Chapter One: Introduction to Alternative Dispute Resolution

1.1.Introduction

The provision of effective dispute resolution is the core concern of domestic as well as international legal system. The aim of devising mechanisms to afford effective dispute resolution is to ensure that disputes are solved through effective and efficient means for the benefits of the disputants and the society in general. So as to attain this core objective, states and the international community have been searching various ways of resolving dispute than insisting on the traditional way of resolving dispute through court litigation which is mostly ineffective and inefficient.

Now days, therefore, Alternative Dispute resolution has got wide acceptance to resolve dispute due to its perceived advantages. Needless to say, even court officials, who used to consider ADR as taking of court power, recognized the need of ADR as a choice to settle dispute. Pre-trial conference and compulsory (court ordered) arbitration might be an indication for this.

Alternative Dispute Resolution is a generic term used to describe a range of procedures designed to provide ways to resolving a dispute as an alternative to court procedures. ADR had been used by human society since ancient times though it gets wide acceptance and recognition in countries'laws recently. ADR methods, in comparison with court litigation, have various advantages though it is not free from different short comings. In this chapter issues in relation with the meaning of ADR, its historical development, its comparative advantages and disadvantages will be dealt. The short comings of court litigation also enumerated to show the rampant problems of litigation.

1.2.What is ADR

ADR is composed o f different words: Alternative, dispute and resolution. Thus to clearly understand or define the phrase it is paramount important to understand each words separately thereof. And then what _Alternative' connotes to you? What about dispute? Is a dispute synonymous with conflict? What about resolution?

The word _Alternative _, as to the definition given in 6th edition of Oxford Advanced Learners Dictionary, refers —a thing that you can choose to or have out of two or more possibilities.

Therefore the word in this context is used as an adjective and refers to all permitted dispute resolution mechanisms other than litigation, be it in court or administrative tribunal . Whereas, the phrase dispute resolution, in the absence of alternative as prefix, is simply a collection of procedures intended to prevent, manage or resolve disputes and refers procedures ranges from self-help in the form of negotiation through to state sanctioned mechanisms called litigation. It is to mean that ‗Alternative' connotes the existence of dispute settling mechanisms other than formal litigation. Though the word ‗Alternative' in ADR seems to connote the normal or standard nature of dispute resolution by litigation and aberrant or deviant nature of other means of dispute resolution mechanisms, it is not really the case. ADR is not an alternative to the court system but only meant to supplement the same aiming on less lawyering.

Now days there are arguments that ADR does not include arbitration and the proponent of this position say that alternative Dispute resolution encompasses various amicable dispute resolutions other than Litigation in court and arbitration. Indeed ADR Rules of The international Chamber of Commerce follows this approach. The preamble of the same rule reads as:

> *Amicable settlement is a desirable solution for business disputes and differences. It can occur before or during the litigation or arbitration of a dispute and can often be facilitated through the aid of third party (the neutral) acting in accordance with these rules.*

Needless to say most literatures and laws consider alternative dispute resolution as methods of dispute resolution which accommodates all the traditional dispute settling mechanisms other than court litigation. As arbitration shares many characteristics with other dispute resolution mechanisms than court litigation ADR in this material connotes all dispute resolutions out of litigation.

The other important word to define ADR is Dispute/ Conflict. There is debate about whether a conflict and a dispute are synonymous. Apart this debate psychologist, Lawyers, Diplomats, and Public Servants all deal in their work with conflict/ dispute. Concerning the distinction between Conflict and Dispute, different people suggested the difference in meaning between these words. Some people, for instance, define ‗Conflict' as a form of competitive behaviour,

like competition for scarce resource. Some see it as mere reflection of differences and an opportunity for personal growth. Still others only recognize conflict as armed conflict or war.

The nouns _Conflict‘ and _Dispute‘ are used interchangeably all time and indeed, are synonymous for each other in English Language, however. Still scholars, including Chornenki, draw slight distinction among the two words. According to the named scholar here, _Conflict‘ is the parent and disputes are the children and frequently, intervention is more important at parental level. He further states that conflict is a phenomenon or condition with three aspects. It manifests it self through attitudes, behaviour and situations. This triangular image opens the prospect that conflict can be internal state of mind, an external act or an environmental situation. By contrast, Dispute is an issue – specific manifestation of conflict as to the same person. It usually has identifiable parties and articulated or defined /delineated points of difference between those parties. A dispute is the subset of conflict: conflict gives rise to and sustains dispute. This distinction, as to the above proponent, is very important because if a dispute is addressed in only superficial way without regard for the underlying conflict, it may recur or replaced by other similar or related disputes.

Similarly, Folberg and Taylor also give the same definition for dispute as of Chornenki. To them _a Dispute‘ is an interpersonal conflict that is communicated or manifested. A conflict may not become a dispute if it is not communicated to someone in the form of perceived incompatibility or contested claim as to them.

Abebe Semagne in his unpublished senior thesis also quoted the meaning of dispute as;

> — *a conflict or controversy; conflict of claims or right; an assertion of right, claim or demand on one side met by the contrary claims or allegations on the other; the subject of litigation; the matter for which a suit is brought and which issue in joined; and in relation to which jurors are called and witness examined*

Apart the above difference in meaning between two words the writers of this teaching material use the two words interchangeably for convenience sake.

The other element of ADR is Resolution. The oxford Advanced Learner‘s Dictionary defines _Resolution‘ as the act of resolving or settling a problem, dispute, etc.

Thus , even if the phrase ,i.e. ADR, defy precise definition ,as to the above illustrations and different literatures, it is a generic term used to describe rang of procedure designed to provide a way of resolving a dispute as an alternative to court or administrative Tribunal procedure. For instance, Kerley , Hames and Sukys in their book entitled _Civil Litigation _ shortly define the phrase as methods to resolve legal problems other than court judgment.

ADR is sometimes referred as Appropriate Dispute resolution as the referred option should be the process most appropriate to the case, the parties and the issue involved.

1.3. Historical Development of ADR

There is no clear information when exactly ADR had been used as means of dispute resolution but it quite possible to conclude its dating back to the history of human society since there were no courts to resolve differences during ancient time .Different scholars have showed the long history of ADR methods in their work. Here under we incorporated the full text of an article written by Lipner, entitled _Methods of Dispute Resolution: TORAH TOTALMUD TO TODAY.' The article indicates the prevalence of the idea of ADR before 2000 years ago by showing the kind of debate in Talmud.

The modern –day methods and the issues raised by the difference between litigation and arbitration, have ancient roots. As this article demonstrates, the fundamental philosophical questions we face every day in the dispute resolution field were also faced by Rabbis and Hebrew sages nearly 2,000 years ago. The debates of these sages and their opinions are reflected today in our attitudes and laws about dispute resolution.

I. The TORAH

The Bible (at this time after referred to by its Hebrew name —TORAH‖) contains one of the earliest legal codes. Throughout much of the TORAH, laws are prescribed and punishments are defined. Some of the laws prescribed are simple and ...from today's perspective...Self-evident (e.g. the Ten Commandments); others are more arcane and obscure. The Torah contains laws that are both societal (what we think of as —criminal —) and laws that are private (What we think of as —tortuous‖ and, in some case —commercial‖).

In the final book of the torah, Deuteronomy, mosses makes two long speeches to nation of Israel . The people‘s travel through the wilderness are nearing an end, and the Israelites are about to cross over the Promised Land. Moses‘ speeches in Deuteronomy are basically recapitulation of the laws recited earlier in the torah combined there with ominous injections that the laws must be strictly observed.

Not only does Moses recite the substantive laws themselves, he also speaks about the nation of Israel about resolution of disputes. Speaking about creation of a leadership structure of his people, Moses says:

I charged your magistrate at that time as follows,‖ Hear out your fellow men, and decide justly between any man and fellow Israelite or a strange. You shall not be partial in judgment: hear out low and high like. Fear no man, for judgment is God‘s. And any mater that is too difficult for you, you shall bring to me and I will hear it.

Moses‘ words seem basic laws were announced; judges were appointed. The judges‘ function was to decide dispute fairly through application of law. Complex cases can be brought before Moses himself, who would sit as a sort of Supreme Court. Correctness of the magistrates‘ rulings would be ensured through divine inspiration. Justice, impartiality and access to court are offered as guiding precepts but no alternative of the ―Magistrates‖ is offered.

II. THE TALMUD

The Talmud (the word means ―learning‖) was compiled between 1,600 and 2,000 years ago by rabbis in Jerusalem and Babylonia. Recorded over a period of four centuries, and combined with later-written commentary, the Talmud consists, in large part, of the studies and debates of Israel‘s leading scholars, predecessors of today‘s rabbis. The Talmud explores in a variety of ways the meaning of the Torah‘s ancient laws. Yet the Talmud was compiled many years after the Torah; the rabbis and the compilers of the Talmud were recording further details about the meaning of the Torah‘s laws.

In studying and expounding on the Torah and its laws, the rabbis in the Talmud also debated methods of dispute resolution. Just like courts and arbitrators today the rabbis of the Talmud

were faced with the question whether the ―laws‖ were to be applied strictly or whether a broader sense of ―Justice‖ and ―equity‖ should prevail.

Their answer is strikingly similar to our own modern attitudes about adjudication and arbitration.

*[*317] In the Tractate of the Talmud called ―Sanhedrin,‖ the rabbis discuss different approaches to dispute resolution. Which is more appropriate, they ask-- ―Judgment‖ based on the strict law, or the ―arbitration‖ of a ―compromise‖. It was taught….‖ once a case has been brought to court, it is forbidden to arbitrate a*

compromise. Not only is compromise forbidden, but whoever arbitrates a compromise is regarded as a sinner, for compromise necessarily involves a deviation from Torah law to the disadvantage of one of the litigants. And whoever praises one who arbitrates a compromise blasphemes God‖.

Rabbi Eliezer… explains: Rather than compromise, ―let the law cut through the mountain. Let even the most difficult case be decided according to the strict letter of the law, as it is said in Deuteronomy 1:17:Do not be afraid of any man, for the judgment is God's . And similarly Moses, who was the first to judge Israel according to the Torahlaw, would Say: ―let the law cut through the mountain‖.

But his brother Aaron, who was not a judge, loved peace and caused peace to reign between a man and his fellow man…Woven into this Talmudic discussion is a fundamental premise that remains with us today-- that arbitration involves the surrender of rights; it thus must be the product of consent.

Inherent in the ―surrender‖ premise is that there is a difference between the strict application of law in the courts and the less-strict approach used in arbitration. Put differently, ―rights‖ are at issue because of the substantive differences between the two approaches-differences that can act to the detriment of one of the parties.

*[*318] The wisdom of applying the letter of the law-and the divine interlocution that is assured in the Bible—is then cast into doubt by the reference to the contradictory philosophy*

of Moses' brother, Aaron. Aaron ,the Talmud tells us , had a different attitude toward the resolution of disputes.

While the details of Aaron's approach are not revealed in Torah or Talmud, the reference to Aaron appears to signal biblical legitimacy for an alternative approach to the resolution of disputes outside of the judicial system. As the High priest of Israel, Aaron knew the laws well, and he could have applied them as did Moses, but we are told that he chose not to do so.

It will not go un-noticed to those experienced in arbitration that Moses' brother Aaron is specifically identified as not being a judge. More important, however, is the fact that this Talmudic passage ends with the incursion of a new but logical goal for dispute resolution-the promotion of ―peace‖

Leaving for another day the question whether arbitration is in fact more likely (than is litigation) to promote peace, it must still be observed that the colloquy leaves the ultimate question unanswered—which approach is superior, that of Moses or that Aaron?

The Talmud next records a ruling on the desirability of an arbitrated compromise versus a litigated judgment, and ends with a not-unusual conundrum meant to inspire further thought: Rav said: the law is in accordance with the view of Rabbi Yehoshua ben korhah, that it is a mitzvah [a meritorious deed] for a court to impose a compromise….

[But] is it really so that Rav rules that a compromise is a mitzvah? Surely Rav Huna, who was a disciple of Rav, accepted his master's rulings, and whenever two people came before Rav Huna to have him adjudicate a dispute, he would ask them: ― Do you want me to adjudicate the case and tender a judgment or do you want me to arbitrate a compromise?‖ Now if Rav ruled that a compromise is a mitzvah, why did his pupil Rav Huna offer the litigants a choice between judgment and compromise?

The question the Talmud asks here lies at the heart of the debate over the benefits and drawbacks of alternative dispute resolution (―ADR‖)- which method is preferable? The Talmud's answer is that ―choice‖ is to be promoted, but that neither arbitration nor letter-of –the law judgment is so superior as to be preferred to the exclusion of the other.

*[*319] The next question might be: but why should the law promote a choice between a divinely-directed system and one that may act contrary to God's law? ADR —believers‖ may be content to rest their case with the citation to Aaron, though they are sure to add certain disbelief about the divine inspiration of judges.*

A principal goal of dispute resolution, the Talmud explains, is creating peace (—shalom‖) between the disputants:

... surely where there is judgment and adherence to the law, there is no peace between the two litigants. And where the litigation ends with

peace reigning between the two parties, there is no true judgment for to arrive at absolute justice, we must strictly follow the letter of the law, which is usually only in one party's favor. How then can there be a judgment which attains peace? You must say that this verse refers to compromise. And similarly, regarding King David, the verse states: —And David executed judgment and charity to all his people.‖ But surely where there is judgment and strict adherence to the law, parties, there is charity, or consideration given to the financial circumstances the two parties. And where there is charity , there is no judgment, for the law is one and the same for rich and poor. How then can there be a judgment which involves charity? You must say that this verse refers to compromise.

King David is venerated in Jewish lore as being unerring; the reference to verse from David, with its linkage of —judgment‖ and —charity,' provides the biblical (albeit post-mosaic) basis for promoting an arbitrated rather than strict legal resolution of disputes.

Those seeking rabbinic authority for a preference for arbitration can, however turn to another scholarly and authoritative work about the meaning of the Torah and Talmud. The —Shulchan Oruch‖ (literally the —prepared table‖) is a more-straightforward recapitulation of the Talmud. By the time of Shulchan Oruch (early 16th Century), the Talmudi —laws‖ and debates had become so complex that people Yearned for a simpler version to which they could turn for answers. The Shulchan Oruch thus tries to answer, in four well-organized volumes, the questions the Talmud asks.

The Shulchan Oruch, written by Rabbi Joseph caro, settles the judgment/ arbitration issue as follows: It is a meritorious deed to compromise. ―It is a mitzvah for the judge to ask the parties at the outset whether they want their dispute resolved according to the law or by the means of a compromise …‖

*[*320] There can be no doubt that , again, the main emphasis is on honoring choice. But now, the thrust is not simply about honoring the parties' choice—arbitration and compromise have not just been elevated to equal status with a court's strict judgment, arbitration is in a sense preferred. The judge must offer the parties a choice.*

The statement that the judge himself does a meritorious act by offering arbitration at the outset [12] is intended as a clear expression to the parties that the use of the arbitration alternative is sanctioned/encouraged. This passage from the Shulchan Oruch displays a certain judicial reluctance on the part of rabbis to apply the strict law.

Other rabbinic interpretations support the concept of preferring arbitration. For example, an older piece of writhing from the 12<th> century—that of Rabbi Moses ben Maimon (Maimonides or RAMBAM) interprets the Talmud as favoring arbitration. The promotion of ― peace‖ is the principal rationale offered. Like Rabbi Caro and the Shulchan Oruch, Maimonides preferred arbitration to letter-of the-law litigation.

But it can also be observed that the Mosaci preference for judgment according to the strict letter of law was derived from a sense that both the law and the decision-maker are divinely directed. But a corollary of that ―faith‖ is that unlike God (and perhaps Moses), humans are fallible, and that God does not necessarily intervene to assure the correctness of every judicial act.

The rabbis thus favor arbitration/compromise because it reduces the potential for grievous error. Put differently, a middle-ground solution reduces the adverse consequences of the judge being totally wrong; the potential for injustice is there by reduced-and justice is the first and foremost goal.

These biblical and rabbinic texts throughout stress the theme that all dispute resolution systems be fair and impartial, and driven by the need to do ―justice.‖ Whether in litigation or arbitration, the decision-maker must do ―justice.‖

*But the Talmud teaches that there is no presumption that strict application of law is necessarily more ―just‖ than an arbitrated, less-legal solution. Indeed, in the later [*321] writings, there is, surprisingly, a preference for the looser approach characterized by what we think of today as ADR.*

Next we will see how that preference continues, in remarkably similar form, in our (secular) law today. But before doing so, it important to note that the Talmud cautions that‖ the power of compromise is greater than the power of judgment, perhaps intended

as a warning to arbitrators that they must always act with utmost discretion and thoughtfulness, rather than cavalierly or capriciously.

III. TODAY

Arbitration law today very much reflects the Rabbinic and Talmudic views on dispute resolution. Any individual who is aggrieved has ready access to the courts, and a right to strict application of the law—including resort in complex cases to appellate authority. The courts, we know, will not modify or ignore legal rues in the name of compromise or peace, letting the proverbial chips fall where they may.

But our law also recognizes that if an agreement to arbitrate exists, the right to go to court and insist on strict application is surrendered. The Federal Arbitration Act (―FAA‖) Section 2, provides:

Validity, Irrevocability, and Enforcement of Agreements to Arbitrate: A written provision in any… contract… to settle by arbitration a controversy thereafter arising out of such contract… shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract.

Every state has a similar, if not identical, statute. There are, as well international treaties to the same effect.

And as was the case with the Talmud, once in arbitration, the parties have no right to insist on strict application of law.

Absent provision in the arbitration clause itself, and arbitrator is not bound by principles of substantive law or by rules of evidence. He may do justice as the sees it, applying his own sense of law and equity to the facts as the finds them to be and making an award reflecting the spirit rather than the latter of the agreement, even though the award exceeds the remedy requested by the parties. His award will not be vacated even though the court concludes that is interpretation of the agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law, unless it is violative of a strong public policy or is totally irrational, or exceed a specific enumerated limitation on his power.

*[*322] comparing the FAA and the Sliverman case with the Rabbinic discussion, one sees a modern judicial attitude identical to that of the Talmud. The agreement, i.e. ― choice,‖ is the main element. 18 once the choice is made to arbitrate, the parties enter into a different system and there is no turning back.*

The system described by the New York court of Appeals in silverman is just like the one the rabbis described in the Talud. The arbitrator has discretion to fashion a solution that the strict law might not support. The comparison of the cases and the centuries- old discussion by the sages reveals that the commonly-recited benefits of arbitration-an emphasis on equity over law, greater flexibility, virtual finality and, yes, the promotion of‖ peace,' go back a long, long way.

The silverman case's famous dicta, however, stands in contrast of sorts to the dicta of the United States Supreme Court in Mitsubish! Motors Corp. V Soler Chrysler Plymouth, Inc. In that case (involving international arbitration of issues arising under U.S. antitrust law) the court stated that by agreeing to arbitrate a… claim, a party does not forego the substantive rights afforded by [law]; it only submits to their resolution in an arbitral rather than a judicial, forum .― In a sense the Court is reminding arbitrators what the Talmud warned two millennia ago-that the ―power of compromise is greater than the power of law‖ that power must be exercised with the same degree of justice as is mandated by the law itself.

The author summarized his conclusion as follows;

These passages, now and old offer ―Sages'‖ advice for the arbitration community today

1. *Arbitrators are not judges, and arbitration is not meant to be a court of law;*

2. *Arbitrators should not apply the law in the same strict way that a judge does that goes for procedures and the rules of evidence as well; and*

3. *Arbitrators must never lose sight of the principle that their overriding obligation is to provide access to all who are aggrieved, to act impartially, and most of all-to do justice.*

According to Reddy, also, informal dispute resolution has long tradition in many of the World societies dating back to the 12th century in China, England and America.

However, 1970s law reform movement in USA had played a great role for the further development of the same. In USA in the middle of the 20th century, legal and academic communities began to have serious concerns about the pitfalls of increased litigations because, even though legislations of the time granted a broad range of rights and individual protection, the search for redress of those rights while they are infringed through legal system was becoming a complex exercise. Adjudication of disputes was characterized by the court congestion, high legal cost and waiting for long hours in courts.The emphasis of the court and other traditional forum was pronouncing rights and wrong. And naming winner and loser destroy almost any pre-existing relationships between the people involved.

The cost, the stresses and inaccessibility of ways to resolve conflict other than through the popular alternative of fight and flight caused people to drop out or to seek extreme techniques to make their points. There for against back drop of formal litigation, new methods of settling disputes had been emerging both in and out of the court.

The Roscoe Pound Conference in Saint Raul, Minnesota, (1976) is well known phenomenon in the history of growth of alternative dispute settlement mechanisms. The conference was summoned by a person named Warren Burger, a former Chief Justice of USA. It was a conference to discuss the causes of popular dissatisfaction with the administration of Justice at the time and to find new and better ways of dealing with disputes. In this conference academics, members of the judiciary and lawyers participated.

The Pound Conference served to spark the interest of legal establishment in alternative ways of dispute settlement. And a lot of changes had taken place on aftermath of the Pound Conference: rapid growth of techniques of settling disputes and emergency of new institution and professionals to use them.

After the Pound conference, the American Bar Association established a special committee on minor dispute, which has now become the special committee on dispute resolution. Law schools and schools of business offered some alternative dispute resolution courses as part of their curriculum. Insurance companies used ADR to handle claims with the growing demands of clients to resolve disputes though ADR mechanisms, law firms appointed ADR coordinators as a response. Troubled families who used to go to the court began to mediation. And following this trend a number of jurisdictions required divorcing couples to try mediation before the courts would resolve their dispute for them.

States become to treat ADR in their law .The American Congress in the late 1990 passed the Administrative Dispute Resolution Act, which requires the Federal Agencies to develop policies on the use of ADR, appoint ADR specialists and provide appropriate employees with training in ADR. In USA, the Civil Justice Reform Act was passed in 1990. It required all Federal district Court to create advisory Committees to consider ways of reducing the cost and delay of civil litigation, and directed these committees to consider the use of ADR to reduce cost and delay.

As ADR mechanisms are disseminated in many countries; countries developed innovative conflict management programs specific to their own cultures.

Apart domestic effort by each states to use ADR, the International Community also resolved to use ADR on the same fashion. The international community, for example, use Arbitration clauses in International Trade contracts so as to reduce the back drop of litigation in court. International Arbitrations may be either ad hock, specified by parties in their contracts and administered and conducted in a manner defined by them or institutional incorporating rules, procedures and administration of Arbitration Institutions. Such Arbitration Institutions include the International Chamber of Commerce (ICC), head quarter in Paris, London Court

International Arbitration (LCIA), The American Arbitration (A.A.A) and the International Center for Settlement of Dispute (ICSID), established by the World Bank in Washington, D.C. The other Arbitration centres have been developed by the United Nations Commission on International Trade laws (UNCITRAL) of uniform set of culturally neutral Arbitral Rules for use of on world basis. The UNCITRAL rules have achieved wide acceptance for private as well as quasi-public International Disputes. In chapter three and four you will see the historical development of ADR in Ethiopia and in the international sphere in detail.

1.4. Types of ADR

What types of ADR methods do you know? Can you mention them?

Types of ADR list cannot be exhaustive or final as there are various dispute resolution mechanisms other than court litigation and it is still evolving.

The types of Alternative Dispute Resolution, however, can be categorized in to three categories based on the procedures we follow in each dispute resolution mechanisms. These categories are formed by considering the kind of work product resulting from ADR and how the parties participate. The categories of ADR procedures are agreement, decision and advice.

Procedure of agreement- negotiation, mediation, facilitation and mini-trials are all procedures of agreement. The work product or result from these procedures is based on the agreement of those who take part. If there is no agreement, there is no outcome. Participants in ADR process of agreement are actively involved in working together to create an outcome that is superior to any outcome that they could individually create. Specific procedures of agreement includes; negotiation, mediation, facilitation, partnering and mini-trial.

Procedure of decision –Arbitration is dominant procedure of decision. The work product or result from this procedure is based on the decision of an outsider about how the dispute is to be resolved. The outsider‘s job is specifically to render that decision. Participants in this process may be collaboratively involved to design the process or to ensure its efficiency. However, when it comes to taking in the ultimate decision process, the

participants‘ roles are not collaborative but competitive and limited to putting forward facts and argument.

Procedure of Advice –neutral case evaluation or early neutral evaluation , non-binding arbitration , fact finding or investigation , and expert opinion are all procedures of advice; the work product or result from these procedures is intended to inform or advice the participants .

Apart from the above general classifications of ADR methods the following methods are widely known mechanisms in the spectrum. These are:

A) Self-help- Disputants may take matters in to their hands and attempt to resolve the situation themselves when they convince themselves that there is no other appropriate method to resolve it. This could involve physical confrontation or a strike.

B) Partnering -This is a conflict prevention mechanism rather than a remedial process. It is typically encountered in construction industry. In construction project the contractor, sub-contractor, architect, and other stake holders, agree that construction project will not stop during dispute resolution, regardless of the methods of dispute resolution they choose.

C) Hilo- Arbitration-Here the parties agree, before arbitration, on the minimum and maximum award. The arbitrators‘ award must fall with in these figures or it will be adjusted to fall with in the figures. Arbitrator may or may not know the limits, before he render the award.

D) Mini-trial-It is fact finding form of ADR. It involves conducting a trial –like hearing in advance of actual trial , usually in informal setting with a private presiding officer , privately retained _Jurors _ and some one role-playing the representative for the other side.

E) Early neutral evaluation-Where an independent third party evaluates the claims made by each side and issues an opinion –either on the likely out come or on a particular point of law.

F) Ombudsmen-Are impartial referees who adjudicate on complaints about public and private organization. Generally ombudsmen serve as a last resort when complaints can not be or are not resolved through the internal complaints procedure of the organization complained about.

G) Arb-Med –a sequence in which the parties first submit their case to arbitration . In this approach, the arbitrator makes and seals the arbitration decision before under taking mediatory efforts or before turning the dispute over to another impartial person who will mediate. If mediation fails, the parties will be bound by the then revealed arbitration award. The purported relative strengths and weakness of their case played out in the arbitration stage of the procedure, the parties will have a more realistic understanding of what would constitute a reasonable accommodation positions. Accordingly, they should be better able to reach a mediated settlement. That is why it is called Arb-Med .

H) MED-ARB- refers to the situation in which, by agreement or by law, negotiating parties submit to the intervention of mediation which will be followed by arbitration if an agreement is not reached. If parties do not reach a negotiated resolution of their difference, the issues can be submitted to arbitration for an imposed resolution. The

> assumption is that this will force each side to present a reasonable, attractive last offer – one that will be more attractive to arbitrator and, for that same reason, will be more likely to gain the other side‘s acceptance.

I) Negotiation - is a consensual bargaining process in which parties attempt to reach agreement on a disputed or potentially disputed matter.

J) Mediation –is a method of non-binding dispute resolution mechanism involving a neutral third party who tries to help the disputing parties reach agreeable solution.

K) Arbitration – means a process by which a tribunal other than a court decides a dispute between two or more parties under authority granted by the parties under an arbitration agreement. There might be also compulsory arbitration- with out the consent of disputing parties.

When ADR is thought there are most commonly known and applicable methods in the system. In the following sub-topics major ADR methods will be discussed with their respective peculiarities and their clear cut demarcation which makes them different from one to another.

1.5. Purpose of ADR (Comparative Advantage of ADR and Litigation)

What are the advantages of ADR?

The age-old complaints lodged against lawyers and the legal process has gained an amplified resonance in the cotemporary world community. The common conception is that judges and lawyers, the procedural rigor of justice and substantive incantation of legality, lay Jury and technical experts hurt more than they help. The recourse to legal actors and proceedings is cost , emotionally debilitating, and potentially counterproductive .It is to meant that now it is a common knowledge that existing justice system is not able to cope up with the ever increasing burden of civil and criminal litigation . The problem is not of a load alone. The deficiency lies in the adversarial nature of judicial process which is time consuming and more often procedure oriented. There is growing awareness that in the bulk of cases court action is not appropriate recourse for seeking justice.

Judicial process is set in motion by the action of an aggrieved party. Each party‘s case is presented before the judge by the advocators, who are expert in court craft, in straight jacket of rules of procedure and substantive law. The Judge perceived the dispute (or the issue involved) in the backdrop of known legal concepts , sifts evidence to arrive at the truth, hears arguments to determine as to how logically the parties stand in terms of applicable legal concepts and pronounce his verdict accordingly. The parties are bound by the verdict, at the peril of legal sanctions, if disobeyed. Represented by lawyers (especially in developed countries) the parties are kept at a distance not only from the judge but also) from each other. The end result is a win–lose litigation .Thus, the dispute is liquidated and justice done or that is what is professed. But the difference between the parties continue to subsist, the competing interest of the parties remain unsolved, inter-personal relationship of the parties becomes more hardened. The adversarial court does not aim at resolution of competing claims of member of the society. It aims at upholding the one and rejecting the other , leaving the conflict between the parties un solved .Thus, apart from the fact that recourse to justice through the court system is time consuming and inaccessible due to mounting arrears, the judicial process itself is not oriented for the adjudicating upon rights –liability relationships created under legal regimes pertaining to modern science and high technology because the subjective matter of the disputes arising from such relationship can be better understood in terms of scientific and technological concepts though disputes are stated in terms of usual legal concepts.

In its philosophical perception, ADR process is considered to be model in which the dispute resolution process is qualitatively distinct from judicial process. It is a process where disputes are settled with the assistance of a neutral third party generally of parties own choice: where the neutral is generally familiar with the nature of the dispute and the context in which such a dispute normally arise; where the proceeding are informal, devoid of procedural technicalities and are conducted, by and large, in the manner agreed by the parties; where the dispute is resolved expeditiously and with less expenses: where a decision making process aims at substantial justice, keeping in view the interests involved and the contextual realities. In substance the ADR process aims at rendering justice in the form and content which not only resolves the dispute but tends to resolve the conflict in relationship of the parties which has given rise to that dispute.

Having stating the above general description about the purposes of ADR in general, here under are specific purposes of ADR with their justifications.

A. Reduction of Cost and Time

One of motivations for ADR system is to reduce the cost and time involved in solving disputes. If a new dispute resolution system can reduce costs and achieve out comes that are just as good as those under previous system, it make the new system desirable. Law suits are expensive, some times the cost goes even the extent of making the victory of a party insignificant or exceeding of the amount of judgment .There are court fees, filling fees, lawyers‘ fees, and other costs. There would also be loses to be incurred by both litigants because of spending longer time in litigation that may not be covered by the courts awards. On the other hand, an ADR system can make it possible to use process that cost small fraction of the litigation, and yet produce as good or even better results. Mediation is usually designed to start and finish in one day. The disputants usually share the cost of the mediator. In this circumstance, therefore, the total cost of mediation is minimal as compared to the cost of litigation.

B. Improve or Maintain the Relationship

In situations where the disputants have an ongoing relation , ADR system allows them to work through their difficulties in a productive way that does not destroy their relationship. After acrimonious litigation, disputants rarely want to put the past behind them and work cooperatively. The dispute resolution system may provide process that will not leave people to work together angry and frustrated with either the result or the process itself. In the ADR process the disputants could rather learn information that will allow them to work more effectively in the future.

C. Satisfactory Outcome

Regardless of the process used, the solution must solve the problem that exists. ADR procedures tend involve the parties with the view to achieving settlement. ADR procedures create a formal setting to bring parties together for serious attempt at resolving a problem .A dispute resolution process must move parties towards workable, durable and easily implement able out come. ADR procedures help to afford chance that the parties can make real progress on the case and that the parties can communicate more fully and frankly through a third party.

D. Deal with Emotion

The ADR process will give disputants an out let to discuss their frustrations. They will get the chance of venting emotions in non-threatening environment. This will help the disputants be satisfied with the outcome. ADR provides for effective and neutral methods or factors for achieving maximum impact on the process, strategy, and tactics to words resolution. A disputant will be ready to deal with the issues when he or she is satisfied that other person has listened to his or her point of view.

E. Avoid Future Disputes

An ADR system can yield us techniques that can resolve disputes effectively and wit out damaging relationships. The process used for a dispute at hand can provide a frame work to deal with anticipated disputes .In the future or recurring disputes, the system may help to take advantage of the resolution in the past to avoid guidance for the future, and to learn from experience.

1.5. Demerits (Shortcomings) of Litigation

As traditional approach to resolve disputes, the major draw backs may be analyzed in various aspects. The following are the major ones:

A) Cost of Litigation

Law suits are expensive. There are legal fees, filling fees and cost that can be imposed against the losing disputant. There are costs for being away from daily work to attend court hearing and at this moment the employer increase cost. In some cases, too, the cost of trying the case may exceed the amount of the judgment.

B) Time

It takes time from the commencement of the law suit until a judgment at the trail. Even after the trial, the loosing disputant may appeal and it may take a good deal of time before final decision is rendered. The is also time that is needed for the implementation of the judgment

C) Emotional Cost

Litigation is an emotional process. It increases tension between the parties. Litigants consider, while they are out of court, what they have said; what they should have said; what they will say; how unfair the process; what they may come out under cross – examination; and the consequence of loosing.

D) Litigation is Public

The public has the right to attend court proceeding but in few confidential cases. The press report and comment on the proceeding might be dispersed through different Medias. On the other hand, the issues in the dispute may be confidential ones that the disputants do not want to share with others. Litigants may be embarrassed about the allegations made against them and may be made public regardless of whether they are true or not.

E) Absence of creative solutions

Judges are empowered to decide the issue before them according to the law, even if the solution to the issue is best fit to the other issue. Judges interpret the law relevant to the case and determine the case based on the legal rights of the parties. They are not permitted to

expand the list of possible options to see if the particular case would be best served by a solution that was not argued and that application of the law would not allow.

F) Little Opportunity for the Parties to Vent Frustration

In court litigation the opportunity for the parties to say what is in their minds and to express their views to each other is very little. Litigants can answer questions when the rules allow them to answer. There is no opportunity for them to talk about how the litigation has affected them, or to vent about what has occurred. Although there is discovery, indirect and cross-examination, there is no opportunity to ask the questions that the parties want to ask each other and to say what the parties want to say.

G) Unpredictability

In litigation, both sides argue the facts that they believe apply to the issue to support their positions. However, at the end, the judges will decide on the issue each side usually believed that his arguments and analysis is better than the other side‘s. However, the issue is unpredictable and is necessary for the judge to make a decision, which is binding. As a result a risk in going to trial and putting the decision in the hands of the judge. Besides there is no guarantee that the judge will always find the truth.

H) Expertise of Decision Maker

In trail, the court selects the judge. Moreover, the judge may or may not understand the unique attributes of the dispute. Judges may work hard to learn the law relevant to the case before them and do their best to make informed and reasoned decision. Nevertheless, they may lack the expertise in all area to properly address the merits of the claim being made.

I) Control over the Process

In litigation, the process is determined by procedural laws and by the judge, the disputants have no control over it. They are told when to sit, when to stand, when to speak, etc. they have no control who presents first and who follows, when the process at a day will finish.

J) Win/Lose

In court litigation, a judge must, determine the winner and the loser. There must be a loser in particular litigation. Therefore, litigation ends up in determining the winner and the loser; not in an agreement or will full disagreement.

K) Decisions are Imposed

Court decision is imposed on the loser against his /her expectation. People rarely like to have decision imposed on them. Most of the judgment debtors of the court judgments perceive it as extremely imposed and unjust. They consider themselves as loser. And even though judicial enforcement mechanisms can be used, mostly they attempt to avoid enforcement of this decision. on the other hand ,ADR mechanisms provides with process and procedures that would help disputing parties to fix the outcome before the end of the process or to be convinced with whatever outcome there may be no need of enforcing settlement agreements in negotiation and mediation.

L) Damage to Relation

Usually the end of litigation leads disputants to hate each other and their relationship is destroyed. The disputants may face difficulty to amend their relationship to the point where they can do business together and enter into future negotiation –they will take it not worth to enter in to contact with their former adversary.

1.6. Demerits of ADR

Of course, together with many advantages, ADR has been also criticized for some disadvantages. In order to get the out most advantages of the ADR, everybody needs to know the pitfalls of ADR so as to use court litigation if the latter would bring best result than the former in specific case.

Do you know the disadvantages of ADR? Can you mention them?

Different scholars approached the pitfalls of ADR from different ways: some of them specify common pitfalls of ADR methods and others on the other hand illustrate the short comings of each ADR methods. Here under are the common shortcomings of ADR methods and under chapter two there will be the discussion on the disadvantages of at least on each common ADR methods.

A) In balance of power

The benefit of voluntary negotiating agreement may be undermined where there is a serious imbalance of power between the parties –in effect , one party is acting less voluntarily than the other.

B) Lack of legal expertise

Where a dispute hinges a difficult point of law, an arbitrator may not have the required legal expertise to judge.

C) No system of precedent

There is no doctrine of precedent, and each case is judge on its merits, providing no real guidelines for future cases.

D) Enforcement

The decision not made by the court may be difficult to enforcement. Don‘t forget that other ADR scholars take easily enforcement of compromise in ADR process as one of the advantages of the system.