Lawyers' Perspective: What do businesses expect commercial mediation to deliver

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In the present world it has become difficult to tackle any issue dealing with business – even one which, at first glance, only concerns activities purely local in nature–without having to address it in the context of globalization and the removal of economic barriers.[1]

In our days, the most ordinary and apparently most local transaction involves a large number of international transactions. To illustrate this fact, a Canadian professor constructed his whole international commercial law curriculum around the web of contracts required for the manufacture of 'his' shirt. It was ordered in Paris from an Indian representative who goes round Europe several times a year to take orders from an international client base. It is made of English cloth, woven from Egyptian cotton and sewn in Hong Kong, under an Italian license in workshops equipped with German machines. It was delivered in Canada by the local partner of a courier network with United States-based company headquarters. By means of this exercise, one realizes the extent to which this shirt is an international product, involving fields as varied as agricultural product import-export regulation, financing, insurance, international transportation, international commercial contracts, intellectual property, sales representation, sale of goods, international consumer contracts and many others. Each of these stages could give rise to disputes. Yet, even if these disputes are standard ones, their scale and frequency are greater when the parties do not speak the same language,[2] do not have the same perception of things or do not believe in the same values – in short, if they belong to different cultures.

The choice of the dispute resolution mechanism depends on the parties' culture and also on the time and place of the dispute. The differences between the French, Japanese, American or African judicial cultures have, indeed, been stressed for a long time. The existence of a young but clearly defined culture of international commercial arbitration is also now accepted. Amicable means,[3] such as mediation and conciliation,[4]have not yet reached this stage of development. They still depend very much on cultural differences. Mediation is the reference model of ADR.[5] It is, upon consideration, an attempt at negotiation between parties who, assisted by a third party (the 'neutral'), communicate, interact, explain themselves, control their emotions, put forward solutions and agree to concessions with the aim of reaching a settlement. The act of negotiation requires very specific skills that fall essentially within the field of communication rather than law, because what is needed is an ability to seize and interpret perceptions and to read between the lines. In order to fulfill their obligations under the process of mediation in an international context, the parties and the neutral must be in a state favorable to constructive exchanges, i.e. capable of interacting culturally.

Due to cultural diversity the practices of ADR in the different countries are different. I do not intend to list all types of ADR and the many ways in which they are carried out, but simply to draw attention to the importance of the issues at stake and the practical consequences of diversity. Accordingly, the'

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[2] Language is the vehicle of interpersonal communication *par excellence*. Yet, it can convey misunderstandings. It has been argued, for example, that, in the Israeli-Palestinian conflict, the negotiators' lack of equal knowledge of Arabic, English and Hebrew was a stumbling block because they took the words *peace* in English, *salam* in Arabic and *shalom* in Hebrewas interchangeable, whereas they are not so in reality. The words *peace, shalom* and *salam* all include the concept of the absence of war, but the Hebrew word also includes the concept of reconciliation and friendship. In Arabic, *salam* and *solh* must be taken together to cover the scope of the meaning of *shalom*. See Raymond Cohen, 'Resolving Conflict Across Languages', (2001) 17 *Negotiation Journal* 20–21.

[3] The English acronym 'ADR', which stands for 'Alternative Dispute Resolution', is used to designate these means. Some people include arbitration in this category, whereas others only include amicable or non-contentious means of settlement. ADR is translated into French as MARL or MARC (*modes alternatifs ou amiables de règlement des litiges ou conflits* ['alternative or amicable means of resolving disputes or conflicts']). See Nabil N. Antaki, *Le règlement amiable des différends* (Cowansville, QC: Yvon Blais Éditions, 1998) at paras23 *et seq*.

[4] Authors do not agree about the definition and the content of these two means. Some consider that they are synonyms, while others think that they are two means of a similar nature, distinguished by the intensity of the power of intervention vested in the third party. Some think that a mediator has greater power than a conciliator; while others believe the reverse. In this text the two concepts are not distinguished.

[5] Article 5(2) of the International Chamber of Commerce ('ICC') ADR Rules provide that,in the absence of an agreement between the parties on the application of a particular settlement technique, the third party, or neutral, is to act as a mediator. *ICC ADR Rules*, 1July 2001, online: www.iccwbo.org/index_adr.asp#rules.

practices' considered are only those that consist of applying and implementing the rules and principles of the science, the technique or the art of mediation.

Business people called on to decide on strategy should have at their disposal a limited range of available models of mediation. In Pakistan we should give them such a tool by developing of indigenized model mediation. Even if the geographical scope of the concept of mediation is undisputed, the perception of the conflict and the way in which it is handled are very different in U.S.A., in Europe, in Singapore, in Malaysia, in China, in Japan or in Pakistan.

Mediation in the international context is a relatively recent phenomenon. As an Alternative Dispute Resolution (ADR) mechanism, third-party neutral mediation is firmly entrenched in the legal ethos and procedural rules of most common law jurisdictions; such as the United Kingdom, the United States and Canada. However, in the rest of the world, including many European, Latin American and Asian nations with civil law traditions, mediation remains an elusive concept. Some commentators suggest this may be due in part to differences in systemic (i.e. adversarial vs. inquisitorial)[6] and cultural (i.e. mediation vs. conciliation) orientations. [7]

Nevertheless, the last half of the 20th century has laid witness to increasing regional economic integration and globalization trends. Domestic and international efforts at harmonization and unification,[8] particularly under the auspices of the United Nations Commission on International Trade (UNCITRAL)[9] and the Hague Conference on Private International Law [10] have resulted in bilateral and multilateral treaties and conventions in the areas of private international law (PRIV-IL) and public international law (PUB-IL), giving rise to a modern *lex mercatoria*.[11] Parallel developments in international arbitration (the New York Convention[12] and the UNCITRAL Model Law on International Arbitration[13]) and international trade law (The United Nations Convention on Contracts for the International Sale of Goods (CISG)[14], reflect this trend towards harmonization, if not, unification, of international trade law. [15] While many international arbitral organizations have a distinguished and lengthy pedigree, [16] others, like the International Centre for Settlement of

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[6] See, Michael McIlwrath, Elpidio Villarreal and Amy Crafts "Finishing Before You Start: International Mediation" in International Litigation Strategies and Practice, Barton Legum (Ed.) (Chicago, IL: ABA International Practitioner's Deskbook Series, 2005) Chap. 6, pp. 41-47 at 42. [hereinafter "Finishing Before Your Start"].

[7] For a concise discussion outlining the differences among arbitration, conciliation and mediation, see,Alessandra Sgubini, Mara Prieditis & Andrea Marighetto, "Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective" (August 2004) available online at:<http://www.mediate.com/articles/sgubiniA2.cfm>. See also, Rona R. Mears, Cross-Cultural Mediation: Issues and Opportunities. Address before the 5th Annual Texas Minority counsel Program (Oct. 24, 1997); and Steven K. Anderson, "NAFTA Mediation and the North American Free Trade Agreement", American Arbitration Association Dispute Resolution Journal, Volume 55, Number 2, 58 (May 2000).

[8] For an excellent analysis of the conceptual distinction between harmonization and unification, see Bruno Zeller, CISG AND The Unification of International Trade Law (Abingdon, Oxon [England] ; New York, NY : Routledge-Cavendish, 2007).

[9] See the UNCITRAL website: <http://www.uncitral.org/uncitral/en/index.html>.

[10] See the Hague Conference on Private International Law website:<http://www.hcch.net/index_en.php>.

[11] See Bernard Audit, "The Vienna Sales Convention and the Lex Mercatoria" in LEX MERCATORIA AND ARBITRATION, Thomas E. Carbonneau ed., rev. ed. [reprint of a chapter of the 1990 edition of this text], (Juris Publishing 1998) Chap. 11, <http://www.cisg.law.pace.edu/cisg/biblio/audit.html>.

[12] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded at New York,June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 available at:
<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html>.

[13] For the text and explanatory materials on the UNCITRAL Model on International Commercial Arbitration, United Nations Document A/40/17, annex I (as adopted by the United Nations Commission on International Trade Law on 21 June 1985http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf and as incorporated in Ontario by the <International Commercial Arbitration Act, R.S.O. 1990, c. I.9> (as am.).[hereinafter the "ICCA"]

[14] United Nations Convention on Contracts for the International Sale of Goods (CISG), April 11, 1980, S. Treaty Doc. No. 98-9 (1984), U.N. Doc. No. A/CONF.97/19, 1489 U.N.T.S. 3, incorporated by, International Sale of Goods Act, R.S.O., ch. I-10 (1990) (Can.), available at: <www.e-laws.gov.on.ca/DBlaws/statutes/English/90i10_e.htm>. For links to other Canadian provincial CISG legislation, as well as related Canadian case law and academic commentary, see the CISG Canada website, (hosted by Osgoode Hall Law School, York University – member of the autonomous network of Convention websites), available at: <http://www.cisg.ca>; or<http://www.yorku.ca/osgoode/cisg>. The CISG is sometimes also referred to as the "Vienna
Convention".

[15] Currently, seventy countries representing three-quarters of the world's trade are CISG signatories. See <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>; and see also, <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>. See also, the UNCITRAL Model Law Guide, infra, note 20, at pp. 13-14 which refers to the UNCITRAL Model Law as a tool for harmonizing legislation.

[16] The Permanent Court of Arbitration (PCA), has over one hundred member states and was established in 1899 to facilitate arbitration and other forms of dispute resolution between states, see the PCA website:
<http://www.pca-cpa.org/showpage.asp?pag_id=363>; see also, Arbitration Institute of the Stockholm

Investment Disputes (ICSID)[17] or the World Intellectual Property Organization (WIPO), [18]albeit more recently created, also enjoy strong reputations. [19] In most cases, these national and international dispute resolution institutions offer mediation procedures and pools of qualified mediators.[20]
As Susan D. Franck notes:

> *The rule of law is essential to those participating in the global economy. Without the clarity and consistency of both the rules of law and their application, there is a detrimental impact upon those governed by the rules and their willingness and ability to adhere to such rules, which can lead to a crisis of legitimacy. Legitimacy depends in large part upon factors such as determinacy and coherence, which can in turn beget predictability and reliability. Related concepts such as justice, fairness, accountability, representation, correct use of procedure, and opportunities for review also impact conceptions of legitimacy. When these factors are absent individuals, companies and governments cannot anticipate how to comply with the law and plan their conduct accordingly, thereby undermining legitimacy.[21] Duncan Kennedy further observes, "when we use law strategically, we change it."[22]*

Historical ADR has been used in Indian Sub-continent[23]. It not a new concept & historically recognized. In ancient India there were three types of popular courts, *Puga* (local courts), *Sreni* (local business guilds) and *Kula* (social matters of community). In Medieval India there were *Panchayats* [24]: Territorial or Sectarian, and were held in great veneration (*Panch Parameshwar*). In India under the British rule, Lord William Bentick (Act VIII of 1859) had Sections 312 – 327 dealing with arbitration). The above provisions were formally and separately enacted under Arbitration Act 1940.In Pakistan the litigation in courts became the usual mode of resolution of disputes. ADR did not catch on and took a Back Seat to Litigation. The commercial conflicts are traditionally managed by litigation in Pakistan. The reasons for the same are that quick availability of interim relief (preliminary injunction, seizure of goods) especially relevant in IP rights because in case of grant of interim relief the half the battle is won. There were flaws in Arbitration Act 1940, namely: No interim power in the arbitrator, too many grounds for judicial intervention at all stages (pre-arbitral, during arbitration & post award), as a result it defeated the whole object of speedy and cost effective dispute resolution.
The four major reasons for the resurgence of ADR are the drawbacks of litigation, changing business scenario, legislative responses including in Pakistan to promote ADR and judicial sponsorship. The

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Chamber of Commerce web website at: < http://www.sccinstitute.com/uk/Home/ >; The London Court of International Arbitration (LCIA) website: <http://www.lcia-arbitration.com/>. The International Court of Arbitration for the International Chamber of Commerce (ICA-ICC), <http://www.iccarbitration.org/>; and ICC, International Chamber of Commerce Rules of Optional Conciliation. 1995. reprinted in 1995 ICSID Review. 10, pp. 158-161; and the American Arbitration Association (AAA)-International Centre for Dispute Resolution®, the international division of the AAA, which was established in 1996 to provide the same high quality alternative dispute resolution (ADR) services available in the U.S. to individuals and organizations
around the globe.

[17] ICSID was established under the <Convention on the Settlement of Investment Disputes between States and Nationals of Other States> (the Convention) which came into force on October 14, 1966. See the World Bank -ICSID website: <http://www.worldbank.org/icsid/index.html>.

[18] Based in Geneva, Switzerland, the WIPO Arbitration and Mediation Center was established in 1994 to offer Alternative Dispute Resolution (ADR) options, specifically arbitration and mediation, for the resolution of international commercial disputes between private parties. See the WIPO website: <http://www.wipo.int/amc/en/center/index.html>.

[19] For a list of arbitral organizations for the North American Free Trade Agreement among the U.S., Canada and Mexico, see the NAFTA Secretariat website: <http://www.nafta-secalena.org/DefaultSite/index_e.aspx?DetailID=867>.

[20] Finishing Before You Start, supra note 1, at 46.

[21] See Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" . (2005) 73 Fordham L. Rev, 1521 at 1584-5, available at SSRN: <http://ssrn.com/abstract=812964> citing Thomas M. Franck, fairness in international Law and institutions 30 (1995); and Thomas M. Franck, the Power of Legitimacy among Nations 49 (1990).

[22] David Kennedy, "Modern War and Modern Law" In 12 International Legal Theory: A Just World Under Law 55-98 AT 75 (Baltimore, MD: Asil -Interest Group on the Theory of International Law, Fall 2006).

[23] "Indian subcontinent". New Oxford Dictionary of English (ISBN 0-19-860441-6) New York: Oxford University Press, 2001; p. 929: "the part of Asia south of the Himalayas which forms a peninsula extending into the Indian Ocean, between the Arabian Sea and the Bay of Bengal. Historically forming the whole territory of greater India, the region is now divided between India, Pakistan, and Bangladesh after partition in 1947."

[24] The panchayat raj is a South Asian political system mainly in India, Pakistan, and Nepal. "Panchayat" literally means assembly (*yat*) of five (*panch*) wise and respected elders chosen and accepted by the village community. Traditionally, these assemblies settled disputes between individuals and villages.

system of dispensing justice in Pakistan has come under great stress for several reasons mainly because of the huge pendency of cases in courts. In Pakistan, the number of cases filed in the courts has shown a tremendous increase in recent years resulting in pendency and delays underlining the need for alternative dispute resolution methods. It has been realized by the Judges, lawyers, litigants and other stakeholders that the Courts were not in a position to bear the entire burden of justice system and that a number of disputes lent themselves to resolution by alternative modes such as arbitration, mediation and negotiation. They have emphasized the desirability of disputants taking advantage of alternative dispute resolution which provided procedural flexibility, saved valuable time and money and avoided the stress of a conventional trial. The existing regime of civil suits in Pakistan is governed by the Code of Civil Procedure enacted in 1908. Since then little change has taken place. The British adversarial system introduced in our country may be distinguished by its laissez fare emphasis on party controlled litigation process, emphasis on procedural justice and limitations on available legal remedies, confined to win or lose legal outcomes. Litigation being the primary means of resolving disputes our civil justice process has failed to administer justice in a timely manner to a larger, more diverse, faster paced, technologically and economically changing society. Outside the sub-continent legal cultures in U.S.A., Singapore, Hong Kong, Australia, England and many other countries have already introduced different Alternative Dispute Resolutions methods to settle disputes outside the court. By updating their systems they have made their judicial systems more efficient, more service oriented, to provide speedy relief to the parties. ADR has emerged as a significant movement in these countries and has not only helped reduce cost and time taken for resolution of disputes, but also in providing a congenial atmosphere and a less formal and less complicated forum for various types of disputes. Like in our country there was a time when the civil justice system in those countries confronted serious crisis for lack of discipline. The examples of these countries make us aware that Pakistan is not alone in addressing the problem. Other countries including, some in the sub-continent, like Pakistan, with comparable problems have been successful in implementing reforms in similar manner.

In a developing country like Pakistan with major economic reforms under way within the framework of the rule of law, strategies for swifter resolution of disputes for lessening the burden on the courts and to provide means for expeditious resolution of disputes, there is no better option but to strive to develop alternative modes of dispute resolution (ADR) by establishing facilities for providing settlement of disputes through arbitration, conciliation, mediation and negotiation. Trade and industry also demanded drastic changes in the Arbitration Act, 1940 and thought it necessary to provide a new forum and procedure for resolving international and domestic disputes quickly. Since the inception of the economic liberalization policies in Pakistan and acceptance of law reforms world over, the legal opinion leaders have concluded that the application of rigorous mediation mechanisms to commercial and civil litigation is a critical solution to the profound problem of arrears of cases in Civil Courts in Pakistan. The Pakistan Parliament considered a bill for amendments in the Code of Civil Procedure which included a mandatory provision for alternate dispute resolution as a step to improve the civil and commercial justice system in Pakistan. This legislation has developed confidence among foreign parties interested to invest in Pakistan or to go for joint ventures, foreign investment, transfer of technology and foreign collaborations.

The proposed reforms to Civil Justice have been under discussion for some years and usage of ADR have had a significant influence on the way in which litigation is conducted in Pakistan, in the sense that courts have tended to anticipate the changes to some extent, or to interpret existing rules in a way which is compatible with ADR philosophy. Nevertheless since the new legislation has come into force, radical changes have to be made in the way in which the courts and lawyers operate.

As a result of Legislative initiatives, amendments in Civil Justice System have taken place and relevant laws (or particular provisions) dealing with the ADR are summarized as under:

1. S.89-A of the Civil Procedure Code, 1908 (as amended in 2002) read with Order X Rule 1-A (deals with alternative dispute resolution methods).
2. The Small Claims and Minor Offences Courts Ordinance, 2002.
3. Sections 102–106 of the Local Government Ordinance, 2001.
4. Sections 10 and 12 of the Family Courts Act, 1964.
5. Chapter XXII of the Code of Criminal Procedure, 1898 (Summary Trial Provisions).
6. The Arbitration Act, 1940.
7. Articles 153–154 of the Constitution of Pakistan, 1973 (Council of Common Interest).
8. Article 156 of the Constitution of Pakistan, 1973 (National Economic Council).
9. Article 160 of the Constitution of Pakistan, 1973 (National Finance Commission)
10. Article 184 of the Constitution of Pakistan, 1973 (Original Jurisdiction when Federal or Provincial governments are at dispute with one another).
11. Finance Bill introduced following ADR Tax Laws:

    Sec. 134-A of I. T Ordinance. 2001 R/w Rule 231-C of the I. T Rules-02.

    Sec. 47 of the Sales Tax Act 1990 and Ch. X of the S.T Rules-04.

    Sec. 195-C of the Customs Act 1969, Ch. XVII of Customs. Rules 2001.

    Sec. 38 of the Federal Excise Act 2005 R/w Rule 53 of FE Rules 2005.

    Section 23 of Industrial Relation Ordinance.

Several reasons exist for choosing mediation over other channels of dispute resolution (such as those involving attorneys and courts).Parties to a dispute may choose mediation as (often) a less expensive route to follow for dispute resolution. While a mediator may charge a fee comparable to that of an attorney, the mediation process generally takes much less time than moving a case through standard legal channels. While a case in the hands of a lawyer or filed in court may take months or even years to resolve, a case in mediation usually achieves a resolution in a matter of hours. Taking less time means expending less money on hourly fees and costs. Mediation offers a confidential process. While court hearings of cases happen in public, whatever happens in mediation remains strictly confidential. No one but the parties to the dispute and the mediator(s) know what has gone on in the mediation forum. In fact, confidentiality in mediation has such importance that in most cases the legal system cannot force a mediator to testify in court as to the content or progress of mediation. Many mediators actually destroy their notes taken during mediation once that mediation has finished. The only exceptions to such strict confidentiality usually involve child abuse or actual or threatened criminal acts. Mediation offers multiple and flexible possibilities for resolving a dispute and for the control the parties have over the resolution. In a case filed in court, the parties will obtain a resolution, but a resolution thrust upon the parties by the judge or jury. The result probably will leave neither party to the dispute totally happy. In mediation, on the other hand, the parties have control over the resolution, and the resolution can be unique to the dispute. Often, solutions developed by the parties are ones that a judge or jury could not provide. Thus, mediation is more likely to produce a result that is mutually agreeable, or win/win, for the parties. And because the result is attained by the parties working together and is mutually agreeable, the compliance with the mediated agreement is usually high. This also results in less costs, because the parties do not have to seek out the aid of an attorney to force compliance with the agreement. The mediated agreement is, however, fully enforceable in a court of law. The mediation process consists of a mutual endeavor. Unlike in negotiations (where parties are often entrenched in their positions), parties to a mediation usually seek out mediation because they are ready to work toward a resolution to their dispute. The mere fact that parties are willing to mediate in most circumstances means that they are ready to "move" their position. Since both parties are willing to work toward resolving the case, they are more likely to work with one another than against one another. The parties thus are amenable to understanding the other party's side and work on underlying issues to the dispute. This has the added benefit of often preserving the relationship the parties had before the dispute. Finally, but certainly not least, and as mentioned earlier in this article, the mediation takes place with the aid of a mediator who is a neutral third party. A good mediator is

trained in conflict resolution and in working with difficult situations. The good mediator is likely to work as much with the emotional aspects and relationship aspects of a case as he or she is to work on the "topical" issues of the matter. The mediator, as a neutral, gives no legal advice, but guides the parties through the problem solving process. The mediator may or may not suggest alternative solutions to the dispute. Whether he or she offers advice or not, the trained mediator helps the parties think "outside of the box" for possible solutions to the dispute, thus enabling the parties to find the avenue to dispute resolution that suits them best.[25]

The eldest branch of mediation applies to business and commerce, and still this one is the widest field of application, with reference to the number of mediators in these activities and to the economical range of total exchanged values. The mediator in business or in commerce helps the parties to achieve the final goal of respectively buying/selling (a generic contraposition that includes all the possible varieties of the exchange of goods or rights) something at satisfactory conditions (typically in the aim of producing a bilateral contract), harmonically bringing the separate elements of the treaty to a respectively balanced equilibrium. The mediator, in ordinary practice, usually cares of finding a positive agreement between (or among) the parties looking at the main pact as well as at the accessory pacts too, thus finding a composition of all the related aspects that might combine. in the best possible way, all the *desiderata* of his clients.[26]Academics sometimes include this activity among the auxiliary activities of commerce and business, but it has to be recalled that it differs from the generality of the others, because of its character of independence from the parties: in an ordinary activity of agency, or in the unilateral mandate this character is obviously missing, this kind of agent merely resulting as a *longa manus* of the party that gave him his (wider or narrower) power of representation. The mediator does not obey to any of the parties, and is a third party, looking at the contraposition from an external point of view. Subfields of commercial mediation include work in well-known specialized branches: in finance, in insurance, in ship-brokering, in real estate and in some other individual markets, mediators have specialized designations and usually obey special laws. Generally, mediators cannot practice commerce in the genre of goods in which they work as specialized mediators.

Pakistan is a region with a strong tradition of consensus based dispute resolution at village level. In a very different context, I have experienced the genuine and rapidly growing interest in and enthusiasm for private commercial mediation, particularly in the business sector. The litigation process is an extremely expensive and time consuming process which offers no guarantee of success. Mediation on the other hand is a quick, solution focused service which allows input from the conflicting parties to help ensure a mutually beneficial solution is reached. This fact is acknowledged by the Business-sector which is recommending that mediation is attempted as a mutually agreed solution is far better than a court determination enforced on both parties.

The commercial process habitually includes legal representation and once agreement is reached a legally enforceable document is executed. In successful cases the dispute is resolved within a matter of days, the relationship between the parties is maintained and time, stress and cost are minimized. The solution is explicitly determined and agreed by both parties and the solution is endorsed by all concerned. When agreement cannot be reached, costs are small and all matters discussed are confidential and do not compromise any court proceedings. Most mediation advocates in commercial disputes understand that the process offers an opportunity for clients to save time and money, preserve relationships, and achieve creative or business-driven solutions not available in either litigation or arbitration. The flexible mediation process permits the parties to go well beyond the litigation positions, and delve into the underlying interests and needs of the participants. Unfortunately, some mediation advocates, who would spend many hours preparing for a single deposition, spend insufficient time preparing for mediation. Perhaps it is a lack of familiarity with the process or the feeling that there is little likelihood of success. For some, there is a sense that because mediation is

[25] See, www.synergymedmw.com, www.mediation.com, www.mediate4you.com and www.mediate4u.info for more information on the mediation process.

[26] From Wikipedia, the free encyclopedia (November, 2008)

not binding, there is no downside. Of course, there is a downside to lax preparation: It is an enormous loss of an opportunity for outcomes that can enhance the client's business objectives. One should always exercise due diligence in selecting the Mediator. Critical to the success of mediation is the employment of a highly skilled and experienced mediator. Especially in a substantial controversy, a mediation advocate should engage in due diligence to assess the skill, experience, and style of a particular mediator candidate. In addition to collecting the kind of data available on the Internet, a mediation advocate should speak with other persons who have employed a potential mediator. It also is entirely appropriate to call a neutral to discuss his or her mediation style and approach. This conversation can include issues such as preparation, written submissions, use of joint versus caucus sessions, use of evaluative techniques and ways in which a mediator would approach an apparent impasse. You should identify and involve client representatives. It is crucial to encourage the participation of a decision maker with full authority to make resolution decisions, even if this person does not have personal knowledge of the underlying facts at issue. Including the decision maker enables the client to monitor and shape the impact that any outcome may have on the client's business goals and objectives. Mediation advocates often assemble a presentation team that includes party representatives, but limits the representatives' participation. If a party representative is articulate and persuasive, his or her statement directly to the other side can be far more powerful than any summation or advocacy statement by counsel. In some instances, the client's interests are best served by having the mediation advocate and client representative divide their presentation. Whatever the arrangement, it is important to decide in advance who will speak in a joint session and what subjects each presenter will address. You should determine whether information exchanges are necessary. Gaps in information present one of the principal reasons that disputes fail to settle in mediation. Especially in disputes' early stages, it is important that parties understand the essential basis of claims and defenses including, in particular, the basis of alleged damages. It is difficult for parties to change their assessments and settlement decisions on a real-time basis when this important information is conveyed for the first time in mediation. Accordingly, a mediation advocate should use the neutral to promote an efficient exchange of such information. Any such request, however, should not be an excuse that substitutes for real discovery. All that is necessary is sufficient information to make an informed settlement decision. You should prepare arguments supporting legal positions and settlement positions. A mediation advocate should develop an overall theme and prepare arguments supporting the merits of claims or defenses with the same dedication as when preparing for trial. In addition, the advocate should also develop reasons why the other side should be willing to move to a "reasonable" settlement proposal. Here, the advocate's goal is to persuade the other side to consider his or her client's proposal. Counsel should recognize and be prepared to advance reasons why the other side's interests are being served by a specific settlement proposal. You should prepare a confidential written statement to the mediator in advance of the mediation session. Regardless of whether the mediator asks for a confidential submission, a mediation advocate can obtain a significant advantage by submitting, in an informal letter, a confidential written statement summarizing the client's various litigation positions, including its rebuttal positions. Pleadings and other litigation documents usually do not provide the summary of the critical arguments and counter-arguments a mediator needs to understand in order to help the parties reach a resolution. More important, a confidential submission also offers an opportunity to address the underlying issues, concerns and questions that often drive settlement decisions as much or even more than the litigation-risk analysis. Counsel should consider addressing issues such as timing; linkage to an unrelated issue or dispute; strategic issues; personal relationship issues; need for privacy; internal company issues and any impact upon the client's future; history of any negotiations that have taken place; suggestions concerning process; suggestions concerning substantive resolution; and any other factors which may favor or present a barrier to resolution. A well-written submission, provided in a timely fashion, will enable the mediator to determine which paths are most likely to result in resolution.

You should prepare a concise "opening statement" for the joint session. Mediation advocates often say that there is no need for a joint session as the parties already understand each other's positions, or that excessive advocacy in a joint session will set the parties even further apart. While there are some instances that call for dispensing with a joint session, joint sessions usually have a number of advantages. For the mediator, a joint session offers an opportunity

to go over the ground rules, and to obtain from each party a commitment to listen respectfully and to engage in good-faith negotiations. For the mediation advocate, a joint session offers an opportunity to have the other side's decision maker hear the client's arguments, often for the first time, in a manner unfiltered by the other side's own counsel. Once in caucus sessions, the mediator can then develop the issues by reacting to what he or she heard in the joint session without risking the loss of trust that might arise if the mediator developed the issues for the first time in caucus sessions. You should make an objective litigation-risk assessment. Mediation advocates usually advance arguments based upon what the client needs or wants, what is fair, what is right and what is true. While all of these issues are appropriate for discussion, a good mediation advocate owes a duty to his or her client to make a realistic assessment and a responsible decision. In advance of the mediation, an advocate will serve the best interests of the client by discussing the only responsible benchmark for settlement decisions—comparing what might be achieved in settlement with the legal and business consequences of the litigation or arbitration alternative. Meeting this counseling responsibility is not always an easy task for a mediation advocate, because most parties view their facts with a degree of selective perception and most advocates cannot avoid a certain amount of advocacy bias. Recent studies at the Harvard University Program on Negotiation and elsewhere establish that it is almost impossible for a party with an interest in the outcome, or its advocate, to make a completely objective assessment of their own case. Mediation advocates, therefore, should make every effort to recognize and discard their advocacy bias when meeting their counseling responsibilities. Moreover, in disputes involving substantial dollars or strategic business interests, mediation advocates should consider retaining an objective third-party to assist in making a litigation-risk assessment well in advance of mediation. You should explore potential for creative solutions. Many mediation advocates bring their litigation perspectives to mediation and focus almost entirely upon issues of fact and law. Many also engage solely in "distributive bargaining" where they exchange offers and demands in an effort to "divide the pie." As a consequence, these mediation advocates and their clients fail to capture an opportunity to create value. In contrast, an advocate should encourage his or her client to engage in "integrative bargaining" and take a more collaborative approach to mediation in an effort to create value in the negotiations. Advocates should encourage their clients to focus upon the client's underlying interests as well as their rights and to look for business-driven solutions, such as agreement restructuring, or the creation of new agreements. Even in pure monetary disputes, mediation advocates should explore the potential for creative means of monetary exchange such as, for example, a deferred payment obligation. The search for creative solutions must begin well in advance of the mediation in order for the client representatives to have the time necessary to explore all of the possible business opportunities that may be available. You should develop a negotiating plan. Whether parties are engaged in a "pure money" dispute or a more layered, complex controversy, counsel and the client should prepare a negotiating plan in advance of the mediation. All too often, parties lose a significant advantage in mediation as the result of having thought about only their end goals.

Many mediations begin with the parties taking extreme positions, and expressing unwillingness to bid against themselves. In these circumstances, counsel should consider the advantages of making the first credible move. Even a small move, if credible, may enable the mediator to meet with the other side and gain significant concessions. Negotiation studies establish that the party making the first credible move can gain an advantage, referred to as "anchoring and adjustment," by setting a recognizable benchmark from which settlement options are developed. In recognition of the fact that counsel and the client will be engaged in a "negotiation" with the mediator as well as adverse parties, counsel should plan the extent of voluntary candor with the mediator. The degree of voluntary candor may depend on a number of factors, including whether the mediator is more facilitative or evaluative; whether the communication involves legal arguments, underlying interests or settlement positions; and whether the mediation is in its early or late stages. In the final analysis, this judgment call is likely to depend on the level of comfort with the mediator and may evolve in the fluid environment of the mediation sessions. While a specific negotiating plan is essential, counsel should recognize the need for flexibility in the mediation sessions and should be prepared to reevaluate in light of new information received and the mediator's suggestions. You should also prepare a draft settlement agreement. Mediators will insist, at the very least, that upon reaching a mutually acceptable resolution, the parties enter into a binding term sheet on all key issues. This document is essential for

avoiding a subsequent disagreement about the settlement terms, and to avoid the possibility of later remorse. Most neutrals ask mediation advocates to bring a settlement agreement draft covering the key economic and non-economic issues that need to be addressed in the event the dispute is settled in mediation. Perhaps motivated by a feeling that the dispute is not likely to settle in a mediation session, many advocates don't follow this instruction. As a consequence, at considerable expense, advocates often spend hours drafting a term sheet after achieving an agreement in principle at the end of the day. At this point, advocates and their clients often find themselves tired and unprepared, find that they are without important information or key documents, and overlook key noneconomic issues. Drafting an agreement at the outset is valuable for preparing the final term sheet. It also is another vehicle through which client and counsel can articulate and review the client's direct and collateral goals and interests before entering the mediation. Preparing for mediation requires an approach vastly different from the path an advocate takes when preparing for a deposition or trial. At the same time, mediation advocates can maximize the potential for successful outcomes by employing the same level of dedication and professionalism as when preparing for trial.[27]

Mediation was the most favorable means of dispute resolution the reasons very accurately outlined the real benefits of mediation over Litigation and other dispute resolution methods. It is **1**. Cost saving: Mediation works out on average approximately 70% cheaper than the other methods of dispute resolution. **2**. Time saving: The informal nature of the process allows matters be resolved much quicker than other process driven alternatives. There is no long wait for court dates and conflicts are usually resolved within 48 hours. In these instances valuable time is saved and business disruption is minimized. **3**. Relationships saved: Mediation actively maintains relationships. While Litigation and Arbitration very often reinforce the division between the parties and increase the levels of tension and hostility, mediation allows the parties achieve a mutually acceptable workable solution. **4**. Control (for the parties): **5**. Confidentiality & Voluntary.

Commercial mediation is a private process of assisted negotiation which can allow that if agreement is reached it becomes fully binding. Businesses are looking for minimum business disruption and a cost effective solution to resolve commercial disputes and in this environment mediation is thriving.

In an environment where commerce has demanded high levels of efficiency and cost effectiveness, business people have been prepared to endure a system of dispute resolution which is far from efficient or cost effective. Dispute resolution takes longer now and costs more than it did ten years ago, notwithstanding that the quality of its delivery has remained high, relative to equivalent systems in other economies. Why then has there not been any real attempt to introduce an alternative, at least for a proportion of our commercial disputes. There are many reasons but the following are suggested as being the more important:

- Lack of awareness of the alternatives. (It seems that most people are not aware that alternative means of commercial dispute resolution do exist outside the Courts system and arbitral process. Mediation is only one of the alternatives.)
- Lack of understanding of the alternatives. (Most people are unaware of the essential characteristics and potential benefits of mediation.)
- The absence of an ADR (Alternative Dispute Resolution) tradition
- A strong tradition of common law and of adversarial litigation.
- The existence of a strong judicial system.
- A strong cultural awareness of legal rights and a desire to have those rights vindicated or defended.
- The existence of a strong legal professional with a primary interest in adversarial litigation and arbitration.
- The natural suspicion of a commercial or trading partner or opponent who is perceived as having committed a wrong.

[27] "Preparation: The Key To Mediation Success" by Bennett G. Picker, published in CPR's "Alternatives to the High Cost of Litigation," Volume 28 Issue 2 (February 2010). .

- The natural human reluctance to take responsibility for finding a solution and a desire to have a solution imposed from outside.
- The natural human tendency to be adversarial rather than co-operative.

There are few commercial disputes that are not amenable to resolution through mediation, from the largest disputes between, for example, a car manufacturer and its national distributor, to the smallest disputes between, for example, a bank and its private customer. Commercial litigants themselves will be the first to admit they would welcome an alternative that allowed them to resolve their disputes more quickly and to spend less money on achieving a resolution. Presently we do not have a specific law for Mediation in Pakistan. Unless there is a special law enacted on or a detailed clause on Mediation is inserted in existing procedural law on Mediation, it is difficult to see positive development of commercial mediation. Although Section 89-A of Civil Procedure Code 1908 contains clause for referral of a dispute pending adjudication for mediation/conciliation but the same is not comprehensive. The Law Reform Act 2007 contained amendment to Section 89-A of CPC 1908 but unfortunately it was not approved by Senate of Pakistan resultantly it lapsed. The Mediation clauses have recently been started to be drafted in commercial contracts. It is suggested that the business-sector should be encouraged to include following model clause in all business agreements:

"Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the [……] Mediation Rules. The place of mediation shall be (…..). The language to be used in the mediation shall be (English)"

In my experience many clients with long-term contracts understand the intrinsic value of creating, at the outset of the relationship, a roadmap to follow when disputes arise. Importantly, the client shares the same roadmap with the other party–rather than creating separate roadmaps when the dispute is upon them. Clients, who have experienced conflicts in long-term contracts, where the preservation of the relationship may have more value than in a short-term contract, often view these clauses as an insurance policy for when a dispute arises.

The Financial Institutions (Recovery of Finances) Ordinance, 2001, The Companies Ordinance, 1984, The Modaraba Companies and Modaraba (Flotation and Control) Ordinance,1980, The HBFC Act, 1952, The Industrial Relations Ordinance, 2002, The Punjab Consumers Protection Act, 2005,The Drugs Act, 1976, The Income Tax Ordinance, 2001, The Sales Tax Act, 1990. The Customs Act, 1969,The Copy Rights Ordinance, 1962, The Registered Designs Ordinance, 2000, The Patents Ordinance 2000,The Registered Layout-Designs of Integrated Circuits Ordinance, 2000, The Pakistan Environmental Protection Act, 1997, The Insurance Ordinance, 2000, The Privatization Commission Ordinance, 2000, The Electronic Transitions Ordinance, 2002, The Imports and Exports (Control) Act, 1950, The Oil and Gas Regulatory Authority Ordinance, Rent Restriction Laws of all the provinces are the areas where ADR should be introduced on a priority basis, amending the special legislations.

We should adopt a **National Action Plan** for promoting and instituting the ADR. A programme of Legal and Judicial Capacity Building should be prepared which should include with other things, Law Reform, Judicial Reform, Judicial Training and Legal Education, Court Automation and Infrastructure, Access to Justice, ADR and Legal Aid, Legal Literacy and Public awareness and Gender Sensitivity.The Pakistan Law Commission should issue a policy statement on court governance for making ADR successful. It should consist of three elements; **The Justice Statement**, which identifies universal justice values common to civilized nations, **The Framework of Core Competencies**, which provides the knowledge capital needed to make the courts response to the challenges of the present century, and **The Strategic Framework**, which provides benchmark through which the court's performance can be assessed. The **Pakistan Law Commission** should prepare & issue a comprehensive instructional code for introducing ADR at the District level.**ADR centre** at the Principal Seat of every High Court should be established and it should be entrusted with the task of promoting, assisting and monitoring the practice of ADR in courts. A **'Pilot Project**

Design/ Convening Committee' should be formed headed by a judge of High court at the High court level. Every High Court should **amend the rules** to give effect to Section 89-A of the Civil Procedure Code. The Pakistan Government will have to make a major investment in training, by utilizing a portion of the ADB loan available for **Access to Justice Program** to create a group of judges well-versed in the intricacies of ADR. The implementation of the Pilot Project should include a comprehensive training program of judges in case management, mediation and conciliation prior to its beginning. Countries like Sri Lanka have established a judicial training institute that trains judges in ADR and Case Management techniques (among other subjects). The **Federal Judicial Academy** in Pakistan should establish a similar program that would concentrate on ADR and Case Management. The initial training should be imparted by **Mediators from abroad**, it should be an intensive five days training course on mediation. The participants in the training program should be judges selected from different districts, legal practitioners including representatives from non-government organizations. After that the training should be given by **trained/accredited Pakistani Mediators**. From time to time a new district should be selected for imparting training to judges and lawyers who have not yet received training in mediation. Such training programs should be organized at respective district head quarters. Mediation or Conciliation does not come easily to anyone, whatever height he/she attains in legal knowledge and experience. Mediation especially involves the use of a facilitator trained in conflict resolution. The mediator must know the techniques of encouraging the parties to discuss their positions with greater candor and he/she must also know how to foster compromise. Mediation involves a thorough training for a few days. We will have to invite trainers from abroad initially but a few trainers in Pakistan are available as well. The first implementation task will be to train up a large number of trainers in mediation and conciliation. These trainers will then spread out throughout the nook and corner of the country to train up judges, lawyers and other interested persons in the art and science of mediation and conciliation. Without such intensive training, it will be a folly to introduce A.D.R. wholesale in our lower courts. India tried to introduce A.D.R. in 1999 by an amendment to the Code of Civil Procedure, known as the Code of Civil Procedure (Amendment) Act, 1999 (Act 46 of 1999). It ended in a fiasco. There was widespread resistance to it by lawyers that forced the Government of India to postpone its implementation. The lesson is that when you introduce any matter of legal reform or innovation, do not try to impose it from above. Do some intensive work at the grassroots level, build up a large following, try the reform on a trial and error basis by setting up pilot courts and then proceed with caution by examining its results. **Learn from the pilot courts** and the lawyers involved in mediation and other methods what practical problems they are encountering with, adjust and re-adjust your program accordingly, so that what finally emerges is not a foreign model but an **indigenous Pakistani mode**l, suited to the legal culture, ethos and traditions of this country. The second implementation task will be to continue the training for all time to come for the new entrants to the Judicial Service through the **Federal Judicial Academy** we will have to develop a **curriculum** especially for A.D.R. and also will have to keep and maintain one or more regular instructor on its pay roll to teach the mechanisms of A.D.R. to the trainee-judges. Outsiders interested to pursue a career of mediation and arbitration may also receive instructions and **certificate** from Federal Judicial Academy, on payment of fees and charges, as and when Federal Judicial Academy is ready enough to render this service. Answerable to both the Chief Justice and District Judges, the ADR specialists will resolve new cases referred to them by the Courts. Conciliators and Mediators will be drawn from among retired judges, senior advocates, other respected individuals in the professional legal community, and accountants ,architects, engineers , bankers, doctors, university professors, and. chambers of commerce & industry.

The Alternative Dispute Resolution has not been enthusiastically embraced by the entire legal community in all the countries where it has been introduced. Majority of the lawyers all over the World in the beginning oppose the introduction of ADR as they believe that by introduction of these mechanisms the reformers are trying to put them out of business. ADR programs the world over experience varying degrees of support from local legal communities. This cross-current likely will not stem the rising tide of ADR programs across the globe. But it is becoming increasingly clear that the success of such programs will depend upon assessing and addressing the legal community's attitudes toward ADR in each country, as well as ADR users' attitudes toward the formal legal establishment. A few of the many critical issues facing any community deciding whether and how to implement an

ADR program are: (1) Why and to what degree will the lawyers and judges oppose or fail to support ADR? (2) How should this opposition or lack of support be addressed? (3) How do potential users of ADR view the judiciary and rest of the legal establishment? and (4) how should the ADR project deal with their views?

Resistance to ADR. To be sure, there are plenty of valid reasons for opposing ADR programs with inappropriate goals or improper design. ADR cannot replace formal judicial systems necessary to further the rule of law, redress fundamental social injustice, provide governmental sanction, or provide a "court of last resort" for disputes that cannot be resolved by voluntary, informal systems. Also, it is hard for ADR to deal well with extreme power imbalances between disputants. I have talked to a number of lawyers of all ages all over the country. Contrary to reformers belief, lawyers do not like their piled-up cases to rot in their chamber for years and decades together. They admire and desire a quick resolution of disputes and they dispute the proposition that the quicker a case goes out of their chamber the lesser is their income. On the contrary, the earlier a case goes out of their chamber by way of final disposal, the more it is replenished by new cases. The more the litigant public comes to know that the legal and judicial system delivers justice speedily and with less expense, the more the public knowledge inspires confidence in the system itself and the more the potential litigant who would not have come near the court premises would flock to the courts for results of a similar nature. The success of ADR in other countries has shown that it is the lawyers who become the best admirers of A.D.R. after practicing A.D.R. The lawyers practicing in the pilot courts will be best pillars of strength in spreading ADR. The trainee lawyers and representatives of non-government organizations should be selected taking stock of their interest, participation and direct involvement in the ADR matters. Training should be imparted to the lawyers as they are the ones on whose advice litigants rely most. It is believed that without their co-operation introduction of mediation in the civil courts will not be successful. The aim should be to dispel their fear of loss of cases, financial hardship and above all suspicion of a new method of dispute resolution and to give assurance that mediation will not adversely effect them financially but will open up new horizons for them. They should be persuaded by the prospect of receiving lump sum amount by way of fees for being lawyers in mediations which provide an opportunity to resolve the disputes rapidly and efficiently; whereas trials take years and in our country usually fees are paid part by part throughout the trials till they end. Further they should be made to understand that successful mediation lawyers will always attract new clients wanting to try mediation who would otherwise have shunned the court. There is a scarcity of skilled and professional mediators. There an urgent need for training on mediation and motivation of the lawyers for the use and promotion of the alternative system.

"Let the lawyer to become mediator, rather than mere pleader,"

The Bar and other Institutional Partnerships. Apart from Pilot court judges, the administrative support staff, and the ADR specialists, support and cooperation from others will be critical. These include the bar and international institutions that will cooperate with the Pilot Courts. In formulating a code of ethics applicable to its members, **Provincial Bars** should include a chapter on the use of ADR, adopting guidelines similar to those of the US **Model Rules of Professional Conduct**, which note that "there will be circumstances in which a lawyer should advise a client concerning the advantages and disadvantages of available dispute resolution options in order to permit the client to make informed decisions concerning representation". Together with the bar, the Pilot Courts must have access to externally operated programs via partnerships that deliver high quality ADR services to litigants. Some organizations that have formal successful partnerships with the courts include institution of higher learning e.g. the Harvard Mediation Program at Harvard Law School and the Boston Mediation Clinic, bar councils and related groups, dispute resolution centres, and religious institutions.

Mediation & Conciliation in Commercial disputes. Retired judges and senior lawyers should act as conciliators in the Pilot Court in commercial matters. Unlike mediation and conciliation in other class of cases however, wherein the target groups are the actual disputants, commercial mediation & conciliation involves lawyers representing the disputing parties.

An ADR centre should be developed at the principal seat of high court to supervise, control and evaluate the performance of pilot courts. A management consultant, under the supervision of the chief justice, should develop an annual operational work plan and timelines for the disposition of cases. The consultant would also help the Pilot Court to absorb current technology, such as allowing the electronic filing of documents and the use of electronic bench books. Finally, s/he would be charged with the duty of auditing the performance of the court by assessing whether or not there was a timely rendering of decisions and judgments, an estimation of legal and other costs that were increased as a result of poor case management, and a sampling of decisions to ensure that the quality of justice has not been compromised. This audit should be a public document and should be considered when taking into account the salary and promotion prospects not only or the judges of such courts but the entire support staff so that the latter will also have a stake in the success of the venture.

Pilot Court Mediators, Neutrals, and Conciliators. Although ADR comprised various levels of informality, the skills required to maintain that system might be difficult to find. In the United States, with its vast pool of learning Institution, non-profit organizations, and community service groups, it is not difficult to find skilled volunteers. However, even those volunteers need to be trained to sit down with disputing parties, invite them to tell their stories, encourage the parties to listen to one another, and help them reach an amicable solution. In the U.S, it is estimated that a minimum of thirty hours of "hands-on" training in mediation theory and skills are required. These skills include putting the disputants at ease, describing the mediation process, coaxing the full story and context from the disputants asking procedure questions, helping the parties invent and consider options, slumping agreements, maintaining confidentially, and adhering the ethical stands.

Law schools should be encouraged to recruit and train doctors, lawyers, university professors, and accountants to serve as potential recruits. These individuals will be accredited as neutrals after satisfying both theoretical requirements. In addition, these institutions should pay special attention to the recruitment of women. Apart from enlarging the base of neutrals, this practice will be useful in situation where women are involved in a dispute. The presence of a female neutral will assist in creating an atmosphere congenial to a successful mediation.

In performing their functions, neutrals should be immune from civil damages for statements, actions, omissions, or decisions made in the course of ADR proceedings (unless that statement, action, omission, or decision is made fraudulently), and no action should be allowed against a neutral without a clearance certificate issued by the chief judge of the High Court. At the same time, neutrals should be subjected to the same **ethical standards** as High Court judges, including the standards of probity and confidentially that are expected by the litigants. Neutrals who egregiously violate certain ethical norms (e.g., taking bribes or misusing information disclosed during the mediation process) should be liable to criminal sanctions. Conciliators should be selected from a pool of retired judges, senior advocates and others in the legal profession who have a reputation for integrity and a deep knowledge of the law. These conciliators could provide pro bono services, or, depending on the complexity of the matter charge fee.

Training for ADR mediators and neutrals: As recommended above, training for those who would serve as ADR mediators and neutrals in the Pilot Courts should be handled by learning institutions that are able to put together specialized courses. The learning institutions should bear the cost of preparing the courses and training materials, while the potential ADR specialists would pay fees to attend the court. The technique of ADR is an effort to design a workable and fair alternative. Conciliators, mediators, arbitrators and other ADR neutrals will be appointed when requested by the parties from among a panel of qualified and experienced ADR neutrals. The Institutes/law schools in the country should undertake training/teaching in ADR and related matters and award diplomas, certificates and other academic or professional distinctions. Besides, the Institutes should plan to develop infrastructure for higher education and research in the field of ADR and arrange for fellowships, scholarships and stipends for developing professionalism in ADR.A major focus should be on training for developing professional mediators and sensitizing judges, lawyers, policymakers, litigants and the masses. I stress on creation of a regular corps of trained and efficient mediators or

neutrals, relying on whom judges or parties in a dispute can comfortably go for consensual process of the ADR methods.

It will be prudent, at least at this stage, to keep in the statute a wide option of mediators and arbitrators to avoid the vagary of availability or no non-availability of senior lawyers. Presiding judges of the disputes in question and other available judges of co-equal jurisdiction not seizing of the disputes in question should be kept as options for the choice of mediator or conciliators. Retired Judges, senior lawyers as per list maintained and constantly updated by the District Judge should be available for mediation and conciliation. Private mediation firms, having experienced judges or retired judges and/or qualified non-practicing lawyers on their staff, recommended by the District Judge and approved by the Chief Justice of High Court, may also be included for mediation, conciliation or non-binding arbitration on payment of equal fees by the parties. Gradually, as the idea spreads and the A.D.R. procedure gains ground, judges may be eliminated from the list altogether. This may take some time, but nothing can be achieved without **patience** and **perseverance**. U.S.A., Australia and Canada have not achieved their present position without sustained efforts for three or four decades. 85 to 90 percent of cases filed are now disposed of by A.D.R. method and only 10 to 15 percent cases filed are disposed of by trial now in those countries. **But Rome was not built in a day, but was built alright.**

Amend the Code of Civil Procedure giving the trial court an enabling and discretionary power to refer a case or part of a case for only mediation, conciliation or non- binding arbitration **at any stage of the suit**. Although the proper stage to do so is after receiving the written statement, I would suggest 'at any stage of the suit' to cover backlogs. When the amendment comes into force, the judges will be trained to refer a case for mediation, conciliation or non-binding arbitration after receiving the written statement in all suitable cases, but they will be further trained to refer pending cases for mediation, conciliation or non-binding arbitration when both parties agree or according to the judge's own discretion, the stage of the suit not being very important. It is necessary to define mediation, conciliation and non-binding arbitration correctly and precisely in the amendment to avoid unnecessary dispute about their nature and character.

Make the presiding judge, a judge of co-equal jurisdiction, lawyers of more than **15** years' standing, and **Private Mediation Firms**, adequately staffed by either experienced ex-judges of not less than 10 years' standing or retired judges and/or non-practicing lawyers of not less than 15 years' standing, recommended by the District Judge and approved by the Chief Justice of High Court, as qualified for appointment as mediator, conciliation or arbitrator. As a matter of practice the presiding judge may not assume that function, but the enabling provision should be there, because in many places a judge of co-equal jurisdiction or a lawyer of stated standing or a private legal firm might not be available. The District Judge will keep a constant eye on A.D.R., provide the High Court with regular up-to-date information about disposal of cases by mediation or conciliation by various pilot courts, amount realized each month by the pilot courts, pending mediations or conciliations in the pilot courts, comparison in terms of disposal and realization of money with the rate of disposal and rate of realization of money prior to mediation, amount realized by execution of decree on a previous 5-year average prior to mediation etc. and oversee the progress of A.D.R. diligently and constantly.

Mediation, conciliation or non-binding arbitration, in my opinion, may not be a suitable form of A.D.R. in big commercial cases involving heavy amounts and insolvency cases under the Insolvency Act. I suggest Early Neutral Evaluation or Settlement Conference as the proper result-yielding method of A.D.R. in such cases. I would advise an amendment to the special legislations covering these types of cases enabling trial judges to refer a case or part of a case at any stage of the suit for application of **Early Neutral Evaluation (ENE)** or **Settlement Conference**, although the ideal time to start this process is after receiving the written statement. I am in favor of adding 'at any stage of the suit or application' to cover the backlogs. Also ENE and Settlement Conference should be suitably defined to avoid any conflicting interpretation of these concepts.

The Government is the major litigant in this country, either as a plaintiff or as a defendant. In most cases the Government does not make any appearance, because the Government do not find, at any rate for the time being, any interest of the Government involved in the case. Yet when the parties in dispute compromise the matter, even without mediation, the option remains for the Government to challenge the compromise at a belated stage, claiming an interest in the subject matter of litigation.

The Government is thus responsible in many cases to prolong the litigation. To make the A.D.R. successful, law should be amended providing that where the Government do not enter appearance or after entering appearance do not file any written statement, or after filing a written statement do not contest the case, any resolution of the dispute through A.D.R. or otherwise by the other parties to the dispute would be binding on the Government.

Conclusion

An ongoing judiciary initiative to institute an alternative dispute resolution system through "National Judicial Policy, 2009" appears significant to reduce the burden of millions of cases pending with the courts. Amendments to several laws have been made and some more are on their way to facilitate to institute mediation, conciliation, arbitration and other alternative dispute resolution systems, as the result of the efforts was `tremendously encouraging. Under a pilot project, alternative dispute resolution system should be initiated in the selected Districts and in a class of cases, under the supervision and control of High Courts, which can eventually be extended to the all the Districts. And when such courts are established, that would truly bring ADR to the centre-stage – no dispute about that. Every case, settled out of the formal courts, will save an average court time of seven to ten years. The ADR-related legislative reforms, when viewed in conjunction with other governments imitative give an excellent opportunity to any group, body or institution seeking to establish themselves as service providers for ADR. There are several established entities actively engaged in providing ADR services and who are already well-positioned to fill the space suddenly created by this healthy juxtaposition of the several legislative provisions. What is lacking is not only awareness of this opportunity but also the proficiency/expertise necessary to implement ADR as a truly viable (and a much healthier) alternative mechanism to litigating in a court of law. Considering the pool of talent available, it is only a question of showing the way. And this is the task that **Government, Judiciary** and **Bar** should take upon themselves – of introducing to the nation, and educating them about, ADR and it's inherent benefits with the help of **ADB** sponsored **Access to Justice Program,** Pakistan stands to benefit greatly from this effort simply because not only does it probably have the highest backlog of cases pending in its courts of law, but also because it's litigious population does not take too many days off. The **IFC** Commercial Mediation program which was initiated in partnership with Ministry of Law, Sindh High Court and IFC in 2005, whereby referral and Enforcement system at Sindh High Court was developed with reference to institutionalized mediations at Karachi Centre for Dispute Resolution (KCDR), resulted in adoption of ADR rules of Sindh High Court Section 89-A of Civil Procedure Code was being used for referral of disputes to KCDR for mediation. Commercial mediation has taken off but a sustained awareness program is required for greater buy in of mediation and referral of disputes. Because IFC's ADR/Mediation initiatives in form of a pilot Project in Karachi has been successful, it wants to reciprocate the same at Lahore. However, experience suggests that ADR and mediation require support of stakeholders for it to be institutionalized at national level. In order to promote the use of ADR and mediation among practitioners and end-users, there has been a strong need to debate its current status, future development and challenges. In view of the National Judicial Policy 2009 and with these objectives in mind, the proposed Conference has been planned with the institutional support of Supreme Court of Pakistan and Federal Judicial Academy, Islamabad. The business-sector should be encouraged to include following model clause in all business agreements, Mediation is a wonderful tool to help counsel obtain a fair and reasonable settlement for his client. I hope that the ideas set forth in this article will help the business-sector to turn their dispute from a business threat into a business opportunity by use of commercial mediation: Yes, many have been shying away from the courts looking at the prolonged delays, but once they have alternative and convenient modes like ADR for resolution of disputes, they are certainly not going to shy away from opting for them to settle their disputes.

The ADR can also be an effective means to deal with the cases involving **default bank loans**, now pending with the banking courts, and in other commercial cases through amendment to the relevant laws to make way for ADR, the banks could recover billions default loans in a very short time. It is hoped that the ADR can clear up the entire bulk of pending cases within three to four years, if properly used. Alternative dispute resolution can mitigate sufferings of poor litigants as it is cheaper

and speedier than the existing legal system. Increasing expenses of litigation, delay in disposal of cases and huge backlogs in the existing legal system have shaken people's confidence in the judiciary. Against this backdrop we cannot but ponder about a device like the ADR, which is potentially useful for reducing the backlogs and delay in some cases of our courts. We recognize traditional, informal and indigenous forms of dispute resolution, like ***Punchayat***, there were handicaps such as dominance of social elite, lack of legal awareness, superstitions and biased mindset. The purpose of the ADR was not to substitute consensual disposal for adversarial disposal or to abolish informal mediation outside courts but to make it part and parcel of the legal system, preserving the trial court's statutory authority and jurisdiction to try the case should the ADR fail.

A major focus should be on training for developing professional mediators and sensitizing judges, lawyers, policymakers, litigants and the masses. It is stressed on creation of a regular corps of trained and efficient mediators or neutrals, relying on whom judges or parties in a dispute can comfortably go for consensual process of the ADR methods. The recommendations include networking and sharing at national, regional and international level, developing curricula for incorporating the ADR in education and continued monitoring, evaluation and improvement of ADR processes in use.

Alternative facility in Pakistan is yet to take a meaningful uplift. But this newly enacted provisions facilitating the ADR system in our justice delivery process is highly appreciable which will open a new horizon in our legal firmament. For meaningful expansion of ADR in Pakistan legal resource has to be developed among the rural poor by providing them with alternative lawyers and judge. The next step would be for the society to come forward to accept change of traditional legal procedure. Only reformative thinking, new values, new projection and positive outlook with determined action can achieve this.

The proposed reforms to Civil Justice have been under discussion for some years and usage of ADR have had a significant influence on the way in which litigation is conducted in Pakistan, in the sense that courts have tended to anticipate the changes to some extent, or to interpret existing rules in a way which is compatible with ADR philosophy. Nevertheless when the new legislation has come into force, radical changes are needed in the way in which the courts and lawyers operate. As the **Chief Justice** is a very **powerful person** in our system the Pakistan reform effort suffered setbacks and delays caused by the shifting role of Chief Justice as happened in India with the retirement of Chief Justice Ahmadi, yet the present Chief Justice of Pakistan, along with many other judges and the government are great supporters of these innovations. We certainly need a **Champion** to make this matter a success in Pakistan.[28]

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