6.1 CONCLUSIONS

In recent times, for resolving the dispute the commercial world is attracted towards settling by non adjudicatory methods than the traditional method of adjudication. These non adjudicatory methods are termed as Alternate Dispute Resolution Techniques. These techniques are advantageous from the commercial view point as they protect the interests of both the parties. As the process is voluntary no one gets hurt. The commercial relations continue. The parties are in a win-win situation. The ego is not hurt. More importantly the decision of third party adjudicator is not thrust upon a party. Party autonomy is maintained. The party has option to participate and to quit at any moment. The party can decide the mode and manner of procedure. It is confidential. The relief to be granted may be molded. 632

In comparison, solutions in adjudicatory methods are limited. Many a times is a zero sum position meaning one party is winner and the other is loser. It hurts the ego of the parties and relations are broken forever. In non adjudicatory method the solutions can be tailor made and helpful for both the parties.

The ADR is basically non adjudicatory method wherein the parties try to settle the dispute with the help of neutral third party. In this technique the third party cannot thrust his/her decision on the parties. Depending upon the involvement of the third party neutral in the process of resolution of the dispute various types of Alternate Dispute Resolution, have developed, like mediation, conciliation, early neutral evaluation, etc, There may be combination of these types. The parties have autonomy in deciding the process and to participate in the process. The parties may leave the process at any time. If the dispute is resolved, the parties may enter into agreement which may be called as ‘Settlement Agreement’.

632 See Chapter 2
In developed countries like England and USA the movement of the ADR is developed due to the court’s support to the said movement. The courts have made it mandatory for the parties to try to settle the dispute through one or the other method of ADR. If the party does not participate the court may impose cost against the party. Thus the ADR has developed due to full hearted support by the judicially for court annexed ADR.

In ADR the parties are free to design their own procedure which suits them or to resolve the subject matter. The focus is not on the rights of the parties but to produce the result that best satisfy the interest of the parties. The focus in ADR is to avoid unnecessary harm to the parties. Confidentiality is maintained. The rules of equity are applicable. The dispute is not resolved on the basis of rigid rules of law. As the parties have mutually agreed there is high compliance of the settled agreement.

However ADR is not panacea. It may not be useful where the parties have conflicting interest or where decision of the court is essential. Coercion in ADR is possible wherein a third neutral party may compel the poor person or weak person to accept the proposal. The arbitration is an adjudicatory method wherein the parties agree to resolve the dispute through third party neutral who is called as arbitrator.

Though ADR is developing as well recognized method of resolving disputes, the question arises as regards enforcement of the settled agreement. The concept of an ADR as a method of resolution techniques in international commercial disputes is well accepted as notable organizations such as Commercial Arbitration and Mediation Centre of America, International Chamber of Commerce, World Trade Organization offers mediation as a method of resolution of commercial disputes. The issue is as there is no counterpart as New York Convention in case of arbitration, the settlement agreement entered in one country may not be enforceable in other country, as the laws of the countries on ADR are different. The UNICIIARL has undertaken the job of making uniform law on Commercial conciliation. However the efforts to find out the agreed formula for enforcing the settlement agreement were futile and the UNCITRAL has left it to the states to insert a description of method of enforcing
settlement agreement or refer to provisions governing such enforcement. There are different approaches by various countries on enforcement of the settlement agreement. Many practicing lawyers suggested that attractiveness of conciliation would be increased if a settlement reached during ADR would enjoy a regime of expedited enforcement or would, for the purposes of enforcement, be treated as or similarly to arbitral award.

In the absence of any international convention to enforce the settlement agreement arrived at during ADR, it is suggested it may be enforced as a contract. Some suggested a judgment may be obtained on the basis of settlement agreement or after settlement arbitral tribunal be formed and it may pass arbitral award on the basis of settlement agreement. However from the discussion made it is clear that the options are not viable and there are divergent opinions about enforceability of the settlement agreement by adopting such procedure.

It is thus clear that unlike arbitration which is well supported by laws both domestically and internationally, the ADR is not yet has the support of law internationally. There is no uniformity as regards the enforcement of the settled agreement arrived in the course of ADR. In the absence of enforceability the efficacy of the ADR is marred as no businessman would like to again go for litigation if the party to settlement agreement does not fulfill his obligation.

Coming back to India the law of ADR is in its infancy. Part III of the arbitration and Conciliation Act, 1996 deals with domestic conciliation. It only mentions about the ‘conciliation’ but not other types of the ADR. The ‘Conciliation’ under Arbitration and Conciliation Act, 1996 should be given wider interpretation to include all types of ADR as explained by UNCITRAL Model Law on International Conciliation 2002. The decisions by the Supreme Court instead of helping or encouraging the ADR have taken the movement of ADR in reverse direction. No provision is made for enforcement of settlement agreement executed out of India. There is no provision made to challenge the settlement agreement. The separate enactment should be made for law relating to ADR.
More participation and encouragement by the courts to participate or resolve the dispute through ADR are necessary. The procedural law regarding the same need to be amended to make the referring the parties for settlement by one or the other mode of ADR compulsory and equally making mandatory for the parties to participate in ADR.

Though the Arbitration has failed to achieve its goal in the sense that it is time consuming and costly still it is mostly favoured method for resolution of disputes. Internationally, without any doubt it is the most accepted and trusted procedure inspite of lacunas. It is mainly due to fact that the arbitration is well supported by the international conventions more particularly New York Convention. It has strong statutory base for its enforceability both domestically as well as internationally.

On the contrary though the ADR is favoured process it has less takers as it lacks statutory support for its enforceability as shown in chapter 5.

6.2 FINDINGS

The researcher has elaborately discussed concept of ADR in chapter 2. The researcher has in chapter 3 elaborated concept of arbitration and discussed its efficacy. In chapter 4, the status, efficacy and techniques of enforcement and failure of UNCITRAL to attain uniformity in enforcement of settlement agreements are analyzed.

In chapter 5, the researcher has shown, while comparing arbitration with conciliation/alternative dispute resolution techniques that the arbitration is well supported by law, both domestically and internationally. Thus enforcement of the arbitral award has more efficacy compared to the settlement agreements executed in conciliation/alternative dispute resolution technique. The empirical data analysis reveals the reasons such as lack of specific law and mind set.

The researcher has come to conclusion that the provisions of present law are not adequate to ensure efficacy of conciliation/ADR. The researcher has given suggestions and recommendations to improve the efficacy based on the findings and objectives.
The researcher has also shown that there is no provision regarding enforcement of international commercial conciliation agreements and settlement agreements executed out of India. Hence recommendations and suggestions are provided below.

### 6.3 RECOMMENDATIONS

Taking the idea from complementary techniques such as contract, judicial order or award under New York Convention to enforce international mediated settlement agreement, it is clear that these techniques are cumbersome and deviate from the purpose of ADR. Hence these recommendations are developed. The concept of ADR in the form of Conciliation is introduced for the first time in India in the year 1996 by incorporating Part III in Arbitration and Conciliation Act, 1996. It is not yet a full fledged legislation on ADR. Only ‘Conciliation’ is contemplated under the said Act of 1996.

The Arbitration and Conciliation Act, 1996 provides only for the conciliation but does not provide for settlement of disputes by other techniques of ADR such as mediation, mini trial etc. The different definitions of ‘conciliation’ or ‘mediation’ are given for Court annexed ADR under section 89 of C.P.C. 1908. No such differentiation is made for ‘Conciliation’ or ‘mediation’ without intervention of the court.

Based upon in depth study so far, professional experience and comparative best practices in UK and USA, the researcher proposes the following legal reforms:

**Amendments in Arbitration and Conciliation Act, 1996**

A. The said Arbitration and Conciliation Act, 1996 does not define ‘conciliation’. In the absence of definition the term ‘conciliation’ is interpreted narrowly by the courts.

- Thus it is desirable that the said Arbitration and Conciliation Act, 1996 be amended and the term ‘conciliation’ be explained in terms of the UNCITRAL Model Law on International Commercial Conciliation 2002 so that all forms of the ADR are covered within its meaning.
Amendment to Definition Section 2 of Arbitration and Conciliation Act, 1996

The ‘Conciliation’ should be defined in Arbitration and Conciliation Act, 1996 by amending the said Act and following definition be added as clause (d-1) to sub section (1) of section 2.

“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”.

B) Amendment to section 7 of the Arbitration and Conciliation Act, 1996.

- Section 7 of the Arbitration and Conciliation Act be amended and clause (d) be added in sub section 4 of section 7 as under

  “(d) an order by the judicial authority in exercise of its power under section 89 of Code of Civil Procedure Code, 1908 to refer the parties to arbitration though not consented to for by party.”

C) Till there is unanimity or international convention accepting enforcement of settlement agreement in International Commercial Conciliation, the researcher suggests the following provision be made in Arbitration and Conciliation Act, 1996.

- Section 7 – A  be added to Arbitration and Conciliation Act, 1996

  “7- A. Multi Tier Agreement- Where the parties have agreed to submit all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not to the dispute to multitier methods of settlement of disputes of conciliation and arbitration, the parties may, before referring the dispute to third neutral party for settlement, constitute the arbitral tribunal. If the conciliation is successful, the parties shall request the arbitrator to record the settlement in the form of an award on agreed terms. The arbitrator shall not refuse to record the settlement in the form of an award unless the settlement agreement
is void or voidable under the Indian Contract Act, 1872 (9 of 1872). However, if the conciliation fails, any party to the agreement shall have an option to terminate the arbitration agreement within 30 days of the termination of the conciliation as per section 78”.

D) **Section 62 of the Arbitration and Conciliation Act, 1996 be amended as under by adding following proviso**

- “Provided the judicial authority may refer the parties before it in any litigation to conciliation even though they have not consented for conciliation.”

E) **Sections 72 A and 72 B be Added to Arbitration and Conciliation Act, 1996**

- The procedure for ‘Conciliation’ should not be mandatory. The parties should have autonomy to follow the procedure of their choice in settling the dispute.
- It is desirable to amend the Arbitration and Conciliation Act, 1996 and following section be added by amending the same.
- “72-A . Procedure of Conciliation not mandatory- The procedure for ‘conciliation’ is not mandatory and the parties may by mutual consent decide the procedure to settle their dispute with the help of third neutral party.”
- “72- B- No court shall refuse to enforce the settlement agreement executed by the parties in “conciliation’ on the ground that the procedure of conciliation under the Act is not followed.”

E) **Arbitration and Conciliation Act, 1996 be amended and following section 77-A be added.**

- “Section 77 –A. Bar to institute Suit

In case any dispute or difference between the parties is settled through conciliation, a party to the settlement agreement or any person claiming through such a party shall be precluded from instituting the suit or any other
II) **Amendment to Code of Civil Procedure Code, 1908**

A. **Amendment in Section 89 of the Code of Civil procedure Code, 1908**

- In the opinion of the researcher it is also desirable that the provisions of section 89 of Code of Civil Procedure should also be amended suitably so that there should not be any disparity between Code of Civil Procedure and Arbitration and Conciliation Act, 1996.
- Section 89 be amended the clause (d) in sub section 1 of section 89 i.e. word ‘Mediation’ be deleted and following explanation be added to the said section 89
- Explanation - “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”.

B. **Amendment by adding Section 89-A to the Code of Civil procedure ,1908.**

- The provisions of section 89 be made mandatory and after filing of pleadings by the parties reference to one of the modes of settlement should be made except in a case where the court for the reasons to be recorded find that it is not desirable to refer the parties to ADR.
- Following may be added as section 89-A-
  “After the parties have submitted their pleadings the court shall before framing issues refer the parties to settle their dispute to any one of the modes of settlement mentioned in section 89. The court shall impose fine or cost if any party refuses to participate in settlement proceedings.”

III) **Amendment to Legal Services Authorities Act, 1987.**

A. The jurisdiction of Permanent Lok Adalats constituted under the Legal Services Authorities Act should be made wider. It should not be
limited to Public Utility services. The money dispute between private parties upto certain value can be referred to Permanent Lok Adalat.

B. In case conciliation before it fail the parties should have right to withdraw. The parties should not be compelled to have their dispute adjudicated by Permanent Lok Adalat, if conciliation fails.

**Section 22-C (8) of the Legal Services Authorities Act be deleted or it may be amended as under**

- “(8) Where the parties fail to reach at an agreement under sub section (7) the Permanent Lok Adalat shall, if the party making application wishes and if the dispute does not relate to any offence shall decide the dispute. Provided that the member of the Permanent Lok Adalat who conducted the matter for settlement shall not decide the same unless the parties specifically in writing has consented for such member to decide the dispute.”

**IV) In the opinion of the researcher, a detailed enactment on ‘Conciliation’ is required as an independent legislation for ADR**

- The said legislation should provide for
- Various methods like conciliation, mediation, mini trial, etc. and laying down model procedures for these different techniques. No doubt that the parties will not be mandatory and a party/ies shall have autonomy to decide mode or procedure. The procedure shall act as guidelines to the parties. Nevertheless the parties shall be at liberty to determine their procedure to resolve their dispute with the help of third neutral party.
- The grounds to challenge the settlement agreement and period within which it can be challenged.
- It is also desirable to provide the procedure to file the settlement agreement in the court within whose local limits of jurisdiction it was executed and authorizing the court to pass decree in terms thereof or to register the same with registrar of assurances to give the settlement agreement more authenticity.
- The finality is required to be given to the settlement agreement.
It is necessary that the detailed procedure for international commercial conciliation be framed. Basically it should lay down the procedure for conciliation to be held in India. It should also lay down the rules for enforcement of the settlement agreement executed out of India.

### 6.4 SUGGESTIONS

- In the proceedings instituted in the local courts every matter of civil nature should be referred to ADR. The party should be penalized if does not participate bonafide in conducting ADR. At the time of institution of proceedings in the court or filing defense, the party shall undertake to participate in ADR process as directed by the court.
- The cost should be levied if the party does not take part in ADR inspite of the result in his favour and in addition be denied cost of the suit from other party.
- The Government being the largest litigant, the state should initiate the setting of the ADR programme for its various departments.
- The Corporate, public utility services, companies should have ADR programme, without intervention of the court, to settle dispute of their customers, contractors, vendors, etc. The party should not be allowed to file proceeding in the court without first referring the dispute to ADR as per the said programme.
- The training programme be undertaken under community legal forum or legal aid services to educate the people/litigant about ADR.
- The training programmes be conducted for judges and advocates to educate them on ADR.
- The advertisement be made through modes of mass communications such as Radio, Television, etc. for encouraging the persons for adopting ADR as a method of settling dispute.
- ADR should be part of education and training right from school level.

### 6.5 SCOPE FOR FURTHER RESEARCH

- There is scope for further studying various modes of ADR techniques, mode and manner of implementing them by statutory enactment. Studies can also
focus on the grounds to challenge the settlement agreement arrived between parties and effective mode of its implementation.

- Specific case studies and comparisons can be analyzed.