

USA

Second Study Commission - Civil Law and Procedure

1. What alternative means are used in your legal system for resolving civil law disputes outside normal court procedures?

- Mediation (a process in which the parties engage a mediator or conciliator to encourage and assist them towards agreeing [on] a solution)
- Arbitration (a process in which the parties agree to submit their dispute to a binding decision by an arbiter)
- Non-binding arbitration (a process in which the parties obtain a decision on their dispute but which is non-binding and does not prevent litigation)
- Other methods (please describe)

There are a variety of alternative means used in the United States for resolving disputes outside normal court procedures. Mediation, arbitration, non-binding arbitration, and other methods are available. Often, a judge will request that the parties to a controversy attempt to settle their claim by using one of these alternative methods. As discussed below, the court has extensive alternative dispute resolution resources. See <http://www.nyed.uscourts.gov/adr/>.

2. (a). Are any of the alternative means used in your country subject to special regulation by statutory provisions?

Yes, for example, the Eastern District of New York is one of ten districts with a mandatory Court-Annexed Arbitration program. The Eastern District of New York program was established in January, 1986, when the Court adopted Local Arbitration Rule 83.10.

The Clerk's Office designates and processes for compulsory Court-Annexed Arbitration all civil cases (excluding Social Security cases, tax matters, prisoners' Civil Rights cases and any action based on an alleged violation of a right secured by the Constitution of the United States or if jurisdiction is based in whole or in part on Title 28 U.S.C. § 1343) wherein money damages only are being sought in an amount not in excess of \$150,000 exclusive of interest and costs.

The cases referred to Court-Annexed Arbitration are heard, usually within six months of the filing of the answer, by one qualified arbitrator, unless one or more parties request a panel of three. Attendance at the arbitration hearing and the production of documents may be compelled by subpoena. Testimony is given under oath and witnesses may be cross-examined. The Federal Rules of Evidence serve as guidelines but are not rigidly enforced. A party may arrange to have the proceedings recorded and transcribed at the party's own expense.

(b). Does a mediator or an arbiter require to have a particular qualification or to have undergone professional training?

Yes, for example in the Eastern District of New York, “[a]n individual may be certified to serve as an arbitrator if he or she: (A) has been for at least five years a member of the bar of the highest court of a state or a District of Columbia, (B) is admitted to practice before this court, and (C) is determined by the certifying judge to be competent to perform the duties of an arbitrator.” Similar rules apply for a mediator. See Local Civil Rules 83.10, 83.11.

- (c). If a mediator requires to undergo training, who provides such training?

The following text is from the New York State Dispute Resolution Center one of many such organizations who are involved with ADR:

To regulate the practice of mediation within court annexed programs, several states (i.e. Florida, Ohio, Georgia and others) have specified various levels of education, training and experience that mediator's must demonstrate before being allowed to mediate cases referred by the courts. These qualifications vary state to state. In New York State, the Office of Court Administration (OCA) has set minimal levels of training and experience that must be met before a mediator can participate in the Community Dispute Resolutions program. Some New York mediators mistakenly perceive that they are "certified" once they satisfy these training and experience requirements. New York State currently has no system for certifying or licensing mediators. People completing these requirements receive a certificate of completion, which is not certification, but qualifies them to mediate within the community dispute centers programs. Given the minimal requirements described by OCA one could make the argument that these requirements define an "apprenticeship" level of mediator skill. Currently, there is no statewide vehicle to recognize more experienced mediation practice.

- (d). Is there a professional organization of mediators which lays down rules of professional conduct?

There are many such organizations.

- 3 (a). Insofar as alternative dispute resolution procedures are available and are in use in your country, what are the principal areas of law (for example family law, building or construction law, medical negligence claims, consumer cases, etc) in which disputes are settled by the alternative procedures?

There is no particular area of law where the procedures are used more than some other area of law. However, in the Eastern District of New York when the amount in controversy is less than \$150,000 the matter must proceed using alternative dispute resolution methods.

- (b). Are there any types of civil law disputes which cannot be resolved by such alternative means but must be decided by a court?

None.

- 4 (a). Is any publically funded system of mediation available in your country? In

particular, is there any mediation service annexed or attached to the courts?

Yes, as already discussed the courts fund the alternative methods.

- (b). If so, for what types of civil law disputes is publically funded mediation available?

All matters can utilize the publically funded alternative methods.

- 5 (a). To what extent, and by what means, are the courts in your system able to encourage or to require parties to attempt mediation or some other form of alternative dispute resolution either as a preliminary to commencing any litigation or in the course of ordinary court proceedings?

The courts have the ability to encourage the parties to attempt alternative dispute resolution methods. It is almost always in the best interests of the parties to attempt an alternative resolution because it will be less expensive and resolved more expeditiously.

- (b). Is the court administration able to assist litigants, or potential litigants, in using alternative dispute resolution procedures by, for example, explaining the various possibilities of alternative dispute resolution or providing information about mediators or arbiters?

Many of the Federal Courts have staff attorneys who should be able to advise litigants, or potential litigants as to the availability of alternative dispute resolution methods. This is particularly true with regard to pro se litigants who do not have any formal legal training.

6. (a) Has the use of alternative dispute resolution procedures in your country been increasing in recent years?

Without any empirical support, it is believed that the use of alternative methods has increased and will continue to increase.

- (b) If so;-(I) are there any particular reasons for the increase in use of alternative dispute resolution procedures?

The increase in the use of alternative dispute resolution is a function of the heavy case loads of the United States Courts. Therefore, the parties may look to alternative methods to have their case heard in a quicker manner and reduce the tremendous costs of litigation.

- (ii) has the increase in use sufficiently reduced the burden of work on the courts to allow the courts to improve the delivery of justice?

It should go without saying that each case that is handled through an alternative method allows a court to handle an additional case.

- (iii) has any alteration been made to the rules of procedure or the practices of the courts in response to the increase in the use of alternative dispute resolution?

No. Local Civil Rule 83.10 and 83.11 provide procedures for litigants who want review of their alternative method. Other than the methods listed there has been no other alterations in the rules.

7. In your system does the court provide any procedures in which a judge acts as a mediator?

There are no procedures in place, however, there are some judges who have retired from their judgeships who act as mediators.

8. Are there any proposals to change the law relating to alternative dispute resolution procedures?

None.