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The Evaluation of Alternative Dispute Resolution: Making a Case for Settlement

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Abstract

ADR is a methodical process which has many different forms for the settlement of disagreements, or even non-agreements. ADR is taken to mean any process which is alternative to the formal procedures of dispute resolution. It is a generic term covering a collection of disparate procedures, which range from conciliatory processes such as mediation and conciliation to more formalised procedures such as the Executive Tribunal (called the mini-trial in the United States), or early neutral evaluation. ADR can be said to have arrived in the Bangladesh as a kind of optional novelty. It would therefore be particularly unwise to reject ADR procedures and their variations on the grounds that they are foreign to our culture and that they would disrupt the well established practice of arbitration in Bangladesh. Litigation will remain irreplaceable; but it would be good to moderate its overheating by the appropriate release valve which, at the same time purges it of certain excesses commonly reproached of it.This article provides an overview of alternative dispute resolution (ADR) methods. It vividly considers: (1) origin of ADR (2) advantages of ADR and disadvantages of ADR (3) clear guidelines of appropriate cases for ADR; (4) consensus , continuity ,confidentiality issues and principles relating to the choice, terms of reference are highlighted in the article.

Keywords: *Alternative dispute resolution; advantages of ADR, disadvantages of ADR*

Introduction

Alternative Dispute Resolution (ADR) is a procedure for settling a dispute outside the courtroom. Alternative Dispute Resolution (ADR) is a process, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. The idea of developing "alternatives" to litigation is not intended to oust the jurisdiction of the courts, but rather to improve conflict and dispute management systems within the legal framework of a country. In common law countries, interest in the utilisation

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of Alternative Dispute Resolution (ADR) mechanisms grew significantly within the last three decades. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. In Bangladesh, the use of non-court dispute resolution mechanisms has gained widespread acceptance at a legislative level. Lawyers' reluctance to use ADR was identified as one of the major grounds for its lack of development in Bangladesh. The unwillingness of the lawyers to recommend ADR is due in some part to lawyers' lack of knowledge. This reluctance went further when some lawyers, fearing an "alarming drop in revenue", deliberately flout the court rules of practice and do not mention ADR to their clients.

Definition of ADR

At the outset, it is essential to define ADR in order to set the parameters of the off the court dispute resolution process. A simple definition of ADR is that it is an alternative to the procedures of formal dispute resolution, namely, litigation. ADR is taken to mean any process which is alternative to the formal procedures of dispute resolution. It is a generic term covering a collection of disparate procedures, which range from conciliatory processes such as mediation and conciliation to more formalised procedures such as the Executive Tribunal (called the mini-trial in the United States), or early neutral evaluation. In the U.S., arbitration is often referred to as ADR, whereas in the U.K. some commentators have disputed this, primarily because the procedure has been given a legal status through the involvement of the court and legislature. However, its role in dispute resolution fell increasingly into disrepute because of its adoption of an adversarial approach and its development of complex rules and procedures. In Bangladesh, arbitration is falling within the ambit of ADR. Many legal theoreticians see ADR as any alternative to litigation, whereas others, particularly those providing ADR services or specialist mediators, prefer not to incorporate arbitration in the definition. Generally, ADR includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party.[1] As said before, any method of resolving disputes other than by litigation is abbreviated as an ADR and it typically includes early neutral evaluation, negotiation, conciliation, mediation, and arbitration. According to the case referred to Hilmond Investments v CIBC (2006)[2] ADR is the method by which legal conflicts and disputes are resolved privately and other than through litigation in the public courts, usually through one of two forms: mediation or arbitration.[3] The Department of Constitutional Affairs describes ADR as: "The collective term for the ways that parties can settle civil disputes, with the help of an independent third party and without the need for a formal court hearing."[4] Thus, ADR, in the context of civil justice, denotes procedures designed to provide

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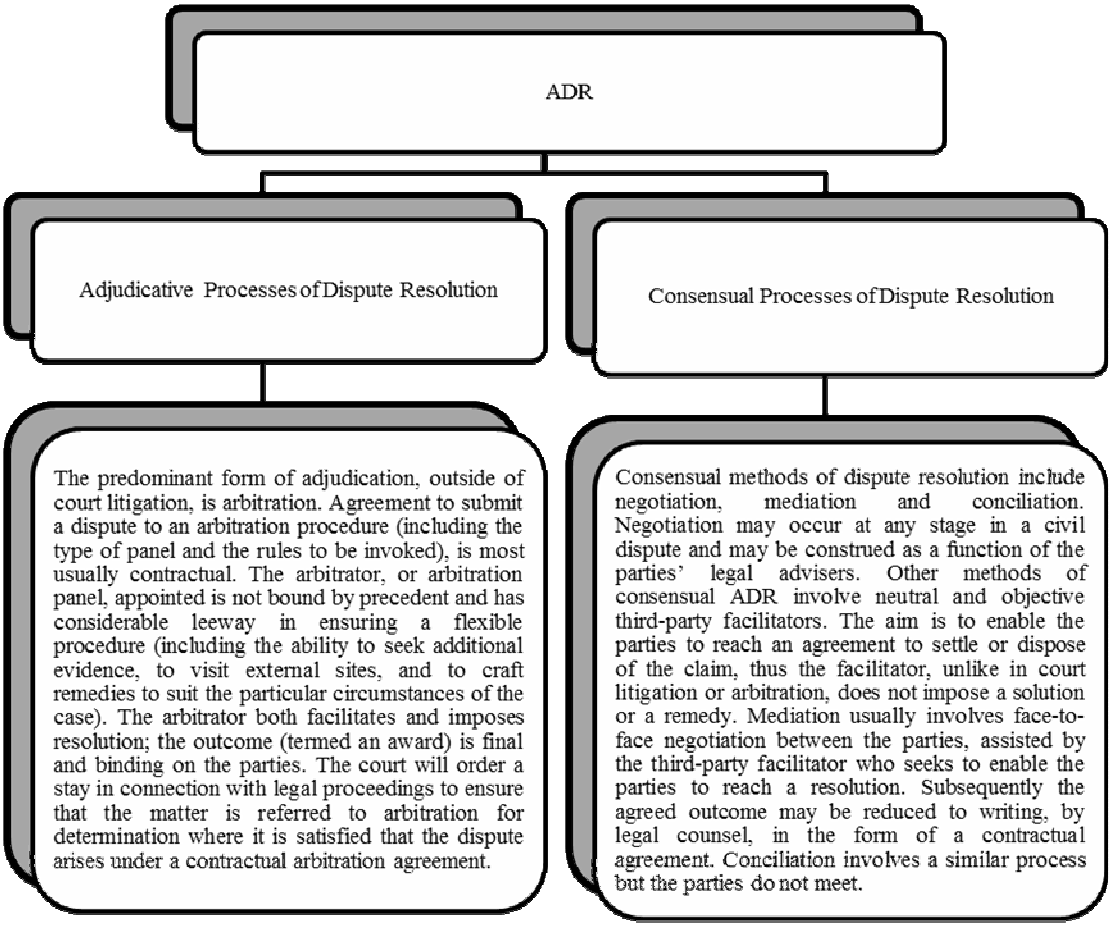
1 Totaro, Gianna, *"Avoid court at all costs" The Australian Financial Review Nov. 14 2008.* (April 19, 2010)

2 *1996 135 DLR 4th 471 (ONT Court of Appeal) 887574*

3 *www.asapcollect.com/Resources--Links.../index.html* (accessed on 26.06.2014)

4 *www.dca.gov.uk/civil/adr/. pp.20-22ACG App.7, G1.8.*

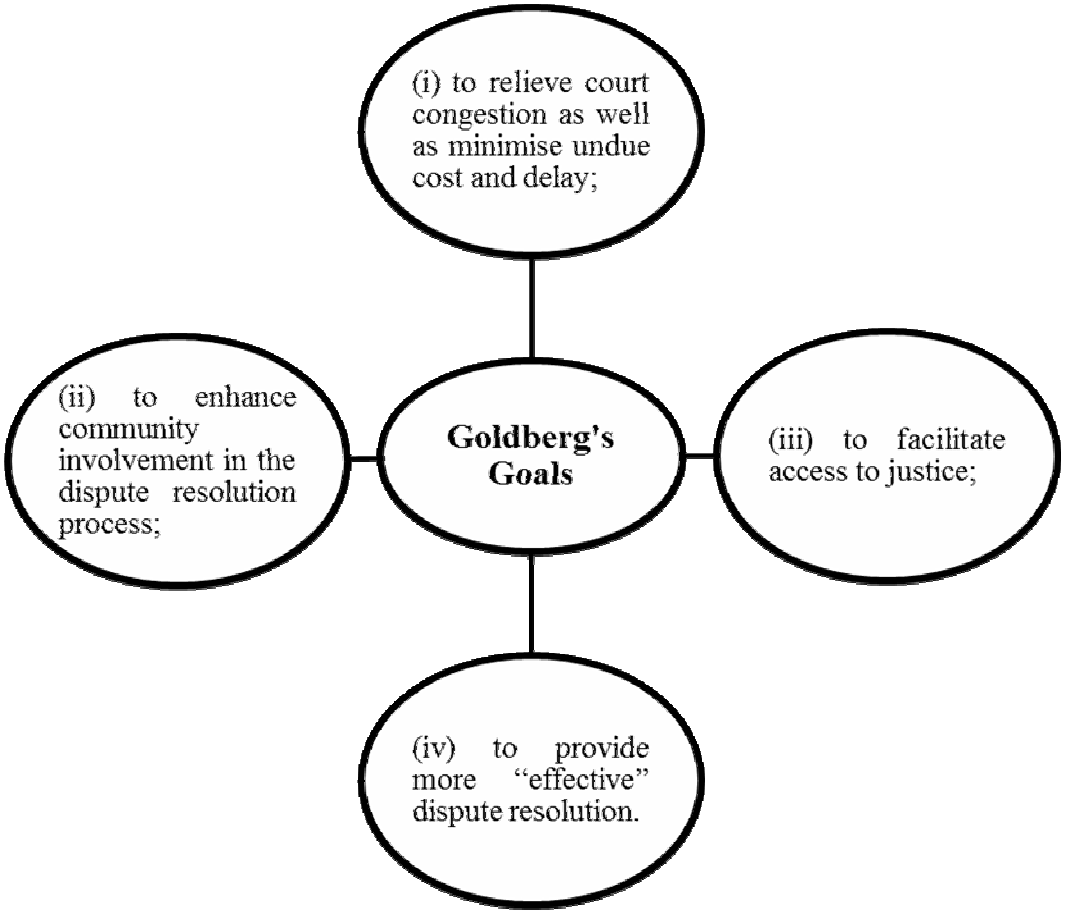
mechanisms, other than court litigation, for resolving civil disputes. Such processes are entered into voluntarily by the parties. Agreement by the parties involved to submit disputes to ADR may be made either in the formation of a business contract (such an agreement constitutes a term of the contract), or on the occasion of the dispute.[5] Methods of alternative dispute resolution broadly fall into two categories: adjudicative and consensual processes of dispute resolution. The adjudicative and consensual processes are explained hereafter with the aid of a diagram:



It is claimed that unlike traditional forms of dispute resolution, ADR is quick, cheap, harmonious, confidential and conducive to party empowerment. But it must be kept in mind that ADR techniques are not designed to undercut the traditional court system, rather ADR options are used only in cases where litigation is not the most suitable solution. However, ADR can also be used in a situation where the disputants want to explore ADR options conjunction with litigation and also want to enjoy freedom for returning to the traditional

[5] Peter De Cruz, *Comparative Law in a Changing World* (London: Routledge-Cavendish, 1999), p.261.

court process at any point.[6] Goldberg[7] identified four separate goals. These goals are illustrated with the help of a diagram placed below:



When these goals are examined, it becomes clear that they overlap and potentially conflict. Indeed, by describing an effective dispute resolution mechanism as "one that is inexpensive, speedy and leads to a final resolution of the dispute" and yet is also "procedurally fair, efficient (in the sense of leading to optimal solutions), and satisfying to the parties," the scene is set for a confusion of aims and objectives and, almost certainly, the rather futile search for a perfect and ideal system which may well never exist. The goals include issues of process and prescriptions of outcomes. This duplicity, coupled with expectations of cost-savings, has often led the proponents of ADR to make claims which, although sound in principle, are flawed in practice.

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[6] Abu Hena Mostofa Kamal, *Paradigms, Process and Practice of Mediation as a Practical Strategy for Resolving Conflict* (Cambridge & Mark Milan Publication, UK,2010), page:17

[7] S. B. Goldberg, E. D. Green and F. E. A. Sander, *Dispute Resolution* (Boston, Mass.: Little, Brown, 1985), p. 5.

What does it take for Successful ADR?

It is important to realise that not every case is fit for ADR and the parties will need to consider very carefully with their advisers whether the investment of time and money in ADR is going to be well spent. In particular, the following factors seem to be important.

First, do the parties genuinely wish to settle? Although it is true to say that the vast majority of disputes settle without ever being decided by a court or arbitrator, some cases will go all the way to a full hearing. Without the desire to settle, there will not be the requisite degree of frankness between each party and the mediator to let settlement proposals be formulated which have a realistic chance of being accepted.

Second, much will depend on the personalities who participate in the ADR process. As has been pointed out above, this will be, in part a question of initial selection, in part a question of deciding in advance on the procedures to be followed and the roles to be adopted and finally a question of how the individuals personally perceive and discharge their functions.

Lastly, is the dispute of a type that can sensibly go to ADR at all? Disputes that revolve around complex considerations of law or construction of documents would not normally be suitable for ADR, but ADR comes into its own where there are questions of fact in dispute between the parties.[8]

Origin of ADR

ADR originated in the USA-Elein Caroll, a lawyer, published an article in the International Financial Law Review which records the promotion and development of ADR in the US. Its birth was in the mid-1970s. The litigation system became uncontrollable, inept and expensive as a consequence of which the centre for Public Resources (CPR) came into being in New York to Promote ADR. The American Courts promptly came to realise the value of ADR as a probable means of helping to relieve the congestion of the court's time in most of the jurisdiction. Under the American system, delays are an inevitable consequence of any civil suit. The majority cases are conducted before a jury unlike the UK and there is an extremely high appeal rate. The Judges came to realise very quickly that it was in the interest of both the Court and litigants that the parties should recognise the strength and weaknesses of their cases as early as possible and as the courts introduced voluntary mediation or other alternative settlement procedures at primary stage. In that case the parties concerned may be required to attend a settlement conference. This procedure has led to some successes. In 1977 the first recorded mini trial was conducted in the USA concerning a patent dispute between Telecredit and TRW. Telecredit sued against TRW and by 1977 over 100,000 documents had been exchanged, and the pre-trial period extended over 30 months. A meeting was held with the respective chief officers along with a neutral adviser, and negotiations went on over fourteen hours. In 30 minutes CEOS finally reached an agreement. One important aspect of the settlement was that it was structured on the basis of a future business relationship which under normal conditions, neither a judge nor an arbitrator would be able to explore. A dispute between Texaco and Borden was the second example of a successful mini trial. In 1980, a £ 200,00,000 suit was filed against Texaco by Borden. Texaco lawyer produced over 300,000 documents in the course of discovery. The parties agreed to attempt a mini trial procedure and each lawyer was allowed one hour to present his case to the executive Vice-President of each company and the matter was resolved over a two week period during which a new

[8] Joseph Morrissey et al., *International Sales Law and Arbitration: Problems, Cases and Commentary* (The Netherlands: Wolters Kluwer, 2008), p.477.

contract was reached which was of immense benefit to both the parties. Not all proceedings have been totally successful. In the 'Michigan Mediation' an attempt was made to apply a sanction for an award of cost against the party who proceeded to trial and who subsequently recovered less than the mediator advised. It should be remembered that in the USA there is no provision for the award of costs to the successful party.[9] At the moment, ADR in its different forms is undergoing extremely rapid development in the United States where these kinds of procedures are very popular, especially it seems in Northern California, where these procedures are systematically being imposed by the courts.

Australia is also a country which favours ADR, because since 1892 there has been a statute in the State of Queensland (which is still in force), entitled the "Courts of Conciliation Act", and another in the State of New South Wales called the "Trades Disputes Conciliation and Arbitration Act".

However, it is only since 1980 and more particularly during the last 10 years that this type of procedure has been developed in the context of relationships between companies. In 1991, the Federal Government passed a statute, the "Courts (Mediation and Arbitration) Act", which deals with "Court-annexed mediation", i.e., mediation forming part of a judicial process.

In Australia, ADR is purely of a "consensual" nature. Mediation is the most important form, but related procedures such as the "Mini-Trial" are also widely practiced. The success rate of ADR is very high.

Parallel to ADR, a federal statute entitled the "Courts (Mediation and Arbitration) Act" of 1991 followed the American example by instituting compulsory mediation that can be ordered by the court in which the proceedings are initiated.

The use of alternative methods of resolving disputes rather than resort to the courts is old within Europe, but the accelerated interest and use of such methods is also underpinned by a practical consideration. ADR is able to offer a solution to the problem of access to justice faced by citizens in many Member States due to the following factors[10] : the volume of disputes brought before the courts is increasing; court proceedings are becoming longer and the costs incurred by such proceedings are increasing; the quantity, complexity and technical obscurity of the legislation also help to make access to justice more difficult.[11] Furthermore, cross-border disputes within the EU tend to result in even more lengthy proceedings and higher court costs than domestic disputes. The intensification of trade and the mobility of citizens between Member States, amplified by e-commerce, have led to an increase in the number of cross-border disputes before the courts. The courts themselves, already overworked, have to deal with increasing numbers of disputes which raise complex issues involving conflicts of laws and jurisdiction as well as the practical difficulties of finance and language. The issue of access to justice for all is a fundamental right enshrined in Art.6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the right to valid remedies has been determined by the European Court of Justice to be a general principle of European Community Law and set out in Art.47 of the Charter of Fundamental Rights of the EU.[12] Access to justice is an obligation which is met by Member States through the provision of swift and inexpensive legal proceedings.

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[9] G. Applebey, *"Alternative Dispute Resolution and the Civil Justice System", in K.J. Mackie (ed.), A Handbook of Dispute Resolution* (Routledge and Sweet & Maxwell, London and New York, 1991), p. 29

[10] *Commission of the European Communities COM (2002) 196 final, p.7.*

[11] *Commission of the European Communities Green Paper "Judicial co-operation in civil matters; the problems confronting the cross-border litigant,"* COM (2000) 51 final (Brussels, February 9, 2000).

[12] John Tackaberry and Arthur Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (Sweet & Maxwell, London in conjunction with the Chartered Institute of Arbitrators, 2003), Vol.1, p.16

Advantages of ADR

ADR may serve the interest of the state in many ways. First, ADR reduces burden on the court and adjudication process by resolving disputes at an earlier stage giving ultimately a healthy sign to the judicial system. Secondly, ADR reduces work load of judges. ADR allows sufficient times in dispensation of justice in another matter raising the standard and quality of justice. Thirdly, by reducing the backlog of pending cases ADR saves large revenue. Fourthly, ADR works as a contraceptive in the field of the unnecessary jungle of litigation, giving a legal system a healthy development. Likewise, ADR serves the interest of state holder in different ways. First, ADR gives litigations respite from unbearable delay in the dispensation of justice. Second, it is cost effective for litigants. Third, as opposed to settling a dispute it provides a reconciliation between the disputants by resolving and the feeling of enmity between the parties is resolved soon. Fourth, it is less cumbersome, easy and accessible to the poor population. With regard to public perception ADR provides a balance in dispute resolution by reducing the number of pending cases and as a result, people can recognise the judiciary as a form of justice dispensing system in the true sense.

Disadvantages of ADR

The main disadvantage of ADR most often referred to is that, the procedures are not binding on the parties. This causes waste of time, particularly where the respondent is in financial difficulties. Delaying tactics, for example, are often employed by a developer who contests a claim for no other reason than the fact that his building has not been let or sold. Once it has been disposed of, it is invariably the case the parties sit down to some serious negotiation and the dispute is settled. While there may be some strength to this complaint, since much of the preparatory work for attempted reconciliation will have to be done anyway, the wasted costs and the relatively short period of time spent in the preparation and conduct of the hearing has little impact on the overall cost of the resolution of the dispute, if not the nerves of the claimant.

Clear guidelines of appropriate cases for ADR

Despite clear indications that both judges and lawyers lack knowledge and experience with ADR, the many domestic legislation places a duty of judges to direct appropriate cases towards ADR. Lists of the diverse features of disputes have often been drawn up by those practised in ADR to indicate the unsuitability of the case to the alternative procedures:

1. where one party exhibits an unwillingness to settle or compromise
2. where there is a need to establish a legal precedent
3. where one needs a preliminary injunction
4. where the reputation of a party or business is at issue
5. where one party wants to deter similar actions (franchise disputes or claims from multiple sub-contractors)
6. where a party can get a final result quickly through summary judgment
7. where the confidentiality of mediation may cause adverse publicity
8. where one party only wishes to obtain free discovery
9. where there are issues of fraud.

Critics often opine that an ADR award is non-binding. This is often considered as a major flaw as it gives the respondent an opportunity to take resort to delaying tactics. It must be emphasized that it is not the role of the ADR forum to make a formal or binding award. While there has been some discussion over whether or not provision can be made for the recovery of wasted costs, which have arisen as a result of a failed ADR. It should be noted that consensus is inherent in ADR. It is open to the parties to enter into an agreement that makes the ADR agreement itself binding.

There is no doubt that the litigation and ADR systems have failed the very people they want to serve. The main difficulty in that any hearing which determines the respective rights of the disputants cannot be conducted without the most careful preparation which costs considerable time and money. When consideration is attached to time and money spent in the preparation of pleadings, discovery and inspection of documents, the preparation of witness, appointments of experts and the cost of professional teams as well as the arbitrator and the hearing room, it takes very little imagination to appreciate the inroads into each flow that is imposed upon the parties.[13] It may so happen that the arbitrator himself and/or the lawyers involved are not available to conduct the hearing for some considerable time. It is an admitted fact that there is a just as much delay in litigation as there is in ADR. Parties are turning to ADR in desperation. The hasty use of ADR cannot lead to a settlement. For any successful ADR 4C's are essential. They are the followings:

1. Consensus: With the consent of the parties only ADR can be adopted. The parties are aware that if the process fails, they are still able to press on either ADR or litigation. It must be admitted that in terms of wasted costs arising from an unsuccessful attempt at ADR, all the prior preparation will be needed for ADR or litigation in any event. If the procedure fails, it after gives the parties chance of thought, will an improved method of settlement subsequently being reached.

2. Continuity: It is definite that at least one party to the dispute will try to maintain a business relationship with the other if at all possible. ADR resolves much of the enmity, either in the course of the hearing, it may very well be possible for a new business arrangement to be created as part of the settlement process. Litigation cannot simply produce such a result, because the respective parties stand becomes polarized, which will definitely lead to a complete breakdown in relations between the parties.[14]

3. Control: Flexibility is inherent in ADR, which allows the parties to exert considerably greater control over the proceedings in order to be able to reach a beneficial decision.

4. Confidentiality: ADR, like litigation enjoys complete confidentially regarding the proceedings. In ADR neither party is exposed to publicity which may affect their credibility or cause trade secrets to be released.

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[13] Flood J. and Caiger A. (1993) *Lawyers and Arbitration: The Juridification of Construction Disputes, Modern Law Review, Vol. 56, 412-440.*

[14] Shapiro D. *Alternative Dispute Resolution; Civil procedure, Alternative Dispute Resolution under the new civil Rules--some guidelines for lawyers and judges, Lit, 1999 18(7) 2-13.*

ADR proceedings are concluded with potential savings in costs and speed. Besides ADR has two other potential advantages –the first is that litigants participate more actively in this kind of forum. Which an advocate presents their case, the informality of the proceedings makes the parties feeling good.[15] The ADR is far less threatening than either a courtroom proceeding. The second advantage is that where there are a number of litigants against one party, or where there are a number of different disputes which raises the same issues, a similar procedure can be adopted to deal with issues involved or with the parties involved, which will save considerable time.

Conclusion

ADR can be said to have arrived in the Bangladesh as a kind of optional novelty. The idea of resorting to procedures for settling conflicts, disagreements and even "non-agreements" other than through litigation, is progressing rapidly and is imposing itself progressively in the legal spheres and in arbitration circles, in spite of the scepticism with which it was first greeted. ADR now has to be taken into account by lawyers who might previously have found nothing wrong in ignoring it and by judges who might previously have regarded it as nothing to do with them. It would therefore be particularly unwise to reject ADR procedures and their variations on the grounds that they are foreign to our culture and that they would disrupt the well established practice of arbitration in Bangladesh. Litigation will remain irreplaceable; but it would be good to moderate its overheating by the appropriate release valve which, at the same time purges it of certain excesses commonly reproached of it.

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[15] Professor H. Genn, *Central London County Court Pilot Mediation Scheme: Evaluation Report.* (Lord Chancellor's Department, Research Series No. 5/98, July 1998).