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NATIONAL INSTITUTE OF ARBITRATION

New Delhi

This website titled www.national.org.in has pleasure in introducing the National Institute of Arbitration (NIA) which has been sponsored by the World Institution Building Programme (WIBP), an international charity and inaugurated by the then Finance Minister of India Shri Yashwant Sinha on 30 December 1990 at New Delhi. The activities of the National Institute of Arbitration (NIA) include studies, training, consultancy, research, publications and conference organizations in the areas of arbitration, negotiation, alternative dispute resolution, mediation, conciliation, conflict resolution, bargaining etc. besides organizations and implementation of grassroot level programmes having social, legal, cultural, educational, scientific, environmental, positive and economic contents for ensuring the optimum development of our society.

Hon'ble Shri Yashwant Sinha inaugurating the National Institute of Arbitration at India International Centre, New Delhi on 30 December 1990.

The National Institute of Arbitration (NIA) has launched the following Certificate level courses for the benefit of all those interested in acquiring expert knowledge of Arbitration and related issues.

CERTIFICATE LEVEL COURSES

1. **Certificate in Arbitration**
2. **Certificate in Mediation**
3. **Certificate in Negotiations**
4. **Certificate in Alternative Dispute Resolution**
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Duration : Three Months

Eligibility : No Minimum Educational Qualification has been led down. All those interested in acquiring expert knowledge of arbitration and allied subjects are eligible to apply.

Fee : Rs. 3500 or US$ 85 only to be paid on account of admission, registration and evaluation fee.

This amount is to be transferred to our Bank Account having the following details :

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Bank Name : Indian Bank, Saket Branch, New Delhi, India
Account Number : 6049796524
IFS Code : IDIB000S097

Step by step method of learning at the National Institute of Arbitration :

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3. Pay the Admission Fee by Cheque / Draft / Electronic Transfer
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7. Submit the Project Report based on your experience and knowledge acquired regarding any topic relevant to the admitted student.
8. Wait for the announcement of results.

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In case of any clarification, contact the Facilitation Officer, National Institute of Arbitration, A 14-15-16, Paryavaran Complex, New Delhi – 110030, India by post or by Email : arbitration@ecology.edu

For any clarification, contact may be made through telephone by calling on 011-29533801, 011-29533830, 011-29535053.

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All those interested in getting admitted to one of the Certificate level courses are here by advised to fill-up the Admission Form given below and send the same on the above mentioned address by email or by post along with payment of Rs. 3500 by cheque / draft / RTGS etc.

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ADMISSION FORM

NAME OF THE COURSE SELECTED …….

Name of the Candidate ……..……

Father's Name ……..……

Mother's Name ……

Date of Birth …….. Nationality……..

Address ……

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Email ……Website *(if any)*……..……

Educational Qualification ……..

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Mention how will this course help you ?

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Details of Fee paid (Cheque / Draft / Electronic Transfer)

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Date

Signature

Universities, Colleges, Institutions, Industrial Houses, Chambers of Commerce, Central and State Governments, Public and Private Sector Organisations interested in collaborating with the National Institute of Arbitration (NIA) are invited to contact :

The President
National Institute of Arbitration
A 14-15-16 Paryavaran Complex
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During the last 29 years of the existence of the National Institute of Arbitration (NIA), the following publications have been brought out :

1. Introduction to Arbitration
2. Types of Arbitration
3. Mediation and Conciliation
4. Alternative Dispute Resolution
5. Arbitration and Conciliation Law
6. Ethics in Arbitration and Mediation
7. Arbitration Awards
8. Case Studies in Dispute Resolution
9. Theories of Conflict Resolution
10. Models of Conflict Management
11. Organisational and Interpersonal Conflict
12. Counselling and Dispute Resolution
13. Principles and Practices of Mediation
14. Ethics and Conflict Resolution
15. Case Studies in Conflict Resolution
16. Theories and Approaches to Negotiations
17. Styles of Negotiations
18. Positive and Negative Effects in Negotiations
19. Barriers to Negotiations
20. Emotion and Negotiations
21. Principles and Practices of Bargaining
22. Negotiations in Business and Government
23. Case Studies in Negotiations
24. Laws relating to Arbitration and Conciliation
25. International Commercial Arbitration
26. Case Studies in Arbitration and Mediation
27. Maritime Arbitration
28. Arbitral Tribunal
29. Arbitration Award
30. Conflict Resolution Research
31. Expert Determination
32. International Arbitration
33. Mandatory Arbitration

34. Conflict Management Style
35. Conflict Style Inventory
36. Intercultural Competence
37. Lawyer supported Mediation
38. Nonviolent Communication
39. Ombudsman
40. Party-Directed Mediation
41. Collective Bargaining
42. Collective Action
43. Consistency
44. Decision Making
45. Group Emotion
46. Impasse
47. Leadership

ARBITRATION

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

Other forms of ADR include mediation (a form of settlement negotiation facilitated by a neutral third party) and non-binding resolution by experts. Arbitration is often used for the resolution of commercial disputes, particularly in the context of international commercial transactions. The use of arbitration is also frequently employed in consumer and employment matters, where arbitration may be mandated by the terms of employment or commercial contracts.

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

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

- judicial proceedings, although in some jurisdictions, court proceedings are sometimes referred as arbitrations
- alternative dispute resolution (or ADR)
- expert determination
- mediation

ADVANTAGES AND DISADVANTAGES

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

- In contrast to litigation, where one cannot "choose the judge", arbitration allows the parties to choose their own tribunal. This is especially useful when the subject matter of the dispute is highly technical: arbitrators with an appropriate degree of expertise (for example, quantity surveying expertise, in the case of a construction dispute, or expertise in commercial property law, in the case of a real estate dispute) can be chosen.
- Arbitration is often faster than litigation in court
- Arbitration can be cheaper and more flexible for businesses
- Arbitral proceedings and an arbitral award are generally non-public, and can be made confidential
- In arbitral proceedings the language of arbitration may be chosen, whereas in judicial proceedings the official language of the country of the competent court will be automatically applied
- Because of the provisions of the New York Convention 1958, arbitration awards are generally easier to enforce in other nations than court judgments
- In most legal systems there are very limited avenues for appeal of an arbitral award, which is sometimes an advantage because it limits the duration of the dispute and any associated liability

Some of the disadvantages include:

- Arbitration may be subject to pressures from powerful law firms representing the stronger and wealthier party.
- Arbitration agreements are sometimes contained in ancillary agreements, or in small print in other agreements, and consumers and employees often do not know in advance that they have agreed to mandatory binding pre-dispute arbitration by purchasing a product or taking a job
- If the arbitration is mandatory and binding, the parties waive their rights to access the courts and to have a judge or jury decide the case
- In some arbitration agreements, the parties are required to pay for the arbitrators, which adds an additional layer of legal cost that can be prohibitive, especially in small consumer disputes.
- In some arbitration agreements and systems, the recovery of attorneys' fees is unavailable, making it difficult or impossible for consumers or employees to get legal representation; however most arbitration codes and agreements provide for the same relief that could be granted in court

- If the arbitrator or the arbitration forum depends on the corporation for repeat business, there may be an inherent incentive to rule against the consumer or employee
- There are very limited avenues for appeal, which means that an erroneous decision cannot be easily overturned
- Although usually thought to be speedier, when there are multiple arbitrators on the panel, juggling their schedules for hearing dates in long cases can lead to delays
- In some legal systems, arbitral awards have fewer enforcement options than judgments; although in the United States arbitration awards are enforced in the same manner as court judgments and have the same effect
- Arbitrators are generally unable to enforce interlocutory measures against a party, making it easier for a party to take steps to avoid enforcement of member or a small group of members in arbitration due to increasing legal fees, without explaining to the members the adverse consequences of an unfavorable ruling
- Rule of applicable law is not necessarily binding on the arbitrators, although they cannot disregard the law
- Discovery may be more limited in arbitration or entirely nonexistent
- The potential to generate billings by attorneys may be less than pursuing the dispute through trial
- Unlike court judgments, arbitration awards themselves are not directly enforceable. A party seeking to enforce an arbitration award must resort to judicial remedies, called an action to "confirm" an award
- Although grounds for attacking an arbitration award in court are limited, efforts to confirm the award can be fiercely fought, thus necessitating huge legal expenses that negate the perceived economic incentive to arbitrate the dispute in the first place.

ARBITRABILITY

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

- Procedures which necessarily lead to a determination which the parties to the dispute may not enter into an agreement upon: Some court procedures lead to judgments which bind all members of the general public, or public authorities in their capacity as such, or third parties, or which are being conducted in the public interest. For example, until the 1980s, antitrust matters were not arbitrable in the United States. Matters relating to crimes, status and family law are generally not considered to be arbitrable, as the power of the parties to enter into an agreement upon these matters is at least restricted. However, most other disputes that involve private rights between two parties can be resolved using arbitration. In some disputes, parts of claims may be arbitrable and other parts not. For example, in a dispute over patent infringement, a determination of whether a patent has been infringed could be adjudicated upon by an arbitration tribunal, but the validity of a patent could not: As patents are subject to a system

of public registration, an arbitral panel would have no power to order the relevant body to rectify any patent registration based upon its determination.
- Some legal orders exclude or restrict the possibility of arbitration for reasons of the protection of weaker members of the public, e.g. consumers. *Examples*: German law excludes disputes over the rental of living space from any form of arbitration, while arbitration agreements with consumers are only considered valid if they are signed by either party, and if the signed document does not bear any other content than the arbitration agreement.

ARBITRATION AGREEMENT

Arbitration agreements are generally divided into two types:

- Agreements which provide that, if a dispute should arise, it will be resolved by arbitration. These will generally be normal contracts, but they contain an arbitration clause
- Agreements which are signed after a dispute has arisen, agreeing that the dispute should be resolved by arbitration (sometimes called a "submission agreement")

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

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

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

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

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

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

1. A contract can only be declared void by a court or other tribunal; and

2. If the contract (valid or otherwise) contains an arbitration clause, then the proper forum to determine whether the contract is void or not, is the arbitration tribunal.

Arguably, either position is potentially unfair; if a person is made to sign a contract under duress, and the contract contains an arbitration clause highly favourable to the other party, the dispute may still referred to that arbitration tribunal. Conversely a court may be persuaded that the arbitration agreement itself is void having been signed under duress. However, most courts will be reluctant to interfere with the general rule which does allow for commercial expediency; any other solution (where one first had to go to court to decide whether one had to go to arbitration) would be self-defeating.

COMPARATIVE LAW

Nations regulate arbitration through a variety of laws. The main body of law applicable to arbitration is normally contained either in the national Private International Law Act (as is the case in Switzerland) or in a separate law on arbitration (as is the case in England). In addition to this, a number of national procedural laws may also contain provisions relating to arbitration.

UNITED STATES

The Federal Arbitration Act (FAA) of 1925 established a public policy in favor of arbitration. For the first six decades of its existence, courts did not allow arbitration for "federal statutory claims" through a bright-line "nonarbitrability" doctrine, but in the 1980s the Supreme Court of the United States reversed and began to use the act to require arbitration if included in the contract for federal statutory claims. Although some legal scholars believe that it was originally intended to apply to federal courts only, courts now routinely require arbitration due to the FAA regardless of state statutes or public policy unconscionability determinations by state courts. In consumer law, standard form contracts often include mandatory predispute arbitration clauses which require consumer arbitration. Under these agreements the consumer may waive their right to a lawsuit and a class action. In 2011, one of these clauses was upheld in *AT&T Mobility v. Concepcion*.

Several arbitration organizations exist, including the American Arbitration Association and JAMS. The National Arbitration Forum also conducts arbitrations, but it no longer conducts consumer arbitrations pursuant to a consent decree entered into in 2009.

INTERNATIONAL

HISTORY

The United States and Great Britain were pioneers in the use of arbitration to resolve their differences. It was first used in the Jay Treaty of 1795, and played a major role in the Alabama Claims case of 1872 whereby major tensions regarding British support for the Confederacy during the American Civil War were resolved. At the First

International Conference of American States in 1890, a plan for systematic arbitration was developed, but not excepted. The Hague Peace Conference of 1899, saw the major world powers agreed to a system of arbitration and the creation of a Permanent Court of Arbitration. President William Howard Taft was a major advocate. One important use came in the Newfoundland fisheries dispute between the United States and Britain in 1910. In 1911 the United States signed arbitration treaties with France and Britain.

Arbitration was widely discussed among diplomats and elites in the 1890-1914 era. The 1895 dispute between the United States and Britain over Venezuela was peacefully resolved through arbitration. Both nations realized that a mechanism was desirable to avoid possible future conflicts. The Olney-Pauncefote Treaty of 1897 was a proposed treaty between the United States and Britain in 1897 that required arbitration of major disputes. The treaty was rejected by the U.S. Senate and never went into effect.

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

INTERNATIONAL AGREEMENTS

By far the most important international instrument on arbitration law is the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. Some other relevant international instruments are:

- The Geneva Protocol of 1923
- The Geneva Convention of 1927
- The European Convention of 1961
- The Washington Convention of 1965 (governing settlement of international investment disputes)
- The UNCITRAL Model Law (providing a model for a national law of arbitration)
- The UNCITRAL Arbitration Rules (providing a set of rules for an ad hoc arbitration)

INTERNATIONAL ENFORCEMENT

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

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

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

GOVERNMENT DISPUTES

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

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

ARBITRAL TRIBUNAL

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

Arbitrations are usually divided into two types:

- *ad hoc* arbitrations and administered arbitrations.

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

In administered arbitration, the arbitration will be administered by a professional arbitration institution providing arbitration services, such as the LCIA in London, or

the ICC in Paris, or the American Arbitration Association in the United States. Normally the arbitration institution also will be the appointing authority. Arbitration institutions tend to have their own rules and procedures, and may be more formal. They also tend to be more expensive, and, for procedural reasons, slower.

DUTIES OF THE TRIBUNAL

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

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

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

ARBITRAL AWARDS

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

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

CHALLENGE

Generally speaking, by their nature, arbitration proceedings tend not to be subject to appeal, in the ordinary sense of the word. However, in most countries, the court maintains a supervisory role to set aside awards in extreme cases, such as fraud or in

the case of some serious legal irregularity on the part of the tribunal. Only domestic arbitral awards are subject to set aside procedure.

In American arbitration law there exists a small but significant body of case law which deals with the power of the courts to intervene where the decision of an arbitrator is in fundamental disaccord with the applicable principles of law or the contract. However, this body of case law has been called into question by recent decisions of the Supreme Court.

Unfortunately there is little agreement amongst the different American judgments and textbooks as to whether such a separate doctrine exists at all, or the circumstances in which it would apply. There does not appear to be any recorded judicial decision in which it has been applied. However, conceptually, to the extent it exists, the doctrine would be an important derogation from the general principle that awards are not subject to review by the courts.

COSTS

In many legal systems - both Common Law and Civil Law - it is normal practice for the courts to award legal costs against a losing party, with the winner becoming entitled to recover an approximation of what it spent in pursuing its claim (or in defense of a claim). The United States is a notable exception to this rule, as except for certain extreme cases, a prevailing party in a US legal proceeding does not become entitled to recoup its legal fees from the losing party.

Like the courts, arbitral tribunals generally have the same power to award costs in relation to the determination of the dispute. In international arbitration as well as domestic arbitrations governed by the laws of countries in which courts may award costs against a losing party, the arbitral tribunal will also determine the portion of the arbitrators' fees that the losing party is required to bear.

NOMENCLATURE

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

- **Judicial Arbitration** is, usually, not arbitration at all, but merely a court process which refers to itself as arbitration, such as small claims arbitration before the County Courts in the United Kingdom.

- **High-Low Arbitration**, or **Bracketed Arbitration**, is an arbitration wherein the parties to the dispute agree in advance the limits within which the arbitral tribunal must render its award. It is only generally useful where liability is not in dispute, and the only issue between the party is the amount of compensation. If the award is lower than the agreed minimum, then the defendant only need pay the lower limit; if the award is higher than the agreed maximum, the claimant will receive the upper limit. If the award falls within the agreed range,

then the parties are bound by the actual award amount. Practice varies as to whether the figures may or may not be revealed to the tribunal, or whether the tribunal is even advised of the parties' agreement.

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

- **Non-Binding Arbitration** is a process which is conducted as if it were a conventional arbitration, except that the award issued by the tribunal is not binding on the parties, and they retain their rights to bring a claim before the courts or other arbitration tribunal; the award is in the form of an independent assessment of the merits of the case, designated to facilitate an out-of-court settlement. State law may automatically make a non-binding arbitration binding, if, for example, the non-binding arbitration is court-ordered, and no party requests a trial *de novo* (as if the arbitration had not been held).

- **Pendulum Arbitration** refers to a determination in industrial disputes where an arbitrator has to resolve a claim between a trade union and management by making a determination of which of the two sides has the more reasonable position. The arbitrator must choose only between the two options, and cannot split the difference or select an alternative position. It was initiated in Chile in 1979. This form of arbitration has been increasingly seen in resolving international tax disputes, especially in the context of deciding on the Transfer Pricing margins.

    - This form of arbitration is also known as **Baseball Arbitration**. It takes its name from a practice which arose in relation to salary arbitration in Major League Baseball.

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

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

MEDIATION

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

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

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

The benefits of mediation include:

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

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

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

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

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

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

HISTORY

The activity of mediation appeared in very ancient times. Historians located early cases in Phoenician commerce. 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 CE) recognized mediation. The Romans called mediators by a variety of names, including *internuncius*, *medium*, *intercessor*, *philantropus*, *interpolator*, *conciliator*, *interlocutor*, *interpres*, and finally *mediator*.

Some cultures regarded the mediator as a sacred figure, worthy of particular respect; and the role partly overlapped with that of traditional wise men or tribal chief. Members of peaceful communities frequently brought disputes before local leaders or wise men to resolve local conflicts. This peaceful method of resolving conflicts was particularly prevalent in communities of Confucians and Buddists.

USES

Urban mediators in Fort-de-France (Martinique)

In addition to dispute resolution, mediation can function as a means of dispute prevention, such as facilitating the process of contract negotiation. Governments can use mediation to inform and to seek input from stakeholders in formulation or fact-seeking aspects of policy-making. Mediation is applicable to disputes in many areas:

Family:

- Prenuptial/Premarital agreements
- Financial or budget disagreements
- Separation
- Divorce
- Alimony
- Parenting plans (child custody and visitation)
- Eldercare
- Family businesses
- Adult sibling conflicts
- Parent(s)/adult children
- Estates
- Medical ethics and end-of-life

Workplace:

- Wrongful termination
- Workers compensation
- Discrimination
- Harassment
- Grievances
- Labor management

Public disputes:

- Environmental
- Land-use

Commercial:

- Landlord/tenant
- Homeowners' associations
- Builders/contractors/realtors/homeowners
- Contracts
- Medical malpractice
- Personal injury
- Partnerships

Other:

- School conflicts
- Violence-prevention

- Victim-Offender mediation
- Non-profit organizations
- Faith communities

SOUTH AFRICA

Since the early 1980s a number of institutions have championed mediation. The Independent Mediation Service of South Africa (IMSSA) was established in 1984. It trained mediators who then worked through Local Dispute Resolution Committees set up as part of the National Peace Accord. Initial training was undertaken by the UK's ACAS. IMSSA covers mediation within unionised environments. The more recently created Commission for Conciliation, Mediation and Arbitration (CCMA) was formed as result of the Labour Relation Act No 66 1995, and replaced the Industrial Courts in handling large areas of employment disputes.

Informal processes that engage a community in more holistic solution-finding are growing.

After 1995, the country established a legal right to take an employment dispute to conciliation/mediation. Mediation agreements are binding in law. The process has grown from generally covering collective agreements such as for wages or terms and conditions, to encompass more individual matters including dismissal.

Mediation was not always successful. In a Southern Cape town case, mediation with two municipal unions did not restore relationships and led to a worse breakdown.

Mediation evolved to include Med/Arb, Con/Arb and Arb/Med.

INDUSTRIAL RELATIONS

AUSTRALIA

ADR began in industrial relations in Australia long before the arrival of the modern ADR movement. One of the first statutes passed by the Commonwealth parliament was the Conciliation and Arbitration Act 1904 (Cth). This allowed the Federal Government to pass laws on conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state. Conciliation has been the most prominently used form of ADR, and is generally far removed from modern mediation.

Significant changes in state policy took place from 1996 to 2007. The 1996 Workplace Relations Act (Cth) sought to shift the industrial system away from a collectivist approach, where unions and the Australian Industrial Relations Commission (AIRC) had strong roles, to a more decentralized system of individual bargaining between employers and employees. The Act diminished the traditional role of the AIRC by placing the responsibility of resolving disputes at the enterprise level. This allowed mediation to be used to resolve industrial relations disputes instead of traditional conciliation.

Australia incorporated mediation extensively into family law Family Law Act 1975 and the 2006 Amendments Mandatory, subject to certain exceptions, Family Dispute Resolution Mediation is required before courts will consider disputed parenting arrangements. The Family Dispute Resolution Practitioners who provide this service are accredited by the Attorney-Generals Department

In industrial relations under the 2006 WorkChoices amendments to the Workplace Relations Act. Examples of this use of mediation can be seen in recent enterprise bargaining negotiations. The Australian government claimed the benefits of mediation to include the following:

- Cost saving
- Reduced polarization
- Education
- Broader issues vs. the courts
- Greater access to justice
- More control by disputant over the process

WORKPLACE MATTERS

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

The decline of unionism and the rise of the individual encouraged the growth of mediation. This is demonstrated in the industries with the lowest unionization rates such as in the private business sector having the greatest growth of mediation.

The 2006 Work Choices Act made further legislative changes to deregulate industrial relations. A key element of the new changes was to weaken the AIRC by encouraging competition with private mediation.

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

Party-Directed Mediation (PDM) is an emerging mediation approach particularly suited for disputes between co-workers, colleagues or peers, especially deep-seated interpersonal conflict, multicultural or multiethnic disputes. The mediator listens to each party separately in a pre-caucus or pre-mediation before ever bringing them into a joint session. Part of the pre-caucus also includes coaching and role plays. The idea is that the parties learn how to converse directly with their adversary in the joint session.

Some unique challenges arise when organizational disputes involve supervisors and subordinates. The Negotiated Performance Appraisal (NPA) is a tool for improving communication between supervisors and subordinates and is particularly useful as an alternate mediation model because it preserves the hierarchical power of supervisors while encouraging dialogue and dealing with differences in opinion.

COMMUNITY MEDIATION

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

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

PEER MEDIATION

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

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

Peace Pals is an empirically validated peer mediation program. was studied over a 5-year period and revealed several positive outcomes including a reduction in elementary school violence and enhanced social skills, while creating a more positive, peaceful school climate.

Peer mediation helped reduce crime in schools, saved counselor and administrator time, enhanced self-esteem, improved attendance and encouraged development of leadership and problem-solving skills among students. Such conflict resolution programs increased in U.S. schools 40% between 1991 and 1999.

Peace Pals was studied in a diverse, suburban elementary school. Peer mediation was available to all students (N = 825). Significant and long-term reductions in school-wide violence over a five-year period occurred. The reductions included both verbal and physical conflict. Mediator knowledge made significant gains pertaining to conflict,

conflict resolution and mediation, which was maintained at 3-month follow-up. Additionally, mediators and participants viewed the *Peace Pals* program as effective and valuable, and all mediation sessions resulted in successful resolution.

COMMERCIAL DISPUTES

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

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

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

NATIVE-TITLE MEDIATION

In response to the Mabo decision, the Australian Government sought to engage the population and industry on Mabo's implications for land tenure and use by enacting the Native Title Act 1993 (Cth), which required mediation as a mechanism to determine future native title rights. The process incorporated the Federal Court and the National Native Title Tribunal (NNTT). Mediation can occur in parallel with legal challenges, such as occurred in Perth.

Some features of native title mediation that distinguish it from other forms include lengthy time frames, the number of parties (ranging on occasion into the hundreds) and that statutory and case law prescriptions constrain some aspects of the negotiations.

GLOBAL RELEVANCE

Mediation's relevance in trans-border disputes is likely to be limited, Mediation explicitly requires that the parties identify themselves, that they participate willingly, that an overarching legal authority enforce the agreements that emerge and that they can overcome language and cultural differences, each of which presents an obstacle to mediation's success.

PROCESS

ROLES

MEDIATOR

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

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

PARTIES

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

PREPARATION

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

DISCLOSURE

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

PARTICIPATION

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

PREPARATION

Choose an appropriate mediator, considering experience, skills, credibility, cost, etc. The criteria for mediator competence is under dispute. Competence certainly includes the ability to remain neutral and to move parties though various impasse-points in a dispute. The dispute is over whether expertise in the subject matter of the dispute should be considered or is actually detrimental to the mediator's objectivity.

Preparatory steps for mediation can vary according to legal and other requirements, not least gaining the willingness of the parties to participate.

In some court-connected mediation programs, courts require disputants to prepare for mediation by making a statement or summary of the subject of the dispute and then bringing the summary to the mediation. In other cases, determining the matter(s) at issue can become part of the mediation itself.

Consider having the mediator meet the disputants prior to the mediation meeting. This can reduce anxiety, improve settlement odds and increase satisfaction with the mediation process.

Ensure that all participants are ready to discuss the dispute in a reasonably objective fashion. Readiness is improved when disputants consider the viability of various outcomes.

Provide reasonable estimates of loss and/or damage.

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

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

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

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

MEETING

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

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

- discuss and analyze solutions
- adjust and refine proposed solutions
- record agreement in writing

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

POST-MEDIATION ACTIVITIES

RATIFICATION AND REVIEW

Ratification and review provide safeguards for mediating parties. They also provide an opportunity for persons not privy to the mediation to undermine the result. Some mediated agreements require ratification by an external body—such as a board, council or cabinet. In some situations the sanctions of a court or other external authority must explicitly endorse a mediation agreement. Thus if a grandparent or other non-parent is granted residence rights in a family dispute, a court counselor will be required to furnish a report to the court on merits of the proposed agreement to aid the court's ultimate disposition of the case. In other situations it may be agreed to have agreements reviewed by lawyers, accountants or other professional advisers.

The implementation of mediated agreements must comply with the statues and regulations of the governing jurisdiction.

Parties to a private mediation may also wish to obtain court sanction for their decisions. Under the Queensland regulatory scheme on court connected mediation, mediators are required to file with a registrar a certificate about the mediation in a form prescribed in the regulations. A party may subsequently apply to a relevant court an order giving effect to the agreement reached. Where court sanction is not obtained, mediated settlements have the same status as any other agreements.

REFERRALS

Mediators may at their discretion refer one or more parties to psychologists, accountants, social workers or others for post-mediation professional assistance.

MEDIATOR DEBRIEFING

In some situations, a post-mediation debriefing and feedback session is conducted between co-mediators or between mediators and supervisors. It involves a reflective analysis and evaluation of the process. In many community mediation services debriefing is compulsory and mediators are paid for the debriefing session.

MEASURING EFFECTIVENESS

Mediation recognized that in addition to the fact of reaching a settlement, party satisfaction and mediator competence could be measured. Surveys of mediation parties

reveal strong levels of satisfaction with the process. Of course, if parties are generally satisfied post-settlement, then such measures may not be particularly explanatory.

MEDIATORS

EDUCATION AND TRAINING

The educational requirements for accreditation as a mediator differ between accrediting groups and from country to country. In some cases legislation mandates requirements; in others professional bodies impose accreditation standards. Many US universities offer graduate studies in mediation, culminating in the PhD or DMed degrees.

AUSTRALIA

In Australia, for example, professionals wanting to practice in the area of family law must have tertiary qualifications in law or in social science, undertake 5 days training in mediation and engage in 10 hours of supervised mediation. Furthermore, they must also undertake 12 hours of education or training every 12 months.

Other institutions offer units in mediation across a number of disciplines such as law, social science, business and the humanities. Not all kinds of mediation-work require academic qualifications, as some deal more with practical skills than with theoretical knowledge. Membership organizations provide training courses. Internationally a similar approach to the training of mediators is taken by organizations such as the Centre for Effective Dispute Resolution.

No legislated national standards on the level of education apply to all practitioner's organizations. However, organizations such as the National Alternative Dispute Resolution Advisory Council (NADRAC) advocate for a wide scope on such issues. Other systems apply in other jurisdictions such as Germany, which advocates a higher level of educational qualification for practitioners of mediation.

CODES OF CONDUCT

Common elements of codes of conduct include:

- informing participants as to the process of mediation
- adopting a neutral stance
- revealing any potential conflicts of interest
- maintaining confidentiality within the bounds of the law
- mindfulness of the psychological and physical wellbeing of all participants
- directing participants to appropriate sources for legal advice
- engaging in ongoing training
- practising only in those fields in which they have expertise.

AUSTRALIA

In Australia mediation codes of conduct include those developed by the Law Societies of South Australia and Western Australia and those developed by organisations such as Institute of Arbitrators and Mediators Australia (IAMA) and LEADR. The CPR/Georgetown Ethics Commission, the Mediation Forum of the Union International des Advocates, and the European Commission have promulgated codes of conduct for mediators.

FRANCE

In France, professional mediators have created an organization to develop a rational approach to conflict resolution. This approach is based on a "scientific" definition of a person and a conflict. These definitions help to develop a structured mediation process. Mediators have adopted a code of ethics which guarantees professionalism.

ACCREDITATION

AUSTRALIA

A range of organizations within Australia accredit mediators. Standards vary according to the specific mediation and the level of specificity that is desired. Standards apply to particular ADR processes.

The National Mediator Accreditation System (NMAS) commenced operation on 1 January 2008. It is an industry-based scheme which relies on voluntary compliance by mediator organisations that agree to accredit mediators in accordance with the requisite standards.

Mediator organizations have varying ideals of what makes a good mediator which reflect the training and accreditation of that particular organization. Australia did not adopt a national accreditation system, which may lead to suboptimal choice of mediators.

SELECTION

Mediator selection is of practical significance given varying models of mediation, mediators' discretion in structuring the process and the impact of the mediator's professional background and personal style on the result.

In community mediation programs the director generally assigns mediators. In New South Wales, for example, when the parties cannot agree on a mediator, the registrar contacts a nominating entity, such as the Bar Association which supplies the name of a qualified and experienced mediator.

As of 2006, formal mechanisms for objecting to the appointment of a particular mediator had not been established. Parties could ask the mediator to withdraw for

reasons of conflict of interest. In some cases, legislation establishes criteria for mediators. In New South Wales, for example, the Family Law Act 1975 (Cth) proscribes qualifications for mediators.

CRITERIA

The following are useful criteria for selecting a mediator:

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

THIRD PARTY NOMINATION

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

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

LIABILITY

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

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

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

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

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

TAPOOHI V LEWENBERG (AUSTRALIA)

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

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

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

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

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

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

UNITED STATES

Within the United States, the laws governing mediation vary by state. Some states have clear expectations for certification, ethical standards and confidentiality. Some also exempt mediators from testifying in cases they've worked on. However, such laws only cover activity within the court system. Community and commercial mediators practising outside the court system may not have such legal protections. State laws regarding lawyers may differ widely from those that cover mediators. Professional mediators often consider the option of liability insurance.

VARIANTS

EVALUATIVE MEDIATION

Evaluative mediation is focused on providing the parties with an evaluation of their case and directing them toward settlement. During an evaluative mediation process, when the parties agree that the mediator should do so, the mediator will express a view on what might be a fair or reasonable settlement. The Evaluative mediator has somewhat of an advisory role in that s/he evaluates the strengths and weaknesses of each side's argument and makes some predictions about what would happen should they go to court. Facilitative and transformative mediators do not evaluate arguments or direct the parties to a particular settlement.

FACILITATIVE MEDIATION

Facilitative mediators typically do not evaluate a case or direct the parties to a particular settlement. Instead, the Facilitative mediator facilitates the conversation. These mediators act as guardian of the process, not the content or the outcome. During a facilitative mediation session the parties in dispute control both what will be discussed and how their issues will be resolved. Unlike the transformative mediator, the facilitative mediator is focused on helping the parties find a resolution to their dispute and to that end, the facilitative mediator provides a structure and agenda for the discussion.

TRANSFORMATIVE MEDIATION

Transformative Mediation looks at conflict as a crisis in communication. Success is not measured by settlement but by the parties shifts toward (a) personal strength, (b) interpersonal responsiveness, (c) constructive interaction, (d) new understandings of themselves and their situation, (e) critically examining the possibilities, (f) feeling better about each other, and (g) making their own decisions. Those decisions can include settlement agreements or not. Transformative mediation practice is focused on supporting empowerment and recognition shifts, by allowing and encouraging deliberation, decision-making, and perspective-taking. A competent transformative mediator practices with a microfocus on communication, identifying opportunities for empowerment and recognition as those opportunities appear in the parties' own conversations, and responding in ways that provide an opening for parties to choose what, if anything, to do with them.

MEDIATION WITH ARBITRATION

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

This process is more appropriate in civil matters where rules of evidence or jurisdiction are not in dispute. It resembles, in some respects, criminal plea-bargaining and Confucian judicial procedure, wherein the judge also plays the role of prosecutor—

rendering what, in Western European court procedures, would be considered an arbitral (even 'arbitrary') decision.

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

ONLINE

Online mediation employs online technology to provide disputants access to mediators and each other despite geographic distance, disability or other barriers to direct meeting. Online approaches also facilitate mediation when the value of the dispute does not justify the cost of face-to-face contact. Online mediation can also combine with face-to-face mediation—to allow mediation to begin sooner and/or to conduct preliminary discussions.

BIASED MEDIATION

Neutral mediators enter into a conflict with the main intention in ending a conflict. This goal tends to hasten a mediator to reach a conclusion. Biased mediators enter into a conflict with specific biases in favor of one party or another. Biased mediators look to protect their parties interest thus leading to a better, more lasting resolution.

ALTERNATIVES

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

Not all disputes lend themselves well to mediation. Success is unlikely unless:

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

CONCILIATION

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

One significant difference between conciliation and mediation lies in the fact that conciliators possess expert knowledge of the domain in which they conciliate. The conciliator can make suggestions for settlement terms and can give advice on the

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

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

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

COUNSELLING

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

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

EARLY NEUTRAL EVALUATION

The technique of *Early Neutral Evaluation* (ENE) have focus on market ineterships, and—based on that focus—offers a basis for sensible case-management or a suggested resolution of the entire case in its very early stages.

In early neutral evaluation, an evaluator acts as a neutral person to assess the strengths and weaknesses of each of the parties and to discuss the same with parties jointly or in caucuses, so that parties gain awareness (via independent evaluation) of the merits of their case.

Parties generally call on a senior counsel or on a panel with expertise and experience in the subject-matter under dispute in order to conduct ENE.

ARBITRATION

Binding Arbitration is a more direct substitute for the formal process of a court. Binding Arbitration is typically conducted in front of one or three arbitrators. The process is much like a mini trial with rules of evidence, etc. Arbitration typically proceeds faster than court and typically at a lower cost. The Arbiter makes the ultimate decision rather than the parties. Arbiters' decisions are typically final and appeals are rarely successful even if the decision appears to one party to be completely unreasonable.

LITIGATION

In litigation, courts impose their thoughts to both parties Courts in some cases refer litigants to mediation. Mediation is typically less costly, less formal and less complex. Unlike courts, mediation does not ensure binding agreements and the mediator does not decide the outcome.

SHUTTLE DIPLOMACY

While mediation implies bringing disputing parties face-to-face with each other, the strategy of "shuttle diplomacy", where the mediator serves as a liaison between disputing parties, also sometimes occurs as an alternative.

PHILOSOPHY

CONFLICT PREVENTION

Mediation can anticipate difficulties between parties before conflict emerges. Complaint handling and management is a conflict prevention mechanism designed to handle a complaint effectively at first contact, minimising the possibility of a dispute. One term for this role is “dispute preventer”.

CONFIDENTIALITY

One of the hallmarks of mediation is that the process is strictly confidential. Two competing principles affect confidentiality. One principle encourages confidentiality to

encourage people to participate, while the second principle states that all related facts should be available to courts.

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

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

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

Confidentiality is a powerful and attractive feature of mediation. It lowers the risk to participants of disclosing information and emotions and encourages realism by eliminating the benefits of posturing. In general, information discussed in mediation cannot be used as evidence in the event that the matter proceeds to court, in accord with the mediation agreement and common law.

Few mediations succeed unless the parties can communicate fully and openly without fear of compromising a potential court case. The promise of confidentiality mitigates such concerns. Organisations often see confidentiality as a reason to use mediation in lieu of litigation, particularly in sensitive areas. This contrasts with the public nature of courts and other tribunals. However mediation need not be private and confidential. In some circumstances the parties agree to open the mediation in part or whole. Laws may limit confidentiality. For example mediators must disclose allegations of physical or other abuse to authorities. The more parties in a mediation, the less likely that perfect confidentiality will be maintained. Some parties may even be required to give an account of the mediation to outside constituents or authorities.

Most countries respect mediator confidentiality.

WITHOUT-PREJUDICE PRIVILEGE

The without-prejudice privilege in common law denotes that in honest attempts to reach settlement, any offers or admissions cannot be used in court when the subject matter is the same. This applies to the mediation process. The rule comes with exceptions.

The privilege is visible in *AWA Ltd v Daniels* (t/as Deloitte Haskins and Sells). *AWA Ltd* commenced proceedings in the Supreme Court of NSW against *Daniels* for failing to properly audit their accounts. Mediation failed to produce an agreement. During mediation *AWA Ltd* disclosed that they had a document that gave its directors full indemnity with respect to any legal proceedings. *AWA Ltd* was under the impression that they had given this information without prejudice preventing its use in court.

During the subsequent litigation *Daniels* asked for a copy of the indemnity deed. *AWA Ltd* claimed privilege, but the presiding **Rolfe J**, admitted the document. Further to

this **Rolfe, J** added that *Daniels* was “only seeking to prove a fact which was referred to in the mediation”.

The without-prejudice privilege does not apply if it was excluded by either party or if the privilege was waived in proceedings. Although mediation is private and confidential, the disclosure of privileged information in the presence of a mediator does not represent a waiver of the privilege.

LEGAL IMPLICATIONS

Parties who enter into mediation do not forfeit legal rights or remedies. If mediation does not result in settlement, each side can continue to enforce their rights through appropriate court or tribunal procedures. However, if mediation produces a settlement, legal rights and obligations are affected in differing degrees. In some situations, the parties may accept a memorandum or moral force agreement; these are often found in community mediations. In other instances, a more comprehensive deed of agreement, when registered with a court, is legally binding. It is advisable to have a lawyer draft or provide legal advice about the proposed terms.

"Court systems are eager to introduce mandatory mediation as a means to meet their needs to reduce case loads and adversarial litigation, and participants who understand the empowerment of mediation to self-determine their own agreements are equally as eager to embrace mediation as an alternative to costly and potentially harmful litigation."

PRINCIPLES

Principles of mediation include non-adversarialism, responsiveness, self-determination and party autonomy.

Non-adversarialism is based on the actual process of mediation. It treats the parties as collaborating in the construction of an agreement. By contrast, litigation is explicitly adversarial in that each party attempts to subject the other to its views. Mediation is designed to conclude with an agreement rather than a winner and loser.

Responsiveness reflects the intent to allow the parties to craft a resolution outside of the strict rules of the legal system. A responsive mediation process also is informal, flexible and collaborative.

Self-determination and party autonomy allow and require parties to choose the area of agreement, rather than ceding the decision to an outside decision-maker such as a judge. This turns the responsibility for the outcome onto the parties themselves.

In the United States, mediator codes-of-conduct emphasize "client-directed" solutions rather than imposed solutions. This has become a common, definitive feature of mediation in the US and UK.

ETHICS

Theorists, notably Rushworth Kidder, claimed that mediation is the foundation of a 'postmodern' ethics—and that it sidesteps traditional ethical issues with pre-defined limits of morality.

Mediation can also be seen as a form of harm reduction or de-escalation, especially in its large-scale application in peace and similar negotiations, or the bottom-up way it is performed in the peace movement where it is often called mindful mediation. This form derived from methods of Quakers in particular.

CONFLICT MANAGEMENT

Society perceives conflict as something that one should resolve as quickly as possible. Mediators see conflict as a fact of life that when properly managed can benefit the parties. The benefits of conflict include the opportunity to renew relationships and make positive changes for the future.

NEGOTIATION

Negotiation is a dialogue between two or more people or parties, intended to reach an understanding, resolve point of difference, or gain advantage in outcome of dialogue, to produce an agreement upon courses of action, to bargain for individual or collective advantage, to craft outcomes to satisfy various interests of two people/parties involved in negotiation process. Negotiation is a process where each party involved in negotiating tries to gain an advantage for themselves by the end of the process. Negotiation is intended to aim at compromise.

Signing the Treaty of Trianon on 4 June 1920. Albert Apponyi standing in the middle.

Negotiation occurs in business, non-profit organizations, government branches, legal proceedings, among nations and in personal situations such as marriage, divorce, parenting, and everyday life. The study of the subject is called *negotiation theory*. Professional negotiators are often specialized, such as *union negotiators*, *leverage buyout negotiators*, *peace negotiators*, *hostage negotiators*, or may work under other titles, such as diplomats, legislators or brokers.

NEGOTIATION STRATEGIES

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

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

DISTRIBUTIVE NEGOTIATION

Distributive negotiation is also sometimes called positional or hard-bargaining negotiation. It tends to approach negotiation on the model of haggling in a market. In a distributive negotiation, each side often adopts an extreme position, knowing that it

will not be accepted, and then employs a combination of guile, bluffing, and brinkmanship in order to cede as little as possible before reaching a deal. Distributive bargainers conceive of negotiation as a process of distributing a fixed amount of value.

The term distributive implies that there is a finite amount of the thing being distributed or divided among the people involved. Sometimes this type of negotiation is referred to as the distribution of a "fixed pie." There is only so much to go around, but the proportion to be distributed is variable. Distributive negotiation is also sometimes called *win-lose* because of the assumption that one person's gain results in another person's loss. A distributive negotiation often involves people who have never had a previous interactive relationship, nor are they likely to do so again in the near future. Simple everyday examples would be buying a car or a house.

INTEGRATIVE NEGOTIATION

Integrative negotiation is also sometimes called interest-based or principled negotiation. It is a set of techniques that attempts to improve the quality and likelihood of negotiated agreement by providing an alternative to traditional distributive negotiation techniques. While distributive negotiation assumes there is a fixed amount of value (a "fixed pie") to be divided between the parties, integrative negotiation often attempts to create value in the course of the negotiation ("expand the pie"). It focuses on the underlying interests of the parties rather than their arbitrary starting positions, approaches negotiation as a shared problem rather than a personalized battle, and insists upon adherence to objective, principled criteria as the basis for agreement.

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

NEGOTIATION TACTICS

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

One view of negotiation involves three basic elements: *process*, *behavior* and *substance*. The process refers to how the parties negotiate: the context of the negotiations, the parties to the negotiations, the tactics used by the parties, and the sequence and stages in which all of these play out. Behavior refers to the relationships among these parties, the communication between them and the styles they adopt. The substance refers to what the parties negotiate over: the agenda, the issues (positions and - more helpfully - interests), the options, and the agreement(s) reached at the end.

Another view of negotiation comprises four elements: *strategy*, *process*, *tools*, and *tactics*. Strategy comprises the top level goals - typically including relationship and the final outcome. Processes and tools include the steps that will be followed and the roles taken in both preparing for and negotiating with the other parties. Tactics include more detailed statements and actions and responses to others' statements and actions. Some add to this *persuasion and influence*, asserting that these have become integral to modern day negotiation success, and so should not be omitted.

ADVERSARY OR PARTNER?

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

EMPLOYING AN ADVOCATE

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

Skilled negotiators may use a variety of tactics ranging from negotiation hypnosis, to a straightforward presentation of demands or setting of preconditions, to more deceptive approaches such as cherry picking. Intimidation and salami tactics may also play a part in swaying the outcome of negotiations.

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

Another negotiation is leaning back and whispering. This establishes a dominant physical position thus intimidating your counterpart.

NEGOTIATION STYLES

Kenneth W. Thomas identified five styles/responses to negotiation. Individuals can often have strong dispositions towards numerous styles; the style used during a negotiation depends on the context and the interests of the other party, among other factors. In addition, styles can change over time.

1. **Accommodating**: Individuals who enjoy solving the other party's problems and preserving personal relationships. Accommodators are sensitive to the emotional states, body language, and verbal signals of the other parties. They can, however, feel taken advantage of in situations when the other party places little emphasis on the relationship.

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

TYPES OF NEGOTIATORS

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

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

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

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

or an arbitrary decisional procedure. These criteria may be drawn from moral standards, principles of fairness, professional standards, tradition, and so on.

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

BAD FAITH NEGOTIATION

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

INHERENT BAD FAITH MODEL IN INTERNATIONAL RELATIONS AND POLITICAL PSYCHOLOGY

Bad faith in political science and political psychology refers to negotiating strategies in which there is no real intention to reach compromise, or a model of information processing. The "inherent bad faith model" of information processing is a theory in political psychology that was first put forth by Ole Holsti to explain the relationship between John Foster Dulles' beliefs and his model of information processing. It is the most widely studied model of one's opponent. A state is presumed to be implacably hostile, and contra-indicators of this are ignored. They are dismissed as propaganda ploys or signs of weakness. Examples are John Foster Dulles' position regarding the Soviet Union, or Hamas's position on the state of Israel.

EMOTION IN NEGOTIATION

Emotions play an important part in the negotiation process, although it is only in recent years that their effect is being studied. Emotions have the potential to play either a positive or negative role in negotiation. During negotiations, the decision as to whether or not to settle rests in part on emotional factors. Negative emotions can cause intense and even irrational behavior, and can cause conflicts to escalate and negotiations to break down, but may be instrumental in attaining concessions. On the other hand, positive emotions often facilitate reaching an agreement and help to maximize joint gains, but can also be instrumental in attaining concessions. Positive and negative discrete emotions can be strategically displayed to influence task and relational outcomes and may play out differently across cultural boundaries.

AFFECT EFFECT

Dispositional affects affect the various stages of the negotiation process: which strategies are planned to be used, which strategies are actually chosen, the way the other party and his or her intentions are perceived, their willingness to reach an

agreement and the final negotiated outcomes. Positive Affectivity (PA) and Negative Affectivity (NA) of one or more of the negotiating sides can lead to very different outcomes.

POSITIVE AFFECT IN NEGOTIATION

Even before the negotiation process starts, people in a positive mood have more confidence, and higher tendencies to plan to use a cooperative strategy. During the negotiation, negotiators who are in a positive mood tend to enjoy the interaction more, show less contentious behavior, use less aggressive tactics and more cooperative strategies. This in turn increases the likelihood that parties will reach their instrumental goals, and enhance the ability to find integrative gains. Indeed, compared with negotiators with negative or natural affectivity, negotiators with positive affectivity reached more agreements and tended to honor those agreements more. Those favorable outcomes are due to better decision making processes, such as flexible thinking, creative problem solving, respect for others' perspectives, willingness to take risks and higher confidence. Post negotiation positive affect has beneficial consequences as well. It increases satisfaction with achieved outcome and influences one's desire for future interactions. The PA aroused by reaching an agreement facilitates the dyadic relationship, which result in affective commitment that sets the stage for subsequent interactions.
PA also has its drawbacks: it distorts perception of self performance, such that performance is judged to be relatively better than it actually is. Thus, studies involving self reports on achieved outcomes might be biased.

NEGATIVE AFFECT IN NEGOTIATION

Negative affect has detrimental effects on various stages in the negotiation process. Although various negative emotions affect negotiation outcomes, by far the most researched is anger. Angry negotiators plan to use more competitive strategies and to cooperate less, even before the negotiation starts. These competitive strategies are related to reduced joint outcomes. During negotiations, anger disrupts the process by reducing the level of trust, clouding parties' judgment, narrowing parties' focus of attention and changing their central goal from reaching agreement to retaliating against the other side. Angry negotiators pay less attention to opponent's interests and are less accurate in judging their interests, thus achieve lower joint gains. Moreover, because anger makes negotiators more self-centered in their preferences, it increases the likelihood that they will reject profitable offers. Opponents who really get angry (or cry, or otherwise lose control) are more likely to make errors: make sure they are in your favor. Anger does not help in achieving negotiation goals either: it reduces joint gains and does not help to boost personal gains, as angry negotiators do not succeed in claiming more for themselves. Moreover, negative emotions lead to acceptance of settlements that are not in the positive utility function but rather have a negative utility. However, expression of negative emotions during negotiation can sometimes be beneficial: legitimately expressed anger can be an effective way to show one's commitment, sincerity, and needs. Moreover, although NA reduces gains in integrative tasks, it is a better strategy than PA in distributive tasks (such as zero-sum). In his

work on negative affect arousal and white noise, Seidner found support for the existence of a negative affect arousal mechanism through observations regarding the devaluation of speakers from other ethnic origins." Negotiation may be negatively affected, in turn, by submerged hostility toward an ethnic or gender group.

CONDITIONS FOR EMOTION AFFECT IN NEGOTIATION

Research indicates that negotiator's emotions do not necessarily affect the negotiation process. Albarracın et al. (2003) suggested that there are two conditions for emotional affect, both related to the ability (presence of environmental or cognitive disturbances) and the motivation:

1. Identification of the affect: requires high motivation, high ability or both.
2. Determination that the affect is relevant and important for the judgment: requires that either the motivation, the ability or both are low.

According to this model, emotions are expected to affect negotiations only when one is high and the other is low. When both ability and motivation are low the affect will not be identified, and when both are high the affect will be identify but discounted as irrelevant for judgment. A possible implication of this model is, for example, that the positive effects PA has on negotiations (as described above) will be seen only when either motivation or ability are low.

THE EFFECT OF THE PARTNER'S EMOTIONS

Most studies on emotion in negotiations focus on the effect of the negotiator's own emotions on the process. However, what the other party feels might be just as important, as group emotions are known to affect processes both at the group and the personal levels. When it comes to negotiations, trust in the other party is a necessary condition for its emotion to affect, and visibility enhances the effect. Emotions contribute to negotiation processes by signaling what one feels and thinks and can thus prevent the other party from engaging in destructive behaviors and to indicate what steps should be taken next: PA signals to keep in the same way, while NA points that mental or behavioral adjustments are needed. Partner's emotions can have two basic effects on negotiator's emotions and behavior: mimetic/ reciprocal or complementary. For example, disappointment or sadness might lead to compassion and more cooperation. In a study by Butt et al. (2005) which simulated real multi-phase negotiation, most people reacted to the partner's emotions in reciprocal, rather than complementary, manner. Specific emotions were found to have different effects on the opponent's feelings and strategies chosen:

- **Anger** caused the opponents to place lower demands and to concede more in a zero-sum negotiation, but also to evaluate the negotiation less favorably. It provoked both dominating and yielding behaviors of the opponent.
- **Pride** led to more integrative and compromise strategies by the partner.
- **Guilt** or **regret** expressed by the negotiator led to better impression of him by the opponent, however it also led the opponent to place higher demands. On the

other hand, personal guilt was related to more satisfaction with what one achieved.
- **Worry** or **disappointment** left bad impression on the opponent, but led to relatively lower demands by the opponent.

PROBLEMS WITH LAB NEGOTIATION STUDIES

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

- Emotions in lab studies are usually manipulated and are therefore relatively 'cold' (not intense). Although those 'cold' emotions might be enough to show effects, they are qualitatively different from the 'hot' emotions often experienced during negotiations.
- In real life there is self-selection to which negotiation one gets into, which affects the emotional commitment, motivation and interests. However this is not the case in lab studies.
- Lab studies tend to focus on relatively few well defined emotions. Real life scenarios provoke a much wider scale of emotions.
- Coding the emotions has a double catch: if done by a third side, some emotions might not be detected as the negotiator sublimates them for strategic reasons. Self-report measures might overcome this, but they are usually filled only before or after the process, and if filled during the process might interfere with it.

TEAM NEGOTIATIONS

Due to globalization and growing business trends, negotiation in the form of teams is becoming widely adopted. Teams can effectively collaborate to break down a complex negotiation. There is more knowledge and wisdom dispersed in a team than in a single mind. Writing, listening, and talking, are specific roles team members must satisfy. The capacity base of a team reduces the amount of blunder, and increases familiarity in a negotiation.

ETYMOLOGY

The word "negotiation" originated from the Latin expression, "negotiatus", past participle of negotiare which means "to carry on business". "Negotium" (from "Nec Otium") means literally "not leisure".

BARRIERS TO NEGOTIATIONS

- Die hard bargainers.
- Lack of trust.
- Informational vacuums and negotiator's dilemma.
- Structural impediments.

- Spoilers.
- Cultural and gender differences.
- Communication problems.
- The power of dialogue.

NEGOTIATION TACTICS

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

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

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

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

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

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

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

Flinch: Flinching is showing a strong negative physical reaction to a proposal. Common examples of flinching are gasping for air, or a visible expression of surprise of shock. The flinch can be done consciously or unconsciously. The flinch signals to the

opposite party that you think the offer or proposal is absurd in hopes the other party will lower their aspirations. Seeing a physical reaction is more believable than hearing someone saying, "I'm shocked."

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

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

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

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

NONVERBAL COMMUNICATION IN NEGOTIATION

Communication is a key element of negotiation. Effective negotiation requires that participants effectively convey and interpret information. Participants in a negotiation will communicate information not only verbally but non-verbally through body language and gestures. By understanding how nonverbal communication works, a negotiator is better equipped to interpret the information other participants are leaking non-verbally while keeping secret those things that would inhibit his/her ability to negotiate.

EXAMPLES OF NON-VERBAL COMMUNICATION IN NEGOTIATION

Non-verbal "anchoring" In a negotiation, a person can gain the advantage by verbally expressing his/or her position first. By "anchoring" your position, you establish the position from which the negotiation will proceed. In a like manner, one can "anchor" and gain advantage with non verbal (body language) ques.

- Personal Space: The person at the head of the table is the apparent symbol of power. Negotiators can repel this strategic advantage by positioning allies in the room to surround that individual.
- First Impression: Begin the negotiation with positive gestures and enthusiasm. Look the person in the eye with sincerity. If you cannot maintain eye contact, the other person might think you are hiding something or that you are insincere. Give a solid handshake.

Reading Non-Verbal Communication : Being able to read the non-verbal communication of another person can significantly aid in the communication process. By being aware of inconsistencies between a person's verbal and non-verbal communication and reconciling them, negotiators will be able to come to better resolutions. Examples of incongruity in body language include:

- Nervous Laugh: A laugh not matching the situation. This could be a sign of nervousness or discomfort. When this happens, it may be good to probe with questions to discover the person's true feelings.
- Positive words but negative body language: If someone asks their negotiation partner if they are annoyed and the person pounds their fist and responds sharply, "what makes you think anything is bothering me?"
- Hands raised in a clenched position: The person raising his/her hands in this position reveals frustration even when he/she is smiling. This is a signal that the person doing it may be holding back a negative attitude.
- If possible, it may be helpful for negotiation partners to spend time together in a comfortable setting outside of the negotiation room. Knowing how each partner non-verbally communicates outside of the negotiation setting will help negotiation partners to sense incongruity between verbal and non-verbal communication within the negotiation setting.

Conveying Receptivity : They way negotiation partners position their bodies relative to each other may influence how receptive each is to the other person's message and ideas.

- Face and eyes: Receptive negotiators smile, make plenty of eye contact. This conveys the idea that there is more interest in the person than in what is being said. On the other hand, non-receptive negotiators make little to no eye contact. Their eyes may be squinted, jaw muscles clenched and head turned slightly away from the speaker
- Arms and hands: To show receptivity, negotiators should spread arms and open hands on table or relaxed on their lap. Negotiators show poor receptivity when their hands are clenched, crossed, positioned in front of their mouth, or rubbing the back of their neck.
- Legs and Feet: Receptive negotiators sit with legs together or one leg slightly in front of the other. When standing, they distribute weight evenly and place hands on their hips with their body tilted toward the speaker. Non-receptive negotiators stand with legs crossed, pointing away from the speaker.

- Torso: Receptive negotiators sit on the edge of their chair, unbutton their suit coat with their body tilted toward the speaker. Non-receptive negotiators may lean back in their chair and keep their suit coat buttoned.

Receptive negotiators tend to appear relaxed with their hands open and palms visibly displayed.

ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution (ADR) includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party. Despite historic resistance to ADR by many popular parties and their advocates, ADR has gained widespread acceptance among both the general public and the legal profession in recent years. In fact, some courts now require some parties to resort to ADR of some type, usually mediation, before permitting the parties' cases to be tried (indeed the European Mediation Directive (2008) expressly contemplates so-called "compulsory" mediation; this means that attendance is compulsory, not that settlement must be reached through mediation). The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute. Some of the senior judiciary in certain jurisdictions (of which England and Wales is one) are strongly in favour of the use of mediation to settle disputes.

SALIENT FEATURES

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

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

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

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

between formal and informal processes are (a) pendency to a court procedure and (b) the possession or lack of a formal structure for the application of the procedure.

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

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

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

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

- delivering respect, for example, affirming the feelings of a visitor, while staying explicitly neutral on the facts of a case,
- active listening, serving as a sounding board,
- providing and explaining information, one-on-one, for example, about policies and rules, and about the context of a concern,
- receiving vital information, one-on-one, for example, from those reporting unacceptable or illegal behavior,
- reframing issues,
- helping to develop and evaluate new options for the issues at hand,
- offering the option of referrals to other resources, to "key people" in the relevant department, and to managers and compliance offices,
- helping people help themselves to use a direct approach, for example, helping people collect and analyze their own information, helping people to draft a letter about their issues, coaching and role-playing,
- offering shuttle diplomacy, for example, helping employees and managers to think through proposals that may resolve a dispute, facilitating discussions,
- offering mediation inside the organization,
- "looking into" a problem informally,
- facilitating a generic approach to an individual problem, for example instigating or offering training on a given issue, finding ways to promulgate an existing policy,
- identifying and communicating throughout the organization about "new issues,"
- identifying and communicating about patterns of issues,
- working for systems change, for example, suggesting new policies, or procedures,
- following up with a visitor, following up on a system change recommendation.

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

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

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

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

The salient features of each type are as follows:

1. In negotiation, participation is voluntary and there is no third party who facilitates the resolution process or imposes a resolution. (NB – a third party like a chaplain or organizational ombudsperson or social worker or a skilled friend may be coaching one or both of the parties behind the scene, a process called "Helping People Help Themselves" – see Helping People Help Themselves, in Negotiation Journal July 1990, pp. 239–248, which includes a section on helping someone draft a letter to someone who is perceived to have wronged them.)
2. In mediation, there is a third party, a mediator, who facilitates the resolution process (and may even suggest a resolution, typically known as a "mediator's proposal"), but does *not* impose a resolution on the parties. In some countries (for example, the United Kingdom), ADR is synonymous with what is generally referred to as mediation in other countries.
3. In collaborative law or collaborative divorce, each party has an attorney who facilitates the resolution process within specifically contracted terms. The parties reach agreement with support of the attorneys (who are trained in the process) and mutually-agreed experts. No one imposes a resolution on the parties. However, the process is a formalized process that is part of the litigation and court system. Rather than being an Alternative Resolution methodology it is a litigation variant that happens to rely on ADR like attitudes and processes.
4. In arbitration, participation is typically voluntary, and there is a third party who, as a private judge, imposes a resolution. Arbitrations often occur because parties to contracts agree that any future dispute concerning the agreement will be resolved by arbitration. This is known as a 'Scott Avery Clause'. In recent years, the enforceability of arbitration clauses, particularly in the context of consumer agreements (e.g., credit card agreements), has drawn scrutiny from courts. Although parties may appeal arbitration outcomes to courts, such appeals face an exacting standard of review.

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

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

An organizational ombudsman works within the institution to look into complaints independently and impartially.

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

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

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

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

BENEFITS

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

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

COUNTRY-SPECIFIC EXAMPLES

MODERN ERA

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

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

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

ICELAND

Njáls saga is the story of a mediator who was so successful that he eventually threatened the local power structure. It ends in tragedy with the unlawful burning of Njal alive in his home, the escape of a friend of the family, a mini-war and the eventual

ending of the dispute by the intermarriage of the two strongest survivors. It illustrates that mediation was a powerful process in Iceland before the era of kings.

ROMAN EMPIRE

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

SUB-SAHARAN AFRICA

Before modern state law was introduced under colonialism, African customary legal systems mainly relied on mediation and conciliation. In many countries, these traditional mechanisms have been integrated into the official legal system. In Benin, specialised *tribunaux de conciliation* hear cases on a broad range of civil law matters. Results are then transmitted to the court of first instance where either a successful conciliation is confirmed or jurisdiction is assumed by the higher court. Similar tribunals also operate, in varying modes, in other francophone African countries.

INDIA

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

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

ARBITRATION AND CONCILIATION ACT, 1996

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

ARBITRATION

The process of arbitration can start only if there exists a valid Arbitration Agreement between the parties prior to the emergence of the dispute. As per Section 7, such an agreement must be in writing. The contract regarding which the dispute exists, must

either contain an arbitration clause or must refer to a separate document signed by the parties containing the arbitration agreement. The existence of an arbitration agreement can also be inferred by written correspondence such as letters, telex, or telegrams which provide a record of the agreement. An exchange of statement of claim and defense in which existence of an arbitration agreement is alleged by one party and not denied by other is also considered as valid written arbitration agreement.

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

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

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

CONCILIATION

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

Parties may submit statements to the conciliator describing the general nature of the dispute and the points at issue. Each party sends a copy of the statement to the other. The conciliator may request further details, may ask to meet the parties, or communicate with the parties orally or in writing. Parties may even submit suggestions for the settlement of the dispute to the conciliator.

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

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

LOK ADALAT

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

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

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

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

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

PERMANENT LOK ADALAT FOR PUBLIC UTILITY SERVICES

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

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

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

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

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

PAKISTAN

The relevant laws (or particular provisions) dealing with the ADR are summarised as under:

1. S.89-A of the Civil Procedure Code, 1908 (Indian but amended in 2002) read with Order X Rule 1-A (deals with alternative dispute resolution methods).
2. The Small Claims and Minor Offences Courts Ordinance, 2002.
3. Sections 102–106 of the Local Government Ordinance, 2001.
4. Sections 10 and 12 of the Family Courts Act, 1964.
5. Chapter XXII of the Code of Criminal Procedure, 1898 (summary trial provisions).
6. The Arbitration Act, 1940 (Indian).
7. Articles 153–154 of the Constitution of Pakistan, 1973 (Council of Common Interest)
8. Article 156 of the Constitution of Pakistan, 1973 (National Economic Council)
9. Article 160 of the Constitution of Pakistan, 1973 (National Finance Commission)
10. Article 184 of the Constitution of Pakistan, 1973 (Original Jurisdiction when federal or provincial governments are at dispute with one another)
11. Arbitration (International Investment Disputes) Act, 2011
12. Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011

US NAVY

SECNAVINST 5800.13A established the DON ADR Program Office with the following missions:

- Coordinate ADR policy and initiatives;

- Assist activities in securing or creating cost effective ADR techniques or local programs;
- Promote the use of ADR, and provide training in negotiation and ADR methods;
- Serve as legal counsel for in-house neutrals used on ADR matters; and,
- For matters that do not use in-house neutrals, the program assists DON attorneys and other representatives concerning issues in controversy that are amenable to using ADR.

The ADR Office also serves as the point of contact for questions regarding the use of ADR. The Assistant General Counsel (ADR) serves as the "Dispute Resolution Specialist" for the DON, as required by the Administrative Dispute Resolution Act of 1996. Members of the office represent the DON's interests on a variety of DoD and interagency working groups that promote the use of ADR within the Federal Government.

ADDITIONAL RESOURCES

CARDOZO SCHOOL OF LAW'S KUKIN PROGRAM FOR CONFLICT RESOLUTION

Cardozo School of Law's Kukin Program for Conflict Resolution is the seventh ranked alternative dispute resolution program in the country. The program includes: courses in negotiation, mediation, arbitration and dispute resolution processes; out-of-the-classroom-applied learning and scholarship in Cardozo's Mediation Clinic and Securities Arbitration Clinic; the Cardozo Journal of Conflict Resolution, a student-run triannual publication; the Cardozo Dispute Resolution Society; and a Certificate in Dispute Resolution, awarded to J.D. students who complete coursework, writing and service requirements. LL.M. students can also receive an LL.M. in Dispute Resolution and Advocacy.

CORNELL UNIVERSITY'S SCHEINMAN INSTITUTE ON CONFLICT RESOLUTION

Cornell's ILR School has joined forces with Cornell's Law School to present the country's most comprehensive conflict resolution program focusing on workplace alternative dispute resolution (ADR). The Martin and Laurie Scheinman Institute on Conflict Resolution mission is to educate the next generation of neutrals – arbitrators, mediators and facilitators – who can help resolve disputes between employers and employees, both unionized and non-unionized. The Institute provides training for undergraduate and graduate students, consultation and evaluation, and conducts research. It also offers courses in two- to five-day sessions designed for professionals who are interested in or practicing in the workplace dispute resolution field. These highly intensive and participatory courses are coordinated by Cornell ILR faculty and are held in the ILR School's conference center in Manhattan and on the Ithaca campus. Participants can earn two certificates, Workplace Alternative Dispute Resolution and Conflict Management and Labor Arbitration.

FORDHAM LAW SCHOOL'S DISPUTE RESOLUTION PROGRAM

Fordham Law School's Dispute Resolution program placed in the top 10 of *U.S. News & World Report*'s 2008 rankings of the best Dispute Resolution programs in the nation, according to the recently released rankings. Along with Fordham's Clinical Training program, the Dispute Resolution program is the top-ranked specialty program at Fordham Law School. The Alternative Dispute Resolution program at Fordham combines an integrated agenda of teaching, scholarship, and practice in conflict resolution within the national and international communities. In addition to the classroom and clinical experience, the law school's student-run Dispute Resolution Society competes in ABA-sponsored interschool competitions as well as international mediation and arbitration competitions. In 2008 the Society's teams won the ABA Regional Negotiation Competition, placed third overall in the International Chamber of Commerce Commercial Mediation Competition in Paris, and reached the semifinals of the Willem C. Vis (East) International Commercial Arbitration Competition in Hong Kong. Additionally, Fordham's Dispute Resolution Society hosts an annual symposium on current Dispute Resolution topics and also teaches a class on dispute resolution skills to seniors at the Martin Luther King, Jr. High School in New York City.

HARVARD PROGRAM ON NEGOTIATION

"The [Harvard] Program on Negotiation (PON) is a university consortium dedicated to developing the theory and practice of negotiation and dispute resolution. As a community of scholars and practitioners, PON serves a unique role in the world negotiation community. Founded in 1983 as a special research project at Harvard Law School, PON includes faculty, students, and staff from Harvard University, Massachusetts Institute of Technology and Tufts University." Harvard currently offers 12 week courses on negotiation and mediation for participants from all disciplines and professions as well as weekend seminars taught by their professors. The Harvard PON program is currently ranked #3 falling from #2 last year according to the US World and News Report, and has also remained among the top 10 schools over the last decade.

STRAUS INSTITUTE FOR DISPUTE RESOLUTION

Pepperdine University School of Law's Straus Institute for Dispute Resolution provides professional training and academic programs in dispute resolution including a Certificate, Masters in Dispute Resolution (MDR) and Masters of Law in Dispute Resolution (LLM). Straus provides education to law and graduate students, as well as mid-career professionals in areas of mediation, negotiation, arbitration, international dispute resolution and peacemaking. The Straus Institute has consistently ranked the number one Dispute Resolution school in the nation for the past 6 years, and has remained among the top 10 schools over the last decade.

CUNY DISPUTE RESOLUTION CONSORTIUM

The City University of New York Dispute Resolution Consortium (CUNY DRC) serves as an intellectual home to dispute-resolution faculty, staff and students at the City University of New York and to the diverse dispute-resolution community in New York

City. At the United States' largest urban university system, the CUNY DRC has become a focal point for furthering academic and applied conflict resolution work in one of the world's most diverse cities. The CUNY DRC conducts research and innovative program development, has co-organized countless conferences, sponsored training programs, resolved a wide range of intractable conflicts, published research working papers and a newsletter. It also maintains an extensive database of those interested in dispute resolution in New York City, a website with resources for dispute resolvers in New York City and since 9/11, the CUNY DRC assumed a leadership role for dispute-resolvers in New York City by establishing an extensive electronic mailing list, sponsoring monthly breakfast meetings, conducting research on responses to catastrophes, and managing a public awareness initiative to further the work of dispute resolvers.

CPR INSTITUTE FOR DISPUTE RESOLUTION

- The International Institute for Conflict Prevention and Resolution, known as the CPR Institute, is a New York City membership-based nonprofit organization that promotes excellence and innovation in public and private dispute resolution, serving as a primary multinational resource for avoidance, management, and resolution of business-related disputes.

The CPR Institute was founded in 1979 as the Center for Public Resources by a coalition of leading corporate general counsel dedicated to identifying and applying appropriate alternative solutions to business disputes, thereby mitigating the extraordinary costs of lengthy court trials.

CPR's mission is "to spearhead innovation and promote excellence in public and private dispute resolution, and to serve as a primary multinational resource for avoidance, management and resolution of business-related and other disputes." CPR is a nonprofit educational corporation existing under the New York state laws, and is tax exempt pursuant to Section 501(c)(3) of the U.S. Internal Revenue Code.

It is governed by a board of directors, and its priorities and policies are guided in large part by consultation with an executive advisory committee. Its funding derives in principal part from the annual contributions of its member organizations, and from its mission-related programming. The various operations and activities that fulfill the Institute's mission are captured in the acronym of its name:

C: CPR convenes legal and business leadership to develop, and encourage the exchange of, best practices in avoiding, managing and resolving disputes.

P: CPR publishes its own work and that of other like-minded organizations, making resources available to a global community of problem-solvers.

R: CPR helps to resolve complex disputes among sophisticated parties, by devising rules, protocols and best practices, and by providing disputants with resources and consulting expertise in selecting appropriate methods and neutrals to assist in the dispute resolution process.

ICAR

Established at George Mason as an alternative to a sociology program due to Virginia's then policy against duplicating graduate schools, it was the nation's first major dispute resolution graduate program. It has been a major success.

THE ASSOCIATION FOR INTERNATIONAL ARBITRATION

The Association for International Arbitration (AIA) is a non-profit organization, founded in Paris in 2001 by Johan Billiet. The Association for International Arbitration has an increasing number of members among arbitrators and mediators of international backgrounds.

The Association was established with the aim of facilitating arbitration, mediation and general forms of dispute resolution internationally. Today, the AIA has developed into an organization dealing in the private international law field to meet the needs of the fast-growing evolution of dispute resolution within the international community. AIA provides information, training and educational activities to expand the promotion of arbitration and ADR globally by means of securing partnerships with various organizations and parties to get involved in the life of the association. The association constantly works to develop partnerships in the international realm and to provide the international community of arbitrators and ADR professionals with continuous exposure to the latest international developments, activities and opportunities in the field. AIA continually encourages the participation and contribution of its members in the pursuit of the association’s goals.