CHAPTER - IV

NON-ADJUDICATORY MODES OF ADR: CONCILIATION, MEDIATION AND NEGOTIATION

4.1 Conciliation

While Arbitration is being given preference over other modes of ADR in contractual disputes of commercial nature because of its adjudicatory nature, it is equally important to consider conciliation in civil matters brought before a Court or in industrial disputes before they are referred for adjudication.\(^1\) The term ‘conciliation’ is often used interchangeably with mediation. However, in India there has been a significant difference between the ‘conciliation’ and ‘mediation’. Conciliation has been given a statutory status right from the Code of Civil Procedure, 1908 (Order XXXIIA Rule 3), the Industrial Dispute Act, 1947 (section 12) and the Hindu Marriage Act, 1955 (section 23) and Arbitration and Conciliation Act, 1996 (Part III) which is quite similar to the American concept of Court annexed mediation. But, in absence of well-structured procedure backed by statutory sanctions, conciliation could not achieve the degree of popularity given to it in the USA and other economically advanced countries.\(^2\) In India, another impetus towards the conciliation was taken in the state of Himachal Pradesh in 1984 when ‘Conciliation Project’ was started under the direction of the then Chief Justice P.D. Desai from September 1, 1984. It consisted of a unique pre-trial, in-trial and post-trial conciliation schemes, which were operationalized

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\(^2\) Ibid. at 87.
by subordinate judiciary as well as High Court. Rule 5-B, Order XXVII and Rule 3, Order XXII-A, The Code of Civil Procedure, 1908 (as amended in 1976) have been recognized by the High Court of Himachal Pradesh as having the potential for reaching justice especially to the underprivileged sections of the society. This made the High Court of Himachal Pradesh as the first one in the country to take the scheme of conciliation through the Subordinate Courts.\(^3\) Under it, in a span of around two years till December 31, 1986 from its inception 6963 cases were resolved. This experience was in the nature of the Michigan Mediation\(^4\) and Mediation tried in Canada. Law Commission of India\(^5\) strongly recommended the project like that of Himachal Pradesh to the other States.

The another impetus came from the statutory recognition accorded to conciliation in the Arbitration and Conciliation Act, 1996, which for the first time in India laid down a well-structured law of conciliation. This Act is based upon the UNCITRAL Conciliation Rules and has the advantage of universal familiarity and can be used for settlement of domestic disputes as well as international commercial disputes.

Part III of the Arbitration and Conciliation Act, 1996 relates to conciliation between the parties at dispute which arises out of legal relationship e.g. husband and wife, father and son etc., which may be contractual like a Mohammedan marriage or a ritual relationship like the Hindus.

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4. A court-related ADR procedure or pre-trial mediation evolved in the USA insisted upon by Courts. This was evolved by the law courts in Michigan and popularly known as Michigan Mediation.

5. Through its Reports nos. 77 and 131.
Conciliation generally is a non-binding process in which an unprejudiced third party, the conciliator, assists the parties to a dispute in reaching a mutually agreed resolution of the dispute. In the USA the procedure is described as ‘mediation’ in which, it is said that emphasis is, in comparison with conciliation, on more positive role to be played by the neutral in assisting the parties to arrive at an agreed settlement. The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute. A conciliator is guided by the principles of objectivity, fairness and justice. He is always supposed to deliberate upon the rights and objection of the parties, the usages of the trade concerned and the circumstances surrounding the dispute including any previous business practices between the parties.

4.1.1 Conciliation and United Nations


4.1.2 Conciliation in Indian Context

The conciliator, upon his/her appointment, calls upon the parties to present a written summary of their respective cases together with the relevant documents. After going through the summary of the

\(^6\) Read also as mediation, Art. 1(3) of the Model Law on International Commercial Conciliation provides that for the purpose of this law, ‘conciliation’ means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or person (conciliator) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.
case filed by each party, the conciliator holds a joint meeting with the parties where each party makes a brief oral presentation of its case. Thereafter, the conciliator holds private meetings with each party separately to further clarify its case and to discuss the merits of the case, guiding the party in respect of the legal position and the requirements to substantiate the claims. While doing so, he/she always tries to bring the parties closer to an agreement. Where the parties are so inclined he/she may even suggest a settlement for acceptance by the parties. If the conciliator receives factual information from the party, he/she discloses the substance of that information to the other party so that it may have an opportunity to present its explanation, if any. At the same time if there is any information which is required by any party to be kept confidential, it is not disclosed. Where the parties to dispute reach to an agreement of settlement, the conciliator holds a final joint sitting for drawing up and signing a settlement agreement by the parties. The parties to such agreement are bound by the settlement. The conciliation proceeding may be initiated either during the pendency of case before court or during the pendency of arbitral proceeding. If such conciliation succeeds, they report to the Court or arbitral proceeding as the case may be, and the respective Court or Arbitral Tribunal may pass a decree/award in terms of such settlement.

In India, the Arbitration and Conciliation Act, 1996 in its Part III vehemently describe the proceedings relating to the Conciliation. Part III of the 1996-Act covering sections 61- 81 provides for scope, commencement, confidentiality etc. of the conciliation proceedings. In conciliation proceedings, particularly as per the provision of
section 75 of the Arbitration and Conciliation Act, 1996 a conciliator is bound to keep confidential all matters relating to the conciliation proceedings. Even the settlement agreement may also be kept confidential unless it is necessary for the purpose of implementation.

Conciliation is becoming popular as a mode of ADR for settling the disputes amicably. It offers a more flexible alternative in a large number of cases. Since conciliation proceeding makes a person free to reserve the freedom of the parties to withdraw from conciliation without prejudice to their legal position inter se at any stage of the proceedings. Conciliation is cost-effective and generates quicker resolution of dispute. Conciliation proceeding can easily be stayed away from the problems like corruption. It would thus be said that dispute resolution by conciliation is a better alternative to the formal adversarial justice system and even to arbitration and other ADR procedures. The 2002 UNCITRAL Model Law on International Commercial Conciliation defines conciliation as:7

... a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (the conciliator) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

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Further, conciliation process is a more formal process as compared to the mediation as noted by Bunni. He said.  

Conciliation is a more formal process than mediation and it could generally involve the engagement of legal representatives, thus making it a more expensive process than mediation. There is, however, the added advantage that should no amicable solution be reached, the conciliator has the duty to attempt to persuade the differing parties to accept his own solution to the dispute.

4.2 Mediation

Settlement of disputes between parties through mediation is considered to be the best option available to the disputants. Mediation is a process in which a third neutral person works with the parties in order to reach towards the amicable settlement of dispute. In its Consultation Paper, the Law Reform Commission defined ADR as:

... a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes.  

Mediation is the mode of the ADR movement, which is considered to be an appropriate dispute resolution. Mediation is best suited mechanism as compared to litigation. In litigation, the focus is on the past, on establishing blame and liability and a win-lose result.

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9 LRC CP 50-2008 at 2.12.
In mediation, the emphasis is on the future, on cooperation and communication, on sustainable solutions, which are a win-win for all parties.\(^\text{10}\) In a mediation due importance is given to long-term interests of the disputants, parties are shown their weaknesses, not just the strengths and best suited alternatives to a negotiated agreement are provided by giving liberty to the parties for choosing best options for settlement. Mediation is a voluntary process where the parties retain decision-making rights all through and are only bound when they enter into a written agreement concluding the mediation.\(^\text{11}\)

Mediation is an extremely elastic process in true sense as it can be initiated either in disputes before they are taken to Court or to disputes of which Courts have taken cognizance or even after a Court verdict has been given.

Mediation as a mode of dispute resolution has been in practice for many centuries in one form or the other. A mediator is a person who settles disputes between the parties as a friend. The need for the use of mediation as a mode of ADR mechanism is on rise in contemporary world. It is the adaptability of mediation process that makes it suitable for the resolution of a broad range of disputes (ranging from family disputes to complex and multiparty disputes in the commercial sphere). So mediation may be described as facilitated negotiation or assisted negotiation of dispute settlement. The most important aspect of mediation is that the mediator cannot impose a decision on the parties. The mediator controls the process, but the

\(^{10}\) Paper by Sriram Panchu for the conference on ADR/ Mediation sponsored by the Law Commission of India– New Delhi (3-4 May, 2003).

\(^{11}\) Ibid.
outcome is always in the hands of the parties.\textsuperscript{12}

Mediation is more broadly defined as: "a facilitative process in which disputing parties engage the assistance of an impartial third party, the mediator who helps them to try to arrive at an agreed resolution of their dispute."\textsuperscript{13}

Mediation is the process in which parties to the dispute are given a platform whereby there is no factor of coercion or no apprehension of losing the case, as it is there in adversarial system. Parties are always given an opportunity for quitting the mediation at any point of time of mediation process. A mediator does not impose a resolution on the parties. Mediation aims to assist two or more disputants in reaching to an agreement. Mediation works purely as facilitative: the practitioner has no advisory role. Instead, a mediator seeks to help parties to develop a shared understanding of the conflict and to work toward building a practical and lasting resolution.\textsuperscript{14} Mediator's role is limited to facilitating the disputing parties to freely articulate their grievances in his presence so that they may recognize the area of difference clearly and restrict the same to acceptable limits. The mediator is supposed to collect all the facts from the contending parties and reformulate them concisely so that the parties can focus on the really problematic areas. The mediator can confabulate with contending parties individually or in each other's presence, to make them see the areas of disagreement and agreement clearly. It is called 'shuttle diplomacy', since the mediator acts merely

as a shuttle or sounding board for the parties to articulate their respective concerns and also confide the bottom line to the mediator in private.\textsuperscript{15}

In his famous book ‘The Mediation Process: Practical Strategies for Resolving Conflict’, Christopher W. Moore describes mediation in the following words:

Mediation is essentially a negotiation that includes a third party who is knowledgeable in effective negotiation procedures and can help people in conflict to co-ordinate their activities and to be more effective in their bargaining. Mediation is an extension of the negotiation process in that it involves extending the bargaining into a new format and using a mediator who contributes new variables and dynamics to the interaction of the disputants.

The process of mediation thus may be summarized by saying that the mediator opens up communication, encourages parties to participate, identifies facts and issues, focuses them on their long-term interest, gets them to be realistic about their case and its prospects, encourages them to come up with options for settlement, and helps them to refine those options to yield an agreement that both parties see as a fair and proper end to their dispute.\textsuperscript{16} Mediation being a process of simplicity, informality, flexibility and economy is best suited towards realizing the access to justice. Mediation process is not

\textsuperscript{15} J. Bellur Narayanasamy Shrikrishna, "Mediation: An idea whose time has come", \textit{HLM} (2009), p. 23.

only helpful in resolving the disputes amicably outside the court but it is also a means to prevent the dispute in future.

Furthermore, one of the unique features of mediation process is that it is strictly confidential. The mediator is always required to inform the parties that communications between them during the discussions and the mediation processes are to be private and confidential. The information discussed in mediation process lacks the evidentiary values before the Court of Law, in the event that the matter does not settle at mediation and proceeds to a court hearing. This definitely provides an opportunity to the disputants for acting fearlessly for resolving their disputes. The essential element of confidentiality in mediation is seen as one of the key ingredients to encourage disputing parties to negotiate with each other in order to resolves their dispute. Mediation has opened the door for parties in conflicts to resolve their differences through non-traditional judicial forums. In contemporary period, the mediation has brought to light the processes, or alternatives to litigation, that enable parties to resolve their differences without paying the sky rocketed cost associated with litigation. Mediation process is considered the need of present hour for its ability to resolve disputes in amicable manner, reduce backlog of cases, and reduce overall legal costs. As an ADR mechanism, mediation has become quite popular in commercial disputes in Europe. The European Commission published a green paper on developing commercial mediation with the European Union in October 1999. The Green paper was result of research groups in the centre for effective dispute resolution set up by some of the European countries like Italy, Belgium and Netherlands. United Nations
Commission on International Trade Law (UNCITRAL) also drafted a model law for mediation and conciliation.

4.2.1 Mediation and Courts in U.S., U.K and India

The United States of America has been a forerunner in using the mediation process in modern times. In 1910, Roscoe Pound, a great jurist of sociological school of jurisprudence, delivered a powerful indictment of American legal system. He said that:

• The common law doctrine of contentious procedure turns litigation into a game. The idea that procedure must of necessity to wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel presents it according to the rules of the game, not to search independently for truth and justice.

• The inquiry is not: What do substantive law and justice require? Instead, the inquiry is: Have the rules of the game been carried out strictly?

• It leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport.

• It turns witnesses, and especially expert witness, into partisans pure and simple.

• It leads to sensational cross-examinations, which have made the witness stand the slaughter house of reputations.

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17 See, Sriram Panchu, _op. cit._, p. 262.
18 It was addressed to the bar at Minnesota and was titled “The causes of popular disaffection with the administration of justice”.
• It prevents the Trial Court from restraining the bullying of witnesses and creates a general dislike, if not fear, of the witness function which impairs the administration of justice.

This was an attack on the entire remedial jurisprudence of America. His remarks were denounced as disparagement of the judiciary and bar. In 1976, another conference was held at Minnesota on the same theme of ‘the causes of disaffection with the administration of justice.’ And lest anyone was in any doubt as to who inspired this meet, it was called the Pound Conference.\(^{19}\) The conference included ADR in the agenda, propagating the view that the legal profession should be receptive to processes other than standard litigation. The Conference’s central question was: “How can we serve the interests of justice with processes speedier and less expensive?” Professor Frank Sander\(^ {20}\) of the Harvard Law School laid down the platform for exploring the alternatives ways of resolving disputes outside the courts, pointing out that there existed ‘a rich variety of different processes which would singly or in combination, provide far more effective conflict resolution.’ He gave the idea of multi-door courthouse and put forth the significant characteristics of various disputes resolution mechanism: adjudication by courts, arbitration, mediation, negotiation and blend of these and other devices. He advocated screening and evaluation of cases with a flexible and diverse panoply of dispute resolution processes.

Pound Conference recorded a definite resolution to embrace


\(^{20}\) Widely credited with being a father of the field in the United States as a result of his paper, The Varities of Dispute Processing, presented at Pound Conference, 1976.
ADR, especially mediation. Conference was followed by legislation requiring the courts and Government to bring ADR measures to deal with congestion and delay and to encourage faster and less costly ways to resolve disputes.

In United Kingdom, the courts had been taking the proactive steps to promote the use of ADR along with the formal justice administration system. Justice Cresswell made a statement at a sitting of commercial court:\(^\text{21}\)

While emphasizing the primary role of the Commercial Court as a form for deciding commercial cases, the judges of the Court wish to encourage parties to consider the use of alternative dispute resolution, such as mediation and conciliation, as a possible additional means of resolving particular issue or disputes. The judges will not act as mediator or be involved in any ADR process but will in appropriate cases invite parties to consider whether their case, or certain issues in their case, could be resolved by means of ADR. By way of example only, ADR might be tried where the costs of litigation are likely to be wholly disproportionate to the amount at stake.

Further, Woolf reports\(^\text{22}\) played a remarkable role by exploring the English legal system and recommended a strong case for ADR. Woolf reforms used the carrot and stick approach to promote ADR processes including mediation to tackle the unholy trinity of

\(^{21}\) In December 1993, as quoted in the foreword by Fali S Nariman in Sriram Panchu, \textit{op. cit.}

\(^{22}\) Lord Woolf, Master of the Rolls, produced an interim report in 1995 and final report in 1996.
complexity cost and delay.\textsuperscript{23} Lord Woolf, in his Report on the civil justice system of England identified a number of principles which the justice system should meet in order to ensure ‘access to justice’. The system according to him should:\textsuperscript{24}

- be just in the results it delivers;
- be fair in the way it treats litigants;
- have appropriate procedure at reasonable cost;
- deal with cases with reasonable speed;
- be understandable to those who use it;
- be responsive to the need of those who use it;
- provide as much certainty as the nature of particular cases allow; and
- be effective: adequately resourced and organized.

Consequently, in England when the new Civil Procedure Rules were drawn up in 1998 they contained a number of express provisions designed to promote ADR. The very first rule laid down an overriding objective of the civil procedure Rules, namely that of ‘enabling the court to deal with cases justly’. This includes ‘saving expense’ and ‘dealing with the case in ways which are proportionate….’ Instead of leaving it to the litigants to make the running, the new Rules placed a duty of ‘active case management’ on the court and this includes:

Encouraging the parties to use an alternative dispute resolution procedure if the court considers that

\textsuperscript{23} Attributed to Neil Andrews of Cambridge University, as quoted in Sriram Panchu, \textit{op cit.}
appropriate and facilitating the use of such procedure.

This was the first time that ADR was officially recognized by the Rules of court in United Kingdom. The willingness of the English court to put their credence behind the active deliberation of ADR processes at all stages of the dispute, up to the appellate stage can rightly be regarded as welcome developments in legal reform.

4.2.2 Mediation in Indian Context

In India the enactment of the Arbitration & Conciliation Act, 1996, gave Arbitration and Conciliation a statutory recognition. The term ‘conciliation’ even though considered synonymous and used interchangeably with ‘mediation’ in most countries, was given a slight difference in the statute. The concept of mediation and conciliation was made familiar or given official Court recognition only in 1996 and by the amendment of the Civil Procedure Code, 1908 in 1999 by inserting section 89. The statutory language of the Arbitration and Conciliation Act, 1996 and of section 89 of the Civil Procedure Code, 1908 shows the existence of differing definitions and meanings for ‘conciliation’ and ‘mediation. Generally both mediation and conciliation provide assistance to disputants by an impartial third party in resolving disputes by mutual agreement. However, a conciliator can be a pro-active and interventionist,²⁵ because of his statutory power ‘to make proposals for settlement of the dispute’ and to formulate and reformulate the terms of the settlement agreement.²⁶

The definition of ‘conciliator’ in the statute is consistent with Rules

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²⁵ Anil Xavier, “Mediation: Its Origin & Growth In India”, HIJPLP Vol. 27.
²⁶ Arbitration and Conciliation Act, 1996, Sec. 73.
for Conciliation promulgated by the United Nations Commission on International Trade Law (UNCITRAL). The Arbitration and Conciliation Act, 1996 was the result of several recommendations of various institutions or bodies like Law Commission Report, Judicial pronouncements27 or the International mandate of UN framework.

It is a matter of concern that even after the enactment of these provisions no concrete steps have been taken by the Courts or by the lawyers to utilize the provisions and encourage the litigants to choose the method. Even though some mediation training and orientation programs were conducted, it did not create the real effect. Rather the amendment of the CPC requiring pending court matters to ADR was not appreciated by lawyers and the amendment was challenged.28 Holding the amendment as constitutional, the Supreme Court of India set up a committee for scrutinizing section 89 for framing the modalities or procedure for its effective implementation particularly for mediation. The Committee was headed by former Judge of the Supreme Court of India and the then Chairman of the Law Commission of India, Justice M. Jagannath Rao to ensure that the amendments become effective and result in quick dispensation of justice. The Committee filed its report and it was accepted and the hon’ble Supreme Court of India pronounced a landmark decision

27 The contribution of Supreme Court of India which initiated an Indo-US exchange of information between high-ranking members of the judiciary can rightly be said as a praiseworthy stride. As part of this effort, former Chief Justice A.M. Ahmadi met with US Supreme Court Justices Ruth Bader Ginsburg and Antonin Scalia. In 1996, Mr. Justice Ahmadi formed a national study team to examine case management and dispute resolution as part of a joint project with the United States. This Indo-US study group suggested procedural reforms, including legislative changes that authorized the use of mediation

Salem Advocate Bar Association, Tamil Nadu v. Union of India (II)\textsuperscript{29}, where it held that reference to mediation, conciliation and arbitration are mandatory for Court matters. This judgment of the Supreme Court of India seems to be the real turning point for the development of mediation in India. The Committee headed by Mr. Justice Jagannath Rao appointed by the Supreme Court in the Salem Bar Association II v. Union of India\textsuperscript{30}, formulated the Model Rules to implement section 89— the Civil Procedure Alternative Dispute Resolution Rules\textsuperscript{31} and the Civil Procedure Mediation Rules.\textsuperscript{32} The Supreme Court of India has also observed that the Model Rules, with or without modification, may be adopted by the High Courts concerned for giving effect to section 89(2)(d) of the Code. Consequently High Courts of the respective States adopted or prepared the Rules governing the procedure of the process of mediation in smooth way by prescribing the detailed procedure therein. Since there was no statutory provision for implementing the mediation process, the Rules framed by the respective High Courts explicitly bridged the gap left by the amendments in 1999 of the Code of Civil Procedure.

In the judgment of Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.\textsuperscript{33}, the Supreme Court of India held that the Model Rules do not automatically apply and that it is for the High Courts to formulate its Rules, taking guidance from the Model

\textsuperscript{29} 2005 (6) SCC 344.  
\textsuperscript{30} Ibid.  
\textsuperscript{31} Civil Procedure Alternative Dispute Resolution Rules, 2003.  
\textsuperscript{32} Civil Procedure Mediation Rules, 2003. Framed by the Committee, in modification of the draft rules circulated earlier, after considering the responses to the consultation paper.  
\textsuperscript{33} (2010) 8 SCR 1053.
Rules as they think fit. The Model Rules are guidelines and do not have the force of law.

4.2.3 The Model Civil Procedure Mediation Rules

These Rules are made to provide for the procedure under section 89(d), where the court refers the matter to the mediation. These Rules deal with the appointment, empanelment, qualification and disqualification of the mediators. These Rules also provide for venue, procedure and role of a mediator. These Rules explicitly dispensed with the procedural aspect of the Code of Civil Procedure, 1908 or the Evidence Act, 1872. These Rules give paramount importance to the privacy, confidentiality and immunity and restrict the communication between mediator and Court. The Supreme Court of India in Moti Ram (D) TR. LRS. v. Ashok Kumar dealt with a matter wherein the mediator in his report had disclosed certain details, including the offer and counter offer made by the parties. The Court expressed its dissatisfaction while stating that:

The mediation proceedings are totally confidential proceedings. This is unlike proceeding in courts which are conducted openly in public gaze. If the mediation succeeds, then the mediator should send the agreement

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34 The Model Civil Procedure Mediation Rules, 2003, Rules 2-5, 7, 10.
35 Id., rule 6 provides that the mediator shall conduct the mediation either at venue of Lok Adalat or permanent Lok Adalat, or any place identified by the District Judge within the court precincts, or any place identified by the Bar Association or State Bar Council or any other place as may be agreed upon by the parties subject to the approval of the court.
36 Id., rule 11.
37 Id., rule 16.
38 Id., rule 12.
39 Id., rule 21.
40 Id., rule 20.
41 Id., rule 23.
42 Civil Appeal No(s) 1095 of 2008.
signed by both the parties to the court without mentioning what transpired during the mediation proceedings. If the mediation is unsuccessful, than the mediator should only write one sentence in his report and send it to the court stating that ‘mediation has been unsuccessful’. Beyond that mediator should not write anything which was discussed, proposed or done during the mediation proceeding....

On a failure of mediation process, a mediator is supposed to refer the matter to the Court without any opinion or elaboration, so that the Court is not prejudiced in any manner. The Courts take up the matter again. As correctly said by Justice Sandra Day O’Connor, a retired Judge of United States Supreme Court: "The courts should not be the places where resolution of disputes begins. They should be the places where the disputes end, after alternative methods of resolving disputes have been considered and tried." The Rules of mediation do also prescribe the ethics to be followed by the mediator.

Taking notice of various lacunae in the drafting of section 89, Mr. Justice R.V. Raveendran has observed:

Section 89 apparently was drafted in a hurry. It is not very happily worded. It is not very practical. But the object behind section 89 is sound....

After pointing out various anomalies, the Supreme Court directed that clause (c) and (d) of sub-section (2) of section 89

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43 Quoted by Her Excellency, the then President of India Shrimati Pratibha Devisingh Patil at the inauguration of the 'National Seminar on Mediation' New Delhi, 7th July, 2012.
44 The Model Civil Procedure Mediation Rules, 2003, Rule 27.
deserves to be interchanged.\textsuperscript{46} The sum and substance of what the court discussed elaborately is that:

Know the dispute; exclude unfit cases; ascertain consent for arbitration or conciliation; if there is no consent, select \textit{Lok Adalat} for simple cases and mediation for all other cases, reserving reference to Judge–assisted settlement only in exceptional or special cases.

Consequently, the Law Commission of India recommended a number of changes to be made in the section 89 of Code of Civil Procedure, 1908.\textsuperscript{47}

\textbf{4.2.4 Mediation in Arbitration}

The term ‘mediation in arbitration’ seems to be of ambiguity in nature but it is very much under the umbrella of ADR mechanism. ADR methods in arbitration are now considered not only as an alternative to litigation but as an alternative to arbitration itself.\textsuperscript{48} ADR should not only compliment or expedite arbitration but should remain as it had earlier been— an integral part of it. Unfortunately, the role of an arbitrator has undergone a sea change from the role of promoting compromise by giving a helping hand to the parties to dispute to the role of sophisticated arbitration which has been jettisoned in the mistaken belief that mediation is not a cup of tea of an arbitrator. The wordings of Lord Mustill seem to be well defining when he said: “we have now lost the culture of compromise.” If the

\textsuperscript{46} Supra note 33.

\textsuperscript{47} Law Commission of India, 238\textsuperscript{th} Report on Amendment of Sec. 89 of the Code of Civil Procedure, 1908 and Allied Provisions (2011).

\textsuperscript{48} Henry Brown and Arthur Marriott as quoted in foreword by Fali S Nariman in Sriram Panchu, \textit{op. cit.}
arbitrator thinks at any time of the arbitral proceedings that the disputed matter may easily be resolved by adopting any other modes of ADR mechanism then arbitrator should go ahead in order to realize the true objective of the ADR i.e. the amicable settlement of the disputes.\textsuperscript{49}

\subsection*{4.2.5 Win-Win Situation}

Mediation affords a 'win-win' situation to both parties instead of an adversarial situation. It allows the parties to keep control over the interest involved in the process instead of getting bogged down in technocratic and burdensome legal procedure in the effort to find a legal solution. Tardy legal procedure is dispensed with in mediation process and a lot of stress is given to confidentiality between parties. The mediator is an unbiased who does not impose his/her solution on the parties, but enables them to ventilate their concerns. He merely reshapes their concerns in focused language, free of emotional content. This process enables each party to clearly appreciate the viewpoint of the other. Without actually participating in the resolution of the dispute, the mediator orients the disputants to become more accommodating towards each other and helps them to discover commonalities in their opposing stands. This enables the disputants to arrive at a mutually agreeable solution. During the mediation proceeding the parties and mediator are free to withdraw and step out without having to give reasons for it. Mediation enables the parties to keep confidential the facts disclosed to the mediator

\textsuperscript{49} See Arbitration and Conciliation Act, 1996, Sec. 30, which provides that Tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.
from each other, and others. Even the fact that there is a dispute subjected to mediation can be kept confidential.\(^{50}\)

Unlike resolution of dispute by the Court, which must of necessity be done within the rigid framework of legal rules, the mediator can act innovatively and enable the parties to reach creative solution to the dispute. This creative resolution of dispute makes mediation an acceptable alternative to the litigation process. It also helps in preserving relationships—business or personal. Businessmen realize that the time spent on mediation is worth the efforts in terms of money and business. Mediation scores over litigation in another important respect. Litigation in courts is adversarial; the judge is merely the umpire to ensure that the combatants follow the rules of the game. Court cases are decided more often on the "sporting theory of justice" as Roscoe Pound and others before him have said. The judge hardly has scope for rendering improvisations or creative solutions. A Court may decide a case on a legal issue, like limitation or jurisdiction, in which case the losing party gets the feeling of not having been heard on the merits of the case. The decision may terminate the proceedings, but not the dispute.

What will mediation do to the legal community?

- Firstly, the harassed and overburdened judges get respite from the pressure of unchecked flow of litigation into courts;
- Second, a working knowledge of the mediation proceed may enable judges to spur settlements in courts;
- Third, if judges can change their mindset, it will provide post-

\(^{50}\) Code of Civil Procedure Mediation Rules, 2003, Rule 20, which dealt with confidentiality in mediation process.
retirement work in abundance.

For lawyers, with the ability to learn newer techniques, mediation provides great opportunity to do professional service to society by satisfactory resolution of conflicts without sacrificing remunerations.

In the rapidly changing contemporary world, the methods adopted to resolve increasingly complex issues will determine the maturity and the stability of the system. People are now looking for early solutions that can put an end to their differences, so that they can move forward to seize new opportunities, and not be held back due to pending disputes and non-clarity about their claims. It is here that mediation by offering a simple, quick and easy solution becomes relevant.

According to Mahatma Gandhi, the true function of a lawyer is "to unite parties driven asunder."

Mediation is ideal and would work best when there is a relationship between parties which needs to be preserved at all cost. It is most suited in such cases because litigation raptures relationships, as disputants indulge in allegations and counter allegations once they descend to the arena of courts; law suits arising out of relationships are most bitterly thought and protracted. The process of mediation is not confined only to such cases of close relationships. There are a number of other areas amenable to the mediation process, such as business transaction, contracts, financial disputes, real estate and construction disputes, consumer cases, employment disputes, banking and insurance disputes, insolvency cases, accident cases, doctor-
patient disputes, landlord-tenant disputes, partnership disputes, family disputes, matrimonial disputes and public disputes.

In this background, an important distinguishing feature between mediation and conciliation may be found in an analysis between a rights-based approach and an interest-based approach to resolving a dispute. As the Law Reform Commission\(^{51}\) of Australia noted in its Consultation Paper that interest-based dispute resolution processes expand the discussion beyond the parties’ legal rights to look at the underlying interests of the parties, they also address parties’ emotions and seek creative solutions to the resolution of the dispute. The focus of these processes is on clarifying the parties’ real motivations or underlying interests in the dispute with the aim of reaching a mutually acceptable compromise which meets the real interests of both parties. It is generally accepted that mediation is a purely interest-based dispute resolution process. However, in conciliation, there can be a greater focus on the legal rights on the parties as opposed to their underlying interests. But to the contrary, in India one of the reasons for the lack of enthusiasm for mediation of commercial disputes is that, as the Courts in India do not impose heavy costs on frivolous litigation, the costs of conducting litigation is often small compared to the advantages to be gained by delaying the performance of the commercial obligations. It is seen many times that commercial parties are more likely to go with litigation to gain such advantages, and are less interested in ADR to seek a mutually agreeable settlement.\(^{52}\)


4.3 Negotiation

Negotiation is a non-binding procedure in which discussions between the parties are initiated without the intervention of any third party with the object of arriving at a negotiated settlement of the dispute. Negotiation is a “consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter.”53 The term Negotiation originated from the Latin word ‘negotiari’, meaning “to carry on business.” Considering that more than 90 per cent of all lawsuits in the United States resolve through settlement or plea deals,54 and almost all lawyering activities involve negotiation of some sort, the importance of negotiation theory in the practice of law cannot be overstated. Objectivity and willingness to arrive at a negotiated settlement on the part of both the parties are essential characteristics of negotiation. The greatest win India witnessed in its history i.e. independence from the colonial rule, could be possible only through the negotiation between the freedom fighters and the Britishers. Negotiation is primarily a common means of securing one’s expectation from others. It is a form of communication designed to reach an agreement when two or more parties have certain interests that are shared and certain others that are opposed.55 Negotiation is the mode of ADR which is required to be devised in the very beginning of the disputes. The only thing that

needs to be overcome is the ‘ego problem’ by the parties so that they
go for the negotiation to sort out the mutual problems unhesitatingly.
As pointed out by Aristotle: “One can become angry; that is easy. But
to be angry with the right person, to the right degree, at the right time,
for the right purpose— that is not easy.” The fundamental principles
of the negotiation process, as highlighted by a scholar, can be put as:

- Separate the people from the problem.
- Focus on interests, not position.
- Invent options for mutual gain.
- Insisting on objective criteria.

Negotiation ought strictly to be viewed simply as a means to an
end; it is the road the parties must travel to arrive at their goal of
mutually satisfactory settlement. But like other means, negotiation is
easily converted into an end in itself; it readily becomes a game
played for its own sake and a game played with so little reserve by
those taken up with it that they will sacrifice their own ultimate
interests in order to win it.\footnote{L. Fuller, \textit{Anatomy of the Law} (1968), p. 128. Quoted in Andrew F. Amendola “Combating
Adversarialism In Negotiation: An Evolution Towards More Therapeutic Approaches”, \textit{4 NUJS L. Rev.} 347 (2011).}

The adversarial court system may result into constant tension,
mistrust and misunderstanding between litigants and can often result
in fewer settlements. It also tends to remove the client from the
negotiation equation, projecting the appearance that the client has
hired the attorney to speak for him/her, and thus relegated him/her to

\footnote{L. Fuller, \textit{Anatomy of the Law} (1968), p. 128. Quoted in Andrew F. Amendola “Combating
Adversarialism In Negotiation: An Evolution Towards More Therapeutic Approaches”, \textit{4 NUJS L. Rev.} 347 (2011).}
a position of self-imposed preclusion. The client’s limited involvement may result in the attorney’s placement of monetary goals above such interests as happiness, well-being and respect (which may be of greater importance to the client).\textsuperscript{57} Furthermore, an attorney’s adversarial approach can lead to declining professionalism, overzealous advocacy, incivility, excessive litigiousness, and violations of the ethical codes.\textsuperscript{58}

4.3.1 Developments in Negotiation

Negotiation need not be a deleterious process. In fact, it has the potential to be a curative process which brings disputing parties together to discuss and deliberate upon their differences, resolve conflict, and reconcile disagreement.\textsuperscript{59} Numerous alternatives to the adversarial approach have developed in the field of negotiation, many of which appear to be evolving towards a more therapeutic result for all parties involved. Among these approaches are the cooperative style, integrative bargaining, and collaborative lawyering.\textsuperscript{60} Most of these styles are not mutually exclusive, and different styles can be used in combination during a negotiation to achieve optimal results. A

\begin{footnotesize}
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\item[60] A related yet uniquely Indian process which combines “mediation, negotiation, arbitration and participation” called Lok Adalat has gained popularity in India. [t]he true basis of settlement of disputes by the Lok Adalat is the principle of mutual consent, voluntary acceptance of conciliation with the help of counsellors and conciliation. It is a participative, promising and potential ADRM. It revolves round the principle of creating awareness amongst the disputants to the effect that their welfare and interest, really, lies in arriving, at amicable, immediate, consensual and peaceful settlement of the disputes.
\end{itemize}
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good negotiator should be adept at alternating between various styles to accommodate particular issues that arise during a negotiation or to most effectively counter the negotiation style adopted by her/his counterpart.