CHAPTER VII

CONCLUSIONS AND SUGGESTIONS

In the first part of this chapter an earnest attempt has been made to assimilate the broad and generalized propositions and conclusions embodied in all the preceding chapters succinctly under various heads.

The second part of the chapter comprehensively elucidates some of the plausible legislative, administrative and other allied remedial measures, including amendment of existing laws, enactment of new legislations, streamlining and improvement of the existing institutions and processes, development of better framework, etc. for rectifying the flaws observed during the research and also contains an exposition of a whole gamut of other suggestions for the better and effective implementation and systematic growth and development of ADR in Delhi from a pragmatic point of view. These suggestions have been developed upon the analysis of the issues and concerns highlighted and conclusions derived by the researcher in the preceding chapters and they have been incorporated under different heads - legislative and administrative & allied.

1. SUMMARY OF CONCLUSIONS

1.1 ALTERNATIVE DISPUTE RESOLUTION

1.1.1 Alternative Dispute Resolution or ADR refers to an assortment of dispute resolution procedures that primarily serve as alternatives to litigation and are generally conducted with the assistance of a neutral and independent third party. At the first place, ADR is therefore an alternative to litigation.

1.1.2 ADR processes can broadly be divided into two categories – non- adjudicatory and adjudicatory. Mediation, conciliation and dispute resolution through Lok Adalats are examples of non adjudicatory ADR processes while Arbitration is an example of an adjudicatory process. The non
adjudicatory ADR mechanisms are the true exponents of the philosophy of ADR, that a dispute is a problem to be solved together rather than a combat to be won. Apart from this broad classification there are hybrid ADR processes such as Med-Arb, Con-Arb, dispute resolution through Permanent Lok Adalats which have both adjudicatory and non adjudicatory trappings.

1.1.3 ADR is not intended to supplant altogether the judicial system and it only offers an additional mode of dispute resolution and is therefore sometimes referred to as Additional Dispute Resolution. In fact the judicial system and ADR need to operate collaboratively so that the ultimate goal of justice for all is achieved. Further ADR aims at providing a remedy to disputant parties which is most appropriate in the circumstances of the case and is therefore also referred to as Appropriate Dispute Resolution.

1.1.4 ADR has proved to be one of the most significant instruments for dispute resolution and judicial reform and it has become an absolute necessity in Delhi. The enormous spurt in litigation and the insurmountable arrears of cases piling up in the courts in Delhi make ADR a sine qua non for preventing the judicial system from collapsing. Initially advocated as a safety valve and a via media to divert the burden on the clogging judicial system, ADR, in the contemporary period, has not only accomplished the goal of clearing the judicial dockets, but has also become an inalienable part of the justice delivery system providing an additional and appropriate mode of resolution of disputes in an economical, expeditious and acceptable manner.

1.1.5 A continuum of individual ADR mechanisms are available in Delhi but arbitration, mediation, conciliation and dispute resolution through lok adalats and permanent lok adalats are the primary ones which flourish in Delhi. These ADR mechanisms have been quite successful and effective in Delhi and the figures indicate that they have been quite successful in relieving the docket congestion.

1.1.6 ADR has been extremely effective in Delhi in the recent past and it has great potential in times to come offering effective, economical and
expeditious resolution of disputes outside the conventional litigative process so that not only access to justice for all but also de facto justice for all becomes a reality.

1.2 MEDIATION

1.2.1 Mediation in its contemporary incarnation is an ADR process where a specially trained mediator facilitates the parties in arriving at an amicable settlement through a structured process involving different stages viz. introduction, joint session, caucus and agreement.

1.2.2 Mediation has distinct advantages - it is cost effective and expeditious, it enables the parties to devise creative tailor-made solutions, results in a win-win situation thereby preserving relationships and is confidential.

1.2.3 Delhi is fortunate to have four court annexed mediation centres at the district courts and the Delhi High Court Mediation and Conciliation Centre (Samdhan) at the Delhi High Court possessing state of the art infrastructure, manned by professional and trained mediators and functioning under the aegis of the Delhi High Court. Mediation at these centres is a full time professional affair and the Mediation and Conciliation Rules, 2004 have also been framed by the Delhi High Court for facilitating mediation at these centres.

1.2.4 Mediation has emerged as the frontrunner in the ADR revolution which is gaining momentum in Delhi. At the post litigation stage mediation is perhaps the most preferred mode of dispute resolution especially for complicated, multifaceted and long standing disputes. Statistics reveal that all the five court annexed mediation centres in Delhi till date more than 55,000 cases in total have been settled through mediation.

1.2.5 Mediation, at the pre litigation stage, however has not made much headway on account of lack of statutory framework, yet we have a range of institutional and ad hoc options available in Delhi for pre litigation
mediation also. Mediation centres at different districts have also been established by the Delhi Dispute Resolution Society, mooted by the Government of NCT Delhi. LCIA India and ICADR also provide professional institutional mediation services.

1.3 LOK ADALATS AND PERMANENT LOK ADALATS

1.3.1 Lok Adalats meaning People’s Courts are ADR fora where the Lok Adalat Judges steer the disputant parties towards a negotiated settlement by the use of generic process of conciliation. Lok Adalats can dispose of the matter only on the basis of settlement and compromise and such settlement is crystallized in the form of the award of the Lok Adalat, which is final and is executable as a decree of the court. Lok Adalats possess statutory recognition under the Legal Services Authorities Act, 1987.

1.3.2 Lok Adalats have proved to be extremely efficacious in Delhi for disposal of simple straightforward cases such as complaints under section 138 of the Negotiable Instruments Act, 1881, bank recovery suits, electricity disputes, motor accident claim cases, traffic challans, etc., although they may not prove to be the most apposite ADR mechanism for resolution of complex cases such as partition suits, family disputes, complex commercial cases, matrimonial disputes. The prime reasons being availability of limited time with the Lok Adalat judges, heavy cause lists, lack of continuous personalized attention, want of confidentiality, limited number of sittings (sometimes only one) with the same Lok Adalat Judge, etc.

1.3.3 Lok Adalats, however, despite these limitations are extremely popular ADR fora in Delhi and are regularly organized by DLSA at the district court level and by DHCLSC at the Delhi High Court level in the form of continuous Lok Adalats, special Lok Adalats, mega Lok adalats etc.

1.3.4 Lok Adalats in Delhi have disposed of thousands of cases and have helped a lot in clearing judicial dockets. Their efficacy can be appreciated from the example that from 01.04.2007 to 31.03.2008 the Lok Adalats in Delhi disposed of more than 1,29,000 cases at the Delhi district
courts. To cite another instance, in the mega traffic Lok Adalats organized by the DLSA at all district court complexes in Delhi only in 4 days in September & December, 2007 more than 80,000 traffic challan cases were disposed of.\(^1\) The empirical data reveals that if the number of cases disposed of were the only parameter Lok Adalats would be crowned as the finest ADR mechanism.

1.3.5 Permanent Lok Adalats are permanent ADR fora which have been established under the Legal Service Authorities Act, 1987 for resolution of disputes pertaining to public utility services at the pre litigation stage. The Permanent Lok Adalats initially utilize the generic process of conciliation to broker a settlement between the parties and in case the matter is not settled it proceeds to decide the case on merits, except in cases involving a criminal offence. The procedure followed by Permanent Lok Adalats is similar to the ADR hybrid procedures Med-Arb or Con-Arb.

1.3.6 In Delhi various Permanent Lok Adalats are functioning for public utility services and are disposing of numerous cases. Their efficacy can understood from the example that 3063 cases were disposed of by the Permanent Lok Adalats constituted for NDPL/ BSES cases from 01.04.2007 to 31.03.2008. The disposal of thousands of cases by Permanent Lok Adalats in Delhi is also a significant contribution to the justice delivery system as all these cases could have become prospective arrears for the Delhi Judiciary.

1.4 ARBITRATION

1.4.1 Arbitration is an adjudicatory ADR mechanism wherein a private judge i.e. arbitrator chosen by the parties adjudicates their disputes on merits through a simplified private process culminating into a binding arbitral award. In India arbitration is governed by the Arbitration and Conciliation Act, 1996.

1.4.2 Arbitration, albeit is an adjudicatory process, yet it finds itself seated in the galleries of ADR since it serves as an effective substitute for litigation.

\(^1\) Delhi Legal Services Authority, 4\(^{th}\) Annual Report, 2008.
1.4.3 Arbitration has distinct advantages – party autonomy, flexibility of procedure, confidentiality, potential for expeditious resolution and finality of arbitral award, etc. It is however a cause of concern that soaring expenses, unethical practices, undue delays and recurrent judicial interruptions are critically impeding the growth of arbitration as an effective ADR mechanism. Institutional arbitration is one of the plausible solutions to the problem and needs to be encouraged.

1.4.4 Be that as it may, despite all its individual and procedure generated aberrations arbitration continues to be widely utilized as an ADR mechanism in Delhi and especially in the commercial quarters since the atmosphere in courts is not too conducive for expeditious resolution of high stake commercial disputes and arbitration becomes the best alternative in this scenario. This is fortified by the pendency of numerous Arbitration Petitions and OMPs pertaining to arbitration matters before the Delhi High Court and the Delhi district courts.

1.4.5 There are various permanent arbitral institutions flourishing in Delhi, such as Indian Council of Arbitration (ICA), International Centre for Alternative Dispute Resolution (ICADR), LCIA (London Court of International Arbitration) India, Delhi High Court Arbitration Centre (DAC), FICCI Arbitration and Conciliation Tribunal (FACT), Construction Industry Arbitration Council (CIAC) etc. which provide state of the art infrastructure for resolution of disputes through arbitration in a professional manner. The establishment of the Delhi High Court Arbitration Centre (DAC) under the aegis of the Delhi High Court has marked the beginning of a new era of cost effective and expeditious institutional arbitration.

1.4.5 Arbitration has tremendous potential in Delhi in times to come and time is not far when majority of the commercial disputes will be resolved through arbitration, however some reforms are unquestionably desirable in this branch of ADR.
1.5 CONCILIATION

1.5.1 Conciliation is an ADR mechanism where the ADR neutral known as the conciliator steers the disputant parties towards a negotiated settlement. Conciliation is governed by the provisions of part III of the Arbitration and Conciliation Act, 1996 in India.

1.5.2 Conciliation is strikingly similar to mediation, however, in India the introduction of the two terms separately in section 89 CPC has necessitated the development of a fine line of distinction between mediation and conciliation. The conciliator plays an evaluative and interventionist role and is statutorily authorized to make suggestions and propose plausible solutions to the parties while mediation is regarded as an ADR process which is primarily facilitative.

1.5.3 The principal advantage in conciliation is that a conciliation settlement agreement is treated to be an arbitral award on agreed terms and is executable as a decree of the court under the Arbitration and Conciliation Act, 1996.

1.5.4 It is primarily because of this advantage that conciliation overshadows mediation as an ADR mechanism at the pre-litigation stage in Delhi. There are various institutions in Delhi such as Indian Council of Arbitration (ICA), International Centre for Alternative Dispute Resolution (ICADR), FICCI Arbitration and Conciliation Tribunal (FACT), etc. which provide state of the art infrastructure, professional conciliators and excellent facilities for conciliation. There are various companies and PSUs in Delhi which incorporate conciliation clauses in their contracts and go in for conciliation at the pre litigation stage, conducted either by ad hoc conciliators appointed by the parties by mutual accord or by institutions providing conciliation services.

1.5.5 At the stage of post litigation stage however, the situation is diametrically opposite. Conciliation is utilized by the courts themselves for resolution of matrimonial and family disputes under the Hindu Marriage Act,
1955, Family Courts Act, 1984 etc. However in general, the process of mediation overshadows conciliation as a dispute resolution process under section 89 CPC at the post litigation stage in Delhi.

1.5.6 The prime reason for this is the judiciary's choice of mediation over conciliation. The process of mediation has been given wide publicity and recognition in Delhi as a court sponsored mode of dispute resolution and since both conciliation and mediation are generically similar, the process of mediation is extensively used at the post litigation stage at the court annexed mediation centres and flourishes in Delhi whereas conciliation remains practically unexplored in this arena.

1.5.7 Conciliation has great potential in Delhi as an ADR mechanism; however, it is not being utilized to its full potential. Therefore there is an urgent need to appreciate the utility of this ADR process and take necessary measures for advocating, propagating, popularizing and utilizing conciliation as an ADR process in Delhi especially at the post- litigation stage.

1.6 ADR UNDER SECTION 89 CPC

1.6.1 Section 89 CPC embodies the legislative mandate to courts for exploring the possibility of a resolution of a dispute de hors the litigative process in matters pending for judicial determination and if found appropriate, refer the dispute to any of the ADR processes provided therein namely arbitration, conciliation, mediation, lok adalats and judicial settlement.

1.6.2 The initiatives taken by the Supreme Court in *Salem Advocate Bar Association v. Union of India*\(^2\) and *Salem Advocate Bar Association v. Union of India (II)*\(^3\) gave the initial momentum to use of ADR in courts pursuant to section 89 CPC. Thereafter in *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*,\(^4\) which can be described as a comprehensive practical guide for effective use of section 89 CPC, the

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\(^2\) AIR 2003 SC 189

\(^3\) AIR 2005 SC 3353

\(^4\) JT 2010 (7) SC 616
Supreme Court has given detailed practical guidelines so that section 89 CPC can be utilized so as to achieve the best results.

1.6.3 In the *Afcons* case (*supra*), the Supreme Court has also directed interchanging of clauses (c) and (d) of section 89 (2) CPC by interpretative process to correct the draftsman’s error so as to give a purposive interpretation to mediation and judicial settlement under section 89 CPC.

1.6.4 Section 89 CPC is being efficiently utilized in Delhi. Mediation and Lok Adalats are the most widely employed ADR mechanisms in terms of section 89 CPC Delhi. However arbitration and conciliation are being rarely resorted to and judicial settlement is not being employed at all in terms of section 89 CPC in Delhi.

1.6.5 The mediation revolution which has stormed Delhi with the establishment of numerous mediation centres is an upshot of section 89 CPC only and the overall results peg mediation as the most efficient ADR mechanism under section 89 CPC both in terms of quality of disposal as well quantum of disposal and therefore mediation has emerged as the primary ADR process in courts in Delhi.

1.6.6 Be that as it may, section 89 CPC has given a massive boost to the ADR revolution in Delhi and has resulted in a paradigm shift by the introduction of ADR in the mainstream litigative process and has thereby helped in developing a settlement culture.

7. ADR has been extremely effective in Delhi in the recent past and it has great potential in times to come. The ADR movement was initially advocated as an escape route for the heavy traffic which was blocking the paths of justice in our judicial system, however with the passage of time ADR has created a niche for itself and it has in fact become an indispensable part and parcel of the contemporary justice delivery system.
8. SUGGESTIONS

2.1 LEGISLATIVE MEASURES

2.1.1 ADR Legislation

The absence of a comprehensive legislation governing all facets of ADR in India is a serious legislative lacuna which needs to be adequately and timely redressed for the systematic and satisfactory growth and development of ADR. The Arbitration and Conciliation Act, 1996 only governs the field in case of resolution of disputes by arbitration or conciliation and the Legal Services Authorities Act, 1987 deals with Lok Adalats only. However, there is no statutory framework for other dispute resolution procedures such as ENE, mini trial, med-arb, etc.

The ICADR offers mini trial and med-arb as dispute resolution procedures and has also framed rules for the same. Similarly the Delhi High Court had referred the parties to ENE in *Bawa Masala Co. v. Bawa Masala Co. Pvt. Ltd*⁵. Thus ENE, mini trial, med-arb, etc. are available as ADR procedures in Delhi. The absence of a statutory framework is bound to act as a barrier to the growth of these ADR mechanisms and others which may are likely to gain momentum in Delhi. Therefore a separate comprehensive legislation on ADR dealing with all forms of ADR in all respects is the key to further systematic and satisfactory growth and development of ADR in Delhi.

The Alternative Dispute Resolution Act, 2004 of the Republic of Philippines comprehensively deals with ADR in all respects. Similarly the Alternative Dispute Resolution Act, 1998 in the United States of America deals with the use of ADR processes in district courts of the United States of America. The Parliament of India also needs to legislate a comprehensive law on the subject dealing with all forms and all facets of ADR on the lines of the Alternative Dispute Resolution Act, 2004 of the Republic of Philippines. Such

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⁵ Rules and Procedure for Mini-Trial under ICADR, 1996.
⁶ AIR 2007 Delhi 284.
legislation should also elaborately deal with post litigation court referred ADR which is now governed by section 89 CPC.

Such a comprehensive legislation would definitely give an extra boost and have a cascading effect on the further development of ADR in India. It may be noted that if incorporation of a single section 89 in the Code of Civil Procedure, 1908 can trigger an ADR revolution of this stature, the positive effect of such a comprehensive legislation on ADR would be unmatchable.

2.1.2 The Mediation Act

In India, unlike the Arbitration and Conciliation Act, 1996 which governs the process of arbitration and conciliation there is no statute which governs the field in case of mediation. Mediation has crossed its nascent stage and is flourishing in Delhi as an ADR mechanism, but lack of statutory recognition is proving to be a barrier in its further development. Therefore there is an urgent need to afford statutory recognition to mediation. The legislation on other ADR mechanisms such as ENE, mini trial etc. which are in their nascent stage can wait, but mediation which has already developed as the frontrunner in the ADR revolution in Delhi cannot afford to remain without a statutory framework at this juncture.

If a comprehensive legislation governing all facets of ADR is not enacted or till the time such a legislation is enacted (as that would require detailed deliberations), in the interregnum, at least a Mediation Act can be immediately legislated on the lines of part III of the Arbitration and Conciliation Act, 1996 to govern the process of mediation in general. Confidentiality in mediation and enforcement of mediation settlement agreement as a decree of the court would then become a statutory guarantee. Additionally a provision for suspension of limitation period in case of pre litigation mediation should also be incorporated in the proposed Mediation Act. Such a Mediation Act

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7 On the lines of the suspension clause as provided in the UNCITRAL Model Law on International Commercial Conciliation, 2002.
would go a long way in increasing the use and efficacy of mediation as an ADR mechanism.

2.1.3 Arbitration Division at High Courts

An Arbitration Division should be statutorily created in the Delhi High Court and every other High Court\(^8\) for exclusively dealing with all arbitration related matters so that all arbitration matters are disposed of as expeditiously as possible. Indeed, expeditious disposal of arbitration matters is the key to the success of arbitration. Furthermore courts of Additional District Judges at the district court level should be earmarked for arbitration matters and placed under the control and direct monitoring of the Arbitration Division of the High Court for expeditious disposal of such matters at the district court level also. The Arbitration Division should also be conferred the power to frame rules and issue practice directions for expeditious disposal of arbitration matters by the courts.

2.1.4 Arbitral Council of India to Regulate Domestic Arbitration

An Arbitral Council of India should be created as a statutory body and its composition, functions, powers and responsibilities may be finalized by fusing the best provisions applicable to the Press Council of India and the Bar Council of India.\(^9\) The Council however, should not be an elected body but should in fact comprise of the judges of the superior judiciary (retired or sitting), nominated arbitration experts and representatives of premier permanent arbitral institutions, solicitor general / advocate general, etc.

Every person who intends to act as an arbitrator in an ad hoc domestic arbitration should be mandatorily enrolled with the Arbitral Council of India and he should not be permitted to arbitrate in any domestic ad hoc arbitration

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\(^8\) The Arbitration and Conciliation (Amendment) Bill, 2003 should be immediately passed and enforced.

without being a member of the council. The institutions providing institutionalized arbitration services should also be registered with the Arbitral Council of India however the council should have only limited powers with respect to such arbitral institutions so as to preserve and protect their autonomy. The object of the council should primarily be to regulate domestic ad hoc arbitration and supervise and monitor others. The council should also have the power to frame rules governing arbitration (except court related issues which should be under the domain of the Arbitration Division of the High Courts) and to take action against erring arbitrators. This will help in curbing the malpractices being followed by arbitrators in case of domestic arbitration.¹⁰

2.1.5 Code of Conduct / Code of Ethics for Arbitrators

In all jurisdictions judges are bound by some form of code of conduct or statutory rules. An arbitrator is also a private judge and this itself underscores the need of a binding code of conduct for arbitrators or a well defined set of rules to be followed by arbitrators so that the purity of this branch of adjudicatory ADR i.e. arbitration is also maintained as the same directly influences the quality of justice delivered.

Thus well-defined ethical standards should be fixed to ensure that the arbitrator making the award is acting fairly,¹¹ impartially and independently. The statute should also be amended so as to provide an effective remedy against any misconduct on the part of the arbitrator. Such a Code of Conduct for arbitrators may be brought into force by making it a part and parcel of the law or even by means of delegated legislation. The state can take a cue from the Code of Conduct framed by the ICA¹² or CIAC operating in Delhi or even from other international institutions.

¹⁰ One may also think of imposing monetary penalties on systematically biased arbitration providers and the businesses who hire them. See Miles B. Farmer, “Mandatory and Fair? A Better System of Mandatory Arbitration” 121 Yale L.J. 2346 (2012).


¹² See Appendix 4.
2.1.6 Regulation of the Procedure for Appointment of Arbitrator in ad hoc Domestic Arbitration.

The appointment of arbitrator is the most crucial aspect which requires consideration from the perspective of independent and impartial arbitral proceedings. Experience has revealed that the power of appointment of arbitrator is usurped by the dominant party in ad hoc arbitration and misused for appointing a biased arbitrator and proceedings which ensue can never be described as independent and impartial arbitral proceedings. This malady is experienced most in case of standard form contracts.

A possible solution may be a legislative amendment. In ad hoc arbitrations the power to appoint the arbitrator should not be permitted to be vested solely with one party, in case we cannot put a full stop on mandatory arbitration clauses between parties with unequal bargaining power, and necessary statutory amendments should be made in this direction. The process of appointment of arbitrator should be mandatorily made a bilateral process so as to obviate the possibility of appointment of a biased arbitrator, failing which we may have a fast track system of appointment of arbitrators through the court so that impartiality and independence of the arbitrator and ultimately of the arbitration process is ensured to a considerable extent.

2.1.7 Other Legislative Measures to Expedite Arbitral Proceedings

Arbitration is a process which has enormous potential to lead to expeditious resolution of disputes yet, in the past, on account of individual and procedural aberrations arbitration has come to be associated with delay

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13 In USA, Arbitration Fairness Act, 2007 proposes to invalidate pre-dispute arbitration Clauses in certain cases of consumer contracts, and employment contracts and which implicate statutes designed to protect civil rights or to protect parties with unequal bargaining power in the contract negotiation process. See “Arbitration — Congress Considers Bill to Invalidate Pre Dispute Arbitration Clauses for Consumers, Employees and Franchisees — Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007)” 121 Harv. L. Rev. 2262 (2008); See also Joshua T. Mandelbaum, “Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context”, 94 Iowa L. Rev. 1075 (2009). See also “Arbitration Fairness Act: Franchisees Pushing US Congress to Pass Bill”, 1(4) The Indian Arbitrator (May 2009); The bill was reintroduced in 2011, however it has yet not been passed.
thereby eroding its credibility to some extent. The situation therefore needs to be immediately legislatively remedied.\(^{14}\)

Firstly there is an urgent need to statutorily prescribe a time frame for completion of arbitral proceedings. The existing Arbitration and Conciliation Act, 1996 can be amended so as to stipulate a time limit of one year for completion of arbitration proceedings by the arbitrator. A mandatory provision for imposition of costs for adjournments should also be incorporated which would curb frivolous adjournments.\(^{15}\) Some grace period with stringent conditions can also be provided and arbitral proceedings should be fast tracked and adjournments should not be permitted in such grace period. Rules should also be framed by the High Courts for expediting arbitrations matters before the courts which should be scrupulously followed by all.\(^{16}\) Separate detailed provisions can be legislatively incorporated in the Act and rules can be framed for fast track arbitrations also.

Further the automatic suspension of the execution of the award, during the pendency of a petition for setting aside of the arbitral award also diminishes the efficacy of arbitration and protracts the proceedings so as to deprive the award holder of the fruits of the award indefinitely.\(^{17}\) There is an apparent need to legislatively rectify this flaw by authorizing the courts to pass orders staying the operation of the award only in deserving cases and bestowing discretion upon the courts to order furnishing of sufficient security as a condition precedent.

\(^{14}\) The Arbitration and Conciliation (Amendment) Bill, 2003 should be immediately passed and enforced.

\(^{15}\) The Delhi High Court Arbitration Centre (Arbitration Proceedings) Rules contemplate time bound arbitral proceedings. The rules also provide for imposition of costs in case adjournments are sought. The result is that arbitration matters are being disposed of expeditiously within a time frame of about 1 year.

\(^{16}\) See also D.R. Dhanuka, “Drafting of Rules under Section 82 of the Arbitration and Conciliation Act, 1996 – A Necessity”, XLI (2) ICA Arbitration Quarterly (July – September 2006).

\(^{17}\) This has been criticized by none other than the Supreme Court in *National Aluminum Co. Ltd. v. M/s. Pressteel & Fabrications Pvt. Ltd.*, 2004 (1) S.C.C. 540. See also Dushyant Dave, “Alternative Dispute Resolution Mechanism in India”, XLII (3 & 4) ICA Arbitration Quarterly 22 (October- December 2007 & January – March 2008).
3.1.8 Amendment of Section 89 CPC

Section 89 CPC has been quite successful in igniting the ADR revolution in Delhi. However the Supreme Court has pointed out serious errors in section 89 CPC which have also been acknowledged by the Law Commission of India thereby underlining the need of an amendment of section 89 CPC. Section 89 of the Code of Civil Procedure therefore needs adequate legislative correction so as to iron out the creases and introduce clarity and coherence for its better and more effective implementation and in order to achieve the avowed objective for which it was enacted.

First of all the requirement of formulation of the terms of the settlement followed by re-formulation of the possible terms of the settlement after taking observations of the parties at the pre reference stage should be done away with. The court should only form an opinion that the matter is an appropriate one to be considered by ADR fora in terms of section 89 CPC. Secondly the flaws in the definitions of mediation and judicial settlement should be legislatively rectified and clarity should be introduced with respect to the enforcement and finality of a mediation settlement agreement.

Thirdly in order to effectively utilize Judicial Settlement as a mode of ADR, the procedure for Judicial Settlement needs to be statutorily prescribed so that judicial settlement as a method of ADR is not rendered redundant. Till the time legislature intervenes the procedure can also be prescribed by the High Courts by framing rules under Part X of the Code of Civil Procedure. The procedure can also be prescribed by the Supreme Court or the High Courts on their judicial side.

We may take a cue from the procedure being adopted for disposal of plea bargaining cases in Delhi where an application for plea bargaining in a case is referred by the magistrate to the ACMM who marks it to another Magistrate for disposal. A similar roster can be devised for judicial settlement also where the case is marked to the Incharge, Judicial Settlement who further assigns it to another judge for conducting judicial settlement proceedings. If the matter

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18 The procedure can also be prescribed by the Supreme Court or the High Courts on their judicial side.
is settled a compromise decree can be passed straight away, however if the case is not settled the same can be sent back to the referral court.

2.1.9 Enhancing the Scope of Permanent Lok Adalats

The scope of Permanent Lok Adalats can be widened. Under the existing law Permanent Lok Adalats can only be organized in respect of matters pertaining to public utility services. The legislature can introduce an amendment in the statute so as to bring other matters such as cases pertaining to all government departments, PSUs, statutory bodies, etc. also within the jurisdiction of Permanent Lok Adalats.

1.1.10 Amendment of Conciliation Law

The Arbitration and Conciliation Act should be amended so as to incorporate a clause for suspension of limitation period in case of pre-litigation conciliation. Further it should be expressly incorporated that a conciliation settlement agreement which is treated as an arbitral award on agreed terms would not be permitted to be assailed or be permitted to be assailed only on still limited grounds and that too within a stipulated period only under section 34 of the Arbitration and Conciliation Act, 1996.

2.1.11 Legislative Recognition of Online Dispute Resolution (ODR)

Another aspect to be considered is Online Dispute Resolution. ODR is a different medium to resolve disputes with the assistance of ICT, from beginning to end, respecting due process principles. ODR includes forms of dispute resolution, such as negotiation, mediation, and arbitration, which are conducted through written digital communications. It employs internet technology as a medium to conduct ADR proceedings and is a result of the synergy between ADR and ICT. In the west ODR is already in vogue.

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19 On the lines of the suspension clause as provided in The UNCITRAL Model Law on International Commercial Conciliation, 2002.


21 Haitham A. Haloush & Bashar H. Malkawi, “Internet Characteristics and Online Alternative
Online Dispute Resolution is the future of ADR in India and in this age of internet, e-commerce and e-courts this aspect of ADR should also be given due importance and requisite infrastructure and facilities for the same should also be developed. \(^{24}\) But before that ODR should be accorded legislative recognition and the ground rules should be statutorily codified and the Parliament should moot appropriate legislative action in that direction.

2.2 ADMINISTRATIVE AND ALLIED MEASURES

2.2.1 Institutionalization of ADR

ADR has now been in existence in Delhi for quite some time and its utility and importance has now been endorsed by all. Now the emphasis is on upgradation of the system, rectifying the flaws and taking the ADR revolution to still greater echelons. \(^{25}\)

The malady perpetuated by ad hoc arbitration and the demand for shift from ad hoc arbitration to institutional arbitration is a lesson which all branches of ADR need to learn. Therefore there is a need to institutionalize ADR right from the very inception. Institutionalization of ADR not only would


\(^{23}\) An increasing number of ODR providers are mediating and arbitrating disputes over the internet in US. In the UK, consensusmediation.com was the first dispute resolution service to offer online mediation services. See Isabelle Manevy, “Online Dispute Resolution: What Future?”, available at http://www.juriscom.net (last visited on 15.04.2010); In the west video conferencing is also being used in the field of ADR. In fact now the use of holography to enhance ODR is also being contemplated. Susan Nauss Exon, “The Next Generation of Online Dispute Resolution: The Significance of Holography to Enhance and Transform Dispute Resolution”, 12 Cardozo J. Conflict Resol. 19 (2010).


result in application of uniform rules in contradistinction to individualized procedures but would also afford better quality services to the consumers of justice. It will definitely bring in more consistency and efficacy. The shift from ad hoc ADR to institutional ADR would therefore go a long way in making ADR more effective and efficacious.

The International Centre for Alternative Dispute Resolution (ICADR) is already providing comprehensive institutionalized ADR services in Delhi. We also have various institutions flourishing in Delhi which are providing facilities for institutional arbitration, conciliation or mediation. These institutions can diversify and expand their role and provide comprehensive ADR services. Both the government and private players should take steps in this direction as we need to have more such institutions providing myriad ADR services – Arbitration, Conciliation, mediation, Early Neutral evaluation, Mini trial, Med-Arb etc. all under one roof. We also need to have numerous decentralized centres coming up in all districts of Delhi so that the consumers of justice are afforded access to justice right at their doorsteps.

In the interregnum there is an urgent need to promote institutional arbitration vis-a-vis ad hoc arbitration. If arbitration is to leave an imprint on Indian jurisprudence as an impartial, expeditious and effective ADR mechanism institutional arbitration should gradually replace ad hoc arbitration to a large extent as the answer to the lack of expedition and exorbitant costs in arbitration lies in institutional arbitrations — institutions with time bound schedules, fixed fees, impartiality and noted judges and experts chosen because of their independence and experience being empanelled.26

26 See also Ruma Pal, “Arbitrations and Arbitrators”, 1(1) Dispute Resolutions (Nani Palkhivala Arbitration Centre Quarterly) 3 (September 2010); The availability of more and more trained arbitrators including a number of retired judges with considerable experience in the legal field has resulted in giving a boost to arbitration as a quality mechanism for resolution of disputes. See Ashok H. Desai, “Challenges to an Award – Use and Abuse”, XLI (2) ICA Arbitration Quarterly 1 (July – September 2006).
2.2.2 Court Annexed ADR– Multi-Door Approach

The court is the parental, conventional and trusted institution for resolution of disputes. If comprehensive ADR services are provided under the aegis of the court the process of administration of justice would become more streamlined and synchronized. This underscores the need of a court annexed ADR system providing a multi door alternative to disputants under a single roof ranging from litigation to arbitration to mediation and other ADR mechanisms.

The establishment of court annexed mediation centres and the High Court Arbitration Centre in Delhi is a welcome step in that direction. We need to have such arbitration, mediation and conciliation centres at all district court complexes. In fact these centres can be renamed as ADR centres and should be equipped to provide comprehensive court annexed ADR services at both pre litigative and post litigative stages. All courts should therefore routinely make available a continuum of dispute resolution tools, from mediation and other forms of assisted negotiation to arbitration and traditional litigation.27

The court annexed ADR centres would provide myriad ADR services – arbitration, conciliation, mediation, early neutral evaluation, mini trial, med-arb etc. The Supreme Court of India has also suggested making ADR as ‘a part of a package system designed to meet the needs of the consumers of justice’.28 The ADR centres would also provide basic information and counseling to the disputants so that they can then make an informed choice with respect to the ADR mechanism to be availed by them in consultation with ADR professionals which is best suited for effective resolution of their disputes. The experience and expertise of judges may also be utilized for improving the ADR system at such Court annexed ADR centres. We may have a separate cadre of willing

ADR judges to supervise and manage and provide court annexed ADR services.29

2.2.3 Mediation and Conciliation Centres – Option for Conciliation

Till the time the proposal for establishment of ADR centres providing comprehensive ADR services becomes a reality at least the mediation centres whether operating under the aegis of the courts in Delhi or under the Delhi Dispute Resolution Society, mooted by the Government of NCT of Delhi, should be immediately classified and designated as Mediation and Conciliation Centres.30 The centres should expressly offer conciliation as an ADR mechanism in the normal course and conciliation should also be given due publicity like mediation.

As far as post litigation court referred ADR31 is concerned the law/rules already contemplate reference to and resolution through conciliation32. Such court annexed mediation and conciliation centres should therefore also provide state sponsored conciliation services in case of sub judice matters. The parties should be permitted to have a choice in terms of conciliation or mediation as dispute resolution mechanisms for settlement of their disputes. Suitable amendments to the rules/ law should also be made so as to enable the referral judge to refer the parties to conciliation also (like mediation) without the consent of the parties at the court annexed mediation and conciliation centres if in the opinion of the judge conciliation would be the more apposite mechanism.

Where the parties are from the socially, economically and educationally backward strata of the society and are not fully aware of their rights and liabilities, conciliation would be the more apposite mechanism since the

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29 In the words of Justice Benjamin F. Overton29, “Judges are the most experienced neutrals in the justice system and should be excellent mediators but they need to fully understand the process and know when to bite their tongue and eliminate their authoritative face”.

30 The centre at the Delhi High Court is already described as the Delhi High Court Mediation and Conciliation Centre (named as Samadhan).

31 Pursuant to the exercise of powers in terms of s. 89, Code of Civil procedure, 1908.

32 The Mediation and Conciliation Rules, 2004 (Notified by the Delhi High Court).
conciliator can play an evaluative and interventionist role and is in a position to suggest various options for settlement to the parties after evaluation of the matter so as to enable the parties to explore a wide variety of options which they themselves may not be able to contemplate and thereafter the parties make an informed decisions. This would give a boost to conciliation as a mode of ADR and would offer an additional option of another time tested dispute resolution process to the parties.

2.2.4 Pre-Litigation Dispute Resolution Mechanism

The Mediation and Conciliation Centres should diversify and expand their role so as to provide dispute resolution services at the pre litigation stage also. There is an urgent need to establish a pre litigation state/ court sponsored mediation/ conciliation/ ADR mechanism for settlement of private disputes. In fact it is more preferable that ADR is explored before the parties initiate litigation rather than the court referring the parties to ADR after they have entered the judicial process.33

In case of such pre litigation proceedings conciliation would have an important role to play. Till the time a Mediation Act is legislated, a mediation settlement agreement cannot be classified as a binding agreement executable as a decree of the court and is in fact prone to further litigation. However a settlement agreement in conciliation is considered to be an arbitral award on

33 See also Anoop V. Mohta, “Alternative Dispute Resolution: A Point of View”, (2) Mh.L.J. (Journal) 12 (2005).
agreed terms and is executable as a decree of the court under the existing law and therefore for the time being conciliation can be employed as the only pre litigation dispute resolution process so as to bring a finality in the pre litigation dispute resolution process at such Mediation and Conciliation Centres.

2.2.5 Separate Cadre of ADR Professionals

There is a need to develop a separate cadre of full time professionals who are dedicatedly engaged in the field of ADR and not merely as part timers. This devoted cadre of professionals would include ADR neutrals, ADR lawyers and ADR practitioners specializing in providing assistance to disputants in the field of ADR. The concept of a separate association of ADR practitioners may also be mooted. If ADR is to develop as a splendid institution on a grand scale affording quality services and substantial justice to the masses these ADR practitioners should provide professional, dedicated and specialized arbitration, mediation, conciliation and other ADR services.

Simultaneously these ADR professionals shall have to be subjected to a code of conduct and ethics and rigorously regulated for achievement as ADR cannot afford to compromise on fairness and impartiality. This would be accompanied by development of standards for ADR as well as a code of conduct, code of practice and code of ethics for establishment of an effective ADR system. However at the same time it is essential to accord some level of protection to such ADR professionals also as that is also essential for the sustenance of the ADR system.


36 Rule 22, Mediation and Conciliation Rules, 2004 (Delhi) provides immunity to mediators/conciliators for their bonafide actions; Court appointed ADR professionals may be afforded the same protection granted to traditional agents of the judicial process. See Brian
2.2.6 Education, Expertise and Training in ADR

In the contemporary period ADR has developed as a highly specialized subject. The separate cadre of ADR professionals including neutrals, lawyers and practitioners should be properly educated and trained in their respective fields so that quality services can be offered to the consumers of justice. There is a need for imparting specialized training to lawyers, mediators, arbitrators, conciliators, members of legal aid committees, judicial officers and all other ADR practitioners and ADR neutrals in ADR techniques. 37

The proposals in the National Plan for Mediation also emphasize upon the selection of right mediators and trainers and training to make them successful mediators. 38 The Delhi Mediation Centre has already been offering training courses in mediation. 39 There is a need to set up more such training centres for ADR professionals. The mediation centres can also diversify their role so as to establish such training centres and provide the necessary theoretical as well as practical training in ADR.

The law colleges/ universities should also incorporate courses on ADR in their curriculum and/or diploma courses on ADR with a provision for some form of practical exposure and training. 40 Institutions dealing with ADR can also come up with practical training courses in ADR processes or new


38 Delhi Mediation Centre, 2 (6) Mediation Newsletter (June 2008).

39 The mediation centres at various court complexes in Delhi have been conducting 40 hours training programs for training advocates and judges as mediators. Apart from that awareness programs on mediation as a tool of responsive and timely Justice and refresher courses on concept of mediation are also conducted. See Delhi Mediation Centre, 4(1) Mediation Newsletter (January 2010).

institutions providing such education and training in ADR may be established by the state or private players.41

2.2.7 Training for Referral Judges

An efficient court referred ADR system, as it exists today in terms of section 89 CPC, requires appropriate case referral so as to obviate avoidable delays and ensure optimum utilization of ADR mechanisms. This also calls for requisite training42 being imparted to the referral judges so as to enable them to identify the cases which may be considered apposite for referral to any of the ADR mechanisms as well as to identify the most apposite ADR mechanism which is best suitable for the case in hand and the parties in the given facts and circumstances. The High Courts and Judicial Academies can chalk out mandatory ADR basic education and training programs on ADR for judicial officers during the induction training or as a part of in service training. Detailed guidelines and practice directions for referral judges can also be issued and circulated amongst them. We have certain guidelines for referral judges available in Delhi, however the same need to reworked in light of the judgment of the Supreme Court in Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.43 The matter would also require subsequent monitoring and supervision.

2.2.8 Improvement of the Lok Adalat system

Lok Adalats are doing a commendable job, yet there is a scope for improvement and the system needs to inhale the life giving oxygen of justice

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41 Indian Institute of Arbitration & Mediation (IIAM) in association with Kochi International Business School (KIBS) has launched certificate programs on negotiation, mediation & arbitration. IIAM also conducts a distance learning certificate course in dispute management (CDM). See 3(10) The Indian Arbitrator (October 2011). Such initiatives can also be taken in Delhi.

42 Various training programs are conducted by the Delhi Mediation Centre at various court complexes for referral judges on referral of cases for mediation and court management. See Delhi Mediation Centre, 4(2) Mediation Newsletter (February 2010).

43 JT 2010 (7) SC 616.
through the Lok Adalats.\textsuperscript{44} The endeavour should be to organize more and more Lok Adalats, ensure greater participation, reduce formalism, spare more time and personalized attention thereby ensuring quality justice through Lok Adalats and leading the Lok Adalat movement to still greater echelons.

Simply by increasing the number of Lok Adalats one can drastically reduce the cause list thereby resulting in more time and attention being spared by Lok Adalat Judges which would improve the quality of deliberations and settlements. Lok Adalats can them be utilized for effective resolution of complex disputes also. There is also a need to engage the services of counselors and psychologists who can assist the Lok Adalat Judges as associate members so as to persuade the parties appearing before Lok Adalats to opt for an amicable resolution of the dispute. The involvement of the law universities, law students, NGOs should also be encouraged for growth and improvement of Lok Adalats.

\textbf{2.2.9 Improvement of Permanent Lok Adalats}

There is a need to establish more and more Permanent Lok Adalats in respect of all possible public utility services and give adequate publicity to them. The Permanent Lok Adalats should provide a more comfortable atmosphere for individuals and assistance and enquiry counters should also be opened. The parties should be unequivocally explained the nature of the dispute resolution process before they enter the Permanent Lok Adalats. Further Permanent Lok adalats can be shifted adjacent to the court complexes so that there is no need to develop separate infrastructure and it is convenient for the parties to seek legal assistance also if required.

\textbf{2.2.10 Development of Infrastructure}

There is a need to develop infrastructure for establishment of a comprehensive ADR system. The government and the courts need to allocate

\textsuperscript{44} Abdul Hassan and National Legal Services Authority v. Delhi Vidyut Board, AIR 1999 Delhi 88.
funds and manpower for developing the infrastructure for establishment of an effective and comprehensive ADR mechanism and regularly monitor the same. Additionally there is a need to beef up the infrastructure at the existing centres so as to enable them to diversify and expand their activities. The private players also need to enter the arena and help in development of infrastructure to provide ADR facilities to cope up with the growing requirement in the near future.

9. EPILOGUE

The exhaustive legislative and administrative measures suggested hereinabove would enable better implementation of ADR and its systematic and proficient development. However the foremost requirement for ADR to flourish is creation of awareness amongst the masses regarding the existence, availability and advantages of various ADR mechanisms. All stakeholders should give adequate publicity to the benefits of ADR to foster the growth of a settlement culture amongst the masses as it is most important to revolutionize the mindset of the people. A detailed ADR literacy program needs to be chalked out.45

There is a need to have an efficient, state of the art, comprehensive and pervasive ADR system followed by regular scrutiny, evaluation and improvement for utilizing ADR as an effective instrument for access to justice. The experiences and the best practices being followed both in India and abroad need to be ingrained into the system so as to develop more effective procedures and rules of uniform application. Evolution of ADR processes so as to adapt them to the Indian socio-economic conditions must also be a constant phenomenon. However, to implement the noble ideas and to ensure the benefits of ADR to common people, the four essential players

(government, bench, bar and litigants) are required to coordinate and work as a whole system.46

ADR has been extremely effective in Delhi in the recent past and it has great potential in times to come. The ADR movement was initially advocated as an escape route for the heavy traffic which was blocking the paths of justice in our judicial system, however with the passage of time ADR has created a niche for itself and it has in fact become an indispensable part and parcel of the contemporary justice delivery system. In the end I hope that in future ADR flourishes in Delhi not on account of the inadequacies of the traditional justice delivery system but as an independent mechanism offering effective, economical and expeditious resolution of disputes outside the conventional litigative process so that not only access to justice for all but also de facto justice for all becomes a reality.