Chapter 1: Understanding ADR and Mediation

1. What is ADR?

ADR is usually used as an acronym for alternative dispute resolution, which is defined as any process or procedure other than adjudication by a presiding judge in court – litigation, in which a neutral third party participates to assist in the resolution of issues in controversy. However, for the purpose of this manual, it seems more useful to think of ADR not as alternative dispute resolution, but appropriate dispute resolution. There are a few reasons why we should think of appropriate and not just alternative processes.

The main idea behind mediation projects is not only to provide alternatives to litigation but to modify the whole dispute resolution system, including litigation, to make it more suitable for the parties in commercial disputes. Introducing mediation or arbitration is one way of making the system more appropriate for end-users. Mediation and other ADR methods are not alternatives to the formal justice system in the sense that they aim to replace it. Their goal is to complement the scope of court procedures so that the parties can choose between these processes. However, this choice does not have to be exclusive. In many cases, parties may choose mediation along with litigation or arbitration and conduct them in parallel, until they settle, withdraw, or get a court decision or arbitration award. Moreover, litigation is and must remain a crucial part of the ADR system in any country. Litigation is particularly vital for the existence of mediation and other non-binding processes because one of the stronger incentives to mediate is often to avoid adjudication.

The word “appropriate” also emphasizes two other important aspects of the problem: creating a dispute resolution system that is appropriate for a given legal system and culture and matching a case to an appropriate dispute resolution procedure.

ADR has become a buzz word in recent years. One of the problems with its application is the wide variety of ADR processes that have diverse rules and dynam-
ics that can accomplish a range of goals. As a result, there is a lot of confusion about various ADR methods. Much of the confusion seems to occur when people speak of ADR but actually mean different processes, very frequently confusing mediation and arbitration. It is, therefore, particularly important for people to recognize that mediation is qualitatively very different from arbitration.

2. Some Key ADR Distinctions

Understanding the key concepts and distinctions described below can be important in using ADR effectively and in understanding some of the concepts discussed later in this manual:

**Non-binding/binding**

These words describe the type of commitment that parties make when entering the ADR process. When they are bound to accept and respect the agreement of the ADR process, such as a third-party decision in arbitration, that agreement is binding. In non-binding processes, such as mediation or mini-trial, the arbitrator cannot force the other parties to accept any agreement, and it is only the parties who can jointly agree on a certain outcome. Once the parties agree to a contract, they are bound by their contractual obligations. Any resolution resulting from a non-binding process culminating in contractual obligations of the parties can be enforced by the courts either as a contract or as a court decision.

**Voluntary vs. mandatory referrals to mediation**

These terms describe the method by which cases enter mediation (or other ADR procedures). If a judge or court refers cases to mediation only at the parties’ request or with consent of the parties, the referral is voluntary. As a general rule, mediation is voluntary. However, in circumstances prescribed by law, participation in mediation is required by the court, whether by an individual judge’s order or by a court rule. This is known as mandatory mediation. Regardless of whether parties entered ADR with their consent or because of a court order (mandatory mediation), they can decide whether to settle the case. Therefore, the parties are not mandated to enter into settlement (as mediation is non-binding), but are obliged only to discuss in good faith, with the other party settlement opportunities. More detailed information on voluntary vs. mandatory mediation is provided in Chapter 3.

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6 Rarely parties may agree to a binding mediation or non-binding arbitration.

7 A party can have a court enforce mediation settlement, only when that jurisdiction has a law recognizing the direct enforceability of such decisions by the court system or if the (mediation) settlement is done in relation to court proceedings and after court approval has a power equal to the court judgment (most jurisdictions have such provisions). Otherwise such mediation settlement will be enforced through the litigation as a regular contract.
**Interest-based vs. rights-based**

These terms describe the main criterion that a procedure applies to resolve the dispute. *Interest-based* dispute resolution processes expand the discussion beyond the parties’ legal rights to look at underlying interests, deal with emotions, and seek creative solutions. The focus of these processes is on clarifying the parties’ real motivations or underlying interests in the dispute and is future oriented. Mediation, for example, is a process that traditionally focuses mainly on underlying interests. Interest-based processes often provide the possibility of value-creation.

*Rights-based processes*, on the other hand, narrow issues, streamline legal arguments, and predict judicial outcomes or render decisions based on assessments of the legal rights of the parties. An example of a rights-based process is arbitration. ADR processes can contain both interest-based and rights-based elements, depending on the structure of the process (e.g., a summary jury trial can involve both outcome prediction and facilitated negotiation) or the style of the neutral (e.g., some mediators predict legal outcome as well as facilitate negotiations). Mediation, in particular, is a type of a process that usually encompasses interest-based and right-based elements. However it is suggested that facilitative, interest-based mediation is less expensive and more likely to produce value-creating results. The distinction between right and interests-based criterion is explained below.

### 3. The Continuum of Dispute Resolution Processes

The main types of ADR processes include: negotiation, mediation, and arbitration. Each of them includes numerous “hybrid” processes that can be ranked in terms of the time and resources needed to use them and reduction of the parties’ control (refer to Figure 1). It should be emphasized that there is no one type of any dispute resolution procedure. Each type of procedure is not a point on the continuum, but an area (segment) encompassing a variety of modifications or other similar processes. Mediation is a particularly broad procedure and has many variations such as *facilitative*, where the mediator (facilitator) seeks to assist the parties improve their communications and clarify the issues between them, as well as reevaluate their positions, without passing an opinion on the merits. A mediation can also be *evaluative* or directive, where the mediator gives a view on the merits of the case. Mediation is also a base of other processes characterized by a non-binding intervention of a neutral third party, such as conciliation or mini-trial.

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9 Hybrid ADR processes are briefly described in Appendix B.

10 See Appendix B for examples and Appendix J for further bibliography.
The table below provides different aspects of each process to allow for a quick comparison between them and to determine what can be achieved with each of them.

Table 1: “Primary” Dispute Resolution Processes

<table>
<thead>
<tr>
<th>Characteristics</th>
<th>Negotiation</th>
<th>Mediation</th>
<th>Arbitration</th>
<th>Adjudication</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary/ involuntary</td>
<td>Voluntary</td>
<td>Voluntary, in some cases involuntary (mandated mediation)</td>
<td>Voluntary (when based on contract clause–mandatory)</td>
<td>Involuntary</td>
</tr>
<tr>
<td>Binding/ non-binding</td>
<td>If agreement, enforceable as contract</td>
<td>If agreement, enforceable as contract, sometimes agreement embodied in court decree</td>
<td>Binding, subject to review on very limited grounds.</td>
<td>Binding, subject to appeal</td>
</tr>
<tr>
<td>Third party</td>
<td>No third-party facilitator</td>
<td>Party-selected outside facilitator</td>
<td>Party-selected decision maker often with specialized expertise</td>
<td>Imposed, third-party neutral decision-maker, generally with no specialized expertise in the dispute subject</td>
</tr>
<tr>
<td>Degree of formality</td>
<td>Usually informal, unstructured</td>
<td>Usually informal, partly structured</td>
<td>Procedurally less formal than litigation; procedural rules and substantive law may be set by parties</td>
<td>Formalized and highly structured by predetermined, rigid rules</td>
</tr>
<tr>
<td>Nature of processing</td>
<td>Unbounded presentation of evidence, arguments and interests</td>
<td>Unbounded presentation of evidence, arguments and interests</td>
<td>Opportunity for each party to present proofs and arguments</td>
<td>Opportunity for each party to present proofs and arguments</td>
</tr>
</tbody>
</table>

4. Mediation Defined

Mediation is a flexible, non-binding dispute resolution process in which a neutral third party (the mediator) assists two or more disputants to reach a voluntary, negotiated settlement of their differences. The parties have ultimate control of the decision to settle and the terms of resolution. The mediator uses a variety of skills and techniques to help the parties reach a settlement, but has no power to make a decision. The parties remain the decision makers.

Mediation is generally referred to as an interest-based process – in contrast to a rights-based process – because it is designed to help the parties clarify any underlying motivations or interests. The mediator also may help the parties prove the strengths and weaknesses of their legal positions, enhance communications, explore the consequences of not settling, and generate settlement options. Mediation sessions sometimes result in creative solutions, including those where both sides can profit from the settlement terms. Thus mediation changes the distributive, zero-sum game into a value-creating situation. Mediation sessions also are generally confidential. The parties sometimes enter into formal confidentiality agreements before the start of the mediation. Such agreements can preclude a party from later using in litigation or arbitration the documents or information obtained during mediation which they did get elsewhere. This confidentiality provision is often a part of mediation law, and such a confidentiality agreement is not necessary. Also the parties often meet with the mediator separately, which encourages them to share some of their sensitive information.

Conciliation is usually understood as a type of mediation where the parties to a dispute use a neutral third party (a conciliator), who meets with them separately.
in an attempt to resolve their differences. Conciliation differs from arbitration in that the conciliation process, in itself, has no legal standing. The conciliator usually does not have authority to seek evidence or call witnesses, and does not write decisions or make an award. The main goal of conciliation is to conciliate, most of the time by seeking concessions. In mediation, the mediator tries to guide the discussion in a way that optimizes parties’ needs, takes feelings into account and reframes representations. In conciliation, the parties seldom, if ever, actually face each other across the table in the presence of the conciliator. Instead, a conciliator meets with the parties separately (“caucusing”). Such form of conciliation that relies exclusively on caucusing is called “shuttle diplomacy.”

Conciliation means different processes in various countries and many people use it interchangeably with mediation. The project manager should generally avoid using this term as it may be confusing for other stakeholders and the parties. Because of the lack of consistency in the usage of the term “conciliation,” “mediation” has emerged as a more generic term to refer to assisted negotiations where the role of the third party can take a variety of forms with a view to helping the parties reach an agreement. Therefore, unless there are important reasons to distinguish conciliation from mediation, we recommend the use of the term “mediation” instead of “conciliation.” In the course of training, mediators will learn different forms of mediation (including conciliation) and will be able to apply it depending on the circumstances, without confusing the parties and other stakeholders.

For definitions of other ADR processes, see Appendix B.