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Faculty of Shari'ah and Law

Theses on

Conciliation and Mediation

(Alternative forms of dispute settlement)

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DEDICATION

This paper is dedicated to my father who cannot read and write, but would like to nake up his deficiency through me, hence, my perennial supporter in shape of :ncouragement to face all odds till the completion of this task.

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LIST OF ABBREVIATIONS

AAA:	American Arbitration Association
ADR:	Alternative Dispute Resolution
AllER:	All England Reporters
CEDR:	Centre for Effective Dispute Resolution
CPC:	Civil Procedure Code
CPR:	Civil Procedure Rules
ICSID:	International Centre for the Settlement of Investment Disputes
IFC:	International Finance Corporation
ISDLS:	Institute for the Study and Development of Legal Systems, USA
FCR:	Frontier Crime Regulation
KCDR:	Karachi Centre Dispute Resolution
KLRCA:	Kuala Lumpur Regional Centre for Arbitration
MoU:	Memorandum of Understanding
NWFP:	North West Frontier Province
PLD:	Pakistan Law Digest
UK:	United Kingdom
UNCITRAL:	United Nation Commission on International Trade Laws
USA:	United States of America
WIPO:	World Intellectual Property Organization

effective, delay-reductive and commercial conductive mode of resolution of disputes. All mediation practices prevailing in the world are not always cost-effective.

There are international as well as domestic frameworks for the settlement of disputes through mediation. International framework can be categorised as specific with regard to kinds of cases and nature of cases. Such as World Intellectual Property Organisation (WIPO) for intellectual disputes, International Centre for the Settlement of Investment Disputes (ICSID) for investment dispute and International Chamber of Commerce (ICC) for commercial disputes. There are also some international organisations which not only provide frameworks for the resolution of disputes through mediation but also model laws for the purpose of uniform practice around the globe, such as, United Nation Commission on International Trade Laws (UNCITRAL). These entire frameworks give some common concepts of mediation i.e. flexible, confidential and non-binding.

In Britain main revolution in the field of mediation came following the Wolf Report 1996, which suggested ADR a main solution for reducing cost and delay in the disposal of cases. In line of that report Civil Procedure Rules were amended by bringing in ADR as a mode of resolution of disputes. It is very successfully working there for the reasons of being compulsory and its denial could entail costs.

India facing very similar problems to that of Pakistan has brought in very successful mediation framework, which is not only cost-effective but also attractive qua litigants. It is cost-effective because it is administered by the Court, in the premises of the Court—such as Delhi Mediation Centres and Lok Adalats—that is why, it is also called Judicial Mediation. It is attractive because it gives incentive in the shape of return of court fee on the successful resolution of dispute through mediation. Delhi Mediation Centres was

came into existence following the amendment of the year 2002 in the Indian Civil Procedure Code and is working under the Mediation Rules 2004 enacted by the Delhi High Court to realise the purpose of the amendment of the Code.

Pakistan despite having model laws for guidance, having made amendment in the Civil Procedure Code 1908, even before India, has not been very successful in this field. Though Pakistan has taken a step, I must say wrong step in the right direction, following the International Finance Corporation Pilot Project (IFC Pilot Project) by establishing Karachi Centre for the Resolution of Disputes. It needs to correct its step by following India and introducing Judicial Mediation Centre and making mediation rules under the CPC in compliance with the amendment of the Code as soon as possible.

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Chapter 1

Introduction

Survival of every State lies in providing peace and security to its people, for which laws are made. One of the main purposes of any law, in any country of the world, is that all disputes between the disputants are resolved quickly so as to maintain trust of the subject on the State and its laws. For the achievement of this purpose procedural laws have been evolved. As we all know, in most of the common law countries the mode of resolving disputes mostly continue to be an adversarial procedurally i.e. a Judge is an impartial arbiter between two rival claimants and they are allowed freely to file their written statements, to adduce evidence, to file miscellaneous applications without effective control from the Judge. This has led to adversarial culture which, at time, affect, or even lose, the very purpose of law—quickly resolution of disputes—mainly by following codel formalities, which are prone to becoming tool of the party having vested interest in such delay. The other pitfalls of this evolution include its being expensive. These shortcomings in the effective resolution of disputes through Courts and tribunals by using adversarial procedural mechanism once again compelled jurist across the world to resort to ancient simplest method of dispute resolution by tingeing them new name i.e. Alternative Dispute Resolution Method (ADR).

"ADR mechanism in itself appeared in very ancient times. Historians presume early cases in Phoenician[1] commerce (but suppose its use in Babylon, too). The practice developed in Ancient Greece (which knew the non-marital mediator as a proxenetas), then in Roman civilization, (Roman law (starting from Justinian's Digest of 530-533) recognized mediation. The Romans called mediators by a variety of names, including internuncius, medium, intercessor, philantropus, interpolator, conciliator, interlocutor, interpres, and finally mediator. The Middle Ages[2] regarded mediation differently, sometimes forbidding the practice or restricting its use to centralized authorities. Some cultures regarded the mediator as a sacred figure, worthy of particular respect; and the role partly overlapped with that of traditional wise men".[3]

It is significant to mention here Islam being a complete and everlasting code of life, has clearly mentioned about mediation and repeatedly ordered that it is incumbent upon the Muslims to make efforts for a compromise or mediation between the two contending parties. In Sura Hijrat Allah Almighty clearly ordained, "If two parties among the believers fall into a fight, make peace between them; but if one of them transgresses against the other, fight the one who has transgressed until he returns to the command of Allah. Then, if he returns, make peace between them with justice and be fair; for Allah loves those who are fair and just".[4] In the same it is disclosed, "the believers are brothers to one another, therefore, make reconciliation between your two your brothers and fear Allah, so that you may be shown mercy".[5] In Surah Nisa the Almighty Allah directs, "if both of them agree to reconcile by means of compromise,

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[1] Phoenician was an ancient civilization centered in the north of ancient Canaan, with its heartland along the coast of modern day Lebanon, Syria, Israel and the Palestinian Territories. Phoenician civilization was an enterprising maritime trading culture that spread across the Mediterranean during the first millennium BC, between the period of 1200 BC to 900 BC.

[2] The Middle Ages are commonly dated from the fall of the Western Roman Empire in the 5th century to the beginning of the Renaissance in the 15th century.

[3] Wekepedia, encyclopedia, History of Mediation, at webpage:www.wikipedia.com last visited on 20.3.2007

[4] The Quran, Surah Hijrat, Verse 9, Part 26, translation by Muhammad Farooq-i-Azam Malik, The Institute of Islamic Knowledge, Houston, Taxas, U.S.A, ed. 2004, p.682.

[5] The Quran, Surah Hijrat, Verse 10, Part 26, translation by Muhammad Farooq-i-Azam Malik, The Institute of Islamic Knowledge, Houston, Taxas, U.S.A, ed. 2004, p.683.

after all compromise (settlement) is the best".[6] In the same Surah He ordains, "If you work out friendly understanding and fear Allah, Allah is Oft-forgiving, Most Merciful".[7] In the same Surah the concept of mediator in family matter is found in the following words, "if you fear a breach of marriage between a man and his wife, appoint one arbitrator from his family and another from hers; if they wish to reconcile, Allah will create a way of reconciliation between them. Allah is the Knowledgeable, Aware".[8]

All these verses transpire the emphasis of Islamic justice system on conciliation and mediation. So according to Islamic Shariah, compromise and conciliation is better than litigation. "The Muslim jurists have laid down to the extent that it is incumbent upon the Qazi (Judge) to ask the parties to enter into a compromise before he starts regular hearing".[9] The Caliph Umer (R.A) wrote a letter to Abu Musa Ash'ari in respect of the concept of justice. He wrote that it is better to mediate between two Muslims unless Haraam (prohibited things) is declared Halaal (permissible things) and Halaal is declared Haraam[10].

There is a long and old tradition in India of the encouragement of dispute resolution outside the formal legal system. Disputes were quite obviously decided by the intervention of elders or assemblies of learned men and other such bodies. "Nyaya Panchayats at the grassroot level were there even before the advent of British justice system. However, with the advent of the British rule these traditional institutions of dispute settlement

[6] The Quran, Surah Nisa, Verse 128 Part 5, translation by Muhammad Farooq-i-Azam Malik, The Institute of Islamic Knowledge, Houston, Taxas, U.S.A, ed. 2004, p.205.
[7] The Quran, Surah Nisa, Verse 129 128 Part 5, translation by Muhammad Farooq-i-Azam Malik, The Institute of Islamic Knowledge, Houston, Taxas, U.S.A, ed. 2004, p.205.
[8] The Quran, Surah Nisa, Verse 35 128 Part 5, translation by Muhammad Farooq-i-Azam Malik, The Institute of Islamic Knowledge, Houston, Taxas, U.S.A, ed. 2004, p.192-193.
[9] Khawaja Iftikhar Hussain Butt, Registrar AJ&K High Court, Mediation as Alternative Dispute Resolution (PLD 1990 Journal 64).
[10] Syed Amir Ali, Ain-ul-Hidaya, Qanooni Kutab Khana Katchary Road, Lahore, p.434.

somehow started withering and the formal legal system introduced by the British began to rule on the basis concept of omissions of rule of law and the supremacy of law".[11]

In view of the above, it may be said that ADR is simply old wine in new bottle, with a new label—ADR. As eminent scholar, Holtzmann said on work on "the Peaceful Settlement of International Dispute in Europe: Future Prospects, Hague academy of International law, September 1990, "in my view, modern dispute resolution techniques, although couched in the language of sociology—and often in jargon of their own—reflect techniques used by successful outsiders for centuries in settling disputes in many cultures and legal systems".[12]

In this thesis I have dilated upon mediation and reconciliation as a method of resolution of commercial disputes. Where parties fail to resolve their dispute through negotiation, there comes a stage, when they turn to an independent third person—called mediator—who persuades each party to reach an amicable resolution of dispute. This is usually followed by Arbitration. Generally these two terms—Mediation and Conciliation—are used interchangeably as we will see in Chapter 1.2 and so will we.

Focus of my study would ultimately be to analysis the position of Pakistan in the field of Mediation for settling commercial disputes. On the other hand, after defining ADR and before going directly to Pakistan, an attempt has been made to critically overview model laws and legislations, international and country specific, on the subject, which would inevitably help us draw comparative conclusion.

[11] K. Jayachandra Reddy, Alternative Dispute Resolution, P.C Rao and William Sheffield, ed. 2002, p.79.
[12] A. Redfern and M. Hunter, Law and Practice of International Commercial Arbitration, ed. 1999 p.40.

1.1 What is Alternative Dispute Resolution (ADR)?

The term "alternative dispute resolution" or "ADR" is often used to describe a wide variety of dispute resolution mechanisms that are alternative to full-scale Court processes. The term can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or mini-trials that look and feel very much like a Courtroom process.

ADR can be seen as dispute resolution mechanism involving structure process with a third party intervention which does not lead to legally binding outcome imposed on the parties. Alternative Dispute Resolution would be used to describe any method of resolving disputes, other than those adopted by the courts of law as part of the system of justice established and administered by the State. On this view, arbitration would itself be classified as a method of alternative dispute resolution—since it is very real alternative to the Court of law. However, the term ADR is not always used in this wide sense. As has been said:

> "Arbitration presents an alternative to the judicial process in offering privacy to the parties as well as procedural flexibility. However, it is nonetheless fundamentally the same in that the role of the arbitrator is judgmental. The function of the judge and the arbitrator is not to decide how the problem resulting in the dispute can most readily be resolved so much as to apportion responsibility for that problem".[13]

ADR system may be generally categorized as negotiation, conciliation/mediation, or arbitration systems. Negotiation systems create a structure to encourage and facilitate direct negotiation between parties to a dispute, without the intervention of a third party.

[13] Carol and Dixon, Alternative Dispute Resolution Development in London, the International Construction Law Review, ed.1990, p.436.

Mediation and conciliation systems are very similar in that they interject a third party between the disputants, either to mediate a specific dispute or to reconcile their relationship. Mediators and conciliators may simply facilitate communication, or may help direct and structure a settlement, but they do not have the authority to decide or rule on a settlement. Arbitration systems authorize a third party to decide how a dispute should be resolved.

It is interesting to suggest that one distinction between ADR on the one hand and litigation and arbitration on the other is that, whilst the litigation and arbitration are compulsory, ADR is non-compulsory method of resolving dispute[14]. ADR, like litigation and arbitration, will often involve an independent third party but his function is fundamentally different from that of a judge or arbitrator and is best described as a neutral facilitator. He does not impose a decision on the parties but, on the contrary, his role is to assist the parties to resolve the dispute themselves. He may give opinion on issues in dispute but his primary function is to assist in achieving a negotiated solution[15].

It is doubtful, however, whether a valid distinction between a compulsory and non-compulsory or consensual process can be maintained. There are various forms of dispute resolution, as will be seen, which come under the general heading of ADR but which are compulsory and lead to binding decision which can be enforced, on ordinary contractual principles.

So, like many areas of social practice, definitions are not watershed or conclusive. In order to have clear understanding of definition of ADR, we will have to recognize intent

[14] A. Redfern and M. Hunter, Law and Practice of International Commercial Arbitration, ed. 1999, p.32.
[15] Carol and Dixon, Alternative Dispute Resolution Development in London, the International Construction Law Review, ed.1990, p.436.

behind the development of the ADR[16]. Thus, most workable definition is to describe ADR as a method of resolving, or attempting to resolve, disputes without resort to the courts (or to arbitrator) by procedures which are informal.[17]

In its philosophical perception, ADR process is considered to be a mode in which the dispute resolution process is qualitatively distinct from the judicial process. It is process where dispute are settled with the assistance of neutral third person generally of parties' own choice; where the neutral is generally familiar with the nature of the dispute and the context in which such dispute normally arise; where the proceeding are informal, devoid of procedural technicalities and codel formalities and are conducted, by and large, in the manner agreed by the parties; where the dispute is expeditiously and with less expenses; where the confidentiality of the subject matter of dispute is maintained to a great extent; where decision making process aim at substantial justice, keeping in view the interest involved and contextual realities. In substance, the ADR process aims at rendering justice in the form and content which not only resolves the dispute but tends to resolve the conflict in the relationship of the parties which given rise to that dispute[18].

Two kinds of ADR have been practiced in Pakistan; traditional ADR and public bodies based ADR. The former refers to the traditional, centuries old system (which was good for simple cases but when it came to status quo issues, would readily succumb to elite capture) including Panchayat (in Punjab) and Jirga (in NWFP and Balochistan). The later includes the ADR attached to public bodies and included Arbitration Councils, Union Councils and Conciliation Courts. "The former is also categorized as parallel system which functions not in tandem but in competition, with the justice system established by law under the

[16] ADR in P.R. China by Zheng Rungao at webpage http://www.softic.or.jp/symposium/open_materials/11th/en/RZheng.pdf last visited on 29.7.2007.
[17] Redfern and M. Hunter, Law and Practice of International Commercial Arbitration, ed. 1999 p33.
[18] Aarvesh Changdra, ADR: Is conciliation the best choice?, Alternative Dispute Resolution, P.C. Rao & William Sheffield, ed, 2006.

constitution. This parallel system is rooted in tribalism, religion, tradition and feudalism and thrives on the post-colonial retention of colonial patterns of submission and control"[19]. It may be argued that this parallel system cannot be part of any system of ADR because it operates outside the law but "it should not be forgotten that this system is indeed an alternative and that it represents about 80% of the ADR regime in Pakistani context"[20].

This parallel system which is extremely powerful in its overall influence may not have behind it the sanction of the state, but it definitely has the approval of large segments of the society—which is diminishing day by day—and it is this approval which enable the Alternative and the Parallel to overlap and fuse together. Once cannot say with any certainty where one system ends and the other begins and therefore it would be safe to say that the Parallel System of Justice as it prevails in Pakistan is indeed the Pakistani version of Alternative Dispute Resolution. However, there is vital and significant difference between the ethos and nature of ADR in Pakistan and its scope that compass in the developed and developing countries where societies have acquired a degree of self regulation.

> "In other words ADR in a given context and in developing countries is intra-legal while parallel systems are extra-legal. This is not to say that it is desirable or beneficial or that its performance is not to be judged on the touchstone of the accepted and prevalent standards and methods of ADR. All that is desired by making this assertion is that the parallel justice system prevailing in Pakistan needs to be assessed and examined with a view to understanding it and then finding ways and means of addressing the problems that it spawns. This idea is definitely not to make the two systems—ADR and the parallel justice system co-terminus because the two differ in two important aspects: those being that ADR function within the legal system and secondly, deals only with civil and commercial disputes

[19] A paper on the subject "Alternative Dispute Resolution—An overview" read by Ch. Mustaq Masood, Senior Advocate, Supreme Court of Pakistan at National Judicial Conference, 2007 held at Islamabad.
[20] ibid

while the parallel system is all encompassing and nothing—not even criminal dispute—are beyond its reach. This is so because while in civil, commercial and family disputes individuals and citizens are ranged against on another, in criminal matters the state is itself a party. Whereas, in civil and related matters it is the question of the pre-eminence of the rights of an individual or individuals against other individuals, in criminal matters it is society which is alleging that it has been wronged and therefore the enacted and codified law must take its course because otherwise it would amount to defeating the maxim that all people are equal under the law and that no special treatment can be meted out to particular individual. For this reason no ever accepted procedures of alternative dispute resolution are ever applied to criminal matters and these are left exclusively to the courts to determine". [21]

In Pakistan the situation is radically different because here ADR or whatever passes for ADR is extended even to the resolution of disputes which are purely criminal in nature. It is for this reason that ADR in Pakistan, in that situation is not merely an alternative to the courts established under the law but it is also a parallel system of justice. This issue has further been discussed in chapter 3.

[21] A paper on the subject "Alternative Dispute Resolution—An overview" read by Ch. Mustaq Masood, Senior Advocate, Supreme Court of Pakistan at National Judicial Conference, 2007 held at Islamabad.

1.2 Kinds/Modes of Alternative Dispute Resolution

ADR is a generic term. It encompass in it different modes of resolving disputes outside the judicial mechanism/system. Many of the techniques brought together under the umbrella term ADR have deep and separate roots. For example, in many civil law and judicial systems, the adjudicator has, by custom or duty, attempted to settle claims by conciliation, mediation in family, community, internal diplomacy and labor relations disputes has independent, and sometimes longstanding, historical or cultural origins. Amongst the various ADR techniques arbitration and mediation are the oldest and well-known. Arbitration, however, is distinct from the mediation and other modes. Arbitration is adjudicatory, and result in binding decision. Conciliation is consensual and helps the parties in settling their dispute mutually albeit with the aid of a neutral third person but the settlement is of the parties themselves. Other ADR techniques, though widely practiced in the USA and other countries for over 20 years, are almost unknown to India[22] and Pakistan where ADR movement has yet to take momentum.

Some scholars have indeed distinguished several types of ADR. In view of the fact that during the last two or three decades, certain modes of ADR have become universally popular, these may rightly be called 'primary' processes, while those which are derived from primary sources after tailoring them into in accordance may be called 'hybrid' process". Thus, these are further divided ADR as follows[23]:

A. Primary ADR Processes:

i. Negotiation

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[22] Sarvesh Changdra, ADR: Is conciliation the best choice?, Alternative Dispute Resolution, P.C. Rao & William Sheffield, ed. 2006, p.83.

[23] Paper read by Dato' Syed Ahmad Idid, Director, Kuala Lumpur Regional Centre for Arbitration on the topic "ALTERNATIVE DISPUTE RESOLUTION (ARD) AN ALTERNATE ACCESS TO JUSTICE at International Judicial Conference,2006, Islamabad.

ii. Mediation / conciliation

iii. Arbitration

B. Secondary ADR Processes:

i. Adjudication

ii. Mini Trial

C. Hybrid ADR Processes:

i. Expert Determination

ii. Med-Arb (Mediation – Arbitration)

iii. Ombudsman

iv. Summary Jury Trail

A(i) Negotiation

"Negotiation is a basic means of getting what you want from others. It is back and forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed"[24].

It is non-binding procedure involving direct interaction of the disputing parties wherein a party approaches the other with the offer of a negotiated settlement based on an objective assessment of each other's position. A trade-off of other interests not involved in the dispute is not uncommon in a negotiated settlement. Objectivity and willingness to arrive at a negotiated settlement on the part of both the parties are essential characteristics of negotiation.

Negotiation is often the best, most economical and satisfactory way of resolving a dispute. Negotiation is an everyday activity for human beings; much of it is not recognized at a time, and most of it is effective.

[24] Paper read by Dato' Syed Ahmad Idid, Director, Kuala Lumpur Regional Centre for Arbitration on the topic "ALTERNATIVE DISPUTE RESOLUTION (ARD) AN ALTERNATE ACCESS TO JUSTICE at International Judicial Conference,2006, Islamabad.

"Negotiation is usually possible where some or all of the following circumstances exist:

(a). the parties can easily identify and agree on what issues at dispute.

(b). the interests, goal and needs of the parties are not entirely incompatible.

(c). the parties need to co-operate to meet their goals.

(d). external constraint, such as time, reputation, cost, and uncertainty of an imposed decision, encourage parties to engage in a private, cooperative process.

(e). parties can influence each other to act in ways that provide mutual benefit or avoid harm.

(f). parties recognize that alternative procedures are not as desirable as negotiation, which allows them to determine the outcome".[25]

A(ii) Mediation

Mediation lies at the heart of ADR. Parties who failed to resolve a dispute for themselves may turn to an independent third person, called mediator, who will listen to outline of the dispute and then meet each parties separately—often shuttling between them—and try to persuade the party to moderate their position. The task of mediator is to attempt to persuade each party to focus on its real interests, rather than what it conceives to be its contractual or legal entitlement.

It is a step further in the ladder of ADR. Suppose, if negotiation, which takes place between the parties, fails, parties still have chance to reach an amicable settlement by the intervention of a third person, called mediator. One illustration of the process that is sometime given is that of a dispute over a consignment of oranges, to which both parties claim title. In this modern Aesop's fable, it transpires (after a careful enquiry by the

[25] The CEDR Mediator handbook, ed. 2004, p.17.

mediator) that one party needs the oranges for their juice and the other for their peel—so an amicable solution to the dispute is happily found[26].

There are two concepts/models regarding mediation: facilitative mediation; evaluative mediation[27]. In "facilitative mediation" the mediator endeavours to facilitate communication between the parties and help each side to understand other's perspective, position and interest in relation to the dispute. Under the second model—evaluative mediation—mediator provides non-binding assessment or evaluation of the dispute, which the parties are free to accept or reject as the settlement of the dispute. It is normally up to the parties which of these two models they wish to follow. Detail discussions on these concepts will be given in Chapter 2.

A(iii) Conciliation

The terms "mediation" and "conciliation" are generally used as if they are interchangeable, and so will we in this write-up. There is no general agreement as to how they should be defined, which becomes evident from two incidents given here. At one place these are found to have been differentiated, "historically, in private dispute resolution, a conciliator was seen as someone who went a step further than the mediator, so to speak, in that the conciliator would draw up and propose the terms of an agreement that he or she considered represented a fair settlement. In practice, two terms seem to have merged, although common lawyers tend to speak of mediation, whilst civil lawyers speak of conciliation".[28]

Another scholar at another place put, "Conciliation is a term which one comes across frequently when dealing with disputes arising out of family and industrial relations.

[26] A. Redfern and M. Hunter, Law and Practice of International Commercial Arbitration, ed. 1999, p.33.
[27] Article 7 (4) of the UNCITRAL Conciliation Rules 1980.
[28] A. Redfern and M. Hunter, Law and Practice of International Commercial Arbitration, ed. 1999, p.33.

Mediation on the other hand is a term more generally associated with disputes arising out of commercial relations. At Kuala Lumpur Regional Centre for Arbitration (KLRCA), Conciliation and Mediation are terms which are used interchangeably"[29]. The Chartered Institute of Arbitrators (U.K) ADR rules while defining conciliation and mediation has scribed, "the conciliator may indicate strong and weak points of disputant's cases and the consequence of a failure to settle, but he/she will not generally make a recommendation for settlement but the mediator, in addition to that of conciliator, will also formulate his/her recommendation on settlement terms of the specific dispute which lead to mediation. In this research paper we imply the same meaning for the both terms—mediation and conciliation.

(iv). Arbitration

A binding procedure where dispute is submitted for adjudication to an arbitral tribunal, or to any third person called arbitrator, consisting of a sole or an odd number of arbitrators chosen by the parties, which gives its decision in the form of an award that being binding upon them finally settles the dispute between the parties.

It can be Adhoc or Institutional. Adhoc arbitration means an arbitration where the parties and the arbitral tribunal will conduct the arbitration according to the procedure which will wither be agreed by the parties or, in default of agreement, laid down by the by the arbitral tribunal at a preliminary meeting once the arbitration has begum. However, this is not only way of proceeding. There are many set of rules available to parties who contemplate arbitration; including (where applicable) the rules of their own trade associations. An "institutional arbitration" is one that is administered by one of the many specialist arbitral institutions under its own rules of arbitration. There are many such

[29] Paper read by Dato' Syed Ahmad Idid, Director, Kuala Lumpur Regional Centre for Arbitration on the topic "ALTERNATIVE DISPUTE RESOLUTION (ARD) AN ALTERNATE ACCESS TO JUSTICE at International Judicial Conference,2006, Islamabad

international and national institutions. Amongst the better known international institutions are the American Arbitration Association (AAA), the Iner-American Commission of Commercial Arbitration (IACCA), the International Centre for the Settlement of Investment Dispute (ICSID), the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA)[30].

Arbitration is quite distinguishable from the other forms of ADR. Its distinguish features include its being binding upon the parties while the other techniques of ADR are non-binding. Further, in most cases arbitration award does not end the dispute between the parties and the award is challenged[31] in the court of law. Therefore, while defining ADR in its narrower sense it does not include arbitration[32].

B(i) Adjudication

The most common form of adjudication is by written submissions to a neutral third party, who is usually a specialist in the area of dispute. In some cases these submissions are all that adjudicator has and, as there is no opportunity for revision, there is great pressure of the parties to present their best case. In some cases the parties may give a response to the other party's submission. There may be also be an oral hearing or a site visit. The process is generally short and decision is binding, although there is usually provision for appeal within a stipulated time.

> "In UK, adjudication has a specific meaning in the context of construction contracts. The Housing Grants, Construction and Regeneration Act 1996 provides a statutory right to adjudication. Intended as an interim dispute resolution process, the adjudicator gives a decision on disputes as they arise during the course of a construction contract. The decision is binding unless or

[30] A. Redfern and M. Hunter, Law and Practice of International Commercial Arbitration, ed. 1999, p.36.
[31] Paper read by Mr. Tassaduq Hussain Jillani, Judge, Supreme Court of Pakistan on the topic "Delayed Justice and The Role of ADR" at International Judicial Conference, 2006 held at Islamabad.
[32] Article by P.M. Bakshi, former member of law commission of India on the subject "ADR in the Construction Industry" published on Alternative Dispute Resolution edited by P.C. Rao & William Sheffield, ed, 2006, p.317.

until the dispute is finally determined by court proceedings, by arbitration or by agreement between the parties".[33]

B(ii) Mini-trial

It is a non-binding procedure where the disputing parties present their respective cases before their senior executives who are competent to take decisions and who are assisted by a neutral third party. Thus, the executives have an objective assessment of the dispute and, if possible, they can mutually arrive at an amicable settlement. It is said to be a most structured form of mediation, found primarily in the United States of America[34]. There is no hard and fast procedure for Mini-trial but, normally, two high level executives, one from each party, are put into an environment in which the strength and weaknesses of their respective cases are drawn to their attention. The theory is that, confronted in this way, the businessmen will focus on the risks involved in taking the dispute to litigation and that this, together with the time and costs likely to be involved in litigation, will induce them to reach a compromise. In it, a hearing takes place followed by disclosure of documents and an exchange of briefs. Lawyer for each party make a brief presentation outlining the evidence they would call in the event of a trial. The hearing is presided over by a neutral adviser (generally a retired judge or senior lawyer who would give a preliminary opinion as to how a court would be likely to react). This information exchange is followed by negotiations between the principals either with or without the intervention of the neutral advisor. If the settlement is not reached, the parties may ask the neutral advisor to give a non-binding opinion as the likely result of litigation. This in itself may lead to a settlement.

Of all the ADR techniques the Mini-trial is most closely associated with complex business disputes. Initially developed in a 1977 in USA in patent infringement case,

[33] The CEDR Mediator handbook, ed. 2004, p.12.
[34] A. Redfern and M. Hunter, Law and Practice of International Commercial Arbitration, ed. 1999 p.36.

Telecredit v. TRW, the mini-trial concept spread through the corporate world[35] in no time.

C(i). Expert Determination

Expert determination may be used to decide on a specific matter of contract or other law, or on disputed fact or financial valuations. Usually the expert, who is selected by the parties, investigates and reports on the issue, and does not necessarily rely exclusively on submissions made by the parties. The decision is generally binding and cannot be appealed[36].

C(ii). Med-Arb (Mediation – Arbitration)

This is a process where parties use mediation to reach a settlement, and then to rely on a decision by a neutral if there are issues on which no agreement can be reached. This process encourages parties to create their own best settlement in the knowledge that an arbitrator will, otherwise, impose a decision. Sometimes, the parties choose to have the same person act as both as a mediator and arbitrator, while sometime they choose one person to be a mediator and another to be an arbitrator. However, knowledge that the mediator eventually act as arbitrator may cause parties to be more restrained in revealing their real needs and positions. There are other potential difficulties if the same person acts in both roles; particularly challenging is the question of how to treat information obtained confidentially in private meetings. It is therefore often desirable for a different neutral to arbitrate on the outstanding issues, even though this will involve further presentation of the case and some further costs[37].

C(iii). Ombudsman

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[35] Article by Tom Arnold on the subject "The Mini-Trial" published on Alternative Dispute Resolution edited by P.C. Rao & William Sheffield, ed, 2006 [p 301]
[36] The CEDR Mediator handbook, ed. 2004, p.13.
[37] ibid

"Originating in Scandinavia, there are now many ombudsman schemes in many countries. Decisions are usually based upon written evidence, although there is an increasing trend towards meeting with the parties, both jointly and individually. The process proves a cheap and relatively informal means for individuals to complain of maladministration of improper decisions by major intuitions, business or government".[38]

Most of ombudsman schemes will not investigate a complaint until the seller of goods or provider of services has been through preset steps, making a serious attempt to resolve the complaint, the parties have become deadlocked. Most ombudsman serviees are funded through a levy on the industries they serve and are free to the individual complainant. Most ombudsman decisions are biding on the industry member but not on the complainant.

In Pakistan, too, there are Federal and Provincial Ombudsmen having the mandate of redressing grievances regarding maladministration. The office of Wafaqi Mohtasib (Federal Ombudsman) was established in 1983 through President Order 1 of 1983 for the stated purpose of diagnosing, investigation, redressing and rectifying an injustice done to a person through maladministration of the Federal Government departments and statutory corporation or other institution controlled or established by the Federal Government excluding judiciary. Wafaqi Mohtasib is appointed for four years terms by the President of Pakistan[39] and can be removed on the ground of misconduct and incapacity by the President of Pakistan[40]. The Mohtasib gives his findings in the shape of recommendation to the agency which is bound to comply with such recommendations subject to representation (appeal) to the President of Pakistan. Mohtasib has also been given contempt powers under the above said Order.

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[38] Ibid.
[39] Section 4 of the Establishment of Office of Wafaqi Mohtasib Order, 1983.
[40] Section 6 of the Establishment of Office of Wafaqi Mohtasib Order, 1983.

C(iv). Summary Jury Trial

Summary judgment is a process through which the Court on the motion of either of the parties decides the case summarily. In American terminology there is a procedure called "demurrer". It means a motion to dismiss an action for failure to state a cause of action[41]. In appropriate cases, either a plaintiff or a defendant may obtain a final and complete resolution of a law suit without incurring the often considerable delay and expense of a full trial. In our Civil Procedure Code, Order VII Rule 11 is more or less a motion in the nature of "demurrer" as in the American Legal System. Order VII rule11 of the CPC reads:

> **"Rejection of plaint**—The plaint shall be rejected in the following cases:
> a). where it does not disclose a cause of action;
> b). where the relief claimed is under-valued, and plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fail to do so;
> c). where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
> d). where the suit appears from the statement in the plaint to be barred by any law

There are other provisions in our Civil Procedure Code through which the matter can be summarily decided. For instance, under Order XXII rule 6 of the CPC, where admissions of fact have been made, the Court may pronounce judgment. It reads:

> **Judgment on admission**—Any party may, at any stage of a suit, where admissions of fact have been made, wither in the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as the Court may think just.

[41] Paper read by Mr. Tassaduq Hussain Jillani, Judge, Supreme Court of Pakistan on the topic "Delayed Justice and The Role of ADR at International Judicial Conference, 2006 held at Islamabad.

Similarly, under Order XV Rule 3, the Court may proceed to decide the case where it is of the view that no further evidence or argument is called for. The rule reads as:

> **Parties at issue**—(1) where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgement accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit.

1.3 Advantages of ADR (Mediation)

It is matter of common knowledge, and of concern that existing judicial system is not able to cope up with the ever increasing burden of litigation. This problem is aggravated mainly by two ends. One is from the litigant's side— due to increase in litigation mainly on account of population explosion, rapid social and economic development and greater awareness in masses about their rights—and other from the judicial side laws due to evolvement of adversarial environment of the procedural laws—where a judge is an impartial arbiter between two rival claimants and they are allowed a free hand to file their written statements, to adduce evidence, to file miscellaneous applications without effective control from the Judge. So, litigation's end can hardly be controlled, thus, leaving Hobson's choice of doing something for the other end.

This evolution of adversarial environment of courts' process, especially in common law countries, has also eroded people's confidence in the system itself. Even in U.K which laid the foundations of the common law jurisdiction, there has been a wide spread dismay over court delays. Lord Woolf, the Chief Justice of England and Walès, in his report on "Judicial Reforms in U.K." voiced his concern in this regard and said:

> "Without effective judicial control, however, the adversarial process is likely to encourage an adversarial culture and to generate an environment in which the litigation process is too often seen as a battlefield where no rules apply. In this environment, question of expense, delay, compromise and fairness may have only low priority. The consequence is that expense is often excessive, disproportionate and unpredictable; and delay is frequently unreasonable".[42]

This situation arises precisely because the conduct, pace and extent of litigation are left almost completely to the parties. There is no effective control of their worst excesses. Indeed, the complexity of the present rules facilitates the use of adversarial tactics and is

[42] www.dca.uk/woolf last visited on 30.6.2007.

considered by many to require it. "As Lord Williams, a former Chairman of the (London) Bar Council, said in responding to the announcement of this inquiry, the process of law has moved from being "servant to master" due to cost, length and uncertainty. He made valuable suggestions which, inter alia, included reference to Alternate Dispute Resolution (ADR)"[43].

Now, the question arises as to whether the main problems of unbearable load on Courts, unprecedented delay in conclusion of disputes, expensive Court process and adversarial environment of Courts erupted from the both ends, can be addressed by resorting to ADR processes. Let us see that aspect of the ADR with special reference to Conciliation and Mediation in the following lines.

1.3.1 Cost Effective

The main argument of the proponent of ADR processes is that it is cost effective. To understand this aspect of it, we see it in both perspectives—in litigant's perspective and in Court's perspective. If we talk about Negotiation, there is no dispute whatsoever in the mind of its critics that it is very cost effective both for litigants as well as for Courts or the department of the State administering the justice.

There is divergence of opinion when we speak of Mediation with respect to its cost effectiveness vis a vis adversarial judicial system. No doubt, it is cost effective for the Judicial Department, whether it is Court or Tribunal. It may not be cost effective, in each case, for the litigants. As we know, there are two modes of referring a matter for Mediation. First, direct or before going to Court and second, by the interference of the Court. In the first case, parties are either required by law to exhaust at least a try to resolve their controversy through Mediation. In the latter case, Court refers the matter to

[43] Paper read by Mr. Tassaduq Hussain Jillani, Judge, Supreme Court of Pakistan on the topic "Delayed Justice and The Role of ADR" at International Judicial Conference, 2006 held at Islamabad.

the Mediator under the mandatory or discretionary, or following the will of the parties, provisions of the law to the mediator for dispute settlement. In the first case, it is cost effective, no dispute or reservation in the mind of the critics, provided the institution administering the Mediation is not expensive.

In the latter case, when the matter is referred to mediator for settlement by the Court—which is also called Court's annexed Mediation—the process may be cost effective for the Court/Judicial department but not, always, for the parties. The parties, on the one hand, has already paid fee of the lawyers, court fee and has beard expenses of the preparing of the case, on the other hand, again is required to pay the fee of the mediators and bear expenses of the meeting, witnesses and documents, etc.[44] Thus, they are double burdened—one for going to the Court and again for going to the mediation—for the same dispute.

During my visit to Karachi[45] for collecting data and information regarding mediation from the Karachi Dispute Resolution Centre—a centre sponsored by the International Finance Corporation with understanding with the Government of Pakistan—and High Court of Sindh, I met with Mr. Abdul Qayyum Abbasi, Advocate High Court and Mr. Ashraf Yar Khan, Senior Civil Judge/Research Officer, High Court of Sindh, a trained

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[44] Rules of the Karachi Centre for Dispute Resolution for conduct of Commercial Mediation:

29. The parties agree to pay those fees and costs established by the Centre in its Fee Schedule in effect at the time a case is submitted for mediation.
30. The expenses of all persons attending for that party shall be the responsibility of that party.

Rules of the Arbitration and Mediation Institute of Canada, Inc. for the conduct of Commercial Mediation:

19. The expenses of witnesses shall be the responsibility of the party calling such witnesses.
20. The Mediator's fee and all expenses of the mediation, including travel and the rental of premises, and the costs and expenses of any expert or consultant engaged by the Mediator pursuant to paragraph 9 hereof, shall be borne equally by the parties unless it is agreed otherwise.
21. Where an administrative fee is payable to the Institute, it shall be borne equally by the parties

[45] I visited Karachi in June 10.03.2007.

mediator from the Karachi mediation Centre, who were very critical of this concept of cost-effectiveness of commercial mediation, especially, being practiced at Karachi through Karachi Dispute Resolution Centre. Mr. Abdul Qayyum Abbasi said, "it is totally misconceived that this mode of ADR is cost effective for the litigants. Litigant once pays to his lawyer, bears Court fee and other case expenses, then again is burdened to pay mediator fee and bear all the expenses of the process of mediation. This is also the main reason people are not inclined and willing to go for mediation". This issue will be discussed in detail in Chapter 3 while dealing with mediation in Pakistan

1.3.2 Confidential

ADR being a private process offers confidentiality which is generally not available in court proceedings. There is probably nothing more important than the fact that mediation is a confidential process and conducted without prejudice. The confidentiality is on two levels[46]:

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[46] The CEDR Mediator handbook, fourth edition, Oct. 2004 [p 46]
The Rules 23 to 26 of the Karachi Dispute Resolution Centre regarding confidentiality:

23. The Mediator shall keep confidential any information disclosed in the course of the mediation including all written material provided to him/her as Mediator.
24. The parties agree that mediation sessions are settlement negotiations and disclosures are inadmissible in any further or pending litigation or arbitration to the extent permitted by law. The parties agree not to require the Mediator to testify or produce records or notes in any future proceedings.
25. No stenographic or taped record shall be made of the mediation proceedings.
26. The parties agree that they shall not rely on or introduce as evidence in subsequent arbitral or judicial proceedings:

    a. any views expressed, or suggestions made, by the other party in respect of the possible settlement of the dispute;
    b. any admissions made by the other party in the course of the mediation;
    c. the fact that the other party had indicated a willingness to accept a proposal or recommendation for settlement made by the Mediator; or,
    d. proposals made or views expressed by the Mediator.

i). the entire mediation is in confidence. It is held in private. What is discussed remains private and the outcome is only publicized if the parties so agree.

ii). the private meetings between the mediator and parties work at a deeper level of confidentiality. No private information shared with one party can be passed to the other party without express permission.

Generally confidentiality means many things—such as there are no records kept by the mediator. When there is no record, it becomes much harder to breach confidentiality or to try to use the mediator to prove or force a particular point not finalized in the parties' agreement. In fact, some ADR groups and centres require the parties to take all notes on provided paper and then take and destroy even the notes after each session.

Confidentiality also means that the facilitator is not subject to subpoena and thus cannot be made a witness. Without notes or the facilitator, the only method to breach confidentiality is the testimony of an interested party who is usually bound by law (and thus subject to being quashed) not to disclose more than is agreed. Confidentiality shall extend to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement[47].

1.3.3 Non-Adversarial and Commercial Conducive

One of the main advantages of ADR is that it is non-adversarial rather a congruous, therefore, commercial conducive because its result come out as a win-win

[47] Section 75 of the Indian Arbitration and Conciliation Act, 1996.

situation for the both parties. To fully comprehend this aspect of ADR, the whole process of ADR need appraisal. For instance, in mediation, each side's respective positions are aired, the mediator then separates them into a private rooms, beginning a process of shuttle diplomacy, shuttling back and forth between the parties' rooms. Unlike the courtroom, the mediator has no power other than the sheer force of his presence and personality, the compelling force of his arguments and his neutrality and experience. As the mediator continues to move back and forth the parties move closer and closer to each other. The end product is agreement between of both sides. When all is said and one, each party feels as though they have reached an acceptable agreement, one they and their company can live with. Both sides feel they have won. Both sides feel good about the outcome[48]. Thus, agreed settlement further salvage the parties from straining their future business relation, which is normally the case where parties choose litigation. Further, confidentiality and secrecy of the proceedings and out-come the proceeding also save the disputants from being exposed in the market, which otherwise may cause to invite adverse reputation in market for disputant entities.

In short, it save huge sum of money, lots of time, vital energy and will allow disputant companies to salvage a business relationship which may be in the companies' best interest to preserve, and last but not the least, provide a forum of privacy for the parties.

[48] Article by William Sheffield on the subject "Dispute among business partner should be mediated or arbitrated, not litigated" published on Alternative Dispute Resolution edited by P.C. Rao & William Sheffield, ed, 2006

Chapter 2

Framework regarding Mediation and Conciliation

Like any other branch of laws, there are both international as well regional and domestic legal and institutional frameworks dealing with commercial disputes through Mediation and Conciliation. In this section of write-up, first, international framework will be dealt with, then of different countries so as to have complete understanding of the laws and concepts.

2.1 International Framework regarding Mediation

It is also apparent that the international community is moving towards a structured international dispute resolution system in which both public courts and private arrangements will interact. All such facilities quite naturally form part of the same overall system. As such, they ought to be interrelated and not left in isolation as many times happens today as a consequence of the fragmentation of the law and dispute settlement procedures.

Thus, internationally the issue of structured dispute resolution is addressed. On the one hand, some forums in the form, internationally, of institutions are created. On the other, model laws are solicited so that countries may adopt them for dealing with the matter

uniformly in the light of internally recognised principles. In the same line, there are legal frameworks for Mediation and Conciliation.

There are certain institutions which provide a kind of institutional framework for the settlement of dispute through ADR including Mediation. These include World Intellectual Property Organisation (WIPO), International Centre for the Settlement of Investment Disputes (ICSID), International Chamber of Commerce (ICC) and United Nations Commission on International Trade Laws (UNCITRAL). United Nations Commission on International Trade Laws also provide for Model law, inter alia, on Conciliation for the countries around the world.

In this sub-chapter we will analytically examine some international frameworks so as to equip ourselves for the purpose of having better understanding of comparative position of our laws on the subject.

2.1.1 World Intellectual Property Organization

WORLD INTELLECTUAL PROPERTY ORGANIZATION

The World Intellectual Property Organization (WIPO) is a specialized agency of the United Nations. It is dedicated to developing a balanced and accessible international intellectual property (IP) system, which rewards creativity, stimulates innovation and stately contributes to economic development while safeguarding the public interest. It was established by the WIPO Convention in 1967 with a mandate from its Member States (till now 179 member states) to promote the protection of IP throughout the world

through cooperation among states and in collaboration with other international organizations. Its headquarters are in Geneva, Switzerland.[1]

Based in Geneva, Switzerland, the WIPO Arbitration and Mediation Centre is a unit of the International Bureau of WIPO,[2] was established in 1994 to offer Alternative Dispute Resolution (ADR) options, in particular arbitration and mediation, for the resolution of international commercial disputes between private parties. Developed by leading experts in cross-border dispute settlement, the procedures offered by the Centre, in the shape of the WIPO mediation, arbitration and expedited arbitration rules and clauses, are widely recognized as particularly appropriate for technology, entertainment and other disputes involving intellectual property[3].

The centre offers specialized service for mediation of intellectual property disputes, that is, dispute concerning intellectual property or commercial transactions and relationship involving the exploitation of intellectual property. Common example of such commercial transactions and relationships are patent and trademark licenses, franchises, computer contracts, multimedia contracts, distribution contracts, joint ventures, research and development contracts, technology-sensitive employment contracts, mergers and acquisitions where intellectual property assets assume importance, sports marketing agreements, and publishing, music and film contracts.[4]

It is the only international provider of specialized intellectual property ADR services. It provides advice on, and administers, procedures conducted under the WIPO rules. For this purpose, the centre also maintains detailed database of well over 1000 intellectual

[1] http://www.wipo.int/about-wipo/en/what_is_wipo.html last visited on 30.06.2007.
[2] Article 1 of the WIPO Mediation Rules
[3] http://www.wipo.int/amc/en/ last visited on 30.06.2007.
[4] Guide to WIPO mediation, http://arbiter.wipo.int last visited on 30.6.2007.

property and ADR specialist who act as neutrals[5]. Mediation is non-binding procedure under the rules[6]. This means that even though parties have agreed to submit their dispute to mediation, they are not obliged to continue with the mediation process after first meeting[7]. Non-binding mediation also mean that decision also cannot be imposed upon the parties. In order for any settlement to be concluded, the parties must voluntarily agree to accept it.

Mediation process provided by the Centre is based on two models: facilitative mediation; evaluative mediation. In "facilitative mediation" the mediator endeavours to facilitate communication between the parties and help each side to understand other's perspective, position and interest in relation to the dispute. Under the second model—evaluative mediation—mediator provides non-binding assessment or evaluation of the dispute, which the parties are free to accept or reject as the settlement of the dispute. It is up to the parties which of these two models they wish to follow. The Centre also assists the parties in identifying the model they prefer to follow[8].

Mediation commences on the basis of agreement[9], at the time of contract or after having arisen disputes, between the parties stipulating submission of dispute under the WIPO rules, following the application by one of the parties to that agreement. Parties have been given full liberty in selecting mediator, but in case of no such selection by the parties, the mediator, that is neutral, impartial and independent[10], is selected by the centre after consultation by the parties[11]. The emphasis on the consultation of the parties, in absence

[5] Ibid.
[6] Article 13 (a) of the WIPO Mediation Rules.
[7] Article 18 (iii) of the WIPO Mediation Rules.
[8] Guide to WIPO mediation, http://arbiter.wipo.int last visited on 30.06.2007.
[9] Article 3 of the WIPO Mediation Rules.
[10] Article 7 of the WIPO Mediation Rules.
[11] Article 6 of the WIPO Mediation Rules.

their already consensus, for the selection of mediator is aim at attaining their full confidence on him, which is crucial for the success of a mediation.

Regarding fee of the mediator, fixed by the centre following the consultation between the parties and the mediator,[12] cost of mediation and administration fee the rules provide that the parties shall bear in equal share unless otherwise agreed by them.[13] The Rules provide two sets of fee. The first is that which is paid to the centre in the name of Registration fee, which amounts to 0.10% of the value of the mediation subject to a maximum of $10,000 as provided in schedule of fee of the rules. The second is that which is paid to mediator. As stated earlier, these are negotiated and fixed at the time of appointment of mediator. The schedule set out indicative hourly and daily[14] fee for the mediator.

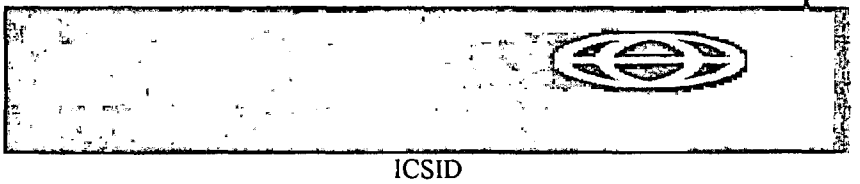
Articles 14 to 17 of the WIPO Mediation rules provide for confidentiality measures at three levels of the mediation process. At first level, these rules provide that every one involved in the process of mediation, whether he is mediator or his assistant, parties or their representative or their advisor, any independent expert or any other person, are required to "sign any appropriate confidentiality understanding prior to taking part in mediation"[15]. This can be categorized as pre-mediation measure. At the second level, no recording of the meetings of the parties with the mediator is allowed[16]. At the third level (which can also be categorized as post-mediation measure regarding confidentiality), all the materials and documents provided by a party is required to be returned without retaining any copy thereof and any note taking during the meetings is also required to be.

[12] Article 22 of the WIPO Mediation Rules.
[13] Article 24 of the WIPO Mediation Rules.
[14] $300-$600 per hour; $1,500-$3,500 per day.
[15] Article 15 of the WIPO Mediation Rules.
[16] Article 14 of the WIPO Mediation Rules.

destroyed[17]. Further, no view expressed by a mediator nor any admission made by a party nor indication or otherwise regarding willingness to accept any proposal made by the mediator during the mediation process can be used as a evidence in any judicial or arbitral proceedings[18].

These rules do not contain every minute detail of the framework required for mediation process but provide for an outer-framework, giving full liberty to the parties, while having all the essential ingredients of the process, i.e. non-binding, confidential and flexible.

2.1.2 International Centre for the Settlement of Investment Dispute



ICSID

The International Centre for Settlement of Investment Disputes (ICSID) is a public international organization created under a treaty, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). The Convention was formulated by the Executive Directors of the World Bank and submitted by them on March 18, 1965 to member States of the Bank for consideration with a view to get signature and ratification. The Convention, entered into force on October 14, 1966.[19]

In accordance with the provisions of the Convention, ICSID provides facilities for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The Centre's objective in making such facilities

[17] Article 16 of the WIPO Mediation Rules.
[18] Article 17 of the WIPO Mediation Rules.
[19] http://www.worldbank.org/icsid last visited on 20.07.2007.

available is to promote an atmosphere of mutual confidence between States and foreign investors conducive to increasing the flow of private international investment. It does not itself engage in such conciliation or arbitration. This is the task of conciliators and arbitrators appointed by the parties or as otherwise provided for in the Convention. The Centre assists in the initiation and conduct of conciliation and arbitration proceedings, performing a range of administrative functions in this respect. Recourse to conciliation and arbitration under the ICSID Convention is entirely voluntary. No Contracting State or national of such a State is obliged to resort to such conciliation or arbitration without having consented to do so. However, once the parties have consented, they are bound to carry out their undertaking[20].

Besides providing facilities for conciliation and arbitration under the ICSID Convention, the Centre has since 1978 had an Additional Facility allowing it to administer certain proceedings between States and nationals of other States which fall outside the scope of the Convention, notably conciliation and arbitration proceedings where one of the parties is not a Contracting State or a national of such a State.

The provisions of the ICSID Convention are complemented by Regulations and Rules adopted by the Administrative Council of the Centre pursuant to Article 6(1)(a)–(c) of the Convention (the ICSID Regulations and Rules). The ICSID Regulations and Rules comprise Administrative and Financial Regulations; Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules); Rules of Procedure for Conciliation Proceedings (Conciliation Rules); and Rules of Procedure for Arbitration Proceedings (Arbitration Rules)[21].

[20] Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States.

[21] http://www.worldbank.org/icsid last visited on 20.07.2007.

In the following paras we would analysis Mediation/conciliation in the light of the ICSID convention and the rules regarding mediation made thereunder i.e. Rules of Procedure for the Institution of Conciliation Proceedings (Institution Rules)— which cover the period of time from the dispatch of the notice of registration of a request for conciliation until a report is drawn up—and Rules of Procedure for Conciliation Proceedings (Conciliation Rules)—which regulate transactions previous to issuance of notice.

Mediation process provided by the Centre, like that of WIPO's, is mainly based on two models. It is a facilitative one when it undertakes to "clarify the issues in between the parties[22]" so as to bringing agreement between them upon mutually acceptable terms. It is evaluative one when it provides non-binding assessment or evaluation of the dispute in the form of "recommendations[23], while also making argument in favour of such recommendation[24], which the parties are free to accept or reject as the settlement of the dispute.

The Centre providing a very institutional conciliation service extends discretion to the disputant parties for the appointment of conciliator, and in absence thereof, it itself designates conciliator with the consultation of the parties amongst the conciliators on the penal of the centre. In case of agreement between parties there can be a sole conciliator or more in uneven number to form commission for the purpose of conciliation process and in case of disagreement three conciliators are appointed, one from each party and third again with agreement between the parties[25]. The conciliation rules also provide quite comprehensive mechanism for replacement on incapacity or resignation and disqualification of conciliator.

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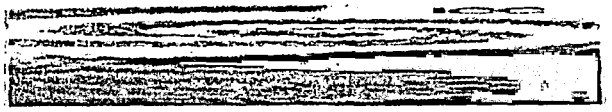
[22] Article 34 of the ICSID Convention.
[23] Article 34 of the ICSID Convention.
[24] Article 22 of the Conciliation Rules.
[25] Article 29 of the ICSID Convention.

Regarding confidentiality of the proceedings it impose on the conciliator as a pre-emptive measure a condition in the form of declaration, inter alia, to the effect that he will maintain confidentiality of all proceedings before him and any report drawn thereunder[26]. As a post-proceeding measures, it disentitle each party of the conciliation proceeding in any other proceeding before the court or tribunal to invoke or rely on any views expressed or statement or admissions or offers of settlement made by the other party in the conciliation proceedings or any report or any recommendation made by the commission[27].

The fees and expenses of the members of the Commission as well as the charge for the use of facilities of the Centre, are required be borne equally by the parties. Each party is also required to bear any other expenses it incurs with the proceeding. The Secretariat provides the Commission and the parties all information in its possession to facilitate the division of the costs[28].

2.1.3 International Chamber of Commerce (ICC)



The International Chamber of Commerce was founded in 1919 with an overriding aim to serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital. Under the influence of its first president, Etienne Clémentel, a former French minister of commerce, the organization's international secretariat was established in Paris and he was instrumental in creating the ICC International Court of Arbitration in 1923.

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[26] Article 14 of Conciliation (Additional Facility) Rules.
[27] Article 35 of the ICSID Convention.
[28] Article 44 of Conciliation (Additional Facility) Rules.

ICC has evolved beyond recognition since those early post-war days when business leaders from the allied nations met for the first time in Atlantic City. The original nucleus, representing the private sectors of Belgium, Britain, France, Italy and the United States, has expanded to become a world business organization with thousands of member companies and associations in around 130 countries. Members include many of the world's most influential companies and represent every major industrial and service sector.[29]

The ICC, ADR Rules offer a legal framework for the amicable settlement of commercial disputes with the assistance of a neutral. They were launched in 2001 to replace the 1988 Rules of Conciliation. The Rules apply exclusively to business disputes. This means, for example, that they cannot be used for the resolution of family or labour disputes. They can be used for international as well as domestic business disputes[30].

An agreement of the parties to submit to the ICC Rules is a prerequisite to the commencement of ICC ADR proceedings. Such an agreement can result from of an ICC ADR clause in the underlying contract between the parties. In the absence of such a clause, a subsequent agreement of the parties in writing, at any time they desire to seek an amicable settlement of their dispute under the Rules. In the absence of any prior agreement, the request for ADR filed with ICC by a party who wishes to submit the dispute to the Rules, followed by the agreement of the other party to participate in the ICC ADR proceedings.[31]

[29] http://www.iccwbo.org/id93/index.html last visited on 25.07.2007
[30] Guide to ADR Rules at http://www.iccwbo.org last visited on 25.07.2007.
[31] Article 2 of the ICC ADR Rules.

The Neutral is selected, either by designation by all of the parties, or by appointment by ICC. In the latter case, the parties may agree upon any desired qualifications or attributes of the Neutral to be appointed, and ICC will make all reasonable efforts to appoint a Neutral having those characteristics. ICC can also take into consideration the suggestions of any party concerning the qualifications or attributes of the Neutral to be appointed.[32]

Immediately after selection of Neutral, the phase of selection of mode or modes of ADR comes. It begins with a discussion among the Neutral and the parties in order to determine the ADR settlement technique to be used and the specific procedure to be followed. The Rules enable the parties to choose the ADR settlement technique which they believe to be the most appropriate for their dispute and the Neutral help in this regard. This may be mediation, whereby a neutral helps the parties to settle their differences through negotiation; a mini-trial, in which a panel comprising a neutral and a manager from each party proposes a solution or gives an opinion; or a neutral evaluation of a point of law or fact. Common to all these techniques is the fact that the decision reached by or in collaboration with the neutral is not binding upon the parties, unless they agree otherwise. Lastly, the parties are not limited to a single technique, but may find it useful to apply a combination of settlement techniques. In the absence of such a choice, mediation, the most common ADR technique, is be used[33]

Confidentiality is an important, if not essential, aspect of ICC ADR proceedings and permits the parties to participate therein with complete confidence. Thus, Article 7 sets

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[32] Article 3 (1) of the ICC ADR Rules: Where all of the parties have jointly designated a Neutral, ICC shall take note of that designation, and such person, upon notifying ICC of his or her agreement to serve, shall act as the Neutral in the ADR proceedings. Where a Neutral has not been designated by all of the parties, or where the designated Neutral does not agree to serve, ICC shall promptly appoint a Neutral, either through an ICC National Committee or otherwise, and notify the parties thereof. ICC shall make all reasonable efforts to appoint a Neutral having the qualifications, if any, which have been agreed upon by all of the parties.

[33] Article 5(1) of the ICC ADR Rules.

out the general rule that the ICC ADR proceedings and related materials are confidential. Article 7(1) provides that ICC ADR proceedings are private and confidential, starting from the filing of the Request for ADR. Only two exceptions are provided. First, the parties may agree that all or part of the proceedings will not be confidential, and, second, a party may disclose any given element of the ICC ADR proceedings if it is required to do so by applicable law. Any settlement agreement between the parties must also remain confidential, subject to the same two exceptions mentioned above. In addition, a party may disclose the settlement agreement if such disclosure is required for its implementation or enforcement. Article 7(2), in application of the general rule established in Article 7(1), contains a list of what a party may not produce, relative to ICC ADR proceedings, as an element of proof in judicial, arbitral, or similar proceedings. As under Article 7(1), the parties may agree to waive this confidentiality obligation. In addition, a party will not be bound by this obligation insofar as applicable law requires it to produce one or more of the listed elements. Article 7(3) deals with whether the Neutral may act as a judge, arbitrator, expert or representative of a party in other proceedings related to the dispute submitted to the ICC ADR proceedings. It provides that it is entirely permissible for a Neutral to act in such capacities if all of the parties to the ICC ADR proceedings agree thereto in writing. However, it is not permissible without such an agreement. Article 7(4) forbids the Neutral to act as a witness in any other proceedings related to the dispute submitted to the ICC ADR proceedings, unless all of the parties agree otherwise or applicable law requires him or her to do so. This article once again is designed to ensure the confidentiality of the ICC ADR proceedings[34]. It should also be noted that any settlement agreement between the parties is never communicated to ICC, in order to preserve its confidentiality[35].

[34] Article 7 of ICC ADR Rules: 1.In the absence of any agreement of the parties to the contrary and unless prohibited by applicable law, the ADR proceedings, including their outcome, are private and confidential. Any settlement agreement between the parties shall similarly be kept confidential except that a party shall

The cost of the ICC ADR proceedings comprises (i) ICC administrative expenses and (ii) the remuneration of the Neutral. ICC administrative expenses comprise the following: a non-refundable registration fee accompanying the Request for ADR in the amount of. US$ 1,500[36]. Administrative expenses capped at a maximum of US$ 10,000[37].

The remuneration of the Neutral is calculated as follows: fees based upon an hourly rate fixed by ICC in consultation with the Neutral and the parties[38]; reasonable expenses fixed by ICC[39]. This system permits ICC to control the cost of the ICC ADR proceedings and to ensure compliance with any established deadlines. Moreover, it saves the parties having to discuss fees directly with the Neutral. It should be noted that, in accordance with Article 4(2), ICC ADR proceedings will not go forward until payment has been deposited. Given the consensual nature of ICC ADR, the parties are required under Article 4 (5) to bear the costs equally, unless they agree otherwise[40].

These rules provide considerable flexibility, reasonable confidentiality but no undertaking of the kind required under the ICSID rules, and non-binding settlement.

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have the right to disclose it to the extent that such disclosure is required by applicable law or necessary for purposes of its implementation or enforcement.

2.Unless required to do so by applicable law and in the absence of any agreement of the parties to the contrary, a party shall not in any manner produce as evidence in any judicial, arbitration or similar proceedings: a) any documents, statements or communications which are submitted by another party or by the Neutral in the ADR proceedings, unless they can be obtained independently by the party seeking to ICC ADR Rules produce them in the judicial, arbitration or similar proceedings; b) any views expressed or suggestions made by any party within the ADR proceedings with regard to the possible settlement of the dispute; c) any admissions made by another party within the ADR proceedings; d) any views or proposals put forward by the Neutral; or e) the fact that any party had indicated within the ADR proceedings that it was ready to accept a proposal for a settlement.

3.Unless all of the parties agree otherwise in writing, a Neutral shall not act nor shall have acted in any judicial, arbitration or similar proceedings relating to the dispute which is or was the subject of the ADR proceedings, whether as a judge, as an arbitrator, as an expert or as a representative or advisor of a party.

4.The Neutral, unless required by applicable law or unless all of the parties agree otherwise in writing,. shall not give testimony in any judicial, arbitration or similar proceedings concerning any aspect of the ADR proceedings.

[35] Guide to ADR Rules at http://www.iccwbo.org last visited on 25.07.2007.

[36] Article 4(1) of ICC ADR Rules and Appendix A.

[37] Article 4(2) ICC ADR Rules and Appendix B.

[38] Article 4(2) of ICC ADR Rules and Appendix C.

[39] Ibid.

[40] Guide to ADR Rules at http://www.iccwbo.org last visited on 27.07.2007.

2.1.4 United Nation Commission on International Trade Laws

UNCITRAL

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966 (Resolution 2205 (XXI) of 17 December 1966). In establishing the Commission, the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission vehicle by which the United Nations could play a more active role in reducing or removing these obstacles[41]. The General Assembly gave the Commission the general mandate to further the progressive harmonization and unification of the law of international trade. The Commission has since come to be the core legal body of the United Nations system in the field of international trade law.

The Commission is composed of sixty member States elected by the General Assembly. Membership is structured so as to be representative of the world's various geographic regions and its principal economic and legal systems. Members of the Commission are elected for terms of six years, the terms of half the members expiring every three years. Pakistan is also member of the commission and her membership will expire in the year 2010[42].

Adopted by UNCITRAL on 23 July 1980, the UNCITRAL Conciliation Rules consisting of 20 Articles provide a comprehensive set of procedural rules upon which parties may agree for the conduct of conciliation proceedings arising out of their commercial relationship. The Rules cover all aspects of the conciliation process, providing a model conciliation clause, defining when conciliation is deemed to have commenced and

[41] www.unicitral.org last visited on 30.7.2007
[42] Ibid.

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[41] www.unicitral.org last visited on 30.7.2007.
[42] Ibid.

terminated and addressing procedural aspects relating to the appointment and role of conciliators and the general conduct of proceedings. The Rules also address issues such as confidentiality, admissibility of evidence in other proceedings and limits to the right of parties to undertake judicial or arbitral proceedings whilst the conciliation is in progress[43].

Unlike the ICC it does not provide institutional framework, but only legal one. It scope is limited to a dispute "arising in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation"[44]. The parties may agree to exclude or vary any rule at any time[45], without any permission of the kind required under the ICC rules.

The proceedings is said to have started on the acceptance of invitation for conciliation by the other party. Then the parties are required to select one or two or more conciliators[46]. In case of one conciliator, the parties are required to reach on agreement. In case of two, each party should select one; and in case of three, each party should select one and reach on agreement regarding the third one. In case parties agree on the recommendations of an institution for the selection of conciliator, the institution should take into consideration impartiality and nationality of the conciliator[47].

The rules encompass both the facilitative and evaluative concepts of conciliation. At the one hand, the conciliator may, at any stage of the conciliation proceedings, make

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[43] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html last visited on 30.07.2007.

[44] Preamble to the UNCITRAL Conciliation Rules 1980, which reads: (The General Assembly) *Recommends* the use of the Conciliation Rules of the United Nations Commission on International Trade Law in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation.

[45] Article 1 (2) of the UNCITRAL Conciliation Rules 1980.

[46] Article 3 of the UNCITRAL Conciliation Rules 1980.

[47] Article 4 of the UNCITRAL Conciliation Rules 1980.

proposals with reasons for a settlement of the dispute[48]. On the other, each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute[49], thus, leaving the rule of the conciliator to that of a facilitator who helps reaching an amicable settlement in the light of the suggestions of the parties. Parties are only bound to settlement after having signed it. Arbitration follows conciliation process, in case of stipulation in the contract between the parties.

The conciliator and the parties are required to keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement[50]. Further, the parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings[51].

The unique feature of these rules is that these require the parties to undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights[52].

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[48] Article 7 (4) of the UNCITRAL Conciliation Rules 1980.
[49] Article 12 of the UNCITRAL Conciliation Rules 1980.
[50] Article 14 of the UNCITRAL Conciliation Rules 1980.
[51] Article 19 of the UNCITRAL Conciliation Rules 1980.
[52] Article 16 of the UNCITRAL Conciliation Rules 1980.

The costs fixed by the conciliator are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.[53] On the commencement of proceedings the conciliator may request each party to deposit cost and in case of failure thereof, he may suspend the proceedings[54].

Apart from providing its own legal framework for the resolution of commercial dispute through conciliation under Conciliation Rules 1980, UNCITRAL also provides the Model Law, together with its Guide to enactment and use, adapted by UNCITRAL at its 2002 session, to the world. The 14-articles Model Law aims to promote the use of conciliation, both internationally and domestically. It is also aimed to assist States in enhancing conciliation legislation, or in formulating it, and would also strengthen the enforcement of settlement agreements. It would provide uniform rules in respect of the conciliation process to encourage the use of conciliation and ensure greater predictability and certainty in its use. To avoid uncertainty resulting from an absence of statutory provisions, the Model Law addresses procedural aspects of conciliation, including appointment of conciliators, commencement and termination of conciliation, conduct of the conciliation, communication between the conciliator and other parties, confidentiality and admissibility of evidence in other proceedings as well as post-conciliation issues, such as the conciliator acting as arbitrator and enforceability of settlement agreements[55]

[53] Article 17 (1),(2) of the UNCITRAL Conciliation Rules 1980.
[54] Article 18 of the UNCITRAL Conciliation Rules 1980.
[55] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html last visited on 30.07.2007.

2.2 Framework of different countries regarding Mediation

After having set an eye bird view on the international framework regarding mediation in the previous sub-chapter, in this sub-chapter we would briefly see country specific framework regarding mediation. Two countries, UK and India, have been selected for the purpose. Reasons for the selection of these two countries are that they have similar, if not identical legal system, to that of Pakistan.

2.2.1 United Kingdom on Mediation

In the United Kingdom, before Woolf Report, case law on ADR excluding arbitration is very scant. The House of Lords in *Walford v Miles*[56] found that an agreement to negotiate is not enforceable as a Court cannot determine the relevant obligations with sufficient certainty and cannot assess compliance. This view has been weakened by the House of Lords' decision in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*[57], where the Court considered that it has a discretionary power to stay proceedings if there is a dispute resolution clause that is equivalent to an effective agreement to arbitrate, as in the case of an expert determination clause. The case was followed in *Cott UK Ltd v FE Barber Ltd*[58], although on the facts of that case, there were grounds for refusing a stay[59]. Despite weakening the view in *Walford v Miles* that agreements to agree or to negotiate are unenforceable for lack of certainty, the *Channel Tunnel* and *Cott UK* cases considered binding ADR procedures.

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[56] [1992] 1 All ER 453.
[57] [1993] AC 334.
[58] [1997] 3 All ER 540.
[59] (1999) SJLS 257.

As far as mediation is concerned, the English High Court considered the enforceability of a mediation clause in *Halifax Financial Services Ltd v Intuitive Systems Ltd*[60]. The Court considered that a mediation clause must be a condition precedent to the issue of litigation proceedings in order to be enforceable. The Court found that, as a matter of construction, the mediation clause in question failed this test. As the *Halifax* decision turned on the construction of the clause in question, the issue of the enforceability of mediation clauses in the United Kingdom remains largely unresolved. Moreover, the *Halifax* decision was made prior to the introduction of the new Civil Procedure Rules ('CPR'), which encourage ADR.

In 1995 and 1996 Lord Woolf conducted a large-scale inquiry into improving access to justice in English courts. The Final Report proposed a new civil justice landscape, which would avoid litigation wherever possible; involve less adversarial and less complex litigation; and provide stricter case management by judges[61]. A unified code of procedural rules (the CPR) provided the centrepiece of the programme of reforms that followed Lord Woolf's inquiry.

The amended Rules came into effect on 26 April 1999 and apply to High Court and County Court proceedings in England and Wales. There is now a duty on Courts to actively case manage by encouraging the parties to co-operate and to use ADR[62]. The Rules specifically provide a window of opportunity early in proceedings for parties to request a stay to attempt ADR[63]. The CPR has also introduced the possibility of cost sanctions if a party does not comply with the court's directions regarding ADR. In

[60] [1999] 1 All ER (Comm) 303.
[61] Lord Woolf, Access to Justice at webpage http://www.dca.uk/woolf last visited on 30.06.2007.
[62] Rules 1.4(2) of the English Civil Procedure Rules.
[63] Rules 26.4(1) of the English Civil Procedure Rules.

particular, a Court when assessing costs can have regard to efforts made by the parties both before and during proceedings to settle the dispute[64].

In *Dyson and Field v Leeds City Council* (22 November 1999), the Court of Appeal reminded the parties that they could order indemnity costs and a higher rate of interest on damages if the parties unreasonably rejected the Court's suggestion that they should attempt ADR[65]. In *Frank Cowl v Plymouth City Council* [2001] EWCA Civ 1935 Lord Woolf stated that sufficient should be known about ADR to make the failure to adopt it, in particular where public money is involved, indefensible. Although this was a public law case in the context of judicial review, Lord Woolf's disapproval of parties who do not properly address ADR options in the course of litigation has general application. Most recently, in *Dunnett v Railtrack* [2002] EWCA Civ 302, the Court of Appeal refused to award costs to the successful litigant (Railtrack) as it had refused to mediate when it was proposed at an earlier stage in the proceedings. The Court stated that the parties and their lawyers should be aware that it is one of their duties to consider ADR, especially when the court has suggested it. This is the first case in England where the judges have actually withheld costs from a successful party on account of a failure to mediate[66].

Although the Central London County Court, Patents Court and Commercial Court were at the forefront of case management and mediation, even before the introduction of the CPR, the civil justice reforms have encouraged further Court mediation schemes. For example, mediation initiatives and ADR protocol have been introduced by the Technology and Construction Court (formerly the Official Referees Court), and the

[64] Rules 44.5(3) of the English Civil Procedure Rules.
[65] http://www.austlii.edu.au/au/journals/BondLRev/2001/20.html last visited on 30.6.2007.
[66] Ibid.

Leeds Combined Court, Mercantile Courts and the Court of Appeal also have mediation schemes in place[67].

Since the introduction of the CPR, there has been a dramatic decline in the number of proceedings instituted and also an increase in the number of settlements at an early stage of proceedings. There is, however, wide-spread belief that neither factor is attributable to mediation, but is largely due to the mechanism of the Part 36 offers[68], which allows parties to make offers of settlement, including prior to issue of proceedings, that have various cost consequences[69].

> "Apart from its impact via civil justice reform, the government has funded mediation schemes in a number of different areas, for example:
>
> a). The Environment Council offers an ADR service for public interest/environmental disputes;
>
> b). The Department of Health/National Health Service ('NHS') has been involved in a mediation pilot in several health regions;
>
> c). The Housing Ombudsman refers tenancy disputes in relation to Local Authority housing to mediation;
>
> d). The Scottish Citizens Advice Bureaux have piloted mediation services;
>
> e). The Planning Inspectorate has run a mediation pilot in the context of planning appeals cases"[70].

Various sectors of commerce have also shown growing support for mediation in the United Kingdom. The Confederation of British Industry provided the initial support to set up the Centre for Dispute Resolution ('CEDR', recently renamed the Centre for Effective Dispute Resolution)[71]. It was launched in the UK in 1990 as an independent, non-profit organization with a mission to encourage and develop mediation and other

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[67] http://www.austlii.edu.au/au/journals/BondLRev/2001/20.html last visited 30.06.2007.
[68] Rules 36.13 and 36.14 of England Civil Procedure Rules.
[69] http://www.austlii.edu.au/au/journals/BondLRev/2001/20.html last visited on 30.06.2007.
[70] Ibid.
[71] Ibid.

cost-effective dispute resolution and prevention techniques in commercial public sector disputes and civil litigation. CEDR works in partnership with business, government and the judiciary, in UK and internationally, to develop effective dispute resolution practice, and has been instrumental in helping to bring mediation into the heart of both business practice and the judicial system in England and Wales[72]. The Centre's membership includes retailers, banks, insurance companies, engineering and construction firms, manufacturing, computer companies, gas and petroleum enterprises, utilities industries, publishing companies and electronics firms. More recently, the Commerce and Industry Group has provided support for the launch of another mediation organisation, InterMediation[73].

CEDR defines "Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution".[74]

CEDR having established at UK and advancing UK concept regarding mediation by considering that mediation is voluntary, but refusal to mediate can give rise to cost sanctions; Courts actively encourage parties to consider mediation; Mediation is confidential and 'without prejudice' (nothing said in the mediation is admissible as evidence in legal proceedings)[75]. Mediation under CEDR can be used in both domestic and international disputes, in two-party and multi-party disputes irrespective to commencement of litigation or arbitration[76].

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[72] The CEDR Mediator Handbook, ed. 2004, p.8.
[73] http://www.austlii.edu.au/au/journals/BondLRev/2001/20.html last visited on 30.06.2007.
[74] http://www.cedr.gov.uk last visited on 30.07.2007.
[75] http://www.cedrsolve.com last visited on 30.07.2007.
[76] Guidance notes for Model Mediation Procedure at webpage http://www.cedr.co.uk last visited on 30.07.2007.

CEDR Solve is Europe's leading commercial mediation provider and has handled over 11,000 mediation referrals. It is stated to be one of the few truly independent dispute resolution providers. CEDR Solve's offers three mediation services which have been designed to offer both client choice and the crucial quality assurance required in today's market. These services include select Mediation, express Mediation and direct Mediation[77].

1. CEDR Solve **select Mediation service** offers a complete service for clients seeking impartial mediator recommendations with full support from start to finish. It enables parties to draw on this experience to ensure they appoint the right mediator for any case.

"Main feature of it includes[78]:

a) Advice on suitability of the mediation or other dispute resolution processes;
b) Mediator recommendations based on professional background, mediation experience, style, geography and availability;
c) Dedicated Client Adviser and Case Manager to assist throughout;
d) Mediation agreement, documents advice and logistics management;
e) Arrangement of venue and dates;
f) Independent management of mediator selection and any procedural hassles; and
g) Assistant mediator at no extra cost".

It also enables parties to appoint directly from a group of around 30 mediators who are part of the CEDR team or are conducting their independent practice with the quality assurance of CEDR Solve.

77 http://www.cedrsolve.com last visited on 30.07.2007.
78 ibid.

2. CEDR **direct mediation service** is a discounted streamlined service for parties who have already agreed a mediation date and venue and want a swift appointment of a quality mediator[79].

3. CEDR Solve **express Mediation Service** provides: assignment of a suitable mediator for the date and venue requested; dedicated Case Manager to assist throughout; mediation agreement and documents advice; assistant mediator at no extra cost[80].

CEDR provides for framework regarding mediation, in addition to adjudication and code of conduct for the mediators, etc, in the form of "Model Mediation Procedure" which states that parties with a view to start mediation process will enter into agreement with the CEDR. Parties may vary from the Model Mediation Procedure by setting such variance in the Mediation Agreement. It provides facilitative as well as evaluative concepts for the mediator for the conduct of mediation. It is facilitative because mediator, and also CEDR, facilitates the parties in selection of mediator, procedures and settlement agreement. It is evaluative because mediator produces for the Parties a non-binding recommendation on terms of settlement on the request of all parties in the situation where parties are unable to reach a settlement[81].

It also fairly covers and respects the concept of confidentiality by demanding from "every person to keep confidential and not use for any collateral or ulterior purpose all information, whether given orally, in writing or otherwise, arising out of mediation".[82] It also put restriction on the mediator "not to disclose to any other party any information given to him by a party in confidence without the express consent of that Party".[83] Any settlement reached in the Mediation will not be legally binding until it has been reduced

[79] Ibid.
[80] Ibid.
[81] Paragraph 12 of the CEDR Model Mediation Procedure.
[82] Paragraph 16 of the CEDR Model Mediation Procedure.
[83] Paragraph 18 of the CEDR Model Mediation Procedure.

to writing and signed by, or on behalf of, the Parties[84]. Fee and other expense of the mediation is equally born by the parties and all payment in this regard are made to the CEDR solve[85].

In addition to all above, CEDR also provides for code of conduct for the mediator and third party neutrals to ensure impartiality of the mediators in the process and confidentiality of the process[86].

2.2.2 India on Mediation

The mechanism to settle the dispute by reference to a third person had been in practice in ancient India, where in ancient India when people needed their disputes resolved by arbitrator or tribunal not established by the King. People used to get their disputes resolved by arbitrators or tribunals not established by the King. Village Councils *(Kulani)*, Corporation *(Sreni)* and Assemblies *(Gorth/Puga)* used to decide law suits. These institutions have been described as arbitral tribunals which have a status of *Panchayat* in modern India. In the Panchayat system the word Panch (arbitrator) and Panchayat (arbitration) are as old as Indian history[87].

India being a country of 125 millions people with liberalization and tremendous economic growth which led to explosion of litigation is also facing the problems of unreasonable delay in the resolution of cases in the court working under adversarial

[84] Paragraph 13 of the CEDR Model Mediation Procedure.
[85] *Paragraph 21 of the CEDR Model Mediation Procedure.*
[86] CEDR Code of Conduct for Mediators and third party Neutrals at webpage http://www.cedrsolve.com last visited on 30.07.2007.
[87] Article by Mr. Justice S.B. Sinhaon, Judge Supreme Court of India on "Mediation and Conciliation" at webpage http://delhimediationcentre.gov.in last visited on 10.07.2007

procedural system. Now an honest litigant is wary of approaching the court for a decision of his dispute. Hence, it has turned to ADR mechanisms[88].

The Supreme Court of India started the process of reforms in the Indian Judicial System. Hon'ble Mr. Justice A.H. Ahmedi, the then Chief Justice of India, in the year 1996 invited the Institute for the Study and Development of Legal Systems (ISDLS), USA to participate in a national assessment of the backlog in the civil Courts. Studies were made in respect of the causes of delay in the civil jurisdiction in the country[89].

The legislature by the Code of Civil Procedure (Amendment) Act, 1999, amended section 89 of the CPC[90] with effect from 1.7.2002 whereby mediation was envisaged as one of the modes of settlement of disputes. The amendment in section 89 was made on the recommendation of the Law Commission of India and the Justice Malimath Committee. It was recommended by the Law Commission that the Court may require attendance of parties to the suit or proceeding to appear in person with a view to arrive at

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[88] http://delhimediationcentre.gov.in/hist.htm last visited on 10.07.2007.

[89] Ibid.

[90] **Section 89 of CPC—Settlement of Dispute Outside the Court:**

1. Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of settlement and refer the same for:
   - (a) arbitration;
   - (b) conciliation;
   - (c) judicial settlement including settlement through Lok Adalat; or
   - (d) mediation.
2. Where a dispute has been referred:
   - (a) for arbitration or conciliation, the provision of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;
   - (b) to Lok Adalat, that Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;
   - (c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the other provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to the Lok Adalat under the provisions of that Act;
   - (d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

an amicable settlement of the dispute between them and make an attempt to settle the dispute amicably. Justice Malimath Committee recommended making it obligatory for the Court to refer the dispute, after issues are framed, for settlement either by way of arbitration, conciliation, mediation or judicial settlement through Lok Adalat. It is only when the parties fail to get their disputes settled through any of the alternative dispute resolution methods then the suit could proceed further. Thus section 89 was introduced to promote alternative methods of dispute resolution[91]. It is, however, interesting to note that under the provisions of section 89 of Code of Civil Procedure, 1908 the Court is given the power and jurisdiction to refer the dispute/litigation to an arbitrator without even existence of an arbitration clause.[92]

The expression "Mediation" used in the section 89 of CPC and "Conciliation" used in the Arbitration and Conciliation Act, 1996 are overlapping in their meaning. As Mr. Justice Dr M.K. Sharma in his article on the subject "Mediation and Conciliation concludes:

> "In India, however, mediation does not have any statutory recognition and existence and, therefore, would not be bound and restricted to any rules and statutory restrictions and limitations, unless it is accepted that both the expressions (Mediation and Conciliation) are overlapping".[93]

As per provision of Order X Rules 1-A[94] of the CPC after recording admission or denial of documents, the Court is under an obligation to direct the parties to opt for any of the

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[91] http://delhimediationcentre.gov.in/hist.htm last visited on 10.07.2007.
[92] Article by Mr. Justice Dr M.K. Sharma on "Mediation and Conciliation" at http://delhimediationcentre.gov.in last visited on 10.07.2007.
[93] http://delhimediationcentre.gov.in last visited on 10.07.2007.
[94] **Order X Rule 1-A**, inserted by **the Code of Civil Procedure (Amendment) Act, 1999**, reads: After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of Section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.
1-B. **Appearance before conciliatory forum or authority**—where a suit is referred under Rule 1-A, the parties shall appear before such forum or authority for conciliation of the suit.

four modes of alternative dispute resolution including mediation. The request for reference of a dispute to mediation can be made by both the parties.

A wide nature of disputes, including Matrimonial, Labour, Motor Accident Claims, eviction matters between landlord and tenants, Complaints under Section 138 of Negotiable Instrument Act, Petitions under Section 125 Cr. P.C. or any compoundable offence can be referred for mediation. If only one of the parties makes a request and the other party is not averse to the idea of mediation, the dispute can still be referred. Any Court can otherwise make a reference of a dispute as provided under Section 89 CPC.[95]

So, under section 89 of CPC the Court may make reference inter alia to the Lok Adalat and through Mediation for the purpose of settlement of dispute under ADR. Therefore a brief introduction about Lok Adalat and Delhi Mediation Centres would be a matter of interest.

i. **Lok Adalats**

Lok Adalats has been assigned special status under the Legal Services Authorities Act, 1987, which has come into force with effect from 9th November 1995. The said Act provides the statutory base to the Lok Adalats. The Lok Adalat shall now have:

i. the same powers as are vested in a civil Court under the Code of Civil Procedure, 1908;
ii. all proceedings before a Lok Adalat shall be deemed to be Judicial proceedings;
iii. every Lok Adalat shall be deemed to be a civil Court;

1-C. **Appearance before the Court consequent to the failure of efforts of conciliation**—where a suit is referred under Rule 1-A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it.

[95] http://delhimediationcentre.gov.in/hist.htm last visited on 10.07.2007.

iv. every Award made by a Lok Adalat shall be final, binding and non-appeal-able.

Lok Adalats under the Act shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of:

i. "any case pending before; or
ii. any matter which is falling within the jurisdiction of and is not brought before any court for which the Lok Adalat is organised".[96]

Now, dispute can be referred to Lok Adalats by mutual consent or at the request of one of the parties or by the Court suo motu. Even private cases can be referred to and decided by Lok Adalats. The Permanent Lok Adalat shall not have jurisdiction in the matter where the value of the property in dispute exceeds ten lac rupees[97]. The act provides. incentive with regard to refund of court fee initially paid at the time of the institution of the case, if the case is eventually settled through the Lok Adalats[98].

Lok Adalats are manned by experienced and talented persons who are ordinary drawn from retired judges, public-spirited lawyers and persons, and the law teachers selected on the basis of their reputation in the community, professional integrity and aptitude for social work. Lok Adalat panels are rendering social service without remuneration[99].

ii. Delhi Mediation Centres

Hon'ble Mr. Justice R.C. Lahoti, the then Chief Justice, Supreme Court of India constituted a Mediation and Conciliation Project Committee (then chaired by Hon'ble Mr. Justice N. Santosh Hegde). A pilot project on mediation was initiated in Delhi in the

[96] Section 20 of the Legal Services Authorities Act, 1987.
[97] Third Proviso of Section 22-C of the Legal Service Authorities Act, 1987.
[98] Section 21 (1) of the Legal Service Authorities Act, 1987.
[99] Mr K. Ramaswamy, Settlement of Dispute through Lok Adalat is one of the Effective ADR on Statutory basis, Alternative Dispute Resolution, P.C. Rao & William Sheffield, ed. 2006, p.93.

month of August, 2005. The first batch of senior Additional District Judges was imparted mediation training of 40 hours duration. The trained mediators started judicial mediation from their chambers in the end of August, 2005. Thereafter, 24 more Additional District Judges have been trained as mediators during the month of September and November, 2005. A permanent mediation centre with all modern facilities was established in Delhi at Tis Hazari court complex in October, 2005. Judicial mediation was started at Karkardooma Court Complex (in Delhi) in the month of December, 2005 and a litigant friendly and modern mediation centre was established in May, 2006. Eleven more Additional District Judges were trained as mediators during the month of June, 2006. A large number of cases were referred to the Tis Hazari Mediation Centre and the Karkardooma Mediation Centre. The settlement rate at the two centres being over 60% is very encouraging considering that judicial mediation is entirely a new concept in our country.[100]

After having briefly dilated upon legal framework of Lok Adalat in the previous section, now we will briefly discuss about legal framework being followed by the Delhi Mediation Centres named above. As stated above, a large number of variant cases are referred to the Mediation centre in terms of the section 89 and Order X, Rule 1-A of CPC.

To start with the referral order, it is an important document which initiates the mediation, explains ground rules and structures the process. A referral order should contain the following:

> "A referral order should state relevant statute or rule authorizing a referral Judge to refer parties to mediation; should outline proposed duties and responsibilities of the mediator; should state who is

[100] http://delhimediationcentre.gov.in/hist.htm last visited on 10.07.2007.

> authorized to appear before a mediator; mentioned whether advocates are permitted to appear during mediation proceedings; should contain that parties are required to participate in mediation in good faith; should spell out a definite time frame for conduction and conclusion of mediation proceedings; should spell out in unambiguous forms that mediation proceedings are confidential in nature".[101]

Then there comes a stage of appointment of Mediator/Mediator. Parties to a suit or other proceeding have been give liberty to reach on agreement on the name of the sole mediator/conciliator for mediating between them. In case parties are unable to agree on a sole mediator/conciliator, the Court may ask each party to nominate the mediator/conciliator or may nominate/appoint the mediator/conciliator[102], not suffering from disqualification provided in the rule 5 of the Mediation and Conciliation Rules 2004. The High Court, and the District and Sessions Judge with the approval of the High Court, prepares penal for the appointment of conciliator among retired judges of the High Courts and District and Sessions Court, legal practitioners and experts in the field[103], for the purpose[104]. The parties may agree on the procedure to be followed by the mediator/conciliator in the conduct of the mediation/conciliation proceedings. Where the parties do not agree on any particular procedure to be followed by the mediator/conciliator, the mediator/conciliator shall follow the procedure mentioned in rule 10 of Mediation and Conciliation Rules 2004. The mediator/conciliator is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872, but shall be guided by the principles of fairness and justice, having regard to the rights and

[101] http://delhimediationcentre.gov.in/guidelines.htm#consent last visited on 10.07.2007.
[102] Rule 2 of the MEDIATION and CONCILIATION RULES, 2004 made by the High Court of Delhi in exercise of the rule making power under Part X of the Code of Civil Procedure, 1908 (5 of 1908) and clause (d) of sub-section (2) of Section 89 of the said Code and all other powers enabling it in this behalf.
[103] Rule 4 of the MEDIATION and CONCILIATION RULES, 2004.
[104] Rule 3 of the MEDIATION and CONCILIATION RULES, 2004.

obligations of the parties, usages of trade, if any, and the circumstances of the dispute[105]. The parties are ordinarily present personally or through constituted attorney at the sessions or meetings notified by the mediator/conciliator. However, they may be represented by the counsel with permission of the mediator/conciliator in such sessions or meetings[106].

The process provided in the rules is both facilitative and evaluative. It is facilitative because it categorically states that mediator shall "facilitate voluntary resolution of disputes by the parties and communicate view of the each party to other"[107]. It is evaluative one because the mediator "explores areas of compromise and generates options in an attempt to solve the dispute"[108]. He is in no way authorised to impose decision upon the parties.[109]

The Rules fairly address the concept of confidentiality of mediation proceedings. These provide that mediator/conciliator shall not disclose specifically confidential information to the other party. Receipt or perusal, or preparation of records, reports or other documents by the mediator/conciliator, while serving in that capacity shall be confidential and the mediator/conciliator shall not be compelled to divulge information regarding those documents nor as to what transpired during the mediation/conciliation before any Court. Further, the parties are required to maintain confidentiality in respect of events that transpired during the mediation/conciliation and shall not rely on or introduce the said information in other proceedings as to views expressed, admission made and proposal offered by a party in the course of the mediation/conciliation proceedings and documents obtained during the mediation/conciliation which were

[105] Rule 11 of the MEDIATION and CONCILIATION RULES, 2004.
[106] Rule 12 of the MEDIATION and CONCILIATION RULES, 2004.
[107] Rule 16 of the MEDIATION and CONCILIATION RULES, 2004.
[108] Rule 16 of the MEDIATION and CONCILIATION RULES, 2004.
[109] Rule 17 of the MEDIATION and CONCILIATION RULES, 2004.

expressly required to be treated as confidential[110]. The mediation/conciliation sessions or meetings are conducted in privacy entitling presence of only persons entitled to represent parties. However, other persons may attend only with the permission of the parties and with the consent of the mediator/conciliator[111].

The agreement of the parties duly signed by them is submitted to the mediator/conciliator who, with a covering letter signed by him, forwards the same to the Court in which the suit or proceeding is pending[112], which on its satisfaction that the parties have settled their dispute, shall pass a decree in accordance with terms thereof[113].

The fee of the mediator is fixed by the Court at the time of referring the dispute to him. All expenses of the mediation/conciliation including the fee of the mediator/conciliator, costs of administrative assistance, and other ancillary expenses concerned, are borne equally by the various contesting parties or as may be otherwise directed by the Court. The mediator/conciliator may, before the commencement of the mediation/conciliation, direct the parties to deposit equal sums, tentatively, to the extent of 40% of the probable costs of the mediation/conciliation including his fee. The expense of the mediation/conciliation including fee, if not paid by the parties, the Court, on the application of the mediator/conciliator or the parties, directs the concerned parties to pay, and if they do not pay, the Court recovers the said amounts as if there was a decree for the said amount[114].

(iii) The Indian Arbitration and Reconciliation Act, 1996

This act was passed by the Indian parliament on 16th August 1996, in the forty seventh year of the Republic, taking into account Model Laws of Arbitration 1985 and

[110] Rule 20 of the MEDIATION and CONCILIATION RULES, 2004.
[111] Rule 21 of the MEDIATION and CONCILIATION RULES, 2004.
[112] Rule 24 of the MEDIATION and CONCILIATION RULES, 2004.
[113] Rule 25 of the MEDIATION and CONCILIATION RULES, 2004.
[114] Rule 26 of the MEDIATION and CONCILIATION RULES, 2004.

Conciliation Rules 1980 adopted by the United Nation Commission on International Trade Law and recommended by the General Assembly of the United Nations for the purpose of providing uniform laws on the subject to the world. As we are concerned only with conciliation therefore we will in the following lines examine part-III of the Act 1996 which deals with conciliation.

A critical perusal of the Act reveals that this part of the Act dealing with conciliation is the same to that of UNCITRAL Conciliation Rules 1980 in substance as well as in scheme. Moreover, most of the section of the act and rules of the Rules 1980 are not only same but identical, being verbatim copied, such as, section and rule dealing with commencement of proceedings, number of conciliators, appointment of conciliators, submissions of statements to the conciliator, role of the conciliator, administrative assistance, communication between conciliator and parties, disclosure of information, co-operation of the parties with the conciliator, suggestions of the parties for the settlement of the dispute, settlement agreement, confidentiality, termination of the conciliation proceedings, not to resort to arbitral or judicial proceedings during the conciliation process, costs, deposits, role of conciliator in other proceedings and admissibility of evidence in other proceedings.

Only the difference in these two laws is laid in application. According to UNCITRAL Rules, it is applicable following the agreed by the parties. Whereas, according to the Act, it is applicable unless an otherwise agreement between the parties. Other difference lies in the treatment of settlement reaching between the parties as the result of conciliation. UNCITRAL Rules state that the parties are "bound by the settlement reached between the parties"[115] whereas, the Act provides that "the settlement agreement shall have the same

[115] Article 13 (3) of the UNCITRAL Conciliation Rules 1980.

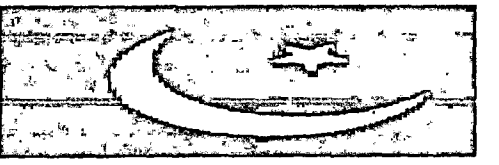
status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal".[116]

As the UNCITRAL Rules 1980 has already been discussed in detail in chapter 2.1.2, therefore, for the purpose of avoiding repetition, conciliation part of the Arbitration and Conciliation Act 1996, being identical, is not being dilated upon.

[116] Section 74 of the Arbitration and Conciliation Act 1996.

Chapter 3

Conciliation and Mediation in Pakistan



Pakistan like India and Bangladesh has inherited legal system from United Kingdom which is adversarial in regard to the mode of settlement of disputes by the Courts. As earlier discussed, this adversarial method of resolving disputes leaves for a Judge very little to control over the process, as he remains an impartial arbiter between two rival claimants and they are allowed a free hand to file their written statements, adduce evidence, to file miscellaneous applications without effective control from the Judge. So this system on the one hand causing unreasonable delay in the resolution of dispute, which spawns very embarrassing problems for all kinds of litigants including litigant businessmen. According to Ms Navin Merchant :

> "Contract enforcement in Pakistan on average takes 46 procedures and 2-10 year litigation process. It is generally recognized that commercial dispute settlement processes are slow, inadequate and inefficient and do not support market based growth or encourage domestic and foreign investment".[1]

[1] Paper read by Ms Navin Merchant on the topic "Commercial Dispute Resolution" at National Judicial Conference 2007

According to another statistic report there are 1, 30,000 cases pending in the Superior Courts of Pakistan[2].

On the other hand the prevalent judicial system is costly both for the Government as well as litigants and on an average, 35 % of the assets of the businesses are caught up in the litigation[3]. All this compelled to the policy makers in tandem with jurists and the heads of superior Courts to look for its solution in the light of world's experiences. The consensus of all concerned with the problem lead to inevitable solution, that is, ADR. Institutional use of ADR comes very late in the judicial system of Pakistan and also progressing at very slow pace. In this section of the thesis, I will try to look at Pakistan's legal, institutional development keeping in view the regional and international frameworks as discussed above.

3.1 Development in Pakistan

The concept of Alternative Dispute Resolution is not a novel concept for Pakistan. On the one hand, Pakistan being a country liberated on basis of having a land where Muslims could live their lives on Islamic principles, finds ADR concept very much given in the Holy Quran. As the Holy Quran ordained, "the believers are brothers to one another, therefore, make reconciliation between your two your brothers and fear Allah, so that you may be shown mercy".[4] While at another place God Almighty has directed, "if you fear a breach of marriage between a man and his wife, appoint one arbitrator from his family and

[2] Ibid.
[3] Paper read by Ms Navin Merchant on the topic "Commercial Dispute Resolution" at National Judicial Conference 2007
[4] The Quran, Surah Hijrat, Verse 10, Part 26, translation by Muhammad Farooq-i-Azam Malik, The Institute of Islamic Knowledge, Houston, Taxas, U.S.A, ed. 2004, p.683.

another from hers; if they wish to reconcile, Allah will create a way of reconciliation between them. Allah is the Knowledgeable, Aware".[5]

On the other hand, there are different cultures in Pakistan which still carry the concept of settlement of disputes outside the judicial domain. These methods in some cultures are called Punchayat, Jirga and Council of Elders, while in some other culture by any other name whatsoever, but are for the same purpose of resolving each kind of disputes between the parties. With the passage of time and development of legal system, these alternatives lost their utilities and started to be considered not in tandem with the existing and developed legal system but in competition with it. This is not true all along. There has been much legislation which not only recognises these old systems of resolving dispute (through Jirgas, etc.) but also bring them into their shelter. As his Lordship Mr. Justice Muhammad Shafi traced out the history in a judgement:

> "In 1873, the five Districts which now form the N.W.F.P and to which the F.C.R. applies were inhabited by Pathans, Balouchs or other tribes akin to them. The disputes, both civil and criminal, of tribal areas occupied by these very tribesmen, were decided by the elders of the tribes to which parties belonged. If the parties belonged to two different tribes, then the elders of both the tribes sat down together to compose the quarrel. For the dispute of greater magnitude a bigger Jirga commonly known as Shahi Jirga used to be convened. That also consisted of the elders of the tribes. The elders who formed the Jirga, which is the local word used for the Council of Elders, used to be person acquainted with the facts and history of both sides, they commanded adequate respect and confidence and used to have considerable influence. Their decisions were followed because they were respected. They could not afford to be dishonest or corrupt because in that case they could have lost the confidence and respect of their tribesmen, which they valued most. In fact if the people in whom trust was placed betrayed the trust, they were liable to be

[5] The Quran, Surah Nisa, Verse 35 128 Part 5, translation by Muhammad Farooq-i-Azam Malik, The Institute of Islamic Knowledge, Houston, Taxas, U.S.A, ed. 2004, p.192-193.

killed. When the British came they has to adopt the same method of settling the disputes because it was very difficult for them to change the time honoured custom and habits of the people in a short time. They legalise this system by introducing Regulation IV of 1873". [6]

For example, Frontier Crime Regulation (FCR), 1901 was promulgated by the then British Government for trial and disposal of criminal cases in certain Districts of the N.W.F.P and the tribal territory where under section 2 (a) the Council of Elders was defined and all cases of civil nature were to be heard by the Council of Elders under section 8. The Deputy Commissioner was required to refer dispute to Council of Elders requiring the Council to give a finding on the matter in dispute after holding an enquiry and affording opportunity of hearing the parties. Under Section 11 of the Regulation the Deputy Commissioner used to refer the criminal cases to the Council of Elders for their finding after holing necessary enquiry and hearing the accused person. The Council of Elders generally known "Jirga" conduct the inquiry for its own satisfaction and to reach a just conclusion. F.C.R was subsequently repealed in the settled districts of N.W.F.P but is still in force in the Federally Administered Tribal Areas (FATA) as defined under Article 246 (c) of the 1973 Constitution of Pakistan. Further, the Government of N.W.F.P promulgated the Provincially Administered Tribal Areas Criminal Law (Special Provisions) Regulation, 1975 where under section 3, certain petty offences were held to be tried by the Jirga. The said Regulation was amended through in 1976 and all offences punishable under Pakistan Penal Code were brought within the purview of Jirga. Likewise for resolution of civil dispute subject matter whereof does not exceed Rs. 5000/- were held triable by Jirga constituted under Provincially Administered Tribal Areas Civil Procedure (Special Provisions) Regulation, 1975. The said special procedure Regulation remained effective for 18/19 years. These regulations were replaced by Provincially Administered Tribal Areas Nifazi Nizami Sharia Regulation 1994. Under

[6] PLD 1955 (W.P) Peshawar 123 (Hamesh Gul Vs. Crown), p.136.

section 7 of it, all disputes were to be referred with consent of the parties to a mediator and the disputes were to be resolved basesd on the opinion of the mediator. The opinion of the mediator, if found in accordance with Sharia, is made rule of the Court[7].

From the above examples, it becomes clear that concept of ADR is not new for Pakistan; rather the wisdom of legislatures of period ranging from pre-partition to post-partition considers it more appropriate not only in accepting Jirga system but also patronising and institutionalising it. At the same time, some element of this system continue to flourish outside the legal domain firstly on account of entrenched partisan of the follower of this system and secondly due to lack of wisdom of legislature for bringing it within the legal domain of the law and institutionalising it. Now this system is said to have constituted a parallel system of justice. This parallel system which is extremely powerful in its overall influence may not have behind it the sanction of the State, but it definitely has the approval of large segments of the society[8]. Even a cursory look at the mechanism of ADR and prevailing Jirga system in Pakistan would reveal sea differences between them. As the Alternative remedies or methods are alternatives only in limited sense because its modes and mechanisms are available and practiced within the overall framework of the prevailing legal system. ADR in that context has the blessings and the sanction of the legal system and it functions within certain constraints and limits. Mediation, Conciliation and Arbitration etc. are conducted by the Courts and Judges or neutral third person and results achieved are clothed in judicial and legal validity. In Pakistan apart from a small percentage of the whole as stated above, remaining so called alternative methods and mechanisms of resolving disputes are outside the law and possess no legal sanction or validity. A higher and extraneous sanction may be present but the secular

[7] Paper on subject "Article on ADR in the N.W.F.P" read by Mr. Justice Shah Jehan Khan, Judge of the Peshawar High Court at National Judicial Conference 2007.
[8] Paper on subject "Alternative Dispute Resolution—an overview" read by Ch. Musthaq Masood, Senior Advocate Supreme Court of Pakistan at National Judicial Conference 2007.

permission is missing and thus in actual fact it causes to create a parallel system of dispute resolution. In this way, ADR is intra-legal because it is controlled and regulated by the legal system while this parallel system is extra-legal because it works outside the legal system. Further, ADR deals only with civil and commercial disputes while the parallel system is all encompassing and nothing—not even criminal disputes—are beyond its reach. Criminal litigation is a no go area for ADR because while in civil, commercial and family disputes individuals and citizens are ranged against one another, in criminal matters the State is itself a party. Whereas in civil related matters it is the question of the pre-eminence of the rights of an individual or individuals against other individuals, in criminal matters it is the society which is alleging that it has been wronged and therefore the enacted and codified law must take its course because otherwise it would amount to defeating the maxim that all people are equal under the law and that no special treatment can be meted out to any particular individual. For this reason no accepted procedures of ADR are ever applied to criminal matters and these are left exclusively to the Courts to determine. Here in Pakistan, these Jirgas always extend their jurisdiction to the criminal matters as well[9].

Though there have been some legislations providing for some measures regarding ADR including mediation for family and other small matters. For example, under West Pakistan Family Court Acts 1964, the Court is required under section 10 (3) to make attempts for the reconciliation between the parties. Under Conciliation Courts Ordinance 1961—promulgated for the stated purpose of making provision for the establishment of conciliation Courts to enable people to settle certain disputes through conciliation—, the matter falling under Part-I of the Schedule are required to be referred to a body of three persons, two of whom be nominated by each party to the dispute, and third one act as

[9] Paper on subject "Alternative Dispute Resolution—an overview" read by Ch. Mushtaq Masood, Senior Advocate Supreme Court of Pakistan at National Judicial Conference 2007.

chairman who is in fact the chairman of the Union Council[10]. Small claims and Minor Offences Court Ordinance was promulgated on 19-6-2002, by repealing the Provincial Small Cause Courts Act 1887, for the purpose of providing inexpensive and expeditious disposal of small claims—the subject matter of which does not exceed one hundred thousand rupees in value for the purpose of jurisdiction[11]—and minor offences. Section 14 of Small Claims & Minor Offences Court Ordinance 2002 provided that where it appears to Court at any stage either on amicable settlement between the parties, the Court can with the consent of the parties refer the matter to Salis/Mediator nominated by the parties and if settlement reached between the parties, Salis/Mediator shall prepare a Deed of Settlement containing terms of such settlement, with signatures of parties and will file the same in Court, with a Certificate that Settlement between the parties was voluntary. Under local Government Ordinance 2001, ADR platform in the form of Musalihat Anjum and Insaf Committee was provided.

Despite all above, there has not been any progress for resolution of commercial dispute through Mediation and Conciliation till 2002 when section 89-A[12] was incorporated in the CPC, which empower Court to resort to ADR, including mediation and conciliation, though for the "object of securing expeditious disposal of case".

A significant development in the history of commercial mediation happened when "the **International Finance Corporation (IFC) pilot ADR project**" was launched[13] on August 30, 2005 at Karachi. The project has the following components:

> "i) **Establishing a pilot mediation centre**: IFC proposes to establish an independent pilot mediation centre that supports court-

[10] Section 5(1) of the Conciliation Court Ordinance 1961.
[11] Section 5(1) of Small Claims and Minor Offences Ordinance 2002.
[12] **89-A of Civil Procedure Code:** Alternative Dispute Resolution—the Court may, where it considers necessary, having regard to the facts and circumstances of the case, with the object of securing expeditious disposal of a case, in or in relation to a suit, adopt with the consent of the parties alternate dispute resolution method, including mediations and conciliation.
[13] www.ifc.org/press last visited on 30.6.2007.

referred mediation. The Centre would be associated with a Court of First Instance, in Pakistan a District and Sessions Court where Small and Medium Enterprises cases under US$50,000 (Rs3million) originate[14]. Cases referred by the Court to the Pilot Mediation Centre, once successfully mediated, would be sent back to the Judge for enforcement. At the Centre, certified mediators that have undergone training in basic and advanced mediation shall be mentored by international ADR experts.

ii) **Reviewing legislation and drafting by-laws for enforcement of court-referred mediation**: Review existing laws to determine compliance with model laws on ADR/mediation. If necessary amend laws, draft by-laws and/or Court Rules that will effectively give "teeth" to the enforcement of ADR and empower judges to apply mediation. Significantly, Section 89A of the Civil Procedures Code which permits judges to explore ADR with consenting parties is currently being amended to empower judges to require both parties to explore ADR and can refer cases to retired judges, lawyers or persons acceptable to both parties for mediation. To implement this law, once passed, technical assistance would be provided to develop working rules and guidelines on mediation, essential for the effective operations of the pilot mediation centre.

iii) **Enhancing case management, referral processes and enforcement processes**: Streamline process, develop systems and provide training for Judges at the District and Sessions Court, to which the pilot mediation project is attached. As at some District and Sessions Courts over 800 cases are filed monthly, case management and referral processes are critical to ensure that a manageable number of cases are referred to the Centre, essentially involving SME disputes. Similarly, one of the main benefits of mediation, is the speed at which disputes can be resolved, it is, therefore, essential that enforcement processes are swift so as not to severely delay successful case closure.

[14] Under the Sindh jurisdiction commercial cases over US$50,000 are filed at Commercial Bench of the High Court.

iv) **Training, certification & registration of independent mediators**: Provide basic and advanced training in mediation for judges and lawyers. Assist in establishing certification and accreditation mechanisms to institute standards and competencies for the registration and issuance of licenses. Also, create a database of mediators, from which trained and certified mediators can be drawn. Currently, in Pakistan there are no certified trainings in mediation, the project would collaborate with existing training institutes and law schools to develop curricula on ADR.

v) **Awareness raising on ADR/mediation with practitioners and end-users**: Promote mediation as an accepted practice amongst the private sector and the legal profession. The project will roll out an aggressive awareness raising campaign. Reporting back the success of the pilot mediation centre, should help establish mediation as a recognized profession, encourage proper payment for services provided and help create sustainable mediation centres". [15]

Though the project failed to achieve its objectives but, admittedly, it has played very important role rather instrumental role in introducing in Pakistan commercial mediation in particular and ADR in general.

[15] IFC PEP MENA Concept Note for an ADR Pilot Project in Pakistan found from the Director, IFC Karachi during visit at Karachi Centre for Dispute Resolution.

3.2 Institution in Pakistan

For the resolution of commercial disputes, as well as other disputes, there are only Courts that follow adversarial procedural law as stated above. Apart from business community, international institutions were grave concerned about slow pace of resolution of commercial disputes and huge pendency of such litigations which result in caught up of big share of assets. These concerns were further vented in the recent years when ADR provided further speedy and inexpensive mechanisms for the settlement of commercial disputes but Pakistan has no such mechanism. The concerns of the International Finance Corporation (IFC) can be sensed in the following lines:

> "Contract enforcement in Pakistan on average takes 46 procedures and 2-10 year litigation process. It is generally recognized that commercial dispute settlement processes are slow, inadequate and inefficient and do not support market based growth or encourage domestic and foreign investment. This makes resolving disputes a costly exercise and also amounts on an average, 35 % of the assets of the businesses caught up in the litigation".[16]

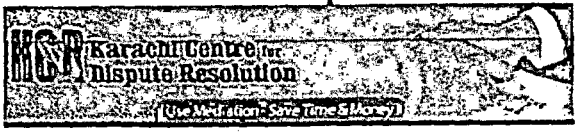
These concerns of international community lead them to corroborate efforts with Pakistan in the establishment of ADR mechanism. These corroborative efforts include financial assistance of 3.5 million dollars in the form of Access to Justice Program and IFC ADR project started in 2005, which is also instrumental, inter alia, in the establishment of first ever institution by the name "Karachi Centre Dispute Resolution". Enhancing the legislative framework on ADR/Mediation in support of the pilot project to institutionalize court-referred ADR/Mediation in Pakistan, Memorandum of Understanding[17] (MoU) was signed on November 1, 2005 between Pakistan through

[16] Para taken from the IFC PEP MENA Concept Note for an ADR Pilot Project in Pakistan.
[17] This document was given by Ms. Navin Merchant, Program Manager, IFC for the ADR Pilot Project during my visit at KCDR Karachi.

Ministry of law, Justice and Human Rights and International Finance Corporation, which is annexed as Annexure A.

IFC and the High Court of Sindh also signed a MoU on November 12, 2005 endorsing to work together to introduce mediation as a mechanism to improve commercial dispute settlement processes in Pakistan, to help reduce the case load in Courts and to offer citizens and legal entities more efficient and sustainable method for disputes resolution. IFC undertook to collaborate with the Court to establish a pilot court-referred mediation centre in Karachi, Pakistan. The aim of the pilot centre is to provide timely commercial dispute settlement for the private sector, especially SMEs, offering an alternative to the formal Court process. The Memorandum of Understanding[18] is annexed as annexure B.

Karachi Centre for Dispute Resolution



> "The Centre is not meant for earning profit. The Centre is working under the supervision and guidance of former and sitting member of superior judiciary, and prominent business leaders. Disputes often arise out of misunderstanding concerning the expectations and responsibilities of the parties and such disputes can be resolved once a dialogue is established" said Mr Justice Saeeduzzaman Siddiqui, former Chief Justice of Pakistan".[19]

Hon'ble Mr. Justice Sabihuddin Ahmed, Chief Justice High Court of Sindh, performed opening ceremony of Karachi Centre for Dispute Resolution on February 16, 2007. It was established with the support of the High Court of Sindh and with the financial

[18] This document was also given by Ms. Navin Merchant, Director, IFC for the ADR Pilot Project during my visit at KCDR Karachi.
[19] Published in Business Recorder dated April 11, 2007.

assistance of the International Finance Corporation/World Bank Group. It is registered as a Not-for-Profit Society under the Societies Registration Act of Pakistan (XXI of 1860) and started its operations to achieve the following stated objectives:

"1. To activate commercial ADR practices in Pakistan.

2. To institutionalize ADR/Mediation systems to increase efficiency and reduce heavy case backlogs in Courts.

3. To professionalize mediation by transferring skills and know-how to judges, lawyers and other groups enabled by ADR practices.

4. To promote access to justice, essentially reducing the time and cost of SME litigation."[20]

The members of its Board of Governors are:

"1. Mr. Justice (R) Saiduzzman Siddiqui, Former Chief Justice, Supreme Court of Pakistan.

2. Mr. Justice Arif Hussain Khilji, Judge, High Court of Sindh.

3. Mr. Anwar Mansoor Khan, Advocate Genreal, Sindh.

4. Mr. Majyd Aziz, President, Karachi Chamber of Commerce & Industry.

5. Mr. Moin M. Fudda, Country Director, CIPE.

6. Mr. Syed Masoud Ali Naqvi, Senior Partner, KPMG Taseer Hadi & Co.

7. Mr Sultan Tiwana, General Manager, SMEDA.

8. Mr. Salman Burney, President, Overseas Investors Chamber of Commerce and Industry".[21]

The Centre is the first of its kind in Pakistan and follows international standard rules and code of ethics governing Mediation proceedings and is offering Mediation as an institutionalized ADR mechanism. This option is available to the parties whose

[20] www.kcdr.org last visited on 306.06.2007.
[21] Ibid.

Commercial cases are either pending before the High Court of Sindh/Civil Courts of Karachi, or who have not yet filed a case in the Court[22].

The Centre mainly provides services for the Court referred cases. In Karachi, High Court of Sindh as well as Civil Courts have original jurisdiction in civil matters subject to pecuniary limitations. The cases pending before the High Court and Civil Courts are referred to the Centre with the consent of the parties for adopting ADR process under section 89-A of the CPC through an order. If any settlement is reached between the parties, the same is submitted to the referring court for passing decrees in terms of that settlement under Order XXIII rule 3[23] of the CPC. The Court passes decrees in terms of that agreement under the said Order, which is not appeal-able under section 96 (3)[24] of the CPC and it operates as estoppel as[25] per decision of the Court. [26]

For the conduct of mediation the Centre has also brought some rules which are called "Rule for the Conduct of Commercial Mediation", which are annexed as Annexure-C[27]. These rules are binding upon the parties during the process of mediation before the Centre unless parties agree otherwise[28]. When a dispute is referred to the Centre, a Mediator is appointed by the Centre and approval of the parties thereupon is sought. In case of non-acceptable to parties a mediator appointed by the centre, another acceptable mediator to the parties are appointed by the centre. The parties may themselves reach on

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[22] www.kcdr.org last visited on 30.06.2006.

[23] **Order XXIII Rule 3 of CPC: Compromise of suit**—where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith o far as it relates to the suit.

[24] **Section 96 (3) of CPC:** No appeal shall lie from a decree passed by the Court with consent of Parties.

[25] Estoppel is a rule of evidence preventing a person from denying the truth of a statement he has made previously, or the existence of facts in which he has led another to believe.

[26] 1991 CLC 1524 at p.1527.

[27] A soft copy of this document was generously given by Wg.Cdr.(R) Abrar Ali Khan, Centre Manager, KCDR.

[28] Rule 2 of KCDR Mediation Rules.

an agreement on the appointment of a mediator[29] among the accredited mediator[30]. These rules are distinctive from the other model rules because these only provide one mediator whereas the model rules more than one, also. The appointed or selected mediator executes an agreement with the parties under rule 12, called Mediation Agreement, setting out terms and conditions under which the mediation takes place.

If we analyse mediator's role in the light of the KCDR rules, he plays role only that of a facilitator and not that of an evaluator because under rule 17 the Mediator is obliged to attempt to help the parties to reach a mutually agreed resolution of their dispute. Interestingly, evaluative role of mediator creeps in the rules dealing with confidentiality[31]. This either is the result of short-sightedness of the drafters or intentional reference so as to broaden the scope of application of the rules.

The rules fairly address the concept of confidentiality of mediation proceedings, the purpose whereof is to shun scepticism of the parties about the adverse affects of such proceedings in subsequent litigation in the Courts, etc. Rules 23 to 26 deal with confidentiality and demand all the proceedings confidential by the Mediator, parties and the Centre, leaving outcome of the proceedings unattended rather not confidential as the settlement agreement is submitted to the referral Court for passing decree thereon.

On my visit to the Centre[32], I was gladly informed about the success story of the Centre. The Manager of the Centre informed that the centre had received 17 cases up till now, out of which 4 disputes have successfully been resolved by adopting the method of

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[29] Rule 9 of KCDR Mediation Rules

[30] The Centre also have list be certified mediator to be appointed for the conduct of mediation in the Centre

[31] Rule 26 (c): the fact that the other party had indicated a willingness to accept a proposal or recommendation for settlement made by the Mediator; or
(d): proposals made or views expressed by the Mediator.

[32] I visited Karachi Centre for Dispute Resolution on June 13, 2007.

mediation, whereas, the website of the Centre exhibits only three cases in its success story. I was shown two separate rooms reportedly used by parties, one by each party in separate sessions of discussions with the mediator and a common room for joint sessions of the parties. The Centre was neat and clean and people were generous and cooperative.

On my inquiry, the Manager of the Centre was very disappointing at the rate of referral of cases to the Centre by the Court and by the parties itself. According to him, this is due to lack of public awareness about benefits of use of mediation and particular attitude of the lawyers who think that more use of mediation would adversely affect their profession.

I then visited the High Court of Sindh to get copies of the cases decided by the Centre[33] and results thereof submitted to the Court for passing decrees thereon. The briefs of two such successes are as under:

a) Muhammad Siddiq Mirza, petitioner, filed a petition on 15.08.2005 in the High Court of Sindh under Section 305 of the Companies Ordinance 1984 praying for payment of Rs. 200,000/- from the Respondent company—M/s Osis Travel (Pvt.) Ltd—due on account of retainer-ship fee. The suit was registered as J.M 27 of 2005. After hearing the learned counsel for the parties, the High Court after having observed that the dispute in the matter can be resolved through mediation and accordingly the matter was referred for mediation vide order dated 27.10.2006. Mr. Yawar Farooqui a trivial mediator was also appointed mediator by the consent of the parties.

On 13.2.2007 the mediator submitted his report in the following words:

> Compromise through Mediation
>
> That the mediation was fixed on various dates and finally proceeded on 1.2.2007. Thereafter the case was mediated on 9.2.07 and the parties agreed

[33] I got copies of the cases from the High Court of Sindh, Karachi on the pointation of the Manger of the KCDR.

to have their dispute settled in terms recorded in the handwriting of the undersigned on the aforementioned dated. Original copy of the terms bearing the signatures of the applicant in person, the counsel of the respondent and the mediator is annexed hereto.

Mediator

Annexure (Terms of settlement[34])

Mr. Haider Waheed Advocate

Mr Siddique Mirza Advocate

That after two sessions of hearings, going through all the phases that mediation involve, which includes joint meetings and separate meetings, the parties have agreed to settle the dispute through mediation in terms as under:

1. that the parties agree that M/s Osis Travel (Pvt.) Ltd. shall pay as full and final settlement to Mr Siddique Mirza a sum of Rs. 100,000/-(one thousand hundred) in respect of his claim on retainer fee.
2. that Mr. S. Mirza Advocate accepts Rs. 100,000/- (one thousand hundred) as full and final settlement and shall not pursue this matter any further before any other forum.
3. both parties the arising of differences, but have now shaken hands and settle the dispute in full and final
4. that Mr. Haider Waheed undertakes to handover a crossed cheque in favour of Mr. Mirza within 7 days.
5. that Mr. Mirza undertakes to withdraw his petition J.M 27/2005, on the above terms.
6. that the agreement dated 19.9.2002 stand concluded. That there is no further dispute outstanding between the parties.

In witness hereof both parties/counsels affirm their signature endorsing the above terms.

Sd/-	Sd/-
Mr. Haider Waheed	Mr. Siddique Mirza
Advocate for	Advocate
Respondent M/s Oasis Travels	Sd/-
	Mr. Yawar Farouqi
	Mediator

On the receipt of report of the mediator, the High Court passed order on 13.02.2007 in the following words:

[34] Terms of compromise was annexed with the compromise submitted by the Mediator.

"Mr. Yawar Farooqui, Mediator now has submitted his report alongwith a statement jointly signed by the parties. The petitioner as well as advocate for the respondent requested that matter may be disposed of in terms of settlement between the parties.

J.M is accordingly disposed of in terms of the agreement of settlement signed by the parties before learned Mediator."

Thus the first matter was finally disposed of following the mediation conducted through the KCDR.

b). The Messers King's Food (Pvt) filed this suit on 11.03.2006 for specific performance and damages for Rs. 50 million against the respondent Messers Makkah Advertising (Pvt.) limited and was registered as Civil Suit No. 272 of 2006. Vide order dated: 11.10.2006 it was referred to Karachi Centre for Dispute Resolutions for the purpose of mediation. The matter was settled by mediation in the Centre and the parties reached on the following agreement:

SETTLEMENT AGREEEMENT

THIS SETTLEMENT AGREEMENT ("AGREEMENT") has been made at Karachi on this 22nd day of March 2007;

BETWEEN

KINGS FOOD (PVT) LTD., having its registered office at 512, Clifton Center Kehakashan, Clifton, Karachi, (hereinafter referred to as the "First Party", which term wherever the context so permits shall mean and include its successors-in-interest and permitted assigns)

AND

ALCOP ALUMINIUM COMPANY OF PAKISTAN, having its registered office at Alcop House, E-5, Central Commercial Area,

Shaheed-e-Millat, Karachi (hereinafter referred to as the "Second Party" which term wherever the context so armpits shall mean and include its successors-in-interest and permitted assigns)

WHEREAS, the parties hereto entered into mediation proceedings pursuant to order dated 11.10.2006 passed by the Hon'ble High Court in Suit No. 272 of 2006 ("Said Suit") filed by the First Party against Makkah Advertising (Pvt) Ltd. , ("Defendant No.1") and the Second party before the Honourable High Court of Sindh at Karachi.

WHEREAS the parties hereto wish to record the terms of their settlement reached on the date of this Agreement between the parties towards resolution of the dispute, which is the subject matter of the said suit as per the terms hereinafter appearing.

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:

1. That the First Party hereby acknowledges receipt of Cheque No. 0199447 dated March 22, 2007 ("Said Cheque") drawn on Allied Bank of Pakistan Limited in the amount of Rs. 1,500,000/- from the second party as full and final settlement of its claims against the second party in consideration of agreeing to unconditionally withdraw the said suit form the Honourable High Court of Sindh at Karachi.
2. That the parties have signed and executed an application under order XXIII Rule 3 R/W Section 151 CPC for the purpose of disposal of the said suit from the Honourable High Court of Sindh at Karachi in accordance with the terms of this agreement.
3. That the parties hereby undertake to file the compromise application on 26.03.2007 before the Honourable High Court of Sindh for further proceedings
4. that neither party hereto shall have any claim against the other in respect of the subject matter of the said suit subsequent to withdrawal thereof,

On 16.04.2007 this agreement was filed by the parties along with an application under Order XXIII rule 3 CPC, by which they also requested for passing of decree in terms of the settlement agreement executed through mediation. The suit was decreed in terms of the settlement agreement vide order dated 16.04.2007.

During my visit to Karachi, I also met a lawyer[35] who was very critical of the way in which the mediation mechanism was adopted in Karachi and in particular of Karachi Mediation Centre. His main argument was that resolution of dispute through Court's referred mediation as is being initiated at Karachi is a double costly for the litigants. First, litigants has to pay fee of the lawyers in addition to court fee for initiating proceedings in the Court, then fee of the mediator and all expenses of the mediation proceedings. He has also pointed out that it is a practise in Pakistan that plaintiff always demands accelerated claims through Court and thereby institute suit by showing accelerated value of the subject matter, which, in case of Court referred mediation, parties are supposed to bear more fee as the KCDR levies fee in view of the value of the suit[36]. He was of the view that if mediation in conducted by courts without charging further fee from the litigants, the situation would be altogether different and rate to such referral as well as it success would be significant.

Fee Schedule of KCDR is as under:

(In Rs.)

Value of Claim	Fee per party	Value of Claim	Fee per party
Upto 1 million	7,500	4 – 5 million	37,500
1 – 2 million	15,000	5 – 6 million	45,000
2 – 3 million	22,500	Over 6 million	50,000
3 – 4 million	30,000		

[35] Abdul Qayyum Abbasi, Advocate High Court of Sindh.

During my this study trip, I also met Mr. Ashraf Yar Khan, Assistant District and Sessions Judge Karachi, then posted as Research Officer, High Court of Sindh. He has also received training from the CEDR, London. He is very proponent of the propagation of ADR in general and mediation in particular. He was of the view:

1. That every judge should be mediator so as to convincing parties to reach compromise and amicable settlement.
2. In each case the Judge should give opinion regarding Order 10 rule 3 CPC.

When I asked about big hurdle in the way of mediation i.e double burden upon the parties in the shape of extra fee of the mediator/mediation proceedings. He was also of the opinion that it is a big hurdle in the way of promotion of this idea in Pakistan and proposed following steps:

1. a dispute should be referred to another judge for the purpose of mediation. In this way mediator judge, being employee would not charge rather extend service in lieu of his salary.
2. Mediation room should be in the Courts' premises; rather the Courtrooms should be used for the purpose of conducting mediation as is being used in London. Police stations are working and its buildings are being utilised around the clock; hospitals are working and its buildings are being utilised around the clock, then why not courtroom?

3.3 Legislation in Pakistan

As has already discussed in previous part of this section—development in Pakistan—that there are some laws having features for resorting to mediation for the resolution of disputes relating to family matters, small cause and minor offences and tax

laws. But there are very few laws addressing the problems of commercial disputes apart from Arbitration Act 1940. Again, for the purpose of mediation, it is section 89-A of the CPC being utilised for the purpose of settling commercial disputes through mediation. The section 89-A, brought in by amendment in CPC in July 2002, is reproduced hereunder:

> **89-A of Civil Procedure Code—Alternative Dispute Resolution**—the Court may, where it considers necessary, having regard to the facts and circumstances of the case, with the object of securing expeditious disposal of a case, in or in relation to a suit, adopt with the consent of the parties alternate dispute resolution method, including mediations and conciliation.

In consonance with the amendment in the CPC in the shape of section 89-A, Order X rules 1 was also amended by inserting rules 1-A which is reproduced hereunder:

> **Order X rule 1-A of CPC**—the Court may adopt any lawful procedure not inconsistent with the provisions of this Code to:-
>
> i). conduct preliminary proceedings and issue orders for expediting processing of the case;
>
> ii). Issue, with the consent of the parties, commission to examine witness, admit documents and take other steps for the purpose of the trial;
>
> iii). Adopt, with the consent of the parties, any alternative method of dispute resolution including mediation, conciliation or any such other means.

Section 89-A, further, proposed to have been amended by provisions empowering Court to require the parties to resort to ADR. The said amendment will not only gives specific power to the Court for resorting to ADR at pre-trial stage or any subsequent stage but also provide timetable for deciding the referred case by the mediator. This amendment

has been recommended and passed by the National Assembly and is laying with the Senate for approval. The proposed amendment[37] is reproduced hereunder:

> **89-A. Alternative dispute resolution.-** (1) In suits for partition or rendition of accounts or in a dispute in any other suit in which it appears to the Court that there is reasonable possibility of an amicable settlement between the parties, the Court shall, with a view to encouraging such a settlement, require the parties to consider to have resort to one of the alternative dispute resolution methods such as mediation, conciliation or arbitration and it the parties agree the court shall proceed accordingly.
>
> (2) The Court shall require the parties to consider to have resort to one of the alternative dispute resolution methods ordinarily at pre-trial stage but nothing herein contained shall preclude the Court to so require the parties at a subsequent stage of the suit.
>
> (3) For the purpose of sub-section (1), the Court may refer the matter to retired judges of Superior Court or of subordinate Courts, technocrats having experience in the relevant field, or an eminent lawyer or any other person acceptable to both the parties, an Insaf committee or a Musalihat Committee constituted under the law relating to local government, or the Ombudsman appointed under such law.
>
> (4) A matter referred to a mediator, conciliator or an arbitrator, as the case may be, shall be disposed of by him within a period of ninety day, extendable for sufficient causes for another period of sixty days.
>
> (5) On receipt of decision of a mediator, conciliator or arbitrator, as the case may be, the court may on its own or on the application of either party examine the propriety or legality of the decision and may pass such order as it deems just without recording any fresh evidence.
>
> (6) If no order setting aside the decision, in whole or in part, is made under sub-section the Court shall pronounce judgment in terms of the decision made as a result of mediation, conciliation or arbitration and upon the judgment so pronounced a decree shall follow.

[37] This draft was collected from the Ministry of Law, Justice and Human Rights, Govt. of Pakistan.

(7) The Arbitration Act, 1940 (X of 1940) shall not apply to arbitration under this section.

(8) Section 28 of the Contract Act, 1872 (IX of 1872), shall not apply to an agreement for the resolution of disputes by one of the alternative dispute resolution methods under this section.

(9) An appeal shall, with the leave of the Appellant Court, lie from every decree or order made under this section to the Court authorized to hear appeals form the decisions of such Court. No further appeal or revision shall lie from the decisions of the Appellate Court.

(10) No appeal or revision shall lie from a decree or order made as a result of the consent of the parties, whether such consent was given in the alternative dispute resolution proceedings or the proceedings before the Court."

Chapter 4

Conclusion and Recommendations

From the discussions of the preceding pages it can safely be concluded that be concluded that the concept of ADR including Mediation and Conciliation is not novel for Pakistan. Pakistan being Islamic country, having Shariah its foremost priority, can found this concept not only in the Holy Quran but also standing directions contained therein. Mediation has been practised both in India and Pakistan in Pre-British era which was recognised and institutionalised by the ruling British and continued to be practised in Pakistan. Therefore, it is just an old wine in the new bottle.

Manifold increase in litigation in the courts which resulted due to explosion in population, greater public awareness about their rights, and considerable growth in economic activities could not be met with traditional Courts which is compelled to follow adversarial system of resolution of disputes in which each party is free to file frequent applications and counter applications in addition to plaint and written statements, especially in common law countries. Therefore, the result of this disproportional increase in litigations was in the shape of huge backlog of cases in Courts, unreasonable delay in the resolution of dispute and unbearable costs for the litigants. This problem compelled jurists and policy makers across the world to find some ways out of such problems. Jurists of almost each country come out with the same solution ADR—most common of which is Mediation and Conciliation, whether it is

Malimath Committee of India or Woolf Report in UK. In Britain main revolution in field of mediation came following the Wolf Report 1996, which suggested ADR a main solution for reducing cost and delay in the disposal of cases. In line of that report Civil Procedure Rules was amended by bringing in ADR as a mode of resolution of disputes. It is very successfully working there for the reasons of being compulsory and its denial could entail costs.

India facing very similar problems to that of Pakistan has brought in very successful Mediation and Conciliation legal framework in the shape of Arbitration and Reconciliation Act, 1996, which is though verbatim copy of the UNCITRAL Conciliation Rules 1980 and amendment in CPC, and institutional framework in the shape of Delhi Mediation Centres, which is not only cost-effective in real sense but also attractive qua litigants. It is cost-effective because it is administered by the Court, in the premises of the Court— such as Delhi Mediation Centres and Lok Adalats—that is why, it is also called Judicial Mediation. It is attractive because it gives incentive in the shape of return of court fee on the successful resolution of dispute through mediation.

Mediation and Conciliation are delay-reductive, commercial conductive modes of resolution of dispute but are not always cost-effective especially for the litigant, excepting that which is being practiced in India.

Apart from domestic framework there are international framework for the settlement of disputes through Mediation and Conciliation. International framework can be categorised as specific with regard to kinds of cases and nature of cases. Such as WIPO for intellectual disputes, ICSID for investment dispute and ICC for commercial disputes. There are also some International Organisations which not only provide framework for

the resolution of disputes through Mediation and Conciliation but also model laws for the purpose of uniform practice around the globe, such as, UNCITRAL. These entire frameworks give some common concepts of mediation i.e. flexible, confidential and non-binding.

Pakistan despite having models law for guidance, having made amendment in the Civil Procedure Code 1908, even before India, has not been very successful in this field. Though Pakistan has taken a step, I must say wrong step in the right direction, following the IFC Pilot Project by establishing Karachi Centre for the Resolution of Dispute. It need to correct its step by taking into consideration Indian experiences by introducing Judicial Mediation Centre and introducing mediation rules under the CPC in compliance with the amendment of the Code as early as possible.

In view of the above discussion, there is dire need of taking following measures so as to fully benefit from the blessings of Conciliation and Mediation:

(a). there is immediate need of bringing rules in the High Courts Rules for realising the purpose of section 89-A of the Civil Procedure Code;

(b). there is need of establishing Judicial Mediation Centre and rules for them should be framed in exercise of the power conferred upon each High Court for giving effect and achieving the purpose of section 89-A. As a temporary measure, a case of one Court can be referred to a judge of another Court for mediation. Mediation proceeding can be conducted in Courts after Court hours, which result in maximum utilisation of Courts' premises and minimum expenses for the conduct of mediation.

(c). proposed amendment in section 89-A should be passed and give effect by the legislatures as soon as possible.

(d). sanction, in cases where parties refuse to resort of ADR, in the shape of cost on losing the party may be imposed by the Courts and winning party may also be deprived from receiving such cost imposed where he refuses to resort to ADR.

(e). short course on the subject should be introduced for the Judges as well as for the Lawyers.

(f). every Judge should be a mediator.

(g). Judge should give opinion after making issues regarding Order X rule 3 of the CPC, which entitles a Court to " adopt, with the consent of parties, any alternative method of dispute resolution including mediation, conciliation or any such other means, before resorting to full scale adversarial procedures of dispute resolution.

(h). Mediation and Conciliation, rather ADR, should be introduced as an optional or compulsory subject in the final year of the LL.B course. It will help make aware the lawyer of the benefit of it. The course can be divided into three sections: the ADR movement in general; the primary form of ADR; and the ADR application in the country.

(i). There is need of establishing an Institute for Mediators and Conciliators. National Judicial Academy can be entrusted this task of training Judges who would works as Mediators and Conciliators.

(j). Parallel justice system (Jirgas, etc) should be brought within the framework of the justice system and these can also be utilised for the purpose of mediation. For this purpose a comprehensive research is need for looking into pitfalls and benefits of this system especially for the purpose of commercial mediation.

(k). the Govt should before signing any understanding or identifying any area requiring foreign aid should conduct through study so as to guide the donors for better utilisation of the money and addressing the problems.

Annexure A

MEMORANDUM OF UNDERSTANDING

Between

ISLAMIC REPUBLIC OF PAKISTAN
Represented by
MINISTRY OF LAW, JUSTICE AND HUMAN RIGHTS
GOVERNMENT OF PAKISTAN

and

INTERNATIONAL FINANCE CORPORATION

on

Enhancing the legislative framework on ADR/Mediation in support of the pilot project to institutionalize court-referred ADR/Mediation in Pakistan

Dated: November 1, 2005

Section 1. Parties

This MEMORANDUM OF UNDERSTANDING (hereinafter "MoU") dated November 1, 2005 is agreed between the Islamic Republic of Pakistan ("Pakistan"), represented by the Ministry of Law, Justice and Human Rights (the "Ministry"), Government of Pakistan and the International Finance Corporation ("IFC"), an international organization established by Articles of Agreement among its member countries, including Pakistan, herein also referred to collectively as the Parties.

WHEREAS:

A. IFC has established a Private Enterprise Partnership for the Middle East and North Africa ("IFC PEP-MENA"), a multi-donor facility of IFC aiming to foster private sector development and, *inter alia*, the business enabling environment in the Middle East and North Africa (MENA) region, including Pakistan and to improve commercial dispute resolution mechanisms through alternative dispute resolution ("ADR"). In addition, working to improve commercial dispute resolution mechanisms through ADR contributes more broadly to IFC PEP-MENA's mission to promote sustainable private sector investment and development, and indeed economic growth, in the region, via its technical assistance and advisory services,

B. The Ministry is actively undertaking and promoting legal reforms including within the framework of the Access to Justice Program (AJP) with a view to enhancing the business enabling environment and supporting commercial dispute settlement through creating a legislative framework for ADR to promote a pro-business legal framework in Pakistan.

C. In accordance with their respective interests and objectives, IFC and the Ministry are willing to cooperate with each other to actively promote and demonstrably improve commercial dispute settlement processes in Pakistan.

NOW, THEREFORE, in recognition of their interests and objectives, IFC and the Ministry hereby confirm their mutual understanding of the following:

Section 2. Scope of Cooperation, Roles and Responsibilities

A. IFC shall launch an ADR/Mediation pilot project aimed at enhancing and

harmonizing the legislative framework for ADR/Mediation and institutionalizing court-referred mediation through the establishment of a pilot mediation center in Karachi. The goal of the project is to provide speedy and effective commercial dispute settlement processes for the private sector, especially SMEs. The full objectives, scope of co-operation, and support are described in more detail in the Project Proposal attached as Appendix -I to this MOU (which refers to Component, II(a) of the Project Proposal, enhancing the ADR/Mediation legislative framework).

B. The Ministry shall cooperate with IFC in the development and implementation of the legislative framework for ADR/Mediation and shall encourage its staff and organizations to do all things necessary to enable IFC, its staff and consultants to carry out the activities necessary to meet the objectives mentioned in the Project Proposal.

C. IFC and the Ministry shall each use their best endeavours to ensure that mutual assistance is provided in the terms of this MoU and engage in discussions, as appropriate, on mutually agreeable approaches designed to enhance the legislative framework for ADR/Mediation.

D. IFC and the Ministry shall carry out their respective roles and responsibilities with due diligence and in a professional manner, and with due regard to applicable laws and regulations. Neither IFC nor the Ministry shall have any liability to the other for non-performance of any services under this MOU to the extent that any such performance would result in the breach of applicable laws and regulations.

Section 3. Timing and Phasing

A. IFC intends to commence its support for the ADR/Mediation pilot project from the date this MoU enters into force, and it is expected that the pilot project will be substantially completed by June 2007, unless extended by mutual agreement.

B. The IFC pilot project incorporates the following components including components II(a) related to this MOU:

Component I: Establishing an independent pilot mediation center in Karachi, Sindh, to support court-referred ADR/Mediation. The center will be attached to the Sindh High Court and a District & Sessions Court to be selected by the pilot center's Advisory

Committee comprising of members of the Government, Judiciary and Bar;

Component II (a): Assisting the Ministry to establish an ADR/Mediation legislative committee to be nominated by the Minister of the Ministry, tasked with a) reviewing and amending of civil and commercial laws with reference to ADR/Mediation, at the first instance propose amendments to Section 89A of the Code of Civil Procedure, 1908 (Act No V of 1908) and b) preparation of a draft Law on Mediation;

Component II (b): Assisting the courts attached to the pilot project to establish a working group tasked with drafting court rules on ADR/Mediation which, subject to the laws enforced, will be considered and approved by the High Court Rules Committee. The formulation of court rules on ADR/Mediation is prerequisite to the establishment of a court-referred mediation center. IFC will provide assistance in the drafting and/or amendment of laws and court rules in compliance with model laws on ADR/Mediation and international best practices;

Component III: Enhancing court judicial systems including case management, referral and enforcement processes at associate court(s) for the pilot mediation center in Karachi. IFC will provide expert advice and training but will not procure equipment;

Component IV: Professionalizing ADR/Mediation through the provision of basic and advanced training and certification of mediators; "sensitizing" training for the Judiciary, Bar and other ADR practitioners; establishment of certification and accreditation mechanisms to institute standards and competencies for the registration of mediators and collaboration with existing training institutes and law schools to develop ADR/Mediation curricula, and

Component V: Rolling out an extensive awareness raising campaign promoting mediation amongst the private sector and the legal profession and encouraging the proper payment for services to create sustainable mediation centers.

Full details of each Component are more particularly described in the Project Proposal attached as Appendix-1 to this MOU, which refers to Component II (a), enhancing the ADR/Mediation legislative framework.

Section 4. Cost Sharing

The Parties agree on the following sharing of costs between them:

A. IFC will be responsible for all financial costs associated with the pilot project as outlined in the budget in the attached Project Proposal, including expenditures associated

with hiring short- and long-term consultants to carry out drafting, consulting and training as well as arranging and conducting conferences, workshops and, possibly, study tours for mediators.

B. The Ministry will contribute to these commitments by non-financial in-kind contributions to support Component II.(a) of the project, including:
(i) establishing and facilitating the ADR/Mediation Legislative Committee to enhance and harmonize the legislative framework,
(ii) hosting project experts on legislative reform at its premises and providing them with adequate office facilities as needed;
(iii) allocating at least one senior staff member as project counterpart to support project implementation including in related components such as the establishment of national certification in ADR/Mediation and the development of a Registry of Mediators,
(iv) allocating at least one staff assistant as logistical support for all conferences, seminars, and trainings and workshops related to enhancing the ADR/Mediation legislative framework, including: venue; formal invitations, press coverage etc,
(v) in addition, facilitating the procurement of IT equipment to enhance court-procedures, especially at courts associated with the pilot project. Upgrading court procedures is an essential part of the on-going reforms.

C. The Ministry is also expected, subject to budgetary allocations, to contribute financially to the participation of their staff at project trainings and study tours as agreed by IFC including associated travel costs and for trainings conducted at State institutions such as the Federal Judicial Academy.

Section 5. Final Provisions

A. This MoU shall enter into force on the date of signatures by the designated IFC and the Ministry representatives and shall continue through the end of the project unless extended by mutual agreement of the Parties.

B. This MoU may be terminated by either Party at any time, with or without cause, without incurring any liability whatsoever to each other, but with the obligation to inform the other of such termination at least thirty (30) days beforehand. Notwithstanding anything herein or elsewhere to the contrary, the provisions of

paragraphs C, D, E, F, H and I of this Section 5 shall survive the termination of this MOU howsoever occurring.

C. Any studies, reports or other material, graphic, software or otherwise, prepared by IFC under this MoU shall belong to and remain the property of IFC.

D. IFC shall not be liable for any loss, cost, damage or liability that the Ministry or any lender or investor or potential investor or client or other third party may suffer or incur as a result of the performance by IFC of the services described in this MOU or from using or relying on any such services or on any reports, documents, analyses or memoranda prepared or distributed by or with the assistance of IFC, its staff or any hired consultants, unless such loss, cost, damage or liability was the result of gross negligence or wilful misconduct on the part of IFC. Notwithstanding any thing herein, IFC's liability, if any, to the Ministry hereunder shall not extend to any indirect damage, loss of profit or loss of opportunity, nor shall exceed the amount of the in kind contribution from the Ministry actually received by IFC for its account pursuant to Section 4 paragraph B of this MOU, if any.

E. While IFC will make diligent efforts in performing the services, IFC makes no express or implied representation or warranty as to the accuracy, completeness or sufficiency of any reports, documents, analyses or memoranda prepared by or with the assistance of IFC or by any hired consultant.

F. Pakistan shall (i) indemnify and hold IFC harmless against, and pay or otherwise reimburse IFC for, any losses, claims, damages or liabilities that IFC and/or any of its employees, officers, or agents may incur or become subject to, including without limitation as a result of any claim, suit or action brought against any of them by any third party (whether or not affiliated with the Ministry) on whatever grounds in connection with the performance of the services by IFC hereunder or the reliance by any person on any thing done or not done by IFC, and (ii) reimburse IFC for any expenses, including any legal expenses, reasonably incurred by IFC in connection therewith; provided, however, that Pakistan shall not be liable under the foregoing indemnity to the extent that such loss, claim, damage or liability results from the wilful misconduct or gross negligence of IFC.

G. To the extent that the performance by IFC of any of the services contemplated in this MoU is delayed or prevented by causes beyond its reasonable control including, but not limited to, acts of God, acts of local authorities or Federal Government or any instrumentality thereof, strikes, civil commotion or the like, IFC shall not be in default of its obligations hereunder.

H. The Ministry agrees that it shall not represent, or permit the representation of, IFC's views without the prior written consent of IFC. The Ministry agrees not to use, or permit the use of, IFC's name in any advertisements, promotional literature or information without the prior written consent of IFC.

I. The Parties hereto shall endeavor to resolve all differences and disputes arising under, or in connection with, this MoU by amicable settlement. In the absence of an amicable settlement, the provisions of this MoU may be enforced against Pakistan in a court in Pakistan having jurisdiction or against IFC in any federal court in Washington DC, United States of America. To the extent that Pakistan may be entitled to claim for itself or its assets immunity in respect of its obligations under this MoU from any suit, execution, attachment (whether provisional or final, in aid of execution, before judgment or otherwise) or other legal process or to the extent that in any jurisdiction that immunity (whether or not claimed) may be attributed to it or its assets, Pakistan irrevocably agrees not to claim and irrevocably waives such immunity to the fullest extent permitted now or in the future by the laws of such jurisdiction. This MoU shall be construed and governed by the Laws of England and Wales.

J. This MoU, together with all its Annexes, constitutes the entire agreement between the Parties hereto and supersedes any and all prior agreements, understandings and arrangements, oral or written, between the Parties with respect to the subject matter hereof.

K. This MOU may be amended or modified through mutual consent of IFC and the Ministry in writing.

L. This MOU may be executed in several counterparts in the English language, each of which is an original, but all of which constitute the same agreement.

IN WITNESS WHEREOF, the Parties have caused this MoU to be signed on November 1, 2005 at Islamabad, Pakistan in their respective names.

For: IFC

Michael Essex
Acting Director
International Finance Corporation

For: Islamic Republic of Pakistan

through the Ministry of Law Justice and Human Rights

Mr. Mohammad Wasi Zafar
Minister
Ministry of Law, Justice and Human Rights
Government of Pakistan

Annexure B

IFC | International Finance Corporation
World Bank Group

MEMORANDUM OF UNDERSTANDING

Background

INTERNATIONAL FINANCE CORPORATION ("IFC") has established a Private Enterprise Partnership for the Middle East and North Africa ("IFC PEP-MENA"), a multi-donor facility of IFC aiming to foster private sector development and, *inter alia*, the business enabling environment in the Middle East and North Africa (MENA) region, including the Islamic Republic of Pakistan ("Pakistan"). To improve commercial dispute resolution mechanisms IFC is promoting alternative dispute resolution ("ADR") through mediation. Working to improve ADR commercial dispute resolution mechanisms through mediation contributes more broadly to IFC PEP-MENA's mission to promote sustainable private sector investment and development, and indeed economic growth, in the region, via its technical assistance and advisory services.

The Court is actively undertaking and promoting judicial reforms, including within the framework of the Access to Justice Program (AJP) which is being implemented by the Ministry of Law, Justice and Human Rights. Specifically, to enhance the business enabling environment, the Court is supporting commercial dispute settlement through enhancement of court processes and procedures as well as support for ADR/mediation.

IFC and the High Court of Sindh (*hereinafter* the Court) will work together to introduce mediation as a mechanism to improve commercial dispute settlement processes in Pakistan, to help reduce the case load in courts and to offer citizens and legal entities more efficient and sustainable method for dispute resolution. IFC will collaborate with the Court to

establish a pilot court-referred mediation centre in Karachi, Pakistan. The aim of the pilot centre is to provide timely commercial dispute settlement for the private sector, especially SMEs, offering an alternative to the formal court process.

Duration of the pilot project is until June 2007, unless extended by mutual agreement or terminated early by any party, at its discretion. Decisions on whether the pilot project would continue would be based on indicators such as: project dynamics; mediation response rate; settlement rate etc., and contingent on the duration of IFC PEP MENA.

This MEMORANDUM OF UNDERSTANDING (hereinafter "MoU") dated November 12 2005 is agreed between the High Court of Sindh (the Court) and IFC, an international organization established by Articles of Agreement among its member countries, including Pakistan. To promote and support court-referred mediation the parties hereby agree to the following:

1. IFC will launch a project aimed at institutionalizing ADR/mediation through the establishment of a pilot court-referred mediation center in Karachi.

2. IFC and the Court will each use their best endeavours to ensure that mutual assistance is provided in the terms of this MoU and engage in discussions, as appropriate, on mutually agreeable approaches designed to institutionalize court-referred ADR/mediation and establish the pilot mediation center.

3. IFC shall be responsible for all financial costs associated with the implementation of the pilot project, including expenditures associated with hiring short- and long-term consultants to carry out work, conferences and workshops as well as study tours for mediators.

4. IFC will convene a working group to propose and advise on court rules on ADR/mediation.

5. The Court will cooperate with IFC and will encourage its judges and staff to do all things necessary, in a timely manner, to enable IFC, its staff and consultants to carry out project activities.

6. The Court will contribute to these commitments by in-kind contributions by:

   i) assigning a judge to act as project counterpart to represent the Court at the mediation centre Advisory Committee meetings and to exchange project related

information.

ii) assigning a team of judges, working primarily on commercial cases at the High Court and selected District and Sessions Court to support the project primarily in case management and referral of cases for mediation to the pilot mediation center and in reviewing and enforcing the mediation agreements. Training in case management will be provided to the judges through the project.

iii) allocating a staff to act as Court Administrator for the pilot project to support the implementation of project activities. IFC will contract the Court Administrator for the pilot project and he/she will be based in the pilot mediation centre but will work closely with the court staff and Judges in the following project areas: selecting a pipeline of cases for the mediation centre; and enhancing court-process for case management, referral and enforcement.

iv) Deputing judicial officers to be apprised of the latest mediation techniques at the mediation centre or at locations designated by the court.

7. The Court is expected to seek support from the Ministry of Law, Justice and Human Rights or any other source for the procurement of all necessary IT equipment to enhance court-procedures, especially at the Courts associated with the project. Upgrading court systems is an essential part of the on-going reforms, including under the Access to Justice Program.

8. IFC project team leader would provide bi-monthly reporting to the Chief Justice of the Court or to a nominated representative of the Court on the pilot project development status and respective project results. Moreover, recruited consultants and IFC project staff will be reporting directly to the IFC on the overall pilot project implementation.

9. The MOU will remain in effect until June 2007, unless terminated by any party at its discretion

10. Should there be any disputes between IFC and the Court during and/or related to the implementation of this Project, they will be resolved by mutual understanding in due time. The parties hereby acknowledge and agree that this MoU is not legally binding. It is not the parties' intention to create, and nothing herein or therein, as applicable, shall be construed as creating, legal rights and obligations or any commitment whatsoever. Each party shall have the discretionary right to terminate at any time any

and all activities whatsoever regarding the project or this MoU.

IN WITNESS WHEREOF, the parties have caused this MoU to be signed in their respective names in Karachi, Pakistan on Saturday, 12 November 2005.

For: High Court of Sindh

Shaukat Ali Memon

Registrar of the Sindh High Court

For: IFC

Michael Essex

Acting Director

International Finance Corporation

Annexure-C

Karachi Centre for Dispute Resolution

D 95
Park Lane Block 5
Clifton-Karachi
Tel: 021-4214749
Fax: 92-21-4214749
Email: [illegible]@yahoo.com
Website

Rules for the Conduct of Commercial Mediations

Definitions

1. In these rules, unless the context otherwise requires,

    a. " The centre" means the Karachi Centre for Dispute Resolution;
    b. "Mediation" means the use of a neutral third party to help the parties to resolve a dispute;
    c. "Mediation Agreement" means a written agreement between the parties, mediator(s), and the centre;
    d. "Mediator" means the neutral person or persons, engaged to help the parties to resolve a dispute, this will also include an assistant mediator;
    e. "Rules" means these Rules of the Karachi Centre for Dispute Resolution;

f. "Settlement Agreement" means a written agreement executed by the parties, which resolves the dispute between them.

Rules

2. The Rules set forth herein shall be binding upon the parties to a dispute submitted to mediation before the Karachi Centre for Dispute Resolution. (hereinafter "The Center"), except as the parties may otherwise agree.
3. These Rules may be modified from time to time without notice by The Center; however the Rules in effect as of the date of commencement of mediation shall remain in effect as to that mediation, unless the parties agree to adopt the modified Rules.

Initiating Mediation

4. A court established by law in Pakistan or any party in a dispute may refer a case for mediation to The Centre. The staff of the Centre will, thereupon, contact all relevant parties and seek their agreement to mediate, unless the parties have already agreed to mediate and have given that consent before a court of law.
5. At least seven days prior to the mediation session, a party requesting mediation shall deliver to the Centre and the appointed Mediator a memorandum setting forth a statement of facts and the issues to be resolved through mediation. In case of a court referring a case for mediation the parties will supply to the Centre copies of the claim and the written statement, as the case may be, and other documents that may be deemed relevant by respective parties for resolving the case through mediation.
6. Parties requesting a mediation meeting will execute a mediation agreement, as prescribed by the Centre, and pay a fee as perscribed.
7. The Center shall endeavor to administer and schedule the mediation session as swiftly as practicable, and the parties agree to exercise good faith in cooperating with and responding to requests from the centre staff.

Appointment of Mediator

8. The Center shall appoint a mediator to mediate the dispute. Should that mediator not be acceptable to the parties or should that mediator have a conflict of interest or resign, another mediator shall be appointed by the Center, until an acceptable mediator is identified.
9. Should the parties themselves propose a mediator, that mediator shall be appointed so long as he or she is a registered accredited mediator with the Centre.
10. The Centre may appoint an assistant mediator to support the lead mediator.
11. Prior to accepting an appointment, a Mediator shall disclose any personal interest in the dispute, any circumstances likely to give rise to a presumption of bias.

Mediation Agreement

12. The Mediator shall prepare and execute together with the parties a Mediation Agreement, as prescribed by the Centre, setting out the terms and conditions under which the mediation shall take place.

CONDUCT OF THE MEDIATION

Time and Place

13. The Centre shall, following consultation with the parties and the mediator, fix the date and time of each mediation meeting.
14. Mediation will normally take place at the premises of the Centre.
15. Off site mediations could be arranged by the Centre provided that the party, or parties, making such a request will pay, in advance to the Centre, all the costs related to the venue and other ancillary arrangements.

Authority of the Mediator

16. The mediator shall have full authority to conduct the mediation meetings as he or

she sees fit, to request such documents as he or she believes are necessary in assisting the parties in resolving their dispute, in seeking the assistance of experts, at the parties' joint expense, and in terminating the mediation if he or she believes that any further efforts would be without a reasonable likelihood of success.

17. The Mediator will attempt to help the parties to reach a mutually agreed resolution of their dispute but has no authority to impose a settlement on the parties.
18. The Mediator is authorized to conduct joint and separate meetings with the parties.
19. The entire process shall be confidential in all respects except where exceptions apply.
20. The Mediator may consult experts or consultants if the parties so desire, provided that the fee and other related expenses of such experts or consultants are borne by the parties unless otherwise agreed.

Representation

21. A party may be represented by a lawyer or agent provided the name and address of any and all such representatives is communicated, in writing, to the Centre and the Mediator at least three days prior to the first meeting such representative will attend unless otherwise agreed.
22. At least one person from each party must have the authority to settle the dispute.

Confidentiality

23. The Mediator shall keep confidential any information disclosed in the course of the mediation including all written material provided to him/her as Mediator.
24. The parties agree that mediation sessions are settlement negotiations and disclosures are inadmissible in any further or pending litigation or arbitration to the extent permitted by law. The parties agree not to require the Mediator to testify or produce records or notes in any future proceedings.
25. No stenographic or taped record shall be made of the mediation proceedings.
26. The parties agree that they shall not rely on or introduce as evidence in subsequent arbitral or judicial proceedings:

a. any views expressed, or suggestions made, by the other party in respect of the possible settlement of the dispute;
b. any admissions made by the other party in the course of the mediation;
c. the fact that the other party had indicated a willingness to accept a proposal or recommendation for settlement made by the Mediator; or,
d. proposals made or views expressed by the Mediator.

Termination of Mediation

27. The mediation shall be terminated:
    a. by the execution of a settlement agreement by the parties;
    b. by a written declaration of one or more parties that the mediation is terminated;
    c. by a written declaration by the Mediator that further efforts at mediation would not be helpful.

Exclusion of Liability

28. Neither the Center, its officers, directors, employees or any mediator is a necessary party in any judicial proceeding, nor shall any such person or entity be liable in any way whatsoever to any party, person or entity for any act or omission arising under or in connection with any mediation conducted under these Rules.

Fees and Expenses

29. The parties agree to pay those fees and costs established by the Center in its Fee Schedule in effect at the time a case is submitted for mediation.
30. The expenses of all persons attending for that party shall be the responsibility of that party.

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