CHAPTER 2
CONCEPTUAL FRAMEWORK, TYPES, PRACTICE OF ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES, ADR IN ENGLAND, USA, ADVANTAGES AND DISADVANTAGES OF ADR

This chapter deals with detailed analysis of the concepts, types and efficacy of ADR. It traces the evolution of ADR, the various shades of meaning and summarizes its application in this research. This chapter also explores the development of ADR in England and USA. This chapter deals with advantages and disadvantages of the ADR.

2.1 CONCEPTUAL FRAMEWORK OF ADR

2.1.1 Evolution of Alternative Dispute Resolution Techniques

Conflict is one of the fundamental conditions of the human existence and an inevitable and necessary fact of all social interaction.\(^{25}\) If managed productively, conflict is an important source of progress and innovation but if left unresolved or if dealt with in a destructive manner, it can cause great harm.\(^{26}\) Conflicts have existed in all cultures, religions and societies since time immemorial as long as humans have walked the earth. In fact, they also exist in animal kingdom, philosophies and procedures for dealing with conflicts have been part of the human heritage, differing between cultures and societies.\(^{27}\) Nations, groups and individuals have tried throughout history to manage conflicts in order to minimize the negative and undesirable effects that they may pose.\(^{28}\) Conflicts can develop in any situation where people interact, in every situation where two or more persons, or groups of people, perceive that their interests are opposing and that these interests cannot be met to the satisfaction of all the parties involved.\(^{29}\)

\(^{25}\) Supra Note 12, at 132.
\(^{26}\) Ibid.
\(^{28}\) Ibid.
\(^{29}\) Ibid.
The notion of conflict has to do with subjective perception.\textsuperscript{30} It suffices for a conflict to exist that one party has a certain perception of the other side’s behavior, immaterial of whether that other side is aware that a conflict or the potential for one exist or knows of these concerns, and immaterial of how that side reacts.\textsuperscript{31}

Conflict is defined as a situation where the perceived interests of two or more persons are opposed in a manner that makes it impossible for all of the respective interests to be fully satisfied.\textsuperscript{32} Merrills defines ‘conflict’ in terms of a closely connected term ‘dispute’, as ”specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another”.\textsuperscript{33}

Disputes usually begin as conflicts, i.e. as grievances. Grievances set out the groundwork for disputes. Disputes are conflicts, i.e. grievances, escalated by confrontation because the other side will not give in.\textsuperscript{34} Conflict becomes a legal dispute if one party asserts a claim which is not accepted or satisfied by the other. The assertion of rights is often perceived as a hostile act and can lead to an escalation of the conflict.

The reference of conflicts of human being can be traced back in the records of religious books and historical documents. The reference is found in The Bible, Mahabharata and similar religious and historical documents that the conflicts were resolved or tried to be resolved by various processes, including negotiation, mediation, arbitration and adjudication.

Because the conflicts are an integral part of human interaction, one must learn to manage them to deal with them in a way that will prevent escalation and destruction and come up with innovative and creative ideas to resolve them.\textsuperscript{35} One potential reason for the escalation of disputes is ‘zero-sum thinking’, i.e. the perception of one

\textsuperscript{31} Ibid.
\textsuperscript{32} Supra Note 12, at 133.
\textsuperscript{33} Ibid, at 132.
\textsuperscript{34} Supra Note 30, at 21.
\textsuperscript{35} Supra Note 30, at 25.
or both sides that each party can only win at the expense of the other.\textsuperscript{36} Litigation is classical example of “fixed sum” or “zero-sum” or “win-lose” situations, where a gain to one party inevitably correlates with loss to the other.\textsuperscript{37}

The field of conflict resolution has matured as a multidisciplinary field involving psychology, sociology, social studies, law, business, anthropology, gender studies, political sciences and international relations.\textsuperscript{38} The discipline is complex because it deals with conflicts at different stages of their existence and also because it is a mix of theory and practice and of art and science.\textsuperscript{39}

There are basically three ways of dealing with the conflict i) ignorance or avoidance ii) the use of force or other coercive means, or iii) procedural resolution which can be guided primarily by interests or by rights.\textsuperscript{40} Procedural resolution includes direct negotiation between the parties, the involvement of a third party as mediator, and adjudication through arbitration or litigation in court.\textsuperscript{41} The adjudication basically involves determination of rights. On domestic field adjudication through the courts is most favoured process of dispute resolution.

Since the Second World War arbitration has proved an extremely popular method of resolving disputes apart from court litigation. Arbitration arguably, could be said to be first step towards privatization of justice, in that it is an alternative to resolution through national (State) courts. As such, parties opting for arbitration have greater control over matters such as the appointment of arbitrators, language, and place of arbitration. At a different level, in International Commercial Arbitration the principles to be applied to issues under consideration need not be tied to a national law. In arbitration if parties so agree, the issue / dispute could be decided on the principles of \textit{Ex-Acquo et bono} or law merchant (\textit{lex mercatoria}).

The arbitration was thought as an alternative to the traditional litigation. It was thought that this procedure shall be less expensive, cost saving and also less time

\textsuperscript{36} \textit{Supra} Note 12, at 134.
\textsuperscript{37} \textit{Ibid}.
\textsuperscript{38} \textit{Supra} Note 27.
\textsuperscript{39} \textit{Ibid}.
\textsuperscript{40} \textit{Supra} Note 12, at 134.
\textsuperscript{41} \textit{Ibid}.
taking. However, the experience has indicated that on the contrary the arbitration is more expensive. The fees of the advocates and arbitrators are beyond the financial capabilities of the parties.

2.1.2 Modern ADR

The emergence of ADR is one of the most significant movements as a part of conflict management and judicial reform. In recent years, in countries the world over, courts have shown an increasing willingness to encourage parties to explore mediation and other ADR techniques before or even after going to trial. All such devices just stop short of compelling parties to mediate, cost sanctions against parties who refused to mediate and even a stay of proceedings to enforce compliance with a mediation clause in an agreement. In England, parties are encouraged ‘to use an alternative dispute resolution procedure’.  

Alternative Dispute Resolution i.e the ADR normally would comprehend any method of dispute resolution other than court adjudication as part of justice established and administrated by the state. From this point of view even arbitration will fall with the scope of ADR since it is major alternative to court litigation. In domestic setting, arbitration may be considered as a method of ADR, but in international context as arbitration is generally accepted procedure in commercial transaction, arbitration is not considered as ADR to procedures which is different from conventional or generally accepted form of arbitration.

Modern ADR is a voluntary system, according to which the parties enter a structured negotiation or refer their disputes to a third party for evaluation and/or facilitation of resolution. ADR is a generic term. It denotes range of private dispute resolution processes that have been developed as alternative to litigation before domestic courts. ADR is a form of facilitated settlement, which is confidential and without prejudice. Alternative Dispute Resolution (ADR, sometimes also called as “Appropriate Dispute Resolution”) is a general term, used to define a set of approaches and techniques

---

aimed at resolving disputes in a non confrontational way.\textsuperscript{45} It covers broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end where an external party imposes a solution.\textsuperscript{46}

In its philosophical perception, ADR process is considered to be the mode in which the dispute resolution process is qualitatively distinct from the judicial process.\textsuperscript{47} It is a process where disputes are settled with the assistance of a neutral third person generally of parties own choice; where the neutral is generally familiar with the nature of the dispute and the context in which such disputes normally arise; where the proceedings are informal, devoid of procedural technicalities and are conducted, by and large, in the manner agreed by the parties; where the dispute is resolved expeditiously and with less expenses; where the confidentiality of the subject-matter of the dispute is maintained to a great extent; where decision making process aims at substantial justice, keeping in view the interests involved and the contextual realities.\textsuperscript{48} In substance, the ADR process aims at rendering justice in the form and content which not only resolves the dispute but tends to resolve the conflict in the relationship of the parties which has given rise to that dispute.\textsuperscript{49}

Alternative methods for resolving legal disputes are related to elements of the legal system which are minimally connected with and impacted by common law. Conflicts between people arise irrespective of the legal system existing in their country. Efforts to find ways out of conflicts are natural for all people. Their desire to settle a dispute ought to be supported by any law–abiding country by establishing simple, lawful and clear procedures. Hence, alternative dispute resolution is not only legal construction; it is also a certain type of thinking and a philosophy leading to compromise, agreement, and peaceful resolution. The psychological boon of the ADR concept consists of a shift from the stereotype of litigation to an opportunity for using less

\textsuperscript{45} Supra Note 27.
\textsuperscript{46} Ibid.
\textsuperscript{48} Ibid.
\textsuperscript{49} Ibid.
stressful and time-consuming, more flexible and informal dispute resolution methods.\textsuperscript{50}

The goals pursued by ADR go beyond legal considerations. Their overriding priority is to prevent difficulties, ensure continued performance of the contract, maintain the contractual relationship and make their joint project a success.\textsuperscript{51} The mediator is in a position to provide solutions which are beyond the powers of the court to provide.\textsuperscript{52}

ADR is not a question of asking a neutral person to settle a dispute by taking a decision. It does not boil down to a bald examination of the dispute after the event. Its primary objective is not to consider the dispute in the context of the law in order to obtain a binding legal decision by applying appropriate rules of law. What it does is to provide the parties with a means of making their negotiations more effective through the intervention of a neutral.\textsuperscript{53} The parties themselves are key players in ADR. The neutral appointed by the parties, legal advisors, witnesses or any of the other people usually involved in litigation have very little role to play in ADR.

In ADR the importance is not to form or procedure but the intention of the parties to settle the dispute amicably with the help of third neutral party on the basis of the procedure agreed between themselves. The only condition being the third neutral party has no right to adjudicate the matter or impose his decision on the parties.

2.1.3 Definitions of ADR

Alternative Dispute Resolution means different things to different people. There is no universally accepted definition of ADR. The following are various attempts in defining ADR.


\textsuperscript{53} Supra Note 51, at 15.
Brown and Marriott see it as a range of procedures that serve as alternatives to litigation through courts for the resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party.\textsuperscript{54}

Julia Hornie uses the terms ADR to refer to all dispute resolution other than litigation in the courts, including other adjudicative techniques such as arbitration.\textsuperscript{ii)}

The British Academy of Experts published a glossary on The Language of ADR (1992) in which they defined ADR as a process of resolving an issue ‘susceptible to normal legal process by agreement rather than by imposing a binding decision’.\textsuperscript{iii)}

O.P. Malhotra states ‘perhaps the most workable definition is to describe ADR as a method of resolving, or attempting to resolve, disputes without resort to the courts (or to arbitration) by procedures which are informal’.\textsuperscript{iv)}

Jean–Claude Goldsmith\textsuperscript{v)} has stated, “In truth, ADR (or RAD in French) presents itself as a catch-all denomination under which are classified without distinction those methods of settling conflicts that lead to any other result than a judgment or arbitral award. Amongst these systems as practiced in the United States and in other Common Law countries, some come within legal framework, sometimes in quite a constricting manner; others on the contrary are purely consensual and have no relationship with state of justice.”

Some definitions and more commonly, exclude not only litigation, but all forms of adjudication whereby a binding decision is given by a third party. According to some definitions the term ‘Alternative Dispute Resolution’, normally would comprehend any form of the dispute resolution other than court adjudication.

From this point of view, the arbitration will fall with the scope of ADR since it is considered as an alternative to court litigation. As stated earlier in domestic setting arbitration may be considered as a method of ADR, but in international context as arbitration is generally accepted procedure in commercial transaction, arbitration is

\textsuperscript{54} JUSTICE DR. B. R. SARAF & JUSTICE S. M. ZUNZUNWALA, LAW OF ARBITRATION AND CONCILIATION 667 (5\textsuperscript{th} ed., Snow White, 2009).

\textsuperscript{55} Supra Note 42, at 1476.

\textsuperscript{56} Ibid, at 1478.

\textsuperscript{57} Jean-Claude Goldsmith, Means of Alternative Dispute Resolution (ADR), I.B.L.J. 221, 233 (1996).
not considered as ADR to procedures which is different from conventional or generally accepted form of arbitration. While in US, one tends to consider arbitration as a form of ADR, Continental Europe and English doctrine and practice tend to regard arbitration as a different method of dispute resolution.

2.1.4 Whether Arbitration is a form of ADR?

Overall, the arbitration is not considered as ADR as the arbitration process is adjudicatory, compulsory and binding. Arbitration presents an alternative to the judicial process in offering privacy to the parties as well as procedural flexibility. However, it is nonetheless fundamentally the same in that the role of the arbitrator is to adjudicate the dispute. The function of the judge and the arbitrator is not to decide how the problem resulting in the dispute can most readily be resolved so much as to apportion responsibility for that problem. Thus it is clear that the world is now looking the term Alternative Disputes Resolution as a process to resolve the disputes between the parties with the help of third neutral person who has no authority to adjudicate the dispute. The process to resolve the dispute by adjudication is thus not considered as an alternative to existing dispute resolution methods. The adjudicatory method is in vogue since last so many decades. These methods are litigation and arbitration. The new methods which are non adjudicatory can be said to be alternative disputes resolution methods. Thus any process to resolve the dispute with element of adjudication is outside the scope of ADR. The modern concept of ADR bars any mandatory adjudication of the dispute. The process of ADR gives total autonomy to parties in the scope of determining the process, method, rules and structure, the procedure for settlement. In this perspective, Arbitration shall not fall within the meaning of Alternative Dispute Resolution.

ADR, like litigation and arbitration, will often involve an independent third party but his/her function is fundamentally different from that of a judge or arbitrator and is best described as a neutral facilitator. He/she does not impose a decision on the parties but, on the contrary, his/her role is to assist the parties to resolve the dispute themselves. He/she may give opinions on issues in dispute but his/her primary
function is to assist in achieving a negotiated solution.\textsuperscript{58} Thus the ADR is considered as purely consensual non adjudicatory procedure.

The basic difference between Arbitration and ADR is that the result of former is enforceable under statute, while the result of later is not so. Alternative Dispute Resolution generally is a system of dispute resolution which is non-binding. By “non-binding” is meant that the parties are under no obligation to comply with any of decision or determination resulting from process, if indeed there is one. Nor the parties are obliged to participate in or continue with the process in the absence of express contractual provision to that effect. Thus ADR does not guarantee a binding result although it can lead to one. The main distinction between ADR and arbitration lies in this aspect.

2.1.5 International Legal Framework of ADR

The United Nations Commission on International Trade Law (UNCITRAL) has framed Model Law on International Commercial Conciliation in the year 2002. Article 1 (3) defines “Conciliation” to mean a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

The UNCITRAL has not used word ‘Alternative Dispute Resolution’. Under Article 1(3) , ‘conciliation’ is defined in wider sense to include within its meaning all forms of processes used to resolve the disputes between the parties with the help of third neutral person but who cannot impose his/her decision upon the parties. The broad nature of the definition indicates that there is no intention to distinguish among the procedural styles or approaches to mediation. The word “conciliation” would express a broad notion of a voluntary process controlled by the parties and conducted with the assistance of a neutral third person or persons. Different styles and techniques might be used to in practice to achieve settlement of a dispute, and different expressions

\textsuperscript{58} Supra Note 42, at 1477.
might be used to those styles and techniques. The methods may differ as regards the technique, the degree to which third parties are involved in the process and the kind of involvement whether as a facilitator or making substantive proposals as to possible settlement. 59

The definition of ‘Conciliation’ in Paragraph (3) of Article 1 sets out the elements for the definition of ‘conciliation’. The definition takes into account the existence of a dispute, the intention of the parties to reach an amicable settlement and the participation of an independent and impartial third person or persons that assists the parties in an attempt to reach an amicable settlement. The intention is to distinguish conciliation, on the one hand, from binding arbitration and, on the other hand, from mere negotiations between the parties or their representatives. 60

The words “and does not have authority to impose upon the parties a solution to the dispute” are intended to further clarify and emphasize the main distinction between conciliation and a process such as arbitration. 61

2.1.6 Operational definition of ADR

According to researcher the term Alternate Dispute Resolution (ADR) can be defined as “a non adjudicatory process, by whatever name called, by which the parties agree to resolve their dispute/s, as per procedure agreed between them, with the assistance of third neutral person and abide by the terms of the settlement in writing, if any, agreed with his/her assistance, which shall be enforceable. However such neutral person shall not have power to compel the parties to accept terms suggested by him/her.”

This, per se excludes Arbitration. The goals pursued by the ADR go beyond legal considerations. Their overriding priority is to prevent difficulties, ensure continued performance of the contract, maintain the contractual relationship and make their joint project a success. ADR can be used as a ‘management tool’ in prevention of disputes and resolution of disputes. The primary objective of ADR is not to consider the

60 Ibid.
61 Ibid.
dispute in the context of the law in order to obtain a binding legal decision by applying the appropriate rules of law. It provides parties the means of making their negotiations more effective through the intervention of a neutral.\textsuperscript{62}

The researcher will refer to ‘Conciliation’ as ADR encompassing any method like mediation, neutral evaluation, mini trial, etc. or all forms of the combinations used to resolve the dispute with assistance of third neutral person by whatever name called.

### 2.1.7 Efficacy of ADR

The word efficacy would mean ability to produce a desired or intended result or effect.\textsuperscript{63} It also mean to able to accomplish something with least waste of time and effort; competency and in performance\textsuperscript{64}.

Thus, operationally in the context of ADR or Arbitration ‘Efficacy’ can be described as the a) ability to resolve the conflict or dispute as an alternative to traditional litigation. b) It also would indicate its ability to enforcement of the arbitral award or settlement agreement arrived in ADR, its assistance in efficiency of justice system, in increasing the effectiveness of courts by reducing bottle necks and improving the trust in legal system in the era of foreign investments and internationalization.

### 2.1.8 Participation in ADR Mandatory or Non Mandatory

An alternate dispute resolution system would supplement and not supplant the present justice delivery system.\textsuperscript{65} Since the beginning of the modern ADR movement, there have been at least two strands of argument supporting the use of alternatives to full–scale legal adjudication by judge or jury. On the one hand is the claim that ADR will ensure speedy, less costly and therefore more efficient case processing. This strand of the movement has been called the quantitative, case-load reducing or case management side of ADR. Another strand of ADR emphasizes the qualitative argument that both dispute processes and their outcomes can be improved with alternatives to full–scale trial. ADR provided for more party participation and control

\textsuperscript{62} Supra Note 51, at 14.

\textsuperscript{63} www.dictionary.com/browse/efficiency (May 29, 2017, 08:11PM).

\textsuperscript{64} www.yourdictionary.com (May 29, 2017, 08:10PM).

\textsuperscript{65} Justice S.B. Sinha, Mediation: Constituents, Process And Merit, in SOUVENIR, NATIONAL CONFERENCE ON MEDIATION 3 (Mediation and Conciliation Project Committee, Supreme Court of India, 2012), at 8.
over the proceedings, a greater possibility of resolving more than the particular ‘dispute” at hand, and reconciliation or better communication between disputing parties.  

There is also a debate if ADR is mandatory or voluntary. The “hot button” in ADR practice involves the merits of mandatory versus voluntary assignment to ADR processes. In a series of debates ranging from the halls of Congress, to state legislatures, to individual courts, fervent proponents argue either for or against mandatory programs. As with so many ADR issues, the lines dividing the definitions are less than clear. The term mandatory mediation only means that one must attend some form of ADR in good faith. What constitutes its compliance remains unclear.

Carrie advocates that even the most vociferous adversarialist discovers some opportunities for exploring differences and possible solutions in settings that are more open and flexible than trial proceedings, yet more structures and protected than dyadic, lawyer-led negotiations. He favors “presumptively mandatory” participation in ADR, so long as parties may ‘opt out’ with good cause shown.  

The agreement to mediate is a contract that obliges the parties to settle their disputes through mediation and not before the domestic courts or an international tribunal. If the parties wish to design tailor-made dispute resolution process or make the best decision when choosing among different off-the-shelf ADR processes, it is important to know where the dispute currently stands on a conflict escalation scale and also within which range of the escalation scale they wish to resolve it.

Arbitration, conciliation and mediation are three commonly available forms of Appropriate Dispute Resolution that can be used together as well as with other ADR

---

67 Ibid, at 1893.
68 Ibid, at 1892, 1893.
69 Ibid, at 1894.
tools to create hybrids, once the differences between these processes are better understood.\textsuperscript{71}

The attitude of the courts towards Alternative Dispute Resolution or ADR is changing. Formerly the courts claimed for themselves exclusive expertise in the resolution of disputes and doubted the accuracy and efficacy of methods of dispute resolution other than their own; they have become increasingly willing to defer to those other methods.\textsuperscript{72} In the United States the courts both federal and state, became not merely participants, but advocates of, the “Alternative Dispute Resolution” or “ADR” revolution that is currently transforming the landscape of civil litigation. Specifically, by not only deferring to, but encouraging, the most commonly used methods of court-annexed ADR (i.e. mediation, case evaluation, mini trial, and summary jury trial), which are all aimed at fostering settlements, the courts have moved to thrust back upon the parties to dispute the very choice, i.e. how to resolve the matter, that one party at least, by instituting litigation, apparently wished a court (or jury) to make. Yet the fundamental impetus underlying the shift with respect to court –annexed ADR and arbitration is the same in both cases the courts have moved to limit the scope of their direct involvement in dispute resolution.

In United States the movement supporting ADR has resulted in the 1990s in court rules and legislation which formally incorporate ADR into the litigation system: so called ”court -annexed ADR” as distinguished from ADR engaged in by parties prior to or without the initiation of a lawsuit.\textsuperscript{73}

The Supreme Court of India has advocated for resolution of disputes with the help of Alternative Dispute Resolution techniques. In \textit{Afcons Infrastructure Ltd. & Anr v Cherian Varkey Construction Co. (P) Ltd. & Ors}\textsuperscript{74} it is stated that “Resort to alternative disputes resolution (for short ‘ADR’) processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the courts.” Thus ADRs are accepted in India as a better choice, but not as mandatory.

\begin{itemize}
\item \textsuperscript{71} \textit{Ibid}, at 352.
\item \textsuperscript{73} \textit{Ibid}, at 16, 17.
\item \textsuperscript{74} \textit{Supra} note 8.
\end{itemize}
Thus the ADR is a non adjudicatory process whereby the parties to the dispute try to settle their dispute with the help of third neutral person or persons engaged by them with the method or process determined by the parties themselves and the neutral person cannot compel the parties to his/her terms. The parties have total autonomy to accept the terms of settlement or refuse the same. The parties also have the autonomy to resile from the process at any moment. The best part is that unless the parties mutually agree, the third neutral person cannot thrust his/her decision on dispute upon the parties.

Next the researcher proposes to discuss the various types of ADR techniques.

2.2 TYPES OF ADR TECHNIQUES

Having considered the concept of Alternative Dispute Resolution techniques, the researcher hereinafter has discussed various kinds of ADR methods.

A non binding type of ADR that has caused stir on the domestic and international commercial scene is mediation or conciliation as a mode of dispute resolution. At international level both these words are used interchangeably. Other well known types of ADR are Negotiations, Early Neutral Evaluation (ENE) or Mini - Trial (or executive tribunal) and Med-Arb,' Arb-Med etc. The ADR may be without intervention of court or Court annexed. Dr. A.S. Anand, a former Chief Justice of India, has wished that the next century would not be a century of litigation, but century of negotiation, conciliation, and arbitration.75

2.2.1 Negotiation

Negotiations differ from other dispute resolution procedures in as much as it does not involve a third party to facilitate or promote the settlement while all other procedures essentially involve a third party. It is more beneficial for the parties to resolve their disputes by negotiated settlement rather than resolving the same through adjudication.

It protects the business secrets and relations of the parties. In commercial disputes the parties try to reach a settlement by understanding each other’s point of view as they best know the strength and weakness of their respective cases. The market reputation

of the parties is also at stake which is preserved in case of settlement through negotiation. The negotiations can be held at any stage even if other methods of resolving the disputes are initiated. Negotiation belongs to the most complex forms of human interaction. The process of communication, persuasion and choice involves the use of highly personal, somewhat intangible skills, a mixture of shrewdness and intuition that many regard more as an “art” than a proper subject for scientific investigation. The question remains in such settlement after the successful negotiations if party retracts from the settled terms, other party will have no other option than to opt for adjudication. No doubt if any other adjudicatory process has been commenced, the parties may request the adjudicating authority to pass decree or award in terms of settlement in which case it will be binding and enforceable directly. However negotiation cannot be considered as ‘Alternate Disputes Resolution’ technique as there is no involvement of third neutral person.

2.2.2 Early Neutral Evaluation (ENE)

In Early Neutral Evaluation, also termed as Mini trial, the parties present their cases in adversarial manner which is evaluated by neutral third party, and the parties negotiate on the basis of this evaluation.

A “mini-trial” is a predictive process designed to narrow the differences between the parties perceptions of their chances in litigation and to bring high-level decision makers together for constructive settlement negotiations facilitated, in most instances by mediator (sometimes called “neutral advisor”). A mini-trial consists of a structured information exchange in which representatives from both sides make brief presentations of their case to a panel of executives from all parties.

Mini trial is conducted with panel comprising of a third neutral party and a senior executive from each side with no connection to the dispute. After hearing the submissions, the senior executives negotiate for a settlement. If no settlement is reached, the neutral is usually invited to become a mediator and give his opinion. However the third neutral party is not required to give his decision.

76 Supra Note 12, at 136.
78 Supra Note 12, at 195.
Of all ADR techniques the mini-trial is most closely associated with complex business disputes. Initially developed in 1977, in the case of Telecredit v TRW, the mini trial is frequently used in the United States of America. In mini-trial, though there is no hard and fast procedure, it changes the arrangements by putting both parties, in the case of corporations their chief executives on the same side of table and lawyers on the other side. This change of arrangement has remarkable effect. The panel of parties themselves becomes the tribunal assisted in most cases by a neutral expert who sits between them. Generally hearing of one or two days, sometimes called as “information exchange” follows a limited form of disclosure of documents and an exchange of briefs. Lawyers for each party make a brief presentation outlining the evidence they would call in the event of trial. Generally the panel asks the questions to the lawyers presenting the case. No procedure is fixed. The parties can agree for procedure before trial. After initial presentation is over, the parties or chief executives may meet privately with or without neutral adviser. The role of neutral adviser is often of relevant importance especially if he is a person with experience within the trade or industry concerned and in whom both executives place a considerable degree of trust and respect. The panel does not make any determination, however the neutral adviser may express a non binding opinion to the parties about the case.79 Mini trial can take place before litigation or arbitration commences or at any time thereafter. It enables the parties to take commercial approach. Parties know the case of the other side and therefore can visualise where it stands in case of litigation.

Perhaps its greatest advantage lies in that it will cause the senior executives to question their own lawyers much more closely than would otherwise be the case and this may well introduce more realization into the advice tendered. The result is private and non binding and in no way affects the ongoing dispute unless it achieves settlement. In case no settlement is arrived at, the parties may ask “neutral advisor” to give his opinion as to non binding result of litigation. The mini trial may not work where there is multiplicity of issues, with no common thread and in case of conflict of evidence. This however is the best structured form of conciliation. It is a novel and pragmatic device evolved by the commercial community to resolve their disputes by

understanding one another’s point of view. The word mini trial however is misnomer as there is no trial and in fact it is non binding ADR procedure. This procedure is hardly used in India.\textsuperscript{80} It is not mentioned in section 89 of Code of Civil Procedure, 1908.

There are certain circumstances in which a mini trial would almost certainly fail to produce settlement. Where either party or key figure on one party’s team wants war rather than peace, either overtly or subconsciously. It takes two to make peace out of a controversy, only one can maintain war.\textsuperscript{81}

\subsection*{2.2.3 Mediation and Conciliation}

A conflict, however, can paradoxically become an opportunity to strengthen ties and generate new business relationships depending on the process chosen for resolving the dispute. One such example is mediation, in which principals with authority can meet and can transform a dispute into a new business deal.\textsuperscript{82} Mediation is one of the world’s ancient modes of dispute resolution and is believed to be as old as human society itself. It evolved over time and differs from place to place. Today, although mediation is gaining popularity in many parts of the world, it is treated and practiced in a disparate manner. For instance in United States, mediation is but one-albeit claimed by some as the most important of a number of methods of Alternative Dispute Resolution (“ADR”). In contrast, in the People’s Republic of China (the “P.R.C.”), mediation is still perceived by many as the principal, favoured means of dispute resolution.\textsuperscript{83} The phrase “Let’s talk” captures mediation’s approach to dispute resolution and deal making. Best understood as assisted and enhanced negotiation, mediation permits confidential discussions directed toward constructive communication. Practiced for centuries and found in most of the world’s cultures, mediation provides a simple, relatively flexible process that allows people to talk and negotiate in the presence, and with the assistance, of third persons. In China, the concept of mediation has evolved out of the antithesis of ‘li’ and ‘fa’ as part of Confucian philosophy, which has always been in favour of allowing a party to save

\textsuperscript{80} Supra Note 42, at 1531.
\textsuperscript{81} Supra Note 79, at 306.
\textsuperscript{82} Supra Note 70, at 340.
face and to work towards the preservation of its relationship with the other side. Unlike arbitrators and judges, mediators do not make binding decisions. Instead they help participants develop solutions and stimulate disputants to make better and more mutually rewarding agreements. Mediation often produces outcomes that exceed the narrower, win – lose legal remedies available with arbitrators and judges.\(^{84}\) Use of a third party which is neutral to the contracting parties to iron out their difference and arrive at amicable solutions is the distinctive feature of mediation.

Mediation is considered a consensual dispute resolution practice in which a third-party with some claim to neutrality facilitates the negotiation, and perhaps resolution, of an issue between two or more parties. Mediation is considered less adversarial than litigation since unlike litigation no assumption is made that the parties cannot come to a mutually agreeable solution. Mediation does not posit a zero sum game as does litigation where it can generally be said that some one wins and someone loses.\(^{85}\)

Conciliation is negotiation facilitated by an independent and impartial third party. It is a process, whereby a dispute is referred to a third person, who hears the parties on questions of fact and law and forms his opinion and attempts to persuade the parties to accept it. The third party is not empowered to impose a decision on the parties,\(^{86}\) and unless parties agree on a settlement, the ADR process will not reach any binding agreement resolving the dispute.

Though terms ‘mediation and conciliation’ are used interchangeably, in mediation the third neutral party plays an evaluative role, i.e. by expressing his opinion, whereas in conciliation the role is facilitative one that is third neutral party does advise parties of his/her own opinion. Bryan A. Garner has drawn the distinction between “mediation” and “conciliation” in following words:

“The distinction between mediation and conciliation is widely debated among those interested in ADR, arbitration and international diplomacy. Some suggest that


conciliation is ‘a nonbinding arbitration’, whereas mediation is merely ‘assisted negotiation’. Others put it this way: Conciliation involves a third party’s trying to bring together disputing parties to help them reconcile their differences, whereas mediation goes further by allowing the third party to suggest terms on which the dispute might be resolved. Still others reject these attempts at differentiation and contend that there is no consensus about what the two words mean that they are generally interchangeable. Though a distinction would be convenient, those who argue that usage indicates a broad synonymy are most accurate.\textsuperscript{87}

Mediation is considered consensual, since the mediator cannot bind the parties to a particular result.\textsuperscript{88} Jereme Lack\textsuperscript{89} defines mediation as “an amicable process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual agreement that will accommodate their needs”.

Practitioners draw distinctions between these expressions in terms of the methods used by the third person or the degree to which the third person is involved in the process. However from the view point of the legislator, no differentiation needs to be made between various procedural methods used by the third person. In some cases, the different expression seems to be more a matter of linguistic usage than the reflection of a singularity in each of the procedural method that may be used. In any event, all these processes share the common characteristic that the role of the third neutral person is limited to assisting the parties to settle the dispute and does not include the power to impose a binding decision on the parties.

Mediation is generally understood as a nonbinding, voluntary (dispute) settlement process. It is not substitute for court adjudication, but it enhances the possibility that the parties will settle their dispute by way of mutually acceptable, rather than by binding third party order. The goal of mediation is to facilitate negotiations between the parties in order to help them reach a mutually acceptable agreement. But there may be more hidden motivations behind this purpose, such as: a) efficiency in terms

\textsuperscript{87} Supra Note 54, at 669.
\textsuperscript{88} Supra Note 85, at 523.
\textsuperscript{89} Supra Note 70, at 343.
of time and money; b) party autonomy in contrast to adjudication; c) reaching creative solutions with win-win results; d) empowerment; and e) reconciliation.  

Le Robert gives a more concise definition of mediation; “a placing between, destined to bring agreement, to conciliate or reconcile persons”, and “conciliation” as being “putting in accord, leading to agreement of persons divided in opinion”. For Littre, conciliation is nothing other than “the removing of the causes of the conflict”.  

It is debated whether Mediation is facilitative or evaluative or both. It has appeared in the columns of dispute resolution journals, “pure” mediation advocates suggest that mediation involves no more than third party neutral facilitating communication between, never evaluating or judging cases. In actual practice, many mediators functions vary from facilitating communication, to probing the parties own thinking about the strengths and weaknesses of their cases, to neutral evaluation on merits, to prediction of how courts will decide cases, to forms that include suggesting solutions (with or without the use of shuttle diplomacy) or approaching decision-like arbitration.  

2.2.4 Multi Tier Agreement  
Sequential processes are very commonly used and are often drafted into contracts as escalation clauses. It is not uncommon that in the arbitration agreement parties include clauses that they should first try to settle the dispute by negotiations. In case the negotiations fail the dispute must be referred to conciliation or other alternative dispute resolution procedures reference to arbitration should be made only when these steps fail. It is well settled principle that agreement to negotiate is not of binding nature. It is therefore necessary in drafting multi tier agreement to set out outer limits within which each stage of process is to be completed so that parties can be certain about the time when they can move to the next level. Parties to international contracts

---

92 *Supra* Note 66, at 1888.
sometimes, use ‘escalation’ dispute resolution clauses, sometimes called ‘cascade’, ‘ADR first’, or ‘multi-tier’ clauses.93

2.2.4.1 Binding Mediation (MED–ARB)
MED - ARB is the most common type of combined process used. Mediation followed by arbitration. Mediation is generally understood as a non binding, voluntary (dispute) settlement process. It is gaining in popularity in the United States and elsewhere. It is not a substitute for court adjudication, but it enhances the possibility that the parties will settle their dispute by way of mutually acceptable agreement, rather than by a binding third-party order. Its goal is primarily to overcome the dangers and problems related to international litigation. Some arbitration agreements provide for variant of mediation known as binding mediation. The mediator becomes an arbitrator and renders an enforceable decision following mediation processes on all issues where the parties fail to reach an agreement. Med- Arb thus blends the elements of negotiations, mediation and arbitration. This process assures resolution of dispute. Med-Arb, is a hybrid of mediation and arbitration, parties start with mediation to try to find a mutually acceptable solution. In the event of failure, the mediator takes on the guise of arbitrator to issue a binding decision. This process aims to profit parties from the advantages of both dispute resolution processes. Sam and John Kagel, of San Francisco, are credited with pioneering the Med-Arb process. They employed it initially to settle nurse's strike.94 However this process may pose many problems including challenge to its validity. Also it has several pitfalls as the party may have disclosed confidential information to the mediator in private caucuses, who himself/herself acts as an arbitrator, if the mediation fails. The confidentiality of mediation is an essential element to most successfully conducting mediation as parties reveal their true interests and perspectives on the dispute without fear that the opposing party will hear about their concerns or that the arbitrator may use that information against them if the matter goes to adjudication.95 The mediator may get

93 Supra Note 30, at 51.
94 Supra Note 90, at 93.
biased. The mediator when has the power to adjudicate may coerce the parties thus hampering the basic principle of autonomy and may become “muscle –mediation”.96

The disadvantage in the procedure is the parties may have divulged the secrets, which may make the mediator biased. It is doubted whether same person should act mediator and then as an arbitrator. It is feared that this process fatally compromise the integrity of adjudicative role. So many suggest Med-Arb (dif) or Med–Arb-opt-out opposed to Med- Arb (same).

In Med-Arb (dif) or Med-Arb-opt-out once the mediation part is completed and before the arbitration part commences, each party is entitled to independently appoint a different person as an arbitrator for the arbitration. It is necessary to define when the mediation process shall be terminated. In this some time limit may be prescribed within which the mediation should be completed. The advantage of this method is that it gives each party the right to reject the med arbitrator from functioning as an arbitrator, in light of the knowledge obtained through the mediation process. In this way the parties may express reservations as to the med-arbitrator’s impartiality and ability to further adjudicate the matter. It also increases the likelihood that the parties will be absolutely candid during mediation, as the parties are aware that in the event of an impasse, another person can be appointed as arbitrator. Finally, there is no issue of coercion, as the parties have yet to determine whether the med-arbitrator will be retained at all as the arbitrator.97

There are many international rules that suggest combinations of mediation followed by arbitration e.g. World Intellectual property Organization ( WIPO), International Chamber of Commerce (ICC), Chartered Institute of Arbitrators (CIArb), American Arbitration Association ( AAA).

2.2.4.2 Arbitration Followed By Mediation (ARB-MED)

The Med-Arb process could be reversed. The Arb-Med could commence with an ordinary arbitration procedure. The parties first conduct a ‘rough and quick’

96 Supra Note 90, at 96.
97 Ibid, at 100.
arbitration, appointing a neutral to give a short ruling as to the amount to be paid by one party to the other. The award is sealed in an envelope and marked “confidential” and leaves it on the table without disclosing its contents. The parties then commence mediation proceedings having agreed in advance to open the envelope and accept it as binding ruling if they have not reached an agreement using mediation or conciliation by a specified time. If the parties settle the envelope is torn up and its contents remain unknown to the parties. The med-arbitrator would bear the parties and allow them to present evidence. This procedure is recognized by UNCITRAL though in a different form. Article 30 of UNCITRAL Model law on International Commercial Arbitration provides that “(1) if during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.”

Section 30 of Arbitration and Conciliation Act, 1996 of India provides that it is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of dispute and with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any have during the arbitral proceeding to encourage settlement. This may lead to Arb- Con or Arb- Med.

As stated above in view of provisions of section 30 of Arbitration and Conciliation Act, 1996, the arbitrator may encourage the settlement of dispute by conciliation. If the conciliation is successful the parties may enter into settlement agreement under section 73 of Arbitration & Conciliation Act, 1996, which shall be binding on the parties. In view of section 74, of the Arbitration & Conciliation Act, 1996 the said settlement agreement shall have same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal. It can be termed as Arb- Con.
It is also possible that during the pendency of arbitration the arbitrator may refer the parties for mediation. If the mediation is successful the arbitral tribunal shall terminate the proceedings and if requested by the parties record the settlement in the form of an arbitral award on agreed terms. Such arbitral award on agreed terms shall have the same status and effect as any other award on the substance of the dispute.\textsuperscript{98} 

This will be Arb-Med.

2.2.5 MEDALOA (Final offer Arbitration)

MEDALOA is an abbreviation of the hybrid process of Mediation and ‘Last Offer Arbitration’ (MEDALOA). ‘Last \textquoteleft offer Arbitration\textquoteright{} has been extensively used in labour disputes and in the United States in the baseball industry to settle salary disputes. It is sometimes referred to as ‘pendulum arbitration’ or ‘baseball arbitration’ accordingly. In fact it is just a modification of the Med-Arb process. If the parties do not settle through agreement, each party then submits a final binding offer to the Med-Arbitrator, and the later chooses between one of the two final offers, which then becomes a binding arbitration award.\textsuperscript{99} The mediator is given the authority to decide which of these binding offers is to be accepted. The mediator can not deviate from the two offers and cannot split the difference between them or propose another outcome. He or she can select only one of these final bonding offers, thus limiting his or her discretion.\textsuperscript{100} The most distinctive feature of this arbitration scheme is the limits it places on the discretion of the arbitrator. The med-arbitrator is not entitled to decide what he believes to be the most appropriate solution for the parties. The rationale behind this process is that in domestic arbitration, arbitrators tend to compromise and “split the baby”. If the parties assume that the arbitrator will “split the baby” they may hesitate to make compromises during negotiation in order to gain the most whenever the arbitrator ultimately splits the baby. In MEDALOA the arbitrator is more likely to choose the last offer he deems more reasonable, which compels the parties to make “reasonable” concessions. The decision of the Med –Arbitrator is merely to choose between two possibilities. A possible disadvantage of this model is

\textsuperscript{98} Arbitration and Conciliation Act 1996, s. 30.
\textsuperscript{99} Supra Note 90, at 101.
\textsuperscript{100} Supra Note 70, at 367.
that, if neither party submits a solution which seems satisfactory to the med-arbitrator, he is not allowed to settle the dispute in a way he believes is appropriate.\textsuperscript{101}

From the above discussion, it is clear that each type of ADR shares a certain common feature with other types in terms of method of interaction, however, in serving as a method of resolving a legal dispute all methods have certain limitations and certain strengths that may make them more suitable for certain types of disputes.

In next topic we shall discuss ADR in England.

\section*{2.3 ADR IN ENGLAND}

After considering the concept of ADR and various types of ADR it is desirous to discuss development of ADR in England as much development is made in Court annexed ADR. The judiciary is traditionally regarded as one of the three state powers. Hence it is the duty of the state to organize a justice system, build the necessary legal and tangible infrastructure, recruit judges and make the services available to the public at a small cost.\textsuperscript{102}

The state subsidizes the system by employing and often training judges and accordingly guaranteeing their competence and independence. Depending on cultural attitudes, judges and courts are deemed either an emanation of state and expression of state power (civil-law-order) or mere service, albeit public service providers (common-law model).\textsuperscript{103}

In the wave of liberalization and privatization services that swept the western world, as well as the so-called emerging markets in the late twentieth century, alternatives to state judicial system have been introduced.\textsuperscript{104} The United Kingdom has been one of the driving forces of such reforms in Europe; the motto of reform was “access to justice”.\textsuperscript{105}

\footnotesize{\textsuperscript{101} Supra Note 90, at 101.  
\textsuperscript{102} Supra Note 43, at 168.  
\textsuperscript{103} Ibid.  
\textsuperscript{104} Ibid, at 167.  
\textsuperscript{105} Ibid, at 168.}
Parallel to the state judicial system, a private independent but binding justice system exists which is activated at the initiation of disputants. More recently, in the late 20th century, systems of alternative dispute resolution (ADR) were introduced and were often entrenched in the legal system overnight. Some ADR systems are significantly older but there are no significant record and rarely a regulatory regime.

Modern ADR is a voluntary system, according to which the parties enter a structured negotiation or refer their disputes to a third party for evaluation and/or facilitation of resolution. Especially in the light of the facts that the justice system was flooded by disputes of variable importance and complexity, and that the parties are almost invariably intimidated by the atmosphere in the courtroom and the litigation process itself, ADR has now become an acceptable and often preferred alternative to judicial settlement or settlement of disputes by arbitration. However, the arbitration is not considered as ADR in Europe.

In UK, a practice direction was issued relating to conciliation in family proceedings; i.e. Practice Direction (Family Decision; Conciliation Procedure). A pilot conciliation scheme was out in operation from January 1983. Discussions about ADR in the UK were fully developed only in the 1990s with the focus on “litigation-mania” and the crisis in civil justice. In the early 1990s two reports were published with recommendations about ADR, one commissioned by the General Council of the bar, the other by the Law society. At the same time, a new practice direction was issued to replace the pilot conciliation scheme used in family proceedings and to reflect changes in the Children Act: Practice Direction (Family Decision: Conciliation Procedure) October 18, 1991.

In 1993, it was noticed that there are certain disputes on which parties need an authoritative ruling of the court, but considered to encourage the parties to use some method of ADR on experiment basis as a possible additional means of resolving at an earlier stage of the proceedings. It was considered that for that purpose either

---

106 Ibid.
107 Ibid.
particular issues arising in a case or the dispute itself may be referred to ADR. This encouragement took the form of a practice statement: *Practice Statement (Commercial cases: Alternative Dispute Resolution)* December 10, 1993. Cresswell J, was then in charge of commercial list. It is mentioned in the statement that the presiding judge before whom the matter is pending would not themselves act as mediator or be involved in any ADR process, they would in appropriate cases invite parties to consider whether their case, or certain issues in their case, could be resolved by means of ADR. The ADR may be experimented where the costs of litigation are likely to be wholly disproportionate to the amount at stake. The Commercial Court acted cautiously.

Next, Lord Taylor of Gosforth published a *Practice Direction (HC Civil litigation: Case Management)* on January 24, 1995. Reducing the cost and delay in litigation by encouraging the parties and their counsel for ADR was the aim of the said direction. Four months later, ADR was added in Section 14 of the Chancery Guide (April 1995) and parties were again reminded of ADR and the list of mediators kept by the Court. Finally on July 26, 1995, Sir Thomos Bingham, MR issued a practice statement addressing the issue in relation to the Court of Appeal, again encouraging the use of mediation.

Another *Practice Statement (Commercial cases: Alternative Dispute Resolution) (No.2)* on June 7, 1996, was issued by Waller J. The statement by Cresswell J was assed and improved by him. In this new statement the use of early neural evaluation is encouraged as a means of reducing costs and delay. In particular the direction provided, *inter alia*, that, if it appeared to a judge that the action before him or any of the issues arising in it are particularly appropriate for an attempt at settlement by ADR techniques but that the parties have not attempted settlement by such means he may invite the parties to take positive steps to set in motion ADR procedures.\(^\text{109}\)

The Court of Appeal a few months later published ADR Guidelines (Paragraph 11) for the Court of Appeal- ADR Scheme. According to these guidelines a pro bono

---

scheme was introduced from 1997 and legal aid was offered to cover the costs of ADR for an assisted party.\textsuperscript{110}

On July 14, 1998 under the Chairmanship of Colman J, appendices 2 and 3 of the \textit{Second Report of the Commercial Court Committee Working party on ADR (ADR Orders in the Commercial Court)} was issued. This working party reviewed court-annexed ADR schemes in Canada, the United States, Australia and New Zealand. It concluded that there was no objection in principle to the court adopting a substantially more driven approach to pre-trial settlement using, where appropriate, more persuasive means. They were, in particular, influenced by the fact that it is in the interests of good court management and of the whole body of litigants that courts should not be clogged with heavy litigation where the parties have not even tried to achieve settlement by other means.\textsuperscript{111} The working party rejected the possibility of allowing the court to order a stay of proceedings until ADR had been tried as they feared that any such order would give justifiable ground for complaint that litigants were being unduly deprived of their rights to have their disputes resolved in court; and they were of course conscious that, in a great many of the disputes referred to the Commercial Court in London, both parties were foreign, had been attracted to London by the high standing of the court, but could well choose to litigate in other sophisticated jurisdiction if they disliked the court’s procedures, to the prejudice of London’s position as major financial and commercial centre.\textsuperscript{112}

A survey by the national Consumer council found in 1995 that three out of four people in serious legal disputes were dissatisfied with the civil justice system. This was also the conclusion of the 1988 Civil Justice Review against this background that the Lord Chancellor set up the Committee in 1994 under Lord Woolf to produce report on \textit{Access to Justice}.\textsuperscript{113} Just as the USA traces its ADR movement to the Pound conference of 1970, the Woolf reforms mark the entry of ADR in the civil justice system of England and Wales. Lord Woolf, Master of the Rolls, undertook a comprehensive examination of the civil legal system and produced an interim report within a year in 1995 and final report in July 1996. The Woolf reports include the

\textsuperscript{110} \textit{Ibid}, at 175.
\textsuperscript{111} \textit{Ibid}, at 176.
\textsuperscript{112} \textit{Ibid}.
\textsuperscript{113} \textit{Ibid}, at 178.
introduction of procedural case tracks and pre-action protocols. They did not stop structural and procedural reform, but sought to change the culture of litigation.\textsuperscript{114}

Lord Woolf while addressing the seminar on 21 July 2000, organized by the chartered Institute of Arbitrators and Dispute Resolution Section of the ABA, in association with the Centre for Dispute Resolution (CEDR) and the London Court of International Arbitration, at Queen Elizabeth II Convention Centre in Westminster, sponsored by Lovells and Towers and Hamlins\textsuperscript{115}, remarked, “it isn’t the Rules which are important. Indeed, everything that is being achieved now by new rules could have been achieved under the old rules. What the new Rules did, however, was to signal a new beginning and a new approach to what we mean by justice and it gave new responsibilities to the courts in seeking to achieve justice. But what is meant by justice is what is important.” He further opined that the new Rules have made it clear that the judges ultimately have to take responsibility for ensuring that litigants behave reasonably and rationally in the process of civil disputes. This is vitally important, because the evidence from all the jurisdictions, both civil law and common law, is that there is no way in which one can make the civil justice process painless. All that one can do is help reduce the pain. The message must be that you’ve got to avoid it, as far as possible, being involved in the civil justice arena and, if you are involved, ensure that your involvement is restricted as far as possible. He further pointed that in bringing out the new Rules, we emphasized that what happened before proceedings started in the courts should influence what orders the courts ultimately made. Under the system as it now is, you can have to pay double indemnity costs or, under the most recent rules with regard to the financing of those people who can’t afford to bring litigation themselves, you may end up paying triple costs. So the key to the reforms has been giving the courts these powers and trusting the courts to exercise them sensibly, coupled with a very important feature and that is the protocol drawn up by those who are expert in the particular field of litigation. We call them pre-action protocols because they describe how persons involved in a dispute should behave before they get involved in the process. It is almost a form of mediation in itself because you are required to give information to the other side, both in the form of

\textsuperscript{114} Supra Note 9, at 265.

documents and in factual account of what your case is, before you go anywhere near the court. The other side then has to respond with its own account of the matter and so both sides are in a position to evaluate the case. We then support that by giving the court power to take into account any offers to settle before the orders as to costs and interest are made, assuming the matter doesn’t settle. This has had effect of changing the culture.

Following the two Woolf reports and the Civil Procedure Act 1997, most recommendations were effected from April 26, 1999 through Civil Procedure Rules 1998. The civil justice reform had four main objectives:

- Simplification of procedure (including expediency and cost reduction through an underlying principle of proportionality)
- Judicial case management (requiring judges to actively manage the resolution process by watering down the adversarial system)
- Pre-action protocols (aiming at encouraging contact between parties and better exchange of information; hoping that a settlement may be facilitated); and
- Alternatives to court procedure.\(^\text{116}\)

There are three different ways, in which the Woolf Reports and the Civil Procedure Rules attempt to promote ADR:

The payment system has been changed so as to enable claimants and defendants alike to make offers relating to the allocation of costs;

The settlement at the earliest possible stage is encouraged by pre-action protocols and an active case management;

Official encouragement is given to the avoidance of litigation through recourse to alternative dispute resolution.\(^\text{117}\)

The overriding objective, as elaborated in CPR 1.1 (2) is to deal with a case “justly”, which includes ensuring that parties are on equal footing, saving expense, dealing

\(^{116}\) Supra Note 43, at 179.

\(^{117}\) Ibid, at 180.
with case in ways that are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party, ensuring that the case is dealt with expeditiously and fairly, and allotting an appropriate share of the court’s resources to it. In furtherance of this objective and the shift in legal culture, a greater emphasis was placed on resolving disputes consensually. This was central to the new litigation culture and was to be achieved through active case management to promote settlement. CPR 1.4 (1) (e) and (f) and CPR 26.4 (1) enable parties to make requests for, or the court of its own initiative to order, a stay of proceedings to enable parties to arrive at settlements by ADR processes. This squarely brings mediation within the ambit of court power and client duty. Parties are encouraged to make offers to settle at pre-litigation or early stage. Cost consequences follow for unreasonable refusal. Similar consequences follow where there is insufficient compliance with the court mandate to undertake mediation efforts.

In Dyson and Anr. v Leeds City Council, the Court of Appeals informed the parties of its powers to impose orders for costs or higher rates of interest on any award of damages, if its suggestion to use ADR were spurned by the parties. The court refused to award cost to successful defendant as he ignored the possibility of ADR when suggested by the Court. The question was raised in Halsey’s case as to whether requiring a party to proceed to mediation would contravene the party’s right to access the courts under Article 6 of the European Convention on Human rights. The Courts of Appeals held that the burden was on unsuccessful party to show why there should be a departure from the general rule that costs should follow the event. Post-Hasley, the law seems to have moved on to make it more difficult for parties to refuse mediation without good cause. In P4 v Unite Integral Solutions, the court said that it would examine if such refusal was objectively reasonable.

118 Supra Note 9, at 265.
119 Ibid, at 266
120 Ibid.
121 Ibid.
122 Ibid.
123 Ibid, at 267.
124 Dunnett v. Railtrack, [2002] EWCA Civ 303. See Also Supra Note 118.
125 Halsey v. Milton Keynes, [2004] EWCA Civ 576. See Also Supra Note 118.
126 [2007] BLR 1, See Also Supra Note 109, at 268.
It was held by Lord Denning in *Courtney and Fairbairn Ltd. v Tolaini Bros.*\(^\text{127}\) that an agreement to negotiate was unenforceable, being too uncertain to have any binding force. It is held ‘contract to negotiate like a contract to enter into a contract is not a contract known to law’.

However changes were brought in civil justice system of England owing to the report of Lord Woolf. In *Frank Cowl v Plymouth*, a dispute was regarding re-housing the elderly residents in a nursing home; the city council which ran the home offered the residents an alternative process to avoid litigation. The offer was rejected by the residents. Lord Woolf strongly while speaking for Court of Appeal held “Today, sufficient should be known about ADR to make the failure to adopt it, in particular where public money is involved, indefensible.”\(^\text{128}\)

The English courts moved yet further to enforce mediation even when the ADR clause in the agreement was unclear.\(^\text{129}\) In *Cable & Wireless Plc v IBM UK Ltd*\(^\text{130}\), where ADR clause that specifically referred disputes to mediation, but was vague in terms of the nature of the procedure that should be used (other than referring broadly to the rules of CEDR, a mediation service provider), was nevertheless held to be contractually enforceable. A stay of the judicial proceedings was granted and the parties were directed to comply with ADR clause.\(^\text{131}\) The court’s reasoning was that declining to enforce contractual references to ADR on the grounds of intrinsic uncertainty would ‘fly in the face of public policy’.\(^\text{132}\) The court emphasized that the entire point of such clauses is to avoid courts and encourage mediation as the first step of a comprehensive procedural scheme.\(^\text{133}\) Litigation, the court said, is last resort and not the beginning point of the dispute resolution process.\(^\text{134}\)

\(^{127}\) [1975] All ER 716.

\(^{128}\) Supra Note 9, at 272.

\(^{129}\) Ibid.

\(^{130}\) [2002] 2 All ER (comm.) 1041.

\(^{131}\) Supra Note 9, at 272.

\(^{132}\) Ibid.

\(^{133}\) Ibid.

\(^{134}\) Ibid.
The European Parliament and The Council of the European Union has issued directives on certain aspects of mediation in civil and commercial matters.\textsuperscript{135} The said directives were issued as it is concluded that the establishment of basic principles in the area of alternative methods of settling disputes under civil and commercial law, is an essential step towards enabling the appropriate development and operation of extrajudicial procedures for the settlement of disputes in civil and commercial matters so as to simplify and improve access to justice. The provisions of the directive apply only to mediation in cross border disputes. It is applicable to the process whereby two or more parties to a cross border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator.\textsuperscript{136} This process may be initiated by parties or suggested or ordered by a court or prescribed by the law of a Member State.\textsuperscript{137} It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the Court or Judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question. It provides that a Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable.\textsuperscript{138} The directive further provide that the content of an agreement resulting from mediation which has been made enforceable in a Member state should be recognized and declared enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where request is made.\textsuperscript{139} The objective of the directive is stated to be to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

The ‘Mediation’ is defined to mean a structured process, however named or referred to, whereby, two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a

\textsuperscript{136} Article 3 (a) definition of ‘Mediation’.
\textsuperscript{137} Article 6(1) of Supra note 135.
\textsuperscript{138} Ibid, Art. 6(1).
\textsuperscript{139} Ibid, Art. 6(2).
mediator. The process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.\textsuperscript{140}

The Cross–Border Mediation (EU Directive) Regulations 2011 are made which has come into effect from 20-05-2011.

Mediation Act of 2012 is enacted. Mediation is defined therein as facilitative and confidential process in which a mediator assists parties to a dispute to attempt by themselves, on a voluntary basis, to reach a mutually acceptable and voluntary agreement to resolve their dispute.\textsuperscript{141}

The Mediation Act\textsuperscript{142} puts responsibility on the solicitor to advising or acting for a client prior to commencing civil proceedings on behalf of the client, to advise the client to consider using mediation as an alternative means of resolving the dispute, to provide the client with information concerning mediation services and all details as to organizations expected cost involved in civil suits etc. It also provides that a person commencing civil proceedings shall, when making application to the court, include a written statement signed by the person and his or her solicitor in the person’s presence, confirming that (i) mediation has been considered as an alternative means of settling the dispute, and (ii) the solicitor has complied with the requirement of the section.

The Parties may engage in mediation either on their own initiative prior to or at any stage following the commencement of civil proceedings, or following invitation by a court.\textsuperscript{143} It is for the parties involved in mediation to determine the outcome of a mediation process. A party involved in a mediation process may withdraw from it at any time with or without explanation.\textsuperscript{144}

\textsuperscript{140} Supra Note 130.  
\textsuperscript{141} The Mediation Act, 2012, s. 2.  
\textsuperscript{142} Ibid, s. 4.  
\textsuperscript{143} Ibid, s. 6.  
\textsuperscript{144} Ibid.
It further provided\textsuperscript{145} that the parties involved in a mediation process shall determine—
(a) if and when an agreement has been reached between them, and
(b) whether the agreement is to be enforceable between them.

(2) Notwithstanding subhead (1) and subject to subhead (3), an agreement in writing signed by the parties and by the mediator shall have effect as a contract between the parties except where it is expressly stated to have no legal force until incorporated into a formal legal agreement or contract to be prepared by either party’s solicitor and signed by the parties.

(3) Without prejudice to section 8 and 8A (inserted by section 20 of the Status of Children Act 1987) of the Family Law (Maintenance of Spouses and Children) Act 1976, a court may, on the application of the parties to any written agreement reached at the conclusion of a mediation process, enforce its terms where it is satisfied that—
(a) the agreement adequately protects the rights and entitlements of the parties and their dependents (if any),
(b) the agreement is based on full and mutual disclosure of assets, and
(c) a party to the agreement has not been overborne or unduly influenced by any other party or parties in reaching the agreement.

Mediation Act as pointed out above provides for mediation through court intervention. A court may (a) on the application of a party involved in civil proceedings, or (b) of its own motion where it considers it appropriate having regard to all the circumstances of the case—(i) invite the parties to use mediation to settle the dispute,(ii) for this purpose direct the parties to attend an information session on the use and operation of mediation, and (iii) draw the attention of the parties to the possibility of staying court proceedings under Head 15 to facilitate such mediation.

The Mediation Act does not provide for the enforcement of settlement agreements executed in pursuance to mediation.

\textsuperscript{145} Ib\textit{id}, s.11.
Also it does not provide for the enforcement of settlement agreements in cross border mediation or ADR.

Thus it is clear that the mediation in England developed due to active participation and encouragement by the courts to settle the disputes through court annexed ADR. The courts have even awarded the costs or refused to awards the cost though party has succeeded, if he has without any reason did not participate in ADR.

2.4 ADR IN USA

After discussing the development of ADR in England, the researcher would like to track the development of ADR in USA.

Earlier Native Americans had “their own dispute resolution methods for centuries”, long before European settlers came and settled on the American continent. But in many ways traditional Native American mediation the peacemaking process was different from mainstream American mediation practice. For example, by nature, the former was oriented to the “individual-in-community” while the latter to “individuals and the assertion of individual needs”. In addition, the terms of actual mediation practice, traditional Native American mediation was and continues to be diverse among the tribes in its forms. There are at least 517 ways that the Native American form of mediation, peacemaking, occurs in the United States today. Navjoses have been pioneers among the Native American tribes in restoring their traditional peacemaking practice, which was ended in 1892 when the United States government imposed on them tribal courts modeled on the American judicial system is offered. The traditional peace making process among the Navjoses is essentially spiritual and derived from the over arching value of tribal unity and harmony. A peacemaker conducting the peace making process is selected on the basis of his personal knowledge and his demonstrated practice of traditional norms, values, and moral principles. He, therefore, commands the respect and trust of tribal members.

---

146 *Supra* Note 83 at 534.
authority is persuasive rather than coercive in nature.\textsuperscript{154} He will teach traditional norms, values, and moral principles, remind parties of their responsibilities to each other guide them to resolve the dispute in a consensual agreement, and assist them in returning to unity and harmony.\textsuperscript{155} The peace making process itself is a ceremony in form, but the goal is to restore disputants to harmony. It tends to be public, and frequently involves elders.\textsuperscript{156}

During the colonial period, the European settlers brought the European mediation tradition to the New World.\textsuperscript{157} One source of the European mediation tradition came from Roman law, under which courts often referred cases to arbitrators.\textsuperscript{158} Although called the process was actually a combination of mediation and arbitration as the arbitrators generally acted first as mediators or conciliators. It was typical that when referring cases to arbitrators, the court would give instructions such as “to reconcile if possible; if not to report their decision to the court”.\textsuperscript{159} Only after the mediation failed would they then make a “decision” or “verdict” and report it to the referring court.\textsuperscript{160} Another major source of mediation in Europe was the Christian tradition. Churches and clergy were often called upon to mediate disputes between their members.\textsuperscript{161} The religious groups of European settlers brought this Christian mediation tradition to the new world.\textsuperscript{162}

Two of the best-known religious groups of the European settlers who practices mediation were the Christian community of Dedham, Massachusetts and Quakers in Philadelp.\textsuperscript{163} The Christian community of Dedham established their own informal mediation system.\textsuperscript{164} According to this informal mediation system, the community members or the disputants themselves could select several fellow community  

\textsuperscript{153} Ibid.  
\textsuperscript{154} Ibid.  
\textsuperscript{155} Ibid, at 535.  
\textsuperscript{156} Ibid.  
\textsuperscript{157} Ibid.  
\textsuperscript{158} Ibid.  
\textsuperscript{159} Ibid.  
\textsuperscript{160} Ibid.  
\textsuperscript{161} Ibid.  
\textsuperscript{162} Ibid.  
\textsuperscript{163} Ibid.  
\textsuperscript{164} Ibid.  

51
members to conduct mediation. The mediation results did not have binding force, but they were rarely challenged. While Dedham eventually ‘legalized’ its ideal to build a new society according to religious specifications in the New World was carried on by another Christian group the Quakers in Philadelphia and other places. Quakers are known as pacifists. They seek peace with everyone and resolve disagreements not by “hot contests” but “in love, coolness, gentleness and dear unity.”

After the Declaration of Independence was ratified in 1776, in addition to continued religious resistance (such as by the Quakers) to the formal U.S. judicial process, mediation was also preferred and practiced by some ethnic immigrant groups with strong mediation tradition in their homeland or within their community.

Among the best known examples of the new mediation practitioners were the first generation Chinese immigrants in San Francisco’s Chinatown, who between 1849 and 1854 formed family association and several district associations also known as “Chinese Six companies” which were formally incorporated in 1991 as the Chinese Consolidated Benevolent Association (“CCBA”). Another immigrant group with mediation tradition is the Jews. In early times, the Jewish mediation tradition was continued in the new World only in “an attenuated way”.

The Jewish Conciliation Board of America was founded in the year 1919. It was not court of law and its purpose was more conciliation than arbitration, its name was changed to Jewish Conciliation Court in 1930 and finally, in 1939, to Jewish Conciliation Board (“JCB”) of America. At its peak, close to a thousand cases were brought to the Board each year. And at times even civil court judges might suggest to litigants to have their disputes settled by the Board. However just like the CCBAs in Chinatowns, towards the end of the 20th century, the use of the Board significantly

---

165 Ibid, at 537.
166 Ibid.
167 Ibid.
168 Ibid.
170 Ibid, at 539.
171 Ibid, at 541.
172 Ibid.
173 Ibid, at 542.
declined.\textsuperscript{174} And eventually the JCB was quietly closed after about 80 years of existence due to lack of interest in its services.\textsuperscript{175}

Beginning in the late 1960’s American society witnessed an extraordinary flowering of interest in alternative forms of dispute resolution.\textsuperscript{176} In the 1964 Civil rights Act, Congress established the Community Relation Service of the Justice Department to assist courts in settling intractable racial and community disputes.\textsuperscript{177} The Ford Foundation established the National Center for Dispute settlement and the Institute of Mediation and Conflict Resolution to study settlement mechanism.\textsuperscript{178} Over a time, community justice centers sought to develop relationships with the local court system, and courts tended to refer minor cases to them. Although community justice centers were mostly a temporary phenomenon, their effectiveness gave courts a sense of the supplemental role that mediation and ADR could fulfill.\textsuperscript{179}

The leading jurists and lawyers expressed concern about increasing expense and delay for parties in a crowded justice system at the 1976 Pound Conference. The concern was expressed over the increasing reliance on the litigation to resolve disputes which has resulted in placing heavy burden on the court system. It has left the courts to ponder as to how to alleviate this burden. Professor Frank Sander of Harvard Law School argued for the creation of multiple types of dispute resolution systems, and to allow litigants the opportunity to choose the one that best fit their needs.\textsuperscript{180} The task force resulting from the conference were impressed with the professor Frank Sander’s vision of a court which included a dispute resolution center where parties would be directed to the process most appropriate for a particular type of case. The task force recommended public funding of a pilot program using mediation and arbitration. The American Bar Association’s committee on dispute resolution encouraged the creation of three model “multidoor courthouses”.\textsuperscript{181}

\ \textsuperscript{174} Ibid, at 542.
\textsuperscript{175} Ibid.
\textsuperscript{176} Supra Note 50, at 8.
\textsuperscript{177} Ibid.
\textsuperscript{178} Ibid.
\textsuperscript{180} Ibid, at 196.
\textsuperscript{181} Supra Note 50, at 9.
In some states, a form of ADR was developed whereby in cases, involving only moderate amounts of money, the parties were automatically forced into arbitration like process. This form of arbitration essentially a streamlined simplistic form of trial. It is presided over by a panel of arbitrators who are lawyers who have volunteered to do this job.\textsuperscript{182}

The ADR programs have been implemented into public justice system, in addition to the private sector. The Civil Justice Reform Act of 1990 was created as a pilot program to develop cost and delay reduction in the federal district courts.\textsuperscript{183} This provided that United States District Court shall consider principles and guidelines of litigation management and cost and delay reduction. It allowed the District Courts to refer appropriate cases to alternative dispute resolution program including mediation. As a result different kinds of pre trial alternatives have become available in the American courts: court annexed arbitration, mediation, summary jury trial, and early neutral evaluation.\textsuperscript{184}

Not all aspects of American mediation tradition are declining today, however on the contrary, many are revitalizing.\textsuperscript{185} Navajo nation became the first native American tribe to recreate in 1982 a traditional Indian justice system the Navajo Peacemaker Court to work in tandem with its federally prescribed tribal court.\textsuperscript{186} The U.S. federal government has formally recognized these efforts. In 1993, the U.S. Congress enacted the Indian Tribal Justice Act. This Act specifically recognized traditional Indian Law and procedure, pointing out that “traditional tribal justice practices are essential to the maintenance of culture and identity of Indian tribes. In the meantime, Christian conciliation, once strictly adhered to in the Christian community of Dedham and still adhered to by Quakers, has also been revived broadly in the American Christian community. The pilot project of Christian conciliation was supported by the 1982 Christian Law Society (“CLS”).\textsuperscript{187}

\textsuperscript{182} Supra Note 179, at 197.
\textsuperscript{183} Supra Note 50, at 9.
\textsuperscript{184} Ibid.
\textsuperscript{185} Supra Note 83, at 542.
\textsuperscript{186} Ibid.
\textsuperscript{187} Ibid, at 543.
The unique Dutch combination of mediation-arbitration-adjudication procedures in New Netherlands may have in some way revived by the modern concept and practice of a “multi-door” courthouse. ¹⁸⁸

A multi-door court house or a Dispute resolution Center including a courthouse is a bold, modern attempt to transform the weakness of the American mediation tradition and make modern mediation a prominent part of the U.S. civil justice system with federal and state recognition and support.¹⁸⁹

Pursuant to procedural changes enacted by Congress, many federal courts developed ADR programs in the early 1990s, and federal courts are now mandated by statute to provide these offerings.¹⁹⁰ By the mid-1990s, every state had one or more court-connected mediation programs.¹⁹¹ Thus early changes made ADR processes available within litigation structures.¹⁹² In parallel development, law schools made special ADR courses available as part of their procedural offerings.¹⁹³

With many mediation programs now available, procedural developments within the litigation system continue to change the climate and more fully integrate the use of ADR processes in practical terms.¹⁹⁴ Some courts combine litigation and resolution processes through procedures such as court referral, or requirements that counsel discuss ADR with clients.¹⁹⁵

The Administrative Dispute Resolution Act was passed in 1996. Its stated background was that the United States government is continually embroiled in disputes with other parties, that one quarter of all claims in federal courts name the federal government as a party, and litigating them cost the taxpayer billions of dollars.¹⁹⁶ To encourage faster, less costly ways to resolve the disputes with federal government, Congress

¹⁸⁸ Ibid, at 544.
¹⁸⁹ Ibid.
¹⁹¹ Ibid.
¹⁹² Ibid.
¹⁹³ Ibid.
¹⁹⁴ Ibid.
¹⁹⁵ Ibid, at 561.
¹⁹⁶ Supra Note 9, at 238.
enacted the law to make explicit the broad authority of the federal agencies to use alternative dispute resolution methods.\textsuperscript{197} The US Postal agency, the AIR Force, the United states Information Agency and the Department of Veteran Affairs have expanded the use of ADR and appointed dispute resolution specialists and settled government contracts disputes.\textsuperscript{198} Thus various state agencies which is main litigant have ADR programmes to settle administrative disputes reducing them burden of judiciary. Over 2500 statutes have authorized or mandated the use of mediation. Several courts have mandatory mediation programmes by which cases are taken off the court calendar and assigned to mediators appointed by the disputants or the courts.\textsuperscript{199} If the mediation is unsuccessful the case is restored to the court docket.\textsuperscript{200} There is no compulsion to settle; however, costs may be imposed by the court if it is shown that a party has not participated with good faith in the mediation.\textsuperscript{201}

\textbf{2.4.1 Change in Roles By American Courts}

With the change in the concept of the disputes resolution techniques, the courts in America are also changing their roles. That is to say, even in the mundane world of civil disputes, the ‘empire of the law”, i.e., the area of absolute dominance claimed for themselves by the courts as the ultimate decision makers, is now shrinking in certain respects.\textsuperscript{202} Recent development shows this to be the case. For example, where once it was settled law that choice of forum clauses were unenforceable, the courts, led by the Supreme Court, reversed course in the 1970s; now, it appears, so long as the contractual choice is reasonable, the parties choice shall be enforced. Thus, the courts themselves have trimmed away an area where they once claimed an exclusive right to decide.\textsuperscript{203} The earlier view expressed by the courts in Wilko and American safety wherein the courts declined to enforce pre suit arbitration agreement on the ground that it was likely to lead to less accurate legal results\textsuperscript{204}, has now been completely rejected by the Supreme Court in a series of important opinions issued in the 1980s. In a series of decisions in the 1980s the Supreme Court literally has forbidden the lower

\textsuperscript{197} \textit{Ibid.}
\textsuperscript{198} \textit{Ibid, at 239.}
\textsuperscript{199} \textit{Ibid.}
\textsuperscript{200} \textit{Ibid.}
\textsuperscript{201} \textit{Ibid.}
\textsuperscript{202} \textit{Supra Note 72, at 15.}
\textsuperscript{203} \textit{Ibid.}
\textsuperscript{204} \textit{Ibid, at 15, 16.}
federal courts, when considering the arbitrability of a dispute, to take into account the obvious flaws in arbitration as a means of arriving at a legally correct answer. In *Mitsubishi Motors Corp. v Soler Chrysler–Plymouth Inc.*, the Supreme Court refused to apply American Safety doctrine in the international arena and upheld an international agreement to arbitrate a statutory claims under the United States antitrust laws. And, in the 1989 decision *Rodriguez de Quijas v Shearson American Express*, the Supreme Court overruled Wilko, using words that amount almost to a denunciation of the Court that had authored the earlier opinion.

It is no coincidence that contemporaneously with the supreme Court’s decisions in the 1980s that reversed Wilko and undermined American safety, the courts, both federal and state, became not merely participants in, but advocates of, the “Alternate Dispute Resolution “ or “ADR” revolution that is currently transforming the landscape of civil litigation. The courts are now encouraging, the most commonly used methods of court annexed ADR (i.e. mediation, case evaluation, mini trial, and summary jury trial), which are all aimed at fostering settlements, the courts have moved to thrust back upon the parties to a dispute the very choice, i.e., how to resolve the matter, that one party at least, by instituting litigation, apparently wished a court (or jury) to make. Analogous supporting ADR has resulted in the 1990s in court rules and legislation which formally incorporate ADR into the litigation system; so called “court-annexed ADR”, as distinguished from ADR engaged in by parties prior to or without the initiation of a lawsuit.

On the federal side, ADR was officially endorsed by Congress in the Civil Reform Act of 1990 and is embodied, for example, in the recently enacted Local Rule 16.4 of the United States District Court for the District of Massachusetts, which is aptly titled “Alternative Dispute Resolution”.

Analogous developments have occurred on the state level. In Massachusetts, for example, legislated courts reform has expressly included ADR. Thus on February
12, 1993, an Act Improving the Administration and Management of the Judicial system of commonwealth went into effect, which included a provision giving the Chief Justice for administration and management the authority to “promulgate rules for a mandatory alternative dispute resolution program for civil actions within the trial court, subject to the approval of the supreme judicial court; provided, however, that the parties to a dispute resolution shall not bound by the results thereof”. 210

Significantly, the legislations on both the federal and state levels were a response to a movement in the judicial branches themselves in favor of court-annexed ADR. Thus, former Chief Justice Burger has consistently been vocal advocate of ADR, as have been other members of the federal judiciary. 211 Likewise, in Massachusetts, the legislation encouraging court-annexed ADR reflected the conclusions already recommended by Chief Justice Liacos’s Commission on the Future of the Courts, which specifically endorsed ADR, noting, inter alia, in its report that “in seeking to resolve tomorrow’s disputes, the justice consumer will demand options as surely as he or she will insist on choices in seeking any other valuable commodity”. 212 This insight was further articulated in the Supreme Judicial Court’s 1993 policy Statement on Dispute resolution. Alternatives, which obligated the Judicial Branch to make ADR—including, but not limited to, “mediation, arbitration, mini or summary trials, case evaluation, and complex case management services”—available to parties irrespective of their financial resources. In support of its position on ADR, the Supreme Judicial Court noted “there is a large body of evidence that establishes that the use of appropriate dispute resolution methods other than adjudication at an early stage in the process substantially reduces the cost, time and complexity of litigation in our courts, and provides greater satisfaction on the part of litigants and their attorneys”. The Court opined out that “the addition of Alternative Dispute Resolution to the basic mission of the courts is a fundamental change. 213 The move to court-annexed ADR is to achieve a reduction in costs concomitant with an increase in efficiency and satisfaction for the “justice consumer” 214

---

210 Ibid, at 17.
211 Ibid.
212 Ibid.
213 Ibid.
214 Ibid.
In USA, many state and federal courts have statutes requiring good faith participation in mediation and authorize courts to sanction bad faith which would involve imposition of costs.\textsuperscript{215} In \textit{Doe v Francis}, the Court had directed the parties to go for mediation.\textsuperscript{216} The defendants subverted the mediation; he was there for less than three minutes during which he threatened to bury the Plaintiff’s lawyer in litigation and ruin his clients. This virtually amounted to a refusal to mediate, as well as unruly behavior at the mediation table.\textsuperscript{217} The Court held that he was acting in bad faith, proceeded to award exemplary costs on him, and sentenced him to a prison term for contempt of court and abuse of the legal process.\textsuperscript{218} While this case illustrates how the medium of costs may be used to make parties mediate, it also provides interesting facets of information being made available to the court about what transpired in the mediation.\textsuperscript{219} Obviously the Court did not allow confidentiality to prevent it from examining whether its direction to mediate was complied with.\textsuperscript{220}

The United States Congress passed the Alternative Dispute Resolution Act of 1998 (“ADR” Act). It states that:

“Alternative dispute resolution has the potential to provide greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements and certain forms of alternative dispute resolution may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States allowing the courts to process their cases more efficiently”\textsuperscript{221} ADR Act requires federal District Courts to establish at least one ADR program and to develop procedural rules for its wide and active use.\textsuperscript{222} In the United states, the ADR Act does not mandate mediation, but rather requires that District Courts offer ADR: “each United States district court shall authorize, [not “mandate”] by local rule adopted under section 2071 (a), the use of alternative dispute resolution processes in all civil actions.” Each of the ninety-four District Courts, however, may mandate mediation via their local rules.\textsuperscript{223} The law further authorizes each Court to exempt “specific

\begin{footnotes}
\item[215] Supra Note 9, at 270.
\item[216] Ibid.
\item[217] Ibid.
\item[218] Ibid, at 271.
\item[219] Ibid.
\item[220] Ibid.
\item[221] Supra Note 83, at 527-528.
\item[222] Supra Note 50, at 9.
\item[223] Supra Note 83, at 529.
\end{footnotes}
cases or categories of cases in which use of alternative dispute resolution would not be appropriate,” but requires that they consult a member of the bar including the United States attorney for their district.224

The Alternative Dispute Resolution Act of 1998, which mandates ADR programs in federal district courts, does not itself establish any procedural protections for confidentiality. Instead, the ADR Act requires each district court to protect confidentiality in its program by local rules.225 These rules vary widely in their scope, terms, and effectiveness, and some courts have found that local mediation confidentiality rules are inadequate to prevent in-court disclosers about the content of court-sponsored mediations.226 There has been limited common law development of a mediation privilege in some of the federal courts, while others have declined to recognize this privilege in the absence of a clear mandate from congress.227

In America, corporate ADR has been called a ‘corporate-consumer revolution” and has resulted in institutional structures like JAMS, a big commercial provider, or the CPR Institute for Dispute Resolution (formerly The Center for Public Resources) which works towards the promotion and continuous improvement of dispute resolution techniques between businesses.228 Considerable American companies have instituted corporate ADR programs.229 Corporate law firms have also started to embrace ADR as part of their services.230

Lawrence M. Watson Jr. while addressing the seminar on 21 July 2000, organized by the chartered Institute of Arbitrators and Dispute Resolution Section of the ABA, in association with the Centre for Dispute Resolution (CEDR) and the London Court of International Arbitration, at Queen Elizabeth II Convention Centre in Westminster, sponsored by Lovells and Towers and Hamlins231, observed that over the past two decades, Alternative Dispute Resolution (ADR) programs in general and mediation

224 Ibid.
225 Supra Note 190, at 565-566.
226 Ibid, at 566.
227 Ibid.
228 Supra Note 12, at 171.
229 Ibid, at 171-172.
230 Ibid, at 172.
231 Supra Note 115, at 40.
programs specifically, have proliferated at a robust pace in the United States. Now virtually every state in the US, and the federal government, has adopted enabling legislation seeking to create alternative dispute resolution systems for courts at all levels. State and federal administrative agencies are now following the judiciary’s lead by developing comparable ADR programs to resolve conflicts in their various jurisdictions. Even the private sector of the American business community has joined the fray, building ADR mechanisms into their contracts with customers, agents, and vendors. Mediation has been the fastest growing of the new ADR processes. American mediators have thus experienced a variety of ADR system infrastructures. There are court annexed and independent systems, mandatory and voluntary programs facilitated conciliation, binding and non binding adjudication systems, and a variety of blended processes. In United States there are classic mediations, mediations coupled with non bonding arbitration,' Med-Arb’ programs, and even mediations joined with private judging—all under a host of differing statutes and procedural rules. The exact wording of the many statutes, ordinances and procedural rules establishing court-annexed mediation programs vary with the creativity and imagination of their authors. The American experiment with mediation has also produced the realization that there are infinite number of ways to ‘do it right’. New techniques and approaches that are often in contradiction with earlier concepts of acceptable processes are surfacing every day. Lawrence M. Watson Jr. regarded four basic concepts as paramount principles to follow in establishing a court annexed mediation program. Firstly it should be mandatory for parties to enter ADR process, secondly parties should have freedom in selecting and retention of dispute resolution neutrals, thirdly not only participation of parties be mandatory but also parties be required to appear through their representatives having sufficient authority to close an agreement should they choose to do so. Fourthly Mediation should be confidential.

Multi step dispute resolution clauses are now becoming popular and are used in domestic and international commercial contracts in the United States. These clauses

---

232 Ibid.
233 Ibid, at 41.
234 Ibid.
235 Ibid.
236 Ibid.
237 Ibid, at 41 - 43.
provide for mediation at the first stage, prior to arbitration/litigation.\textsuperscript{238} The courts in USA are willing to enforce such clauses when they are able to clearly discern such an intention of the contracting parties.\textsuperscript{239} In \textit{CB Richard Ellis, Inc v American Environmental Waste Management & Ors\textsuperscript{240}}, the US District court for the eastern New York held that it was appropriate to stay the proceedings and compel mediation because the mediation clause in the disputes agreement was sufficient to manifest the parties’ intention to attempt to settle the dispute by reference to mediation and, further, that the mediation clause as drafted would fit within the terms of the Federal Arbitration Act, 1988 which provided statutory powers to compel mediation in accordance with the terms of the agreement.\textsuperscript{241}

In 2001, the Federal Government passed The Uniform Mediation Act(UMA Act),\textsuperscript{242} which is a major milestone in the development of procedures to make mediation more effective within, and as a complement to, litigation.\textsuperscript{243} This Act is designed to simplify a complex area of the law.\textsuperscript{244} Currently, legal rules affecting mediation can be found in more than 2500 statutes.\textsuperscript{245} It governs both court-connected mediations and mediations conducted pursuant to an agreement by the parties.\textsuperscript{246} The Act to be applied and construed in a way to promote uniformity, as stated in Section, and also in such manner as to:

• promote candor of parties through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests;
• encourage the policy of fostering prompt, economical, and amicable resolution of disputes in accordance with principles of integrity of the mediation process, active party involvement, and informed self determination by the parties; and
• advance the policy that the decision-making authority in the mediation process rests with the parties.

\textsuperscript{238} Supra Note 9, at 273.
\textsuperscript{239} Ibid.
\textsuperscript{241} Supra Note 9, at 273-74.
\textsuperscript{242} Amended in the year 2003.
\textsuperscript{243} Supra Note 190, at 562.
\textsuperscript{244} Prefatory note of Uniform Mediation Act (USA).
\textsuperscript{245} Ibid.
\textsuperscript{246} Supra Note 190, at 562.
Mediation is defined under UMA Act as a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute. The emphasis on negotiation in this definition is intended to exclude adjudicative processes, such as arbitration and fact-finding, as well as counseling. It was not intended to distinguish among styles or approaches to mediation. An earlier draft used the word "conducted," but the Drafting Committees preferred the word "assistance" to emphasize that, in contrast to arbitration, a mediator has no authority to issue a decision. The use of the word "facilitation" is not intended to express a preference with regard to approaches of mediation.\(^{247}\)

The UMA Act essentially establishes procedures for protecting the confidentiality of statements made in the mediation process. It delineates boundaries between privileged communications and those that need to be disclosed to protect “specific and compelling societal interests”. In doing so, the Act strikes the balance between the encouragement of effective mediation and the fundamental adjudication value of “every [person’s] evidence.”\(^{248}\) The UMA Act seeks to support fairness in mediation by respecting core mediation values, which it identifies as the parties’ exercise of self determination and the impartiality of the mediator.\(^{249}\)

The UMA Act protects integrity and knowing consent through provisions that provide exceptions to the privilege (Section 6), limit disclosures by the mediator to judges and others who may rule on the case (Section 7), require mediators to disclose conflicts of interest (Section 9), and assure that parties may bring a lawyer or other support person to the mediation session (Section 10). In some limited ways, the law can also encourage the use of mediation as part of the policy to promote the private resolution of disputes through informed self-determination.

The UMA was prepared in response to the need to provide comprehensive confidentiality, protection and reduce substantially the current choice-of-law uncertainties in multi-state mediations.\(^{250}\) The UMA Act provided for a privilege that

\(^{247}\) UMA Act Drafted By National Conference Of Commissioners On Uniform State Laws, Comment to s.2.

\(^{248}\) Supra Note 190, at 562.

\(^{249}\) Ibid.

\(^{250}\) Ibid, at 567.
prevents disclosure of mediation communications, broadly defined, in discovery processes or as evidence in a proceeding.\textsuperscript{251} Actually, the Act establishes multiple privileges.\textsuperscript{252} The Act leaves control in the hands of the parties in that they may agree in advance to dispense with privilege for all or part of their mediation.

Privileges have exemptions that embody a weighing of competing values: they permit disclosures deemed necessary for goals that transcend the justifications for keeping the protected communications confidential.\textsuperscript{253} The majority of the UMA exceptions are formulated as bright-line rules to take advantage of the predictability offered to parties by a specific list of exemptions.\textsuperscript{254} The Act authorizes disclosures for a recorded agreement signed by all the parties; communications in mediations open to the public or covered by open record or meeting acts; threats of bodily injury or violence; certain communications connected to criminal activity; information relevant to claim of professional misconduct or malpractice; and statements that would be introduced in certain abuse, neglect or abandonment proceedings.\textsuperscript{255} Some case by case balancing to determine exceptions remains in the Act, but it is confined to two instances where a bright rule is unworkable; criminal proceedings and proceedings to enforce or void an agreement reached in mediation.\textsuperscript{256}

Without an exception to the privilege, a party would be unable to present evidence of duress or fraud that occurred during mediation. Yet a bright–line automatic exception that would allow disclosure of mediation communications to support any claimed contract defense could be used too easily with unjustified allegations to undermine confidentiality.\textsuperscript{257} In two instances, exceptions to the privilege that allow disclosures do not apply to mediators; the mediator may not be compelled to provide evidence of a mediation communication (1) in connection with a complaint of professional misconduct filed against a party, party representative, or non party participant, or (2) in a proceeding to enforce or void a contract reached in mediation.\textsuperscript{258} These

\textsuperscript{251} Ibid, at 568.
\textsuperscript{252} Ibid.
\textsuperscript{253} Ibid.
\textsuperscript{254} Ibid.
\textsuperscript{255} Ibid.
\textsuperscript{256} Ibid.
\textsuperscript{257} Ibid, at 570.
\textsuperscript{258} Ibid.
restrictions on otherwise strong recognized exceptions to the mediation privilege place strong weight on the principle of mediator neutrality, as mediators are exempted from providing information in situations where it could favor one party over the other.

The exception under section 6 of UMA Act would permit evidence of a signed agreement, such as an agreement to mediate, an agreement regarding how the mediation should be conducted including whether the parties and mediator may disclose outside of proceedings, or, more commonly, written agreements memorializing the parties' resolution of the dispute. The exception permits such an agreement to be introduced in a subsequent court proceeding convened to determine whether the terms of that settlement agreement had been breached. The words "agreement evidenced by a record" and "signed" refer to written and executed agreements, those recorded by tape recorded and ascribed to by the parties on the tape, and other electronic means to record and sign, as defined in Sections 2(9) and 2(10). In other words, a participant's notes about an oral agreement would not be a signed agreement. 259

The Uniform Mediation Act does not apply to the establishment, negotiation, administration or termination of a collective bargaining relationship, or to disturb pending under or as a process established by a collective bargaining treatment, except that the Act applies to mediation arising out of such disputes that have been filed with an administrative agency or the court, etc. 260

UMA provides for international commercial mediation and defines it as “an international commercial conciliation as defined in Article 1 of the Model Law.” “Model Law” means the Model Law on International Commercial Conciliation adopted by the United Nations Commission on International Trade Law on 28 June 2002 and recommended by the United Nations General Assembly in a resolution (A/RES/57/18) dated 19 November 2002. 261 It has provided that the international commercial mediation shall be governed by Model law unless the parties agree that all or part of an international commercial mediation is not privileged, and if the

259 UMA Act Drafted By National Conference Of Commissioners On Uniform State Laws, Comments on s. 6(1)
260 Supra Note 9, at 240.
261 Uniform Mediation Act, 2001 (USA), s. 11.
parties to an international commercial mediation agree under Article 1, subsection (7), of the Model Law that the Model Law does not apply, this [Act] applies.\textsuperscript{262}

As currently approved, the Uniform Mediation Act (UMA) applies to both domestic and international mediation. The purpose of this amendment is to facilitate state adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation (set forth in Appendix A) that was adopted on November 19, 2002. Adoption of the amendment will encourage the use of mediation of commercial disputes among parties from different nations while maintaining the strong protections of the Uniform Mediation Act regarding the use of mediation communications in legal proceedings. There is broad international agreement that it is important to have a similar legal approach internationally for the mediation of international commercial disputes, so that the international parties will know the applicable law and feel comfortable using mediation. With this increased use of mediation, the parties will resolve more of their disputes short of arbitration and litigation.\textsuperscript{263}

The UMA has not provided for any status to the settlement agreements arrived at between in pursuance to the mediation. It is also silent on the aspect of its enforceability. The question therefore remains if the parties do not perform the obligations as stipulated in the settlement agreement, how it will be enforced. The UMA mainly deals with promoting condor, confidentiality and privileges in mediation.

Thus it is quite clear the ADR in USA has received more fruits and has developed as it is well supported by legislations both at federal and state level and also not only by judiciary but even the private sector has developed ADR module to settle their disputes with customers, vendors, etc. with technique of ADR without intervention of the court.

Having discussed about the concept, types, development of ADR movement the researcher next discuss advantages and disadvantages of the ADR.

\textsuperscript{262} \textit{Ibid}, Sub s. (c) & (d) of s. 11.
\textsuperscript{263} UMA Act, Prefatory note to s. 11.
2.5 ADVANTAGES OF ADR TECHNIQUES

In this topic the researcher points out the advantages which the parties may gain due to the adoption of ADR technique to resolve the dispute.

There is growing body of opinion around the world that arbitration - domestic and international - even arbitration that is well conducted by competent arbitrators, is not necessarily the most successful way of resolving the disputes, especially commercial disputes.264 There is increasing awareness of the various practical ways in which the arbitrator can reorganize the process in a direction increasing the chances of settlement. Processes like mediation and conciliation as well as methods like mini-trials or dispute review boards have entered the mainstream discussions and practice, and more and more arbitral institutions offer particular rules on mediation, conciliation and mini trials.

Since the beginning of the modern ADR movement, there have been at least two strands of argument supporting the use of alternatives to full-scale legal adjudication by judge or jury. On the one hand is the claim that ADR will ensure speedy, less costly and more efficient case processing. This strand of the movement has been called the quantitative, caseload-reducing, or case management side of ADR and is the main reason many jurists and court administrators support ADR.265

Hon. Betty Southar Murphy while addressing the seminar on 21 July 2000, organized by the Chartered Institute of Arbitrators and Dispute Resolution Section of the ABA, in association with the Centre for Dispute Resolution (CEDR) and the London Court of International Arbitration, at Queen Elizabeth II Convention Centre in Westminster, sponsored by Lovells and Towers and Hamlins266 has stated “Mediation is becoming the preferred ADR method because it is quicker than litigation, it is less expensive, it is conducted in private, its confidentiality is easier to maintain, and the parties remain in control. Mediation also makes it easier to resume a business relationship after the mediation is completed. Whether or not a party feels that he or she has obtained the best deal, the solution reached has been agreed to and has not been imposed by an

264 Supra Note 9, at xxi.
265 Supra Note 66, at 1872.
266 Supra Note 115, at 66.
outsider, judge or arbitrator. A business relationship is harder to maintain if the opponent has cross examined your CEO very tenaciously in public at trial or in private at arbitration. When the parties want to have both a speedy resolution and a continuing business relationship, mediation is the best choice. Mediation is also more flexible. The parties can write and abide by any rules they want. The parties can meet together or separately; the mediator can deal privately with one or all of the principals, and so forth. Flexibility is the name of the game.”

Another strand of ADR emphasizes the qualitative argument that both dispute processes and their outcomes can be improved with alternatives to full-scale trial. Those who focus on process suggest that ADR provides for more party participation and control over the proceedings, a greater possibility of resolving more than the particular “dispute” at hand, and reconciliation or better communication between disputing parties.267

In addition for those who focus on outcomes, ADR promises the possibility of optimal solutions in which bipolar results are avoided, compromises may not be necessary, and parties underlying interests may be explored and hopefully met.

Further ADR promotes the adoption of more complex solutions that are tailored to the parties’ needs or situation. The courts have “limited remedial imagination” to grant injunctions, award damages, or declare parties innocent or guilty, liable or not liable. In ADR we can look to the future, as well as the past, and involve many more parties than the traditional adversarial system allows. ADR promotes solutions that are more flexible and responsive to party needs, as well as to non parties affected by the resolution of a particular dispute.268 ADR provides society as a whole with definite benefits.

Alternative Dispute Resolution helps to cut parties time and expenses, reduce court’s caseloads and expenses, improve public satisfaction with justice system, preserve parties relationships, provide early and speedy settlement, provide accessible forums

267 Supra Note 66, at 1871-1873.
268 Ibid.
to people with disputes, teach the public to try procedures that are more effective than violence or litigation for setting disputes.\textsuperscript{269}

Compared to the risky undertaking of adjudication; litigation or arbitration- mediation offers parties the possibility of acceptable conclusions, once they have crafted themselves. Mediation can be scheduled quickly, and sessions, for certain cases, can take as little as few hours. The mediatory process can temper unrealistic positions, unwarranted assumptions, and demonization of another party.\textsuperscript{270}

The phrase ‘Let’s talk’ captures mediation’s approach to dispute resolution and deal making. Best understood as assisted and enhanced negotiation, mediation permits confidential discussion directed toward constructive communication.\textsuperscript{271} Practiced for centuries and found in most of the world’s cultures, mediation provides a simple, relatively flexible process that allows people to talk and negotiate in the presence, and with the assistance, of third persons.\textsuperscript{272}

In ADR, both sides have full control over the situation, and their fate does not lie in the hands of an arbitrator against whose award they have no right to appeal.\textsuperscript{273} They are bound only by their own acceptance of mediator's proposals, which are often revised as a result of discussion and negotiation.\textsuperscript{274} The neutral is not bound by the legal straitjacket of pleadings and terms of reference that encases arbitration. The neutral’s freedom of thought and speech can also be a powerful driving force in finding a solution. The solution may also take innovative forms that are not available to the courts.\textsuperscript{275}

ADR being purely consensual process any party can abandon it at any time. The advantage of it is that the parties can communicate openly and arrive at mutually accepted solution. Neither side is pressured by the need to defend a legal position and

\textsuperscript{269} Supra Note 50.
\textsuperscript{271} Supra Note 84, at 1251 & 1253.
\textsuperscript{272} Ibid.
\textsuperscript{273} Ibid. 84, at 51, at 27.
\textsuperscript{274} Ibid.
\textsuperscript{275} Ibid.
convince a court of its argument. Another advantage as mentioned above, ADR can have broader array of solutions than courts, as the courts can only deliver rulings or remedies and relief permitted by law.\textsuperscript{276}

The very nature of some disputes virtually rules out recourse to litigation or arbitration. The subject of the dispute may be so technical and expertise required so specialized that only an expert or highly experienced person can take an appropriate decision.\textsuperscript{277}

The goals pursued by users of ADR go beyond legal considerations. Their overriding priority is to prevent difficulties, ensure continued performance of the contract, maintain the contractual relationship and make their joint project a success.\textsuperscript{278} This is more important than the dispute itself, even though ADR might fail and also have a negative impact on the ensuing litigation or arbitration.\textsuperscript{279} When two or more groups have frequent relationships or when disputes and conflict are unavoidable, establishing a system of ADR can help avoid deterioration in their relationship and create a framework that suits both parties and protects their mutual interests.\textsuperscript{280}

ADR can be a real ‘management tool’ and is in fact used as such in many circumstances.\textsuperscript{281} Prevention and resolution of disputes is of such importance that parties make provision in their contract to use ADR as a contractual ‘monitoring’ mechanism that can be easily set in motion by either party; this will trigger the intervention of a neutral, wherever necessary.\textsuperscript{282}

ADR has been growing. It is a great deal quicker and cheaper than litigation, and attempts at ADR are generally successful, ending in form of an agreement.\textsuperscript{283} Mediation does not posit zero-sum game as does litigation where it can generally be

\textsuperscript{276} Ibid.
\textsuperscript{277} Ibid, at 31.
\textsuperscript{278} Ibid, at 14.
\textsuperscript{279} Ibid.
\textsuperscript{280} Ibid, at 37.
\textsuperscript{281} Ibid, at 14.
\textsuperscript{282} Ibid.
\textsuperscript{283} Supra Note 9, at xxii.
said that someone wins and someone loses.\textsuperscript{284} Mediation procedures are far less structured and more flexible than those of courts and of arbitration. Thus, parties can exert great control over the mediation process and take ownership of their dispute.\textsuperscript{285}

The focus in ADR is on the interests of both parties, which may be quite different from narrow legal positions to which an adjudication procedure is limited by its nature.\textsuperscript{286} In addition, the scope ADR procedure may be extended beyond the very issues in dispute.\textsuperscript{287} In fact, other (joint) interests of the parties may be taken into consideration and included in the settlement, possibly covering a variety of solutions and thus more business-like than a classic legal remedy obtained in adjudication.

The main advantage ADR and mediation are claimed to have in common over adjudication in general are flexibility, cost effectiveness, expedition, confidentiality and control by the parties and, finally, an unlimited range of solutions.\textsuperscript{288}

\subsection*{2.5.1 Party Autonomy}

ADR methods are premises on the right of the parties to freely dispose over their controversies through voluntary agreement. This liberty implies the freedom to devise any kind of procedure for resolution of disputes, including the voluntary submissions to binding determination by a third party. Where the procedures are non binding, they are voluntary in a double sense: both the participation in the process and acceptance of its results are subject to a free determination by the parties.\textsuperscript{289} Unlike arbitrators and judges, mediators do not make binding decisions.\textsuperscript{290} Both sides have full control over the situation, and their fate does not lie in the hands of an arbitrator against whose award they have no right of appeal.\textsuperscript{291} The parties are bound only if they accept the proposal of mediator. The proposal is generally revised on the discussions, negotiations. The parties themselves decide the dispute. As the result is on agreement,

\begin{thebibliography}{9}
\bibitem{285} \textit{Ibid}.
\bibitem{287} \textit{Ibid}.
\bibitem{288} Supra Note 51, at 73.
\bibitem{289} Supra Note 12, at 174.
\bibitem{290} Supra Note 84, at 1251 \\& 1253.
\bibitem{291} Supra Note 51, at 27.
\end{thebibliography}
the tendency to abide by it is more than in the result of binding procedure. In these techniques it depends upon the party whether to participate or not in the process. The party can abandon the participation mid way. Even no binding decision can be given against the party. It to be is noted that the trend is moving away from arbitration and towards more flexible, meditative approaches, perhaps because of greater party control involved and the possibility of more responsive and individually crafted outcomes (as well as non binding quality of mediation). 292 The key players in ADR are not the neutral, legal advisors, witnesses or any of the other people usually involved in litigation, but the parties themselves. 293 ADR is purely voluntary procedure that can be abandoned at any time by either party. This essential feature offers two advantages, which are perhaps the main reasons for ADR’S growing success. First, the solution is usually better understood by the parties as it is the result of open communication and, more importantly, mutual agreement between them. The second advantage is that ADR can lead to a broader array of possible solutions, as the courts can only deliver rulings or remedies and relief permitted by law. Control in ADR means that the parties are really dominus litis. 294

2.5.2 Flexibility

In contrast to a legal procedure, an ADR procedure is completely flexible and parties are free to design jointly with mediator the appropriate procedure. 295 In addition, the ability to consult each of the parties separately in a caucus and obtain confidential information that may assist in the evaluation of possible solutions is in principle not available to adjudicators, at the risk of invalidating the judgment or award. 296 ADR is not bound by a tried and tested rules and practices. 297 Unlike binding adjudication where the procedure is laid down statutorily and parties are bound by it, in these techniques the parties have freedom to make rules as suited to them. Even the rules agreed can be changed and modified during the process. It is less formal than judicial procedure. There is lot of flexibility in the use of ADR methods. The flexibility is available in the procedure as well as the way solutions are found to the dispute. The solution can be problem-specific. The rigidity of precedent as used in adversarial

---

292 Supra Note 66, at 1871-1889.
293 Supra Note 51, at 15.
294 Supra Note 286.
295 Supra Note 51, at 74.
296 Ibid.
297 Ibid, at 22.
method of dispute resolution will not come in the way of finding solutions to the
disputes in a creative way.\textsuperscript{298} The rules of procedure are flexible without formal
pleadings, extensive documentation and rules of evidence and can be controlled by
the parties. The ADR, mediation allows parties to select decision makers, choose
rules of procedure, and decide on the desired outcomes, thus returning control of the
process to the parties. Such processes also allow parties to arrive solutions that are
often not possible in traditional legalistic outcomes, such as future-oriented
agreements or sharing arrangements.\textsuperscript{299} The Supreme Court in \textit{Mysore Cements
Limited v Svedala Barmac Limited} \textsuperscript{300} held that it is not every agreement or
arrangement between the parties to the disputes, arrived at in whatever manner or
form, during the pendency of conciliation proceedings that automatically acquires the
status of a ‘settlement agreement’ within the meaning of section 73 of the Act so as to
have the same status and effect as if it is an arbitral award, for being enforced as if it
were a decree of the court. It is only that agreement which has been arrived at in
conformity with the manner stipulated and form envisaged and got duly authenticated
with section 73 of the Act, alone can be assigned the status of a settlement agreement,
within the meaning of and for effective purpose of the Act, and not otherwise.” In
humble opinion of the researcher this decision needs reconsideration. The very basic
concept of the ADR technique postulates that the parties shall have autonomy to
choose the method and lay their own procedure to solve the dispute. If the parties
agree to conduct conciliation proceeding in a different manner than laid down under
Arbitration and Conciliation Act, 1996, then the Courts in India may not recognize the
‘settlement agreement’ arrived between the parties as binding in view of the above
decision. Also if apart from procedure of ‘conciliation’, if the parties settle their
disputes through different procedure of ‘conciliation’ or other methods of ADR, then
also the same may not be recognized by the Indian Courts.

\textbf{2.5.3 Focus on Relationship}

In adjudicatory system the focus is on the rights of the parties, where as in ADR
technique aim to produce results that best satisfy the party’s interests. These interests
can be influenced by the legal rights and remedies. There is complex interaction

\textsuperscript{298} Supra Note 75, at 25.
\textsuperscript{299} Supra Note 66, at 1871-1901.
\textsuperscript{300} Supra Note 10.
between rights and interests. Rights influence the interest but realization of rights is no end in itself- any success in litigation in the end has to be measured against a party’s underlying interests. Although mediators and arbitrators help to put an end to disputes, they do not do so in the same way, certainly not with the same tools and techniques; what is needed is trained negotiators-who are also wise and imaginative.\textsuperscript{301} The approach of a “mediator” to a case at hand is essentially different from that of an “arbitrator”. It is a settled feature of arbitration and litigation that arbitrators and judges cannot issue awards or sentences which go beyond what the parties had requested.\textsuperscript{302} Whether dispute involve high or low monetary stakes, or whether are classified as consumer or family disputes, mediation and other facilitative and advisory dispute resolution processes allow legal and extra-legal considerations to be considered simultaneously; terms of settlement need not focus solely on a restricted range of legal remedies.\textsuperscript{303} In some situations, solutions that are more imaginative could better meet the requirements of justice, and the expectations of the parties as well.\textsuperscript{304} Consider a homely example (imaginary) dispute over an orange, offered by Richard Hill, a highly competent and dedicated arbitration lawyer from Switzerland : This is how he puts it: two persons have a legitimate claim to an orange but neither of them is willing to accept half of the orange. If the claim is resolved in accordance with a judicial paradigm, one of them will get some portion (possibly none) of the orange, and the other will get the remaining portion.\textsuperscript{305} But then, a mediator is called in: who asks each person what they intend to do with the orange. The first person answers that she intends to use the rind to make perfume, while the second answers that she intends to use the pulp to make orange juice.\textsuperscript{306} The mediation process yields a solution that is fair, and better satisfies the interests of the parties than could any solution based on an adversarial process.\textsuperscript{307}

Alternative Disputes Resolution methods are usually conducted in less adversarial atmosphere than litigation. Their consensual nature and the focus on the parties

\textsuperscript{301} Supra Note 9, at xxviii.
\textsuperscript{302} Ibid.
\textsuperscript{303} NADJA ALEXANDER, INTERNATIONAL AND COMPARATIVE MEDIATION 48 (Wolters Kluwer, 2009).
\textsuperscript{304} Supra Note 9, at xxviii.
\textsuperscript{305} Ibid.
\textsuperscript{306} Ibid.
\textsuperscript{307} Ibid.
underlying interests make it possible to go to the roots of conflict while avoiding unnecessary harm to, or even improving, the relationship between the disputants. If the ADR method is successful, it brings about a satisfactory solution in the dispute and the parties will not only be satisfied, the ill-will that would have existed between them will also end. ADR methods, especially mediation and conciliation not only address the dispute, they also address the emotions underlying the dispute. In fact, for ADR to be successful, first the emotions and ego existing between the parties will have to be addressed. Once the emotions and ego are effectively addressed, resolving the dispute becomes very easy. Well conducted caucuses can free the parties from the climate of opposition and systematic rejection that destroys the contractual relationship. It can help both sides take stock of and begin to understand the neutral’s proposed solution. It can drive the process forward by allowing one side or the other to ‘save face’, particularly if the neutral presents any proposals as his or her own ideas, rather than as coming from the opposition.

2.5.4 Confidentiality

A more classic reason for using ADR is confidentiality, a common concern in our increasingly media driven business world. Most court cases take place in public, and in regard to arbitration, practitioners have long since lost their illusions, as there is no real guarantee of confidentiality. Private dispute resolution gives greater control over who will know about the existence of the controversy, how it was resolved and any trade secrets that may have been to be revealed in the course the negotiations. Wrong or incomplete publicity about a dispute can harm company’s commercial activity, share price or ability to raise finance. In settlement mediation, exchange of information is an important aspect of the process as parties work towards reaching a consensual agreement. Sharing interests, needs, and priorities with the other side or at least with the mediator, can help the parties reach an agreement.

---

308 Supra Note 12, at 175.
309 Supra Note 75.
310 Supra Note 51, at 21.
311 Ibid, at 21-22.
312 Supra Note 190, at 564.
313 Ibid.
2.5.5 Costs
Alternative Disputes Resolution procedure produce significant savings in terms of the time invested and money spend. Also, indirectly, cost arising in the context of disputes, such as the diversion of management time and corporate energies, the disruption of business, damage to existing relationships and loss of business opportunities.\textsuperscript{315} Mediation is considered as cost effective, in particular in comparison with arbitration.\textsuperscript{316} With less time spent managing the disputes, commercial parties not only save transactions costs but are able to refocus on their respective businesses.\textsuperscript{317} Increased use of mediation also diminishes the unnecessary expenditure of personal and institutional resources for conflict resolution, and promotes a more civil society.\textsuperscript{318}

2.5.6 Application of Rules of Equity
ADR programs are instruments for application of equity rather than rule of law. The dispute is decided on the negotiated term by the disputants and not by uniform legal rules.

2.5.7 Direct Participation
This process ensures direct participation by the disputants in the process and designing settlements more direct dialogue and opportunity for reconciliation between the disputants. ADR is not constrained by strict legal rights: it facilitates even non legal forms of relief, such as the offer to the aggrieved party of a substitute contract or the resuscitation of an agreement that has been terminated.\textsuperscript{319}

2.5.8 High Compliance
It is understood that as the parties themselves have settled the terms there is greater possibility of the parties complying with the settlement than the court order. Mediation often produces outcomes that exceed the narrower, win-lose legal remedies available with arbitrators and judges.\textsuperscript{320}

\textsuperscript{315} Supra Note 12, at 175.
\textsuperscript{316} Supra Note 303, at 49.
\textsuperscript{317} Ibid, at 50.
\textsuperscript{318} Uniform Mediation Act (USA), prefatory note.
\textsuperscript{319} Supra Note 9, at xxii.
\textsuperscript{320} Supra Note 84, at 1251 & 1253.
2.5.9 Reducing Burden on the Court

Another important aspect of ADR method is that it reduces the burden of the court. The courts in India are already over burdened, if the disputes are resolved out of court through ADR it will help in reducing the burden on the court and Courts can concentrate on more important matters.

Another important aspect is that it shall reduce corruption. As in case of ADR it is parties who themselves voluntarily resolve the disputes there is no scope for third party judge or arbitrator to dictate his opinion and thus shall reduce corruption.

The ADR is not panacea. Though it has many advantages, the ADR techniques like any other method do have some disadvantages. Next topic explains the disadvantages of ADR.

2.6 DISADVANTAGES OF ADR TECHNIQUES

Having considered the advantages of ADR, the researcher proceeds to discuss disadvantages of ADR. Arthur Marriott QC Lawrence M. Watson Jr. cautioned that court attached ADR is not panacea. It is manifestly unsuitable for a range of cases, notably those involving relations between the citizen and the state. It is also unsuitable where definitive decisions are required, for example on the operation of a standard form contract in use in industry, or a decision of principle which is required for the operation an important market. Contentious, competitive business cultures exist, and they generate disputes initially while erecting barriers to efficient resolution.

One of the techniques of ADR is Med-Arb. In this method as pointed out earlier a third neutral–party works as a mediator to resolve the disputes between parties using the techniques of mediation. If mediation fails med-arbitrator changes hats and becomes an arbitrator as a second step. In such a type of ADR process when the mediator has the power to decide the dispute he may coerce the parties into settlement. This may compromise the value of the mediation. “What appears to be a
negotiated resolution may be perceived by the parties as an imposed one thus diminishing the degree of satisfaction and commitment”. This kind of mediation then becomes “muscle mediation”. Another problem is when an arbitrator puts himself in the position of recommending a settlement to the parties and one of them would feel obliged to say “no” that party goes through agony because the arbitrator – consciously or not- puts his ego behind settlement that he has crafted : and if a party says “no” and the arbitral decisions comes down against them they will be very often convinced of the fact that this was because arbitrator resented their not accepting the settlement. This is another face of impartiality problem. Since the losing party does not believe the arbitrator will remain impartial once a case evaluation has occurred, that party will perceive an award as retaliation. 

Coercion into mediation is one thing: coercion in mediation is another. Mandatory mediation forces the parties to sit face to face and see whether a basis for an amicable solution exists between them. Although this may seem superfluous, many parties to a dispute may not have taken the time or made the effort to see if litigation is necessary. Assuming few cultural supports for making such an effort, coercion into mediation seems a valid exercise of legislative power-simply encouraging settlement talks, but not requiring parties to reach an agreement. Coercion in mediation, however, goes further. This type of coercion affects free will and may cause parties to lose sight of their rights or goals, to undervalue the same, or to be convicted to settle on the basis of exaggerated or false information. This risk is heightened in situations where coercion by the mediator or judge exists alongside external factors—such as, corruption and poverty- that exert pressure in the same direction.

Researchers in United States have suggested that mediation’s lack of evidentiary and procedural rules puts certain types of disputants at risk. Specifically, they have shown that women, minorities, and any individual bargaining against a corporation tend to achieve worse outcomes in the handling of civil case functioned to suppress the realities of class, gender, and racial antagonisms in the United States, while affording efficiency and often cheaper dispute resolution for business. Some economically

324 Ibid, at 98.
325 Ibid.
326 Supra Note 85, at 542.
disadvantaged disputants may be amenable to such terms, given their lack of alternatives, even if they do not receive what they are legally due.  

Procedurally, any justice system serves fairness by fostering certainty through the combination of consistency and integrity. Consistency may take two forms, which are not contradictory and combined, contribute to integrity: vertical and horizontal. Vertical consistency arises from the interpretation of the law as progressing through a hierarchy of authoritative adjudicatory instances. In other words, the hierarchy of courts represents steps towards finality. In the vocabulary of municipal law, vertical consistency means levels of appeals. Horizontal consistency secures that rights and obligations remain identical and universal across time and subject matter as they arise in different cases and under varying circumstances. In the vocabulary of municipal law, horizontal consistency means *stare decisis*, precedent.

Neomi Gal-Or has pointed that the finality is an important aspect. What constitutes finality in international law was and still remains unclear. One element of finality is provided through the principle of res judicata. It has two aspects one regards the identity of the claim and operates as a direct *estoppel* barring the plaintiff from reclaiming the same against the same defendant, the judgment operating as a replacement of the cause of action (or merger). The other aspect bars re-litigation by the same parties where the new claims are different from those previously judged, if the issue in question is the same and has been determined by the court. Res judicata thus serves one main purpose namely countering the risk of indeterminacy arising from multiple proceedings. She further observes that the global integration of States requires a more effective “international rule of law”. This can be achieved only by rendering international law more effective and by interpreting and integrating “the national rule of law” and “international rule of law” in a mutually consistent manner. The orientation from towards the municipal— as a standard for the international— is

327 Ibid, at 549.
329 Ibid at 47.
330 Ibid.
331 Ibid, .
332 Ibid.
333 Ibid, at 49.
appealing can be seen in the establishment of, for instance the WTO- Appellate Body. It reflects the desire to satisfy the need for finality also at the international level. The conciliation agreement does not have a res judicata effect. Thus even though the matter is settled the parties may re-litigate the issues settled as it does not operate as res judicata. In the opinion of the researcher this can be a major disadvantage of ADR.

The mediator’s opinion or decision is not enforceable by a process of forcible execution. This is the greatest weakness of ADR and strength or arbitration or litigation. Attempts to standardize the enforcement of international mediated settlement agreements have failed, leaving enforcement dependent on varied national policies. As a result, mediating a settlement in good faith does not immunize it from potential future challenges to compliance.

Efficiency is an insufficiently disaggregated concept. Any definition of efficiency contains implicit assumptions. Accordingly, it must be asked, “For whom is the law efficient?” and “For what specific purpose (or values) is the law efficient?”

If the advantages of mediation (or any non-adjudicatory dispute resolution process) are to be highlighted, it will be necessary to set out the disadvantages of litigation as a dispute resolution process. But that does not mean that the adjudicatory process by way of litigation in courts is outdated, impractical or has lost its relevance. It only means that for certain categories of litigation, non adjudicatory dispute resolution process is better suited and beneficial to the parties. The question therefore is not whether mediation is better or litigation is better. The question should be: “which process is more suited for a particular type of dispute?”

---

334 Ibid, at 55.
336 Supra Note 51, at 34.
337 Supra Note 17, at 1388.
338 Justice R.V. Raveendran, Mediation- Its Importance and Relevance, in SOUVENIR, NATIONAL CONFERENCE ON MEDIATION (Mediation and Conciliation Project Committee, Supreme court of India, 2012), at 18.
The absence of judicial power to mandate mediation in transborder commercial cases leaves the choice of a dispute resolution to the decision of the disputants. These decisions may be made prior to initiation of the dispute through dispute resolution contract clauses in documents creating transborder transactions. Most private transborder commercial arbitrations as well as most domestic arbitrations are created by such contract clauses.\textsuperscript{339} Although the use of multi-tiered dispute resolution clauses may prove beneficial to the parties to the agreement, there are considerations that should be taken into account regarding the possible problems that may arise with such clauses. As set by Michael Pryles, problems associated with such clauses are sometimes attributed to the use of subjective criteria for determining when one tier of the dispute resolution procedure has ended and the next is to begin.\textsuperscript{340} Additionally, enforcement issues include whether all stages of the dispute resolution procedure are enforceable and whether the existence of multiple procedures deprives a party of the benefits of enforcement under laws of multiple and conventions providing for the enforceability of arbitration agreement.\textsuperscript{341}

The nature of dispute itself may act as a restraint on initiating the alternative dispute resolution process, that is, if a dispute is predominantly judicial in nature, it is usually resolved by an application of the appropriate legislation, and by relying on judicial decisions.\textsuperscript{342} Where dispute relates to the interpretation of a term of a contract, a breach of which would necessarily entail allowing legal remedies and where a dispute relates to the interpretation of a statute or legislation, alternative dispute resolution should not be activated because it is a matter that must be resolved by judicial means.\textsuperscript{343}

ADR can be transformed into a method of extremely effective delaying tactics with one party seeking to manipulate the neutral or striking out negotiations by causing continuous incidents or making false or minor concessions.\textsuperscript{344}

\textsuperscript{339} Supra Note 84, at 1251.
\textsuperscript{342} Ibid.
\textsuperscript{343} CHARLES CHATTERJEE & ANNA LEFCOVITCH, ALTERNATIVE DISPUTE RESOLUTION: A PRACTICAL GUIDE, 11 (Routledge, first published 2008).
\textsuperscript{344} Ibid.
\textsuperscript{341} Supra Note 51, at 15.
Matters relating to people’s fundamental rights should not be matters for any form of alternative dispute resolution as a state is the guardian of this right, and it is for the state to justify the loss of those rights or to reinstate them with remedies, where appropriate.\(^{345}\) By the same token, it may be submitted that the alternative dispute resolution process should not be involved in the matters of constitutional rights of the individual or where injunctive relief in any form including security for costs is entailed.\(^{346}\) Where a matter is required to be settled by reference to mandatory rules, it may be difficult to justify the application of any method of alternative dispute resolution.\(^{347}\) Public policy, public morality and issues of the national interest must be outside the remit of alternative dispute resolution.\(^{348}\)

Litigation is the only option where one party needs to set a legal precedent or obtain an injunction, or where one party is refusing to acknowledge the problem or engage in negotiations. Several remedies will not be normally available in ADR proceedings.\(^{349}\) In some cases there is no alternative than to approach courts, such as where

a) The sanction of a court is needed by law, e.g. probate of a will.

b) The case requires an authoritative interpretation of a statute.

c) The relief is for declaration of a legal right to be binding against another party, or in rem.

d) There is need for binding precedent.

e) There are governance issues relating to responsibility and liability of the state, and the limits of state power.

f) The establishment, extension or implementation of a legal or social right is sought (e.g. cases of dowry, bonded labour, minority rights, prisoner’s rights, environment protection, safety on roads and in workplaces etc.)\(^{350}\).

g) There is need for urgent interim orders.

h) Serious criminal offences are involved.

i) The issue is clearly of principle, and not of interests dressed up as principles.

j) The conduct of the other party is socially dangerous e.g. adulterous food, wanton pollution), where punishment and deterrence are called for.

\(^{345}\) Supra Note 342.

\(^{346}\) Ibid.

\(^{347}\) Ibid.

\(^{348}\) Ibid.

\(^{349}\) Supra Note 43, at 185.

\(^{350}\) Supra Note 9, at 187.
k) There is severe imbalance between parties in terms of strength and resources, which reflects correspondingly in their negotiating ability, e.g. a battered woman in a marriage.

l) There is bad faith, pervasive lack of trust, or the case is instituted or defended to profit by delay.

m) Disputes relate to election to public officers.

n) Constitutional remedies are needed to quash illegal orders or direct performance of public bodies.\(^{351}\)

Thus it is rightly observed that ADR is not Panacea. Like any other techniques it also has its own limitations.

### 2.7 CONCLUSION

The Alternative Disputes Resolution Techniques are non adjudicatory methods. In this procedure the parties settle the dispute with the help of third party neutral, who helps the parties to arrive at settlement. The third party neutral party has no right to thrust his opinion on the parties. The parties have autonomy to take part in the process. The parties have freedom to determine the procedure for settlement. Any adjudicatory process does not fall within ambit of ADR.

The ADR is developed in England and USA due to backing by the Courts. In USA particular the ADR is supported by corporate who have laid down programme for settlement of disputes through ADR regarding disputes with customers/contractors etc. which has resulted in reducing burden on the courts.

The ADR is speedy, can be settled within few caucuses, less time taking and cost effective. Though there are advantages to settle the dispute through ADR as both the parties are in win-win situation, but as rightly said ADR is not panacea. It may not be helpful in various situations.

In the next chapter, the researcher has dealt with the concept and efficacy of arbitration.

\(^{351}\) *Ibid*, at 188.