SUBJECT: ALTERNATIVE DISPUTE SETTLEMENT

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SYLLABUS

UNIT-1

a. ADR: Concept and Need
b. Legal Aid:

- Concept , Dimensions and practice
- Constitutional provisions
- Legal services Authority Act,1987
- Legal Literacy Mission

UNIT-2

Techniques of ADR-1:

- Negotiation/Consultation
- Mediation
- Good offices

UNIT-3

Techniques of ADR-II

- Concilliation: nature , scope and methods
- Arbitration- Arbitration agreement/clause , jurisdiction of the arbitral tribunal
- Applicable Law: IIC, UNCITRAL,KSID
- THE Arbitration and Concilliation Act 1996

UNIT-4

Recognition and Enforcement

- Indian practice
- International practice

UNIT--1

A. Alternative dispute resolution

Alternative dispute resolution (**ADR**; known in some countries, such as Australia, **external dispute resolution**) includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party.

Despite historic resistance to ADR by many popular parties and their advocates, ADR has gained widespread acceptance among both the general public and the legal profession in recent years. In fact, some courts now require some parties to resort to ADR of some type, usually mediation, before permitting the parties' cases to be tried (indeed the European Mediation Directive (2008) expressly contemplates so-called "compulsory" mediation; this means that attendance is compulsory, not that settlement must be reached through mediation). Additionally, parties to M&A transactions are increasingly turning to ADR to resolve post-acquisition disputes.

The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute. Some of the senior judiciary in certain jurisdictions (of which England and Wales is one) are strongly in favour of this (ADR) use of mediation to settle disputes

Salient features

ADR is generally classified into at least four types: negotiation, mediation, collaborative law, and arbitration. (Sometimes a fifth type, conciliation, is included as well, but for present purposes it can be regarded as a form of mediation. See conciliation for further details.) ADR can be used alongside existing legal systems such as sharia courts within common law jurisdictions such as the UK.

ADR traditions vary somewhat by country and culture. There are significant common elements which justify a main topic, and each country or region's difference should be delegated to sub-pages.

Alternative Dispute Resolution is of two historic types. First, methods for resolving disputes outside of the official judicial mechanisms. Second, informal methods attached to or pendant to official judicial mechanisms. There are in addition free-standing and or independent methods, such as mediation programs and ombuds offices within organizations. The methods are similar, whether or not they are pendant, and generally use similar tool or skill sets, which are basically sub-sets of the skills of negotiation.

ADR includes informal tribunals, informal mediative processes, formal tribunals and formal mediative processes. The classic formal tribunal forms of ADR are arbitration (both binding and advisory or non-binding) and private judges (either sitting alone, on panels or over summary jury trials). The classic formal mediative process is referral for mediation before a court appointed mediator or mediation panel. Structured transformative mediation as used by the U.S. Postal Service is a formal process. Classic informal methods include social processes, referrals to non-formal authorities (such as a respected member of a trade or social group) and intercession. The major differences between formal and informal processes are (a) pendency to a court procedure and (b) the possession or lack of a formal structure for the application of the procedure.

For example, freeform negotiation is merely the use of the tools without any process. Negotiation within a labor arbitration setting is the use of the tools within a highly formalized and controlled setting.

Calling upon an organizational ombudsman's office is never, by itself, a formal procedure. (Calling upon an organizational ombudsman is always voluntary; by the International Ombudsman Association Standards of Practice, no one can be compelled to use an ombuds office.)

Organizational ombuds offices refer people to all conflict management options in the organization: formal and informal, rights-based and interest-based. But, in addition, in part because they have no decision-making authority, ombuds offices can, themselves, offer a wide spectrum of informal options.

This spectrum is often overlooked in contemporary discussions of "ADR." "ADR" often refers to external conflict management options that are important, but used only occasionally. An organizational ombuds office typically offers many internal options that are used in hundreds of cases a year. These options include:

- delivering respect, for example, affirming the feelings of a visitor, while staying explicitly neutral on the facts of a case,
- active listening, serving as a sounding board,
- providing and explaining information, one-on-one, for example, about policies and rules, and about the context of a concern,
- receiving vital information, one-on-one, for example, from those reporting unacceptable or illegal behavior,

- reframing issues,
- helping to develop and evaluate new options for the issues at hand,
- offering the option of referrals to other resources, to "key people" in the relevant department, and to managers and compliance offices,
- helping people help themselves to use a direct approach, for example, helping people collect and analyze their own information, helping people to draft a letter about their issues, coaching and role-playing,
- offering shuttle diplomacy, for example, helping employees and managers to think through proposals that may resolve a dispute, facilitating discussions,
- offering mediation inside the organization,
- "looking into" a problem informally,
- facilitating a generic approach to an individual problem, for example instigating or offering training on a given issue, finding ways to promulgate an existing policy,
- identifying and communicating throughout the organization about "new issues,"
- identifying and communicating about patterns of issues,
- working for systems change, for example, suggesting new policies, or procedures,
- following up with a visitor, following up on a system change recommendation. (See Rowe, Mary, Informality — The Fourth Standard of Practice, in JIOA, vol 5, no 1, (2012) pp 8–17.)

Informal referral to a co-worker known to help people work out issues is an informal procedure. Co-worker interventions are usually informal.

Conceptualizing ADR in this way makes it easy to avoid confusing tools and methods (does negotiation once a lawsuit is filed cease to be ADR? If it is a tool, then the question is the wrong question) (is mediation ADR unless a court orders it? If you look at court orders and similar things as formalism, then the answer is clear: court annexed mediation is merely a formal ADR process).

Dividing lines in ADR processes are often provider driven rather than consumer driven. Educated consumers will often choose to use many different options depending on the needs and circumstances that they face.

Finally, it is important to realize that conflict resolution is one major goal of all the ADR processes. If a process leads to resolution, it is a dispute resolution process.[5]

The salient features of each type are as follows:

1. In negotiation, participation is voluntary and there is no third party who facilitates the resolution process or imposes a resolution. (NB – a third party like a chaplain or organizational ombudsperson or social worker or a skilled friend may be coaching one or both of the parties behind the scene, a process called "Helping People Help Themselves" – see Helping People Help Themselves, in

Negotiation Journal July 1990, pp. 239–248, which includes a section on helping someone draft a letter to someone who is perceived to have wronged them.)

2. In mediation, there is a third party, a mediator, who facilitates the resolution process (and may even suggest a resolution, typically known as a "mediator's proposal"), but does *not* impose a resolution on the parties. In some countries (for example, the United Kingdom), ADR is synonymous with what is generally referred to as mediation in other countries.

3. In collaborative law or collaborative divorce, each party has an attorney who facilitates the resolution process within specifically contracted terms. The parties reach agreement with support of the attorneys (who are trained in the process) and mutually-agreed experts. No one imposes a resolution on the parties. However, the process is a formalized process that is part of the litigation and court system. Rather than being an Alternative Resolution methodology it is a litigation variant that happens to rely on ADR like attitudes and processes.

4. In arbitration, participation is typically voluntary, and there is a third party who, as a private judge, imposes a resolution. Arbitrations often occur because parties to contracts agree that any future dispute concerning the agreement will be resolved by arbitration. This is known as a 'Scott Avery Clause'. In recent years, the enforceability of arbitration clauses, particularly in the context of consumer agreements (e.g., credit card agreements), has drawn scrutiny from courts Although parties may appeal arbitration outcomes to courts, such appeals face an exacting standard of review.

Beyond the basic types of alternative dispute resolutions there are other different forms of ADR:

- Case evaluation: a non-binding process in which parties present the facts and the issues to a neutral case evaluator who advises the parties on the strengths and weaknesses of their respective positions, and assesses how the dispute is likely to be decided by a jury or other adjudicator.
- Early neutral evaluation: a process that takes place soon after a case has been filed in court. The case is referred to an expert who is asked to provide a balanced and neutral evaluation of the dispute. The evaluation of the expert can assist the parties in assessing their case and may influence them towards a settlement.
- Family group conference: a meeting between members of a family and members of their extended related group. At this meeting (or often a series of meetings) the family becomes involved in learning skills for interaction and in making a plan to stop the abuse or other ill-treatment between its members.
- Neutral fact-finding: a process where a neutral third party, selected either by the disputing parties or by the court, investigates an issue and reports or testifies in court. The neutral fact-finding process is particularly useful for resolving complex scientific and factual disputes.
- Ombuds: third party selected by an institution – for example a university, hospital, corporation or government agency – to deal with complaints by employees, clients or constituents. The Standards of Practice for Organizational Ombuds may be found at.

"Alternative" dispute resolution is usually considered to be alternative to litigation. It also can be used as a colloquialism for allowing a dispute to drop or as an alternative to violence.

In recent years there has been more discussion about taking a systems approach in order to offer different kinds of options to people who are in conflict, and to foster "**appropriate**" dispute resolution.

That is, some cases and some complaints in fact ought to go to formal grievance or to court or to the police or to a compliance officer or to a government IG. Other conflicts could be settled by the parties if they had enough support and coaching, and yet other cases need mediation or arbitration. Thus "alternative" dispute resolution usually means a method that is not the courts. "Appropriate" dispute resolution considers **all** the possible responsible options for conflict resolution that are relevant for a given issue.

ADR can increasingly be conducted online, which is known as online dispute resolution (ODR, which is mostly a buzzword and an attempt to create a distinctive product). It should be noted, however, that ODR services can be provided by government entities, and as such may form part of the litigation process. Moreover, they can be provided on a global scale, where no effective domestic remedies are available to disputing parties, as in the case of the UDRP and domain name disputes. In this respect, ODR might not satisfy the "alternative" element of ADR.

Benefits

ADR has been increasingly used internationally, both alongside and integrated formally into legal systems, in order to capitalise on the typical advantages of ADR over litigation:

- Suitability for multi-party disputes
- Flexibility of procedure - the process is determined and controlled by the parties to the dispute
- Lower costs
- Less complexity ("less is more")
- Parties choice of neutral third party (and therefore expertise in area of dispute) to direct negotiations/adjudicate
- Likelihood and speed of settlements
- Practical solutions tailored to parties' interests and needs (not rights and wants,as they may perceive them)
- Durability of agreements
- Confidentiality
- The preservation of relationships and the preservation of reputations

Modern era

Traditional people's mediation has always involved the parties remaining in contact for most or all of the mediation session. The innovation of separating the parties after (or sometimes before) a joint session and conducting the rest of the process without the parties in the same area was a major innovation and one that dramatically improved mediation's success rate.

Traditional arbitration involved heads of trade guilds or other dominant authorities settling disputes. The modern innovation was to have commercial vendors of arbitrators, often ones with little or no social or political dominance over the parties. The advantage was that such persons are much more readily available. The disadvantage is that it does not involve the community of the parties. When wool contract arbitration was conducted by senior guild officials, the arbitrator combined a seasoned expert on the subject matter with a socially dominant individual whose patronage, good will and opinion were important.

Private Judges and summary jury trials are cost- and time-saving processes that have had limited penetration due to the alternatives becoming more robust and accepted.

Latin has a number of terms for mediator that predate the Roman Empire. Any time there are formal adjudicative processes it appears that there are informal ones as well. It is probably fruitless to attempt to determine which group had mediation first.

India

Alternative dispute resolution in India is not new and it was in existence even under the previous Arbitration Act, 1940. The Arbitration and Conciliation Act, 1996 has been enacted to accommodate the harmonisation mandates of UNCITRAL Model. To streamline the Indian legal system the traditional civil law known as Code of Civil Procedure, (CPC) 1908 has also been amended and section 89 has been introduced. Section 89 (1) of CPC provides an option for the settlement of disputes outside the court. It provides that where it appears to the court that there exist elements, which may be acceptable to the parties, the court may formulate the terms of a possible settlement and refer the same for arbitration, conciliation, mediation or judicial settlement.

Due to extremely slow judicial process, there has been a big thrust on Alternate Dispute Resolution mechanisms in India. While Arbitration and Conciliation Act, 1996 is a fairly standard western approach towards ADR, the Lok Adalat system constituted under National Legal Services Authority Act, 1987 is a uniquely Indian approach.

Arbitration and Conciliation Act, 1996

Part I of this act formalizes the process of Arbitration and Part III formalizes the process of Conciliation. (Part II is about Enforcement of Foreign Awards under New York and Geneva Conventions.)

Arbitration

The process of arbitration can start only if there exists a valid Arbitration Agreement between the parties prior to the emergence of the dispute. As per Section 7, such an agreement must be in writing. The contract regarding which the dispute exists, must either contain an arbitration clause or must refer to a separate document signed by the parties containing the arbitration agreement. The existence of an arbitration agreement can also be inferred by written correspondence such as letters, telex, or telegrams which provide a record of the agreement. An exchange of statement of claim and defense in which existence of an arbitration agreement is alleged by one party and not denied by other is also considered as valid written arbitration agreement.

Any party to the dispute can start the process of appointing arbitrator and if the other party does not cooperate, the party can approach the office of Chief Justice for appointment of an arbitrator. There are only two grounds upon which a party can challenge the appointment of an arbitrator – reasonable doubt in the impartiality of the arbitrator and the lack of proper qualification of the arbitrator as required by the arbitration agreement. A sole arbitrator or a panel of arbitrators so appointed constitute the Arbitration Tribunal.

Except for some interim measures, there is very little scope for judicial intervention in the arbitration process. The arbitration tribunal has jurisdiction over its own jurisdiction. Thus, if a party wants to challenge the jurisdiction of the arbitration tribunal, it can do so only before the tribunal itself. If the tribunal rejects the request, there is little the party can do except to approach a court after the tribunal makes an award. Section 34 provides certain grounds upon which a party can appeal to the principal civil court of original jurisdiction for setting aside the award.

The period for filing an appeal for setting aside an award is over, or if such an appeal is rejected, the award is binding on the parties and is considered as a decree of the court.

Conciliation

Conciliation is a less formal form of arbitration. This process does not require an existence of any prior agreement. Any party can request the other party to appoint a conciliator. One conciliator is preferred but two or three are also allowed. In case of multiple conciliators, all must act jointly. If a party rejects an offer to conciliate, there can be no conciliation.

Parties may submit statements to the conciliator describing the general nature of the dispute and the points at issue. Each party sends a copy of the statement to the other. The conciliator may request

further details, may ask to meet the parties, or communicate with the parties orally or in writing. Parties may even submit suggestions for the settlement of the dispute to the conciliator.

When it appears to the conciliator that elements of settlement exist, he may draw up the terms of settlement and send it to the parties for their acceptance. If both the parties sign the settlement document, it shall be final and binding on both.

Note that in USA, this process is similar to Mediation. However, in India, Mediation is different from Conciliation and is a completely informal type of ADR mechanism.t

Lok Adalat

Etymologically, Lok Adalat means "people's court". India has had a long history of resolving disputes through the mediation of village elders. The current system of Lok Adalats is an improvement on that and is based on Gandhian principles. This is a non-adversarial system, whereby mock courts (called Lok Adalats) are held by the State Authority, District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee, or Taluk Legal Services Committee, periodically for exercising such jurisdiction as they thinks fit. These are usually presided by retired judge, social activists, or members of legal profession. It does not have jurisdiction on matters related to non-compoundable offences.

While in regular suits, the plaintiff is required to pay the prescribed court fee, in Lok Adalat, there is no court fee and no rigid procedural requirement (i.e. no need to follow process given by [Indian] Civil Procedure Code or Indian Evidence Act), which makes the process very fast. Parties can directly interact with the judge, which is not possible in regular courts.

Cases that are pending in regular courts can be transferred to a Lok Adalat if both the parties agree. A case can also be transferred to a Lok Adalat if one party applies to the court and the court sees some chance of settlement after giving an opportunity of being heard to the other party.

The focus in Lok Adalats is on compromise. When no compromise is reached, the matter goes back to the court. However, if a compromise is reached, an award is made and is binding on the parties. It is enforced as a decree of a civil court. An important aspect is that the award is final and cannot be appealed, not even under Article 226 of the Constitution of India [which empowers the litigants to file Writ Petition before High Courts] because it is a judgement by consent.

All proceedings of a Lok Adalat are deemed to be judicial proceedings and every Lok Adalat is deemed to be a Civil Court.

Permanent Lok Adalat for public utility services

In order to get over the major drawback in the existing scheme of organisation of Lok Adalats under Chapter VI of the Legal Services Authorities Act 1987, in which if the parties do not arrive at any compromise or settlement, the unsettled case is either returned to the back to the court or the parties are advised to seek remedy in a court of law, which causes unnecessary delay in dispensation of justice, Chapter VI A was introduced in the Legal Services Authorities Act, 1987, by Act No.37/2002 with effect from 11-06-2002 providing for a Permanent Lok Adalat to deal with pre-litigation, conciliation and settlement of disputes relating to Public Utility Services, as defined u/sec.22 A of the Legal Services Authorities Act, 1987, at pre-litigation stage itself, which would result in reducing the work load of the regular courts to a great extent. Permanent Lok Adalat for Public Utility Services, Hyderabad, India

The Lok Adalat is presided over by a sitting or retired judicial officer as the chairman, with two other members, usually a lawyer and a social worker. There is no court fee. If the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the Lok Adalat. The procedural laws, and the Evidence Act are not strictly followed while assessing the merits of the claim by the Lok Adalat.

Main condition of the Lok Adalat is that both parties in dispute should agree for settlement. The decision of the Lok Adalat is binding on the parties to the dispute and its order is capable of execution through legal process. No appeal lies against the order of the Lok Adalat.

Lok Adalat is very effective in settlement of money claims. Disputes like partition suits, damages and matrimonial cases can also be easily settled before Lok Adalat as the scope for compromise through an approach of give and take is high in these cases.

Lok Adalat is a boon to the litigant public, where they can get their disputes settled fast and free of cost.

B. LEGAL AID :

CONCEPT,DIMENSIONS AND CONSTITUTIONAL PROVISIONS:

"Legal Aid scheme was first introduced by Justice P.N. Bhagwati under the Legal Aid Committee formed in 1971. ing to him, the legal aid means providing an arrangement in the society so that the missionary of administration of becomes easily accessible and is not out of reach of those who have to resort to it for enforcement of its given to y law" the poor and illiterate should be able to approach the courts and their ignorance and poverty should not be ediment in the way of their obtaining justice from the courts. Legal aid should be available to the poor and e. Legal aid as defined, deals with legal aid to poor, illiterate, who don't have access to courts. One need not be a to seek aid by means of legal aid. Legal aid is available to anybody on the road.

39A of the Constitution of India provides that State shall secure that the operation of the legal system promotes on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes or other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or isability. Articles 14 and 22(1) also make it obligatory for the State to ensure equality before law and a legal which promotes justice on a basis of equal opportunity to all. Legal aid strives to ensure that constitutional pledge led in its letter and spirit and equal justice is made available to the poor, downtrodden and weaker sections of the }

liest Legal Aid movement appears to be of the year 1851 when some enactment was introduced in France for ng legal assistance to the indigent. In Britain, the history of the organised efforts on the part of the State to provide rvices to the poor and needy dates back to 1944, when Lord Chancellor, Viscount Simon appointed Rushcliffe ttee to enquire about the facilities existing in England and Wales for giving legal advice to the poor and to make nendations as appear to be desirable for ensuring that persons in need of legal advice are provided the same by the ince 1952, the Govt. of India also started addressing to the question of legal aid for the poor in various conferences Ministers and Law Commissions. In 1960, some guidelines were drawn by the Govt. for legal aid schemes.

rent states legal aid schemes were floated through Legal Aid Boards, Societies and Law Departments. In 1980, a ttee at the national level was constituted to oversee and supervise legal aid programmes throughout the country ne Chairmanship of Hon. Mr. Justice P.N. Bhagwati then a Judge of the Supreme Court of India. This Committee o be known as CILAS (Committee for Implementing Legal Aid Schemes) and started monitoring legal aid es throughout the country. Expert committees constituted, from 1950 onwards, to advise governments on providing d to the poor have been unanimous that the formal legal system is unsuited to the needs of the poor. The 1977 of the committee of Justices Krishna Iyer and P.N. Bhagwati, both of the Supreme Court, drew up a detailed which envisaged public interest litigation (PIL) as a major tool in bringing about both institutional and law reform hile it enabled easy access to the judicial system for the poor. Their report, as those of the previous committees, nored. This explained partly the impatience of these two judges, in the post-emergency phase, in making the on appear responsive to the needs of the population that had stood distanced from it. The two judges played a ole in spearheading the PIL jurisdiction.

roduction of Lok Adalats added a new chapter to the justice dispensation system of this country and succeeded in ng a supplementary forum to the litigants for conciliatory settlement of their disputes. In 1987 Legal Services ties Act was enacted to give a statutory base to legal aid programmes throughout the country on a uniform pattern. ct was finally enforced on 9th of November, 1995 after certain amendments were introduced therein by the ment Act of 1994. Hon. Mr. Justice R.N. Mishra the then Chief Justice of India played a key role in the ment of the Act.

National Legal Services Authority was constituted on 5th December, 1995. His Lordship Hon. Dr. Justice A.S. Anand, Judge, Supreme Court of India took over as the Executive Chairman of National Legal Services Authority on 17the July, 1997. Soon after assuming the office, His Lordship initiated steps for making the National Legal

--LEGAL LITERACY MISSION

About 70% of the people are living in rural areas and most of them are illiterate and even more than that percentage of the people are not aware of the rights conferred upon them by law. Even substantial number of the literate people living in the cities and villages do not know what are their rights and entitlements under the law. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits, from which the people suffer in the state. The miserable condition in which the people find themselves can be alleviated to some extent by creating legal awareness amongst the people.
Following steps have been taken by Haryana State Legal Services Authority for Legal Awareness Campaign in the State of Haryana :-

Legal Literacy/Legal Awareness Camps/Seminars

On the direction of this Authority, all the District Legal Services Authorities are organizing Legal Literacy/Legal Awareness Camps in the remote rural areas in the State of Haryana at least once in a week i.e. on Sunday/ holidays, on the topics concerning SC/ST, Women and children and general public, so that the common man may be made aware about his legal rights.

Implementation of Legal Literacy Missions

In order to achieve the objective of spreading Legal Literacy, Haryana State Legal Services Authority has implemented special Legal Literacy Missions.

Prisoners Legal Literacy Mission (PLLM)

Haryana State Legal Services Authority is implementing Prisoners Legal Literacy Mission. The main objective of the Prisoners Legal Literacy Mission (PLLM) is to provide access to justice and to eradicate the evils of exploitation, inequality and suffering with the lamp of literacy. The project envisions that legal literacy will reform the mindset of the prisoners and help them become responsible members of the society. The objectives of the mission are to target the prisons and jails in a systematic manner and to hold Legal Awareness Camps in prisons, prepare and publish Legal Literacy Literature in local language and to circulate the same amongst the prisoners; to organize skits and audio/visual presentations for the prisoners to educate them about their rights; to co-ordinate with the prisons authorities to ensure that freedoms that belong to the prisoners are made available to them and to help improve prison conditions by setting up low cost programmes such as crafts, weaving, workshops etc. which are vacation oriented and self-financed. The project is being implemented and monitored at the district level by the District & Sessions Judge-cum-Chairman of the District Legal Services Authority through Co-ordination Committee and Haryana State Legal Services Authority is periodically reviewing the progress of the mission.

Legal Literacy Mission for empowerment of underprivileged (LLUP)

Haryana State Legal Services Authority has also launched Legal Literacy Mission for empowerment of underprivileged (LLUP). LLUP envisages creating awareness among neglected children, who are forced to take shelter in orphanage centres, helpless girls and women who are forced to take shelter in Nari Niketan or other such institutions, neglected old age people, disabled, mentally ill persons living under helpless situation under the care or control of government-run or non-government-run organizations. Such people have also guaranteed constitutional right to food, clothing and shelter and right to equality and equal access to justice and legal aid for enforcement of the said rights. The Haryana State Legal Services Authority through Legal Aid Panel Advocates or otherwise is coordinating with all such organizations running such homes with a view to ensure the fulfillment of constitutional rights of such persons.

Publicity through print and electronic Media

Haryana State Legal Service Authority through the District Legal Services Authorities and Sub-Divisional Legal Services Committees distributes books, pamphlets, folders amongst the masses and displayed flex banners/calendars/canopies on the different occasions so that they may be made aware about their legal rights and availability of free legal services under the Legal Services Authorities Act, 1987. Wide publicity is also given in the leading newspapers in the State of Haryana and on cable TV and Doordarshan.

Publicity regarding Lok Adalats, Legal Aid and Legal Literacy Programmes in the State of Haryana is also made by the Public Relations and Cultural Affairs Department, Haryana through electronic and print media by organizing skits and nukkar-nataks, displaying the documentary films "Savera", "Beti" and "Nasha Khori Se Nasha Mukti Ki Aur" through the local cable network and mobile vans of the Department.

Recently, on 9th November, 2011 i.e. Legal Services Day, Hon'ble Executive Chairman of this Authority attended a talk show on TV, highlighting activities of HALSA and explained the various schemes being run by HALSA for downtrodden people which was telecasted in all over Haryana through Doordarshan Kender, Hissar. Similar talk show was broadcasted on All India Radio, Chandiagarh.

PUBLICATION BY HARYANA STATE LEGAL SERVICES AUTHORITY

Exhibiting documentary films through EDUSAT:

The recent advances in telecommunication are also being utilized for achieving the object of spreading legal awareness. Documentary films on socially relevant issues, such as "Beti" (dealing with evils of female foeticide), "Nashakhori Sey Nashamukti Ki Aur" (dealing with evil of drug abuse) and "Savera" (dealing with legal services and Lok Adalats) have been shown to the students through EDUSAT.

STEPS TAKEN FOR LEGAL LITERACY CLASSES FOR WOMEN

Haryana State Legal Services Authority has requested all the Secretaries, District Legal Services Authorities, Director, Social Justice and Empowerment, Director, Women and Child Development Departments, Haryana to organize legal literacy classes for women in small groups like neighborhood groups(NHG) and self-help groups(SHG) with the assistance of District Child Welfare Officers/ District Welfare Officers/Protection Officers and distribute the books published by this Authority on the topics of social and legal issues concerning women. A set of books has been sent to them with the request to get published sufficient number of theses books for distribution to the women who attend these classes. In this regard legal literacy classes for women are organizing by the District Legal Services Authorities.

STEPS TAKEN FOR STRENGTHENING AND TRAINING OF LEGAL AID LAWYERS.

Workshop for Training of the Empanelled Advocates of District Legal Services Authorities

The advocates were sensitized regarding the need for spreading legal literacy especially amongst the under privileged and regarding need to inform the weaker sections of the society about their rights and also about the mode for enforcing those rights. It was emphasized that HSLSA should become a household word. Everyone should know about it, and should rely upon it. The advocates were also asked to address the Legal Literacy Clubs set up in the schools and colleges, on the topics given in the list prepared for Legal Literacy Camps.

The Field Officer, Social Welfare Office, Protection Officers, Project Officers, MGNREGA also attended the Workshop. The Protection Officer addressed this Workshop on the provisions of 'Protection of Women from Domestic Violence Act, 2005'and shared her experiences while working as a Protection Officer. The Social Welfare Officer disclosed about the various welfare schemes of the Haryana Government, regarding compensation in cases of deaths and injuries from hit and run motor vehicle accidents as well as deaths due to snake bites etc. and also explained the Rajiv Gandhi Parivar Bima Yojna and Rashtriya Parivar Yojna.

Front Office

This Authority vide letter No.6524-6544 dated 18.5.2010 forwarded the Scheme for Free and Competent Legal Services – 2010 to all the District & Sessions Judges/Additional District & Sessions Judge(I)-cum-Chairmen, District Legal Services Authorities in the State of Haryana for taking appropriate action at the earliest. Again this Authority vide letter No.6028-6048 dated 26.5.2011 requested all the District & Sessions Judges/Additional District & Sessions Judge(I)-cum-Chairmen, District Legal Services Authorities in the State of Haryana to intimate this Authority whether the "Front Office" has been established by their District. They were also requested to send date wise schedule of Advocate/Retainers manning "Front Office". In response thereto Front Office has been set up by 9 District Legal Services Authorities i.e. Faridabad, Fatehabad, Jhajjar, Kaithal, Karnal, Palwal, Panipat, Narnaul, Rewari and Rohtak. There are 21 Districts in

Haryana and DLSAs of other districts have been requested to set up Front Office at the earliest under intimation to this Authority.

Panel of Lawyers

All the District Legal Services Authorities and Sub-Division Legal Committees have prepared panel of Lawyers as per Regulation 8 of the National Legal Services Authority (Free Competent Legal Services) Regulations, 2010.

Legal Practitioners to be designated as Retainers

As per Regulation 8 of the National Legal Services Authority (Free Competent Legal Services) Regulations, 2010, Haryana State Legal Services Authority has designated ten empanelled advocates of DLSA/five empanelled advocates of SDLSC as Retainer on rotation basis in each District and in each Sub- Division of Haryana. The Retainers are available on rotation basis in the Front Office established in the Court Complexes during office hours for giving free legal aid and advice to any person who approach them with any legal problem.

Scrutinizing Committee

As per Regulation 7(2) of the National Legal Services Authority (Free Competent Legal Services) Regulations, 2010, Haryana State Legal Services Authority has constituted a Scrutinizing Committee in each District and in each Sub-Division of Haryana to scrutinize and evaluate the applications for Legal Services under the said scheme.

Monitoring Committee

As per Regulation 10(3) of the National Legal Services Authority (Free Competent Legal Services) Regulations, 2010, Haryana State Legal Services Authority has constituted a Monitoring Committee in each District and in each Sub-Division of Haryana for close monitoring of the court based legal services rendered and the progress of the cases in legal aid matters.

B) Haryana State Legal Services Authority has launched Legal Literacy Mission for empowerment of underprivileged (LLUP). LLUP envisages creating awareness about their rights among neglected children, who are forced to take shelter in orphanage centers, helpless girls and women who are forced to take shelter in Nari Niketan or other such institutions, neglected old age people, disabled, mentally ill persons living under helpless situation under the care or control of government-run or non-government-run organizations.

UNIT-2

TECHNIQUES OF ADR-I

NEGOTIATION

Negotiation can take a wide variety of forms, from a trained negotiator acting on behalf of a particular organization or position in a formal setting, to an informal negotiation between friends. Negotiation can be contrasted with mediation, where a neutral third party listens to each side's arguments and attempts to help craft an agreement between the parties.[1] It can also be compared with arbitration, which resembles a legal proceeding. In arbitration, both sides make an argument as to the merits of their case and the arbitrator decides the outcome. This negotiation is also sometimes called positional or hard-bargaining negotiation.

Negotiation theorists generally distinguish between two types of negotiation. Different theorists use different labels for the two general types and distinguish them in different ways.

One very common distinction concerns the distribution of gains (distributive versus integrative models):[1]

Distributive negotiation

Distributive negotiation is also sometimes called positional or hard-bargaining negotiation. It tends to approach negotiation on the model of haggling in a market. In a distributive negotiation, each side often adopts an extreme position, knowing that it will not be accepted, and then employs a combination of guile, bluffing, and brinkmanship in order to cede as little as possible before reaching a deal. Distributive bargainers conceive of negotiation as a process of distributing a fixed amount of value. The term distributive implies that there is a finite amount of the thing being distributed or divided among the people involved. Sometimes this type of negotiation is referred to as the distribution of a "fixed pie." There is only so much to go around, but the proportion to be distributed is variable. Distributive negotiation is also sometimes called *win-lose* because of the assumption that one person's gain results in another person's loss. A distributive negotiation often involves people who have never had a previous interactive relationship, nor are they likely to do so again in the near future. Simple everyday examples would be buying a car or a house.

Integrative negotiation

Integrative negotiation is also sometimes called interest-based or principled negotiation. It is a set of techniques that attempts to improve the quality and likelihood of negotiated agreement by

providing an alternative to traditional distributive negotiation techniques. While distributive negotiation assumes there is a fixed amount of value (a "fixed pie") to be divided between the parties, integrative negotiation often attempts to create value in the course of the negotiation ("expand the pie"). It focuses on the underlying interests of the parties rather than their arbitrary starting positions, approaches negotiation as a shared problem rather than a personalized battle, and insists upon adherence to objective, principled criteria as the basis for agreement.[3]

Integrative negotiation often involves a higher degree of trust and the forming of a relationship. It can also involve creative problem-solving that aims to achieve mutual gains. It is also sometimes called *win-win* negotiation

Tactics

There are many different ways to categorize the essential elements of negotiation.

One view of negotiation involves three basic elements: *process*, *behavior* and *substance*. The process refers to how the parties negotiate: the context of the negotiations, the parties to the negotiations, the tactics used by the parties, and the sequence and stages in which all of these play out. Behavior refers to the relationships among these parties, the communication between them and the styles they adopt. The substance refers to what the parties negotiate over: the agenda, the issues (positions and - more helpfully - interests), the options, and the agreement(s) reached at the endAnother view of negotiation comprises four elements: *strategy*, *process*, *tools*, and *tactics*. Strategy comprises the top level goals - typically including relationship and the final outcome. Processes and tools include the steps that will be followed and the roles taken in both preparing for and negotiating with the other parties. Tactics include more detailed statements and actions and responses to others' statements and actions. Some add to this *persuasion and influence*, asserting that these have become integral to modern day negotiation success, and so should not be omitted

Adversary or partner

The two basically different approaches to negotiating will require different tactics. In the distributive approach each negotiator is battling for the largest possible piece of the pie, so it may be quite appropriate - within certain limits - to regard the other side more as an adversary than a partner and to take a somewhat harder line. This would however be less appropriate if the idea were to hammer out an arrangement that is in the best interest of both sides. A good agreement is not one with maximum gain, but optimum gain. This does not by any means suggest that we should give up our own advantage for nothing. But a cooperative attitude will regularly pay dividends. What is gained is not at the expense of the other, but with him.

Employing an advocate

A skilled negotiator may serve as an advocate for one party to the negotiation. The advocate attempts to obtain the most favorable outcomes possible for that party. In this process the negotiator attempts to determine the minimum outcome(s) the other party is (or parties are) willing to accept, then adjusts their demands accordingly. A "successful" negotiation in the advocacy approach is when the negotiator is able to obtain all or most of the outcomes their party desires, but without driving the other party to permanently break off negotiations, unless the best alternative to a negotiated agreement (BATNA) is acceptable.

Another negotiation tactic is bad guy/good guy. Bad guy/good guy is when one negotiator acts as a bad guy by using anger and threats. The other negotiator acts as a good guy by being considerate and understanding. The good guy blames the bad guy for all the difficulties while trying to get concessions and agreement from the opponent.

Perspective taking for integrative negotiation

Perspective taking can be helpful for two reasons: that it can help self-centered negotiators to seek mutually beneficial solutions, and it increases the likelihood of logrolling (when a favor is traded for another i.e. quid pro quo). Social motivation can increase the chances of a party conceding to a negotiation. While concession is mandatory for negotiations, research shows that people who concede more quickly, are less likely to explore all integrative and mutually beneficial solutions. Therefore, conceding reduces the chance of an integrative negotiation.

Negotiation styles

Kenneth W. Thomas identified 5 styles/responses to negotiation These five strategies have been frequently described in the literature and are based on the dual-concern model. The dual concern model of conflict resolution is a perspective that assumes individuals' preferred method of dealing with conflict is based on two themes or dimensions A concern for self (i.e. assertiveness), and

1. A concern for others (i.e. empathy).

Based on this model, individuals balance the concern for personal needs and interests with the needs and interests of others. The following five styles can be used based on individuals' preferences depending on their pro-self or pro-social goals. These styles can change over time, and individuals can have strong dispositions towards numerous styles. 1. Accommodating: Individuals who enjoy solving the other party's problems and preserving personal relationships. Accommodators are sensitive to the emotional states, body language, and verbal signals of the other parties. They can, however, feel taken advantage of in situations when the other party

places little emphasis on the relationship. 2. Avoiding: Individuals who do not like to negotiate and don't do it unless warranted. When negotiating, avoiders tend to defer and dodge the confrontational aspects of negotiating; however, they may be perceived as tactful and diplomatic. 3. Collaborating: Individuals who enjoy negotiations that involve solving tough problems in creative ways. Collaborators are good at using negotiations to understand the concerns and interests of the other parties. They can, however, create problems by transforming simple situations into more complex ones. 4. Competing: Individuals who enjoy negotiations because they present an opportunity to win something. Competitive negotiators have strong instincts for all aspects of negotiating and are often strategic. Because their style can dominate the bargaining process, competitive negotiators often neglect the importance of relationships. 5. Compromising: Individuals who are eager to close the deal by doing what is fair and equal for all parties involved in the negotiation. Compromisers can be useful when there is limited time to complete the deal; however, compromisers often unnecessarily rush the negotiation process and make concessions too quickly.

Types of negotiators

Three basic kinds of negotiators have been identified by researchers involved in The Harvard Negotiation Project. These types of negotiators are: **Soft bargainers**, **hard bargainers**, and **principled bargainers**.

- **Soft**. These people see negotiation as too close to competition, so they choose a gentle style of bargaining. The offers they make are not in their best interests, they yield to others' demands, avoid confrontation, and they maintain good relations with fellow negotiators. Their perception of others is one of friendship, and their goal is agreement. They do not separate the people from the problem, but are soft on both. They avoid contests of wills and will insist on agreement, offering solutions and easily trusting others and changing their opinions.

- **Hard**. These people use contentious strategies to influence, utilizing phrases such as "this is my final offer" and "take it or leave it." They make threats, are distrustful of others, insist on their position, and apply pressure to negotiate. They see others as adversaries and their ultimate goal is victory. Additionally, they will search for one single answer, and insist you agree on it. They do not separate the people from the problem (as with soft bargainers), but they are hard on both the people involved and the problem.

- **Principled**. Individuals who bargain this way seek integrative solutions, and do so by sidestepping commitment to specific positions. They focus on the problem rather than the intentions, motives, and needs of the people involved. They separate the people from the problem, explore interests, avoid bottom lines, and reach results based on standards (which are independent of personal will). They base their choices on objective criteria

rather than power, pressure, self-interest, or an arbitrary decisional procedure. These criteria may be drawn from moral standards, principles of fairness, professional standards, tradition, and so on.

Researchers from The Harvard Negotiation Project recommend that negotiators explore a number of alternatives to the problems they are facing in order to come to the best overall conclusion/solution, but this is often not the case (as when you may be dealing with an individual utilizing soft or hard bargaining tactics) (Forsyth, 2010).

Bad faith negotiation

When a party pretends to negotiate, but secretly has no intention of compromising, the party is considered to be negotiating in bad faith. Bad faith is a concept in negotiation theory whereby parties pretend to reason to reach settlement, but have no intention to do so, for example, one political party may pretend to negotiate, with no intention to compromise, for political effect.

In international relations and political psychology

Bad faith in political science and political psychology refers to negotiating strategies in which there is no real intention to reach compromise, or a model of information processing. The "inherent bad faith model" of information processing is a theory in political psychology that was first put forth by Ole Holsti to explain the relationship between John Foster Dulles' beliefs and his model of information processing. t is the most widely studied model of one's opponent. A state is presumed to be implacably hostile, and contra-indicators of this are ignored. They are dismissed as propaganda ploys or signs of weakness. Examples are John Foster Dulles' position regarding the Soviet Union, or Hamas's position on the state of Israel.

Problems with laboratory studies

Negotiation is a rather complex interaction. Capturing all its complexity is a very difficult task, let alone isolating and controlling only certain aspects of it. For this reason most negotiation studies are done under laboratory conditions, and focus only on some aspects. Although lab studies have their advantages, they do have major drawbacks when studying emotions:

- Emotions in lab studies are usually manipulated and are therefore relatively 'cold' (not intense). Although those 'cold' emotions might be enough to show effects, they are qualitatively different from the 'hot' emotions often experienced during negotiations. In real life there is self-selection to which negotiation one gets into, which affects the emotional commitment, motivation and interests. However this is not the case in lab

studies. Lab studies tend to focus on relatively few well defined emotions. Real life scenarios provoke a much wider scale of emotions. Coding the emotions has a double catch: if done by a third side, some emotions might not be detected as the negotiator sublimates them for strategic reasons. Self-report measures might overcome this, but they are usually filled only before or after the process, and if filled during the process might interfere with it

Barriers

- Lack of trust
- Informational vacuums and negotiator's dilemma
- Structural impediments
- Spoilers
- Cultural and gender differences
- Communication problems
- The power of dialogue

- **Tactics**

Tactics are always an important part of the negotiating process. But tactics don't often jump up and down shouting "Here I am, look at me." If they did, the other side would see right through them and they would not be effective. More often than not they are subtle, difficult to identify and used for multiple purposes. Tactics are more frequently used in distributive negotiations and when the focus in on taking as much value off the table as possible. Many negotiation tactics exist. Below are a few commonly used tactics.

Auction: The bidding process is designed to create competition. When multiple parties want the same thing, pit them against one another. When people know that they may lose out on something, they will want it even more. Not only do they want the thing that is being bid on, they also want to win, just to win. Taking advantage of someone's competitive nature can drive up the price.

Brinksmanship: One party aggressively pursues a set of terms to the point at which the other negotiating party must either agree or walk away. Brinkmanship is a type of "hard nut" approach to bargaining in which one party pushes the other party to the "brink" or edge of what that party is willing to accommodate. Successful brinksmanship convinces the other party they have no choice but to accept the offer and there is no acceptable alternative to the proposed agreement.[37]

Bogey: Negotiators use the bogey tactic to pretend that an issue of little or no importance to him or her is very important Then, later in the negotiation, the issue can be traded for a major concession of actual importance.

Chicken: Negotiators propose extreme measures, often bluffs, to force the other party to chicken out and give them what they want. This tactic can be dangerous when parties are unwilling to back down and go through with the extreme measure.

Defence in Depth: Several layers of decision-making authority is used to allow further concessions each time the agreement goes through a different level of authority In other words, each time the offer goes to a decision maker, that decision maker asks to add another concession in order to close the deal.

Deadlines: Give the other party a deadline forcing them to make a decision. This method uses time to apply pressure to the other party. Deadlines given can be actual or artificial.

Good Guy/Bad Guy: The good guy/bad guy approach is typically used in team negotiations where one member of the team makes extreme or unreasonable demands, and the other offers a more rational approach This tactic is named after a police interrogation technique often portrayed in the media. The "good guy" will appear more reasonable and understanding, and therefore, easier to work with. In essence, it is using the law of relativity to attract cooperation. The good guy will appear more agreeable relative to the "bad guy." This tactic is easy to spot because of its frequent use.

Highball/Lowball: Depending on whether selling or buying, sellers or buyers use a ridiculously high, or ridiculously low opening offer that will never be achieved. The theory is that the extreme offer will cause the other party to reevaluate his or her own opening offer and move close to the resistance point (as far as you are willing to go to reach an agreement Another advantage is that the person giving the extreme demand appears more flexible he or she makes concessions toward a more reasonable outcome. A danger of this tactic is that the opposite party may think negotiating is a waste of time.

The Nibble: Nibbling is asking for proportionally small concessions that haven't been discussed previously just before closing the deal. This method takes advantage of the other party's desire to close by adding "just one more thing."

Snow Job: Negotiators overwhelm the other party with so much information that he or she has difficulty determining which facts are important, and which facts are diversions.[43] Negotiators may also use technical language or jargon to mask a simple answer to a question asked by a non-expert.

MEDIATION

Mediation is the attempt to help parties in a disagreement to hear one another, to minimise the harm that can come from disagreement (e.g. hostility or 'demonising' of the other parties) to maximize any area of agreement, and to find a way of preventing the areas of disagreement from interfering with the process of seeking a compromise or mutually agreed outcome.

Mediation, as used in law, is a form of alternative dispute resolution (ADR), a way of resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediator, assists the parties to negotiate a settlement. Disputants may mediate disputes in a variety of domains, such as commercial, legal, diplomatic, workplace, community and family matters.

The term "mediation" broadly refers to any instance in which a third party helps others reach agreement. More specifically, mediation has a structure, timetable and dynamics that "ordinary" negotiation lacks. The process is private and confidential, possibly enforced by law. Participation is typically voluntary. The mediator acts as a neutral third party and facilitates rather than directs the process.

Mediators use various techniques to open, or improve, dialogue and empathy between disputants, aiming to help the parties reach an agreement. Much depends on the mediator's skill and training. As the practice gained popularity, training programs, certifications and licensing followed, producing trained, professional mediators committed to the discipline.

The benefits of mediation include:

Cost

While a mediator may charge a fee comparable to that of an attorney, the mediation process generally takes much less time than moving a case through standard legal channels. While a case in the hands of a lawyer or a court may take months or years to resolve, mediation usually achieves a resolution in a matter of hours. Taking less time means expending less money on hourly fees and costs.

Confidentiality

While court hearings are public, mediation remains strictly confidential. No one but the parties to the dispute and the mediator or mediators know what happened. Confidentiality in mediation has such importance that in most cases the legal system cannot force a mediator to testify in court as to the content or progress of mediation. Many mediators destroy their notes taken during a mediation once that mediation has finished. The only exceptions to such strict confidentiality usually involve child abuse or actual or threatened criminal acts.

Control

Mediation increases the control the parties have over the resolution. In a court case, the parties obtain a resolution, but control resides with the judge or jury. Often, a judge or jury cannot legally provide solutions that emerge in mediation. Thus, mediation is more likely to produce a result that is mutually agreeable for the parties.

Compliance

Because the result is attained by the parties working together and is mutually agreeable, compliance with the mediated agreement is usually high. This further reduces costs, because the parties do not have to employ an attorney to force compliance with the agreement. The mediated agreement is, however, fully enforceable in a court of law.

Mutuality

Parties to a mediation are typically ready to work mutually toward a resolution. In most circumstances the mere fact that parties are willing to mediate means that they are ready to "move" their position. The parties thus are more amenable to understanding the other party's side and work on underlying issues to the dispute. This has the added benefit of often preserving the relationship the parties had before the dispute.

Support

Mediators are trained in working with difficult situations. The mediator acts as a neutral facilitator and guides the parties through the process. The mediator helps the parties think "outside of the box" for possible solutions to the dispute, broadening the range of possible solutions.

Workplace matters

The implementation of human resource management (HRM) policies and practices has evolved to focus on the individual worker, and rejects all other third parties such as unions and AIRC. HRM together with the political and economic changes undertaken by Australia's Howard government created an environment where private ADR can be fostered in the workplace

The decline of unionism and the rise of the individual encouraged the growth of mediation. This is demonstrated in the industries with the lowest unionization rates such as in the private business sector having the greatest growth of mediation. The 2006 Work Choices Act made further legislative changes to deregulate industrial relations. A key element of the new changes was to weaken the AIRC by encouraging competition with private mediation.

A great variety of disputes occur in the workplace, including disputes between staff members, allegations of harassment, contractual disputes and workers compensation claims At large, workplace disputes are between people who have an ongoing working relationship within a closed system, which indicate that mediation or a workplace investigation would be appropriate as dispute resolution processes. However the complexity of relationships, involving hierarchy, job security and competitiveness can complicate mediation.

Party-Directed Mediation (PDM) is an emerging mediation approach particularly suited for disputes between co-workers, colleagues or peers, especially deep-seated interpersonal conflict, multicultural or multiethnic disputes. The mediator listens to each party separately in a pre-caucus or pre-mediation before ever bringing them into a joint session. Part of the pre-caucus also includes coaching and role plays. The idea is that the parties learn how to converse directly with their adversary in the joint session. Some unique challenges arise when organizational disputes involve supervisors and subordinates. The Negotiated Performance Appraisal (NPA) is a tool for improving communication between supervisors and subordinates and is particularly useful as an alternate mediation model because it preserves the hierarchical power of supervisors while encouraging dialogue and dealing with differences in opinion.

Community mediation

Disputes involving neighbors often have no official resolution mechanism. Community mediation centers generally focus on neighborhood conflict, with trained local volunteers serving as mediators. Such organizations often serve populations that cannot afford to utilize the courts or professional ADR-providers. Community programs typically provide mediation for disputes between landlords and tenants, members of homeowners associations and small businesses and consumers. Many community programs offer their services for free or at a nominal fee.

Experimental community mediation programs using volunteer mediators began in the early 1970s in several major U.S. cities. These proved to be so successful that hundreds of programs were founded throughout the country in the following two decades. In some jurisdictions, such as California, the parties have the option of making their agreement enforceable in court.

Peer Mediation

A peer mediator is one who resembles the disputants, such as being of similar age, attending the same school or having similar status in a business. Purportedly, peers can better relate to the disputants than an outsider

Peer mediation promotes social cohesion and aids development of protective factors that create positive school climates The National Healthy School Standard (Department for Education and Skills, 2004) highlighted the significance of this approach to reducing bullying and promoting pupil achievement Schools adopting this process recruit and train interested students to prepare them.

Peace Pals is an empirically validated peer mediation program. was studied over a 5-year period and revealed several positive outcomes including a reduction in elementary school violence and enhanced social skills, while creating a more positive, peaceful school climate. Peer mediation helped reduce crime in schools, saved counselor and administrator time, enhanced self-esteem,

improved attendance and encouraged development of leadership and problem-solving skills among students. Such conflict resolution programs increased in U.S. schools 40% between 1991 and 1999

Commercial disputes

Mediation was first applied to business and commerce and this domain remains the most common application, as measured by number of mediators and the total exchanged value.[The result of business mediation is typically a bilateral contract.

Commercial mediation includes work in finance, insurance, ship-brokering, procurement and real estate. In some areas, mediators have specialized designations and typically operate under special laws. Generally, mediators cannot themselves practice commerce in markets for goods in which they work as mediators.

Procurement mediation comprises disputes between a public body and a private body. In common law jurisdictions only regulatory stipulations on creation of supply contracts that derive from the fields of State Aids (EU Law and domestic application) or general administrative guidelines extend ordinary laws of commerce. The general law of contract applies in the UK accordingly. Procurement mediation occurs in circumstances after creation of the contract where a dispute arises in regard to the performance or payments. A Procurement mediator in the UK may choose to specialise in this type of contract or a public body may appoint an individual to a specific mediation panel.

Process

Roles

Mediator

The mediator's primary role is to act as a neutral third party who facilitates discussions between the parties In addition, the mediator can contribute to the process ensuring that all necessary preparations are complete

Finally, the mediator should restrict pressure, aggression and intimidation, demonstrate how to communicate through employing good speaking and listening skills, and paying attention to non-verbal messages and other signals emanating from the context of the mediation and possibly contributing expertise and experience. The mediator should direct the parties to focus on issues and stay away from personal attacks.

Parties

The role of the parties varies according to their motivations and skills, the role of legal advisers, the model of mediation, the style of mediator and the culture in which the mediation takes place. Legal requirements may also affect their roles. Party-Directed Mediation (PDM) is an emerging approach involving a pre-caucus between the mediator and each of the parties before going into the joint session. The idea is to help the parties improve their interpersonal negotiation skills so that in the joint session they can address each other with little mediator interference.

One of the general requirements for successful mediation is that those representing the respective parties have full authority to negotiate and settle the dispute. If this is not the case, then there is what Spencer and Brogan refer to as the "empty chair" phenomenon, that is, the person who ought to be discussing the problem is simply not present.

Preparation

The parties' first role is to consent to mediation, possibly before preparatory activities commence. Parties then prepare in much the same way they would for other varieties of negotiations. Parties may provide position statements, valuation reports and risk assessment analysis. The mediator may supervise/facilitate their preparation and may require certain preparations.

Disclosure

Agreements to mediate, mediation rules, and court-based referral orders may have disclosure requirements. Mediators may have express or implied powers to direct parties to produce documents, reports and other material. In court-referred mediations parties usually exchange with each other all material which would be available through discovery or disclosure rules were the matter to proceed to hearing, including witness statements, valuations and statement accounts.

Participation

Mediation requires direct input from the parties. Parties must attend and participate in the mediation meeting. Some mediation rules require parties to attend in person. Participation at one stage may compensate for absence at another stage.

Preparation

Choose an appropriate mediator, considering experience, skills, credibility, cost, etc. The criteria for mediator competence is under dispute. Competence certainly includes the ability to remain neutral and to move parties though various impasse-points in a dispute. The dispute is over

whether expertise in the subject matter of the dispute should be considered or is actually detrimental to the mediator's objectivity.

Preparatory steps for mediation can vary according to legal and other requirements, not least gaining the willingness of the parties to participate. In some court-connected mediation programs, courts require disputants to prepare for mediation by making a statement or summary of the subject of the dispute and then bringing the summary to the mediation. In other cases, determining the matter(s) at issue can become part of the mediation itself.

Consider having the mediator meet the disputants prior to the mediation meeting. This can reduce anxiety, improve settlement odds and increase satisfaction with the mediation process. Ensure that all participants are ready to discuss the dispute in a reasonably objective fashion. Readiness is improved when disputants consider the viability of various outcomes.

Provide reasonable estimates of loss and/or damage.

Identify other participants. In addition to the disputants and the mediator, the process may benefit from the presence of counsel, subject-matter experts, interpreters, family, etc.

Secure a venue for each mediation session. The venue must foster the discussion, address any special needs, protect privacy and allow ample discussion time.

Ensure that supporting information such as pictures, documents, corporate records, pay-stubs, rent-rolls, receipts, medical reports, bank-statements, etc., are available.

Have parties sign a contract that addresses procedural decisions, including confidentiality, mediator payment, communication technique, etc.

Meeting

The typical mediation has no formal compulsory elements, although some elements usually occur:

- establishment of ground rules framing the boundaries of mediation
- parties detail their stories
- identification of issues
- clarify and detail respective interests and objectives
- search for objective criteria
- identify options
- discuss and analyze solutions
- adjust and refine proposed solutions

- record agreement in writing

Individual mediators vary these steps to match specific circumstances, given that the law does not ordinarily govern mediators' methods.

Criteria

The following are useful criteria for selecting a mediator:

- Personal attributes—patience, empathy, intelligence, optimism and flexibility
- Qualifications—knowledge of the theory and practice of conflict, negotiation and mediation, mediations skills.
- Experience— mediation experience, experience in the substantive area of dispute and personal life experience
- Training
- Professional background
- Certification and its value
- Suitability of the mediation model
- Conflicts of interest
- Cost/fee

Third party nomination

Contracts that specify mediation may also specify a third party to suggest or impose an individual. Some third parties simply maintain a list of approved individuals, while others train mediators. Lists may be "open" (any person willing and suitably qualified can join) or a "closed" panel (invitation only).

In the UK and internationally, lists are generally open, such as The Chartered Institute of Arbitrators, the Centre for Dispute Resolution. Alternatively, private panels co-exist and compete for appointments e.g.,Savills Mediation

Liability

Legal liability may stem from a mediation. For example, a mediator could be liable for misleading the parties or for even inadvertently breaching confidentiality. Despite such risks, follow-on court action is quite uncommon. Only one case reached that stage in Australia as of 2006. Damage awards are generally compensatory in nature. Proper training is mediators' best protection.

Liability can arise for the mediator from Liability in Contract; Liability in Tort; and Liability for Breach of Fiduciary Obligations.

Liability in Contract arises if a mediator breaches (written or verbal) contract with one or more parties. The two forms of breach are *failure to perform* and *anticipatory breach*. Limitations on liability include the requirement to show actual causation.

Liability in Tort arises if a mediator influences a party in any way (compromising the integrity of the decision), defames a party, breaches confidentiality, or most commonly, is negligent. To be awarded damages, the party must show actual damage, and must show that the mediator's actions (and not the party's actions) were the actual cause of the damage.

Liability for Breach of Fiduciary Obligations can occur if parties misconceive their relationship with a mediator as something other than neutrality. Since such liability relies on a misconception, court action is unlikely to succeed.

Tapoohi v Lewenberg (Australia

As of 2008 Tapoohi v Lewenberg was the only case in Australia that set a precedent for mediators' liability.

The case involved two sisters who settled an estate via mediation. Only one sister attended the mediation in person: the other participated via telephone with her lawyers present. An agreement was executed. At the time it was orally expressed that before the final settlement, taxation advice should be sought as such a large transfer of property would trigger capital gains taxes.

Tapoohi paid Lewenberg $1.4 million in exchange for land. One year later, when Tapoohi realized that taxes were owed, she sued her sister, lawyers and the mediator based on the fact that the agreement was subject to further taxation advice.

The original agreement was verbal, without any formal agreement. Tapoohi, a lawyer herself, alleged that the mediator breached his contractual duty, given the lack of any formal agreement; and further alleged tortious breaches of his duty of care.

Although the court dismissed the summary judgment request, the case established that mediators owe a duty of care to parties and that parties can hold them liable for breaching that duty of care. Habersberger J held it "not beyond argument" that the mediator could be in breach of contractual and tortious duties. Such claims were required to be assessed at a trial court hearing.[*clarification needed*]

This case emphasized the need for formal mediation agreements, including clauses that limit mediators' liability.

Mediation with arbitration

Mediation has sometimes been utilized to good effect when coupled with arbitration, particularly binding arbitration, in a process called 'mediation/arbitration'. The process begins as a standard mediation, but if mediation fails, the mediator becomes an arbiter.

This process is more appropriate in civil matters where rules of evidence or jurisdiction are not in dispute. It resembles, in some respects, criminal plea-bargaining and Confucian judicial procedure, wherein the judge also plays the role of prosecutor—rendering what, in Western European court procedures, would be considered an arbitral (even 'arbitrary') decision.

Mediation/arbitration hybrids can pose significant ethical and process problems for mediators. Many of the options and successes of mediation relate to the mediator's unique role as someone who wields no coercive power over the parties or the outcome. The parties awareness that the mediator might later act in the role of judge could distort the process. Using a different individual as the arbiter addresses this concern.

Alternatives

Mediation is one of several approaches to resolving disputes. It differs from adversarial resolution processes by virtue of its simplicity, informality, flexibility, and economy.

Not all disputes lend themselves well to mediation. Success is unlikely unlessAll parties' are ready and willing to participate.

- All (or no) parties have legal representation. Mediation includes no right to legal counsel.
- All parties are of legal age (although see peer mediation) and are legally competent to make decisions.

Conciliation

Conciliation sometimes serves as an umbrella-term that covers mediation and facilitative and advisory dispute-resolution processes. Neither process determines an outcome, and both share many similarities. For example, both processes involve a neutral third-party who has no enforcing powers.

One significant difference between conciliation and mediation lies in the fact that conciliators possess expert knowledge of the domain in which they conciliate. The conciliator can make

suggestions for settlement terms and can give advice on the subject-matter. Conciliators may also use their role to actively encourage the parties to come to a resolution. In certain types of dispute the conciliator has a duty to provide legal information. This helps ensure that agreements comply with relevant statutory frameworks. Therefore, conciliation may include an advisory aspect.

Mediation is purely facilitative: the mediator has no advisory role. Instead, a mediator seeks to help parties to develop a shared understanding of the conflict and to work toward building a practical and lasting resolution

Both mediation and conciliation work to identify the disputed issues and to generate options that help disputants reach a mutually satisfactory resolution. They both offer relatively flexible processes. Any settlement reached generally must have the agreement of all parties. This contrasts with litigation, which normally settles the dispute in favour of the party with the strongest legal argument. In-between the two operates collaborative law, which uses a facilitative process where each party has counsel.

Counselling

A counsellor generally uses therapeutic techniques. Some—such as a particular line of questioning—may be useful in mediation. But the role of the counsellor differs from the role of the mediator. The list below is not exhaustive but it gives an indication of important distinctions:

- A mediator aims for clear agreement between the participants as to how they will deal with specific issues. A counsellor is more concerned with the parties gaining a better self-understanding of their individual behaviour.
- A mediator, while acknowledging a person's feelings, does not explore them in any depth. A counsellor is fundamentally concerned about how people feel about a range of relevant experiences.
- A mediator focuses upon participants' future goals rather than a detailed analysis of past events. A counsellor may find it necessary to explore the past in detail to expose the origins and patterns of beliefs and behaviour.
- A mediator controls the process but does not overtly try to influence the participants or the actual outcome. A counsellor often takes an intentional role in the process, seeking to influence the parties to move in a particular direction or consider specific issues.
- A mediator relies on all parties being present to negotiate, usually face-to-face. A counsellor does not necessarily see all parties at the same time.
- A mediator is required to be neutral. A counsellor may play a more supportive role, where appropriate.
- Mediation requires both parties to be willing to negotiate. Counselling may work with one party even if the other is not ready or willing to participate.

- Mediation is a structured process that typically completes in one or a few sessions. Counselling tends to be ongoing, depending upon participants' needs and progress.

Confidentiality

One of the hallmarks of mediation is that the process is strictly confidential. Two competing principles affect confidentiality. One principle encourages confidentiality to encourage people to participate, while the second principle states that all related facts should be available to courts.

The mediator must inform the parties of their responsibility for confidentiality.

Steps put in place during mediation to help ensure this privacy include:

1. All sessions take place behind closed doors.
2. Outsiders can observe proceedings only with both parties' consent.
3. The meeting is not recorded.
4. Publicity is prohibited.

Confidentiality is a powerful and attractive feature of mediation . lowers the risk to participants of disclosing information and emotions and encourages realism by eliminating the benefits of posturing. In general, information discussed in mediation cannot be used as evidence in the event that the matter proceeds to court, in accord with the mediation agreement and common lawFew mediations succeed unless the parties can communicate fully and openly without fear of compromising a potential court case. The promise of confidentiality mitigates such concerns Organisations often see confidentiality as a reason to use mediation in lieu of litigation, particularly in sensitive areas. This contrasts with the public nature of courts and other tribunals. However mediation need not be private and confidential In some circumstances the parties agree to open the mediation in part or whole. Laws may limit confidentiality. For example, mediators must disclose allegations of physical or other abuse to authorities. The more parties in a mediation, the less likely that perfect confidentiality will be maintained. Some parties may even be required to give an account of the mediation to outside constituents or authorities. Most countries respect mediator confidentiality.

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Section 2. Good Offices And Mediation

Art. II. In cases of serious disagreement or conflict, before appealing to arms the signatory powers agree to resort, as far as circumstances will permit, to the good offices or mediation of one or more friendly powers.

Art. III. Independently of this recourse, the signatory parties deem it expedient that one or more powers, strangers to the dispute, should, of their own initiative, in so far as circumstances favor it, tender their good offices or mediation to the litigant states. The right of tendering good offices, or mediation, belongs to the powers who are strangers to the dispute, even during the progress of hostilities. The exercise of this right can never be considered, by either of the litigant parties, as an unfriendly act.

Art. IV. The role of mediator consists in the reconciliation of opposing claims and the removal of ill feeling to which the dispute between the states may-have given rise.

Art. V. The functions of a mediator cease the instant it is declared by one of the litigant powers, or by the mediator himself, that the measures of conciliation proposed by him are not accepted.

Art. VI. Good offices and mediation, either upon the request of the litigant states or upon the initiative of powers foreign to the dispute, have exclusively the character of advice; they never have obligatory force.

Art. VII. The acceptance of mediation can never have the effect, save in the event of an agreement to the contrary, to interrupt, delay, or impede mobilization, or other measures preparatory to war. If mediation occurs after the opening of hostilities, save in the case of a contrary agreement, it does not interrupt the existing military operations.

Art. VIII. The signatory powers agree in recommending the application, in circumstances which permit it, of special mediation under the following form:

In case of a dispute seriously compromising peace, the states in conflict choose, respectively, one power to whom they intrust the task of entering into direct communication with the power chosen by the other party, with a view to prevent the rupture of peaceful relations.

During the existence of this commission, the duration of which, save in the case of stipulations to the contrary, shall not exceed thirty days, the litigant states are to refrain from all direct communication with each other, in respect to the cause of difference, which is to be regarded as referred to the exclusive consideration of the mediating powers. The latter are to put forth every endeavor to adjust the difference. In case of definite rupture of friendly relations, these powers continue to be jointly charged with the duty of profiting by every opportunity to re-establish peace.

UNIT-3

Techniques of ADR-II

Conciliation is a process through which two or more parties may explore and reach a negotiated solution to their conflict with the help of a third neutral and disinterested party, the conciliator.

The conciliation process finds its most solid foundation and eventual success on the will of the parties to engage in a meaningful dialogue regardless of the depth of their differences. Anyone wishing to explore a negotiated solution to a problem -whatever its nature-should do so with an open mind, for conciliation intends to explore common grounds upon which the parties may build an agreement acceptable to all involved.

Because of his impartiality, independence, and professional experience, the conciliator can help the parties understand the motives and needs of all involved. However, the conciliation process does not seek a solution at any cost, nor may a conciliator impose a solution upon the parties.

The difference between conciliation and mediation lies in that the conciliator may offer an opinion and alternatives with respect to proposals advanced by any one party to the other. The process itself does not vary when compared to the mediation process.

It is notable that the terms mediation and conciliation are often used interchangeably and are accorded the same meaning, mediation. Most Latin American countries, for example, refer to mediation as conciliation; they mean mediation. It is also noteworthy that an increasing number of countries are prohibiting the making of a legal distinction between conciliation and mediation because there have been instances where mutually acceptable agreements were later successfully challenged in court on the bases that the accord was reached through conciliation, not mediation **Conciliation** is an alternative dispute resolution (ADR) process whereby the parties to a dispute use a conciliator, who meets with the parties both separately and together in an attempt to resolve their differences. They do this by lowering tensions, improving communications, interpreting issues, encouraging parties to explore potential solutions and assisting parties in finding a mutually acceptable outcome.

Conciliation differs from arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award.

Conciliation differs from mediation in that in conciliation, often the parties are in need of restoring or repairing a relationship, either personal or business.

Effectiveness

Recent studies in the processes of negotiation have indicated the effectiveness of a technique that deserves mention here. A conciliator assists each of the parties to independently develop a list of all of their objectives (the outcomes which they desire to obtain from the conciliation). The

conciliator then has each of the parties separately prioritize their own list from most to least important. He/She then goes back and forth between the parties and encourages them to "give" on the objectives one at a time, starting with the least important and working toward the most important for each party in turn. The parties rarely place the same priorities on all objectives, and usually have some objectives that are not listed by the other party. Thus the conciliator can quickly build a string of successes and help the parties create an atmosphere of trust which the conciliator can continue to develop.

Most successful conciliators are highly skilled negotiators. Some conciliators operate under the auspices of any one of several non-governmental entities, and for governmental agencies such as the Federal Mediation and Conciliation Service in the United States

Historical conciliation

Historical conciliation is an applied conflict resolution approach that utilizes historical narratives to positively transform relations between societies in conflicts. Historical conciliation can utilize many different methodologies, including mediation, sustained dialogue, apologies, acknowledgement, support of public commemoration activities, and public diplomacy.

Historical conciliation is not an excavation of objective facts. The point of facilitating historical questions is not to discover all the facts in regard to who was right or wrong. Rather, the objective is to discover the complexity, ambiguity, and emotions surrounding both dominant and non-dominant cultural and individual narratives of history. It is also not a rewriting of history. The goal is not to create a combined narrative that everyone agrees upon. Instead, the aim is to create room for critical thinking and more inclusive understanding of the past and conceptions of "the other."

Conflicts that are addressed through historical conciliation have their roots in conflicting identities of the people involved. Whether the identity at stake is their ethnicity, religion or culture, it requires a comprehensive approach that takes people's needs, hopes, fears, and concerns into account.

---ARBITRATION: Arbitration agreement/clause

Arbitration, a form of alternative dispute resolution (ADR), is a technique for the resolution of disputes outside the courts. The parties to a dispute refer it to *arbitration* by one or more persons (the "arbitrators", "arbiters" or "arbitral tribunal"), and agree to be bound by the arbitration decision (the "award"). A third party reviews the evidence in the case and imposes a decision that is legally binding on both sides and enforceable in the courts

Arbitration is often used for the resolution of commercial disputes, particularly in the context of international commercial transactions. In certain countries such as the United States, arbitration is also frequently employed in consumer and employment matters, where arbitration may be mandated by the terms of employment or commercial contracts.

Arbitration can be either voluntary or mandatory (although mandatory arbitration can only come from a statute or from a contract that is voluntarily entered into, where the parties agree to hold all existing or future disputes to arbitration, without necessarily knowing, specifically, what disputes will ever occur) and can be either binding or non-binding. Non-binding arbitration is similar to mediation in that a decision cannot be imposed on the parties. However, the principal distinction is that whereas a mediator will try to help the parties find a middle ground on which to compromise, the (non-binding) arbitrator remains totally removed from the settlement process and will only give a determination of liability and, if appropriate, an indication of the quantum of damages payable. By one definition arbitration is binding and non-binding arbitration is therefore technically not arbitration.

Arbitration is a proceeding in which a dispute is resolved by an impartial adjudicator whose decision the parties to the dispute have agreed, or legislation has decreed, will be final and binding. There are limited rights of review and appeal of arbitration awards. Arbitration is not the same as:

- judicial proceedings, although in some jurisdictions, court proceedings are sometimes referred as arbitrations[2]
- alternative dispute resolution (ADR) expert determination
- mediation (a form of settlement negotiation facilitated by a neutral third party)

Advantages and disadvantages

Parties often seek to resolve disputes through arbitration because of a number of perceived potential advantages over judicial proceedings:

- In contrast to litigation, where one cannot "choose the judge arbitration allows the parties to choose their own tribunal. This is especially useful when the subject matter of the dispute is highly technical: arbitrators with an appropriate degree of expertise (for

example, quantity surveying expertise, in the case of a construction dispute, or expertise in commercial property law, in the case of a real estate dispute) can be chosen.
- Arbitration is often faster than litigation in court. Arbitral proceedings and an arbitral award are generally non-public, and can be made confidential
- In arbitral proceedings the language of arbitration may be chosen, whereas in judicial proceedings the official language of the country of the competent court will be automatically applied.
- Because of the provisions of the New York Convention 1958, arbitration awards are generally easier to enforce in other nations than court verdicts.
- In most legal systems there are very limited avenues for appeal of an arbitral award, which is sometimes an advantage because it limits the duration of the dispute and any associated liability.

Some of the disadvantages include:

- Arbitration agreements are sometimes contained in ancillary agreements, or in small print in other agreements, and consumers and employees often do not know in advance that they have agreed to mandatory binding pre-dispute arbitration by purchasing a product or taking a job.
- If the arbitration is mandatory and binding, the parties waive their rights to access the courts and to have a judge or jury decide the case.
- If the arbitrator or the arbitration forum depends on the corporation for repeat business, there may be an inherent incentive to rule against the consumer or employee
- There are very limited avenues for appeal, which means that an erroneous decision cannot be easily overturned.
- Although usually thought to be speedier, when there are multiple arbitrators on the panel, juggling their schedules for hearing dates in long cases can lead to delays.
- In some legal systems, arbitration awards have fewer enforcement options than judgments; although in the United States arbitration awards are enforced in the same manner as court judgments and have the same effect.
- Arbitrators are generally unable to enforce interlocutory measures against a party, making it easier for a party to take steps to avoid enforcement of member or a small group of members in arbitration due to increasing legal fees, without explaining to the members the adverse consequences of an unfavorable ruling.
- Discovery may be more limited in arbitration or entirely nonexistent.
- The potential to generate billings by attorneys may be less than pursuing the dispute through trial.
- Unlike court judgments, arbitration awards themselves are not directly enforceable. A party seeking to enforce an arbitration award must resort to judicial remedies, called an action to "confirm" an award.

Arbitrability

By their nature, the subject matter of some disputes is not capable of arbitration. In general, two groups of legal procedures cannot be subjected to arbitration:

- Procedures which necessarily lead to a determination which the parties to the dispute may not enter into an agreement upon: Some court procedures lead to judgments which bind all members of the general public, or public authorities in their capacity as such, or third parties, or which are being conducted in the public interest. For example, until the 1980s, antitrust matters were not arbitrable in the United States . Matters relating to crimes, status and family law are generally not considered to be arbitrable, as the power of the parties to enter into an agreement upon these matters is at least restricted. However, most other disputes that involve private rights between two parties can be resolved using arbitration. In some disputes, parts of claims may be arbitrable and other parts not. For example, in a dispute over patent infringement, a determination of whether a patent has been infringed could be adjudicated upon by an arbitration tribunal, but the validity of a patent could not: As patents are subject to a system of public registration, an arbitral panel would have no power to order the relevant body to rectify any patent registration based upon its determination.

Arbitration agreement

Arbitration agreements are generally divided into two typesAgreements which provide that, if a dispute should arise, it will be resolved by arbitration. These will generally be normal contracts, but they contain an arbitration clause

- Agreements which are signed after a dispute has arisen, agreeing that the dispute should be resolved by arbitration (sometimes called a "submission agreement")

The former is the far more prevalent type of arbitration agreement. Sometimes, legal significance attaches to the type of arbitration agreement. For example, in certain Commonwealth countries (not including England and Wales), it is possible to provide that each party should bear their own costs in a conventional arbitration clause, but not in a submission agreement.

In keeping with the informality of the arbitration process, the law is generally keen to uphold the validity of arbitration clauses even when they lack the normal formal language associated with legal contracts. Clauses which have been upheld include:

- "arbitration in London - English law to apply
- "suitable arbitration clause
- "arbitration, if any, by ICC Rules in London"

The courts have also upheld clauses which specify resolution of disputes other than in accordance with a specific legal system. These include provision indicating:

- That the arbitrators "must not necessarily judge according to the strict law but as a general rule ought chiefly to consider the principles of practical business
- "internationally accepted principles of law governing contractual relations"

Agreements to refer disputes to arbitration generally have a special status in the eyes of the law. For example, in disputes on a contract, a common defence is to plead the contract is void and thus any claim based upon it fails. It follows that if a party successfully claims that a contract is void, then each clause contained within the contract, including the arbitration clause, would be void. However, in most countries, the courts have accepted that:

1. A contract can only be declared void by a court or other tribunal; and
2. If the contract (valid or otherwise) contains an arbitration clause, then the proper forum to determine whether the contract is void or not, is the arbitration tribunal.
3. Arguably, either position is potentially unfair; if a person is made to sign a contract under duress, and the contract contains an arbitration clause highly favourable to the other party, the dispute may still referred to that arbitration tribunalConversely a court may be persuaded that the arbitration agreement itself is void having been signed under duress. However, most courts will be reluctant to interfere with the general rule which does allow for commercial expediency; any other solution (where one first had to go to court to decide whether one had to go to arbitration) would be self-defeating.

International

History

The United States and Great Britain were pioneers in the use of arbitration to resolve their differences. It was first used in the Jay Treaty of 1795, and played a major role in the Alabama Claims case of 1872 whereby major tensions regarding British support for the Confederacy during the American Civil War were resolved. At the First International Conference of American States in 1890, a plan for systematic arbitration was developed, but not excepted. The Hague Peace Conference of 1899, saw the major world powers agreed to a system of arbitration and the creation of a Permanent Court of Arbitration. President William Howard Taft was a major advocate. One important use came in the Newfoundland fisheries dispute between the United States and Britain in 1910. In 1911 the United States signed arbitration treaties with France and Britain

Arbitration was widely discussed among diplomats and elites in the 1890-1914 era. The 1895 dispute between the United States and Britain over Venezuela was peacefully resolved through

arbitration. Both nations realized that a mechanism was desirable to avoid possible future conflicts. The Olney-Pauncefote Treaty of 1897 was a proposed treaty between the United States and Britain in 1897 that required arbitration of major disputes. The treaty was rejected by the U.S. Senate and never went into effect.[24]

American Secretary of State William Jennings Bryan (1913-1915) worked energetically to promote international arbitration agreements, but his efforts were frustrated by the outbreak of World War I. Bryan negotiated 28 treaties that promised arbitration of disputes before war broke out between the signatory countries and the United States. He made several attempts to negotiate a treaty with Germany, but ultimately was never able to succeed. The agreements, known officially as "Treaties for the Advancement of Peace," set up procedures for conciliation rather than for arbitration. Arbitration treaties were negotiated after the war, but attracted much less attention than the negotiation mechanism created by the League of Nations.

International agreements

By far the most important international instrument on arbitration law[is the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, usually simply referred to as the "New York Convention". Virtually every significant commercial country is a signatory, and only a handful of countries are not parties to the New York Convention.

Some other relevant international instruments are:

- The Geneva Protocol of 1923
- The Geneva Convention of 1927
- The European Convention of 1961
- The Washington Convention of 1965 (governing settlement of international investment disputes)
- The Washington Convention (ICSID) of 1996 for investment arbitration
- The UNCITRAL Model Law on International Commercial Arbitration of 1985, (revised in 2006).[26]
- The UNCITRAL Arbitration Rules (providing a set of rules for an ad hoc arbitration)

International enforcement

It is often easier to enforce arbitration awards in a foreign country than court judgments.[*citation needed*] Under the New York Convention 1958, an award issued in a contracting state can generally be freely enforced in any other contracting state, only subject to certain, limited defenses. Only foreign arbitration awards are enforced pursuant to the New York Convention. An arbitral decision is foreign where the award was made in a state other than the state of recognition or where foreign procedural law was used.[27]

Virtually every significant commercial country in the world is a party to the Convention while relatively few countries have a comprehensive network for cross-border enforcement of judgments their courts. Additionally, the awards not limited to damages. Whereas typically only monetary judgments by national courts are enforceable in the cross-border context, it is theoretically possible (although unusual in practice) to obtain an enforceable order for specific performance in an arbitration proceeding under the New York Convention.

Article V of the New York Convention provides an exhaustive list of grounds on which enforcement can be challenged. These are generally narrowly construed to uphold the pro-enforcement bias of the Convention.

Government disputes

Certain international conventions exist in relation to the enforcement of awards against states.

- The Washington Convention 1965 relates to settlement of investment disputes between states and citizens of other countries. The Convention created the International Centre for Settlement of Investment Disputes (or ICSID). Compared to other arbitration institutions, relatively few awards have been rendered under ICSID.[28]
- The Algiers Declaration of 1981 established the Iran-US Claims Tribunal to adjudicate claims of American corporations and individuals in relation to expropriated property during the Islamic revolution in Iran in 1979. The tribunal has not been a notable success, and has even been held by an English court to be void under its own governing law.[29]

Arbitral tribunal

The arbitrators which determine the outcome of the dispute are called the arbitral tribunal. The composition of the arbitral tribunal can vary enormously, with either a sole arbitrator sitting, two or more arbitrators, with or without a chairman or umpire, and various other combinations. In most jurisdictions, an arbitrator enjoys immunity from liability for anything done or omitted whilst acting as arbitrator unless the arbitrator acts in bad faith.

Arbitrations are usually divided into two types: *ad hoc* arbitrations and administered arbitrations.

In *ad hoc* arbitrations, the arbitral tribunals are appointed by the parties or by an appointing authority chosen by the parties. After the tribunal has been formed, the appointing authority will normally have no other role and the arbitation will be managed by the tribunal.

In administered arbitration, the arbitration will be administered by a professional arbitration institution providing arbitration services, such as the LCIA in London, or the ICC in Paris, or the American Arbitration Association in the United States. Normally the arbitration institution also

will be the appointing authority. Arbitration institutions tend to have their own rules and procedures, and may be more formal. They also tend to be more expensive, and, for procedural reasons, slower.

Duties of the tribunal

The duties of a tribunal will be determined by a combination of the provisions of the arbitration agreement and by the procedural laws which apply in the seat of the arbitration. The extent to which the laws of the seat of the arbitration permit "party autonomy" (the ability of the parties to set out their own procedures and regulations) determines the interplay between the two.

However, in almost all countries the tribunal owes several non-derogable duties. These will normally be:

- to act fairly and impartially between the parties, and to allow each party a reasonable opportunity to put their case and to deal with the case of their opponent (sometimes shortened to: complying with the rules of "natural justice"); and
- to adopt procedures suitable to the circumstances of the particular case, so as to provide a fair means for resolution of the dispute.[31]

Arbitral awards[

Although arbitration awards are characteristically an award of damages against a party, in many jurisdictions tribunals have a range of remedies that can form a part of the award. These may include:

1. payment of a sum of money (conventional damages)
2. the making of a "declaration" as to any matter to be determined in the proceedings
3. in somejurisdictions, the tribunal may have the same power as a court to:
    1. order a party to do or refrain from doing something ("injunctive relief")
    2. to order specific performance of a contract
    3. to order the rectification, setting aside or cancellation of a deed or other document.
4. In other jurisdictions, however, unless the parties have expressly granted the arbitrators the right to decide such matters, the tribunal's powers may be limited to deciding whether a party is entitled to damages. It may not have the legal authority to order injunctive relief, issue a declaration, or rectify a contract, such powers being reserved to the exclusive jurisdiction of the courts.

Nomenclature

As methods of dispute resolution, arbitration procedure can be varied to suit the needs of the parties. Certain specific "types" of arbitration procedure have developed, particularly in North America.

- **Judicial Arbitration** is, usually, not arbitration at all, but merely a court process which refers to itself as arbitration, such as small claims arbitration before the County Courts in the United Kingdom
- **Online Arbitration** is, a form of arbitration that occurs exclusively online There is currently an assumption that online arbitration is admissible under the New York Convention and the E-Commerce Directive, but this has not been legally verified Since arbitration is based on a contractual agreement between the parties, an online process without a regulatory framework may generate a significant number of challenges from consumers and other weaker parties if due process cannot be assured.

- **High-Low Arbitration**, or **Bracketed Arbitration**, is an arbitration wherein the parties to the dispute agree in advance the limits within which the arbitral tribunal must render its award. It is only generally useful where liability is not in dispute, and the only issue between the party is the amount of compensation. If the award is lower than the agreed minimum, then the defendant only need pay the lower limit; if the award is higher than the agreed maximum, the claimant will receive the upper limit. If the award falls within the agreed range, then the parties are bound by the actual award amount. Practice varies as to whether the figures may or may not be revealed to the tribunal, or whether the tribunal is even advised of the parties' agreement.

- **Binding Arbitration** is a form of arbitration where the decision by the arbitrator is legally binding and enforceable, similar to a court order.

- **Non-Binding Arbitration** is a process which is conducted as if it were a conventional arbitration, except that the award issued by the tribunal is not binding on the parties, and they retain their rights to bring a claim before the courts or other arbitration tribunal; the award is in the form of an independent assessment of the merits of the case, designated to facilitate an out-of-court settlement. State law may automatically make a non-binding arbitration binding, if, for example, the non-binding arbitration is court-ordered, and no party requests a trial *de novo* (as if the arbitration had not been held).
- **Pendulum Arbitration** refers to a determination in industrial disputes where an arbitrator has to resolve a claim between a trade union and management by making a determination of which of the two sides has the more reasonable position. The arbitrator must choose only between the two options, and cannot split the difference or select an alternative position. It was initiated in Chile in 1979. This form of arbitration has been increasingly seen in resolving international tax disputes, especially in the context of deciding on the Transfer Pricing margins. This form of arbitration is also known

(particularly in the United States) as **Baseball Arbitration**. It takes its name from a practice which arose in relation to salary arbitration in Major League Baseball.

- **Night Baseball Arbitration** is a variation of baseball arbitration where the figures are not revealed to the arbitration tribunal. The arbitrator will determinate the quantum of the claim in the usual way, and the parties agree to accept and be bound by the figure which is closest to the tribunal's award.

Such forms of "Last Offer Arbitration" can also be combined with mediation to create MEDALOA hybrid processes (Mediation followed by Last Offer Arbitration).[42]

JURISDICTION OF ARBITRAL TRIBUNAL

The Judiciary's Role In American Government
Judicial Review was established by the U.S. Supreme Court in *Marbury v. Madison*(1803) where Chief Justice Marshall wrote:
"It is emphatically the province and duty of the judiciary to say what the law is…."
Basic Judicial Requirements
Jurisdiction:
"Juris" (law) "diction" (to speak) is the power of a court to hear a dispute and to "speak the law" into a controversy and render a verdict that is legally binding on the parties to the dispute.
Jurisdiction over Persons
Power of a court to compel the presence of the parties (including corporations) to a dispute to appear before the court and litigate.
Courts use long-arm statutes for non-resident parties based on "minimum contacts" with state.
Case 2.1: *Cole v. Mileti* (1998).
Jurisdiction over Property
Also called "in rem" jurisdiction.
Power to decide issues relating to property, whether the property is real, personal, tangible, or intangible.
A court generally has in rem jurisdiction over any property situated within its geographical borders.
Subject Matter Jurisdiction
This is a limitation on the types of cases a court can hear, usually determined by federal or state statutes.
For example, bankruptcy, family or criminal cases.
General (unlimited) jurisdiction**.**

Limited jurisdiction.

Original and Appellate Jurisdiction

Courts of original jurisdiction is where the case started (trial).

Courts of appellate jurisdiction have the power to hear an appeal from another court.

Federal Court Jurisdiction

"Federal Question" cases in which the rights or obligations of a party are created or defined by some federal law.

"Diversity" cases where:

The parties are not from the same state, and,

The amount in controversy is greater than $75,000.

Exclusive vs. Concurrent Jurisdiction

Exclusive:

only one court (state or federal) has the power (jurisdiction) to hear the case.

Concurrent:

more than one court can hear the case.

Venue

Venue is concerned with the most appropriate location for the trial.

Generally, proper venue is whether the injury occurred.

Standing

In order to bring a lawsuit, a party must have "standing" to sue.

Standing is sufficient "stake" in the controversy; party must have suffered a legal injury.

Case 2.3: *High Plains Wireless LP vs. FCC* (2002)

Trial Courts

Courts of record-court reporters.

Opening and closing arguments.

Juries are selected.

Evidence, such as witness testimony, physical objects, documents, and pictures, is introduced.

Witnesses are examined and cross-examined.

Verdicts and Judgments are rendered.

Appellate Courts

Middle level of the court systems.

Review proceedings conducted in the trial court to determine whether the trial was according to the procedural and substantive rules of law.

Generally, appellate courts will consider questions of law, but not questions of fact.

Supreme Courts

Also known as courts of last resort.

The two most fundamental ways to have your case heard in a supreme court are:

Appeals of Right.

By *Writ of Certiorari*.

Alternative Dispute Resolution

Trials are a means of dispute resolution that are very expensive and sometimes take many months to resolve.
There are "alternative dispute resolution" (ADR) methods to resolve disputes that are inexpensive, relatively quick and leave more control with the parties involved.

ADR

ADR describes any procedure or device for resolving disputes other than the traditional judicial process.
Unless court-ordered, there is no record which is an important factor in commercial litigation due to trade secrets.

Most common:

negotiation, mediation, arbitration.

Negotiation

Less than 10% of cases reach trial.
Negotiation is informal discussion of the parties, sometimes without attorneys, where differences are aired with the goal of coming to a "meeting of the minds" in resolving the case.
Successful negotiation involves thorough preparation, from a position of strength.

Assisted Negotiation

Mini-Trial: Attorneys for each side informally present their case before a mutually agreed-upon neutral 3rd party (*e.g.*, a retired judge) who renders a non-binding "verdict." This facilitates further discussion and settlement.
Expert evaluations.

Conciliation:

3rd party assists in reconciling differences.

Mediation

Involves a neutral 3rd party (mediator).
Mediator talks face-to-face with parties (who typically are in different adjoining rooms) to determine "common ground."

Advantages:

few rules, customize process, parties control results (win-win).

Disadvantages:

mediator fees, no sanctions or deadlines.

Arbitration

Many labor contracts have binding arbitration clauses.
Settling of a dispute by a neutral 3rd party (arbitrator) who renders a legally-binding decision; usually an expert or well-respected government official.
Recall the 1997 UPS strike when US. Labor Secretary Alexis Herman helped arbitrate the strike.

Arbitration Disadvantages

Results may be unpredictable because arbitrators do not have to follow precedent or rules of procedure or evidence.
Arbitrators do not have to issue written opinions.
Generally, no discovery available.

Arbitration Process

Case begins with a submission to an arbitrator. Next comes the hearing where parties present evidence and arguments. Finally, the arbitrator renders an award.

Courts are not involved in arbitration unless an arbitration clause in a contract needs enforcement.

Providers of ADR Services

Non-profit organizations:

American Arbitration Association.

Better Business Bureau.

Online Dispute Resolution

Also called ODR

Uses the Internet to resolve disputes.

Still in its infancy but is gaining momentum.

IIC applicable law

ICC offers four alternative model mediation clauses to parties wishing to have recourse to ICC mediation or other settlement procedures under the ICC Mediation Rules. Parties are encouraged to include an appropriate dispute resolution clause in their agreements.

The Clauses can be adjusted to fit national laws and the parties' special needs. For instance, they may wish to specify the use of a different settlement technique other than mediation. Furthermore, they are encourage to stipulate the language and place of the proceedings. At all times, care must be taken to avoid any risk of ambiguity in the drafting of the clause. Unclear wording causes uncertainty and delay and can hinder or even compromise the dispute resolution process.

The Clauses can be used for mediation alone or in parallel with or prior to arbitration or other proceedings. Two of the proposed clauses combine mediation with arbitration, one simultaneously, the other successively; another creates an obligation to consider referring disputes to the ICC Mediation Rules; while the least constraining clause merely reminds parties of their option to use the ICC Mediation Rules. The clauses are accompanied by a general introductory note providing guidance on their use and each clause is followed by notes addressing its specific effects and meaning and explaining how it may be adjusted to particular needs and circumstances. In multi-tiered clauses consideration needs to be given to the Emergency Arbitrator Provisions in the 2012 Arbitration Rules. Parties are encouraged to determine whether or not they wish to have recourse to the emergency arbitrator when providing for ICC mediation in parallel with or prior to arbitration proceedings administered by the ICC International Court of Arbitration.

When incorporating any of these clauses in their contracts, parties are advised to take account of any factors that may affect their enforceability under applicable law.

Clause A: Option to Use the ICC Mediation Rules:

" The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC Mediation Rules. "

Notes: By including this clause, the parties acknowledge that proceedings under the ICC Mediation Rules are available to them at any time. This clause does not commit the parties to do anything, but the presence of the clause is designed to remind them of the possibility of using mediation or some other settlement procedure at any time. In addition, it can provide a basis for one party to propose mediation to the other party. One or more parties may also ask the ICC International Centre for ADR for its assistance in this process.

Clause B: Obligation to Consider the ICC Mediation Rules:

" In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider referring the dispute to the ICC Mediation Rules. "

Notes: This clause goes a step further than Clause A and requires the parties, when a dispute arises, to discuss and consider together referring the dispute to proceedings under the ICC Mediation Rules. One or more parties may ask the ICC International Centre for ADR for its assistance in this process.

This clause may be appropriate where the parties do not wish to commit to referring a dispute to proceedings under the Rules at the outset but prefer to retain flexibility as to whether to use mediation to try and settle a dispute.

Clause C: Obligation to Refer Dispute to the ICC Mediation Rules While Permitting Parallel Arbitration Proceedings if Required:

" (x) In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. The commencement of proceedings under the ICC Mediation Rules shall not prevent any party from commencing arbitration in accordance with sub-clause y below. "

(y) All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. "

Notes: This clause creates an obligation to refer a dispute to proceedings under the ICC Mediation Rules. It is designed to ensure that when a dispute arises, the parties will attempt to settle the dispute using proceedings under the Rules.

The clause also makes it clear that the parties do not need to conclude the proceedings under the ICC Mediation Rules, or wait for an agreed period of time, before commencing arbitration proceedings. This is also the default position under Article 10(2) of the Rules.

The clause provides for ICC arbitration as the forum for final determination of the dispute. If desired, the clause can be adapted to provide instead for a different form of arbitration, or for judicial or other similar proceedings.

Clause D: Obligation to Refer Dispute to the ICC Mediation Rules, Followed by Arbitration if Required:

" In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration. "

Notes: Like Clause C, this clause creates an obligation to refer a dispute to proceedings under the ICC Mediation Rules.

Unlike Clause C, this clause provides that arbitration proceedings may not be commenced until an agreed period has elapsed following the filing of a Request for Mediation. The lapse of time suggested in the model clause is 45 days, but parties should select a period that they consider to be appropriate for the contract in question.

Clause D changes the default position under Article 10(2) of the ICC Mediation Rules allowing judicial, arbitral or similar proceedings to be commenced in parallel with proceedings under the ICC Mediation Rules.

Like Clause C, Clause D provides for ICC arbitration as the forum for final determination of the dispute. If desired, the clause can be adapted to provide instead for a different form of arbitration, or for judicial or other similar proceedings.

Specific Issues Concerning the Emergency Arbitrator Provisions:

The parties should determine whether they wish to have recourse to the Emergency Arbitrator Provisions under Clauses C and D.

Clauses C and D

If the parties wish to exclude any recourse to the Emergency Arbitrator Provisions, the following wording should be added to Clause C or D as applicable:

" The Emergency Arbitrator Provisions shall not apply. "

Clause D

1. If the parties wish to have recourse to the Emergency Arbitrator Provisions, and want that recourse expressly to be available prior to expiry of the 45-day or other agreed period following filing of the Request for Mediation, the following wording should be added to Clause D:

" The requirement to wait [45] days, or any other agreed period, following the filing of a Request for Mediation, before referring a dispute to arbitration shall not prevent the parties from making an application, prior to expiry of those [45] days or other agreed period, for Emergency Measures under the Emergency Arbitrator Provisions in the Rules of Arbitration of the International Chamber of Commerce. "

2. If the parties wish to have recourse to the Emergency Arbitrator Provisions, but only after expiry of the 45-day or other agreed period following filing of the Request for Mediation, the following wording should be added to Clause D:

" The parties shall not have the right to make an application for Emergency Measures under the Emergency Arbitrator Provisions in the Rules of Arbitration of the International Chamber of Commerce prior to expiry of the [45] days or other agreed period following the filing of a Request for Mediation. "

ICC Mediation Clauses

ICC offers four alternative model mediation clauses to parties wishing to have recourse to ICC mediation or other settlement procedures under the ICC Mediation Rules. Parties are encouraged to include an appropriate dispute resolution clause in their agreements.

The Clauses can be adjusted to fit national laws and the parties' special needs. For instance, they may wish to specify the use of a different settlement technique other than mediation. Furthermore, they are encourage to stipulate the language and place of the proceedings. At all times, care must be taken to avoid any risk of ambiguity in the drafting of the clause. Unclear wording causes uncertainty and delay and can hinder or even compromise the dispute resolution process.

The Clauses can be used for mediation alone or in parallel with or prior to arbitration or other proceedings. Two of the proposed clauses combine mediation with arbitration, one simultaneously, the other successively; another creates an obligation to consider referring

disputes to the ICC Mediation Rules; while the least constraining clause merely reminds parties of their option to use the ICC Mediation Rules. The clauses are accompanied by a general introductory note providing guidance on their use and each clause is followed by notes addressing its specific effects and meaning and explaining how it may be adjusted to particular needs and circumstances. In multi-tiered clauses consideration needs to be given to the Emergency Arbitrator Provisions in the 2012 Arbitration Rules. Parties are encouraged to determine whether or not they wish to have recourse to the emergency arbitrator when providing for ICC mediation in parallel with or prior to arbitration proceedings administered by the ICC International Court of Arbitration.

When incorporating any of these clauses in their contracts, parties are advised to take account of any factors that may affect their enforceability under applicable law.

Clause A: Option to Use the ICC Mediation Rules:

" The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC Mediation Rules. "

Notes: By including this clause, the parties acknowledge that proceedings under the ICC Mediation Rules are available to them at any time. This clause does not commit the parties to do anything, but the presence of the clause is designed to remind them of the possibility of using mediation or some other settlement procedure at any time. In addition, it can provide a basis for one party to propose mediation to the other party. One or more parties may also ask the ICC International Centre for ADR for its assistance in this process.

Clause B: Obligation to Consider the ICC Mediation Rules:

" In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider referring the dispute to the ICC Mediation Rules. "

Notes: This clause goes a step further than Clause A and requires the parties, when a dispute arises, to discuss and consider together referring the dispute to proceedings under the ICC Mediation Rules. One or more parties may ask the ICC International Centre for ADR for its assistance in this process.

This clause may be appropriate where the parties do not wish to commit to referring a dispute to proceedings under the Rules at the outset but prefer to retain flexibility as to whether to use mediation to try and settle a dispute.

Clause C: Obligation to Refer Dispute to the ICC Mediation Rules While Permitting Parallel Arbitration Proceedings if Required:

" (x) In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. The commencement of proceedings under the ICC Mediation Rules shall not prevent any party from commencing arbitration in accordance with sub-clause y below. "

(y) All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. "

Notes: This clause creates an obligation to refer a dispute to proceedings under the ICC Mediation Rules. It is designed to ensure that when a dispute arises, the parties will attempt to settle the dispute using proceedings under the Rules.

The clause also makes it clear that the parties do not need to conclude the proceedings under the ICC Mediation Rules, or wait for an agreed period of time, before commencing arbitration proceedings. This is also the default position under Article 10(2) of the Rules.

The clause provides for ICC arbitration as the forum for final determination of the dispute. If desired, the clause can be adapted to provide instead for a different form of arbitration, or for judicial or other similar proceedings.

Clause D: Obligation to Refer Dispute to the ICC Mediation Rules, Followed by Arbitration if Required:

" In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration. "

Notes: Like Clause C, this clause creates an obligation to refer a dispute to proceedings under the ICC Mediation Rules.

Unlike Clause C, this clause provides that arbitration proceedings may not be commenced until an agreed period has elapsed following the filing of a Request for Mediation. The lapse of time suggested in the model clause is 45 days, but parties should select a period that they consider to be appropriate for the contract in question.

Clause D changes the default position under Article 10(2) of the ICC Mediation Rules allowing judicial, arbitral or similar proceedings to be commenced in parallel with proceedings under the ICC Mediation Rules.

Like Clause C, Clause D provides for ICC arbitration as the forum for final determination of the dispute. If desired, the clause can be adapted to provide instead for a different form of arbitration, or for judicial or other similar proceedings.

Specific Issues Concerning the Emergency Arbitrator Provisions:

The parties should determine whether they wish to have recourse to the Emergency Arbitrator Provisions under Clauses C and D.

Clauses C and D

If the parties wish to exclude any recourse to the Emergency Arbitrator Provisions, the following wording should be added to Clause C or D as applicable:

" The Emergency Arbitrator Provisions shall not apply. "

Clause D

1. If the parties wish to have recourse to the Emergency Arbitrator Provisions, and want that recourse expressly to be available prior to expiry of the 45-day or other agreed period following filing of the Request for Mediation, the following wording should be added to Clause D:

" The requirement to wait [45] days, or any other agreed period, following the filing of a Request for Mediation, before referring a dispute to arbitration shall not prevent the parties from making an application, prior to expiry of those [45] days or other agreed period, for Emergency Measures under the Emergency Arbitrator Provisions in the Rules of Arbitration of the International Chamber of Commerce. "

2. If the parties wish to have recourse to the Emergency Arbitrator Provisions, but only after expiry of the 45-day or other agreed period following filing of the Request for Mediation, the following wording should be added to Clause D:

" The parties shall not have the right to make an application for Emergency Measures under the Emergency Arbitrator Provisions in the Rules of Arbitration of the International Chamber of Commerce prior to expiry of the [45] days or other agreed period following the filing of a Request for Mediation. "

UNCITRAL International agreements

By far the most important international instrument on arbitration law[is the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, usually simply referred to as the "New York Convention". Virtually every significant commercial country is a signatory, and only a handful of countries are not parties to the New York Convention.

Some other relevant international instruments are:

- The Geneva Protocol of 1923
- The Geneva Convention of 1927
- The European Convention of 1961
- The Washington Convention of 1965 (governing settlement of international investment disputes)
- The Washington Convention (ICSID) of 1996 for investment arbitration
- The UNCITRAL Model Law on International Commercial Arbitration of 1985, (revised in 2006).[26]
- The UNCITRAL Arbitration Rules (providing a set of rules for an ad hoc arbitration)

International enforcement

It is often easier to enforce arbitration awards in a foreign country than court judgments.[*citation needed*] Under the New York Convention 1958, an award issued in a contracting state can generally be freely enforced in any other contracting state, only subject to certain, limited defenses. Only foreign arbitration awards are enforced pursuant to the New York Convention. An arbitral decision is foreign where the award was made in a state other than the state of recognition or where foreign procedural law was used.[27]

Virtually every significant commercial country in the world is a party to the Convention while relatively few countries have a comprehensive network for cross-border enforcement of judgments their courts. Additionally, the awards not limited to damages. Whereas typically only monetary judgments by national courts are enforceable in the cross-border context, it is theoretically possible (although unusual in practice) to obtain an enforceable order for specific performance in an arbitration proceeding under the New York Convention.

Article V of the New York Convention provides an exhaustive list of grounds on which enforcement can be challenged. These are generally narrowly construed to uphold the pro-enforcement bias of the Convention.

Government disputes

Certain international conventions exist in relation to the enforcement of awards against states.

- The Washington Convention 1965 relates to settlement of investment disputes between states and citizens of other countries. The Convention created the International Centre for Settlement of Investment Disputes (or ICSID). Compared to other arbitration institutions, relatively few awards have been rendered under ICSID.[28]

The Algiers Declaration of 1981 established the Iran-US Claims Tribunal to adjudicate claims of American corporations and individuals in relation to expropriated property during the Islamic revolution in Iran in 1979. The tribunal has not been a notable success, and has even been held by an English court to be void under its own governing law.**ation Clause**

When parties agree to use UNCITRAL Arbitration Rules in arbitration, they typically specify this in the arbitration clause of their business contract. Below is the model UNCITRAL arbitration clause.

Model UNCITRAL Arbitration Clause

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force."

(a) The appointing authority shall be … [name of institution or person];
(b) The number of arbitrators shall be … [one or three];
(c) The place of arbitration shall be … [town and country];
(d) The language(s) to be used in the arbitral proceedings shall be …"
(e) The law governing the proceedings shall be…"

Arbitration and Conciliation Act, 1996

Part I of this act formalizes the process of Arbitration and Part III formalizes the process of Conciliation. (Part II is about Enforcement of Foreign Awards under New York and Geneva Conventions.)

Arbitration

The process of arbitration can start only if there exists a valid Arbitration Agreement between the parties prior to the emergence of the dispute. As per Section 7, such an agreement must be in writing. The contract regarding which the dispute exists, must either contain an arbitration clause or must refer to a separate document signed by the parties containing the arbitration agreement. The existence of an arbitration agreement can also be inferred by written correspondence such as letters, telex, or telegrams

which provide a record of the agreement. An exchange of statement of claim and defense in which existence of an arbitration agreement is alleged by one party and not denied by other is also considered as valid written arbitration agreement.

Any party to the dispute can start the process of appointing arbitrator and if the other party does not cooperate, the party can approach the office of Chief Justice for appointment of an arbitrator. There are only two grounds upon which a party can challenge the appointment of an arbitrator – reasonable doubt in the impartiality of the arbitrator and the lack of proper qualification of the arbitrator as required by the arbitration agreement. A sole arbitrator or a panel of arbitrators so appointed constitute the Arbitration Tribunal.

Except for some interim measures, there is very little scope for judicial intervention in the arbitration process. The arbitration tribunal has jurisdiction over its own jurisdiction. Thus, if a party wants to challenge the jurisdiction of the arbitration tribunal, it can do so only before the tribunal itself. If the tribunal rejects the request, there is little the party can do except to approach a court after the tribunal makes an award. Section 34 provides certain grounds upon which a party can appeal to the principal civil court of original jurisdiction for setting aside the award.

The period for filing an appeal for setting aside an award is over, or if such an appeal is rejected, the award is binding on the parties and is considered as a decree of the court.

UNIT-4

RECOGNITION AND ENFORCEMENT

Globalization has been a great stimulation in the process of integration of economies and societies of different countries across the globe. It has been a great tool for breaking economic barrier and envisioning world as a market for trade.

When economies and societies integrate it indubitably leads to the rise in various types of disputes such as:-

a) Industrial disputes,
b) Commercial disputes,
c) International disputes etc.

The remedy is not in avoidance of these disputes but rather in building mechanisms to resolve these disputes amicably. It is a sine qua non for growth and for maintaining peace and harmony in every society.

ubi jus ibi remedium – This legal maxim rightly laid down the foundation of legal system in every human society. It means whenever any wrong is done to a person, he has a right to approach the court of law. This legal pattern of resolving dispute has resulted in abundance of pending cases, which rightly justifies the cliché "justice delayed is justice denied". The legal proceedings in a court of law get stretched down the years consuming oodles of money and which ultimately leads to disruption in business and career.

These interminable and complex court procedures have propelled jurists and legal personalities to search for an alternate to conventional court system. The search was a great success with the discovery of alternate forum known as **Alternate Dispute Resolution**, which is commonly called by its generic acronym "ADR".

ADR is being increasingly acknowledged in the field of law and commercial sectors both at national and international levels. Its diverse methods have helped parties to resolve their disputes at their own terms cheaply and expeditiously.

At National Level

Benjamin Franklin once said; "when will mankind be convinced and settle their difficulties by arbitration". I think Indian community can aptly answer him by providing the example of **Panchayat System**, which in reality is not very different from modern ADR system. Infact, panchayat system is vogue in India from centuries. It is a process by which a neutral third party usually a person of higher stature and reputation deemed to be unbiased during adjudication will be rendering legally binding decision. Unfortunately, this system has lost its credibility due to intervention of politics and communal hatred among people.

Litigation in India is generally longitudinal and expensive. Hence, there has been considerable amount of efforts by legislature and judiciary to make ADR more prevalent among societies.

Legislative efforts towards ADR in India:
In India credit for springing up ADR goes to East India Company. It gave the statutory recognition to the said forum under various acts such as:
· Bengal Regulation Act of 1772 and Bengal regulation act of 1781 which provided parties to submit the dispute to the arbitrator, appointed after mutual agreement and whose verdict shall be binding on both the parties.

Alternate dispute redressal received legislative recognition in India, after the enactment of Civil Procedure Code, 1859 which provided –
Sec 312 - reference to Arbitration in pending suit.
Sec 312 – 325 – laid down the procedure for arbitration.
Sec 326 – 327 – provided for arbitration without courts intervention.
#Arbitration is also recognized under Indian Contract Act, 1872 as the first exception to Section

28, which envisages that any agreement restraining legal proceedings is void.
The Legal Service Authorities Act, 1987 brought another mechanism under ADR with the establishment of Lok Adalat system.
The Industrial Dispute Act, 1947 statutorily recognized conciliation as an effective method of dispute resolution.
Indian Electricity Act, 1910 and A.P Co-operative Societies Act, 1964 are few more examples in this regard.

The Arbitration Act of 1899 was the first exclusive legislation on arbitration. Subsequently the said act was repealed and was replaced by Arbitration Act 1940. Arbitration Act of 1940 also failed to give desired result and in realizing its objective of enactment. Then various recommendations of successive Law Commissions and policy of liberalization in the field of commerce acted as a catalyst in the growth of ADR mechanism. After the liberalization of Indian economy which opened the gates for inflow of foreign investment; Government of India on the UNCITRAL model enacted the Arbitration and Conciliation Act 1996 which repealed the 1940 Act.

The main objectives of the Act are:-
A) To cover international and domestic arbitration comprehensively.
B) To minimize the role of courts and treat arbitral award as a decree of court.
C) To introduce concept of conciliation.
D) Lastly, to provide speedy and alternative solution to the dispute.

Code of Civil Procedure 1908 carries section 89 which formulates four methods to settle disputes outside the court. These are:-

a) Arbitration (b) Conciliation (c) Lok adalat (d) Mediation.
At the same time the Constitution of India puts arbitration as a Directive Principle of State Policy. Article 52(d) provides that the state should encourage settlement of international disputes by arbitration.

Judicial effort towards ADR in India:
Indian judiciary has also played a substantial role in upgradation of ADR mechanism. The apex court has recognized the alternate forum in its various decisions.

In In Guru Nanak Foundation V/S Rattan & Sons court observed that "Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedure claptrap…"

The realization of concepts like speedy trial and free legal aid by apex court in various cases has also helped in the upgradation of alternate dispute redressal mechanism. One of the biggest step in the lines of development of the said machinery was maintaining the validity of "fastrack courts" scheme as laid down in Brijmohan v/s UOI.

Fastrack court scheme has done wonders in disposing number of pending cases. These courts have disposed of 7.94 lakh cases out of 15.28 lakh cases transferred at the rate of 52.09% and recent statistics show that the number of pending cases has reduced to 6 lakhs.

Another major step in the growth of ADR services in India is the establishment of institutions such as:
· IIAM - Indian Institute of Arbitration and Mediation
· ICA - Indian Council for Arbitration
· ICADR – International Centre for Alternate Dispute Resolution.

These institutions provide services of negotiation, mediation, conciliation, arbitration, settlement conferences etc. They also help in finding lacunae in existing ADR laws and recommended reforms to overcome them.

At International Level

The history of Alternate 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 a longstanding commercial dispute between General Motors Co. and Johnson Matthey Inc., which was pending in US District Court since past few years.

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 on arbitration are:-
· The Geneva Protocol on Arbitration clauses of 1923.
· The Geneva Convention on the execution of foreign award,1927
· The New York Convention of 1958 on the recognition and enforcement of foreign arbitral award.

In India Part III of Arbitration and Conciliation Act, 1996 provides for International Commercial Arbitration

Another step in strengthening the international commercial arbitration is the establishment of various institutions such as:-
A) ICC – International Court of Arbitration of the International Chamber of Commerce.
B) Arbitration and mediation centre of World Intellectual Property Organization.
C) AAA – International centre for dispute resolution of the American Arbitration Association and others have explored new avenues in the ADR field.

Alternate Dispute Resolution Mechanism

Ø Arbitration – It is one of the cardinal mechanism in alternate dispute machinery. Whereby the dispute is submitted to one or more arbitrators, who is duly appointed by both the parties.

They give their verdict in the form of "Arbitral Award", which is legally binding on disputed parties. Arbitration is very common in business transactions, but unknown to many that it is the oldest method of resolving disputes, which had been enshrined since ancient history.

Ø Mediation – It is a non binding process in which a third party called "Mediator" helps the disputed parties to reach a settlement.

"Mediation is the technical term in international law which signifies the interposition by a neutral and friendly state between two states at war or on the eve of war with each other, of its good offices to restore or to preserve peace"<!--[if !supportFootnotes]-->[1]<!--[endif]-->

Ø Conciliation – This mechanism is also non binding on the parties. It is a process by which a third party called "Conciliator" meets disputed parties separately in order to resolve their differences. He neither gives verdict nor makes any award.

It is also called "Shuttle diplomacy". Most mediators consider it as a specific type of mediation practice. Part III of Arbitration and Conciliation act, 1996 provides for this mechanism.

Ø Lok Adalat – Lok Adalat is also called "people's court". It was established by the Government under Legal Services Authorities act, 1987 to facilitate inexpensive and prompt settlement of pending suits by conciliation and compromise. This forum is very effective in settlement of money claims, partition suits, matrimonial cases etc.

Ø Ombudsman – It is an external agency appointed by government to probe into administrative mishaps. It is a mechanism by which an aggrieved party can claim relief against abuse of discretionary power by government authority. Sweden was the first country to adopt this institution in 1809 A.D followed by Finland, Denmark, Norway, New Zealand, Australia and Scandinavian countries.

Ø Negotiation – It is a non binding process of resolving disputes, by which parties to dispute interact with one another and try to work out a settlement without the intervention of third party. Importance of Negotiation in concise can be aptly put in words of former US President John F. Kennedy – "Let us negotiate with fear but let us not fear to negotiate".

Ø Collaborative Law – It is a voluntary dispute resolution process by which parties to dispute are represented by their own lawyers, to facilitate the discussion in accordance with an agreement. It has been an effective mechanism in the context of divorce and family law. Collaborative law is practiced internationally in countries like USA, UK and the list goes on with the inclusion of countries such as France, Germany, Austria, Australia, Scotland, Switzerland, Hong Kong etc.

in number of law school courses, diplomas, seminars, etc. focusing on alternate dispute resolution and rationalizing its effectualness in processing wide range of dispute in society.

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