ALTERNATE DISPUTE RESOLUTION

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The views expressed by speakers or contributors in this book do not necessarily reflect the opinion of the Institute of Cost and Management Accountants of Pakistan nor can the Institute be, in any way, held responsible for them.

Foreword

It gives me great pleasure to introduce and present this booklet containing thought-provoking views, expert comments and worth-sharing ideas on the relatively new but highly relevant concept of Alternate Dispute Resolution (ADR).

ADR mechanism has been introduced in Pakistan only recently for resolving tax - related disputes. Like most new initiatives, the introduction of this system too has given rise to a number of searching questions in the minds of taxpayers and professionals.

The Institute of Cost and Management Accountants of Pakistan recently organized a one-day workshop. The participants included prominent personalities from academia, judiciary, regulatory agencies, the government, accounting bodies, financial sector and journalism. To encourage honest expression of views and candid discussion, the workshop was kept a closed door affair. The participants spoke on all aspects of ADR, highlighted the philosophy behind it, analyzed its nature, discussed the proceeding process, highlighted the professional ethics involved and deliberated upon other allied dimensions. Presence among the participants of the representatives of regulatory agencies and the government signified their tacit support to this professional research venture of the Institute.

The booklet in your hands brings to you the proceedings of the workshop based on the transcription of the presentations made and viewpoints expressed by various multi-discipline professionals. Arranging a forum for discussion and exchange of views among experts of diversified backgrounds on an important subject of high topical relevance was a research undertaking of the Institute which, though modest, will undoubtedly help promote the concept of Alternate Dispute Resolution in Pakistan.

I wish to place on record my deep appreciation for Mr. Qaisar Mufti, Chairman Research & Technical Committee, for having thought of bringing out a booklet on the vital subject of Alternate Dispute Resolution on the basis of the workshop's deliberations. I personally know that he has spent many restless days and sleepless nights for this arduous work. His labour will be more than fully rewarded if the professionals, scholars, legal experts, government departments, professional bodies and students find this to be a useful reference document.

My thanks are also due to the team of ICMAP's Research Department which has put in strenuous efforts to make this a successful undertaking.

Muhammad Rafi, FCMA

President - ICMAP

8th September, 2005

From Chairman Research & Technical Committee

It gives me immense pleasure to present to you this booklet on “Alternate Dispute Resolution”, which encompasses the transcribed speeches and presentations, made by professionals and legal experts during the ADR workshop held in April this year.

I am highly grateful to Justice Saiduzzaman Siddiqui, former Chief Justice of Pakistan, for accepting my invitation to conduct the proceedings of the workshop.

I must acknowledge the contribution of all speakers and participants of the workshop in providing us useful input for the booklet.

I would like to place on record my deep appreciation for the valuable contribution made by Mr. Noor Mohammad, FCMA, Coordinator, Mr. Kamaluddin, FCMA, Director Research and Mr. Shamimuddin A. Zuberi, Director Internal Audit, in brining out this important booklet.

I would be failing in my duty if I do not mention the services rendered by Ms. Ghazala Younus, Senior Deputy Director Secretariat, Mr. Kamran Jamil, Deputy Director CRD, Mr. Shahid Anwar, Deputy Director Research and Mr. Jamal Qureshi, Advocate. They deserve my sincere thanks for putting in their best efforts for brining out this publication.

Qaisar Mufti

Chairman

Research & Technical Committee, ICMAP

8th September, 2005

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Introduction

The Institute of Cost and Management Accountants of Pakistan (ICMAP) organised a multi-discipline workshop on the Alternate Dispute Resolution (ADR) system on April 09, 2005, at the Institute's Head Office in Karachi. The purpose of the workshop was to analyse, synthesise and highlight the philosophy, process of proceedings, professional ethics and allied dimensions of the ADR system.

Alternate (or Alternative) Dispute Resolution is a generic term. It connotes any method of resolving disputes between parties through any mode other than litigation in the court of law. It aims at out-of-court settlement of disputes through compromise.

There are several recognised ADR procedures of which negotiation is the most common which seeks involvement of the parties themselves to make creative efforts to resolve the dispute. Other procedures adopted for resolving disputes outside the court include mediation, conciliation, arbitration and neutral evaluation etc.

Following the advancement of national and international business over the years, commercial negotiations in the courts of law involving government agencies increased substantially, throughout the world, exposing the inability of the courts to provide speedy justice which in turn delayed justice in other cases as well.

In the 1970s, the developed countries thought of finding ways and means to adjucate outside the court disputes, between citizens and governments as well as between nations and multinational companies, and also between disputing persons and companies. Such mode of resolving disputes outside the court has, in fact, developed so much as a subject of law after the 70s, that it has become a specialised field for the legal profession in the developed countries. ADR is now an established method to settle disputes between the litigants outside the court, and is now inserted in every statute dealing with civil disputes. Alternate Dispute Resolution Acts have been promulgated in a number of developed countries and many countries have inserted provisions to this effect in their various statutes. Such provisions of law (mediation) are now popularly termed as ADR.

The ADR system carries a number of advantages. The most important of these can be identified as under:

- In the court, disputes between the parties are adjudicated by a judge or different judges, who, while being independent, may have limited knowledge of the dispute and, therefore, may need advice from expensive counsels. In ADR, the persons appointed in complex disputes are well-versed with the subject and the laws involved.

- In litigation, there are strict rules as to where civil proceedings can be commenced and, as parties to the dispute, the litigants have little control over the location. In ADR, disputes are to be resolved, where possible, by documents only and the parties do not have to face the hardship of attending the court. If a hearing is required for the resolution of the dispute, the parties and the panel of persons who have to resolve the dispute agree upon a venue and time convenient to all concerned.

- In litigation, there are rules of procedure laid down by the court, which both parties have to follow. In ADR also, there are rules but these are very flexible. The parties and the neutral

persons appointed to settle the dispute can mutually agree to change them, as the process matures.

- In litigation, there may be a timetable, which is usually designed to suit the needs of the court and not the parties. But in ADR, timetables are specified in the agreed rules that the parties sign up and these rules can be made more flexible with the agreement of the parties and the neutrals.

- Although the courts do have powers to ensure that the parties stick to the timetable but they often do not use them and a party can delay matters for years before the court strikes out the claim or defence. The court can also be inclined to enforce the rules without any regard to the personal circumstances of the parties and, therefore, can strike out cases too early. Under ADR, the procedures can be tailored to meet the demands of the parties and the neutrals taking into account their personal circumstances. It thus allows greater flexibility. This means that the neutrals have powers which have been agreed upon by the parties and can, therefore, deal with delays in the appropriate manner.

- In litigation, the court on a given day may not cope with all the cases and the unheard cases may be put off to some other date, several weeks or months later. In ADR, if there is a hearing or meeting of the parties and the neutrals, the date for it is set by the neutrals, after close liaison with the parties and after ensuring that everyone would be available, thus limiting the possibility of cancellations.

- In litigation, there is discretion on costs, although they normally follow the event. Therefore, the loser generally pays the winner. In ADR, the issue of cost is dealt with as a preliminary matter, and the parties know in advance the likely range of costs and also that who will be liable to pay. In a well-managed ADR procedure, costs are almost invariably substantially lower than in litigation. In many countries, such expenses are shared by both the parties.

- ADR is a great balancer of power between parties. ADR allows the parties an opportunity to have a dispute resolved quickly, cost-effectively and privately, rather than having to suffer from an imbalance in representation, which may lead to heavy expenses as well as public mauling in the courts.

- For the businessmen and professionals, ADR reduces litigation costs and saves valuable management time.

In Pakistan, resolution of disputes outside the court is not a new concept. Since centuries, resolution of disputes has been done through arbitration, mediation and by soliciting the services of Panchayat or Jirga or similar other institutions or through the interference of elders.

Reasonable commercial disputes are already being resolved through arbitration. But disputes between government agencies and the citizens are increasing manifold in the courts of law. The massive increase in litigations is not only time-consuming but also leads to delay in justice that eventually results in undermining faith in the speedy performance of the courts. Inordinate delays in the resolution of disputes also create hurdles in the growth of national economy.

In the year 2002, the Law and Justice Commission of Pakistan recommended for implementation the Alternate mode of Dispute Resolutions. Subsequently, the Government of Pakistan amended the Civil Procedure Code, 1908, whereby powers were given to the civil courts under Section 89

to adopt (subject to the consent of the parties), to settle a dispute by Alternate Dispute Resolution. Complementary addition was also made in Order X of Civil Procedure Code, whereby the court has been empowered to pass necessary orders for expediting the trial proceedings.

On the recommendation of the Federal Tax Ombudsman, necessary amendments were also made in the Central Excise, Customs, Income Tax and Sales Tax laws through the Finance Act, 2004, to introduce provisions regarding Alternate Dispute Resolution in the tax laws.

The ICMAP workshop on ADR was intended to help thrash out outstanding pertinent issues, in collaboration with a cross section of multi-discipline professionals. We are grateful to all those who made presentations, and added new dimensions to the concept and practice of the ADR system. Transcribed texts of the presentations made at the workshop are reproduced, in some cases in summarised form, in the pages that follow.

A Wholly New Set-up For Redressal Of Disputes

— Chief Justice (R) Saiduzzaman Siddiqui

Former Chief Justice of Pakistan

I would, first of all, like to congratulate the Institute of Cost and Management Accountants of Pakistan, for arranging this workshop and inviting me to participate in it. Proverbial court delays and the pendency of large number of cases in conventional courts, is the major reason for the development of ADR as a substitute for court litigation. Much work has been done in countries like USA, Canada, Australia and UK to develop the system of ADR, for resolving disputes between the parties to reduce the burden of ordinary courts.

I would like to mention here the number of cases pending in the Superior and Subordinate Courts in Pakistan as on 31st December, 2002/2003, to give an idea to the participants of the seriousness of the problem. According to the published reports, the number of cases pending in the Supreme Court of Pakistan as on 31st December 2003 was 14,642, as against 4,746 cases pending as on December 31, 1999. Similarly, the number of pending cases in the High Courts of Lahore, Karachi, Peshawar and Quetta, and their respective circuit benches for the period ending 31st December 2002 were 65,685; 87,511; 10,879 and 3,079 respectively. In the like manner, cases pending before the subordinate courts (District and Session Judges, Civil Judges and Judicial Magistrates) for the period ending 31st December 2002 in Punjab (35 districts), Sindh (20 districts), NWFP and Baluchistan are reported to be 939,562 (66,635 + 872,927); 121,557; 22,870 and 5,135 respectively. This stated pendency of cases must have increased by now as these figures were published about 2/3 years ago. The problem of pendency of such a large number of cases in the courts is described as perennial. The task before us is to find a viable solution to this perennial problem, in order to bring relief to the litigant public.

It is in this background that we will be discussing the subject of ADR. The main object of adopting ADR as a mode for dispute resolution, is to provide a cost-effective and speedy way of dispute settlement. The most common mode of ADR adopted in our country to resolve disputes is through arbitration. But this is voluntary in nature or based on agreement between the parties to the dispute. The arbitration proceedings in our country are governed under the Arbitration Act of 1940. In fact the intervention of courts in arbitration proceeding is very frequent under the Act of 1940. When the parties select their own forum for resolution of dispute, there should be least intervention by the Court. The Supreme Court of India, in the case of M/s Guru Nanak Foundation v. M/s. Rattan Singh & Sons (AIR 1981 SC 2075) made the following very interesting observations on the working of Arbitration Act 1940:-

"Interminable, time-consuming, complex and expensive court procedures impelled jurists to search for an alternate forum, less formal, and effective and speedy for resolution of the disputes, avoiding procedural claptrap, and this led them to Arbitration Act 1940. However, the way in which the proceedings under the Act are conducted and without any exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony, that proceedings under the Act have become highly technical, accompanied by unending prolixity, at every stage providing a legal trap to the unwary. The formal forum chosen by the parties for expeditious disposal of their disputes has, by the decisions of the Courts, been clothed with 'legalese' of unforeseeable complexity."

Inspired by the above quoted observations of Indian Supreme Court, the Indian Government replaced the old Act of 1940, with the new Indian Arbitration and Conciliation Act 1996. The new Act of 1996 consists of four parts. Part one contains general provisions on arbitration. Part two deals with enforcement of certain foreign awards, Part three deals with conciliation and the fourth deals with certain supplementary provisions. There are three schedules which produce texts of the Geneva and New York conventions' awards, regarding their recognition and enforcement respectively. The provisions on conciliation in the Act are largely based on UNCITRAL conciliation rules, though they cover conciliation of domestic disputes too. Thus, the new Act has ushered in a wholly new set up for redressal of disputes through arbitration, thereby implementing the two basic aims of maximisation of party autonomy and minimisation of judicial intervention. The main objectives of the Act of 1966 are:-

- To cover international commercial arbitration and conciliation as also domestic arbitration and conciliation; (2) To make provision for efficient and capable procedure to meet the needs of the specific arbitration.; (3) To include reasons for its arbitral award; (4) To ensure the tribunal to work within the jurisdiction; (5) To minimise the supervisory role of courts in arbitral process, (6) To provide that every final award is enforced in the same manner, as if it were a decree of a court; (7) To give the award on settled terms of the parties; and (8) to provide conditions and process for the purposes of enforcement of foreign awards of New York and Geneva Conventions.

- Conciliation is virtually a non-binding procedure, in which an impartial third party assists the parties to reach a conclusion to end their malice and solve their problem of different and distinct clash of interest. In USA, the procedure of conciliation is described as mediation, in which a positive role is played by the neutral, assisting the parties to arrive at an agreed settlement. Adoption of conciliation as a mode of dispute resolution can either be agreed before the arising of dispute in the transaction or subsequently when the dispute has already arisen. In the latter situation, an invitation is made by a party to adopt the means of conciliation or mediation between them.

- The conciliator may be one or two or three persons, as desired by the disputants. The parties may appoint the conciliator by naming someone. They may appoint one from each side and agree together on the inclusion of a third conciliator. The parties may consult suitable institutions or persons, in connection with the appointment of conciliators. The advantages of conciliation are many, viz:

- It offers flexible options to the parties;

- It obviates the parties from litigation;

- It reserves the freedom to withdraw from conciliation at any stage;

- It maintains confidentiality through its proceedings;

- It is less costly;

- It is held in continuity of relations of the parties; and

- It eliminates the scope of corruption or bias.

It is high time that the Government, the legal professionals and the intellectuals give a serious thought to the development of ADR process as a method of dispute resolution to relieve pressure on the ordinary courts, and to provide quick relief to the litigant public.

The list of large number of participants, who have agreed to express their views in today's seminar, is very encouraging. I invite the distinguished participants to open the debate. I am sure, as a result of today's deliberations, we will be able to formulate some recommendations to promote the idea of ADR as an effective, cheap and speedy mode of dispute resolution.

ADR In Pakistan And Other Countries

— Justice (R) Dr. Ghous Muhammad

Advocate, Supreme Court of Pakistan

and Director General, Sindh Judicial Academy

The use of Alternative dispute resolution has grown tremendously in the last several years throughout the globe. This is primarily due to the fact that the business community has come to realise that it is a vital tool to preserve business relationships and provide a speedy, cost-effective and less-adversarial alternative to litigation. The cost-effectiveness of ADR may be appreciated from a recent Australian study, which has concluded that mediation of commercial disputes by the Australian Commercial Disputes Centre, costs 5% of the cost of litigating the same matter. An additional factor why ADR has become so popular is that there is no international court that deals with international commercial disputes.

ADR can take many forms. In Pakistan, the first and foremost is the Arbitration Act, 1940, that is widely used in commercial contracts. The idea is that once a dispute occurs, the aggrieved party can have recourse to an arbitrator to decide the matter. Such type of arbitration can be with or without the intervention of the court. However, the court always has some degree of control: it can interfere in the arbitration award in limited cases such as fraud, misconduct or patent errors committed by the Arbitrator.

A large number of multi-national organisations prefer to use the I.C.C. Arbitration rules, especially in cases of cross border disputes. The ICC International Court of Arbitration also has Rules of Optional Conciliation (1988) to facilitate the initiation and conduct of the conciliation process, and the amicable settlement of business disputes of international character.

In India, traditionally the Panchayats were a means by which village level disputes were settled through the intervention of village elders. This type of system was prevalent throughout India before the times of the British Raj. However, as the British introduced their own legal system, they started to drift away. However, this system again became popular, as the Courts were unable to cope with the monumental workload. The Lok Adalat movement came into being in March 1982 in Gujrat and quickly spread throughout India. One of the most significant initial successes was in the cases of 40,000 families that were uprooted to accommodate the Hydro-electric power project at Srisailam. The cases had been pending for 20 years, but were finally decided in a Lok Adalat . The then Prime Minister participated in the Lok Adalat and was also present when compensation of Rs. 1510 million was paid.

Until 1996, more than 13,000 Lok Adalats had been held in India, and over 5 million cases had been settled. Motor accident cases alone amounting to 3,00,000 had been settled and compensation of Rs. 8,162 million had been paid.

In the United States, the ADR can be traced back to 1768, when arbitral tribunals were established in New York to settle disputes in clothing, printing and merchant seaman industries. The ADR movement really started to flourish in the social activism of the 1960s, and the establishment of Community-Related Services (CRS), which utilised mediation and negotiation to settle disputes. The ‘60s and ‘70s also saw the emergence of Law Enforcement Assistance Administration (LEAA), which helped resolve disputes within communities.

The Judicial System in the USA was slightly slow in adopting arbitral methods for dispute resolution. It really grew after 1990 with the enactment of the Civil Justice Reform Act, that called upon the federal district courts to implement the civil justice expense and delay-reduction plan. This resulted in tremendous growth in the creation of ADR programmes and the use of ADR by Federal and State Courts.

Eventually, the Congress passed the Alternative Dispute Resolution Act of 1998, which gave the Federal Courts substantial authority to use ADR. Under the ADR Act, "an alternative dispute resolution process includes a process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, mini-trial and arbitration ….". Those who can serve as neutrals (arbitrators or mediators) are magistrate judges or those, who have been trained to serve as neutrals in ADR processes, and professional neutrals from the private sector.

As in Pakistan at present, Indian domestic arbitration was governed by the Arbitration Act 1940, and international arbitration in India by the Arbitration (Protocol and Convention) Act, 1937. However, these two Acts were consolidated when on January 25, 1966 the Arbitration and Conciliation Ordinance, 1966, was brought into force, dealing with both domestic and international arbitration. This new Act was an adaptation of the United Nations Commission on International Trade Law (UNCITRAL).

Although we have been discussing ADR with reference to arbitration, strictly speaking, ADR is not necessarily arbitration but encompasses mediation and conciliation methods, whereby the parties to the dispute themselves negotiate their own settlement, with the help of an independent intermediary called a mediator. The parties themselves control the outcome of the dispute.

In the UK, one of the major advantages of ADR has been the success rate. Over 90% of disputes, mediated by the Centre for Dispute Resolution (CEDR), result in settlement. The main reason is the massive cost savings, as what might take several months in litigation, can usually be achieved within a few days in ADR. One of the disadvantages of this type of dispute resolution is that, where parties are negotiating between themselves, occasionally one side may go on a "fishing expedition" to delay contemporaneous judicial proceedings. If one side has no genuine intent to pay, mediation is again not going to be effective.

Other countries, such as Australia, Sri Lanka, Hong Kong and New Zealand, have also developed their own systems of ADR. In Australia, for example, studies are being carried out to ascertain what types of disputes are appropriate for mediation. It has been found that whether or not a particular dispute should be sent to mediation depends on a variety of factors, some of which are underscored below:-

a) whether matter is complex and lengthy;

b) number of plaintiffs and defendants involved;

c) whether there are any cross claims;

d) are any of the parties a "frequent litigator"?

e) whether the parties have a continuing relationship?

Hong Kong has long been a regional centre for resolution of commercial disputes. Because of its geographical position and built-up infrastructure, it has an excellent reputation for mediation and arbitration. The Hong Kong model arbitration is based on the UNCITRAL Model Law for International Arbitration. The particular areas of expertise are maritime arbitration, construction disputes and equities and securities disputes.

In a move similar to India, New Zealand has consolidated its legislation, being the Arbitration Act, 1908, the Arbitration Amendment Act, 1938, Arbitration (International Investment Disputes) Act, 1979 and Arbitration (Foreign Agreements and Awards) Act, 1982. Through a recommendation from the Law Commission in 1991, new legislation was implemented that adopted the UNCITRAL Model Law to cover both domestic and international arbitration.

It is particularly interesting that New Zealand has recognised the importance of arbitration to such an extent that it has an institute that provides training exclusively for this purpose. In 1882, the New Zealand branch of the Chartered Institute of Arbitrators was established, which subsequently evolved into the Independent Arbitrators' Institute of New Zealand. The Institute initially focused, exclusively on arbitration but other ADR techniques, such as mediation, were quickly recognised by the Institute. The Institute provides training to a wide variety of professionals, such as lawyers, engineers, architects, quantity surveyors, property managers, valuers, accountants and so on.

The types of dispute resolution processes have also been broadly categorised into adjudication, arbitration, mediation and negotiation, private judging, neutral expert fact-finding, mini-trial, ombudsman and summary jury trial. Which one is best for a particular dispute will also depend on such factors as mentioned above.

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

a) to process and decide applications filed by assessees declaring income hitherto not declared;

b) to process and decide applications by assessees arising out of an assessment order or an order passed by the Appellate Additional Commissioner;

c) to process departmental appeals filed before the Income Tax Appellate Tribunal for settlement or withdrawal thereof; and

d) any other function specifically assigned by the Federal Government to the Commission.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a) the liability of tax against registered persons or refunds, as the case may be;

b) the extent of waiver of additional tax or penalty;

c) the quantum of additional tax admissible under Section 7(3);

d) relaxation of any procedural or technical irregularities, and condonation of any time limitation; and

e) any other specific relief, sought to resolve the dispute.

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

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

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

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

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

Speaking for myself, I do not subscribe to this extreme and one sided view adopted by the Supreme Court. Taxation per se is a compulsory exaction from the citizens by the State. The fundamental philosophy behind a just and proper taxing system and administration is that the tax base should be broadened and the existent tax payers should not be made to suffer from the ever-escalating tax burden. It seems that the administrators of tax system do not perform their own fundamental task to broaden the base, but thrive on escalating tax burdens on the existent tax payers. This approach is counter-productive and can give rise to devices and methodologies to evade tax. Sometimes the tax can be excessively harsh and becomes expropriatory and confiscatory in nature, violating the fundamental rights entrenched in the Constitution (see Government of Pakistan v. Muhammad Ashraf PLD 1993 SC 176 and Elahi Cotton v. Federation of Pakistan PLD 1997 SC 582).

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

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The System Requires Amendments

— Mohammad Yunus Khan

Joint Chief Economist, Planning Commission

Government of Pakistan

Having observed that Alternate Dispute Resolution (ARD) – more specifically resolution of disputes through arbitration – has been in practice as a means to overcome, and avoid lengthy litigation in many countries of the world, including USA and UK, the Government of Pakistan (Central Board of Revenue), has also introduced ADR in Customs, Sales Tax and Income Tax. ADR works through a committee comprising three members - a subject specialist; a government representative; and an independent member from the business community, all appointed by CBR that may or may not agree to the findings and decision of the committee.

ADR appears to be a sort of Panchayati Nizam or Jirgah System. It may be something new for others but in Pakistan, it is part and parcel of our religion and culture. Prior to the repeal of FCR, Jirgah used to be an integral part of the judicial system of NWFP. In fact it worked better, as compared to the normal criminal proceedings, particularly where witnesses were not forthcoming.

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

We have Arbitration Act in force, and the same could be suitably amended and strengthened. Broad parameters could have been laid down, paving the way for making separate ADR rules and regulations, not only for CBR but also for other government departments and extending them to universities, hospitals and even utilities. Alternatively, the ADR should be required to be based on the Panchayati Nizam or Jirgah System, where the qualification of Saalis are primarily integrity, common sense and knowledge of the issue to be resolved, and where there could be only one Saalis, appointed with the consent of both the parties, or two-one each by both parties – and both the saalis may or may not appoint a third Saalis above them.

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

(1) For selecting the Chairman of an ADR Committee, CBR should draw and keep a panel consisting of retired judges of the Superior Courts, retired bureaucrats and academicians, Chartered Accountants, Cost Accountants and advocates, who are no more in active practice. In no case should former heads or other former senior officers of CBR be included in the panel. Otherwise such a person working as Chairman would dictate and impose his views on the Committee.

(2) CBR and the party concerned should appoint representatives of their own choice.

(3) Representatives should be respectively paid by CBR and the concerned party, while the Chairman should be jointly and equally paid by CBR and the party.

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

An Extra-legal Facilitation

– Shahid Jamal

Director General

Large Tax Payers Unit (LTU), Karachi

The CBR has taken a bold initiative in providing an alternative forum to the taxpayers, where disputes can be resolved in a give-and-take spirit. Evidently, as the situation prevails, numerous appeals are pending before different forums, and the delay in disposal of those appeals, adds up to the cost and discomfort of the taxpayer. The Department has already taken the initiative of reviewing appeals, pending before different forums. Wherever these are found frivolous, these are in the process of being withdrawn.

The history of appeals and appellate decisions shows that quite a number of frivolous appeals are filed every year from both sides, and the litigation lingers on and on before different forums, and it takes at-least seven to ten years before the matter is settled by a conclusive decision. Meanwhile, on the same issue further appeals are filed.

As the saying goes, justice delayed is justice denied, CBR would like to resolve the disputes in the shortest possible time so as to dispense justice to the taxpayer. CBR's initiative should be reciprocated by the taxpayers in the same spirit in which it has been enforced.

Dispute resolution is not a legal proceeding in the strict sense of the word, nor it should be guided by legal procedures or precedence. It is more akin to a conciliatory body like Panchayat or Jirgah, where two parties are persuaded to agree on something.

Since it is a simple and honest endeavour, in my opinion, it does not need the brilliance of lawyers or expertise in judicial matters, or acquaintance with cumbersome procedures. All it needs is basic common sense, intelligence to comprehend the problem, and a rational approach to evolve a consensus decision. If it is made to operate like an expert committee, its purpose will be lost and it may simply end up as yet another institution where, due to legal complexities, resolution would not come quickly and easily.

There appears to be some confusion in the mind of some people that Alternate Dispute Resolution Committee and appeals are inter-related, and the right to go to the ADR Committee arises after appeal proceedings are exhausted. This is not so. The right to go to ADR, commences immediately after an assessment or audit is completed and the taxpayers' point of view on certain issues is not understood or accepted. However, the right to appeal is intact, and it is a separate proceedings and should not be forsaken because a request to CBR is made to avail the option of ADR. In fact these are two separate proceedings. The right to appeal is not influenced or barred by the ADR proceedings and in fact the time limitation is not, at all, connected with ADR proceedings. Therefore, no taxpayer should run out of time to file the appeal. Filings of appeal are to be determined according to the limitations placed in the Ordinance and are not to be influenced by the ADR proceedings. The taxpayer must file his appeal within the time specified, and thereafter go for Dispute Reolution before the Committee as an alternative. Any decision of the ADR is not appealable, although the taxpayer has the option not to accept it and may retain and prefer his appellate channels. The taxpayer should, therefore, not lose the limitation prescribed under the law for filing of appeal, and should pursue the ADR as an alternative. ADR is an extra-

legal facilitation, mainly with a view to reducing cost of compliance and promote hassle-free business.

Centuries-Old System That Works Successfully

— Ejaz Ali Pirzada

Director General, Pakistan Revenue

Indeed, a court is the only forum to settle disputes; but it cannot be denied that all the matters do not land at courts of law for adjudication. For example, all and sundry disputes like quarrel over children, tenancy, property heirship and allied matters are settled by the elders and neighbours, without approaching any judicial forum, notwithstanding their availability in the nook and corner of the country. Obviously, there is a reason for it. Settlement of disputes through judiciary is not only cumbersome and costly, but it has been witnessed that the cases filed by grandfathers are fought by grandchildren. In case all these petty matters are brought before the courts of law, it will further hamper the snail-paced process of settlement of disputes in courts, given the huge number of disputes arising out in our daily life.

Justice by way of arbitration is centuries-old. Arbitration is not only a legal instrument in the judicial hierarchy, but is also commonly practised in rural areas of the country, even in this modern-age. The aggrieved people approach the sardars, waderas or numberdars for settlement of their disputes, because it is not only a cheap and quick mode of dispensation of justice but, unlike the courts, does not involve the hassles of exorbitant court and lawyers fees, and prolongation of a settlement or award.

The offices of federal and provincial ombudsmen, Nazims, panchayats and justice of peace, though all statutory in nature, are different modes of arbitration. These modes of early and cheaper litigation help resolve matters sooner than the normal channels, and major clashes are also averted due to guarantees involved. We all are well-aware of the fact that in feudal matters, where things cannot be put right through a court or tribunal, such fragile matters are referred to jirgahs, and their decisions and awards are respected by the civil administration as well.

I have had an opportunity to work in Baluchistan, where I noticed that the Baloch and Pushtoon tribes approach their sardars or notables, who provide them quick justice without any cost, and the system works successfully. I also had an opportunity of a meeting with DIG, Gawadar (future hub of development activities), and it was no less than a surprise to learn that the crime rate in Gawadar District was zero. Similarly, during my posting at Pakistan Steel as Director (Finance), the case of a builder, which was pending in the court for a considerably long period, was settled through arbitration suggested by the Federal Ombudsman. The contractor had approached the Federal Ombudsman who ordered for negotiation by a committee headed by Director (Finance). In this case, only decision-making was involved because, like a number of public enterprises/ corporations, no one was ready to pass an order, take the responsibility or make a decision, because the Director (Finance) and/or the committee so authorised for negotiation were afraid of being subjected to corruption blame, as the matter involved huge cost overrun of several millions of rupees. The matter was resolved amicably with the intervention of the Federal Ombudsman. The management was able to get a hefty discount of Rs. 4.5 million, besides essential repairs of the hospital building 'free of cost'. The matter was resolved without resorting to cumbersome legal process and the resultant draining out of public money in engaging an advocate and paying

court fees etc. The arbitration, suggested by the Ombudsman, saved both the parties from prolonged litigation.

The senior speakers of various specialities have thrown ample light on the need of strengthening the ADR and inculcating sense of responsibility and trust for effective and user-friendly approach. I share their valued suggestions for improvement in the existing institution of Ombudsman and strengthening the working of Income Tax, Customs and other revenue-generating departments, so as to make them business-friendly enabling them to play an effective role in the prosperity of the country. ADR should be improved, encouraged and strengthened because of its cost-effectiveness and user-friendly approach.

Training Of ADR Skills Is A Must

— Navin Merchant

Advocate Supreme Court of Pakistan

and Faculty Member, Sindh Judicial Academy

Conflict is a growing industry; more and more occasions require negotiation. Everyone wants to participate in decisions that affect him. Conflicts in business, government or the family, people try to reach settlement through negotiation, even when their cases are in the court. In many countries, the judicial system can no longer cope with its case-load, or offer cost-effective procedures for resolving disputes outside the traditional, formal system. Further, the traditional legal system is felt to be adversarial, costly, unpredictable, rigid, over professionalised, damaging to relationships and limited to arrow remedies compared to realistic problem-solving.

The term "Alternative Dispute Resolution" originated in the USA in a drive to find alternatives to the traditional legal system. ADR as a term covers the whole range of alternatives to litigation or arbitration, which involves third party intervention to assist resolution of a dispute. In some writings, arbitration is also referred to as part of ADR. ADR was, of course, the first well-developed "alternative" to litigation and finds place in the Holy Quran.

The strength of ADR lies not in any formal definition but in its flexibility of practice - where it has helped to introduce new thinking to the choice of techniques available, when dispute or potential dispute arises. Undoubtedly, ADR has helped to broaden the criteria, by which appropriate methods of dispute resolution can be judged, including the role of the legal system itself.

Amongst ADR techniques, mediation has proved to be the most flexible, powerful and user-friendly approach. Mediation has established three main streams (1) Commercial (2) Family and (3) Community. All require distinct approaches, but the principle of a neutral third person, assisting parties to find their solution, is fundamental to all three. Mediation is the most commonly used ADR process. Many people now use the terms ADR and mediation interchangeably, although "Alternative Dispute Resolution" encompasses a range of techniques, one of which is mediation.

Now let us have a look at the following formal and informal ways of resolving disputes.

Litigation:

Litigation is the most recognised form of dispute resolution throughout the world. It is publicly-financed and administered, carried out in a public forum, and is bound by mandatory rules about process, evidence and testimony. It is not voluntary- parties have to be present when required or suffer penalty, and the decision is binding although may be subject to appeal. The decision is based upon law and precedent but subject to human error and the outcome is not easy to predict and may be perceived as unfair. Attempts have been made, and continue to be made, to speed up the litigation process and to reduce the cost, but litigation remains an expensive and time-consuming way to resolve disputes. In fact the value of many disputes is exceeded by eventual cost of resolution and the time taken to obtain a decision is often measured in years and not months.

Arbitration:

Arbitration has been introduced to overcome some of the problems encountered in litigation. Arbitration still empowers a third party to decide the outcome of a dispute, although it is more likely that the Arbitration will have subject area expertise which, for some, makes the decision more agreeable. The decision is made according to the relevant law, is binding and is not normally subject to appeal. Like litigation, the process of arbitration is adversarial and mostly formal, but the proceedings take place in private and the arbitrator is usually selected by the parties. Unfortunately, arbitration has become very similar to litigation in both cost and time, although more streamlined fast track forms of arbitration have been developed. Like litigation procedure, arbitration style and process may differ across cultures.

Negotiation:

When a dispute occurs, the first thing that comes to the mind of the disputant is negotiation. The best, cheapest, most economical and most satisfactory way of resolving disputes is by negotiation. Negotiation is an everyday activity for human beings; much of it is not recognised as negotiation at the time and most of it is effective. It is a skill that is built into human nature, and yet has only recently been studied, understood and refined. Direct negotiation requires the negotiators to communicate with each other about the dispute and often about their willingness to compromise. Negotiation is usually possible when the parties can identify and agree on what issues are in dispute. Their interests, goals and needs are not entirely incompatible, and they are constrained by time.

There are two recognised core-strategies for negotiating:

- positional bargaining, and
- principled negotiation.

Positional bargaining is the traditional strategy in any kind of dispute, where two parties try to solve dispute without intervention of the third party. The key characteristics of this strategy are:

- each side takes its best and most extreme position on what it demands or offers.
- "discussions" take place where parties haggle, threaten, bully, cry, or lie in an effort to extract movement or agreement from the other side.
- Concessions are exchanged.
- Settlement is usually achieved somewhere in the middle of the bargaining range, depending partly on the balance of power between the parties.

Principled Negotiation: The key characteristics of this strategy are:

- Negotiating on the basis of principles, not positions
- Encouraging problem-solving

- Using objective standards to support decision-making
- Aiming for a wise outcome reached efficiently

And this is not possible without intervention of the third person, helping the parties to solve the dispute.

Why negotiations fail:

- poor negotiating skills of one or both parties or their advisers
- unrealistic expectations
- unrealistic assessment of interests, or alternatives, or of what the other side can do
- desire for revenge
- failure to communicate interests or offers
- inability of the parties to identify or solve a real problem in their dealings.

Alternative Dispute Resolution:

Any alternative to the two established and traditional methods of dispute resolution, namely litigation and arbitration, is encompassed by the term ADR, even including some processes which involve an imposed decision. However, mediation is being regarded as the core ADR process, but in specific circumstances it is considered to be inappropriate, where the use of others appears to be more practicable and meaningful. The need for an alternative to litigation and arbitration is broadly accepted, in particular, because of the problem of time and cost, but also because any adversarial process leaves wounds which damage, even destroy relationship. The litigation and arbitration look back to the past and any decision is largely based upon history. In ADR, the focus is primarily on the future and on party interests which are not limited to legal issues.

Why ADR works:

ADR techniques work, because a third party can help to eliminate or to reduce the effect of some main obstacles to successful negotiation. Mediation is the ADR technique which enables the parties to resume or sometimes to begin negotiations. The mediator brings negotiating, problem-solving and communication skills to the process, deployed from a position of independence and neutrality, making real progress possible where direct negotiations have stalled. The general definition of mediation is as follows:

Mediation is a voluntary, non-binding (parties can opt for quitting mediation any time they want), private dispute resolution process, in which a neutral person helps the parties try to reach a negotiated settlement.

How mediation works:

The Mediator………

- Facilitates communication and separates the people from the problem

- Helps overcome deadlock and emotional blockages
- Restores the negotiation process
- Identifies and focuses on the real issues and needs of the parties
- Gets the right people and the right information to the table
- Helps parties to reassess their cases
- Increases the options for resolution
- Keeps ownership of the problem and the settlement with the parties
- Restores and safeguards relations

Mediator, as a neutral facilitator, is potentially in a better position than any party or representative to:

- Win the trust of all parties
- Facilitate communication
- Focus the parties on the problem
- Overcome emotional blockage
- Help one party to understand the other party's case
- Probe each party's case for interests, positions, strengths and weaknesses
- Help parties realistically assess their own case
- Suggest new avenues to explore
- Overcome deadlock and help save face
- Explore settlement proposals in more depth
- Assess realistically the chances of settlement
- Win approval for settlement proposals

Learning mediation skill is a journey of understanding the actions and reactions of the parties, and also understanding yourself. You cannot assist disputants to think clearly and wisely unless you are not clear within yourself. The mediator works directly with disputants, teaching them communication and problem-solving skills, so that they may resolve their conflict themselves. This requires range of skills, such as understanding the disputants, communication, managing the process, investigation of the dispute, reality-testing, reflecting, making the parties understand the real problem and problem-solving etc. The mediator should be able to separate people from

problem, keep the focus of the parties on the interest, generate variety of options for parties to work on, and bring about solution based on the objective standards.

May I mention here that I have the opportunity of being a faculty member of the Sindh Judicial Academy, and also have the honour of imparting the knowledge of ADR to the Additional District Judges and Senior Civil Judges, where the special skill of mediation is being taught. During my sessions, I have noticed a keen inclination towards mediation by the judges, as this is not new to them. We have shared different situations where they had occasions to get the parties into compromise. But there was one serious concern: If a judge, with whom the litigation is pending, sees a potential of compromise in the case, can he assume the role of mediator himself and try to resolve the dispute?

There is a great possibility of resolving the dispute; however, we cannot discount the failure of such a mode of dispute resolution. The danger lies not in his acting as a mediator of the case which is pending in his own court, but it lies in not getting exposed to the parties' interests, goals, strengths and weaknesses. In case of failure, the information will definitely influence his judgment as an adjudicator of the case. To mitigate this risk, it is my humble suggestion that if the judge feels that there is a possibility of compromise in a case, then for the purpose of mediation, the case should be referred to one of his brother judges. This would not only create trust and confidence in the litigants but would guard against any adverse impression, such as judge being partial etc.

By now in many counties of the world, mediation has been introduced as a mandatory requirement of Law. Alternative Dispute Resolution today is a buzz word–may it be a disagreement in Corporate or Government sector or Commercial and Family disputes. In Pakistan, the term ADR has been introduced in many laws through different amendments, but so far it has remained ineffective, due to its non-mandatory nature as far as the courts are concerned.

In the commercial laws, a procedure has been given to formulate committees, comprising people from private and public sectors to act as mediators to solve tax disputes. These committees work with the disputants and make appropriate recommendation to the tax authorities. This is a very good move by the Government to minimise the backing of the cases and avoid litigation, and is also successful to some extent. But a question arises here: whether these committee members are equipped with the necessary skills to tackle the disputes? No matter how much one reads about this particular subject, the beauty lies in the skill which is applied to make the participants arrive at a solution themselves to create a win-situation for both. It is my humble submission that the judges and the mediators should be equipped with the necessary skill in this subject and, therefore, ongoing training of the ADR skill is the need of the time.

In my humble opinion, the Government should also look into setting up training institutions where the skills of mediation can be imparted to the relevant people regularly, to make this move more effective.

Adaptability Of ADR To Commercial Disputes

— Begum Akram Khatoon

Former President, First Women Bank Ltd.

The concept of 'Alternate Dispute Resolution' (ADR) implies making use of various negotiation strategies, like mediation, arbitration, conciliation, etc., to resolve disputes of varying nature among individuals and organisations without going to court of law. It is not a new find for countries like India and Pakistan. It has been a centuries-long practice in the rural and tribal areas of the Subcontinent to resolve family and property disputes, in particular, through Panchayats and Jirgahs, constituted of respectable and elderly persons of tribes and villages, who resolve the issue through mediation and reconciliation approach.

Despite easy accessibility to courts, this crude system of dispute resolution still pervades the tribal and many rural areas of Pakistan. However, due to moral and ethical degradation in the Pakistani society as a whole, the panchayats and Jirgahs have lost their utility. Now decisions of Panchayats and Jirgahs rest on the whims of tribal lords and waderas who dominate the entire community and are normally against the oppressed person, despite his / her claim to the issue being justified and crystal clear to all inmates of the village / tribe.

The philosophy behind ADR approach is to save the aggrieved person from hardship of going to a court of law, involving heavy expenses and very often indefinite and unjustified time period and with the least surety that justice will be done to the aggrieved party, as decisions of the courts are generally based on evidence produced, and the capability of the lawyer pleading the case. The phrase 'Qanoon andha hai' is often found true in case of court decisions relating to the oppressed and financially disadvantaged parties against their opponents belonging to the affluent class.

The term ' dispute resolution' had actually developed in late seventies. The growth of economic and commercial activity throughout the globe and greater interdependence of nations through international trade, overseas employment and investments multiplied the number of cases in courts of law. Hence alternate dispute resolutions, which are generally based on mediation and arbitration, started gaining grounds in almost all the developed countries.

In Pakistan, sophisticated strategies for resolving disputes without legal recourse, and arbitration, in particular, have earned legal recognition for resolving various family, property and commercial disputes, as provisions for ADR have been made in Family and Commercial laws and also in the Civil Procedure Code through insertions. Arbitration for resolving income tax disputes between individuals and income tax authorities, and between organisations and income tax authorities, has been allowed through the insertion of Section 134A in the Income Tax Ordinance 2001, under the Finance Act.

Under ADR process, there are fewer formal requirements and a wider spectrum of settlement options, which enable reaching decisions in the shortest possible time at costs much lesser than those involved in court cases. The success of mediation and arbitration strategies to resolve dispute of any kind, apart from his/her professional competence, depends on the extent of emotional intelligence of the person / persons involved in the process as arbitrators or mediators.

John Mayor, a renowned sociologist, propounded the concept of emotional intelligence. He defines emotional intelligence as one's capability of controlling / regulating emotions in a manner that he or she is able to understand not only his / her own self but also has empathy for others. It

is one's competence regarding social awareness or social empathy which enables a person to have judicious awareness of others' emotions, concerns and needs. It is possible only when the person, to be assigned the responsibility as a mediator or arbitrator, is aware of his / her own strengths and weaknesses. This enables him / her to have self-control which, in turn, makes him/her able to handle all antagonism and conflict effectively, through collaboration and consultation. Being an emphatic leader and a good listener in such a situation, he / she communicates effectively with the parties involved in the dispute with a problem-solving approach.

ADR strategies as incorporated in Income tax Ordinance 2001, through the insertion of Section 134A, can be applied for resolving disputes relating to tax liability, refunds and waiver of penalty imposed etc. In this regard, on an application from the aggrieved party, the Central Board of Revenue (CBR) constitutes a committee, which consists of one Income Tax Officer and two members taken from the approved panel of advocates, Chartered Accountants, income tax practitioners and well-reputed tax-payers. The committee members conduct intensive inquiry into the case and, if need arises, comprehensive audit is done to arrive at a decision. The decision / recommendations of the committee are then communicated to CBR for their final decision, which is normally in consonance with the recommendations / findings of the committee. In case, the aggrieved person is not satisfied with the decision of CBR, he / she can file appeal in a court of law or the income tax tribunal.

The cost involved in the process on account of travelling expenses, daily allowance and miscellaneous expenses, is intimated to the parties of dispute and is equally borne by them.

Meetings of the committee are normally held in the office of the concerned Income Tax Commissioner, but the Commissioner is allowed to perform his routine office work during the conduct of the committee meetings. The committee is required to proceed with the case, strictly in accordance with the guidelines issued by CBR for procedure to be followed. In terms of the said Section (134A) of Income Tax Ordinance 2001, the committee may dispose of the case within 30 days, from the date it is constituted. However, if in view of the complexity of the case, the committee needs further consultation with experts other than members of the committee, more time can be availed by giving reasons to CBR for additional time required.

The ADR approach to resolve income tax issues in Pakistan needs improvement. The limited number of committees constituted for different areas are not enough to handle large number of applications within the specified time. As such, the number of committees should be increased. Besides, in order to eliminate chances of conflict of interests, conduct of meetings in the office of Income Tax Commissioner should be discouraged.

To minimise the number of income tax-related disputes on permanent basis, it is essential that emotional intelligence and problem-solving approach pervade at the policy-making level. Economic managers, while formulating taxation policy, need to follow the canons of taxation propounded by Adam Smith, in letter and spirit. Main emphasis should be on fairness and equity, while structuring the tax system. The concept of equity / justice should exist in the system, both horizontally and vertically to avoid anomalies, which finally culminate into never-ending disputes. No doubt horizontal equity, if taken care of prudently, can satisfy tax-payers of similar financial status. However, to ensure vertical equity, where progressive taxation formula is applied for different levels of income, care should be taken that the final incidence of tax does not mitigate the concept of equity at various levels of income.

The corporate tax giving leverage, with regard to time-period for payment of tax, often results in delay in the payment of tax. Heavy penalties are thus levied and the quantum of corporate tax

disputes is accentuated. It is, therefore, advisable that like income tax, the payment of corporate tax should also be made as soon as income is earned.

Disputes with regard to tax refunds form the main component of total tax disputes. As such, policies and procedures with regard to tax refund should be simplified by adopting emphatic approach to hardship and injustice faced by tax-payers, especially those individuals and businesses, falling in lower levels of taxable incomes.

Unlike ADR approach to resolve tax disputes, arbitration for resolving other commercial disputes has not been found very effective, because of its mandatory provision in the law. Due to the non-cooperative attitude of defending lawyer towards ADR system, cases remain undecided for quite a long time and the aggrieved party is compelled to go to a court of law. As such, while inducting a lawyer in arbitration cases, his / her track record should be taken into consideration.

Advantages Of ADR

— Abdur Razzaq Thaplawala, FCMA

Advocate High Court

The daily "Dawn" of Wednesday 6th April, 2005. contained a very interesting single column news item. The heading of the news item read: "Is Judiciary wiser than parliament?"

This news item, bearing the dateline of 5th April, related to a petition filed by Advocate A.K. Dogar before the Supreme Court of Pakistan. The news item said that the Chief Justice asked Mr. Dogar the following question towards the end of Tuesday's proceedings on constitutional petitions challenging the 17th amendment and the dual office of President Pervez Musharraf:

"And can we consider ourselves (the judiciary) wiser than the elected representatives?",

In the same case, Justice Iftekhar Chaudhry made the following observation:

"Should we substitute the parliamentarians and start doing their job?"

The honourable judges of the Superior Court have apparently made these remarks in lighter mood. There is no question of one being wiser than the other amongst the legislature and the judiciary. They very well know the role of judiciary and the legislature – two important organs of the state. I may take the liberty to quote here Lord Simonds on the subject. He said:

"The duty of the Court is to interpret the words that the Legislature has used. Those words may be ambiguous, but even if they are, the power and duty of the Court to travel outside them on a voyage of discovery are strictly limited".

It is obvious that the major function of the judiciary lies in the interpretation of statutes. In this field, the problems are substantially the same for all common law jurisdictions. The Pakistani, as much as the English, American, Canadian, Australian or Indian judge, whether he interprets a statute or applies a common law precedent, is faced with the perennial problem: how to balance the need for stability and certainty aimed at, if not always achieved by, a strict adherence to the letter of the law with individual justice.

The mental attitude of a judge acting as an interpreter has been very ably described in a well-known judgment as follows:

"And in order to form a right judgment, it is a good way, when you peruse a statute and suppose that the lawmaker is present, and that you have asked him the question you want to know touching the equity; then you must give yourself an answer as you imagine he would have done, if he had been present… And if the lawmaker would have followed the equity, notwithstanding the words of the law… you may safely do the like…"

In another judgment, the matter was clarified further. The judgment said:

"The key to the opening of every law is the reason and spirit of the law; It is the animus imponents, the intention of the law-maker expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of the particular phrase in a statute, the particular phrase is not to be

viewed detached from its context in the statute; it is to be viewed in connection with its whole context, including the title and preamble."

The subject of Alternate Dispute Resolution (ADR) is more related to taxation. The following observation will, therefore, be quite appropriate to quote here:

For years a battle of manoeuvre has been waged between the legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects…. It would not shock us in the least to find that the legislature was determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the tax-payer who plays with fire to complain of burnt figures."

Who may exercise the power of the construction in general? Crawford has dealt with this aspect in the following words:

"Normally the power to interpret statutes is judicial function, and does not fall within the province of the legislature. On the other hand, the executive department of government is frequently called upon to interpret statutes, long before they appear in court for judicial construction. While the interpretation placed upon a statute by the executive department is not absolutely binding upon the courts, as well we shall hereafter see, it is entitled to great weight and is often accepted by the judiciary."

Halsbury on construction of fiscal and revenue statutes has made the following observations:

"The language of a statute imposing a tax must receive a strict construction. If the State claims a duty under a statute, it must show that duty is imposed by clear and unambiguous word, and where the meaning of the statute is in doubt, it must be construed in favour of the subject, however much within the spirit of the law the case might otherwise appear to be."

Resolution of disputes outside the court is not a new concept in Pakistan. Arbitration, resolution of disputes through Punchayat or Jirgah or through the interference of elders, etc. are the ways to resolve disputes between parties in Pakistan since long. Reasonable commercial disputes are resolved through arbitration in Pakistan.

The problem is that disputes between the Government agencies and the citizens in Pakistan are increasing in geometrical progression in the courts of law. The increase in litigation by or against the Government is not only time-consuming, but the delay in such disputes causes loss to both the Government and the citizens. Such disputes between the state agencies and citizens are one of the causes that justice is delayed in Pakistan and the people are losing faith in the courts of law.

I recollect a specific case, in which the statute required the tax-payers to file an application, and take appropriate prescribed action by 30th June of that year. Unfortunately, the draftsman of the statute made a mistake. Instead of writing the words "BY 30TH JUNE" he wrote "BEFORE 30TH JUNE. The executive and the tax-payer both consider that 30th June was the deadline for the application and action, prescribed by the relevant statute. Obviously, most of the tax-payers took the action and filed the applications on 30th June of that year. When the matter went to the Appellant Authorities and Tribunals, the discrepancy came to light. It was declared by the Appellant Authorities that the last date for taking the action or filing the applications was 29th June of that year, and not the 30th June. The executive as well as the tax-payers faced a dilemma. The only solution available to them was to amend the law. The law was amended through an

Ordinance, and the word “BEFORE” was replaced by the word “BY”. This is a classical example of mistakes of omission and commission, which create problems in the implementation of a law.

Before the Alternate Dispute Resolution system, there have been some very unusual examples where the Government of Pakistan had realised the genuine difficulties of the tax-payers, and had ignored the defaults on their part. Just think of the situation where the law is clear and a tax-payer has defaulted in obeying the law for genuine reasons - and the government coming to his rescue for condoning the default. This is a rare phenomenon but it is a fact, and I have reproduced two notifications of this kind at the end of this write-up. Alternate Dispute Resolution between state agencies and citizens, which has already been developed in advance countries by making laws, is thought to be introduced in Pakistan for the reasons that the overgrowing disputes between Government agencies and the citizens had, on the one hand, burdened more work on the courts of law and, on the other hand, such disputes benefit neither the Government nor the citizens. Such disputes are also a hurdle in the growth of the economy of the country.

The Law and Justice Commission of Pakistan recommended for implementation of alternate modes of dispute resolution. The Government of Pakistan in the year 2002, amended the Civil Procedure Code, 1908. Section 89 gives powers to the civil courts to adopt, subject to the consent of the parties, to settle dispute by Alternate Dispute Resolution. Reportedly on the recommendation of the Hon’ble Federal Tax Ombudsman, amendment in Central Excise, Customs, Income Tax and Sales Tax, laws have been made through Finance Act, 2004, whereby provisions regarding Alternate Dispute Resolution are introduced in the tax laws.

Introduction of ADR in various statutes to get the dispute settled outside the court, has not only reduced the burden of the court but has also saved time and money of the litigants. It has also controlled corruption and mal-administration in various Government agencies. The advantages of the ADR are as under:

a) Reduction in liability of tax against a registered person, or admissibility of refunds, as the case may be:

b) The extent of waiver of additional tax and penalty, by stating reasons and circumstances leading to the recommendation.

c) The quantum of input tax admissible under Sales Tax Law.

d) Relaxation of any procedural or technical irregularity, and condonation of any prescribed time limitation; and

e) Any other specific relief required to resolve the dispute.

In the courts, dispute between the parties is adjudicated by a judge or several different judges, who, whilst being independent, may have limited knowledge of the dispute and, therefore, need advice from expensive counsels. In ADR, the persons appointed in complex disputes are well-versed with the subject and the law involved. They may not only act as a neutral but also have all of the necessary knowledge of the subject as well as the law involved.

In litigation, there are rules of procedure laid down by the court, which both parties have to follow. In ADR, there are also rules, but they are very flexible. The parties and the neutral persons so appointed to settle the dispute, can mutually agree to change them as the process matures.

In litigation, there may be a time-table, but it is usually designed to suit the needs of the court and not the parties'. However, in ADR time-tables are specified in the agreed rules that the parties have signed up to, and can be made more flexible with the agreement of the parties and the neutrals.

The courts do have powers to ensure that the parties stick to the time-table, but they often do not seem inclined to use them, and a party can delay matters for years before the court will strike out the claim or defence. On the other hand, the court can be inclined to enforce the rules without any regard to the personal circumstances of the parties and, therefore, can strike out cases too early. In ADR, because the procedures can be tailored to meet the demands of the parties and the neutrals, they take into account the personal circumstances of the parties and, therefore, allow greater flexibility.

In the Finance Act, 2004, the amendments, providing for alternate dispute resolution, have been made in the statutes by the insertion of new Sections. These amendments can be summarised as follows:

1) Amendment in Central Excise Act, 1944

A new Section 36-D "Alternate Dispute Resolution" has been inserted, after the Section 36-C in Central Excise Act, 1944.

2) Amendment in Customs Act, 1969

A new Section 195-C "Alternate Dispute Resolution" has been inserted, after Section 195-B, by amending Customs Act, 1969.

3) Amendment in Sales Tax Act, 1990

A new Section 47-A "Alternate Dispute Resolution" has been inserted, after Section 47, by amending Sales Tax Act, 1990.

4) Amendment in Income Tax Ordinance, 2001

A new Section 134-A "Alternate Dispute Resolution" has been inserted, after Section 134, by amending Income Tax Ordinance, 2001.

It will be interesting to the listeners of this workshop and the readers of this paper, that at times, the Government of Pakistan has acted magnificently by reducing the burden of the tax-payer, without resorting to the Alternate Dispute Resolution Committee. The following are the two examples:

SRO. 322(I)/2004. dated 22.5.2004

Whereas an amount of Rs. 18,318,809 as principal amount of sales tax was outstanding against M/s. Mustafa Spinning Mills (Private) Limited, Faisalabad, as adjudged in orders-in-original, bearing numbers 68/2001, dated the 28th July, 2001 and 25/2003, dated the 20th August, 2003, along with additional tax and penalty thereon;

AND WHEREAS M/s. Mustafa Spinning Mills (Private) Limited, have explained the reason for non-payment of sales tax due to their financial crisis, price-hike of cotton, and inability to get

loan from the bank, but have now deposited the whole outstanding principal amount of tax adjudged in the above mentioned orders, as confirmed by the Collectorate of Sales Tax, Faisalabad;

Now, THEREFORE, the Central Board of Revenue, in exercise of the powers conferred by Section 34A of the Sales Tax Act, 1990, is pleased to exempt, as a special case, the whole amount of additional tax and penalty, adjudged against M/s. Mustafa Spinning Mills (Pvt) Limited, Faisalabad, in the afore-mentioned orders-in-original.

SRO. 345(I)/2004. dated 26.5.2004

WHEREAS a case was adjudged against M/s. Polycon Pakistan (Pvt) Limited, Lahore, vide Order No. 62/64, dated the 19th June, 1994, on the charge that they did not pay sales tax on supply of sliver cans, during the period from November, 1990 to June, 1993;

AND WHEREAS the Appellate Tribunal, Lahore, vide Order passed on the 13th May, 1996, against Appeal No. 49 of 1995, observed that there was nothing on record to suggest that the failure to pay sales tax was deliberate and willful and that no element of malafide was found on the part of the registered person;

AND WHEREAS the Federal Government passed an order issued under C.No. 1(12)STJ/2000 dated the 1st July, 2002, that it was satisfied that, inadvertently and as a general practice, sales tax was not charged on sliver cans supplied by M/s. Polycon Pakistan (Pvt) Limited, during the period from November, 1990, to June, 1993;

NOW, THEREFORE, in pursuance of Section 65 of the Sales Tax Act, 1990, the Federal Government is pleased to direct that the tax not levied during the aforesaid period, shall not be required to be paid by M/s. Polycon Pakistan (Pvt) Ltd subject to the condition that the registered person accounts for the supplies from the 12th April, 1994, to the 3rd July, 1994, and pays sales tax along with additional tax amounting to 20% of the principal amount due thereon.

It may be interesting for the readers to have a look at the notifications issued by the Government of Pakistan, after considering the report of an Alternate Dispute Resolution Committee.

The following two notifications may be of interest to the readers:

SRO. 618(I)/2004. dated 17.7.2004

In exercise of the powers conferred by Section 34A of the Sales Tax Act, 1990, the Central Board of Revenue is pleased to exempt as a special case, the full amount of additional tax and penalty adjudged against M/s. Janana De Malucho Textile Mills Limited, Kohat, vide Order-in-Original No. 27/2003, dated the 7th April, 2003, passed by the Deputy Collector of Customs, Sales Tax and Central Excise, (Adjudication), Peshawar, for the reason that the principal amount of sales tax has already been paid by the registered person and the Alternate Dispute Resolution Committee, constituted by the Central Board of Revenue u/s 47A of the Sales Tax Act, 1990, in the case of the said registered person in its report dated 7th June, 2004 has unanimously recommended for exemption of the whole of the additional tax and penalty raised against the company.

SRO. 639(I)/2004. dated 24.7.2004

In exercise of the powers conferred by Section 34A of the Sales Tax Act, 1990, the Central Board of Revenue is pleased to exempt as a special case, the full amount of additional tax and penalty adjudged against M/s. Babri Cotton Mills Limited, Kohat, vide Order-in-Original No. 28/2003, dated the 7th April, 2003, passed by the Deputy Collector of Customs, Central Excise and Sales Tax (Adjudication), Peshawar, for the reason that the principal amount of sales tax has already been paid by the registered person and the Alternate Dispute Resolution Committee, constituted by the Central Board of Revenue under Section 47A of the Sales Tax Act, 1990, in the case of the said registered person, in its report dated the 7th June, 2004, has unanimously recommended for exemption of the whole of the additional tax and penalty raised against the company.

ADR In The Education Sector

— M. Arif Dossal

Executive Director,

COMMECS Educational Trust

They say that "Conflict is the beginning of consciousness". Conflict is usually based upon a difference over goals, objectives or expectations between individuals or groups. Conflict also occurs when two or more people or groups compete over limited resources and/or perceived, or actual, incompatible goals.

A lot depends on the context, the feelings and the way we manage conflict. In this process of managing a conflict, we identify and handle the dispute in a rational, equitable and efficient manner. As individuals, once we become acquainted with the techniques of managing conflict, we may utilise them in all aspects of our lives - be it our family issues, work-related problems, social issues **or educational disputes** etc.

As Dorothy Thompson very rightly said:

"Peace is not the absence of conflict, but the presence of creative alternatives for responding to conflict — alternatives to passive or aggressive responses, alternatives to violence".

Alternate Dispute Resolution as per our understanding refers to techniques used in resolving various kinds of disputes through the involvement of a neutral third party/ies. The neutral/s can play a variety of roles, including facilitating discussions, providing parties with a "reality check" on the merits and values of their claims, assisting with creative problem-solving and writing agreements that reflect needs of the parties.

Although the general ADR basic document/discussion, refers to trade and government-related disputes and conflicts in relation to procedural matters and revenue issues, it is felt that the ambit of the system can well be extended to areas beyond the usually accepted ones. A major area which lacks proper governance in many ways and operates without adequate checks and controls is the education sector. The education sector in any developed country is the cradle, which nurtures all other areas of development — professional or otherwise. In our country, we end up presenting the exterior wrappings of the product (education) without really delving into the core. It is this difference between the outer crust and the inner hollowness that gives rise to tremendous conflicts which, in turn, give birth to disputes which take such a long time in resolving. Either the essence of justice is lost, or else the situation is not addressed by the victim who feels the hopelessness of the existing system. If an ADR system could be introduced to resolve the situation, many issues could reach their logical and timely conclusion without being stretched to their breaking limits.

Disputes over differences/conflicts in curriculum policy have to be seriously looked into. Curriculum classically refers to, as John Kerr says (taken up by Vic Kelly in his standard work on the subject), "all the learning which is planned and guided by the school, whether it is carried on in groups or individually, inside or outside the school". Hence, the concept that there are four ways of approaching curriculum theory i.e. curriculum as:

a) a basis of knowledge to be transmitted

b) an attempt to achieve certain ends in students – product

c) process

d) praxis

It is in these areas that vast differences accumulate either on the basis of non-developmental efforts by the concerned authorities, as against individualised efforts, or those by individual institutions or group of institutions. The obsolescence of various educational levels of learning on the national, provincial or district scale, as compared to the relatively updated curriculum of private institutions, serves only to create distinct classes of society.

The order of student development has taken a veritable u-turn. The product of the government schools and colleges of the 60s and 70s, who are now in the ruling strata of society, were probably the last generations to walk toe-to-toe with, and often excel in competition, knowledge and skill development areas with their contemporaries from private institutions. The product of these schools (often laughingly and sometimes patronisingly branded as the "Peela" yellow schools) has not only lost its leadership status of yester-years, but has slid down to a near state of apathy with a big blank area in the place where the words "quality" and "dedication" used to be written. All attempts at curriculum development meet a solid wall of resistance when presented to the relevant government department. There is no forum on which to take up and address an issue which is of prime importance, insofar as the development of our future generations is concerned.

Indiscriminate assessment systems, results and disputes arising from them due to the examiner not being subject to any accountability process, give rise to injustice, often on an immeasurable scale. Glaring examples can be found in the incidents of those poor students who obtained admission to professional colleges, completed their tenure but were denied their degrees because of a quirk of fate, when the government decided to withdraw the affiliation/registration of the institution. Justice delayed is justice denied. These victims of circumstances get their degrees, only after fighting out the issue on roads and in courts for a number of years — precious time for young aspirants.

Various opposing policies of admissions and assessment are other thorny issues. Various public sector university policies deny admission to some students from particular institutions, but welcome students from other educational centres, despite the fact that they have an identical background and similar subjects. It is a fact that in a like situation, the students went to court for the redressal of their rights and won the case, but only after a precious period of more than two years had been lost.

Punishments sometimes grow beyond the natural system or limits of decency. Regulatory records of punishments accorded as required by the law of the land, are rarely maintained by the institutions and equally rarely followed up on or checked by the authorities. Corporal punishment, which is not allowed, is often rampant in institutions specially madresahs. The victims have hardly any recourse to justice since there is no forum for the resolution of these disputes.

Appointment procedures and promotion policies are often written down but rarely implemented in the true letter and spirit. Employees sometimes have to sign salary vouchers for higher amounts than the amount actually received. Benefits promised and written down are not given; probation rules and benefits are not observed. Often nothing is given in writing and the employees' otherwise non-existent rights come to a zero level. Promotion policies are either not there or are just in the form of a formal paper. Favouritism is the name of the game, and merit

sometimes turns into an alien word. The whole system seems to work as preying maggots, feeding away on an already dying system.

Parental rights in most situations are almost nil. Parents, out of fear of their ward's future, keep mum about the atrocities visited on their children at various levels within the institutions. The role of school management and college management committees, of which parents are to be an essential part, are merely a farce.

In view of the above, the areas in the education sector which need to be covered, besides so many others, in terms of dispute resolution are:

- Disputes over differences/conflicts in curriculum policy, which may leave particular board-students with a handicap.
- Disputes regarding results of public examinations
- Conflicts regarding assessment and marking systems, which do not provide an equitable comparative base.
- Disputes regarding punishment type and procedure in schools, colleges and madresahs.
- Disputes in appointment procedures at educational institutions, and perception of rights and duties.
- Disputes regarding teacher's workload in respect of varying policies and institutional levels.
- Disputes regarding promotions and promotion policies.
- Disputes regarding parental rights.
- Other areas.

What needs to be done?

1) Develop a Total Quality Management (TQM) basis for planning any system of conflict resolution. It is very rightly said that 'for any sustained initiative to succeed in a bureaucratic system, it must be given consistent support from the highest levels down'. Total Quality Management is an all-encompassing concept, which seeks to address the issue of creativity standards at all levels of education — its delivery, management and dispute resolution.

2) Form a diverse planning committee to conduct an assessment of the needs of various levels of educational institutions, and determine the types of conflicts and the management best suited to the issues/institutions.

3) Map out a plan for how conflict management and dispute resolution can be institutionalised in all institutions within the educational sector.

4) Include both peer mediation and conflict management curriculum as part of the plan to provide all students, teachers and managements with better conflict/dispute resolution skills.

5) Adopt mediation as an option for resolving all conflicts that occur.

6) Educate students, teachers, guidance counsellors, administrators, institution's board members and parents about conflict management initiatives.

7) Develop in-school curricular materials and training expertise in respect of the philosophy and methodology of dispute resolution.

8) Build a system of evaluation of management of dispute resolution activities to determine if they are meeting the stated goals and objectives.

9) Develop partnerships with all stakeholders of the education sector to explore ways in which conflict management/dispute resolution concepts and skills can be infused into their activities.

Lastly, it would be sufficient to say that we all need to do what needs to be done.

Suggestions For Improving Fiscal ADR System

— Hammad Raza Zaidi, FCMA

Introduction:

Internationally, the Alternate Dispute Resolution System (ADRS) is treated as a superior form of arbitration. The course and procedures of such arbitration are determined mutually by the executive authority and the disputants (tax-payers), usually represented by the associations of trade and industry. The option of such sublime arbitration is adopted at a particular stage of the case, where the tax-payer finds no other non-ADR remedy available, and execution of the last available decision is likely to create incorrigible hardship for him, and the tax authority feels that any further pressure for such execution will put the tax-payer's business activity at stake and adversely impact his capability to discharge future tax liabilities or to make contribution to future tax collections of the government.

In the past, Pakistan experienced such arbitration mechanism under the Indirect Taxes Settlement Commission System (ITSCS). But the system failed mainly because of the weakness of Government's resolve to make the system succeed, low level of participation of the business community in the decision-making processes, collateral success of the Appellate Tribunal System at initial stages, and tax-payers' tendency to prefer judicial options over quasi-judicial or executive remedies.

Need for improving / strengthening Adjudication/ Appeal system:

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

ADR System:

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

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

No doubt, the Government was and is sincerely keen to bring maximum success to ADR system and to make it as maximally transparent, efficient, effective and productive as possible. But hitherto passive response from the tax-payers' community is impacting the speed of its success, and certainly, its output and impressiveness. That means the system does need improvement so as to make it more attractive option for the tax-payers. After discussing with different popular experts of law and taxation, the following suggestions are made:

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

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

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

iv) **REMUNERATION TO ADRC'S MEMBERS**: The clause of remuneration of the members of ADR committees has perhaps been eliminated. This decision needs restoration with a ceiling on maximum payment, and power to relax such ceiling in any case, should be left with CBR. Or alternatively, a proper fee system may be introduced for the private sector members of the committees.

v) **PANELS FOR ADR COMMITTEES**: There is a general impression in the public that mostly 'favourites' have been included in the ADR committees' panels. It is, therefore, proposed that either the penal system should be discontinued and the tax-payers may be given option to suggest at least six names of persons from the private sector for selection of two members for the committee at Board's level, or the number of persons in the panels may be increased suitably, (the relevant notification(s) also need referential updating of

statutory provisions). It is also advisable to create a pool of experienced officers on regular basis for nomination on ADR committees. These officers should not otherwise be posted in offices involving heavy work load, so that they may pursue their ADR-related assignments more attentively.

vi) **ENTERTAINMENT OF ADR APPLICATIONS IN CBR**: Currently, ADR applications are being received and processed by separate sections in each Wing of the CBR. Decisions for acceptance or rejection of any application for ADR purposes is, no doubt, a crucial stage. In this regard, uniformity and consistency of approach needs to be observed to make the system more judicious. Instances are on record where conflicting views have been taken by different Wings of CBR, on the question of the so-called 'closed transactions/estoppels'. In order to avoid such a scenario, it will be appropriate if all the work relating to the ADR regime is entrusted to the Legal Wing, where secretaries from all taxes with a chief (all having sufficient knowledge and experience), should be posted to exclusively deal with ADR cases, under the overall supervision of Member (Legal).

Besides, suitable (taxpayers-friendly) parameters may be chalked out for deciding about the 'entertainability' of ADR applications (these parameters may be incorporated in the ADR rules, if deemed proper). This will enable CBR to centrally computerise the records of ADR cases in due course. (A software can be developed for this purpose with the assistance of Member (IMS) and (PRAL).

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

viii) **CONSOLIDATION OF ADR RULES**: As of today, separate ADR rules are notified under the 'Customs Act' 1969, Central Excises Act, 1944 and Sales Tax Act, 1990. (Besides, under the Income Tax Ordinance 2001). Almost all rules have structurally identical provisions. Such dispersal of subordinate legislations on the same subject is not in line with the Government's ongoing efforts to simplify the fiscal procedures and promote inter-tax integration. It is, therefore, suggested that the question of consolidation of ADR rules, at least on customs, excise and sales tax sides, may be examined in the Board and, if found convenient and feasible, the ADR rules for these three indirect taxes may be consolidated.

Reportedly, under the direction of the Honourable Chairman, the Director General (Training & Research), Customs, Excise and Sales Tax, Islamabad has initiated an exercise to examine/analyse, and propose improvements in the departmental adjudication system, with a view to increasing its efficiency and ability to deliver, so that internal litigations may be curtailed and dealt with in a rational manner, promoting tax-payers' facilitation and the trustworthiness of the system.

Promising Opportunities For CMAs

— Jawed Mansha, FCMA

Alternate Dispute Resolution has now become an internationally accepted method of dispute resolution, and majority of the litigants worldwide prefer ADR methods. According to a survey, not more than 20 per cent cases in USA, UK, Canada, Australia and several other countries go to the national courts. There is no reason why we cannot make ADR methods popular in Pakistan.

Traditionally, the Punchayat formed the keystone of our village life and its decisions were honoured and accepted by the village community and any non-compliance attracted penalty. That system has been vastly overtaken by a complex modern judicial system, but the relevance of that tradition remains unaffected even today – especially to those who crave for quick resolution of disputes.

Of late, there is a move all over the world to encourage professionals and experts like chartered accountants, cost and management accountants, engineers, advocates etc. to play an active role in arbitral process. The objective of arbitration is to provide expedient, efficient and economical justice to the aggrieved parties, as it is felt that too much lawyering defeats the very purpose of arbitration. The Central Board of Revenue, Government of Pakistan, has also formed committees on Alternate Dispute Resolution in matters of income tax, sales tax, customs and central excise, and also appointed on these committees professionals, including the cost and management accountants. In my view, the formation of these dispute resolution committees offer promising opportunities to the cost and management accountants, and they must look at ADR as a crucial addition to their skills and services. They can be instrumental in resolving complex disputes by utilising their wide range of experience.

In this perspective, the holding of a workshop on Alternate Dispute Resolution by the Research Department of the Institute of Cost and Management Accountants of Pakistan, is a welcome and timely step. I am sure that the workshop would help popularise the concept of ADR methods in the country and highlight the significant role of the cost and management accountants in this respect. The learned speakers of the workshop, who represent diversified fields of public, private and legal professions, have presented their papers on the importance of ADR, and the inherent problems in our judiciary and political system. The recommendations, made by the speakers during the workshop, should be implemented in letter and spirit by the concerned quarters.

I am confident that this initiative by the Institute would be appreciated by the Government, which has recently been giving due importance to the professionals like CMAs in the matter of alternate dispute resolution.

Rooted In Our Culture

— Qaisar Mufti, FCMA

Chairman, Research & Technical Committee, ICMAP

As one of the two professional bodies of accounting in the country, we feel, it is our duty to contribute in nation-building to the extent we are in a position to. We feel that one of the ways we can do this is through providing a forum on which people from different walks of life may freely and frankly speak their mind. Such fora in other countries serve as think tanks for purposes of both policy formulations and evaluation of decisions made.

Within the overall discipline of ICMAP, we have groups involved in discourse and dialogue in relation to issues having directly to do with the profession. In our modest way, we have been involved in research. Listing of the work done by us has been placed before you. So far, it has basically been professional accountants engrossed with accounting problems, and issues having to do with management accounting. Alternate Dispute Resolution is a new chapter on our statute book. But as the learned participants of this workshop have pointed out, the thing was practised from ages even before Christ. I am a person knowing the subject much less than every participant here is blessed with the knowledge of. So it does not behove on my part to attempt a comprehensive dovetailing of the subject.

My submission to you is that we should help build think tanks, where learned of the land and people like you gather to provide guidelines for laws, rules and etiquettes, cultural and otherwise. ICMAP is here to play its role. In its role as the provider of a forum to serve as a think tank, it shall be guided by you, wisest in lore. But we can provide only a forum. It is upto you, the like of participants in this assembly, to provide light and energy for its functioning.

The whole idea and concept of ADR can be summarised into the words of a former Chief Justice of India, Hon'ble Dr. A. S. Anand, as "Justice with Co-operation". ADR means and aims at "resolving disputes",and not at "giving to one what is due to him or taking away from one that does not belong to him". It does not stand on "what is just or judicious". "It does not proceed on a set track or moves through what are otherwise murky labyrinths of judicial system". In ADR, there is no "loser" or "winner". It is "deciding disputes". In ADR, dispute is set at rest on the motto of "win-win situation for all".

Interest in the ADR system in other countries stems from a desire to revive and reform the traditional mediation mechanism, the like of a Lok Adalat in India and Panchayat / Jirgah system in countries like ours. The modern ADR movement originated in the United States in the 1970s. It was spurred by a desire to reduce the litigation cost, delay and adverse ramifications of litigation.

The roots of present ADR concept and mechanism are in the punchayati system of our ancient heritage. The traditional punchayati system has been successful over ages. Those who became involved even in hotly contested disputes, co-operated with each other to resolve differences amicably. The punch called upon to decide matters between contesting parties were no experts of law. Neither they were nor were they taken for jurists. They were no experts of the relevant trade e.g. the one called on to adjudicate cotton crop damaged by the deed or misdeed of a farmer, was not to be an expert on cotton culture or cotton trade. He was to be one who commanded respect in

the locality. He was believed for one who would make a pronouncement without fear or favour, keeping in view traits of the society and realising ramifications of the award in a dispute.

The punchayati system is built on oriental traditions, on the pillars of traditional models of popular justice that relied on elders, most pious in the society, religious leaders or other community figures to help resolve conflicts. We have today seen the resurgence of interest in ADR the world over. We can learn a lot by examining the traditional, informal, community-based systems of disputes resolution. This culminates into community harmony, longevity of relationships and the infusion of local values and morals over “winning”.

One of the old traditions of the Indo-Pak Subcontinent is to settle disputes by the elder and learned members of the society through mediation, negotiation or conciliation. The formal panchayati system, banking on local elder persons in the rural area, has been in place since the Mughal period. All petty disputes of the rural areas are generally resolved through the panchayati system, prevailing since that time. In the Sub-continent, the panchayats have been a means by which village level disputes were settled through the intervention of the village elders; punchs, mukhiyas, sardars, chaudhries, saalis etc.

An ADR type of system was prevalent throughout India since before time immemorial. As the British introduced their own legal system, our system started to drift away. However, this system again became popular as the courts became unable to cope with the workload. This was caused by multiplication of complexities over the years. In March, 1982, the Lok Adalat movement staged resurgence in the Indian State of Gujrat. It quickly spread throughout India. One of the most significant initial successes was in the cases of 40,000 families that were uprooted to accommodate the hydroelectric power project at Srisailam. The cases pending for 20 years were finally decided by a Lok Adalat. The then Prime Minister participated in the Lok Adalat. He was present when compensation of Rs. 1,510 million to the affectees was paid. Until 1996, more than 13,000 Lok Adalats had been held in India and over 5 million cases had been settled.

The institution of Lok Adalat existed in our society in one form or the other. It continues to exercise decisive influence in the life of village folk even today. Lok Adalat can be said to be the extension of traditional Indian Nyaya Panchayats with some modification, in its functioning and characteristics. The Nyaya Panchayats were popular tribunals in rural areas. They used to settle civil and criminal disputes through the intervention of village elders. Village Panchayats were usually independent bodies. The state rarely interfered in panchayat’s matters. May not be formally, they were taken for delegates from the Crown or God. The common people held the panchayats in very high esteem and great confidence. Members of the jury or the ones who constituted panchayat were referred to as “Panchas” or as Pancha Parmeshwar. This shows the amount of respect and reverence that the Panchayats commanded in the eyes of the village community. After independence, the constitution-framers in India made a provision in Article 40 thereby giving powers to the State to take measures for organising village panchayats, and endow them with such authority as may enable them to function as units of self-government. In this way, the institution of panchayats was brought into recognition.

In Bangladesh, though there is no panchayat system as such, such type of dispute resolution outside the court is a common phenomenon in the rural area. It is shaalishi (mediation). Petty disputes, whether civil or criminal in nature, are resolved through shaalishi. Sometimes grave criminal offences are also resolved through shaalishi to avoid long period of adjudication in the court. Shaalishi is one kind of mediation, where one or more than one persons are nominated by the disputant parties to assist them to reach an agreed settlement. The nominated persons entrusted to make a settlement of the dispute are called 'Shsalish', and the meeting is called

'Shsalishi'. It is an informal social meeting where the invited person/persons hear the disputant parties carefully and try to sort out the main issues of the dispute. They assist the disputant parties to sort out their problem themselves.

The shaalish bring the disputant parties close to the settlement, instead of pronouncing their judgement. There are no formal proceedings in the shaalishi. The disputant parties disclose their causes of dispute orally before the shaalish. Sometimes they submit documents to substantiate their claim. Generally there arises no question of witnesses, but the shaalish may hear the witnesses to determine the core issues. Witnesses can be the ones named by the parties or called by the jurists. After determining issues of the dispute, the shaalish provides an outline to the disputant parties to reach an agreed settlement.

In Pakistan, the Punchayat or Jirgah (consisting of elders of the tribe) has age old history. The punchayat or jirgah is headed by the sardar [head of a tribe]. If the dispute is of lesser importance, local heads of the tribe can either be called on an ad hoc basis or taken regularly. They deal with a range of issues, including conflicting claims to land and water, inheritance, alleged breaches of the 'honour' code and intra-tribal or inter-tribal killings. Many sardars or local tribal leaders, who are the punchs in such cases of disputes, hold regular 'adjudication' days, which are widely known and attended by people with a variety of complaints.

Apart from the traditional mediation mechanism, dispute resolution is also a familiar concept in the Islamic ideology. The Holy Qur'an refers, at several places, to the principle of resolving disputes amicably, calling on the protagonists to forgive: for to forgive is ennobling. The Qur'an very specifically mentions:

"If you fear a breach between them (husband and wife), appoint two arbiters, one from his family, and the other from hers. If they wish for peace, Allah will cause their conciliation. For Allah has full knowledge, and is Acquainted with all things (IV:35)"

In the sunnah of the Holy Prophet (peace be upon him), the role of the person who reconciles differences between men is amply illustrated in various hadiths. The Prophet (peace be upon him) had accepted to judge an arbitration case, rather he had appointed an arbitrator and had accepted the latter's decision and he had also counselled a tribe to have a dispute arbitrated. The Khulafa-e-Raashideen did likewise with respect to disputes relating to goods and obligations.

As I submitted earlier, resolution of disputes outside the court is not a new concept in Pakistan. This has been an existing system for arbitration, mediation and resolution of disputes, through Punchayat, Jirgah and through interference of elders etc. Lot many disputes in business are resolved through arbitration in our milieu.

It would not be out of place to mention here that the partition of the Sub-continent is a good example of arbitration. In June 1947, when British India was to be partitioned and two independent Dominions – India and Pakistan – were to be established, the British Government considered questions about judicial forums to deal with the various problems arising out of partition and also to deal with the demarcation of the boundaries of the two States. The British Foreign Office examined the issues, whether the matters could be referred to the International Court of Justice. However, reference to the Court was ruled out, and it was eventually decided to establish an Arbitral Tribunal to deal with the problems arising out of partition. Mr. Jinnah (Pakistan) suggested that the Chairman of the Arbitral Tribunal should be a member of the Judicial Committee of the Privy Council. Pandit Nehru (India) suggested that three Judges of the Federal Court of British India should constitute the Arbitral Tribunal. In the end, there was

agreement that he Arbitral Tribunal should be composed of Sir Patrick Spens as Chairman and two High Court Judges, one Muslim and one Hindu, as members. So far as the demarcation of boundaries was concerned, a Tribunal was constituted consisting of five members, two from India, two from Pakistan, and Sir Cyril Radcliffe as Chairman. India and Pakistan, both were dissatisfied with the awards, but accepted.

A high percentage of the population in Pakistan is illiterate or with little schooling or learning. This factor handicaps them in approaching the official judicial system in case of any injustice experienced. Bulk of the people do not understand the law, its procedures and the system that administers it. Nor are they aware of the ways to access legal aid and justice. In this backdrop, an overhauling of our ageing legal system has become the need of the day. We need a new jurisprudence. Such jurisprudence has to shift away from fine-spun technicalities and abstract rules to practical justice.

Today, justice delivery institutions, in most of the developing countries, are confronted with serious crisis, mainly on account of delay in the resolution of civil and commercial disputes, or unduly fine woven legal intricacies. This situation erodes public trust and confidence in legal institutions. This also obstructs growth of social and judicial culture. The crisis demands instant remedial actions.

In Pakistan, litigation between governmental agencies and the citizens has been increasing manifold. This is not only time-consuming but also leads to delay in justice. Protracted litigation, anxiety and botheration create bitterness. These deterrent factors are bound to breed contempt and disillusionment among masses, which pushes them to agitate for their rights in streets. It is absolutely necessary to restore the confidence of masses in our judicial system and prevent anarchy and disorders in our society. In order to uphold the spirit of democracy and justice to all, out-of-court settlement between disputants should be encouraged, and efforts be made to popularise out-of-court settlement, through ADR mechanisms.

- Resolving disputes Out-of-Court (through ADR) :
- Reduces the burden of the courts
- Saves the management time of litigation
- Saves litigation costs
- Controls corruption and mal-administration in Government agencies
- Avoids expenses, delay, stress
- Avoids divergence of time in bringing case to the court
- Settles disputes through people and institution, which the contesting parties trust
- Takes people direct to the root, instead of loitering through peripheries

In the courts, disputes between the parties are adjudicated by a judge or several different judges, who, whilst being independent, may have limited knowledge of the dispute. Therefore, they need advice from counsels who are expensive. The judges are paid-servants of the State. In ADR, the persons appointed in complex disputes are well-versed with the subject. It is their reputation and

standing in the society which take them to administer justice. They may not only act as a neutral but also have all of the necessary knowledge of the subject as well as the law involved by obtaining assistance from outside. In litigation, there are rules of procedure laid down by the court, which both parties have to follow. In ADR also, there may be rules; but these are very flexible. The parties and the neutral persons appointed to settle the dispute can mutually agree to change them in keeping with the need and time. In litigation, there may be a time-table. The time-table is usually designed to suit the needs of the court and not of the parties'. In ADR, time-tables are specified in the agreed rules that the parties have signed up to, and can be made more flexible with the agreement of the parties and the neutrals.

Positional bargaining is the traditional strategy in any kind of dispute, where two parties try to solve dispute without the intervention of the third party. The key characteristics of this strategy are that each side takes its best and most extreme position on what it demands or offers. Further "discussions" take place, where parties haggle, threaten, bully, cry or lie, in an effort to extract movement or agreement from the other side. Concessions are exchanged and settlement is usually achieved somewhere in the middle of the bargaining range, depending partly on the balance of power between the parties.

On the other hand, the key characteristics of principled negotiation are that negotiation is made on the basis of desire and willingness of the disputants to end disputes and not on positions. Furthermore, problem-solving encourages obtaining objective standards. They are used to support decision-making. Principled negotiation aims at wise outcome reached efficiently.

Today, ADR has developed as a specialised field for lawyers in developed countries. It is now inserted in every statute dealing with civil and business disputes. Alternate Dispute Resolution Act has also been formally legislated by a number of countries. Such provisions of law are now popularly termed as ADR. The types of dispute resolution processes have also been broadly categorised into adjudication, arbitration, mediation and negotiation, private judging, neutral expert fact finding, mini-trial, ombudsman and summary jury trial. Which option or combination of options is best for a particular dispute, depends on the real life situation.

"Right to justice" is directly linked with "access to justice". It is the fundamental right of every citizen to get steady justice. But this constitutional guarantee becomes a farce due to the backlog of cases in the court. It is also very hard for the poor to afford the required court expenses, to take recourse to the court. Mitigation of civil and business disputes through the ADR will reduce the overburden of cases in the courts.

Keeping in consideration the growing interest in ADR worldwide, and our own domestic requirements, it is high time that the legal policy makers in Pakistan should take immediate steps to strengthen the institution of Alternative Dispute Resolution, so as to provide less expensive, easy and prompt justice to the people. It would not be a herculean task as the ground exists in the shape of panchayats and jirgahs in our society. We must also learn from the experience of our neighbouring country, India, with respect to the functioning of their Lok Adalats.

It is reassuring that in Pakistan the Central Board of Revenue (CBR) has now introduced the mechanism of ADR to resolve tax related disputes. Various Committees have been constituted to provide an alternate mechanism to the tax-payers to resolve their disagreements with the tax collecting agencies over facts, figures or interpretation of taxation laws. The ADR Committee is an Advisory body, and its recommendations are neither binding on the CBR nor the tax-payer. Thus, no occasion of taking up the matter further arises. In fact, the recommendations of the ADR Committees are only a guideline for the CBR for resolution of dispute or hardship.

The ADR system introduced by CBR is, in fact, not substitution of the existing conventional appellate system, and any issue in dispute or cause of hardship can also be referred back to continue in the existing conventional appellate system. This system will operate side by side with the existing conventional appellate system, where the tax-payer can refer the contentious issues for consideration and recommendations of the independent experts on the subject, and make an out-of-court settlement with tax collectors in the light of such recommendations. There is only one condition for referring a matter for ADR, which is that the matter should be pending before an appellate authority, tribunal or court.

ADR can play a positive role in support of judicial reforms. The strengthening of ADR system in Pakistan can be seen as one of the judicial reforms intended to provide quick and easy justice to the people. The courts must respect the development of the ADR culture as an autonomous, parallel and independent avenue of dispute resolution. ADR would serve as a supplement to existing law courts, reducing the burden of the courts on the one hand, and the hardships and miseries of litigants on the other. This would also help restore confidence of the people in the judiciary, who will take a sigh of relief on escaping, to a large extent, the technicalities and rigmarole inherent in our judicial culture. It would reduce the cost and time required to resolve disputes. It can help increase access to justice for the traditionally disadvantaged groups. ADR would lead to greater activism among the disenfranchised for access to formal legal system.

Developing a legal culture in support of ADR, however, poses a considerable challenge. Obstacles litter the path to reform. Successful development of ADR, therefore, requires candid self-awareness of the problems, rigorous comparative study of worldwide experience, thoughtful adaptations mindful of local incentive structures, and effective implementation strategy, besides a will to do away with tautology.

Section 134A Of The

Income Tax Ordinance 2001

— Rehan Hasan Naqvi

Advocate Supreme Court of Pakistan

The idea of resolving disputes in relation to liability of income tax, penalties, fines etc., otherwise than appellate fora and reference under the Income Tax Ordinance 2001 has found its way as Section 134A inserted vide Finance Act 2004. In order to facilitate understanding of the provisions in relation to ADR, sub-Sections (1) and (2) of Section 134 (A) are reproduced below:

134-A, Alternate Dispute Resolution, (1) Notwithstanding any other provision of this Ordinance, or the rules made thereunder, any aggrieved person in connection with any matter of income tax, pertaining to liability of income tax, admissibility of refund, waiver or fixation of penalty or fine, relaxation of any time period or procedural and technical condition may apply to the Central Board of Revenue for the appointment of a committee, for the resolution of any hardship or dispute mentioned, in detail, in the application.

(2) The Central Board of Revenue, after examination of the application of an aggrieved person, shall appoint a committee consisting of an officer of Income Tax and two persons from a notified panel of Chartered or Cost Accountants, Advocates, Income Tax Practitioners or reputable tax-payers for the resolution of the hardship or dispute.

First of all, I would like to dilate on the fact that sub-Section (1) of Section 134-A, starts with the words "notwithstanding any other provision of this Ordinance or the rules made there-under", thus overriding all the provisions, as contained in Income Tax Ordinance 2001. In support, I rely on the following case laws, which contain authoritative meaning of the word "notwithstanding".

1. Arif Husain Shah versus The Operative Director Administration, Electric Equipment Manufacturing Co. Ltd., Lahore reported as 1979 PLC 389.

   "The word 'non obstante' means 'notwithstanding'. It means 'despite of', or 'in spite of'. A 'non obstante' clause is used in a provision to indicate that the provision should prevail despite anything to the contrary in any provision. No doubt, one of the objects is to indicate that, despite any repugnancy between the provision containing a 'non obstante' clause and another provision, the former should prevail. This clause owes its origin to the fact that in the year 1750, a British King began to issue licence to do such and such thing 'non obstante' any law to the contrary.'

2. Commissioner of Income Tax Versus National Agriculture Limited, Karachi reported as 2000 PTD 254, in which it has been held as under :-

   "On perusal of the observations and the pronouncements made in the aforecited cases, it is established beyond any doubt that when a provision of the Statute starts with the expression "notwithstanding" or with "non-obstante" clause, then the effect thereof would be that such provision would have to be given preference, and would override any other provision or Section of the Statute. The other provisions or the sections of the Statute, inconsistent with the provision containing the "non-obstante" clause, would be subjugated, and preference

> would be given to the provision, or the section containing the non-obtante clause. From the pronouncement made in the aforecited cases, it is also to be deducted that if two provisions of a Statute or Section starting with the expression "notwithstanding" or with "non obstante" clause, would have preference and would override the provisions or the sections of the Statute dealing with the same subject-matter".

In sub-Section (2), the provision has been made for the Central Board of Revenue, to examine the grievance of a tax-payer and after examination if, in the opinion of Central Board of Revenue, the grievance is worth-consideration, then it would be referred to an Alternate Dispute Resolution Committee, consisting of an Income Tax Official, two persons from a notified panel of Chartered or Cost Accountant, Advocates, Income Tax Practitioners or reputable tax-payers. Thus I am not unjustified to say that it is an attempt to override all laws in relation to grievances of a tax-payer in the matter relating to taxation, relaxation of any time period, or procedural or technical condition. This has resulted in the usurpation of all judicial powers by the Central Board of Revenue, as contained in the appellate fora prescribed under the law.

Why forget the fact that proceedings under the Income Tax Ordinance are quasi- judicial and, therefore, the CBR is barred from exercising judicial functions, in the case of liability to tax or waiver or fixation of penalty or relaxation of time period. Actually, I would say that the CBR has adopted the role of an adjudicator, in order to negate what has been held in the case of Central Insurance Company Versus CBR reported as (1993) 68 Tax 86 (S.C.Pak), which says that "though the CBR has administrative control over the functionaries discharging their functions under this Ordinance, but it does not figure in the hierarchy of the forums provided for adjudication of assessee's liability as to tax".

So far as constitution of an ADR Committee is concerned, its members and Chairman, besides an Income Tax Official, have been selected from amongst the Income Tax Practitioners, Advocates, Chartered and Cost Accountants, practising on the Income Tax side and, therefore, are not qualified to decide disputes judicially.

Such provisions in the income tax laws not only would encourage the tax-payers to adopt ways and means of contravening the tax laws, but would also act as a lever in the hands of the tax collector to gratify himself. It would result in the invention of new and novel norms of showing dispute in a manner which is bound to increase inefficiency in a system already deficient in observing tax laws.

A very interesting provision has been made in sub-Section (5) of Section 134A, which provides for modification of all decisions, orders and judgments, made or passed according to the decision of CBR accepting the recommendation of ADR Committee and the tax-payers has been allowed to make payment of tax liability as determined by CBR. It means that in this manner the CBR has been vested with power to super impose its decisions and destroy the sanctity of the decisions, orders and judgments of appellate or judicial fora. Although, while starting sub-Section (1) with "notwithstanding", it covers only the Income Tax Ordinance 2001 and rules made hereunder, but not the decisions, orders and judgments of superior courts.

In sub-Section (6) of Section 134A, it has been laid down that if a tax-payer is not satisfied with the order of the CBR approving the recommendations of ADR Committee, he may file appeal or reference to the appropriate authority, tribunal or court within 60 days of communication of the order of CBR, without defining the appropriate authority or laying down the procedure for compliance in Section 127, 131, 133 and 134 of Income Tax Ordinance 2004. This Section is full of confusion regarding the assessment order as well as the appellate orders or decisions of the

superior-courts. If at all the purpose was to get the disputes settled by an independent authority, the Federal Tax Ombudsman Ordinance 2000 (Ordinance No. XXXV 2000) is already on the statute book and Section 33 thereof has provided for informal resolution of disputes.

In my humble view, because of the inherent defects as have been pointed out, ADR is bound to meet the same fate as was met in the case of the Settlement Commission established under chapter XIII-A of the repealed Income Tax Ordinance 1979.

ADR As A Function Of Civil Society

— Dr. Manzoor Ahmed

Chairman, Executive Committee

Usman Institute of Technology

I thank the ICMAP for inviting me to the workshop on Alternative Dispute Resolution. I also thank the Chairman of the Workshop, Justice (R) Saeed uz Zaman Siddiqui Sahib, for giving me the first chance to speak.

I was aware of the terminology of Dispute Resolution and have been watching its efficacy in a number of socio-political disputes, both at intra-national and international levels. But that this methodology could be efficacious in tax-related problems, was something new to me. I assumed that tax laws and regulations were very clear and definitive in nature, so there could hardly be any dispute between the tax-payer and the tax receiver. It should have been a matter of 2+2=4 and in such cases the numbers speak for themselves. The disputed problems could easily be referred to a court of law, and the matter could hardly be left pending for a long time, but for the inefficiency of our legal system. Eventually, it became clear to me that due to ambiguity in laws, complicated procedures and rules of business to be followed by the tax-payer along with other circumstantial problems, a simple matter of tax-paying and tax-receiving has become extremely tenuous and requires alternative options for its solution.

The concept of Alternative Dispute Resolution is not new. It is as old as recorded human history. As a matter of fact, it was the only civil society institution available for dispute resolution, other than the fiat of the ruler or religious leader or a sooth-sayer. Since documented civil and criminal laws and the institution of courts of law are of recent origin, societies had to rely more and more on consensus reached by warring parties, with the assistance of 'elders' or through 'punchayats' as common facilitators. This practice is still continuing in rural areas but, unfortunately, these indigenous institutions violate the contemporary norms of social justice and result in socially unacceptable decisions.

Dispute resolution outside the courts of law is basically a part of the judicial process and is permissible in Pakistan, yet there are no specific provisions or special institutional setups for different kinds of disputes. In many countries, it is a civil society activity, which is performed in an organised way with the help and assistance of their judicial system but in Pakistan it has yet to take roots and needs to become a public policy issue for the government. In developed countries, the two processes go hand in hand and dispute resolution, particularly in civil matters, has almost become a private professional activity, but of course in accordance with the regulations framed by public authorities. In Pakistan, we require two pronged activities. One is to develop dispute resolution as an institution of civil society, and the other to make it a public policy activity. These two activities should act in consonance with each other with the support of formal judiciary or the law courts. Public policy, as a matter of fact, should make it incumbent upon the disputing parties to go to a dispute resolution institution, before they could approach the court of law. There is a plethora of disputes - like tax disputes, utility bills, rental issues - which can thus be allocated to professional bodies.

The existence of such dispute resolution agencies would have the advantage of working as a buffer between the all-powerful bureaucracy of tax collectors, utility bills collectors etc. and the public, which most of the time feels helpless against its strong and powerful opponents. A general

legislation may be required laying down the procedures for resolving disputes by civil society institutions. In our neighbouring country, India, so far as I know, there exists a public policy to resolve such disputes through civil society institutions.

Making dispute resolution as a civil society activity would generate a healthy relationship between various disputant groups and provide a safety net for the poor citizens, who find themselves helpless before the awesome authority of the government. Dispute resolution as a function of civil society would also endeavour to improve and simplify the rules and regulations, particularly in matters of levying taxes, and would also generate pleasant and friendly relationship between the disputants.

Once a dispute is resolved by a civil society institution, it would leave an impression of fairness and friendliness on the disputants, rather than develop a sense of recrimination between the parties concerned. In the civil society scenario, there is a greater possibility of having an open discussion between the parties, facilitated by the professional dispute resolution functionaries, and the matters could be dealt with open mindedness. In a law court scenario, specially with the pending back-log of cases, this leisured activity is not conceivable and getting a short shrift leaves everybody unsatisfied.

I should think that a mechanism of tax dispute resolution by civil society can provide a paradigm for others to follow suit. The policy makers, the tax collectors, and civil society professionals should sit together and draw up rules of the game for resolving disputes. Once such a paradigm is developed, the benefits of the dispute resolution set-up would readily and immediately attract others towards this mode of solving problems. For developing institutional capability as a part of public policy for dispute resolution, we would require special arrangements to professionally train and educate people for this purpose. This can be done by private educational institutions either by themselves or some institutions may be commissioned by the Government to fulfil this requirement. The idea is to provide a critical mass of human resource, which is capable of handling the issues relating to taxes. Such institutions are already working in America, and quite a lot can be learned from them. They can be registered as "companies" or "societies" approved by the Government, and work in a transparent way with an auditing mechanism for its functions and finances. I should think that ICAMP is the most appropriate institution to initiate such a programme. A proper feasibility report for developing such institutional structures should be prepared since this activity requires comprehensive planning, specific targets and best possible resources for training the critical mass of people. I should think that ICAMP has the capability and the required autonomy to take a step forward in this direction.

Successful Implementation Still Awaited

— Zafar Iqbal Sobani

President, Institute of Chartered

Accountants of Pakistan

Alternate Dispute Resolution is not a new concept in Pakistan. So far as I know, until now only few cases have been referred to ADR and people are still waiting for the successful implementation of this concept. But CBR has been vehemently saying that this will save unnecessary litigations. At CBR, they are trying that, by the end of June 2005, all the undue litigation will be removed and a healthy changed environment under ADR may become effective. How and in what way?

I am, apart from being the President of the Institute of Chartered Accountants of Pakistan, also working as CFO of a large company. Their problem is that their business trend varies too much. They do not want to block down their decision at any level. All the litigations obviously disturb business affairs and delay decisions. This is the reason why business managers and owners don't want to go into litigations, and hence, a lot of evil and corruptions is coming up. They do not want to involve themselves in cases that consume their energy.

Alternate Dispute Resolution is a very new concept and few cases have been referred to it. But the progress of these cases in due course of time is not the same as this concept visualises. Somebody has mentioned that in the West this is a very popular way in which things are settled. Unfortunately, the culture in Pakistan is different. Our culture is that everybody is fighting for his own concept. The businessmen always fight for those things which are even not their right. The way the economy is improving and foreign investment is coming in Pakistan, I feel that the availability of these alternates will give a good option to these people and will also help create a very congenial business atmosphere in Pakistan.

Privatisation Commission's Experience

— Muhammad Asghar

Senior Consultant, Privatisation Commission,

Government of Pakistan

I was impressed by the presentations made here today. So far as the concept of Alternate Dispute Resolution, I would like to inform the house that this concept has been practically institutionalised in the Privatisation Commission and it has been very fruitful.

I would just like to give the background of the problems that we faced in the Commission and then come to dispute resolution. Most of us are aware of the privatised government commodities and ownership. In the early phase of the privatisation process, the ownership was passed on after receiving 40% to 50% payment and subject to an audit. The audit reports by the Chartered Accountants often created disputes between the buyers and the Government. Obviously, the disputes, when not attended in time, ended-up in standstill.

That was the time when the Government and the Privatisation Commission realised, that they needed to think creatively of ways to solve cases that were pending in the courts since 1991-92 and had not been resolved. There was a lack of trust between the buyers (who bought government property) and the Government, as no creative solution had been found to create trust. So an initiative was taken by the Commission that we formed a negotiation committee, using different terms like mediation, reconciliation, arbitration, etc. But the arbitrator was again a Government nominee of the Secretary Finance. Most of his decisions were not accepted by the buyers, and matters again ended up in the courts. So in 1998, the Board of Privatisation Commission formed a negotiation committee, that contained three members of the Board who were not from the Government. They were from the private sector - renowned industrialists and renowned lawyers, helped by government servants.

The process of negotiations started with about 27 buyers. It was initiated in 1998, and I am happy to report that majority of the cases have been resolved and have been withdrawn from the courts by those buyers. There are still few pending cases and the process is still going on and no buyer has complained against the Privatisation Commission. If any one has any complaint, he can approach the committee and get his dispute resolved. I just wanted to add that the concept of Alternate Dispute Resolution is working in another institution of the Government of Pakistan and, I think, it has brought fruitful results.

All About ADR In Tax-Related Matters

– Wasful Hassan Siddiqi, FCMA

Redressal of public's grievances

Redressal of public's grievances is the corner stone of judicial systems throughout the civilised societies. The more speedy the redressal, the more efficient a judicial system is known to be. And for seeking the redressal, right of appeal has been bestowed upon every individual by almost all the constitutions of the world. The respect and regard accorded by the courts to this right of appeal is the main element that keeps public's faith and hopes in a judicial system.

Resolution of tax disputes

The right of appeal against tax disputes is also well-recognised around the globe. Disagreements between the tax-payer and tax-collectors are natural. Usually an agreement is reached by correspondence or discussion, and in most cases disputes are settled with the tax-payers at the initial level of Taxation Officer, Commissioner or Collector, saving time and trouble all around. However, there may be disagreements over facts, figures or interpretation of law between the tax-payer and the tax-collectors that remain un-resolved at the initial level and generally result in further duties or tax liability, over and above the admitted liability.

What is "dispute resolution"?

To resolve disagreements that remain un-resolved at the initial level, all the tax laws lay down the procedure that gives the tax-payer right of taking up the contentious issues to the higher forums by way of appeals, etc., for appropriate redressal. This right, commonly known as right of appeal, is in fact the regular dispute resolution mechanism. This comprises:

- First appeal before the respective Collector (Appeals) or Commissioner of Income Tax (Appeals) by the tax-payer;

- Second appeal before the Customs, Excise & Sales Tax Appellate Tribunal or Income Tax Appellate Tribunal, both by the tax-payer and the tax-collector, as the case may be.

- Reference to a High Court and petition to the Supreme Court of Pakistan, both by the tax-payer and the tax-collector, as the case may be.

What is "Alternate Dispute Resolution Mechanism (ADR)"?

Alternate dispute resolution mechanism, as the very name denotes, is a system that operates side by side with the existing conventional appellate system, but with simpler procedures and lesser technicalities. In other words, ADR is a simple system whereby the tax-payer can refer the contentious issues for consideration and recommendations of independent experts on the subject, and make an out of court settlement with the tax-collector, in the light of such recommendations.

Why ADR?

Right of appeal is one of the most important rights of tax-payers, whereby they can prefer an appeal against any order that they believe to be contrary to the facts, or unjust in one way or another.

After the decision of the first appellate authority, both the tax-payer and the tax-collector have a further right of appeal before Appellate Tribunal and further right of reference on law points before a High Court. Petition can also be moved in the Supreme Court.

The existing conventional appellate system works within the framework of the technical language of the respective laws, and facts and figures evident from the records, and takes its own course and time. The result is that a considerable number of appeals keep pouring into the adjudication and appellate system everyday, involving not only issues pertaining to facts and circumstances, but a large number of appeals on interpretation of the provisions of law.

There is no denying the fact that the existing conventional appellate system is the only way under which the law itself develops and matures. But, on the other hand, this is also a ground reality that majority of the tax-payers, only to lessen their cost of doing business, would love to have an alternate system as well.

Taking cognisance of this situation and realising tax-payer's genuine problems, the Government through Finance Act, 2004 extended the ADR, that was available in Sales Tax only, to Federal Excise, Customs & Income Tax as well.

The key objective of introducing the ADR is the expeditious resolution of contentious issues between the tax-payer and tax-collector, or hardships faced by the tax-payers, by independent and honorary experts free of cost.

Is ADR a substitution of the existing conventional appellate system?

ADR is not a substitution of the existing conventional appellate system. In fact, it works side by side with the existing conventional appellate system.

However, at any stage of the existing conventional appellate system, an issue in dispute or cause of hardship can be referred for ADR, and can also be referred back to continue in the existing conventional appellate system.

Provisions Pertaining To ADR

Central Excise: Section 38 of the Federal Excise Act, 2005 and Rule 53 of the Federal Excise Rules, 2005

Customs: Section 195C of Customs Act, 1969 and Chapter XVII of the Customs Rules, 2001.

Income Tax: Section 134A of the Income Tax Ordinance, 2001 and Rule 231 C of the Income Tax Rules, 2002.

Sales Tax: Section 47A of the Sales Tax Act, 1990 and Chapter X of the Sales Tax Rules, 2004.

Wealth Tax: Finance Act of 2003 repealed the Wealth Tax Act, 1963, without affecting the liability of wealth tax assesses to pay wealth tax, or any other amount under the said Act in respect of assessment years ending on or before 30 June, 2001. Finance Bill 2005, in line with the concept of alternate dispute resolution as prevalent under the Sales Tax Act, 1990, and the Income Tax Ordinance, 2001 is now sought to be introduced in the context of Wealth Tax. For this purpose, a new Clause (c) is now sought to be inserted in Section 3 of the Finance Act, 2003, to provide for a statutory forum for settlement and resolution of grievances of any aggrieved

person. Such matters may pertain to an aggrieved person's liability of wealth tax, admissibility of refund, determination or waiver of penalty or fine, redressal of any procedural and technical condition or relaxation of any time limitation.

What can be referred for ADR?

As a principle, any issue, dispute or cause of hardship, pertaining to determination of liability of duties, taxes, additional duties/taxes, admissibility of refund or rebate, waiver or fixation of penalty or fine, confiscation of goods and relaxation of time limitations, procedural and technical conditions under the Federal Excise, Customs, Income Tax or Sales Tax law can be referred to for resolution through ADR.

However, it is expected that generally such cases would be referred to for ADR wherein contentious issues or hardship:

- Arise as a result of any anomaly or lacuna in the law;
- Arise due to some misrepresentation of facts in the early stages of assessment and/or subsequent appeals; and
- Are expected to linger on in the existing conventional appellate system for one reason or another.

It is also expected that while applying for ADR, the applicants will keep in mind the amount of revenue involved. It should also be clearly understood that the interpretation of the law is the sole domain of the existing conventional appellate system, hence outside the scope of ADR. In other words, the scope of ADR mechanism revolves mainly around the facts and circumstances of the case.

At what stage a matter can be referred for ADR?

A matter can be referred for ADR from either of the following stages:

- After adjudication or assessment, i.e.;
    - During pendency of appeal before the Collector (Appeals) or Commissioner of Income Tax (Appeals);
- After decision of appeal by the Collector (Appeals) or Commissioner of Income Tax (Appeals), i.e.;
    - During pendency of appeal before the Appellate Tribunal;
- After decision of appeal by the Appellate Tribunal, i.e.;
    - During pendency of appeal before a High Court;
- After decision of appeal by a High Court, i.e.;
    - During pendency of petition before the Supreme Court;

Past and closed transactions cannot be referred for ADR. Only those matters in dispute and cause of hardship can be referred for ADR which are pending before any appellate authority, tribunal or court.

Who can request for ADR?

Any aggrieved person i.e.,

In case of:

An individual	–	The individual himself;
An association of persons	–	Any partner or member of the association;
A company	–	The principal officer of the company;
A trust	–	Any trustee of the trust;

In case of a deceased individual, the legal representatives of the deceased, and in case of an individual under legal disability or a non-resident person, his/her/it's "representative", as defined in the respective laws.

Are there any conditions for referring a matter for ADR?

There is only one condition that the matter should be pending before any appellate authority, tribunal or court.

How to apply for ADR?

Application in writing

A tax-payer desirous of referring a matter for ADR, should submit an application in writing to the Chairman, Central Board of Revenue in the format given in Annex-I.

Nature of dispute or hardship

State the nature of dispute or cause of hardship as to why the applicant believes that the disputes or hardship exists. These are commonly known as the grounds for referring a dispute or hardship for ADR.

The grounds should be:

- Serially numbered;
- Written in Urdu or English;
- Precise; and
- Stated separately and distinctly for each matter of dispute or cause of hardship.

Additional sheet for stating the grounds can be used.

Claim / pray

State the claim / pray, i.e., what is finally requested from the Chairman, Central Board of Revenue to direct or order.

Prescribed fee

The Alternate Dispute Resolution (ADR) does not involve any fees, charges or costs.

Time-limit

There is no time-limit for applying for ADR. The application can be submitted any time during the pendency of the matter before any appellate authority, tribunal or court, and that it should not be a past and closed transaction.

Documentation with application for ADR

It is necessary that all documents relied upon by the applicant are annexed with the application.

Does someone else is to be informed?

No. However, it is advisable that the concerned Collector of Customs, Collector of Sales Tax & Federal Excise or Commissioner of Income Tax may be informed along with the concerned appellate authority, tribunal or court, with whom the case was pending before applying for ADR.

Can an application requesting for ADR be submitted once the limitation for filing an appeal or reference has expired?

It is a well-settled principal of law that once the period of limitation for filing an appeal or reference has expired, it is a past and closed transaction. Moreover, as only those cases would be entertained for ADR which are pending before any appellate authority, tribunal or court, no application for ADR is entertained once the period for filing of an appeal or reference has expired.

However, the appellate authorities, tribunals and courts have inherent powers for condoning the delay in exceptional circumstances, after being satisfied that there was sufficient cause (good reasons) for the delay. Once such a delay is condoned, and the matter becomes an issue pending before any appellate authority, tribunal or court, it can be brought for ADR. However, if the matter or cause in itself is that of relaxation of time-limitation, it can definitely be referred for ADR.

How the application for ADR is processed?

An application for ADR is examined in the Board to ascertain:

- That the matter is pending before any authority, tribunal or court;
- That it is not a past and closed transaction;

- That necessary documents for drawing up the case are attached; and
- That the matter is of a nature and volume that is appropriate for ADR.

An incomplete application is sent back to the applicant for doing the needful. Applicant of an un-approved application is informed accordingly. Once the application is approved, the next step is the formation of a Committee for ADR.

Who forms the committee and who are members of the committee?

The Board forms the committee which comprises three members, who are selected/nominated by the Board, depending upon the facts and circumstances of each case and the nature of the dispute or hardship.

Each committee member is selected / nominated by the Board, from amongst the following three categories:

- The Director General of the Large Tax-payer Unit, Collector of Customs, Collector of Sales Tax, Commissioner of Income Tax or any Officer of these departments,
- A fellow member of the Institute of Chartered Accountants of Pakistan or Institute of Cost and Management Accountants of Pakistan, an advocate, income tax practitioner or tax consultant.
- A reputable tax-payer.

The Board is also empowered to nominate one of the committee members to be the chairman of the ADR Committee.

The independence, integrity, relevant knowledge and professionalism of the members of the ADR committee are the prime consideration while selecting/nominating and constituting the committee for each case. Members of these committees are honorary and do not get any payment in return for this social and national service.

How does the committee dispose off an application for ADR?

After the formation and notification of the committee for ADR, the members of the committee are informed and the application of the tax-payer, along with related documents, is forwarded to all the members.

The committee members determine the issue(s) involved and make their recommendations on the matter referred to it by the Board.

What procedures, rules and regulations are in force to regulate the working of the ADR committee?

The committee is empowered to:

- Conduct inquiry in respect of the matter in dispute, or cause of hardship;
- Seek expert opinion in respect of the matter in dispute, or cause of hardship.

- Direct any officer of the Customs, Excise, Sales Tax or Income Tax, or any other person to conduct an audit and make recommendations to the committee, in respect of the matter in dispute, or cause of hardship; and

- Provide the applicant an opportunity to represent and explain the point of view on the matter in dispute, or cause of hardship.

The chairman of each committee is empowered and responsible to decide the procedures that will regulate the working of the committee.

In particular, the chairman of each committee is:

- Empowered to decide:
  - The place of sitting of the committee;
  - The date and time for conducting the proceedings;
  - The mode of sending notices i.e., by courier, registered post or electronic mail;
- Responsible to:
  - Supervise the proceedings;
  - Requisition and enforce production of relevant records and witnesses;
  - Ensure the attendance of the applicant at the time of hearing, either in person or through a representative;
  - Consolidate the recommendations of the committee and submit a conclusive report to the Central Board of Revenue;

Notice of proceedings

The chairman of the ADR committee, if necessary, will inform the applicant, normally seven (7) days before, of the place, day and time, fixed for the proceedings of the committee.

Can the day of proceedings be changed or adjourned?

Yes; the committee may, at its discretion, change the day or adjourn the proceedings from time to time, either on its own or on the request of the applicant, keeping in view the facts, circumstances and merits of the case, justifying the change of day or adjournment of proceedings.

Is the applicant required to attend and represent personally?

- Not necessarily. The applicant has an option either to attend and represent the application personally or through a representative.

How to make the submissions (verbally or in writing)?

There is no hard and fast rule for making the submissions (arguments / point of view / explanations etc.) verbally or in writing. It depends on the facts and circumstances of the dispute, or cause and convenience of the applicant, his/her/its representative, advocate or tax consultant and members of the ADR committee.

However, it is advisable to make written submissions (arguments / point of view / explanations etc.) particularly where multiple disputes, causes or complex issues are involved, so that nothing is left un-attended.

Can any further documents, material or evidence be submitted in support of the dispute or hardship?

The chairman of each ADR committee is empowered and responsible to decide the procedures that will regulate the working of the committee. This also includes whether further documents, material or evidence should be accepted or not, during the course of proceedings.

What will happen at the proceedings?

The applicant or the applicant's representative, advocate or tax consultant, or both, if required by the facts, circumstances, nature of matter in dispute, or cause of hardship are given opportunity to make submissions (arguments / point of view / explanations etc.).

The burden of proof rests on the applicant to explain the matter in dispute or cause of hardship, and prove that either the facts of the case are not properly appreciated, or the law incorrectly applied. The applicant has to state and explain quite clearly:

- What is already agreed;
- What is disputed;
- What evidence is being produced;
- What are the applicant's contentions on the points of disagreement or disputes; and
- Why should the matter be resolved in his/her favour.

The committee gives its recommendations after considering the:

- Applicant's submissions (arguments, point of view / explanations etc);
- Relevant details, information and material;
- Results of inquiry;
- Expert's opinion;
- Recommendations of audit ordered; and
- Consulting the records.

The recommendations of the committee are communicated to the Board, the applicant and the concerned commissioner or collector simultaneously.

Can the ADR committee enhance the liability of tax or duty?

No; the ADR committee has no power to enhance the liability of duty or tax.

Is there any time limit for the ADR committee to give its recommendations?

Yes; the ADR committee is required to give its recommendations within thirty days of its constitution.

The Board, on the request of the chairman of the committee duly supported by the reasons for the delay and after satisfying that there exists a valid reason for the delay, may extend the period of thirty days, subject to such conditions and limitations, as it may deem proper.

Can the matter be taken further, if the appellant disagrees with the

recommendation(s) of the ADR committee?

The ADR committee is an advisory body. The recommendations are neither binding on the Central Board of Revenue nor the tax-payer/applicant. Thus, no occasion of taking up the matter further arises.

In fact, the Board has to pass an order, as it may deem appropriate. The recommendations of the ADR committee are only a guideline for the Board for resolution of the dispute or the hardship.

Can the application for ADR be withdrawn?

Yes; generally the applicant can withdraw the application any time before the committee submits its recommendations to the Central Board of Revenue.

Can the ADR committee rectify or review its recommendations?

The recommendations of the committee can be referred back by the Board on its own motion, or on the request of the tax-payer/applicant for:

- Rectification of any mistake apparent from the records; or
- Re-consideration of any fact or law, which could not be considered earlier.

However, the committee has no powers to review its recommendations.

What happens after the receipt of recommendations of the ADR committee by the Board?

The recommendations of the ADR committee are examined at Central Board of Revenue. The Board may or may not agree with the recommendations of the ADR committee, either in full or in part. However, in case of agreement, the Board, at its discretion, may pass an order on the recommendations as it may deems appropriate for the resolution of the dispute or hardship. Generally, such an order is a mutually acceptable out of court settlement between the parties. Copy of the order of the Board is sent to the tax-payer/applicant, Chairman of the committee and the concerned collector or commissioner.

How the decision of the Board is implemented?

The order of the Board is communicated to the Appellate Authority, Tribunal or Court, with whom the case was pending before applying for ADR, for consideration and order, as deemed appropriate by the said Appellate Authority, Tribunal or Court.

What re-course is available if the decision of the Board is not acceptable to the tax-payer/ applicant?

If the decision of the Board is not acceptable to the tax-payer, the matter reverts to the stage from where it was referred for ADR. In other words, referring a matter or cause for ADR does not affect any of the rights already acquired or available to the tax-payer/applicant, under the Federal Excise Act, 2005, Customs Act, 1969, Income Tax Ordinance, 2001 and Sales Tax Act, 1990 or Rules made thereunder.

Does the balance duty or tax is payable in the meantime?

Any duty or tax imposed under the Federal Excise Act, 2005, Customs Act, 1969, Income Tax Ordinance, 2001 and Sales Tax Act, 1990 or Rules made thereunder, remains enforceable and recoverable unless any authority, tribunal or court stays the recovery thereof,

Merely by applying for ADR, recovery proceedings of the balance duty or tax liability do not stop.

It is, therefore, advisable to properly evaluate the undisputed and disputed portion of the duty or tax liability, and the undisputed portion of the duty or tax liability discharged / paid, as early as possible, to avoid the levy of additional duty or tax (interest).

Does the additional duty or tax (interest) is payable?

Yes; additional duty or tax or default surcharge, as the case may be, is payable according to the applicable rates, from the date originally due to the date of actual payment irrespective of the fact that an appeal, reference or request for ADR has been made. Even where under exceptional circumstances, the recovery of duty or tax is stayed or allowed to pay in installments, the charge of additional duty or tax is mandatory.

However, when the duty or tax liability stands modified as a result of any decision, including a decision of the Board under the ADR, the additional duty or tax (interest) also stands automatically modified and re-calculated on the revised duty or tax liability, but from the date it was originally due to the date it is actually paid.

Can the decision of the Board under an ADR be made a precedent?

No. The resolution of a dispute or hardship arrived at between a tax-payer and the Board is only for the tax year or tax years covered by the agreement. Any resolution of a dispute or hardship between a tax-payer and the Board cannot be quoted or used as a precedent in the same case or any other case.

Annex-I

Application Form For Alternate Dispute or Hardship Resolution

The Chairman,
Central Board of Revenue,
Islamabad.

Dear Sir,

1. The undersigned, being duly authorized hereby apply for dispute or hardship resolution under:

   (Please Mark ✓ in the relevant box)

   Section 38 of Federal Excise Act, 2005; or ☐

   Section 195C of Customs Act, 1969; or ☐

   Section 134A of Income Tax Ordinance, 2001; or ☐

   Section 47A Sales Tax Act, 1990. ☐

2. Necessary details of the dispute or hardship are set out in the annexure to this application.

3. A request is made to constitute to Committee as provided under

   (Please Mark ✓ the relevant box

   Sub-Section (2) of section 38 of Federal Excise Act, 2005; or ☐

   Sub-Section (2) of section 195C of Customer Act, 1969;or ☐

   Sub-Section (2) of section 134A of Income Tax Ordinance, 2001; or ☐

   Sub-section (2) of section 47A Sales Tax Act, 1990. ☐

4. The following documents as are necessary for the resolution of the dispute or hardship are enclosed.

   (a)____________________________

   (b)____________________________

   (c)____________________________

Yours faithfully, ____________________________

Signature ____________________________

Name of signatory ____________________________

Designation of signatory ____________________________

Name of Taxpayer/Applicant (if other than signatory) ____________________________

Date ____________________________

Annexure to the Application For Alternate Dispute or Hardship Resolution

1. Particulars of the taxpayer/applicant
   a. Name of the applicant (in block letters) ____________________
   b. National Tax No./Sales Tax Registration No. ____________________
   c. Address of the applicant ____________________
      ____
   d. Telephone ____________________
   e. Fax ____________________
   f. E-mail ____________________
2. Tax year/period to which the dispute or hardship rates ____________________ ____________________
3. The Collector or Commissioner with whom a dispute has arisen ____________________ ____________________
4. Particulars of the case or statement of the relevant facts and law with respect to dispute or hardship having bearing on the question(s) on which the resolution is required ____________________ ____________________ ____________________ ____________________

   (Please annex extra sheet, if required) ____________________
5. Grounds or statement containing the applicant's interpretation of law or facts, as the case may be, in respect of question(s) on which resolution of the dispute or hardship is required ____________________ ____________________ ____________________ ____________________

   (Please annex extra sheet, if required) ____________________
6. The extent or the amount of duty or tax, additional duty or tax and penalties etc., which the applicant agrees to pay, if any. ____________________ ____________________ ____________________
7. Details of amount of duty or tax etc., already paid, if any ____________________ ____________________
8. Particulars of the person who will represent the applicant ____________________ ____________________
9. The understand, solemnly declares, that,-
   a. full and true particulars of the dispute or hardship for the purposes of resolution have been disclosed and no material aspect affecting the determination of the application filed in this behalf has been withheld;
   b. (i) that the above issue(s) is/are not pending before any]
      appellate forum or court.]Strike out which ever

      OR]is not applicable

      (ii) that the above issue(s) is/are pending before]

      (name of the appellate authority, tribunal or court)

Signature ________

Name of signatory ______________________

Designation of signatory ______________________

Date ______________________

✧✧✧✧✧

The Need To Change National Psyche
(Translated from Urdu)

— Muhammad Hussain Mehanti, FCA

Member, National Assembly

In my opinion, ICMAP has provided an excellent opportunity to discuss ADR by inviting people from all the relevant walks of life. We have two traditional institutions, namely CBR and the Judiciary, for the resolution of disputes; but unfortunately both these institutions suffer from moral degradation. They are indisciplined, inefficient and corrupt. That is why we, as a notion, are not marching forward on the road to progress. We have created a society which is, collectively speaking, based on dishonesty instead of truth.

Our tax department's perception is that businessmen always submit false and fabricated income statements to deceive the tax authorities. On their part, the businessmen think that even if they disclose their correct income position, it will never be accepted by the department. The reason behind this is that the majority of people working in the tax–collecting departments are mostly concerned with their own self-interest instead of national interest or tax collection. They are most of the time thinking of ways to tease the businessmen to extract some benefits for themselves and, at the some time, meet the Government's requirements. So we find mistrust on both sides which is the root cause of all problems. The Government and CBR know that the tax returns and certificates submitted are not correct. They need to be corrected and they have the powers to correct them, which they exercise. And when the businessmen stumbles into this net, they try to wriggle out of it by using whatever means they can. In such a problematic situation, the introduction of the concept of Alternate Dispute Resolution seems like a ray of hope.

On the other hand, our judicial system is so corrupt, so expensive and suffers so much from malpractices that an ordinary man dreads to approach it. And if he does, he tries to hide facts even there. Under these circumstances, there is a need to introduce an alternate system, whereby disputes can be resolved in a better and quicker way.

In the budget 2003-2004, ADR was introduced but nobody knows that such a concept has been introduced. Neither any seminar was organised nor was there any talk-show or discussion programme. The Government also did not properly publicise the fact that a new way has been opened to resolve disputes, to free the tax-payers from the clutches of those who are born and die in corruption, and to get their disputes resolved by people like themselves, people from amongst themselves. The new system, which is expected to resolve disputes in an improved manner, has not been duly publicised. So when Mr. Qaisar Mufti invited me to this workshop, I readily accepted to attend, because I myself wanted to understand the new concept and the new system to resolve disputes and to be enlightened as to how to strengthen this alternate institution. I also wished to know as to why any performance of this new institution has not so far come to light.

I believe that whatever institutions we create, these must be vested with powers to take final decisions. If they do not have such powers, no one will trust them. Secondly, such institutions should take correct decisions based on merit. If the tax liability of an individual or an organisation is decided by this institution (of ADR), it must be paid so that he or it is relieved of unnecessary burden and the misconception about him or about it in the government is removed.

In our society, people prefer to deal with the existing institutions, because it is convenient for them. They know the way to get things done in those institutions. They know the channel – the chain – that exists there and gets decisions made. They prefer to use that chain to get their disputes resolved. I must say that we need to bring about a fundamental change in our national psyche. We have, on the whole, become morally corrupt. Every government which came into power promised to bring fundamental changes in our national thinking and approach but, unfortunately, every government strengthened corruption, became party to it and thrived on it. And that includes the present government and present institutions also. Good governance is a good slogan. I like it. People throughout the world are adopting good governance, but we are moving towards bad governance. In all our institutions, may those be the courts or commercial organisations or any other institution, you will find bad governance instead of good. The result is that an environment of all-out mistrust prevails, in which no institution can prosper and the common man is compelled to believe that all doors are closed on those who wish to work honestly. I know it because I come from, and live among common people and am in constant interaction with them.

I am a Chartered Accountant. When I did my CA, I decided not to go in practice because the atmosphere in our country is not congenial for CAs who want to work honestly. I did not want to spoil my moral values and my Hereafter; so I preferred industry over practice. I went to business and tried to work there honestly.

As you are aware, I am a member of the Parliament, where the budget is presented and discussed. All matters come to the Parliament for discussion – may it be matters relating to the CBR or to the courts. But unfortunately, we do not get a chance to speak there. The 'thumping majority' is used so badly in the Parliament that anyone wishing to make any good suggestion, does not get a chance to do so and everything is pushed aside. In a society where we complain of general degradation, ADR appears to be a good beginning.

As many of my friends have said here today, even murder cases are decided in the tribal areas within hours. On the contrary, cases in our courts are not decided in years – not even in decades. People pass away waiting for court judgments. But in the tribal area, disputes are resolved quickly through the Jirgah system.

Someone talked about the Panchayat system here. From 1981 to 1983, I had been a councillor and a member of the Panchayat Committee, People used to bring their problems before that Committee. Disputes about marriages, divorces, tenancy and other neighbourhood problems were brought before the Committee and, Alhamdulillah, about 90% of them – nay, almost all of them – were solved by us through discussion and dialogue within our jurisdiction. But if we had a complaint to refer to, say KESC, we knew we would have to wait for God knows how long. What I am talking about is disappointing, but we must realistically assess the situation so as to appreciate the problems and rise to our responsibilities to solve them.

ADR is a good concept. We should try to give it a good start and try to involve good people in it so that decision are properly arrived at. It we give the system encouragement and some independence to work, it can also be successfully applied to other walks of life. It can help resolve disputes speedily and can create an environment of trust to talk and work in.

The recommendations you will formulate today, I will Inshaallah try to discuss them with the CBR, the Ministry of Finance and the relevant authorities in the Parliament. I have the right to convey your view point and to discuss it. And I will use that right. It should be our endeavour to remove the mistrust that exists in the trade and commerce circles and to relieve the nation of

indiscipline and bad governance and provide to it correct guidance. Present here today are persons holding responsible positions in diverse fields. If they light a candle wherever they are, if they set examples through their honest behaviour in their dealings and transactions to show that even in this age it is possible to live and work honestly, that it is possible to change the system, then I hope they can provide guidance to the people and can help light many a candle to end all disputes.

I was in jail for a few days in connection with the recent strike. I was pained to observe there that a number of helpless, poor people have to wait for years and years behind the bars for their turn for court-hearing. The jail staff treats them badly. The courts do not do justice to them. They linger on in untold misery with no one to care about them. This is the situation in our prison houses and this is the condition of our judicial system. We all must work honestly and sincerely to bring about drastic changes and drastic improvements. I hope we do. Thank you very much.