

International and National Perspective of Alternative Dispute Resolution (ADR)

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Abstract

Online Dispute Resolution (ODR) is a branch of dispute resolution which uses technology to facilitate the resolution of disputes between parties. It primarily involves negotiation, mediation or arbitration, or a combination of all three. In this respect, it is often seen as being the online equivalent of alternative dispute resolution (ADR). However, ODR can also augment these traditional means of resolving disputes by applying innovative techniques and online technologies to the process.

ODR was born from the synergy between Alternate Dispute Resolution (ADR) and Information and Communication Technologies (ICT), as a method for resolving disputes that were arising online, and for which traditional means of dispute resolution were inefficient or unavailable. The introduction of ICT in dispute resolution is currently growing to the extent that the difference between off-line dispute resolution and ODR is blurry. It has been observed that it is only possible to distinguish between proceedings that rely heavily on online technology and proceedings that do not. Some rapid growth and development in the field of online dispute resolution is the need of the current legal framework and it is considered to bring about a revolution in not only the dispute resolution process but also in the legal field as a whole.

Keywords – Arbitration, ADR, ODR, Dispute Resolution

INTERNATIONAL PERSPECTIVE

The concept of ADR is not a new phenomenon. For centuries, societies have been developing informal and non-adversarial processes for resolving disputes. In fact, archaeologists have discovered evidence of the

use of ADR processes in the ancient civilizations of Egypt, Mesopotamia, and Assyria.

In the late 1980s and early 1990s, many people became increasingly concerned that the traditional method of resolving legal disputes in the United States, through conventional litigation, had become too expensive, too slow, and too cumbersome for many civil lawsuits (cases between private parties). As of the early 2000s, ADR techniques were being popular, as litigants, lawyers and courts realized that these techniques could often

help them resolve legal disputes quickly and cheaply and more privately than court process also ADR approaches are being more creative and more focused on problem solving than litigation through court.

▪ United States

In the United States, Chambers of Commerce created arbitral tribunals in New York in 1768, in New Haven in 1794, and in Philadelphia in 1801. These early panels were used primarily to settle disputes in the clothing, printing, and merchant seaman industries. Arbitration received the full endorsement of the Supreme Court in 1854, when the court specifically upheld the right of an arbitrator to issue binding judgments in *Burchell v Marshall*. Writing for the court, Grier J stated that - Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity.

The federal government has promoted commercial arbitration since as early as 1887, when it passed the *Interstate Commercial Act 1887*. The Act set up a mechanism for the voluntary submission of labour disputes to arbitration by the railroad companies and their employees. In 1898, Congress followed initiatives that began a few years earlier in Massachusetts and New York and authorised mediation for collective bargaining disputes. The *Newlands Act 1913* and later legislation reflected the belief that stable industrial peace could be achieved through the settlement of collective bargaining disputes; settlement in turn could be advanced through conciliation, mediation, and voluntary arbitration. Special mediation agencies, such as the Board of Mediation and Conciliation for Railway Labour 1913 [National Mediation Board in 1943] and the Federal Mediation and Conciliation Service 1947 were formed and funded to carry out the mediation of collective bargaining disputes. Beginning in the late 1960's, American society witnessed the start of a significant movement in ADR, in a climate of criticism of the adversarial nature of litigation,

and, perhaps, loss of faith in traditional adjudication and the competence and professionalism of lawyers. It is, however, the Pound Conference held in 1976, which is recognised as being the birthplace of the modern ADR movement. The Pound Conference full title was the 'National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice.' The Pound Conference picked up on the dissatisfaction with the adversarial system. Professor Frank Sander's speech entitled 'Varieties of Dispute Processing', urged American lawyers and judges to re-imagine the civil courts as a collection of dispute resolution procedures tailored to fit the variety of disputes that parties bring to the justice system. The goal, Sander argued, should be to 'let the forum fit the fuss'. Sander criticised lawyers for tending to assume that the courts are the natural and obvious dispute resolvers, when, in point of fact there is a rich variety of different processes...that may provide far more effective conflict resolution. He advocated "a flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to different processes". Sander then outlined the spectrum of disputing methods he regarded as apt, these included; adjudication, arbitration, problem-solving efforts by a government ombudsman, mediation or conciliation, negotiation, avoidance of the dispute. He stated that we should "reserve the courts for those activities for which they are best suited and to avoid swamping and paralyzing them with cases that do not require their unique capabilities." He envisioned that "not simply a courthouse, but a Dispute Resolution Centre, where the grievant would first be channelled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case." The room directory in the lobby of such a Centre might look as follows:

"screening unit at the centre would diagnose disputes, then using specific referral criteria, refer the disputants to the appropriate dispute resolution process, the door, for handling the dispute. Sander's idea was a catalyst for what later became known as the "Multi-Door Courthouse". Multi-door courthouses were established, initially on a pilot basis, in Tulsa (Oklahoma); Houston (Texas); and in the Superior Court of the District of Columbia. From these experiments, the idea spread to many courts throughout the world. In a relatively short amount of time, the use of ADR processes in American courts has increased to the extent that this once unusual process is now commonplace ...and hailed as the most important tool available to the courts. Arbitration as a well-established alternative to litigation is not a new procedure for America. Only the development and use of alternative dispute resolution mechanism has proliferated in recent years. As early as is the year, 1768 arbitration as a well-established alternative, was made available in New York, and thereafter in other cities, to settle dispute in the clothing, printing and merchant seaman industries by setting up arbitration tribunals. Arbitration first received the endorsement of

the Supreme Court in 1854 when the court upheld the right of an arbitrator to issue binding judgements. In *Burchell v. Marsh*, Justice Grier stated that “Arbitrators are judges’ chosen by the parties to decide the matter submitted to them, finally, and without appeal. As a mode of setting disputes, it should receive every encouragement from the courts of equity.”

In 1920, New York passed the first state law recognizing voluntary arbitration agreement. In 1925, the federal Arbitration Act (FAA) was enacted to provide statutory framework to enforce arbitration clauses in interstate contracts and created the foundation upon which modern arbitration agreements are built today. In 1926, the American Arbitration Association (AAA) becomes the largest private ADR service provider in United States. Moreover, the arbitration was not accepted everywhere in the United States. In contractual arbitration clause was made revocable at the option of either party. Until 1970, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) has not ratified despite of difficulties in implementation. At the Pound Conference, in 1976, leading jurists and lawyers expressed concern about increasing expense and delay for parties in crowded justice system. A task force resulting from the conference was intrigued by Prof. Frank Sander’s vision of a court that included a dispute resolution centre where parties would be directed to the process most appropriate for a particular type of case, the task force recommended public funding of a pilot program using mediation and arbitration and The American Bar Association’s news committee on dispute resolution encouraged the creation of three model “multi-door courthouses.” In the same year, 1976 the alternative Dispute resolution movement was officially recognised by the American Bar Association. It established a special Committee on Minor Disputes. Due to these initiatives, the ADR movement increased its pace. Not only use of arbitration but at the same time different ADR techniques mediation, conciliation, facilitation mini-trials, summary jury trial, expert fact-finding and early neutral evaluation etc. developed.

Presently in this global era, ADR mechanisms have proliferated, and their use has expanded according to needs of communities and businesses with the support of lawyers and judges, modern laws were enacted for providing binding as well as non-binding ADR mechanisms.

Primarily used Alternative Dispute Resolution Processes

American Society witnessed an extraordinary flowering of interest in alternative forms of dispute settlement. ADR have been developed from elements of procedural reform into an integral part of the American legal system. At present many kinds of ADR exist in United States. American lawyers count about twenty different alternative proceedings for settling legal disputes. There are wide array of ADR processes, but primarily there are three well known processes - negotiation,

mediation and arbitration. Elements of these processes have been combined in a number of ways to create a rich variety of so-called “hybrid” dispute resolution techniques such as mini-trial, early neutral evaluation, med-arb, rent-a-judge and ombudsman etc. All these methods described as non-court or private ADR practices. In addition to private sector, ADR programs have been implemented into the public justice system. We will learn the inherent characteristics of these processes separately. Mostly adopted ADR processes are as follows: -

1) Negotiation-

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

Negotiation is a communication process used to put deals together or resolve conflicts. It is a voluntary, non-binding process in which the parties control the outcome as well as the procedures by which they will make an agreement. Because most parties place very few limitations in a negotiation process, it allows for a wide range of possible solutions maximizing the possibility of joint gains, [Institution for Dispute Resolutions, Pepperdine University [USA, Mediation. The art of facilitating the settlement] P Gulliver has explained Negotiation in following words: As a first description the picture of negotiation is one of two sets of people, the disputing parties or their representatives, facing each other across a table. They exchange information and opinion, engage in argument and discussion and sooner or later propose offers and counter offers relating to the issue in dispute between them seeking an outcome acceptable to both sides. Negotiation is an art of knowing how to exchange concessions. The parties have to develop new options so that every party gets some kind of share in the benefit of negotiation.

2) Mediation-

There are two distinct forms of mediation right based and interest-based mediation. In right based, the mediator looks to the rights that the disputants to resolve the dispute within those parameters. For example- In accident claims, right the court process and then use that information to help the parties to reach to an acceptable settlement. Hence, rights based approach would look to the outcome if this case were to go to court and seeks to use that ‘shadow’ to facilitate a settlement. An interest based approach would look to the needs of the parties, regardless of what a court might decide in the particular dispute for instance if there is a dispute between two partners of a small manufacturing business, one of whom has contributed the capital and other all invention. Suppose

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

3) Adjudication-

In the United States there are several kinds of adjudication. In addition to Court redressal system then is also private adjudication i.e. arbitration. There are two kinds of private adjudication, one the parties may voluntarily submit their dispute or pursuant to a clause in their contract that provides resolution of disputes. The later type of arbitration has been practiced in United States, particularly in commercial disputes between companies having continuing relationship as well as in labour disputes of Unions and employers.

Presently Different kinds of arbitration has been commonly used in United States viz. Voluntary and binding arbitration, compulsory and non-binding arbitration.

4) Hybrid Processes-

In US, there is significant development in dispute resolution movement by spawning up various hybrid dispute resolution processes for instance. Mini-trial Early Neutral Evaluation, Summary Jury Trial, Neutral Expert, Med-Arb etc. Mini-trial does not require a case filed in court it can be applied just as well to an incipient dispute. It is totally flexible and can be tailored to the needs of the individual case. A jury session of mini trial is called summary jury trial. Hence the abbreviated prosecution is made to a mock jury of 6 which then renders an advisory verdict that is used as a basis for settlement. In early neutral evaluation process, one or more experienced attorneys hear abbreviated presentation by each side and then decide evaluation of case. It resembles to right base mediation and court annexed arbitration method. In United States District Court of Northern California this process is more successful as to the cases of torts or certain money claims when liability is not an issue. The med-arb is the process in which mediation is blended with its persuasive force and arbitration with its guarantee of an assured outcome. Another new technique used by some courts in U.S. is settlement week, where a large number of lawyers in settlement skills and then use these additional personnel during a particular week to seek to settle long pending cases.

Presently ADR is quite widely used outside the courts viz voluntary arbitration in commercial and labour cases, consumer disputes. Many companies and other institutions have their own internal dispute resolution mechanisms such as an ombudsman or a mediator to handle disputes arising within their jurisdiction. Hence the ADR use in the United States will continue to expand.

Development of ADR system

A. Community Related Services

With the promulgation of Civil Rights Act in 1964, Congress established the Community Relation Service (CRS) of the Justice Department, to assist the courts to utilize mediation and negotiation in preventing violence and resolving community wide racial and ethnic disputes. During 1960s the CRS helped resolve numerous disputes involving schools, police, prisons and other government entities. In 1970s arbitration program and mediation programs are funded by the federal Law Enforcement Assistance Administration (LEAA). These programs designed to help the resolution of disputes within these communities. Thousands of cases were being resolved utilizing these programs. By 1980 more than eighty community based alternative dispute resolution centres were formed. Recent estimates indicate that more than 400 Local Community Justice Centres handle more than several hundred thousand cases per year. The public and private schools were not remained immune from adopting such community-based justice program. Presently, more than 4000 schools throughout the United States have developed mediation programs to resolve the disputes among the students peaceably.

B. ADR through Judicial System

Federal Courts- For the early and easy resolution of disputes the Civil Justice Reform Act (CJRA), 1990 was enacted. It make mandatory to every federal district court to implement a civil justice expense and delay reduction plan. Since, then there has been tremendous growth in the creation of ADR programs and the use of ADR by federal and State courts. As a result, judges were authorized to recommend or require litigants to participate in ADR procedures such as summary jury trials, early neutral evaluation, mini trials mediation and arbitration. In 1995, 80 federal district courts had authorized or established some form of ADR program.

In District of Columbia, the United States District Court introduced a voluntary mediation program in 1989. The Program has been running successfully having settlement rate 50%. The Court of Appeals for the District Court of Columbia also implemented the mediation Program in which cases are selected for mediation by the court's Chief Staff Counsel, and not voluntary. This Program reports a settlement rate of 31%. In 1988, Congress formally authorized ten districts courts, viz. Arizona, Middle Georgia, Western Kentucky, Northern Ohio, Western Washington to conduct mandatory court annexed arbitration programs according to the rules in Judicial Improvements and Access to Justice Act of 1988. However, these programs provide that one or more of the litigants, after an arbitration decision is rendered, many demands, and in a majority of the cases have demanded, a trial de novo. Despite of these findings, most of the parties reported

that arbitration was worthwhile and was a good starting point for settlement negotiations. 97% of the judges surveyed agreed that the county caseload burden was reduced as a result of arbitration programs. In 1994 some districts adopt opt-in and opt-out systems in voluntary arbitration program in which litigants are free to opt for arbitration and continue with the litigation. Judges in the federal court system are used to resort to ADR. In *Homeowners funding corp. of America V. Century Bank*, Judges in the United States Districts courts in the District of Massachusetts utilized an “array of Alternative Dispute Resolution Choices such as summary jury trial, trial before a magistrate, trial before a retired Massachusetts Superior Court Justice, and the court mediation Project.” Even without a court rule, judges are ordering or suggesting to parties towards the use of ADR. In *G.*

Heileman Brewing Co. V. Joseph Oat corp., court order client’s attendance at non-binding ADR.

ii) State Courts - In 28 State courts, there is mandatory nonbinding arbitration programs. Most of the courts have formally incorporated ADR method into their systems through state-wide legislations. The State Court ADR programs have been implemented successfully in California, Connecticut, Minnesota, New Jersey, North Carolina, and Texas spontaneously. Also, Special business courts, offering relatively expeditious processing of commercial dispute resolution has been set up in New York Chicago and Wilmington. This court is proving to provide high quality dispute resolution service, fair and expeditious proceedings one third of the states have established high level commissions to structure and plan for ADR use and to address related confidentiality, ethics and other issues on a state-wide basis.

iii) Federal Agencies - Court annexed ADR programs increased due to the enactment of ADR legislations within the government and industry. The Alternative Dispute Resolution Act of 1990 (ADRA) and the Negotiated Rulemaking Act of 1990 helped to adopt resolution officer is designated and ADR training imparted. ADRA expired in 1995 but by executive orders the government agencies authorized to use ADR.

iv) Corporate Class - Many Companies in Unites States have developed and implemented ADR programs to handle complaints and resolve disputes of customers’ franchisees, employees and others. Such programs include multilevel review by peers of the employee confidential employee advisers, ombudspersons, voluntary arbitration and arbitration and third-party mediation programs.

The major banks entered into an agreement subscribed to the CPR Institute of Dispute Resolution Banking Industry Dispute Resolution Commitment for resolving a number of common transactional disputes within Banks. Several banks include mandatory arbitration clause in all agreement for governing important monetary bank transaction. Sixteen major food companies

have subscribed to CPR institute “Food Industry Dispute Resolution Commitment” which provides that parties to dispute use ADR for 90 days before instituting litigation and maintain status quo while ADR is being pursued. Another approach to the resolution of inter corporate disputes has been a pledge by corporations to explore alternative means of setting disputes with other pledge signatories before initiating litigation.

v) Law Firms in United States - Law firms in United States had effectively incorporated ADR into their practice. Being responsive to client demands and court imposed rules, U.S. lawyer’s development of ADR expertise has been promoted in a number of jurisdictions (e.g. Arkansas, Colorado, Kansas, Hawaii and Georgia) by the issuance of ethics rules or opinions that require or encourage attorneys to advise clients about the availability of ADR under certain circumstances. e.g. Rule 2.1, Colorado Rules of Professional conduct (1995); Ark. Stat. Ann’s 16-7-204(1995); Georgia Supreme court Uniform Rule and Order for Alternative Dispute Resolution Programs and related amendment to ethical considerations 7-5 of the Rules and Regulations of the State Bar of Georgia; Hawaii Professional Conduct Rule 2.; Kansas Bar Association Professional Ethics Advisory Committee opinion 94-1, dated April 15, 1994.

vi) The Multi-Door Court House Approach - Instead of just one ‘door’ leading to the courtroom, many doors through which individual might pass to get to the most appropriate process. Among the doors such as arbitration, such as medical malpractice screening boards or tax courts. In multi-door courthouse approach, disputes would be analysed according to various criteria to determine what mechanism would be best suited to resolve the dispute. While selecting the criteria among ADR mechanism the following factor are to be taken into consideration viz. nature of case, relationship of parties, history negotiations between disputants, nature of relief sought by plaintiff; size and complexity of claim etc. Some U.S. Jurisdictions, though not yet having anything as all-encompassing as the multi-door courthouse, do have the functional equivalent in that they give judges the power to refer appropriate cases to any of a listed set of ADR options.

The basic thrust behind the multi-door approach is to provide more effective and responsive solutions to disputes which is important to maintain good relation between the parties. Prof. Frank E. A. Sander who was the author of the said system identified two important questions:

1) What are the significant characteristics of various alternative dispute resolution mechanisms (such as adjudication by courts, arbitration, mediation, negotiation, and various blends of these and other devices)?

2) How can these characteristics be utilized so that, given the variety of disputes that presently arise, we can begin to develop some rational criteria for allocating various types of dispute resolution processes?

Upon analysing various factors of comparing systems the learned Professor Sander recommended: “.....A flexible and diverse panoply of dispute resolution processes with particular types of cases being assigned to differing processes (or combination of processes) mentioned. Conceivably such allocation might be accomplished for a particular class of cases at the outset by the legislature that in effect is what was done by the Massachusetts legislature, for malpractices cases. Alternatively, one might envision by the year 2000 not simply a courthouse but a Dispute Resolution Centre where the grievant would first be channelled through a screening clerk who would then direct him to the process or sequence of processes most appropriate to his type of case.” The theory of Prof. Sander has been tested in different States of USA such as Columbia, New Jersey, Houston and Philadelphia and a number of American cities and countries now offer multi-door programme. Presently ADR is quite widely used outside the courts viz. voluntary arbitration is commercial and labour cases, consumer disputes. Many companies and other institutions have their own internal dispute resolution mechanisms such as an ombudsman or a mediator to handle disputes arising within their jurisdiction. Hence the ADR use in the United States will continue to expand.

▪ **United Kingdom**

The United Kingdom has three different legal systems: England and Wales, Scotland and Northern Ireland. Each system has its own. The information on ADR in the United Kingdom in this section applies mainly to the situation in England. Some comments about the ADR situation in Scotland are presented at the end of this section. Sander’s concerns for the future of the civil justice system were echoed in the Woolf Reports on the civil justice system of the 1990’s when the system in England and Wales was viewed as ... too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induce the fear of the unknown; and it is incomprehensible to many litigants. The then Lord Chancellor appointed Lord Woolf in 1994 to review the rules of civil procedure with a view to improving access to justice and reducing the cost and time of litigation. The aims of the review were “to improve access to justice and reduce the cost of litigation; to reduce the complexity of the rules and modernise terminology; to remove unnecessary distinctions of practice and procedure”. Perceived problems

within the existing civil justice system, summed up by Lord Woolf in his review in England and Wales as - the key problems facing civil justice today...cost, delay and complexity.

The Woolf Reports led to the enactment of the UK *Civil Procedure Act 1997* and the *Civil Procedure Rules 1998* (CPR). The new CPR Rules apply both to proceedings in the High Court and the County Court. The stated objective of the procedural code is to enable the court to deal with cases justly. Dealing with a case justly includes, so far as practicable:

- Ensuring that the parties are on an equal footing;
- Saving expense;
- Dealing with the case in ways which are proportionate;
- Ensuring that the case is dealt with expeditiously and fairly; and
- Allotting it to an appropriate share of the court's resources.

The CPR vests in the court the responsibility of active case management by encouraging the parties to co-operate and to use ADR. Under the CPR a court may either at the request of the parties or of its own initiative stay proceedings while the parties try to settle the case by ADR or other means. Since the introduction of the CPR, ADR has significantly developed in England and Wales and the judiciary has also strongly encouraged the use of ADR. The judgments of the Court of Appeal in *Cowl v Plymouth City Council* and *Dunnett v Railtrack plc.* both indicated that unreasonable failure to use ADR may be subject to cost sanctions.

Indeed, the CPR has also introduced the possibility for cost sanctions if a party does not comply with the court's directions regarding ADR. The English judge, Lightman J. who is a strong supporter of incorporating mediation into the justice system, summarised the main developments in relation to ADR since the introduction of the CPR Rules as follows:

- (1) The abandonment of the notion that mediation is appropriate in only a limited category of cases. It is now recognised that there is no civil case in which mediation cannot have a part to play in resolving some (if not all) the issues involved;
- (2) Practitioners generally no longer perceive mediation as a threat to their livelihoods, but rather a satisfying and fulfilling livelihood of its own;
- (3) Practitioners recognise that a failure on their part without the express and informed instructions of their clients to make an effort to resolve disputes by mediation exposes them to the risk of a claim in negligence;
- (4) The Government itself adopts a policy of willingness to proceed to mediation in disputes to which it is a party;

(5) Judges at all stages in legal proceedings are urging parties to proceed to mediation if a practical method of achieving a settlement and imposing sanctions when there is an unreasonable refusal to give mediation a chance; and

(6) Mediation is now a respectable legal study and research at institutes of learning.

For some time, it has been UK Government policy that disputes should be resolved at a proportionate level, and that the courts should be the last resort. Although ADR is independent of the judicial system, a judge can state that parties involved in litigation should first attempt to resolve the dispute through ADR. The court may also impose sanctions if it decides that one or more of the parties has/have been unreasonable in refusing to attempt ADR. The UK courts will also take pre-litigation behaviour into account including whether or not an attempt has been made to use ADR. For some types of dispute, there are specific pre-action protocols to set out the steps parties are expected to take before starting judicial proceeding. For all other types of disputes parties are expected to follow the Practice Direction for pre-action Protocols.

Primarily used alternative dispute resolution processes in the UK

1. Arbitration such as the Association of British Travel Agents, a scheme to deal with problems in the travel industry, in particular with package holidays.
2. Mediation is increasingly used in commercial, personal injury and clinical negligence cases. But that short list is not restrictive.
3. Contractual Adjudication
4. Neutral Evaluation where a neutral third party provides a nonbinding assessment of the merits of the case.
5. Conciliation, which is similar to mediation but the third party, (conciliator) takes a more interventionist role.
6. Expert Determination where an independent expert is used to decide the issue.
7. Neutral Fact Finding is used in cases involving complex technical issues where a neutral expert investigates the facts of the case and produces a non-binding evaluation of the merits.
8. Med-Arb (a mixture of mediation and arbitration) where parties agree to mediate but refer the dispute to arbitration if the mediation is unsuccessful.
9. Ombudsmen an Ombud is a third party selected by an institution For example-A hospital, university, or constituents. The ombuds works within the institution to investigate complaints independently and impartially. For e.g., Parliamentary Ombudsman, the various Regulators like the Energy Regulator, Ofgen or the Rail Regulator.

10. Mini-trial, it is a private trial, consensual process where the attorneys for each party make a brief presentation of the case as if at a trial, the presentations are observed by a neutral advisor and representatives

from each side, at the end of the presentations the representatives try to settle the dispute. If the representatives fail to settle, the neutral advisor, at the request of the parties may issue a non-binding opinion as to the likely outcome in court.

Legal Provisions

The Civil Procedure Rules, introduced in 1999, place great emphasis on the fact that parties in a dispute should make every attempt to resolve cases without going to court. Judges are also strongly encouraged to facilitate that process. Extract from a speech by the then Lord Chancellor, Lord Irvine, to the Faculty of Mediation and ADR in January 1999. 'In the UK the Centre for Dispute Resolution (CEDR) was launched with the support of the Confederation of British Industry in 1990 to promote ADR in dispute handling. CEDR pro-motes ADR, trains and accredits mediators and arranges mediations and they claim a 95 per cent success rate in resolving disputes. The Academy of Experts, although its main purpose is to promote the better use of experts, is also at the forefront in the development of ADR processes and was the first UK body to establish a register of qualified mediators. The British Association of Lawyer Mediators was set up in 1995 with the aim of promoting mediation in the UK and of the role of lawyers in mediation and the maintenance of high professional standards. The City Disputes Panel was founded in 1994 to settle financial disputes in the financial services industry. Its panellists are dedicated to the resolution of financial disputes through mediation, evaluation, determination and arbitration. Also, the use of ADR has been established in the UK in resolving family and divorce disputes, employment disputes, environmental disputes, and community or neighbourhood disputes. The Government freely recognises that ADR has a significant part to play in the delivery of civil justice.'

Steps taken by Government

Government departments and agencies have made the following about the resolution of disputes involving them:

- 1) Alternative Dispute Resolution will be considered and used in all suitable cases wherever the other party accepts it.

2) In future departments will provide appropriate clauses in their standard procurement contracts on the use of ADR techniques to settle their disputes. The precise method of settlement will be tailored to the details of individual cases.

3) Central government will produce procurement guidance about the different options available for ADR in Government disputes and ADR might be best deployed in different circumstances. This will spread best practice and ensure consistency across Government.

4) Departments will improve flexibility in reaching agreements on financial compensation, including using an independent assessment of a possible settlement figure. At the moment these pledges do not apply to local government authorities or agencies.

Promotion of ADR became a key strategic imperative for the Department of Constitutional Affairs (DCA) following the publication of the Government's 2002 Spending Review White Paper. The former Lord Chancellor's Department's Public Service Agreement (PSA) included a target to reduce the proportion of disputes resolved by resorting to the courts. In particular, two sub-targets have been set to reduce the number of allocated cases that are resolved by a civil trial. The key activities in the PSA Delivery Plan to achieve these targets are a range of initiatives to promote mediation. There are two strands to the DCA work to meet the PSA3 target:

1. Initiatives are being developed that will help people resolve their disputes in the earliest possible stage so that they do not have to incur the costs and stress that may be involved in entering the judicial system.

2. For those people who feel it necessary to have recourse to court proceedings, mediation will be promoted as an alternative, faster method of resolving their dispute.

The following ideas are also being developed:

Court Mediation Schemes

A range of court-based and court-endorsed mediation schemes have been developed over recent years.

a) Automatic Referral to Mediation Scheme (ARMS)-

An automatic referral scheme is being piloted at the Central London Civil Justice Centre. Under the scheme, a selection of appropriate cases allocated to the fast- and multi-track proceedings are automatically referred to mediation. The standard directives for court proceedings are suspended while a mediation appointment is arranged. Parties can opt-out of the scheme if they feel that pursuing mediation would be fruitless. However, the reasons for opting out will be recorded in the court register, and party/parties that has/have refused mediation may find themselves subject to an

adverse cost order at the end of a trial if the trial judge feels that a settlement could have been achieved earlier on. The scheme commenced in April 2004 and will run until March 2005.

b) Mediation Advice Service-

A civil mediation advisor has been appointed for a trial period by Manchester Combined Court Centre. The advisor is primarily available to talk to parties attending case management conferences at the court, but is also available to the general public. She does not actually mediate cases but discusses with and informs parties about the benefits mediation may bring to their case, and then sets up a mediation appointment with a local provider if they choose to try the process. The scheme commenced in March 2004 and will run as a pilot until the end of December 2004. The scheme is currently being evaluated and a decision on its future will be made in the coming months.

c) Proportionate Dispute Resolution-

The DCA is also developing a vision for Proportionate Dispute Resolution (PDR). PDR is about much more than ADR. The vision for PDR is that people have access to the information and the range of services they need to understand their rights and responsibilities, avoid legal problems where possible, and where not, to resolve their disputes effectively and proportionately. This vision is a radical departure from the traditional approach to civil justice, which focuses first on courts, judges and judicial procedure, and second on legal aid to pay mainly for litigation lawyers. Mediation, however, is not compulsory. It is usual to incorporate an ADR clause in business-to-business contracts. The general consensus is that in the construction industry ADR clause in contracts is widely used. The construction industry uses adjudication as their preferred ADR method.

Other industries do not yet seem to have adopted ADR so quickly.

d) Organisations-

Numerous bodies are available in connection with dispute resolution. e.g.:

- a. Centre for Effective Dispute Resolution (CEDR)
- b. Chartered Institute of Arbitrators
- c. Permanent Court of Arbitration - The Hague
- d. Academy of Experts
- e. The ADR Group
- f. Mediation UK
- g. The Law Society
- h. The Community Legal Service

In addition, there are many commercial bodies providing ADR services including 'on-line' services.

e) Relation between judicial dispute resolution and ADR

The DCA annual report 2003/2004, reported a significant increase in the use of ADR compared to the initial year when 49 cases were reported, in the period March 2002 to April 2003 when 619 cases were reported. The estimated saving was £17m to June 2003. ADR and judicial litigation are seen as complementary means to resolve disputes.

Interest in alternative dispute resolution (ADR) has been growing steadily among the Judiciary and legal profession over the last decade. A significant impetus came from Lord Woolf's Access to Justice Report (1996) that identified the need for fair, speedy and proportionate resolution of disputes. Those principles are at the heart of the Civil Procedure Rules (CPR), which came into force in April 1999. The CPR included references to ADR in rules of court and introduced pre-action protocols, with their emphasis on settlement, even before judicial proceedings are issued. (Department of Constitutional Affairs) However: DCA also note that there is a strong perception that anything that speeds up dispute resolution will reduce the amount of conventional legal work (thus competitive with the litigation process) It has been suggested in more than one report that some opposition to ADR has resulted from the idea that if resolution is not achieved by ADR then the total cost of resolution will be increased, as recourse to the courts will be necessary. Also, some researchers suggest that the process of ADR can expose the parties' arguments, which could be damaging should the matter go to court if ADR failed. On the 'consumer' side many parties are simply not aware of alternative methods of resolution, particularly those with smaller claims.

▪ European Developments

Council of Europe

In 1998 the Committee of Ministers of the Council of Europe adopted a Recommendation on Family Mediation in Europe. This Recommendation focused on the use of mediation in resolving family disputes. It sets out principles on the organisation of mediation services, the status of mediated agreements, the relationships between mediation and proceedings before the courts and other competent authorities, the promotion of, and access to mediation and, the use of mediation in international matters. In addition, it calls for the government of all Member States to introduce or promote family mediation and to take or reinforce measures necessary for this purpose, and to promote family mediation as an appropriate means of resolving family disputes.

European Commission

I) Green Paper on Alternative Dispute Resolutions in Civil and Commercial Law 2002

As a follow-up to the conclusions of the 1999 Tampere European Council, the Council of Justice and Home Affairs asked the European Commission to present a Green Paper on alternative dispute resolution in civil and commercial law other than arbitration. Priority was to be given to examining the possibility of laying down basic principles, either in general or in specific areas, which would provide the necessary guarantees to ensure that out of court settlements offer the same guarantee of certainty as court settlements.

In 2002 the European Commission published a Green Paper on Alternative Dispute Resolutions in Civil and Commercial Law. It deals with the promotion on an EU wide basis of ADR as an alternative to litigation primarily due to the ever-increasing number of international disputes but also, with the aim of promoting a framework to ensure that disputes can be dealt with in an efficient and cost-effective manner.

II) European Code of Conduct for Mediators 2004

In 2004, a European Code of Conduct for Mediators was developed by a group of stakeholders with the assistance of the European Commission. It sets out a number of principles to which individual mediators can voluntarily decide to commit. It is intended to be applicable to mediation in civil and commercial matters. Organisations providing mediation services can also make such a commitment, by asking mediators acting under the auspices of their organisation to respect this code. Adherence to the code is without prejudice to national legislation or rules regulating individual professions.

NATIONAL PERSPECTIVE

Alternative dispute resolution is a tool that refers to several different methods of resolving to business related disputes outside traditional legal and administrative forms. All countries, societies, communities, business organization and individuals have to experience conflicts at one time or the other. Instead of allowing conflicts to take a negative course, they are required to be diverted towards growth and positive solutions benefiting all the disputing parties by envisioning procedures for cooperative problems solving so as to eradicate distrust and animosity among the parties. A dispute is basically 'lex inter parties' and ADR mechanism is the most efficient alternative to existing adversarial system. Article 39A of the Constitution of India provides that State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by

reason of economic or other disability. Articles 14 and 22(1) also make it obligatory for the State to ensure equality before law and a legal system which promotes justice on a basis of equal opportunity to all. Legal aid strives to ensure that constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the poor, downtrodden and weaker sections of the society. Article 21 of the constitution of India guarantees the fundamental right to life and liberty which includes right to speedy trial. The Supreme Court held the right to speedy trial a manifestation of fair, just and reasonable procedure. The failures prosecuting agencies and executive to act and secure expeditious and speedy trial have persuaded the Supreme Court in devising solutions which go to the extent of almost enacting by judicial verdicts bars of limitation beyond which the trial shall not proceed and the arm of laws shall lose its hold. Article 39-A of the constitution provides for ensuring equal access to justice. To achieve the objective, Lok Adalat is being hold at various places in the country. So that speedy and affordable justice could be made available to the litigants at the door steps. Efforts are also being made at state, District and Taluka level.

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