CHAPTER – 5
COMPARATIVE EFFICACY OF
CONCILIATION/ALTERNATIVE DISPUTE RESOLUTION
TECHNIQUES AND ARBITRATION IN INDIA

5.1 INTRODUCTION

From the discussions made in earlier chapters it is clear that earlier court litigation was the only source to resolve the disputes. Subsequently arbitration was developed as an alternative to the court litigation both at domestic level as well as international level.

At domestic level, earlier the law relating to arbitration was contained in Schedule II of Code of Civil Procedure and some provisions were incorporated in Specific Relief Act 1877. However subsequently a full fledged enactment on the arbitration was made by enacting the Arbitration Act 1940. This Act was enacted with the object that it will be expeditious and shall be less time consuming and shall be cheaper. The Act failed in these aspects. The Supreme Court way back in the year 1980 showed its anguish in Gurunanak Foundation v Rattan Singh & Ors.513

On recommendation of law Commission, several representative bodies of trade and industry and experts in the field of arbitration and to make economic reforms fully effective the legislature has thought it fit to repeal Arbitration Act,1940 which has become out dated.

At international level the arbitration became the most favoured mode of settlement of disputes. Considering the development under the auspices of League of Nations under Geneva Convention the arbitration agreements and awards were recognized vide conventions of 1923 and 1927. Arbitration (Protocol and Convention) Act, 1937 was enacted in India it being signatory to the said convention. Some lacunae were found in the provisions of Geneva Convention in enforcement of arbitral awards therefore to do away with that and to ease the enforcement of arbitral awards; a new treaty was

513 AIR 1981 SC 2075.
promoted which led to the adoption of New York Convention on the Recognition and Enforcement of Foreign arbitral awards. India became state signatory to this convention in the year 1960. Foreign Awards (Recognition and Enforcement) Act, 1961 was enacted in India. By this Act, the Arbitral award declared outside Indian territory governed by the said New York Convention could be enforced in India.

The United Nations Commission on International Trade Law had adopted Conciliation Rules, 1980. Though the arbitration is an accepted mode throughout the world, there was no uniformity in the law relating to arbitration at domestic level. Every country had adopted law of arbitration as suitable to its local conditions. In the year 1985, the United Nations Commission on International Trade Law (UNCITRAL) had drafted Model Law on International Commercial Arbitration to achieve uniformity. The said model law can be applied to domestic arbitration also by suitable changes.

Considering the worldwide recognition to conciliation as an instrument of settlement of disputes and recognizing that there is no general law on the subject in India, the legislature has consolidated and amended the law relating to domestic arbitration, international arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation. The Arbitration and Conciliation Act, 1996 was enacted by repealing Arbitration Act, 1940, Arbitration (Protocol and Convention) Act, 1937 and Foreign Awards (Recognition and Enforcement) Act, 1961.

In this chapter the provisions of law relating to arbitration and conciliation are discussed in detail to compare their efficacy in the Indian context.

5.2 TRACING DEVELOPMENT OF ADR IN INDIA

Access to the justice, as a fundamental and human right should be within reach of the disputants. It cannot become mirage.\footnote{Supra Note 65, at 7.} It is well known that the courts are overcrowded and litigations are dragged for years together. Justice delayed is justice denied. It is demand of time that for economic growth internationally the domestic dispute resolution process should be speedy and less expensive. It is necessary to find
an alternative to the court or litigation. Section 89 of Code of Civil procedure, Section 23 of Hindu Marriage Act, 1955, Industrial Disputes Act, Family Courts Act and Lok Adalats under Legal Services Authorities Act, 1987 are based on the concept of ADR with or without intervention of the court. The concept of conciliation as a method of settling the dispute, without intervention of the court, is introduced by the Arbitration and Conciliation Act, 1996.

The use of Ombudsman is other type of Alternative Dispute Resolution (ADR) technique. It is cost effective, quick, and frequently used worldwide for complaints by individuals against particular sectors such as insurance, banking etc. In India, Banking Ombudsman Scheme, 1995 is laid to resolve the disputes between banks and customers. The role of Ombudsman is similar to mediator or conciliator.

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 taking. However, the experience has indicated on the contrary that the arbitration is more expensive. The fees of the advocates and arbitrators are beyond the financial capabilities of the parties. Law Commission of India in its report observed “All have equal rights, but, unfortunately, all cannot enjoy the rights equally. Enforcement of the rights has to be through courts, but the judicial procedure is very complex, costly and dilatory putting the poor persons at a distance.” The Supreme Court in Guru Nanak Foundation’s, wherein the dispute arose between parties under contract for construction of building. The application under section 20 of the Arbitration Act, 1940 was filed in the year 1974 by the respondent for directions to appoint arbitrator. The arbitrator was appointed accordingly by the High Court Delhi. When the reference was pending application was moved to remove an arbitrator in the year 1975, which was rejected by the court against which petition was filed before Supreme Court. By consent the arbitrator was removed and another arbitrator was appointed. The newly appointed arbitrator directed parties to file pleading afresh. The petition was filed in Supreme Court to direct the arbitrator to start proceedings from the stage where it was left by earlier arbitrator. The said application was allowed.

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515 Section 89, O.XXXII-A.
516 Supra Note 75.
new arbitrator commenced the proceeding a petition was filed by the appellant before Delhi High Court for allowing them to raise counter claim and directions to arbitrator to decided the same. Delhi High Court declined to interfere as the Supreme Court is seisin of the matter. The partied privately agreed to allow the appellant to raise counter claim. The new arbitrator accordingly passed award and issued notices to the parties. The first respondent requested the arbitrator to file award before Supreme Court. The registry of the Supreme Court directed arbitrator to file award before Delhi High Court. The first respondent moved a petition before Supreme Court for direction to Delhi High Court to submit award before Supreme Court, while deciding the petition on above facts the Supreme Court showed its anguish in following words:

“Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940 (‘Act' for short). However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the Courts been clothed with 'legalese' of unforeseeable complexity. This case amply demonstrates the same.”

In India, the origin of Alternative Dispute Resolution (ADR) could be traced to the origin of political institutions on one hand and trade and commerce on the other. Dr. Priyanath Sen in his book “The general principles of Hindu jurisprudence” has given an exposition of the dispute resolution institutions prevalent during the period of Dharmashastras. He refers to the resolution of the disputes between members of a particular clan or occupation or between members of a particular locality, by Kulas (assembly of the members of a clan), Srenis (guild of a particular occupation) and Pugas (neighborhood assemblies).”

518 Supra Note 47, at 85.
Earlier in India, disputes were settled by a council of village elders, known as a *Panchayat*. This was an accepted method of conflict resolution. Since the *Vedic* times, India has been heralded as a pioneer in the achievement of the social goal of speedy and effective justice through informal but culminating resolution systems. Alternative Dispute Resolution (ADR) methods are not new to India and have been in existence in some form or the other in the days before modern justice delivery system was introduced by the colonial British rulers.\(^{519}\)

One of the main characteristics of these traditional institutions is that they were recognised system of administration of justice and not merely “alternatives’ to the formal system established by the sovereign-the feudal lords.

As pointed out earlier the Arbitration Act, 1940 has failed in its goal. The Supreme Court of India has shown its anguish, about failure in its aim. The Arbitration Act, 1940 was replaced by Arbitration and Conciliation Act, 1996. The important feature of the Arbitration and Conciliation Act, 1996 is that for the first time it has incorporated the concept of ‘Conciliation’ without intervention of the court.\(^{520}\)

The Preamble to the said Act of 1996 states that the part III relating to conciliation is based on UNCITRAL Conciliation Rules, 1980. The main objective of the said Act is to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation.\(^{521}\) It also aspires to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of dispute rendered by an arbitral tribunal.\(^{522}\) The Part III of the Arbitration and Conciliation Act, 1996 deals with ‘Conciliation’.

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\(^{520}\) Arbitration and Conciliation Act, 1996, Part III.


5.3 CONCILIATION UNDER PART III OF ARBITRATION AND CONCILIATION ACT, 1996

The importance of Alternative Dispute Resolution system can be noticed from the fact that India has entered into bilateral investment protection agreement *inter alia* with the United Kingdom, Germany, the Russian Federation, the Netherlands, Malaysia and Denmark and other countries. 523 Also India is a party to the Convention establishing the Multilateral Investment Guarantee Agency which provides for settlement of disputes between State parties to the Convention and the Multilateral Investment Guarantee Agency through negotiation, conciliation and arbitration.

The Part III of the said Act of 1996 is applicable to settlement of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto through ‘conciliation’. The conciliation is not applicable to certain disputes where by virtue of law for time being in force such disputes cannot be submitted to conciliation. 524 Thus the dispute regarding divorce or disputes relating to eviction of tenants governed under the Rent Control Act cannot be settled through conciliation.

Sections 61 to 81 of the said Act of 1996 provide the procedure for the settlement of the disputes by conciliation. The said Act of 1996 does not define ‘conciliation’. However, section 67 (1) of the said Act of 1996 impliedly defines it as the assistance given to the parties in an impartial manner in their attempt to reach an amicable settlement of their dispute. 525

Section 62 of the said Act of 1996 provides that the party desiring to initiate conciliation may send written invitation to the other party to conciliate briefly identifying the subject of dispute. The conciliation proceeding starts when the other party accepts the invitation. If the other party refuses the invitation, there will be no conciliation proceedings. If the other party does not wish to accept invitation, he may refuse it or if party giving invitation does not receive reply within 30 days from the

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523 So far India has agreement with about 84 countries out of which 66 are in force and rest are either terminated or signed but not in force, (May 29, 2017, 05:15PM) Invetmentpolicyhub.unctad.org/IIA/countryBits/96.
524 Ibid, Sub Section (2) of Section 61.
525 Supra Note 338, at 17, 20.
date he sent invitation or within such time as stipulated in the invitation, he may elect to treat this as rejection of an invitation to conciliate. 526

Thus it is clear that the participation in the conciliation is voluntary. It is for the party to the dispute to decide whether he wishes to settle the dispute through conciliation, take part in the ‘conciliation’, the party can withdraw from conciliation at any time. From bare reading of section 62 of the said Act of 1996 it is clear that, unlike arbitration, conciliation does not require any prior written agreement between parties.

The question is, if the parties have earlier entered into an agreement to settle the dispute through conciliation in the event of dispute and party to such an agreement refuses to conciliate; can such party be forced to take part in conciliation proceedings. The success of the alternative dispute resolution process is dependent upon the voluntary participation of the parties. It may not be advisable to force the parties to take part in conciliation proceedings. But one view is that the parties may not take part or refuse to conciliate but at least he should take part in one meeting and may inform in such meeting his refusal to proceed with the conciliation. Carrie Menkel-Meadow527 suggested that there can be mandatory ADR. The term ‘mandatory’ may only mean that one must attend to some form of ADR in good faith. He states that the ‘mandatory participation’ does not bind anyone to any particular outcome. Thus mandatory participation must always be separate from the consideration of whether a particular ADR process is binding or non binding either by party’s choice or court rule.

It may also be noted that as the parties have choice to participate in conciliation, the party also has autonomy to decide whether to continue with the process or not. The party can withdraw from conciliation at any time. The conciliation proceedings are terminated by signing of the settlement agreement if they resolve dispute through conciliation or by written declaration of the conciliator, after consulting parties, to the effect that further efforts at conciliation are no longer justified, or by a written declaration signed by the parties addressed to the conciliator to the effect that conciliation proceedings are terminated or by a written declaration of a party to other

526 Arbitration and Conciliation Act, 1996, s. 62.
527 Supra Note 66, at 1871-1894.
party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated.\textsuperscript{528} Even otherwise, if party does not take part in conciliation, a conciliator cannot proceed ex-parte or unilaterally formulate terms for settlement and declare it as a settlement agreement. The point is, party autonomy is maintained and party may resile from conciliation proceedings at any moment at his/her wish. It is necessary that the parties shall cooperate in good faith to the conciliator and shall comply with requests of the conciliator to submit written materials, provide evidence and attend meetings.\textsuperscript{529}

Sections 63 and 64 of the said Act of 1996 provide for number of conciliators and lays down the procedure for their appointment. It is for the parties to decide as to how many conciliators are to be appointed. The parties may agree for sole, or two or three or more number of conciliators. The conciliation can be ad-hoc or institutional. In ad-hoc conciliation, the parties themselves shall appoint the conciliator as they agree. In institutional conciliation, the parties may seek assistance of suitable institute in connection with appointment of conciliators.

Sections 65 to 75 of the said Act of 1996 deal with the manner to conduct the conciliation proceedings and its nature. Section 65 requires that the conciliator shall upon his/her appointment request each party to submit to him/her a brief written statement describing the general nature of the dispute and the points at issue. The conciliators may request a party to submit to him/her further written statement or additional information as he/she deems appropriate. The conciliator may invite parties to meet him/her or may communicate with them orally or in writing. He/she may meet them or communicate with the parties together or with each of them separately.\textsuperscript{530} This is called as caucus. The conciliator is to assist the parties in an independent and impartial manner and shall be guided by the principles of objectivity, fairness and justice\textsuperscript{531}. When the information is received by the conciliator concerning the dispute from a party, he/she shall disclose the substance of that information to the other party so that the other party shall have an opportunity to present any explanation which he/she considers appropriate. However, when a party gives information to the

\textsuperscript{528} Arbitration and Conciliation Act, 1996, s. 76.
\textsuperscript{529} Ibid, s. 71.
\textsuperscript{530} Ibid, s. 69.
\textsuperscript{531} Ibid, s. 67.
conciliator with a specific condition that it be kept confidential, the conciliator shall not disclose the said information to the other party. The conciliator at any stage of the proceedings may make a proposal for settlement of the dispute. Such proposal need not be in writing and need not be supported by reasons.

Section 73 of the said Act of 1996 provides that when it appears to the conciliator that there exists an element of settlement which may be acceptable to the parties, he/she shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving their observations, the conciliator may reformulate the terms of a possible settlement in the light of such observations. If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties the conciliator may draw up or assist the parties in drawing up, the settlement agreement. When parties sign the settlement agreement, it is final and binding on the parties and persons claiming under them respectively. The conciliator shall authenticate the settlement agreement.

The settlement agreement has the same status and effect as if it is an arbitral award on agreed terms on substance of dispute rendered by arbitral tribunal. An arbitral award on agreed terms has the same status and effect as any other award on substance of dispute.

Thus the settlement agreement gets the status and effect as if it is an arbitral award. It would be enforceable in the same manner as if it is a decree of the court. But this is applicable only in case of domestic conciliation.

The said Act of 1996 does not mention 'mediation' separately. Looking at the function of the conciliator, his/her job is not only to bring the parties to the table of settlement but also to actively participate in the proceedings and suggest the terms of settlement. Thus it appears that legislatures have not made any distinction between conciliation and mediation, under the said Act of 1996.

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532 Ibid, s. 70.
533 Ibid, s. 67 (4).
534 Ibid, s. 73(4).
535 Ibid, s. 74.
536 Ibid, s. 30.
537 Ibid, s.30 and 34.
It is pointed that section 89 of Code of Civil Procedure, which provides for Court Annexed ADR mentions arbitration, conciliation, mediation, judicial settlement and Lok Nyayalaya as the methods of settlement. Thus conciliation and mediation are considered distinct methods.

5.4 JUDICIAL APPROACH
At this juncture it is desirable to discuss judgments of the Supreme Court of India on conciliation.

In Haresh Dayaram Thakur v State of Maharashtra, the issue before the Apex Court was whether the agreement drawn by the conciliator himself and not signed by the parties can be final and binding on the parties. The Apex Court disagreed with the Bombay High Court and referring to provisions of the Arbitration and Conciliation Act, 1996 held that a conciliator is a person who is to assist the parties to settle the disputes between them amicably. When the parties are able to resolve the dispute, between them by mutual agreement and it appears to the conciliator that there exists an element of settlement which may be acceptable to the parties he is to proceed in accordance with the procedure laid down in section 73, formulate the terms of a settlement and make it over to the parties for their observations; and the ultimate step to be taken by a conciliator is to draw up a settlement in the light of the observations made by the parties to the terms formulated by him. The settlement takes shape only when the parties draw up the settlement agreement or request the conciliator to prepare the same and affix their signatures to it. The settlement agreement signed by the parties is final and binding on the parties and persons claiming under them. A successful conciliation proceeding comes to an end only when the settlement agreement signed by the parties comes into an existence. It is such an agreement which has the status and effect of legal sanctity of an arbitral award under section 74. The Supreme Court upheld the autonomy of the parties in arriving at the settlement. The Conciliator cannot unilaterally determine or decide the dispute himself unless the parties have consented to the terms suggested by him.

In *Mysore Cements Limited v Svedala Barmac Limited*, the Supreme Court had to deal with the enforcement of the Letter of Comfort furnished on the same day of a settlement arrived at during conciliation signed by both the parties and authenticated by the Conciliator, without intervention of court. The Supreme Court referred to the procedure of Conciliation to be followed under Arbitration and Conciliation Act, 1996. The Supreme Court held that once procedure is laid down then it should be done in that manner and in no other way. The Supreme Court held as they do not find there any formulation and reformulation of the terms of settlement by the Conciliator, as required under section 73 of the Arbitration and Conciliation Act, 1996, the requirements of section 73 are not complied with. The Hon’ble Apex Court observed 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 the humble opinion of the researcher as noted in chapter 2, basically ADR is a process to resolve the dispute amicably with the help of third neutral party. The techniques/ procedure/ form used to settle the disputes may vary depending upon the nature of the dispute. The parties have autonomy to decide the form, style of procedure for conducting the ADR as suits to them. There cannot be well defined process. The parties may have their tailor made procedure to suit their purpose. As long as the parties voluntarily agree to settle the dispute with the intervention of third neutral party and settles the dispute by entering settlement agreement, such an agreement should be recognized and enforced. A broader view is required to be adopted. Considering the fact that party may choose their own procedure/rules to settle the dispute by ADR. It may be a combination of one or more techniques which may not be found in statute books. The parties may have their own procedure to settle

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539 *Supra* Note 10.
the dispute. Part III of the said Act of 1996 has provided the procedure only for ‘Conciliation’. The said Act of 1996 has given the status of arbitral award to the ‘settlement agreement’ arrived at between the parties which in turn would be enforceable as a decree of the Court in accordance with the provisions of Code of Civil procedure, 1908.\textsuperscript{540} \textit{Mysore Cement},\textsuperscript{541} the Supreme Court stated very categorically that it is only that agreement which has arrived with conformity of the manner stipulated and form envisaged and got duly authenticated with section 73 of the Act, alone can be assigned the status of the ‘settlement agreement’.

The question arises if the dispute between the parties is resolved with any other alternative disputes resolution techniques than ‘conciliation’ or combinations thereof, and the parties execute settlement agreement in pursuance thereto, what will be the status of such settlement agreement. Whether such settlement agreement arrived between the parties will be binding and shall enjoy the same status as that of ‘settlement agreement’ contemplated under section 74 the said Act of 1996?

As pointed out above the Arbitration and Conciliation Act, 1996 does not define ‘conciliation’. Indirectly by virtue of section 67 of the Act, it is a process by which conciliator assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

The parties to the dispute have autonomy to select their own method, procedure, style to settle the dispute with the help of third neutral party. They may have their own tailor made procedure depending upon nature of transaction and issue involved. The legislature may lay down the model procedure but insistence to follow the same is against the basic tenets of the concept of ADR.

The Statement of Objects and Reasons of the Arbitration and Conciliation Act, 1996 mentions that the UNCITRAL has adopted a set of conciliation rules in 1980 and General Assembly of United Nations has recommended the use of these Rules in cases where the disputes arise in the context of international commercial relations and the parties seek amicable settlement of their disputes by recourse to

\textsuperscript{540} Arbitration and Conciliation Act, 1996, s. 74 r.w. s. 30 & 36.
\textsuperscript{541} Supra Note 10.
conciliation. Further in clause (3) of the Statement of Objects and Reasons of the said Act of 1996 it is stated that though the said UNCITRAL Rules are intended to deal with international commercial conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic conciliation. The said Act of 1996, defines the law relating to conciliation, taking into account the UNCITRAL Rules. It is thus clear that the Part III of the said Act of 1996 regarding the ‘Conciliation’ is based on UNCITRAL Conciliation Rules of 1980. Thus to interpret the meaning of ‘conciliation’ for the purposes of Arbitration and Conciliation Act, 1996, it is desirable to take help of UNCITRAL Conciliation Rules of 1980. Apex Court in M/s Sunderam Finance Ltd v M/s NEPC India Ltd held that 

In the Statement of Objects and Reasons appended to the Bill it was stated that the 1940 Act, which contained the general law of arbitration, had become outdated. The said objects and reasons noticed that the United Nations Commission on International Trade and Law (UNCITRAL) adopted in 1985 the Model Laws on International Commercial Arbitration. The General assembly had recommended that all countries give due consideration to the said Model Law which along with the rules, was stated to have harmonized concepts on arbitration and conciliation of different systems of the world and thus contained provisions which were designed for universal application. The above said Statement of Objects and Reasons in para 3 states that “Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model laws and Rules”.

The Supreme Court held that the provisions of the said Act of 1996 have; therefore, to be interpreted and construed independently and in order to get help in construing the provisions it is more relevant to refer to the UNCITRAL Model Law.

543 AIR 1999 SC 565.
It may be noted that the United Nations has also enacted UNCITRAL Model Law on International Commercial Conciliation in the year 2002.\textsuperscript{544} Also Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation 2002 is published. Paragraph 3 of Article 1 of the UNCITRAL Model Law defines ‘conciliation’ “means 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 a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.” Pragaph 3 of article 1 sets out the elements of definition of conciliation. The definition takes into account the existence of dispute, the intention of parties to reach an amicable settlement and participation of an impartial and independent third person or persons that assists the parties in an attempt to reach an amicable settlement. It distinguishes conciliation from binding arbitration and from negotiations between parties or their representatives. The words “does not have authority to impose upon the parties a solution to dispute” differentiates it from arbitration. The Guide\textsuperscript{545} explains that the inclusion of the words “whether referred to by the expression conciliation, mediation, or an expression of similar import” in paragraph 3 is intended to indicate that the Model Law applies irrespective of the nature of or name given to the process used to settle the dispute. The broad nature of the definition of conciliation indicates that there is no intention to distinguish between the procedural styles or approaches used in settling the dispute with the help of ADR. All types of techniques are covered within concept of ‘Conciliation’. The Commission intends that the world "conciliation" would express broad notion of a voluntary process controlled by the parties and conducted with the assistance of a neutral third person or persons. Different procedural styles and techniques might be used in practice to achieve settlement of a dispute, and different expressions might be used to refer to those styles and techniques. In drafting the Model Law, the Commission intended to encompass all the styles and techniques that might fall within the scope of Article 1. The Government negotiating the Model law intended to include in the new regime created by the Model Law all those methods of dispute settlement where the

\textsuperscript{544} Resolution no. 57 /18 adopted by General Assembly in its 52\textsuperscript{nd} plenary meeting dated 19 November 2002.

parties in dispute request a neutral third person to help them settle the dispute. These methods may differ as regards the technique, the degree to which the third person is involved in the process and the kind of involvement (e.g. whether just by facilitating the dialogue or also by making substantive proposals as to possible settlement). However, the legislative policy reflected in the Model Law should apply equally to all such dispute settlement methods. For example, the Model Law could apply to "ad hoc" as well as "institutional" conciliations, where the process would normally be governed by the rules of a specific institution."

Thus instead of defining ADR, the UNCITRAL Model Law mentions only ‘Conciliation’ which encompass all forms of ADR techniques by whatever name called or whatever procedure or style or form is used to settle the dispute with the help of third neutral party.

Looking from this point of view, in the considered opinion of the researcher, the “conciliation” in part III of the said Act of 1996 should receive wider interpretation and should include mediation or any other process by whatever name called by which the dispute is resolved with the help of third neutral person or persons. The narrower interpretation given by the Supreme Court to the 'conciliation', in Mysore Cement, in the humble opinion of the researcher, will take the march of ADR in the reverse direction. The test in Mysore Cement case if applied, the settlement agreements, executed by the parties through any other techniques of ADR than ‘conciliation’ for which the procedure to resolve the dispute would be different than conciliation as provided under the said Act of 1996, would not be enforceable. In the humble opinion of the researcher, the decision in Mysore Cement case needs reconsideration or legislature should widen the definition of the conciliation by amending the Act of 1996 and bring it at par with the UNCITRAL Model Law on International Commercial Conciliation, 2002.

5.5 INDIAN APPROACH ON INTERNATIONAL COMMERCIAL CONCILIATION

The position in India regarding the international commercial conciliation is far from satisfactory. Let us scan the provision relating to international commercial
conciliation under Arbitration and Conciliation Act, 1996 as it is the only legislation dealing with the subject.

The Statement and Object of the said Act of 1996 states that the main objectives of the Bill are to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation, to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal.

Sub section (2) of section 1 of Arbitration and Conciliation Act, 1996 provides that the said Act extends to the whole of India, provided that Parts I, III and IV shall extend to the State of Jammu and Kashmir only in so far as they relate to international commercial arbitration or, as the case may be, international commercial conciliation. Explanation to the said section explains that, the expression “international commercial conciliation” shall have the same meaning as the expression “international commercial arbitration” in clause (f) of sub section (1) of section 2, subject to the modification that for the word “arbitration” occurring therein, the word “conciliation” shall be substituted.

Clause (f) of subsection (1) of section 2 inter alia provides “international commercial arbitration.”

Thus ‘international commercial conciliation” is to be termed according to this provision. The “international commercial conciliation” therefore means a conciliation relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-

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546 International Commercial Arbitration means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is- i) An individual who is a national of, or habitually resident in, any country other than India; or ii) A body corporate which is incorporated in any country other than India; or iii) An association or a body of individuals whose central management and control is exercised in any country other than India; or iv) The Government of a foreign country.
(i) An individual who is a national of, or habitually resident in, any country other than India; or
(ii) A body corporate which is incorporated in any country other than India; or
(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

There is no other provision regarding the international commercial conciliation in entire Arbitration and Conciliation Act, 1996. Part I deals with both domestic and international commercial arbitration held in India. Part III (sections 61 to 81) deals with conciliation. Section 61 of the Arbitration and Conciliation Act, 1996 provides that this part shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings in relating thereto.

The problem arises when the settlement agreement is executed between the parties in international commercial conciliation in India, but the county where it is to be enforced does not recognize such settlement agreement for example, USA. Also the problem may arise if the settlement agreement is executed out of India in international commercial conciliation. There is no provision under Arbitration and Conciliation Act, 1996, for recognition and enforcement of such settlement agreement.

5.6 ADR- COURT ANNEXED

Apart from conciliation without intervention of court, a Court annexed Conciliation/alternative disputes resolution techniques are also evolved in recent times. Section 28 of the Indian Contract Act, 1872 provides that every agreement by which any party is restricted absolutely from enforcing his rights under any contract ‘by the usual proceedings in ordinary tribunals’ (i.e. in Courts) ‘shall be void’. The statutory exception (not a statutory alternative) is of a reference of disputes to arbitration; first under the Indian Arbitration Act, 1940, now under Arbitration and Conciliation Act, 1996. Under our ancient Contract Law, arbitration still is an exception to litigation in Court, not yet an alternative to it.
Section 89 was inserted in the Code of Civil procedure, 1908 by section 7 of the Code of Civil procedure (Amendment) Act, 1999. The said section was added to implement the 129th Report of the Law Commission of India and to make the conciliation scheme effective; it is proposed to make it obligatory for the court to refer the dispute after the issues are framed for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only after the parties fail to get their disputes settled through any one of the alternate dispute resolution methods that the suit shall proceed further in the Court in which it was filed.

The constitutional validity of the said section 89 was challenged before Supreme Court in Salem Advocate Bar Association v Union of India. The Supreme Court observed that keeping in mind the law’s delays and limited number of judges available, it has become imperative that resort should be had to ADR mechanisms with a view to bring to end litigation between the parties at an early date. The ADR mechanism as contemplated by section 89 is arbitration or conciliation or judicial settlement, including settlement through Lok Adalat or mediation.

Thus it appears from the object and reasons of enacting section 89 of the Code of Civil Procedure and judicial pronouncement that it is enacted basically to reduce the growing burden on the courts.

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550 “89. Settlement of dispute outside the court.—(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may formulate the terms of a possible settlement and refer the same for—
(a) arbitration;
(b) conciliation
(c) judicial settlement including settlement through Lok Adalat; or
(d) Mediation.
(2) Where a dispute has been referred—
(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;
(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub section (1) of section 20 of the Legal services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;
(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;
(d) For mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed”.

551 AIR 2003 SC 189.
Order X\(^{552}\) of Code of Civil Procedure, 1908 is amended laying down procedure to exercise the powers given to the courts under section 89 of Code of Civil Procedure.

Perusal of these provisions make it clear that ‘arbitration’ is also considered as a form of ADR, in India at domestic level. It can be seen that the concept of court annexed ADR is introduced by this amendment.

The section 89 has contemplated the four different methods by which the disputes can be settled amicably. The concept of ‘Judicial settlement’, which is prevailing in United States, is introduced in India.

The terms ‘conciliation’ and ‘mediation’ are ordinarily used interchangeably. But considering the Parliamentary intent under section 89 of the Code of Civil Procedure, 1908, they must be held to be carrying different meaning. Basically section 89 is not drafted properly. The first anomaly is mixing up of the definitions of ‘mediation’ and ‘judicial settlement’ under clauses (c) and (d) of sub section (2) of section 89 of the code. Clause (c) says that for judicial settlement the Court shall refer the same to a suitable institution or person who shall be deemed to be a Lok Adalat. Clause (d) provides that where the reference is to mediation, the court shall effect a compromise between the parties by following such procedure as may be prescribed. It makes no sense to call a compromise effected by a court as mediation as is done in clause (d) nor does it make any sense to describe a reference made by a court to a suitable institution or person for arriving at a settlement as judicial settlement as is done in clause (c). The Supreme court in \textit{Afcons Infrastructure Ltd. v Cherian Varkey Construction Co. (P) Ltd \\& Ors}\(^{553}\) has done away with the said anomaly by

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552 “(1A) Direction of the Court to opt for any one mode of alternative dispute resolution – After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub section (1) of section 89 . On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.

(1B) Appearance before the conciliatory forum or authority- Where a suit is referred under rule 1 A, the parties shall appear before such forum or authority for conciliation of the suit.

(1C) Appearance before the Court consequent to the failure of efforts of conciliation.—Where a suit is referred under rule 1 A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it”.

553 2010 (8) SCC 24.
interchanging the terms judicial settlement and mediation in clauses (c) and (d) of section 89 (2).

The Supreme Court had appointed committee under Mr. Justice Jagannadha Rao, former Judge of Supreme Court and Chairman of the Law Commission of India to suggest model rules for implementing section 89 efficiently. In *Salem Bar Association (II)* 554 the Supreme Court adopted the model rules. The different definitions of mediation and conciliation are given in model mediation rules. Model Mediation rules defines mediation under rule 4 (v) as “Settlement by mediation means the process by which a mediator appointed by parties or by the court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring area of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties own responsibility for making decisions which affect them.”

It also defines “Conciliation” as “Settlement of Conciliation” means the process by which a conciliator who is appointed by parties or by Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of the Arbitration and Conciliation Act, 1996 in so far as they relate to conciliation, and in particular, in exercise of his powers under section 67 and 73 of that Act, by making proposals for a settlement of the dispute and by formulating or reformulating the terms of a possible settlement; and has a greater role than a mediator”.

Thus in India both ‘mediation’ and ‘Conciliation’ are considered to be different methods of settlement having different meaning, at least under Code of Civil procedure 1908. In India, a mediator is a facilitator, whereas a conciliator is an evaluator. 555

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554 2005 (6) SCC 344.
555 *Supra* Note 65, at 9.
In the opinion of the researcher the definition of 'Conciliation' or 'Mediation' given in the said rules are narrow and may not encompass within it the other techniques of ADR.

The question is can the court in exercise of its power under section 89 of Code of Civil procedure, 1908, refer the parties to arbitration or conciliation if they did not consent?

The similar question arose in Afcon’s case. In this case the trial court, on the application by one party under section 89 of the Code of Civil Procedure, on satisfying itself held that the dispute can be referred to arbitration though the defendant was not agreeable for arbitration. The revision petition filed in Kerala High Court was rejected. The Apex Court overruling the decisions of the both trial court and High Court held that unwilling party could not be compelled to go to arbitration or conciliation without consent of the parties. The Apex Court also held that as far as conciliation is concerned ‘the court cannot refer the parties to conciliation under section 89 in the absence of consent of all the parties.’ The Supreme Court held that section 89 refers to five types of ADR procedures, made up of one adjudicatory process (arbitration) and four negotiatory (non adjudicatory) processes- conciliation, mediation, judicial settlement and Lok Adalat settlement. It is further held that arbitration and conciliation will be governed by the provisions of Arbitration and Conciliation Act 1996 and two other processes Lok Adalat, judicial settlement, and Mediation will be governed by the Legal Services Authorities Act 1987. As for the last of the ADR processes Judicial Settlement provided under section 89, it is clear that it is not governed by any enactment and the court will follow such procedure as may be prescribed by appropriate rules. The Supreme Court held that the court can refer the dispute to the arbitration or conciliation only when the parties have consented for the same. If there pre-exist arbitration agreement between the parties, in all probability, the sections 8 and 11 of the Arbitration and Conciliation Act, 1996 would have stood referred and no need to have recourse to section 89 of the Code of Civil Procedure, 1908. Section 89 presupposes that there is no pre existing arbitration agreement. Even if there was no pre existing arbitration agreement, the parties to the

556 Supra note 8.
suit can agree for arbitration, when choice of ADR processes is offered to them by the court under section 89 of the code. It has further held that once the dispute is referred to the arbitration then the matter before the court stands disposed off, it will go outside the stream of the court permanently and will not come back to the court. In short further proceedings shall be conducted as per the provisions of Arbitration and Conciliation Act, 1996; the arbitrator appointed shall conduct the arbitration, declare the award and party aggrieved thereby shall have recourse against it under section 34 of the Arbitration and Conciliation Act, 1996.

The Supreme Court held that Conciliation is a non adjudicatory ADR process, which is also governed by the provisions of Arbitration and Conciliation Act, 1996. There can be valid reference only if both parties to the dispute agree to have negotiations with the help of a third party or third neutral parties either by an agreement or by the process of invitation and acceptance provided in section 62 of Arbitration and Conciliation Act 1996 followed by appointment of conciliator/s as provided in section 64 of Arbitration and Conciliation Act 1996 Act. However in contrast to arbitration, when a matter is referred to conciliation, the matter does not go out of the stream of court process permanently. If there is no settlement, the matter is returned to the court for framing issues and proceeding with the trial. It is held that when ‘conciliation’ is successful the settlement agreement will have to be placed before the court where it is pending for recording settlement.

As regards other three ADR processes i.e. mediation, judicial settlement, and Lok Adalat, the Apex Court held that these processes do not need consent of the parties.

The four ADR processes are non-adjudicatory and the case does not go out of the stream of the court when a reference is made to such a non- adjudicatory ADR forum. The court retains its control and jurisdiction over the case, even when the matter is before the ADR forum. When a matter is settled through conciliation, the Settlement Agreement is enforceable as if it is a decree of the court having regard to Section 74 read with Section 30 of the Arbitration and Conciliation Act 1996. Similarly, when a settlement takes place before the Lok Adalat, the Lok Adalat award

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is also deemed to be a decree of the civil court and executable as such under Section 21 of the Legal Services Authorities Act, 1987. Though the settlement agreement in a conciliation or a settlement award of a *Lok Adalat* may not require the seal of approval of the court for its enforcement when they are made in a direct reference by parties without the intervention of court, the position will be different if they are made on a reference by a court in a pending suit/proceedings.559 As the court continues to retain control and jurisdiction over the cases which it refers to conciliations, or *Lok Adalats*, the settlement agreement in conciliation or the *Lok Adalat* award will have to be placed before the court for recording it and disposal in its terms. The Supreme Court560 observed further where the reference is to a third neutral party (mediation as defined above) on a court reference, though it will be deemed to be reference to *Lok Adalat*, as court retains its control and jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal. Where the matter is referred to another Judge and settlement is arrived at before him, such settlement agreement will also have to be placed before the court which referred the matter and that court will make a decree in terms of it. Whenever such settlements reached before non-adjudicatory ADR Fora are placed before the court, the court should apply the principles of Order 23 Rule 3 of the Code of Civil Procedure 1908 and make a decree/order in terms of the settlement, in regard to the subject matter of the suit/proceeding. The Apex Court held that in regard to matters/disputes which are not the subject matter of the suit/proceedings, the court will have to direct that the settlement shall be governed by Section 74 of Arbitration and Conciliation Act 1996 (in respect of conciliation settlements) or Section 21 of the Legal Services Authorities Act, 1987 (in respect of settlements by a *Lok Adalat* or a Mediator). Only then such settlements will be effective.

Thus when the settlement agreement is executed between the parties, on reference by the court under section 89 to any of the non adjudicatory techniques including conciliation, it will not be enforceable unless the court approves it.

The Apex Court has categorically stated that it is mandatory for the civil court to invariably refer cases to ADR process.561 Only in certain recognized excluded

559 Ibid, para 28.
560 Ibid
561 Ibid.
categories of cases, it may choose not to refer to an ADR process on briefly recording the reasons for not resorting to any of the settlement procedures prescribed under section 89 of the Code of Civil Procedure 1908. The recourse to ADR process under section 89 of the Code of Civil Procedure 1908, is mandatory. The Judge, in charge of the case, if assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. The Supreme Court held some categories of the cases such as representative suits, disputes relating to election to public offices, disputes relating to grant of probate, etc; are normally not suitable for ADR process having regard to their nature.

The other suits and cases of civil nature are normally suitable for ADR process, for example, all cases relating to trade, commerce, and contracts, cases arising from strained relationships, all consumer disputes etc.

562 The following categories cases may not be referred for ADR (i) Representative suits under Order I rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).
(ii) Disputes relating to election to public offices (as contested from disputes between two groups trying to get control over the management of societies, clubs, association etc.).
(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.
(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.
(v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.
(vi) Cases involving prosecution for criminal offences.

563 Supra note 8.

564 The cases which should be referred for ADR.
(i) All cases relating to trade, commerce, and contracts, including
- disputes arising out of contracts (including all money claims)
- disputes relating to specific performance
- disputes between suppliers and customers
- disputes between bankers and customers
- disputes between developers/builders and customers;
- disputes between landlords and tenants/licensor and licensees;
- disputes between insurer and insured;
(ii) All cases arising from strained or soured relationships, including
- disputes relating to matrimonial causes, maintenance, custody of children; disputes relating to partition/division among family members
- disputes relating to partnership among partners.
(iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including
- disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);
- disputes between employers and employees;
- disputes among members of societies / associations / Apartment owners Associations;
(iv) All cases relating to tortious liability including claims for compensation in motor accidents/other accidents; and
(v) All consumer disputes including
However the Supreme Court has clarified that the above categorization as ‘suitable’ and ‘unsuitable’ is not exhaustive or rigid and is illustrative.\footnote{565 Supra note 8.}

The decision of the Apex Court in Afcon’s\footnote{566 Ibid.} case is set back to the movement of ADR through assistance of the courts, opined the eminent lawyer Fali S. Nariman. A strained construction has been placed on a most important and salutary provision in the code.\footnote{567 Supra Note 9, at xxvii.} He further opined that after the decision of the highest court in Afcon’s case, there is not much help to be expected on ADR in future from the courts. Mediation must stand on its own; its success judged on its own record, un-assisted by Judges.\footnote{568 Ibid, at xxviii.} The Apex Court should have used the opportunity to take the movement of ADR further.

The Apex court has unnecessarily restricted powers of court to exercise jurisdiction to refer the parties to arbitration or conciliation only if parties consent thus efficacy of the said section is reduced. Ironically the court held the court may refer person to mediation even though party has not consented to but not for conciliation when conciliation and mediation are synonym. Also in the opinion of the researcher, if the parties are referred to conciliation or mediation and the settlement agreement is executed it should not be compulsory to get decree passed by the court on consent terms. This approach of Supreme Court may affect the efficacy of ADR/Conciliation.

Lord Woolf M.R. has in Cowl v Plymouth City Council\footnote{569 [2002] 1 W.L.R. 207.} stated that the courts should make appropriate use of their ample powers under the CPR to ensure that the parties try to resolve the dispute with the minimum involvement of the courts.

### 5.7 ADR UNDER LEGAL SERVICES AUTHORITIES ACT

Another effort made by the legislator in furtherance of ADR is establishment of Lok Adalats, Nyaya Panchayats. Legal Services Authorities 1987 are also a part the campaign to take justice to the people and ensure that all people have equal access to

- disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or ‘product popularity’.

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\footnote{565 Supra note 8.} \footnote{566 Ibid.} \footnote{567 Supra Note 9, at xxvii.} \footnote{568 Ibid, at xxviii.} \footnote{569 [2002] 1 W.L.R. 207.}
justice in spite of various barriers, like social and economic backwardness. The philosophy behind setting up of permanent and continuous Lok Adalat is that in India, the litigant public has not so far been provided any statutory forum for counseling and as such, these Lok Adalats may take upon themselves the role of counselors as well as conciliators. Experience of Lok Adalat as an ADR mode has come to be accepted in India as a viable, economic, efficient and informal one.

Article 39-A came to be inserted in the Constitution by Constitution (42nd Amendment) Act, 1976 w.e.f. 3.1.1977. Equal justice to all and free legal aid are hallmark of Article 39-A. Pursuant to these objectives, the Legal services Authorities Act 1987 (Act of 1987) was enacted by the Parliament to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity.

With the object of providing free legal aid, Government had by Resolution dated 26th September, 1980 appointed the Committee for implementing Legal Aid Schemes (CILAS) under the Chairmanship of Mr. Justice P.N. Bhagwati (as he then was) to monitor and implement legal aid programmes on a uniform basis in all the States and Union territories. CILAS evolved a model scheme for legal Aid programme applicable throughout the country by which several legal aid and advice boards have been set up in the States and Union territories. CILAS is funded wholly by grants from the Central Government. The Government is accordingly concerned with the programme of legal aid as it is the implementation of a constitutional mandate. But on a review of the working of the CILAS, certain deficiencies have come to the fore. It is; therefore, felt that it will be desirable to constitute statutory legal service authorities at the National, State and District levels so as to provide for the effective monitoring of legal aid programmes. The Bill provides for the composition of such authorities and for the funding of these authorities by means of grants from the Central Government and the State Governments. Power has been also given to the

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570 Supra Note 75.
571 Ibid, at 20.
National Committee and the State Committees to supervise the effective implementation of legal aid schemes.

*Lok Adalats* were constituted at various places in the country for the disposal, in a summary way and through the process of settlement between the parties, of a large number of cases expeditiously and with lesser costs. The institution of *Lok Adalats* was functioning as a voluntary and conciliatory agency without any statutory backing for its decisions. It proved to be very popular in providing for a speedier system of administration of justice. In view of its growing popularity, there has been a demand for providing a statutory backing to this institution and the awards given by *Lok Adalats*. It is felt that such a statutory support would not only reduce the burden of arrears of work in regular Courts, but would also take justice to the door-steps of the poor and the needy and make justice quicker and less expensive.

The Act of 1987 provides for organizing *Lok Adalats* at such intervals and such places as may be determined by every State Authority or District authority or the Supreme Court Legal Services Committee.\(^572\) The *Lok Adalat* has jurisdiction to determine and to arrive at compromise or settlement between the parties to a dispute in respect of (i) any case pending before; or (ii) any matter which is falling within the jurisdiction of, and is not brought before, any Court for which the *Lok Adalat* is organized.\(^573\) However the *Lok Adalat* has no jurisdiction in respect of an offence which is not compoundable.\(^574\) The *Lok Adalat* shall take the cognizance of the cases referred to it when the parties agree or if one of the parties make an application to the Court for referring the case to *Lok Adalat* or that the Court is satisfied that the matter is an appropriate one to be taken cognizance of by the *Lok Adalat*.\(^575\) The *Lok Adalat* shall proceed to dispose of the case or matter and arrive at a compromise or settlement between the parties. Thus the *Lok Adalat* has no jurisdiction to adjudicate the matter or case referred to it. If the case or matter is not settled, and no award is passed by the *Lok Adalat*, the *Lok Adalat* shall advise the parties to seek remedy in a Court.\(^576\)

Where the matter is settled or compromised before *Lok Adalat*, an award shall be

\(^{572}\) Legal Services Authorities Act, 1987, Sub s. (1) of s. 19.

\(^{573}\) Ibid, Sub s. (5) of s. 19.

\(^{574}\) Ibid, Proviso s. 19.

\(^{575}\) Ibid, s. 20 (1).

\(^{576}\) Ibid, s. 20(6).
drawn by the *Lok Adalat*, and it shall be deemed to be the decree of a civil court.\(^{577}\)

But in view of the decision of *Afcon’s* case the approval of the court would be necessary if a case pending before the court is referred to it.\(^{578}\) Thus there is confusion which is required to be removed. No such provision is made in Legal services Authorities Act 1987, but for the decision in *Afcons* case such approval is necessary. To encourage the parties to settle or compromise their disputes it is provided that once the parties settle or compromise their dispute and award is drawn by the *Lok Adalat* the Court fee paid by the party shall be refunded in the manner provided under Court - Fee Act, 1870.\(^{579}\)

By amendment in the year 2002 to Legal Services Authorities Act, 1987 chapter VI-A, containing sections 22–A to 22-E, is introduced. Section 22-B provides for the establishment of the Permanent Lok Adalats\(^{580}\) in respect of one or more public utility services.\(^{581}\)

This amendment introduces the court annexed settlement of disputes before it reaches the court. Section 22–C of The Legal Services Authorities Act, 1987 provides that any party to the dispute may, before the dispute is brought before any Court, make an application to the Permanent Lok Adalat for the settlement of dispute. It also provides that the Permanent Lok Adalat does not have jurisdiction in respect of any matter relating to an offence not compoundable under any law. Also pecuniary jurisdiction of the *Lok Adalat* is limited to settle disputes not exceeding ten lakh rupees.

Section 22 –D lays down the procedure to settle the dispute to be followed by the Permanent Lok Adalat to settle the dispute. It provides that the each party to the application shall submit written statement stating therein the facts and nature of the

\(^{577}\) *Ibid*, s. 21(1).

\(^{578}\) *Supra* note 8, para 28.

\(^{579}\) Legal Services Authorities Act, 1987, s. 21(1).

\(^{580}\) Permanent Lok Adalat is defined to mean a permanent Lok Adalat established under sub section (1) of section 22 B.

\(^{581}\) The public utility service is defined to mean any

(i) transport service for the carriage of passengers or goods by air, road, or water; or
(ii) Postal, telegraph or telephone service; or
(iii) Supply of power, light or water to the public by any establishment; or
(iv) System of public conservancy or sanitation; or
(v) Service in hospital or dispensary; or
(vi) Insurance service.
dispute, points or issues in such dispute and grounds relied upon in support of or in opposition to such points or issues. The parties may file documents to supplement their written statement. A copy of such written statement and documents shall be given to each of the parties to the application. The parties are at liberty to file additional statement. After the filing of the statement or additional statement is complete to the satisfaction of the Permanent Lok Adalat, it shall conduct the conciliation proceedings between the parties in such manner as it thinks proper considering and taking into account the circumstances of the dispute. The Permanent Lok Adalat shall assist the parties in their attempt to reach amicable settlement of the dispute in an impartial and independent manner. Where the Permanent Lok Adalat is of the opinion that there exist elements of settlement in such proceedings which may be acceptable by both the parties, it may formulate the terms of a possible settlement of dispute and give to the parties concerned for their observations and in case the parties reach an agreement on the settlement of the dispute, they shall sign the settlement agreement and the Permanent Lok Adalat shall pass an award in terms thereof. Sub section (8) of the section 22–C provides that where the parties fail to reach an agreement under sub section (7) of section 22–C; the Permanent Lok Adalat shall, if the dispute does not relate to any offence, decide the dispute. It is pertinent to note, as per section 22-E every award of the Permanent Lok Adalat shall be deemed to be a decree of a Civil Court. Every award made by the Permanent Lok Adalat shall be final and not called in question in any original suit, application, or execution proceeding.582

In the opinion of the researcher; the provisions of sub section (8) of section 22-C and section 22-E of the Act of 1987 are contrary to the basic philosophy of party autonomy of the alternative disputes resolution techniques. The party participating in ADR process has right to withdraw from the process at any time. A party to ADR cannot be or should not be forced to get the dispute adjudicated.

582 Legal Services Authorities Act, 1987, s. 22-E.
The term ‘conciliation’ is not defined under the Legal Services Authorities Act, 1987. It should, therefore, be considered from the perspective of Arbitration and Conciliation Act, 1996.\textsuperscript{583}

The Supreme Court\textsuperscript{584} held “Chapter VI-A stands independently. Whereas, the heading of the Chapter talks of pre-litigation, conciliation and settlement, Section 22-C (8) of the Act speaks of determination. It creates another adjudicatory authority, the decision of which by a legal fiction would be a decision of a civil court. It has the jurisdiction to decide a case. The term `decide' means to determine; to form a definite opinion; to render judgment. (See Advanced Law Lexicon, 3rd Edition, 2005 at 1253). Any award made by the Permanent Lok Adalat is executable as a decree. No appeal there against shall lie. The decision of the Permanent Lok Adalat is final and binding on parties. Whereas on the one hand, keeping in view the Parliamentary intent, settlement of all disputes through negotiation, conciliation, medication, Lok Adalat and Judicial Settlement are required to be encouraged, it is equally well settled that where the jurisdiction of a court is sought to be taken away, the statutory provisions deserve strict construction. A balance is thus required to be struck. A court of law can be created under a statute. It must have the requisite infrastructure therefor. Independence and impartiality of Tribunal being a part of human right is required to be taken into consideration for construction of such a provision. When a court is created, the incumbents must be eligible to determine the lis.”

The Apex Court observed an option is given to any party to a dispute. It may be a public utility service provider or a public utility service recipient. The service must have some relation with public utility. Ordinarily insurance service would not come within the public utility service. But having regard to the statutory scheme, it must be held to be included there under. It is one thing to say that an authority is created under a statute to bring about a settlement through Alternative Dispute Resolution mechanism but it is other thing to say that an adjudicatory power is conferred on it. Chapter VI-A, therefore, in our opinion, deserves a closer scrutiny. In a case of this nature, the level of scrutiny must also be high.

\textsuperscript{583} United India Insurance Co. Ltd v. Ajay Sinha, 2008 DGLS (Soft.) 633.
\textsuperscript{584} \textit{Ibid.}

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The Supreme Court further held that Sub-section (1) of Section 22-C speaks of settlement of disputes. The authority has to take recourse to conciliation mechanism. One of the essential ingredients of the conciliation proceeding is that nobody shall be forced to take part therein. It has to be voluntary in nature. The proceedings are akin to one of the recognized ADR mechanism which is mode of Medola\textsuperscript{585}. It may be treated at par with Conciliation and Arbitration. In such a case the parties agree for settlement of dispute by negotiation, conciliation or mediation. The proceedings adopted are not binding ones, whereas the arbitration is a binding procedure. Even in relation to arbitration, an award can be the subject matter of challenge. The provisions of the Arbitration and Conciliation Act, 1996 shall apply thereto. The jurisdiction in terms of Section 34 of the Arbitration and Conciliation Act, 1996 is wide. The court in exercise of the said jurisdiction may not enter into the merit of the case but would be entitled to consider as to whether the arbitrator was guilty of misconduct. If he is found to be biased, his award would be set aside. The scope of voluntary settlement through the mechanism of conciliation is also limited. If the parties in such a case can agree to come to settlement in relation to the principal issues, no exception can be taken thereto as the parties have a right of self determination of the forum, which shall help them to resolve the conflict, but when it comes to some formal differences between the parties, they may leave the matter to the jurisdiction of the conciliator. The conciliator only at the final stage of the proceedings would adopt the role of an arbitrator.

In the opinion of the Court, the Permanent Lok Adalat does not simply adopt the role of an Arbitrator whose award could be the subject matter of challenge but the role of an adjudicator. The Parliament has given the authority to the Permanent Lok Adalat to decide the matter. It has an adjudicating role to play.

The Constitutional validity of the chapter VI -A of the Legal services authorities Act, 1987 was challenged before Supreme Court in Bar Council of India v Union of India\textsuperscript{586}.

\textsuperscript{585} Medola is explained in Chapter 2.
\textsuperscript{586} 2012 AIR (SC) 3246.
The challenge is principally on the ground that Sections 22-A, 22-B, 22-C, 22-D and 22-E are arbitrary per se; violative of Article 14 of the Constitution of India and are contrary to the rule of law as they deny fair, unbiased and even-handed justice to all. It was argued that Section 22-C(1) read with Section 22-C(2) provides that a dispute before Permanent Lok Adalat can be raised by moving an application to it unilaterally by any party to the dispute (before the dispute is brought before any court for settlement). The public utility service provider, thus, can play mischief by pre-empting an aggrieved consumer from going to the consumer fora or availing other judicial process for redressal of his grievance and enforcement of his rights. Permanent Lok Adalats have been empowered to decide dispute on merits upon failure between the parties to arrive at a settlement under Section 22-C (8). While deciding the case on merits, the Permanent Lok Adalat is not required to follow the provisions of the Civil Procedure Code or the Evidence Act. Section 22-C(8) prevents the courts and the consumer fora to examine the deficiencies in services such as transport, postal and telegraph, supply of power, light or water, public conservancy or sanitation, service in hospital, etc. and renders the provisions under challenge arbitrary and irrational. It was further argued “award of the Permanent Lok Adalat on merits is made final and binding and cannot be called in question in any forum or court of law under Section 22-E(1) and (4). No right to appeal has been provided for against the award in any court of law. Since all the public utility services basically relate to the fundamental right to life provided under Article 21 of the Constitution, any adverse decision on merits by Permanent Lok Adalat would immediately impinge upon fundamental right of an aggrieved citizen and, therefore, even absence of one right of appeal makes these provisions unconstitutional as it is against the fundamental principles of fair procedure. To say that an aggrieved person can approach the High Court under Articles 226/227 of the Constitution against awards given by the Permanent Lok Adalats on merits and, therefore, absence of right of appeal does not matter, is completely misplaced. The writ jurisdiction under Articles 226/227 is extremely limited and is no substitute of the appellate jurisdiction.”

The Apex Court held that Parliament can definitely set up effective alternative institutional mechanisms or make arrangements which may be more efficacious than the ordinary mechanism of adjudication of disputes through the judicial courts. Such institutional mechanisms or arrangements by no stretch of imagination can be said to
be contrary to constitutional scheme or against the rule of law. The establishment of Permanent Lok Adalats and conferring them jurisdiction up to a specific pecuniary limit in respect of one or more public utility services as defined in Section 22-A (b) before the dispute is brought before any court by any party to the dispute is not anathema to the rule of law. It observed that instead of ordinary civil courts, if other institutional mechanisms are set up or arrangements are made by the Parliament with an adjudicatory power, such institutional mechanisms or arrangements cannot be faulted on the ground of arbitrariness or irrationality.

The Court further held that Permanent Lok Adalats can adjudicate only if the process of conciliation and settlement fails. The emphasis is on settlement in respect of disputes concerning public utility services through the medium of Permanent Lok Adalat. It is for this reason that sub-section (1) of Section 22-C states in no unambiguous terms that any party to a dispute may before the dispute is brought before any court make an application to the Permanent Lok Adalat for settlement of dispute. Thus, settlement of dispute between the parties in matters of public utility services is the main theme. However, where despite the endeavors and efforts of the Permanent Lok Adalat the settlement between the parties is not through and the parties are required to have their dispute determined and adjudicated, to avoid delay in adjudication of disputes relating to public utility services, the Parliament has intervened and conferred power of adjudication upon the Permanent Lok Adalat. The court upheld the power conferred on Permanent Lok Adalats to adjudicate the disputes between the parties concerning public utility service up to a specific pecuniary limit, if they do not relate to any offence, as provided under Section 22-C(8). This is held to be constitutional. The Apex court was of the opinion that an authority empowered to adjudicate the disputes between the parties and act as a tribunal may not necessarily have all the trappings of the court. What is essential is that it must be a creature of statute and should adjudicate the dispute between the parties before it after giving reasonable opportunity to them consistent with the principles of fair play and natural justice.

The concept of ‘Permanent Lok Adalat’ is introduced as an alternative dispute resolution technique by way of conciliation in certain types of disputes against some institutions. The participation in conciliation is voluntary and conciliator cannot give
decision or force his decision upon the parties to conciliation. No one can be forced for adjudication of the dispute against his wishes. In the event the conciliation fails, the conciliator cannot force his decision upon the parties. It may be noted that the conciliator cannot act as an arbitrator unless otherwise agreed by the parties. Thus conciliator cannot act as an adjudicator. The provision is made to avoid any prejudices or bias. During the conciliation, the party may have disclosed various facts to the conciliator. The conciliator may have formed opinion based on these facts and suggested terms of the settlement. If the party refuses to act on the suggestions by the conciliator it is likely to cause personal bias or official bias. Permanent Lok Adalat first acts as a conciliator and if conciliation fails it assumes the function of an adjudicator. Certainly there is a probability that the Permanent Lok Adalat may act in biased manner. In *Afcon*, Supreme Court held that if the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. In the considered opinion of the researcher these points were not brought to the notice of the Supreme Court. Thus the said provisions in Legal Services Authorities Act, 1987 need reconsideration. The option should be given to the party making an application to Permanent Lok Adalat to get the dispute adjudicated through it, in case conciliation fails.

5.8 **ARB-MED/CON (ARBITRATION AND CONCILIATION ACT, 1996)**

During the pendency of arbitration the arbitrator may refer the dispute to ADR. Section 30 of the Act of 1996 provides that it shall not be incompatible with an arbitration agreement for an arbitral tribunal to encourage the parties for settlement of disputes and with the consent of the parties the arbitral tribunal may use mediation, conciliation or other procedure during the arbitral proceedings. Thus, as there is provision for court annexed ADR, similarly there could also be arbitration annexed ADR or ARB-MED OR ARB-CON, etc. If the parties settle the dispute through any of such methods of ADR, the arbitral proceedings are terminated and the arbitral

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587 Arbitration and Conciliation Act, 1996, s. 80.
588 *Supra* note 8.
tribunal may record the settlement in the form of arbitral award on agreed terms. It may be noted that this is left to the discretion of the arbitral tribunal whether to pass award in terms of settlement or not. In the event the arbitral tribunal refuses, the parties have no remedy.

5.9 CRITICAL APPRAISAL OF ARBITRATION AND CONCILIATION ACT, 1996

The Act of 1996 does not define term ‘Conciliation’. Part III which deals with the Conciliation only refers to the procedure for settlement of dispute through ‘Conciliation’ which is one of the methods of ADR. It has not contemplated other techniques of ADR. The term ‘Conciliation’ should be given wider interpretation in terms of the UNCITRAL Model Law on International Commercial Conciliation, 2002. It is necessary that the ‘conciliation’ should cover within its sweep all the non adjudicatory modes of alternate dispute settlement techniques with the help of third neutral party.

The passing of an arbitral award on agreed terms is left at the discretion of the arbitral tribunal under Section 30 of the Arbitration and Conciliation Act, 1996. The passing of the arbitral award on agreed terms should not be left to the discretion of the arbitral tribunal. If the analogy in Afcon is adopted the parties shall require arbitrator to pass an award if they settle their dispute amicably through conciliation.

There is no provision to challenge the settlement agreement executed between the parties in conciliation proceeding. Also no finality is provided to the settlement agreement. If one thinks of a situation where the settlement agreement is executed in successful conciliation proceedings and party seeks to enforce the same. The other party challenges the same raising all the possible defenses under the Contract Act. The party may then be remediless if by that time his original claim or cause of action is time barred.

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589 Arbitration and Conciliation Act, 1996, s. 30(2). 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.

590 Supra note 8.
The mechanism and period within which such settlement agreement can be challenged should be provided under the Act. The provision should be made to register the settlement agreement before registrar under the Registration Act or to file it in the ‘Court’ which shall pass decree in terms of the settlement agreement.

Also the legislation may provide the grounds to challenge the settlement agreement. The conciliation may be domestic commercial conciliation or international commercial conciliation. The said Act of 1996 provides that the part III shall extend to the state of Jammu and Kashmir only in so far as they relate to international commercial arbitration or, as the case may be, international commercial conciliation. It further explains that the expression “international commercial conciliation” shall have the same meaning as the expression “international commercial arbitration” in clause (f) of sub section (1) of section 2, subject to the modification that for the word ‘arbitration” occurring therein, the word “conciliation” shall be substituted.

Apart from this provision there is no other provision in the said Act of 1996 as to recognition and enforcement of the settlement agreement that may take place in consequence of international commercial conciliation.

5.9.1 **Indian Approach on Arbitration under Arbitration and Conciliation Act, 1996**

Historical roots of arbitration go back to colonial India. Prior to the enactment of the Arbitration and Conciliation Act, 1996, the law of Arbitration in India was contained in the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937, and the Foreign Awards (Recognition and Enforcement) Act, 1961. There were no further amendments in the aforesaid three Acts.

UNCITRAL has adopted Model law on International Commercial arbitration to achieve uniformity on the law of arbitration in the year 1985. The Law Commission

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591 Sub section (2) of Section 1.
592 “International Commercial Arbitration” means as arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-(i) an individual who is national of, or habitually resident in, any country other than India, or (ii) a body corporate which is incorporated in any country other than India; or (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or(iv) the Government of a foreign country.
of India, several representative bodies of trade and industry and experts in the field of arbitration have proposed amendments to the existing Acts governing arbitration to make it more responsive to contemporary requirements. It was felt that the economic reforms may not be fully effective if the law dealing with settlement of both domestic and international commercial disputes remains out of tune with such reforms. It was generally felt that the arbitration laws in India had failed to keep pace with the developments at the international level.

Thus, the archaic Arbitration Act of 1940, Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1963 are repealed, consolidated and amended and the Arbitration and Conciliation Act, 1996 (the said Act of 1996) was enacted. The said Act of 1996 is passed in India to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. The said Act of 1996 is amended in the year 2015. By the amendment; section 29 A is introduced. This section mandates the arbitral tribunal to make an award within twelve months from the date the arbitral tribunal enters upon reference i.e from the date the arbitrator receive notice of appointment. Also a provision is made for Fast Track Arbitration under section 29 B. It allows the parties to an arbitration agreement to agree in writing to have their dispute resolved by fast track procedure. Under this provision the award shall be made by the arbitral tribunal within a period of six months from the date on which arbitral tribunal enters upon a reference. Also the fees of arbitral tribunal are fixed.

The said Act of 1996 defines “arbitration” as any arbitration whether or not administered by permanent arbitral institution. The ‘arbitration agreement’ is defined to mean as agreement referred to in section 7. Section 7 interalia explains an arbitration agreement as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a

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593 Came into force from 23rd October 2015.
594 Arbitration and Conciliation Act, 1996, Explanation to s. 29 A.
595 Ibid, s. 11 (14) r/w schedule IV.
596 Ibid, s. 2(1) (a).
597 Ibid, s. 2(1) (b).
defined legal relationship, whether contractual or not. 598 It is however, necessary that an arbitration agreement should be in writing. 599 It provides that an arbitration agreement is in writing if it is contained in- i) a document signed by the parties, ii) exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; iii) an exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other. 600 An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. 601 Even a reference in a contract to a document containing an arbitration agreement constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract. 602

Thus for referring the dispute to arbitration, it is essential that there should be an arbitration agreement in writing as contemplated under section 7 of the Arbitration and Conciliation Act, 1996.

The arbitration, when is held in India between two Indian citizens it is domestic arbitration. An arbitration held in India, arising out of commercial transaction, when at least one of the parties to dispute is an individual who is a national of, or habitually resident in, any country other than India; or a body corporate which is incorporated in any country other than India; or a company or association or a body of individuals whose central management and control is exercised in any country other than India; or the Government of a foreign country, is referred to as “international commercial arbitration”. 603 Where the situs of an arbitral tribunal is out of India, the award declared by the arbitral tribunal shall be a ‘Foreign Award’ in India though it may be domestic in the country in which it was passed.

598 Ibid, s. 7 (1).
599 Ibid, s. 7 (3).
600 Ibid, s. 7 (4).
601 Ibid, s. 7 (2).
602 Ibid, s. 7 (5).
603 Ibid, Clause (f) of s. 2 (1).
The part I of the said Act of 1996 is applicable where the place of arbitration is in India. Thus domestic arbitration and international commercial arbitration held in India are governed by Part I of the said Act of 1996.

The Arbitration and Conciliation Act, 1996 defines arbitration agreement, rules for composition of arbitral tribunal, conduct of arbitral proceedings, making of award and recourse against arbitral award. Part II of the said Act of 1996 lays down the provisions for the implementation of arbitration agreement and enforcement of the foreign arbitral awards passed out side India in international commercial arbitration.

Section 8 of the said Act of 1996 recognizes the arbitration agreement. It mandates the judicial authority before which an action is brought in a matter which is the subject matter of an arbitration agreement to refer the parties to arbitration, if conditions of the said section are satisfied. Section 8 is held to be mandatory if the condition stipulated therein are satisfied i.e. (1) there is an arbitration agreement; (2) a party to the agreement brings an action in the Court against the other party; (3) subject matter of the action is the same as the subject matter of the arbitration agreement; (4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.

Section 9 of the said Act empowers the court to protect the interest of the parties by passing interim reliefs. By the amendment in the year 2015 this power or jurisdiction is conferred upon the courts even in case of international commercial arbitration where place of arbitration is out of India. Under section 9 of the said Act of 1996

604 Ibid, s. 2(2).
605 Ibid, s. 7.
606 Ibid, Chapter III, Ss. 10 to 15.
607 Ibid, Chapter V, Ss. 18 to 27.
608 Ibid, Chapter VI, Ss. 28 to 33.
609 Ibid, s. 34.
610 Power to Refer to arbitration where there is an arbitration agreement- (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any other Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists. Also see AIR 2000 SC 1886, P. Anand Gajapathi Raju v. PVG Raju (dead) and others.
611 Arbitration and Conciliation Act, 1996, s. 2 (2).
an application to the court can be made for seeking the interim measure before or
during arbitral proceedings or at any time after the making of arbitral award but
before it is enforced in accordance with section 36 of the said Act of 1996. Thus the
party can move the court for protection of their rights by seeking injunction, or
attachment of the property or requiring other party to give security or maintaining
status quo or appointing receiver before, during arbitral proceedings or even after the
award is declared.

A party may apply to arbitral tribunal for the appointment of guardian for a minor or
person of unsound mind for the purpose of arbitral proceedings. The arbitral Tribunal
may on the application of a party, grant interim measures of protection for the
preservation, interim custody or sale of any goods which are subject matter of arbitral
proceedings. Arbitral tribunal is also empowered to grant interim injunction or
appoint receiver.

Sections 10 to 15 of the said Act of 1996 lay down the procedure for composition of
an arbitral tribunal. Section 10 provides that the parties are free to determine the
number of arbitrators; however such number should not be even. Section 11 lays
down the detailed procedure for constitution of arbitral tribunal. The parties are free to
agree on the procedure for the appointing the arbitrator or arbitrators. In case there is
no agreement regarding procedure of appointment between the parties a) in arbitration
with three arbitrators each party shall appoint one arbitrator and the two arbitrators
shall appoint third arbitrator. If party fails to appoint an arbitrator or the two
arbitrators fail to agree on the third arbitrator, or b) in an arbitration with sole
arbitrator, if parties fail to agree on the arbitrator within 30 days from receipt of
request made by one party from the other party to so agree, the appointment shall be
made, upon request of a party by the Supreme Court, or as the case may be, the High
Court or any person or institution designated by such court.

Sub section (6) of section 11 contemplates a procedure where there is an agreement
between the parties to constitute the arbitral tribunal, a) if any party to the arbitration
agreement fails to act as per agreed procedure; or b) the parties or the two appointed

612 Ibid, Section 9.
613 Ibid, s. 17.
arbitrators, fail to reach an agreement expected of them under that procedure; or c) a person, including institution, fails to perform any function entrusted to him or it under that procedure for composition of arbitral tribunal, a party may request the Supreme Court, or as the case may be, the High Court or any person or institution designated by such court to take the necessary measures. An application is to be made to the High Court in case of Domestic arbitration and the Supreme Court in case of International Commercial arbitration. The application is to be made to the High court within whose local limits the principal civil court referred to in clause (e) of subsection (1) of section 2 is situate. This function under section 11 is held to be a judicial function.

The appointment of an arbitrator can be challenged if there exist circumstances that give rise to justifiable doubts as to his impartiality or independence. The amendment to the said Act of 1996, in the year 2015, has added Fifth schedule and Seventh Schedule which has detailed the guidelines to determine grounds and relationships between the parties and arbitrator which shall raise justifiable doubts about impartiality and independency of an arbitrator.

The autonomy is given to the parties to agree on the procedure to be followed in conducting the arbitral proceedings. The parties are free to agree on the place of arbitration and language. In the absence of an agreement between the parties, the procedure for conducting the arbitral proceedings is laid down under sections 18 to 27 of the said act of 1996.

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614 “Court” means- (i) in case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject matter of a suit, but does not include any Civil Court of a grade inferior to such principle Civil Court, or any Court of Small Causes; (ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court. Generally District Court is principal civil court in every district.


616 Arbitration and Conciliation Act, 1996, Ss. 12 to 15.

617 Ibid, s.19.

618 Ibid, s.20.

619 Ibid, s.22.

620 Ibid, Ss.18-27.
Section 28 of the said Act of 1996 provides that the dispute under domestic arbitration is to be decided by the arbitral tribunal in accordance with the substantive law of India.\textsuperscript{621} However, in case of International Commercial Arbitration held in India, the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of dispute or in absence of such designation the arbitral tribunal has discretion to apply the rules of law it considers to be appropriate considering all surrounding circumstances of the dispute.\textsuperscript{622}

The party aggrieved by the award, in both domestic arbitration as well in International Commercial Arbitration held in India, may have recourse against an arbitral award by way of an application to the Court for setting aside award.\textsuperscript{623} However the Court does not sit as an appellate court against the arbitral award.\textsuperscript{624} The Court has no jurisdiction to evaluate the evidence laid before arbitrator. The award can be challenged only on the grounds set out in sub section (2) of section 34 of the said Act.\textsuperscript{625} The award declared by arbitrator under part I of the said Act is final and binding on the parties and persons claiming under them respectively.\textsuperscript{626} The award declared by arbitrator is enforceable as if it were a decree of the court.\textsuperscript{627} Thus the award declared by an

\textsuperscript{621} Ibid, s. 28(1).
\textsuperscript{622} Ibid, s. 28(1) (b).
\textsuperscript{623} Ibid, s. 34.
\textsuperscript{624} J.G. Engineers Pvt. Ltd. v. Union of India & Anr., AIR 2011 SC 2477.
\textsuperscript{625} S. 34(2) - An arbitral award may be set aside by the Court only if -(a) the party making the application furnishes proof that -
(i) a party was under some incapacity, or
(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;
Provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
(b) the Court finds that -
(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
(ii) the arbitral award is in conflict with the public policy of India.
\textsuperscript{626} Arbitration and Conciliation Act, 1996, s. 35.
\textsuperscript{627} Ibid, s. 36.
arbitrator in domestic arbitration or international commercial arbitration held in India is executable as if it is a decree, by Indian courts. An award passed in India, in an international commercial arbitration, if sought to be enforced out of India, shall be a foreign award and shall be governed by the New York Convention if that country is a signatory to the convention.

5.9.2 Indian Legal Provisions relating to Foreign Awards


The arbitration agreements executed in one country are recognized in other country and also the arbitral award passed in pursuance thereto shall be enforced in the country other than the one wherein it is passed, if governed by Geneva Convention or New York convention.

Due to wide acceptance of New York Convention by most of the countries the arbitration agreements and the awards passed in one country can be enforced in other country.

Part II of the said Act of 1996 deals with enforcement of the foreign awards governed under Geneva Convention and New York Convention. Sections 44 to 52 deals with recognition and enforcement of arbitration agreement and arbitral awards declared under New York Convention. Sections 53 to 60 deal with Geneva Convention awards. The award declared in convention country on the basis of reciprocity shall be recognized and enforced in India under New York Convention.
Section 45 of the said Act of 1996 recognizes arbitration agreement and mandates the court to refer the matter to arbitration, in the event a judicial authority is seized with the matter in respect of which an agreement is executed by the parties. Section 46 of the said Act of 1996 lays down that the foreign award is to be treated as binding for all purposes on the persons. Section 48 lays down the conditions when the enforcement of the foreign awards shall be refused at the request of the party against whom it is sought to be invoked.

Section 53 of the said Act of 1996 recognizes the arbitration agreement under Geneva Convention. Section 55 provides when the Foreign awards shall be binding while section 57 and 58 lay down the conditions for enforcement of the foreign award declared under Geneva Convention.

The Supreme Court in Bharat Aluminium Co.628 (Balco) has observed that “it must be remembered that Part I of the Arbitration Act, 1996 applies not only to purely domestic arbitrations, i.e., where none of the parties are in any way foreign but also to international commercial arbitrations covered within Section 2(1)(f) held in India. The term domestic award can be used in two senses: one to distinguish it from international award, and the other to distinguish it from a foreign award. It must also be remembered that foreign award may well be a domestic award in the country in which it is rendered. As the whole of the Arbitration Act, 1996 is designed to give different treatments to the awards made in India and those made outside India, the distinction is necessarily to be made between the terms domestic awards and foreign awards. The Scheme of the Arbitration Act, 1996 provides that Part I shall apply to both international arbitrations which take place in India as well as domestic arbitrations which would normally take place in India”. The Supreme Court held that the term domestic award means an award made in India whether in a purely domestic context, i.e., domestically rendered award in a domestic arbitration or in the international context, i.e., domestically rendered award in an international arbitration. Both the types of awards are liable to be challenged under Section 34 and are enforceable under Section 36 of the Arbitration Act, 1996.629

629 Ibid.
The arbitration law provides detailed guideline for recognizing the arbitration agreement, procedure for conducting arbitral proceedings, passing of an award and enforcement of awards whether domestic, international commercial or foreign awards. The greatest advantage of the arbitration is recognition of arbitration agreement or arbitral award and its enforcement by the courts whether it is domestic or international whether rendered in India or foreign award declared out of India.

As regards the domestic or international commercial arbitration a well laid procedure right from the constitution of arbitral tribunal till award declared by the arbitral tribunal is executed and is enforceable as if it is a decree passed by the court. The arbitration agreement and awards declared by arbitrator are recognized and enforceable as being backed with legislations both domestically and internationally.

Still arbitration has its lacunae. The most important aspect is the time consumed in an arbitral proceedings or proceedings before court incidental thereto. Arbitrations may be the mechanism of choice for the resolution of international business disputes. Arbitration has supportive mechanism both at international and domestic level all over the world. But it is proving costly and time taking.

Recently in *White Industries*, India was directed by an arbitral tribunal to pay 4 million Australian Dollar for delay in deciding the application for challenging arbitral award, which is pending in Supreme Court. This award is declared by the arbitral Tribunal consisting of the Hon. Charles N. Brower, Christopher Lau SC, J. William Rowley QC (Chairman). The arbitral tribunal rendered award against Coal India. The place of arbitration was Singapore but by consent the parties agreed to move hearing to London. The facts of the case are on 28 September 1989, White entered into a contract with Coal India (on behalf of its subsidiary, Central Coalfields Limited) for the supply of equipment to, and development of a coal mine at Piparwar, India ("Contract"). In return, White was to be paid approximately A$206.6 million. The Contract is governed by Indian law. It contains an arbitration clause requiring the

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630 WHITE INDUSTRIES AUSTRALIA LIMITED (Claimant) and THE REPUBLIC OF INDIA (Respondent), (May 30, 2017, 03:20PM) http://arbitrationlaw.com/file_download/49479/31642. It was an arbitration under an UNCITRAL arbitration in Singapore under the agreement between the government of Australia and the government of the Republic of India on the promotion and protection of investments.
parties to arbitrate all disputes under the ICC Arbitration Rules. The Contract excludes the operation of the Indian Arbitration Act 1940. Disputes subsequently arose between Coal India and White as to whether White was entitled to the bonuses and/or Coal India was entitled to penalty payments. A number of other related technical disputes also arose, primarily concerning the quality of the washed and processed coal and the sampling process by which quality would be measured. 3.2.29 White filed a Request for Arbitration with the ICC dated 28 June 1999. A tribunal (sometimes "ICC tribunal") consisting of Mr. Max Abrahamson, Mr. Trevor Morling QC and Justice Jeevan Reddy was appointed. A majority of the arbitrators (Messrs Abrahamson and Morling) rendered an award on 27 May 2002. The said award was challenged before Calcutta High Court on 06-09-2002 by Coal India under section 34 of the Arbitration and Conciliation Act, 1996. Unaware of this proceeding the White Industries filed execution proceedings on 11-09-2002, before Delhi High Court to enforce the said award. The matters were pending in Indian court. On 10 December 2009, White Industries wrote to India contending that by the action of its courts, and by the actions of Coal India, it had breached the provisions of Articles 3, 4, 7 and 9 of the BIT. White Industries asserted claims exceeding A$10 million for loss and damages. It offered to meet with India to negotiate an amicable resolution of the matter within the six-month negotiation period provided for in Article 13.2 of the BIT to negotiate the disputes between the parties. The White Industries initiated arbitral Proceedings for the said breach under BIT. It was contended by White Industries that it has long been recognised that a denial of justice may give rise to a breach of the fair and equitable treatment requirement in international law. The White Industries contended that the matters which give rise to a denial of justice in this case are:

(a) The Indian courts' improper exercise of jurisdiction in asserting they have the power to set aside the Award;

(b) The Indian courts' shocking delay in dealing with the enforcement of the Award (i.e., a failure to provide justice to White by allowing the enforcement process - and the disputed setting aside proceedings - to continue for over nine years without any realistic end in sight).

The arbitral tribunal upheld the contentions of White Industries and awarded compensation to White. Thus delay in deciding proceedings arising out of arbitral award itself is a cause for payment of compensation.
From the critical evaluation in the doctrinal study, it is clear that the Conciliation/Alternative Dispute Resolution techniques are presently are less efficient than the arbitration. The arbitration is well supported by the law, both domestically and internationally, by convention. The arbitral award governed under New York Convention are recognized and enforced as foreign award. On the contrary the law relating to the conciliation /alternate dispute resolution technique is not adequate. There is no provision as regards enforcement of the settlement agreement executed out of India or enforcement of it out of India if executed in India. The law relating to conciliation only lay down the procedure of conciliation. The law at present is inadequate as regards other techniques of alternate dispute resolutions. The ‘Conciliation’ should be given wider interpretation in consonance with Guide lines issued by UNCITRAL on Model International Commercial Conciliation, 2002. The law on Conciliation / Alternative Dispute Resolution techniques is inadequate. No summary provision is made to challenge the settlement agreement.

In the light of such recent globally relevant legal developments, the researcher intends to validate the doctrinal findings through survey of stakeholders such as laypersons and litigants, Law students, Lawyers, Judges and persons in law field. The survey and findings are discussed below.

5.10 **EMPIRICAL SURVEY**

The researcher has collected responses from a total of 100 respondents in order to understand the efficacy of ADR in India *vis a vis* arbitration. 25 respondents were litigants or laypersons, 25 were Law students, 25 were Lawyers, 10 were Judges including the one who has now become High Court Judge and 15 were academicians. The respondents were chosen on the basis of convenience and voluntariness. The questionnaire consists of 15 questions. It is divided in two parts, Part A and Part B. Part A consists of 6 questions i.e. question no. 1 to 6 dealing with conceptual aspects of ADR and to test awareness and Part B consists of 9 questions i.e. questions no. 7 to 15 about technical aspects of ADR and its efficacy. Layperson and litigant were asked to answer only part A while Law students, Lawyers, Judges and respondents in the
legal filed were asked to answer question in both part A and B. This is because questions in Part B needs legal knowledge.

To question no. 9, as regards to interpreting ‘conciliation’ widely, the researcher in the survey carried has found that out of 75 respondents which included 10 judges, 25 advocates, 25 law students and 15 academicians, 66 respondents i.e. 88% answered in the affirmative, 3 respondents i.e. 4% answered in the negative while 6 respondents i.e. 8% offered no comments.

21 Law students, (84%), 22 advocates (88%), 9 judges (90%), 14 academicians (93.33%) opined conciliation should be interpreted widely.

Thus the finding of the researcher in doctrinal research that the wider interpretation should be given to the ‘conciliation’ is validated by empirical survey. All stakeholders affirm the wider interpretation to the word ‘conciliation’ to include all ADRs in consonance with UNCITRAL Model Law on International Commercial Conciliation. This is beyond the narrower interpretation in Mysore Cement\textsuperscript{631}. This validates the doctrinal findings on the needs of law reform.

On the question no. 5 on preference of the method of dispute Resolution. Out of 100 respondents 50 i.e. 50% answered for ‘Alternative Disputes resolution Techniques’, 32 respondents i.e 32% opted for ‘Arbitration’ and 8 respondents i.e 8 % opted for

\textsuperscript{631} Supra Note 10.
Litigation. The 10 % respondent did not answer the said question. Some stated it may depend upon case to case depending upon subject matter, some stated as they have no case pending they cannot answer this question.

Thus 50 % of the respondents have favored the ADR and 32 % arbitration as a method of dispute resolution. It shows that the ADR gaining popularity over arbitration. Still 50 % respondents are not favoring ADR emphasizes the need to make people at large aware of the ADR.

Question No.7 is about efficacy of Arbitration and ADR. Out of 75 respondents, 33 respondents i.e. 44% answered for ‘Arbitration’, 21 respondents i.e. 28% opted for ‘ADR’ while 21 respondents i.e. 28% said both ‘Arbitration’ and ‘ADR’.

16 Law students (64%), 12 advocates (48%), 0 judges, 5 academicians (33.33%) opted for arbitration.

3 Law students (12%), 10 advocates (40%), 3 judges (30%), 5 academicians (33.33%) favored ADR.

6 Law students (24%), 3 advocates (12%), 7 judges (70%) and 5 academicians (33.34%) favored for both.
Thus out of total 75 respondents, 33 i.e. 44% respondents opined that arbitration is efficient than ADR. 21 respondents i.e. 28% opined that both ADR and arbitration are efficient. It is very surprising that none of the judges opined arbitration as efficient method, but 70% of judges opined both arbitration and ADR are efficient. From the survey it is clear that majority of the respondents feel that the arbitration is more efficient than ADR. Some lawyers revealed that they prefer arbitration as it is more efficient in its enforcement.

To the question no.8 as to whether present law in India on the ADR is efficient to enforce settlement agreement executed in the course of ‘Conciliation’?”, out of 75 respondents 34.66 % answered in the affirmative, 46.67% answered in the negative, while 18.67% offered no comment.

12 Law students (48%), 4 Advocates i.e. 16%, 5 judges i.e. 50 %, 5 academicians i.e. 33.33% opines that present law on ADR is efficient to enforce settlement agreement.

12 Law students (48%), 10 Advocates i.e. 40 %, 5 judges i.e. 50 %, 8 academicians i.e. 53.33% opines that present law on ADR is not efficient to enforce settlement agreement.

1 Law student (4%), 11 Advocates i.e. 44%, 0 judges i.e. 0 %, 2 academicians i.e. 13.34% have opted for other comment option. They stated that they are not aware.
Thus 48% of Law students, 40% of advocates, 50% of judges and 53.33% of the academicians stated that the present law to enforce settlement agreement is not efficient. Large number of stakeholders revealed that the current law in India on ADR lacks efficacy to enforce settlement agreement in the course of conciliation.

On the question no.11 regarding the mode of authenticating settlement agreement out of 75 respondents, 18 respondents i.e. 23.99% opted that settlement agreement should be registered, 50 respondents i.e. 66.68% opted for confirmation by Court, 5 respondents i.e. 6.67% preferred that it should neither be registered nor confirmed by Court, while 2 respondents i.e. 2.66% offered no comments.
From this survey it is revealed that majority of stakeholders feel that confirmation by court shall be helpful in enforcement of the settlement agreement which shall increase efficacy of the settlement agreement.

On the question no.12 as regards adequacy of present law to deal with International Commercial Conciliation, 17 respondents i.e. 22.66 % opined affirmative, 52 respondents i.e. 69.34% opined in the negative, 6 respondents i.e. while 8% offered no comments.
69.34% of stakeholders feel that the provisions of the Arbitration and Conciliation Act, 1996 are not sufficient to deal with international commercial conciliation. It validates the findings of the researcher on the basis of doctrinal research.

As regards enforceability of the settlement agreement executed out of India in a conciliation proceeding held out of India in Question no.13. 18 respondents i.e. 24% answered in the affirmative, 47 respondents i.e. 62.67% in negative while 10 respondents i.e. 13.33 % offered no comments. 5 judges have shown ignorance of knowledge on the question.
This response also validates the doctrinal research that the law needs reform in case of international commercial conciliation and awareness with the growth in the financial development in India.

On the question no.14, if separate consolidated legislation is needed dealing with ADR, 63 respondents i.e., 84% answered in affirmative, 9 respondents i.e.12% answered in negative, while 3 respondents i.e. 4% had no comments.
Thus large number of stakeholders prefer an independent legislation on ADR. Validating the finding of the researcher on the need of an independent enactment on ADR.

To question no.15, if ADR is useful method of resolving dispute out of the court 74 respondents i.e. 98.67% favoured ADR as a very useful method in resolving dispute out of court while only 1 respondent i.e. 1.33% answered in the negative.
It shows that stakeholders are interested in adopting the ADR as a mode of settling the dispute in preference to arbitration.

5.11 CONCLUSION

From both doctrinal and empirical survey the following inferences are drawn:

a. In India presently the ADR is in developing state.

b. It is necessary the provisions regarding Conciliation should be made more elaborative and the process should be supported with law. In fact a independent legislation on Conciliation would be required.

c. The litigants need to be educated to adopt the ADR. Even other stake holder need to be educated.

d. The procedural law should be made more stringent to refer the parties to any of the mode of ADR before commencing the trial. The party refusing to ADR should be penalized.

e. The researcher is a practicing advocate. From the experience it is seen that though Supreme Court in Afcon has held that ADR is mandatory, a little effort is taken by the judiciary to refer the dispute to ADR. It appears that the mind of the judges is not yet trained in that direction. A much more radical change is essential in that direction.

f. The judges and lawyers should be trained in ADR. Even at college level in law schools, concept of ADR should be explained and skills should be imparted as a part of curriculum. The legal education is needed to be given to train the mind for ADR.
g. Client counseling workshops should be held from grass root level through Community Legal Service or Legal aid.

h. Corporate and Public Bodies /Authorities be trained to adopt ADR.

The researcher moves to next chapter in which the conclusions from above discussion are summarized along with suggestions and recommendations.