Executive Summary

Earlier the parties had to refer the disputes to adjudication of the court in the event of any dispute. The method of arbitration comes into vogue as an alternative to the court. This was a step towards privatization of courts. Arbitration was considered as an alternative mode of resolution of disputes. Both these methods of settling the disputes are adjudicatory in the nature. Arbitration is most used method of resolving international commercial disputes. Thus cannot be considered as an alternative to the litigation.

It is realized that the traditional concept of resolving the disputes through adjudication is time consuming, costly. In traditional method of resolution of disputes one party wins and other loses. It results into zero sum situations. It hurts the feelings of the party and many a times the relations get severed permanently. Moreover the adjudicator has to act within the limits laid down by the statute. The adjudicator has to determine the dispute within four corners of the law. The parties to litigation have little or no autonomy once the dispute is referred to adjudication. Till recently litigation and arbitration, both adjudicatory methods were only available techniques of resolving the disputes.

The present century the mind of the businessmen, industrialist is attracted towards method of settlement of disputes which is non adjudicatory and the resolution of dispute is purely on the basis of the wish of the parties. In this method the parties try to settle their disputes with the help of third neutral party who acts as a conciliator and facilitate the parties to settle their disputes. The conciliator has no authority to thrust his decision on the parties. The parties have absolute autonomy in taking part in the process of resolution of disputes, decide the procedure for settling the dispute, abandon process at any time. Various methods are evolved to settle the dispute with the help of third neutral party such as conciliation, mediation, Early Neutral evaluation, etc. These techniques are termed as Alternative Disputes Resolution Techniques or Appropriate Dispute Resolution Techniques (ADR). The important aspect of these techniques is the autonomy given to the parties. A party has right to decide to participate, agree to the terms of the settlement. Another important aspect is
these are non adjudicatory methods to resolve the dispute. As the settlement is arrived at with the consensus of the parties. The parties to the dispute are in win-win situation. The egos are not hurt and most importantly the relations continue. The third neutral party has no authority to adjudicate the dispute. The party themselves resolve the dispute with the help of third neutral party.

Though there are many advantages to resolve the dispute through ADR, there are certain disadvantages also. ADR is not panacea and is not available in criminal matters or where an authoritative pronouncement on legal point is required.

The decree/order passed by any court of law shall be enforceable through court. The award declared by the arbitral tribunal is also enforceable through the court. Both these processes of resolving disputes are recognized and backed with statutes both domestically and internationally. Though Arbitration is considered as an alternative to litigation in fact it is the most acceptable mode of settlement of disputes internationally in case of international commercial disputes. Thus it cannot be considered as an alternative mode of settlement of disputes. Though in the context of domestic disputes it is termed as an alternative to litigation considering the basic elements of Alternative Disputes Resolution Techniques, the arbitration may not be considered as an alternate method of disputes resolution. As it lacks autonomy to parties. The ADR in pure sense is non adjudicatory method.

The important question arises as regards the enforcement of the settlement agreement arrived at between the parties in the course of ADR. If one of the parties to the settlement agreement resile from the terms of settlement agreement, the question arises as to how to enforce the settlement agreement. In the absence of any statutory enactment recognizing the settlement agreement as a decree or order it will be difficult to enforce the same. There is no point if the parties have to litigate again. The business man certainly will not be willing to waste time in the process which won’t be enforceable.

Considering the fact that the alternative resolution disputes techniques is being accepted as the mode of settlement of disputes, it is necessary to examine whether it is
well supported by legislation at domestic level in India or by conventions at international level.

The researcher has analyzed the provision regarding ADR in comparison with arbitration and its efficacy in enforcement of the settlement agreement arrived at between the parties through ADR both domestically and internationally.

The introductory chapter no. 1 gives outline and explains the objectives, researchable questions, data used, methodology for the research.

The chapter 2 analyses the concepts of ADR, its types, merits and demerits of ADR and efficacy. It discusses evolution of the techniques of ADR, the various shades of its meaning and summarizes for application in this research. This chapter also explores the development of ADR in England and USA. The advantages and disadvantages of the ADR are also explained in this chapter.

Conflict is one of the fundamental conditions of the human existence and an inevitable and necessary fact of all social interaction.\(^1\) If managed productively, conflict is an important source of progress and innovation but if left unresolved or if dealt with in a destructive manner, it can cause great harm.\(^2\) Conflicts have existed in all cultures, religions and societies since time immemorial as long as humans have walked the earth. In fact, they also exist in animal kingdom, philosophies and procedures for dealing with conflicts have been part of the human heritage, differing between cultures and societies.\(^3\) Nations, groups and individuals have tried throughout history to manage conflicts in order to minimize the negative and undesirable effects that they may pose.\(^4\)

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\(^2\) Ibid.


\(^4\) Ibid.
Disputes usually begin as conflicts, i.e. as grievances. Grievances set out the groundwork for disputes. Disputes are conflicts, i.e. grievances, escalated by confrontation because the other side will not give in.\(^5\) A conflict becomes a legal dispute if one party asserts a claim which is not accepted or satisfied by the other. The assertion of rights is often perceived as a hostile act and can lead to an escalation of the conflict.

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

Because the conflicts are an integral part of human interaction, one must learn to manage them to deal with them in a way that will prevent escalation and destruction and come up with innovative and creative ideas to resolve them.\(^6\) One potential reason for the escalation of disputes is ‘zero-sum thinking’, i.e. the perception of one or both sides that each party can only win at the expense of the other.\(^7\) Litigation is classical example of “fixed sum” or “zero–sum” or “win-lose” situations, where a gain to one party inevitably correlates with loss to the other.\(^8\)

There are basically three ways of dealing with the conflict i) ignorance or avoidance ii) the use of force or other coercive means, or iii) procedural resolution which can be guided primarily by interests or by rights.\(^9\) Procedural resolution includes direct negotiation between the parties, the involvement of a third party as mediator, and adjudication through arbitration or litigation in court.\(^10\) The adjudication basically involves determination of rights. On domestic field adjudication through the courts is most favoured process of dispute resolution.

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\(^6\) Ibid

\(^7\) Supra Note 1, at 134

\(^8\) Ibid

\(^9\) Ibid

\(^10\) Ibid
Since the Second World War arbitration has proved an extremely popular method of resolving disputes apart from court litigation. Arbitration arguably, could be said to be first step towards privatization of justice, in that it is an alternative to resolution through national (State) courts. As such, parties opting for arbitration have greater control over matters such as the appointment of arbitrators, language, and place of arbitration. At a different level, in International Commercial Arbitration the principles to be applied to issues under consideration need not be tied to a national law. In arbitration if parties so agree the issue / dispute could be decided on the principles of *Ex-Aquo et bono* or law merchant (*lex mercatoria*).

The arbitration was thought as an alternative to the traditional litigation. It was thought that this procedure shall be less expensive, cost saving and also less time taking. However, the experience has indicated that on the contrary the arbitration is more expensive. The fees of the advocates and arbitrators are beyond the financial capabilities of the parties.

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

Alternative Dispute Resolution i.e the ADR normally would comprehend any method of dispute resolution other than court adjudication as part of justice established and administrated by the state.

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In its philosophical perception, ADR process is considered to be the mode in which the dispute resolution process is qualitatively distinct from the judicial process.\textsuperscript{12} It is a process where disputes are settled with the assistance of a third neutral person generally of parties own choice; where the neutral is generally familiar with the nature of the dispute and the context in which such disputes normally arise; where the proceedings are informal, devoid of procedural technicalities and are conducted, by and large, in the manner agreed by the parties; where the dispute is resolved expeditiously and with less expenses; where the confidentiality of the subject-matter of the dispute is maintained to a great extent; where decision making process aims at substantial justice, keeping in view the interests involved and the contextual realities.\textsuperscript{13} In substance, the ADR process aims at rendering justice in the form and content which not only resolves the dispute but tends to resolve the conflict in the relationship of the parties which has given rise to that dispute.\textsuperscript{14}

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

There are various types of ADR. A non binding type of ADR that has caused stir on the domestic and international commercial scene is mediation or conciliation as a mode of dispute resolution. Other well known types of ADR are Negotiations, Early Neutral Evaluation (ENE) or Mini - Trial (or executive tribunal) and Med-arb,’ Arb-med etc. The ADR may be independent or Court annexed. Dr. A.S. Anand, a former

\textsuperscript{13} \textit{Ibid}
\textsuperscript{14} \textit{Ibid}
Chief Justice of India, has wished that the next century would not be a century of litigation, but century of negotiation, conciliation, and arbitration.\textsuperscript{15}

Negotiations differ from other dispute resolution procedures in as much as it does not involve a third neutral party to facilitate or promote the settlement while all other procedures essentially involve a third party.

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

Mediation is considered a consensual dispute resolution practice in which a third-party with some claim to neutrality facilities the negotiation, and perhaps resolution, of a issue between two or more parties.

Conciliation is negotiation facilitated by an independent and impartial third neutral party. It is a process, whereby a dispute is referred to a third person, who hears the parties on questions of fact and law and forms his opinion and attempts to persuade the parties to accept it. The third neutral party is not empowered to impose a decision on the parties,\textsuperscript{16} and unless parties agree on a settlement, the ADR process will not reach any binding agreement resolving the dispute.

Multi tier Agreement processes are very commonly used and are often drafted into contracts as escalation clauses. It is not uncommon that in the arbitration agreement parties include clauses that they should first try to settle the dispute by negotiations. In case the negotiations fail the dispute must be referred to conciliation or other alternative dispute resolution procedures reference to arbitration should be made only when these steps fail.

MED - ARB is the most common type of combined process used. Mediation followed by arbitration. Mediation is generally understood as a non binding, voluntary (dispute)
settlement process. It is gaining in popularity in the United States and elsewhere. It is not a substitute for court adjudication, but it enhances the possibility that the parties will settle their dispute by way of mutually acceptable agreement, rather than by a binding third-party order.

The med-arb process could be reversed. The arb-med could commence with an ordinary arbitration procedure. The parties first conduct a ‘rough and quick’ arbitration, appointing a neutral to give a short ruling as to the amount to be paid by one party to the other. The award is sealed in an envelop and marked “confidential” and leaves it on the table without disclosing its contents. The parties then commence mediation proceedings having agreed in advance to open the envelop and accept it as binding ruling if they have not reached an agreement using mediation or conciliation by a specified time. If the parties settle the envelop is torn up and its contents remain unknown to the parties.

MEDALOA is an abbreviation of the hybrid process of Mediation and ‘Last Offer Arbitration’ (MEDALOA). ‘Last offer Arbitration’ has been extensively used in labour disputes and in the United States in the baseball industry to settle salary disputes. It is sometimes referred to as ‘pendulum arbitration’ or ‘baseball arbitration’ accordingly. In fact it is just a modification of the Med-Arb process. If the parties do not settle through agreement, each party then submits a final binding offer to the med-arbitrator, and the later chooses between one of the two final offers, which then becomes a binding arbitration award. The mediator is given the authority to decide which of these binding offers is to be accepted.

The United Kingdom has been one of the driving forces of such reforms in Europe; the motto of reform was “access to justice”. A survey by the national Consumer council found in 1995 that three out of four people in serious legal disputes were dissatisfied with the civil justice system. This was also the conclusion of the 1988 Civil Justice Review against this background that the Lord Chancellor set up the Committee in 1994 under Lord Woolf to produce report on Access to Justice. Just as the USA traces its ADR movement to the Pound conference of 1970, the Woolf

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18 Ibid at 178
reforms mark the entry of ADR in the civil justice system of England and Wales. Lord Woolf, Master of the Rolls, undertook a comprehensive examination of the civil legal system and produced an interim report within a year in 1995 and final report in July 1996. The Woolf reports include the introduction of procedural case tracks and pre-action protocols. They did not stop structural and procedural reform, but sought to change the culture of litigation.\textsuperscript{19}

Lord Woolf while addressing the seminar on 21 July 2000, organized by the chartered Institute of Arbitrators and Dispute Resolution Section of the ABA ,in association with the Centre for Dispute Resolution (CEDR) and the London Court of International Arbitration ,at Queen Elizabeth II Convention Centre in Westminster, sponsored by Lovells and Towers and Hamlins\textsuperscript{20}, remarked, “it isn’t the Rules which are important. Indeed, everything that is being achieved now by new rules could have been achieved under the old rules. What the new Rules did, however, was to signal a new beginning and a new approach to what we mean by justice and it gave new responsibilities to the courts in seeking to achieve justice. But what is meant by justice is what is important.”

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

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

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

Official encouragement is given to the avoidance of litigation through recourse to alternative dispute resolution.\textsuperscript{21}

\textsuperscript{19} SRIRAM PANCHU, MEDIATION PRACTICE AND LAW, THE PATH TO SUCCESSFUL DISPUTE RESOLUTION, xxvii (Lexis Nexis Butterworths Wadhwa, first published, 2011).
\textsuperscript{20} Mediation post Woolf; can the American experience assist?, Arbitration, 35, 38 (2001)
\textsuperscript{21} Supra Note 17 at 180
In USA pursuant to procedural changes enacted by Congress, many federal courts developed ADR programs in the early 1990s, and federal courts are now mandated by statute to provide these offerings. By the mid-1990s, every state had one or more court-connected mediation programs. Thus early changes made ADR processes available within litigation structures. In parallel development, law schools made special ADR courses available as part of their procedural offerings.

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

The Administrative Dispute Resolution Act was passed in 1996. Its stated background was that the United States government is continually embroiled in disputes with other parties, that one quarter of all claims in federal courts name the federal government as a party, and litigating them cost the taxpayer billions of dollars. To encourage faster, less costly ways to resolve the disputes with federal government, Congress enacted the law to make explicit the broad authority of the federal agencies to use alternative dispute resolution methods. The US Postal agency, the AIR Force, the United States Information Agency and the Department of Veteran Affairs have expanded the use of ADR and appointed dispute resolution specialists and settled government contracts disputes. Thus various state agencies which is main litigant have ADR programmes to settle administrative disputes reducing them burden of judiciary. Over 2500 statutes have authorized or mandated the use of mediation. Several courts have mandatory mediation programmes by which cases are taken off the court calendar and assigned

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23 Ibid
24 Ibid
25 Ibid
26 Ibid
27 Ibid at, 561
28 Supra Note 19, at 238
29 Ibid
30 Ibid at, 239
to mediators appointed by the disputants or the courts.\textsuperscript{31} If the mediation is unsuccessful the case is restored to the court docket.\textsuperscript{32} There is no compulsion to settle; however, costs may be imposed by the court if it is shown that a party has not participated with good faith in the mediation.\textsuperscript{33}

Multi step dispute resolution clauses are now becoming popular and are used in domestic and international commercial contracts in the United States. These clauses provide for mediation at the first stage, prior to arbitration/litigation.\textsuperscript{34} The courts in USA are willing to enforce such clauses when they are able to clearly discern such an intention of the contracting parties.\textsuperscript{35}

ADR promises the possibility of more Pareto optimal solutions in which bipolar results are avoided, compromises may not be necessary, and parties underlying interests may be explored and hopefully met.

Further ADR promotes the adoption of more complex solutions that are tailored to the parties’ needs or situation. The courts have “limited remedial imagination” to grant injunctions, award damages, or declare parties innocent or guilty, liable or not liable. In ADR we can look to the future, as well as the past, and involve many more parties than the traditional adversarial system allows. ADR promotes solutions that are more flexible and responsive to party needs, as well as to non parties affected by the resolution of a particular dispute.\textsuperscript{36} ADR provides society as a whole with definite benefits.

ADR methods are premises on the right of the parties to freely dispose over their controversies through voluntary agreement. This liberty implies the freedom to devise any kind of procedure for resolution of disputes, including the voluntary submissions to binding determination by a third party. Where the procedures are non binding, they

\textsuperscript{31}Ibid  
\textsuperscript{32}Ibid at, 239  
\textsuperscript{33}Ibid  
\textsuperscript{34}Ibid, at 273  
\textsuperscript{35}Ibid  
\textsuperscript{36}Carrie Menkel-Meadow, Symposium on Alternative Dispute Resolution: When Dispute Resolution begets Disputes of its Own Conflicts among Dispute Professionals, 44 UCLA L. REV. 1871, 1873 (1997)
are voluntary in a double sense: both the participation in the process and acceptance of its results are subject to a free determination by the parties.\footnote{Supra Note 1, at 174}

In contrast to a legal procedure, an ADR procedure is completely flexible and parties are free to design jointly with mediator the appropriate procedure. \footnote{Jean Francois Guillemin, \textit{Reasons For Choosing Alternative Dispute Resolution}, in ADR IN BUSINESS PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES 14 (Arnold Ingen-Housz ed., Vol II, Wolters Kluwer, Kluwer Law International, 2011).} In addition, the ability to consult each of the parties separately in a caucus and obtain confidential information that may assist in the evaluation of possible solutions is in principle not available to adjudicators, at the risk of invalidating the judgment or award.\footnote{\textit{Ibid}}

In adjudicatory system the focus is on the rights of the parties, whereas in ADR technique aim to produce results that best satisfy the party’s interests.

A more classic reason for using ADR is confidentiality, a common concern in our increasingly media driven business world.

Alternative Disputes Resolution procedure produce significant savings in terms of the time invested and money spend.

This process ensures direct participation by the disputants in the process and designing settlements more direct dialogue and opportunity for reconciliation between the disputants.

It is understood that as the parties themselves have settled the terms there is greater possibility of the parties complying with the settlement than the court order. ADR reduces the burden of the court.

Coercion in mediation, is considered as disadvantage in ADR. This type of coercion affects free will and may cause parties to lose sight of their rights or goals, to undervalue the same, or to be convicted to settle on the basis of exaggerated or false information. This risk is heightened in situations where coercion by the mediator or
judge exists alongside external factors—such as, corruption and poverty—that exert pressure in the same direction.  

The conciliation agreement does not have res judicata effect. Thus even though the matter is settled the parties may re-litigate the issues settled as it does not operate as res judicata.

The absence of judicial power to mandate mediation in transborder commercial cases leaves the choice of a dispute resolution to the decision of the disputants. The mediator’s opinion or decision is not enforceable by a process of forcible execution. This is the greatest weakness of ADR and strength or arbitration or litigation.  

In chapter 3 concept and efficiency of the arbitration is discussed.

Arbitration is essentially a settlement of disputes between parties by somebody, be it a person, an individual or a group of persons or an institution on which the parties repose confidence. The law of arbitration is based upon principle of withdrawing the dispute from the ordinary courts and enabling the parties to substitute domestic tribunal for adjudication thereof.

The disputants give the arbitral tribunal powers backed by legislation, to make a binding decision for them. Arbitration is a mechanism for resolution of disputes which takes place, usually in private, pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law or, if so agreed, other considerations, after a fair hearing such decision being enforceable at law.

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42 Supra Note 38, at 35
Arbitration presents an alternative to the judicial process in offering, procedural flexibility. Fundamentally, however it is nonetheless the same in that the role of the arbitrator is judgmental.\footnote{46 Ibid, at 91}

The parties are bound by an agreement to settle the dispute through arbitration. If a party to an arbitration agreement moves judicial authority relating to the matter covered by the arbitration agreement the other party may object to adjudication of such dispute and pray to refer the dispute to the adjudication by arbitrator. \footnote{47 Section 8 Arbitration and Conciliation Act, 1996} Also the award declared by the arbitrator is not open to challenge on merits. The award passed by an arbitrator shall be enforceable as a decree.

At the international level also a need was felt to recognize the arbitration agreement and to honour the arbitral award passed in one country if sought to be enforced in another country. The arbitral award in an international commercial arbitration when passed in a country where it is sought to be executed it is domestic award. When an arbitral award in an international commercial arbitration is sought to be executed in a country other than that in which it is passed it is foreign award.

With the growth of International Trade and Commerce, there was an increase in disputes arising out of such transactions being adjudicated through Arbitration. One of the problems faced in such Arbitration, related to recognition and enforcement of an arbitration agreement and Arbitral Award made in one country by the Courts of other countries. This difficulty was sought to be removed through International Conventions. The first such International Convention was the Geneva Protocol on Arbitration Clauses, 1923, popularly referred to as the 1923 Protocol. It was implemented w.e.f. 28\textsuperscript{th} July, 1924. This Protocol was the product of the initiative taken by the International Chamber of Commerce (ICC) under the auspices of the League of Nations. The 1923 Protocol sought to make arbitration agreements and arbitration clauses in particular enforceable internationally. It was also sought to ensure that Awards made pursuant to such arbitration agreements would be enforced in the territory other than the state in which they were made. The 1923 Protocol proved to be inadequate. It was followed by the Geneva Convention on the execution
of Foreign Arbitrated Awards, 1927 and is popularly known as the Geneva Convention of 1927. This convention was made effective on 25th July, 1929. India became a signatory to both the 1923 Protocol and the 1927 Convention on 23rd October, 1937. To give effect to both the 1923 Protocol and 1927 Convention the Arbitration (Protocol and Convention) Act, 1937 was enacted in India.

In 1953 the International Chamber of Commerce (ICC) promoted a new treaty to govern International Commercial Arbitration. The proposals of ICC were taken up by the United Nations Economic Social Council. This in turn led to the adoption of the convention on the Recognition and Enforcement of Foreign Arbitral Awards at New York in 1958 (popularly known as the New York Convention). The New York Convention is an improvement on the Geneva Convention of 1927. It provides for a much more simple and effective method of recognition and enforcement of foreign arbitral awards. It gives much wider effect to the validity of arbitration agreement and enforcement of awards passed by an arbitrator. This convention came into force on 7th June, 1959. India became a State Signatory to this convention on 13th July, 1960. In India the Foreign Awards (Recognition and Enforcement) Act, 1961 was enacted to give effect to the New York Convention.

The significant feature of international commercial arbitration governed under New York Convention is its high level of enforceability. Arbitral awards are enforceable in domestic courts of many states by virtue of the New York Convention on Arbitral Awards. This Convention constitutes the backbone of the international regime for the enforcement of foreign awards. About 140 countries have signed /ratified this convention.

Internationally, the Arbitration Law developed in different countries to cater for the felt needs of a particular country. This necessarily led to considerable disparity in the National Laws on arbitration. Therefore, a need was felt for improvement and harmonization as National Laws which were, often, particularly inappropriate for resolving international commercial arbitration disputes. The preparation of a Model Law on arbitration was considered the most appropriate way to achieve the desired

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48 A/CN/9-169
uniformity. Accordingly United Nations Commission on International Trade Law (UNCITRAL) prepared Model Law on arbitration. It is suggested that an UNCITRAL Model Law on arbitral procedure would, if implemented at the national level, solve many of the problems referred to. It would also establish universal standards of fairness. Moreover, such Model Law would prevent some, if not all, of the difficulties detected in the survey on the application and interpretation of the 1958 New York Convention.49

As its name suggests, the Model law is only a “model”, i.e. a prototype of a law on international commercial arbitration, which can be adopted verbatim or only partially. This consequence crucially distinguishes it from a convention, which apart from certain “reservations” can generally only be ratified verbatim. 50 Sixty one countries including India have adopted the Model law.

Arbitration shares many of litigation’s disadvantages. Unless it produces a settlement while unfolding, arbitration generates winners and losers. Despite attempts to use decision making processes that respect ongoing business associations and arbitrators’ oft- criticized tendency to render compromise decisions, arbitration more often ends-rather than repairs commercial relationships. Losers usually do not want to do further business with companies that defeat them in adjudicatory battles.51 Arbitration also presents general adjudication disadvantages, including sacrificing outcome control by delegating it to external decisions makers.

The criticisms are also leveled against the international arbitration due to high costs; sets of procedural rules with unnecessary or dangerous provisions providing too many opportunities to create incidents; excessive bureaucracy imposed by the arbitration institutions; appointment of arbitrators with little knowledge of the business, country or law concerned; continual self appointment of the same people; tendency for advisors and arbitrators to mindlessly follow ‘Anglo- Saxon’ practices (not

49 Ibid
necessarily properly understood or applied); delaying tactics; a plethora of written
submissions, hearings, witnesses, expert opinions and so forth. Status and efficacy of conciliation in enforcement of settlement agreement is analysed
in chapter 4.

The word "conciliation" is being used to include all types of ADR Technology by
whatever named called. The resolution of international ("transnational") commercial
disputes requires careful appraisal of the underlying business transactions from which
a given dispute arises. Particular attention must be paid to several attendants
problems-political, economic, jurisprudential, and cultural-that are seldom
encountered in the resolution of domestic commercial disputes. While drafting the
agreement an important component should be dispute resolution clause that reflects
the parties’ explicit intention to anticipate future disputes and resolve them in a
manner conducive to preserving the business relationship.

Until recently, litigation and arbitration represented the only resolution techniques.
The last decade however has witnessed an expansion of the available techniques,
which manifests growing business confidence in the practice of resolving disputes
through the use of voluntary, non-binding processes such as negotiation, mediation,
conciliation, and the mini trial, etc. Adversarial adjudicative techniques, such as
arbitration and litigation, remain important; but executive management has begun to
inquire into the efficacy of those techniques, in the light of growing experience in the
resolution of domestic disputes.

Mediation is no longer the stepchild of international dispute resolution practice
scholars and practitioners recognize its enormous potential as a confidential, cost
saving, time saving, relationship enhancing process that gives control over disputes to
the affected parties and often results in greater levels of satisfaction than litigation. The
developments in international and regional organizations, laws and protocols
reflect the growing interest in mediation at international level. The organizations such
as the Commercial Arbitration and Mediation Centre of the America (CAMCA), the

52 Supra Note 38 at 26
53 Jacqueline Nolan-Haley, Symposium: Transatlantic Perspectives on Alternative Dispute Resolution:
Teaching Comparative Perspectives in Mediation: Some Preliminary Reflections, 81 ST. JOHN’S L.
REV.259, 260, 2007
IICPR International Institute for Conflict Prevention & Resolution, and the International Chamber of Commerce (ICC), to mention the few, are the organizations that offer rules and procedures to resolve the private commercial disputes through mediation. The World Trade Organization’s (WTO) dispute settlement system offers mediation as one method of resolving the trade disputes between members. And a primary example of legislation is the Model Law on International Commercial Conciliation that was developed by the United nations Commission on International Trade and Law (UNCITRAL) in the year 2002.

In a perfect world no enforcement mechanism is required for mediation because voluntary agreement yields voluntary compliance. In the world of international business, imperfect circumstances affect the performance of mediation agreements. For instance, human rights abuses could make investors balk, the commodity in question could be subject to embargo, or the currency designated for payment could suffer devaluation. Moreover, recent attempts to standardize the international enforcement of mediation agreements have failed, leaving enforcement dependent on varied national policies. As a result mediating a settlement in good faith does not immunize it from potential future challenges to compliance.54

There are no international conventions relating to ADR. Adjudication remains the primary dispute resolution choice, despite the escalating costs of arbitration and litigation. In addition settlements negotiated during litigation are influenced by predictions of potential outcomes and are typically suboptimal because they fail to realize all gains actually available in these disputes.55

Only legislation could achieve the level of predictability and certainty necessary to facilitate enforcement of settlement agreements resulting from conciliation.56 The enforceability of mediation agreements varies according to the legal status of the

55 Supra Note 51 at 1251 & 1262
mediated outcome and the extent to which it is recognized by local courts.\textsuperscript{57} This variability across jurisdictions, and consequent legal uncertainty, is viewed by many as a major limitation of international mediation.\textsuperscript{58}

The nations differ in their procedures for enforcing mediation agreements and some may refuse to recognize the procedure of nation of origin. For example, the United States might refuse to recognize a summary enforcement award issued in India because India does not allow judges to initially review the fairness of awards. China might refuse to recognize an award on agreed terms from Hungary, because the mediation in Hungary preceded arbitration rather that interrupting the arbitral proceedings.\textsuperscript{59}

UNCITRAL attempted to remedy this varied assortment of enforcement measures by developing a model law on conciliation. Given the diversity of approaches, the drafting committee for UNCITRAL searched for the lowest common denominator. The drafters recognized that the enforcement of conciliation agreements varied greatly by legal system and often relied on adjudication with myriad domestic procedure technicalities and contract law conceptions. The drafters failed to find sufficient commonality to distill a uniform model law under their lowest common denominator approach. The drafters eventually abandoned their efforts and delegated the development of enforcement procedures to the individual adopting nation-states.\textsuperscript{60}

However, meeting the practitioner’s demand Article 14 of the Model Law was enacted which states “if the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable…the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement.”

The avenues for enforcement of mediation settlement agreements (MSAs) are not as robust as they should be if we were to maximize the utility of this dispute resolution tool. Parties can, of course, attempt to enforce the MSA under the contact law

\textsuperscript{57} NADJA ALEXANDER, INTERNATIONAL AND COMPARATIVE MEDIATION 51 (Wolters Kluwer, 2009).
\textsuperscript{58} Ibid
\textsuperscript{59} Supra Note 54 at 1385, 1392
\textsuperscript{60} Supra Note 54 at 1385, 1387
principles subject to the usual contract defenses. MSAs can be entered as a judgment in some jurisdictions. For example, the EU mediation Directives expressly contemplates such court action in providing that member States ‘shall ensure that it is possible for the parties, or one of them with the explicit consent of the others, to request that the content of the written agreement be made enforceable…… by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with law of the member State where the request is made.  

The awards given by arbitrators on agreed terms after appointment of an arbitrator are governed under New York convention and enforceable. Whether the same result holds if the arbitrator is appointed after settlement of the dispute as a result of mediation.

Although the enactment of such provision would seem to be a useful avenue for MSA enforcement, such an appointment after dispute is settled may be difficult to effect in many jurisdictions because under local law there must be a dispute at the time arbitrator is appointed.

Thus it is suggested in present scenario the settlement agreement can be enforced as a contract, on getting judgment of the court on the basis of settlement agreement or as an arbitral award under New York convention. The scholars are divided in their opinion regarding the same.

Chapter 5 explores the efficacy of conciliation /ADR and arbitration in India.

In India, the origin of Alternate 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

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62 Ibid
63 Ibid at 396
64 Ibid at 394
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).  

The Arbitration Act, 1940 has failed in its goal. The Supreme Court of India shown its anguish, as it has failed 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 (the said Act of 1996) is that for the first time it has incorporated the concept of ‘Conciliation’ without intervention of the court.

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.

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 awards award on substance of dispute. But this would be applicable only in case of domestic conciliation.

Section 89 of Code of Civil Procedure, provides for court annexed ADR viz. arbitration, conciliation, mediation, judicial settlement and Lok Nyayalaya as the methods of settlement.

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65 Supra Note 12 at 82
66 Part III of Arbitration and Conciliation Act, 1996
67 Justice R.V. Raveendran, Mediation- Its Importance and Relevance, in SOUVENIR, NATIONAL CONFERENCE ON MEDIATION (Mediation and Conciliation Project Committee, Supreme court of India, 2012), at 17, 20
68 Section 74 of Arbitration and Conciliation Act,1996
69 Section 30 of Arbitration and Conciliation Act, 1996
In *Mysore Cements Limited v Svedala Barmac Limited*, the Supreme Court has refused to enforce settlement agreement arrived in conciliation as the procedure followed was in conformity with the provisions of the Arbitration and Conciliation Act, 1996.

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.

Explanation to the sub section (2) of section 1 of Arbitration and Conciliation Act, 1996 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. Except this definition there is no other provision regarding international commercial conciliation in the Arbitration and Conciliation Act, 1996.

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 exa, 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.

The court annexed ADR is contemplated under section 89 of the Code of Civil Procedure, 1908. The question arose can the court refer the parties to arbitration or conciliation if did not consent ? The apex court answered the same in the negative in *Afcons Infrastructure Ltd. & Anr v Cherian Varkey Construction Co. (P) Ltd & Ors*

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70 2003 DGLS( Soft.) 320= AIR 2003 SC 3493= 2003 (10) SCC 375
2010(8) SCC 24. The decision of the Apex Court in Afcon’s\textsuperscript{71} 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.\textsuperscript{72} He further opined that after the decision of the highest court in Afcon 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.\textsuperscript{73} The Apex Court should have used the opportunity to take the movement of ADR further.

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\textsuperscript{74} in respect of one or more public utility services. Basically this amendment introduces the court annexed settlement of disputes before it reaches the court. Sub section (8) of the section 22–C provides that where the parties fail to reach at 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. Section 22-E provides that 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.\textsuperscript{75} This provision in the opinion of the researcher is contrary to the basic philosophy of party autonomy of the alternative disputes resolution techniques.

Earlier, The Arbitration Act,1940, Arbitration ( Protocol and Convention) Act, 1937, Foreign Awards ( Recognition and Enforcement) Act,1961 were holding the field of arbitration. These Acts were repealed and consolidated and amended and Arbitration and Conciliation Act,1996 was enacted. This Act deals with domestic and international arbitration and enforcement of foreign awards. The arbitration, when is held in India between two Indian citizens it is domestic arbitration. An arbitration held

\textsuperscript{71} Afcons Infrastructure Ltd. & Anr v Cherian Varkey Construction Co. (P) Ltd & Ors, 2010(8) SCC 24
\textsuperscript{72} Supra Note 19 at xxvii
\textsuperscript{73} Ibid at xxviii
\textsuperscript{74} Permanent Lok Adalat is defined to mean a permanent Lok Adalat established under sub section (1) of section 22 B.
\textsuperscript{75} Section 22-E of Legal Services Authorities Act, 1987
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".\textsuperscript{76} Where the \textit{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.

The Arbitration and Conciliation Act, 1996 defines arbitration agreement,\textsuperscript{77} rules for
composition of arbitral tribunal\textsuperscript{78}, conduct of arbitral proceedings\textsuperscript{79}, making of
award\textsuperscript{80} and recourse against arbitral award.\textsuperscript{81} 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 outside India in international commercial arbitration.

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{82} However the award can
be challenged only on the grounds set out in sub section (2) of section 34 of the said
Act. The award declared by arbitrator is enforceable as if it were a decree of the
court.\textsuperscript{83} Thus the award declared by an arbitrator in domestic arbitration or
international commercial arbitration held in India is executable as if it is a decree, by
Indian courts. Such an award passed in India in an international commercial
arbitration if sought to be enforced out of India, shall be foreign award in another
country and shall be governed by the New York Convention if that country is
signatory to the convention.

\textsuperscript{76}Clause (f) of Sub Section (1) of section 2 of Arbitration and Conciliation Act, 1996.
\textsuperscript{77} Section 7 of Arbitration and Conciliation Act, 1996.
\textsuperscript{78} Chapter III, sections 10 to 15 of Arbitration and Conciliation Act, 1996. See Annexure
\textsuperscript{79} Chapter V, sections 18 to 27 of Arbitration and Conciliation Act, 1996.
\textsuperscript{80} Chapter VI, sections 28 to 33 of Arbitration and Conciliation Act, 1996.
\textsuperscript{81} Section 34 of Arbitration and Conciliation Act, 1996.
\textsuperscript{82} Section 34 of Arbitration and Conciliation Act, 1996.
\textsuperscript{83} Section 36 of Arbitration and Conciliation Act, 1996.

The arbitration agreements executed in one country is 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 about 142 countries the arbitration agreements and the awards passed in one country can be enforced in other country.

The most important aspect is time consumed in arbitration. 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 v Union of India the India was directed to pay 4 million Australian Dollar for delay in deciding the application for challenging arbitral award, which is pending in Supreme Court.

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

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

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

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

**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 thrusted 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. \(^\text{84}\)

\(^{84}\) See Chapter 2
In comparison, solutions in adjudicatory methods are limited. Many a times it is a zero sum position meaning one party wins 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 third neutral party. In this technique the third neutral party cannot thrust his/her decision on the parties. Depending upon the involvement of the third neutral 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’.

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 UNCIARL 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.
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.

Recommendations

Taking the idea from complementary techniques such as contract, judicial order or award under New York Convention to enforce international arbitral award, 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**

- 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”.

**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.”
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 multtier 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 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”.

Section 62 of the Arbitration and Conciliation Act, 1996 be amended as under:-

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

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.

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

“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.”

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• 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 proceeding in any court of law or authority for the same subject matter which is settled amicably between the parties.”

Amendment to Code of Civil Procedure Code, 1908

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”.

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.”

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

- 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 up to certain value can be referred to Permanent Lok Adalat.
- 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 through it 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.”

**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.

**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.