Albert Fiadjoe

Alternative Dispute Resolution: A Developing World Perspective

ALTERNATIVE DISPUTE RESOLUTION:

A DEVELOPING WORLD PERSPECTIVE

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This book is dedicated to my brothers and sisters
who taught me through practical living the
very important virtues of conciliation,
negotiation and mediation
and
my students, both past and present

FOREWORD

In the last 25 years, throughout the common law world, traditional arrangements for the delivery of civil justice have come under scrutiny, challenge and change. The search for alternative processes to litigation in the resolution of disputes gained momentum and a great debate has ensued.

There is now a veritable mountain of literature and learning on ADR, the acronym for Alternative Dispute Resolution. More and more, universities and law schools have recognised the need to teach ADR as a separate and discrete course of study. This book will undoubtedly find a place of eminence in the libraries of law students at the Faculty of Law of the University of the West Indies.

With his customary scholarship, skill in handling legal materials and a felicitous writing style, Professor Fiadjoe has produced a work of exceptional merit. It is a timely and relevant publication, for it locates much of its learning and discussion in the realities of the contemporary Caribbean and the wider global environment.

Caribbean people, lawyers and non-lawyers alike, must become conversant with the dispute settlement Articles of the Revised Treaty of Chaguaramas which provides for the establishment of the CARICOM Single Market and Economy. Equally, they must understand the dispute settlement mechanisms of the World Trade Organization. On these matters this book is a storehouse of necessary information.

The timeliness and relevance of *Alternative Dispute Resolution: A Developing World Perspective* are well exemplified by the efforts of several States of the Commonwealth Caribbean to reform their rules of civil procedure to conform to a more judge-driven paradigm, at the heart of which will be ADR and its companion case management. In addition to treating of those techniques, Professor Fiadjoe examines attempts in the region to incorporate processes of mediation in the area of criminal law. This is a novel departure from traditional works on ADR.

In commending this book to the widest possible readership, I feel a sense of profound satisfaction that, once again, my expectations of the Faculty of Law of the UWI have been fulfilled. One dared to hope in 1970, on inauguration of the Faculty, that it would have been a catalyst for the publication of first class legal literature. That hope has been realised beyond measure in the last 30 years.

Professor Albert Fiadjoe has been an indefatigable author and a prolific contributor to legal learning in the Commonwealth Caribbean. His vast knowledge and intellectual agility have enabled him, apparently seamlessly, to make the transition from expert in Public Law to expert in an exciting, developing area of the law. I have every confidence that the same large measure of acclaim that attended his highly successful *Commonwealth Caribbean Public Law* will be accorded *Alternative Dispute Resolution: A Developing World Perspective.*

All lawyers in the Commonwealth Caribbean are advised to read this book and digest the contents of its pages. The monopoly of lawyers in the management and settlement of disputes is under threat from a new class of professional mediators and others offering services in ADR in the common law world. It is a counsel of prudence to be forewarned and forearmed. Professor Fiadjoe amply provides the intellectual armour to meet the competition.

David Simmons
Chief Justice
Supreme Court of Barbados

PREFACE

I pioneered the introduction of a course in Alternative Dispute Resolution (ADR) in the curriculum of the Faculty of Law of the University of the West Indies, Cave Hill Campus, in 1998. Little did I then realise that the level of student interest in the subject would be so overwhelming, and that this interest would, as in 1995 when my students' commitment led me to write *Commonwealth Caribbean Public Law*, result in the creation of this book.

When the Faculty of Law at the University of the West Indies decided to make ADR a part of its curriculum offering, I had the undeserved honour of being asked to teach the course. This text owes a great deal to those students who put their faith in me blindly, by enthusiastically enrolling for the course, far in excess of the cut-off numbers. That show of enthusiasm also revealed to me that our students were forward-looking in their vision and thinking as to where the jurisprudence in the Caribbean region ought to be heading. Despite limitations in student numbers, the Faculty has been forced to accommodate unusually large student numbers. This phenomenal growth in student interest also attests to the importance of ADR worldwide.

I dedicate this book to my brothers and sisters and also to all my students who have embraced this subject in the full knowledge that lawyering in this millennium has to take into account processes of dispute resolution other than litigation through the courts. The discerning client of today is asking a simple but very fundamental question: has my attorney delivered results for me which are quick, effective and creative to my needs?

Never in the history of litigation has there been more focus and purpose in the area of client services and results. The attorney without legal wisdom and business vision is out of step with the ethos of our times. The attorney of today has to focus on the client's short-term and long-term objectives and interests. That requires forward-thinking, uncompromising quality and exceptional client service. That is why all respectable law schools now carry a course in ADR.

This book has two equally important objectives. The first goal is to examine ADR techniques from a societal perspective. In spite of the impression that one gets from examining law schools' curricula, the vast majority of disputes are not filed in court. Even those few disputes that are filed as lawsuits are generally resolved before trial, primarily through settlement or some dispositive motion. Increasingly, disputes are being resolved by litigants using private agreements to bind themselves to such alternatives to litigation. In addition, sometimes the state itself requires parties to resolve their disputes using methods other than litigation. The underlying question which we need to address is whether this rushing tide toward ADR is a good thing. The second goal is to provide readers with some of the knowledge and skills required to function in a legal system that resolves many disputes through negotiation, mediation and arbitration, as well as through litigation.

Today's practice of the law does not provide a simple 'yes' or 'no' answer to dispute resolution. In both large and small jurisdictions, it is, indeed, a verifiable truism that the lawyer of today requires a marriage of both litigation and dispute resolution skills. There is now no option for the attorney to choose to work primarily in either a litigation context or, instead, in an ADR setting. In fact, virtually all attorneys will need to be well-versed in both styles of dispute resolution. For example, the attorney will need to know how to interview clients and witnesses and how to negotiate agreements, but even in that role, he will also need to know how to represent

clients in mediations, arbitrations, mini-trials, etc, and how to advise them on which technique would be preferable.

In this book, I have included an ample discussion of arbitration. There is some disputation as to whether arbitration properly falls within ADR. This is because arbitration is a hybrid system which closely approximates to litigation. Brown and Marriott in *ADR Principles and Practice* justify some discussion of arbitration in their book on the grounds that the history of arbitration forms a 'part of ADR and because its practices and procedures have influenced some hybrid ADR processes. An understanding of its operation is essential to an application of dispute resolution generally'.[1] In the case of this book, the justification for discussing arbitration as a part of ADR is far easily explained.

It is a strategic part of the Faculty's mandate to promote regional development. International commercial arbitration has become a critical tool for the promotion of international trade. All the global treaties of modern times mandate the use of arbitration as one of the modes for the settlement of international disputes. Reference is easily made to the Caribbean Community and Common Market (CARICOM) Protocol 9 where arbitration may be invoked in addition to the original jurisdiction of the Caribbean Court of Justice, the WTO and, soon to come, the Free Trade Area of the Americas (FTAA). In the Law of the Sea Convention, arbitration is the default system for contentious proceedings. All these impact directly on the Commonwealth Caribbean region and influence the legal system in a significant way. In the WTO, arbitration is a subsidiary appendage to the institutionalised processes of dispute resolution.

I have sought to discuss in some detail the dispute resolution processes within the WTO and CARICOM, principally because of the impact of those treaties on Caribbean trade, commerce and economies.

The rapid adoption of case management techniques in the Commonwealth Caribbean has also given added impetus to ADR. As the region moves to modernise its civil court procedures to simplify and expedite the resolution of disputes, thus providing greater access to justice, questions remain as to whether case management should be practised in conjunction with mandatory ADR systems, which many would regard as essential to an effective civil justice system. The developing need for the resolution of conflicts and disputes not hitherto taken seriously drives the motivation to include some discussion, albeit briefly, on the Ombudsman and the Small Claims Court.

In sum, I have tried to address the 'why', 'what' and 'how' of ADR, while also dealing also with some policy issues and considerations.

In putting together this text, I have tried to provide the required Caribbean, and sometimes developing world, perspective and flavour, thus making the book refreshingly current, topical and relevant to the needs of developing countries.

I have also provided opportunities for role plays and de-brief exercises, because a skills training course will not be complete without some opportunity to practice some skills.

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1 *ADR Principles and Practices*, 1999, Sweet & Maxwell, p 12.

All the role play materials used in the book have been graciously supplied by Donna Parchment of the Dispute Resolution Foundation in Jamaica. Her contribution is gratefully acknowledged as well as that of the Jamaica/Capital Project 1991.

My thanks also go to Sir David Simmons, KA, BCH, QC, Chief Justice of Barbados for readily agreeing to write the Foreword to this book. I wish to thank him also for his constant encouragement to me over the years. My grateful thanks also go to my colleagues, Professor AR Carnegie, Executive Director of the Caribbean Law Institute Centre, and Mr Endell Thomas, both of whom read the manuscript and made several constructive suggestions and comments.

Miss Pat Worrell continues to exhibit extraordinary skills in deciphering my awful calligraphy. I am indeed eternally grateful to her for secretarial assistance.

I thank my family for their patience and forbearance during the preparation of this book. Cavendish Publishing continues to support my efforts. I thank them for the confidence.

I have tried to illustrate the breadth and depth of conflict resolution as an academic field as well as the many levels of experience and analysis that practitioners of the subject and theorists bring to the dialogue.

I hope that this book will help to stimulate greater interest, awareness and discussion of issues related to the prevention and resolution of conflict peacefully. May our societies continue to drink deep from the wells of conflict resolution and management.

Albert Fiadjoe
Law Faculty
University of the West Indies
Barbados
August 2004

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CHAPTER 1

ADR: ORIGINS, CONTEXTUAL BACKGROUND AND PURPOSE

INTRODUCTION

There is no question but that conflict resolution, through the processes of negotiation, mediation and arbitration, has become an acceptable and, indeed, inevitable part of creative lawyering in the 21st century. That explains why all self-respecting law schools now provide for skills training in the field of Alternative Dispute Resolution (ADR) as part of their core offerings. Today, ADR processes are being applied worldwide to a universality of situations hitherto governed by either litigation or, in extreme cases, by warfare between nations. Obvious examples of such situations are in the areas of international peace and world order, environmental and public policy, science and technology, sports, social development and community-related issues, crime control and prevention, schooling, restorative justice and the family. To this list may be added the more traditional areas such as commercial contracts, employment, labour relations and insurance.

Indeed, there is now increasing recognition of the fact that every type of dispute can be the subject of a dispute resolution process. From business controversies to labour management disputes, ADR is becoming the preferred choice for the resolution of conflict and disagreement, and the reasons are not hard to find. Litigation is a stressful undertaking. It is a costly, lengthy, public exhibition of differences, leading to a great deal of ill-will between litigants. In contrast, ADR processes are usually faster, less expensive, less time-consuming and more conclusive than litigation. Some of the perceived advantages of ADR can be summarised as follows:

(a) speed;
(b) choice and expertise of impartial neutrals;
(c) informality and flexibility;
(d) privacy;
(e) economy;
(f) finality;
(g) diversity and adaptability of ADR;
(h) recognition of the needs of the parties;
(i) win-win situation;
(j) involvement of the parties in creating imaginative solutions;
(k) savings in public expenditure;
(l) private savings in time and energy;
(m) retention of beneficial business and personal relationships;
(n) shortening of court dockets;
(o) more efficient legal systems;
(p) qualitative improvement in the delivery of justice; and
(q) increased participation and access to justice.

ORIGINS

What then is ADR? In its pristine form, ADR originally referred to a variety of techniques for resolving disputes without litigation. But, having regard to the evolution of modern techniques, such as caseload management and the ever-growing prevalence of ADR within the litigation context, it might be more accurate now to describe ADR not as an alternative to litigation but one technique which is appropriate in the context of dispute resolution generally. Following that way of thinking, litigation is considered as just one of a variety of methods of dispute resolution.

Reading through the vast literature on ADR, one is left with the impression that ADR is of recent vintage and that its genesis traces to the USA. Without in any way detracting from the enormous, innovative and creative contribution of American scholars to this discipline, the point has to be made that both these propositions are false. Until now, western writers have assumed or given the impression that the traffic in ADR travelled in one direction, across the Atlantic from west to east. That is a fallacy.

The origins of ADR trace to traditional societies. Traditional societies, without the trappings and paraphernalia of the modern state, had no coercive means of resolving disputes. So, consensus building was an inevitable and necessary part of the dispute resolution process. The court system only developed as a necessary by-product of the modern state. Societies in Africa, Asia and the Far East were practising non-litigious means of dispute resolution long before the advent of the nation state, for the building of long-term relationships was the bedrock on which those societies rested.

Kaplan, Spruce and Moser chronicle early examples of dispute settlements by means of arbitration.[1] They write:

> In respect of arbitration, its history may be linked to the genesis of human society itself, parents are normally arbiters in disputes between their children. Mythological references to arbitration have been chronicled thus:
>
> > There are mentions of disputes between two gods being submitted to a third for decision in the earliest myths. Stories from Ancient Egypt tell of disputes between Osiris and Seth, and Horus and Seth, being decided in that way ... The earliest Greek arbitration myth is of a mortal arbiter, Paris, deciding between immortal parties, Hera, Athene and Aphrodite ...

References to arbitration were made around 350 BC by Plato, in *The Laws*, stating, *inter alia*, as follows:

> Whenever someone makes a contract and fails to carry it out ... an action may be brought in the tribal courts if the parties have been unable to resolve it before arbitrators or neighbours.

Another renowned historian, Plutarch, wrote of an arbitration anecdote:

1 *Hong Kong and China Arbitration Cases and Materials*, 1994, Butterworths (Asia), p xxxiii, quoted in a speech by VP Pradhan entitled 'Mediation and Alternative Dispute Resolution: Developments in the Various Jurisdictions: Have the Lawyers Caught On?'.

> Plutarch tells of two men appointing the King, Archidamus II, to resolve their dispute. He took them into a remote temple and made them swear they would abide by his award. He then gave it: 'Stay here till you have made up your quarrel.'

Similarly in Rome, it is said that:

> ... there was a well-established practice of arbitration separate from the procedures of litigation. Cicero, writing before 50 BC, knew arbitration as part of the highly developed legal system of which he was the master:
>
> > A court hearing is one thing, the award of an arbitrator quite another. The trial concerns a definite sum, an arbitrator's award an indefinite. When we go to court we know that we are going to win all or lose all. But we go to arbitration with different expectations – that we may not get all we want but we will not lose everything. The very words of the arbitration contract are proof of that. What is a trial like? Exact, clear cut, explicit. And arbitration? Mild, moderate.[2]

In respect of commercial arbitration, the following has been said:

> Commercial arbitration must have existed since the dawn of commerce. All trade potentially involves disputes, and successful trade must have a means of dispute resolution other than force. From the start, it must have involved a neutral determination, and an agreement, tacit or otherwise, to abide by the result, backed by some kind of sanction. It must have taken many forms, with mediation no doubt merging into adjudication. The story is now lost forever. Even for historical times it is impossible to piece together the details, as will readily be understood by anyone who nowadays attempts to obtain reliable statistics on the current incidence and varieties of arbitrations. Private dispute resolution has always been resolutely private.[3]

In the Malaysian context, RH Hickling, in his book on Malaysian law,[4] points out that conciliation and mediation are the traditional dispute resolution processes of the different races in Malaysia, with the emphasis upon *adat* and Confucian values of yielding and compromise. Traditionally, mediation is the key to reconciliation, with the mediator taking a broader view of the issues involved than any common law judge, whose area of investigation is limited by narrow concepts of what is relevant or irrelevant.

Early advocates of ADR include Abraham Lincoln, to whom is attributed the following exhortation: 'Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the loser in fees, expenses and cost of time.' While advocating compromise may not be the same as advocating ADR, it represents a path away from litigation which is in line with the traditional thrust of ADR. Mahatma Ghandhi is quoted as saying of his practice:

> I realized that the true function of a lawyer was to unite parties ... A large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul.

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2 *Ibid* at p xl.
3 Mustill, 'Arbitration: History and Background' (1989) 6 Journal of International Arbitration, p 43.
4 *Malaysian Law*, 1987, Professional (Law) Books Publishers, pp 136–41.

By way of further example, Professor G Woodman reminds us that among the ethnic groups of the Aruba and Tanzania, modes of dispute resolution existed before the advent of colonial rule and the inception of the modern state.[5]

Much nearer home, Helen Alves of Trinidad & Tobago has this to say on the point with respect to mediation:

> Mediation has had a long and varied history, and has traditionally been used as a means of dispute resolution and as a means of ensuring in several cultures, that societal cohesion was maintained in the face of individual and communal conflicts.
>
> Mediation had its genesis in traditional decision making procedures used at some stage in the history of almost all cultures of the world. The Hindu villages of India which have traditionally engaged the *panchayat* justice system, (and which system, in traditional times, was also used in Trinidad and Tobago as a means of dispute resolution). In traditional African societies, respected notables were often called to mediate disputes between neighbours, and Islamic traditional pastoral societies in the Middle East also established mediation methodologies. In the Jewish culture, a form of mediation was, in Biblical Times, practised by both religious and political leaders. Mediation has also been widely practised in Japan and a number of other Asian societies. The Christian religion has as well, traditionally used mediation among its members.
>
> Whilst factors such as cultural values, belief, self concepts, the relationship between the parties will affect the process used, the introduction of an impartial third party to the resolution process appears to transcend these differing factors.
>
> Despite the established historical background of mediation, it has only been since the mid-1990s that the process has become formalized, and, only within the last twenty-five years that the process has gained ground as an institution and as a developing profession.[6]

This viewpoint is also echoed by P Britton of Guyana, who writes:

> We are all aware that in African rural Communities, eg Victoria Village on the East Coast of Demerara, there existed what was known as the Village Committee, and in the administration of the Village affairs it was a stipulated condition precedent that disputes – especially with respect to the ownership of land – had to be brought before the Committee before recourse was had to the Courts ...
>
> In like manner, it must not be overlooked that in the East Indian Communities there were the famous Panchayat which means, 'the settlement of dispute by the elders within the East Indian Community'. The Panchayats operated in the open preferably sitting under a tree, either by themselves or together with the disputants. Marriages have been saved, family honours have been restored and family property preserved through the intervention of these wise men.

5 'The Alternative Law of Alternative Dispute Resolution' (1991) 32 Les Cahiers de Droit 2. Attention is drawn to the copious citations of literature on the subject of alternative dispute resolution practised under the umbrella of the state as well as non-state adjudication.

6 Alves, H, 'Mediation: A Method of Alternative Dispute Resolution' (1999) Hugh Wooding Law School Journal, The Junior Counsel 36.

> In our impatient endeavour to leap into the new millennium the roles which were and still are being played by Priests, the Parsons, the Moulvis and the Pandits have been overlooked, if not all together forgotten. It is worthy to note that the functioning of the Panchayat has been recognised by the High Court of Trinidad and Tobago, where a settlement which was formulated by the Panchayats and agreed to by the parties, was later enforced by an Order of Court.[7]

It is well-documented that mediation has a long and varied history in all the major cultures of the world. As stated by CW Moore in his book, *The Mediation Process*,[8] 'Jewish, Christian, Islamic, Hindu, Buddhist, Confucian and *many indigenous cultures* all have extensive and effective traditions of mediation practice'.

In the case of Ghana, for example, there is abundant evidence showing the historical existence of ADR processes. In the Privy Council case of *Kwasi et al v Larbi*,[9] there is the discussion in the judgment of the Board on the question whether there is a right to resile from an arbitration after the award has been made. Reference was made to Sarbah's *Fanti, Customary Laws (Gold Coast)* published in 1887 and the case of *Ekua Ayafie v Kwamina Banyea*,[10] reported in 1884.

Also, in the present day customary law regime of Ghana, there is still a recognition of non-litigious modes of dispute resolution whereby the parties to a dispute may refer their disagreement to conciliation, mediation or arbitration, outside of the formal court system, to a chief or some respected elder of the community.[11] In a general sense, this respect for a non-litigious process of dispute resolution was underpinned by a society that was then largely culturally homogenous. Respect for the lineage, the household and personal abhorrence of crime and the focus on community rather than personal interests, all served, in large measure, to preserve the equilibrium of the society. The introduction of the court system, as part of the modern state, was an indication of the loss of society's homogeneity through the growth of internal fecundity or external admixture. In that kind of a mix, old sanctions tended to become inadequate to the new needs of maintaining law and order.

The second fallacy (in addition to the supposed one-way flow of ADR from west to east) is that ADR is of recent vintage. According to the American Arbitration Association, a public-service, not-for-profit organisation that has been in existence since 1926, the movement toward ADR in the USA began after World War I and reached its first milestone with the passage of the first modern arbitration statute in New York in the mid-1920s. Since then, the movement has grown steadily, achieving explosive growth since 1980. A chronology of significant dates is then provided in the development of the ADR movement.

It is indeed a significant fact that today, ADR methods have achieved broad acceptance by America's business, labour-management and legal communities. The

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7 'Alternative Dispute Resolution' (1999) 1(1) The Guyana Law Review 108–09.

8 2nd edn, Jossey-Bass, pp 20 *et seq.* Emphasis added.

9 [1953] AC 164.

10 (1884) Fanti LR 38. For those interested in pursuing the point, several cases on customary arbitration are discussed in the judgment. See also Agbosu, LK, 'Arbitration Under the Customary Law' (1983–86) XV Review of Ghana Law 204.

11 Numerous records can be found in the holdings of the Institute of African Affairs, University of Ghana, Legon. See also an incisive and well-researched article by Professor G Woodman entitled 'The Alternative Law of Alternative Dispute Resolution' (1999) 32 Cahiers de Droit 2, and also Brukum, *Conflict and Conflict Resolution among the Nchumuru*, Transactions of the Historical Society of Ghana, New Series, no 2, p 39.

annual ADR caseload processed by the American Arbitration Association alone has surpassed 60,000 cases – a figure equivalent to one-quarter of the cases now handled each year in the Federal Courts. In fact, the courts have recognised the value of ADR. Today, in many state and federal jurisdictions in the USA, there are mandatory and voluntary court-sponsored ADR programs to divert cases which might be settled without litigation.

What can truly be said, therefore, is that the USA deserves credit for putting a modern face to the process and bringing to it some coherence and internal logic. That is acknowledged by Brown and Marriott when they say that:

> ... the reforms in court procedures have provided an increasing interest in the use of ADR, regarded hitherto by English lawyers with very considerable scepticism and initially seen as an American device to cope with the severe and supposedly unique problems of the USA litigation system. But there is now, we believe, an awareness that the problems which face our civil justice system are not unique to this country; and, that there is much we can learn from what happens elsewhere, particularly in common law countries with which we share a legal tradition and heritage.[12]

As has been shown in the preceding paragraphs, ADR long pre-dated World War I. It is important to acknowledge the ancient and long-standing roots of ADR while clothing it with a modern facade.

The additional point must also be made that international law has long recognised mediation, conciliation and good offices as essential tools of conflict resolution, long before the new fad in municipal law to wholeheartedly embrace ADR. Indeed, in international law, it is litigation which is the latecomer. Mediation, conciliation and good offices were in use before the establishment of the Permanent Court of International Justice (PCIJ) after World War II, and the confusingly named Permanent Court of Arbitration is earlier than the World Court. In earlier times, international lawyers never talked about an 'alternative' to the package of modes of 'pacific settlement of disputes' which included mediation, conciliation and good offices.

CONTEXTUAL BACKGROUND

Contemporary global politics teaches that the world is essentially a village, firing on the cylinders of free and fair trade. It is a marvel to contemplate the threshold on which the world economy stood at the turn of the century. The end of the Cold War had led to the abolition of geopolitical and ideological divisions between the capitalist west and the communist east. Divisions of economic ideology and mutual hostility that had existed between north and south had been significantly reduced.

Furthermore, enormous developments in information and communications technologies had accelerated the integration of the world and, at least in theory, led to wealth creation on a global scale. In her brilliant book, *The Death of Distance*,[13] Frances Cairncross writes that the reality of our times is that geography, borders and time zones are all rapidly becoming irrelevant to the way we conduct our business and

12 *ADR Principles and Practices*, 1999, Sweet & Maxwell, p viii.
13 1999, Harvard Business School Press.

personal lives, courtesy of the communications revolution. She predicts that this death of distance will be the single most important economic force shaping all of society over the next half century.

That may well be so, but that will not prevent disputes among individuals and nations. It may well, indeed, accelerate disputes. Indeed, as 'the death of distance' opens up enormous possibilities for increased economic interface, so the need for fast and efficient dispute resolution mechanisms will grow more, not less. At the national and international levels, the Cold War era may be gone but terrorism has replaced that as the principal outcome and form of international conflict. These wars include wars of terrorism, guerilla wars, civil wars and inter-state conflicts,[14] and the reasons may not be too hard to fathom. Generally, global trade has led to greater wealth-creation among states, but Utopia has not arrived for many in the world. Indeed, from a developing world perspective, the pace of technological change has caused income gaps to widen both between countries and within them. Widespread poverty, disease, ignorance and perceived injustices remain critical issues that need to be vigorously addressed if conflict reduction is to be achieved in the world. These are big issues which will be with us for a long time to come. They underscore the need for societies to put in place mechanisms for a quick resolution of conflict as a critical tool in diffusing tension. But that is not all. Our common law system of jurisprudence is also suspect. It carries within it the seeds of continued conflict.

The common law is very much an adversarial system of jurisprudence. The notion of a plaintiff versus a defendant, appellant versus respondent, the legal principles established through judicial precedents, the rules of court, the rules of admissibility, hearsay, etc, are all manifestations of this adversarial approach to dispute resolution.

Two cases that illustrate the ills of present day litigation very well are the civil and criminal trials of OJ Simpson, accused of the murder of his wife. This is not to suggest that ADR can be used for the resolution of serious crimes, but merely to underscore the ills of litigation. In both cases, millions of dollars were expended in litigation costs and expenses. The world was treated to a protracted criminal trial, thousands of rulings by Judge Lance Ito, and the jury suffered an unduly harsh sequestration for several months. OJ Simpson was eventually acquitted, but that was not all. That trial was followed by a subsequent civil trial, involving basically the same parties, in which OJ Simpson was found liable.

If this is an exaggerated example of the problems of modern litigation, everyone can, on their own, at least, begin to enumerate the normal, every-day criticisms of the judicial process. Some of these are:

(a) the adversarial nature of the trial;
(b) delay;
(c) expense;
(d) court overcrowding;
(e) rising demands on scarce public resources;
(f) escalating legal and emotional costs;
(g) an increasingly long, arduous litigation process; and
(h) inefficiency and popular frustration with litigation.

14 The attack of 11 September 2001 on the USA is a prime example but several examples of conflict remain in the world – Bosnia, Kosovo, Macedonia, Chechnya, Azerbaijan, Tajiskitan Kashmir, the Philippines, Indonesia, the Middle East, Sudan, Nigeria, etc.

One of the main driving forces towards ADR is public dissatisfaction with litigation. It is not a secret that the search for alternatives to the adjudicative model through courtroom litigation has been fuelled by the growing client dissatisfaction with traditional legal methods. There are the usual complaints of spiraling costs, lengthy delays, increasing levels of litigation and court overload. Then there are also the unusual complaints – clients being left out of the decision making process once they have instructed a lawyer, complete loss of control when they turn their claim to the lawyer, client intimidation by the formality of the adjudicative processes. Also, there is the not uncommon feeling that the burning issue, which originally belonged to the disputants, becomes detached from them once it is placed in the hands of the legal system. In the process, the original, personal facts of the case are reconstructed to fit the relevant legal rules.

ADR seeks to address one fundamental question – what is the best way for people to deal with their differences? Before an attempt is made to answer this question, an examination, albeit brief, of the nature of conflict is needed.

THE NATURE OF CONFLICT

The imagery that conflict evokes is that of clashing passions, intense emotional upheaval, the turmoil of battle and the tension of struggle. To the ordinary mind, therefore, conflict represents a sharp disagreement, a negative collision of ideas, values and interests. There is some sympathy for this viewpoint. For as 'cultural programming' well illustrates, individuals have different experiences, and are influenced by personal biases on life. Surely, all individuals cannot see things in the same light. Conflict is, therefore, a fact of life. It illustrates the simple fact that individuals and nations are uniquely different.

The word 'conflict' is derived from two Latin words *con* (together) and *fligere* (to strike). To take a straight definition from *The Concise Oxford English Dictionary*,[15] conflict means a 'fight, struggle, collision'. Some of its synonyms are belligerency, hostilities, strife, war or clash, contention, difficulty, disdain, dissension, dissent, friction and strife. Additionally, conflict has been defined to include a clash of opposed principles, statements or arguments.

Several theories seem to explain the genesis of conflict. Morton Deutsch[16] explains conflict in terms of incompatible activities of man. Folberg and Taylor[17] explain away conflict in terms of the divergent aims, methods or behaviour of people. Interesting though these theories may be, conflict can simply be viewed as the result of the differences which make individuals unique and the different expectations which individuals bring to life.[18]

While conflict is inevitable, disputes need not be. Disputes occur when we are unable to manage conflict properly. The main traditional responses are to fight, coerce or force a solution, usually of the win-lose variety. In other circumstances, compromise

15 7th edn, p 197.

16 Deutsch, M and Coleman, P, *The Handbook of Conflict Resolution*, 2000, Jossey-Bass, pp 9–16.

17 *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*, 1984, Jossey-Bass, p 24.

18 For an indepth study of conflict, see Hocker & Wilmot, *Interpersonal Conflict*, 6th edn, 2000, McGraw-Hill.