

# Basic Introduction to Alternative Dispute Resolution

## §1. Definition of Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) is defined «as encompassing all legally-permitted processes of dispute resolution other than litigation»<sup>1</sup>. It is also seen as «an umbrella term that refers generally to alternatives to the court adjudication of disputes such as negotiation, mediation, arbitration, mini-trial and summary trial»<sup>2</sup>. ADR is also known as «appropriate dispute resolution»<sup>3</sup> or «amicable dispute resolution»<sup>4</sup>. It is seen as «a colloquialism for allowing a dispute to drop or as an alternative to violence»<sup>5</sup>.

Like many concepts, hardly do we find a uniform definition of ADR. Though, there are common elements in the above three definitions. Since definitions in general do not offer a comprehensive nature of a subject, it is appropriate to describe the essential elements of this institution.

## § 2. Description of ADR

### § 2.1. ADR as a Legal Institution

ADR is a product of the legal institution to offer the best possible service to its clients. In fact, lawyers are sometimes urged to use ADR. In United States for example, «the professional responsibility codes of many states require that lawyers advise their clients of ADR options»<sup>6</sup>.

Even though ADR is a private way of resolving dispute, it must work within the broad legal framework in which it operates. This means, the use of ADR to settle disputes must be done within the confines of law. For instance, mediation as ADR process cannot be used to settle serious criminal cases, which would be a subversion of the law and public good<sup>7</sup>.

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<sup>1</sup> S. J. WARE, *Alternative Dispute Resolution*, St. Paul, 2001, 5.

<sup>2</sup> J. M. NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*, St. Paul, 2008, 2.

<sup>3</sup> Ibid. 2.

<sup>4</sup> Ibid. 2.

<sup>5</sup> *Alternative Dispute Resolution*, [http://en.wikipedia.org/wiki/Alternate\\_dispute\\_resolution](http://en.wikipedia.org/wiki/Alternate_dispute_resolution), Retrieved December 10, 2008.

<sup>6</sup> NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*, 3.

<sup>7</sup> B.A., NAGLE LECHMAN, *Conflict and Resolution*, New York, 2008, 38.

## **§2.2. ADR as a Process**

There are different kinds of ADR processes. One process differs from the other. The notable ADR processes are: «negotiation, mediation, arbitration, settlements, summary jury trial, early neutral evaluation, the mini-trial, consensus building, and negotiated rule-making»<sup>8</sup>.

ADR practitioners have well-defined process of resolving conflicts within their jurisdiction. The choice of a particular process depends on the kind of conflicts and the interests of the parties involved. In mediation process, with the aid of the mediator, disputants resolve their conflict themselves. On the other hand, in arbitration process, there is adjudication, which binds the parties<sup>9</sup>.

There are two things that all ADR processes share in common. First, there are two or more parties' involved-the claimant and the respondent. Second, there is a presumed goodwill of the parties to find solution to their conflicts through ADR process.

## **§2.3. ADR aims at Resolving Conflicts**

Conflicts or disputes are everyday life experience both in private and public life<sup>10</sup>. Whenever there is a dispute, which is «an expressed struggle between at least two interdependent parties who perceive incompatible goals, scarce resources, and interference from others in achieving their goal»<sup>11</sup>, there is the need for resolution. There are various ways in which disputants try to resolve their differences. Some resolve conflicts by the use of violence like killing the other disputant. Some use court of law by going through litigation. ADR aims to be an alternative to litigation and violence.

The difference between litigation and violence is that litigation is a rational and civilised way to resolve a dispute through a complex government judicial system, while violence is not a good option. ADR opposes violence as intrinsically wrong way of resolving dispute but it is opposed to litigation as matter of giving disputants another a better option to resolve their conflicts. ADR's primary goal is to help disputants resolve their conflict through various techniques and procedure.

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<sup>8</sup> NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*, 3.

<sup>9</sup> NAGLE LECHMAN, *Conflict and Resolution*, 100.

<sup>10</sup> M.L.MOFFITT, R.C.BORDONE, *Perspectives on Dispute Resolution, An Introduction*, in *The Handbook of Dispute Resolution*, Jossey-Bass, 2005,1.

<sup>11</sup> WILMOT, and HOCHER, *Interpersonal Conflict*, 7th Ed., 2007.

ADR professionals' main goal is to end a dispute. To end a dispute means resolving it<sup>12</sup>. The resolution of dispute entails the following: «the claimant is satisfied with the result, *or* all parties are satisfied with the result-*which is* a just result-through a fair process or something of the foregoing»<sup>13</sup>.

## §2.4. ADR is the Opposite of Litigation

The word *alternative* is used as an option to litigation. ADR is a recognised and a time-tested alternative to litigation across the globe<sup>14</sup>. In common law tradition, it is becoming increasingly one of the best ways of resolving many disputes<sup>15</sup>.

ADR process has been used to resolve conflicts among religious and ethnic groups since time in memorial. However, in many countries, especially in United States, a legally instituted ADR movement started in 1976 as real alternative to litigation<sup>16</sup>. It was introduced in law schools so that lawyers can go beyond litigation, since the «failure to do this for so long may be part of the reason for so much congestion in the civil justice system»<sup>17</sup>.

## §2.5. ADR is Voluntary

Disputants decide voluntarily to use ADR to resolve their differences. ADR thrives under the principle of self-determination of the disputants to use legally accepted procedure to resolve a conflict other than litigation. No one is coerced to enter into ADR. It is a voluntary process unlike litigation where respondents can be subpoenaed to respond to charges or provide evidence in public court of law.

Mediation as typical ADR process «invites the parties to engage in a potentially creative and collaborative method of problem solving, without forcing a decision»<sup>18</sup> on any of the parties. In mediation process the final decision rest in the bosom of the parties and not a third party deciding for them<sup>19</sup>.

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<sup>12</sup> WARE, *Alternative Dispute Resolution*, 4.

<sup>13</sup> Ibid. 4. (The Italics are mine. The author does admit that the list is not exhaustive of what dispute resolution entails).

<sup>14</sup> NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*, 10.

<sup>15</sup> Online Dispute Resolution-(ODR)services reveal how common law countries have well established ADR.

<sup>16</sup> NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*, 5.

<sup>17</sup> Ibid.3.

<sup>18</sup> K.K. KOVACH, *Meditation*, in *The Handbook of Dispute Resolution*, Jossey-Bass, 2005, 304.

<sup>19</sup> Ibid.305.

In all ADR processes, the parties are those who decide to resolve their conflicts through appropriate dispute resolution method. It is enough for one party to say no to ADR process like mediation and the process may not start or continue.

## **§ 2.6. ADR can be Mandatory**

Arbitration as ADR process is mandatory if there is arbitration clause in a contract<sup>20</sup>. The arbitration clause stipulates that, in case of a dispute among the parties, ADR process will be used to settle the dispute. Pre-dispute arbitration clause is an expression of the will of the two parties to use ADR. This does not mean the parties are forced into it, but they are simply called to respect a prior voluntary agreement to use arbitration as an alternative dispute resolution. After Arbitration process, the outcome can be challenged in a competent court of law.

## **§2.7. ADR is Confidential**

Often there is much public interest when a case is under litigation and with the media sometimes giving details of court proceedings. However, ADR is private and confidential<sup>21</sup>. Its practitioners are bound by their code of ethics to preserve the privacy of their clients<sup>22</sup>.

ADR proceedings are most often done behind closed doors. In many cases, the parties involved in the process have to sign agreement, to keep the proceedings confidential and private unless permitted by law to do otherwise<sup>23</sup>.

## **§2.8. ADR process maybe Non-binding**

Some ADR processes have no legal binding effect. Negotiation, for instance, as ADR process, is non-binding<sup>24</sup>. It is often an agreement between the disputants, which is subject to their goodwill. Since it is non-binding it cannot be enforced in public law court. It is a private approach to conflict. For this reason, the disputants decide themselves what is fair and abide by it.

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<sup>20</sup> NAGLE LECHMAN, *Conflict and Resolution*, 103.

<sup>21</sup> L. E. SUSSKIND, *Consensus Building and ADR, Why They Are Not the Same Thing*, in *The Handbook of Dispute Resolution*, Jossey-Bass, 2005, 359.

<sup>22</sup> American Model Standards of Conduct for Mediators, Standard V stresses this confidentiality.

<sup>23</sup> NAGLE LECHMAN, *Conflict and Resolution*, 85.

<sup>24</sup> WARE, *Alternative Dispute Resolution*, 7.

## **§2.9. ADR process can produce Legally Binding Results**

ADR process is legally binding in two ways. First, the disputants have the obligation to honour their pre-dispute agreement to use ADR to settle their dispute. Second, they have to abide by the adjudication of the arbitrator, which is enforceable in a public government court of competent jurisdiction. Nevertheless, they can also challenge the outcome of arbitration in court, which is often difficult<sup>25</sup>.

## **§2.10. ADR is Efficient, Saves Time and Costs Less**

Low-cost is one of the key advantages of ADR process. The exponents of ADR emphasise its low-cost as compared to often high-cost of litigation<sup>26</sup>. It does not only cost less but it also saves time<sup>27</sup>. The prolong nature of litigation sometimes makes it very frustrating. If the modern adage, *time is money*, stands, and then ADR is super cost effective, since it saves time and costs less.

We can measure ADR quality in two ways. One, quality in terms of satisfaction of the interests and the needs of the parties involved in the process<sup>28</sup>. Two, quality in terms of the capacity of ADR to provide disputants reconciliation and «mutual understanding»<sup>29</sup>, which litigation does not offer<sup>30</sup>.

## **§3. Major Alternative Dispute Resolution Processes**

### **§3.1. Negotiation**

Negotiation can be defined as a «bilateral or multilateral process in which parties who differ over a particular issue attempt to reach agreement or compromise over that issue through communication»<sup>31</sup>. Negotiation is about communication, which entails dialogue, deliberation and round table conference with the aim of reaching an agreement or settlement over a determined subject or object.

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<sup>25</sup> S.R.COLE and K.M. BLANKLEY, *Arbitration*, in *The Handbook of Dispute Resolution*, Jossey-Bass, 2005, 325.

<sup>26</sup> NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*,10.

<sup>27</sup> WARE, *Alternative Dispute Resolution*,12.

<sup>28</sup> COLE-BLANKLEY, *Arbitration*, in *The Handbook of Dispute Resolution*, 324.

<sup>29</sup> WARE, *Alternative Dispute Resolution*,12.

<sup>30</sup> NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*,11.

<sup>31</sup>D.H. YARN, ed., *Dictionary of Conflict Resolution*, 1991, 314.

Negotiation is a voluntary ADR process. There is no third party to facilitate the resolution process or impose a sentence<sup>32</sup>. It is an act of goodwill through «back-and-forth communication designed to reach an agreement between two or more parties with some interests that are shared and others that may conflict or simply be different»<sup>33</sup>.

Negotiation demands a lot of listening. It works when the parties are ready to listen to each other and come to an agreement or compromise. Negotiation has also a legal dimension. The settlement agreement has certain legal requirement to fulfill for example; it cannot evade tax and in some cases a court approval of the settlement<sup>34</sup> is needed.

Even though negotiation is everyday life experience, dispute negotiation is an art to learn. It is like a science with prediction and experimentation<sup>35</sup>. Most ADR professionals are very good in the art of negotiation. With techniques and understanding they are able to help disputants negotiate well<sup>36</sup>. There are two kinds of negotiation; namely, transactional and dispute or adversarial negotiations<sup>37</sup>.

### **§3.2. Transactional Negotiation**

Transactional negotiation is also known as cooperative, interest-based, integrative, value creating, and win-win negotiation<sup>38</sup>. It is based on positive-sum negotiation principle that means negotiation is perceived not as a war to win or lose but a communication to iron out differences and keep relationship going<sup>39</sup>. Therefore, it is cooperative and it is a win-win deal. Transactional negotiation is everyday life experience, with enormous collaboration from the parties involved. It is mutual dialogue approach to a problem. It seeks to maintain personal relationship with the other party.

Transactional negotiation deals with daily activities like buying and selling of goods and services such as house, ticket, food, employing workers etc. It takes place in all the basic institutions of human life: in marriage, family life,

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<sup>32</sup> NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*, 17.

<sup>33</sup> B. PATTON, *Negotiation*, in *The Handbook of Dispute Resolution*, Jossey-Bass, 2005, 279.

<sup>34</sup> NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*, 59.

<sup>35</sup> *Ibid.* 14-15.

<sup>36</sup> *Ibid.* 39.

<sup>37</sup> *Ibid.* 23.

<sup>38</sup> *Ibid.* 147.

<sup>39</sup> WARE, *Alternative Dispute Resolution*, 147.

education, industry, government, religion, and business. It is part of everyday life face-to-face, telephone, email, or chat rooms conversation<sup>40</sup>.

### §3.3. Dispute Negotiation

It is problem solving and the problem is resolving a conflict through communication<sup>41</sup>. Dispute negotiation process entails four general principles, namely: «planning and analysis, exchanging information, exchange concessions and compromise, reaching agreement»<sup>42</sup>. It can be done by the interested parties themselves or their representatives. Lawyers have a lot to do with negotiation: «Corporate lawyers negotiate business deals. Government lawyers negotiate with administrative agencies»<sup>43</sup>.

Dispute negotiation is «win-lose proposition»<sup>44</sup>. Dispute negotiation is adversarial and very competitive and that makes negotiation a win or lose contest<sup>45</sup>. It drives on the principle of zero-sum negotiation, which means one enters into negotiation to defeat or win big<sup>46</sup>. In this kind of negotiation, the primary concern of lawyers is negotiation's «validity as well as whether it serves the client's needs and interests»<sup>47</sup>.

Again, according to Gerald Williams' research, the aims of lawyers who use this kind of negotiation can be summarized as: «maximizing settlement for their clients; obtaining profitable fees for themselves; and, outmaneuvering their opponents»<sup>48</sup>. This is what makes this type of negotiation competitive and even adversarial. Nonetheless, the final decision to settle the dispute rests on the client and not necessarily on the lawyer<sup>49</sup>.

There are different kinds of dispute negotiation. Among them are distributive, integrative, and settlement negotiations. *Distributive dispute negotiation* is bargaining negotiation which works under zero-sum principle<sup>50</sup> whereby one of the parties focuses on winning over the other.

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<sup>40</sup> NAGLE LECHMAN, *Conflict and Resolution*,39.

<sup>41</sup> WARE, *Alternative Dispute Resolution*, 120-121.

<sup>42</sup> NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*,31.

<sup>43</sup> *Ibid.*14.

<sup>44</sup> *Ibid.*22.

<sup>45</sup> WARE, *Alternative Dispute Resolution*, 147.

<sup>46</sup> *Ibid.*147.

<sup>47</sup> *Ibid.*14.

<sup>48</sup> NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*,24.

<sup>49</sup> The American Bar Association's Model Rules of Professional Conduct Rule 1.2.(a) (1983) make this clear : «A lawyer shall abide by a client's decision whether to settle a matter »

<sup>50</sup> WARE, *Alternative Dispute Resolution*, 121.

*Integrative dispute negotiation* on the other hand, operates on positive-sum<sup>51</sup>. It focuses on satisfying all the parties involved. This is possible only if the parties do not have sharp opposing interest. It may not be possible in certain cases to use positive sum negotiation for fairness or justice<sup>52</sup>.

Finally, *settlement dispute negotiation* has a tripartite principle. One, there is «an agent»<sup>53</sup> involved who is mostly a lawyer. Second, is about «the sale of a claim by Plaintiff to Defendant». under «the shadow of the law»<sup>54</sup>. Third, there is «bilateral monopoly»<sup>55</sup>, which means there are two parties involved in the negotiation unlike transactional negotiation which is opened to more than two people.

#### § 4. Mediation

Mediation is «an extension of the negotiation process»<sup>56</sup>. Mediation takes place, when parties cannot settle their dispute through negotiation and go to «an impartial third party to assist them in reaching a resolution»<sup>57</sup>. The heart of mediation «is the principle of self determination»<sup>58</sup>. This principle means that the disputants decide the outcome of their conflict. Mediation is therefore, a «facilitated negotiation. While negotiation involves only the parties and their agents such as lawyers, mediation adds only the mediator, who is not agent of either party. The mediator is a neutral»<sup>59</sup>.

The unique feature of mediation is the «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»<sup>60</sup>. In United Kingdom and other countries «ADR is synonymous with what is generally referred to as mediation»<sup>61</sup>.

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<sup>51</sup> Ibid. 121.

<sup>52</sup> Ibid. 143-144.

<sup>53</sup> Ibid.123.

<sup>54</sup> WARE, *Alternative Dispute Resolution*, 123.

<sup>55</sup> Ibid.123.

<sup>56</sup> NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*,68.

<sup>57</sup> Ibid. 68.

<sup>58</sup> Ibid. 70.

<sup>59</sup> WARE, *Alternative Dispute Resolution*, 201.

<sup>60</sup> *Alternative Dispute Resolution*, [http://en.wikipedia.org/wiki/Alternate\\_dispute\\_resolution](http://en.wikipedia.org/wiki/Alternate_dispute_resolution), Retrieved December 10, 2008.

<sup>61</sup> Ibid.

The principle of mediation is to offer the parties opportunity to create or evolve their own solutions instead of relying on a third party to pass a judgment as to who is right and who is wrong<sup>62</sup>. It saves time and money<sup>63</sup>. It is flexible and cost less. It is confidential and this enables parties to communicate freely without fear of media coverage. In mediation, real issues are brought to light and dealt with<sup>64</sup>.

Mediation as ADR process has gained tremendous popularity in dispute resolution from local to national and from national to international dispute resolution. Mediation is used from the private sector to the public sector and from domestic issues to big business issues. In fact, there is increasing number of jurisdictions where «mediation has become a mandatory prerequisite to trial»<sup>65</sup>. In the US, there are important legislation on the use of mediation to resolve disputes in private and public sectors<sup>66</sup>.

Disputants go into mediation for many reasons but prominent among them are: one, to resolve a dispute- that is *to settle a case*; two, to explore a balanced or win-win settlement-that is *exploit positive-sum opportunities*; three, to restore a broken relationship due to the dispute-that is *engender moral growth*<sup>67</sup>.

The mediation process involves; the disputants and the mediator. In some cases, their lawyers can represent them. At times, their family members can participate in the process<sup>68</sup>.

In the actual mediation process, there are joint sessions whereby the mediator brings the two together for communication. The mediator can also have separate meetings with them known as private causes or shuttle diplomacy, which is continuous or constant meeting of the parties to understand their concerns<sup>69</sup>.

Throughout the process, the mediator facilitates communication, which can be direct or indirect dialogue with the aim of enabling the parties to reach a

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<sup>62</sup> KOVACH, *Mediation*, in *The Handbook of Dispute Resolution*,305.

<sup>63</sup> Ibid. 305.

<sup>64</sup> Ibid. 305.

<sup>65</sup> NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*,70.

<sup>66</sup> Ibid. 69-70, Examples are; «Arbitration Act of 1888, Erdman Act of 1898, New Lands Act of 1913, Railway Labor Act of 1926 with the creation of National Mediation Board and the Taft-Hartley Act 1947 which established the Federal Mediation and Conciliation Service».

<sup>67</sup> WARE, *Alternative Dispute Resolution*, 204.

<sup>68</sup> Ibid. 208.

<sup>69</sup> Ibid. 210.

settlement or agreement<sup>70</sup>. There are two kinds of mediation process. They are dispute mediation and transactional mediation.

Dispute mediation is about resolution of conflict under the principles of negotiation settlement<sup>71</sup>. Dispute mediation can be mandatory or voluntary. It is mandatory when «a court or government agency requires it»<sup>72</sup>. On the other hand it is voluntary when the parties decide freely to use mediation to settle their dispute.

Transaction mediation process is «when a mediator helps parties form a deal such as a collective bargaining agreement between a labor union and an employer»<sup>73</sup>. It is a settlement on a particular object or subject of interest to the parties.

A mediator plays a big role in resolving a dispute but there are three principal roles, namely: facilitator, evaluator, and transformer<sup>74</sup>. As a facilitator, the mediator «creates an environment in which parties work together collaboratively as problem-solvers»<sup>75</sup>. The art of mediation places on the disputants «a full responsibility for resolving the dispute»<sup>76</sup> with the mediator acting as a facilitator.

The evaluative role is exercised when the mediator «assists the participants in breaking impasses by contributing her views of the merits of the legal case, the consequences of failure to settle, and the benefits of particular settlement proposals»<sup>77</sup>. The transformative task of the mediator is to help participants «to determine their own direction and supports the parties own opportunities for perspective-taking, deliberation and decision-making»<sup>78</sup>.

The mediation process works under three basic principles. One, the principle of the parties «self-determination»<sup>79</sup> which means parties resolve their differences without coercion but freely. This also means that the mediator helps them to make informed choice or decision. Two, the mediator «is impartial and

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<sup>70</sup> NAGLE LECHMAN, *Conflict and Resolution*,63.

<sup>71</sup> WARE, *Alternative Dispute Resolution*, 203.

<sup>72</sup> Ibid.204.

<sup>73</sup> Ibid. 208.

<sup>74</sup> I.H., ABRAMSON, *Mediation Representation, Advocating in a problem-solving process*, NITA, 2004, 69.

<sup>75</sup> Ibid. 70.

<sup>76</sup> Ibid. 70.

<sup>77</sup> Ibid. 70.

<sup>78</sup> Ibid. 71.

<sup>79</sup> I.H., ABRAMSON, *Mediation Representation, Advocating in a problem-solving process*, 69.

evenhanded»<sup>80</sup>, that is, the mediator has no personal interest or benefit of the substantive issue. Three, the mediator should keep proceedings private and confidential<sup>81</sup>.

## § 5. Arbitration

Arbitration is defined as «a process by which a private third-party neutral renders a binding determination of an issue in dispute»<sup>82</sup>. In arbitration process the «adjudicator decides the result of the dispute»<sup>83</sup>. Arbitration can operate as voluntary or mandatory, in «public context, as well as voluntary, in private settings»<sup>84</sup>.

Arbitration is a flexible and confidential adjudication process. It is the only ADR process that has a resemblance of litigation<sup>85</sup>. It is private; even if it is done under the supervision of public court, because the proceedings remain private.

In arbitration process there can be one or more adjudicators or arbitrators. The decision of the arbitrator is based on the hearing and evidence gathered<sup>86</sup>. After weighing the presentation and facts of the matter by disputants or their lawyers and witnesses, the arbitrator decides in favor of one party who deserves award or compensation<sup>87</sup>. Therefore, arbitration is win-lose process. The resolution is most often rapid, as compared to litigation, which is a long process with «crowded court dockets»<sup>88</sup>.

There is a «degree of autonomy through the selection of an arbitrator, who is more likely to have subject matter expertise than a judge»<sup>89</sup> in litigation. It is very efficient, in fact, arbitration «is generally considered a more efficient process than litigation because it is quicker and less expensive ... it also offers greater flexibility of the process and procedure than litigation»<sup>90</sup>.

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<sup>80</sup> Ibid. 69.

<sup>81</sup> Ibid. 69.

<sup>82</sup> COLE-BLANKLEY, *Arbitration*, in *The Handbook of Dispute Resolution*, 318.

<sup>83</sup> WARE, *Alternative Dispute Resolution*, 19.

<sup>84</sup> NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*, 153.

<sup>85</sup> NAGLE LECHMAN, *Conflict and Resolution*, 98.

<sup>86</sup> Ibid. 98.

<sup>87</sup> Ibid. 98.

<sup>88</sup> Ibid. 99.

<sup>89</sup> NAGLE LECHMAN, *Conflict and Resolution*, 160.

<sup>90</sup> NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*, 160.

Arbitration covers an enough fields of human endeavors such us; commerce, which is known as commercial arbitration. It is used in government public court which is known as court-annexed arbitration. It also takes place in daily activities like buying and selling known as consumer arbitration. There is also environmental arbitration up to international level with the International Court of Environmental Arbitration and Conciliation (ICEAC). Arbitration is also an effective means to resolve intellectual property disputes from national to international level<sup>91</sup>. In the public sector, employees and employers use arbitration to settle disputes<sup>92</sup>. Arbitration is also used to settle many divorce issues. It therefore plays an important role in family disputes.

Arbitration has a formal procedure and substantive rules to follow<sup>93</sup>. The process consists of a defined simple procedure whereby disputants argue their case before an arbitrator or arbitrators. Sometimes there is a representation by attorney and witnesses. The process ends with a settlement or an offer kown as award. The final decision of the arbitrator can be appealed against. Though «parties may appeal arbitration outcomes to courts, such appeals face an exacting standard of review»<sup>94</sup>.

Even though, arbitration has been opposed by some people in the judiciary<sup>95</sup>, it is «the most formalized alternative to the court adjudication of disputes and enjoys a dominant position in the American legal system»<sup>96</sup>. In the United States, there are some important States and Federal acts about arbitration<sup>97</sup>.

Arbitration is either mandatory or voluntary depending on «whether the parties are required to participate in arbitration or choose to do so»<sup>98</sup>. As a principle «court-annexed arbitration, based on statute or court rules, is mandatory arbitration»<sup>99</sup>. Arbitration is mandatory in two ways.

First, it is mandatory in a case in which «a complaint has been filed in court, which falls under the statute requiring arbitration, will be arbitrated in the court–

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<sup>91</sup> NAGLE LECHMAN, *Conflict and Resolution*,103-105.

<sup>92</sup> NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*,163.

<sup>93</sup> NAGLE LECHMAN, *Conflict and Resolution*,98.

<sup>94</sup>*Alternative Dispute Resolution*, [http://en.wikipedia.org/wiki/Alternative\\_dispute\\_resolution](http://en.wikipedia.org/wiki/Alternative_dispute_resolution), Retrieved December 10, 2008.

<sup>95</sup> Lord Coke is cited as a classical example.

<sup>96</sup> NOLAN-HALEY, *Alternative Dispute Resolution in a Nutshell*,53.

<sup>97</sup>Ibid.p.155:Federal Arbitration Act-FAA, Uniform Arbitration Act,UAA-1955,Revised Uniform Arbitration Act-RUAA-2000.

<sup>98</sup> NAGLE LECHMAN, *Conflict and Resolution*,101.

<sup>99</sup> Ibid.101.

house and the arbitration is considered mandatory and non-binding»<sup>100</sup>. In this case, arbitration is seen as a first option to resolve dispute.

Second, it is mandatory when there is an arbitration clause in a contract known as a '*Scott Avery Clause*'<sup>101</sup>. It is prior agreement between parties «to resolve their dispute through a final and binding arbitration»<sup>102</sup>. Contractual arbitration «arises out of the initial voluntary act»<sup>103</sup> to use arbitration to settle dispute.

Voluntary arbitration is the goodwill of two or more parties to use arbitration to resolve their dispute. In this case, there is no arbitration clause that impels them to go into arbitration but they voluntarily decide to use arbitration instead of litigation.

### **§5.1. Kinds of Arbitration**

There are many kinds of arbitration. Some of them are as follows: First, there is court-annexed or court-ordered arbitration. This kind of arbitration is ordered and directed by a statutory court. It is arbitration «provided by the court system and under the court authority»<sup>104</sup>. The «award is non-binding» since the whole process was initiated under the dictates of the court.

Second, there is private arbitration, which is the opposite of court-annexed arbitration. It is the free choice of the parties to use «private providers of arbitration services»<sup>105</sup> to resolve their dispute. In this kind of arbitration almost all the records are confidential and the bill of the arbitration is paid by the disputants.<sup>106</sup>

The third is called binding arbitration. In this type of arbitration, «the arbitrator's award is final and generally not appealable».<sup>107</sup> In case of an appeal in a government court the award can be overturned but it is not frequent<sup>108</sup>.

Fourth, there is non-binding arbitration by which disputants are asked by the court to go through the process. The outcome or the award is not binding

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<sup>100</sup> Ibid.101.

<sup>101</sup> *Alternative Dispute Resolution*, [http://en.wikipedia.org/wiki/Alternative\\_dispute\\_resolution](http://en.wikipedia.org/wiki/Alternative_dispute_resolution), retrieved December 10, 2008.

<sup>102</sup> WARE, *Alternative Dispute Resolution*,19.

<sup>103</sup> NAGLE LECHMAN, *Conflict and Resolution*,101.

<sup>104</sup> Ibid.99.

<sup>105</sup> Ibid.99.

<sup>106</sup> Ibid.99.

<sup>107</sup> Ibid.100.

<sup>108</sup> COLE-BLANKLEY, *Arbitration*, in *The Handbook of Dispute Resolution*, 325.

especially if the two or one of them is not satisfied with it. They can then begin litigation in the same court of law.<sup>109</sup>

Some authors divide arbitration into mainly contractual and non-contractual arbitration<sup>110</sup>. This division is not always opposing. Since it is possible and indeed does happen when «one can have private, binding, contractually based arbitration, or one can have court-annexed, nonbinding, statutory based arbitration»<sup>111</sup>.

## §6. Disadvantages of ADR

Sometimes lack of commitment on the part of ADR parties can cause delayed like in litigation. For instance, a «panel of arbitrators whose scheduling»<sup>112</sup> do not meet the needs of disputants increase «delay and costs»<sup>113</sup>. There are lots of abuses in the «labor relations cases»<sup>114</sup> which gives an impression of usual judicial system of frequent law sue. In mandated ADR process like arbitration by court sometimes «results in additional delays, lost time from work, frustration, for the parties»<sup>115</sup>.

It has also been pointed out that «efficiency is achieved at the expense of the quality of justice»<sup>116</sup>. This happens, when there is much «difficulty of appealing an arbitral award»<sup>117</sup>. The difficulty of appealing against arbitral award helps the most powerful and influential parties to win<sup>118</sup>.

ADR can endanger public good. «If a company harms an individual with a new product but resolves the resulting personal injury lawsuit privately, the product could conceivably continue to harm other consumers»<sup>119</sup>. In this case, ADR can protect criminals who must and should face public humiliation for their wrong actions or behavior. For example, «some educators believe that peer mediation can be utilitised to address a bullying issue between two students»<sup>120</sup>. On the

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<sup>109</sup> NAGLE LECHMAN, *Conflict and Resolution*,101.

<sup>110</sup> WARE, *Alternative Dispute Resolution*,19.

<sup>111</sup> NAGLE LECHMAN, *Conflict and Resolution*,98.

<sup>112</sup> *Ibid.*160.

<sup>113</sup> *Ibid.*160.

<sup>114</sup> *Ibid.*160.

<sup>115</sup> *Ibid.*134-135.

<sup>116</sup> *Ibid.*160.

<sup>117</sup> *Ibid.*160.

<sup>118</sup> *Ibid.*135.

<sup>119</sup> *Ibid.*135.

<sup>120</sup> *Ibid.*135.

other hand, it is also seen as protecting those who bully from educational authorities and shield them from punishment.

Another contentious issue is the use of ADR for domestic violence and sexual harassment cases<sup>121</sup>. For some people «mediation of the violent acts is clearly a subversion of the law and a violation of the victim, which cannot be tolerated»<sup>122</sup>. The response of ADR is «by removing all domestic violence cases from mediation»,<sup>123</sup> ADR will give up its principle of «self-determination and transformation through mediation»<sup>124</sup>.

## §7. Conclusion

To sum up, dispute or conflict is part of human experience. For this reason, there is the need to resolve dispute. Each society has ways of resolving dispute. In a democratic society, there are established norms of resolving conflict. Litigation in public court of law is one of them. Nonetheless, today, there is a growing movement, especially in common law tradition, to use other alternatives besides litigation. The generic name for any other legitimate means of conflict resolution is called ADR.

There are many ADR processes but prominent among them are: negotiation, which is basically a formalised procedure by disputants to use communication to resolve their conflict. The second ADR process is mediation. It is a process in which a third party helps the disputants to resolve their conflict in a manner that satisfies the parties involved. The mediator acts as a facilitator, an evaluator and a trans-formatter. It is one of the best-known ADR processes.

The third ADR process is arbitration. It is a process in which a private third party who is neutral renders a binding adjudication having listened and gathered evidence of the issue in dispute<sup>125</sup>. ADR has gained popularity such that, its various processes are used for local, national and international disputes resolution.

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<sup>121</sup> Ibid.137-139.

<sup>122</sup> Ibid.138.

<sup>123</sup> Ibid.138.

<sup>124</sup> Ibid.138.

<sup>125</sup> WARE, *Alternative Dispute Resolution*, 19.

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