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, Sub-Continent 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 are in the process of development. They 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. 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.

Mediation was the most favorable means of dispute resolution the following reasons very accurately outline 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

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

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.
- 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.

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.

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, Bar and business sector representative bodies should take upon themselves – of introducing to the nation, and educating them about, ADR and it's inherent benefits with the help of IFC sponsored 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. A Mediation Center at Lahore Chamber of Commerce & Industry has been established in collaboration with IFC and is functioning where a panel of accredited Mediators trained by CEDR & IFC are providing Mediation services. 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. The business-sector should be encouraged to include 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.

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. [i]

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