2019

The New Jersey International Arbitration, Mediation, and Conciliation Act: Closing the Gap in International Commercial ADR Proceedings

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I. Introduction

In response to a need for efficient mechanisms that allow for parties to engage in international arbitration and mediation, New Jersey recently enacted a statute that will govern most commercial disputes where at least one party is a non-resident of the United States.[1] The International Arbitration, Mediation, and Conciliation Act (the Act) was enacted on May 7, 2017 and supplements prior New Jersey statutes that govern alternative resolution disputes (ADRs).[2] The Act is the first statute that allows for mediation settlement agreements to be converted into arbitration awards that can be enforced under the New York Convention.[3]

The Act is an innovative push towards a comprehensive framework that facilitates and promotes all types of alternative dispute resolution. Not only does it allow mediation agreements to be enforced on a global scale, but it also allows non-profit entities to open "centers" for parties to engage in ADR proceedings.[4] These centers will adopt their own rules and procedures that parties have the option to follow.[5] The Act requires that centers allow for significant party-participation, keeping with the spirit of international ADR practices.[6]

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[1] *See* New Jersey International Arbitration, Mediation, and Conciliation Act, N.J.S.A. 2A:23E-1.
[2] Double check this
[3] The Act is among only 10 states that allows for international mediation settlement agreements to be converted into arbitral awards. *See* Newswire, "Kean: New Jersey Should Compete in Amazon's Search for Home of New HQ, Billions in Investment and Tens of Thousands of Jobs" (Sept. 17, 2017; *see also* N.J.S.A. 2A:23E-3.
[4] *See* N.J.S.A. 2A:23E-3.
[5] *Id.*
[6] *Id.*; *See* Jean-François Poudret and Sébastien Besson, Comparative Law of International Arbitration 6.1, 526 (2nd ed) (explaining that the rules that govern an arbitration are decided by the parties before or after the dispute has arisen; furthermore, most countries do not require formal requirements, such as a written agreement, regarding the rules that would govern the arbitration proceeding); *see also* ICDR IDRP MED R Art. 1 (en) (2010) (explaining that

The Act is a major advancement in New Jersey, with some practical benefits for businesses.[7] Proponents of the Act are hopeful that it will ease some of the burdens that are associated with arbitration, such as the costs and time involved in proceedings.[8] Furthermore, lawmakers suggest that the Act will promote international trade in New Jersey.[9] New Jersey's economy already greatly benefits from international trade and commerce; in 2015, the state exported around $32.1 billion in merchandise.[10] Legislation which would make it easier for international businesses to resolve their disputes through arbitration or mediation, could help to generate more business that would positively impact New Jersey's economy.[11]

Perhaps the most important part of the Act is the mechanism it provides to convert mediation settlements into arbitral awards, enforceable under the FAA. Businesses have begun to search for other forms of dispute resolution, such as mediation, to resolve their disputes in a timely and cost-efficient manner.[12] Mediation is an excellent alternative to arbitration because it allows for a significant party participation, while saving time and money.[13]

However, some argue there needs to be a new convention to allow for mediation settlements to be enforceable in the international sphere.[14] Those scholars also tend to agree that modern-day mechanisms that allow for mediation settlements to be converted into arbitral awards

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mediations conducted under the International Centre for Dispute Resolution can change any of the Rules that the ICDR provides).

[7] *See* Jason K. Gross and David L. Cook, *New Jersey Law Adds Teeth to Mediation*, Metropolitan Corporate Counsel, (June 2017) http://www.metrocorpcounsel.com/pdf/2017/June/10.pdf.

[8] Dorothy Atkins, *New NJ Law Eases Resolution of Global Business Disputes*, Law360 (Feb. 7, 2017).

[9] *Id.*

[10] *Id.*

[11] *See id.*

[12] *See* Jacqueline Nolan-Haley, *Mediation: The "New Arbitration,"* 17 Harv. Negot. L. Rev. 61, 66 (Spring 2012).

[13] *See* Ellen E. Deason, *Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?*, 22 No. 1 Disp. Resol. Mag. 32 (Fall 2015).

[14] *See* Deason, *supra* n. 13 at 33 (stating that a convention could provide a clear and uniform framework that encourages parties to use mediation for international disputes); *see also* Strong, *supra* n. 14 at 38 (suggesting that businesses might be more inclined to mediation over arbitration in the international commercial dispute resolution context, and thus it would be necessary to adopt legislation that allows for international enforcement similar to the New York Convention).

overcomplicate the mediation.[15] They argue that mediation settlements should be enforceable on their own through a convention or other piece of legislation.[16]

This note will argue that there is no need to have a separate convention to enforce mediation settlements because the mechanisms that state international mediation statutes such as the Act provide are sufficient to achieve the goals of parties seeking mediation settlements. Furthermore, this note will highlight the benefits of allowing states to enforce mediation settlements under their own legislation, especially for smaller businesses seeking to engage in alternative dispute resolution. This note will also discuss the shortcomings of mediation proceedings from a policy perspective.

II. Drafting History

On September 8, 2016, the Act was first introduced by primary sponsors New Jersey State Senators Sandra B. Cunningham and Senator Thomas H. Kean.[17] The Act passed both houses of the New Jersey legislature with a 77-0 vote.[18] Lawmakers believed that the bill could help New Jersey take advantage of its "'unique position to benefit from the growth on international trade.'"[19]

Mediation experts agree that the Act's passing was an acknowledgement of the increasing use of mediation as an alternative to arbitration, which can be costly and time-consuming.[20] Most international arbitrations involve at least $1 million in dispute (and oftentimes, especially in international commercial arbitration, that number is much higher).[21] For cases valued at exactly

[15] Deason, *supra*, note 13 at 33.
[16] Deason, *supra*, n. 13 at 33.
[17] 2016 NJ S.B. 602 (NS).
[18] *Id.*
[19] Hannah Sheehan, *NJ Can Attract International Dispute Resolution, Sens. Told*, Law360 (May 16, 2016).
[20] Caroline Simpson, *New Jersey Angles to Become Global Dispute Resolution Hub*, Law360 (Oct. 21, 2016).
[21] Thomas H. Oehmke, "Arbitrating International Claims—At Home and Abroad" § 126.

$1 million, the average cost of administrative fees is $17,390, and the average cost of arbitrator fees is $16,560.[22] The average arbitration costs a total of $33,678—and that is only for arbitrations involving $1 million.[23]

Arbitrators and mediators have also noted that arbitration has become more like litigation, and that there was a gap in alternative dispute resolution proceedings.[24] Specifically, there was no mechanism to enforce mediation settlement agreements in foreign jurisdictions.[25]

Mediation is when a third person chosen by the parties initiates a negotiation in order to adjust or settle the parties' dispute. Mediation differs from arbitration because it results in a settlement made by the parties, rather than by a third party.[26]

While the Act was meant to facilitate international arbitration and mediation proceedings to attract big businesses to New Jersey, lawmakers also hoped that the Act would benefit small businesses that want to expand overseas, but that are wary of the costs associated with international commercial litigation and arbitration.[27]

III. The Act's Provisions

i. Definitions

The Act defines "arbitral award" as an award that is signed by an arbitrator, which could be the result of any type of dispute resolution that involves a neutral, such as arbitration, mediation, or conciliation.[28] This means that arbitral awards can arise not only from arbitration

[22] *Id.*
[23] *Id.*
[24] *Id.*; *see* David Weiss and Brian Hodgkinson, *Adoptive Arbitration: An Alternative Approach to Enforcing Cross-Border Mediation Settlement Agreements*, at 276.
[25] *See* David Weiss, *A Pathway to Enforcement Mechanisms of International Settlement Agreements*, 70 Disp. Resol. J. 25, 26 (2015).
[26] Black Law Dictionary. "What is arbitration?" http://thelawdictionary.org/arbitration/
[27] This is especially true considering the fact that New Jersey's neighboring state, New York, is among the world's most popular arbitration destinations for big businesses. **Cite.;** Simpson, *supra*, n. 22.
[28] N.J.S.A. 2A:23E-3.

proceedings, but also from mediation or conciliation. Because there is currently no federal enforcement mechanism that covers mediation settlement agreements, this Act allows for mediation settlement agreements to be converted into an award signed by an arbitrator.[29] Thus, the agreement is allowed to fall under the New York Convention.[30]

The Act allows for centers to conduct arbitration, mediation, and conciliation proceedings.[31] A center is defined by the Act as a non-profit entity with a principal purpose of assisting the resolution of disputes involving international business, trade, commercial, and any other disputes between persons that choose to engage in alternative dispute resolution.[32] This definition changed from the original introduction of the Act; in the original text, center was defined as a public research university, rather than the more general non-profit entity provision.[33] This is likely because legislators felt that limiting the definition of center to public research universities would make it more difficult to open up centers in attractive geographic locations.

The term "person" applies to individuals and legal commercial entities, which includes certain business organizations (e.g. corporations, partnerships, limited liability companies) and government agencies.[34] The Act also defines a resident as a person whose sole residence is within one of the states, possessions, or territories of the United States, or in the District of Columbia.[35]

For a business, it is unclear by the statute how residency would be determined. Perhaps residency for businesses will be determined the same way as it is determined for diversity

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[29] *Id.*
[30] *See* New York Convention on the Recognition and Enforcement of Foreign Arbitral Wards, USCS Foreign Arb Awards (find actual cite?)
[31] N.J.S.A. 2A:23E-3.
[32] *Id.*
[33] Cite to prior version of Act
[34] N.J.S.A. 2A:23E-3.
[35] N.J.S.A. 2A:23E-3.

jurisdiction purposes, which would mean that a business's residency is wherever it is domiciled (i.e., its principal place of business).[36] Or, maybe it will be determined the same way that it is determined for venue purposes, which would mean that a business is considered a resident wherever it is subject to personal jurisdiction.[37]

This ambiguity raises issues of manipulative use of nationality. For example, a party may attempt to operate through a holding company outside of the U.S. to take advantage of the Act by claiming to be a non-resident. This issue, known as forum shopping, most often comes into play in the U.S.'s litigation system, where parties seek to conduct litigation in jurisdictions that can result in a more favorable outcome. Perhaps one way the Act can be improved is to provide consequences for forum shopping.[38]

Furthermore, the Act requires a written undertaking to arbitrate in certain instances. The definition of a written undertaking to arbitrate is a writing in which persons agree to arbitrate.[39] This writing can take form as part of a contract, a separate writing, or any other form of written communication.[40] Lawyers should note that this definition does not regard contract law that dictates whether the writing is valid, or any defenses that can be applied.[41]

ii. Scope

The Act applies to arbitration disputes between two or more persons, where at least one party is not a resident of the U.S.[42] The Act also applies to two or more persons who are residents of the U.S. if the dispute involves: property that is located outside of the U.S.; a

[36] Cite to civil procedure case
[37] Cite to civil procedure case
[38] Need more on this. Perhaps it would be good to also play devil's advocate; discuss why forum shopping may be OK or not necessarily terrible in certain situations.
[39] N.J.S.A. 2A:23E-3.
[40] *Id.*
[41] *Id.*
[42] N.J.S.A. 2A:23E-4.

contract that requires enforcement or performance outside of the U.S.; or has some other relation to a foreign country.[43]

The Act departs from the NJUAA because its application is more limited than the NJUAA. While the NJUAA governs all arbitration proceedings (except for arbitrations between employers and representatives of employees pursuant to a collective bargaining agreement), the Act only governs disputes that involve some sort of international component.[44]

Importantly, the Act also does not apply to any disputes that involve family or domestic relations law.[45] Most jurisdictions, until recently, have deemed arbitration of family disputes to be contrary to public policy.[46] While the efficiency of arbitration and mediation have resulted in many jurisdictions permitting certain aspects of family law to be resolved through alternative dispute resolution, there are still policy concerns with power imbalance and the parties' lack of experience.[47]

The concern with power imbalance is based on the principle that courts should not enforce arbitration agreements when there is significant reason to believe that one party would not have willingly agreed to eliminate the right to seek judicial relief.[48] States do not want to allow one party to "take advantage of the vulnerability of another in the context of family arbitration."[49]

Further, parties in family law arbitration are typically not familiar with the law and legal process involved in family law alternative dispute resolution.[50] While commercial arbitration

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[43] *Id.*
[44] *Compare* N.J.S.A. 2A:23B-3 *with* N.J.S.A. 2A:23E-4.
[45] *Id.*
[46] Wendy Kennett, "It's Arbitration, But Not as we Know It: Reflections on Family Law Dispute Resolution." Int J Law Policy Family (2016) 30 (1): 1 (April 1, 2016).
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*

oftentimes involves arbitral institutions that play a large role in establishing an arbitral tribunal, the qualifications of arbitrators are subject to the parties' specific requests.[51] Thus, parties may fail to request for skills that are necessary to resolve family law disputes (e.g. legal experience, mental health experience, or social work experience).[52] This can ultimately result in unfairness. By excluding family law disputes from the benefits of the Act, New Jersey legislators are directly addressing these concerns.

iii. How it Works

Once parties determine that they fall under the scope of the Act, they can apply the rules of the Act to their alternative dispute resolution proceedings in a few different ways. While the arbitration does not have to be held in New Jersey, the parties must satisfy one of the following three requirements to apply the Act: (1) by including in the written undertaking to arbitrate an express statement that New Jersey law applies; (2) when there is no choice-of-law provision in the written undertaking, as long as that writing creates a part of a contract that is governed by New Jersey law; or (3) when the arbitral tribunal or other panel decides that, under conflict of law principles, the arbitration will fall under the laws of New Jersey.[53]

The first prong applies when there is an explicit written agreement that New Jersey law will govern the arbitration. An example of the second prong arises when there is not a specified choice-of-law provision in the writing undertaking to arbitrate, but the writing is part of a larger contract that applies New Jersey law. The third prong could arise when one party believes the arbitration should be governed by New Jersey law and the other party believes it should be

[51] Kennett, *supra* n. 43.
[52] *Id.*
[53] N.J.S.A. 2A:23E-4.

governed by the law of another jurisdiction, and the neutral decides that conflict of law principles dictate that the arbitration falls under New Jersey law.

If there is no written agreement to arbitrate in New Jersey, parties can also consent to arbitration simply by conducting arbitration in the state.[54]

iv. The Centers

The Act provides for non-profit entities to open up centers where parties can go and engage in alternative dispute resolution.[55] And while the Act allows these centers to form their own rules and procedures for establishing arbitral tribunals and other panels, the Act states that those rules are only meant to be illustrative to parties rather than limiting.[56]

The Act requires centers to allow arbitral tribunals and other panels to decide a number of different issues related to the proceeding. The panels can: (1) determine the relevancy of the evidence presented without following formal rules of evidence; (2) utilize whatever lawful methods they deem appropriate to get additional evidence; (3) issue subpoenas for witnesses, requests to produce documents, and requests for other evidence; (4) administer oaths, order depositions, and hire experts; (5) fix fees for attendance of witnesses where appropriate, and (6) enter awards that can include interest, costs, and attorney's fees pursuant to a written agreement, or if there is no agreement, when appropriate.[57]

Although the Act requires that centers allow arbitral tribunals and other panels to have these powers, the Act also strongly emphasizes the fact that participants have broad discretion to conduct the proceedings how they see fit.[58] Specifically, the Act states that centers must allow

[54] *Id.*
[55] N.J.S.A. 2A:23E-6.
[56] *Id.*
[57] *Id.*
[58] *Id.*

parties to choose any set of rules and procedures for the "conduct, administration, and facilitation of that proceeding."[59] These rules can be prepared by the center, the arbitral tribunal, or by the participants themselves.[60] Thus, if participants do not want arbitral tribunals to have all of the specified powers that the Act provides for, the Act implies that the parties can choose to waive those powers by adopting their own body of rules.[61]

This level of autonomy is typical in international arbitration conventions and national arbitration statutes.[62] The New York Convention codifies the parties' right to create whatever arbitral procedures they wish, and provides that awards that have not adhered to the agreed procedures would not be recognized.[63] UNCITRAL Model Law jurisdictions also highlight the significance of parties' procedural autonomy.[64]

The broad discretion that the Act allows parties to have is another way in which it departs from prior New Jersey arbitration and mediation statutes. In the NJUAA, for example, grants most (if not all) of the decision-making power to the arbitral tribunal.[65]

The Act provides examples of rules that centers should provide for parties, which grant arbitral tribunals to: (1) Determine the relevance of materiality of the evidence without the need to follow formal rules of evidence; (2) Be able to utilize any lawful methods that it deems appropriate to obtain evidence additional to that produced by the parties; (3) issue subpoenas or other requests for the attendance of witnesses or for the production of books, records, documents,

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[59] *Id.*
[60] N.J.S.A. 2A:23E-6.
[61] *Id.*
[62] Gary Born, *International Commercial Arbitration*, p. 2130.
[63] *Id.* at 2131 (Citing §11.03[C][1][b]; §15.02[A].
[64] *Id.* at 2133.
[65] Beyond the negotiated agreements made by parties regarding the choosing of the arbitrator, the venue, and other matters, the NJUAA does not explicitly grant parties the right to adopt their own rules that would govern the arbitration proceeding. The NJUAA does, however, give arbitrators a number of powers in the arbitration process. *See* N.J.S.A. 2A:23B-15.

and other evidence; (4) be empowered to administer oaths, order depositions to be taken or other discovery obtained or produced, without regard to the place where the witness or other evidence is located, and appoint one or more experts to report to it; (5) fix any fees for the attendance of witnesses it deems appropriate; and (6) make awards of interest, reasonable attorney's fees and costs of arbitration as agreed to in writing by the parties, or in the absence of an agreement, as it deems appropriate.[66]

One thing that is missing from the Act is a provision for centers to require arbitral tribunals to implement procedural authority in cases where procedural fairness and equality are at stake. Some jurisdictions, including UNCITRAL areas, proscribe the arbitral tribunal the power to ensure that an arbitration proceeding will be conducted fairly to both parties.[67] Admittedly, UNCITRAL grants broader procedural authority to arbitral tribunals in this respect than most other national arbitration statutes.[68] In some jurisdictions, the arbitral tribunal is not given any authority to override the agreed procedures.[69]

If one of the parties involved in the settlement resides in a country that is not a signatory to the New York Convention, then the centers can require the party to post a bond or any other type of security that the center "deem[s] appropriate" to assure [the] reasonable likelihood" that the award will actually be enforced.[70]

v. Enforcement

Finally, the Act has an enforcement provision that states that arbitral awards issued pursuant to the Act will be enforced by courts of competent jurisdiction, consistent with the FAA and the

[66] N.J.S.A. 2A:23E-6.
[67] *See* Born, *supra* at 2143.
[68] *See* Born, *supra* at 2143.
[69] *See* Born, *supra* at 2143.
[70] N.J.S.A. 2A:23E-6.

New York Convention.[71] Note that, because "arbitral award" is defined as any award signed by an arbitrator pursuant to arbitration, mediation or conciliation,[72] this means that mediation settlement agreements will also be enforced by courts of competent jurisdiction. Again, the key difference between international arbitration and mediation law prior to the Act and now is that mediation settlement agreements can be enforced.[73]

This foreign mediation settlement mechanism is extremely important, largely because it is so few in number.[74] The use of international commercial mediation typically arises pursuant to a contractual agreement.[75] However, it can also arise through the voluntary adoption as suggested by counsel, or pursuant to a company policy.[76] Parties that choose to pursue international commercial mediation generally do so in order to save costs and time.[77] Parties also choose this method in order to have a more satisfactory dispute resolution process, and to preserve relationships.[78]

vii. What the Act Does Right

There are a number of characteristics that international business organizations look for when choosing their arbitral seat for a dispute resolution proceeding, many of which are embodied within the Act. In fact, the selection of the arbitral seat is among the most significant aspects of an international arbitration agreement.[79] Thus, parties move cautiously when choosing the seat.[80]

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[71] *Id.*
[72] Footnote needed
[73] *See* Atkins, *supra*, n. 11.
[74] Cite to source stating that only 10 other states provide for this enforcement mechanism.
[75] S. I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 Wash. & Lee L. Rev. 1973, 2026 (Fall, 2016).
[76] *Id.* at 2026-27.
[77] *Id.* at 2031.
[78] *Id.*
[79] Influence of Arbitral Seat at 333.
[80] *Id.*

Businesses prefer arbitral seats that provide a legal environment that supports international dispute resolution processes and is pro-arbitration. Additionally, they desire sufficient facilities to conduct dispute resolution proceedings that employ experienced ADR practitioners.[81] Other characteristics that many foreign businesses look for include a neutral and impartial system, limited judicial review, and adequate enforcement mechanisms.[82]

The Act is meant to make ADR proceedings easier to conduct, which is stated in the purpose of the Act.[83] Rather than going through the trouble of finding a neutral to conduct the dispute resolution proceeding as well as finding a venue, parties can simply go to a designated center.[84] Centers not only have a policy that is meant to facilitate arbitration and mediation,[85] but they also have experienced lawyers that are capable of fulfilling the needs of foreign parties.[86]

There are some aspects of the Act that depart from common jurisprudence regarding international arbitration and mediation. For example, the Act allows parties to agree to arbitrate either by having a written agreement, or by proceeding to conduct arbitration in New Jersey in the absence of a written agreement.[87] This differs from certain international conventions and many of the laws of European nations that require arbitration agreements to be in writing.[88]

Furthermore, the Act gives New Jersey an advantage over its counterpart, New York, which is known as "the center" of international commercial arbitration in the United States.[89] New York is the leading venue for international arbitration, and has more than double the

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[81] *Id.*
[82] *Id.*
[83] Act
[84] Act
[85] The Act is in line 6with the FAA, which favors arbitration.
[86] Maybe discuss the center being opened in jersey city here?
[87] Footnote needed
[88] Jean-François Poudret and Sébastien Besson, Comparative Law of International Arbitration 3.3, 183 (2nd ed).
[89] James H. Carter and John Fellas, *International Commercial Arbitration in New York*, (2nd ed) (June 16, 2016) at p. 0.01.

number of international arbitration cases heard than in any other U.S. city.[90] And while the Act may not lead to international arbitration in New Jersey competing with that of New York, it does provide an attractive alternative that New York state law lacks; the ability to convert mediation settlements into arbitral awards.[91]

This is a crucial tool that the Act provides. While arbitration is still the leading form of dispute resolution in the international commercial sphere, its perhaps unnecessary formalism has been luring potential cases towards mediation.[92] It is true that international commercial mediation is still relatively uncommon.[93] However, there was a point in time where international commercial arbitration, too, was extremely rare.[94] Although this does not definitively show that international commercial mediation will grow at the same rate as international commercial arbitration, it does show that perhaps the rare use of international commercial arbitration does not necessarily mean that it will not be a popular form of dispute resolution in the future.[95]

In fact, in a study done by the Cornell/PERC Institute, 85% of corporate lawyers have reported that "their organizations are likely to utilize mediation in the future."[96] Those lawyers also indicated that mediation would likely be used in the commercial and employment context.[97]

The Act is not only unique and beneficial in that it provides for an enforcement mechanism for international mediation settlements; it is also valuable because it addresses the beginning, the end, and everything in between in a mediation proceeding. The centers are

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[90] *Id.*
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[92] S. I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 Wash. & Lee L. Rev. 1973 (Fall, 2016).
[93] *Id.* (citing to empirical data where most international commercial transaction lawyers have reported that they did not partake in many mediations in the past few years).
[94] *Id.*
[95] *See id.*
[96] Sarah R. Cole, Craig A. McEwen, Nancy H. Rogers, et al., 1 Mediation: Law, Policy and Practice § 15:3 (March 2018).
[97] *Id.*

essentially a one-stop shop for parties seeking to engage in international commercial mediation. Indeed, many transactional attorneys that engage in foreign alternative dispute resolution agree that if there were any form of legislation to address international commercial mediation, they would prefer that the legislation address the mediation process from the beginning through the end.[98] Thus, as the use of international commercial mediation grows, the fact that the Act provides a mechanism to enforce foreign mediation settlements puts New Jersey one step ahead of New York.

viii. Where the Act can be Improved

One of the factors that foreign businesses consider when determining where to choose their arbitral seat is whether the seat allows foreign counsel to attend and practice during the proceedings.[99] The Act is silent on this matter, and it is unclear whether centers can create their own procedures that allow for foreign counsel to advise their clients.[100] More clarity on this issue, especially if the Act does allow for foreign counsel, would improve the Act. Preferably, the Act would allow for foreign counsel to attend and practice during arbitration proceedings.

Another issue that presents itself in the Act is the ambiguity regarding the process of converting mediation settlement agreements into arbitral awards. Some scholars that are skeptical of the utility of state mechanisms that enforce mediation settlement agreements in foreign jurisdictions note that it is unclear as to whether those settlement agreements follow the "disagreement" language found in the New York Convention.[101] Because mediation settlement

[98] Strong, *supra* note 92 at 2057.
[99] Find the source that mentions this (should be in outline)
[100] Given the degree of autonomy the Act gives centers to create their own procedures, it is unlikely that there would be a restriction on the use of foreign counsel. However, that also means that it is possible for a center to make a rule that states that foreign counsel is not allowed. Thus, it would be better to have a specific provision stating that parties are permitted to use foreign counsel.
[101] Cite to source

agreements are technically the result of a resolved dispute, they may not constitute a disagreement that would allow them to fall under the Convention.[102]

Furthermore, it is unclear whether the process of converting mediation settlement agreements into arbitral awards would cause any further delays or extra costs. This is likely to be determined by the dispute resolution centers that are established pursuant to the Act, but the Act would greatly improve if it shed some light as to how the conversion process works.

ix. The Act in Relation to Prior New Jersey Law

While the Act alone indicates that New Jersey law favors mediation settlements, it is necessary to look at prior legislation and case law that deals with arbitration and mediation to have a better sense of the legal climate in New Jersey regarding international dispute resolution. The Uniform Mediation Act (UMA) governs mediation proceedings that do not fall under the Act.[103] Among other things, the UMA gives parties a mediation-communication privilege,[104] confidentiality assurance,[105] and mediator impartiality assurance.[106] Because the Act is meant to supplement prior New Jersey law, it is likely that these principles would also apply to disputes under the Act.

A more recent New Jersey Supreme Court case dealt with the question of whether a mediation settlement agreement can be enforced absent a written document signed by the parties.[107] In *Willingboro*, the New Jersey Supreme Court held that if a mediation proceeding leads to an agreement, then the terms of that agreement must be written down and signed by the parties.[108] The Court further stated that requiring the agreement to be in writing would "greatly

[102] *Id.*
[103] N.J. Stat. § 2A:23C.
[104] N.J.S.A. 2A:23C-4(a).
[105] N.J.S.A. 2A:23C-8.
[106] N.J.S.A. 2A:23C-9.
[107] *See* Willingboro Mall, Ltd. v. 240/242 Franklin Ave., LLC, 215 N.J. 242, 252 (2013).
[108] *Id.* at 262-63.

minimize the potential for litigation" because it would "protect the settlement against a later collateral attack."[109] Although *Willingboro* does not deal with international commercial mediation, it does speak on the New Jersey Courts' preference towards settlement of disputes. The opinion reiterated the fact that public policy in New Jersey favors the settlement of disputes, both to spare parties of the time and costs of litigation and to preserve overstretched judicial resources.[110]

Furthermore, New Jersey has a separate statute that deals with arbitration proceedings that do not fall under the Act, called the New Jersey Uniform Arbitration Act (NJUAA).[111] The NJUAA is based on the Revised Uniform Arbitration Act, which sought to address the problems with modern-day arbitration.[112] These problems include the added costs and time to arbitration proceedings that transform them to look more like litigation.[113]

While the NJUAA is a standard arbitration statute,[114] one critical difference between New Jersey law and other jurisdictions is the grounds on which a party can petition the court to vacate an arbitral award.[115] In *Tretina*, the New Jersey Supreme Court abolished the mistake-of-law doctrine, which allowed parties to argue for vacation of an arbitral award based on the arbitrator's egregious mistake-of-law.[116] The Court reasoned that "asking an arbitrator to explain his or her reasoning works against the very goals of arbitration: finality and expedition."[117]

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[109] *Id.* at 263.
[110] *Id.* at 253-54.
[111] N.J.S.A. 2A:23B.
[112] Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law* 2001 J. Disp. Resol. 1, 2 (2001).
[113] *Id.*
[114] The NJUAA follows the RUAA, which has been adopted by many other jurisdictions. *See* 26 West's Legal Forms, Alt. Disp. Res. Appendix 1B (4th ed.)
[115] *See* Ilan E. Simon, Comment, *New Jersey Development: Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc.: The Eradication of the Mistake of Law Doctrine in Private Sector Arbitration*, 48 Rutgers L. Rev. 533, 579 (2014).
[116] *See* Tretina v. Fitzpatrick & Assocs., 135 N.J. 349, 364 (1994).
[117] *Id.*

This degree of discretion differs from other large arbitration jurisdictions, such as California, where their international arbitration laws allow for more expansive judicial intervention.[118] The Supreme Court of the United States views expansive judicial review as inconsistent with the fundamental principles of arbitration.[119] And while some larger businesses that have large amounts of money at stake may appreciate greater judicial review,[120] smaller businesses that are conscious of the costs associated with arbitration may want limited judicial intervention.[121]

The significance of limited judicial intervention in international commercial arbitration can also be seen when looking at jurisdictions where international arbitration has been growing. Singapore is just one example of an area where international arbitration has seen a recent jump. In fact, in 2016, the Singapore International Arbitration Center's cases valued at a total of $11.85 billion.[122] This was a sharp increase compared to the $4.41 billion the SIAC generated only the year prior.[123]

There are a number of reasons why Singapore has been so successful in making itself a hub for international arbitration. The SIAC's rules are updated frequently, which means that they are constantly evolving and adapting to the needs of parties engaging in international arbitration.[124] The SIAC also has no restrictions on foreign counsel that want to participate in SIAC arbitration proceedings.[125]

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[118] Victoria Vlahoyiannis, Note, *The Reality of International Commercial Arbitration in California*, 68 HASTINGS L.J. 909, 919 (May, 2017).
[119] *Id.* at 920.
[120] *Id.*
[121] Cite to arbitration panel at New Jersey City University
[122] Larry Smith, "Singapore is one of the Hottest Spots on the Globe" 36 No. 7 Of Counsel 13 (Jul. 2017).
[123] *Id.*
[124] *Id.*
[125] *Id.*

In *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*, Singapore's Court of Appeal held that one cannot appeal for an error of law or fact that was made in an arbitral decision in Singapore, thus affirming the finality of arbitral awards.[126] The Court stated that the public policy is only a factor in cases where upholding the award would "'shock the conscience' or is 'clearly injurious to the public good….'"[127] This is similar to the decision made in *Tretina*.[128]

Singapore has become one of the most popular arbitral seats in the world because of its laws regarding arbitration and mediation.[129] The SIAC is regularly updated, and there is no "bureaucratic red tape" that prevent foreign counsel from participating in arbitration proceedings.[130] Furthermore, parties of diverse backgrounds trust the SIAC's fairness.[131] These factors have lead to the sharp increase in arbitrations conducted in Singapore.[132] If the Act allows for parties to use foreign counsel with ease, then it has the potential to increase the number of international commercial arbitrations conducted in the state.

While the NJUAA continues to have enumerated situations where an arbitral award can be vacated, such as an award procured through corruption or fraud,[133] the decision in *Tretina* shows that those situations are limited to those enumerated cases.[134] This is another example of New Jersey court's preference towards alternative dispute resolution. Businesses seeking an arbitral seat may find this to be another attractive characteristic, because it ensures that their award will be final and that they will not have to spend more time and money trying to defend

[126] Chan, *supra*, at 13.
[127] *Id.*
[128] *See* Tretina, *supra*, note 90.
[129] *See* Larry Smith, "Singapore is One of the Hottest Spots on the Globe" 36 No. 7 Of Counsel 13 (July, 2017).
[130] *Id.*
[131] *Id.*
[132] *Id,*
[133] N.J.S.A. 2A:23B-23.
[134] *See* Tretina, 135 N.J. at 364.

the award. Therefore, New Jersey's support of alternative dispute resolution puts the state in a better position compared to other states.

IV. The Significance of the Act

The most significant aspect of the Act, as stated previously, is that it allows for parties to convert a mediation settlement into an arbitral award, thus making the settlement enforceable in foreign jurisdictions.[135] Because mediation is an increasingly popular means of international dispute resolution, New Jersey can attract big businesses to arbitrate in the state, especially considering that New York (among the most popular arbitral seats in the world) lacks a similar statute.[136] This has the potential to be especially beneficial to small businesses, because it allows them to engage in less expensive dispute resolution when needed.[137]

Although an overwhelming amount of international commercial disputes are resolved through arbitration, international businesses have been increasingly interested in pursuing mediation settlements.[138] Mediation settlements typically take less time and involve less costs than arbitration, which is why many public entities and private entities alike have begun to apply initiatives that would facilitate mediation in the commercial context.[139]

Another important aspect of the Act is that it increases awareness about the availability of mediation as a means for international commercial dispute resolution. Perhaps one of the reasons why mediation is so seldom used for international commercial disputes is because some smaller

[135] Act
[136] Simpson, *supra*, n. 25.
[137] *Id.*
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[139] S. I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, W. Lee L.R. at 1983.

businesses are unaware that such a mechanism exists.[140] As the Act becomes more popular, it can save smaller businesses time and money, thus promoting New Jersey's economy.

a. The Benefits of Mediation Settlement Agreements

There are many benefits to using mediation as opposed to arbitration; for example, mediation exemplifies self-determination and party participation.[141] The self-determination aspect of mediation is extremely valuable for parties that have an interest in utilizing their own problem-solving strategies, and in pursuing individualized justice based on their personal interests.[142]

Another important component of mediation is the degree of voluntariness that is afforded to the parties.[143] Parties choose to mediate, they choose the third-party neutral involved, they choose the rules, and they ultimately choose the terms of the settlement; from the beginning until the end, parties make their own voluntary decisions.[144]

b. The Potential Issues with the Growth of International Mediation Enforcement Mechanisms

Although mediation presents an excellent alternative to arbitration in many respects, there are some flaws inherent in the practice of international mediation that warrant some concern. While mediation has traditionally been described as a "consensual, confidential, and problem-solving process," the process has recently been conducted as a "less-than-voluntary, not-so-confidential, and adversarial process."[145] This indicates that modern-day mediation proceedings

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[140] Cite to panel, where small business owners lamented over the fact that they did not know that mediation was an option.
[141] Jacqueline Nolan-Haley, Article, *Mediation: The "New Arbitration."* 17 Harv. Negot. L. Rev. 61, 68 (Spring 2012).
[142] *Id.* at 69.
[143] *Id.*
[144] *Id.*
[145] Nolan-Haley "Mediation: the 'New Arbitration'" at 73.

tend to look more like arbitration proceedings, which defeats the purpose of choosing mediation in the first place.[146]

There are also a number of diversity issues related to mediation.[147] Critics have recognized that prejudice can negatively affect disadvantaged parties.[148] Because mediation has the unique quality of allowing parties to tell their own stories, those stories must "compete for legitimacy or primacy in a mediation."[149] Underrepresented parties, then, will have "negative cultural myths…i.e. stereotypes" associated with their stories, which could disadvantage them in the mediation proceeding.[150]

c. The Necessity of Adequate International Mediation Mechanisms

Due to the increasing disfavor of arbitration in international commercial disputes, international businesses are looking to mediation as a potential solution to the issue of cost and time.[151] And while mediation provides a promising alternative, as demonstrated in prior sections, there is currently no federal international enforcement mechanism for international commercial mediation.[152]

The United Nations Commission on International Trade Law (UNCITRAL) Working Group II is currently considering possible ways to advance current mediation law to include enforcement mechanisms for international disputes.[153] Working Group II proposed that

[146] Insert string cite with parentheticals here
[147] *See generally*, Isabelle R. Gunning, Article, "Diversity Issues in Mediation: Controlling Negative Cultural Myths, 1995 J. Disp. Resol. 55 (1995).
[148] *See id.* at 58.
[149] *Id.* at 68.
[150] *Id.*
[151] Nolan-Haley "Mediation: the 'New Arbitration'" at 73.
[152] Ellen E. Deason, "Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?" 22 No. 1 Disp. Resol. Mag. 32 (Fall, 2015).
[153] *Id.*

UNCITRAL establish a convention that is modeled after the New York Convention to allow enforcement on international mediation settlement agreements.[154]

Commentators state that a convention that allows for this type of enforcement would be beneficial because it would create a uniform framework while highlighting the significance of international mediation.[155] Furthermore, this type of convention would also create more certainty that mediation settlement agreements would be enforced.[156]

d. The Utility of State International Mediation Mechanisms

Those who argue that there should be convention to enforce mediation settlements are perhaps overlooking the utility of state international mediation statutes similar to the Act. Not only do these statutes allow mediation settlement agreements to be enforced under the New York Convention, but they also allow states to fill in the gaps that are present in the FAA and the New York Convention.[157]

It is useful for states to have their own international alternative dispute resolution statutes that would address modern-day concerns and issues. Indeed, legislation is often a response to the political and social climate of the time. However, federal legislation tends to be much slower than state legislation. This is evident by the fact that the FAA has yet to be updated and has not addressed any of the issues that are present today.[158]

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[154] *Id.*
[155] *Id.* at 33.
[156] *Id.*
[157] Heather A. Purcell, *State International Arbitration Statutes: Why They Matter*, at 542.
[158] Such as agreement to arbitrate, court intervention, etc. String cite.

Furthermore, states are often known as the laboratories of the nation.[159] Thus, if state legislation does not accomplish what it seeks to accomplish, perhaps it would at the very least give some useful insight as to how to create a statute that would work to achieve certain goals.

V. Conclusion

While many proponents of the Act believe that it can create a surge in international mediation conducted in New Jersey that will benefit New Jersey citizens, others are not so confident in the bill.[160] One critic stated that the Act, on its own, will not have the impact that proponents hope for.[161] Instead, New Jersey needs to implement additional legislation that would promote foreign investment in conjunction with the Act for the state to become the international dispute resolution hub that it hopes to be.[162] It would be interesting to see this argument backed up by sufficient research, but that is beyond the scope of this note.

What we do know about the Act is that it allows for the use of alternative dispute resolution methods in the state of New Jersey to be less bogged down with unnecessary red tape. Parties that wish to engage in international alternative dispute resolution may go to one of the designated centers and have all of their mediation and arbitration needs taken care of.[163] The Act's enforcement mechanism for mediation settlement agreements put New Jersey ahead of the game, especially in the absence of a similar mechanism in New York or through an international convention. Although international commercial mediation is still rarely used, it has the potential to grow in the future.

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[159] Cite to O'Connor
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] Act

Another benefit of the Act is that it provides increased awareness of the availability of mediation as a means to resolve disputes in the international commercial sphere. Mediation provides a useful tool for parties who are seeking an avenue to resolve their disputes without spending a lot of time and money. This is especially true for owners of small businesses. While big businesses are not as conscious about the costs associated with arbitration and litigation, small businesses are well aware of the costs of conflict resolution. Unfortunately, however, many owners of small businesses are not even aware that mediation is an option. If mediations were more widely used, perhaps closely held corporations would be able to utilize mediation from the outset, and save all the extra costs that they would incur if they did not start with mediation. Whether or not the Act proves to have a positive impact in New Jersey, perhaps it would at least raise awareness about the availability of mediation as a form of conflict resolution.