THE HISTORY OF ALTERNATIVE DISPUTE RESOLUTIONS IN THE UNITED STATES[1]

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ABSTRACT

The aim of this study is to present the birth, the improvements and the promotion of Alternative Dispute Resolutions (ADR) in the United States. In the research stage of this study, Emory University School of Law Library and its online law database were the guidelines. In this paper, the forms of common ADR procedures, which are negotiation, mediation, and arbitration, are introduced in brief and compared in order to get acquainted with them. Then premature ADR examples are explained in traditional societies and religions in order to notice the differences and improvements between before and now. After that, how America met ADR will be expressed in a chronological order between 1700 to 2000s with emphasizing and reasoning the most important steps, which are important for the development of ADR in the US. As a human being the best means to understand each other is communication. ADR techniques are the guidelines to cooperate with the opposite side and the US has early discovered how these techniques are beneficial.

Key Words*:* Alternative Dispute Resolutions, negotiation, mediation, arbitration, United States of America

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1. Introduction

The mankind accomplished to create disputes in every era, in every environment, even in every peaceful time. The conflict between the sons of Adam and Eve, the war for the most beautiful woman in the world, Helen, are the proofs of how much the existence of disputes has gone beyond in time. Ancient people had resolved their disputes by neutral and impartial third parties that they really trusted before there was a legal sys-

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tem. In time, the developing relations of commercial activities between communities have changed the kinds of disputes. In addition to that the developments of industry and the need for men power caused labor-management disputes. Besides race, color, religion, and national origin as well as the diplomacy between the countries can be considered as other kinds of disputes in history.

The evolvement the judicial system could not and cannot answer to reach desired solutions. Excessive costs, complexity of the litigation procedures, inevitable delays in bringing suits to trials because of overburdened courts, publicity, no opportunity to involve into the cases by parties, no satisfactory justice and inefficient resolutions of litigation system induced to find alternative methods of resolving disputes[3]. Particularly in 1990s, there has been a big shift from traditional litigation system to the use of alternative dispute resolution procedures in order to get quick and less costly resolution[4], to produce creative solutions, to serve business goals, to improve relations, and to enhance the quality of human interaction[5].

During 21th century, Alternative Dispute Resolutions's scope widened and opened up its doors to much more topics. Because in this century there have been developments in the business area, technology, global economy, and hot issues between the countries which led to differ the types of disputes and the types of resolutions that the parties desire.

2. Alternative Dispute Resolution

The term *alternative dispute resolution*, which is usually considered to be alternative to litigation, consists of a large variety of dispute resolution mechanisms and techniques, which are a response to widespread dissatis-

3 Katherine V. W. Stone, Private Justice: The Law of ADR (2000), at 2-5.

4 According to Toro Company's reports; 984 product liability claims, more than 62 percent in 12 months resolved between 1992 and 2003 with the means of ADR. Average per claim costs and fees were reduced from a pre-1991 average of $47,252 to $9,074-an 81% percent reduction; the average verdict or settlement was reduced from a pre-1991 figure of $68.368 to $26,589-a 61% reduction. At the end of 2002, Toro had only two files open in litigation and 35 active claims; ten years before there had been 60 cases in litigation and 150 active claims; Thomas J. Stipanowich, ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution" (2004), at 887.

5 *Id.*

faction with the judicial system. ADR refers to any means of settling disputes outside of the courtroom[6].

ADR procedures are highly recognized to resolve conflicts and potential conflicts between and among individuals, business entities, organizations, private and public agencies, and states. ADR generally depends on agreement by the parties to use ADR processes; either before or after a dispute has arisen.

ADR covers many sorts of different processes that differ whether[7];

- participation is voluntary;
- parties represent themselves or are represented by a counsel;
- decisions are made by the disputants or by a third party;
- the procedure employed is formal or informal;
- the basis for decision is law or some other criteria; and
- the settlement is legally enforceable.

2.1. Primary Forms of ADR

Primary forms of ADR are negotiation, mediation and arbitration. In addition to that there are some specific procedures such as fact-finding panels, mediation-arbitration (med-arb), mini trials, summary jury trials, and third party evaluation that are included in the term of ADR[8].

a. Negotiation

Negotiation is the major building stone of ADR procedures. It is a voluntarily problem solving process between two or more parties to converse their differences and an attempt to reach a joint and satisfied resolution on their common interests. There is not a third party who assists in developing a resolution process or imposes a resolution.

6 Alternative Dispute Resolution (ADR): An Overview: www.law.cornell.edu/wex/index.php/ADR.

7 Leo Kanotwitz, Alternative Dispute Resolutions Case and Materials (1986), at 5-6.

8 *Supra* note 1, at 5; Nancy F. Atlas & Stephen K. Huber & E.Wendy Trachte Huber, ADR The Litigator's Book (2000), at v; for a detail summary look at Joanne Goss, *An Introduction to Alternative Dispute Resolution*, 34 Alta. L. R. 1, (1995-1996), 2-33.

In the process of negotiation, parties clarify the main points that they are dissatisfied, educate each other about their key interests and the issues that they would like to discuss, make efforts to reach a settlement, offer and bargain for possible resolutions[9].

b. Mediation

Mediation is a voluntary and confidential problem solving process for helping people to resolve their disputes. With the help of an impartial and independent third party, mediator, the parties work together to develop a structure for mutual education about their key interests and issues that they would like to discuss and to reach mutually agreeable solutions to their problems.

The mediator does not have a duty to decide who is right or wrong, and to impose a resolution. The decision maker in mediation process is the parties. Besides, the mediator's role is to provide a safe environment and to assist to build an accurate communication that will help the parties to settle their disputes.

c. Arbitration

Arbitration is a typically voluntary process that the parties submit their dispute to an independent, impartial third party, arbitrator, or parties, arbitral tribunal, by mutual consent or a statutory provision for a final and binding decision, award. Arbitration is a substitute for a trial and review of a trial court's decision by appellate courts. The arbitrators can be selected by two parties, or through the procedures of an organization. After the selection, both parties are given the opportunity to present their positions on the disputed issues at hearing.

Witnesses and exhibits often are presented to support a case in arbitration, however the strict rules of litigation in this process is not followed. The parties are frequently represented by attorneys. After hearing, the arbitrators consider all of the material and issue a ruling. The parties agree ahead of time to abide by the arbitrator's ruling or award, the language, the seat, the procedures and the applicable law of the arbitration.

Usually the scope for challenging an award in court is limited to alleged problems in the process, such as arbitrator misconduct or incompliance

9 Christopher W. Moore, Negotiation, www.au.af.mil/au/awc/awcgate/army/usace/negotiation.htm.

with the arbitration clause or law. The merits of an arbitrator's decision are not subject to judicial review, there is no appeal and awards are widely enforceable under certain conventions, to which most countries are signatory.

Hereunder the advantages and disadvantages of arbitration[10];

Advantages	Disadvantages
• Confidentiality, there is no public record of the proceedings. • Parties choose their own arbitrator(s) who are experienced and qualified in their industry or dispute. • There is no appeal process. • Parties can set some of the rules, which results the flexibility of the arbitration. • Because of limited discovery, informal hearing procedures, and the expedited nature of the process, parties can save on legal fees and time. • Arbitration is usually faster than litigation. • Arbitrations awards are widely enforceable under member states of New York Convention. • The award is final and binding. • Parties can choose the seat, applicable law, and the language of arbitration. Besides parties can also state a deadline for the award.	• High cost of arbitrators and organization fees. • The process is less legal and judicial than litigation, because arbitrators do not have a duty to strict application of the law and procedures. • If the award is not fair, the losing party has nothing to do, because the courts cannot review the award except certain conditions.

3. History of ADR

3.1 In Traditional Societies

Since the beginning of humanity, "disputes, both within groups and between them, are found everywhere in the society[11]". Even the early steps of resolving disputes go back to traditional societies such as the Bushmen of Kalahari, Hawaiian Islanders, the Kpelle of Central Liberia, the Abkhazian of the Caucasus Mountains, China and Ancient Greek.

10 Adam Greaves, Litigation v. Arbitration (2005), at 5.

11 Maureen Cain & Kalman Kulcsar, Thinking Disputes: An Essay on the Origins of the Dispute Industry (1982), at 377.

Traditional societies had a kind of mediation particularly in family resolving disputes. Parties discussed their problems in front of the leadership of someone or a group who were respected elders.

The Abkhazian people have resolved disputes between themselves and neighbor tribes by mediation. Again mediators are respected elders. It is really surprising that even today there are no many female mediators[12], the Abkhazians has some[13]. Chinese mediators are more farseeing when compared to the Western practitioners in that they educate the participants of mediation to continue and preserve a better relationship for a long term. In addition to that, the philosophers of Ancient Rome clearly state the reasons of proliferation of arbitration as crowdedness of courts, slowness and formality. While Aristotle said that "arbitration was introduced to give equity its due weight, making possible a larger assessment of fairness", Cicero said that "a person going to court expects to win or lose; a person going to arbitration expects not to get everything but not lose everything either[14]". In other words Cicero founded win-win negotiation hundred years ago.

3.2 In Religion

From a religious perspective, "the process of ADR is not a revolutionary concept, as several groups in society have preferred to settle disputes outside of the litigational setting[15]". In other words ADR plays an important role in monotheistic religions[16]. Hebrew and Christian traditions have always been has the idea that one should first try to settle his dispute by some sort of reconciliation before going to court; "the preferred proce-

12 Tibor Varady & John J. Barcelo & Arthur Taylor Von Mehren, International Commercial Arbitration (2002), at 265-272.

13 Jerome T. Barrett & Joseph P. Barrett, A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement (2004) [hereinafter Barretts], at 4.

14 *Id*. at 8.

15 Amber McKinney, *The ACLU and the Propriety of Dıspute Resolution in Civil Rights Controversies*, 6 Pepp. Dispute L.J. (2006), at 112.

16 The King of Israel, Solomon, is one of the great arbitrators ever lived (around 960 BC) for his settlement of the famous dispute over which claimant is the mother of a child in Frank Martin, Historical Achievements, The Negotiator Magazine, 2005, http://www.negotiatormagazine.com/outstanding.shtml; Labor Law Beyond Borders: ADR and the Internationalization of Labor Dispute Settlement, (the International Bureau of the Permanent Court of Arbitration ed., 2002) at 59.

dure involves, first, conversation; if that fails, it involves mediation; is mediation fails, it involves airing the dispute before representatives of the community[17]".

In Jewish tradition, after agreement that they were willing to be bound by the award, parties discuss their disputes before three rabbinical judges (Beth Din) like arbitration. Today, Jewish community has their own modern Jewish Arbitration Court in New York City, which settles disputes between Jews related to religious ceremonies, labor, business and family issues[18].

In Christianity, there are lots of examples of conflict resolutions in biblical references such as "settle matters quickly with your adversary who is taking you to court. Do it while you are still with him on the way or he may hand you over to the judge, and the judge may hand you over to the officer, and you may be thrown into prison" (Matthew 5:25). Christian way of settlement of disputes can be defined briefly as "a process for reconciling people and resolving disputes out of court in a biblical manner[19]". Christian Conciliation Service was founded in 1980 in order to be encouraged to follow the rule of God that is "So in everything, do to others what you would have them do to you, for this sums up the Law and the Prophets" (Matthew 7:12).

On the other hand in Islam, a claimant must first try to resolve his dispute by negotiation, if there is no reached solution by this way, he should refer to arbitration in accordance with Islamic rules accepting to be bound by the given decision[20]. The Qur'an has a reference for this statement; "By your Lord! (the fact is) that they will not be true believers until they make

17 Andrew W. Mc Thenia, Thomas L. Shaffer, *For Reconciliation*, 94 Yale L. J. 1660, at 1666 (1985).

18 In Blitz v. Beth Isaac Adas Israel Congregation 694 A.2d 107 (Md. Ct. Spec. App. 1997), the decision of the Circuit Court affirmed in part and reversed in favor of Rabbi in employment dispute with his synagogue, noting that Maryland courts recognize validity of arbitration proceedings of a Beth Din even when the proceeding is not in strict compliance with Maryland's Uniform Arbitration Act, as long as parties knowingly and voluntarily agreed to the Beth Din proceeding.

11 Glenn G. Waddell & Judith M. Keegan, Christian Conciliation: An Alternative to Ordinary ADR–Part2,www.peacemaker.net/site/c.aqKFLTOBIpH/b.1123435/k.9B25/Christian_Conciliation_An_Alternative_to_Ordinary_ADR__Part_2.htm.

20 Ayat. Muhammed Beheshti, Arbitration in Islam, http://smma59.wordpress.com/2006/09/12/arbitration-in-islam/.

you judge in what is in dispute between them and then do not find in themselves any dislike of what you decide, and submit (to your judgment) without reservation". (Surah al-Nisa, 4:65). Besides the prophet Muhammad (571-632), led his followers to practice arbitration to settle disputes involving also the criminal ones[21]. Arbitration has a great role in traditional Islam named as sulh (settlement) and Musalaha (reconciliation).

4. How America met with ADR

4.1. Background Between 1700s and 1920

ADR spreads all over the world by commercial activities. The most common form of ADR, arbitration, first arises in Roman Law[22] and gets stronger to be followed in Middle Ages[23]. In medieval Europe, in 10th and 11th centuries, the Law Merchant, which was originally a group of rules and principles regulated by the dealings of merchants and mariners, consisting of usages and customs common to traders in Europe, was applied voluntarily by the respected members of trade community, whereby no government intervention appeared[24]. It occurred for the need of quick and effective jurisdiction and specialism in the related area for the resolution of allegations of violations contractual breaches about customary norms of trade[25].

21 Muhammad prevented a war over the reconstruction of the Kaaba, the holy house of God for Muslims that they turn to Kiblah (Kaaba) in their daily prayers. There was a sacred black stone that the leaders of each tribe had a discussion for whom would replace it. Muhammad was the arbitrator by mutual consent of the leaders. He placed the sacred stone on a cloth and let all the leaders to carry a corner of it as a resolution.

22 "It was adopted by the Greek City States and incorporated into the Roman Ius Gentium (the "Law of Nations" later codified by Justinian in the Corpus Juris Civilis)" at Alternative Dispute Resolution,www.australianarbitration.com/alternative-dispute-resolution; Katherine V.W. Stone, Arbitration- National, http://papers. ssrn.com /sol3/papers.cfm?abstract_id=781204.

23 Katherine V.W. Stone, Arbitration- National, http://papers.ssrn.com/sol3/papers.cfm? abstract_id=781204.

24 *Id;* Frank A. Cona, *Application of Online Systems in Alternative Dispute Resolution*, 45 Buffalo L.R. 975 (1997).

25 A. Claire Cutler, Private Power and the Global Authority, Transitional Merchant Law in the Global Political Economy (2003), at 175; some fundamental principles of the Law Merchant continues in International Commercial Arbitration. For instance, it was Ireland that the first arbitration law is enacted in 1698; *it may be*

By the 17th century, many mercantile disputes including commercial trade and maritime pursuits were settled by arbitration in England by the experts. The usages and customs of trade, applied in arbitration tribunals led to found the London Court of Arbitration, which has its history back from 1883[26].

Early colonists, Dutch (1624-1664) and British (1664-1776) arrived in the United States with the understanding of ADR from their business experience in Europe. Massachusetts (1632) and Pennsylvania (1705) were the first colonists that enacted laws to allow arbitration. Even Native American tribes were the first that used arbitration to resolve disputes between other tribes and among themselves before the colonists arrived in the United States[27].

In 1776, Declaration of Independence declared that the Thirteen Colonies in North America were "Free and Independent States" and that "all political connection between them and the State of Great Britain, is and ought to be totally dissolved" because of the refusal to negotiate its relationship with the colonies[28].

In 1790, Thomas Jefferson[29] acted as a mediator to resolve a financial and a geographical dispute separately. He led to understand the importance of creative solutions for the disputed issues to convert differences

lawful for all merchants, traders and others desiring to end by arbitration any controversy, sute or quarrels-for which there is no other remedy but by personal action or suit in equity, to agree that their submission of the matter to the award or umpirage of any person or persons should be made a rule of any of his Majesty's courts of record, which the parties shall chuse. This includes choice of arbitrators and arbitration institutions, procedures, applicable law and arbitrators, and the goal to reflect customs, usage and good practice among the parties, see Barretts, at 16-17.

26 London Court of International Arbitration, http://en.wikipedia.org/wiki/ London_Court_of_International_ Arbitration

27 *See* Barretts, at 42-43, 71; Robert V. Massey, Jr., History of Arbitration and Grievance Arbitration in the United States, www.wvu.edu/~exten/depts/ilsr /arbitration_ history.pdf; E. Walter Van Valkenburg, *Inside the Litigious Society*, 85 Colombia L. R. 216 (Book review of Justice Without Law? by Jerold Auerbach. New York: Oxford University Press, 1983).

28 *See* Barretts, at 46.

29 He is the principal author of Declaration of Independence and the third president of United States. He represented the US in Paris for five years (1784-1789) that his duty covered also negotiations with Europeans for commercial treaties disputes in *id.* at 49.

to a common ground in order to reach an effective solution. Freedom of press, speech, religion, assembly, and petition, were the rights to be free of unreasonable search and seizure, cruel and unusual punishment, and compelled self-incrimination were the products of successful negotiations, which are declared separately as a right in the United States Bill of Rights. "The growth of rights throughout the American history is the key to the growth of ADR since the application of rights often gives rise to disputes to which ADR could be applied"[30].

The most significant appearance of ADR in the US was in the Will of George Washington[31] in 1799; "..My Will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants –each having the choice of one- and the third by those two. Which three men chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testators intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States".

In 1829, delegates of Philadelphia had an arbitration clause in their union constitution, which was the first labor management document that had an arbitration clause in the US.

In 1850, Abraham Lincoln had expressed explicitly in a law lecture how ADR techniques are important; "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser-in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man[32]".

Between 1861-1865, after the Declaration of Independence ADR was a great tool to ban slavery; however, negotiation attempts were failed to avoid the war between the coexistence of a slave-owning South and an increasingly anti-slavery North triggered the American Civil War. It was the best example of the need for mutual consent for ADR process to work. In order to end the Civil War, there were two negotiations; one was

30 *Id.* at 51.

31 *Id.* at 46.

32 George A. Mckeon, *Keeping Cases out of Court* (Article), Brief, Volume 18, Issue 4 (Summer 1989), at 11.

between General Ulysses S. Grant and General Robert E. Lee and the other was between General William Tecumseh Sherman and General Joseph E. Johnston. In addition to that, during reconstruction of the Union (1865-1877), General Oliver Howard systemized arbitration process to resolve disputes between former slaves and their former owners under Freedman's Bureau in 1866. There were 3 arbitrators that two of which were nominated by the parties and the third one by the Bureau. However, usually a white man was appointed by the Bureau for the former slave party because of the refusal of the appointed arbitrator by the former owner. Although it was complained that this process was not fair, it was the only chance for blacks to settle their disputes till 1886, when they could gain the right to be a witness in front of the courts.

After the end of Civil War, while the industry standards were developing, there was not enough labors' safety for physical, mental and social conditions[33]. Besides 12 million of immigrants did not have healthy and justified worker standards (1865-1900). Unions were established but could not have a long life to defend rights of labors. Until 1914, the labors could have dispute resolution only if the employer wanted to compromise with the union. However, occasionally the employers were not willing to agree. During the period of President Roosevelt, a commission, which aimed to resolve disputes between employers and labors, was built in order to listen to and learn from both sides how a peace could be reached. In addition to that, due to the necessity of coal, there were strikes against the coal mine owners by 140.000 workers (1902). Under the leadership of the President Roosevelt, a 10 percent wage increase and a few minor grievances were succeed but could not have a union recognition. This was a kind of mediation because there were no negotiations as the coal-mine owners refused to negotiate with the union representatives.

In West Virginia, the coal mine owners started to control every aspect of miners' lives that led the United Mine Workers Union to ask for safety, fair hours, equality, and compensation. However, the disputes caused the loss of innocent lives and property damages, known as West Virginia Coal Wars (1912-20). Henry D. Hatfield, governor of West Virginia, acted as a mediator like in an evaluative mediation. He wrote a recommendation for the settlement between the Union and the owners, which

33 Arthur Elliott Suffem, Conciliation and Arbitration in the Coal Industry of America (1915), at 25.

was accepted by all mine owners in the end. This suggested and finally accepted recommendation covered the right to have an honest weighmen and two thousand pounds to equal a ton, a fair price for a nine-hour workday, equal conduct between union members and semimonthly payments[34].

a. Railroads

During the Civil War, railroads became important for transportation, military needs and public control. In addition to that, pursuant to the end of the War, railroads preserved their necessity and became central for transportation, industry and trade, as well as being a backbone for the development of labor policy. Because there were increasing rail strikes towards the end of the nineteenth century. Moreover there was an uncertainty about who was liable for the loss caused by the delay due to the rail strikes[35]. After the announcement that there would be a second wage reduction in Pennsylvania Railroad in 1877; the biggest strike, which would change the route of the labor rights, was started in Baltimore and Ohio, and spread all around the country and finally ended in 1878, by a law providing voluntary but binding arbitration for labor disputes in Maryland. New Jersey, Pennsylvania, Ohio, Iowa, and Kansas also passed this law. It was New York and Massachusetts that established a permanent arbitration tribunal in 1886. In 1887, the Interstate Commerce Act was passed, which had a voluntary arbitration for railroad workers.

After another railroad strike in 1888, the first dispute resolution act, named as the Arbitration Act of 1888, was passed. It stipulated voluntary arbitration and the appointment of a commission to investigate the causes of related labor disputes. However, since it was not compulsory, it was far away from efficiency to settle the labor disputes. In 1898, in order to avoid inefficiency of the Arbitration Act of 1888, the Congress passed the Erdman Act. The Erdman Act authorized the chairman Interstate Commerce Commission and the commissioner of labor to mediate by the application of each party. If mediation failed, arbitration was recommended due to the fact that the awards were enforceable in court and binding for one year. The Erdman Act was only for training employees.

34 *See* Barretts, at 85-95.

35 James W. Ely, Jr., Railroads & American Law (2001), at 185.

In 1913, the Newlands Act of 1913 that established permanent mediation and arbitration boards, however arbitration was subject to voluntary agreements. The Newlands Act of 1913 was a more successful attempt than the Erdman Act.

During the World War I, President Wilson offered a proposal to the Congress, named later as the Adamson Act, which mandated an eight-hour-day for the operator of the trains. The best result was that overtime compensation could be calculated after eight, rather than ten hours of work in a day by this Act.

In Wilson v. New, the Supreme Court reached a decision that in an emergency arising from a nationwide dispute over wages, Congress was authorized "to compulsorily arbitrate the dispute between the parties by establishing….a legislative standard of wages….binding as a matter of law upon the parties[36]". This decision was the first time that the Supreme Court coerced the Congress to regulate the railroad labor disputes.

After the WWI, in 1920, the Congress passed Transportation Act of 1920, which established Railroad Labor Board as final arbitrator to resolve all disputes related to all interstate railroad workers. However, the Board could not enforce its decisions, and finally it was the reality that this Act was inadequate to handle the disputes as stated by the Republicans that collective bargaining, voluntary mediation and arbitration are the most important steps in maintaining peaceful labor relations and public opinion must be final arbitrator. Between 1924 and 1926, with the encouragement of the President Coolidge, rail managements and the unions negotiated to recommend their wills and experiences for legislation to establish a peaceful environment in labor relations to then Congress. The product of the negotiations, the bill was accepted by the Congress and the Railway Labor Act was passed in 1926. It was the first federal law that guaranteed the right of the workers to organize without employer interference[37]. The basic elements of the Act remains also today as the right to join a union, the independency of the unions, collective bargaining assisted by prompt mediation about the payments and working conditions, the opportunity for a series of thirty-day cooling of periods and a presi-

36 Wilson v. New, 243 US 332, 347 (1917).

37 One of the participants of the negotiations said that this bill was the product of a negotiation between employers and employees which is unparallel, he believed, in the history of American industrial relations, *see* Barretts, at 100.

dential fact-finding board or voluntary arbitration in case of a fail in mediation, the prohibition of strikes or lock outs during these procedures and the foundation of the National Mediation Board. In 1934 and 1936, there were several amendments in the Act in order to include airlines and the employees and also the authorization of National Mediation Board to establish rules and procedures to determine whether group of employees wanted to be represented in collective bargaining[38].

b. The US Department of Labor

The Bureau of Labor was established in 1885 under the Department of Interior in order to investigate the causes of labor disputes from an objective point of view and possibly arbitrate them according to the will of President Cleveland. Carrol D. Wright, who was a great statistician, was appointed as a presidential adviser of the Bureau, but was not involved directly in the resolution processes. The Bureau became an independent Department of Labor without the executive rank. It turned out as The Department of Commerce and Labor and survived between 1903 and 1913. In 1913, President Taft signed the bill for the foundation of the Department of Labor on his last day as a president[39]. In the words of the original act, the Department's purpose was "to foster, promote and develop the welfare of working people, to improve their working conditions, and to enhance their opportunities for profitable employment[40]".

President Wilson followed his promise to be friendly to the unions, and appointed William Bauchop Wilson as the secretary, who was a workingman, a union leader, and a congressman, who had an important role for the creation of the Department in its own history. The Act gave the secretary of labor "the power to act as mediator and appoint commissioners of conciliation in labor disputes whenever in his judgment the interests of industrial peace may require it to be done". Besides Wilson believed that no strike settlement would last unless it was accepted by both sides. He was in favor of voluntary mediation rather than compulsory arbitration. With his own words; "The Department neither dictates nor

38 *Supra* note 26, at 251-259; *see* Barretts, at 97-101.

39 Jonathan Grossman, The Department of Labor (1973), at 7.

40 It remains the same purpose today.

arbitrates; it negotiates and recommends". At the end of 1914, the Department had mediated thirty-three cases[41].

However, the Congress failed to provide sufficient funds for the continuity of the Department. For that reason, Wilson led for establishing US Conciliation Service (USCS) in 1917 providing a sufficient budget with its own conciliators[42]. The USCS had mediated 1217 cases.

In April 1917, the US entered into World War I with the need of men for the military while the number of immigrants was decreasing. It was time for cooperation and coordination. By the invitation of President Wilson, labor and industrial leaders leagued together in order to develop a labor code for duration of the War under National War Labor Board and this Magna Charta of Labor provided no strike and lockouts during the wartime and freedom for workers to join unions. The Board acted as a supreme court for labor relations and applied the rules of Magna Charta of Labor such as informal mediation and formal arbitration orders and reached success in ending strikes. Although usually the Board decisions are accepted by both sides, sometimes there could be exceptions that refused to follow the Board decisions. In such situations, the issues referred to President Wilson who strongly defended to use arm methods to resolve the disputes. The government carried on to improvements of the system to settle the disputes. In similar, for wage settings, long-shore labors, coal mining and shipbuildings, commissions were created in order to resolve disputes related to these issues. During President Roosevelt, a dispute settlement process clause required to include all government wartime contracts[43].

Following the end of the War, many individuals and groups had gained ADR experience for settling the disputes between employers and employees. Cooperation and coordination by mediation and arbitration between labor representatives and employers provided peaceful environment for labor disputes. However, the gained rights of labors and im-

41 *Supra* note 30, at 7.

42 In 1947, it continued to survive under the name of the Federal Mediation and Conciliation Service.

43 *Supra* note 30, at 14-21.

provements in resolution of labor disputes by ADR procedures fell back by the interwar years, the Great Depression and Roosevelt's New Deal[44].

4. 2. 1920-1945

It did not take long time for employers to give up the recognition of the newfound rights of labors after the end of War. Even there were more strikes than before. President Wilson organized another meeting for employers and unions for cooperation between them, however the employers refused to recognize the unions. This caused the effectiveness of the collective bargaining to be diminished.

The American Plan was the term for the policy of employers to refuse negotiation with the unions. This policy promoted union-free open shops and had a result of decreasing number of union membership from 5 million (1920) to 3.6 million (1923) as the application of ADR processes between employers and labors including the Great Depression term.

In 1925, the Federal Arbitration Act (FAA) was passed which provided for judicial facilitation of private dispute resolution through arbitration and applied both Federal courts and state courts. It was the proof of the government support for arbitration.

During the Great Depression, industrial nations and primary producers were truly badly affected. During the four-year period, Gross National Product fell by 30 percent, industrial production wasvirtually halved, farm prices fell by about 60 percent. The construction industry was badly hit and investment fell dramatically. Unemployment rose from 3 percent to around a quarter of the work force. The shock effects of the Depression caused to cuts in pays and all major sectors of society faced with changes.

Marriner S. Eccles who served as Franklin D. Roosevelt's Chairman of the Federal Reserve for fourteen years detailed what he believed caused the Depression in his memoirs as inequality of wealth and income, *Beckoning Frontiers* (New York, Alfred A. Knopf, 1951):

*"*As mass production has to be accompanied by mass consumption, mass consumption, in turn, implies a distribution of wealth -- not of existing wealth, but of wealth as it is currently produced -- to provide men with buying power equal to the amount of goods and services offered by the

[44] *See* Barretts, at 108-109.

nation s economic machinery. [Emphasis in original.] Instead of achieving that kind of distribution, a giant suction pump had by 1929-30 drawn into a few hands an increasing portion of currently produced wealth. This served them as capital accumulations. But by taking purchasing power out of the hands of mass consumers, the savers denied to themselves the kind of effective demand for their products that would justify a reinvestment of their capital accumulations in new plants. In consequence, as in a poker game where the chips were concentrated in fewer and fewer hands, the other fellows could stay in the game only by borrowing. When their credit ran out, the game stopped.

That is what happened to us in the twenties. We sustained high levels of employment in that period with the aid of an exceptional expansion of debt outside of the banking system. This debt was provided by the large growth of business savings as well as savings by individuals, particularly in the upper-income groups where taxes were relatively low. Private debt outside of the banking system increased about fifty per cent. This debt, which was at high interest rates, largely took the form of mortgage debt on housing, office, and hotel structures, consumer installment debt, brokers' loans, and foreign debt. The stimulation to spending by debt-creation of this sort was short-lived and could not be counted on to sustain high levels of employment for long periods of time. Had there been a better distribution of the current income from the national product -- in other words, had there been less savings by business and the higher-income groups and more income in the lower groups -- we should have had far greater stability in our economy. Had the six billion dollars, for instance, that were loaned by corporations and wealthy individuals for stock-market speculation been distributed to the public as lower prices or higher wages and with less profits to the corporations and the well-to-do, it would have prevented or greatly moderated the economic collapse that began at the end of 1929.

The time came when there were no more poker chips to be loaned on credit. Debtors thereupon were forced to curtail their consumption in an effort to create a margin that could be applied to the reduction of outstanding debts. This naturally reduced the demand for goods of all kinds and brought on what seemed to be overproduction, but was in reality under consumption when judged in terms of the real world instead of the money world. This, in turn, brought about a fall in prices and employment.

Unemployment further decreased the consumption of goods, which further increased unemployment, thus closing the circle in a continuing decline of prices. Earnings began to disappear, requiring economies of all kinds in the wages, salaries, and time of those employed. And thus again the vicious circle of deflation was closed until one third of the entire working population was unemployed, with our national income reduced by fifty per cent, and with the aggregate debt burden greater than ever before, not in dollars, but measured by current values and income that represented the ability to pay. Fixed charges, such as taxes, railroad and other utility rates, insurance and interest charges, clung close to the 1929 level and required such a portion of the national income to meet them that the amount left for consumption of goods was not sufficient to support the population.

This then, was my reading of what brought on the depression"[45].

The US could not recover the Great Depression's bad effects till the World War II. Despite failing to solve its economic problems till the WWII, the American government succeeded in diverting political difficulties with the New Deal by reformist President Roosevelt in 1933. The New Deal aimed to awake the sleeping economy by reforming the financial system including the banks and Wall Street. For labor-management relations the New Deal ensured to reduce unemployment by ensuring fair price and working hours, and eliminating unfair trade practices, setting minimum prices and wages and competitive conditions in all industries, encouraging unions that would raise wages to increase the purchasing power of the working class, forcing businesses to work with government to set price codes, creating the NRA board to set labor codes and standards by the enactment of National Industrial Recovery Act of 1933, named as the NRA. The NRA recognized the right of the workers to organize and bargain collectively through representatives of their own choice. Between 1933 and 1935, nonstatutory Labor Board, which was established under NRA, assisted parties to adapt new regulations and laws in informal negotiations and meditations. However, the NRA was insufficient for the concrete issues like how much support the government provide for collective bargaining. Since only the voluntary agree-

[45] The Great Depression, http://en.wikipedia.org/wiki/Great_Depression.

ments were in the scope of the Act, it was inefficient to prevent or stop the strikes or unwilling employers to bargain with unions[46].

In 1935, the National Labor Relations Act (Wagner Act) diverted the direction of NRA about labor management that legalized making unions and its activities. Its aim was to protect the rights of the workers in the private sector, except agricultural employees, domestic employees, supervisors, independent contractors, some close relatives of individual employers, and the workers included in the Railway Labor Act, to organize labor unions, to engage in collective bargaining, and to take part in strikes and other forms of concerted activity in support of their demands. It established negotiations and mediations for resolving disputes between employers and unions. It prohibited the employers for firing labors for union activities or refusing to bargain with the unions.

The Act prohibited discrimination against a union member and refusals to bargain with a union that had the support of the majority of the employees. The Act established the National Labor Relations Board (NLRB), with the power to investigate and decide on unfair labor practices and union representation problems. Contrary to the Labor Board of NRA, the NLRB was given more extensive powers because of the recognition of the National Labor Relations Act by the Supreme Court as constitutional in 1937 in *National Labor Relations Labor Board v. Jones & Laughlin Steel Corporation*. The NLRB required the good faith in bargaining process for employers rather than the compulsory agreement to any union proposal. The Act included only wages, hours and working conditions, since if a union bargained on a new issue and the employer refused for the reason that it was outside of the scope of the Act, the NLRB decided whether the refusal constituted an unfair labor practice or not. The National Labor Relations Act was a great movement for the relations between employers and unions. It improved the processes of collective bargaining negotiations and mediations[47].

4.3. 1937-1960

In World War II (WWII), because of the increasing need of production and men power, the National Defense Mediation Board was established to resolve disputes that could not be settled by the USCS while the NLRB

46 *Supra* note 30, at 37.

47 *See* Barretts, at 117-120.

and the USCS continued to play important roles in labor-management dispute resolution during the wartime[48]. In order to have more effective and speedy results the War Labor Board was established as replacement of the National Defense Mediation Board with the coordination of both unions and employers, while the USCS survived. The War Labor Board was under the Department of Labor but had an independent organization. It required that labor and management had to place arbitration clauses into collective bargaining agreements as a final and binding decision to meet the wartime production needs of the country[49].

During the War, the price and wage controls led the disputes between labor and management minimum by the Office of Price Administration and the Office of Wage Stabilization. However, the Japanese surrender induced the price and wage controls to be fluctuated. While the unions considered collective bargaining with a broad scope of wide-ranging negotiations between managements and them without government interfere, many employers perceived a limited scope for negotiations without the government interfere. Disharmony between the unions and management for collective bargaining as well as instability of the price-wage controls postponed the transition back to the peacetime economy.

After the end of the War, the labors "were in no mood to slide back from their earning levels of the war years, while management, under controlled prices, was equally determined to hold the line on wages"[50]. Therefore wage and fridge benefits disputes constituted the basic reason for strikes. President Truman called a conference for cooperation between unions and employers in 1945. At the end of the conference; trainings for mediators, improvements for mediation techniques, reorganization and improvement of the USCS were recommended. However, because of the absence of sufficient budget and support of the Congress, the recommendations were unable to be actualized[51].

48 *Supra* note 30, at 53.

49 Robert V. Massey, Jr., History of Arbitration and Grievance Arbitration in the United States, www.wvu.edu/~exten/depts/ilsr/arbitration_history.pdf.

50 *Supra* note 30, at 63. At the end of the War, there were several experienced mediators and arbitrators in the WLB and the USCS as well as many experienced negotiators in union and management departments.

51 *Supra* note 30, at 63.

Between 1945 and 1946 many strikes in the area of steel, automobiles, meatpacking, coal and electrical manufacturing were occurred. In order to reach a peaceful environment and balance the relations between the unions and management, the Congress decided to reform the labor regulations. On the first day, seventeen bills were offered to amend the Wagner Act. Finally, the Taft-Hartley Act of 1947 (the Labor-Management Relations Act)[52] was passed with new reformist regulations. The new Act[53];

- stated unfair practices by labor;
- prohibited unions to lean on an employer that the union had no dispute in order to affect another employer who had a dispute with the union;
- required collective bargaining and mediation to settle the disputes between labors and employers; and
- replaced the UCSC with Federal Mediation and Conciliation Service (FMCS) independent from the Department of Labor in 1947[54]. All staffs, officers and records of the UCSC were transferred to the FMCS including commissioners of conciliation.
- required the applying party to give notice to both the other side and the FMCS in order to be informed about the problem before renegotiation of an expiring agreement.
- required impartial and neutral arbitrators therefore there was no staff of arbitrators but had a list of offered arbitrators.

Literally in section 201 (b), the Act indicated the national policy as to advance collective bargaining by providing government assistance for conciliation, mediation, and voluntary arbitration. In section 203 (c), alternative dispute resolution procedures were recommended when the FMCS failed to resolve the disputes. Section 203 (d) was about grievance disputes; *..final adjustment by a method agreed upon by the parties is the*

52 It was the basic regulation remains today for the unions.

53 *Supra* note 30, at 62-69.

54 The Author of the Act, Senator Taft pointed that if the new mediation service (FMCS) was under the Department of Labor, there would be mistrust for a mediation service, which had to be impartial. He emphasized that by an independent agency there could be a fair balance between the parties for a mediation session, *see* Barretts, at 131.

desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. In section 301, the federal courts were authorized to enforce collective bargaining agreements[55], while the Wagner Act had had no reference for the enforcement of collective bargaining agreements. In the Steel Trilogy cases[56], the collective bargaining agreements stipulated arbitration for the violations, or grievances, of the contracts. However, the employers preferred to file cases in front of the courts instead of submission of disputes to arbitration. The Courts refused to do so in all three cases reasoning for proarbitration that (in *Warrior and Gulf* case)[57]; *an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.* In other words, the courts started to enforce the agreements without examining merits of the cases. Since they had authority to order specific performance of the arbitration provisions in the collective bargaining agreements[58].

4.4. 1960s

258 With great developments in social rights, political movements and industrial improvements, the scope of the capacity of employment was widened which induced the establishment of many unions in order to organize teachers, police, firefighters etc. However, federal employees were still lack of many new founded rights. In 1962, with the Executive Order 10988 by President Kennedy, it was the first time that federal agencies were required to bargain with their employees' unions. However the scope of bargaining was still limited for federal employers since agencies preserved their discretion power to determine the amount of official time union representatives would receive, besides agencies could command

55 Laura J. Cooper & Dennis R. Nolan & Richard A. Bales, ADR in the Workplace (2005), at 11.

56 United Steelworhers of America v. American Manufacturing Co., 363 US 574, 80 S Ct. 1343, 4 L. Ed. 2d 1403 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 US 574, 80 S Ct. 1347, 4 L Ed 2d 1409 (1960); and United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 US 593, 80 S Ct. 1358, 4 L Ed. 2d 1424 (1960).

57 *Supra* note 46, at 11-14.

58 *See* Barretts, at 139; Arbitration Now Opportunities For Fairness, Process, Renewal and Invigoration (Paul H. Haagen ed., 1999), at 34.

that negotiations be conducted during the non-duty hours of the union representatives[59]. Moreover, the Order was failed to provide to name which dispute resolution procedures were applied. On the other hand, it was a big step for the federal employees that the prohibition on strike of federal employees by the Taft-Hartley's Act was overcome and led to extend unionization to all public employees.

In 1969, President Nixon replaced the Executive Order 10988 with the Executive Order 11491. The essence of the new Order was the condition to meet in good faith with respect to personnel policies and practices and matters affecting working conditions for both representatives of an agency and of labor organization. The end result was a collective bargaining agreement between the agency and the labor organization[60]. The new Order expanded the scope of bargaining for employees, authorized the FMCS to provide mediation, created a new council, the Federal Labor Relation Council (FLRC), to create a new policy and direct it, supposed the award binding unless successfully appealed to the FLRC[61].

In 1964, the Civil Rights Act aimed to end discrimination against race, color, religion, national origin and outlawed segregation in the US schools and public places. It established the Community Relations Service to mediate community disputes rising because of race, color, religion, or national origin[62].

In 1967, the Taylor Act of 1967, which was compose of the rights and limitations of public employees' unions in New York, was enacted under Article 14 of New York State Civil Service Law. The Taylor Act recognized the public employees the right to organize and elect their union representatives and also determined the boundaries for public employers in negotiating and entering into agreements with these public unions. The most impressive improvement was the prohibition of strike for the public

59 Executive Order 10988 Law & Legal Definition, http://definitions.uslegal.com/e/executive-order-10988.

60 *See* ttp://stinet.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA057286.

61 *See* Barretts, at 144-145.

62 *Id,* at 149, Stephen B.`Goldberg & Eric D. Green & Frank E. Sander, Dispute Resolution (1985), at 4.

employees and the punishment for the strikers that the fine would be twice the employee's salary for each day the strike lasts[63].

In 1968, in order to prevent two separate and unequal societies, the National Center for Dispute Settlement and the Center for Mediation and Conflict Resolution were established in New York[64].

4.5. 1970s

In 1970s, since many dispute resolutions were related to labor-management disputes, the mediators and arbitrators could not imagine new dispute areas for mediation or arbitration. Opening dispute resolution procedures to the new areas, *nonlabor disputes* or *new dispute areas* were commonly used instead of the term of ADR.

Given new rights to Native Americans, women, environmentalists, prisoners opened new areas of ADR; environmental ADR, Prisoner Grievance Arbitration, Agricultural ADR, Age Discrimination Mediation, Native American Mediation. Besides the existing ADR procedures and organizations were upgraded and developed like Relationships by Objectives (developed by the FMCS) which combined organizational development with mediation and training skills to help a labor-management group to examine their relationship and develop plans and commitment for improvements[65].

In addition to that, there was a kind of explosion of new organizations in ADR field[66]. The Society of Professionals in Dispute Resolution, which was a professional organization of labor-management mediators, was founded in 1972. The SPIDR was the origin of the idea that ADR must not be only means for labor-management disputes, but also be open to the new dispute areas such as marriage and family, and commerce. The SPIDR opened the doors of ADR to women, minorities and younger mediators.

Moreover, bar associations, law schools, universities, states and non-profit organizations started to show the applicability and availability of

63 *Id.* at 147-148.

64 *Id.* at 151-158.

65 *Id.* at 159-176.

66 Margaret S. Herrman. *ADR In Context: Linking Our Past, Present, and a Possible Future*. Journal of Contemporary Legal Issues, Volume 3, (1989-1990), at 38.

ADR procedures to the civil disputes in late 1970s. Particularly mediation was a common used procedure of ADR in private labor management disputes, since negotiators did not want an outsider to decide on an inside issue. However, after the strike of steelworkers in 1973, during 1974, all disputes which could not be settled by mediation, were submitted to arbitration as a binding and final decision[67].

In 1975, the first Citizen Dispute Settlement Center was established in Florida under the state court[68].

In 1977, the Special Committee on the Resolution of Minor Disputes was established by American Bar Association (ABA) for the resolution of minor civil and criminal matters and placed attention on the full range of programs dealing with such disputes, including the justice system-based, community-based, and composite programs. As the committee's work widened to major civil cases and negotiated rulemaking with Federal agencies[69]; in 1993, the Special Committee was replaced with the Section of Dispute Resolution, which provided its members and the public with creative leadership in the dispute resolution field by fostering diversity, developing and offering educational programs, providing technical assistance, and producing publications that promote problem-solving and excellence in the provision of dispute resolution services, by ABA. It is now one of the fastest growing sections of the ABA with six thousand members[70].

4.6. 1980s

There were ADR improvements in labor management relations as well as organizations which support ADR. One of the outstanding reform was interest based negotiation. In traditional bargaining, the parties had stable positions that they had specific offers on wages, benefits, and working conditions and made offers and counter offers until reaching a settlement[71]. Usually it did not satisfy the parties' interests sufficiently. On the

67 *Id.* at 183-184.

68 Thomas J. Stipanowich, ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution" (2004), at 849.

69 Daniel McGillis, Community Mediation Programs: Developments and Challenges (1997), at 36.

70 http://www.abanet.org/dispute/home.html

71 *See* Barretts, at 205.

other hand, interest based negotiations (also named as integrative bargaining, mutual gain bargaining, in interest based problem solving, win-win bargaining, principle-based negotiations, open bargaining), the parties cooperated to find a "win-win" solution to their dispute. This new type of negotiation focused on developing mutually beneficial agreements based on the interests (the needs, concerns, fears[72]) of the disputants. With this new type, both side left their positions for *take it or leave it* or *take it or we will strike*. In addition to that, the P.A.S.T. model of interest-based negotiation was developed with a two-day training program for both parties to educate themselves for interest-based negotiations. The P.A.S.T. consisted of principles, assumptions, tools, techniques and steps. This model helped the parties choose the best option to have a win-win outcome[73].

Moreover, interest-based negotiation expanded not just to labor management relations but to academic departments, corporations in order to reach a win-win outcome, which satisfied both sides. 1980s were a jump for traditional ADR to interest-based approach. New type of ADR focused on to reach a satisfaction outcome for both sides, a win-win outcome for all, not declaring a loser and a winner like the traditional court style. This interest-based approach aimed to invent options for mutual gain by[74]:

- Do not assume there is a fixed pie and only one answer,
- Do not think solving the other side's problem is their problem, help them,

72 The most common example is that two girls have a dispute on an apple. Their mother serves as the neutral of the dispute and based on their positions, cuts the apple in half and gives each girl one half. The outcome seems compromise, however if the mother had asked each of the girls why they wanted the apple, what their interests were; there could have been a different, win-win outcome. This is because one girl wanted to eat the meat of the apple, but the other just wanted the peel to use in baking some cookies. If their mother had known their interests, they could have both gotten all of what they wanted, rather than just half.

73 *See* Barretts, at 205-208; Russel Korobkin, Negotiation Theory and Strategy (2002), at 111-128; Roger Fisher & William Ury & Bruce Patton, Getting to Yes (1991), at 56-80; Brad Spangler, Integrative or Interest-Based Bargaining (2003), www. beyondintractability.org/essay/interest-based_bargaining/.

74 Roger Fisher & William Ury & Bruce Patton, Getting to Yes (1991), at 56-80.

- Separate inventing from deciding: brainstorming process,
- Broaden your options,
- Look through the eyes of different experts,
- Invent agreement of different strengths,
- Identify shared interests,
- Ask for their preferences, and
- Make their decision easy.

Since in any negotiation, there would be realities that will be hard to change. The negotiations must meet two objectives; to protect the party against making an agreement that the party should reject, and to help the party to make the most of assets that he has so that any agreement he reaches will satisfy his interests as well as possible. BATNA, best alternative to a negotiated agreement, which is a measure for agreements that will protect the party against both accepting the agreement that the party must reject in fact, and rejecting an agreement that the party must accept in fact, is developed as an alternative to have a better result in negotiations. This approach presented it is better to be open and honest while negotiating[75].

In 1980s, ADR started to be offered as a law course in law schools. In 1981, the first educational program for offering degrees and certificates in dispute resolution was opened in George Mason University.

In 1981 also Academy for Family Mediators was established as a non-profit organization. It still exists and preserves the largest family mediation (property distribution, alimony, child support, custody) organization in US[76]. Even the courts started to order couples to mediate to find an outcome that both sides are satisfied.

In 1982, the National Conference on Peacemaking and Conflict Resolution (NCPCR) was founded in 1982 to provide a forum where individuals

75 *Id.* at 97-106.

76 Academy of Family Mediators, www.mediate.com/people/personprofile.cfm?auid =724.

working on and researching conflict resolution could gather to exchange ideas and learn[77].

In 1983, the Program on Negotiation (PON) was officially recognized in Harvard University, which aimed to initiate collaboration in research and teaching of all phrases of conflict resolution. It consisted of five major programs; the Dispute Resolution Program, the Negotiations Project, the Negotiations Roundtable Dialogues, the Nuclear Negotiation Project, The Public Dispute Program[78].

In 1983, the National Institute for Dispute Resolution (NIDR) was established in order to find funds for the promotion of ADR. The initial foundations came from Ford, Hewlett, MacArthur, AT&T, and Prudential[79].

In 1983, around thirty eight law schools offered courses in interviewing, counseling and negotiation. Today, more than ninety four percent of law schools offer courses in dispute resolutions[80].

In 1984, Conflict Resolution Education Network (CREnet) was established, which was defined as "a spectrum of processes that utilize communication skills and creative and analytic thinking to prevent, manage, and peacefully resolve conflict". CREnet aims that 12,000 public schools including elementary, middle, and high schools in the US have some form conflict resolution education[81]. CREnet started with the establishment of the National Association for Mediation in Education (NAME). NAME subsequently merged with the National Institute for Dispute Resolution (NIDR) and changed its name as CREnet. CREnet aims to instruct students more constructive means of handling conflict including the staff, teacher, and parent education and activity in order to help address conflicts that may occur between staff, parent, teacher, and admin-

77 *See* http://www.apeacemaker.net/, Margaret S. Herrman. *ADR In Context: Linking Our Past, Present, and a Possible Future*. Journal of Contemporary Legal Issues, Volume 3, (1989-1990), at 38.

78 *See* Barretts, at 213-214.

79 *Id.* at 222.

80 Amber McKinney, *The ACLU and the Propriety of Dıspute Resolution in Civil Rights Controversies*, 6 Pepp. Dispute L.J. (2006), at 114.

81 Resa L. Harris, *ADR Update,* Judges' Journal, Volume 34, Issue 1 (Winter 1995), at 24.

istration groups[82]. In 1985, the NIDR gave matching grants to five states including New Jersey, Massachusetts, Minnesota, Hawaii, and Wisconsin, as the states were so slow to promote ADR[83].

In 1985, the Washington Superior Court established the Multidoor Dispute Resolution Division (Multi-Door) in order to help parties to settle disputes through mediation and other types of appropriate dispute resolution (ADR), including arbitration, case evaluation and conciliation. The Multi-Door aims to provide citizens with easy access to justice, reduce delay, and provide links to related services, making more options available through which disputes can be resolved. The Multi-Door assists parties to reach agreements that meet their interests, preserve relationships, and save time and money. It includes Family Mediation Program, Civil Dispute Resolution Program, Community Family Information and Referral Center, Child Protection Mediation Pilot Program, tax and complex civil cases[84].

In 1989, it was the first time that a dispute resolution program offered a Ph. D. in an academic institute, the Institute for Conflict Analysis and Resolution (ICAR), in George Mason University. The program was composed of connection between globalization and conflict, religion and conflict, dynamics of change in conflict, identity issues in conflict, and reflective practice. The Institute offers research, teaching, publication and opportunities to get experience in conflict resolution[85].

4.7. 1990s

In 1990s, the widespread adoption of personal computers and the Internet increased economic productivity, while high levels of private investment in equity markets increased personal wealth among many people including the Americans[86], even Online ADR was becoming common with wi-

82 Tricia S. Jones, Conflict Resolution Education: Goals, Models, Benefits, and Implementation, http://www.directionservice.org/cadre/cr-education.cfm

83 *See* Barretts, at 236.

84 Multi-Door Dispute Resolution Division, www.dccourts.gov/dccourts/superior/ulti/ index.jsp.

85 Institute for Conflict Analysis & Resolution, http://icar.gmu.edu/ICAR_About.html.

86 1990s, http://en.wikipedia.org/wiki/1990s.

dened usage of computers[87]. ADR found its own way to leak in everyday life and spread beyond the US borders.

In 1944, the Bureau of Labor Statistics showed that 73% of all labor contracts in US contained arbitration clause. Today, 98% of all collective bargaining agreements contain arbitration clauses in US[88].

In 1970, the United States joined the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In 1993 in Middle East and in 1995 in Bosnia Herzegovina, ADR was used a tool for compromise.

In 1997, according to a survey among Fortune 1,000 corporations by Cornell University; *ADR processes are well established in corporate America, widespread in all industries and for nearly all types of disputes…[and] ADR practice is not haphazard or incidental but rather seems to be integral to a systematic, long-term change in the way corporations resolve disputes*[89].

In the US, all three branches of the Federal government, legislative, administrative, and judiciary, continued to advance ADR by regulations.

a. Legislative Branch; In 1990, the Administrative Dispute Resolution Act (ADRA) and the Negotiated Rulemaking Act (NRA) enacted to promote ADR. The ADRA strengthened the federal agencies to use ADR in most of the administrative disputes. The NRA ordered regularity agencies to use ADR in development of administrative rules. It was a product of the Administrative Conference of the United States (ACUS). The ADRA and NRA were reenacted in 1996. In 1997, the Individuals with Disabilities Education Act (IDEA) ordered that local school borders must offer mediation to resolve disputes with parents. Disputes over identification, evaluation, educational placement, or free and appropriate public education for disabled children must be mediated if their parents choose. Even though mediation is voluntary for the parents, the awards are binding[90].

b. Administrative Branch; During the President Clinton's term, all department lawyers had to be trained in ADR and had to write the reasons

87 *See* Barretts, at 242.

88 *Supra* note 40.

89 *Supra* note 58, at 879.

90 *See* Barretts, at 246.

of their choice if they went to trial. In 1993, the Executive Order 12871 of President Clinton, the coordination between Federal agencies and their unionized employees and the use of interest-based negotiations between Federal agencies and unions were promoted. However, President Bush revoked this Order. ACUS continued to promote the use of ADR until it lost its budget in 1996[91].

c. Judiciary Branch; In 1990, with the order of the Civil Justice Reform Act, which encourage all Federal district courts to develop programs to utilize ADR procedures, ADR has a great role in the decreasing number of trials. In 1991, President Bush issued an executive order requiring that executive branch agencies explore settlement possibilities and consider ADR before filing a suit[92]. In 1998, the Alternative Dispute Resolution Act[93] empowered and required all district courts to design their own ADR programs and to refer cases to mediation, mini-trials and summary jury trials[94]. In FY2000[95], approximately in 24.000 cases had an ADR form in district courts[96].

At the end of 1990s, Alternative Dispute Resolutions gained its own name.

4.8. 2000-..

The 21st century opened with a deep impact on the United States because of the September 11, 2001 attacks. Besides wars in Afghanistan and Iraq started. However, ADR gains and preserves its importance by the need of it in such kinds of darkest moments.

Although the number of civil and criminal court cases continues to rise, the number of the trials are decreasing when compared to past 40 years because of the replacement of litigation for ADR procedures. For example, in 1962, %11.5 of federal criminal cases went to trial. In 2002, it de-

91 *Id.* at 247-248.

92 Robert Benham, Ansley Boyd Barton, *Alternative Dispute Resolution: Ancient Models Provide Modern Inspiration*, 12 Georgia State University L. R. 634.

93 Pub. L. No. 105-315, 112 Stat. (codified at 28 U.S.C. 651-658 (Supp. V 2000).

94 Caroline Harris Crowne, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. Law Review (2001), at 1768-1769.

95 The fiscal report of American goverment in 2000.

96 *Supra* note 58, at 849.

creased to %1.8 according to one of ABA's research. From 1980 to 2002, the Federal criminal trial rate fell %23 to %4.8[97].

The movements of ADR from the beginning to the end show explicitly how it is important and how much the global world needs it.

5. Conclusion

With the development of new sectors, ADR became an increasing dispute settlement mechanism both in national and international disputes in the US. Particularly while mediation is being used in cross border transactions and intellectual property disputes; in standardized individual employment and consumer contracts binding arbitration is commonly used in US. Nearly half of (47 %) of American Bar Association (ABA) Tort Trial Insurance Practice Section (TIPS) respondents resolved more than five cases through ADR in 2005, with (8 %) resolving over 25 cases through ADR[98]. More than 40 % ABA TIPS respondents resolved six or more cases through mediation in 2005[99].

The reason why ADR standouts in US is the opportunity to settle disputes in less cost and time than litigation. A survey of ABA proves that 78 % of those surveyed believe that arbitration is generally timelier than litigation, 56 % feel it is more cost effective[100]. According to another survey prepared by National Center for State Courts, employment claims take 650 to 720 days to be resolved in court while the median time to resolve an employee dispute by arbitration is 104 days[101]. According to another survey; "Justice Department lawyers estimated average savings of approximately 89 hours of staff and attorney time through the use of ADR in a manner. The lawyers also reported ADR-related savings of $10.700

97 Frank O. Bowman, American Buffalo: Vanishing Acquittals and The Gradual Extinction of the Federal Criminal Trial Lawyer, www.pennumbra.com/responses/11-2007/Bowman.pdf.

98 *ADR Preference and Usage Survey* in Collaboration with Tort Trial and Insurance Practice Section of the American Bar Association prepared by National Arbitration Forum, at 6, 2006.

99 *Supra* note 96, at 12.

100 *Survey on Arbitration*, by ABA Section of Litigation Task Force on ADR Effectiveness (2003), at 4.

101 National Center for State Courts (1999-2000) www.nsconline.org/D_Research/csp/ 1999-2000_Tort-Contract_Section.pdf

in litigation expenses in each case[102]". oın addition to that given the choice of how they would like to settle a serious dispute with a company, voters overwhelmingly choose arbitration (82 %) over litigation (15 %) according to a survey of Institute for Legal Reform[103] [104].

Unfortunately, there is not a transfer of information parallel to the improvement of ADR. Even "policy matters in private sector and corporations in the private sector have been making decisions about how to use ADR on the basis of very limited information[105]" while "nearly 90 % of ABA TIPS respondents believe that their clients' interests are sometimes best served by offering ADR solutions. More than half of respondents also believe that (1) their practice will include offering ADR solutions in the future; (2) offering ADR solutions is an ethical obligation as a practitioner; and (3) ADR use will increase in the future[106]". Besides "most ABA TIPS respondents want additional information about ADR including: empirical studies comparing litigation to ADR; and learning about the laws governing mediation and arbitration. More than one in three ABA TIPS respondents would value opportunities to learn more about the distinctions and implications of the rules and panels of national ADR providers and effective drafting techniques[107]". Therefore there must be more detailed surveys and created written and open-public resources in order to improve and provide assistance for ADR.

Finally, the basic reason why ADR has an increasing trend is the discovery of the understanding of developed civilizations that human being can

102 *Supra* note 2, at 867.

103 Institute for Legal Reform, *Key Findings From a National Survey of Likely Voters*, April 2008,www.instituteforlegalreform/component/ilr_docs/29/issue/ADR/STU.html

104 On the other hand, to be objective, it must be stated that in disputes that are not international in nature, and when given a choice, US companies strongly prefer litigation (% 55), while UK companies prefer arbitration (% 51) according to *Fulbright-Jaworski 6th Litigation Trends Survey Report (2009): Expect Increase in Commercial International Arbitration*, www.fulbright.com

105 David B. Lipsky & Ronald L. Seeber, the Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by US Corporations (1998), at 5; *id.* at 846.

106 *Supra* note 96, at 7.

107 *Supra* note 96, at 9.

bargain and negotiate without losing but leaving something on the table in order to reach a win-win solution.

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Alternative Dispute Resolution (ADR) in the common law tradition has its origins rooted in English legal development. As early as the Norman Conquest, legal charters and documents indicate that English citizenry instituted actions concerning private wrongs, officiated by highly respected male members of a community, in informal, quasi-adjudicatory settings.Â While ADR as a system has gone through a number of iterations in the United States, the ultimate purpose of the many types of ADR remains similar to that of the early common law equivalentsâ€”to provide parties with a satisfactory resolution of a conflict short of formal court proceedings. It is for this purpose that ADR continues to be an important and popular option for individuals and businesses in the United States. NOTES. The History of Alternative Dispute Resolution in the United States. Since colonial times, religious groups, voluntary associations and other small sub-. communities have eschewed the formal judicial system and established their own dispute. resolution mechanisms to resolve disputes between members. However, the recent popularity. and proliferation of alternative dispute resolution is to a large extent a response to widespread. dissatisfaction with the civil justice system. Since the 1970s, there has been widespread public. talk of a crisis in the civil justice system, a crisis caused by excess