CHAPTER I

INTRODUCTION

1. AN OVERVIEW OF ALTERNATIVE DISPUTE RESOLUTION

1.1. THE CONCEPT OF A.D.R.

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. The basic rationale of ADR as the expression itself implies is to resolve disputes outside the conventional judicial system and therefore during the entire process of appreciation of ADR, the baseline remains to be litigation. ADR procedures have thus emerged as distinct alternatives to the courts established under the writ of the state and hence the epithet ‘alternative’ has been coined. ADR techniques are extra judicial in character and can be used in almost all contentious matters which are capable of being resolved, under law by agreement between the parties.


2 This is the accepted connotation in which Alternative Dispute Resolution is understood the world over. The National Alternative Dispute Resolution Advisory Council, Australia defines ADR as: “ADR is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.”, available at: http://www.nadrac.gov.au (last visited on 12.05.2011). In the United States of America, the Alternative Dispute Resolution Act, 1998 which has amended s. 651 of title 28, United States Code inter alia enunciates that “….an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy ….”; See also Alternative Dispute Resolution Act, 2004 (Republic of Philippines).


ADR processes are conducted with the assistance of an ADR neutral, who is an unbiased, independent and impartial third party not connected with the dispute, and helps the disputant parties to resolve their disputes by the use of the well established dispute resolution processes.\(^5\)

1.2 CLASSIFICATION OF ADR PROCESSES

ADR processes can broadly be divided into two categories – non adjudicatory and adjudicatory processes.

The non adjudicatory ADR processes are those dispute resolution procedures falling within the umbrella of ADR, which, do not involve any final and binding determination of factual or legal issues of the dispute by the ADR neutral, but involve exploration of a mutually acceptable solution with the cooperation of the parties who are assisted by the ADR neutral. The non adjudicatory ADR processes 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.\(^6\)

One of the basic principles of ADR is cooperative problem solving.\(^7\) The ultimate objective is to resolve the dispute by arriving at a compromise with the participation and collaborative effort of the parties, facilitated by the ADR neutral. ADR methods aim at blunting the adversarial attitude and encouraging more openness and better communication between the parties leading to a mutually acceptable resolution.\(^8\) In that sense ADR methods are definitely more cooperative and less competitive than adversarial litigation.\(^9\) The ADR methodology focuses on purging the adversarial constituent from the dispute resolution process, steering the parties to appreciate their mutual interests, dissuading them from adopting rigid positions and persuading them towards a negotiated settlement. The parties control the dispute resolution process as well as the outcome of the process and they themselves are responsible for finding an effective, practical and acceptable solution to the dispute.\(^10\) The emphasis in ADR, which is informal and flexible, is therefore on "helping the parties to help themselves".\(^11\)

The general approach in ADR (non adjudicatory) can be illustrated by the story of two cooks fighting over an orange. The judge selects some

\(^6\) Woodrow Wilson has said that a dispute is a problem to be solved together rather that a combat to be won.

\(^7\) S.B. Sinha, “Courts and Alternatives” available at: www.delhimediationcentre.nic.in (last visited on 05.09.2010). See also Ujwala Shinde, “Challenges Faced by ADR System in India”, 4 (2) The Indian Arbitrator 6 (February 2012).

\(^8\) Alexander Bevan, *Alternative Dispute Resolution* 2 (Sweet and Maxwell, London, 1992); ADR methods are in fact participatory solution finding processes. See Law Commission of India, 222\(^{nd}\) Report, Need for Justice-dispensation through ADR, etc. (2009).


\(^10\) It is very important that the parties place themselves in a position of responsibility and create their own solutions, thus maximizing the probability of their long-term success, since no one can really comprehend what is best for the parties better than the parties themselves. See Michael Tsur, “ADR — Appropriate Disaster Recovery”, 9 Cardozo J. Conflict Resol. 371 (2008).

reason for giving it to the first cook. The arbitrator divides it in to half. The mediarator asks each cook why they want it – to learn that the first wants the peel for marmalade and the other wants the flesh for the juice. The mediator gives the peel to the first and the flesh to the other. The result is optimization for both parties. The cooks and the mediator have looked at the problem from the point of view of interest together rather than rights and positions.\textsuperscript{12}

Mahatma Gandhi had also advocated this approach which forms the backbone of ADR and observed:

“…I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was no indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing out private compromises of hundreds of cases. I lost nothing thereby – not even money; certainly not my soul.”\textsuperscript{13}

ADR processes are, mostly, non adjudicatory and they are bound to be since ADR is primarily an alternative to litigation which is nothing but adjudication by a court of law. The examples of non adjudicatory ADR processes are mediation, conciliation, dispute resolution through Lok Adalats etc., which derive their sanctity from the will of the parties to arrive at a mutually acceptable resolution by way of an amicable settlement.

On the other hand adjudicatory ADR processes are those dispute resolution procedures which involve a final and binding determination of factual and legal issues of the dispute, by the ADR neutral. The adjudicatory processes derive their sanctity from the will of the parties to get their rights adjudicated by an ADR neutral outside the conventional litigative process. Arbitration and binding expert determination are examples of adjudicatory ADR processes.

\begin{flushleft}\textsuperscript{12} Alexander Bevan, \textit{Alternative Dispute Resolution} 2 (Sweet and Maxwell, London, 1992). \textsuperscript{13} Mahatma Gandhi, \textit{An Autobiography: The Story of My Experiments with Truth} 134 (Beacon Press, Boston, 1993); In \textit{B.S. Krishna Murthy v. B.S. Nagaraj, AIR 2011 SC 784} the Supreme Court after quoting various passages from Mahatma Gandhi's book 'My Experiments with Truth' referred the dispute to mediation.\end{flushleft}
ADR is sometimes sought to be strictly and hypertechnically construed as a process which is bereft of the trappings of adjudication and does not finally result into a binding decision sans the will of the parties.\(^{14}\) However, since the adjudicatory ADR processes also operate outside the realm of the courts established under the writ of the state and are essentially substitutes for the conventional litigative process they find themselves seated within the galleries of ADR.\(^{15}\) Further the adjudicatory ADR processes are also consensual in the sense that recourse to such processes cannot be had unless the parties are \textit{ad idem}, but once the parties have entered the fray they must suffer a binding determination at the hands of the ADR neutral and they cannot unilaterally withdraw from the same.

Apart from the broad classification of ADR processes into non adjudicatory and adjudicatory there are also hybrid ADR processes, which are amalgamations of the two and possess both adjudicatory and non adjudicatory trappings. ADR processes such as Med-Arb, Con-Arb and dispute resolution through Permanent Lok Adalats are examples of such hybrid procedures.

1.3 ADR = ADDITIONAL/ APPROPRIATE DISPUTE RESOLUTION

ADR, albeit, is primarily understood as Alternative Dispute Resolution, however, ADR is not an alternative in the sense that it may be a complete substitute for the entire judicial system. It is not in competition with the established judicial system\(^{16}\) nor is it intended to supplant altogether the traditional mechanism of resolving disputes by means of litigation in the

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\(^{14}\) On these lines, sometimes a distinction is sought to be drawn between arbitration on the one hand and ADR on the other. See also V.A. Mohta & Anoop V. Mohta, \textit{Arbitration, Conciliation and Mediation} (Manupatra, Noida, 2\textsuperscript{nd} Edn., 2008).


\(^{16}\) Laurence Street, “The Language of Alternative Dispute Resolution” 66 \textit{Australian L.J.} 194 (1992).
The ADR movement therefore does not advocate abandoning or replacing the judicial dispute resolution system; it simply means understanding the alternatives to litigation, their advantages and disadvantages and considering how they can be most effectively utilized. Thus ADR techniques therefore, in essence, offer only an additional mode of dispute resolution other than litigation to the disputant parties. Hence ADR is also sometimes referred to as Additional Dispute Resolution as it supplements and complements the traditional dispute resolution process of litigation.

It happens, quite often that it is not apt for the parties to have their disputes resolved through the conventional litigative process or such litigative process is not likely to yield timely fruits in the given facts and circumstances and this steers the disputant parties to opt for ADR. ADR processes are therefore consensual and voluntary processes which are chosen by the parties to the dispute for effective resolution of their disputes. The prime object of ADR movement is avoidance of vexation, expense and delay and promotion of the ideal of access to justice for all.

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20 Ashwanie Kumar Bansal, Arbitration and ADR 17 (Universal Law Publishing Co. Pvt. Ltd., Delhi, 2005); However parties may be required to engage in ADR due to legislation and this requirement may be part of a system of pre-litigation compulsory dispute resolution or may be a step in the process of case management in courts. See Kathy Douglas, “Shaping the Future: The Discourses of ADR and Legal Education”, 8 (1) QUT Law and Justice J. 118 (2008). In India also section 89 CPC mandates that the parties be referred to an ADR process prior to commencement of trial.

21 P.C. Rao, “Alternatives to Litigation in India”, in P.C. Rao and William Sheffield (eds.), Alternative Dispute Resolution 24 (Universal Law Publishing Company Pvt. Ltd., Delhi, 1997); Warren E. Burger, Former Chief Justice, United States Supreme Court in his keynote address in the “National Conference on the Causes of Popular Dissatisfaction with Administration of
choose a dispute resolution process which is best suited for the resolution of their disputes keeping in mind their requirements, priorities, aspirations and interests. Thus ADR aims at providing a remedy which is most appropriate in the circumstances of the case and hence sometimes ADR is also referred to as Appropriate Dispute Resolution.  

1.4 ADVENT OF ADR IN INDIA

Conflict is a fact of life and indeed it is difficult to imagine a human society without conflict of interests. Human conflicts result in disputes. If elemental human behavior and disposition is kept in mind it can be said that disputes are unavoidable. However disputes need to be resolved and that too in a judicious manner and indeed such resolution of disputes is essential for societal peace, amity, comity and harmony and easy access to justice. This underlines the need for an adequate and effective dispute resolution mechanism, which is an indispensable prerequisite for the subsistence of a civilized society and a welfare state.

The primary objective of every legal system is to render justice and access to justice is one of the cherished goals, which is also the sine qua non for the existence of a democratic and civilized state. The quest for justice has been an ideal which mankind has been aspiring for generations down the

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23 Pruitt describes conflict as an episode in which one party tries to influence the other or an element of the common environment and the other resists. See Tony Whatling, “Conflict Matters - Managing Conflict and High Emotion in Mediation”, 1(10) The Indian Arbitrator 2 (November 2009).


25 Jitendra N. Bhatt, “Round Table Justice through Lok Adalat (People’s Court) – A Vibrant ADR in India”, 1 SCC (Journal) 11 (2002).

26 Justice is a guarantee which, even the Preamble to the Constitution of India seeks to secure to all the citizens of India.
The expression “access to justice” focuses on two basic purposes of the legal system – firstly the system must be equally accessible to all and secondly it must lead to results that are individually and socially just. However access to justice, in its true sense postulates effective and judicious resolution of disputes and that is vital for realization of the fundamental rights of individuals in a welfare state.

The natural and necessary concomitant is that one of the prime functions of a welfare state is to provide an effective dispute-resolution mechanism to which all citizens have equal access for judicious resolution of their disputes and realization of their fundamental and legal rights. Indeed, in a democratic society people should have proper access to the dispute resolution mechanism/ process as the legal maxim *ubi jus ibi remedium* cannot be permitted to be reduced to an empty promise. However when we speak of access to the dispute resolution mechanism/ process it is implicit that the process must yield fruitful results in an efficacious manner.

In the contemporary legal system as it operates in India, however, ‘wrong’ is regarded as a matter of course. The path of litigation is adorned with thorns and it is extremely difficult for an ordinary litigant to tread thereupon. Characterized by a huge and continuously increasing population and limited resources ‘access to justice for all’ in India is still a distant dream even after six decades of independence. The judicial system in India, laden

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28 Law Commission of India, 222nd Report, Need for Justice-dispensation through ADR, etc., 2009.
29 The justice delivery system, is under an obligation to deliver prompt and inexpensive justice to its consumers, without in any manner compromising on the quality of justice or the elements of fairness, equality and impartiality. Lecture of Justice Y.K. Sabharwal at Justice Sobhag Mal Jain Memorial Lecture on Delayed Justice delivered on 25th July, 2006.
30 In the Magna Carta also it is stated “To no man will we deny, to no man will we sell, or delay, justice or right”.
31 Latin maxim meaning “where there is a right, there is a remedy”.
33 The fact that the Government is still grappling with this problem is clear from the fact that as late as in the year 2008 the Gram Nyayalayas Act, 2008 has been enacted to provide for the
with insurmountable arrears, marred by a poor judge to population ratio and attended with procedural complexities, inherent delays and soaring expenses, in the recent past, had entered into a phase where its credibility and efficacy was getting eroded to a considerable extent.

The reasons are not far to seek. In the last few decades, there has been a sea change, both qualitative and quantitative, in the litigation in India. Not only have new and diverse areas of litigation cropped up, but there has also been an exponential increase in the quantum of litigation leading to what is often called "docket explosion". The intricacies of our intertwined society and ever increasing population coupled with development and liberalization of the economy, flourishing trade and commerce, rising literacy rate, increasing awareness amongst the masses regarding their rights, new legislations and ever increasing legal ingenuity are some of the reasons for this colossal spurt in litigation.

In the United States America it was once commented by a contemporary expert that so widespread is the impulse to sue that ‘litigation has become the nation’s secular religion’. The same applies to India as well as like Americans we too are a litigious society and people here are said to be ever engaged to discover new and better ways to litigate.

The consequence has been a tremendous spurt in litigation in India in the recent past and this has now become a recurring feature of the Indian judicial system. The statistical data reveals shocking details as in the quarter establishment of Gram Nyayalayas at the grass root level for the purpose of providing access to justice to the citizens at their door steps which shows that we are still at the legislative stage only and the effective implementation would require decades.


35 Eg. The insertion of the provision regarding dishonor of cheques in the Negotiable Instruments Act, 1881 has alone resulted institution of lacs of cases in Delhi.


from 1\textsuperscript{st} July 2010 to 30\textsuperscript{th} September 2010 (within three months) 11,30,518 civil cases and 37,06,939 criminal cases were instituted in the district courts in India and 3,55,351 civil cases and 1,71,840 criminal cases were instituted in the High Courts.\textsuperscript{39}

As against this the number of judges to cope up with this docket explosion is far too low. The Law Commission in its 120\textsuperscript{th} Report\textsuperscript{40} stated that the number of judges per million of population in India was 10.5 which is one of the lowest in the world. Recently the Supreme Court\textsuperscript{41} had underlined the need to raise the judge to population ratio to 50 per million. The problem stands aggravated on account of unfilled vacancies in courts and this issue still continues to haunt the judicial circles. The statistical data explicates the magnitude of this problem and it shocks our conscience that on 30.09.2010 there were 3170 unfilled vacancies in the district courts in India and as 01.02.2011 there were 291 unfilled vacancies in the High Courts.\textsuperscript{42} Though judges cannot impede or thwart the influx of lawsuits into the judicial system, nor they are expected to attempt to do so, yet the availability of sufficient number of judges to counter the enormity of litigation is essential for the basic wellbeing of the judicial system.

Further the problem is not of docket explosion alone. The complexity and formality associated with the conventional justice delivery system is baffling the consumers of justice. The common man is practically unable to comprehend what transpires in a court of law and he is totally dependent upon his lawyer. Further, scrupulous adherence to procedural laws, frequent filing of frivolous interlocutory applications, repeated adjournments sought by

\textsuperscript{39} See Supreme Court of India, V (4) Court News (October-December 2010).

\textsuperscript{40} Law Commission of India, 120\textsuperscript{th} Report on Manpower Planning in the Judiciary: A Blueprint, Ministry of Law, Justice and Company Affairs, Government of India (1987); The Committee on Reforms of the Criminal Justice System (Malimath Committee), Bangalore: The Ministry of Home Affairs (March 2003) assessed this ratio as 12–13 per million persons.

\textsuperscript{41} All India Judges Association v. Union of India, (2002) 4 SCC 247.

\textsuperscript{42} See Supreme Court of India, V (4) Court News (October-December 2010).
the lawyers and multiple rounds of appeals and revisions make delay, inevitably an endemic part of the system. These complexities and maladies which have come to be associated with the process protract the litigation ad infinitum and this prolixity dampens the spirits of an ordinary litigant waiting in the queue for justice.

The enormous cost of litigation is also a major burden upon the litigant. The litigant not only has to take care of skyrocketing lawyers’ fees and court fees but also the attendant and ancillary miscellaneous expenditures, which go on multiplying with successive appeals and revisions and this makes litigation a costly affair, which is gradually moving beyond the reach of an ordinary litigant. This towering cost of snail paced and fruitless litigation totally frustrates the litigant. Litigation has, therefore come to be regarded as costly, time consuming, unproductive and full of complications and associated with the perception that it destroys both the parties in terms of money, time, energy and good relations.

In the recent past all these factors acting cumulatively had brought the justice delivery system on the verge of a collapse and had resulted in growing

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43 See N.A. Palkhiwala, We the Nation: The Lost Decades (UBS Publishers’ Distributors Pvt. Ltd., Delhi, 1994).
44 The Code of Civil Procedure is an unbreakable elastic piece of legislation which enables all piecemeal dealings in litigation enabling clever lawyers and mischievous litigants to unduly protract the proceedings. See V. Narayana Swamy, “The Procedural Law in India Requires a Thorough Change” AIR Journal 85 (1987).
45 The Delhi Legislative Assembly has recently passed the Court Fees (Delhi Amendment) Act, 2012 which provides for manifold increase in existing court fee rates in Delhi.
discontent amongst the masses regarding the efficacy of the judicial system. However law is not a static concept and its efficacy is directly proportional to its dexterity to remodel and adapt itself to the needs and aspirations of the society with the passage of time. It is trite that every system has certain flaws and it continuously strives to devise new ways and means to overcome those flaws and shortcomings with the introduction of required modifications.

What was now being witnessed in India, however, had already been experienced in the west. To effectively counter the vicious crisis of judicial arrears and colossal spurt in litigation coupled with protracted, rigid and expensive judicial procedure the jurists, the lawmakers and even the courts themselves were propelled to explore alternatives of conservative litigation, which were less formal and more efficacious and expeditious for resolution of disputes. This led to the growth of ADR mechanism in its contemporary modern incarnation.\(^48\)

The modern ADR movement originated in the United States in the 1960s, as an extension of the legal reform movement seeking to improve the legal judicial system\(^{49}\) stimulated by the aspiration to circumvent the costs, delays and complexities associated with adversarial litigation. ADR had been in vogue in the west for quite a long time and had not only proved to be fairly effective in relieving docket congestion but had also afforded an additional expeditious and economical mode of resolution of disputes.

India, also followed pursuit and learning from the experiences of the western nations, introduced ADR in its contemporary form. The existing milieu - problems of the legal system and the experiences of establishing fora alternate to regular courts - seemed to be perfect for the introduction of ADR

\(^{48}\) The position in the United States of America was no different at one point of time and critics saw ADR as a way for courts to reduce their increasing dockets which was the main reason for the advent of the ADR revolution. See Katherine V.W. Stone, “Alternative Dispute Resolution: Encyclopedia of Legal History”, research paper, University of California, Los Angeles School of Law, available at: http://papers.ssrn.com (last visited on 11.04.2012).

as an alternate to the mainstream litigative process. This led to the advent of ADR in its contemporary incarnation in India.

1.5 TRACING THE DEVELOPMENT OF ADR IN INDIA

The contemporary ADR mechanism which is prevalent in India is primarily based on the western model and is inspired by the experiences of the western countries. The basic ADR methods, however, are not new to India and have been in existence in some form or the other in the days before the modern justice delivery system was introduced by the colonial British rulers.

In fact, the Panchayat, in its original conception was, primarily, an instrument of law and order, a means of conciliation and arbitration within the community. The awards were known as decisions of Panchayats, commonly known as Panchats. In ancient India Disputes were peacefully decided by the intervention of Kulas (family assemblies), Srenis (guilds of men of similar occupation), Parishad, etc.

ADR is therefore by no means a recent phenomenon, though it has been organized and systematized, expressed in clearer terms, employed more widely in dispute resolution in recent years than before. The Arbitration Act, 1940 was an early step towards recognizing and providing an alternative mode of dispute resolution outside the courts, although the entire process under the Act turned out to be court oriented.

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52 In Sitanna v. Viranna, AIR 1934 PC 105 the Privy Council while affirming the decision of the Panchayat in a family dispute had observed that reference to a village Panchayat is a time honoured method of deciding disputes of this kind.
Article 39A\(^{56}\) was inserted into the Constitution of India\(^{57}\) and within few years the Constitutional mandate of Article 39A manifested itself in the enactment of the Legal Services Authorities Act, 1987 which inter alia provides was organizing Lok Adalats which are important ADR fora.\(^{58}\)

In 1989, the Government of India, constituted a committee, popularly known as the Malimath Committee\(^{59}\) to \textit{inter alia} propose remedial measures to manage and ease out the judicial dockets. The Malimath Committee submitted its comprehensive report in August, 1990 \textit{inter alia} identifying various causes of accumulation of arrears and endorsed the recommendations made by the Law Commission of India in its 124\(^{th}\) and 129\(^{th}\) reports to the effect that the legal void resulting in the inability of the courts to cause the litigating parties to resort to arbitration or mediation requires to be remedied by necessary legislative action. The committee also advocated the introduction of conciliation as a dispute resolution process.

A joint conference of Chief Ministers of the States and Chief Justices of High Courts was held on 4th December, 1993 at New Delhi wherein also the inadequacies of the traditional justice delivery system were discussed and acknowledged and the need for recourse to ADR was underlined.\(^{60}\)

During this period, all over the world, there was a movement aimed at streamlining and standardizing the law governing arbitration and conciliation under the auspices of the United Nations Commission on International Trade Law (UNCITRAL). In this backdrop the Arbitration and Conciliation Act, 1996

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\(^{56}\) Article 39 A of the Constitution of India directs that “The State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disability.”

\(^{57}\) Vide the Constitution (Forty-second Amendment) Act, 1976 (w.e.f. 3-1-1977).

\(^{58}\) The Legal Services Authorities Act, 1987 was amended in the year 2002 and Chapter VI-A pertaining to Permanent Lok Adalats was introduced with the title “Pre-litigation Conciliation and Settlement”.

\(^{59}\) As Justice V.S. Malimath, Chief Justice of Kerala High Court was the Chairman of the Committee.

was enacted by the Indian Parliament, which unequivocally demonstrates the legislative consciousness and concern towards the necessity and importance of ADR in India.

The turning point in the ADR movement was, however, the legislative mandate articulated in the enactment of section 89 of the Code of Civil Procedure, 1908 followed by an extraordinary, committed and concerted judicial endeavour, which triggered an ADR revolution in India of a stature which was unprecedented and preeminently unmatchable. The legislature gave statutory recognition to the importance of ADR, in respect of *sub judice* matters, by empowering the courts to refer the parties to ADR for resolution of pending lawsuits. The Supreme Court of India reiterated the importance of ADR while meticulously analyzing and expounding the provisions of section 89 of the Code of Civil Procedure, 1908. The Supreme Court and the High Courts have vociferously advocated the pervasive use of ADR and have themselves taken myriad initiatives for popularizing and promoting ADR in India. Since then there has been no looking back and ADR flourishes in India and continues to attain greater echelons day by day.

1.6 REASONS FOR GROWTH OF ADR - UTILITY AND ADVANTAGES OF ADR

The advent of ADR in India, in its modern setup, may be said to be primarily attributable to the inadequacies of the justice delivery system to deliver expeditious and effective justice and cope up with the swelling judicial dockets. There can also be no denial of the fact that the process of underlining the need for ADR inevitably involves an invariable rhetoric aimed at highlighting these lacunae and inadequacies of the judicial system. This, however, is not peculiar to India alone as throughout the world, ADR is perceived as a method for channelizing disputes outside the formal justice

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61 Section 89 was introduced into the Code of Civil Procedure, 1908 by the Code of Civil Procedure (Amendment) Act, 2002 with effect from 01.07.2002.

This is, however only one side of the coin. The pitfalls of the traditional justice delivery system may have been one of the prime propellants for the advent of the ADR but the ADR revolution has gained momentum on account of its own virtues. ADR offers an effective alternative to the disputants bereft of the rigours, complexities and flaws of formal adjudication. It offers an additional remedy for resolution of disputes outside the conventional litigative process and enables the parties to choose a remedy which is most appropriate in the given circumstances.

ADR has distinct advantages and it offers a comparatively speedier and inexpensive mode of dispute resolution than conventional litigation. It offers a system with procedural flexibility, a broad range of remedial options and a focus on individualized justice. The flexibility is available not only in terms of procedure but also in terms of the solutions to the dispute. ADR, in contradistinction to a judicial adjudication can provide creative solutions – novel ways of resolving disputes.

Further most ADR mechanisms offer a private process, assuring confidentiality, which is generally not available in court proceedings. The assurance of confidentiality in ADR permits free and frank exchange of views and open and honest discussions between the parties thereby improving the relationship between the parties as well as their understanding of the dispute. Confidentiality also reduces posturing and destructive dialogue amongst the parties.


64 As a movement, ADR has grown out of a general concern that courts are burdened with too many cases. See Chandana Jayalath, “Courts and ADR - For a Harmonious Co-habitation”, 3 (10) The Indian Arbitrator 5 (October 2011).


parties during the resolution process\(^{67}\) thereby increasing the probability of amicable resolution.

ADR (non adjudicatory) is a purely voluntary process and the parties are free to opt out of the same at any point of time as per their own volition. If a party does not accede to the settlement or to the continuance of ADR proceedings, it is open to him to unilaterally terminate the ADR process and initiate the formal legal process. Thus there is nothing to lose in ADR and even if ADR is unsuccessful, the time and expense spent in ADR is put to good use as trial preparation is advanced, issues are narrowed and thoughts are clarified.\(^{68}\) On the other hand adjudicatory ADR also affords an expeditious, efficacious and convenient mode of resolution of disputes outside the courts. But the biggest advantage in ADR is finality since the dispute is finally resolved, thereby obviating the possibility of successive appeals.\(^{69}\)

ADR is in fact a collaborative effort of the parties of discovering their actual concerns and appreciating their interests in contradistinction to their superficial positions and claims. It results in a win-win situation, steering clear of the acrimony which is in built in the adversarial litigative process and thus results in increased respect and faith between the parties, thereby preserving relationships in the long run.\(^{70}\)

Further merely because a dispute is defined as justiciable, does not necessarily mean that the courts are the only option to seek redress.\(^{71}\) Moreover a legal adjudication may be flawless but heartless but a negotiated


\(^{68}\) Alexander Bevan, Alternative Dispute Resolution 61 (Sweet and Maxwell, London, 1992).

\(^{69}\) In the empirical research conducted majority of the respondents asserted that finality was the biggest advantage associated with individual ADR processes.


settlement\textsuperscript{72} will be satisfying, even if it departs from strict law.\textsuperscript{73} ADR processes, on the other hand, aim 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{74} and thus ADR systems enable a change in the mental approach of the parties.\textsuperscript{75}

ADR has undoubtedly been successful in clearing the dockets in India. In certain countries of the world ADR has been successful to the extent that over 90 per cent of the cases are settled out of the court.\textsuperscript{76} However, the objective is to facilitate more responsive and effective solutions to disputes and relieving the court dockets or saving time and money are secondary concerns.\textsuperscript{77} However during this course of action, ADR indirectly reduces the burden on the courts and resultanty saves valuable judicial time enabling the courts and judges to devote adequate time and attention to the cases which inevitably require judicial determination. But the basic goals of ADR are not only to relieve court congestion as well as undue cost and delay, but also to enhance community involvement in the dispute resolution process, to facilitate access to justice and to provide more effective dispute resolution.\textsuperscript{78}

The reasons for the strengthening of the ADR revolution are therefore quite obvious. ADR aims to provide the litigants with an economical, speedy


\textsuperscript{73} \textit{Agarwal Engineering Comapany v. Technoimpex Hungarian Machine Industries, Foreign Trade Company, AIR 1977 SC 2122}.

\textsuperscript{74} Sarvesh Chandra, “ADR: Is Conciliation the Best Choice” in P.C. Rao and William Sheffield (Eds.), \textit{Alternative Dispute Resolution 82} (Universal Law Publishing Company Pvt. Ltd., Delhi, 1997).

\textsuperscript{75} \textit{Byram Pestonji Gariwala v. Union Bank of India, AIR 1991 SC 2234}.


and less formalistic remedy for resolution of disputes, a remedy, which is most appropriate given the prevalent state of affairs. ADR succeeds because it steers clear of rigidity, complexity and formality, which are inherent in the conventional litigative process apart from the procedural delays and high expenditure involved.\textsuperscript{79} It is because of all its advantages that the emergence of ADR has been one of the most significant movements as a part of conflict management and judicial reform and now it has become a global necessity.\textsuperscript{80}

1.7 AN OUTLINE OF DIFFERENT ADR PROCESSES

1.7.1 Mediation\textsuperscript{81}

The Black’s Law Dictionary defines mediation as a method of non binding dispute resolution involving a neutral third party (mediator) who tries to help the disputing parties to reach a mutually agreeable solution.\textsuperscript{82} Thus mediation is nothing but facilitated negotiation\textsuperscript{83} by a third party who assists the parties in moving towards an acceptable resolution. Mediation is, however, a structured process and involves different stages viz. introduction, joint session, caucus, agreement, etc.\textsuperscript{84}

The mediator has no authority to make any decisions that are binding on the parties, but uses certain procedures, techniques and skills to help them

\textsuperscript{79} ADR programs are in fact tools of equity rather than tools of law. Ujwala Shinde, “Challenges Faced by ADR System in India”, 4 (2) The Indian Arbitrator 6 (February 2012).

\textsuperscript{80} Jitendra N. Bhatt, “Round Table Justice through Lok Adalat (People’s Court) – A Vibrant ADR in India”, 1 SCC (Journal) 11 (2002); See also K.D. Raju, “Alternative Dispute Resolution System: A Prudent Mechanism of Speedy Redress in India” available at: papers.ssrn.com/sol3/paper (last visited on 25.05.2011).

\textsuperscript{81} For a detailed analysis of Mediation see Chapter II.


\textsuperscript{84} See also H.E. Chodosh, N.J. Bhatt, F.Kassam, Mediation in India: A Toolkit (U.S. Educational Foundation in India, Fulbright House, New Delhi, Feb. 2004); See also Delhi High Court Mediation and Conciliation Centre, Mediator’s Tool Box (Volume I).
to negotiate an agreed resolution of their dispute without adjudication.\textsuperscript{85} His role is primarily that of a facilitator and he focuses on effective communication and negotiation skills\textsuperscript{86} and drives the parties towards a self determined solution. If successful, mediation culminates into a settlement agreement acceptable to the parties.

In India there is no comprehensive legislation on mediation, however section 89 of the Code of Civil Procedure, 1908 distinctly recognizes mediation as an available ADR mechanism.

1.7.2 Conciliation\textsuperscript{87}

Conciliation is also plainly a process of arriving at a settlement with the assistance of a third party/conciliator.\textsuperscript{88} Comprehensively conciliation may be defined as a non-adjudicatory ADR mechanism involving a settlement procedure in which an impartial third party (conciliator) enables and steers the disputant parties to arrive at a satisfactory and agreed settlement. The process of conciliation aims at bringing the parties together before a third person whom they have chosen for the purpose of assisting them in settling their dispute.\textsuperscript{89} Thus mutual agreement and not an imposed decision, forms the spirit of conciliation.\textsuperscript{90} Successful conciliation proceedings culminate into a binding settlement agreement.

In India conciliation is governed by the provisions of Part III of the Arbitration and Conciliation Act, 1996. Under the Arbitration and Conciliation


\textsuperscript{87} For a detailed analysis of Conciliation see Chapter V.

\textsuperscript{88} Ashwanie Kumar Bansal, \textit{Arbitration and ADR} 19 (Universal Law Publishing Co. Pvt. Ltd., Delhi, 2005).

\textsuperscript{89} G.K. Kwatra, \textit{Arbitration & Alternative Dispute Resolution} 39 (Universal Law Publishing Co. Pvt. Ltd., Delhi, 2008).

\textsuperscript{90} V.A. Mohta and Anoop V. Mohta, \textit{Arbitration, Conciliation and Mediation} 483 (Manupatra, Noida, 2nd Edn., 2008).
Act, 1996 the conciliation settlement agreement is deemed to be an arbitral award on agreed terms and is per se executable as a decree of the civil court.

Conciliation is strikingly similar to mediation. The fundamental ideology is the same in both mediation and conciliation, in the sense that a neutral third party facilitates negotiations between the disputant parties in their pursuit of an acceptable resolution. In fact, at times the two terms are used synonymously or interchangeably, however there is fine line of distinction amongst the two. Moreover in India the introduction of the two terms separately under section 89 of the Code of Civil Procedure, 1908 unequivocally indicates that the two terms are to be understood distinctively.

1.7.3. Lok Adalats and Permanent Lok Adalats

The term Lok Adalat means ‘People’s Court’. However, a Lok Adalat is not a court in its accepted connotation as it not an adjudicatory body, but an ADR forum established under the aegis of the Legal Services Authorities Act, 1987. Lok Adalats are organized by Legal Services Authorities/ Committees, constituted under the Legal Services Authorities Act, 1987 intermittently at such intervals and places and for exercising such jurisdiction as the authority/ committee may deem fit and proper and have the jurisdiction in respect of any case pending before any court for which they are organized.

The Lok Adalat system is basically meant for the resolution of people’s disputes by using conciliatory and persuasive techniques and voluntary participation and discussion for arriving at a mutually acceptable solution and


92 For a detailed analysis of Lok Adalats and Permanent Lok Adalats see Chapter III.


94 However the Lok Adalats have no jurisdiction to deal with cases pertaining to non compoundable criminal offences.
the whole emphasis is on conciliation rather than adjudication. Thus settlement or compromise can only form the basis of dispute resolution by Lok Adalats. The settlement arrived before a Lok Adalat gets crystallized into the award of the Lok Adalat which is deemed to be a decree of a civil court and is final and binding upon the parties and no appeal lies against such award.

Permanent Lok Adalats, on the other hand are permanent pre litigation ADR fora established for resolution of disputes pertaining to public utility services only. Any party to a dispute may, at the pre litigation stage, make an application to the Permanent Lok Adalat for the settlement of the dispute. However where a matter before a Permanent Lok Adalat cannot be settled mutually the Permanent Lok Adalat is enjoined to decide the dispute on merits and thus the Permanent Lok Adalat must pass an award, either on the basis of a mutual settlement or on merits. The award passed by the Permanent Lok Adalat is also deemed to be a decree of a civil court and is final and binding upon the parties.

1.7.4. Arbitration

Arbitration is a recognized private legal procedure used to resolve disputes between two or more parties where the parties entrust the dispute resolution process and the outcome of the dispute to a private neutral third party i.e. the arbitrator (or the arbitral tribunal) who hears and considers the

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101 S. 22C(8), Legal Services Authorities Act, 1987; See also Pu Lalkanglova Sailo v. Pi Ngurthantluangi Sailo, AIR 2009 Gauhati 39. In InterGlobe Aviation Ltd. v. N. Satchidanand, (2011) 7 SCC 463 the Supreme Court has opined that the procedure adopted by Permanent Lok Adalats is what is popularly known as ’CON-ARB’ (conciliation cum arbitration).
103 For a detailed analysis on Arbitration see Chapter IV.
merits of the dispute and renders a final and binding decision on merits called the arbitral award. Arbitration is therefore an adjudicatory ADR mechanism.

The primary aim of arbitration is a just resolution of the dispute by a private judge outside the conventional litigative process, expeditiously and conveniently. The parties are free to agree how their disputes are to be resolved and intervention by the courts is restricted. However unlike litigation, arbitration is consensual and the existence of an arbitration agreement is a condition precedent for the initiation of the arbitral process. But once the parties enter the arbitral process they cannot unilaterally opt out of the same and must suffer a binding decision on merits. In India arbitration is governed by the Arbitration and Conciliation Act, 1996.

1.7.5. Mini Trial

A Mini Trial consists of an abbreviated adjudication like presentation of evidence and arguments to a neutral joined by the high level principals of each of the disputant parties, which is then followed by negotiations between the principals. Mini Trial is therefore a non-binding ADR method of resolving disputes, primarily business disputes that combines the techniques of negotiation, mediation and advisory arbitration.

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1977 patent infringement case, *Telecredit v. T.R.W.*, the Mini Trial concept has now spread through the corporate world.109

In the mini trial process a tribunal comprising of the senior officers of the disputant parties and one or more third party neutrals is constituted which hears and considers the respective cases of the disputant parties. A statement on the substance of the dispute along with the material on which either party is placing reliance is also placed before the tribunal and the representatives of both the parties also advance their respective arguments before the tribunal. However it is a condensed trial as parties are given limited time to present their respective cases with brevity and precision and the proceedings are conducted in an expeditious manner.

The tribunal, thereafter, gives a decision on merits on the basis of the material produced and the arguments advanced. The decision rendered by the tribunal is confidential and non-binding in nature, however, it becomes the baseline for negotiation or conciliation between the parties for settlement of the dispute.110 The objective of this simulated procedure is to enable a concentrated judicial contest before the negotiations start between the parties.111 The neutral may also be requested to give an opinion as to the most likely outcome of the case in case the parties go in for a full dressed trial.

After the decision has been rendered the neutral may also be called upon to assist the parties in their pursuit of an acceptable solution and for facilitating negotiations between them. The neutral then becomes the mediator and attempts to facilitate the discussion and induce a settlement

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110 The negotiations are benefitted from the fact that the senior executives of the parties have already made an in depth assessment of the merits and demerits of not only their own case but also the case of the adversary and this pre evaluation helps them to negotiate better. See also Arunvir Vashista, “Emerging Trends in ADR as Dispute Resolving Techniques”, XLIX ICA Arbitration Quarterly 31 (January – March 2011).

between the parties.\textsuperscript{112} Since the neutral has been a part of the tribunal and has also already heard, understood and evaluated the entire dispute, he is in a better position to facilitate the settlement process.

The process may thereafter culminate into a settlement agreement based on the recommendations given in the Mini-Trial. The effect of a mini trial is therefore to convert a dispute from a legal problem to a business problem by putting the resolution of the dispute back into the hands of the disputants directly.\textsuperscript{113} However if no settlement is achieved the procedure has no evidentiary effect and the case is to be sorted out in the court or through arbitration.\textsuperscript{114}

1.7.6 Med-Arb

'Med-Arb' is a hybrid ADR process, an admixture of mediation and arbitration, wherein the parties consensually permit a neutral third party to mediate their dispute and if no settlement materializes to thereafter arbitrate the dispute on merits. The ADR neutral who is appointed by the parties, therefore, first attempts to resolve all or some of the issues by facilitating a mutually acceptable solution through the persuasive and facilitative process of mediation and thereafter in case some or all issues remain unresolved he proceeds to decide them on merits functioning as an arbitrator.\textsuperscript{115}

In Med-Arb generally the same neutral person performs both the roles. This kind of a process has its own pitfalls and it may complicate things as the third party neutral muddies the adjudicative waters by delving into mediation and learning about matters which are irrelevant and prejudicial to the decision

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making function.\textsuperscript{116} However the advantage of the process is clearly visible if the process is essentially visualized as an arbitral process preceded by an option for consensual resolution.

This concept of Med-Arb, in this sense, is also implicitly embodied in the Indian Arbitration and Conciliation Act, 1996\textsuperscript{117} which provides that it is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement. Thus in such a case where the arbitrator first attempts to facilitate a settlement by the use of mediation/ conciliation he is technically resorting to the ADR mechanism described as Med-Arb.

1.7.8. Early Neutral Evaluation (E.N.E.)

‘Early Neutral Evaluation’ is an ADR process where a concise presentation given to an experienced neutral followed by an assessment of the case by the neutral at an early stage forms the baseline for a consensual resolution of the dispute between the parties. E.N.E. is pre-emptive in nature and its primary purpose is to reconcile the dispute amicably at the earliest stage.

In the words of Robert A. Goodin: Early Neutral Evaluation is a technique used in American litigation to provide early focus to complex commercial litigation, and based on that focus, to provide a basis for sensible case management or offer resolution of the entire case, in the very early stages.\textsuperscript{118}

\textsuperscript{116} See Alexander Bevan, \textit{Alternative Dispute Resolution} 9 (Sweet and Maxwell, London, 1992).

\textsuperscript{117} S. 30(1), Arbitration and Conciliation Act, 1996

\textsuperscript{118} Quoted in \textit{Bawa Masala Co. v. Bawa Masala Co. Pvt. Ltd}, AIR 2007 Delhi 284. The Delhi High Court in this case referred the dispute to be resolved by the ADR process of Early Neutral Evaluation taking recourse to s. 89 CPC.
ENE is a non-binding, flexible and confidential ADR process in which a neutral third party, generally having expertise in the subject matter of the dispute is appointed by the parties for the purpose of evaluation of the dispute on merits at the initial stages of the dispute. The parties provide the evaluator with written submissions on the substance of their respective cases along with the material on which they are placing reliance. The process may be conducted even without an oral hearing, however, if the parties desire a brief hearing can be given. Again the emphasis is on brevity and precision and limited time is given to the parties so that the hearing is completed expeditiously. Thereafter the neutral assesses each disputant’s case and makes an evaluation as to the likely outcome of litigation.¹¹⁹ ENE, therefore, provides the parties with an early and confidential evaluation of the merits of a dispute at the initial stage.

ENE is extremely useful where the dispute involves some disputed and complex question of fact or law or contractual interpretation which is acting as a barrier in the resolution of the dispute through facilitated negotiation. The parties also come to understand the merits of their respective cases in a better perspective and become aware as to where they actually stand in a court of law in case the matter is adjudicated on merits. ENE was originally designed to provide an early evaluation of a case’s merits and was not originally intended as a settlement device.¹²⁰ However in its contemporary incarnation ENE is utilized as a procedure for facilitating amicable resolution of a dispute. The evaluator gives a non-binding decision expressing his opinion as to the most likely outcome of the dispute in case of a full dressed trial.

Thereafter based on his assessment the evaluator also explores the possibilities of a settlement between the parties and may also make recommendations so as to assist the parties. The parties may thereafter arrive

at a settlement on the basis of the evaluation made by the evaluator or with the necessary modifications thereof as are acceptable to the parties. In case the dispute is not settled the parties are free to litigate or arbitrate for a final binding adjudication.

1.7.9 Dispute Review Boards and Dispute Adjudication Boards

Dispute Review Board (DRB) is a tribunal consisting of experienced and impartial expert reviewers for facilitating resolution of disputes related to a particular project or a particular type of dispute. The procedure before such DRB is flexible and simple which is determined with consent of the parties and further developed by the DRB. The DRB after hearing the parties with respect to their respective cases and after going through the records of the case and the material produced by the parties gives a final report. The report is recommendatory in nature. However, normally the parties resolve their dispute in terms of the report.

The DRBs provide an informal and expeditious forum for resolution for contract related disputes and they are constituted commonly for settlement of construction related disputes. The Board attempts to reduce acrimony between the parties, which usually in construction projects is on account of festering, long unresolved claims and disputes which have a cumulative effect and make the resolution of simple issues more difficult as time progresses. The DRB therefore aims to solve the problem at the job level nipping the problem at its beginning leaving no room for its escalation as a major long term dispute.

121 See also J.C. Seth, “ICC Dispute Board and Arbitration”, XLI (4) ICA Arbitration Quarterly 17 (January – March 2007).

122 Eg. National Highways Authority of India (NHAI) has started to incorporate DRB clauses in their road construction projects; See http://nhai.org (last visited on 01.04.2012); See also National Highways Authority of India v. Bumihway DDB Ltd. (JV), 2006 (10) SCC 763.


Dispute Adjudication Board (DAB) is a tribunal consisting of experienced and impartial experts on the lines of a DRB. The difference is that whereas the DRB issues a recommendation, the DAB plays an adjudicatory role and gives a decision on merits. The decision of the DAB has interim-binding force until and unless it is revised amicably or by an arbitral award. FIDIC (Fédération Internationale Des Ingénieurs-Conseils: International Federation of Consulting Engineers) advocates the use of the term Dispute Adjudication Board (DAB) whereas the World Bank advocates the use of the term Dispute Review Boards (DRB). The International Chamber of Commerce (ICC) even provides for Combined Dispute Boards.

1.7.10. Expert Determination

Expert Determination is an ADR process in which the parties agree to appoint an independent third party, who is an expert in the field to which the dispute relates so as to adjudicate their dispute on merits. Normally the contract contains a stipulation that the expert determination would be final and binding. Binding expert determination is an adjudicatory form of ADR. However where the decision of the expert does not finally binds the parties, the parties may negotiate to settle the dispute in light of the findings of the expert.

1.7.11 Negotiation

Negotiation – communication for the purpose of persuasion – is the preeminent mode of dispute resolution. Although negotiation is not conducted with the assistance of a third party yet it is classified as an ADR process because it is still an alternative to litigation. Negotiation is an ADR

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127 The term ADR is also used so as to include approaches that enable parties to prevent or manage disputes without outside assistance. See http://www.nadrac.gov.au (last visited on 12.05.2011).
process by which the parties resolve their disputes themselves by arriving at a mutually acceptable amicable solution. In this mode of settlement the parties or their representatives\textsuperscript{128} voluntarily sit together themselves and negotiate directly by putting the factual content of the dispute and discuss their claims and counter claims, earmarking the extent to which they can forego their claims and their readiness to accommodate each other.\textsuperscript{129} The parties mutually agree upon a course of action and bargain for advantage.

Negotiation is the basic dispute resolution process\textsuperscript{130} and it signifies solving disputes by dialogue.\textsuperscript{131} Effective bilateral communication, mutual accommodation, good faith and trust amongst the parties and enthusiasm to amicably resolve the dispute steer the disputant parties towards a mutually acceptable settlement in negotiation resulting in a win-win situation. Objectivity and willingness to arrive at a negotiated settlement on the part of both the parties are essential requirements of negotiation.\textsuperscript{132} If negotiation succeeds, the parties sign a settlement agreement incorporating the terms and conditions of the agreement or they can simply enforce the agreement.

The aforesaid list of ADR processes is not exhaustive. There are various other ADR processes\textsuperscript{133} which are employed all over the globe for resolution of disputes. Some of them are MEDOLA\textsuperscript{134}, summary jury trial\textsuperscript{135},


\textsuperscript{129} See S.S. Mishra, Law of Arbitration and Conciliation in India (With Alternative Dispute Resolution Mechanisms (Central Law Agency, Allahabad, 1\textsuperscript{st} Edn., 2007).

\textsuperscript{130} Alexander Bevan, Alternative Dispute Resolution 3 (Sweet and Maxwell, London, 1992).

\textsuperscript{131} V.A. Mohta and Anoop V. Mohta, Arbitration, Conciliation and Mediation 541-542 (Manupatra, Noida, 2\textsuperscript{nd} Edn., 2008).


\textsuperscript{133} They are however rarely employed in India.

\textsuperscript{134} MEDOLA or Mediation and Last Offer Arbitration is an ADR procedure where if the parties fail to reach an agreement through mediation, the ADR neutral (mediator or an arbitrator) will select between the final negotiated offers of the parties and such selection is binding on the parties.

\textsuperscript{135} The idea behind a summary jury trial is to see as to how a mock jury would deal with the case after a brief presentation of the cases of both the parties. See Alexander Bevan,
neutral expert fact finding\textsuperscript{136}, neutral listener’s agreement\textsuperscript{137}, fast track arbitration\textsuperscript{138}, final offer arbitration\textsuperscript{139} etc. and even new techniques are being evolved. Thus the horizon of ADR is ever expanding and it has become an indispensable part of the justice delivery system.

1.8 ADR IN DELHI – A PROLOGUE

Delhi is the capital of India and also the seat of the highest judicial authority in India. The variety, complexity and enormity of litigation in Delhi has no parallels as far as India is concerned. The extent of the judicial dockets in Delhi can be appreciated from the fact that as on 30.09.2010 more than 10 lac cases were pending in the Delhi district courts and the Delhi High Court. To cite another instance between 01.07.2010 and 30.09.2010 more than 2,47,000 cases were instituted in the courts in Delhi.\textsuperscript{140} In the past Delhi, like the rest of India was striving to cope up with the ever surmounting judicial arrears with its under average judge to population ratio and in this milieu, was stormed by the ADR revolution. In the backdrop of positive legislative action and constant judicial endeavour Delhi realized the advantages of ADR and became one of the pioneers in the adoption and implementation of ADR in India.

Further, burdened with the colossal spurt in litigation on the one hand and adorned with superior infrastructure, flourishing trade and commerce,

\textit{Alternative Dispute Resolution} 16 (Sweet and Maxwell, London, 1992); This however has no application in India as there are no jury trials in India.

\textsuperscript{136} The process is employed in complex technical cases where the two experts engaged by the parties express conflicting opinions and therefore a neutral expert is appointed to re evaluate the technical evidence and encourage the parties to reassess the issue so as to arrive at an agreement. See Alexander Bevan, \textit{Alternative Dispute Resolution} 17 (Sweet and Maxwell, London, 1992).

\textsuperscript{137} In this method parties to a dispute discuss their respective best settlement offers with a neutral third party who, after his own analysis and evaluation, suggests settlements options to enable the parties to arrive at a negotiated settlement.

\textsuperscript{138} This is basically an arbitration process only which has been expedited so as to achieve the end result in a fast track manner.

\textsuperscript{139} In this ADR mechanism the parties submit their best and final offers to the neutral arbitrator who then chooses one of the two submitted offers which in his decision is the most appropriate in the given facts.

\textsuperscript{140} See Supreme Court of India, V (4) \textit{Court News} (October-December 2010).
vibrant corporate sector and educated and aware masses on the other hand, Delhi has tremendous potential for development of ADR. Albeit, a whole gamut of procedures are available under the umbrella of ADR, primarily four ADR processes namely Mediation, Lok Adalats, Arbitration and Conciliation have attained noteworthy recognition in Delhi and they are flourishing in Delhi.

The International Centre for Alternative Dispute Resolution (ICADR) has been established with its headquarters at Delhi for providing comprehensive facilities for resolution of disputes through various ADR processes, imparting teaching and trainings in ADR and for promoting and popularizing ADR. The ICADR was inaugurated on 6th October, 1995 by the then Prime Minister of India. It is an autonomous organisation working under the aegis of the Ministry of Law and Justice, Government of India and the Chief Justice of India is the patron of ICADR.

The ICADR provides facilities for resolution of disputes through various ADR processes such as Arbitration, Conciliation/Mediation, Con/Med-Arb, Mini-trial, Fast-track Arbitration, etc. The ICADR has framed various rules for conduct of ADR proceedings such as ICADR (Arbitration) Rules, 1996 (including provisions for Fast Track Arbitration), the ICADR (Conciliation) Rules, 1996, the ICADR Mini-Trial Rules, 1996, etc.

Moreover various other institutions have also proliferated in Delhi to provide institutional services in the field of arbitration, conciliation and mediation. Mediation centres have been established under the aegis of the Delhi High Court and the Government of NCT of Delhi all over the city. Myriad

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141 However other ADR processes are also available in Delhi. Eg. Bawa Masala Co. v. Bawa Masala Co. Pvt. Ltd, AIR 2007 Delhi 284 the Delhi High Court referred the dispute to be resolved by Early Neutral Evaluation.

142 Chapter II to Chapter VI contain a detailed exposition and analysis of individual ADR mechanisms namely mediation, dispute settlement through lok adalats & permanent lok adalats, arbitration and conciliation with reference to Delhi.

143 A society registered under the Societies Registration Act, 1860 on 31st May, 1995 at Delhi and having its regional centres at other places also.

144 Eg. Indian Council for Arbitration (ICA), FICCI Arbitration and Conciliation Tribunal (FACT), LCIA India etc. [These have been discussed in detail in the succeeding chapters].
avenues for private *ad hoc* ADR (including arbitration, conciliation and mediation) are also readily available in Delhi. Lok Adalats are being organized on a regular basis by the Delhi Legal Services Authority and Delhi High Court Legal Services Committee in Delhi and various Permanent Lok Adalats for different public utility services have also been established. ADR is therefore flourishing in Delhi with active support from the government, judiciary, bar and ADR Organizations and has tremendous potential in the future.

2. REASONS FOR THE STUDY

I had applied with the Board of Research Studies, Faculty of Law, University of Delhi in the year 2007 for being enrolled as a research scholar. At that point of time, being a part of the legal and judicial system, I was not oblivious of the fact that the ever increasing insurmountable arrears of cases piling up in the courts are operating as an alarming barrier in the path of dispensation of justice and the adversarial system, procedural wrangles, enormous costs and inordinate delays are adding to the plight of litigants who in their quest for justice have to tread through difficult waters for years together.

Undoubtedly, ADR was found to be one of the most promising remedies which had been advocated to counter this problem. ADR jurisprudence was a developing subject as far as India was concerned. The incorporation of section 89 CPC in the statute book had also given a powerful boost to the ADR movement. The Supreme Court had vociferously advocated the use of ADR mechanisms and had started taking various initiatives for popularizing ADR. The establishment of mediation centres was in progress. Yet the movement was in its nascent stage in comparison to the west. However, it was crystal clear that ADR was here to stay and in future it would develop into a highly specialized and omnipresent subject. I also had an occasion to deal with the issue day in and day out and it was apparent that the courts and judges would have a much greater role to play in the ADR movement in the coming years.
I also reviewed the literature available on the subject at that time and found that though, scholarly contributions were available with respect to individual components of ADR, yet a comprehensive and pervasive, academic and empirical analysis on ADR and ADR processes collectively was missing. This further encouraged me to undertake this academic pursuit and persuaded me to contribute meaningfully to the development of ADR jurisprudence. I felt that the time was apposite for a comprehensive analysis of the ADR mechanism in general as well as with respect to the different individual ADR processes collectively. How far ADR had catered to the needs and aspirations of the people and how far it had proved to be an effective and efficacious instrument for dispute resolution was the moot question, which needed to be answered.

Therefore when I wanted to register myself for Ph.D. in Law the idea of conducting an in depth research into the concept, law, practices, procedures and framework relating to ADR so as to ascertain its need, efficacy and success and to formulate plausible remedial measures for overcoming the shortcomings, if any and to offer suggestions for its better and more effective implementation and progress, immediately crossed my mind. I immediately applied with the board for being enrolled for Ph.D. (Law) on the topic Efficacy of Alternative Dispute Resolution.

Delhi is a legally advanced city and the variety, complexity and enormity of litigation in Delhi has no parallels. At that time also it was becoming clear that Delhi had great potential for development of ADR and indeed Delhi had been one of the pioneers in the adoption and implementation of ADR, guided by constant executive and judicial endeavour. The presence of individual ADR processes namely Mediation, Conciliation, Lok Adalats, Permanent Lok Adalats and Arbitration was evident in Delhi. A comprehensive research on ADR with respect to Delhi was however wanting. It was therefore felt that Delhi could serve as an ideal place for conducting an in depth research on ADR and thereafter the experiences and developments in the field of ADR in Delhi could also serve as a model for being replicated in other cities of India. Hence the topic, Alternative Dispute Resolution
Mechanism: A Case Study of Delhi was found most appropriate and approved by the Board.

3. OBJECTIVES OF THE STUDY

The objectives of this study are generally to explore, examine, ascertain, and analyze the concept, law and efficacy of ADR as a mechanism for expeditious and economical resolution of disputes and more specifically of four individual ADR processes namely mediation, conciliation, lok adalats & permanent lok adalats and arbitration with reference to Delhi. The specific objectives of this study are as under:

(i) To explore, discuss and analyze the nature, scope and concept of ADR and the different individual ADR procedures.

(ii) To explore, examine and analyze the reasons for the advent and growth of ADR in India.

(iii) To examine and analyze the law with respect to ADR and more specifically with respect to mediation, conciliation, lok adalats & permanent lok adalats and arbitration in India.

(iv) To examine and analyze the practices and procedures with respect to individual ADR procedures namely mediation, conciliation, lok adalats & permanent lok adalats and arbitration in Delhi.

(v) To ascertain, examine and analyze the framework and avenues for implementation of individual ADR procedures namely mediation, conciliation, lok adalats & permanent lok adalats and arbitration in Delhi.

(vi) To examine, discuss and analyze the utility and merits of ADR and more specifically of mediation, conciliation, lok adalats & permanent lok adalats and arbitration as ADR mechanisms with reference to Delhi.

(vii) To examine, discuss and analyze the issues pertaining to individual ADR procedures namely mediation, conciliation, lok adalats & permanent lok adalats and arbitration with reference to Delhi.
(vii) To examine, discuss and analyze the legislative shortcomings pertaining to individual ADR procedures namely mediation, conciliation, lok adalats & permanent lok adalats and arbitration with reference to Delhi.

(viii) To look for the causes for the limitations and shortcomings of individual ADR procedures namely mediation, conciliation, lok adalats & permanent lok adalats and arbitration with reference to Delhi.

(ix) To examine, analyze and demonstrate the utility, efficacy and success of ADR and individual ADR procedures namely mediation, conciliation, lok adalats & permanent lok adalats and arbitration with reference to Delhi.

(x) To formulate plausible remedial measures for overcoming the shortcomings, if any in this framework and to offer suggestions for the better and more effective implementation as well as progress and development of ADR and individual ADR procedures namely mediation, conciliation, lok adalats & permanent lok adalats and arbitration with reference to Delhi.

4. RESEARCH METHODOLOGY

The nature of the topic was such that doctrinal research and empirical research were both necessitated. Accordingly this research work has been a combination of doctrinal as well as empirical study.

Extensive doctrinal research has been done on the subject and legal literature from both India and foreign countries has been examined. References have been made to the foreign legislations wherever required. The research involved the study and analysis of both primary as well as secondary sources. The primary sources which were referred include the Constitution of India, various Indian and foreign legislations, case laws, etc. The secondary sources which were referred include various books, journals, articles, research papers, reports, newspapers, websites, etc.

During this research I carried out a detailed and meticulous examination of the law, practices and procedures of ADR and individual ADR mechanisms with reference to Delhi. Extensive doctrinal and empirical
research was conducted so as to ascertain the framework, structure and avenues of ADR generally as well as of the four individual ADR procedures namely mediation, conciliation, lok adalats & permanent lok adalats and arbitration in Delhi. This was followed by an in depth doctrinal and empirical research so as to ascertain their merits and accomplishments as well as to analyze the issues concerning them with reference to Delhi. A thorough analysis of the data collected enabled me to arrive at rational and firm conclusions with respect to the efficacy and success of individual ADR mechanisms as well as ADR collectively as a whole in Delhi and further to formulate various suggestions for the betterment and growth of the ADR revolution.

The empirical research was conducted through direct observation as well through interviews (both structured and unstructured) inter alia using the questionnaire method. The sampling method was utilized for collecting and analyzing data from various sources such as judges, legal practitioners, arbitrators, mediators, etc. who have dealt with ADR. Individual cases were also examined and analyzed so as to further understand the practical aspects in a better manner. This research work is also based on my personal observations and experiences as a judicial officer, a referral judge and a Lok Adalat judge and the experiences and opinions of the other members of the legal fraternity. I also attended various conferences, refresher courses and trainings on ADR which enabled me to ascertain the viewpoints of other members of the legal fraternity and understand the nuances and practicalities concerning the subject in a broader perspective.

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145 See Appendix 1.
146 Some of them being the National Mediation Conferences organized by the Mediation and Conciliation Project Committee, Supreme Court of India, the latest being the 3rd National Mediation Conference held on 07th-08th July, 2012 at Vigyan Bhawan, New Delhi, International Conference on Legal Aid: Catalyst for Social Change organized at the University of Delhi on March 17, 2012, Regional workshop on Speedy Justice organized by National Judicial Academy at Shimla from 28th to 30th March, 2008; conference/course on ‘Principles of Mediation’ at Manesar organized by the Delhi High Court from 7th to 9th August 2009, etc.
147 Conducted by the Delhi Judicial Academy, High Court of Delhi etc.
5. OVERVIEW OF CHAPTERS

CHAPTER I - INTRODUCTION

Chapter I, in the beginning, gives a concise yet fairly comprehensive exposition of the concept of ADR in general and then proceeds to explain the reasons for the advent of ADR in India and traces the growth of ADR in India. This chapter further highlights the requirement, relevance, utility and advantages of ADR and gives an insight into the customary ADR processes such as mediation, conciliation, lok adalats, arbitration, mini trial, early neutral evaluation, med-arb, etc. It then proceeds to give a brief overview of the state of affairs with respect to development of ADR in Delhi.

In the end this chapter also outlines the reasons behind this research, the objectives of the study, the research methodology and the sources of study and further gives a brief overview of all the chapters.

CHAPTER II – MEDIATION

Chapter II elaborately deals with mediation as an ADR mechanism with special reference to Delhi. This chapter first of all explains the concept and process of mediation, the role of the mediator and the advantages of mediation.

This chapter then proceeds to discuss the pre litigation and post litigation mediation framework and avenues available in Delhi giving specific details about the mediation centres at Delhi district courts, the Delhi High Court Mediation and Conciliation Centre (Samadhan), the mediation centres established under the aegis of the Delhi Dispute Resolution Society mooted by the Government of NCT of Delhi and other private avenues of mediation such as LCIA India, etc. It simultaneously expounds the concept, practices and procedure of court annexed mediation at the mediation centres at Delhi, *inter alia* referring to various judicial pronouncements on the subject including *Salem Advocate Bar Association v. Union of India*, AIR 2003 SC 189, *Salem Advocate Bar Association v. Union of India (II)*, AIR 2005 SC 3353 and *Afcons*
CHAPTER III – LOK ADALATS AND PERMANENT LOK ADALATS

Chapter III elaborately deals with Lok Adalats and Permanent Lok Adalats as ADR mechanisms with special reference to Delhi. This chapter, in the beginning explains the concept, evolution, law, practices and procedures of Lok Adalats and the advantages offered by them as ADR fora. Lok Adalats possess statutory recognition under the Legal Services Authorities Act, 1987 and regular references have also been made to the relevant statutory provisions and the significant judicial pronouncements.

This chapter further proceeds to discuss the framework of Lok Adalats as ADR fora in Delhi giving an overview of various Lok Adalats viz. continuous Lok Adalats, special Lok Adalats, mega Lok Adalats, etc. organized by Delhi Legal Services Authority at the district courts level and the Delhi High Court Legal Services Committee at the Delhi High Court level.

This chapter thereafter specifically highlights the achievements of Lok Adalats in Delhi after succinctly referring to the statistical data, examines and analyzes the issues pertaining to Lok Adalats with reference to the doctrinal research as well as the empirical research conducted in Delhi and discusses the efficacy of Lok Adalats as an ADR mechanism in Delhi.
The last part of this chapter deals with the concept of Permanent Lok Adalats and their status as an ADR mechanism and goes on to expound the framework of Permanent Lok Adalats in Delhi succinctly referring to the statistical data and concluding with an analysis of achievements and success of Permanent Lok Adalats in Delhi.

CHAPTER IV – ARBITRATION

Chapter IV elaborately deals with the adjudicatory ADR mechanism – Arbitration. This chapter first of all gives an insight of the concept of arbitration, types of arbitration and the historical background of arbitration in India. It then expounds the process of arbitration, which is governed by the Arbitration and Conciliation Act, 1996, referring to the relevant statutory provisions and the significant judicial pronouncements. It further explains the advantages of arbitration as a dispute resolution mechanism.

This chapter thereafter proceeds to elaborately discuss analyze the continuum of arbitration avenues available in Delhi specifically referring to various permanent arbitral institutions flourishing in Delhi, such as the 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.

This chapter further gives an outline of the arbitration cases before the Delhi High Court and the district courts in Delhi referring to the statistical data. The chapter then proceeds to examine and analyze the issues and concerns pertaining to arbitration with reference to the doctrinal research as well as the empirical research conducted in Delhi and ends by highlighting the pervasive presence of arbitration in Delhi despite the individual and procedure generated aberrations which have come to be associated with arbitration and endorsing its potential as an excellent ADR mechanism for resolution of commercial disputes.
CHAPTER V – CONCILIATION

Chapter V elaborately deals with conciliation as an ADR mechanism with special reference to Delhi. It first of all explains the concept and process of conciliation and the role of the conciliator and highlights the advantages of conciliation referring to the relevant provisions of the Arbitration and Conciliation Act, 1996 and the applicable case law.

This chapter further elaborately discusses the distinction between mediation and conciliation, which are fundamentally similar processes being species of the generic process of plain facilitated negotiation.

This chapter thereafter expounds a range of conciliation options available in Delhi, specifically referring to institutional conciliation under the auspices of Indian Council of Arbitration (ICA), International Centre for Alternative Dispute Resolution (ICADR) and FICCI Arbitration and Conciliation Tribunal (FACT) and also gives an overview of conciliation under specific legislations in Delhi.

The last part of the chapter examines and analyzes the issues pertaining to conciliation with reference to the doctrinal research as well as the empirical research conducted in Delhi and highlights the inadequate use of conciliation at the post litigation stage on account of the preferential treatment given to mediation and ends by asserting the immense potential of conciliation as an ADR mechanism and the requirement of giving adequate publicity to conciliation.

CHAPTER VI – ALTERNATIVE DISPUTE RESOLUTION UNDER SECTION 89 CODE OF CIVIL PROCEDURE

Chapter VI elaborately expounds the contribution of section 89 CPC to ADR jurisprudence with special reference to Delhi. In the beginning it explains the nature and ambit of section 89 CPC and highlights the reasons for incorporating section 89 CPC in the statute book. This chapter then proceeds to outline the procedure enshrined under section 89 CPC and also gives an
insight into the role of referral judges in ensuring that the salutary objective behind the incorporation of section 89 CPC is accomplished.

This chapter then proceeds to discuss and analyze the available ADR mechanisms under section 89 CPC with special reference to Judicial Settlement as an ADR mechanism specifically referring to the judgment of the Supreme Court in Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., JT 2010 (7) SC 616. It further analyses certain legislative drafting errors in section 89 CPC and the need for amending section 89 CPC to iron out the creases and overcome the shortcomings.

The last part of this chapter illustrates the efficacy and use of section 89 CPC and the individual ADR mechanisms available under section 89 CPC with reference to Delhi and impresses that section 89 CPC has resulted in a paradigm shift by the introduction of ADR in to the mainstream litigative process and has thereby helped in giving a massive boost to the ADR revolution.

**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 with brevity and precision. The second part of the chapter comprehensively expounds some of the plausible legislative, administrative and other allied remedial measures 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 of ADR in Delhi from a pragmatic point of view.