"ADR in a Changing World: The Asian Experience"

Keynote Address

delivered by

H.E. Prof. Dr. Kennedy Gastorn,

Secretary-General of AALCO

ASIA ADR WEEK 2018, Organized by Asian International Arbitration Centre (Malaysia), Kuala Lumpur, Malaysia

5- 7 May, 2018

---

1. Introduction

Excellencies, Distinguished Guests, Distinguished Experts, Participants, Ladies and Gentlemen;

It is an honour and a great pleasure for me to have the opportunity to deliver the Keynote Address at Asia ADR Week 2018. At the outset, I congratulate Datuk Professor Sundra Rajoo and his team for organizing the ADR Week.

I also profess my heartiest congratulations and best wishes to them on the official launch of the Asian Institute of Alternative Dispute resolution (AiADR) which will take place tomorrow.

AALCO's participation in the alternative dispute resolution scheme and the establishment of five regional arbitration centers in Kuala Lumpur, Cairo, Tehran, Lagos and Nairobi deserve to be highlighted. We, at AALCO, are determined to play an even greater role in the field of alternative dispute resolution."[1]

Pursuant to the theme of the Conference, that is, "Discover the Difference: The Asian Experience", I propose to speak today on the topic "ADR in a Changing World: The Asian Experience".

This keynote address shall furnish a prologue to the sessions scheduled to be held during the course of two days. Taking note of AIAC's recent expansion into holistic dispute management and dispute avoidance and its aspiration to spearhead an era of development and expansion both for AIAC and global ADR ecosystem, the keynote address seeks to discuss the experience of the Asian States in this regard.

In this context, comprehending the connotation of ADR, and the reason of the mechanisms' growing popularity and prominence, is an essential precondition to any deliberation on the Asian experience on ADR.

[1] Inaugural Address by H.E. Ms. Sujata Mehta, Secretary (West), Ministry of External Affairs, India during the 55th Annual Session of AALCO in 2016.

2. ADR

The history of humankind is necessarily a saga of a series of conflicts and a narrative of the evolution of ideas regarding management or resolution of such conflicts. In this era of globalization the pace of human interaction, including international business and commercial transactions, has accelerated. Consequently, the number of conflicts or disputes has experienced a surge and their nature rendered more complex. This has solicited increasingly specialized and prompt attention.

Therefore, Alternative Dispute Resolution (hereafter, ADR) mechanisms have been revitalized and revived to cater to the needs of this changing world. As Justice Sanjay Kishan Kaul of the Supreme Court of India said "with a large number of industrial and businesses cases coming up before the courts, the arbitration [ADR] is certainly the need of the hour".[2]

Generally perceived, ADR is an all-encompassing term which refers to multiple non-judicial methods of handling conflict between parties.[3] It is defined by *Black's Law Dictionary* as a "procedure for settling dispute by means other than litigations, such as arbitration and mediation."[4] Although the term ADR has gained currency in a format essentially of western

[2] Shruti Mahajan April 28, 2018 News.
[3]See Alternative Dispute Resolution, Legal Information Institute, at https://www.law.cornell.edu/wex/alternative_dispute_resolution.
[4]Georgetown Law Library,Alternative Dispute Resolution and Mediation Research Guide, at http://guides.ll.georgetown.edu/adr_mediation.

import, its roots run deep in human history, and it has played a crucial role in cultures across the globe.[5]

ADR mechanisms have, thus, catered to the rule of law over the years, such extra-judicial methods having been practiced since antiquity. As Datuk Prof Sundra Rajoo in his paper entitled "Overview of ADR in Malaysia" says, structural and formal codification of such methods in order to tackle more complex disputes over time is what we loosely refer to as ADR today.[6]

The broadening spectrum[7] of the term ADR comprises an entire array of dispute resolution forms, *viz.*, arbitration, mediation, conciliation, adjudication, settlement conferences and neutral evaluation which "stands parallel to the judicial processes also known as litigation".[8]

In that broad spectrum of approaches "from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end, where an external party imposes a solution", somewhere along the axis, between the two extremes, lies "mediation": a process by which a third party aids

[5] Anthropological and sociological studies of traditional societies vouch for the resolution of disputes through pacific means in the Bushmen of Kalahari, Hawaiian Islanders, the Kpelle of Central Liberia, the Abkhazian of the Caucasus mountains, and the Yoruba of Nigeria; Jerome Barrett and Joseph Barrett (2004), *A History of Alternative Dispute Resolution: The Story of a* Political*, Cultural, and Social Movement,* USA: Jossey Bass, 2.

[6]SundraRajoo (2017), "Overview of ADR in Malaysia" in TunArifinZakaria, SundraRajoo and Philip Koh (eds.), *Arbitration in Malaysia- A Practical Guide,*Sweet and Maxwell, Thomson Reuters: Malaysia, 1-22, 2.

[7] The term ADR was not originally conceived to include even arbitration; see generally Brown and Marriott (1999), *ADR Principles and Practice*, Sweet and Maxwell: London, 9; Laurence Street (2014), "The Language of ADR", in Julio César Betancourt and Jason A. Crook (eds.), *ADR, Arbitration, and Mediation: A Collection of Essays,* Chartered Institute of Arbitrators, AuthorHouse UK Ltd.: USA, 105-120, 107.

[8]*Supra* note 4. SundraRajoo (2017), "Overview of ADR in Malaysia" in TunArifinZakaria, SundraRajoo and Philip Koh (eds.),*Arbitration in Malaysia- A Practical Guide* (Sweet and Maxwell, Thomson Reuters, Malaysia) 1-22, 2.

the disputants to reach a mutually agreed solution.[9] As *Paul Gelinas*, then President of the International Law Commission of the ICC (International Chamber of Commerce) said: "*In the conscience of every arbitration, there is a mediator who is asleep. The only question is how do you wake him up*?"[10]

While the classic forms of ADR, *viz.,* arbitration and mediation are acquiring a patina of familiarity, newer and more specialized forms of ADR are evolving. These are more easily tailored to specific cases, and include Med-Arb,[11] mini-trial, summary jury trial, early neutral evaluation, private judging, last offer arbitration, MEDALOA, fact- finding and partnering.[12]

Although each of these methods listed fall under the umbrella of ADR, they vary in ways that match them to different types of disputes.[13]

The flexibility of ADR is said to lend to itself the expertise of crafting "win-win" solutions rather than the "zero sum game of litigation."[14] ADR focuses on consensus building and the non-antagonistic resolution of disputes, and pays obeisance to active participation and principle of mutuality and reconciliation. The non-invasive and private nature of ADR

[9]YonaShamir (2003), Alternative Dispute Resolution: Approaches and the Application, UNESCO, 2, at http://unesdoc.unesco.org/images/0013/001332/133287e.pdf, 2.
[10] F.S. Nariman, "Redefining the Landscape of ADR in Asian Jurisdiction", Kuala Lumpur International ADR Week, 15 May 2017, 34.
[11]As both mediation and arbitration become increasingly formalized, Med-Arb is perceived as one way to correct the adversarial disadvantages of each by providing for both "finality" and "flexibility;" Brian A. Pappas (2015), "Med-Arb and the Legalization of Alternative Dispute Resolution", *Harv. Negot. L. Rev.*, 20: 157- 203, 157.
[12] For detailed discussions on the forms, see A. M. Parris (2012-13), "Alternative Dispute Resolution: The Final Frontier of the Legal Profession?",*J. Legal Prof.*, 37: 295- 307, 295-6.
[13] Ibid.
[14] W. Kamau (2009), "Law, Culture and Dispute Resolution: Prospects for Alternative Dispute Resolution (ADR) in Africa", *East African Journal of Peace and Human Rights*, 15 (2): 336- 360, 337.

allows for preservation and continuity of business relationships.[15] ADR promotes culture of compromise and results in a peaceful and acceptable settlement of the dispute and should greatly be preferred to adversarial litigation in court,[16]or procedures in which an allegedly neutral third party is present and presiding. We can here recall the truth said by an English judge that "*Litigation is an activity that has not markedly contributed to the happiness of mankind*".[17]

The advantage of fora dispensing justice vide methods of ADR, including arbitral tribunals, over judicial settlement bodies, had been summed up commendably by Shaw:[18]

> "Arbitration is an extremely useful process where some technical expertise is required, or where greater flexibility than is available before the International Court is desired. Speed may also be a relevant consideration… the establishment of arbitral tribunals has often been undertaken in order to deal relatively quietly and cheaply with a series of problems within certain categories."

The practices of ADR are increasingly displacing, infiltrating, and transforming conventional models of legal dispute resolution,[19] and at times, even complementing these. In the afore-mentioned broad spectrum

---

[15]Ibid.
[16]F.S. Nariman, "Redefining the Landscape of ADR in Asian Jurisdiction", Kuala Lumpur International ADR Week, 15 May 2017, 27.
[17] F.S. Nariman, "Redefining the Landscape of ADR in Asian Jurisdiction", Kuala Lumpur International ADR Week, 15 May 2017, 35.,
[18]M Shaw (2003), *International Law,*Cambridge University Press, 958- 959.
[19] D. Paul Emond (1998), "Introduction: The Practices of Alternative Dispute Resolution", *Osgoode Hall Law Journal*, 36 (4): 617-623, 617.

of approaches in ADR, preference is gradually seen to shift towards the end of party-to-party resolutions. Herein the rationale behind the soaring popularity of ADR mechanisms to resolve disputes lies.

ADR mechanisms have now begun to mimic formal processes over time,[20] and have undeniably become part of the legal systems. With the increasing institutionalization of dispute resolution processes, many commentators refer ADR as 'appropriate' or 'proportionate' dispute resolution,[21] rather than using the word 'alternative'.

Such reframing posits that the "means and costs of resolving disputes should be proportionate to the importance and nature of the issues at stake"[22] rather than presuming that courts are the preferred form of dispute resolution.[23]

Against this backdrop, I now proceed to assess the Asian experience on ADR.

I propose to peruse the attitude of the continent vis-à-vis ADR amidst claims that ADR has always formed a part of customs in the region. Thereafter, I intend to delve explicitly into the Indian scenario in this matter and decipher the law, practice and trends pertaining to ADR therein. Finally, following a study of the institutions in the region catering

[20] This was predicted by Jerold Auerbach in his work; Jerold Auerbach (1983), *Justice Without Law?,* OUP, 15.
[21] Susan Blake, Julie Browne and Stuart Sime (2012), *A Practical Approach to Alternative Dispute Resolution*, Oxford University Press, 5; YonaShamir (2003), Alternative Dispute Resolution: Approaches and the Application, UNESCO, 2, at http://unesdoc.unesco.org/images/0013/001332/133287e.pdf.
[22]M. Elliot and R. Thomas (2012), "Tribunal Justice and Proportionate Dispute Resolution", *Cambridge Law Journal,* 71(2): 297- 324, 299.
[23] Lorna McGregor (2015), "Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR", *The European Journal of International Law,* 26 (3): 607- 634.

to ADR, I seek to evaluate the feasibility and potential of an institutional ADR convergence in Asia.

3. ADR in Asia: Attitudes and Institutions

The Asian experience on ADR could best be comprehended through a perusal of the Asian values regarding the same and a study of the institutional setup in the region catering to that particular methodology of justice dispensation.

Hereafter, Part A covers the concept of Asian values with reference to arbitration and includes the findings of Cornell/CPR/Pepperdine 2010-11 Survey on attitudes towards ADR in the Asia-Pacific Region, and Part B covers few of the major Asian countries and their arbitration institutions.

3.1 Asian Values and Arbitration

Any legal scholar with a fair degree of interest in the Japanese legal system would be familiar with the name *Takeyoshi Kawashima*. The iconic pioneer of the legal sociology movement in Japan has remained the undisputed theoretician of Japan's unique and remarkable model of dispute resolution.

Kawashima's claim which has been scrupulously studied by legal experts across the globe ever since its advancement in 1963 highlighted the unimpeachable proposition that the Japanese are naturally inclined to avoid litigation preferring alternative modes of dispute resolution that are fundamentally non-confrontational.

His classic work '*Dispute Resolution in Contemporary Japan*' remains one of the gold standards to evaluate diverse approaches to conflict resolution in Japan in addition to opening a gateway to evaluate 'Asian' values in the field.[24] The cultural aversion to litigation rooted in the sociological mores of Japanese society would have been the story for much of Asia but for the forceful imposition of imperial common law and civil law legal systems that nurtured if not entirely manufacturing the 'litigant' in the oriental worldview.

ADR or rather its adoption is a timely endeavour to examine Asia's tryst with this philosophy in the context of the continents remarkable success in institutionalizing the practice of arbitration as an alternative to litigation in civil, commercial and private matters.[25]

Central to any discussion on Asian values has to be an analysis of philosophies central to the continent. Confucianism occupies a position of prominence. Having frowned upon the very notion of disputes itself, Confucianism has viewed litigation as inconsistent with character, morality and personal rectitude. Scholars have regarded Confucianism as having accorded a legitimate basis for alternative modes of dispute resolution.

The concept of *li* as a social factor accords greater weight to ethical and persuasive modes of dispute resolution as opposed to strictly legalistic

[24]Eric Feldman (2007),*Law, Culture and Conflict: Dispute Resolution in Post-War Japan,* Penn Law: Legal Scholarship Repository, University of Pennsylvania Law School.
[25]Kota Fukui (2014), "The Diversification and Formalisation of ADR in Japan: The Effect of Enacting the Act on Promotion of Use of Alternative Dispute Resolution" in Joachim Zekoli (ed.), *Formalisation and Flexibilisation in Dispute Resolution,* Brill.

measures. This puts the idea in contrast with 'Western Rationalism' and its emphasis on 'judicial centric' modes of dispute resolution.

The ancient Hindus had their unique models of dispute resolution. According to Colebrook, Panchayats (village councils) have historically operated as arbitration forums settling disputes between parties. *Kula*, (*informal body of family elders*) *Shreni/Sreni* (*a court of guilds or assembly of persons following a particular profession*) and *Puga* (*an association composing of persons from various castes and professions living in the same village*) existed as arbitral bodies at various levels adding to the vibrancy of the dispute resolution exercise.

Professional guilds known as '*Srenya*' operated as fraternal modes of dispute settlement in addition to being broader associational bonds between members. It is worthwhile to mention that none of these institutions had an exclusive 'litigation character' implying a long and cherished tradition of peaceful dispute settlement outside the framework of the formal judiciary.

As I now live in India, allow me also quote an experience as presented by Senior Advocate Mr. Nariman, that India is the land where the Buddha first preached. According to the book on the "Teaching of Buddhist", Buddha prescribed with prescient wisdom, five principles that must be observed by a wise ruler when resolving disputes amongst his subjects:

- First, examine the truthfulness of the facts presented;
- Second, ascertain that they fall within jurisdiction;

- Third, enter into the minds of the parties to the dispute so that the judgment to be rendered be a just one;
- Fourth, pronounce the verdict with kindness not harshness; and
- Fifth judge with sympathy."[26]

It's my unflinching faith that these five principles constitutes the core of the ADR system.

In Islam, the tradition of *Tahkim* was the conventional equivalent of arbitration. Civil and commercial disputes were widely settled using *Tahkim* and were binding on the parties. It is believed that Prophet Mohammad himself arbitrated matters and his followers are known to have followed the same tradition of dispute settlement. The *Hanafi* School of Islamic thought made a clear distinction between judicial/legal modes of dispute resolution and forms of dispute resolution based on arbitration while recognizing its contractual nature.

It can be said with certainty that ADR is compatible with Islam.[27] According to Dr. Zulkifli Hasan of Universiti Sains Islam Malaysia in his presentation on 'Law of Arbitration', Islam encourages parties to use '*sulh*' in order to resolve their disputes.[28] '*Sulh*" is a settlement grounded upon compromise negotiated by the disputants themselves or with the help of a

[26] F.S. Nariman, "Redefining the Landscape of ADR in Asian Jurisdiction", Kuala Lumpur International ADR Week, 15 May 2017, 35-36: refering to the publication by Buddhist Promotions Foundations (Bukhyo Dendo Kyaokai) 3-14, Shiba, 4 Chome Minato-ku, Tokyo, Japan.

[27] Md. Zahidul Islam, Provision of Alternative Dispute Resolution Process in Islam, OSR Journal of Business and Management, Volume 6, Issue 3, 2012, 31-36. Also see George Sayen, Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia, *U. Pa. J. Int'l Econ. L., 905-956.*

[28] Also see Md. Shahadat Hossain, Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview, Journal of Philosophy, Culture and Religion, Vol.1, 2013, 1-13, at 1.

third party. According to him, *Verse 128 Sura Nisa* provides that '*reconciliation between them, and reconciliation is better*' and *Verse 9 in Sura AlHujurat* says "If two parties among the Believers fall into a quarrel, make ye peace between them; make peace between them with justice, and be fair: For God loves those who are fair and just.'

This leads one to the question as to whether arbitration is a Western tradition or an Eastern one. While there is no conclusive answer to the question, and often it is believed that today's ADR is of western import, it could safely be observed that actually modern arbitration is a result of the harmonisation and syncretisation of both Western and Eastern values. However, on closer analysis on the oriental worldview, it could be argued that arbitration as a concept of ADR has an origin in the East as opposed to the West and was subsequently co-opted by the latter into the lexicon of modes of dispute settlement.

As *Funke Adekoya San* puts it, despite disproportionate number of arbitrators from the Western hemisphere in the arbitration community – now described by some as "*a tightly-knit, Anglo-European (plus the odd American) gentlemen's club*", it is not true that ADR or commercial arbitration was established there, and moved elsewhere, following the incursion of its merchant seamen and other trading activities into other parts of the globe.

To the contrary, ADR such as mediation and customary arbitration as a dispute settlement mechanism existed in Asia, Middle East and Africa, long before the incursion of western civilisation.[29]

It needs to be noted that British colonialism in Asia as well as in many other commonwealth countries, including my mother land Tanzania, disrupted the ADR systems by abhorring resolution of disputes outside His Majesty's Courts! For instance, as Senior Advocate and jurist Nariman has argued, since the Contract Act was introduced in India's legal system more than 100 years ago, alternate dispute resolution was outlawed: resolution of disputes by *arbitration* was just about tolerated! And what the England abhorred, colonized people were taught to abjure!

To date, Section 28 of the Indian Contract Act 1872 [and Section 29 of the Malaysian Contract Act 1950]:

> "provide that every agreement by which any party is restricted absolutely from enforcing his rights under any contract "*by the usual proceedings in ordinary tribunals" (i.e. in Courts) "shall be void".*[30]

A reference of disputes to arbitration is a statutory exception, not a statutory alternative. Under Indian ancient Contract Law, arbitration still is – an *exception* to litigation in Court, not yet an *alternative* to it. According to Nariman, the above section 28 of the Indian Contract Act 1872 is now

[29] Funke Adekoya SAN, "*Is International Arbitration Truly International - The Role of Diversity*", 1st Keynote at the 3rd Annual Conference on Energy Arbitration and Dispute Resolution in the Middle East and Africa on 6th March 2018, para 11.
[30] F.S. Nariman, "Redefining the Landscape of ADR in Asian Jurisdiction", Kuala Lumpur International ADR Week, 15 May 2017, p. 34.

museum pieces – not bothered about by the Courts.[31] On a light note, I must say that Section 28 of the Indian Contract Act 1872 is *pari materia* with section 28 of the Law of Contract of Tanzania.[32]

The advent of globalization pushed the Asian continent at the forefront of the global economic landscape. As a leading global player, it is a direct beneficiary of economic liberalization and its accompanying material progress. It is no surprise that arbitration has re-emerged as a key mechanism for dispute settlement in such a favourable environment.

Rising cross-border transactions, trade and investment has necessitated the need for quicker and more economic means of dispute resolution. The ever increasing demand for commercially viable modes of dispute resolution is something that will only increase further with time. Asia has risen to the opportunity and has cemented itself as the rising player in international commercial arbitration.[33] It can safely be said that the wheel has come a full circle for Asia's tryst with arbitration.

[31] F.S. Nariman, "Redefining the Landscape of ADR in Asian Jurisdiction", Kuala Lumpur International ADR Week, 15 May 2017, p. 34.

[32] Section 28 of the Law of Contract of Tanzania (Cap. 345 R.E. 2002) provides that "Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent: Provided that this section shall not (a)render illegal (i) a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred; or (ii) any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen; or (b) affect any provision of any law in force for the time being as to references to arbitration".

[33] In 1985, the China International Economic and Trade Arbitration Commission handled 37 cases. In 2012 the number was 1060. Similarly, for the Hong Kong International Arbitration Centre the corresponding figure in 1985 was 9 which went up to as high as 293 in 2015.

3.2 Attitude towards ADR in the Asia-Pacific Region

The Cornell/CPR/Pepperdine 2010-11 Survey of the Fortune 1000 ADR Study sponsored by a GE Foundation grant was an interesting contribution to better understand the prevalent attitudes towards ADR in the Asia-Pacific Region.[34] The objective of the survey was as follows:

a) To conduct a broad-based study of business interests in China and Southeast Asia;

b) To identify and better understand attitudes towards dispute resolution in general;

c) To identify and better understand attitudes, mediation and barriers to the use of mediation;

d) To lay the foundation to develop workable approaches on a country-specific basis to growing mediation.

Though the sample size was small (comprising 122 respondents), they were from a broad array of countries (15) namely Cambodia, China, Japan, Indonesia, India, Laos, Malaysia, Philippines, Singapore, South Korea, Thailand, Taiwan, Vietnam, Australia and New Zealand.

41% of the responses came from companies and the rest from law firms. While Law firms were of all sizes, their clients covered every sector of the economy. Similar was the case with corporate respondents, majority of whom were senior executives. The overall attitude of the respondents was strongly positive and favourable towards both mediation and

[34] The survey was administered by Cornell's Survey Research Institute.

arbitration individually with 82% attesting to that fact despite a slight preference for mediation over arbitration.

The Survey was among landmark studies in ascertaining the attitudes of resource persons concerned with commercial dispute resolution and attested to the fact that majority of the respondents viewed ADR/ arbitration favourably suggesting a positive path forward for the institution in the Asia-Pacific region.

3.3 Selected Major Arbitration Institutions in Asia (in no particular order)

(a) AIAC [Malaysia]

The AIAC or KLRCA as it was formerly known was the first arbitration centre in Asia to be established under the AALCO. The Centre was first set up in 1978 to provide institutional support as an independent and neutral venue for arbitration proceedings in Asia. I think we can agree that the AIAC has come a long way since then and has far exceeded the expectations of the task entrusted to them.

Since its inception, the Centre has evolved into a global hub for ADR, not only promoting the use of ADR but also heavily investing in capacity building of this field. The Centre's 40th year in existence has been marked with its rebranding to the Asian International Arbitration Centre as part of its effort to strengthen its regional footprint and presence globally.

Over the past four decades, I am proud to witness the Centre's growth having recorded 932 cases in 2017 after it started with only 22 in 2010. The AIAC's continuous focus on catering to and developing the needs of Asian markets is recognized internationally and one need not look farther than to make reference to the 2012 Global Arbitration Review's award to the AIAC for 'Innovation by an Individual or Organization' for its development of the i-Arbitration Rules which were designed to meet the demands of commercial transactions premised on Islamic or Shariah principles.

The Asian Institute of ADR is another ambitious project undertaken by the AIAC which I am very honoured to make mention of. The AiADR will serve as a central hub for conveying ADR practices, building capacity and providing affordable and accessible ADR education for all stakeholders of the economy.

What is particularly desirable about the AiADR is its focus on Asian and African economies with consideration for the geopolitical and socioeconomic intricacies of these markets and the cultural nuances of conducting business and settling disputes in these continents, which are otherwise often neglected attention.

I am certain that with the Centre's rebranding, the AIAC has much in store for the future of ADR in Asia and beyond, and look forward to seeing these projects unveil for the betterment and advancement of the ADR community.

(b) JCAA [Japan]

Since 1953, the Japanese Commercial Administrative Association (JCAA) has operated as an independent entity. The JCAA has administered the arbitration of hundreds of commercial disputes since its inception based on its Commercial Arbitration Rules. The prime mission of the JCAA is to administer cases fairly and efficiently from a neutral standpoint. The JCAA is well regarded for its transparent rules globally.[35]

Japanese Arbitral awards have the same effect as conclusive judgments and the enforceability of such awards is guaranteed by the Arbitration law of the country. On the other hand, the enforcement in Japan of awards rendered in foreign treaty countries are also guaranteed by the Geneva Convention of 1927 and the New York Convention of 1958, both of which Japan is a signatory to. Conversely, the enforcement of arbitral awards made in Japan is guaranteed in foreign treaty countries.

Japan also has several bilateral treaties with many countries and these treaties guarantee the enforcement in other treaty countries of arbitral awards rendered in Japan. They also guarantee the enforcement in Japan of arbitral awards made in other treaty countries.

I am told that, there has been no instance of a Court of Law not approving and enforcing a foreign award till date.

[35]At http://www.jcaa.or.jp/e/jcaa/what.html

(c) CIETAC [China]

The China International Economic and Trade Arbitration Commission (CIETAC) established in 1956 is China's oldest and perhaps most experienced arbitration institution, accepting the majority of international and cross border arbitration cases in the country. CIETAC is regarded as one of the major international arbitration institutions resolving commercial disputes in a fair and transparent manner.

China's unique contribution to global arbitration has been the concept of Mediation-Arbitration which facilitates the arbitrator to double up as a mediator to settle the dispute when the former does not result in a conclusive result.[36]

(d) HKIAC [Hong Kong]

Ever since its establishment in 1985, the Hong Kong International Arbitration Centre (HKIAC) has been one of the leading players in the Asian arbitration ecosystem. Interestingly, the role of the HKIAC is not limited to providing arbitration services but extends to mediation, conciliation and domain name dispute resolution services.

[36] At http://www.cietachk.org/portal/showIndexPage.do?pagePath=%5Cen_US%5Cindex&userLocale=en_US

Hong Kong adopted the UNCITRAL Model Law in 1990. In 2010, a single comprehensive legislation for international and domestic arbitrations was enacted.[37]

(e) PCA, SIAC etc [Singapore]

Singapore is also one of the leading centres of international trade and commerce. Its location in Asia is also of strategic importance. In 2007 the PCA set up the court's first Asian centre in the country. In 2009 Maxwell Chambers was established as a dedicated world-class dispute resolution complex which remains a benchmark for the Asian continent to emulate. Some of the other leading arbitration institutions in the country are the Singapore International Arbitration Centre (SIAC), the American Arbitration Association, the PCA, the International Chamber of Commerce (ICC) and the International Centre for the Settlement of Investment Disputes (ICSID).

The SIAC has a panel of 280 arbitrators from over 30 countries and is regarded as one of the world's leading arbitration institutions in the world. In addition to the SIAC, the Singapore Institute of Arbitrators (SIArb), which is also wholly independent, undertakes training and accreditation of arbitrators. In 2004 the Singapore Chamber of Maritime Arbitration (SCMA) was launched to administer maritime disputes in Singapore, strengthening the arbitration ecosystem in the country.[38]

[37]At http://www.hkiac.org/
[38]At http://www.siac.org.sg/

(f) KCAB [South Korea]

The Korean Commercial Arbitration Board (KCAB) is the only authorized institution of its kind in Korea, statutorily empowered to settle commercial dispute under the Act. Apart from its own Rules, the KCAB can also administer arbitration proceedings in accordance with any other Rules as contractually agreed to by the parties.[39]

4 The Case Study of India: Law, Practice and Trends

In the identification of trends in the Asian Region relating to ADR, India presents itself as a jurisdiction which has undergone sustained judicial interest and far and wide changes to its law within a short period of time. Two major trends emerge out of the plethora of judgments of the Indian Court that are of interest to the academic and practitioner community at large:

Firstly, a trend towards restricting judicial intervention in the challenge and enforcement of arbitral awards; and

Secondly, a trend towards the seat centric approach towards international arbitration.

Long before the criticisms against India's inadequate response to ADR started erupting; India was one of the foremost advocates for the need to make uniform laws relating to the recognition of international arbitral awards. In fact, India was only amongst six other Asian countries

[39]At http://www.kcab.or.kr/jsp/kcab_eng/index.jsp

to sign the Geneva Convention of 1927, and promulgate an act for the enforcement of the same. As regards, the New York Convention, 1958 India ratified the convention long before any of the jurisdiction that we refer to today as developed centres of Arbitration such as the United Kingdom that ratified it in 1975, the United States in 1970 and Malaysia, Singapore and China ratifying the convention as late as the 1990's.[40]

The need for arbitration was felt in the early years right after independence as it was considered condition precedent to attract foreign exchange and investment was that required for the development of trade and industry in its economy.

Although, laws were quick to be brought into force, delays and contradictions in the interpretation of the law of arbitration, along with an interventionist approach of the Judiciary, brought much disrepute and imputed a lack of confidence to the system of ADR/arbitration in India.[41] As a result, Indian corporate entities soon found themselves to be involved in costly arbitrations abroad as opposed to domestic arbitrations. A number of similar concerns were also shared by other AALCO Member States whose nationals were often subjected to commodity arbitrations seated in Europe that they found costly and oppressive.[42]

---

[40]F.S. Nariman, (2004) "East Meets West: Tradition, Globalisation and the Future of Arbitration", *Arbitration International* 123-138, 126; Also See New York Arbitration Convention available at:http://www. newyorkconvention.org/countries.

[41] S. Kachwaha (2008), "Enforcement of Arbitration Awards in India", *Asian International Arbitration Journal* 4:64.

[42] AALCC Secretariat 'AALCC's Scheme for Settlement of Disputes in Economic and Commercial Matters' presented in the Regional Seminar on International Commercial Arbitration, Cairo.

Illustrative in this regard is an often lauded judgment of the Supreme Court of India in the case of the *Renusagar Power Co.* v. *General Electric Corp*[43] wherein in the case of foreign award it was held that the interpretation given to public policy in the applicable law of arbitration[44] was to be in conformity with its definition provided for in the New York Convention thereby, and giving it a restricted scope.

The meaning of the term 'public policy' in a number of leading authorities were considered and an approach was adopted that favored the predominant interpretation of the New York Convention, thus heralding a *'pro-arbitration'* approach.[45] The judgment is based on a sound approach in as much as the position of Indian law in this regard has returned it, albeit to some it appears to be diluted and restricted; as we shall see such is not the case.

At the turn of the 1990's, demands to create a favorable investment climate became stronger with the fall of the planned economic model giving way to the economics of the neo-liberalism.[46] A need was felt to harmonize the law of arbitration in India with other jurisdictions, to create a robust investment climate that favored stability and certainty over the

[43](1994) SCC Supl. (1) 644; (1995) XX *Yearbook of Commercial Arbitration* 681.
[44]The Foreign Awards (Recognition and Enforcement) Act, 1961.
[45] F.S. Nariman (1989), "Foreign Arbitration Awards in India: Problems, Pitfalls and Progress",*Journal of International Arbitration* 6: 25-40; H.K. Satyapalan (2017), "Indian Judiciary and International Arbitration: A BIT of Control?"*Arbitration International* 33:503; S. Rewari (2013), "From *Bhatia to Kaiser*: Testing the Indian Judiciary's Self Restraint"*Asian International Arbitration Journal,* 9: 97, 99. S. Rai (2012), "Proposed Amendment to the Indian Arbitration Act: A Fraction of the Whole?"*Journal of International Dispute Settlement,*3:169, 198
[46] T.S. Works (1997), "India Satisfies its Jones in Arbitration: New Arbitration Law in India", *Transnational Law* 10: 217; V. Raghavan (1996), "New Horizons for Alternate Dispute Resolution in India: The New Arbitration Law of 1996' *Journal of International Arbitration* 13: 5; J. Paulson (1996), 'La reforme de la Arbitrage en Inde' *Revue de l'Arbitrage* 597.

need for a close judicial examination of the award. It was hoped that the new act would reduce court interference to the minimum and promote a culture of arbitration in India.[47]

As we shall see the experience with this new Act in the initial years was not very different, with the judiciary grappling the intricate language used in the legislation, juxtaposed with the added burden of interpreting the statute in conformity with the UNCITRAL Model Law, 1985.

It may be said that the first major blow to the concept of minimal judicial intervention in the recognition and enforcement of arbitral awards came with the decision of the *Oil & Natural Gas Corporation Ltd.* v. *Saw Pipes Ltd.*[48] The decision has been often criticized by reputed members of the bar[49] and academia alike for permitting a substantial merits review of arbitral awards permitting a somewhat elusive plea of 'patent illegality' within the meaning of the term 'public policy'. The decision cites with approval the opinion of the noted jurist Mr. N.A. Palkhivala:

> "If the Arbitral Tribunal does not dispense justice, it cannot truly be reflective of an alternate dispute resolution mechanism.

---

[47] *Konkan Railway Corporation* v. *Mehul Construction Co.* (2000) 7 SCC 201; D. Gupta (2000), "The Effectiveness of Arbitration Clauses in India", in A. J. Van den Berg (eds.) *International Arbitration and National Courts: The Never Ending Story*; Section 5, the Arbitration and Conciliation Act, 1996.

[48] (2003) 5 SCC 705.

[49] S. Gupta (2003), "Challenge to arbitral awards on the ground of public policy: A comment on ONGC v Saw Pipes Ltd", *Arbitration Law Reports*3: 52; N Darwazeh and R Linnane (2004), "The Saw Pipes decision: Two steps back for Indian Arbitration?"*Mealey's International Arbitration Report*19(3): 34; S. Kachwaha (2005), "The arbitration law in India: A Critical Analysis",*Asian International Arbitration Journal*, 1: 105. B. Srinivasan (2008), "Public Policy and Setting aside of patently illegal arbitral awards in India", at: https://papers.ssr n.com/sol3/papers.cfm?abstract_id=1958201; B. Srinivasan (2011), "Arbitration and the Supreme Court: A Tale of Discordance bet the Text and Judicial Determination",*NUJS Law Review*4: 639; D. R. Dhanuka (2003), "A critical analysis of the judgement ONGC v Saw Pipes Ltd-Plea for consideration by Larger Bench"*Arbitration Law Reporter*51: 1. 1; F.S. Nariman (2011), "Ten Steps to Salvage Arbitration India- The First LCIA- India Arbitration Lecture" *Arbitration International* 27: 115.

> Hence, if the award has resulted in an injustice, a court would not be well within its right in upholding the challenge to the award on the ground that it is in conflict with the public policy of India."[50]

In making its decision, the court also seems to be convinced by the argument advanced by the Appellant that unlike in the UK, for domestic awards where the curial law applicable is the law of arbitration in India, no procedure permitting the review of the merits is permissible under the scheme of the Act.[51]

It was in this regard that the court recognized a difference between the challenge of an award (annulment) before it attains finality, and a rejection of the enforcement of the award, and based on this reason restricted the earlier precedent of *Renusagar* only to foreign awards.

In fact, it is well recognized that a court in India does not sit in appeal over an arbitral award, it only has the power to annul the award on grounds including but not restricted to public policy.[52] Therefore, a need was felt to expand the notion of public policy to include those situations where the illegality goes to the root of the matter, or is so unfair and unreasonable that it shocks the conscience of the court.[53] Therefore, read on its own, the *Saw Pipes* decision does have its merits and therefore has

[50] B. P. Saraf and S. M. Jhunjhunwala (2012), *Law of Arbitration in India*, quoted with approval in *Saw Pipes*.
[51] *Saw Pipes* at 725.
[52] I. Malhotra (2014), *OP Malhotra on the Law & Practice of Arbitration and Conciliation*, 1252.
[53] *Saw Pipes* at 728.

been lauded by some notable proponents of its reasons who emphasize that the decision is only restricted to domestic awards.[54]

As seen by us herein, that the notion of 'Public Policy' although employed by the Act in the same manner in two different provisions of the Act, i.e., one for challenge or annulment and other for rejection of enforcement; have different meanings that has arisen due to what is understood by 'Seat Theory' in international arbitration.[55]

The negative effects of the decision in *Saw Pipes*, are only fully revealed when it is read along with earlier decision of the Hon'ble Supreme Court of India in *Bhatia International* v. *Bulk Trading S.A.*[56] whereby this distinguishing factor between domestic awards and foreign awards based on *Seat Theory* was blurred.

The consequences of both these decisions lead to anomalous result, which was most profoundly apparent in the case of *Venture Global Engineering* v. *Satyam Computer Services*[57] wherein the Supreme Court upheld the challenge to arbitral award seated in foreign country thereby impliedly applying the decision of Saw Pipes, to those cases that which it explicitly did not mean to apply to.

---

[54] I. Malhotra (2014), *OP Malhotra on the Law & Practice of Arbitration and Conciliation*, 1252; O.P. Malhotra (2005), "The Scope of Public Policy under the Indian Arbitration and Conciliation Act, 1996"*Arbitration*71: 36; *Associate Builders Ltd.* v *Delhi Development Authority* (2015) 3 SCC 49; D. Mathews (2015), "Situating Public Policy in the Indian Arbitration Paradigm: Pursuing the Elusive Balance"*Journal of the National Law University Delhi*3:105-140.

[55] N. Blackaby, C. Partasideset. al (eds.) (2015), *Redfern and Hunter on International Arbitration,* 172; G. B. Born (2014),*International Commercial Arbitration*, 1530; G. Kaufmann-Kohler (1999), "Identifying and applying the law governing the arbitral procedure: The role of the law of the place of arbitration"*ICCA Congress Series*9:336; W. Park (1983), "The Lex Loci Arbitri and International Commercial Arbitration", *International and Comparative Law Quarterly*32: 21.

[56](2002) 4 SCC 105.

[57](2008) 4 SCC 190.

A barrage of criticism[58] was unveiled against the decisions, most notably by legal luminary Mr. Fali S. Nariman, who in an article published in the Journal of International Arbitration shortly after the judgment remarked that:

> "A larger bench of the Supreme Court will need to iron out the creases in *Bhatia International* (a bench of three Justices) and *Venture Global* (a bench of two Justices)." [59]

The opportunity to correct this situation arose in the year 2012, when a Constitution Bench of five Justices in *Bharat Aluminum Company v. Kaiser Aluminum Technical Services INC.,*[60] re-examined the issues raised in the aforesaid decisions of *Bhatia International* and *Venture Global* and whole heartedly adopted the notion of 'Seat Theory'.

With one stroke of the pen an anomalous situation prevailing for a period of almost a decade was corrected and the earlier decisions were expressly overruled. Although, the decision was welcomed by members of the bar, academia and foreign investors it made the decision applicable

[58] F.S. Nariman (2009), "India and International Arbitration" *George Washington International Law Review* 41: 367, 374; T.T. Arvind (2010), "The transplant effect in harmonization" *International and Comparative Law Quarterly* 59:64; D. Rautray (2009), "India's Supreme Court places new hurdles on Enforcement of Foreign Awards: Venture Global and the cases leading up to it", Dispute Resolution Journal 64: 80; S. Kachwaha (2008), "Enforcement of Arbitration Awards in India", *Asian International Arbitration Journal* 4:64; P. Nair (2007), "Surverying a Decade of the New Law of Arbitration in India", *Arbitration International* 23: 733; Law Commission of India (2014), 246th Report on Amendments to the Arbitration and Conciliation Act 1996.

[59] F.S. Nariman (2008), "Application of the New York Convention in India" *Journal of International Arbitration* 25: 893, 898.

[60] (2012) 9 SCC 552.

only prospectively i.e., applicable only to those agreements that have been executed after the date of the decision i.e., 6 September, 2012.[61]

Therefore, it may be safely surmised that the position of law regarding international arbitration and ADR in India has come around full circle, beginning with a pro arbitration trend towards implementing the relevant international conventions and best practices; followed by a period of judicial intervention and close supervision leading to an anomalous application of the Model Law, 1985 and the New York Convention and finally the position of 'coming of age' as one commentator[62] has chosen to describe the current position.

The judicial position taken in the *Bharat Aluminum Company* decision was also taken note of by the Law Commission of India[63] and the legislature who incorporated the dictum in the Arbitration and Conciliation (Amendment) Act, 2015 thereby cementing the position that was so painstakingly arrived at by the Indian Judiciary.

---

[61] S. Rewari (2013), "From *Bhatia to Kaiser*: Testing the Indian Judiciary's Self Restraint",*Asian International Arbitration Journal*9: 97; Promod Nair (2013), "Piloting a Much-Needed Course Correction: The Decision of the Indian Supreme Court in BALCO v Kaiser Aluminium"*Asian Dispute Review*, 15: 98-102; D. Rautray (2013), "Enforcement of Foreign Awards in India"*Asian International Arbitration Journal*9: 79-95; S. Ahuja (2016), "Arbitration Involving India Recent Developments"*Asian Dispute Review*18: 132-139; D. A. R. Williams (2014), "Defining the Role of the Court in Modern International Commercial Arbitration"*Asian International Arbitration Journal* 10: 137-180; M. Thadikkaran (2012), "Judicial Intervention in International Commercial Arbitration: Implications and recent Developments from the Indian Perspective", *Journal of International Arbitration* 29:6.

[62] J. Canfield (2014), "Growing Pains and Coming of Age: The State of International Arbitration in India"*Pepperdine Dispute Resolution Law Journal* 14: 335.

[63] Law Commission of India (2014), 246th Report on Amendments to the Arbitration and Conciliation Act 1996.

Taking cue from the pro-arbitration mood in the legal community, the legislature took the opportunity in the Amending Act to make certain profound changes ushering in a pro-arbitration era in the Indian ADR story. The amendment clearly defined the term 'public policy' in the two different manners as interpreted by the Supreme Court in the *Renusagar* and *Saw Pipes* decision thereby maintaining the distinction between challenge to an arbitral award at the place where the seat of arbitration is located and enforcement proceedings where by the arbitral award is sought to be enforced by the awardee.

To conclude this section, the present trends visible in ADR in India are reminiscent of the exchanges between two revered English Judges. Lord Burrough J. in *Richardson* v. *Melish*[64] once described public policy as "*a very unruly horse, and when once get astride it you never know where it will carry you*." Commenting upon this observation, Lord Denning M.R. in *Enderby Town Football Club Ltd.* v. *Football Assn. Ltd.*[65] remarked that "*With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles*."

5 An Assessment of the Potential of Institutional ADR Convergence in Asia

Having perused the rejuvenated interest of the Asian region in general, and that of India in particular, regarding ADR, I feel that the time

[64](1824) 2 *Binghams Common Pleas Reports* 229, 252.
[65] 1971 *Law Report Chancery Division* 591, 606.

is ripe now to ponder upon the possibility of embarking on a quest for convergence of the institutional mechanisms for ADR in the region. I call upon AIAC to take the necessary lead and pave the way for the quest, pursuant to its aspiration to spearhead an era of development and expansion both for AIAC and global ADR ecosystem. While the possibility and potential of an international judicial system is being pondered upon,[66] 'institutional ADR convergence' involves bringing the disparate collection of fora for ADR in a particular region, Asia in the present context, together.

The heightened volume and pace of transnational commerce calls for an effective, just and speedy dispute resolution mechanism tailored to suit the needs of the parties to the dispute. The project of institutional ADR convergence lies at the interface between such need and the milieu of national or regional legal cultures.

In order to achieve this institutional ADR convergence, a two-step process may be suggested. The first step is to harmonize the rules pertaining to ADR in institutions dealing in ADR in the region, including the Regional Centres for Arbitration under the auspices of AALCO in Kuala Lumpur and Tehran.Such an effort in harmonization shall be conducive to the evolving scheme of ADR incessantly serving users' demands in the resolution of cross-border disputes.

The second step should involve the formation of alliances/ networks between the Centres and the other ADR institutions in the region, national as well as regional. Some of those institutions I have mentioned in Part II

[66]Jenny S. Martinez (2003), "Towards an International Judicial System", *Stanford Law Review*, 56 (2): 429-529.

of this address. The new initiative of AALCO, the AALCO Annual Arbitration Forum (AAAF) scheduled to be held in July, aspires to initiate and provide a platform for a discourse aiming to realize this objective.

In the context of convergence, it is essential to identify the "common denominators"[67] of correlation between the ADR institutions as a precursor to formation of any aforementioned alliance. The first common denominator is that "all these fora exercise a parcel or a particle of the 'international judicial function'"[68] wherein the basis of jurisdiction is consensus. The second element pertains to the "epistemic community" of international adjudication, composed of the persons who are the "usual suspects" or actors on the international adjudicative scene.[69]

Institutional ADR convergence in Asia would, thus, surely serve two purposes. *Firstly,* it would aid in the identification, in definitive terms, of this pool of adjudicators for this region. Such identification might, in turn, facilitate educating the next generation of arbitrators/ mediators in a better fashion. *Secondly*, an insight into this pool's understanding of the international judicial function would impart a degree of predictability to the issues generally adjudicated upon.

---

[67]Georges Abi-Saab (2010), "The Normalization of International Adjudication: Convergence and Divergences", *NYU Journal of International Law and Politics,* 43: 1-14, 7.

[68] Ibid.

[69]To quote Prof.Abi-Saab:

> "If we consider who have been the judges, the counsel, the arbitrators, and the commentators on the ensemble of international courts and tribunals, we will find that it is a fairly limited number; much the same persons appear at different times, in different capacities, at different fora. And this limited community is socialized in and adheres to the same epistemology, i.e. it shares roughly the same understanding of the concept of the international judicial function, and deals with or adjusts to it according to the variable geometry of the mandates and environments of the different fora."

Id at 9.

However, the practical realization of the idea of institutional ADR convergence in the Asian is mired in hindrances. The identification of these underlying barriers is indispensable in the mission to "make provision in the newly evolving systems for the concerns that are at the root of these barriers".[70]

One such obstacle is constituted by "culture".[71] The concept of ADR, as understood today, has an occidental overtone to it and heavily incorporates Euro-American values. While some countries in Asia have been aligned with and adjusted to those Western norms of ADR, most have not. While some ADR institutions in the region have imbued the Western values in their institutional rules on dispute resolution, some have not. Any institutional ADR convergence must take note of and respect such differences, and craft the rules of dispute resolution in a manner conducive to pacific settlement of the disputes despite such differences.

Additionally, the heterogeneity of cultures, legal or otherwise, in the region must be heeded to. Dispute resolution among groups herein with different cultural, racial, religious, and ethnic value systems can prove to be a nightmare for an adjudicator trained and practiced in the traditions of Global North.

[70] M. Negot J. Millhauser (1987), "The Unspoken Resistance to Alternative Dispute Resolution", *Negotiation Journal,* 3(1): 29- 35, 29.

[71] Culture is defined as "a set of shared and enduring meanings, values, and beliefs that characterize national, ethnic, and other groups, and orient their behaviour;" JeswaldSalacuse (1993), "Implications for Practitioners" in G. Faure and J. Rubin (eds.), *Culture and Negotiation- The Resolution of Water Disputes*, (Sage Publications, London) 199- 208, 201. In legal sense, culture consists of "shared norms and expectations produced by legal actors," who function as an epistemic community; Florence Karimi Shako (2016), "Towards a Transnational Legal Order: The Role of Culture in Commercial Arbitration in Africa", *Transnational Dispute Management,* 13(4): 1- 15, 5.

Therefore, the project of convergence must incorporate undertakings to educate the adjudicators in the indigenous ADR traditions. The best route to achieve the convergence is through striving for harmonization on the mosaic of cultures, legal or otherwise, and not necessarily on the melting pot thereof, seeking to adopt the best practices within a flexible framework of dispute resolution.

6 Conclusion

It can be noted without qualm that despite fervent assertions that the present perception of ADR is of western dissent, an exercise in deciphering Asian values regarding the idea of ADR reveals ancient evidences of its efficacious use in the region.

This leads me to believe that instead of practicing a strain of ADR that myopically subscribes to the Western tenets thereof, we might attempt to perceive ADR in practice more holistically as a product of harmonization and syncretisation of both Western and Eastern values. This would make the aspiration of institutional ADR convergence even more worthwhile.

In this era of globalization, Asia has undeniably risen to the occasion and proven its worth as the rising player in international commercial arbitration, and the ADR institutions in the region command appreciation in this regard. That ADR is gaining popularity and prominence in Asia needs no reiteration: a study of the ADR trends and attitudes in the region in

general, and that of India in particular, vouches for the magnitude of confidence which is being bestowed upon the mechanisms of ADR to dispense justice in the region.

The advantages of ADR are manifold, as already pointed out, and one pertains to ensuring that the commercial relationship that the parties share remains intact while their disputes are solved in an efficacious and amicable manner.

Foremost among the advantages of ADR is the possibility for it to lead to win- win situation, as it has been said 'don't litigate if you are not prepared to lose'. In litigation (and arbitration) only lawyers win-one of the parties always loses. "*In mediation or conciliation no party wins no party loses – and the lawyer in his or her new role becomes a healer of conflicts, not a combatant*".[72]

A mediator or conciliator lead parties into the grey-shaded areas of a problem where a variable range of outcomes become available to achieve a mediated consensual resolution.[73] This win-win situation is best captured by the story of the conflict between two sisters for an orange, and how their Mother solved it.

The mother patiently called both the daughters who were fighting for the orange. She first manages their emotions and calms them down. She then asks them as to why they require the orange. The elder one wants to

[72] International Trade Centre UNCTAD/WTO, Arbitration and alternative dispute resolution: How to settle international business disputes with Supplement on Indian Arbitration Law, Geneva: ITC, 2004, p. vii.
[73] International Trade Centre UNCTAD/WTO, Arbitration and alternative dispute resolution: How to settle international business disputes with Supplement on Indian Arbitration Law, Geneva: ITC, 2004, p. vii.

eat the fruit and the younger wants the peel of the orange for baking a cake. The problem is solved instantly. *The fruit to the elder daughter and the peel to the younger one!* A classic win-win situation![74]

Therefore, with unfaltering hopes and unflinching faith, based on the Asian experience, that Asia would continue to succeed in its experiments with ADR, I wish all of you a very productive ADR Week.

[74] The story about the sisters' conflict over the orange has been attributed to Mary Parker Follett, see Deborah M. Kolb (1995), "The Love for Three Oranges, or: What Did We Miss about Ms. Follett in the Library?",*Negotiation Journal*, 11: 339, 339.