CHAPTER - 2

CONCEPTUAL ANALYSIS AND HISTORICAL BACKGROUND OF ALTERNATIVE DISPUTE RESOLUTION MECHANISM

2.1 INTRODUCTION

In this chapter the researcher examines alternative dispute resolution mechanism and its concept, evolution and development worldwide. This chapter provides a general overview of nature of dispute, its resolution, evolution, development and growth of ADR system in commercial sector. It also discusses the terminology of ADR and necessity of common definitions of the terms of ADR. The researcher had described the classification of alternative dispute resolution mechanism into preventive ADR processes, facilitative ADR processes, advisory ADR processes, determinative ADR processes etc., then, need and significance of ADR mechanism, its characteristics, disputes suitable and non-suitable to ADR, advantages and limitations of ADR mechanism

2.2 RESOLUTION OF DISPUTES

2.2.1 The Nature of Disputes

The majority of people world at large are likely to become involved in a civil dispute at least once during their lifetime. Disputes are an inevitable element of human interactions and society needs to develop efficient and innovative methods of dealing with them. A dispute is a product of unresolved conflict. Conflict can simply be viewed as “the result of the differences which makes individuals unique and the different
expectations of individuals in life”\(^1\). While conflict is inevitable, disputes need not be. Miller and Sarat note that:

“Disputes are not discrete events like births or deaths; they are more like such constructs as illnesses and friendships, composed in part of the perceptions and understandings of those who participate in and observe them. Disputes are drawn from a vast sea of events, encounters, collisions, rivalries, disappointments, discomforts, and injuries. The span and of that sea depend on the broad contours of social life …The disputes that arrive at courts can be seen as the survivors of a long and exhausting process”\(^2\).

**2.2.2 Development of a Dispute**

Disputes often begin as grievances. “A grievance is an individual’s belief that he or she is entitled to a resource which someone else may grant or deny”. For example, if a consumer purchases a product which they believe is defective, they may respond to such a belief in various ways. They may, for instance, choose to ‘lump it’ and not return to the shop to complain so as to avoid potential conflict. They may redefine the problem and redirect blame elsewhere, for example to a family member for damaging the product. They may register a claim to communicate their sense of entitlement to the most proximate source of redress, in this instance, the shop assistant, the party perceived to be responsible.\(^3\) For something to be called a dispute, it must have moved past the solitary awareness of one person, the consumer, to a joint recognition with at least one more person, such as the shop assistant. Both parties need not agree on the nature of the dispute, its origin, or its substance, but they must agree that there is a dispute. If only one person sees a problem, it is not yet a

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\(^1\) Fiadjo, Alternative Dispute Resolution: A Developing World Perspective (Cavendish 2004) at 8.


\(^3\) Ibid
If one party accepts the entitlement of the other, that the consumer should be refunded, there is no dispute. It is only when there is partial or total rejection of the other party’s claim, for example, if the shop assistant rejects the belief that product was defective when it was purchased, that a dispute is born. A dispute may be viewed as a class or kind of conflict which manifests itself in distinct justifiable issues. A justifiable problem is defined as a matter experienced by a respondent which raised legal issues, whether or not it was recognized by the respondent as being legal and whether or not any action taken by the respondent to deal with it involved the use of any part of the civil justice system. Justifiable problems are, for the most part, those that people face in their everyday lives, such as child support, consumer, education, employment, health, and welfare benefits.

2.2.3 Saturation of Dispute

The dynamics of a dispute are often compared to an iceberg. Only a fraction of the issues in a dispute are immediately accessible. The submerged part of the iceberg represents the personal interests of the party, the fundamental underlying factors contributing to any given conflict, which do not always surface during formal rights-based processes such as litigation or arbitration.

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5 Supra note no. 2
7 See Van Riemsdijk, Cross-Cultural Negotiations Interactive Display. Paper delivered at The Expanding ADR Horizon Conference, 27th April 2007, Trier.
8 The iceberg diagram is taken from Gugel, The Iceberg Model for Conflict Dynamics Tubingen Institute for Peace Education. Available at http://www.dadalos.org/frieden_int/grundkurs_4/eisberg.htm.
9 Cloke & Goldsmith, Resolving Conflicts at Work (Jossey-Bass 2000) at 114
Interest-based dispute resolution processes expand the discussion beyond the party’s legal rights to look at these underlying interests; they address party’s emotions, and seek creative solutions to the resolution of the dispute. The focus of these processes is on clarifying the party’s real motivations or underlying interests in the dispute with the aim of reaching a mutually acceptable compromise which meets the interests of both parties.

Preventive, facilitative and advisory dispute resolution processes explore below the surface of the iceberg and can be described as interest based resolutions. Determinative processes such as arbitration can be described as rights-based processes which focus on the positions and issues of the parties illustrated at the tip of the iceberg. These processes tend to narrow issues, streamline legal arguments, and predict judicial outcomes or render decisions based on assessments of fact and law.¹⁰

A simple example can illustrate the idea of the dispute iceberg. Two neighbours are in dispute over a tree. Each neighbour takes the position that

the tree is on their land. This represents the tip of the iceberg and the main issue. No compromise is possible, since the tree cannot be sawn in half. It turns out, however, that the interest of one neighbour is in using the fruit of the tree and the interest of the other is in having the shade. Without exploring the underlying expectations and interests of the parties, no compromise would be possible. Characteristic of almost every conflict is that the party standpoint or the claim (the self-chosen solution to the conflict) is not considered acceptable by the other. However, one or more interests are often behind each standpoint and, once they have become known, can form the key to a possibly effective solution.\footnote{Pel, “Court-annexed Mediation in the Netherlands. The execution of the nationwide project - Mediation and the Judiciary”. Paper presented at Southeast European Regional Conference on Alternative Dispute Resolution Slovenia, November 2002. Available at www.rechtspraak.nl/NR/rdonlyres/B9573CE2-503B-4D3A-B281-C6563D459D84/0/JustVerkEngvertalingno9_2000.pdf.}

### 2.2.4 Process of Dispute Resolution & Justice

The process of resolving a dispute has also been represented in the shape of a pyramid, which moves from the most common response at the base of the pyramid to the least common response at its apex.
As the pyramid\textsuperscript{12} above illustrates the most common response to disputes that arise is for a disputant to take no action at all. Reasons for this may include that the issue is small (more trouble than its worth) or that the disputant does not feel empowered to pursue a course of action. In a larger number of matters disputants will attempt informal negotiation. Indeed, many disputes are heard by school principals and shop keepers – i.e. in the forum that are part of the social setting within which the dispute arose. Such forums process a tremendous number of disputes.\textsuperscript{13} Fewer still disputants will seek legal advice. This may be because of the cost and time involved in consulting with a solicitor. ADR processes occupy the second tier of the pyramid. Court based-litigation occupies the apex. In other words, ADR processes, and to an even greater extent, the courts will resolve a small percentage of disputes and probably the more complex ones with more significant financial, personal or social consequences.

In promoting access to justice, a modern civil justice system should offer a variety of approaches and options to dispute resolution. Citizens should be empowered to find a satisfactory solution to their problem which includes the option of a court-based litigation but as part of a wider ‘menu of choices’. We are living in a time of social and legal evolution and it appears as if a single civil adversary court style process will not be adequate to satisfy all the desires of a good justice system. With specialization in some area and varying claimant preferences in other, it certainly appears that a modern civil justice system ought to permit some menu of choices for particular kinds of processes.\textsuperscript{14}


\textsuperscript{13} See Galanter “Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society” (1983) 31 UCLA L Rev 4.

The concept of such a ‘menu of choices’ emphasises the importance of taking into account the preferences of those in dispute and increasing avenues to access to justice. It also reflects the American concept of ‘fitting the forum to the fuss’\textsuperscript{15}. This involves allocating civil justice problems to the most appropriate process, depending on what the parties involved wish to achieve.

In this respect, “access to justice” encompasses access to a range of processes.\textsuperscript{16} Justice may sometimes require a decision from a High Court judge who has heard and considered evidence and legal arguments from both sides after an adversarial hearing. In another case, justice might mean an apology and change of administrative process in response to a particular problem. It is clear that in that sense there are circumstances in which ADR can provide resolutions which a court cannot.\textsuperscript{17}

2.2.5 Appropriate Dispute Resolution

There is increasing recognition that while many disputes can be resolved, there is no single formula to decide which resolution process is suitable for or appropriate to a conflict situation. There are many variations in relation to disputes: the range of subject matters is very wide; within any category, a multitude of issues can arise; various factors can influence parties who disagree; and there are some conflicts which are not readily to dispute resolution processes.\textsuperscript{18} Therefore, one of the more challenging aspects of alternative dispute resolution is to determine which process is most appropriate for a particular dispute.

\textsuperscript{15} Sander FEA, Goldberg SB, ‘Fitting the forum to the fuss: A user friendly guide to selecting an ADR procedure’” (1994) 10 Negotiation journal, 49.


The potential for dealing constructively with conflicts often depends on the type of conflict and its stage of development. Using this analysis and depending on which level the dispute is at, a specific process is appropriate for its resolution. The earlier a dispute resolution mechanism is introduced in a dispute, the more effective it is likely to be in resolving that dispute. The longer a dispute continues, the more parties tend to become entrenched in their positions. In addition, both the financial and emotional costs continue to escalate while party control over the outcome decreases. There are a number of situations in which certain forms of ADR could be considered appropriate for the resolution of a dispute. These included:\(^{19}\):

- Mediation or conciliation may be helpful where parties wish to preserve an existing relationship;
- Parties involved in a sensitive family or commercial dispute may prefer to use a form of ADR to keep sensitive information private;
- Arbitration may be suitable in cases where there is no relationship to preserve, and a rapid decision is needed;
- Trade association arbitration schemes, regulators and ombudsmen may provide a cheaper alternative for an individual seeking redress against a company or large organisation, but they may be limited in the redress they can provide;
- Early neutral evaluation might be applicable in cases where there is a dispute over a point of law, or where one party appears to have an unrealistic view of their chances of success at trial;
- Mediation or determination by an expert might be best where there is a technical dispute with a great deal of factual evidence;

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\(^{19}\) www.lawreform.ie.
• Mediation has achieved settlement in many apparently intractable multi-party cases; and

• Any form of ADR will be worth considering where the cost of court proceedings is likely to equal or exceed the amount of money at issue.

However, ADR is not a panacea for all disputes, it has its limitations and it is not always appropriate. In some cases power imbalances may exist which put the parties on an unequal footing, allowing one party to place undue pressure on the other. The result may be that one party may impose their solution on the other side. This could arise from the relative economic positions of the parties or from the nature of the personal or business relationship between them. In such cases ADR may not be appropriate. It has also been suggested that “cases based on allegations of fraudulent conduct or illegal behaviour are not conducive to mediation because the polarised positions that characterise these disputes inhibit discussion. Moreover, they often place the mediator in an impossible ethical position”.

In other cases there may be uncertainties in the law which is important to clarify, either because there is a lot at stake in a particular case, or because its outcome could affect a number of other cases. Sometimes legal precedents need to be relied on, or to be established for future cases. There are cases in which public interest dictates that a public hearing should take place and a public decision be made. It is important to note, therefore, that the courts will always remain central and indispensable to our civil justice system for a number of reasons. Firstly, while the courts should be


viewed as the ultimate port of call to resolve a dispute, they must always be 
available when other ADR processes fail. The researcher notes in this 
respect the constitutional right of access to the justice under Article 21 and 
39A of the Constitution of India. Thus, other forms of dispute resolution 
are often seen to be conducted ‘in the shadow of the court’. Furthermore, 
there will be cases where fundamental rights, such as those enshrined in the 
Constitution, will require judicial protection. Finally, courts can also be 
seen to perform an important function in preserving peace and stability in 
society as a whole.

While the courts will always retain a central place in the civil 
administration of justice, it is increasingly recognised throughout the world 
that in many instances there may be alternative and perhaps better ways of 
resolving civil disputes. Other less formal means of dispute resolution may 
be quicker, cheaper and better suited to the needs of the parties involved. 
“Where there exists an appropriate alternative dispute resolution 
mechanism which is capable of resolving a dispute more economically and 
efficiently than court proceedings, then the parties should be encouraged 
not to commence or pursue proceedings in court until after they have made 
use of that mechanism.” Once it is determined that the dispute is suitable 
for ADR, the next step is to consider the goals of the parties involved.

While selecting a dispute resolution process is what process can best 
satisfy the interests and goals of the party to the dispute. This outcome-
oriented approach asks what should happen as a result of the choice of the 
particular dispute resolution process.

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24 Sander & Rozdeiczer, “Matching Cases and Dispute Resolution Procedures: Detailed Analysis 
Leading to a Mediation-Centered Approach” (2006) 11 Harv Negot L Rev 1 at 2., from 
www.lawreform.ie.
The criteria which might influence the party’s choice of process could include the following:

- the need or desire for confidentiality or privacy,
- whether a precedent is required,
- where a reputation or good name is at risk, the costs involved,
- the time the process might take,
- the importance of preserving relationships,
- the desire for non-legal solutions,
- the desire for an opinion or evaluation by a third party,
- the desire to have their ‘day in court’,
- the complexity of the issue,
- the need for a final and binding determination, and the number of parties involved.

The role of the legal profession should not be overlooked in relation to assessing the appropriateness of ADR. Many disputants may not be aware of the different modes of dispute resolution processes which are available to them and, when considering a client case, lawyers should also consider whether ADR is appropriate. As noted by the Former US Chief Justice Warren Burger: “The obligation of the legal profession is to serve as the healers of human conflicts. To fulfil this traditional obligation of our profession means that we should provide the mechanisms that can produce an acceptable result in the shortest possible time with the least possible expense and with a minimum of stress on the participants. That is what a system of justice is all about.”25

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2.3 BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION SYSTEM

The history of alternative dispute resolution forum at international level can be traced back from the period of Renaissance, when Catholic Popes acted as arbitrators in conflicts between European countries. One of the successful examples of the said mechanism is the international mediation conducted by former U.S. President Jimmy Carter in Bosnia. ADR has given fruitful results not only in international political arena but also in international business world in settling commercial disputes among many corporate houses for e.g. Settlement of an outstanding commercial dispute between General Motors Co. and Johnson Matthey Inc., which was pending in US District Court since past few years. It is not new; societies world over have long used non-judicial, indigenous methods to resolve conflicts. What is new is the extensive promotion & proliferation of ADR models, wider use of Court annexed ADR, & increasing use of ADR as a tool to realize goals broader than the settlement of specific disputes. The ADR movement in the United States was launched in 1970’s,beginning as a social movement to resolve community wide civil rights disputes through mediation and as a legal movement to address increased delay and expense in litigation arising from an overcrowded court system. In 1980’s demand for ADR in commercial sector began to grow as part of an effort to find more efficient and effective alternatives to litigation.

ADR is essentially an attempt to settle legal disputes by private efforts as opposed to their resolution by courts or other authorities. ADR appears in incipient forms in the cultural history of several countries. In India, we have had the system of village elders, called Panchas, chosen by villagers, resolving disputes by common consent. The Native American tribes, had peace councils, which resolved disputes by a process that had remarkable similarity to present day ADR techniques. George
Washington’s will is said to have contained a clause that disputes touching the estate should be resolved by arbitration. In Europe, the roots of ADR go back to the thirteenth century, when community disputes were resolved by ADR techniques in Medieval France. The Chinese used mediation to resolve personal disputes for nearly 2000 years.\textsuperscript{26}

The business community has now recognized that ADR, in one form or other, is the acceptable mode of dispute resolution. ADR seems to be less costly, less adversarial, & therefore conducive for the preservation of business relations. The use of ADR has become inevitable in this era of privatization, liberalization & increased globalization. Many developed as well as developing countries have adopted ADR system as an efficacious way of handling domestic as well as international disputes.

The biggest stepping stone in the field of International ADR is the adoption of UNCITRAL [United Nation Commission on International Trade Law] model on international commercial arbitration. An important feature of the said model is that it has harmonized the concept of arbitration and conciliation in order to designate it for universal application. General Assembly of UN also recommended its member countries to adopt this model in view to have uniform laws for ADR mechanism. Other important international conventions are viz., The Geneva Protocol on Arbitration clauses of 1923, The Geneva Convention on the execution of foreign award, 1927 and The New York Convention of 1958 on the recognition and enforcement of foreign arbitral award etc.\textsuperscript{27}

\textsuperscript{26} Justice Raveendran, Mediation Its importance and relevance, (2010)P.L October 10.
\textsuperscript{27} Dr. Sant Prasad Gupta and Satya prakash Gupta, The Arbitration and Conciliation Act with Alternative Dispute Resolution, second edition, 2008, Allahabad law agency, 23.
2.4 THE DEVELOPMENT OF ALTERNATIVE DISPUTE RESOLUTION: AN OVERVIEW

The concept of ADR is not a new phenomenon. For centuries, societies have been developing informal and non-adversarial processes for resolving disputes. In fact, archaeologists have discovered evidence of the use of ADR processes in the ancient civilizations of Egypt, Mesopotamia, and Assyria.\(^\text{28}\)

Furthermore, it can be argued that many of the modern methods of ADR are not modern alternatives, but merely a return to earlier ways of dealing with such disputes in traditional societies. The court system itself was once an alternative dispute resolution process, in the sense that it superseded older forms of dispute resolution, including trial by battle and trial by ordeal. This section will look at some of the more relevant periods in the development of ADR.

In the late 1980s and early 1990s, many people became increasingly concerned that the traditional method of resolving legal disputes in the United States, through conventional litigation, had become too expensive, too slow, and too cumbersome for many civil lawsuits (cases between private parties). This concern led to the growing use of ways other than litigation to resolve disputes. These other methods are commonly known collectively as alternative dispute resolution (ADR).

As of the early 2000s, ADR techniques were being popular, as litigants, lawyers and courts realized that these techniques could often help them resolve legal disputes quickly and cheaply and more privately than court process also ADR approaches are being more creative and more focused on problem solving than litigation through court. Although certain ADR techniques are well established and frequently used for example,

mediation and arbitration. Alternative dispute resolution has no fixed
definition. The term alternative dispute resolution includes a wide range of
processes, many with little in common except that each is an alternative to
full-blown litigation. Litigants, lawyers, and judges are constantly adapting
existing ADR processes or devising new ones to meet the unique needs of
their legal disputes. The definition of alternative dispute resolution is
constantly expanding to include new techniques.

*Alternative dispute resolution* encompasses arbitration, mediation,
conciliation, and other methods, short of formal litigation, for resolving
disputes. Alternative dispute resolution offers several advantages over a
lawsuit. It is less adversarial and in some cases can be faster and less
expensive. It can also reduce court workloads. For these reasons its use is
being promoted by court reformers in many developing and transition
economies.

2.4.1 Alternative Dispute Resolution in Classical Times

One of the earliest recorded mediations occurred more than 4,000
years ago in the ancient society of Mesopotamia when a Sumerian ruler
helped avert a war and developed an agreement in a dispute over land.  
Further evidence reveals that the process of conciliation among disputants
was very important in Mesopotamian society. Organization advocated
that commercial disputes be resolved outside of the court process through a
confrontation between the creditor and debtor in the presence of a third
party referee. The role of the referee was to help facilitate conciliation. In
this way, the referee would suggest alternative settlements, if the options
put forward by the parties themselves were rejected. If the dispute was not
resolved according to this manner, the dispute could be brought before the
court.

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29 See Fuller, "Mediation - Its Forms and Functions" (1971) 44 S Cal L Rev 305 at 325.
30 Ibid
The development of ADR in the Western World can be traced to the ancient Greeks. As Athenian courts became overcrowded, the city-state introduced the position of a public arbitrator around 400 B.C.\textsuperscript{31}

The arbitral procedures were structured and formal. The arbitrator for a given case was selected by lottery. His first duty was to attempt to resolve the matter amicably. If he did not succeed, he would call witnesses and require the submission of evidence in writing. This can be described as the modern day process of med-arb.\textsuperscript{32} The parties often engaged in elaborate schemes to postpone rulings or challenge the arbitrator’s decision. An appeal would be brought before the College of Arbitrators, who would refer the matter to the traditional courts.\textsuperscript{33}

The Classical Greek epic poem *The Iliad* contains several examples of mediation and arbitration in Greek culture. One such example concerns the negotiation of an agreement between a murderer and the victim’s family. Traditional law required that the accused make an offer to the victim’s family which was laid out in public view for all to assess. Some negotiation regarding the offer occurred. However, the final assessment of the offer was made by a respected elder whose decision would be accepted by all.\textsuperscript{34} This example incorporates the modern processes of restorative justice and arbitration.

### 2.4.2 Alternative Dispute Resolution in Traditional Societies

Arbitration was an important feature of Irish Brehon Law. A 'brithem'\textsuperscript{35} who had trained in a law-school but had not been appointed by


\textsuperscript{32} Infra, Med-arb

\textsuperscript{33} Ibid

\textsuperscript{34} Supra., Foot note 25

\textsuperscript{35} Brithem is an agent noun from breth, and so means maker of judgements”Kelly *A Guide to Early Irish Law* Volume III (Dublin Institute for Advanced Studies, 1998) at 51.
the king as the official judge for the area earned his living by arbitrating disputes between parties who had agreed to be bound by the decision.\footnote{A History of Arbitration in Ireland The Dublin International Arbitration Centre at www.dublinarbitration.ie.} They simply judged the amount of fines due from those guilty, and left it to extended families, patrons or chiefs to enforce payment. If a brithem left a case undecided he would have to pay a fine of 8 ounces of silver. Founded in the maxim 'to every judge his error', he would have to pay a fine for an erroneous judgment.\footnote{Ibid} There are many other examples of ADR processes which have developed in traditional societies as mechanisms for resolving disputes. The Bushmen of Kalahari, a traditional people in Namibia and Botswana, have sophisticated systems of resolving disputes that avoid physical conflict and the courts. This process incorporates negotiation, mediation, and consensus building and bears some resemblance to the parliamentary filibuster.

Hawaiian islanders of Polynesian ancestry use a form of mediation called ho’oponopono’ for resolving disputes. This process involves a family coming together to discuss interpersonal problems under the guidance of a respected leader.\footnote{Barrett, A History of Alternative Dispute Resolution (Jossey-Bass San Francisco, 2004) at 3.} Similarly, the Abkhazian people of the Caucasus Mountains of Georgia have long practised mediation by elders to resolve disputes within their group and among tribes in surrounding areas.\footnote{Ibid at 4}

In Nigeria, the Yoruba live in modern cities but continue to revert to traditional methods of resolving disputes. Courts are seen as the last resort as it is generally considered a mark of shame on the disputants when a matter ends up in the courts. They are viewed as ‘bad people’ who should favour reconciliation.\footnote{Barrett, A History of Alternative Dispute Resolution (Jossey-Bass San Francisco, 2004) at 5.}
India also has a long tradition of using ADR processes. The most popular method of dispute resolution, ‘panchayat’, began 2,500 years ago and is widely used for resolution of both commercial and non-commercial disputes.

Similarly, since the Western Zhou Dynasty in China 2,000 years ago the post of mediator has been included in all governmental administration. Today in China it is estimated that there are 950,000 mediation committees with 6 million mediators. Article 111 of the Constitution of the People's Republic of China states "People's Mediation Committees (PMC) is a working committee under grassroots autonomous organizations - Residents Committee, Villagers Committee - whose mission is to mediate civil disputes." Today, these Committees handle between 10 and 20 million cases per year, ranging from family disputes to minor property disputes. Chinese citizens are not forced to use the PMCs and can bypass them for the courts. But since the committees are tasked with settling matters in no longer than a month, PMCs can be an efficient way to administer justice. Judgments also can also be appealed to the courts\(^\text{41}\) in mediation.

It is well-documented that mediation has a long and varied history in all the major cultures of the world. Both the Koran and the Bible\(^\text{42}\) provide references to the resolution of disputes through arbitration or mediation.

### 2.5 ALTERNATIVE DISPUTE RESOLUTION TERMINOLOGY: AN OVERVIEW

An examination and clarification of ADR terminology is a necessary starting point in any discussion of ADR. The terminology of the mechanisms that make up the spectrum of dispute resolution processes


\(^{42}\) Matthew 5:9-1; Timothy 2:5-6; Corinthians 6:1-4.
appears to be understood and interpreted in many different ways. For instance, one of the questions usually asked by many is what is meant by conciliation and mediation? Whether they are the same and, if not, what are the differences? A common terminology of ADR terms helps ADR service providers and practitioners to develop consistent and comparable standards. Common definitions or descriptions of ADR processes guarantee those who use, or make referrals to, ADR services receive consistent and accurate information, and have reasonable and accurate expectations about the processes they are. This will enhance their confidence in, and acceptance of, ADR services. Consistent use of terms for ADR processes helps courts and other referring agencies to match dispute resolution processes to specific disputes. Better matching would improve outcomes from ADR processes. Common terms provide a basis for policy and programme development, data collection and evaluation.\textsuperscript{43} While consistent and clear terminology is necessary, it is important that this does not limit the creativity and innovation that have made ADR services so effective and popular.\textsuperscript{44} Only a very limited number of key terms should be defined in statute, where consistency and compliance are essential. Where diversity and flexibility are important, may be more appropriate to have descriptive terms.\textsuperscript{45}

2.5.1 Definition of Alternative Dispute Resolution

ADR is usually used as an acronym for alternative dispute resolution, which is defined as any process or procedure other than adjudication by a presiding judge in court – litigation, in which a neutral third party

\textsuperscript{43} Dispute Resolution Terms (National Alternative Dispute Resolution Advisory Council of Australia, September 2003).

\textsuperscript{44} The Hon. Daryl Williams, Federal Attorney General VCAT Mediation Newsletter No. 6, November 2002.

\textsuperscript{45} Ibid
participates to assist in the resolution of issues in controversy. However, for the purpose of this manual, it seems more useful to think of ADR not as alternative dispute resolution, but appropriate dispute resolution. There are a few reasons why we should think of appropriate and not just alternative processes.

In general terms, ADR to represents a broad spectrum of structured processes which are fundamental to any modern civil justice system in providing greater access to individualized justice for all citizens. ADR should not been seen as a separate entity from the court-based arrangements for civil justice but rather should be seen as an integral part of the entire system.

Alternative Dispute Resolution includes practices, techniques and approaches for resolving and managing conflicts short of, or alternative to, full-scale court process. The variety of ADR models found in developed and developing countries.

The acronym ADR is as flexible as the processes it embodies. It has been described as “A halfway house between the certainty of the system and the flexibility of negotiation”. Emanating from the United States, the letters ADR evolved originally as an acronym for Alternative Dispute Resolution. Historically this referred to an alternative to the courts. This original view of ADR as an “alternative” dispute resolution mechanism to litigation in the court system is no longer appropriate. Current practice of mediation internationally demonstrates that ADR and litigation “are not homogenous, separate and opposed entities”.

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48 Astor & Chinkin, Dispute Resolution in Australia (2nd ed Butterworths, 2002) at 77.
A number of other ‘A’ words have been developed which are aimed at identifying ADR as a dispute resolution concept in its own right and not as an alternative, but rather ‘additional’ to some other procedures, including litigation.49 ‘Amicable dispute resolution’ has been proposed to emphasize the non-adversarial objectives and processes of ADR, as has ‘accelerated’ dispute resolution, which underlines one of the main advantages of many dispute resolution processes, in that disputes are often resolved more quickly than traditional litigation. As ADR has developed, importance has been placed on choosing techniques to match the needs of a dispute and the interests of the parties. Thus, ‘appropriate’ dispute resolution is often encouraged as an alternative component of the ADR acronym.

Moving on from ‘ADR’, BDR for ‘better dispute resolution’, or IDR, for ‘innovative dispute resolution’ have also been promoted in other jurisdictions such as Canada. In some jurisdictions ADR is now so popular that it is no longer an alternative form of dispute resolution but a primary form of dispute resolution. Within the family law area ADR has been renamed “primary dispute resolution” in Australia for this reason.50

Furthermore, ADR has come to represent not only a body of processes for dispute resolution but also a body of processes for dispute avoidance and dispute management. This is increasingly evident in the employment sector. Recognizing this, it has been argued that the letters should be seen in their own right as describing “a holistic concept of a consensus oriented approach to dealing with potential and actual disputes.

49 Supra, note 48.

The concept encompasses dispute avoidance, dispute management and dispute resolution.”

Today, ADR has flourished to the point that it has been suggested that the adjective should be dropped altogether and that ‘dispute resolution’ should be used to describe the modern range of dispute resolution methods and choices.

2.5.2 Classification of the Alternative Dispute Resolution Mechanism

Dispute resolution processes can be arranged along a spectrum which correlates with increasing third party involvement, decreasing control the parties over the process and outcome, and usually, increasing likelihood of having the relationship between the disputants deteriorate during and after resolution of the dispute.

ADR mechanism can also be divided into five distinct categories.

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54 www.lawreform.ie.
A] Preventive ADR Processes

Preventive ADR can be described as conflict avoidance processes that provide for efficient and systematic management of disputes. It is obvious that preventing unnecessary disputes can result in enormous monetary savings for individuals, avoid relationship break-downs and enhance trust and confidence between individuals.

Preventive ADR is a tool which is widely used in the construction and employment sector. For example, The Advisory Committee advises on and develop specific grievance, disciplinary, and disputes procedures.\(^{55}\) Expressly promotes the use of preventive ADR in the workplace. The major objective of these procedures is to establish arrangements to deal with issues which could give rise to disputes. Such procedures provide for discussion and negotiation with a view to the parties reaching agreement at the earliest possible stage of the procedure and without resort to any form of industrial action. It is becoming increasingly mandatory that, in employment and consumer sectors, organizations must put in place internal structured dispute resolution procedures to deal with grievances. There are various types of internal dispute resolution processes aimed at resolving grievances fairly, consistently and in a timely manner. These can range from a very formal arbitration procedure to the informal open door policy. Normally employees or consumers must first exhaust these internal procedures when a grievance occurs. If no resolution can be reached, the parties may then proceed to use external mechanisms. These internal dispute procedures resolve an overwhelming percentage of grievances and prevent the escalation of the grievance into a full-blown dispute.

Preventive ADR processes include negotiation, partnering, ADR clauses, joint problem solving, and systems design.

i) Negotiation

Negotiation is the process most commonly used by disputants to resolve a dispute. In which the disputants retain control over both the process and the outcome. It is a vital and pervasive process. Negotiation is primarily a common mean of securing one’s expectations from others. It is a form of communication designed to reach an agreement when two or more parties have certain interests that are shared and certain others that are opposed.56

The Pepperdine University of USA has developed an explanatory definition for ‘negotiation’.

Negotiation is a communication process used to put deals together or resolve conflicts. It is a voluntary, non-binding process in which the parties control the outcome as well as the procedures by which they will make an agreement. Because most parties place very few limitations a negotiations process, it allows for a wide range of possible solutions maximizing the possibility of joint gains, [Institution for Dispute Resolutions, Pepperdine University USA, Mediation. The art of facilitating the settlement]

P Gulliver has explained Negotiation in following words:

As a first description the picture of negotiation is one of two sets of people, the disputing parties or their representatives, facing each other across a table. They exchange information and opinion, engage in argument and discussion and sooner or later propose offers and counter offers relating to the issue in dispute between them seeking an outcome acceptable to both sides.57

56 Roger Fisher, William Ury and Bruce Pattou, Getting Yes Negotiating Agreement without Giving In,1992 P xiii.

Negotiation is any form of voluntary communication between two or more people for the purpose of arriving at a mutually acceptable agreement.

Negotiation is something that occurs in everyday life, without most of us really being aware that we are engaging in a process. For example, it may consist of a simple and informal conversation between a parent and a child regarding an increase in pocket money. On the other end of the spectrum, negotiation can be a highly structured and formal process between parties and their solicitors on the steps of the courthouse. Indeed, the majority of disputes, justifiable and non-justifiable, are resolved by this process and negotiation is at the core of all ADR processes.

Ury and Fisher note that “Negotiation is a basic means of getting what you want from others. It is a back and forth communication designed to reach an agreement when you and the other side have some interest that are shared and others that are opposed”. By contrast, in adversarial negotiations the sides often begin from fixed positions with the two sides make offers and counteroffers supported by arguments until reaching a settlement. “To a large extent, the settlement will reflect the relative power of the parties” and may result in a win-lose situation.

Principled negotiation refers to the interest-based approach to Negotiation. The essence of this approach is that parties concentrate on solving the problem by finding a mutually-beneficial solution rather than on defeating the other side. The four fundamental principles of principled negotiation are:

1) separating the people from the problem;
2) focusing on interests, not positions;

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3) inventing options for mutual gain; and
4) insisting on objective criteria.

In most settlement negotiations, parties are influenced consciously or unconsciously by their assessment of their alternatives to a negotiated agreement. The better their alternatives, the more they may push for a more favourable settlement. The worse their alternatives, the more accommodating they may be in the settlement negotiations. This is sometimes referred to using the acronym which refers to - best alternative to a negotiated agreement. "(BATANA) and “worst alternative to a negotiated agreement” (WATNA). BATNAs are important to negotiation because a party cannot make an informed decision about whether to accept a negotiated agreement unless they know what their alternatives are. Fisher and Ury outline a simple process for determining a party’s BATNA: develop a list of actions you might conceivably take if no agreement is reached; improve some of the more promising ideas and convert them into practical options; and select, tentatively, the one option that seems best.\(^{60}\)

In effect, the BATNA is the best result the party can hope to achieve if a settlement cannot be negotiated. For example, when negotiating a pay rise, having another job offer with a different employer at a higher rate of pay may be a powerful BATNA. The concept of determining a party’s BATNA is also used in mediation and conciliation.

ii) Partnering

Partnering is a co-operative arrangement between two or more parties. It is based on the promotion and recognition of mutual goals and it requires all parties to agree on how they will make decisions, including strategies for resolving disputes during the lifetime of the project.

\(^{60}\) Supra, foot note 59.
When partnering is successful, it can enhance communication and trust in business relationships such as in the context of a building or public infrastructure project. In that setting it addresses concerns of other stakeholders, such as private developers, community groups, governmental organisations and regulatory authorities, since they can be invited to participate in the partnering process. This can help to build widespread support for a project.\(^61\)

Partnering is used extensively in the construction industry. It was first used by the US Army Corps of Engineers in the late 1980s and was first applied in the UK in the North Sea oil and gas industries in the early 1990s.\(^62\)

Joint problem solving, consensus building and systems design are concepts which are similar to partnering. They involve determining, in advance, what processes will be used for handling conflicts which arise within an organisation or between organisations and individuals.

iii) **ADR Clauses**

An ADR clause is a contractual clause requiring the parties to attempt to settle any dispute arising out of the contract using an ADR process or processes.

The International Centre for Dispute Resolution offers the following short form model standard clause for international commercial contracts:

"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its

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\(^61\) Clay et.al., “Creating Long-Term Success Through Expanded Partnering” (Feb-Apr 2004) 59 Dispute Resolution Journal 42 at 47.

International Arbitration Rules.” ADR clauses can also be ‘multi-tiered’ or ‘stepped’ which means that the parties agree to move along the ADR spectrum and they are required to engage in distinct and escalating stages of dispute resolution often finishing in final and binding resolution by arbitration or litigation. In other words, if one process fails, another dispute resolution process is attempted in order to resolve the dispute.

B] Facilitative ADR Processes

Facilitative processes involve a neutral and independent third party providing assistance in the management of the process of dispute resolution.

The neutral and independent third party has no advisory or determinative role in the resolution of the dispute or in the outcome of its resolution but assists the parties in reaching a mutually acceptable agreement by encouraging parties to define the issues with the aim of finding common ground between the parties. This category of ADR includes the process of mediation.

i) Mediation

The mediation process consists of the neutral and independent third party meeting with the parties who have the necessary authority to settle the dispute. The mediator begins the process by explaining the process to the parties, assessing the appropriateness of mediation to the situation and ensuring that the parties are willing and able to participate. This is known as a joint session. The neutral and independent third party then meets with each party privately to discuss their respective positions and their own underlying needs and interests. These private meetings are known as caucus. Information which is provided by the party to the third party during

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63 Guide to Drafting International Dispute Resolution Clauses International Centre for Dispute Resolution. Available at www.adr.org.
a caucus is strictly confidential, unless a party expressly consents to the third party informing the other party of such information.

Suppose, the inventor partner has come forth with some product which has initially rejected by other partner, but after passing 3 years he wants to appropriate this product for the partnership. In the situation, less emphasis is given to what court will decide in the matter if it will be before the court and parties more tends towards interest of both the partners complex arrangement for their settlement.

Once all parties have expressed their views and interests to the mediator in private, the mediator will try to establish areas of common ground and provide the parties with the opportunity of exploring proposals for a mutually acceptable settlement. When an agreement is reached between the parties, the mediator will draft the terms of agreement, ensuring that all parties are satisfied with the agreement, and have all parties sign the agreement.  

This final session is known as the closing joint session.

The parties are not bound by any positions taken during mediation until a final agreement is reached and signed, at which point it becomes an enforceable contract. Mediation aims to achieve a ‘win-win’ result for the parties to a dispute. Some of the proclaimed advantages of mediation include: speed, privacy, cost, flexibility, informality, party-control, and preservation of relationships.

Several varieties of mediation have been developed. Shuttle mediation is a form of mediation where the mediator goes between the parties and assists them in reaching an agreement without meeting "face to face".

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65 See Liebmann Community and Neighbourhood Mediation (Cavendish Publishing Ltd. 1998) at 59.
Transformative mediation does not seek resolution of the immediate problem, but rather, seeks the empowerment and mutual recognition of the parties involved. Therapeutic mediation is an assessment and treatment approach that assists families in dealing with emotional issues in high conflict separation and divorce. The focus is on the parties themselves as opposed to the dispute. In evaluative mediation the third party plays a more advisory role in assisting in the resolution of the disputes. The mediator allows the parties to present their factual and legal arguments. After evaluating both sides, he or she may then offer his or her own assessment of the dispute or put forward views about the merits of the case or particular issues between parties. This form of mediation mirrors conciliation.

Community mediation is mediation of a community issue. Peer mediation is a process whereby young people, trained in the principles and skills of mediation, help disputants of their own age group to find solutions to a range of disputes and is often promoted in school settings for resolving disputes between peers.

Facilitation and fact-finding are similar concepts to mediation and involve a neutral and independent third party assisting the parties in identifying problems and positions but they do not impose or recommend any solutions to the parties.


68 See the Northside Community Law Centre website for more information on their community mediation service at www.nclc.ie.
Thus, mediation is a facilitative, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement. The participation of the parties in the process is voluntary and the mediator plays no advisory or evaluative role in the outcome of the process, but may advise on or determine the process.

C] Advisory ADR Processes

Advisory processes include for example, conciliation and collaborative lawyering. They are also called evaluative processes, because they involve a neutral and independent third party, actively assisting the parties in reaching a mutually acceptable agreement. The third party may evaluate the positions of the parties, advice the parties as to the facts of the dispute and recommend options for the resolution of the dispute.

i) Conciliation

Conciliation is the process which is used by the advisory committee to settle industrial disputes. It is also extensively used in the construction industry.

Conciliation is a process similar to mediation but the neutral third party takes a more interventionist role in bringing the two parties together. In the event of the parties are unable to reach a mutually acceptable settlement, the conciliator issues a recommendation which is binding on the parties unless it is rejected by one of them. While the conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, it is not a determinative role. A conciliator does not have the power to impose a settlement. This interpretation of conciliation mirrors the Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law. Article 6 (4) of the Model

law states that “The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.”

ii) Collaborative Lawyering

Collaborative lawyering is a problem-solving method of dispute resolution, used primarily for the resolution of family disputes, where the parties and their lawyers agree, through a contractual commitment, to resolve the issues without litigation. Typically, each spouse retains a solicitor to help them to negotiate an outcome that they consider, following independent advice, to be fair and acceptable. However, in collaborative lawyering, there is no neutral and independent third party present during the process since, the solicitors in the process play an advisory role in assisting the clients in reaching a mutually acceptable negotiated agreement. Lawyers represent the parties for settlement purposes only and should the process end, both solicitors are disqualified from any further involvement in the case. The aim is to find a fair and equitable agreement for the couple. The success and effectiveness of the system depends on the honesty, cooperation and integrity of the participants.

If a client wishes to proceed through the collaborative law process, both sides must sign a legally-binding agreement to disclose all documents and information that relate to the issues. Negotiation sessions take place during four-way meetings, with the solicitors and clients all meeting together. Both the clients and the solicitors must agree to work together.

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honestly and in good faith. Neither party may go to court, or even threaten to do so, when they are working within the collaborative law process.\textsuperscript{73}

D) Determinative ADR Processes

Determinative processes involve a neutral and independent third party hearing both sides of the dispute and making a determination, which is potentially enforceable, for its resolution. This category of ADR includes the processes of arbitration, adjudication, and expert determination.

i) Arbitration

Arbitration is a long-established procedure in which a dispute is submitted, by agreement of the parties, to one or more impartial and independent arbitrators who make a binding and enforceable decision on the dispute. It is a sophisticated method of dispute resolution in India and is the preferred method of dispute resolution in a number of sectors in India, including the construction and insurance industries. India has a single legal regime for domestic and international arbitration. The Arbitration and Conciliation Act, 1996 which is based on UNCITRAL Model Law. The arbitrator is usually selected from a panel of available arbitrators or may have already been agreed upon in the arbitration clause. Once the matter has been submitted to the arbitrator, the arbitrator will contact all parties. A schedule will be set, which includes when all documents must be exchanged, when all witnesses must be disclosed, when arbitration briefs are to be submitted, and where and when the hearing will be conducted. A preliminary meeting will be held at arbitrator's request. This may be a joint session with all parties present or may be conducted by telephone conference. At the arbitration hearing, each of the respective parties is allowed to present evidence. After review of the evidence, the arbitrator will make an "arbitrator's award." After the arbitrator's award has

\textsuperscript{73} Supra, note 72.
been issued, the prevailing party often has the ability to have it issued as an enforceable court order.\footnote{See Avtar singh, Arbitration and conciliation, 5\textsuperscript{th} ed., 2001, 115.}

There are number of advantages of arbitration over litigation, they are as follows:

- **Flexibility:** The arbitrator is typically chosen by the parties or nominated by a trusted third party.
- **Specialist Knowledge:** The arbitrator will usually have specialist knowledge of the field of activity.
- **Efficiency:** The parties can decide on the location, language and to a great extent, the timing of the hearing to facilitate the parties and their witnesses.
- **Informality:** The process is less formal than court.
- **Certainty:** The arbitral award is binding and enforceable.
- **Finality:** The arbitral award is final and cannot be appealed.
- **Speed:** Expedition results in cost savings.
- **Privacy:** Arbitral awards are private and do not become binding precedents.

There are now many variants of arbitration developing in other jurisdictions. These include:-

- **Baseball arbitration** - In this arbitral process, each party submits a proposed monetary award to the arbitrator. At the conclusion of the hearing, the arbitrator is required to select one of the proposed awards, without modification. This approach, sometimes called “Last Offer Arbitration”, severely limits the arbitrator's discretion.\footnote{The International Institute for Conflict Prevention & Resolution “ADR Glossary” 2005 at www.cpradr.org.}
Bounded arbitration: In this process the parties agree privately without informing the arbitrator that the arbitrator's final award will be adjusted to a bounded range.

High-low arbitration: This is an arbitration in which the parties agree in advance to the parameters within which the arbitrator may render his or her award. 76

ii) Hybrid Models including combinations of mediation and arbitration: Med-Arb and Arb-Med

Hybrid models, which involve a combination of mediation and arbitration, have also developed. These hybrid processes are known as med-arb and arb-med. Both models allow the parties to select a single third party to serve as both mediator and arbitrator.

Med-arb is a process in which the parties first attempt to settle the dispute through mediation. If mediation does not yield a settlement, the mediator switches roles from mediator to arbitrator, and imposes a binding decision on the disputing parties. Med-arb is commonly used in labour disputes in the United States and is considered suitable for patent disputes also. 77 Arb-med is a process where the parties first present their case to arbitration. At the end of the hearings, the arbitrator writes up a decision and seals it without disclosing its contents to the parties. Then, for a fixed period the parties mediate the dispute. If the parties reach agreement before the deadline for the end of the mediation, the parties never learn about the contents of the arbitrator’s decision. If they do not reach agreement by the specified deadline, the arbitrator’s decision becomes final and binding on


the parties\textsuperscript{78}. Arb-med procedure has been used in South African union management relations in the auto and steel industries and, to a limited extent, in the United States.

These hybrid models have been met with some criticism. It has been suggested that the parties are likely to be inhibited in their discussions with the mediator if they know that the mediator might be called upon to act as arbitrator in the same dispute; and a third party who mediates and then assumes the role of arbitrator may be biased by what has been conveyed to him or her informally and confidentially in the mediation process\textsuperscript{79}.

\textbf{iii) Adjudication}

Adjudication is a process similar to expert determination and involves a neutral and independent third party, an adjudicator, who uses his or her own knowledge and investigations, whilst also weighing the evidence presented by the parties, in order to reach a legally binding decision. Adjudication is used by the Financial Service Ombudsman’s to resolve complaints that have not been settled by mediation.\textsuperscript{80} The process is most commonly associated with the resolution of disputes in the building and construction industry in the UK.

\textbf{iv) Expert Determination}

Expert determination is a process in which the parties to a dispute appoint a neutral and independent third party to make a final and binding determination on a dispute which relates to that expert’s particular area of specialisation. The parties therefore agree in advance to be bound by the decision of the expert determination.

\textsuperscript{78} Zack, “Quest for Finality in Airline Disputes: A Case for Arb-Med” (Jan 2004) 58 the Dispute Resolution Journal at 34-38.


\textsuperscript{80} See www.financialombudsman.ie.
Expert determinations can be particularly useful in disputes involving technical issues. For example, Bord Gais Eireann’s dispute resolution procedures provide that a dispute relating exclusively to technical issues which is not resolved by mediation within 30 days may be referred to “determination by an Expert”.\(^{81}\)

Expert determinations are often conducted purely on written submissions. It has been suggested that this makes the process short and cost effective compared to litigation. It can also be used in conjunction with other dispute resolution systems such as mediation, where a technical issue needs to be resolved quickly and with the correct expertise. Common examples of expert determination include the use of a surveyor in a rent review, or an accountant to provide a valuation under a share purchase agreement.\(^{82}\)

There are currently no statutory provisions applicable to expert determinations. In terms of enforcement, an expert’s determination will not be enforceable domestically without separate court action.\(^{83}\)

**F] Collective ADR**

Collective ADR can be used successfully as a method of dealing with multi-party scenarios without resorting to litigation. Collective ADR processes can also prevent the creation and escalation of disputes through regulation.

In addition to the collective ADR processes represented by regulators another collective ADR process is offered by ombudsman schemes. An Ombudsman can either be appointed by statute or through a non-statutory sectoral scheme. Ombudsmen have wide powers of investigation and their recommendations need not be limited to the form of orders commonly

\(^{81}\) Bord Gáis Eireann, “Approved Dispute Resolution Legal Drafting” Section 6.3.2. Available at www.bordgais.ie.


associated with litigation. There are a number of Ombudsmen operating in the State.

G] Judicial ADR Processes

Judicial ADR processes are dispute resolution processes which often occur after litigation has been initiated and during the lead up to the commencement of a trial and are aimed at reaching a settlement on some or all issues. These processes may involve the assistance of a judge of the Court or a Court official in overseeing the process.

Judicial ADR processes are well developed in Canada and the United States and include early neutral evaluation, mini-trial, Court settlement conferences and small claims procedures.

i) Early Neutral Evaluation

Early neutral evaluation is a process in which parties to a dispute appoint a neutral and independent third person, usually a judge or somebody legally qualified, who provides an unbiased evaluation of the facts, evidence or legal merits of a dispute and provides guidance as to the likely outcome should the case be heard in court. The evaluation is without prejudice and is nonbinding.  

The purpose of early neutral evaluation is to reduce the costs of litigation by facilitating communications between the parties while at the same time providing them, early in the process with a realistic analysis of their case.

It is often described as a means of providing the parties with a ‘reality-check’ of the strengths and weaknesses of their case. Early neutral evaluation often occurs early in the litigation process, traditionally in the

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pre-trial period prior to the commencement of discovery (the exchange of detailed documents between the parties).

In early neutral evaluation process, one or more experienced attorneys hear abbreviated presentation by each side and then decide evaluation of case. It resembles to right base mediation and court annexed arbitration method. In United States District Court of Northern California this process is more successful as to the cases of larks of certain money claims when liability is not an issue.\textsuperscript{86}

The evaluator holds an informal meeting of clients and their legal representatives where each side presents the evidence and arguments supporting its case. The evaluator identifies areas of agreement and clarifies and focuses the issues. The evaluator generally writes an evaluation in private that may include an assessment of the relative strengths and weaknesses of each party's case and the reasoning that supports this assessment. This evaluation is provided to the parties either privately or jointly.

Early neutral evaluation is often appropriate when the dispute involves technical or factual issues that lend themselves to expert evaluation. It is also used when the parties disagree significantly about the value of their cases. In Australia, early neutral evaluation is increasingly used in family law disputes where a husband and wife are in conflict over issues arising out of their martial breakdown. The evaluator, who is often a family law specialist, will provide to both parties an early neutral evaluation of the likely result if the matter were to be litigated in the Family Court. This process is also used in certain US state courts, and is offered by the English Commercial Court judges and the Technology and Construction Court.

\textsuperscript{86} Brazil W., Effective Approaches to Settlement: A Handbook for Lawyers and Judges, P.26
Case appraisal is a similar process to early neutral evaluation in which a neutral and independent third party investigates the dispute and provides advice on possible and desirable outcomes for the resolution of the disputes.

ii) Mini Trial

The mini trial is a flexible voluntary process that involves a blend of mediation, adjudication and negotiation procedures. It can be described as a highly structured settlement process a procedural agreement is usually drawn up between the parties, outlining their obligations, their right to terminate the process, the confidentiality of the process, and the effect on any litigation. Before the mini trial there is an exchange of documents, without prejudice to any litigation if the mini-trial is unsuccessful. The parties select a neutral adviser, often a retired judge or expert in the matter of the dispute, to preside over the mini-trial. The adviser’s role is that of a facilitator in the proceedings, as in mediation. However, if settlement is not reached, the advisor may be asked what the likely trial outcome would be and so acts then as an arbitrator in a non-binding arbitration.

Mini-trial does not require a case filed in court it can be applied just as well to an incipient dispute. It is totally flexible and can be tailored to the needs of the individual case. A jury session of mini trial is called summary jury trial. Hence the abbreviated presentation is made to a mock jury of 6 which then renders an advisory verdict that is used as a basis for settlement.87

At the mini-trial, lawyers for each side make summary presentations, generally in the range of one to six hours. Witnesses, experts or key documents generally may be used. Once an agreement is reached, it is enforceable as a contract between the parties.88


88 See Alberta Law Reform Institute Research Paper on Dispute Resolution: A Directory of Methods, Projects and Resources’ No. 19 July 1990 at 26; Alberta Law Reform Institute
The judicial mini-trial, used in Canada and the United States, is a voluntary process similar to early neutral evaluation. The primary difference is that a judge serves as the evaluator. In the process, the parties’ legal representatives present brief argument to a judge, who will not be the judge if the case goes to trial. The judge hears both sides and then meets with the parties and their legal representatives in an attempt to resolve the dispute. In doing so, the judge may point out the strengths and weaknesses of each party’s case.

iii) Court Settlement Process

Court settlement process is a process similar to the judicial mini-trial and was introduced into the England and Wales Technology and Construction Court in 2006 as a pilot scheme. It is a confidential, voluntary and non-binding dispute resolution process in which a settlement judge (who is a judge of the Technology and Construction Court) assists the parties in reaching an amicable settlement at a court settlement conference.89

Unless the parties otherwise agree, during the court settlement conference the settlement judge may communicate with the parties together or with any party separately, including private meetings at which the settlement judge may express views on the disputes. Each party must cooperate with the settlement judge. A party may request a private meeting with the settlement judge at any time during the court settlement conference. The parties shall give full assistance to enable the court settlement conference to proceed and be concluded within the time stipulated by the settlement judge. If an agreement is reached, it becomes binding on the parties once they sign the agreement. If no settlement is reached, the case continues, but with a different judge. The settlement judge

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89 See www.gov.uk/docs/tcc_court_settlement_process.pdf.
cannot be called as a witness in any future proceedings connected with the claim. After the process, the parties have the option of asking the settlement judge for an "assessment", giving his views on the dispute, including prospects of success and likely outcome. This will be entirely confidential and the parties will not be able to use or refer to it in any subsequent proceedings.\(^90\)

Judicial settlement conferences are either permitted or required by statute in many United States courts as a procedural step before trial.\(^91\) Federal judges are expressly authorised under Rule 16 of the *Federal Rules of Civil Procedure 2007* to use settlement procedures to resolve the case or controversy before the court. Local court rules often provide for mandatory settlement conferences during the pre-trial proceedings. The judge handling the case may conduct informal settlement discussions with the parties but, in recent years, a practice has developed of assigning a judge or magistrate to conduct the settlement conference. This judge will not be the judge to try the case if settlement is unsuccessful. This separates the roles of adjudicator and mediator. Once again, the settlement judge has no power to impose settlement and does not attempt to coerce a party to accept any proposed terms. The parties may agree to a binding settlement. If no settlement is reached, the case remains on the litigation track.

The business community has now recognized that ADR, in one form or other, is the acceptable mode of dispute resolution. ADR seems to be less costly, less adversarial, & therefore conducive for the preservation of business relations. The use of ADR has become inevitable in this era of privatization, liberalization & increased globalization. Many developed as

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well as developing countries have adopted ADR system as an efficacious way of handling domestic as well as international disputes.

The biggest stepping stone in the field of International ADR is the adoption of UNCITRAL [United Nation Commission on International Trade Law] model on international commercial arbitration. An important feature of the said model is that it has harmonized the concept of arbitration and conciliation in order to designate it for universal application. General Assembly of UN also recommended its member countries to adopt this model in view to have uniform laws for ADR mechanism. Other important international conventions are viz., The Geneva Protocol on Arbitration clauses of 1923, The Geneva Convention on the execution of foreign award, 1927 and The New York Convention of 1958 on the recognition and enforcement of foreign arbitral award etc.

2.6 NEED AND SIGNIFICANCE OF ALTERNATIVE DISPUTE RESOLUTION SYSTEM

As the dominance of commercial element increased & service character diminished, the profession of law & system of adjudication could not meet the growing demand for justice & thus most of a reasonable amount of time, people were forced to search for alternatives. Till commerce, trade & industry started expanding, the system delivered justice faster, while maintaining respect & dignity. Independence brought with it the Constitution, the consciousness of fundamental & individual rights, government participation in growth of the nation’s business, commerce & industry, establishment of the parliament & state legislatures, government corporations, financial institutions, fast growing international commerce & public sector participation in business. The government becomes a major litigant. Tremendous employment opportunities were created. Multi-party complex civil litigation, the expansion of business opportunities beyond local limits, increase in the population, numerous new enactments creating
new rights & new remedies & increasing popular reliance on the only judicial forum of courts brought an uncountable explosion of litigation. The inadequate infrastructural facilities to meet with the challenge exposed the inability of the system to handle the sheer volume of caseloads efficiently & effectively. The clogged courthouses have become an unpleasant compulsive forum instead of temples of speedy justice instead of waiting in queues for years & passing on litigation by inheritance, people are inclined either to avoid litigation or to start resorting to extra-judicial remedies.  

Almost all the democratic countries of the world have faced this situation. USA was the first to introduce drastic law reforms about 20 years back and Australia followed the same. United Kingdom has recently adopted ADR in its system. The undecided cases accumulate into backlog to jaw the system. Looking over the huge pendency of cases, we must commit ourselves to find the ways & means to handle the present and future grave situation.

There is yet another aspect which is to be seriously look out, challenges of 21st century i.e. the ability of courts to dispose of cases with the speed and the complicated and burdensome procedural details which are inherently very slow moving. Filing of the plaint, serving the process, filing the written statements, the time irresponsibly taken and given, the discovery procedure, recording of depositions, ineffective court management fragmented & discontinuous trial, unattractive alternatives to trial & indifferent attitudes of legal actors, namely, lawyers, judges & litigants have resulted into vicious circle of backlogs & delay in cases. The lack of financial & political support, accountability & the will to accept, introduce & implement law reforms have resulted in a very sorry state of affaires. In this fast changing world international trade, commerce & global

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interactions in all fields have created an inevitable need to compare laws of different countries of the world & adapt them with advantage as per the sociological approach propounded by Roscoe Pound, who construed the law as tool of social engineering. The context is relative in case of adapting ADR programs for dispute resolution for the present situations. If we do not increase the pace of learning and adopting new methods, we will be under tremendous difficulties from which we will not be able to recover. The crippled & slow moving justice system needs modern tools to supplement the obsolete methods which take years & years for disposal of cases. The inordinate delay in disposal of cases & escalating costs of litigation are alienating people from the court system.\textsuperscript{93} It needs supplementary & alternative system to meet with the growing trade; commerce, & phenomenal rise in global context. The business of multinational companies will be diverted to other countries having a more efficient system of dispute resolution.

The Indian culture carries on inherent promise that ADR process is most likely to succeed in India if implemented with an administrative will & proper legal education. The nature of disputes in India is quite varied & multiplex. The economic liberalization policies of the government, establishment of large multinational companies, economic industrial & banking growth and opportunities for international commerce & industries have increased to a large extent. ADR will provide on expedited negotiated settlement to business & industry. When a dispute arises ADR will offer an opportunity to resolve the disputes in a way that is private, fast and economical. In short ADR provides a mechanism whereby parties can find business solutions for business problems, family solution for family problems and individually tailored settlement will become a custom for the

\textsuperscript{93} Ancient mediation Rediscovered in India with global innovation - a paper presented by Niranjan Bhatt at German mediation Congress at Frankfurt’oder on 25/9/2004.
litigants. As there is always a difference between winning a case & seeking a solution. Court cases are decided more often than not on the “sporting theory of justice” as Roscoe Pound, but merely umpire to ensure that the combatants follow the rule of game.

In the words of P. V. Narasimha Rao\textsuperscript{94} “While reforms in the judicial sector should be undertaken with necessary speed, it does not bear the entire burden of the justice system. It is incumbent on government to provide at reasonable cost as many modes of settlement of disputes as are necessary to cover the variety of disputes that arise. Litigants should be encouraged to resort to alternative dispute resolution so that the court system would be left with a smaller number of important disputes that demand judicial attention” As India is a developing country there is low literacy ratio. The illiterate litigants, either socially backward or economically exploited. The ADR system will enable the poor to meet the better-off opponents on an equal footing to negotiate, which will be helpful in foundation of human dignity.

Thus, the Indian forms of disputes resolution, which were lost in the shadow of British Rule, is now being rediscovered with global innovations in the contemporary context of the alternative dispute resolution system.

2.7 CHARACTERISTICS OF ADR PROCESSES

Although the characteristics of negotiation, mediation, conciliation, arbitration & other forms of ADR vary from each other, there are some common elements of distinction from the formal judicial structure. They are as under-

1) **Informality:** Most fundamentally ADR processes are less formal than judicial processes. The rules of procedure are flexible, without formal

\textsuperscript{94} Former Prime Minister of India, while inaugurating ,International Alternative Dispute resolution on 6\textsuperscript{th} Oct., 1995.
pleadings, extensive written documentation or rules of evidence. It is important for reducing the cost and delay in dispute resolution.

2) **Application of equality:** ADR mechanisms are instruments for the application of equity, rather than rule of law. Each case is decided by a third party or negotiated between disputants themselves, based on principles & terms those seem equitable in the particular case, rather than on uniformly applied legal standards. ADR system tends to achieve efficient settlements at the expense of consistent & uniform justice.

3) **Law is relevant in ADR:** Alternative to court redressal system do not deviate completely from law & legal process. Legality is a necessary requirement, while the myriad forms of solutions could be invented beyond the law & reach of enforcement regulators. Thus the need to resort to alternatives has emerged from, the problems arising out of litigation such as inordinate delay, escalating costs of litigation, mounting arrears, pervasive corruption, and inequities in system.

4) **Direct participation and communication between disputants:** In ADR systems, there is more direct participation by the disputants in the process and in designing settlements, more direct dialogue & opportunity for reconciliation, between disputants with higher level of confidentiality since public records are not typically kept, also more flexibility in designing creative settlements.

2.8 **THE DISPUTES SUITABLE AND NON-SUITABLE FOR ADR**

The role of the legal profession should not be overlooked in relation to assessing the appropriateness of ADR. Many disputants may not be aware of the full spectrum of dispute resolution processes which are available to them and when assessing a client case, solicitors should also
assess whether ADR is appropriate. As noted by the Former US Chief Justice Warren Burger:

“The obligation of the legal profession is to serve as the healers of human conflicts. To fulfil this traditional obligation of our profession means that we should provide the mechanisms that can produce an acceptable result in the shortest possible time with the least possible expense and with a minimum of stress on the participants. That is what a of justice is all about.”

2.8.1 Disputes suitable to ADR-

Following are the cases of disputes which are appropriate for solving through the alternative dispute resolution system:-

1) Cases relating to commerce and contracts, which include-
   a) disputes between supplier and customers,
   b) disputes arising out of contracts,
   c) disputes relating to specific performance,
   d) disputes between bankers and customers,
   e) disputes between developers/builders and customers,
   f) disputes between landlords and tenants, and licensors and licensees,
   g) disputes between insure and insured.

2) All cases arising from strained or sourced personal relationships, including:
   a) disputes relating to partition, division among family members, coparceners, co-owners,

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b) disputes of matrimonial causes, maintenance, custody of children,
c) disputes relating to partnership among partners.

3) Cases where there to partnership among partners exiting relationship in spite for the parties –
   a) disputes between employers and employees,
   b) disputes between neighbors [easementary]
   c) disputes among members of societies, associations, apartment owners, association.

4) Consumer disputes and

5) Cases arising out of tortuous liability (negligence) claims for compensation in motor accidents/other accidents.  

2.8.2 The Disputes not suitable to ADR

The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:

i) Representative suits which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).

iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

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iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.

v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.

vi) Cases involving prosecution for criminal offences.

vii) Cases involving public interest,

viii) Cases affecting a large number of persons matters relating to taxation (direct an indirect) and administrative law have to be decided by court by adjudicatory process.\(^97\)

ix) Where an authoritative exposition of law is required,

x) Where declarations in rem are against third party is needed,

xi) Where there is need for binding precedent, where issues with regard to the State’s liability or power arise,

xii) Where a declaration, extension, or abolition of social right is sought [for e.g. Abolition of slavery, bonded labour, sati, dowry etc.]

xiii) Where urgent interim orders are required,

xiv) Where there is serious imbalance in negotiating power between parties and

xv) Where there is lack of faith or lack trust or demonstrable motive to delay matters to dishonestly gain thereby and many more.

2.9 ADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION MECHANISM

Alternative dispute resolution method is not intended to supplant altogether the traditional means of resolving disputes by means of litigation.

\(^97\) Ibid at 14.
There are certain areas such as constitutional law & criminal law, in respect of which there is no substitute for court redressal mechanism.

ADR may not be appropriate for every dispute even in other areas, even if appropriate; it cannot be invoked unless both parties to a dispute are genuinely interested in a settlement. ADR mechanism may be designed to meet a wide variety of difficult goals. Some of these goals are directly related to improving the administration of justice & the settlement of particular disputes. Some, however, are related to other development objectives, of tensions & conflicts in communities. For instance, developing an efficient, consensual way to resolve land disputes may be critical to an AID mission not because of its commitment to strengthening the rule of law but Because land disputes threaten the social & economic stability of the country. Likewise, efficient dispute resolution procedures may be critical to economic development objectives where court delays or corruption inhibit foreign investment & economic restructuring.

Comparing ADR Procedure and Court Procedure\(^98\) -
Table No. 2.1
Comparing ADR Procedure and Court Procedure

<table>
<thead>
<tr>
<th>Disputants Goals</th>
<th>ADR Procedures</th>
<th>Court Procedures</th>
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<tbody>
<tr>
<td></td>
<td>Mediation Conciliation</td>
<td>Non-binding Arbitration</td>
</tr>
<tr>
<td>1.Minimize Costs</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>2.Resolve Quickly</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>3.Maintain Privacy</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>4.Maintain Relationship</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>5.Inolve Constituencies</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>6.Link Issues</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>7.Get Neutral Opinion</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>8.Set President</td>
<td>0</td>
<td>0</td>
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</tbody>
</table>

Key – 3-Highly likely to satisfy goal  2-Likely to satisfy goal  1-Unlikely to satisfy goal  0-Highly Unlikely to satisfy the goal

One above table generalize the relative advantages of different dispute resolution mechanisms ADR mechanisms has several advantages that can be summarized in following words-

1. ADR can support & complement court reform

ADR mechanism helps in the reduction of work load of the courts & thereby helps the litigants as well as judicial officers to focus attention on the cases which ought to be decided try courts as small informal systems can better reach geographically dispersed population. ADR programs can complement court reform by reducing caseloads. They can also complement court reform by increasing access to dispute resolution services for disadvantaged groups (e.g. urban neighborhood & rural centers) providing.
2. **ADR can by pass ineffective or discredited courts**

When civil courts system has so many institutional weaknesses & failures (inadequate resources, corruption, system bias) that there is no near term prospects of successful civil court of reform, ADR program may be an appropriate way to provide on alternative reform. Working with or within the existing judicial system is unlikely to be effective or receive popular support at the same time specialized ADR program focused on particular types of technical or complex disputes can be more effective & produce better settlements than courts. Since, ADR procedures permit to choose neutrals who are specialist in the subject matter of the dispute. For instance, ADR in construction environmental & patient etc. disputes. The ADR programs may also be more effective in solving ethnic conflicts, public environmental disputes or family disputes as it can create more altercative alternatives to the courts even when the courts are functioning reasonably well.

3. **ADR can increase satisfaction of disputants with outcomes**

ADR mechanism can provide a solution which is mutually acceptable & better, more expeditiously & at less cost than litigation hence. It has positive influence on disputant’s satisfaction.

4. **ADR programs can increase access to justice for disadvantaged groups**

Many poor are denied access to justice simply because they cannot afford to pay the registration & representation fees necessary to enter the formal legal system. The ADR programs way consider these people leniently as to give them justice in true sense.

5. **ADR programs can reduce delay in the resolution of disputes**

Delays are endemic in most court systems throughout the world & affect the justice system adversely. Delays in the resolution of commercial
disputes impair economic development & undermine the efficiency of the economy. Informal dispute resolution or simplified procedures for dispute resolution can significantly reduce court backlog by redirecting cases that would otherwise go to court. Since, ADR mechanisms are flexible in nature & not bound by rigours of rules of procedure of adversarial system.

6. **ADR procedure can reduce the cost of resolving dispute**

Many ADR programs are designed with a goal of reducing the cost of resolving disputes both to the disputants and to the dispute resolution system. The court system requires high costs in formal procedures and legal representation; court daily also imposes high costs on parties.

7. **ADR system can reduce the contentious issues**

The ADR system can be used to reduce the number of contentious issues between the parties, and it can be terminated at any stage by any one of the disputing parties. It helps in keeping the dispute a private matter and promotes creative and realistic business solutions. Since, the parties are in control of the ADR proceedings ADR procedures take only a day or a few days to arrive at a settlement.

8. **Failed ADR proceeding is never a waste**

The freedom of the parties to litigation is not affected by ADR proceedings. Even a failed ADR proceeding is never a waste either in terms of money or time spent on it since, it helps the parties to appreciate and understand each others case position in litigation better, on legal point of view matter.

9. **ADR procedure can prepare community leaders, increase civic engagement and create public processes to facilitate economic restructuring and other social change.**
10. ADR programs can reduce the level of tension and present conflict in a community also it helps to manage conflicts which directly impair development initiatives.

11. The harassed and overburdened judges get respite from the pressure of unchecked flow of litigation into courts

12. If judges can change their mindset, it will provide post-retirement work in abundance.

13. For lawyers, with ability to learn new techniques, mediation provides great opportunity to do professional service to society by satisfactory resolution of conflicts without sacrificing remuneration. It was for all these reasons

2.10 LIMITATIONS OF ADR

Although ADR mechanisms can play an important role in many development efforts, they are ineffective and perhaps even counterproductive, in serving some goal related to rule of law initiatives. In particular, ADR has its own limitations.

1. ADR programs do not set precedent, refine legal norms or establish broad community or national standards, nor do they promote a consistent application of legal rules :-

ADR procedures are based upon the concept of equity justice and good conscience. They seek to resolve individual disputes on a case by case basis and may resolve similar cases in different way as circumstances suggests i.e. it do not set precedent.

2. ADR programs cannot correct systematic injustice, discrimination or violations of human rights :-

ADR systems often reflect the accepted norms of society. These norms may include discrimination against certain groups and populations.
When this true ADR system may hinder efforts to change the discriminatory norms and establish new standards of group or individual rights, for instance, in India, women did not like the system [ADR] for family disputes, as the resolution of dispute is based on local woman.

3. **ADR programs do not work well in the context of extreme power imbalance between parties:**

A more powerful or wealthy party may press the weaker into accepting an unfair result, so that the settlement may appear consensual, but in fact result from coercion. For the same reason, ADR programs may not work well when one party is the government. Thus, weak party may prefer ADR to litigation in order to secure a settlement which may not reflect the merits.

4. **ADR settlements do not have any educational, punitive or deterrent effect on the population:**

Since, the ADR settlements are private in nature; it is not able to produce any public sanction or deterrence among the people at large.

5. **ADR is inappropriate in disputes of multiparty cases in which some of the parties of not participate:**

When all interested parties cannot be brought into the process, ADR may not be appropriate for multi-public or private disputes; as participation of the parties is the most essential element of ADR process for settlement of a dispute.

6. **ADR may undermine judicial reform efforts:**

In general, ADR programs reduce costs for the state, as well as for the disputants but some efforts in the nature free legal aid has also been taken by judicial systems of the different countries.
7. **The settlement through ADR might not result in a binding solution:**

Although inordinate delay is a consistent complaint with the courts of law, it is considered a preferable route because there is a possibility of obtaining an urgent ex-parte interim order from a court-compelling the opposite party to do or desist from doing some kind of act, which will be binding on the other party, which gives the concerned party scope for strengthening their interests. Whereas, ADR, process is slow as that requires the consent of the other party, and the settlement might not result in a binding solution.

8. **Consensus is the basis of jurisdiction of ADR program:**

There is an overall limit, to determine and arrive at a compromise or settlement. Compromise or settlement would be possible only when the parties are agreeable. The unwillingness of the parties will operate as a major hurdle to jurisdiction. It is basically a consensual process and jurisdiction of these programs emerges on the foundation of unwillingness of the parties.

9. **ADR programs can not resolve non-compoundable offences:**

In certain, less serious offences the victims can excuse the offenders. Such all excuse is possible on several terms including the payment of money as compensation or damages. Those offences are classified as compoundable offences, section 320 of code of criminal procedure. But non-compoundable offences are of serious nature and in such cases ADR programs are of no use.99

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10. **Unfamiliarity of process in ADR programs :-**

The unfamiliarity of process is a hampering. It is, therefore, imperative that dispute resolution procedure is incorporated into the contracts, which govern relationships between the parties.

2.11 CONCLUSION

ADR mechanism can serve as useful vehicles for promoting many rules of law and other development objectives. Properly designed ADR programs, undertaken under appropriate conditions, can support court reform, improve access to justice, increase disputer’s satisfaction with outcomes, reduce delay, and reduce the cost of resolving disputes. In addition, ADR programs can help to prepare community leaders, increase civic engagement, reduce the level of community tension and resolve conflicts which will promote peace and harmony in the society. Therefore, alternative dispute resolution is a need, both at national and international front. Quality of justice suffers when there is a disproportionate delay in deciding piles of cases. When easier way has been resorted and found then holding on to traditional concepts is not a wiser show. This technique is useful in dispensing justice effectively, which is the basic pillar of every judicial system. Alternative dispute resolution is an appreciable step if taken, with serious concern and proper management. A common man can enjoy the real justice.

*Abraham Lincoln* said,

“Discourage litigation persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the loser in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough”