Implementation strategy for ADR in Pakistan

Zafar Iqbal Kalanauri*

Discourage Litigation. Persuade neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees, expenses and a waste of time. As a peacemaker the lawyer has a superior opportunity of becoming a good man.

Abraham Lincoln

Notes for a law lecture
July 1, 1850

Mediation in the international context is a relatively recent phenomenon. As an Alternative Dispute Resolution (ADR) mechanism, third-party neutral mediation is firmly entrenched in the legal ethos and procedural rules of most common law jurisdictions; such as the United Kingdom, the United States and Canada. However, in the rest of the world, including many European, Latin American and Asian nations with civil law traditions, mediation remains an elusive concept. Nevertheless, the last half of the 20th century has laid witness to increasing regional economic integration and globalization trends. Domestic and international efforts at harmonization and unification, particularly under the auspices of the United Nations Commission on International Trade (UNCITRAL) and the Hague Conference on Private International Law, have resulted in bilateral and multilateral treaties and conventions in the areas of private international law (PRIV-IL) and public international law (PUB-IL), giving rise to a modern lex mercatoria. Parallel developments in international arbitration (the New York Convention and the UNCITRAL Model Law on International Arbitration and international trade law (The United Nations Convention on Contracts for the International Sale of Goods (CISG)) reflect this trend towards harmonization, if not, unification, of international trade law. While many international arbitral organizations have a distinguished and lengthy pedigree, others, like the International Centre for Settlement of Investment Disputes (ICSID) or the World Intellectual

---

9 The Permanent Court of Arbitration (PCA), has over one hundred member states and was established in 1899 to facilitate arbitration and other forms of dispute resolution between states, see the PCA website: <http://www.pca-cpa.org/showpage.asp?pag_id=363>; see also, The London Court of International Arbitration (LCIA) website: <http://www.lcia-arbitration.com/>.
10 ICSID was established under the <Convention on the Settlement of Investment Disputes between States and Nationals of Other States> (the Convention) which came into force on October 14, 1966. See the World Bank -ICSID website: <http://www.worldbank.org/icsid/index.html>.
Property Organization (WIPO), albeit more recently created, also enjoy strong reputations. In most cases, these national and international dispute resolution institutions offer mediation procedures and pools of qualified mediators.

ADR has been used in Indian Sub-continent. It is not a new concept & historically recognised. In ancient India there were three types of popular courts, Puga (local courts), Sreni (local business guilds) and Kula (social matters of community). In Medieval India there were Panchayais: Territorial or Sectarian, and were held in great veneration (Panch Parameshwar). In India under the British rule, Lord William Bentick (Act VIII of 1859) had Sections 312 – 327 dealing with arbitration). The above provisions were formally and separately enacted under Arbitration Act 1940. In Pakistan the litigation in courts became the usual mode of resolution of disputes. ADR did not catch on and took a back seat to litigation. The conflicts are traditionally managed by litigation in Pakistan. The reasons for the same are that quick availability of interim relief (preliminary injunction, seizure of goods) especially relevant in IP rights because in case of grant of interim relief the half the battle is won. There were flaws in Arbitration Act 1940, namely: No interim power in the arbitrator, too many grounds for judicial intervention at all stages (pre-arbitral, during arbitration & post award), as a result it defeated the whole object of speedy and cost effective dispute resolution.

The four major reasons for the resurgence of ADR are the drawbacks of litigation, changing business scenario, legislative responses including in Pakistan to promote ADR and judicial sponsorship. The system of dispensing justice in Pakistan has come under great stress for several reasons mainly because of the huge pendency of cases in courts. In Pakistan, the number of cases filed in the courts has shown a tremendous increase in recent years resulting in pendency and delays underlining the need for alternative dispute resolution methods. It has been realised by the judges, lawyers, litigants and other stakeholders that the Courts were not in a position to bear the entire burden of justice system and that a number of disputes lent themselves to resolution by alternative modes such as arbitration, mediation and negotiation. They have emphasized the desirability of disputants taking advantage of alternative dispute resolution which provided procedural flexibility, saved valuable time and money and avoided the stress of a conventional trial. The existing regime of civil suits in Pakistan is governed by the Code of Civil Procedure enacted in 1908. Since then little change has taken place. The British adversarial system introduced in our country may be distinguished by its laissez faire emphasis on party controlled litigation process, emphasis on procedural justice and limitations on available legal remedies, confined to win or lose legal outcomes. Litigation being the primary means of resolving disputes our civil justice process has failed to administer justice in a timely manner to a larger, more diverse, faster paced, technologically and economically changing society. Legal cultures in U.S.A, Singapore, Hong Kong, Australia, England, India, Sri Lanka, Bangladesh and many other countries have already introduced different Alternative Dispute Resolutions methods to settle disputes outside the court. By updating their systems they have made their judicial systems more efficient, more service oriented, to provide speedy relief to the parties. ADR has emerged as a significant movement in these countries and has not only helped reduce cost and time taken for resolution of disputes, but also in providing a congenial atmosphere and a less formal and less complicated forum for various types of disputes. Like in our country there was a time when the civil justice system in those countries confronted serious crisis for lack of discipline. The examples of these countries make

11 Based in Geneva, Switzerland, the WIPO Arbitration and Mediation Center was established in 1994 to offer Alternative Dispute Resolution (ADR) options, specifically arbitration and mediation, for the resolution of international commercial disputes between private parties. See the WIPO website: <http://www.wipo.int/amc/en/center/index.html>.
12 For a list of arbitral organizations for the North American Free Trade Agreement among the U.S., Canada and Mexico, see the NAFTA Secretariat website: <http://www.nafta-secalena.org/DefaultSite/index_e.aspx?DetailID=867>.
13 Finishing Before You Start, supra note 1, at 46.
15 The panchayat raj is a South Asian political system mainly in India, Pakistan, and Nepal. “Panchayat” literally means assembly (samt of five (panch) wise and respected elders chosen and accepted by the village community. Traditionally, these assemblies settled disputes between individuals and villages.
us aware that Pakistan is not alone in addressing the problem. Other countries including, some in the sub-continent, like Pakistan, with comparable problems have been successful in implementing reforms in similar manner.

In a developing country like Pakistan with major economic reforms under way within the framework of the rule of law, strategies for swifter resolution of disputes for lessening the burden on the courts and to provide means for expeditious resolution of disputes, there is no better option but to strive to develop alternative modes of dispute resolution (ADR) by establishing facilities for providing settlement of disputes through arbitration, conciliation, mediation and negotiation. Trade and industry also demanded drastic changes in the Arbitration Act, 1940 and thought it necessary to provide a new forum and procedure for resolving international and domestic disputes quickly. Since the inception of the economic liberalization policies in Pakistan and acceptance of law reforms World over, the legal opinion leaders have concluded that the application of rigorous mediation mechanisms to commercial and civil litigation is a critical solution to the profound problem of arrears of cases in Civil Courts in Pakistan. The Pakistan Parliament considered a bill for amendments in the Code of Civil Procedure which included a mandatory provision for Alternate Dispute Resolution as a step to improve the civil and commercial justice system in Pakistan. However, it is widely acknowledged in Pakistan, that ADR lacks “teeth”, in that it has not been effectively implemented or institutionalized. Essentially, High Court rules do not apply ADR practices, judges are not trained mediators and rarely refer cases for mediation, hence courts remain backlogged with over a million cases.

The proposed reforms to Civil Justice have been under discussion for some years and usage of ADR have had a significant influence on the way in which litigation is conducted in Pakistan, in the sense that courts have tended to anticipate the changes to some extent, or to interpret existing rules in a way which is compatible with ADR philosophy. Nevertheless since the new legislation has come into force, radical changes have to be made in the way in which the courts and lawyers operate. As a result of Legislative initiatives, amendments in Civil Justice System have taken place and relevant laws (or particular provisions) dealing with the ADR are summarized as under:

6. The Arbitration Act, 1940.
10. Article 184 of the Constitution of Pakistan, 1973 (Original Jurisdiction when Federal or Provincial governments are at dispute with one another).
11. Finance Bill introduced following ADR Tax Laws:
   Section 23 of Industrial Relation Ordinance.

Mediation is the most favorable means of dispute resolution all over the world. The real benefits of mediation over litigation and other dispute resolution methods are that: It is 1. Cost saving: Mediation works out on average approximately 70% cheaper than the other methods of dispute resolution. 2. Time saving: The informal nature of the process allows matters be resolved much quicker than other process driven alternatives. There is no long wait for court dates and conflicts are usually resolved within 48 hours. In these instances valuable time is saved and business disruption is minimized. 3. Relationships saved: Mediation actively maintains relationships. While Litigation and Arbitration
very often reinforce the division between the parties and increase the levels of tension and hostility, mediation allows the parties achieve a mutually acceptable workable solution. 4. Control (for the parties): 5. Confidentiality & Voluntary.

Businesses are looking for minimum business disruption and a cost effective solution to resolve commercial disputes and in this environment mediation is thriving. In an environment where commerce has demanded high levels of efficiency and cost effectiveness, business people have been prepared to endure a system of dispute resolution which is far from efficient or cost effective. Dispute resolution takes longer now and costs more than it did ten years ago, notwithstanding that the quality of its delivery has remained high, relative to equivalent systems in other economies. Why then has there not been any real attempt to introduce an alternative, at least for a proportion of our commercial disputes. There are many reasons but the following are suggested as being the more important:

- Lack of awareness of the alternatives. (It seems that most people are not aware that alternative means of commercial dispute resolution do exist outside the Courts system and arbitral process. Mediation is only one of the alternatives).
- Lack of understanding of the alternatives. (Most people are unaware of the essential characteristics and potential benefits of mediation).
- The absence of an ADR (Alternative Dispute Resolution) tradition.
- A strong tradition of common law and of adversarial litigation.
- The existence of a strong judicial system.
- A strong cultural awareness of legal rights and a desire to have those rights vindicated or defended.
- The existence of a strong legal professional with a primary interest in adversarial litigation and arbitration.
- The natural suspicion of a commercial or trading partner or opponent who is perceived as having committed a wrong.
- The natural human reluctance to take responsibility for finding a solution and a desire to have a solution imposed from outside.
- The natural human tendency to be adversarial rather than co-operative.

There are few commercial disputes that are not amenable to resolution through mediation, from the largest disputes between, for example, a car manufacturer and its national distributor, to the smallest disputes between, for example, a bank and its private customer. Commercial litigants themselves will be the first to admit they would welcome an alternative that allowed them to resolve their disputes more quickly and to spend less money on achieving a resolution. Presently we do not have a specific law for Mediation in Pakistan. Unless there is a special law enacted on or a detailed clause on Mediation is inserted in existing procedural law on Mediation, it is difficult to see positive development of commercial mediation. Although Section 89-A of Civil Procedure Code 1908 contains clause for referral of a dispute pending adjudication for mediation/conciliation but the same is not comprehensive. The Law Reform Act 2007 contained amendment to Section 89-A of CPC 1908 but unfortunately it was not approved by Senate of Pakistan resultantly it lapsed. The Mediation clauses have recently been started to be drafted in commercial contracts. It is suggested that the business-sector should be encouraged to include mediation in all business agreements.

In my experience many clients with long-term contracts understand the intrinsic value of creating, at the outset of the relationship, a roadmap to follow when disputes arise. Importantly, the client shares the same roadmap with the other party—rather than creating separate roadmaps when the dispute is upon them. Clients, who have experienced conflicts in long-term contracts, where the preservation of the relationship may have more value than in a short-term contract, often view these clauses as an insurance policy for when a dispute arises.


We should adopt a National Action Plan for promoting and instituting the ADR. A program of Legal and Judicial Capacity Building should be prepared which should include with other things, Law Reform, Judicial Reform, Judicial Training and Legal Education, Court Automation and Infrastructure, Access to Justice, ADR and Legal Aid, Legal Literacy and Public awareness and Gender Sensitivity. The Law & Justice Commission of Pakistan should issue a policy statement on court governance for making ADR successful. It should consist of three elements; The Justice Statement, which identifies universal justice values common to civilized nations, The Framework of Core Competencies, which provides the knowledge capital needed to make the courts response to the challenges of the present century, and The Strategic Framework, which provides benchmark through which the court’s performance can be assessed. The Commission should prepare & issue a comprehensive instructional code for introducing ADR at the District level. ADR centre at the Principal Seat of every High Court should be established and it should be entrusted with the task of promoting, assisting and monitoring the practice of ADR in courts. A ‘Pilot Project Design/Convening Committee’ should be formed headed by a judge of High court at the High court level. Every High Court should amend the rules to give effect to Section 89-A of the Civil Procedure Code. The Pakistan Government will have to make a major investment in training, by utilizing a portion of the ADB loan available for Access to Justice Program to create a group of judges well-versed in the intricacies of ADR. The implementation of the Pilot Project should include a comprehensive training program of judges in case management, mediation and conciliation prior to its beginning. Countries like Sri Lanka have established a judicial training institute that trains judges in ADR and Case Management techniques (among other subjects). The Federal Judicial Academy in Pakistan should establish a similar program that would concentrate on ADR and Case Management. The initial training should be imparted by Mediators from abroad, it should be an intensive five days training course on mediation. The participants in the training program should be judges selected from different districts, legal practitioners including representatives from non-government organizations. After that the training should be given by trained/accredited Pakistani Mediators. From time to time a new district should be selected for imparting training to judges and lawyers who have not yet received training in mediation. Such training programs should be organized at respective district head quarters. Mediation or Conciliation does not come easily to anyone, whatever height he/she attains in legal knowledge and experience. Mediation especially involves the use of a facilitator trained in conflict resolution. The mediator must know the techniques of encouraging the parties to discuss their positions with greater candor and he/she must also know how to foster compromise. Mediation involves a thorough training for a few days. We will have to invite trainers from abroad initially but a few trainers in Pakistan are available as well. The first implementation task will be to train up a large number of trainers in mediation and conciliation. These trainers will then spread out throughout the nook and corner of the country to train up judges, lawyers and other interested persons in the art and science of mediation and conciliation. Without such intensive training, it will be a folly to introduce ADR wholesale in our lower courts. India tried to introduce ADR. In 1999 by an amendment to the C. P.C., known as the Code of Civil Procedure (Amendment) Act, 1999. It ended in a fiasco. There was widespread resistance to it by lawyers that forced the Government of India to postpone its implementation. The lesson is that when you introduce any matter of legal reform or innovation, do not try to impose it from above. Do some intensive work at the grassroots level, build up a large following, try the reform on a trial and error basis by setting up pilot courts and then proceed with caution by examining its results. Learn from the pilot courts and the lawyers involved in mediation and other methods what practical problems they are encountering with, adjust and re-adjust your
program accordingly, so that what finally emerges is not a foreign model but an indigenous Pakistani model, suited to the legal culture, ethos and traditions of this country. The second implementation task will be to continue the training for all time to come for the new entrants to the Judicial Service through the Federal Judicial Academy. We will have to develop a curriculum especially for ADR and also will have to keep and maintain one or more regular instructor on its pay roll to teach the mechanisms of ADR to the trainee-judges. Outsiders interested to pursue a career of mediation and arbitration may also receive instructions and certificate from Federal Judicial Academy, on payment of fees and charges, as and when Federal Judicial Academy is ready enough to render this service. Answerable to both the Chief Justice and District Judges, the ADR specialists will resolve new cases referred to them by the Courts. Conciliators and Mediators will be drawn from among retired judges, senior advocates, other respected individuals in the professional legal community, accountants, architects, engineers, bankers, doctors, university professors, and chambers of commerce & industry.

The ADR has not been enthusiastically embraced by the entire legal community in all the countries where it has been introduced. Majority of the lawyers all over the World in the beginning oppose the introduction of ADR as they believe that by introduction of these mechanisms the reformers are trying to put them out of business. ADR programs the world over experience varying degrees of support from local legal communities. This cross-current likely will not stem the rising tide of ADR programs across the globe. But it is becoming increasingly clear that the success of such programs will depend upon assessing and addressing the legal community's attitudes toward ADR in each country, as well as ADR users' attitudes toward the formal legal establishment. A few of the many critical issues facing any community deciding whether and how to implement an ADR program are: (1) Why and to what degree will the lawyers and judges oppose or fail to support ADR? (2) How should this opposition or lack of support be addressed? (3) How do potential users of ADR view the judiciary and rest of the legal establishment? and (4) how should the ADR project deal with their views?

Resistance to ADR: To be sure, there are plenty of valid reasons for opposing ADR programs with inappropriate goals or improper design. ADR cannot replace formal judicial systems necessary to further the rule of law, redress fundamental social injustice, provide governmental sanction, or provide a "court of last resort" for disputes that cannot be resolved by voluntary, informal systems. Also, it is hard for ADR to deal well with extreme power imbalances between disputants. I have talked to a number of lawyers of all ages all over the country. Contrary to reformers belief, lawyers do not like their piled-up cases to rot in their chamber for years and decades together. They admire and desire a quick resolution of disputes and they dispute the proposition that the quicker a case goes out of their chamber the lesser is their income. On the contrary, the earlier a case goes out of their chamber by way of final disposal, the more it is replenished by new cases. The more the litigant public comes to know that the legal and judicial system delivers justice speedily and with less expense, the more the public knowledge inspires confidence in the system itself and the more the potential litigant who would not have come near the court premises would flock to the courts for results of a similar nature. The success of ADR in other countries has shown that it is the lawyers who become the best admirers of ADR after practicing ADR. The lawyers practicing in the pilot courts will be best pillars of strength in spreading ADR. The trainee lawyers and representatives of non-government organizations should be selected taking stock of their interest, participation and direct involvement in the ADR matters. Training should be imparted to the lawyers as they are the ones on whose advice litigants rely most. It is believed that without their co-operation introduction of mediation in the civil courts will not be successful. The aim should be to dispel their fear of loss of cases, financial hardship and above all suspicion of a new method of dispute resolution and to give assurance that mediation will not adversely effect them financially but will open up new horizons for them. They should be persuaded by the prospect of receiving lump sum amount by way of fees for being lawyers in mediations which provide an opportunity to resolve the disputes rapidly and efficiently; whereas trials take years and in our country usually fees are paid part by part throughout the trials till they end. Further they should be made to understand that successful mediation lawyers will always attract new clients wanting to try mediation who would otherwise have shunned the court.
There is a scarcity of skilled and professional mediators. There is an urgent need for training on mediation and motivation of the lawyers for the use and promotion of the alternative system.

“Let the lawyer to become mediator, rather than mere pleader,”

Law schools should be encouraged to recruit and train doctors, lawyers, university professors, and accountants to serve as potential recruits. These individuals will be accredited as neutrals after satisfying both theoretical requirements. In addition, these institutions should pay special attention to the recruitment of women. Apart from enlarging the base of neutrals, this practice will be useful in situations where women are involved in a dispute. The presence of a female neutral will assist in creating an atmosphere congenial to a successful mediation.

In performing their functions, neutrals should be immune from civil damages for statements, actions, omissions, or decisions made in the course of ADR proceedings (unless that statement, action, omission, or decision is made fraudulently), and no action should be allowed against a neutral without a clearance certificate issued by the Chief Justice of the High Court. At the same time, neutrals should be subjected to the same ethical standards as High Court judges, including the standards of probity and confidentiality that are expected by the litigants. Neutrals who egregiously violate certain ethical norms (e.g., taking bribes or misusing information disclosed during the mediation process) should be liable to criminal sanctions. Conciliators should be selected from a pool of retired judges, senior advocates and from the people of other professions who have a reputation for integrity. These conciliators could provide pro bono services, or, depending on the complexity of the matter charge fee.

Training for ADR mediators and neutrals: As recommended above, training for those who would serve as ADR mediators and neutrals in the Pilot Courts should be handled by learning institutions that are able to put together specialized courses. The learning institutions should bear the cost of preparing the courses and training materials, while the potential ADR specialists would pay fees to attend the court. The technique of ADR is an effort to design a workable and fair alternative. Conciliators, mediators, arbitrators and other ADR neutrals will be appointed when requested by the parties from among a panel of qualified and experienced ADR neutrals. The Institutes/law schools in the country should undertake training/teaching in ADR and related matters and award diplomas, certificates and other academic or professional distinctions. Besides, the Institutes should plan to develop infrastructure for higher education and research in the field of ADR and arrange for fellowships, scholarships and stipends for developing professionalism in ADR. A major focus should be on training for developing professional mediators and sensitizing judges, lawyers, policymakers, litigants and the masses. I stress on creation of a regular corps of trained and efficient mediators or neutrals, relying on whom judges or parties in a dispute can comfortably go for consensual process of the ADR methods.

It will be prudent, at least at this stage, to keep in the statute a wide option of mediators and arbitrators to avoid the vagary of availability or no non-availability of senior lawyers. Presiding judges of the disputes in question and other available judges of co-equal jurisdiction not seizing of the disputes in question should be kept as options for the choice of mediator or conciliators. Retired Judges, senior lawyers as per list maintained and constantly updated by the District Judge should be available for mediation and conciliation. Private mediation firms, having experienced judges or retired judges and/or qualified non-practicing lawyers on their staff, recommended by the District Judge and approved by the Chief Justice of High Court, may also be included for mediation, conciliation or non-binding arbitration on payment of equal fees by the parties. Gradually, as the idea spreads and the ADR procedure gains ground, judges may be eliminated from the list altogether. This may take some time, but nothing can be achieved without patience and perseverance. U.S.A., Australia and Canada have not achieved their present position without sustained efforts for three or four decades. 85 to 90 percent of cases filed are now disposed of by ADR method and only 10 to 15 percent cases filed are disposed of by trial now in those countries. But Rome was not built in a day, but was built alright.
Amend the Code of Civil Procedure giving the trial court an enabling and discretionary power to refer a case or part of a case for mediation at any stage of the suit. Although the proper stage to do so is after receiving the written statement, I would suggest ‘at any stage of the suit’ to cover backlogs. When the amendment comes into force, the judges will be trained to refer a case for mediation, conciliation or non-binding arbitration after receiving the written statement in all suitable cases, but they will be further trained to refer pending cases for mediation, conciliation or non-binding arbitration when both parties agree or according to the judge’s own discretion, the stage of the suit not being very important. It is necessary to define mediation, conciliation and non-binding arbitration correctly and precisely in the amendment to avoid unnecessary dispute about their nature and character.

Make the presiding judge, a judge of co-equal jurisdiction, lawyers of more than 15 years’ standing, and Private Mediation Firms, adequately staffed by either experienced ex-judges of not less than 10 years’ standing or retired judges and/or non-practicing lawyers of not less than 15 years' standing, renowned professionals from other fields recommended by the District Judge and approved by the Chief Justice of High Court, as qualified for appointment as mediator, conciliation or arbitrator. As a matter of practice the presiding judge may not assume that function, but the enabling provision should be there, because in many places a judge of co-equal jurisdiction or a lawyer of stated standing or a private legal firm might not be available. The District Judge will keep a constant eye on ADR, provide the High Court with regular up-to-date information about disposal of cases by mediation or conciliation by various pilot courts, amount realized each month by the pilot courts, pending mediations or conciliations in the pilot courts, comparison in terms of disposal and realization of money with the rate of disposal and rate of realization of money prior to mediation, amount realized by execution of decree on a previous 5-year average prior to mediation etc. and oversee the progress of ADR diligently and constantly.

The Government is the major litigant in this country, either as a plaintiff or as a defendant. In most cases the Government does not make any appearance, because the Government do not find, at any rate for the time being, any interest of the Government involved in the case. Yet when the parties in dispute compromise the matter, even without mediation, the option remains for the Government to challenge the compromise at a belated stage, claiming an interest in the subject matter of litigation. The Government is thus responsible in many cases to prolong the litigation. To make the ADR successful, law should be amended providing that where the Government do not enter appearance or after entering appearance do not file any written statement, or after filing a written statement do not contest the case, any resolution of the dispute through ADR or otherwise by the other parties to the dispute would be binding on the Government.

Conclusion:

An ongoing judiciary initiative to institute an alternative dispute resolution system through “National Judicial Policy, 2009” appears significant to reduce the burden of millions of cases pending with the courts. Amendments to several laws have been made and some more are on their way to facilitate to institute mediation, conciliation, arbitration and other Alternative Dispute Resolution mechanisms, as the result of the efforts was ‘tremendously encouraging. Under a pilot project, ADR should be initiated in the selected Districts and in a class of cases, under the supervision and control of High Courts, which can eventually be extended to the all the Districts. And when such courts are established, that would truly bring ADR to the centre-stage – no dispute about that. Every case, settled out of the formal courts, will save an average court time of seven to ten years. The ADR-related legislative reforms, when viewed in conjunction with other government initiatives give an excellent opportunity to any group, body or institution seeking to establish themselves as service providers for ADR. There are several established entities actively engaged in providing ADR services and who are already well-positioned to fill the space suddenly created by this healthy juxtaposition of the several legislative provisions. What is lacking is not only awareness of this opportunity but also the proficiency/expertise necessary to implement ADR as a truly viable (and a much healthier) alternative
mechanism to litigating in a court of law. Considering the pool of talent available, it is only a question of showing the way. And this is the task that **Government, Judiciary and Bar** should take upon themselves – of introducing to the nation, and educating them about, ADR and it’s inherent benefits with the help of **ADB** sponsored **Access to Justice Program**, Pakistan stands to benefit greatly from this effort simply because not only does it probably have the highest backlog of cases pending in its courts of law, but also because it’s litigious population does not take too many days off. The **IFC** Commercial Mediation program which was initiated in partnership with Ministry of Law, Sindh High Court and IFC in 2005, whereby referral and Enforcement system at Sindh High Court was developed with reference to institutionalized mediations at Karachi Centre for Dispute Resolution (KCDR), Section 89-A of Civil Procedure Code was being used for referral of disputes to KCDR for mediation. Commercial mediation has taken off but a sustained awareness program is required for greater buy in of mediation and referral of disputes. Because IFC’s ADR/Mediation initiatives in form of a pilot Project in Karachi has been successful, it wants to reciprocate the same at Lahore. However, experience suggests that ADR and mediation require support of stakeholders for it to be institutionalized at national level. In order to promote the use of ADR and mediation among practitioners and end-users, there has been a strong need to debate its current status, future development and challenges. In view of the National Judicial Policy 2009 and with these objectives in mind, the proposed Conference has been planned with the institutional support of Supreme Court of Pakistan and Federal Judicial Academy, Islamabad. The business-sector should be encouraged to include following model clause in all business agreements, Mediation is a wonderful tool to help counsel obtain a fair and reasonable settlement for his client. I hope that the ideas set forth in this article will help the business-sector to turn their dispute from a business threat into a business opportunity by use of commercial mediation: Yes, many have been shying away from the courts looking at the prolonged delays, but once they have alternative and convenient modes like ADR for resolution of disputes, they are certainly not going to shy away from opting for them to settle their disputes.

The ADR can also be an effective means to deal with the cases involving **default bank loans**, now pending with the banking courts, and in other commercial cases through amendment to the relevant laws to make way for ADR, the banks could recover billions default loans in a very short time. It is hoped that the ADR can clear up the entire bulk of pending cases within three to four years, if properly used. Alternative dispute resolution can mitigate sufferings of poor litigants as it is cheaper and speedier than the existing legal system. Increasing expenses of litigation, delay in disposal of cases and huge backlogs in the existing legal system have shaken people’s confidence in the judiciary. Against this backdrop we cannot but ponder about a device like the ADR, which is potentially useful for reducing the backlogs and delay in some cases of our courts. We recognize traditional, informal and indigenous forms of dispute resolution, like **Punchayat**, there were handicaps such as dominance of social elite, lack of legal awareness, superstitions and biased mindset. The purpose of the ADR was not to substitute consensual disposal for adversarial disposal or to abolish informal mediation outside courts but to make it part and parcel of the legal system, preserving the trial court’s statutory authority and jurisdiction to try the case should the ADR fail.

A major focus should be on training for developing professional mediators and sensitizing judges, lawyers, policymakers, litigants and the masses. It is stressed on creation of a regular corps of trained and efficient mediators or neutrals, relying on whom judges or parties in a dispute can comfortably go for consensual process of the ADR methods. The recommendations include networking and sharing at national, regional and international level, developing curricula for incorporating the ADR in education and continued monitoring, evaluation and improvement of ADR processes in use.

Alternative facility in Pakistan is yet to take a meaningful uplift. But this newly enacted provisions facilitating the ADR system in our justice delivery process is highly appreciable which will open a new horizon in our legal firmament. For meaningful expansion of ADR in Pakistan legal resource has to be developed among the rural poor by providing them with alternative lawyers and judge. The next step would be for the society to come forward to accept change of traditional legal procedure. Only
reformative thinking, new values, new projection and positive outlook with determined action can achieve this.

The proposed reforms to Civil Justice have been under discussion for some years and usage of ADR have had a significant influence on the way in which litigation is conducted in Pakistan, in the sense that courts have tended to anticipate the changes to some extent, or to interpret existing rules in a way which is compatible with ADR philosophy. Nevertheless when the new legislation has come into force, radical changes are needed in the way in which the courts and lawyers operate. As the Chief Justice is a very powerful person in our system the Pakistan reform effort suffered setbacks and delays caused by the shifting role of Chief Justice as happened in India with the retirement of Chief Justice Ahmadi, yet the present Chief Justice of Pakistan, along with many other judges and the government are great supporters of these innovations. We certainly need a Champion to make this matter a success in Pakistan.\(^\text{16}\)

---

\(^\text{16}\) This paper has been prepared by Zafar Iqbal Kalanauri Mediator & Advocate Supreme Court Pakistan, and published by Pakistan Alternate Dispute Resolution Centre (the only private forum in Pakistan where the experts in different fields resolve disputes outside the court room using different ADR mechanisms), 128-A, Upper Mall Scheme Lahore, Pakistan, Web: http://www.zklawassociates.com
E-Mail: kalanauri@gmail.com Tel: (92-42) 35760171 Mobile: (92)-314-4224411 & (92)-0300-4511823.