Overview of Alternative Dispute Resolution: A Primer for Judges and Administrators

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Introduction

This Overview of Alternative Dispute Resolution (ADR) is intended to serve as a practical introduction to the various mechanisms for resolving disputes between parties. It is designed to inform deliberations among judges, justice ministry officials, and administrators who are considering the possibility of adding new dispute resolution options to the traditional adjudicative model operative in their government-based court systems. This Overview provides some guidance on how to design and implement an expanded ADR program in an existing court system.

Leaders of all self-governing countries, regardless of their stage of development, seek to incorporate into their institutions of government a judicial function. They establish a framework of courts operated by the government and appoint individuals who meet the specified qualifications to serve as judges. The primary function of these judges is to resolve disputes in a civil manner based on the rule of law and subject to the authority delegated to them by the government. Because courts of law generally are perceived as the primary dispute resolution mechanisms in civil society, other forms of dispute resolution such as arbitration and mediation, two of the most popular, are known as ***alternative dispute resolution*** or ***ADR*** processes. In the past 30 years, the use of alternative dispute resolution in the court environment has evolved from what began as scattered experimental programs to become an essential component of many court systems throughout the world. Increasingly, court systems in countries at various stages of economic and political development are recognizing the functional efficiency of ADR as an alternative to the formal court adjudication process, and they are incorporating ADR programs to supplement the traditional dispute-resolution services they offer to their clientele. Virtually all leading court systems have integrated some form of ADR into their dispute resolution processes as a means of expediting case processing. Where disputes that are brought to courts can be resolved by less-costly and more efficient processes, courts may either require or urge the litigants to pursue ADR. The results in virtually all of these court systems have been positive for reasons explored in this Overview.

The Overview does not review all forms of ADR and their application to different types of disputes. It focuses on those forms that are commonly employed within the framework of court systems as alternatives to the formal legal process of adjudicating disputes. Part One of the Overview begins with a brief review of the three broad categories of dispute resolution processes: facilitative, evaluative, and adjudicatory. Part Two explores how governments and court systems provide access to ADR, including the advantages of having an ADR program within the larger organizational framework of the court system. It then reviews different approaches taken by court systems that have established court-annexed ADR systems. The Overview concludes with a summary review of the different types of ADR.

Part One -- Dispute Resolution Processes

Court-affiliated dispute resolution processes can be organized into three broad categories as set forth in the table below: Facilitative, Advisory, and Adjudicative.

Facilitative Processes	Advisory Processes	Adjudicative Processes
Facilitative Mediation	Evaluative Mediation	Court Adjudication
Conciliation	Neutral Evaluation	Binding Arbitration
	Non-Binding Arbitration	
	Court Mini-Trial	

1. ***Facilitative dispute resolution processes*** focus on assisting the parties to reach an agreement that settles their dispute in a manner that is mutually acceptable and fair. The role of the expert facilitator does not include assessing or evaluating the merits of the case or providing any type of judgment, whether preliminary or other. Rather, the facilitation expert assists the parties to reach their own settlement or to craft their own agreement in a variety of ways that might include:

- Help the parties to identify the core issues in the dispute that need to be resolved
- Guide the parties through a process that helps them to communicate their needs and requirements to each other in a cordial, respectful and objective manner
- Identify possible barriers to settlement of the dispute and work with the parties to eliminate them
- Work with the parties to identify the elements of what for them will be a successful solution

- Guide the negotiation process between the parties to ensure that it remains flexible, upbeat, and proactive
- Help to ensure that one party does not take undue advantage of the other in the negotiation process

A primary goal of the facilitation process is to complete the negotiations and to structure a settlement agreement that permits the parties to preserve a positive, trusting, and ongoing working professional relationship. To that extent, facilitative resolution can be an effective tool in resolving, for example, commercial disputes without destroying or undermining what typically are fundamentally strong, mutually useful, and long-standing associations between the parties. Facilitative processes are most useful in disputes in which the parties:

- Seek to avoid the investment of time and expense entailed by formal litigation;
- Understand the issues on which they disagree
- Appreciate the relative strengths and weaknesses of their side of the dispute
- Require a professional facilitator to help them negotiate a settlement agreement that is mutually acceptable to the parties
- Wish to preserve their existing professional relationship
- Do not require the services of a professional evaluator, arbitrator, or judge to adjudicate the dispute and resolve it independently of the parties

Facilitative processes also assist the parties to carefully analyze what their minimum requirements are before they will consider settlement negotiations. An expert facilitator will skillfully guide the parties through a negotiation process in which they mutually reduce their expectations and demands in order to achieve an amicable settlement. This may and frequently does require that the parties meet independently of each other during the process to discuss their options and flexibility, then return to the joint session. It also is not unusual for the facilitator to meet separately with one or both of the parties during the process for brief consultations and counseling.

Although the effectiveness of a professional facilitator is enhanced by technical expertise in the subject matter of the dispute, the key attributes are the skills necessary to:

- Establish a bond of trust, competence, and confidentiality with the parties;
- Stimulate the parties to communicate honestly and directly with each other;
- Ensure that the negotiations are fair and based on good faith expectations; and
- Assist the parties to focus both on short- and long-term goals and relationships.

2. ***Advisory dispute resolution processes*** focus on assisting the parties by providing professional evaluative expertise. In this process, a third-party expert hears each party describe its side of the dispute and asks for additional detail, as necessary, to understand the competing positions. The expert then analyses the claims represented by each side, and offers each parties an independent and objective assessment of the merits of its position. This assessment is non-binding, and it informs the parties' understanding of the relative strengths and weaknesses of their side of the dispute. Once aware of how an independent and objective third-party expert views the dispute and their claims, the parties often are more willing to engage in alternative dispute resolution, such as mediation or arbitration. The success of such efforts requires that the expert:

- Have sufficient expertise in the specialized subject matter to satisfy and guide the parties
- Conduct the inquiry in an open, objective, and respectful manner
- Ensure that the primary issues and evidence for each party are carefully reviewed and factored into the assessment
- Provide an assessment that is clear, well-reasoned, and persuasive
- Offer each party an objective review and analysis of the strong and weak points of its position

The primary goal of the advisory process is to provide the parties with a preliminary and independent third-party appraisal of which side in the dispute (i) has the stronger and more persuasive position, and, consequently, (ii) is likely to prevail if the matter is submitted to a judge for formal court proceedings. To that extent, the advisory process is more structured than the facilitative process and results in a preliminary but non-binding judgment whose primary purpose is to inform the parties of which has the stronger case and is more likely to prevail. Advisory processes are most useful in disputes in which the parties:

- Either do not appreciate or refuse to acknowledge the relative strengths and weaknesses of their position
- Are not yet prepared to negotiate or to discuss settlement

- Desire to have an independent and objective expert review the merits of their positions before they decide on what further dispute resolution action to take
- Wish to preserve their existing professional relationship
- Prefer to avoid the investment of time and expense entailed by formal litigation

Although the effectiveness of a professional evaluator is enhanced by facilitative expertise, the key skills of evaluators in advisory processes are:

- Capacity to cultivate a bond of trust, competence, and objectivity with each of the parties
- Capability to carefully listen to, understand, analyze, and appraise each party's position
- Ability to objectively and competently assess evidence offered by the parties
- Aptitude to review and synthesize specialized technical matters
- Facility to present the assessment of the parties' positions in a clear, persuasive, objective, and justifiable manner

3. ***Adjudicative Dispute Resolution Processes:*** Adjudicative processes focus on resolving disputes under the direction of a designated official who is empowered to review the dispute and to impose a binding and enforceable judgment on the parties. Of the three broad categories of dispute resolution processes, adjudicative processes are the least collaborative, most adversarial, and typically most costly in terms of time and expense required. Where the parties retain legal professionals such as barristers or advocates to represent them, the costs are commensurately higher. Adjudicative processes include:

   - Binding arbitration, in which the arbitral judgment issued by the arbitrator following the arbitration proceedings is enforceable and non-negotiable[1]
   - Court adjudication, in which a judge, acting under the authority of the state, issues a judgment following the court proceedings that is non-negotiable, enforceable under the laws of the state, and may be appealed to a higher court for review

When parties elect to pursue arbitration, they often jointly agree on the selection of the arbitrator who will hear the dispute. When they pursue adjudication in a court of law, they are excluded from the process of influencing or deciding which judge or panel of judges will be assigned to hear their dispute.[2] Increasingly, court systems rely on a random selection process, often computer-generated, for determining which judge or panel of judges will preside. Thus, the parties run the risk of having a judge or panel of judges assigned in whom they have less than full faith and confidence.

In the adjudicative process, the parties present their arguments, evidence, and witness testimony in formal proceedings that are supervised by a judge(s) or arbitrator. These proceedings are conducted according to procedural rules which govern the process. In a court of law where a judge presides over the dispute proceedings, these rules have the force of law, and violations of them can result in sanctions being imposed or in complaints being dismissed. In arbitration proceedings, application of the procedural rules is often relaxed to varying degrees, but such rules still prescribe how the process is to be conducted. Because of these procedural rules, arbitrators and judges in particular have considerably less technical flexibility in ***how*** they conduct the dispute resolution process than do dispute facilitators and advisors or evaluators.

At the conclusion of the proceedings, the judge or arbitrator completes the review and analysis of the positions presented by the parties and prepares a judgment. Apart from the arguments and evidence they submit during the proceedings, the

[1] In some states, the adjudicatory function of the government is authorized under law to accept petitions from parties for judicial review of arbitration judgments issued by private arbitrators. Such review often extends to disputes involving foreign parties such as multinational corporations commercially engaged with domestic companies. Increasingly, such disputes may involve highly complex technical issues such as sophisticated financial transactions which require the expertise of highly skilled and very specialized experts who are jointly selected by the parties to serve as the arbitrators. Where a domestic party in such states is dissatisfied or unhappy with the arbitration judgment, the multinational party risks having that judgment reviewed (i) by domestic judges who may have little, if any, training, experience, or competence in the complex subject matter at the core of the dispute, and (ii) on the basis of domestic statutory law which has not been updated to cover the types of issues in dispute. Where no relevant laws exist to guide judges, the parties risk having the arbitration judgment reviewed in a manner that stimulates judicial invention or second-guessing of what domestic law would or should provide if it were current and did cover such disputed issues.

[2] In some court systems where corruption is a factor in the judicial process, one or more of the parties may seek to influence the selection of a judge or judicial panel likely to be more sympathetic than others to their position by covertly offering cash or other material inducements or by political or other forms of persuasion or coercion.

parties are specifically excluded from any role in determining the outcome of the process or what the judgment provides. More so than with facilitative or advisory processes, adjudicative processes entail risks that the parties are not always able to anticipate. The elements of preparing the judgment include the following:

- The judge and, to a lesser extent the arbitrator, are constrained by the statutory laws that apply to the dispute
- The judge and, to a lesser extent the arbitrator, must interpret and apply those laws, drawing on higher-court precedent to the extent that their particular legal system permits, to the issues and the evidence with limited flexibility
- The authority of the judge and, to a lesser extent the arbitrator, to determine the outcome, assign responsibility, and impose sanctions, must proceed according to the procedural rules and laws that govern the relationships and interactions between the parties
- The final judgment frequently sides with one party at the cost of the other; one is deemed the winner and the other the loser
- Although appeals of judicial and arbitral judgments is possible, pursuing them almost always entails significant additional costs in time and expense

Because adjudicative processes often result in winners and losers, professional business or related relationships the parties may have enjoyed prior to adjudication can be harmed and sometimes destroyed. Adjudicative processes do not exist to maintain relationships; their primary purpose is to interpret and apply the law as fairly and objectively as possible, and relationships, commercial, professional, and otherwise, can be and often are a casualty of those processes.[3]

4. ***Hybrid Dispute Resolution Processes:*** The processes outlined above are not mutually exclusive. ADR experts frequently combine elements of these different processes as they seek to craft strategies and solutions that best fit the needs of the parties in their common pursuit of a successful resolution. Mediation, for example, frequently may include both facilitative and evaluative elements. On occasion, as is detailed later in this report, mediation may be combined with arbitration. The key to successful merging of these various processes rests with the expertise and experience of the ADR professionals. Where the individuals who are assisting the parties with ADR have insufficient expertise and experience, they not only are less likely to achieve success; their efforts also may result in negative consequences. Such consequences, instead of defusing the conflict and uniting the parties in a common purpose and agreement to move on, aggravate the relationship, increase the level of adversarial tension, and diminish the likelihood of resolving the dispute through alternatives to going to court.

Part Two -- Court-Affiliated versus Non-Affiliated ADR Programs

Governments differ from country to country, and sometimes within countries where federal and local governments co-exist, as to whether ADR programs should be:

- Annexed to the courts;
- Allowed to exist apart from the courts but remain within the larger framework of the institutions of government; or

[3] The general win-lose character of the formal adjudicative process is often mitigated by settlement agreements which the parties negotiate while their dispute is moving through the various stages of court proceedings. Such settlement agreements may be reached either with or without the assistance of the judge(s) assigned to the case or other judges serving informally as neutral settlement facilitators. Such settlements are broadly and sometimes enthusiastically encouraged by judge(s) assigned to the case for any of a variety of reasons that range from expediting case processing to avoiding the time and expense of trial proceedings, from facilitating a more satisfactory result for the parties to precluding oftentimes bitter confrontation over legal fine points that do little to address the underlying basis for the disagreement. Settlement of civil disputes during their sojourn through the formal adjudicative process is very common in the courts of the United States on both the state and federal levels. The criminal adjudicative process has its own mechanism for "settlement" proceedings during the adjudicative process; it is popularly referred to as "plea bargaining" where the prosecution engages in negotiations with the defendant to adjust the criminal charges in exchange for certain concessions including waiver of the right to trial proceedings. The resulting bargain is submitted to the presiding judge(s) for review and approval. Where the bargain is approved, the case is disposed of without a trial because the defendant pleads guilty to the adjusted charges and agrees to waive his or her right to trial. Civil settlements may or may not involve judicial review. On some occasions, a trial judge will carefully review the terms of the proposed settlement to ensure that the interests of both parties and, where appropriate, the public are adequately represented and protected. In some instances, the trial judge may require a formal hearing to review such concerns. A judge for the US District Court for the Southern District of New York in late October 2100 ordered the US Securities and Exchange Commission (SEC) and Citigroup to defend their recent settlement agreement . The agreement concluded the dispute that charged Citigroup with having misled its investors about a $1 billion loan that defaulted. The result left investors to bear the burden while Citigroup reaped $160 million in profits from trading and fees. The judge directed both parties to answer nine questions pertaining to the $285 million settlement. A principal issue raised by the judge is why the SEC imposed a $95 million penalty on Citigroup but imposed a $535 million penalty on Goldman Sachs in a a similar July 2010 suit. The judge also found fault with the reasoning behind the settlement and asked the parties prepare to defend their reasoning at the hearing he scheduled.

- Permitted to be established by the private sector where their adequacy and costs are subject to market, governmental, and/or other quality controls, such as standards imposed by an advocates' or bar association. For example, governments can indirectly control them by refusing to recognize and enforce the arbitral judgments or the mediated settlements they produce.

The three alternatives are not necessarily mutually-exclusive. A country may have a court system that has mediation programs annexed to it, and judges have the authority to refer to those programs cases they deem are ready or ***ripe*** for settlement. The same country also may have a quasi-independent arbitration center that is loosely overseen or regulated by the government and to which judges can refer cases that are suitable candidates for arbitration. For example, the government may require that all contracts that involve any of its official ministries, departments, or agencies include language requiring that any disputes that result from the execution of the contract be resolved through that arbitration center. The same country may permit certified and licensed professional mediators and arbitrators to offer their services on the open market. The government can exercise a certain level of regulatory control over such private ADR providers by limiting the extent to which any arbitral judgments or mediation agreements issued by them will be enforced in the courts of law or by law enforcement authorities. If the judgments and agreements are not enforceable, prospective clients of such services may be reluctant to utilize them.

In some instances, the court system may be directed by the legislative branch or the parliament to establish court-annexed ADR programs. The Congress of the United States, for example, as part of a broad review of the civil case processing efficiency of the federal trial courts in the 1990s, imposed a requirement that all of the trial-level or first-instance federal courts of general jurisdiction experiment with ADR programs and processes in an effort to reduce the costs and otherwise expedite the resolution of civil disputes subject to federal judicial authority. Virtually all 94 of the federal trial courts responded by establishing such programs.

In some countries, both the government and the court system may be strong advocates of ADR processes but leave the provision of ADR services largely or even exclusively to private providers. In the United Kingdom, for example, judges[4] in the Commercial Court of the Royal Courts of Justice actively promote the use of ADR to arbitrate or settle disputes where the parties are amenable. However, the court offers no in-house ADR options or programs, and it leaves to the parties the selection from among a number of different private ADR service providers. Among the most prominent of these are the London Court of International Arbitration and the Center for Effective Dispute Resolution.

Where an ADR program is attached to and under the oversight of the court system, such programs typically are considered as "court-sponsored" or "court-annexed." Although court-annexed programs operate quasi-independently of the court system, as will be explained below, the judges exercise program oversight to ensure quality control. Such programs operate under the protective authority of the court to which they are annexed. ADR services in these court-annexed programs may be offered by the active judges themselves under certain conditions and, in addition, by other qualified neutrals such as highly experienced attorneys, retired judges, or even non-legal technical specialists that are retained by the court on an as-needed basis. A key element in the success and credibility of these court-annexed systems is ensuring that all of those who serve in an ADR capacity have undergone (i) a minimum of forty hours of intensive certification training, including ethics, and (ii) that they complete a minimum number of hours of continuing ADR education on an annual basis as a condition of retaining their court certification. Because the court is in a position to exercise a level of quality control over the ADR program, judges generally are much more willing to treat any arbitral judgment or settlement agreement reached through the program as the equivalent of a court judgment and therefore subject to the court's enforcement authority. Another important element for litigants when contemplating whether to utilize a court-annexed program is that the performance of the neutrals in their court-deputized role typically is governed by a code of conduct or ethics with disciplinary sanctions, including loss of certification for certain violations, prescribed and enforced by the judges of the court to which the program is attached.

Part Three -- Mandatory ADR Programs versus Optional ADR Programs

Court systems differ on the question as to whether the parties should be ***required*** to engage in ADR. Some, such as Singapore's Subordinate Courts, take the position that imposing an ADR requirement forces the parties to evaluate the relative strengths and weaknesses of their positions early in the history of the case and before they have incurred significant expense. Parties in certain categories of cases are required to meet with a mediation judge at the commencement of a case to explore whether the dispute requires the attention of the court system or can be resolved more informally and at substantially less cost through mediation. Abu Dhabi requires parties in most civil cases to appear before a Settlement and Reconciliation Committee for a mediation session prior to registering a case with the civil or

[4] A judge of the Commercial Court may serve as a mediator in an effort to help settle a case, but such judicial mediations, according to Honorable Justice David Steel, who currently presides over the Court, are rare.

commercial courts. Parties retain the option of requesting a waiver if they acknowledge that mediation has been considered but refused. The courts of Australia, Singapore, and other countries also impose a mandatory ADR requirement in certain categories of cases. As the costs of operating and maintaining court systems continue to increase, budget-minded government and judicial leaders recognize the savings that increased reliance on ADR can produce, and they impose requirements upon litigants both to explore and to utilize ADR processes when (i) the circumstances of the case are appropriate, and (ii) the parties' access to justice is not compromised.

Research has shown that where there is no requirement to engage in ADR and where judges do not actively promote it, the parties are less likely to consider ADR at the beginning of the case, focusing more on assembling their evidence and arguments. As their costs in time and expense increase, their positions may harden and they will find it more difficult to consider ADR because of what they already have invested. Other court systems take the position that they do not have the authority to require the parties to engage in ADR or that the parties are likely to already have considered and rejected ADR before registering their case with the court.

Advanced best-practice court systems recognize that ADR programs have the potential to reduce court caseloads, conserve judicial time, and lower not only the expenses of the parties but, in addition, the general operating costs of the judicial system. They seek to stimulate the use of ADR in a manner that maximizes efficiency but preserves the rights of the parties to have their dispute resolved in a court of law. To that end, such court systems authorize their judges to exercise considerable discretion when determining how much pressure to place on the parties to engage in ADR. That discretion ranges from suggesting or advising the parties to consider ADR to directly ordering the parties to engage in ADR in good faith and to do so in a limited time frame. In the federal courts of the United States, for example, first-instance judges, when it appears to them that a case before them is ready or ***ripe*** for settlement, frequently will direct the parties to participate in a settlement conference. These settlement conferences are conducted by assistant or magistrate judges who work with the parties to explore whether the dispute can be settled without further court proceedings.

The attitude toward court-annexed ADR programs of the barristers, advocates, or attorneys who represent parties in court proceedings is not always positive, particularly when such programs are first introduced. Many initially view the use of ADR, with its potential to dramatically reduce time spent in court, as threatening their livelihood by reducing the amount of work and the time frame over which they are able to charge their clients. As a consequence, they may not be enthusiastic about advising their clients to pursue ADR as a less-costly and more expedient way of resolving their disputes. That approach appears to be on the decline. A growing trend among bar associations is to encourage their members to discuss ADR with their clients. Some, including those in a number of the states of the United States, have included provisions in their codes of professional conduct advising members that they ***should*** discuss ADR options with their clients. An emerging trend that is likely to spread is imposing a requirement that they ***shall*** do so in the interests of diminishing the costs in time and expense to their clients of seeking justice.

Part Four – Should ADR be available only prior to registering a case in court

When a court system decides to establish a court-annexed ADR program, another question is when or at what point in the progression of the dispute within the court system should ADR first be made available to the parties? Should parties have the option of pursuing ADR options, such as evaluation or mediation, before they register a case with the court? Or should they first register the case and be required to disclose to each other information and evidence about the relative strengths of their case before they pursue ADR? Court systems differ in their response to such issues, although all support the general principle that the ADR intervention should begin earlier rather than later in that progression.

Some court systems, including those of the United Arab Emirates, require parties to consider mediation prior to case registration in the interests of avoiding having to go to court at all. To encourage the parties to pursue pre-registration ADR, the government agrees to pay the costs of the ADR service so the parties incur no charges, a strong incentive for parties such as small businesses with modest income. The objective is to assist the parties to resolve their disputes before they even register the case, thus (i) avoiding altogether the expense of fees charged by the court at the time of filing and by the attorney, and (ii) minimizing the loss of valuable time in resolving the case. If the pre-registration ADR effort is unsuccessful, or if the parties certify that ADR is not a viable option, the case is registered, and the dispute is decided by a judge or panel of judges in the course of formal court proceedings.

Other systems prefer to wait until after the case has been registered with the court and the parties have some understanding of the strength of each other's case. In many cases, one or more of the parties simply overestimate the relative strength of their case and underestimate that of their opponent, an almost natural tendency. Such parties are less likely to agree to engage in ADR proceedings because they assume they are going to prevail against their opponent. Only after the case is registered with the court are they able, by reviewing the arguments and evidence of their opponents,

to determine whether their case in fact is as strong as they assumed it is. Where a party does determine that the other party has a strong case against it, that party is likely to be more inclined to enter into an ADR process to resolve the dispute. Post-case registration ADR may be preferred by parties in complex commercial cases where the stakes may be high and the parties may first want to learn about the relative strength of their case vis-a-vis that of the other party. They do so by examining the documents and arguments filed by the other party with the court.

More progressive court systems establish ADR programs that offer both options – the parties may pursue ADR either pre- or post-registration depending on factors such as the relative simplicity or complexity of the case and how much they know about the strength of the opposing party's position. To facilitate prompt case resolution, progressive courts take a proactive approach. They may require that parties in more routine types of civil cases involving relative few and simple issues meet with a mediation judge prior to any court hearing. After a preliminary evaluation of the case, the judge shares with the parties his or her objective assessment of the merits of the dispute and may work with them to craft a settlement agreement which has the force in law of a court judgment. Alternatively, parties to more complex cases that may involve multiple plaintiffs or defendants may not be in position to adequately assess the relative strengths and weaknesses of their side of the dispute prior to court proceedings. Only after the case has been registered and they have had the opportunity through preliminary hearings and the exchange of evidentiary documents to assess the strength of the opposing party's side of the dispute may they be willing to consider ADR. Although court-sponsored ADR programs which offer both options require more time and effort to administer, they respond more adequately to the needs of both types of parties – those who are prepared to consider settling the case before going to court ***and*** those who prefer to wait until they have a better idea of how strong or how weak their case may be.

Part Five -- The Multi-Door Approach to Court-Annexed ADR Programs

More advanced court systems recognize that the sources of disputes that are brought to them for resolution vary widely not only in the substance of the dispute but, in addition, the motivation for bringing the dispute to court. The parties may be motivated by:

- A desire for justice
- The need for an apology from the other party
- The demand for admission of culpability from the other party
- The need for an award for damages to recover from a business loss
- A desire for revenge for harm suffered
- The need for a civil solution with the intent of preserving the relationship
- The need for a clarification of duties and responsibilities under the law

This list is not exhaustive. Human emotion and motivation extend over an expansive range and manifest themselves along a scale that extends from sudden impulse to carefully calculated design. Advanced court systems recognize that because (i) the substance of civil disputes and the motivation that sparks them vary broadly, and (ii) effective responses to them require diverse types of intervention, formal court proceedings are not the most effective means for resolving all or even most of them. Although formal court proceedings may be the ideal means for resolving certain types of disputes, they may be entirely inappropriate for other types of disputes. To respond to the public's need for a ***variety*** of civil and commercial dispute resolution services, advanced court systems in large metropolitan areas have reinvented themselves by implementing what are known as ***multi-door dispute-resolution*** programs and services. Parties who come to these courts for assistance are offered a variety or menu of different dispute resolution options from which they can select those most likely to help them solve their dispute in as little time and with as little expense as possible. ***These multiple options provide litigants with a broad range of alternatives; they reflect the new business model for innovative court systems which seek to serve their clientele across a broad spectrum of dispute-resolution needs.*** We already have discussed above in Part One the three broad categories of dispute-resolution options: facilitative, advisory, and adjudicative. Court-sponsored multi-door dispute resolution programs offer options in all three categories. The types of dispute resolution options typically available in a first-instance multi-door court are as follows:

1. **Mediation --** Multi-door programs all offer one or more forms of mediation where a trained and certified mediator assists the parties in the process of negotiating a settlement agreement that they voluntarily work together to achieve and jointly agree to implement. Traditional mediation is primarily facilitative. However, it also can include evaluative elements where:

    - The facilitator is a judge, experienced legal professional, or technical expert with specialized knowledge in the subject matter area of the dispute, and

- The parties request that the facilitator provide a professional assessment of their position on one or more of the issues in the dispute

Some multi-door systems offer a newer form of mediation conceived in the mid-1990s known as ***transformative*** mediation. It is an ADR process in which the parties proactively seek not only to preserve but to transform their existing relationship as they jointly resolve the dispute. In the transformative mediation process, each party strives to achieve a greater understanding and recognition of the other parties' values, needs, interests, and objectives. The motivation behind transformative mediation is that the parties must take the dispute-resolution initiative largely on their own. They rely less on the mediator as a facilitator and/or evaluator and more on themselves. The parties thereby empower each other to take responsibility for the dispute and to resolve it in a manner that, ideally, will diminish the likelihood of future disputes and result in improved and more productive relationships between them. The role of the transformative mediator is to support this process of mutual acknowledgement, empowerment, and improved or transformed relationships. It requires a special level of commitment and, to that extent, has limited appeal to some parties.

2. **Arbitration --** Multi-door programs typically offer one or more forms of arbitration as an ADR option. Arbitration, as detailed above, is the form of ADR that most closely approaches the court adjudication function in which a judge (i) permits each party to present its arguments and evidence, then (ii) prepares a judgment that describes which of the parties prevailed, why that party prevailed, and what the consequences are for the other parties. In arbitration, a similar model is followed with a professional arbitrator listening to each party present its side of the case, then preparing an arbitral judgment. In the arbitration process, the strict rules that govern court processes are relaxed somewhat, but arbitration remains one of the most formal of the ADR processes. The parties do not actively participate in evaluating their respective positions; nor do they participate in crafting the judgment. Those functions rest with the arbitrator. Where arbitration does differ from formal court adjudication is that the parties jointly select who will serve as their arbitrator, and most programs permit the parties to work with the arbitrator to negotiate what rules and procedures will be applicable to the process.

Arbitration falls into two broad categories: non-binding and binding. In non-binding arbitration, the parties agree to proceed with arbitration but decline to be bound by the judgment that issues from it. In non-binding arbitration, the parties seek an independent third-party evaluation and analysis of their case with a judgment as to which party prevailed. The non-binding judgment informs their decision as to whether to (i) accept the judgment, (ii) proceed with a full-fledged court proceeding, or (iii) opt for mediation, settlement, or some other form of dispute resolution.

Binding arbitration more closely approximates court-based adjudication. When two or more parties agree to participate in binding arbitration, they commit to abide by the judgment issued by the arbitrator whether or not it is in their favor. Parties which seek binding arbitration do so with the expectation that the resulting judgment will have legal status in the domicile where it is issued, that it will be enforceable under the authority of that domicile, and that the judicial authority in that domicile will not countermand, modify, or otherwise interfere with or intervene in the enforcement of the terms of the judgment. Contracts between commercial entities and, increasingly, between service providers and individuals, typically specify that any disputes resulting from the contract must be resolved through binding arbitration. This requirement reflects the preference of the commercial and service-provider communities for binding arbitration over court adjudication which typically takes much more time and involves greater expense. At the same time, it reflects their interest in reaching a final resolution to the dispute so they can minimize its distracting impact on their business operations and activities.

Although private arbitration originally provided a much less-expensive alternative to taking a dispute to court, the expense of professional private-sector arbitration services has increased dramatically in the past 20 years. As a consequence, the use of such services can be prohibitively expensive for small- and medium-sized businesses with limited resources. Multi-door courts that offer arbitration services at a more reasonable cost can play an important role for the small business community by making arbitration, whether binding or non-binding, available on the basis of a sliding-scale fee structure or at a cost that is subsidized by the government. Some governments willingly provide financial support for court-annexed arbitration programs because they recognize that doing so diminishes the number of disputes that will be subject to the costly not only to the litigants but, in addition, to the government, and often lengthy court adjudication process.

3. **Mediation/Arbitration or Med/Arb** -- Med-Arb is a hybrid ADR tool that combines the benefit of facilitating a settlement through mediation with the option, if required, of obtaining a final judgment. A typical med-arb session begins with mediation where the parties, with the assistance of a facilitator/ advisor, jointly seek to negotiate a settlement. If the parties are unable to reach agreement, they then proceed to arbitration. The arbitration session may be handled either by the mediator who shifts roles and assumes the function of an arbitrator or by a separate arbitrator.

There is an obvious advantage to having one professional handle both roles because the mediation will have provided important information about the dispute for the mediator/arbitrator that will reduce the time the parties need to present their respective positions. Depending on the arrangements, the mediator-arbitrator may be able to render an award based on what transpired during the mediation phase. In other cases, the mediator-arbitrator may require additional sworn testimony, documentary evidence, legal arguments, or memoranda/briefs.

Some parties, however, may prefer a separate arbitrator without prior knowledge of the dispute or familiarity with the parties to hear their respective positions and render a final and binding decision. Whatever specific arrangement the parties elect, utilizing med-arb ensures parties who are uncertain as to whether mediation will be successful that at the conclusion of the process, a final determination will have been reached.

4. **Early Neutral Evaluation (ENE)** – ENE is an advisory process. Its purpose is to intervene as early as possible in the progress of a case by evaluating the major issues in a summary proceeding and rendering a non-binding advisory judgment as to how a court might rule. When the parties select ENE, they meet with a trained and certified neutral evaluator with professional expertise in the area of the dispute. Each party then summarizes the key elements of its position in one or more sessions at which all parties and their attorneys are present. After the parties have concluded, the evaluator assesses the strengths and weaknesses of each party's position; reviews areas of agreement between the parties; sets forth the issues and matters over which they disagree; and provides a non-binding assessment of the merits of the case.

ENE is designed to provide the parties with an early professional assessment of the dispute and the strength and weaknesses of their respective positions. Although the assessment is non-binding, many parties view it as indicative of how a judge might rule. Because the assessment is developed by an independent and objective evaluator, it encourages the parties to consider settlement much earlier in the process than they otherwise would. ENE has proven to be an effective technique for assisting the parties to better assess the value of their respective sides in the dispute and stimulating them to resolve their differences through ADR instead of the more costly and lengthy court adjudication process.

5. **Court Mini-Proceeding** -- The court mini-proceeding or mini-trial is a flexible, non-binding evaluative process. It typically is reserved for large and complex disputes. Mini-proceedings are scheduled early in the case adjudication process and usually conducted in a formal setting, such as a courtroom or hearing room. A judge or non-judicial neutral with subject matter expertise and relevant legal experience presides over the proceedings which typically require one to two days. Each party presents a summary of its primary issues, arguments, and evidence. Where the monetary value of the dispute is high, senior executives representing the corporate interests of the parties and with the authority to make settlement commitments will be in attendance. The hearing is informal, does not include witnesses, and is conducted under a less-rigorous version of court rules that govern evidence and procedure. In common law jurisdictions, this mini-trial may include a jury whose purpose is to assess and evaluate the facts of the case. At the conclusion of the hearing and the assessment of the relative strengths and weaknesses of each side's position, the client representatives meet, with or without the judge or neutral expert being present, to review the relative strengths and weaknesses of their case and to negotiate a settlement. The parties may request that the judge or neutral expert assist them by facilitating the settlement discussions or by issuing a non-binding advisory opinion. If the negotiation discussions fail, the parties may pursue arbitration or have the dispute adjudicated through formal court proceedings.

6. **Judge-Hosted Settlement Conferences --** Another form of ADR that can be either facilitative or evaluative – or sometimes both -- is the settlement conference presided over by a judge. Courts in which this option frequently is used will designate one of the judges – often an older, semi-retired trial judge or an assistant or magistrate judge – as the settlement judge. Other courts utilize junior-level judges or registrars to conduct these conferences. The process is as follows. As a court case progresses, the presiding judge or panel of judges may determine that the parties are ready to discuss settlement rather than participate in additional hearings. Alternatively, the parties may request a settlement conference on their own. The presiding judge will refer the case to the settlement judge or another judge to assist the parties in their settlement negotiations. During the settlement conference, the judge uses mediation techniques – facilitative and evaluative -- to improve communication among the parties, inquire about the issues in dispute, probe barriers to settlement, and assist in formulating resolutions.

Such conferences may be arranged at any time while a case is active until just before the final hearing or the trial. It is not unusual for cases that have already been through numerous hearings to suddenly settle as a result of the settlement conference. The participating judges carefully avoid siding with either party during these conferences. Their function is to help the parties to communicate with each other, to narrow the differences between them, and to consider the benefits of

settling the dispute on their own terms rather than waiting for the presiding judge to issue a final judgment. If the settlement effort fails and the case is returned to the formal trial calendar, any record of the settlement proceedings remains confidential and cannot be divulged to the assigned trial court judge.

7. **Settlement Week --** Some state and a few federal courts in the U.S. offer what is referred to as ***Settlement Week***. During a settlement week, a court suspends normal case-processing activity and, with the assistance of members of bar associations and volunteer lawyers, devotes itself to resolving backlogged civil and commercial cases that have been pending for an extended time. Mediation is the primary ADR option utilized by courts during a typical settlement week. Experienced volunteer lawyers selected and certified by the court conduct mediations in courtrooms, conference rooms and other areas of the courthouse. Sessions may involve several hours; additional sessions may be scheduled as needed. Unresolved cases return to the court's docket for adjudication.

In additional to the options listed above, there are other lesser-known local variations of ADR methods and practices that multi-door court systems make available to parties to facilitate resolution of their disputes. Some multi-door courts, in addition to a menu of standard ADR options, go one step further to offer parties the alternative of a customized ADR process specifically tailored to their particular requirements. Such a customized process is designed by experts in the court system's ADR department collaborating jointly with the parties.

In designing a multi-door system, it is important to bear in mind that the success of the multi-door approach lies ***less*** in the number of options a court system makes available and ***more*** in the qualifications, experience, and competence of the professional neutrals on whom those systems rely to manage and conduct their ADR programs. The other key factor is having experts in the court system ADR department who are capable of counseling with the parties and assisting them to determine which of the ADR options offered by the multi-door program are best suited for the type of dispute in which they are involved. The most effective multi-door systems are those which are carefully conceived and designed, incrementally constructed, and staffed by highly qualified candidates. Ideally, a court system aspiring to offer the multi-door approach will begin with the basic options such as mediation and arbitration, ensuring that the professionals who work with the parties in those capacities are well trained and carefully vetted. Over time, as the professional legal community and the public come to trust and have confidence in the capacity of the court system to deliver effective ADR service through these basic options, the court system can add additional options, taking due care at each stage to ensure that qualified professionals will be available to provide outstanding service.

Part Six -- Use of ADR at the Second-Instance or Intermediate Appellate Level

Court-annexed ADR programs are primarily used at the first-instance level. Increasingly, however, court-based mediation programs are being implemented at the second-instance or intermediate appeals levels. Select intermediate appeals courts in the U.S. began to experiment with mediation in the 1980s. By 2006, use of them had expanded to all of the appellate-level federal courts and to 23 appellate-level courts of the 50 state-based court systems. Statistically, they have achieved an overall success rate of 50%. Select appellate courts in the U.K. began to experiment with mediation in the mid-1990s; in the past 15 years, use of mediation has expanded to include most of them. In the UK, however, the mediation service providers are affiliated with non-profit or commercial organizations rather than court-annexed programs. Parties may face sanctions if they refuse to accommodate a request by the opposing party to engage in mediation. The Chinese courts of appeals have traditionally offered mediation. Appellate mediation also is offered through court-annexed programs in Singapore and, to a lesser extent, in Hong Kong. Australia's intermediate appeals courts began to utilize mediation in the late 1990s and now have well-developed programs. In Europe, by contrast, the use of appellate-level mediation has been more sporadic and less developed but is gradually increasing.

Generally, court-annexed appellate mediation programs focus on facilitative mediation. The parties already have completed the rigorous and exhaustive court-adjudication process, and they typically are not interested in additional expert evaluation of their respective positions. Having already invested significant time and expense, the parties recognize that the appellate process will only further postpone the final resolution of the dispute at substantial additional costs in time and expense. This is particularly true in civil law jurisdictions which, such as Abu Dhabi, provide the parties with the equivalent of a new full-length or ***de novo*** court proceeding, including the introduction of new evidence. With the assistance of a skilled ADR facilitator, the parties have the option of (i) substantially reducing the investment of additional time and expense, and (ii) reaching a settlement agreement to which all are able to contribute. This is particularly important where the parties recognize the need to rebuild and resume their business relationship for future mutual benefit.

Many court-annexed appellate mediation programs offer the parties the choice of working with in-house attorneys who have been trained in and equipped with facilitation skills or outside legal facilitation experts. An increasing number of appeals courts, in an effort to diminish the sheer increase in the number of appeals ***require*** parties whose cases seem well-suited for mediation to participate in mandatory pre-argument conferences that explore settlement possibilities.

Although some appellate programs focus exclusively on settling cases, others also address case management and procedural issues designed to minimize the time and expense required if the parties are determined to proceed with the formal appeal.

As an added incentive for the parties, many of these appellate court-sponsored programs are made available to the parties at no expense to them. The providing court absorbs the costs of providing the service. Studies have shown that the cost to the courts of covering the expense of appellate mediation programs are small compared with the significant savings in judicial and staff time that are achieved when cases are successfully mediated.

Suggested Reading for Additional Information on ADR

The broad topic of alternative dispute resolution has generated thousands of articles, guides, manuals, and other resources with commensurate variations in quality, applicability, and practicality. Many are accessible online. For IJCA readers who are interested in learning more, below is a short list of select resources. Many others are easily accessible via online searches under various topics. Be advised that the popularity of ADR has spawned thousands of ADR service providers, many of whom have developed materials that are available online under the guise of manuals and guides whose primary function is to market their services rather than to inform readers' understanding of ADR processes, notwithstanding their titles.

- "Early Neutral Evaluation or Mediation: When Might ENE Deliver More Value," Wayne D. Brazil, *Dispute Resolution Magazine,* Fall 2007, pp. 10-15. Accessible at http://berncojury.nmcourts.gov/Brazil,%20Early%20Neutral%20Evaluation%20or%20Mediation.pdf
- *Alternative Dispute Resolution Manual: Implementing Commercial Mediation,* Lukasz Rozdeiczer and Aljendro Alvarez de la Campa International Finance Corporation, The World Bank Group, November 2006 Accessible at http://rru.worldbank.org/Documents/Toolkits/adr/adr_fulltoolkit.pdf
- *Alternative Dispute Resolution Practitioners' Guide,* Technical Publication Series, Center for Democracy and Governance, United States Agency for International Development, March 1998. Accessible at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacb895.pdf
- Federal Judicial Center Directions Alternative Dispute Resolution Issue: A series of articles of varying usefulness on different aspects of ADR from a U.S. federal courts perspective. Although some of the articles are dated, overall the collection provides some useful information. Issue accessible at: http://www.fjc.gov/public/pdf.nsf/lookup/direct07.pdf/$file/direct07.pdf
- *Civil Court Mediation Service Manual,* Civil Justice Council, Judicial Studies Board, Her Majesty's Courts Service, Version 3 – February 2009. Accessible at http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/civil_court_mediation_service_manual_v3_mar09.pdf
- *The Handbook of Dispute Resolution,* Michael L. Moffitt and Robert C. Bordone, Editors, Project on Negotiation at Harvard Law School, Jossey-Bass Publishers, August 16, 2005. Available in libraries, bookstores, and Amazon.com