CHAPTER- 1
INTRODUCTION

“Sir, is our case weak? Do we lack evidence? I will bring any kind of evidence you want. Are you doubtful of success in the matter?” The client confronted the researcher with these questions when the researcher suggested accepting the settlement proposal given by the defendant in a money suit filed by the said client. The defendant was asking for concession on interest component. The client rejected the proposal of settlement. But the same proposal was accepted after about two years by the same client after realizing that it will take time to get dispute adjudicated through court. Such is the psyche of litigants in India.

In another instance, the researcher was called to preside as a judge in Lok Adalat\(^1\) in the Civil Court at Bhor in Pune District. In one of the matters placed before the panel, the advocate for a party came and told “Don’t take up the matter, it is not going to be settled, don’t waste your time”. The researcher calmed him down and asked him to complete his other work before other panels. The researcher called the plaintiff and defendant. The researcher enquired from plaintiff as to what his case is. He narrated his case in presence of the defendant, stating that the waste water from defendant’s house runs through his house causing nuisance to him. His prayer was for mandatory directions to the defendant to channel the waste water through pipeline and connect it to main drainage line of Municipal council. The researcher enquired with the defendant about the allegations made by the plaintiff. The defendant admitted to the allegations. Then the researcher asked him, “is it good thing”. “No” came the prompt reply from the defendant. “What should be done?” the researcher asked the defendant. “I will lay the drainage line. It is my waste water, I will do the needful”, replied the defendant. “What about expenses?”, the researcher made a query. “It is my waste water. I shall bear all the expenses” was the reply of the defendant. “How much time will you need?” the researcher asked. “8 days maximum”, the defendant replied. The compromise terms were written and were sent to Judge for confirmation. The judge asked the researcher how the matter is compromised, he seemed to be astonished. “Whenever the matter was called in the court, the parties quarreled tooth and nail,

\(^1\)“Lok Adalat” means a Lok Adalat organized under Chapter VI of Legal Services Authorities Act, 1987, s. 2(d).
jeopardizing the other matters in the court”, the Judge told the researcher. It appeared that the clash of egos between two litigants or may be between the two advocates was the root cause of the litigation.

Yet another instance is from recent times. The researcher was conducting the arbitration on a dispute arising out of an agreement for supply, manufacture and erection of Sugar factory. The claimant had claimed an amount of Rs. 60 Crores and the respondent filed counter claim of the like amount. The dispute started right from formation of the arbitral tribunal which was constituted on the intervention of the High Court under section 11 of the Arbitration and Conciliation Act, 1996. The hearing before the arbitral tribunal had not yet commenced and the parties had already spent substantial amount in lakhs of rupees in payment of fees to the arbitral tribunal, which consisted of three arbitrators. The researcher suggested parties to settle the dispute amicably. The main grievance of the claimant was that the machinery supplied by the respondent was not yielding the desired result. The researcher enquired with the claimant whether they were interested in getting the damages or the efficiency of the machinery improved. Respondent client was confident that the machinery supplied by them will give necessary results if some modifications are made. Both the parties negotiated and settled dispute without exchange of a single farthing. It saved both the parties from long litigation, expenses, tensions and waste of time in leading evidence. Most importantly, their business relations remained intact. Both parties were happy in a win–win situation.

1.1 BACKGROUND AND RATIONALE

Imagine if these parties were not able to arrive at inexpensive solutions without adjudication and were required to get the dispute adjudicated causing huge financial and other implications.

Stemming from such experiences, the researcher as a senior advocate has seen the truth many a times from the perspective of the both litigating parties. Their perception about their right is correct from their angle or they may feel they have a right which is infringed by the other party. When one writes number 6 on the paper from one side it will look “6” from other side it will be “9”. Both the parties are correct from their
perspectives. Here one needs a third neutral person who will solve the problem. If one goes to court or for that matter any adjudicating procedure like arbitration, the outcome would be either “6” or “9” thus resulting into win-lose situation.

Untill recently, litigation and arbitration represented the only resolution techniques.\(^2\) The last decade however has witnessed an expansion of the available techniques, which manifests growing business confidence in the practice of resolving disputes through the use of voluntary, non-binding processes such as negotiation, mediation, conciliation, and mini-trial.\(^3\) This helps to keep the business relations intact without hurting the egos as both are in a win-win situation. The decision is not thrust upon a person.

In negotiation, the parties themselves negotiate to resolve their dispute. Strictly speaking negotiation is not the form of Alternative Dispute Resolution techniques (ADR) as no third neutral party is involved. The terms Mediation and conciliation are many times used interchangeably. They are regarded as synonyms. In both these forms the disputing parties seek help of third neutral party. In mediation, the role of third party is to bring disputing parties to the table of negotiation. However in ‘Conciliation’, the conciliator helps the parties to arrive at settlement by taking active part such as holding caucuses, getting their pleas in writing or asking parties to deliver documents, suggesting the terms of settlement, etc. Early Neutral Evaluation also called as Mini Trial is a form of ADR wherein the parties sit on one side and their advocates on the other. Advocates for the parties make their submissions in presence of third neutral party who is generally expert in the field. On the basis the parties negotiate and may take help of third neutral party X by taking his opinion. The parties can put questions to the advocates. This helps the parties to understand where they stand.

At the international level also, United Nations Commission on International Trade and Law (UNCITRAL) has taken note of development of ADR and has laid down rules


\(^3\) Ibid.
for conciliation in the year 1980.\textsuperscript{4} Also, a Model Law on International Commercial Conciliation is enacted by UNCITRAL in the year 2002.\textsuperscript{5}

Taking note of the recent developments in ADR, the legislature in India has also undertaken several measures to resolve the disputes by Alternative Dispute Resolution techniques (ADR). For the first time procedure for the settlement of dispute through conciliation proceedings under the Arbitration and Conciliation Act, 1996\textsuperscript{6} is provided.

Also section 89 of the Code of Civil procedure, 1908 was added by amendment in the year 2002 and made provision for settlement of disputes in the litigation pending before the court through court annexed Alternative Dispute Resolution techniques.\textsuperscript{7} It authorizes the court to refer the dispute for mediation, conciliation, judicial settlement, Lok Adalat or arbitration. Even Legal services Authorities Act, 1987 is amended in the year 2002 and thereby Permanent Lok Adalat are established to settle the disputes regarding public utility services, in addition to provision of Lok Adalat.

Though various provisions are made in legislations, it appears that the efforts are sporadic. Concerted efforts are not made to make effective the Alternative Dispute Resolution techniques. There are various lacunae in the provisions of conciliation under Arbitration and Conciliation Act, 1996 and other provisions in Legal Services Authorities Act, 1987.

The Supreme Court of India, in the recent Afcon’s\textsuperscript{8} case has taken the process of alternate disputes resolution techniques in a backward direction. Fali S. Nariman in

\textsuperscript{4} Resolution 35/52 adopted by the General assembly on December 4, 1980.
\textsuperscript{5} UNCITRAL Model Law on Conciliation with Guide to Enactment and Use, 2002, was adopted by United Nations Commission on International Trade Law in its 35\textsuperscript{th} Session in 2002.
\textsuperscript{6} Arbitration and Conciliation Act, 1996, Ss. 61 to 81.
\textsuperscript{7} Section 89 is inserted by the Code of Civil Procedure (Amendment) Act, 1999 S.7 (w.e.f. 01-07-2002). It provides for the settlement of disputes outside the Court. In objects and reasons mentions that, it was suggested by Law Commission of India that the Court may require attendance of any party to the suit or proceedings to appear and in person with a view to arriving at an amicable settlement of dispute between the parties and make an attempt to settle the dispute amicably. Malimath Committee recommended to make it obligatory for the Court to refer the dispute, after issues are settled, for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only when the parties fail to get their disputes settled through any of the alternative disputes resolution method that the suit could proceed further.
\textsuperscript{8} Afcons Infrastructure Ltd. v. Cherian Varkey Construction (P) Ltd. and others, 2010(8) SCC 24.
his foreword opined, “------ decision of the Supreme Court of India (in Afcons Infrastructure Ltd; 2010(8) SCC 24) handed down in July 2010, has been a setback: a strained construction has been placed on a most important and salutary provision in the code.”\(^9\) In this case the Supreme Court took a view that unless the parties consent, the court cannot refer the parties to arbitration or conciliation by invoking section 89 of the Code of Civil Procedure, 1908. Also some judgments rendered by Supreme Court took the movement of the alternate dispute resolution backward.

The alternate dispute resolution techniques contemplate non formal procedure, to settle the dispute with the help of third neutral party, accepted by the parties to dispute. The Supreme Court in *Mysore Cements Limited v Svedala Barmac Limited*\(^10\) had refused to give effect to the settlement agreement as the procedure for conciliation as provided under the Arbitration and Conciliation Act, 1996 was not followed.

Such judicial pronouncements defeat ADR ethos. The aim of any settlement or resolution of the dispute between the parties by any mode whether adjudicatory or non adjudicatory is that the parties should not be required to quarrel over the same dispute again and it attains finality. In that respect once the matter is settled through non adjudicatory technique, it should attain finality. It should be enforceable as a decree. The settlement agreement entered between the parties through alternate dispute resolution techniques should attain finality. There should be some technique or procedure adopted so that parties should not be required to revert back to the square one position once the dispute is settled through mediation, conciliation or any other mode of ADR.

The parties in commercial transactions are interested in settling the disputes once for all. The settlement arrived between the parties should therefore be recognised and enforced. There is no point of wasting time if the settlement arrived between the parties is not enforceable in a sense that the parties will have to take recourse to


\(^10\) *AIR 2003 SC 3493*. 

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adjudication on the basis of such settlement agreement, if the party to the settlement agreement fails to perform its part.

Also there is lack of legislative mandate or international convention recognizing the international mediated settlement agreement executed between the parties in a country other than a country where it is to be enforced. The researcher has not come across any Indian authority on this point.

Against the backdrop of the abovementioned limitations, lacunae and challenges, the researcher has made an effort to compare the efficacy of ADR techniques with arbitration and has made suggestions to make the ADR more efficacious.

1.2 LITERATURE REVIEW

ADR techniques are extra–judicial in character. They can be used in almost all contentious matters which are capable of being resolved, under law, by agreement between the parties. They have been employed with very encouraging results in several categories of disputes, especially civil, commercial, industrial and family disputes. In particular, these techniques have been shown to work across the full range of business disputes; banking; contract performance and interpretation; construction contracts; intellectual property rights; insurance coverage; joint ventures; partnership differences; personal injury; product liability; professional liabilities; real estate; and securities. ADR offers best solution in respect of commercial disputes of an international character.11

In the United States, alternative disputes resolution techniques have attained practical relevance that has converted an initially exotic field into a standard area of the practice of law. Alternative techniques have entered into mainstream to the extent that lawyers who ignore the possibility of employing ADR techniques in the interest of their clients may find themselves at risk of discipline or malpractice liability. Conciliation has deep roots in China. In United Kingdom, alternative methods of dispute resolution have become standard part of ordinary legal practice. Under new

Civil Procedure Rules, courts take very proactive role towards settlement. Not only do they encourage the use of mediation, they can even go so far as to penalize a party declining an offer to mediate without good cause-irrespective of the case’s outcome.\textsuperscript{12}

To what extent is it better to resort to arbitration than to use other ADR methods of conciliation, mediation, etc. This is completely different from the choice between State Courts and arbitration. An arbitration clause excludes State Court intervention on the merits of a case. However, conciliation or mediation does not exclude arbitration and conversely, arbitration does not exclude conciliation or mediation. As regards ADR methods, their efficiency depends exclusively on the goodwill of the parties, who are free to comply or not with the recommendations or decisions rendered by the conciliator or the mediator. These recommendations are not equivalent to a court judgment and cannot seek enforcement of a mediation or conciliation recommendation or of an agreed settlement.\textsuperscript{13}

In past decade the arbitration was the only choice to settle the dispute as an alternate to the litigation in case of international commercial dispute. The international conventions recognized and enforced the arbitration agreements and awards declared by the arbitrator. The New York convention is signed by near about 157 countries. The arbitration award therefore can be enforced under the said convention in a signatory country.

Arbitrations may be the mechanism of choice for the resolution of international business disputes; the past decade has seen an upsurge in the use of non arbitral ADR processes, most notably mediation and conciliation.\textsuperscript{14} One weakness is that ADR mechanisms lack a coherent legal framework for ensuring the enforceability of results. There is no analogue to the New York Convention for mediation and other ADR process.\textsuperscript{15} Thus alternative procedures are subject to the full range of legal


\textsuperscript{13} G.K. KWATRA, ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION HOW TO SETTLE INTERNATIONAL BUSINESS DISPUTES 51 (Butterworths Lexis Nexis, 2004).


\textsuperscript{15} Ibid, at 1398.
problems arising out of the multiplicity of legal systems that affect international trade. Brette L Steele considered the potential for and challenges of enforcing mediation agreements as arbitral awards under the New York Convention. He observed that in Hong Kong, a settlement agreement reached during arbitration may only be enforced as if it were an arbitral award if there was a valid arbitration agreement prior to commencing arbitration. He concluded that enforcement of mediation agreements under the New York Convention results in an imperfect fit that creates challenge. This is the point of discordance and confusion as it curtails ADR choices of the disputant where the law reform is required. There is a need to critically evaluate the enforceability of mediated settlement agreement arrived at with the help of ADR techniques.

The General assembly of United Nations adopted UNCITRAL Rules on International Conciliation in the year 1980. The rules are meant to govern the conduct of Conciliation intended to resolve a dispute or disputes between the parties. The rules are directed to potential or actual parties to the dispute.

If rules-making activity is any indication, it appears that international commercial mediation is a dispute resolution technique whose time is coming. The International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL) and the American Arbitration Association (AAA) as well as many other national arbitration institutions have promulgated specific procedures for mediation.

Considering the increased use of the ADR, the General Assembly of United Nations, by resolution in its plenary meeting on 19th November 2002, has adopted Model law on International Commercial Conciliation (2002) framed by UNCITRAL. The aim of the model International Commercial Conciliation is the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations. Even the perusal of the Model Law will show that

16 Ibid.
the enforcement of the settlement agreement is left to the domain of Municipal law. Even the issue as to recognition of the conciliation agreements entered outside territory of the country is not dealt with. If the procedure for the conciliation is not approved in the country where it is sought to be enforced, it may pose problems. The recent attempts to standardize the international enforcement of mediated agreements have failed, leaving enforcement dependent on varied national policies. Brette L. Steele cautions the parties opting for settlement of disputes through conciliation, first to check the enforcement options available to the parties.¹⁹

The developed countries like England and USA have made amendment in their procedural laws so that the parties to litigation should resort to settle their dispute through ADR. Considering the fact that globally in commercial field, the ADR is used as a tool to resolve the disputes, India is lagging behind in this field. Also considering the great advantages ADR is having over adjudication like low cost involved, speedy remedy, win-win situation, no compulsion; it is desirable to explore the position in India to make the ADR techniques more efficacious.

It may also be noted that though ADR is not binding, if the conciliation in India is successful and parties enter into settlement agreement, the said settlement agreement gets the same status and effect as an arbitral award passed by arbitral tribunal under section 30 of the Arbitration and Conciliation Act, 1996.²⁰ It may be seen that the disputes, subject to the international commercial mediation/conciliation, may be enforced in more than one country. The nations differ in their procedure for enforcing conciliation agreements. The nation, where the settlement agreement is sought to be enforced, may not approve the procedure of conciliation where it has taken place or originated. Some countries may not even recognize the award passed on agreed terms. Even article 14 of UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 has left the enforcement of settlement agreement to the discretion of the state. This gives rise to various questions. Whether the settlement agreement in ADR executed in India will be enforced out of India? Whether the settlement agreement in ADR, executed out of India, will be enforced in

¹⁹ Supra Note 17, at 1387.
²⁰ Arbitration and Conciliation Act, 1996, s.73.
India? These and many more questions will have to be studied and probed. Hence it is desirable to conduct a research.

The concept of settling the dispute through ‘conciliation’ is introduced very recently in India. However, other techniques are not yet introduced. Also, some enactments like Code of Civil procedure 1908, Legal Services Authorities Act, 1987 make some provision for conciliation. Considering the trend to settle the dispute through conciliation and/or mediation, it is necessary to study if the present provisions in this respect are sufficient.

It is known fact that there is huge pendency in Indian Courts, both at the level of lower Judiciary and Higher Judiciary. India is striving to become a global economic power. To achieve this goal it is necessary that there should be expeditious resolution of commercial disputes. The Prime Minister has made a call and dreamt of Make in India. Even large scale agreements are made with foreign entrepreneurs. This is definitely going to give rise to disputes of commercial nature in future. One cannot rely on litigation or arbitration as methods to resolve disputes, as both these methods prove to be expensive and time consuming.

It is worth here to mention recent case of White Industries wherein the Union of India was directed to pay huge amount of 4 million Australian dollars as Indian Higher Judiciary failed to decide the matter for nine years. White Industries obtained an arbitral award in its favour in a contractual dispute with Coal India, an Indian public sector company, and sought enforcement of the award before the Delhi High Court. Simultaneously, Coal India approached the Calcutta High Court to have the award set aside, and the request was granted. White Industries appealed to the Supreme Court in 2004 and the final decision is still pending. In 2010, White Industries took the matter to arbitration on the grounds that the inordinate delay in Indian courts to enforce the arbitration award violates the India-Australia Bilateral Investment Treaty (BIT). White Industries argued that the delay violated the provisions on fair and equitable treatment (FET), expropriation, Much Favoured

21 Ibid, Part III.
Nation (MFN) treatment, and free transfer of funds. The tribunal found India guilty of violating the India-Australia BIT because the Indian judicial system has been unable to deal with White Industries’ jurisdictional claim in over nine years. The tribunal held that the delay by Indian courts violated India’s obligation to provide White Industries with an “effective means’ of asserting claims and enforcing rights.”

Thus though arbitration is largely used method in resolving the disputes, due to increasing cost and delay it is necessary to search for other Alternative Dispute Resolution techniques. The other methods which will be expeditious and less expensive need to be adopted. From this angle also it is necessary to study the efficacy of the non adjudicatory methods of resolving disputes.

The gaps in Model Law on International Commercial Conciliation are also under scanner and Nadja Alexander (Editor) Singapore International Dispute Resolution Academy), Anna Howard (Associate Editor) (Centre for Commercial Law Studies) addressed their concern of uniform enforcement of international mediated settlement agreements (iMSA) as the 65th session of the UNCITRAL Working Group II on Arbitration and Conciliation are likely to discuss proposed multi lateral convention on recognition and enforceability of international mediated settlement agreements.

Based on the gaps shown in the literature discussed above research is carried out with following objectives.

1.3 OBJECTIVES
The objectives of the research are as follows:

A. To examine and evaluate the relative efficacy and complementary role of the Conciliation/alternative disputes resolution (ADR) techniques and arbitration.

B. To study the adequacy of the present law in India for enforcement of international mediated settlement agreements in pursuance to conciliation/ADR executed outside India.

23 Ibid.
C. To explore if any law is required to be enacted or any amendment is necessary to the present law to increase efficacy of resolution of disputes through ADR techniques.

D. To suggest necessary reforms/amendments, if any.

These objectives are achieved through the following questions:

### 1.4 RESEARCHABLE QUESTIONS

1) What is efficacy and complementary nature of conciliation/ Alternative Disputes Resolution (ADR) Techniques?

2) What is relative efficacy of arbitration and conciliation/ADR techniques in International and Indian context?

3) Whether the provisions of Arbitration and Conciliation Act, 1996 in India (as amended in 2015) are adequate to ensure efficacy of conciliation/ADR? How should they be reformed?

### 1.5 METHODOLOGY

The methodology used for the research is predominantly doctrinal and partially non-doctrinal through questionnaire circulated to advocates, judges, law students and litigants. The doctrinal method is used since the study mainly aims to analyze and compare the present position of law for alternative disputes resolution techniques. The study covers conventions, rules, regulations and cases since 1980 along with the present legal scenario regarding enforcement of international commercial conciliation agreement. Pertinent data on legislations from the UK and US are used to draw comparative analysis. The method is descriptive, comparative, interpretative, analytical and evaluative.

Non Doctrinal method of appreciative enquiry through a set of questions is used to collect responses from a total of 100 respondents in order to understand the efficacy of ADR in India vis a vis arbitration. 25 respondents were litigants or laypersons, 25 were Law students, 25 were Lawyers, 10 were Judges and 15 were academicians. The respondents were chosen on the basis of convenience and voluntariness. The questionnaire consists of 15 questions. It is divided in two parts, Part A and Part B.
Part A consists of 6 questions and Part B consists of 9 questions. Layperson and litigant were required to answer only Part A while Law students, Lawyers, Judges and academicians were asked to answer questions in both part A and B. This is because questions in Part B need legal knowledge. The doctrinal findings are further verified with this process.

The tool of data collection is the questionnaire which is personally administered in most of the cases and mailed in a few cases. While administering it, all the ethical aspects of research involving human element are observed.

The outcome of both these approaches is synthesized to arrive at conclusions, summarizing the findings of the study and in recommendations and suggestions.

1.6 DATA
Primary data consist of the conventions and recommendations by the UNCITRAL, statutes and case laws. These also include responses from stakeholders.

Secondary data consist of books, articles published in various journals and other publications. The data up to December 2016 is taken into account.

1.7 SCOPE
The scope of this research is to study efficacy of alternative dispute resolution techniques of conciliation in comparison with arbitration in India in a comparative context. It also focuses on limitations of ADR and challenges in enforcement of transnational conciliation and mediation settlement agreements.

In this study the Conciliation/Alternative Disputes Resolution techniques are used to denote all forms of ADR. The word conciliation includes all forms of ADR but to avoid any confusion, the researcher has used phrase ‘Conciliation/Alternative Disputes Resolution techniques’.

This study does not deal with extensive discussion of all ADR techniques. It does not cover a range of commercial and other instances of ADR.
The thesis consists of six chapters. The chapter 1 deals with introduction. The researcher has given details about the background which prompted the researcher to take up this topic, literature review, objectives, researchable questions, methodology used, data referred to and scope and limitations of the research.

Chapter 2 explains conceptual framework of ADR, types of ADR, ADR in England and USA, advantage and disadvantage of ADR.

Chapter 3 deals with concept and efficacy of arbitration.

Chapter 4 is regarding the status and efficacy of conciliation in enforcement of settlement agreement.

Chapter 5 in particular explains the efficacy of conciliation / Alternative Dispute Resolution techniques and Arbitration in India.

Chapter 6 is regarding conclusions, recommendations and suggestions.

In the next chapter the researcher has dealt with conceptual frame work of ADR, types of ADR, ADR in England and USA and advantages and disadvantages of ADR.