ADR for Resolving Tax Related Disputes.

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ADR mechanism has been introduced in Pakistan only recently for resolving tax-related disputes. Like most new initiatives, the introduction of this system too has given rise to a number of searching questions in the minds of taxpayers and professionals.
I would, first of all, like to congratulate the Lahore Tax Bar of Association, for arranging this workshop and inviting me to participate in it. This workshop shall encourage honest expression of views and candid discussion. I'll speak on some aspects of ADR, highlighting the philosophy behind it, analysing its nature, discuss the proceeding process, highlighting the professional ethics involved and deliberate upon other allied dimensions in presence of the learned participants who are the stake holders.

In the present world it has become difficult to tackle any issue dealing with business-even one which, at first glance, only concerns activities purely local in nature-without having to address it in the context of globalization and the removal of economic barriers. In our days, the most ordinary and apparently most local transaction involves a large number of international transactions. To illustrate this fact, a Canadian professor constructed his whole international commercial law curriculum around the web of contracts required for the manufacture of 'his' shirt. It was ordered in Paris from an Indian representative who goes round Europe several times a year to take orders from an international client base. It is made of English cloth, woven from Egyptian cotton and sewn in Hong Kong, under an Italian license in workshops equipped with German machines. It was delivered in Canada by the local partner of a courier network with United States-based company headquarters. By means of this exercise, one realizes the extent to which this shirt is an international product, involving fields as varied as agricultural product import-export regulation, financing, insurance, international transportation, international commercial contracts, intellectual property, sales representation, sale of goods, international consumer contracts and many others. Each of these stages could give rise to disputes. Yet, even if these disputes are standard ones, their scale and frequency are greater when the parties do not speak the same language[1], do not have the same perception of things or do not believe in the same values-in short, if they belong to different cultures.

The choice of the dispute resolution mechanism depends on the parties' culture and also on the time and place of the dispute. The differences between the French, Japanese, American or African judicial cultures have, indeed, been stressed for a

[1] Language is the vehicle of interpersonal communication *par excellence*. Yet, it can convey misunderstandings. It has been argued, for example, that, in the Israeli-Palestinian conflict, the negotiators' lack of equal knowledge of Arabic, English and Hebrew was a stumbling block because they took the words *peace* in English, *salam* in Arabic and *shalom* in Hebrewas interchangeable, whereas they are not so inreality. The words *peace, shalom* and *salam* all include the concept of the absence of war, but the Hebrew word also includes the concept of reconciliation and friendship. In Arabic, *salam* and *solh* must be taken together to cover the scope of the meaning of *shalom*. See Raymond Cohen, 'Resolving Conflict Across Languages', (2001) 17 *Negotiation Journal* 20–21.

long time. The existence of a young but clearly defined culture of international commercial arbitration is also now accepted. Amicable means,[2] such as mediation and conciliation,[3] have not yet reached this stage of development. They still depend very much on cultural differences. Mediation is the reference model of ADR.[4] It is, upon consideration, an attempt at negotiation between parties who, assisted by a third party (the 'neutral'), communicate, interact, explain themselves, control their emotions, put forward solutions and agree to concessions with the aim of reaching a settlement. The act of negotiation requires very specific skills that fall essentially within the field of communication rather than law, because what is needed is an ability to seize and interpret perceptions and to read between the lines. In order to fulfil their obligations under the process of mediation in an international context, the parties and the neutral must be in a state favourable to constructive exchanges, i.e. capable of interacting culturally.

Due to cultural diversity the practices of ADR in the different countries are different. I do not intend to list all types of ADR and the many ways in which they are carried out, but simply to draw attention to the importance of the issues at stake and the practical consequences of diversity. Accordingly, the' practices' considered are only those that consist of applying and implementing the rules and principles of the science, the technique or the art of mediation. Business people called on to decide on strategy should have at their disposal a limited range of available models of mediation. In Pakistan we should give them such a tool by developing of indigenized model mediation. Even if the geographical scope of the concept of mediation is undisputed, the perception of the conflict and the way in which it is handled are very different in U.S.A., in Europe, in Singapore, in Malaysia, in China, in Japan or in Pakistan.

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. Some commentators suggest this may be due in part to differences in systemic (i.e. adversarial vs. inquisitorial)[5] and cultural (i.e. mediation vs. conciliation) orientations.[6]

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[2] The English acronym 'ADR', which stands for 'Alternative Dispute Resolution', is used to designate these means. Some people include arbitration in this category, whereas others only include amicable or non-contentious means of settlement. ADR is translated into French as MARL or MARC (*modes alternatifs ou amiables de règlement des litiges ou conflits* ['alternative or amicable means of resolving disputes or conflicts']). See Nabil N. Antaki, *Le règlement amiable des différends* (Cowansville, QC: Yvon Blais Éditions, 1998) at paras23 *et seq*.

[3] Authors do not agree about the definition and the content of these two means. Some consider that they are synonyms, while others think that they are two means of a similar nature, distinguished by the intensity of the power of intervention vested in the third party. Some think that a mediator has greater power than a conciliator; while others believe the reverse. In this text the two concepts are not distinguished.

[4] Article 5(2) of the International Chamber of Commerce ('ICC') ADR Rules provide that, in the absence of an agreement between the parties on the application of a particular settlement technique, the third party, or neutral, is to act as a mediator. *ICC ADR Rules*, 1July 2001, online: .iccwbo.org/index adr.asp#rules.

[5] See, Michael McIlwrath, Elpidio Villarreal and Amy Crafts "Finishing Before You Start: International

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,[7] particularly under the auspices of the United Nations Commission on International Trade (UNCITRAL)[8] and the Hague Conference on Private International Law[9] 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*.[10] Parallel developments in international arbitration (the New York Convention[11] and the UNCITRAL Model Law on International Arbitration[12]) and international trade law (The United Nations Convention on Contracts for the International Sale of Goods (CISG)[13], reflect this trend towards harmonization, if not, unification, of international trade law.[14]While many

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Mediation" in International Litigation Strategies and Practice, Barton Legum (Ed.) (Chicago, IL: ABA International Practitioner's Deskbook Series, 2005) Chap. 6, pp. 41-47 at 42. [hereinafter "Finishing Before Your Start"].

[6] For a concise discussion outlining the differences among arbitration, conciliation and mediation, see, Alessandra Sgubini, Mara Prieditis & Andrea Marighetto, "Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective" (August 2004) available online at:http://.mediate.com/articles/sgubiniA2.cfm. See also, Rona R. Mears, Cross-Cultural Mediation: Issues and Opportunities. Address before the 5th Annual Texas Minority counsel Program (Oct. 24, 1997); and Steven K. Anderson, "NAFTA Mediation and the North American Free Trade Agreement", American Arbitration Association Dispute Resolution Journal, Volume 55, Number 2, 58 (May 2000).

[7] For an excellent analysis of the conceptual distinction between harmonization and unification, see Bruno Zeller, CISG AND The Unification of International Trade Law (Abingdon, Oxon [England] ; New York, NY : Routledge-Cavendish, 2007).

[8] See the UNCITRAL website: http://.uncitral.org/uncitral/en/index.html.

[9] See the Hague Conference on Private International Law website: http://.hcch.net/index_en.php>

[10] See Bernard Audit, "The Vienna Sales Convention and the Lex Mercatoria" in LEX MERCATORIA AND ARBITRATION, Thomas E. Carbonneau ed., rev. ed. [reprint of a chapter of the 1990 edition of this text], (Juris Publishing 1998 Chap.11, http://.cisg.law.pace.edu/cisg/biblio/audit.html.

[11] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded at New York,June 10, 1958, 21U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 available at: http://.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

[12] For the text and explanatory materials on the UNCITRAL Model on International Commercial Arbitration, United Nations Document A/40/17, annex I (as adopted by the United Nations Commission on International Trade Law on 21June1985 http://.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf and as incorporated in Ontario by the International Commercial Arbitration Act, R.S.O. 1990, c. I.9 (as am.).[hereinafter the "ICCA"]

[13] United Nations Convention on Contracts for the International Sale of Goods (CISG), April 11, 1980, S. Treaty Doc. No. 98-9 (1984), U.N. Doc. No. A/CONF.97/19, 1489 U.N.T.S. 3, incorporated by, International Sale of Goods Act, R.S.O., ch. I-10 (1990) (Can.), available at: .elaws.gov.on.ca/DBlaws/statutes/English/90i10_e.htm. For links to other Canadian provincial CISG legislation, as well as related Canadian case law and academic commentary, see the CISG Canada website, (hosted by Osgoode Hall Law School, York University– member of the autonomous network of Convention websites), available at: http://.cisg.ca; or http://.yorku.ca/osgoode/cisg. The CISG is sometimes also referred to as the "Vienna Convention".

[14] Currently, seventy countries representing three-quarters of the world's trade are CISG signatories. See http://.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>; and see also http://.cisg.law.pace.edu/cisg/countries/cntries.html. See also, the UNCITRAL Model Law Guide, infra, note 20, at pp. 13-14 which refers to the UNCITRAL Model Law as a tool for harmonizing legislation.

international arbitral organizations have a distinguished and lengthy pedigree,[15]others, like the International Centre for Settlement of Investment Disputes (ICSID)[16]or the World Intellectual Property Organization (WIPO),[17]albeit more recently created, also enjoy strong reputations.[18] In most cases, these national and international dispute resolution institutions offer mediation procedures and pools of qualified mediators.[19]

As Susan D. Franck notes:

> *The rule of law is essential to those participating in the global economy. Without the clarity and consistency of both the rules of law and their application, there is a detrimental impact upon those governed by the rules and their willingness and ability to adhere to such rules, which can lead to a crisis of legitimacy. Legitimacy depends in large part upon factors such as determinacy and coherence, which can in turn beget predictability and reliability. Related concepts such as justice, fairness, accountability, representation, correct use of procedure, and opportunities for review also impact conceptions of legitimacy. When these factors are absent individuals, companies and governments cannot anticipate how to comply with the law and plan their conduct accordingly, thereby undermining legitimacy.[20]Duncan Kennedy further observes, "when we use law strategically, we change it."[21]*

Historical ADR has been used in Indian Sub-continent[22]. It not a new concept &

[15] 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://.pca-cpa.org/showpage.asp?pag_id=363>; see also, Arbitration Institute of the Stockholm.

[16] 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://.worldbank.org/icsid/index.html.

[17] Based in Geneva, Switzerland, the WIPO Arbitration and Mediation Centre 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://.wipo.int/amc/en/center/index.html.

[18] 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://.naftasecalena.org/DefaultSite/index_e.aspx?DetailID=867.

[19] Finishing Before You Start, supra note 1, at 46.

[20] See Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions".(2005) 73 Fordham L. Rev, 1521 at 1584-5, available at SSRN: <http://ssrn.com/abstract=812964> citing Thomas M. Franck, fairness in international Law and institutions 30 (1995); and Thomas M. Franck, the Power of Legitimacy among Nations 49 (1990).

[21] David Kennedy, "Modern War and Modern Law" In 12 International Legal Theory: A Just World Under Law 55-98 AT 75 (Baltimore, MD: Asil -Interest Group on the Theory of International Law, Fall 2006).

[22] "Indian subcontinent". New Oxford Dictionary of English (ISBN 0-19-860441-6) New York: Oxford University Press, 2001; p. 929: "the part of Asia south of the Himalayas which forms a peninsula extending into the Indian Ocean, between the Arabian Sea and the Bay of Bengal. Historically forming the whole territory of greater India, the region is now divided between India, Pakistan, and Bangladesh after partition in 1947."

historically recognized. 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 *Panchayats*[23]: 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 commercial 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 realized 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 fare 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. Outside the sub-continent legal cultures in U.S.A., Singapore, Hong Kong, Australia, England 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

[23] The panchayat raj is a South Asian political system mainly in India, Pakistan, and Nepal. "Panchayat" literally means assembly (*yat*) of five (*panch*) wise and respected elders chosen and accepted by the village community. Traditionally, these assemblies settled disputes between individuals and villages.

countries confronted serious crisis for lack of discipline. The examples of these countries make 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. This legislation has developed confidence among foreign parties interested to invest in Pakistan or to go for joint ventures, foreign investment, transfer of technology and foreign collaborations.

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:

1. S.89-A of the Civil Procedure Code, 1908 (as amended in 2002) read with Order X Rule1-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
7.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. Section 68 Canal & Drainage Act,1873. Sec. 63 Baluchistan Canal & Drainage

Ordinance,1879

12. Finance Bill introduced following ADR Tax Laws:
Sec. 134-A of I. T Ordinance. 2001 R/FBR Rule 231-C of the I. T Rules-02.
13. Sec. 47-A of the Sales Tax Act 1990 and Ch. X of the S.T Rules-04.
14. Sec. 195-C of the Customs Act 1969, Ch. XVII of Customs. Rules 2001.
15. Sec. 38 of the Federal Excise Act 2005 R/FBR Rule 53 of FE Rules 2005.
16. Section 23 of Industrial Relation Ordinance.
17. Section 151 (1) (2), West Pakistan Land Revenue Act,1967.
18. In Table A to the First Schedule of the Companies Ordinance,1984 a new section 83A has now been inserted
19. The ADR Act, 2017

Several reasons exist for choosing mediation over other channels of dispute resolution (such as those involving attorneys and courts). Parties to a dispute may choose mediation as (often) a less expensive route to follow for dispute resolution. 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 filed in court may take months or even years to resolve, a case in mediation usually achieves a resolution in a matter of hours. Taking less time means expending less money on hourly fees and costs. Mediation offers a confidential process. While court hearings of cases happen in public, whatever happens in mediation remains strictly confidential. No one but the parties to the dispute and the mediator(s) know what has gone on in the mediation forum. In fact, 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 actually destroy their notes taken during mediation once that mediation has finished. The only exceptions to such strict confidentiality usually involve child abuse or actual or threatened criminal acts. Mediation offers multiple and flexible possibilities for resolving a dispute and for the control the parties have over the resolution. In a case filed in court, the parties will obtain a resolution, but a resolution thrust upon the parties by the judge or jury. The result probably will leave neither party to the dispute totally happy. In mediation, on the other hand, the parties have control over the resolution, and the resolution can be unique to the dispute. Often, solutions developed by the parties are ones that a judge or jury could not provide. Thus, mediation is more likely to produce a result that is mutually agreeable, or win/win, for the parties. And because the result is attained by the parties working together and is mutually agreeable, the compliance with the mediated agreement is usually high. This also results in less costs, because the parties do not have to seek out the aid of an attorney to force compliance with the agreement. The mediated agreement is, however, fully enforceable in a court of law. The mediation process consists of a mutual endeavour. Unlike in negotiations (where parties are often entrenched in their positions), parties to a mediation usually seek out mediation because they are ready to work toward a resolution to their dispute. The mere fact that parties are willing to mediate in most circumstances means that they are ready to "move" their position. Since both parties are willing to work toward resolving the case, they are more likely to work with one another than against one another. The parties thus are

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. Finally, but certainly not least, and as mentioned earlier in this article, the mediation takes place with the aid of a mediator who is a neutral third party. A good mediator is trained in conflict resolution and in working with difficult situations. The good mediator is likely to work as much with the emotional aspects and relationship aspects of a case as he or she is to work on the "topical" issues of the matter. The mediator, as a neutral, gives no legal advice, but guides the parties through the problem solving process. The mediator may or may not suggest alternative solutions to the dispute. Whether he or she offers advice or not, the trained mediator helps the parties think "outside of the box" for possible solutions to the dispute, thus enabling the parties to find the avenue to dispute resolution that suits them best.[24]

The eldest branch of mediation applies to business and commerce, and still this one is the widest field of application, with reference to the number of mediators in these activities and to the economical range of total exchanged values. The mediator in business or in commerce helps the parties to achieve the final goal of respectively buying/selling (a generic contraposition that includes all the possible varieties of the exchange of goods or rights) something at satisfactory conditions (typically in the aim of producing a bilateral contract), harmonically bringing the separate elements of the treaty to a respectively balanced equilibrium. The mediator, in ordinary practice, usually cares of finding a positive agreement between (or among) the parties looking at the main pact as well as at the accessory pacts too, thus finding a composition of all the related aspects that might combine. in the best possible way, all the *desiderata* of his clients.[25]Academics sometimes include this activity among the auxiliary activities of commerce and business, but it has to be recalled that it differs from the generality of the others, because of its character of independence from the parties: in an ordinary activity of agency, or in the unilateral mandate this character is obviously missing, this kind of agent merely resulting as a *longa manus* of the party that gave him his (wider or narrower) power of representation. The mediator does not obey to any of the parties, and is a third party, looking at the contraposition from an external point of view. Subfields of commercial mediation include work in well-known specialized branches: in finance, in insurance, in ship-brokering, in real estate and in some other individual markets, mediators have specialized designations and usually obey special laws. Generally, mediators cannot practice commerce in the genre of goods in which they work as specialized mediators.

Pakistan is a region with a strong tradition of consensus based dispute resolution at village level. In a very different context, I have experienced the genuine and rapidly growing interest in and enthusiasm for private commercial mediation, particularly in the business sector. The litigation process is an extremely expensive and time consuming process which offers no guarantee of success. Mediation on the other hand is a quick, solution focused service which allows input from the conflicting

[24] See, .synergymedmw.com, .mediation.com, .mediate4you.com and .mediate4u.info for more information on the mediation process.

[25] From Wikipedia, the free encyclopaedia (November, 2008)

parties to help ensure a mutually beneficial solution is reached. This fact is acknowledged by the Business- sector which is recommending that mediation is attempted as a mutually agreed solution is far better than a court determination enforced on both parties.

The commercial process habitually includes legal representation and once agreement is reached a legally enforceable document is executed. In successful cases the dispute is resolved within a matter of days, the relationship between the parties is maintained and time, stress and cost are minimized. The solution is explicitly determined and agreed by both parties and the solution is endorsed by all concerned. When agreement cannot be reached, costs are small and all matters discussed are confidential and do not compromise any court proceedings.

Mediation was the most favorable means of dispute resolution the reasons very accurately outlined the real benefits of mediation over Litigation and other dispute resolution methods. 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.

Commercial mediation is a private process of assisted negotiation which can allow that if agreement is reached it becomes fully binding. 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
- 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 Mediation clauses have recently been started to be drafted in commercial contracts. It is suggested that the business-sector should be encouraged to include following model clause in all business agreements:

"Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the [……] Mediation Rules. The place of mediation shall be (…..). The language to be used in the mediation shall be (English)"

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.

ADR for Resolution of Tax disputes

In Pakistan, fiscal statutes have also incorporated means of resolving disputes, without recourse to the courts. For example, Chapter XIIIA of the Income Tax Ordinance, 1979 provided for a procedure, whereby cases could be settled through an Income Tax Settlement Commission. Under Section 138C, the Commission was conferred with the following functions: -

(a) to process and decide applications filed by assesses declaring income hitherto not declared;
(b) to process and decide applications by assesses arising out of an assessment order or an order passed by the Appellate Additional Commissioner;

(c) to process departmental appeals filed before the Income Tax Appellate Tribunal for settlement or withdrawal thereof; and
(d) any other function specifically assigned by the Federal Government to the Commission.

Under Section 138D, the assesse could make an application to the Commission to have his or her case settled, by providing full disclosure of his income and also by filing the return of income that should have been previously filed.

Once applications are brought before the Commission, it could call for such particulars as were required, or the Commission could cause further inquiries to be made by the Commissioner. The Commission could also allow the application to be proceeded with or reject the same.

After the Ordinance, 1979, was repealed and the Income Tax Ordinance 2001 was brought in, it was expected that more stress would be put on ADR in Income Tax. However, the Ordinance, 2001, when promulgated did not contain the equivalent of Section 138 of the Ordinance, 1979. It was only through the Finance Act, 2004, that a new Section 134-A has been recently inserted in the Ordinance, 2001. This was reportedly due to the recommendation of the Federal Tax Ombudsman that amendments in Central Excise, Customs and Income Tax laws were made, and ADR was introduced in these fiscal statutes.

The new Section 134-A of the Ordinance, 2001 is titled 'Alternative Dispute Resolution'. It is of a lot wider scope than the previous Section 138 of the Ordinance, 1979 in that it allows any aggrieved person in connection with any matter, pertaining to liability of income tax, admissibility of refund, waiver or fixation of penalty or fine, relaxation of any time period, or procedural and technical condition to apply to the FBR, for appointment of a Committee, for resolution of any hardship or dispute mentioned in the application.

After examining the application, the FBR shall appoint a Committee, consisting of an officer of Income Tax along with two persons from a notified panel of Chartered or Cost Accountants, advocates, Income Tax Practitioners or reputable taxpayers for resolution of the dispute.

The Committee may, if it deems necessary, conduct an inquiry, seek expert opinion or direct an audit to be conducted. The FBR may then, on the recommendations of the Committee, pass such order as deemed appropriate u/s 134-A (4). The aggrieved person may then make the payment as ordered by the FBR, and all decisions, orders and judgments shall stand modified to that extent.

If any matter is subjudice before any authority, tribunal or court, any agreement made between the aggrieved person and the FBR shall be submitted for consideration before that authority, tribunal or court.

The person aggrieved against the order of the FBR u/s 134-A(4), has the right to appeal before the appropriate authority, within 60 days of receiving the order.

Under circular No. 20 of 2004 dated 4.9.2004, the FBR has constituted committees, as required under sub Section (2) of Section 134-A. There are three committees for Lahore, two for Karachi and one each for Islamabad, Rawalpindi, Sialkot and Faisalabad. It may be noted that the said Committees do not contain any advocates, apart from the Lahore Committees. This is contrary to the established rules of ADR, whereby advocates are actively encouraged and employed, as they are the best at resolving legal issues.

It is envisaged that the costs of the ADR shall be met by the aggrieved person entirely, which is again not in consonance with the established norms of ADR, whereby costs are usually met by both parties equally. This is also against the principle of ADR that costs should be minimal and a lot less than litigation or adjudication.

A further problem seen is that in the ADR process, the committee acts like an assessing officer and spends hours going through the record, which is an extremely time-consuming and cumbersome exercise. In other countries, where such ADR in fiscal statutes is incorporated, the procedure is a lot simpler. The committee passes on the application to the concerned officer, who files his comments and subsequently, in the presence of both parties, the committee frames the issues. The committee thus confines itself to deciding the issues and can, in two sittings, make its recommendations to the Board.

It is interesting to note that the FBR may pass an order on the "recommendation" of the Committee. This word seems to have been used deliberately, instead of award or decision to, perhaps, make it non-binding.[26]

The Finance Act, 2004 also inserts Section 36-D to the Central Excise Act, 1944. This Section is para materia to the above mentioned Section 134-A of the Ordinance, 2001. A Committee is to be formed by the FBR, consisting of an officer of Central Excise along with two other persons from the notified list.

Similarly, the Customs Act, 1969, now has a new Section 195-C titled "Alternative Dispute Resolution which is again para materia to Sections 134-A of the Ordinance, 2001 and 36-D of Central Excise Act, 1944 stated above.

Even before the Finance Act, 2004, the Sales Tax Act, 1990 had a specific provision, that dealt with Alternative Dispute Resolution. The relevant Section 47-A of the Act provided that any registered person may apply to the FBR for the appointment of a Committee for the resolution of any hardship or dispute.

[26] Through SRO 748(I)/2004 dated 30.8.2004, Rule 231-C, has been inserted in the Income Tax Rules, 2002, which has, in detail, prescribed the ADR procedure-see PTCL 2004 St. 1683.

The types of cases envisaged by Section 47-A were as follows: -

a) the liability of tax against registered persons or refunds, as the case may be;
b) the extent of waiver of additional tax or penalty;
c) the quantum of additional tax admissible under Section 7(3);
d) relaxation of any procedural or technical irregularities, and condonation of any time limitation; and
e) any other specific relief, sought to resolve the dispute.

The FBR may appoint a committee for resolution of the disputes. The committee may conduct an inquiry, seek expert opinion and direct any person to conduct an audit to resolve the dispute.

It is important to note that in matters that are sub-judice before any authority or tribunal or court, an agreement made between a registered person and the Board, shall be submitted before such authority, tribunal or court for consideration and orders as deemed appropriate.

The said Section 47-A of the Act was substituted by the Finance Act, 2004 (Act II of 2004). The previous Section 47-A was inserted by the Finance Ordinance, 2002 (XXVII of 2002). It is interesting to note that the earlier Section 47-A did not have within its purview cases that were sub-judice before the High Courts or Supreme Court or had been decided by them. The relevant provision was the proviso to sub-Section (1) of Section 47-A which stated that no committee shall be constituted in cases where the matter has been decided by or are sub-judice before a High Court or the Supreme Court. The scheme of Section 47-A of the Sales Tax Act, 1990, is analogous to Section 134-A of the Income Tax Ordinance, 2001.

It must be said that the insertion of Alternative Dispute Resolution clauses in fiscal statutes is a welcome sign. Many types of situations can arise in which the assesse is simply not able to pay the tax within the period prescribed, due to no fault of his own. For example, situations have arisen where two different Government departments issue differing notifications on the same subject matter. Here the assesse does not know which notification to follow. A way out exists under the ADR in such circumstances.

One cynical view is that such "ADR clauses allow and" propagate tax-evasion. In this context one may consider Chapter XIIIA Settlement of Cases of the Income Tax Ordinance, 1979, which was a copy of Chapter XIXA of the Indian Income Tax Act, 1961. The background to the Indian amendment was to facilitate settlement of huge tax disputes, while providing immunity from criminal proceedings. The Supreme Court of India in CIT v. B.N. Bhattachargee and others (1979) 118 ITR 461 (SC) noted that it was a debatable policy to collect public money from tycoons, rather prosecute them and gain total recovery of unpaid tax. The Supreme Court even went so far as to say that social working audit of the relevant provisions of law may be carried out to ascertain as to who are the real beneficiaries of this legislation. It is thus imperative that a committee be constituted of the highest degree of integrity, and

sense of justice and fair play. This will be the only safeguard against tax evaders, taking an escape route through such ADR clauses.

I do not subscribe to this extreme and one sided view adopted by the Supreme Court. Taxation per se is a compulsory exaction from the citizens by the State. The fundamental philosophy behind a just and proper taxing system and administration is that the tax base should be broadened and the existent tax payers should not be made to suffer from the ever-escalating tax burden. It seems that the administrators of tax system do not perform their own fundamental task to broaden the base, but thrive on escalating tax burdens on the existent tax payers. This approach is counter-productive and can give rise to devices and methodologies to evade tax. Sometimes the tax can be excessively harsh and becomes expropriatory and confiscatory in nature, violating the fundamental rights entrenched in the Constitution.[27]

In my humble opinion, the entire system of administration of justice is based upon the philosophy of justice tempered with mercy. The administration of tax laws is in no way different. The assesse should always be given the chance to minimise his tax liability, through schemes of immunities, amnesties, self-assessments, settlements and ADRs. The entire culture should become tax-friendly and not tax-hostile. There is yet another very impelling reason as to why, even in tax cases, a conciliatory approach should be adopted, which is that if an assesse, in view of a situational hazard, is caught in the flux of harsh laws or under some personal greed has suppressed true transactions, on a subsequent change of mind he may want to rectify his own doing. In such an event, the doors of mercy and compassion should not be closed. It is with this philosophy that the entire ADR process should be perused with minimal or no technical bottlenecks.

It is an irony that we do not appreciate the achievements of our forefathers, or practices and customs which are our own, or are part of our religion unless someone from the West appreciates or acknowledges it. *Muqaddamah Ibne Khaldoon* was never given due appreciation unless *Toyenby* the British historian- acknowledged *Ibne Khaldoon* as the father of modern history. Ijaarah for the last 1400 years has been an important mode of Islamic business, but it gained due importance in Muslim countries only, when it was introduced as leasing in the Western countries. Leasing was introduced in Pakistan but without taking into consideration leasing practices prevalent in our society, ground realities or religious susceptibilities of our people. More or less the same is the case of ADR. Where all the three members of the Committee are appointed by FBR, can it be called ADR, particularly when the Chairman of the Committee also happens to be a former head or a former senior officer of the FBR?

As far as the ADR introduced by FBR is concerned, it requires amendments as given below: -

[27] Government of Pakistan v. Muhammad Ashraf PLD 1993 SC 176 and Elahi Cotton v. Federation of Pakistan PLD 1997 SC 582.

(1) For selecting the Chairman of an ADR Committee, FBR should draw and keep a panel consisting of retired judges of the Superior Courts, retired bureaucrats and academicians, Chartered Accountants, Cost Accountants and advocates, who are no more in active practice. In no case should former heads or other former senior officers of FBR be included in the panel. Otherwise such a person working as Chairman would dictate and impose his views on the Committee. Ideally the matter should be refereed to Mediation Centres of Chambers of Commerce & Industry who have on their panel accredited Mediators from all walks of life to have a platform which is neutral.
(2) FBR and the party concerned should appoint representatives of their own choice.
(3) Representatives should be respectively paid by FBR and the concerned party, while the Chairman should be jointly and equally paid by FBR and the party.
(4) The Committees should not be under compulsion to follow precedence(s)/ decision(s) of other Committees.

Need for improving / strengthening Adjudication/ Appeal system:

Failure of the Settlement Commission System certainly means that any system providing remedy out of the regular appeal regime should be carefully evolved ensuring that the errors and weaknesses responsible for such failure would not be repeated. Theoretically, the need for efficient and effective ADR system is a result of the realisation that the existing departmental adjudication/appeal system (including the Appellate Tribunal System) and judicial remedies are not satisfactorily providing true justice in fiscal matters. Thus, any effort to introduce and regulate a good ADR system will not fructify, unless the bottle-necks and deficiencies of the departmental adjudication/appeal system (including judicial fora) are removed to the extent possible.

In Pakistan, ADR system was introduced in the budget 2002-03. Initially, cases decided by, or subjudice before, the higher judicial fora were not covered under the ADR scheme. However, unanimous recommendations of the ADR committees were made binding upon FBR and the tax-payer. Now these two features have been reversed with a provision, that the agreement made between FBR and the tax-payer, on the basis of ADR committee s recommendations shall be submitted before the authority, Tribunal or court (with whom the matter is pending) for consideration at the time of taking decision.

The scope of the existing ADR scheme in Pakistan is quite wider in that a matter can be brought for consideration under this system at any stage of its pendency under the regular regime of adjudication, appeal or judicial remedy. This means the ADR system is working not only as an alternate or parallel system, but also as a support or collateral system.

No doubt, the Government was and is sincerely keen to bring maximum success to ADR system and to make it as maximally transparent, efficient, effective and productive as possible. But hitherto passive response from the tax-payers' community is impacting the speed of its success, and certainly, its output and impressiveness.

That means the system does need improvement so as to make it more attractive option for the tax-payers. After discussing with different popular experts of law and taxation, the following suggestions are made:

i) **STATUS OF ADR COMMITTEES:**

Under the existing legal framework, a person aggrieved with the decision of the Board, made in the light of ADRC s recommendations, is required to file appeal within 60 days before the authority, Tribunal or court relevant to that stage of the case at which it was brought for ADRC s consideration. This gives an impression as if resort to ADR forum is simply an additional or extra exercise with no certainty of success in seeking relief, and leaves the status of the ADR forum unspecified in the hierarchy of dispute resolving fora as defined under the law. Thus, there is a need to define the exact hierarchal status of the ADR committees and specify the exact next forum of appeal. It is proposed that the next forum of appeal should be the High Court, and relevant statutory sections should be amended appropriately. This will cut down the duplicity or multiplicity of processes and the number of steps/stages towards the finalisation of the tax-payer s struggle, for seeking remedy of or relief for his dispute.

ii) **REVIEW UNDER ADR SCHEME:**

Under the ADR rules, a provision has been made for reconsideration by the ADR committee of its recommendations on reference by the Board, either on its own or on the request of the tax-payer. But such reconsideration is restricted to the rectification of errors and consideration of facts not considered earlier. Thus, mistakes of judgment resulting from other reasons are not covered under this provision. To overcome this deficiency, a proper provision for formal review by ADR committee of its recommendations may be introduced with a specific time framework for deciding such review and the collectorates should also be entitled to file review, if aggrieved. This will increase the quality of ADR committees working.

iii) **STATUS OF ADR COMMITTEES' RECOMMENDATIONS:**

The decisions of ADR committees are of recommendatory nature, which may or may not be accepted by the Board. Even unanimous recommendations are not binding either upon FBR or on the tax-payer. This has deprived the ADR system of its definiteness, creating uncertainties in the minds of those who intend to, but do not, bring their disputes for ADR consideration. Thus, it is proposed that once agreed, the unanimous recommendations of the ADR committees should be made binding upon the Board and the tax-payer. This will forestall further litigation on, or further continuation of, disputes.

iv) **REMUNERATION TO ADRC'S MEMBERS:**

The clause of remuneration of the members of ADR committees has perhaps been eliminated. This decision needs restoration with a ceiling on maximum payment, and power to relax such ceiling in any case, should be left with FBR. Or alternatively, a proper fee system may be introduced for the private sector members of the committees.

v) **PANELS FOR ADR COMMITTEES:**

There is a general impression in the public that mostly favourites have been included in the ADR committees' panels. It is, therefore, proposed that either the penal system should be discontinued and the tax-payers may be given option to suggest at least six names of persons from the private sector for selection of two members for the committee at Board s level, or the number of persons in the panels may be increased suitably, (the relevant notification(s) also need referential updating of statutory provisions). It is also advisable to create a pool of experienced officers on regular basis for nomination on ADR committees. These officers should not otherwise be posted in offices involving heavy work load, so that they may pursue their ADR-related assignments more attentively.

For selecting the Chairman of an ADR Committee, FBR should draw and keep a panel consisting of retired judges of the Superior Courts, retired bureaucrats and academicians, Chartered Accountants, Cost Accountants and advocates, who are no more in active practice. In no case should former heads or other former senior officers of FBR be included in the panel. Otherwise such a person working as Chairman would dictate and impose his views on the Committee. Ideally the matter should be refereed to Mediation Centres of Chambers of Commerce & Industry who have on their panel accredited Mediators from all walks of life to have a platform which is neutral.

FBR and the party concerned should appoint representatives of their own choice.

Representatives should be respectively paid by FBR and the concerned party, while the Chairman should be jointly and equally paid by FBR and the party.

The Committees should not be under compulsion to follow precedence(s)/ decision(s) of other Committees.

vi) **ENTERTAINMENT OF ADR APPLICATIONS IN FBR:**

Currently, ADR applications are being received and processed by separate sections in each Wing of the FBR. Decisions for acceptance or rejection of any application for ADR purposes is, no doubt, a crucial stage. In this regard, uniformity and consistency of approach needs to be observed to make the system more judicious. Instances are on record where conflicting views have been taken by different Wings of FBR, on the question of the so-called closed transactions/estoppels. In order to avoid such a scenario, it will be appropriate if all the work relating to the ADR regime is entrusted to the Legal Wing, where secretaries from all taxes with a chief (all having sufficient knowledge and experience), should be posted to exclusively deal with ADR cases, under the overall supervision of Member (Legal). Besides, suitable (taxpayers-friendly) parameters may be chalked out for deciding about the entertainability of ADR applications (these parameters may be incorporated in the ADR rules, if deemed proper). This will enable FBR to centrally computerise the

records of ADR cases in due course. (A software can be developed for this purpose with the assistance of Member (IMS) and (PRAL).

vii) **POWERS OF THE ADR COMMITTEES:**

At present, the jurisdiction or powers of the ADR committees on matters referred to them are restricted to examining facts of the cases and making recommendations. Thus, an ADR committee can make and express opinion, but cannot decide or resolve the dispute. The final decision in this regard lies with FBR. For this reason, FBR remains an integral authoritative component of the process of resolution of a dispute. Even questions relating to condonations, relaxations and waivers of penalties or fines, are decided upon by the FBR, which means the final competence and responsibility to decide upon any matter, even though brought under ‹ADR regime, continues to remain› with FBR. This scenario certainly does not provide for due sharing of responsibility or is not fully in line with the accepted principles of participatory tax management. Hitherto, several important cases have been amicably decided under the ADR regime, which fact testifies to the inherent operational strength and efficacy of the ADR system. Thus, time is now ripe for delegating limited statutory powers to the ADR committees, whereunder: they can grant condonations, relaxations and waiver of penalties/fines, and even waiver of additional tax obligations (which too is a penal taxation). This will make the ADR system more attractive in public eyes and relief-oriented in practice.

viii) **CONSOLIDATION OF ADR RULES:**

As of today, separate ADR rules are notified under the Customs Act 1969, Central Excises Act, 1944 and Sales Tax Act, 1990. (Besides, under the Income Tax Ordinance 2001). Almost all rules have structurally identical provisions. Such ›dispersal of subordinate legislations on the same subject is not in line with the Government s ongoing efforts to simplify the fiscal procedures and promote inter-tax integration. It is, therefore, suggested that the question of consolidation of ADR rules, at least on customs, excise and sales tax sides, may be examined in the Board and, if found convenient and feasible, the ADR rules for these three indirect taxes may be consolidated. Reportedly, under the direction of the Honourable Chairman, the Director General (Training & Research), Customs, Excise and Sales Tax, Islamabad has initiated an exercise to examine/analyse, and propose improvements in the departmental adjudication system, with a view to increasing its efficiency and ability to deliver, so that› internal litigations may be curtailed and dealt with in a rational manner, promoting tax-payers facilitation and the trustworthiness of the system.

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