Block 4

INTRODUCTION TO CLINICAL SKILLS

UNIT 3: Alternative Dispute Resolutions

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3.1. Introduction:

A human being is a social animal. He cannot exist in isolation. He has been endowed by the nature, with capabilities which are unique and make him different from rest of the animals. This man also has his needs, the most important being his need to be in the company of his fellow human beings. It is this interdependence, which makes humans live and associate with each other. There is no doubt that collective living has solved many a problems. But while living together, the individual interests of these humans

definitely would come in conflict with the interest of the others. These conflicts, are what we term as disputes.

These disputes assumed greater proportion, especially when there was transition of life of the nomadic man to a more civilized man, having a permanent settlement. This transition brought into existence, the ideas of possession and ownership and exclusive rights, right in rem and rights in personam, etc, which gave rise to the need for a mechanism to resolve disputes. Initially what was created was an ad hoc system of resolving dispute, but gradually the need to have a more stable system was felt. Thereafter, an organized Dispute Resolution System came into existence.

In the present day, the Dispute Resolution Systems are divided into two categories; the regular method of resolving of disputes (RDR- Regular Dispute Resolution) which refers to the regular judicial setup; and alternative way of resolving of disputes (ADR- Alternative Dispute Resolution) which refers to the four methods (Negotiation, Mediation, Conciliation and Arbitration) created to resolve dispute outside court.

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Globalization is considered as a major factor responsible to reinvent the ADR system. Presently the ADR is the main source of resolution of dispute in the areas of family, property, insurance and corporate disputes. The trend is such that the role of a lawyer has expanded as never before, making him a key player ‘in’ as well as ‘out’ of the Court.

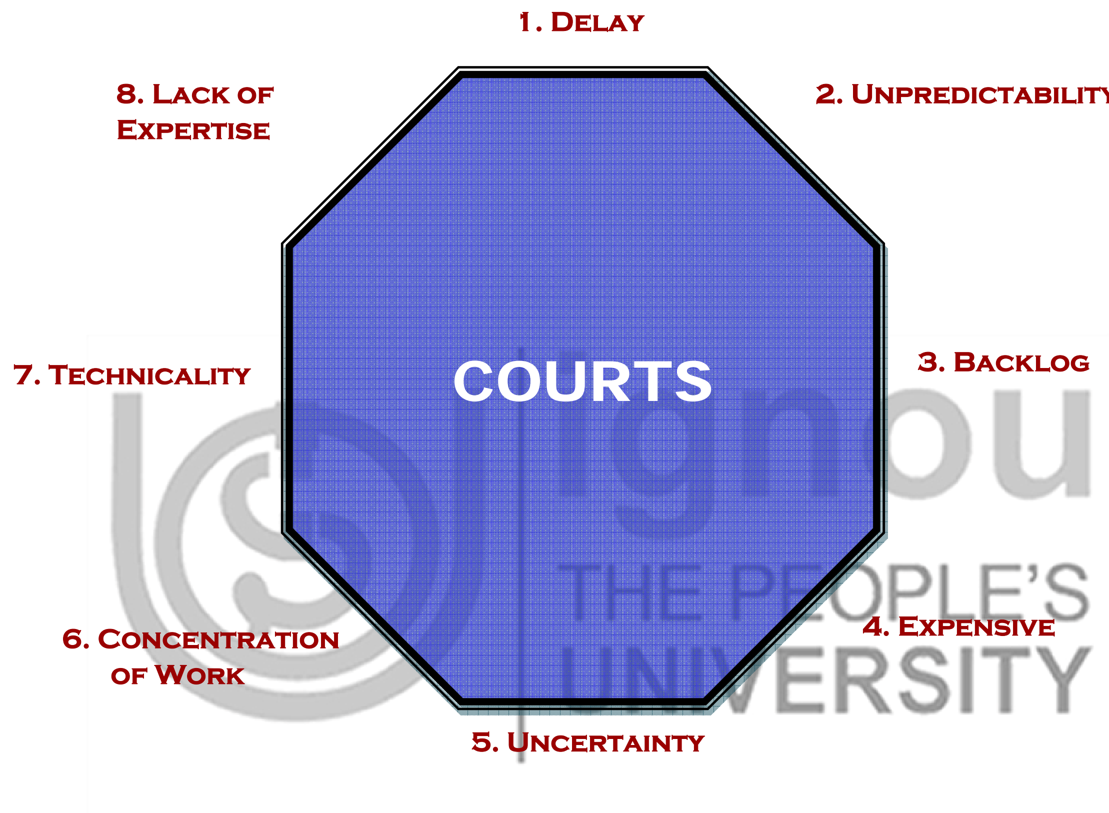
3.2 Objectives

After reading this unit you should be able to :

- Understand the disadvantages of the Regular Dispute Settlement System
- Comprehend the advantages of ADR System

- Learn the process of Negotiation, Mediation, Conciliation and Arbitration.
- Acquire basic skills in conducting Negotiation, Mediation, Conciliation and Arbitration.

3.3 Disadvantages of Regular Dispute Settlement system



1. Delay

This is a major problem which the judiciary is affected with. It is a result of various factors, which in turn result into further unwanted consequences. Once delay is caused due to some reasons like, technicality, backlog, or lack of expertise; it leads to increase in the expenses, which again causes backlog and overburdening of the judiciary. So, delay is not only a cause of other defects in the judiciary, but also a result of various flaws inherent in the functioning of the judiciary.

2. Unpredictability

The fate of the parties in judicial proceedings is in the hands of two persons; the judge and the lawyer. The expertise of the lawyer and the understanding capacity of the judge, decides the fate of the litigation. Therefore, the proceedings become highly unpredictable as the procedural law is influenced by human nature. An expert lawyer would be able to quote the set of facts in a very subtle manner and convince the judge about the merits of his case, but a novice may fail to do so. The facts are same but the results may be different due to difference in expertise of the lawyers. This effect of human temperament does not only play in case of a lawyer, but also manifests itself in case of the judge, making the judicial process highly unpredictable.

3. Backlog

The disparity between judge and population ratio, builds pressure on the judiciary. The pressure reduces the efficiency of the Authority, thereby affecting the efficiency of the institution as a whole. The reasons for the backlog may be many. But the most important are technicality, delay tactics adopted by the lawyers and clients, and less number of judges.

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4. Expensive proceedings

Justice in not for free, and the parties have to spend a lot money to obtain it. The expenditure includes mainly the lawyer's fee and the court fees. However, this is only the part of the expenses. There are expenses on logistics, like travel to the court from the place of residence and incidental expenses, travel cost incurred in bringing witnesses, expenses included in helping the court to find out real facts in issue, appointment of Commissioner, Receiver etc. When these are added to the lawyers and court fees, it makes justice prohibitive.

5. Uncertainty

The outcome of a case cannot be predicted with precision. Lack of precision or uncertainty may give rise to a suspicion of possibility of injustice. The decree depends upon different variables introduced due to the human element. Even though the parties have nothing to do with such human element, they are ultimately the ones who pay the price. Uncertainty is in relation to the law as well as the judge and the other party. The law may change from the date of filing of the case till the completion of hearing, and consequently a good case may turn to be hopeless in the light of the changed circumstances. Similarly, the social and economic background of the judge is also one very important factor leading to uncertainty. The professional ethics requires him to remain impassionate and treat the subject matter professionally. This may not be possible at all times, as the judge also suffers from human frailties.

6. Concentration of Work

This drawback is not with the judiciary, but with the friend of court, the Advocate. Even though, a fair number of advocates are practicing in the city or town, 85% of the cases are with 15 to 20% of practicing advocates. Remaining 80% of advocates deal with the remaining 15% of cases. This results in to overburdening of those few practitioners and their inability to present the case when court is ready to hear the matter. One of the main causes of adjournment is that the lawyer is engaged in presenting a case before another judge at the same time. The problem of concentration of work affects the speedy disposal of cases.

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7. Technicality

The rights, duties and interests of the parties are decided through the court procedure. However the irony is that the most affected party may not be in a position to understand the proceedings. For the Judge, it is not feasible to explain the procedure, and the advocates have no time to explain. In the court of law, the rights of the parties are decided in their very presence where the sad fact is that they may not have the slightest idea about the proceedings

due to the procedure which is highly technical. Another important reason is the language of the law and the courts which is beyond the understanding of a lay man. The lack of understanding of the court proceedings develops suspicion in the minds of the litigants and they express their unwillingness by disobeying the orders of the court, leading to further litigations.

8. Lack of Expertise

With increasing development in every sphere of human activity, every transaction has become complex in itself. This in turn results into problems of a complex nature. These problems require to be understood and analysed properly when they come up as a dispute before the court. A judge qualified in the study of general laws, may not be in a position to appreciate the technicalities of certain matters which require a special knowledge or expertise. Matter relating to Intellectual Property Rights is a good example.

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The above discussion helps us to understand the difficulties involved in the proceedings before the regular judiciary. What is required is a procedure which will address this problem effectively, where there will be better involvement of the parties, and the parties will have more confidence in the procedure. It is for this reason that the Alternative Dispute Resolution Systems are found better suited and desirable.

3.4 Advantages of the ADR system.

Anyone can easily avail ADR

Faster Remedy

Win – Win situation

No Institutional Barrier

Greater Participation of Parties

Protect Interest

Parties control over out come

Prevent litigation

Problem solving

Low cost

Please answer the following Self Assessment Questions:

Self Assessment Question 1	*Spend 2 minutes*
1) Name the two categories of Dispute Resolution Systems?	
2) Which system provides the parties with the control over the outcome of the disputes?	

3.5 Kinds of ADR

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There are four kinds of alternative dispute resolution methods. They are

3.6. Negotiation

Is conflict bad? Would life is happier if no conflict in life exists? Though the answer to these questions as 'NO' sounds strange, in reality conflicts help the growth of the society. People differ and they use negotiation to resolve their differences by using negotiation as a method. Imagine, if you would like to buy a television, would you agree to the price quoted by the seller? Or would you bargain? Is bargaining a way of negotiation and resolving the differences between you the buyer, and the seller? The answer would be yes.

Therefore, everyone is a negotiator and every one negotiates several times in his life time. That is the reason why negotiation is treated as the most important mode of alternative dispute resolution. It is the primary method of resolution of disputes. The success and failure of this mode has resulted in the development of the more refined methods. All these refined processes have negotiation as the foundation on which new alternatives have been added later to overcome the defects. Therefore study of Negotiation is a must for you as a student of ADR as this will open up a gateway to the better understanding of all other ADR processes.

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Definition

Negotiation is a process which is chiefly based on the dialogues and discussions between the parties. This process can be defined as follows;

> "It is a process of adjustment of existing differences, with a view to the establishment of a mutually more desirable legal relation by means of barter and compromise of legal rights and duties and of economic, psychological, social and other interests". – Mathews

Negotiation is a process, which focuses on protection of the interests of the parties through adjustment. This is in contrast to the approach of the judiciary which tries to protect the right of an individual by enforcing it or ordering compensation for it. Second important departure,

is the concept of relationship. Negotiation concentrates on protection of relationship between the parties, for which the judiciary shows complete disregard.

Therefore, we can say that negotiation can be the most suitable process for resolving dispute where protection of the relationship is the paramount consideration.

Please answer the following Self Assessment Questions:

Self Assessment Question 2	*Spend 2 minutes*
1) Why conflicts are not bad?	
2) Give two reasons why negotiation is a better option than going to the court?	

3.6.1. Kinds of Negotiation

i. Informal negotiation:

It is a direct communication between the parties. Here the intervention of a third person or an outsider does not exist. Only the affected parties are involved in the dialogue and discussion for the purpose of resolving the dispute. Chances of failure of this process are high.

The main reason for its failure is that more importance is given to the emotional factor rather than protection of interest. The presence of emotions causes a deadlock.

Advantages:

- Informal negotiations are secretive
- Involvement of a third person is nil
- There are no procedural hassles during negotiation

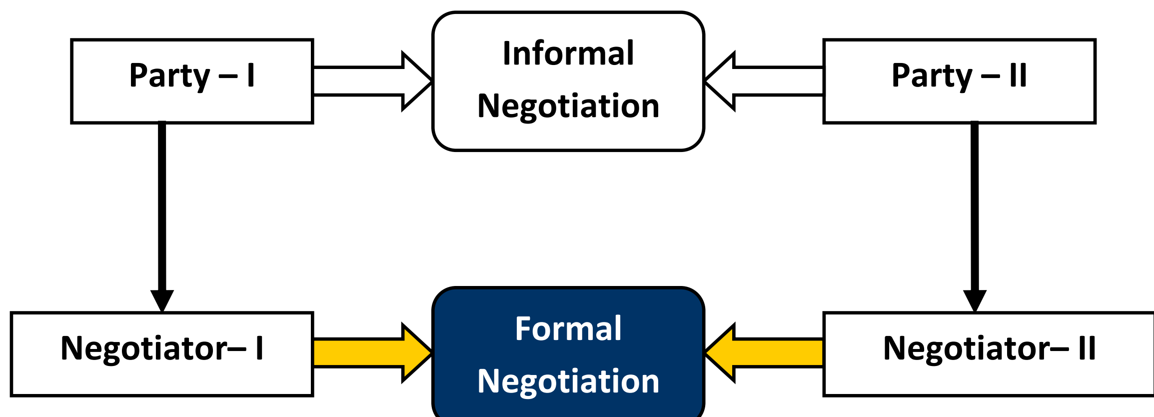
Disadvantages

- Parties direct involvement results into an emotional bargain
- Parties tend to get identified with position
- Interests are replaced with egos
- Emotional satisfaction becomes the major objective
- Frequently ends with deadlock
- Frequent deadlocks leads to breakdown of negotiation
- Breaking down of negotiation leads to additional enmity

ii. Formal Negotiation

To overcome the defects of the informal negotiation, a modification was introduced and it became another genera of negotiation called the 'formal negotiation'. The modification is in the form of introduction of a third party as a representative of the parties to the dispute.

Each party here appoints a negotiator, and this negotiator is supposed to negotiate on behalf of the parties. In this process the parties remain in control of the process through the negotiator, though they have no direct control over it. The negotiator has to negotiate on the basis of the interests expressed to him by the party which appoints him. The addition of this negotiator as a third party helps to cure the defects of the informal negotiation as there is absence of emotion.



Advantages:

- Formal negotiations are conducted by the third party which helps to avoid emotions
- Involvement of outsiders helps to focus on the problem and the future than on the past and the ill will
- There is absence of procedural hassles during negotiation
- Negotiation becomes more objective
- Negotiator can successfully avoid deadlocks.
- Negotiator can adopt a different approach all together
- A different approach can avoid major conflicts or prevent conflict all together.
- Interests to be protected takes centre stage and not the emotions.
- Protection of interests reduces enmity

Disadvantages

- It may end with deadlock
- Parties may force the negotiator to take a definite position.
- Parties may insist on emotional satisfaction

Please answer the following Self Assessment Questions:

Self Assessment Question 3 *Spend 2 minutes*

1) What is the difference between Formal and Informal Negotiation?
2) Which kind of negotiation involves high chances of focusing on interests rather than emotions?

3.6.2. Modes of Negotiation

After studying the kinds of negotiation and its advantages and disadvantages, let us understand the modes of negotiation. When we want to go for a negotiation, the basic issue

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would be about how to negotiate? There are two choices available to us. We can either go in for a hard negotiation or else for a soft negotiation.

a. Position based or Hard Negotiation

In this mode of negotiation, the negotiators choose to take positions at the preliminary stage of negotiation. They choose the position of a victim or a sufferer. For example, in a case of breach of a contract, the party takes a position that he is a victim, and that his rights need to be addressed. The negotiator is automatically prompted to bargain hard, thereby making it impossible for him to change and adapt.

This consequently leads to an unwise agreement. During negotiation, when the client takes the position of a victim, almost instantly, ego gets attached to it and the rest of the bargain is directed towards the satisfaction of this ego, rather than finding a solution to the problem. Arguing over positions, thus endangers an ongoing relationship. The task of jointly devising an acceptable solution tends to become a battle.

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b. Soft Negotiation

This mode of negotiation is opposite to hard negotiation. The Negotiator here adopts a more gentle style of negotiation. This depends on the needs of the parties and the object behind the negotiation. In this kind of negotiation, the parties instead of viewing the other side as an adversary, prefer to view them as friends. The emphasis is not on the goal of victory but on the necessity of reaching an agreement. In soft negotiation, the standard moves are to make offers and concessions, which aim to win the trust of the other party.

A soft negotiator tries to adopt the role of a friend and is willing to repose faith in the other party. His approach makes him yield to the demands of the other party, in order to avoid confrontation. In this mode of negotiation, if a soft negotiator meets a hard negotiator, it leads

to exploitation, resulting into the feel of being cheated. Thereafter the party attempts to find ways to breach the agreement which is referred to as a 'settlement agreement'. This type of a settlement agreement, though favours one party, ultimately leads to litigation wherein relationship becomes a casualty.

Both approaches lead to an unwise agreement. The negotiator therefore needs to adopt a process which will yield a wise agreement. The characteristics of the hard or soft negotiations are enumerated in the following table.

Soft Negotiation	**Hard Negotiation**
Participants are friends	Participants are adversaries
The goal is to reach an agreement	The goal is to achieve victory
Concessions are made to improve relationship	Concessions are demanded as a condition for the relationship
Negotiator is soft on the people and the problem	Negotiator is hard on the problem and the people
There is trust towards others	Distrust towards others.
Can change position easily	Digs in to position firmly
Involves making of offers.	Involves making of threats
Negotiator discloses the bottom line	Negotiator misleads as to bottom line
Accepts one-sided losses to reach agreement.	Demands one-sided gains as the price of agreement.
Searches for a solution agreeable to other party.	Searches for a solution in his own favour.
Insists on agreement	Insists on position.
Attempt to avoid a contest of will.	Attempt to win a contest of will.
Yields to pressure	Applies pressure.

So which one to choose, **soft** or **hard negotiation?**

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Neither of the modes is advisable as the soft negotiator allows himself/ herself to be exploited, and the hard negotiator exploits the other party. Under both circumstances, the settlement agreement fails to achieve an important object of negotiation that is the 'commitment' to settlement agreement. In absence of a commitment, the chances of breaching the settlement agreement would be very high. In case of such a breach, the parties will be left with no option but to approach the court. So all the attempts made, will go in vain if parties end up in court. Therefore, we have to know how to obtain a commitment? The mode which is available to obtain a wise agreement which is agreeable to both the parties exhibiting commitment to the agreement, is by adopting "Principled Negotiation".

Please answer the following Self Assessment Questions:

Self Assessment Question 4 *Spend 2 minutes*

1) Which mode of negotiation gives more importance maintaining relationship, than the out come?
2) Which mode of negotiation results in more commitment towards the settlement agreement?

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3.6.3. Principled Negotiation

For a 'Principled Negotiation', we have to prepare a plan of action keeping in mind the mistakes in case of soft and hard negotiation and avoiding them consciously.

The plan of action of a good negotiator contains flexibility, multiple solutions, and adaptability. This flexibility provides an opportunity to the negotiator to take ad hoc decisions. This helps in having a comprehensive approach and gives more control over the proceedings thus avoiding frequent re-consultation with the client, which may affect the level of trust between the negotiating parties.

During negotiation, the whole process can be subjected to self-analyses by posing three questions to yourself;

1. Whether I have produced a wise agreement?
2. Whether I have produced an efficient agreement?
3. Whether the negotiation has had any positive impact on the relationship with the other party?

If the answer is yes, then it can be concluded that you have a principled negotiation at hand.

Now let us see the difference between the Soft, Hard and Principled negotiation through this table.

	Soft Negotiation	Hard Negotiation	Principled Negotiation
1.	Participants are friends	Participants are adversaries	Participants are problem-solvers.
2.	The goal is to reach an agreement	The goal is to gain victory	The goal is to have a wise outcome reached efficiently and amicably.
3.	Makes concessions to improve relationship	Demands concessions as a condition of the relationship	Separates the people from the problem
4.	Soft on the people and the problem	Hard on the problem and the people	Soft on people, hard on the problem
5.	Trust others	Distrust others.	Proceeds independent of trust.
6.	Readily changes position	Digs in to position	Focuses on interests, not on positions
7.	Offers are made	Threats are made	Interests are explored
8.	Disclosure of bottom line	Misleading as to bottom line	Avoids having a bottom line
9.	Acceptance of one-sided losses to reach an agreement.	Demand of one-sided gains as the price of agreement.	Inventing options for mutual gain.
10.	Searches for a solution agreeable to other party.	Searches for a solution in their own favour.	Develops multiple options to choose from and decide later.
11.	Insistence on agreement	Insistence on the position	Insistence on objective criteria.

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12.	Try to avoid a contest of will.	Try to win a contest of will.	Try to reach a result based on standards independent of will.
13.	Yields to pressure	Applies pressure	Yields to reason and principle but not pressure.

The principled negotiation is designed on the basis of seven principles laid down by Harvard University, popularly known as 'Harvard Seven Principles'. These are designed to achieve the basic principles which should be made as a part of the negotiation.

Harvard Principles

For a successful negotiation process, the following seven Harvard Principles on Negotiation have to be followed. These principles propose to eliminate selfish bargain, replacing it with Principled Bargain.

i. ***Interests***

Interests are the needs or the desires of the negotiators. The parties involved in a negotiation always attempt to protect their own interests. However an expert negotiator tries to assess the concerns, objectives, needs, desires, or fears of the other party.

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The Method:

First you must understand that negotiators are human beings, and they carry emotions. In every dispute the negotiator has two kinds of interest;

1. Interest in substance.
2. Interest in relationship.

You need to separate the relationship with the substance. If you do not separate them, then you tend to do positional bargaining. When you fail to separate the relationship with the

substance, parties tend to treat statements as personal attack. Unnecessary interferences would be drawn as to your intentions and attitudes.

Examples: If a father says to his child “Your marks are very low”, the child may react to such statement with “You think I am not studying and simply playing? Actually the father may be addressing the problem, but the child thinks that it is a personal attack on his ability to study. If the father and the child could separate their relationship and only concentrate on the substance that is low marks, then they can objectively identify the solution.

The other concern for a good negotiator, is addressing the fears. Fears are the main blocks in the negotiation process. A party which is under fear does not open up easily and looks at the process with a doubt. The fear also creates bluffing, puffing etc, which are dangerous to the negotiation. A good negotiator always addresses the fears of the other party, thereby building a rapport which is essential for a successful negotiation.

The next step is identifying interests. The interests are of two types, vis., the conflicting interests, and the common interests. Enlisting conflicting interest provides a path for the negotiation which helps to draw a fair outline of the approach of the opposite party. Identifying conflicting interest would be helpful in addressing the fears of the other party.

However, the most important factor is the common interest. Once the common interest is enumerated and explained, the opposite party tends to understand the importance of the success of the negotiation. Common interest always binds the parties together and helps them understand and appreciate the needs and importance of each other.

Example: You are looking for a house on rent. You have found a landlord and would like to negotiate the rent with him. What are the common and conflicting interests?

Common Interests	**Conflicting Interests**

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<table>
<tr>
<td>▪ Both want stability
▪ Both would like to maintain the apartment well
▪ Both want good relationship</td>
<td>▪ Amount of Rent
▪ Amount of Advance
▪ Vacating the premises
▪ Who has to pay for maintenance
▪ Payment of water and electricity charges</td>
</tr>
</table>

Once you identify interests you would be able to negotiate better with the landlord by using common interest to knock off the conflicting interests.

Please answer the following Self Assessment Questions:

<table>
<tr><td>Self Assessment Question 5   Spend 2 minutes
1) Name the two concerns that are more important for a Negotiator to take care of?
2) Why is it necessary for a negotiator to identify common interests?</td></tr>
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ii. Options

The negotiator proposes Options. Options are the possible ways by which the parties could work together, balancing their interests and more-or-less satisfy them in a negotiated agreement. The success of negotiation depends upon the number of options that parties propose. The exercise of enlisting ‘options’, includes the act of enumerating the various interests of the parties. You need to invent the options for mutual gain.

Example: You are negotiating for a settlement in an accident case on behalf of your client. Your client has suffered multiple fractures in his right leg. What are the options you have?

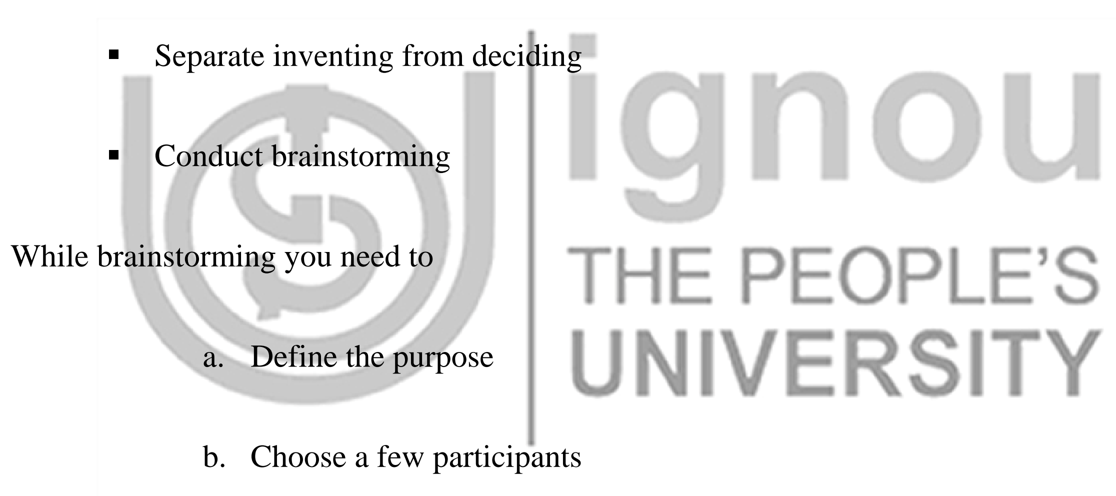
1. You could ask for one time payment, or

2. Medical expenses and compensation

3. Medical expenses and compensation with an assurance of further payment in case of future complications.

This example as to options, sufficiently explains that negotiation is a process where the parties have no restriction for coming out with options. When parties concentrate on the interests, their rights and liabilities take a backseat. With the different options available, the parties feel that they belong to the process, they feel recognized and they enjoy the importance and credibility given to them for including the options aired by them during negotiation. All this helps in developing the first principle, ‘relationship’.

How to invent options for mutual gain?



- Separate inventing from deciding
- Conduct brainstorming

While brainstorming you need to

a. Define the purpose
b. Choose a few participants
c. Choose a facilitator
d. Clarify the ground rules, including the no criticism rule

Conduct the brainstorming and record the ideas

After the brainstorming, start with the most promising idea and then improve it. After that you need to evaluate the idea in terms of its feasibility and once you are convinced about the idea then proceed with the negotiation.

Please answer the following Self Assessment Questions:

Self Assessment Question 6 *Spend 2 minutes*

1) What does the success of negotiation depend on?
2) How can one generate options?

iii. Legitimacy

Negotiation being a voluntary process, the parties have complete control over it. It begins with the freedom to agree or disagree to negotiate, which continues during the actual negotiation to the extent of agreeing or disagreeing to continue with the negotiation, and even includes the freedom to agree or disagree to a settlement agreement.

In this voluntary process, the negotiator has to strive to gain the confidence of the parties during the course of negotiation. The success of negotiation depends upon the faith of the parties. The success in case of a negotiation is not assessed on how much profit the parties make, but on basis of whether both the parties respect the agreement, and whether both are willing to fulfil their respective obligations under the settlement agreement. In absence of these elements, the negotiation would be partly successful. It is a success as far as the ability to achieve settlement agreement is concerned. However, in absence of loyalty, the settlement agreement may be breached and may result into an inevitable litigation.

The only method available to a negotiator to ensure loyalty of the parties towards settlement agreement is by providing legitimacy to the demands of the parties. Legitimacy is an attempt made by the negotiator to provide a justification to the demand made by his party. The discussion between professionals will not be emotion based, but objective based. Thus legitimacy brings in moral force to the demand made by the parties.

Examples of objective criteria	
Market value	Precedent
Professional standards	What a court would decide

Actual Costs	Scientific judgment
Moral standards	Tradition reciprocity
Equal treatment	Custom and Usage

Legitimacy can be explained by providing objective standards relied upon for making such demand e.g., in case of demand of compensation for the breach of a contract, the negotiator will assess the total loss suffered and it is liquidated by referring to the market value. In case of ambiguity in the contract as to transportation charges, the negotiator will rely on the precedents followed in such trade or business.

The objective standards also includes the negotiator's effort to convince the other party regarding his honest objective and to convince them that even the Court of law will follow the same standards and therefore the outcome of the litigation would be largely similar.

The success of negotiation and the respect to the settlement agreement depends on the feeling of belonging, fair treatment and the feeling that a fair procedure has been followed. Fair procedure is a slippery slope. Being fair is not enough. The fairness has to be rather manifested in the negotiators approach and dealing.

Usually the negotiators act fairly and expect the other party to believe them and have faith in their honest intention. This may be an unfair expectation while negotiating with a stranger. This is equally unfair, even while dealing with known parties, as they are already in dispute, and may obviously have doubts regarding the negotiator's intention to exploit.

The establishment of a fair procedure is a necessary task. In a partition between two brothers, if the eldest brother does the splitting of share to his best capacity impartially, and then selects his share, the younger one may have an objection. The younger one may have a doubt in his mind, even though the elder has acted fairly. Therefore, this cannot be a fair procedure.

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The better way to deal with this situation is to give options to one of them to spilt the shares and the other to select.

To establish fairness in the proceedings, periodical appraisals of the proceedings by narrating back the facts discussed, or making list of the interests involved, plays a very important role. To provide a fair chance to both the bidding parties is also a better way to establish fairness. These fair procedures can be used to evaluate the options given to the parties.

Please answer the following Self Assessment Questions:

Self Assessment Question 7	*Spend 2 minutes*
1) On what basis would the success of Negotiation, be assessed?	
2) How do you explain legitimacy?	

iv. Relationship

Relationship is an important aspect of the negotiation process. The main reason to adopt negotiation is to protect the relationship between the parties. The regular judicial mechanism or Arbitration is an efficient process. However, it leads to sacrificing of relationship due to the adversarial approach in the justice delivery system from day one itself. As two or more parties deal with one another in a negotiation process, protecting relationship becomes the major object, even though it may be a one-time transaction and they may have no past or ongoing interaction.

Usually people look at short-term gains, and are ready to sacrifice relationship for it. However, to be successful, one should always invests in long-term gains. To be successful, you need to adopt a good negotiation process. Handling relationship causes the most anxiety in the process of negotiation. You do not want to spoil your relation at the same time you do not want to give up.

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How to resolve the dispute without destroying the relationship?

You need to separate the problem from relationship. You need to be firm on the problem but soft on the people.

Ex: You have a money lending firm and your friend wants to borrow money from you. Your firm as a policy, insists on collateral security for a loan. Your friend says, he being a friend of yours want waiver of the condition of collateral security. How do you handle the situation?

If you say you cannot waive the condition, you spoil your relation with the friend. If you waive the condition there is a possibility that you may suffer loss if your friend fails to pay.

Remember the rule, "separate the problem from the people". You need to clearly explain to your friend that the firm's rule has nothing to do with the friendship. Loan is a business deal, therefore it needs to be in accordance with your firm's policy. If you fail to do this, you may lose friendship or money. In any event, you spoil your relationship with your friend.

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v. Communication

During negotiation, people tend to get angry, depressed, fearful, hostile, frustrated, offended and confused about their perception as reality. When they are confronted with this situation, the principle which helps to overcome the situation, is communication. Parties must talk to each other. The more you discuss the problem, more clarity is brought to the discussion table.

Miscommunication or a vague communication may lead to misunderstandings. This misunderstanding, affects the trust between the parties, which may lead to misinterpretation of the statements. This may prejudice the relationship, and further lead to deadlock in the negotiation process. If not, then it may lead to counter reactions, further damaging the relationship between the parties. This may lead to further misunderstandings. The lack of

proper communication may lead to such vicious circle, which may be very difficult to break and will lead to two main casualties' vis., the failure of the negotiation process itself; and the souring of the relationship between the parties. Even if the negotiation fails, keep the communication open.

For example, if the other party refuses to all your proposals, you could still keep open the communication by saying that, "it is unfortunate that we could not reach any agreement but, we are still open to new proposals."

Please answer the following Self Assessment Questions:

Self Assessment Question 8	*Spend 2 minutes*
1) How can a negotiator resolve dispute without destroying the relationship? 2) Do you think that the communication needs to be open even if the negotiation fails?	

vi. Alternatives

As a lawyer does not depend on single argument or issue, similarly you also should not depend on one single process. Your endeavour should always be to find the alternatives. Your attempt to settle the dispute depends on the BATNA (Best Alternative to a Negotiated Agreement), which is usually discussed in the preliminary stage of negotiation. This helps in making a decision as to whether to agree to the proposal or not to agree. If you have no alternatives, you would be forced to agree in the negotiation.

As mentioned above, negotiation is one of the processes of resolution of dispute. There may be various other options available to the parties, in case negotiation fails. There is no guarantee that the negotiation would be successful. What if the negotiation fails? The knowledge of the alternatives helps you during negotiation as you would be in a position to decide and choose between the options available.

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For example, In case of an accident, the offender offers to compensate for the loss suffered due to the damage to the vehicle. Before agreeing to his proposal, the negotiator has to check BATNA. Alternatives available here would be, to file a suit and claim damages from the Motor Vehicle Tribunal or to forego the litigation and make a claim against the insurer of the vehicle (Insurance Co).

Out of the three alternatives, litigation causes delay, includes lawyers expenses and if contributory negligence plea is accepted then the amount of compensation gets reduced. Litigation is a risk, but we have to think whether it is worth taking. Does it offer much more compensation then the offer made by the other party? If the answer is yes, then litigation can be BATNA.

Applying to the insurer (insurance Co) and claiming compensation directly cannot be a BATNA, as the Insurance Co will pay for the loss according to the agreement. Most of the spare parts of the vehicle involved are not included in the Insurance coverage. In addition, the party may lose the 'non-claim bonuses for the next insurance coverage. So litigation will be the BATNA if the offenders offer is much lower than the prescription of law.

vii. Commitment

The success of negotiation depends on the commitment of both the parties. The negotiator has to include pre-conditions if any, to ensure their commitment to the negotiation. These pre-conditions help in assessing the attitude of the opposite party. If the party is interested in negotiation or believes in negotiation then the parties' involvement will be of higher level and chances of agreement will be high. Even in a case where the party is new to negotiation and has framed no opinion, these pre-conditions help in understanding the inclination of the other party. These pre-conditions also help in assessing the parties' ability to assent to the final agreement.

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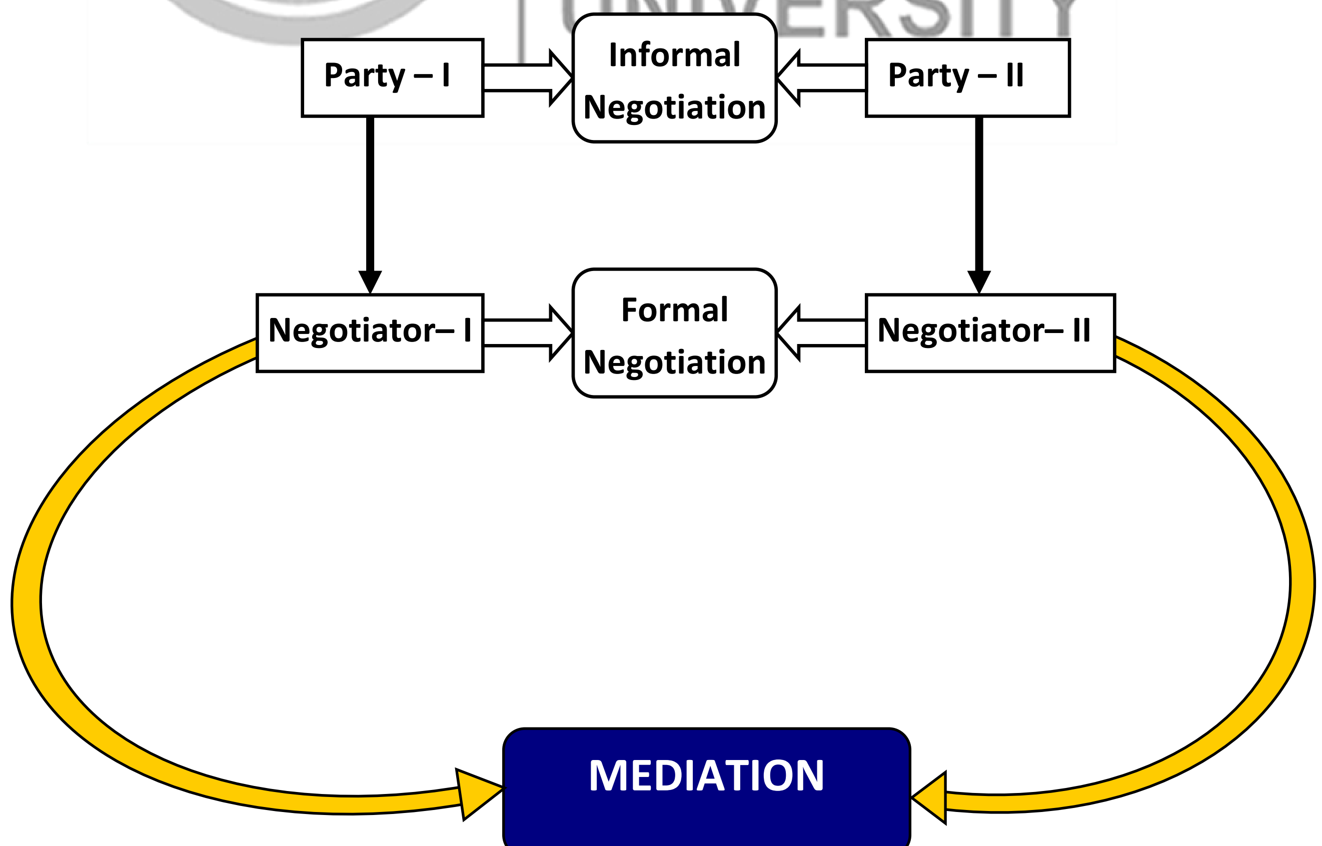
Please answer the following Self Assessment Questions:

Self Assessment Question 9	*Spend 2 minutes*
1) What is the meaning of BATNA?	
2) Why do you need BATNA?	

3.7. Mediation

We have discussed above the process of Negotiation as one of the efficient ways to resolve disputes. Nevertheless, the way it developed, it suffered from certain defects. These defects were answered effectively by formulating a new genus of ADR in form of 'Mediation'. The fundamental process in mediation is nothing but a negotiation. However, mediation is a slightly modified version which has been developed to overcome the defects involved with the negotiation process.

"Mediation is a dispute resolution process where the parties discuss the subject matter in presence of the third party called mediator, who is experienced and has trust and faith of both parties and who tries to bring out an amicable settlement between the parties."



The above definition makes it very clear that the main difference between negotiation and mediation is the involvement of a third person called the Mediator. This person acts as a catalyst between the parties and tries to achieve an amicable settlement between parties. Involvement of the third party does not change the style of proceedings. It basically remains a negotiation, but takes place in the presence of a third person.

3.7.1. Role of a Mediator

The main role of the mediator is to avoid deadlocks. The purpose of his appointment is to keep the parties at the negotiation table. If any party tries to break the negotiation process, then mediator becomes active and immediately gets involved in resolving the deadlock. His presence reduces the risk of emotional bargain, and in cases where it is unavoidable, he can act as a vent to the emotions of the parties. This venting of emotions brings the party back on to negotiation table and it helps to create a better negotiation atmosphere.

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Please answer the following Self Assessment Questions:

Self Assessment Question 10 *Spend 2 minutes*

1) What is the difference between negotiation and mediation?
2) What is the main role of mediator?

3.7.2. Stages of Mediation

Mediation resembles the negotiation process, it being an improvement over the negotiation process. The improvement is in the form of introduction of the third independent party to oversee the negotiation process. This being the situation, the basic principles remains same. Even in mediation seven Harvard Principles play a very

important role. The party's behaviour in mediation has to be guided by these principles. The difference lies in the stages of mediation where the mediator plays a important role.

1. **Convening Process –** At this stage mediator makes preliminary arrangements such as the venue for mediation and time. It is always better to select a neutral venue for conducting mediation. Before fixing the time and venue you may need to consult both the parties for their consent and availability.

2. **Mediator's introduction and developing ground rules to be followed in the Mediation.** The first session of mediation involves two important components, where in the mediator needs to introduce himself and the procedure that is going to be followed during the mediation.

3. **Statement of problem by Negotiators.** After mediator's introduction both the parties may be allowed to state the problem.

4. **Re-statement of the problem by mediator –** After hearing the problem from both the parties, you need to restate the problem. Restating the problem means you are summarizing the problem. Summarizing the problem has its own advantage. It not only shows that you have understood the dispute between the parties, but also that if there is an thing missing the parties would be free to add.

5. **Collection of additional information if necessary-** In case the problem explained by the parties is not clear or more information is required to understand the dipute fully and properly, the mediator may seek additional information or documents in support of such dispute.

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6. **Setting the agenda for Mediation –** Once the problem is clear the mediator needs to set the agenda. Setting agenda is similar to framing issues. It is nothing but identifying the differences and framing them in the form of issues for negotiation.

7. **Facilitating negotiation –** After framing issues the mediator invites the negotiators to negotiate.

8. **Mediator generating options-** Remember the negotiation principles. Generating options is more important for a successful negotiation. Therefore, mediator must encourage and help the parties to generate options. He needs to play proactive role in generating options.

9. **Private meetings if necessary-** In case of necessity you may hold private meetings. Private meeting means you could talk to only one party and request the other party to move out of the mediation room. Before you conduct the private meeting you need to explain to both the parties that you may be conducting private meetings and the purpose of the meeting is not hamper the other party's interest, but to convince the party for settlement. Private meeting also may be conducted to get the inside information which the party may not be comfortable in disclosing in the presence of the other party. Private meeting also helps the parties to express the apprehensions freely to the mediator and the mediator could understand these apprehensions. Mediator should build the confidence among the parties that the private meetings are not going to affect his neutrality towards the mediation of the dispute.

10. **Persuasion to reach a settlement-** The role of the mediator in mediation is not of a mute spectator but he has to actively involve the parties to reach a settlement. Therefore, persuasion to reach settlement does not mean that the mediator will force the parties for settlement, but he will encourage and motivate the parties to settle. The

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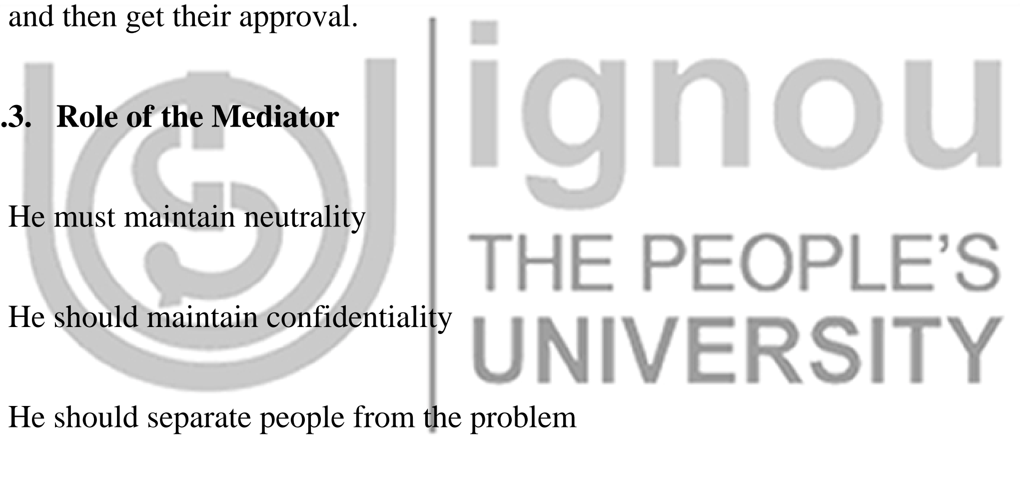
role of the mediator is to avoid situations having the effect of hampering the process of negotiation between the parties.

11. **Realistic Agreement–** If the negotiation is successful and the parties reach a settlement then the mediator should see whether the agreement is realistic. At this stage mediator is not assessing whether the agreement between the parties is reasonable he has to see whether it is an enforceable agreement according to the law.

12. **Summing up and reducing the settlement into writing-** Once the mediator is satisfied that the agreement is enforceable by law then he needs to sum up the agreement and write the same. After that he should make sure that the parties read it, and then get their approval.

3.7.3. Role of the Mediator



1. He must maintain neutrality
2. He should maintain confidentiality
3. He should separate people from the problem
4. He should motivate parties to negotiate.
5. He needs to counsel the negotiators about the process of mediation.
6. He should provide scope of venting emotions by the parties
7. Sometimes mediator may act as face saver.
8. He must resist the temptation of being a via media
9. He must help the negotiators in identifying interests.

The role of a Mediator is deemed to have lesser involvement compared to a Conciliator. The major theoretical difference drawn is regarding the ability to make suggestions as to possible ways of settlement of disputes. During Mediation, the mediator is not supposed to make any such suggestions. A Conciliator however is allowed to make suggestions as to possible ways of settlement of dispute.

3.7.4. Statutory recognition of Mediation:

Mediation is recognised under section 89 of Civil Procedure Code added as an amendment in 2002.

Sec 89: Settlement of disputes outside the Court

(1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for…

(d) mediation.

(2) Where a dispute had been referred-

(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

The provision under CPC has transformed a mediator from non-statutory to a statutory authority.

Please answer the following Self Assessment Questions:

Self Assessment Question 11 *Spend 2 minutes*

1) Which section gives Mediation a statutory recognition?
2) What is the meaning of setting the agenda for mediation?

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3.8. Conciliation

Conciliation is an Alternative Dispute Resolution process which is similar to the Mediation process. The process of Conciliation has become more streamlined due to the passing of the Arbitration and Conciliation Act 1996. Conciliation is a process by which discussion between parties is kept going through the participation of a Conciliator. In conciliation the decision would be taken by the parties with the assistance of conciliator.

3.8.1. Conciliation procedure

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Conciliation being a voluntary process, the law has taken ample care to provide voluntariness. The involvement of the parties is taken care of in each and every stage of the conciliation. Along with this law also has taken care to avoid unnecessary delay tactics which parties may employ during the conciliation process.

- **Appointment**

The parties have prerogative to seek appointment of the Conciliator. The appointment can be done in consultation with both parties. In case of lack of consensus, the parties can appoint their own conciliator.

Even though law provides for appointment of two conciliators, the spirit of the process of conciliation and the role of conciliator makes it necessary to conduct conciliation with only one conciliator.

- **Submission of statements**

Once the appointment of conciliator is sought, he will request the parties to provide brief written information of the dispute. This information helps him to understand the general nature of the dispute as well as the points at issue. This general information may be later asked to be supported by documents and other evidences. These additional information and evidences can be used to convince the conciliating party to reach a settlement.

3.8.2. Role of the Conciliator

He should be independent and impartial. His role is to act as a catalyst and bring in speedy and amicable settlement among the parties. The role of the conciliator is guided by the major principles of objectivity, fairness and justice. While acting as conciliator he should give due regard to the rights and obligation of the parties, usages of the trade and circumstances surrounding the dispute. To bring in speedy settlement, the conciliator may make a proposal of settlement. Such proposals will be kept for further discussion. Conciliation officer is required to maintain confidentiality. Any information disclosed to him cannot be used against the disclosing party in any proceeding before any authority. This provision helps parties to act freely and fairly in conciliation.

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3.8.3. Settlement Agreement

The settlement agreement is arrived at by the parties with the assistance of the conciliator. Basically it is a document of consent between parties wherein the conciliator has acted only as a facilitator.

To achieve the speedy settlement the conciliator may opt for a short cut during conciliation proceedings. Where the conciliator finds elements of settlement, he will immediately announce the probable settlement agreement and it will be communicated to

both parties. The proposal of settlement agreement is not binding on the parties, but acts as mere persuasion and more importantly provides guidance for the further proceedings.

This proposal has to be studied by both parties who will then pass their observation on the proposed settlement agreement. The observation of the parties provides invaluable insight into the minds of the disputing parties. With this invaluable information, the conciliator may make new proposed settlement agreement and achieve final settlement agreement between the parties.

Once such agreement is achieved, it will be properly drafted by the conciliator and will be properly signed by both parties and the conciliator involved in the conciliation.

Please answer the following Self Assessment Questions:

Self Assessment Question 12	*Spend 2 minutes*
1) Who takes the decision in conciliation? 2) What is the need for confidentiality?	

3.9. Arbitration

The importance of Arbitration as a process has increased manifold due to the advent of globalization. As the multinational and transnational companies began investing in India, they started giving preference to the outside court settlement in the form of arbitration. As they used these provisions extensively, the process of Arbitration became attractive. Further, the increased protection granted to the parties and the award pronounced by the arbitrator due to passing of the Arbitration and Conciliation Act, 1996 encouraged the role of arbitration in settling civil disputes.

Arbitration has no resemblance with the other ADR processes. The base for all the ADR processes has been Negotiation. But in arbitration there is no negotiation between parties. Arbitration resembles adversarial process more. Therefore, arbitration would be a suitable

process where the parties do not wish to spend time in the court but would like their dispute to be decided by a neutral third party.

In arbitration any dispute or difference may be referred to a third person for determination. Therefore, we can say that arbitration is a process conducted by a private judge appointed by the parties, who conducts hearing and decides the dispute between the parties.

According to section 7, parties by an agreement may submit to arbitration all or certain disputes, which have arisen or may arise, relating to a defined legal relationship, whether contractual or not.

Therefore, arbitration agreement is a precondition for referring a dispute to arbitration. However, such an agreement may be in a main contract or a separate agreement or even by exchange of letters. The basic difference between arbitration and the existing court system is that the parties are free to choose arbitrator in arbitration proceedings. The parties may choose sole or multiple arbitrators. In case of multiple arbitrators the number of arbitrators must be odd in number.

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Arbitrators should be appointed by mutual consent of the parties, and in case there is no consensus then they may approach the court for appointment of arbitrator. The arbitrator appointed either by the parties or by the court shall give equal treatment and full opportunity to parties. But rules of Civil Procedure Code and Indian Evidence Act would not apply to arbitral proceedings. The place of arbitration and language to be used during the proceedings could be decided by the parties with mutual consent. In absence of such consent the arbitrator would decide.

In case of domestic disputes the arbitrator needs to decide the dispute in accordance with the substantive law in force. If the dispute involves international commercial dispute then the

law of the country as agreed by the parties would apply. In the absence of such an agreement, the arbitrator would decide about which country's law would apply, as he deems fit. The decision of the arbitrator is called as 'award'.

Arbitrator must be neutral and shall not have any interest in either the subject matter or any relation with parties. If his relation with parties is such that it is likely to influence his rational decision, award given by the arbitrator in such dispute would become invalid. Though procedural technicalities do not apply for arbitral proceedings, arbitrator is bound to follow principles of natural justice.

Please answer the following Self Assessment Questions:

Self Assessment Question 13	*Spend 2 minutes*
1) Which rules do not apply to arbitral proceedings? 2) Who appoints arbitrators?	

Free markets and liberal global trends expedited expansion of ADR system. Globalization is considered as a major factor to reinvent the ADR system. ADR systems such as negotiation, mediation, conciliation and arbitration were particularly successful in resolving disputes in family, property and business matters where maintaining relationship becomes paramount for the parties. As a result the role of lawyers underwent sea changes.

Negotiation is a primary source of dispute settlement. However, for a successful and effective negotiation one has to follow the principles of Principled Negotiation. For conducting principled negotiation, the negotiator must keep the following seven principles in mind;

i. Identify both, common and conflicting interest.

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ii. Invent several options for negotiation.

iii. The options invented must be based on legitimate standards

iv. Separate the people from problem, to protect relationship

v. Keep the communication open

vi. Identify alternatives which could be used in case of failure of negotiation

vii. Ensure commitment of the parties to the negotiated agreement.

Mediation is nothing but a negotiation by parties in the presence of a third party called mediator. The role of the mediator is to facilitate the negotiation. His basic function is to see the negotiation process continues between the parties. He maintains neutrality and usually does not propose settlements. He would encourage the parties to make the proposals for settlements.

On other hand a conciliator would make proposal for settlements from time to time. This is the basic difference between mediation and conciliation. In arbitration, the parties refer their dispute to a third person for settlement. Arbitration is an offshoot of adversarial system with an advantage of speedy disposal. The arbitrator is not bound to observe rules of Civil Procedure and Law of Evidence. The award of the arbitrator is binding on the parties.

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3.11. Terminal Questions

1. What are the reasons for development of ADR system?

2. Enumerate various advantages of ADR system?

3. Why a neither soft nor hard negotiation is advisable for settling the disputes?

4. Explain the features of principled negotiation?

5. Identify the differences in features of Hard, Soft and Principled negotiations

6. What are interests? Why identifying those interests is necessary for successful negotiation?

7. How do you invent options?

8. What are objective standards?

9. What is mediation? Explain the role of Mediator?

10. What are the stages of Mediation?

11. What is Conciliation? In what respect it differs from Mediation?

12. What is Arbitration? Explain the rules regarding appointment and procedure of Arbitration.

3.12. Answers and Hints

Self Assessment Questins:

1. (1) Regular Dispute Resolution, Alternative Dispute Resolution, (2) Alternative Dispute Resolution
2. (1) Because Conflicts help the growth of the society. (2) Any two from Part 3.4.
3. (1) Introducing a third party as representative of the parties to the dispute. 2. Hard Negotiation.
4. (1) Soft Negotiation. (2) Principled negotiation
5. (1) Handling interests and identifying interests (2) To balance the conflicting interests
6. (1) Number of Options (2) By conducting brainstorming
7. (1) Respect of parties to the agreement. (2) Providing objective standards for the demands
8. (1) By separating the people from problem. (2) Yes.
9. (1) Best Alternative to the Negotiated Agreement. (2) To decide whether to agree the proposal or not.
10. (1) Involvement of third party. (2) To avoid deadlocks

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11. (1) Section 89 of C.P.C. (2) . Framing the Issues.

12. (1) Parties (2) To make parties act freely and fairly in conciliation

13. (1) Rules of C.P.C. and Indian Evidence Act. (2) Parties

Terminal Questions

1. Refer to section 3.3. of the unit.
2. Refer to section 3.4. of the unit.
3. Refer to section 3.6.1. b. of the unit.
4. Refer to section 3.6.3. of the unit.
5. Refer to section 3.6.1. b. of the unit.
6. Refer to section 3.6.3. i. of the unit.
7. Refer to section 3.6.3. ii. of the unit.
8. Refer to section 3.6.3. iii. of the unit.
9. Refer to section 3.7 and 3.7.1. of the unit.
10. Refer to section 3.7.2. of the unit.
11. Refer to section 3.8. of the unit.
12. Refer to section 3.9. of the unit.