a means of providing access to justice. The Commission approved a Uniform Arbitration Act in 1955 and a Uniform Mediation Act in 2001, both of which have since been adopted by some states.<sup>79</sup>

Today, ADR is very much a part of the U.S. civil justice system. Court-connected ADR programs exist throughout the nation, and there is little question that parties can be required to participate in them. State statutes provide for mandatory mediation as a condition precedent for accessing the court.<sup>80</sup> Case law has upheld mandatory participation in court-connected mediation,<sup>81</sup> and sanctions have been imposed on parties and attorneys who fail to mediate in good faith.<sup>82</sup>

### B. European Union

The European Union's push towards adopting mediation and other forms of ADR followed in the wake of the modern ADR movement in the U.S. and Australia.<sup>83</sup> A Green Paper on consumer access to justice was issued in 1993,<sup>84</sup> followed by the Vienna Action Plan of 1998, which promoted mediation in family conflicts.<sup>85</sup> Further groundwork for ADR was established beginning in 1999 with a meeting of E.U. political leaders in Tampere, Finland where it was agreed that ADR would be beneficial in commercial and civil cases and, therefore, should be promoted.<sup>86</sup> The Council of Europe and the European Commission then began multiple ADR development efforts, including the development of a code of ethics for mediators.<sup>87</sup> All of these activities resulted in the issuance of the E.U. Directive on Mediation in 2008, which applied to cross-border commercial disputes.<sup>88</sup> In

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77. 5 U.S.C. § 581 (2020).

78. The Uniform Law Commission was established in 1892 with the goal of providing states with nonpartisan legislation that “creates stability, clarity and conformity” against state statutory law. See *Overview*, UNIFORM LAW COMM’N, <https://www.uniformlaws.org/aboutulc/overview> (last visited Mar. 5, 2020).

79. Twelve states have enacted the Uniform Mediation Act, and twenty-two states have enacted the Uniform Arbitration Act. See *generally* UNIFORM LAW COMM’N, <https://www.uniformlaws.org> (last visited Feb. 26, 2020).

80. For more information see *Chapter 9*, in SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY AND PRACTICE* (2018).

81. See, e.g., *In re Atl. Pipe Corp.*, 304 F.3d 135 (1st Cir. 2002).

82. *Id.*

83. Hopt & Steffek, *supra* note 38, at 9.

84. Green papers are offered by the European Commission to generate discussion and consultation on particular issues. See *generally* European Green Paper Comm’n, *Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market*, 93 COM 576 (1993).

85. See Jacqueline Nolan-Haley, *Evolving Paths to Justice: Assessing the E.U. Directive on Mediation*, reprinted in *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS* 407, 408 (Arthur W. Rovine ed., 2012).

86. *Id.*

87. See *European Code of Conduct for Mediators* (2004), <https://o.b5z.net/i/u/10032073/i/European-Code-of-Conduct-for-Mediators.pdf>.

88. Directive 2008/52/EC, of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136/3) 8 [hereinafter Directive 2008/52/EC].

2013, the European Commission issued two additional ADR directives, one related to E.U.–wide rules for consumer ADR<sup>89</sup> and one to ODR.<sup>90</sup>

The purpose of the Mediation Directive was to “promote the amicable settlements of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.”<sup>91</sup> It required member states to enact legislation that would provide for mediating cross–border commercial disputes.<sup>92</sup> The Directive set out several provisions to encourage the use of cross–border commercial mediation. These provisions dealt with mediator quality, enforceability of mediated agreements, and confidentiality.<sup>93</sup> Several states went beyond the Directive’s mandate on cross–border disputes and expanded their legislation to include domestic mediation.<sup>94</sup> Considerable energy was expended to generate interest in mediation. A press release on the E.U. website by the E.U. Commissioner for Justice explicitly linked mediation with access to justice:

These E.U. measures are very important because they promote an alternative and additional access to justice in everyday life. Justice systems empower people to claim their rights. Effective access to justice is protected under the E.U. Charter of Fundamental Rights. Citizens and businesses should not be cut off from their rights simply because it is hard for them to use the justice system. . . . [T]he bare minimum is to allow cross–border disputes to find amicable settlement. But why stop there? Why not make the same measures available at national level?<sup>95</sup>

Despite enthusiastic promotion and descriptions of “mediation fever” spreading in the E.U.,<sup>96</sup> mediation is utilized in less than one percent of the cases in civil and commercial litigation.<sup>97</sup> The fact that mediation is praised and promoted, coupled with its lower–than–expected usage several years after the passage of the Directive, has been referred to as the “E.U. mediation paradox.”<sup>98</sup> This has

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89. See generally Directive 2013/11/EU, of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L 165).

90. See generally Commission Regulation (EU) 524/2013, of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR), 2013 O.J. (L 165); but see Horst Eidenmüller & Martin Engel, *Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe*, 29 OHIO ST. J. ON DISP. RESOL. 261 (2014).

91. Directive 2008/52/EC, *supra* note 88, at 1.

92. *Id.* at art. 1, 2.

93. *Id.* at art. 4, 6, 7.

94. *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters*, at 5, COM (2016) 542 final (Aug. 26, 2016).

95. Press Release, European Comm’n, European Comm’n Takes Action to Ease Access to Justice in Cross–Border Legal Disputes (July 22, 2011) (on file with the European Commission).

96. See CHRISTOPHER HODES, IRIS BENGHR, & NAOMI CREUTZFELDT–BANDA, CONSUMER ADR IN EUROPE: CIVIL JUSTICE SYSTEMS 255 (Christopher Hodges et al. eds., 2012).

97. Giuseppe De Palo, *A Ten Year Long “E.U. Mediation Paradox”*—When an E.U. Directive Needs to be More . . . Directive, EUROPEAN PARLIAMENT THINK TANK 1 (Nov. 21, 2008), [https://www.europa.rl.europa.eu/thinktank/en/document.html?reference=IPOL\\_BRI\(2018\)608847](https://www.europa.rl.europa.eu/thinktank/en/document.html?reference=IPOL_BRI(2018)608847).

98. *Id.* at 3.

generated intense debate over the merits of imposing some form of a mandatory regime.<sup>99</sup>

Concerned with the situation, the European Parliament commissioned a study in 2011 to evaluate and respond to parties' reluctance to engage in mediation.<sup>100</sup> The results of this study showed that substantial cost savings in time and money could be achieved by using mediation.<sup>101</sup> Therefore, the report encouraged its use.<sup>102</sup> As mediation continued to be under-utilized, the European Parliament commissioned a second study in 2014 to examine the impact of the Mediation Directive.<sup>103</sup> The authors of this study recommended that mandatory mediation with an opt-out provision be introduced on a trial basis.<sup>104</sup> Alternatively, the study recommended that the E.U. affirm the existing obligation of Member States to determine a target number of mediations to take place annually in order to achieve a balanced relationship between mediation and judicial proceedings.<sup>105</sup>

In 2016, the E.U. Parliament issued a further study on the implementation of the Mediation Directive.<sup>106</sup> One of the reports in the study identified four models of mediation regulation that were used in Member States to implement the Mediation Directive: (1) fully voluntary mediation; (2) voluntary mediation with incentives and sanctions; (3) required initial mediation session; and (4) fully mandatory mediation. The authors of the report recommended two options to reach a balanced relationship between mediation and judicial proceedings. Option one suggested requiring that parties go through an initial mediation session with a mediator before a dispute could be filed with the courts in all new civil and commercial cases.<sup>107</sup> Option two proposed asking the Commission to send a letter to each E.U. government asking them to explore the reasons for failure to achieve a balanced relationship between mediation and judicial proceedings.<sup>108</sup>

Still concerned that the Mediation Directive had not achieved its desired impact, the E.U. Parliament passed yet another resolution in 2017.<sup>109</sup> Noting that

99. Compare Giuseppe De Palo & Romina Canessa, *Sleeping? Comatose? Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union*, 16 CARDOZO J. CONFLICT RESOL. 713 (2015) with Jacqueline Nolan-Haley, *Mediation: The Best and Worst of Times*, 16 CARDOZO J. CONFLICT RESOL. 731 (2015).

100. See generally Giuseppe De Palo, Ashley Feasley, & Flavia Orecchini, *Quantifying the Cost of Not Using Mediation—A Data Analysis*, EUROPEAN PARLIAMENT: DIRECTORATE—GENERAL FOR INTERNAL POLICIES (2011), <https://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf>.

101. *Id.* at 5.

102. *Id.* at 18.

103. See generally Giuseppe De Palo et. al, 'Rebooting' the Mediation Directive: Assessing the Limited Impact of its Implementation & Proposing Measures to Increase the Number of Mediations in the E.U., EUROPEAN PARLIAMENT: DIRECTORATE—GENERAL FOR INTERNAL POLICIES (2014), [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI\\_ET\(2014\)493042\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf).

104. *Id.* at 8.

105. *Id.* at 10 (this is referred to as the Balanced Relationship Target Number Theory).

106. See generally Rosa Raffaelli, *The Implementation of the Mediation Directive*, EUROPEAN PARLIAMENT: DIRECTORATE—GENERAL FOR INTERNAL POLICIES (2016), [https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL\\_IDA%282016%29571395\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL_IDA%282016%29571395_EN.pdf).

107. Giuseppe De Palo & Leonardo D'Urso, *Achieving a Balance Relationship Between Mediation and Judicial Proceedings*, reprinted in THE EUROPEAN PARLIAMENT, THE IMPLEMENTATION OF THE MEDIATION DIRECTIVE (2016).

108. *Id.*

109. See Resolution of 12 September 2017 on the Implementation of Directive 2008/52/EC, of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2017 O.J. (C 337/01).

mediation is used in less than one percent of the cases in court on average in the majority of Member States, the Parliament proposed several recommendations, including calling on Member States to increase their efforts to encourage the use of mediation in civil and commercial disputes and calling on the European Commission to assess the need to develop E.U.–wide quality standards for mediation.<sup>110</sup> Notably, none of the proposed solutions included the compulsory models suggested in prior reports.

A recent study of ADR development in the E.U. conducted by the European Law Institute and the European Network of Councils for the Judiciary suggests that it may be time to pay attention to the benefits of mandatory approaches. The report echoes the earlier access to justice themes of the Mediation Directive:

[I]n some Member States, there has apparently been little thought given to the desirability of introducing some form of mandatory ADR so as to relieve the burden on the courts and to improve access to justice.<sup>111</sup>

The extent to which compulsory ADR models will be successful in the E.U. is unclear. The report found that there was “great cultural and economic resistance to the promotion and use of ADR processes.”<sup>112</sup>

Part of the E.U.’s resistance to imposing a mandatory scheme may be due to the lingering effects of the English Court of Appeal’s 2004 decision in *Halsey v. Milton Keynes General NHS Trust*.<sup>113</sup> The issue in *Halsey* was whether the court could require unwilling parties to participate in mediation. The court stated that it would not require unwilling parties to participate in mediation because, in its view, compulsory referral would violate a litigant’s fundamental right to have access to the courts and thus be in violation of Article 6 of the ECHR.<sup>114</sup> Even if it did have jurisdiction to compel unwilling parties to mediate, the court found it difficult to identify the conditions under which “it would be appropriate to exercise it.”<sup>115</sup> Moreover, the court specifically rejected the notion that there should be a presumption in favor of mediation.<sup>116</sup> Recent case law may signal a softening of the court’s position on the significance of party consent to ADR.<sup>117</sup>

### C. Africa

There is nothing new about the use of ADR processes in African states. The familiar dispute resolution processes of negotiation, mediation, and arbitration have a longstanding tradition in the customary law traditionally used in Africa.

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110. *Id.* at (C 337/5).

111. European Law Inst. & European Network of Councils for the Judiciary, *The Relationship Between Formal & Informal Justice: The Courts & Alternative Dispute Resolution*, EUROPEAN LAW INST. 17 (2018), [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/ADR\\_Statement.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ADR_Statement.pdf).

112. *Id.*

113. *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576.

114. *Id.* at 9.

115. *Id.*

116. *Id.* at 16.

117. *See Lomax v. Lomax* [2019] EWCA (Civ) 1467 (recognizing judge’s right to refer parties to an early neutral evaluation [ENE] process regardless of party consent).

Modern forms of ADR have taken root in many African countries as a result of their initial use in the peacemaking efforts of the post-colonial era and rule of law programs initiated by western governments and non-governmental organizations (“NGOs”).<sup>118</sup> Court-related ADR programs are operative in several countries, African universities are generating significant ADR scholarship,<sup>119</sup> and ADR is even a required course in at least one law school.<sup>120</sup>

Just as inefficiencies, delays, and high costs led to the adoption of ADR in American and European courts, such factors have influenced the development of ADR in some African countries, including the introduction of the multi-door courthouse.<sup>121</sup> The World Bank, the U.S. Department of State, and other NGOs have been actively involved in importing ADR and mediation training programs to Africa pursuant to rule of law and access to justice projects. While some have criticized the exportation of Western ADR into Africa,<sup>122</sup> others have welcomed its presence.<sup>123</sup>

One of the most enthusiastic adopters of ADR in Africa is the West African country of Ghana. In 1996, twelve leaders from the legal profession in West Africa, including the former Chief Justice of Ghana and the former president of the Ghana Bar Association, participated in an ADR training program in the United States. These individuals returned to West Africa and, two years later, set up an ADR Task Force.<sup>124</sup>

Ghana’s formal court system was challenged with the familiar list of ills that afflict other court systems: lengthy delays due to case backlog, high costs, limited resources, and corruption.<sup>125</sup> All of these factors acted as an impetus for ADR to become an access to justice vehicle in Ghana. After developing a strategic plan for implementing ADR, Ghana passed a comprehensive ADR Act in 2010 that is considered by some scholars to be a model for other African countries.<sup>126</sup>

The Act integrated customary arbitration and mediation in the formal legal system. Popular commentary claimed that ADR enhanced access to justice by persons who were unable to access it through the prevailing court trial system.<sup>127</sup>

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118. See Nolan-Haley, *Ghana*, *supra* note 6, at 73–74.

119. *Id.* at 71.

120. *Programmes*, GHANA SCH. OF LAW, <https://gslaw.edu.gh/academics/programmes-academics/> (last visited Mar. 3, 2020).

121. See, e.g., Bukola Faturoti, *Institutionalised ADR and Access to Justice: The Changing Faces of the Nigerian Judicial System*, 1 J. COMP. L. IN AFR. 66 (2014) (reporting that more than one-third of the thirty-six states in Nigeria have adopted some form of court-related ADR including the multi-door courthouse); see *Court Annexed Mediation in Kenya*, THE WORLD BANK (Oct. 5, 2017), <https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans>.

122. Nokukhanya Ntuli, *Africa: Alternative Dispute Resolution in a Comparative Perspective*, 22 CONFLICT STUD. Q. 36, 36–61 (Jan. 2018).

123. Anthony P. Greco, *ADR and a Smile: Neocolonialism and the West’s Newest Expert in Africa*, 10 PEPP. DISP. RESOL. L. J. 649, 666–67 (2010) (for example, in Uganda, ADR has been described as a “magic wand” to alleviate the problem of crowded dockets in the commercial courts).

124. GEORGINA T. WOOD, *ALTERNATIVE DISPUTE RESOLUTION (ADR): ALTERNATIVE DISPUTE RESOLUTION AND PEACE-BUILDING IN AFRICA*, xiii–xv (Ernest Uwazie ed., 2014).

125. Nana Oye Lithur, *Legal Regime Too Expensive in Ghana*, GHANAWEB (June 16, 2010), <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Legal-regime-too-expensive-in-Ghana-Nana-Oye-184324>.

126. Catherine Price, *Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?*, 18 PEPP. DISP. RESOL. L. J. 393, 403–04 (2018).

127. Nolan-Haley, *Ghana*, *supra* note 6, at 87.

One group that did not share in the enthusiasm over ADR were traditional chiefs; they were concerned that they had been excluded from assisting in the design of the new law that had radically changed the position of customary arbitration.<sup>128</sup> Since passage of the Act, the Judicial Service of Ghana has been active in supporting mediation and public education about ADR.<sup>129</sup> The Commercial Division of the High Court of Ghana has issued rules making mediation a mandatory pre-trial procedure.<sup>130</sup> In addition to the Judicial Service, other forms of institutionalized ADR have been established.<sup>131</sup>

Traditional justice systems are still present and co-exist with the formal legal system.<sup>132</sup> But, according to a 2013 report on access to justice in Ghana, these systems encounter several obstacles in the delivery of justice.<sup>133</sup> The report identified several problems with traditional ADR processes including high cost, unfairness, challenges in enforcing awards at the local level, and criminal cases that are not suited for the traditional system.<sup>134</sup>

Mediation is used in Ghana to provide access to justice that courts *could not* provide and to give fairness that traditional chiefs often *did not* provide.<sup>135</sup> It is promoted today as a method to handle land disputes not easily resolved through the courts.<sup>136</sup> A high volume of land disputes and low settlement rates are a burden to the courts.<sup>137</sup>

There are numerous examples of how mediation has been enthusiastically welcomed by the Judiciary. Georgina Wood, the former Chief Justice of Ghana, stated that ADR “holds promise for an improved and qualitative access to justice for all Ghanaians, while serving as an attractive feature for economic development.”<sup>138</sup> The following Chief Justice, Sophia Abena Bofofo Akuffo, instituted an annual ADR Week that gives parties the opportunity to settle cases through mediation and to create awareness of the availability of ADR as a complement to the court process.<sup>139</sup> The Judicial Services of Ghana Annual Report from 2017–2018 states that courts developed the ADR program as part of the

128. Paul Kirgis, *Status and Contract in an Emerging Democracy: The Evolution of Dispute Resolution in Ghana*, 16 CARDOZO J. CONFLICT RESOL. 101, 124–25 (2014).

129. Daily Graphic, *131 Courts Observe Alternative Dispute Resolution Week*, GRAPHIC ONLINE (July 5, 2019), <https://www.graphic.com.gh/news/politics/ghana-news-131-courts-observe-adr-week.html>.

130. Amadou Dieng, *ADR in Sub-Saharan African Countries*, in *ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES* 611, 616–24 (Arnold Ingen-Housz ed., 2d ed. 2011) (Neth.).

131. Nolan-Haley, *Ghana*, *supra* note 5, at 89.

132. Kwesi Appiah, *Report on Access to Justice—Scoping Study of the Justice (Formal and Informal) Sector in Ghana*, STARGHANA 1, 13 (Apr. 2013).

133. *Id.* at 15.

134. *Id.*

135. Georgina Theodora Wood, Chief Justice of the Republic of Ghana, Keynote Address at the Catholic University, Fiapre, Sunyani on the occasion of the inauguration of the ADR Training Institute (Aug. 1, 2011) (transcript available at [http://marianrc.org/wp-content/uploads/2011/09/MCRC\\_openingKeynote.pdf](http://marianrc.org/wp-content/uploads/2011/09/MCRC_openingKeynote.pdf)).

136. Richard C. Crook, *Access to Justice and Land Disputes in Ghana's State Courts: The Litigants' Perspective*, 50 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 25 (2004) (Crook argues, however, that ADR mechanisms are unlikely to be successful in Ghana unless they provide the equivalent degree of authority and enforceability to the courts).

137. *Id.* at 25.

138. WOOD, *supra* note 124, at xix–xx.

139. Daily Graphic, *supra* note 129. A practical goal of the week is to reduce the backlog of cases. See *Alternative Dispute Resolution Reduces Backlog of Land Dispute Cases*, GHANAWEB (Mar. 13, 2017), <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Alternative-Dispute-Resolution-reduces-backlog-of-land-dispute-cases-518354>.



adjudication system “to empower disputants to be directly involved in the resolution process of their disputes.”<sup>140</sup>

## V. STRUCTURAL, CULTURAL, AND VALUE DIFFERENCES

ADR’s access to justice claims are similar in the U.S., E.U., and Ghana: using ADR will result in greater efficiency, greater satisfaction, and lower costs. What is different among these countries is how the ADR systems are designed, with the big divide between mandatory and voluntary structures.<sup>141</sup> In the E.U., Italy stands alone in country-wide adoption of a mandatory regime, while several E.U. countries are beginning to consider mandatory approaches.<sup>142</sup> The United States supports mandatory regimes in both the courts and with respect to consumer and employment arbitration.<sup>143</sup> In addition to systemic design differences, there are cultural differences that pose barriers and challenges to achieving access to justice through ADR. These are discussed in the following Subsections.

### A. Barriers and Challenges to Achieving Access to Justice through ADR

The barriers to accessing justice through ADR processes vary depending on geographic location and context. In Western countries, for example, barriers could include the lack of legal counsel or financial ability to file in court. Citizens in some E.U. countries may be unaware of their rights or have insufficient knowledge of the tools that are available to access justice.<sup>144</sup> In Africa, besides lack of government funding for ADR and mediation programs,<sup>145</sup> there may be a lack of transportation to bring parties to court mediation programs. For example, in Rwanda, where land disputes are abundant and commonly mediated, the Ministry of Justice has provided mediators with bicycles to assist them in reaching disputing parties.<sup>146</sup>

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140. JUDICIAL SERVICE OF GHANA, JUDICIAL SERVICE 2017–2018 ANNUAL REPORT 56–57 (2018), <http://www.judicial.gov.gh/jsfiles/annualrep20172018.pdf> (the program became “a preferred choice to some court users who seek expeditious, flexible and affordable justice,” in addition to reducing the backlog of cases. For the period 2017–18, 981 of the 2,158 cases referred to mediation were settled. This represents forty-five percent settlement rate).

141. See, e.g., Nolan–Haley, *Ghana*, *supra* note 6 (describing the generally voluntary regime in Ghana); SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* (2019) (describing mandatory regimes in the United States); Francesca De Paolis, *Italy Responds to the E.U. Mediation Directive and Confronts Court Backlog: The New Civil Courts Mandatory Mediation Law*, 4 N.Y. DISP. RESOL. LAW. 41, 41–43 (2011) (describing the mandatory mediation structure in Italy).

142. See Sophia Ampoulidou, *The New Legal Framework on Compulsory Mediation in Greece*, DRAKOPOULOS (Feb. 14, 2019), <https://drakopoulos-law.com/2019/02/14/the-new-legal-framework-on-compulsory-mediation-in-greece/>.

143. See generally Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.–C.L. L. REV. 155 (2019).

144. For more information about your rights, visit <https://fra.europa.eu/en/theme/access-justice>.

145. Price, *supra* note 126, at 405.

146. ADR Daily, *Over 15,000 Rwandan Mediators Receive Bicycles*, ADR DAILY (June 13, 2019), <https://adraily.com/15000-rwandan-mediators-receive-bicycles/>.

*B. The Influence of Customary Law and  
Traditional Values on ADR and  
Access to Justice*

Unlike in the U.S. and Europe, customary law—the laws and customs that governed in Ghana before the introduction of colonial law by the British in 1844<sup>147</sup>—is still influential in Africa and may present a barrier to accessing justice through modern ADR processes. Some state courts have jurisdiction to adjudicate cases on the basis of customary law. Other countries establish community courts where judges first attempt to mediate a settlement based on customary law.<sup>148</sup> Customary dispute resolution, with its long history of providing access to justice for African parties, emphasizes the principles of consent and reconciliation.<sup>149</sup> Elders and chiefs manage and resolve disputes generally within a communitarian framework. Decision-making is based on mutual agreement of the parties.<sup>150</sup> In several countries, customary law co-exists with modern ADR.

In addition to the influence of customary law, there are differences in ADR values in Western and African countries. Three values which permeate Western ADR and mediation practice—neutrality, party self-determination, and confidentiality—may be treated differently in some parts of Africa. The Model Standards of Conduct for Mediators and the European Code of Conduct for Mediators that govern Western mediation practice require that mediators act impartially and avoid even the appearance of partiality.<sup>151</sup> Studies of African mediators show a more evaluative role for mediators.<sup>152</sup> They are considered wise and moral persons whose authority comes from the community and who may express opinions and encourage particular moral outcomes.<sup>153</sup>

Party self-determination, which under the Model Standards of Conduct for Mediators is considered the controlling principle of mediation, is in tension with the communitarian values of many African dispute resolution procedures. Research by Professor Elisabetta Grande emphasizes the importance of understanding group relationships as well as the individuals' relationship to the group: “[T]he individual does not exist outside the group . . . [R]ights and duties are only ascribed to the group.”<sup>154</sup> In short, individual rights and autonomy do not rule the day.

Finally, Western conceptions regarding the importance of confidentiality may not be honored to the same degree in Africa. The Model Standards of Conduct for Mediators requires that mediators honor the confidentiality of the mediation process unless the parties agree otherwise.<sup>155</sup> In the informal systems of many African societies, the dispute affects the whole community and therefore belongs to the

147. See Victor Essien, *Sources of Law in Ghana*, 24 J. BLACK STUD. 246 (1994).

148. Janine M. Ubink, *Access vs. Justice: Customary Courts and Political Abuse—Lessons from Malawi's Local Courts Act*, 64 AM. J. COMP. L. 745, 757 (2016).

149. Elisabetta Grande, *Alternative Dispute Resolution, Africa and the Structure of Law and Power: The Horn in Context*, 43 J. AFR. L. 63, 64 (1999).

150. Nolan-Haley, *Ghana*, *supra* note 6, at 69–70.

151. MODEL STANDARDS OF CONDUCT FOR MEDIATORS § II.B. (2005) [hereinafter MODEL STANDARDS].

152. See generally Richard C. Crook et al., *Popular Concepts of Justice and Fairness in Ghana: Testing the Legitimacy of New or Hybrid Forms of State Justice*, 42 INST. DEV. STUD. BULL. 64 (2011).

153. *Id.* at 72.

154. Grande, *supra* note 149, at 66.

155. MODEL STANDARDS, *supra* note 151, at § V.A.

community.<sup>156</sup> In this respect, protecting confidentiality presents difficult challenges.

## VI. FUTURE DIRECTIONS

What can we expect from the ongoing merger of ADR and access to justice? Looking forward, this Section focus on two questions: whether there is a right to access justice through ADR, and whether there is a right *not to access* justice through ADR.

### A. A Right?

To the extent that access to justice and ADR are inter-connected, it may well be that demands for access to courts and legal representation will be supplemented by demands for a right of access to specific ADR processes, such as mediation. This raises the question of whether there is a right of access to ADR processes.

In the United States, there would, no doubt, be strong support for the proposition that such a right of access exists. The ABA Section of Dispute Resolution Task Force on Access to Justice and ADR supports a broad definition of access to justice that includes the use of ADR processes.<sup>157</sup> The E.U. Parliament has also included within the concept of access to justice access to ADR processes.<sup>158</sup>

Finally, an empirical response to this question comes from a group of European, Japanese, and American scholars who conducted a comparative study of experience with regulating dispute resolution in twelve different jurisdictions. Their research resulted in the publication of a transnational “Guide for Regulating Dispute Resolution” in civil and commercial matters, what they describe as a first attempt to provide guidance for a value-based and coherent system of dispute resolution.<sup>159</sup> In this Guide, these scholars argued in favor of a right of access to ADR: “Citizens have a right of access to effective and fair dispute resolution. . . . [T]he state has to provide citizens with a reliable framework for ADR and should, within the means available, support such alternative forms of dispute resolution.”<sup>160</sup>

Related to a right of access to ADR is awareness or knowledge of the availability of ADR options and an understanding of how they operate. A recent multi-jurisdictional empirical study from the U.S. showed that parties were unaware of the ADR options available to them in court.<sup>161</sup> Even when parties *are* aware of ADR options, they do not really understand how they operate.<sup>162</sup>

156. See, e.g., Grande, *supra* note 149, at 64.

157. See *Access to Justice*, *supra* note 20, at 1 (“This Task Force takes a broad view of access to justice to include not only access to the courts but access to legal representation, access to resolution of issues, and access to quality processes that do not necessarily include the court system. When access to justice is defined more broadly, the use of processes such as mediation, arbitration, negotiation and other alternative fits naturally in solving these problems.”).

158. Raffaelli, *supra* note 106, at 57.

159. Steffek & Unberath, *supra* note 3, at 13.

160. *Id.* at 18.

161. Donna Shestowsky, *When Ignorance Is Not Bliss: An Empirical Study of Litigants’ Awareness of Court-Sponsored Alternative Dispute Resolution Programs*, 22 HARV. NEGOT. L. REV. 189, 211–18 (2017). One way to meet this “unfamiliarity with mediation” challenge, at least with represented parties, is to require that attorneys advise their clients of ADR options.

162. Symposium, *Fordham Law School Access to Justice and ADR Symposium* (2019).

Likewise, a study of Russian attitudes toward mediation showed the lack of popular knowledge about the mediation process; “both neophytes and court veterans were equally ignorant.”<sup>163</sup>

### B. *The Right to Say No?*

The corollary question to whether there is a right of access to justice through ADR is whether there is a right to say *no* to participating in an ADR process. Simply put, will dispute resolution systems, particularly court-connected programs, be designed as voluntary or mandatory going forward? The issue is significant for when countries such as Russia or the E.U. Member States confront non-usage or low usage of ADR. One of the policy responses has typically been to make ADR programs mandatory, or at least require parties to attempt an ADR process such as mediation as a pre-requisite for initiating a case in court.<sup>164</sup> Going forward, we should see greater party participation in how ADR regulatory systems are constructed. The “mandatory versus voluntary” question implicates dispute system design principles that emphasize the importance of stakeholder participation in design.<sup>165</sup>

The trend seems to favor voluntary dispute resolution regimes. The E.U. Directives on mediation and ADR reflect a consensual approach to accessing justice through ADR. The 2008 Mediation Directive proposed a voluntary scheme for mediation of cross-border commercial disputes.<sup>166</sup> The E.U. Directive on Consumer ADR makes it clear that the use of ADR be consensual for the consumer and not act as a barrier to exercising his or her right of access to the court system.<sup>167</sup> Article 10(1) of the Consumer Directive further emphasizes that ADR cannot act as a barrier to the courts through the use of pre-dispute ADR agreements.<sup>168</sup> Specifically, it states that Member States:

[S]hall ensure that an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it

163. Hendley, *supra* note 11, at 484. A related issue, beyond the scope of this Article, concerns the ability to pay for an ADR process. A 2006 Report on access to justice in Ghana stated that the cost of accessing ADR is sometimes more expensive than the cost of accessing the regular courts. See Raymond A. Atuguba et al., *Access to Justice in Ghana: The Real Issues*, LADA GROUP (2006), <https://ladagroupgh.com/docs/5854320d48f0ed75317469e0d04679eeAccess%20to%20Justice%20In%20Ghana%20-%20The%20Real%20Issues.pdf>.

164. See Hendley, *supra* note 11, at 493; Giuseppe De Palo et al., *Sleeping? Comatose? Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union*, 16 CARDOZO J. CONFLICT RESOL. 713, 715 (2015).

165. Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 139 (2009).

166. Directive 2008/52/EC, *supra* note 88.

167. The Directive on Consumer ADR states: “The purpose of this Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by ensuring that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures. This Directive is without prejudice to national legislation making participation in such procedure mandatory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.” Directive 2013/11/EU, of the European Parliament and of the Council of 21 May 2013, on Alternative Dispute Resolution for Consumer Disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L 165/70) 10, 1.

168. *Id.*

was concluded before the dispute has materialized and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the disputes.<sup>169</sup>

The United Nations has also demonstrated support for a consensual approach to mediation in its report, “Strengthening the Role of Mediation in the Peaceful Settlement of Disputes.”<sup>170</sup> Noting that consent may sometimes be given incrementally, the report states that once given, consent may also be withdrawn.<sup>171</sup> Finally, the authors of the “Guide for Regulating Dispute Resolution” state as their first principle:

The regulation of dispute resolution should start with and focus on the parties. Generally, the parties and not the state should choose the dispute resolution mechanism (principle of self-determination and party choice of process). While consensual resolution is preferable over resolution forced on one of the parties, there is no preference of one sort of dispute resolution mechanism over another. Regulation may reflect, however, that certain dispute resolution mechanisms may be particularly well suited for specific types of disputes.<sup>172</sup>

In contrast with support for voluntary, consent based ADR systems are the efforts of some countries—namely, the United States, Italy,<sup>173</sup> Turkey,<sup>174</sup> and some African countries<sup>175</sup>—to put some form of mandatory regime into effect. The desirability of designing a mandatory system is also suggested in the policy objectives in the 2018 report of the European Network of Councils for the Judiciary.<sup>176</sup>

## VII. CONCLUSION

This Article has argued that as ADR and access to justice have evolved into global reform projects, there has been, in essence, a merger of the ADR and access to justice movements. The popular narrative that ADR is the equivalent of access to justice is common in many countries and cultures. Nevertheless, while the rhetoric is similar, the systemic design structures are different. In some countries,

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169. *Id.*

170. See U.N. Secretary-General, *Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution: Report of the Secretary-General*, U.N. Doc. A/66/811, at 89 (June 25, 2012).

171. *Id.* at 24.

172. Steffek & Unberath, *supra* note 3, at 15.

173. Italy has a mixed model in commercial and civil cases. There is an initial required mediation session in eight percent of the cases (e.g., banking, insurance, real estate) and a voluntary mediation model with incentives and sanctions in the remaining ninety-two percent of cases. Implementation of the Mediation Directive 29 November 2016, *supra* note 106, at 21.

174. See Leonardo d’Urso, *How Turkey Went from Virtually Zero to 30,828 Mediations in Just One Month*, *MEDIATE.COM* (Feb. 2018), <https://www.mediate.com/articles/depalog20180222.cfm>.

175. Price, *supra* note 126, at 397 (reporting that several countries are implementing mandatory models of mediation or conciliation into civil litigation processes).

176. European Law Inst. & the Euro. Network of Councils for the Judiciary, *supra* note 5.

ADR is *offered* as an access to justice provider; in other countries, it is *imposed*. There are costs and consequences to both regimes.

Going forward, with the continuing merger of the ADR and access to justice movements, countries will be more actively engaged in designing ADR regulatory systems and, at the same time, grappling with the cost of party choice. While governments may have primary responsibility for promoting better access to justice through wide use of ADR processes, the courts should continue to play a significant role to ensure the quality of that justice.<sup>177</sup>

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177. See Masucci, *supra* note 31, at 978 (arguing that governments have “a primary responsibility for taking action to promote better access to justice in commercial dispute resolution” and to create more awareness among lawyers to increase education about ADR).

