CHAPTER -4

THE ALTERNATIVE DISPUTE REDRESSAL METHODS

INTRODUCTION

In India, ADR methods have a very ancient legacy. Indian civilization expressly encouraged the settlement of differences by Tribunals chosen by the parties themselves. An equivalent of it in the old Indian system is the ‘Peoples Court’ known as the ‘Panchayat’. The position outside India was akin in the sense; submission of disputes to the decision of private persons was recognised under the Roman law known by the name of Compromysm (compromise), arbitration was a mode of settling controversies much favored in the civil law of the continent. The Greeks attached particular importance to arbitration. The attitude of English law towards arbitration has been fluctuating from stiff opposition to moderate welcome. The Common Law Courts looked jealously at agreements to submit disputes to extra-judicial determination.\(^\text{140}\)

The word “Arbiter” was originally used as a non-technical designation of a person to whom controversy was referred for decision irrespective of any law. Subsequently the word “Arbiter” has been attached to a technical name of a person selected with reference to an established system for friendly determination of controversies, which though not a judicial process is yet to be regulated by law by implication. Arbitration is a term derived from the nomenclature of Roman law. It is applied to an arrangement for taking, and abiding by judgment of a

\(^{140}\) Russell on Arbitration, twenty second edition, 2003, p 362, para 8-002
selected person in some disputed matter instead of carrying it to the established Courts of justice. 

Before the enactment of Arbitration and Conciliation Act, 1996 the statutory provisions on arbitration in India were contained in three different enactments, namely, The Arbitration Act, 1940, The Arbitration (Protocol and Convention) Act, 1937 and The Foreign Awards (Recognition and Enforcement) Act, 1961. The Arbitration Act, 1940 laid down the framework within which domestic arbitration was concluded in India, while the other two Acts dealt with foreign awards. The Arbitration and Conciliation Act, 1996 has repealed The Arbitration Act, 1940, The Arbitration (Protocol and Convention) Act, 1937 and The Foreign Awards (Recognition and Enforcement) Act, 1961. The history of the Arbitration and Conciliation Act, 1996 has been discussed in the previous chapters of this study. The Arbitration and Conciliation Act, 1996 also defines the law relating to conciliation providing for matters connected therewith and incidental thereto on the basis of Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985. This modern law seeks to provide for an effective mode of settlement of disputes between the parties, both for domestic and for international commercial arbitration. Thus, an elaborate codified recognition to the concept of arbitration and conciliation is given in India by the enactment of The Arbitration and Conciliation Act, 1996. Its emergence is one of the most significant movements, both in terms of judicial reforms as well as conflict management. The alternative dispute redressal methods like arbitration, conciliation, mediation, and their hybrids have become a global necessity and the study on its utility is undeniable.

The ADR methods are seen to be speedier, more informal and cheaper than conventional judicial procedure. They provide a forum more convenient to the parties who can choose the time, place and procedure, for conducting the preferred dispute redressal process. Further, where the dispute concerns a technical matter, the parties have the opportunity to select the expert who possesses appropriate special qualifications or skills in that trade. The study precedes with the purpose that, alternative disputes redressal mechanisms, are to be encouraged among the disputants to reduce the delays and high pendency of cases in Courts. The alternative dispute redressal methods have to be looked up to with all earnest so that the litigant public has a faith in the speedy process of resolving their disputes with these processes\textsuperscript{142}.

4.1 LITIGATION AND ARBITRATION

‘Litigation’ is a Judicial controversy, a contest in a Court of law; a judicial proceeding for the purpose of enforcing a right\textsuperscript{143}. In Vide Mury Exportation Vs Khaitan and Sons\textsuperscript{144} case, it was held that, litigation and arbitration are both methods of resolving disputes, one in a Court of law while the other through a private Tribunal. Litigation is a Public Process. The Courts has the dignity, authority and attract public confidence. Free Legal aid is available in cases of litigation. In this process, any party can institute litigation. It follows adversarial procedure, thus formal and inflexible Rules and Procedures are strictly followed. In litigations, parties to the dispute have no voice in selection of adjudicators, Judge or Jury. Adjudicators apply the laws and the decisions of the High Court and Supreme Court are precedents for the subordinate Courts. Remedy in the form of appeal against decisions of the Court is available to the disputed

\textsuperscript{143} P.Ramanatha Aiyar’s (2002),’The Law Lexicon’,p1135.
\textsuperscript{144} AIR 1956 Cal 644,648.
parties. Remedies may include compensatory and punitive damages, injunctive relief. The complete process of litigation is generally expensive. In many cases, differences between the parties to the dispute are so highlighted that the parties sometimes take extreme positions in that adversarial atmosphere. Litigation usually ends in winning, loosing situation and compromise are rare, thus causing concern, anxiety and stress. Litigation is a process where justice is delayed due to the various auxiliary factors from the part of Litigants, Advocates and Judges along with the procedural complications involved in the process of litigation\textsuperscript{145}.

‘Arbitration’ is a private process, as the initiation of arbitration is under an agreement. It may be less adversarial, less formal, and flexible with the adoption of simpler procedures. Arbitration does not follow any formal rules of evidence. The findings are limited to some documents, with no interrogatories or depositions. Generally, the disputed parties select the Adjudicators. Adjudicators are selected based on their qualification and expertise. Their decisions do not formally set precedents to any other arbitration. Vacation of award is generally limited to arbitrator's misconduct and bias. Arbitrators normally are empowered to grant compensatory damages including provisional relief. All these factors usually reduced costs and makes way for delivery of quick justice\textsuperscript{146}. The process of ‘Conciliation’ and ‘Mediation’ is distinguishable from Arbitration as the disputed party’s willingness to submit to mediation or conciliation does not bind them to accept the recommendation of the conciliation or mediator but an arbitrator’s award, by contrast, is binding on the parties\textsuperscript{147}.

4.2 ARBITRATION AND CONCILIATION ACT, 1996

With a view to give effect the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign awards and to define the law relating to conciliation, the Arbitration and Conciliation Bill 1995\textsuperscript{148} was introduced in the Rajya Sabha on 16\textsuperscript{th} May 1995. The Arbitration and Conciliation Act, 1996\textsuperscript{149} received the Presidential assent and was brought into force from 16 August 1996\textsuperscript{150}, the Act being a continuation of the Ordinance is deemed to have been effective from 25 January 1996 when the first Ordinance came into force\textsuperscript{151}. The long title of this Act replicates that, the object of the Act is to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.

4.2.1 SALIENT FEATURES OF THE ARBITRATION AND CONCILIATION ACT, 1996

The Arbitration and Conciliation Act, 1996\textsuperscript{152} lays considerable stress on the party autonomy. The party to the dispute can decide the number of arbitrators, the rules of procedure, and the rules governing the substance of the dispute, the place of arbitration and the language of the arbitrators. The major advantage of the new law is that, it facilitates quick resolution of the commercial disputes and speeds up arbitration procedure by minimizing intervention by the Court. Under the new law, a Court may provide certain interim measures of protection at a party’s request.

\textsuperscript{148} Bill No.30 of 1995.
\textsuperscript{149} The Arbitration and Conciliation Act, 1996. (No. 26 of 1996).
\textsuperscript{150} Notification No. GSR 375 (E) published in the Gazette of India, Extraordinary, Pt II
\textsuperscript{151} Fuerst Day Lawson Ltd. VS. Jindal Exports Ltd. (2001) 6 SCC 356.
\textsuperscript{152} The Arbitration and Conciliation Act, 1996 herein after referred to as “1996 Act”
and may offer assistance in taking evidence or recovering documents at the request of the arbitral tribunal or a party to the reference. The award of an arbitrator is itself enforceable as a decree of Court and is not required to be made a “Rule of Court”. The arbitrator has to give reasons for his award. However, no reasons need to be given if the disputant parties agree before hand to such a thing. In Babar Ali Vs Union of India153 case it was held by Supreme Court that, The Arbitration and Conciliation Act,1996 is neither unconstitutional nor in any way offends the basic structure of the Constitution of India, as Judicial review is available for challenging the award in accordance with the procedure laid down therein. The time and manner of the judicial scrutiny can be legitimately laid down by the Act passed by the parliament.

**4.2.2 PREAMBLE**

Preamble to the 1996 Act is an introductory, prefatory and an explanatory note about the sections namely that of the Arbitration and Conciliation Act, 1996. United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985. Thereby, the General Assembly of the United Nations recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The United Nations Commission on International Trade Law has adopted the UNCITRAL Conciliation Rules in 1980. Thereby, the General Assembly of the United Nations recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to

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153 (2000) 2 SCC 178
conciliation. The said Model Law and Rules has a significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.

Based on the above facts the Parliament of India considered that it was expedient to make law with respect to arbitration and conciliation, taking into account the aforesaid Model Law and Rules in the forty-seventh year of the Republic. The Arbitration and Conciliation Act, 1996 repealed the Arbitration Act of 1940, the Arbitration (Protocol and Convention) Act of 1937 and the Foreign Awards (Recognition and Enforcement) Act of 1961. Supreme Court in Fuerst Day Lawson Ltd Vs Jindal Exports Ltd\textsuperscript{154} held that the provisions of the Arbitration and Conciliation Act, 1996 have to be interpreted and construed independent to that the Arbitration and Conciliation Act, 1940. In order to get any further help in construing the provisions, it is more relevant to refer to the United Nations Commission on International Trade Law. The Arbitration and Conciliation Act, 1996 is divided into following parts, Part I deals with the “Domestic arbitration”. Part II deals with the “Enforcement of foreign awards”. Part III deals with the “Conciliation procedures” and Part IV of the Act deals with the “Supplementary provisions”. Act has three Schedules namely, The First Schedule on the Convention on recognition and enforcement of foreign arbitral award as per New York convention, the Second Schedule on the Protocol on Arbitration clauses and Third Schedule on the convention on the execution of foreign arbitral awards as per Geneva Convention. In Konkan Railways Corp. Ltd. V. Mehul Construction Co\textsuperscript{155} case, Supreme Court of India stated that the Arbitration and Conciliation Act, 1996 was introduced in order to attract

\textsuperscript{154} A.I.R. 2001 S.C.2293.,and also Sundaram Finance Ltd Vs NEPC India Ltd.AIR 1999 S.C 565.
\textsuperscript{155} (2000) 7 SCC 201.
the ‘international mercantile community’ and at the time of interpretation, regard must be had to the objectives behind the enactment of the Act.

4.3 ARBITRATION

The Arbitration and Conciliation Act, 1996 governs the “arbitration procedures” in India. Part-I of the Arbitration and Conciliation Act, 1996 comprises of 43 sections spread over ten chapters, making detailed provisions relating to domestic arbitration and International commercial arbitration held in India under this Act. ‘Arbitration’ means, a process of dispute resolution in which a neutral third party called arbitrator, renders a decision after a hearing at which both parties have an opportunity to be heard\(^{156}\). Arbitration is a consensual process. It is not a matter of coercion. No arbitration statute can require parties to arbitrate when they have not agreed to do so. Nor can it prevent them from excluding certain claims from the scope of arbitration agreement in any manner they choose. It requires Courts just to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.\(^{157}\).

As defined under Section 2(1) (a) of Arbitration and Conciliation Act, 1996 it covers any arbitration whether it is administered by any permanent arbitral institution or not. It also covers arbitration relied on voluntary agreement by the private parties or by operation of law. The Arbitration and Conciliation Act, 1996 does not provide definition of the word "Arbitration". Arbitration, in law, is a form of Alternative Dispute Resolution - specifically, a legal alternative to litigation, whereby the parties to a dispute agree to submit their respective positions (through agreement or hearing) to a neutral third party called the Arbitrator for resolution of the dispute between them. The literal meaning is that


\(^{157}\) Volt Information Sciences, Inc Vs Leland Stanford University 489 US 468(1989)
"settlement" of differences or disputes by mutual understanding or agreement by the parties where the rights and liabilities of the parties are determined in judicial point of view which are binding to them, such settlement may be before the arbitral tribunal but not by the Court of law.

In Jivaji Raja Vs Khimiji Poonja & Company\textsuperscript{158}, Bombay High Court observed that, arbitration is the reference of dispute or difference between two or more parties to a person chosen by the parties or appointed under statutory authority, for determination of the same. In a broad sense, it is substitution of ordinary judicial machinery by a mutually chosen tribunal i.e., an Arbitrator or an Arbitral Institution.

4.3.1 KINDS OF ARBITRATION

Depending on the terms of arbitration agreement, the subject matter of the dispute in arbitration, and the laws governing such arbitrations, arbitrations can be classified into different types, such as\textsuperscript{159}

\textbf{Ad-hoc Arbitration:} The Ad-hoc Arbitration is agreed to and arranged by the parties themselves without recourse to an arbitral institution. It is to get the justice, in the balance of the un-settled part of their dispute only. It may be either International or Domestic arbitration\textsuperscript{160}.

\textbf{Domestic arbitration:} The Domestic arbitration means, an arbitration which takes place in India, wherein parties are Indians and the dispute is decided in accordance with substantive law in India

\textbf{International Arbitration:} An Arbitration, which may take place either within India or outside India but, where there are ingredients of foreign

\textsuperscript{158} AIR 1934 Bom 476.
\textsuperscript{159} Indu Malhotra & OP. Malhotra, The Law and Practice of Arbitration And Conciliation, 2\textsuperscript{nd} Edn2006, p115-129
\textsuperscript{160} Russell on Arbitration, twenty –second edn, 2003,p29,para 2-010.
origin in relation to the parties, or the subject matter of the dispute. In this process, the dispute is decided in accordance with substantive law in India or any other country, depending on the contract in this regard and the rules of conflict of laws are termed as International Arbitration.

**Institutional Arbitration:** It means, an arbitration conducted by an arbitral institution in accordance with the prescribed rules of the institution. In such kind of arbitration, there is prior agreement between the parties that in case of future differences or disputes arising between the parties during their commercial transactions, such differences or disputes will be settled by arbitration as per clause provide in the agreement and in accordance with the rules of that particular arbitral institution. The arbitrator or arbitrators, as the case may be is appointed from the panel maintained by the institution either by disputants or by the governing body of the institution. The Arbitration and Conciliation Act, 1996 gives recognition and effect to the agreement of the parties to arbitrate according to institutional rules and subject to institutional supervision. Some of the leading Indian institutions providing for institutional arbitration are, The Indian Council of Arbitration (ICA), New Delhi, The Federation of Indian Chamber of Commerce and Industries (FICCI), New Delhi and The International Center for Alternative Dispute Resolution (ICADA). Some of the leading international institutions are The International Chamber of Commerce (ICC), Paris, The London Court of International Arbitration (LCIA), London and The American Arbitration Association (AAA). The World Intellectual Property Organisation (WIPO) is an agency of the United
Nations, which is offering its services exclusively for the intellectual property disputes. WIPO is based in Geneva.¹⁶¹

Statutory Arbitration: It is mandatory form of arbitration, which is imposed on the parties by operation of law. It is conducted in accordance with the provisions of an enactment, which specifically provides for arbitration in respect of disputes arising on matters covered by the concerned enactment byelaws or Rules made there under having the force of law. In such a case, the parties have no option as such but to abide by the law of land. It is apparent that statutory arbitration differs from the other types of arbitration for the reason that, the consent of parties is not necessary, it is compulsory form Arbitration and it is binding on the Parties as the law of land. As an example to it, Sections 24, 31 and 32 of the Defence of India Act, 1971 and Section 43(c) of The Indian Trusts Act, 1882 are the statutory provision, which deals with statutory arbitration.

Foreign Arbitration: When arbitration proceedings are conducted in a place outside India and the Award is required to be enforced in India, it is termed as Foreign Arbitration.

Fast Track Arbitration or Documents Only Arbitration: The Documents only arbitration is not oral and is based only on the claim statement and statement of defence, and a written reply by the claimant, if any. It also includes the documents the document submitted by the parties with their statements along with a list of reference to the documents or other evidences submitted by them. The written submission may take the form of a letter to the tribunal from the party or his representative, or may

be a more formal document produced by lawyers. The parties may agree upon, or in default, the tribunal may adopt the procedure to resolve the dispute only on the basis of the documents submitted to the tribunal and without any oral hearing or cross-examination of the witnesses.

**Look –Sniff Arbitration:** Institutions specialised in special types of disputes have their own special rules to meet the specific requirements for the conduct of arbitration in their specialised areas. Look –Sniff Arbitration is a hybrid arbitration, and also known as quality arbitration. It is a combination of the arbitral process and expert opinion. On the bases of the evidence and inspection of goods or commodities that are subject matter of the dispute placed before the arbitrator, who is selected based on his specialised knowledge, expertise and experience in a particular area of trade or business, the arbitrator decides the dispute and makes his award. The award may relate to the quality or price of the goods or both. There is no formal hearing for taking evidence or hearing oral submissions. For example, Rules of the London Court of International Arbitration (LCIA) permit the arbitrator, on his own, to ascertain the quality of goods and their prevalent price.

**Flip –Flop Arbitration:** This type of arbitration has its origin in a United States arbitration case, which dealt with a baseball player. In such arbitration, the parties formulate their respective cases beforehand. They then invite the arbitrator to choose one of the two. On the evidences adduced by the parties, the arbitrator decides which submission is the correct submission, and then makes an award in favour of that party. After both parties have submitted their respective cases to the arbitrator,

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163 In shipping and Grain Trade Disputes, this method of arbitration is used. Rules of London Maritime Arbitrators Association (LMAA) and Grain and Feedstock Trade Association (GAFTA).
he makes an award either favoring the claimant of the respondent. He
cannot pick and choose from a party’s case. If a party inflates its claim,
then it is possible that it will everything. This type of arbitration is also
known as ‘pendulum arbitration’.

**International Commercial Arbitration:** Section 2(1)(f) of the
Arbitration and Conciliation Act,1996 defines an ‘International
Commercial Arbitration’ as the one in which at least one of the parties is a
resident of a country other than India, or a body corporate incorporated in
any country other than India, or a company or association or a body of
individuals whose central management and control is exercised in any
country other than India. Arbitration with the government of a foreign
country is also considered to be an international commercial arbitration.

Thus, the above classifications of the process under different heads
reflects that, the process of arbitration is flexible enough so that, it can be
altered and modified according to the dispute to its best form, by the
disputed parties. Thus, it is a fact that the above classification is not
exhaustive. The best method or the form of arbitration is to be chosen by
the parties according to their requirement, which can help them fulfill the
objective of an amicable resolution of the dispute for the betterment of
all.

**4.3.2 ARBITRATION AGREEMENT**

The first stage in arbitration is the formulation of the arbitration
agreement whereby the parties agree to submit their present or future
differences to arbitration. Section 2 (1)(b) does not give a definition of
the term, but states that “Arbitration agreement” means an agreement

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165 Tweeddale & Tweeddale, Arbitration of Commercial Disputes, International & English Law and
Practice, 1st edn, 2005, pp2728, paras 1.63 to 1.65.
referred to in section 7. As per Section 7, the arbitration agreement is
defined as, an agreement by the parties to submit to arbitration all or
certain disputes which have arisen or which may arise between them in
respect of a defined legal relationship, whether contractual or not. Thus,
the provision of arbitration can be made at the time of entering the
contract itself, so that if any dispute arises in future, the dispute can be
referred to arbitrator as per the agreement. It is also possible to refer a
dispute to arbitration after the dispute has arisen. It was held by the
Supreme Court in the Wellington Association Ltd Vs Kirti Mehta\textsuperscript{166} case
that, the word in the Section 7(1) “means an agreement by the parties to
submit to arbitration”, postulates an agreement which necessarily or
rather mandatory requires the appointment of an arbitrator or arbitrators.
Section 7 does not cover a case where the parties agree that they “may”
go to a suit or that they “may” also go to arbitration. Arbitration
agreement may be in the form of an arbitration clause in a contract or in
the form of a separate agreement. Section 7(3) of the Act requires that the
arbitration agreement must be in writing. Section 7(2) provides that it
may be in the form of an arbitration clause in a contract or it may be in
the form of a separate agreement. Under Section 7(4), an arbitration
agreement is in writing, if it is contained in : (a) a document signed by the
parties, (b) an exchange of letters, telex, telegrams or other means of
telecommunication, providing a record of agreement, (c) or an exchange
of claims and defense in which the existence of the agreement is alleged
by one party and not denied by the other. Sec.7 (5) of the Act expressly
provides that reference to a document containing an arbitration clause
would constitute an arbitration agreement. In Jayant N.Seth Vs
Gyaneshwar Apartment Cooperative Housing Society Ltd\textsuperscript{167}, case the

\textsuperscript{166} AIR 2000 SC 1379.
\textsuperscript{167} 2000(1) RAJ 117 (Bom)
Court laid down the essential ingredients of an arbitration agreement as defined in Clause 2(1) (b) read with Section 7 as, there should be a valid and binding agreement between the parties. Such an agreement may be contained as a clause in a contract or in the form of a separate agreement. Such an agreement is deemed to be in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement or an exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other. Reference in a contract to a document containing an arbitration clause also constitutes an arbitration agreement, provided the contract is in writing and the reference is such as to make that arbitration clause part of the contract. Parties intend to refer present or future disputes to arbitration. The dispute to be referred to an arbitrator is in respect of a defined legal relationship, whether contractual or not. In Motilal Vs Kedarmal Jainarayan Bharadiya\(^\text{168}\) case, it is held that, arbitration is an alternate dispute resolution system of quasi-judicial nature and if no judicial functions are attributed to the nominated persons, the document cannot be said to be an arbitration agreement. The Supreme Court of India in Firm Ashok Traders Vs Gurumukh Das Saluja\(^\text{169}\) case held that, under the scheme of the Arbitration and Conciliation Act, 1996, the Arbitration clause is separable from other clause of partnership deed. The arbitration clause constitutes an agreement by itself.

In Tamil Nadu Electricity Board Vs Sumathi and others\(^\text{170}\), case there was no arbitration agreement within the meaning of Section 7 of the Arbitration and Conciliation Act, 1996. The dispute relating to the

\(^\text{168}\) 2002(3) RAJ 403 (Bom)
\(^\text{169}\) 2004 (3) SCC 155.
\(^\text{170}\) 2000(4) SCC 543
payment of compensation for the death due to electrocution was under the consideration of the High Court under Article 226. The High Court appointed an arbitrator in exercise of its power under the 1996. The Supreme Court quashed the order of the High Court, as the Suo-motu appointment of arbitrator in the absence of agreement to that effect is not provided for under the provisions of the Arbitration and Conciliation Act, 1996.

The Section 4 of the Arbitration and Conciliation Act, 1996 is a deeming provision. It lays down that, where a party precedes with the arbitration without stating his objection to non-compliance of any provision of Part I from which the parties may derogate or any requirement under arbitration agreement, it shall be deemed that he has waived his right to so object. In Basheshar Nath Vs Commissioner of Income Tax, the Supreme Court held that, ‘There must be an international relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of relinquishment of a known right or privilege’. In Union of India Vs MAA Agency, it was held that, it was open to the petitioner to challenge either the jurisdiction of the arbitral tribunal to adjudicate upon the third claim or to raise the plea that the tribunal was exceeding its scope of authority. However, the petitioner did not raise any such objection and on the contrary, proceeded with a defense to the claim on merits, thereafter, which an award was passed. This being the case, it may be deemed that the petitioner had waived its rights under Section 4, to object on the ground that any requirement of the arbitration agreement had not been complied with.

172 AIR 1959 SC 149
173 2003(3) RAJ 335 (Bom)
The Supreme Court of India in P.Anand Gajapathi Raju Vs PVG Raju\(^{174}\), held that Section 5 of the Arbitration and Conciliation Act, 1996 brings out clearly the object of the Act, namely that of encouraging resolution of disputes expeditiously and less expensively and when there is an arbitration agreement, the Court’s intervention should be minimal. In BHEL Vs CN Garg & Ors \(^{175}\) case, it was held that, Section 5 was inserted to discourage judicial intervention. It is seen that a party having grievances against an arbitrator on account of bias or prejudice is not without remedy. It only has to wait till the award is made and then it can challenge the award on various grounds under Section 34 of the Arbitration and Conciliation Act, 1996.

Determination on the applicability of Section 2(1)(f) of the Indian Arbitration and Conciliation Act, 1996 the Supreme Court of India in the case of TDM Infrastructure Private Limited Vs UE Development India Private Ltd \(^{176}\) held that, when both the companies are incorporated in India, and have been domiciled in India, the arbitration agreement entered into by and between them would not be an international commercial arbitration agreement. The MM Acqua Technologies Ltd Vs Wig Brothers Builders Ltd\(^{177}\) case helps in explaining the definition of a binding agreement between parties. In order to be a binding arbitration agreement between the parties, the same must be in writing and the parties should have specifically agreed to settle their disputes by arbitration. An arbitration agreement cannot be inferred by implication.

\(^{174}\) AIR 2000 SC 1886.
\(^{175}\) 2001(57) DRJ 154 (DB)
\(^{176}\) (2008) SCC 2263
\(^{177}\) 2001(3) RAJ 531 (Del)
4.3.3 THE COURT REFERRAL TO ARBITRATION

If a party to the dispute approaches the Court despite the presence of an arbitration agreement, the other party can raise the objection. The Arbitration and Conciliation Act, 1996 further says that, the party must raise such an objection before submitting his first statement on the substance of dispute. The original arbitration agreement or its certified copy must accompany such objection. On such application, the judicial authority shall refer the parties to arbitration. Since the word used is “shall”, it is mandatory for judicial authority to refer the matter to arbitration\textsuperscript{178}. However, once the opposite party makes the first statement to Court, the matter has to continue in the Court. Once the other party for referring the matter to arbitration makes an application, the arbitrator can continue with arbitration and even make an arbitral award. The Supreme Court of India in P.Anand Gajapathi Raju Vs P.V.G Raju\textsuperscript{179} case held that arbitration agreement being brought into existence while action is pending before Court is also a valid arbitration agreement. The language of section 8 is peremptory. It is therefore, obligator for the Court to refer the parties to the arbitration in terms of their arbitration agreement. The Supreme Court of India in the case of Haryana Telecom Ltd Vs Sterlite Industries (India) Ltd\textsuperscript{180} held that, notwithstanding any agreement between the parties, an arbitrator would have no jurisdiction to order winding up of a company.

The Supreme Court of India in S.N Palanitkar Vs State of Bihar\textsuperscript{181} case held that, merely because there is an arbitration clause in a commercial agreement, that cannot prevent criminal prosecution against

\textsuperscript{178} The Arbitration and Conciliation Act,1996. Section 8
\textsuperscript{179} AIR 2000 S.C 1886.
\textsuperscript{180} AIR 1999 SC 2354.
\textsuperscript{181} AIR 2002 Bom 8.
the accused if an act constitutes a criminal offence is made out even prima facie.

4.3.4 INTERIM MEASURES OF PROTECTION

The Arbitration and Conciliation Act, 1996 under Section 9 empowers the Court to take certain interim measures of protection including granting of interim injunctions, preservation, interim custody, sale of goods, appointment of receivers, etc. Supreme Court of India in the case of Bhatia International Vs Bulk Trading SA\textsuperscript{182} held that, the provisions such as section 9 of the 1996 Act, relating to interim measures of protection by the Court were the, 'general provisions which are applicable to international commercial arbitrations held outside India, unless excluded either expressly by a statute or by an agreement between parties, or by implication'. Thus, it is open for parties in an international arbitration with the seat of arbitration outside India to apply for interim measures of protection within India where the assets relating to the dispute are located in India. The Supreme Court of India in Firm Ashok Traders Vs Gurumukh Das Saluja\textsuperscript{183} case held that, the Court under Section 9 is only formulating interim measures to protect the right under adjudication before the Arbitral Tribunal from being frustrated. The Court is conferred with the same power for making the specified order as it has for the purpose of and in relation to any proceeding before it through the venue of the proceedings in relation to which the power under Section 9 is sought to exercised is the Arbitral Tribunal. The Supreme Court of India in Sundaram Finance Ltd Vs NEPC India Ltd\textsuperscript{184} case held that, inorder to give full effect to Section 9, it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party.

\textsuperscript{182} 2002(4 ) SCC 105
\textsuperscript{183} 2004 (3) SCC 155.
\textsuperscript{184} AIR 1999 SC 565.
before an application under section 9 can be filled. Thus, the Court is not debarred from dealing with an application merely because no notice has been issued under Section 21 of Arbitration and Conciliation Act, 1996.

### 4.3.5 APPOINTMENT OF ARBITRATOR

The term arbitrator has already been defined above in this chapter. Under the provisions of the Arbitration and Conciliation Act, 1996 the arbitral tribunal can consist of either a sole arbitrator or an odd number of arbitrators. If the arbitral tribunal is to consist of more than one arbitrator, then the 1996 Act provides that either party can appoint their nominee arbitrator and the appointed nominee would further appoint a third arbitrator who would be the presiding arbitrator. This is different from the 1940 Act, wherein it was permissible to appoint an even number of arbitrators and an umpire to whom the disputes were to be referred to in the event of a deadlock. Section 10 of the 1996 Act provides that the number of arbitrators cannot be an even number. In Narayan Prasad Lohia Vs Nikunj Kumar Lohia 185, the Supreme Court held that parties would be entitled to derogate from the provisions of section 10 of the 1996 Act and an award by two arbitrators would not be void. If either of the parties fails to make an appointment under the agreed appointment procedure then, the other party may make a request to the Chief Justice or a person or institution designated by him to take the necessary measure. The arbitration agreement entered into by the parties can provide for other means of securing the appointment, for example by delegating the appointing function to an institution.

The parties can agree on a procedure for appointing the arbitrator or arbitrators. If they are unable to agree on a single arbitrator then, each

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185 2002 (3) SCC 572
party will appoint one arbitrator and the two appointed arbitrators will appoint the third arbitrator who will act as a presiding arbitrator. If one of the parties does not appoint an arbitrator within 30 days, or if two appointed arbitrators do not appoint third arbitrator within 30 days, the party can request Chief Justice to appoint an arbitrator. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under section 11, that would be valid and only then the right of the opposite party ceases. The Chief Justice can authorize any person or institution to appoint an arbitrator. In case of international commercial dispute, the application for appointment of arbitrator has to be made to Chief Justice of India. In case of other domestic disputes, application has to be made to Chief Justice of High Court within whose jurisdiction the parties are situated.

Thus, the study shows that the major difference between an international commercial arbitration with its seat in India and a domestic arbitration is that, in an international commercial arbitration there exist provisions for expedited appointment of arbitrators by directly approaching the Supreme Court. The other difference is that unlike in a domestic arbitration, in an international commercial arbitration, the parties are free to choose the law applicable to the substance of the dispute for governing the arbitral proceedings. The decision of the Chief Justice on the issue of appointment in an international commercial arbitration is final and is not appealable.

The Section 11(6) of the Arbitration and Conciliation Act, 1996 provides for intervention of the Chief Justice in appointing the arbitrators.

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186 Section 11(3)
187 Section 11(4)
189 Section 11(12) of Arbitration and Conciliation Act, 1996.
where there is failure under the appointment procedure agreed upon by the parties. The Supreme Court of India in Datar Switchgears Ltd Vs Tata Finance Ltd \(^{190}\) held that, under Section 11(6) if one of the party demands the opposite party to appointment an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section11 that would be sufficient. Only then, the right of the opposite party ceases.

The framers used a language different from the Model Law. The question that arose was whether the Chief Justice to whom the power was conferred to take the necessary measure of making an appointment was exercising powers in a 'judicial capacity' or in an 'administrative capacity'. The Arbitration and Conciliation Act, 1996 only refers to the power of the Chief Justice to take the 'necessary measures' for the appointment of arbitrators in case of default by the parties. The UNCITRAL Model Law provided that the 'Court' would have the power to make the appointment. The Supreme Court of India in Ador Samia (P) Ltd Vs Peekay Holding Ltd\(^{191}\) case categorically held that the powers of the Chief Justice under Sec11 are administrative powers and therefore, the Chief Justice while exercising powers under Section 11 does not act as a “Court”. The Supreme Court in the SBP & Co Vs. Patel Engineering\(^{192}\) case ultimately resolved this controversy. A bench consisting of seven judges held that the power conferred by section 11 of the 1996 Act was a ‘judicial power’ and the Chief Justice had to act in his judicial capacity and not in an ‘administrative capacity’. The Chief Justice has the power to decide

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\(^{190}\) 2000(8)SCC 151.
\(^{191}\) A.I.R 1999 S.C. 3246.also in Konkan Railways Corp Ltd Vs Mehul Construction Pvt Ltd. 2000 (7) SCC 201
\(^{192}\) 2005 (3)Arb LR 285 (SC).
certain preliminary issues such as existence of a valid arbitration agreement, existence of a live claim, existence of conditions for the exercise of power and the qualifications of the arbitrator or arbitrators.

The Supreme Court of India in Malaysia Airlines system BHD (II)Vs Stic Travels (P)Ltd \(^{193}\) held that while nationality of the arbitrator is a matter to be kept in view while appointing the arbitrator but, it does not follow from Sec 11(9) that the proposed arbitrator is necessarily disqualified because he belongs to the nationality of one of the parties. The provision is not mandatory. In cases, the party who belongs to a nationality other than that of the proposed arbitrator, has no objection, the Chief justice of India can appoint an arbitrator belonging to a nationality of one of the parties.

4.3.5.1 CHALLENGE TO APPOINTMENT OF ARBITRATOR

An arbitrator is expected to be independent and impartial person. If there are some circumstances due to which his independence or impartiality can be challenged, he must disclose the circumstances before his appointment\(^{194}\). Appointment of Arbitrator can be challenged only if (a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality (b) He does not possess the qualifications agreed to by the parties\(^{195}\). Appointment of arbitrator cannot be challenged on any other ground. The challenge to appointment has to be decided by the arbitrator himself. If he does not accept the challenge, the proceedings can continue and the arbitrator can make the arbitral award. However, in such case, application for setting aside arbitral award can be made to

\(^{193}\) 2001, 1SCC. 509
\(^{194}\) Section 12(1)
\(^{195}\) Section 12(3)
Court. The sub section (4) and (5) of section 13 is designed to prevent dilatory tactics by not allowing the unsuccessful party to challenge the appointment of the arbitrator immediately when the challenge had been unsuccessful before the arbitrator, and requires such party to wait and challenge the same only after the arbitral award has been made. If the Court agrees to the challenge, the arbitral award can be set aside. Thus, even if the arbitrator does not accept the challenge to his appointment, the other party cannot stall further the arbitration proceedings by rushing to Court. The arbitration can continue and challenge can be made in Court only after arbitral award is made.

In the case of Shivnath Rai Harnarain (India) Ltd. Vs. Abdul Ghaffar Abdul Rehman (Dead) by L.Rs, the Supreme Court of India held that, having mutually agreed to have the dispute referred to an arbitrator at Singapore, the applicant is not permitted to turn around and say that this Court be appointed an arbitrator. In the case of Aurohill Global Commodities Ltd. Vs. M.S.T.C. Ltd the Supreme Court of India held that, the Court has the power to appoint an arbitrator in case of international transaction in accordance with terms of contract.

4.3.6 TERMINATION OF ARBITRATION AGREEMENT

The mandate of an arbitrator shall terminate if the arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay and in the cases where the arbitrator withdraws from his office or the parties agree to the termination

196 Section 34.
197 Harile Rice Mills Vs State of Punjab 1998 (1) 118 PLR 395 and the decision was followed in Satish Chandra Gupta & Sons Vs Union Of India 2003 (1) Arb LR 589,599 (P&H)(DB).
198 Section 13(6)
199 (2008)5SCC135
200 (2007)7SCC120
of his mandate. If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate. If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

Thus, these three grounds constitute arbitrators inability. The first being the arbitrators de jure inability, which is to refer his legal disability to perform his functions. Such situation of legal disability is found in the lex loci arbitri and relate to circumstances under which the arbitrator is by law, barred and from continuing in the office, for reasons such as incapacity, bankruptcy and conviction for a criminal offense. Like wise, the inability on the part of the arbitrator to make award within the time prescribed in the agreement of the parties, renders him de jure unable to continue with the proceedings, and has the effect of terminating of his mandate. The second ground of inability concerns cases of factual situations in which the arbitrator is physically prevented form fulfilling his functions for instance serious illness, other physical disability or death. Moreover, the third ground refers to other factors influencing the level of expectations like the ability to function efficiently and expeditiously and any special competence or other qualification required of the arbitrator by agreement of the parties.

In addition to the circumstances, referred to in section 13 or section 14, the mandate of an arbitrator shall terminate in the cases where he withdraws from office for any reason; or by or pursuant to agreement of arbitrators de jure inability, which is to refer his legal disability to perform his functions. Such situation of legal disability is found in the lex loci arbitri and relate to circumstances under which the arbitrator is by law, barred and from continuing in the office, for reasons such as incapacity, bankruptcy and conviction for a criminal offense. Like wise, the inability on the part of the arbitrator to make award within the time prescribed in the agreement of the parties, renders him de jure unable to continue with the proceedings, and has the effect of terminating of his mandate. The second ground of inability concerns cases of factual situations in which the arbitrator is physically prevented form fulfilling his functions for instance serious illness, other physical disability or death. Moreover, the third ground refers to other factors influencing the level of expectations like the ability to function efficiently and expeditiously and any special competence or other qualification required of the arbitrator by agreement of the parties.

In addition to the circumstances, referred to in section 13 or section 14, the mandate of an arbitrator shall terminate in the cases where he withdraws from office for any reason; or by or pursuant to agreement of

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201 Section 14 (1)
202 Section 14 (2)
203 Section 14 (3)
204 Shyam Telecom Ltd Vs.Arm Ltd 2004 (3) Arb. L R 146,153 (Del).
the parties. In such cases where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal. Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal. Thus, Section 15 is designed for appointment of a substitute arbitrator, rather than the grounds for the termination of his mandate. Thus the wording, ‘the rules that were applicable to the appointment on the arbitrator’ in Section 15(2) indicates the party autonomy set forth in Section 11 of the Act. As per the decision taken in case of San-A Tradubg Co.Ltd Vs I.C.Textiles Ltd it is held that Sec 15 of Arbitration and Conciliation Act, 1996 a new arbitrator can be appointed if the named arbitrator, refuses to act.

In Kalyan People’s Cop Bank Ltd Vs Dulhabibi Aqual Aminsahdeb Patil case, the Supreme Court of India held that, where there is a change in the constitution of the arbitral tribunal and the parties consented to the procedure that the tribunal could rely on the evidence adduced before the tribunal prior to its reconstruction, it would not be open to the parties subsequently to question the procedure.

205 Section 15 (1)(a)(b)and (2).
206 Section 15 (1) to(4)
208 AIR 1966 SC 1072.
In the case of India Household and Healthcare Ltd. Vs LG Household and Healthcare Ltd\textsuperscript{209}, it is held by the Supreme Court of India that, Fraud has the effect of vitiating the entire agreement formed between the parties including the arbitration clause formed under the agreement. Doctrine of comity or amity\textsuperscript{210} required a Court not to pass and order which would be in conflict with another order passed by a competent Court of law. An application for appointment of an arbitrator is not maintainable unless the procedure and mechanism agreed to by and between the parties is complied with.

### 4.3.7 CONDUCT OF ARBITRAL PROCEEDINGS

The Section 16 of the Arbitration and Conciliation Act, 1996 provides that the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or authority of the arbitration agreement\textsuperscript{211}. For this purpose, an arbitration clause that forms part of a contract will be treated as an agreement independent of the other terms of the contract; and a decision by the arbitral tribunal that the contract is null and void will not entail, ipso jure, the invalidity of the arbitration clause. A plea that the arbitral tribunal does not have jurisdiction, will however have to be raised not later than the submission of the statement of defense. However, a party shall not be precluded from raising such a plea merely because he has appointed, or participated in the appointment of an arbitrator. In Nissho Iwai Corpn Vs Veejay Impex\textsuperscript{212} case, it was held that Civil Court is not competent to decide the question with respect to the existence or validity of arbitration. The Arbitral Tribunal only has jurisdiction to decide such questions.

\textsuperscript{209} (2007)5SCC510
\textsuperscript{210} Doctrine of comity or amity requires a Court not to pass any order which would be in conflict with another Order passed by a competent Court of law.
\textsuperscript{212} AIR 2000 Cal .207
In National Agricultural Co-op. Marketing Federation India Ltd. Vs. Gains Trading Ltd\textsuperscript{213} case, it was held that, the arbitration clause forming part of the contract is to be treated as an agreement independent of the other terms of the contract.

The Arbitration and Conciliation Act, 1996 under Section 16 does not take away the jurisdiction of the Chief Justice of India or his designate if need be, to decide the question of the “existence” of the arbitration agreement. In Wellington Associates Ltd Vs Kirit Mehata\textsuperscript{214} case, Supreme Court of India held that, Section 16 does not declare that except the Arbitral Tribunal, none else can determine such question. Merely because the new Act of 1996 permits the arbitrator to decide this question, it does not necessarily follow that at the stage of Section 11 the Chief Justice of India or his designate cannot decide a question as to the existence of the arbitration clause. In Owners and Parties interested in the Vessel M.V. “Baltic Confidence” Vs State Trading Corporation Ltd\textsuperscript{215} it was held by the Supreme Court that, whether a particular dispute arising between the parties comes within the purview of the arbitration clause as incorporated in the Bill of Lading is a matter to be decided by the arbitrator or the Court. However, that does not mean that despite incorporation of arbitration clause in the Bill of Lading by specific reference the parties had not intended that an arbitrator should resolve the disputes arising on the Bill of Lading.

A plea that the arbitral tribunal is exceeding the scope of its authority has to be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings\textsuperscript{216}. The

\textsuperscript{213} (2007) 5 SCC 629
\textsuperscript{214} 2000 S.C. 1379.
\textsuperscript{215} 2001 (7) SCC 473.
\textsuperscript{216} The Arbitration and Conciliation Act,1996. Section 16 (3)
arbitral tribunal, in either of the cases referred to above, may admit later a plea if it considers the delay justified. The arbitral tribunal has to decide on a plea about lack of jurisdiction or about the tribunal exceeding the scope of its authority. Where the arbitral tribunal takes a decision rejecting the plea it shall continue with the arbitral proceedings and make the arbitral award\textsuperscript{217}. Section 16(6) of the 1996 Act provides that, a party aggrieved by such an arbitral award is free to make an application for setting aside the award under section 34 of the Act. Section 34(2) (a) inter alia permits a challenge to an award on the above grounds.

In the case of Heavy vehicle factory, Rep By SGM Avadi Madras Vs Oscar Equipments(p)Ltd Rep By MD Kolkotta and another\textsuperscript{218} it was held by the Madras High Court that, the Court will not exercise its power under section 34 interfere with the reasoned award passed after consideration of the entire evidence, merely because another conclusion is possible.

The power of the arbitral tribunal to grant interim relief generally depends on the authority of the tribunal as agreed upon by the parties. This may be done expressly in the arbitration agreement, or by the choice of institutional rules, which allow arbitrators to grant such relief. This power is generally classified as a matter of procedure and therefore is governed primarily by law governing the arbitration concerning the place of arbitration. In addition, regard may be given to the law of the place where the interim measures is to be enforced.\textsuperscript{219} The Supreme Court of India in MD, Army Welfare Housing Organisation Vs Sumangal Services

\textsuperscript{217} The Arbitration and Conciliation Act,1996. Section 16 (4) and (5).
\textsuperscript{218} (2006) 4 MLJ 1420
Pvt. Ltd\textsuperscript{220} held that, the interim order of the arbitrator which was in the nature of an interim award, in view of the restricted jurisdiction of arbitrator under Section 17, was held to be wholly without jurisdiction and thus a nullity, being coram non judice\textsuperscript{221}. Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection, as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1)\textsuperscript{222}. The Arbitration and Conciliation Act, 1996, unlike the predecessor Act of 1940, the Arbitral Tribunal is empowered by Section 17 of the Act to make order amounting to interim measures. The need for Section 9, in spite of Section 17 having been enacted is that, Section 17 would operate only during the existence on the Arbitral Tribunal and its being functional. During that period, the power conferred on the Arbitral Tribunal under Section 17 and the power conferred on the Court under Section 9 may overlap to some extent but so far as the period pre and the post arbitral proceeding is concerned, the party requiring an interim measure of protection shall have to approach only the Court of laws\textsuperscript{223}.

The Arbitral Tribunal should treat the parties equally and each party should be given full opportunity to present his case\textsuperscript{224}. In State Bank of Patiala Vs SK Sharma\textsuperscript{225} the Supreme Court stated that it would not be correct to say that for any and every violation of a facet of Natural Justice or of a rule incorporating such facet, the order passed is altogether void and ought to be set aside without further enquiry. In all cases, where the

\textsuperscript{220} 2004 (9) SCC 619.
\textsuperscript{221} Smt Kanak Vs Uttar Pradesh Avas Vikas Parishad. 2003(7) SCALE 157.
\textsuperscript{222} The Arbitration and Conciliation Act,1996. Section17 (1)and (2).
\textsuperscript{223} Firm Ashok Traders Vs Gurumukh Das Saluja 2004 (3)SCC 155.
\textsuperscript{224} The Arbitration and Conciliation Act,1996. Section 18
\textsuperscript{225} 1996 (3)SCC 346,387.
complaint is not that there was no hearing but one of not affording a proper hearing or of violation of a procedural rule or requirement governing the enquiry, the complaint should be examined on touchstone of prejudice. The two rule contemplated by this section are two separate concepts and thus are governed by separate considerations of, impartiality of the arbitrator and fair trail of proceedings.

Code of Civil Procedure, 1908 or Indian Evidence Act, 1872, does not bind the Arbitral Tribunal functioning under Arbitration and Conciliation Act, 1996. Arbitral Tribunal it is not precluded from adopting principles of law judicially developed under them. The arbitrators generally apply the rule of res judicata, albeit the strict provisions of the Statute do not bind them. The Arbitral Tribunal is required to comply with the rules of Natural Justice as enshrined in Section 18, which will cover all the necessary procedural requirements. In the case of Moti Lal Vs State of Himachal Pradesh, it was held that the arbitrator has the power to administer oath to the parties and the witnesses before recording their evidences.

4.3.7.1 THE APPLICABILITY OF THE LAW OF LIMITATION

The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in Court. For the purposes of Section 43 and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in Section 21. Where an arbitration agreement is to submit the future disputes to arbitration provides that, any claim to which the agreement applies it shall be barred unless some step

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226 The Arbitration and Conciliation Act, 1996. Section 19(1)
227 TK Poulton Vs State of Kerala 1995 (2) Arb. LR 182 (Ker); Classic Motors Ltd Vs Maruti Udyog Ltd 1996(Supp) Arb LR 112 (Del); SP Gupta Vs State of Madhya Pradesh 1996(Supp) Arb. LR 143 (MP).
228 AIR 1996 HP 90; State of Haryana Vs JK Jain AIR 1989 P& H 24
to commence arbitral proceedings is taken within a time fixed by the agreement. Where a dispute arises to which the arbitration agreement applies, the Court in such cases if it is of opinion that, in the circumstances of the case undue hardship would otherwise be caused and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper. Every hardship is not undue hardship. The Supreme Court of India in Sterling General Insurance Co Vs Planters Airways Pvt. Ltd229 held that, the emphasis in the expression ‘undue hardship ’is on the adjective undue, which means something not merited by the conduct of the claimant, or is very much disproportionate to it. The conduct of the party, the bona fide and reasonableness of the claim , the amount at stake, the reason for delay in taking the required step to commence arbitration proceedings, the possibility of any material prejudice to the other side being caused by the extension of time, are some of the relevant thought not exhaustive considerations for determining the question of undue hardship. For extending the time limit, the principles laid down on the construction and application of Section 5 of Limitation Act 1963, are to be followed.

If the Court sets Arbitration Award aside, then the time spent in arbitration will be excluded for purpose of Limitation Act, 1963. The expression ‘Court’ used in this provision means not only the Court under Section 34, but also includes the Court of Appeal under Section 37(1) (b), and the Supreme Court under Art 133 or Art 136. Therefore, the time between the order of commencement of the arbitral proceedings and the

229 1975 (1)SCC 603.
The final order of such Court has to be excluded. The exclusion of time is not in terms of Section 14 of the Limitation Act 1963.

Therefore, unless otherwise agreed by the parties, the arbitral proceeding for the purpose of the Limitation Act as well as section 43 of this Act are deemed to commence on the date on which request for the dispute to be referred to arbitration is received by the respondent. If on that date, the claim is barred under Limitation Act, the arbitration cannot continue. In Sunil Kumar Vs AAKAR case, it is held that, the right to invoke the arbitration clause accrues to a party the moment differences or disputes arise and are brought to each other's notice. No party can be allowed to sleep over or continue for years as in the present case where the petitioner had waited for 3 years to invoke the clause. It is not the date on which the notice is sent for invoking the arbitration clause, which is relevant but the moment differences arise and are, brought to each other's notice.

**4.3.7.2 FLEXIBILITY OF PROCEDURE, PLACE AND LANGUAGE IN THE ARBITRATION PROCEEDINGS**

The parties to arbitration are free to determine the procedural rules subject, however, to certain mandatory rules. If the parties do not agree to the procedure, the procedure will be as determined by the arbitral tribunal. Arbitral Tribunal has powers to decide the procedure to be followed, unless parties agree on the procedure to be followed and conduct the proceeding in manner it considers appropriate. The Tribunal also has powers to determine the admissibility, relevance, materiality and

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231 Jugal Kishore Asti Vs State of Madhya Pradesh AIR 1979 MP 89,93 (DB).
232 Section 43(2)
233 2002(3) RAJ 624 (Del)
234 The Arbitration and Conciliation Act,1996. Section 19(2)
235 Section 19(3)
The Place of arbitration will be decided by mutual agreement. However, if the parties do not agree to the place, tribunal shall decide the same after having regard to the circumstances of the case, including the convenience of the parties. Similarly, the language to be used in arbitral proceedings can be mutually agreed otherwise, Arbitral Tribunal can decide. The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language agreed upon by the parties or determined by the parties or determined by the arbitral tribunal. The provisions under Arbitration and Conciliation Act, 1996 shows that the Act granted party autonomy with maximum freedom to the parties to agree to decide how to determine when the arbitration has officially commenced.

The Supreme Court of India, in the case of the Sanshin Chemicals Industry Vs Oriental Carbon and Chemicals Ltd, held that, the conjoint reading of Section 2 (6) and Section 20 of Arbitration and Conciliation Act, 1996 leads to the conclusion that, in the event parties do not agree with regard to the place of arbitration, though they were free to determine the same, then they had the right to authorize any person including an institution for deciding the venue of the arbitration. Such decisions would not partake the character of adjudication of a dispute arising out of the agreement, so as to clothe it with the character of an award. The arbitral tribunal has the discretion conditioned by the circumstances of the case, particularly the convenience of the parties. Thus, the Tribunal cannot fix the venue of its choice regardless of the convenience of the parties, and must take account ‘all the material circumstances, including the residence

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236 Section 19(4)
237 Section 20 (1)and(2).
238 Section 22(1) and (2)
239 Section 22(4)
240 A.I.R .2001 S.C. 1219
of the parties, their witnesses, and the subject matter of the reference and the balance of convenience’. 241

4.3.7.3 SUBMISSION OF STATEMENT OF CLAIM AND DEFENCE

The statement of claims defines the facts supporting the case, which the party starting the arbitration raises. The statement of defence delineates the other party’s contest and the facts supporting it. The Supreme Court of India in Vikaram Kashinath Rawat Vs Vinayak N Joshi242 case held that, the object of pleading, is to ascertain the real dispute between the parties, to narrow down the area of conflict, to make each side aware of the questions to be argued, to preclude one party from taking the other by surprise and to prevent a miscarriage of justice. Section 23 of Arbitration and Conciliation Act, 1996 is a procedural provision for arbitral proceedings. It states the rule to be applied to the pleadings of the parties. The wordings in section provides that, within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant should submit statement of claims, points of issue and relief or remedy sought within the period agreed upon by the parties or determined by the arbitral tribunal. The respondent shall state his defence in respect of these particulars. The parties along with their statements must submit all relevant documents or a reference to the documents or other evidence243. The provisions under the 1996 Act also give the parties the option to amend or supplement unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it. Such claim or defence can be amended or supplemented any time during the course of the arbitral

242 AIR 1999 SC 162.
243 Section 23 (1) and (2)
In the Jayashree Patnaik Vs Urban Cooperative Bank, Bhubaneswar case it was held that, in the absence of agreement of the parties to the contrary specifically excluding amendment of the pleading, the arbitral tribunal normally has the power to allow an amendment of the pleadings, as long as it does not prejudice the opposite party in any manner.

In the case of Bhatia International Vs Bulk Trading S.A. and Another, the Supreme Court of India held that, an ouster of jurisdiction could not be implied but expressed. Provisions of Part I of the Arbitration and Conciliation Act, 1996 are applicable also to international commercial arbitration which take place outside India unless the parties by agreement express or impliedly excluded it or any of its provisions.

The issues are to be framed with regard to those pleadings only, which are asserted by one party and denied by the other. However non-framing of an important issue is not fatal, if it does not prejudice any of the litigants, particularly where both the parties and the arbitrators are aware of the issue and lead evidence.

4.3.7.4 HEARINGS AND WRITTEN PROCEEDINGS

The parties have the option to decide the questions, whether to hold oral hearings for the presentation of evidence or for or an argument, or whether the proceedings shall be conducted based on the documents and other materials. In default, the arbitral tribunal shall decide the said question. In other words, in the absence of an agreement by the parties to

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244 Section 23(3)
245 2003 (2) Arb LR 294 (Orissa) (DB); C.Thanka Vs Narayani , AIR 1981 Ker 261.
246 (2002)4SCC105
247 Om Prakash Rawal Vs Justice Amrit Lal Bahri AIR 1994 HP 27, 32
248 Monoranjan Paul Vs Narendra Kumar Paul AIR 1994 Gau 64.
249 The Arbitration and Conciliation Act,1996, Sec 24(1).
the effect that no oral hearing shall be held, the arbitral tribunal shall hold oral hearings, at an appropriate state of the proceedings, only on a request by a party. The arbitral tribunal is not bound by any procedural rules other than those agreed upon by the parties. The arbitral tribunal is not bound to follow the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872 and can decide the dispute in accordance with the terms of the contract and the substantive law in force in India. Decision-making by the arbitral tribunal is by the majority of its members. The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property. All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. It was held in Carey and Brown Vs Henderson and Liddell case that in the final stage of oral hearing of the case each party must be given an opportunity to address their arguments on the issue of fact and law.

After submission of documents and defence, unless the parties agree otherwise, the Arbitral Tribunal can decide whether there will be oral hearing or proceedings can be conducted on the basis of the documents and other materials. However, under section 24 if one of the parties requests, the hearing shall be oral. Sufficient advance notice of hearing should be given to both the parties. Thus, unless one party requests, oral hearing is not compulsory. Thus, the basic object of the whole exercise in conducting the arbitral, proceeding is that each party can, put before the arbitrator, his comments upon the evidence taken as a

250 The Arbitration and Conciliation Act, 1996. Section 24(2)
whole, and upon the case finally presented by the opposing party. In this course, the arbitrator can thereby clarify his mind as to which are the crucial issues, their supporting facts and arguments of the said case and finally pass a reasoned award as to why the arbitrator has preferred one to the other.

4.3.7.5 DEFAULT OF THE PARTIES

The parties may agree as to the powers to be possessed by the arbitral tribunal, in the event that a party fails to proceed properly and expeditiously with the arbitration, or non-abidance of an order or with the directions of the tribunal. In the absence of such agreement Section 25 of Arbitration and Conciliation Act, 1996 confers default powers on the tribunal. This section clearly mentions that, unless otherwise agreed by the parties, where, without showing sufficient cause, if the claimant fails to communicate his statement of claim in accordance with subsection (1) of section 23, the arbitral tribunal shall terminate the proceedings. If the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the alienations by the claimant. A party fails to appear at an oral hearing or to produce documentary evidence; the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.  

It is to be noted that a default award has more serious consequences than a default judgment of a Court, because it is generally not open to recourse under Section 34 or appeal under Section 37 of this Act. Therefore once the arbitral tribunal has made the award, it no longer has jurisdiction over the dispute. The main principles governing arbitral

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252 The Arbitration and Conciliation Act, 1996. Section 25 (a)(b)and (c).
proceedings are that the default does not constitute admission of the liability, hence does not automatically validate the arguments of a party and secondly default by a party must not paralyze or even slow down the progress of the arbitral proceedings. Thus, the arbitral tribunal must primarily examine the merits of a party’s legal and factual arguments and must go ahead despite the absence of defaulting party. The requirement of due process is complied with where the defaulting party has been notified of the proceedings and progress thereof, and has been given opportunity to present its case at each stage of the proceedings. Thus, the party to the arbitral proceeding cannot obstruct the arbitration by refusing to participate in the proceedings253.

Chapter 6 of the Arbitration and Conciliation Act, 1996 has mandatory provisions as it leaves little room for the parties for individual alteration of the proceeding. The reason being, this chapter has the provisions that regulate the award-making process and thus meant to settle the dispute finally.

4.3.8 SETTLEMENT DURING ARBITRATION PROCEEDING

It is permissible for parties to arrive at mutual settlement even when arbitration is proceeding. Settlement of a disputed claim to avoid a lawsuit is, ‘an agreement ending a dispute or law suit,’ arrived at either in or out of Court, for settling a dispute on what appears to the parties to be equitable terms, having regard to the uncertainty they are in regarding the facts or the law and the facts together254. In fact, even the Tribunal can make efforts to encourage mutual settlement. If parties settle the dispute by mutual agreement, the arbitration shall be terminated. However, if

both parties and the Arbitral Tribunal agree, the settlement can be recorded in the form of an arbitral award on agreed terms. Such Arbitral Award shall have the same force as any other Arbitral Award\textsuperscript{255}. It was held in Malpati Sevasangh Vs Gujarat State Khadi nad Village Industries Bourd\textsuperscript{256} case that, an effective compromise presupposes that both the parties to the dispute are willing to abide by the terms and conditions of the agreement. Otherwise, it cannot be said to be effective because a compromise cannot be one sided, as both the sides to the dispute should agree for such compromise.

### 4.3.9 ARBITRAL AWARD

The decision of the Arbitral Tribunal is termed as 'Arbitral Award'. Arbitrator can decide the dispute ex aequo et bono (in justice and in good faith) if both the parties expressly authorize him to do so\textsuperscript{257}. Section 28 of the Arbitration and Conciliation Act, 1996 grants autonomy to the parties to choose the substantive law to be applied to ‘Arbitration other than an international commercial arbitration’ as well as to an ‘international commercial arbitration’, where the place of arbitration is in India. The Supreme Court of India in Sumitomo Heavy Industries Vs Oil and Natural Gas Co Ltd\textsuperscript{258} held that, where the parties had made an express choice of Indian law as proper law of the contract, then it would follow that the proper law of the arbitration agreement is also Indian Law. It was held as the arbitration agreement is part of the substance of the underlying contract and terms of arbitration clause are held to be clear in that respect\textsuperscript{259}. The provisions has made a vital improvement in making international commercial arbitration considerably more user-friendly and

\textsuperscript{255} The Arbitration and Conciliation Act, 1996. Section 30
\textsuperscript{256} 2004 (2) Arb. LR 521 (Guj)
\textsuperscript{257} The Arbitration and Conciliation Act, 1996. Section 28(2)
\textsuperscript{258} 1998 (1) 1 SCC 305.
\textsuperscript{259} Channel Tunnel Group Ltd Vs Balfour Beatty Construction Ltd.1993 (1) ALL ER 664.
In the arbitral proceedings with more than one arbitrator, the decision of Arbitral Tribunal will be by majority. In the Shin-Etsu Chemical Co Ltd. Vs. Aksh Optifibre Ltd and another Case it was held that, in an application for reference rejected on the ground of invalidity of agreement under Section 45 of the Act, the judicial authority is required to pass reasoned order after hearing parties. Impugned order is liable to appeal under Section 50(1) (a) of the Act.

4.3.9.1 FORM AND CONTENTS OF ARBITRAL AWARD

The award must be in writing and signed by the members of Arbitral Tribunal. Therefore, an award is complete and final only when the arbitrators sign it. It was also held that once an arbitrator has signed an award, he becomes functus officio. It is not necessary that it should also be delivered, pronounced, or filed in the Court. It must state the reasons for the award unless the parties have agreed that no reason for the award is to be given. Reasons are the link between the material on which certain conclusions are based and the actual conclusion. This was held by the Supreme Court of India in the Union of India Vs Mohanlal Kapoor case. The Arbitration and Conciliation Act, 1996 does not prescribe any particular form for a reasoned award. The reasoned award is emphasized under the 1996 Act in order to enable the parties and the reviewing Courts to understand the facts and the general reasoning which led the arbitrator to conclude that this was the decisive point, and to understand the facts and so consider the position with respect to

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261 The Arbitration and Conciliation Act, 1996. Section 29
262 (2005)7 SCC 234
263 The Arbitration and Conciliation Act, 1996. Section 31(1)
264 Satwant Singh Sodhi Vs State of Punjab 1999 (3) SCC 487
265 The Arbitration and Conciliation Act, 1996. Section 31(3)
266 1972 (2) SCC 836
267 Russell on Arbitration , 22nd Ed. , 2003 , p 238, para 6-028.
reviewing the award on any other issue which arose before the arbitrators. In AK Kraipak Vs Union Of India the Supreme Court of India held that there is increasing emphasis on the requirement of reasons in all judicial, quasi-judicial and arbitral decisions. The award should be dated and place where it is made should be mentioned. Copy of award should be given to each party. In the Union of India Vs Tecco Trichy Engineers and Contractors case, it was held that, according to Section 31(5), 'after the arbitral award is made, a signed copy shall be delivered to each party'. Section 2(1) (h) defines a "party" as meaning 'a party to an arbitration agreement'. In a large organization like the Railways, "party" as referred to in Section 2(1) (h) read with Section 34(3) has to be construed to be a person directly connected and involved in the proceedings and who is in control of the proceedings before the arbitrator. The delivery of an arbitral award, to be effective, has to be 'received' by the party and this delivery by the tribunal and receipt by the party sets in motion several periods of limitation, therefore it is an important stage in the arbitral proceedings.

### 4.3.9.2 KINDS OF AWARDS

The Arbitration and Conciliation Act, 1996 contemplates four types of awards, namely the definition of award under Section 2(c) includes an interim award. Section 31(6) authorizes an arbitral tribunal to make an interim award on any matter with respect to which it may make final arbitral award at any time during the arbitral proceeding. Interim award deals only with some of the matters referred, so that the remaining matters will be dealt with later. As in case of additional award, Section 268 Transcatalana De Commercio SA Vs Incobrasa Industrial E Commercial Brazileria SA [1995] L Lloyd’s Rep 215

269 1969 (2)SCC 262

270 The Arbitration and Conciliation Act, 1996. Section 31(5)

271 2005(1) RAJ 506 (SC)
Section 33 (4) provides that, in the absence of an agreement by the parties to the contrary, a party with notice to the opposing party may, within 30 days from the receipt of the award, request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from arbitral award. If the tribunal considers such request to be justified, it shall make the additional award within 60 days from the receipt of the request\textsuperscript{272}. If the parties settle their dispute during arbitration proceeding, the arbitral tribunal shall terminate the proceedings and if request by the parties and not object to by the arbitral tribunal, it shall record the settlement in the form of an arbitral award on agreed terms.\textsuperscript{273} Section 35 of Arbitration and Conciliation Act,1996 says that once an arbitral award has been made, signed and delivered to the parties, subject to the provisions of part 1 of the Act, it shall be final and binding on the parties and persons claiming under them respectively. Corollary rule is that an award must dispose of all the issues in dispute, unless parties have so agreed. There is the residuary power in the arbitral tribunal to terminate proceeding where it finds that a continuation thereof has for any other reason, become unnecessary or impossible. If the situation develops where the arbitration proceedings becomes in-fructus, or with the continuation of the proceedings becomes impossible, the tribunal shall order termination of the arbitral proceeding. Like wise if the subject matter of the dispute is not arbitrable, or the contract has been frustrated or become impossible of performance and so on the tribunal shall terminate the arbitral proceedings\textsuperscript{274}.

\textsuperscript{272} The Arbitration and Conciliation Act,1996. Section 33(5)
\textsuperscript{273} The Arbitration and Conciliation Act,1996. Section30(2)
\textsuperscript{274} The Arbitration and Conciliation Act,1996. Section 32 (2) c , Maharashtra State Electricity Board Vs Datar Switchgears Ltd, 2003 (Supp) Arb LR 39, 63 (Bom).
In the Bhatia International Vs Bulk Trading S.A\textsuperscript{275} case, it was held that foreign awards are those where arbitration takes place in a convention country; awards in arbitration proceedings, which take place in a non-convention country, are considered neither as foreign awards nor as domestic awards under the Act. The Court also stressed that 'Domestic Awards' include all awards made under Part I of the Act. Awards made in an international commercial arbitration held in a non-convention country will also be considered to be a 'domestic award'.

4.3.10 COST OF ARBITRATION

The cost of arbitration means reasonable cost relating to fees and expenses of arbitrators and witnesses, legal fees and expenses, administration fees of the institution supervising the arbitration and other expenses in connection with arbitral proceedings. The tribunal can decide the cost and share of each party\textsuperscript{276}. If the parties refuse to pay the costs, the Arbitral Tribunal may refuse to deliver its award. In such case, any party can approach Court. The Court will ask for deposit from the parties and on such deposit, the award will be delivered by the Tribunal. Then Court will decide the costs of arbitration and shall pay the same to Arbitrators. Balance, if any, will be refunded to the party\textsuperscript{277}.

4.3.11 SETTING ASIDE OF AN ARBITRAL AWARD

The arbitration award made by the arbitral tribunal is open to challenge on the grounds mentioned in section 34 of the 1996 Act. These grounds include incapacity of a party, invalidity of the arbitration agreement, improper notice of appointment of the arbitrators, dispute not contemplated by or not falling within the terms of the arbitration,

\textsuperscript{275} 2002 AIR SC 1432  
\textsuperscript{276} The Arbitration and Conciliation Act, 1996 Section 31(8)  
\textsuperscript{277} Section 39
composition of the arbitral tribunal not in accordance with the agreement of the parties, dispute incapable of settlement by arbitration under the law for the time being in force and the award being in conflict with the public policy of India. It was held by the Supreme Court in P. Anand Gajapathi Raju Vs P.V.G .Raju\textsuperscript{278} case that, the Court to which the party shall have recourse to challenge the award would be the Court as defined in Section 2 (e) and not the Court to which an application under Section 8 of the Arbitration and Conciliation Act, 1996. The Supreme Court of India in, Union of India Vs Popular Construction Co\textsuperscript{279} case held that, by virtue of Section34(1), recourse to the Court against an arbitral award cannot be made beyond the prescribed period. The time limit prescribed under Section34 to challenge an award is absolute and un-extendible by Court under Section5 of Limitation Act.

The grounds of challenge under the Arbitration Act 1940 were very wide and included grounds such as 'errors of law arising on the face of the award' making them more open to the challenge procedure. The Arbitration and Conciliation Act, 1996 has very limited grounds of challenge based on the UNCITRAL Model Law. Apart from jurisdictional grounds, the arbitral award made by the arbitral tribunal can be set aside if the award is in conflict with the public policy of India. In ONGC Vs Saw Pipes Ltd\textsuperscript{280} case, the Supreme Court interpreted the meaning of 'public policy' in a wide sense in case of a domestic arbitration. It held that an arbitral award could be challenged on the ground that it is contrary to fundamental policy of Indian law, the interest of India; or justice or morality, patently illegal; or so unfair and unreasonable that it shocks the conscience of the Court. Illegality of a

\textsuperscript{278} AIR 2000 S.C 1886
\textsuperscript{279} 2001 (8)SCC 470.
\textsuperscript{280} 2003 (5)SCC 705.
trivial nature, however, can be ignored. Under the 1996 Act, awards that have become final and binding are enforceable in the domestic Courts system in India and are deemed to be decrees of the Court.

4.3.12 FINALITY AND ENFORCEMENT OF ARBITRAL AWARDS

The finality of arbitral awards in an arbitral proceeding is subject to Part VIII of The Arbitration and Conciliation Act 1996. An award becomes final it prevents the successful party from subsequently raising a claim on which he has succeeded. Likewise, it prevents the loosing party from raising the issue on which it has lost ‘just because he believes that on the second occasion he may have a more sympathetic tribunal, more convincing witnesses, or a better advocate. There must be an end to disputes\textsuperscript{281}. Thus, Section 35 provides that an arbitral award shall be final and binding on the parties and persons, claiming under them respectively.

Prior to 1940 an award could be executed in the same manner, to the same extent and subject to the same limitation as a decree of the Court\textsuperscript{282}. Under the Arbitration Act 1940, under section17, an award could be enforced by filing it in the Court and obtaining a judgment and decree on it.

The Arbitration and Conciliation Act, 1996 under Section 36, provides that, where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court. This section provides for the summary

\textsuperscript{281} Mustin and Boyd , Commercial Arbitration, second edn,1989,p413.

\textsuperscript{282} Kanhiya Lal Gauba Vs People’s Bank of Northern India Ltd AIR 1935 Lah 49;Donald Graham and Co Vs Kewalram and Ors AIR 1921 Sind 132.
procedure for excluding Court intervention at the enforcement stage, because most of the object of arbitration would be defeated if a claimant who succeeds in an arbitration has again stand in the queue of litigations seeking to enforce their agreements. The fact that an arbitral award is enforceable as if it were a decree does not render the arbitral proceeding as proceeding in a suit. Nor does it render an arbitration a suit. All that this section provides is that for the purpose of enforcement, an arbitral award can be enforced as if it were a decree283.

The Supreme Court of India in Fuerst Day Lawson Ltd Vs Jindal Exports Ltd284 case held that, as the object of the Arbitration and Conciliation Act, 1996 is to provide speedy and alternative solution to the dispute. Thereby, for the enforcement of a foreign award there is no need to take separate proceedings, one for deciding the enforceability of the award to make it a rule of the Court or decree and other to take up execution thereafter. In one proceeding, the Court enforcing a foreign award can deal with the entire matter.

4.3.12.1 INTERVENTION BY COURT

One of the major defects of earlier arbitration law was that the party could access Court almost at every stage of arbitration - right from appointment of arbitrator to implementation of final award. Thus, the defending party could approach Court at various stages and stall the proceedings. Now, approach to Court has been drastically curtailed. In some cases, if an objection is raised by the party, the decision on that objection can be given by Arbitral Tribunal itself. After the decision, the arbitration proceedings are continued and the aggrieved party can approach Court only after Arbitral award is made. Appeal to Court is now

283 Saurabh Kalani Vs Tata Finance Ltd 2003(Supp)Arb LR 217,238 (Bom).
284 AIR 2001 SC 2293.
only on restricted grounds. Of course, Tribunal cannot be given unlimited and uncontrolled powers and supervision of Courts cannot be totally eliminated. An application to challenge the award will not be maintainable if the party proposing to challenge it has accepted and acted upon it. The Supreme Court in Pooran Chand Nangia Vs National fertilisers Ltd, held that the appellant had received the money, which was due to him under the award accepting it unequivocally and without any reserve and so the challenge was not maintainable that it did not lie in his mouth to challenge the award. In Union of India Vs Popular Constructions Co, the Supreme Court held that by virtue of Sec34 (1), recourse to the Court against an arbitral award cannot be made beyond the prescribed period. The time limit prescribed under Sec 34 to challenge an award is absolute and un-extendable by Court under Section 5 of Limitation Act.

In the Venture Global Engineering Vs. Satyam Computer Services Ltd. and Another it was held that, in case of international commercial arbitrations held out of India provisions of Part-I would apply unless the parties by agreement express or implied, exclude all or any of its provisions.

The Arbitration and Conciliation Act, 1996 has limited the powers of Court. This Act has restricted the exercise of judicial powers, in other words confined the extent of judicial intervention as provided under Section 5 of the Arbitration and Conciliation Act, 1996. Section 5 says that, "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall

285 2003 (8) SCC 245.
287 (2008)4SCC190
intervene except where so provided in this part." The Supreme Court of India in the case of P. Anand Gajapathi Raju Vs P.V.G Raju\textsuperscript{288} held that, section 5 brings out clearly the object of the 1996 Act, namely, that of encouraging resolution of dispute expeditiously and less expensively and when there is an arbitration agreement, the Court’s intervention should be minimal. Finality of Arbitral Award under Section 35 is subject to the part according to which an arbitral award shall be final and binding on the parties and persons claiming under them respectively. Thus, Section 36 of the 1996 Act provided finality of arbitral awards and its enforcement, without intervention of the Court. The Arbitral Tribunals are empowered to settle any objections rose in respect of jurisdiction or scope of authority of the arbitrators.

The 1996 Act provides for appeals against orders granting or refusing to grant interim measures of protection under section 9 and orders setting aside or refusing to set aside, the arbitral award under section 17 shall lie to the Court authorized by law to here the appeals from original decrees of the Court passing the order.\textsuperscript{289} Orders concerning the jurisdiction or authority of the tribunal or award under Section 16(2), (3) are also appealable. The appellate Court is usually the High Court. No other statutory appeal is provided. Section 37 (3) prohibits a second appeal against the appellate order under section 37 (1) and (2). These mandatory provisions shut the door on the face of the second appeal whether through Scetion100 of the Code of Civil Procedure 1908, or a Letters Patent appeal. In Nirma Ltd Vs Lurgi Lent Jes Energietechnik GmbH\textsuperscript{290} case, dealing with a petition for special leave to appeal under Art 136 of the Constitution, against an appellate order passed by City Civil

\begin{footnotesize}
\textsuperscript{288} AIR 2000 S.C 1886.
\textsuperscript{289} The Arbitration and Conciliation Act,1996 Section 37
\textsuperscript{290} 2002 (5) SCC 520.
\end{footnotesize}
Court, Ahmedabad under Section 37(2), a two judge Bench of the Supreme Court contented itself by echoing the first part of the Shyam Sundar Agarwal and Co Vs Union of India\textsuperscript{291} case stating that, ‘merely because a second appeal against the appellant order is barred by the provisions of Section 37(3) of the Act 1996 ,the remedy of revision under Section115 of Code of Civil Procedure does not cease to be available to the petitioner’. In other words if the Act contains a provision which bars revisional power of the High Court which militates against giving effect to a provision of the Act, the revisional jurisdiction will stand superseded under the Act. Any subsequent appeal can go only to the Supreme Court by way of a special leave\textsuperscript{292}.

4.3.13 THE ADVANTAGES OF ARBITRATION OVER LITIGATION

From the study of the provisions of The Arbitration and Conciliation Act, 1996 and the judicial reviews of the Courts under the said Act of 1996, it is evident that, arbitration offers definite advantages that litigation from its very nature can never provide. Courts have always adopted a conservative approach to problems. The Courts of law are put into a straight jacket as it has to follow fixed procedure and fixed rules of evidence. Arbitration, on the other hand, is more informal. The Evidence Act is not applicable to arbitration. The Civil Procedure Code has no application. The arbitrator need only proceed in a manner conforming to justice, equity and good conscience. Arbitrator is not hunched in by any formulated rules. One of the major advantages of arbitration is that an expert arbitral tribunal can be selected considering the field of dispute, so much so that the entire procedure can be conducted without the

\textsuperscript{291} 1996(2) SCC 132,143.
\textsuperscript{292} The Arbitration and Conciliation Act,1996. Section 37 (3)
intervention of expert lawyers, with major gains in speed and economy. Thus, many disputes as to quality in commodity trades, many disputes arising out of construction contract etc. can be settled through arbitration in a speedy manner at lesser cost and more quickly than through Courts. The relevance of arbitration, its importance and its needs can never be over-emphasized. The rapid and phenomenal growth of commerce and industry and the complex and varied problems thrown out by them can find solution only through arbitration.

A final and enforceable decision can generally be obtained only by recourse to the Courts or by arbitration. In arbitration, since both the parties agree to the terms and conditions, they are bound by the decisions. It depends ultimately on the goodwill and cooperation of the parties. Over 134 countries have signed the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention. The Convention facilitates enforcement of awards in all contracting states and there by provides international recognition of the arbitral awards. On studying the provisions of the Arbitration and Conciliation Act, 1996 it can be said that, in arbitral proceedings, parties can place themselves on an equal footing in five key respects viz. place of arbitration, language used, procedures or rules of law applied, nationality and legal representation. Arbitration may take place in any country, in any language and with arbitrators of any nationality. With this flexibility, it is generally possible to structure a neutral procedure offering no undue advantage to any party.

In the cases of redressal of disputes through Court of law or judicial systems, do not allow the parties to a dispute to choose their own judges. However, arbitration offers the parties the unique opportunity to designate persons of their choice as arbitrators, provided they are
independent. This enables the parties to have their disputes resolved by people who have specialised competence in the relevant field. Arbitration is faster and less expensive than litigation in the Courts. Although a complex international dispute may sometimes take a great deal of time and money to resolve even by arbitration, the limited scope for challenge against arbitral awards, as compared with Court judgments, offers a clear advantage. Above all, it helps to ensure that the parties will not subsequently be entangled in a prolonged and costly series of appeals. Furthermore, arbitration offers the parties the flexibility to set up proceedings that can be conducted as quickly and economically as the circumstances allow. The arbitration hearings are not public, and only the parties themselves receive copies of the awards. This is of great significance in commercially sensitive disputes. Thus, the disputants often seek to resolve their disputes through arbitration because of such perceived potential advantages over judicial proceedings.

While the Arbitration and Conciliation Act, 1996 was not intended to supplant the tried and tested judicial system with the non-formal private arbitration or the purely consensual conciliation mechanisms. The new law certainly ushered in an era of privatisation of the hitherto State monopoly over dispute settlement procedures and institutions in conformity with the global rend of liberalisation of economic policies, privatisation of industry and globalisation of markets.

4.4 ENFORCEMENT OF CERTAIN FOREIGN AWARD

In view of its relative simplicity, economy, speed and privacy, alternative dispute redressal methods have particular attractions in the international sphere. For instance, a party from one country would always have reservations in suing the other party in another country where the
procedures are unfamiliar and the approach of the Courts may be different because of different legal and cultural perspectives. Even if the party were to sue the other in its own country, the enforceability of award in the foreign country where the other party may be having property would pose multifarious problems. As against this, recourse to arbitration avoids the need to resort to Courts. It is always easier to enforce arbitral awards than Court judgments because of presence of the multilateral conventions.

Part II of The Arbitration and Conciliation Act, 1996 deals with enforcement of New York Convention awards and Geneva Convention awards and empowers Indian Courts to refer matters coming before them to arbitration where the seat of arbitration is outside India. The Arbitration and Conciliation Act, 1996 deals with the enforcement of foreign awards in Part II only in relation to States which were parties to the New York Convention on the Recognition and Enforcement of Foreign Awards of 1958\textsuperscript{293}, and the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Awards of 1927\textsuperscript{294}. India made reservations to those instruments on the grounds of reciprocity and for confining the disputes to matters of commercial nature. Consequently, the Arbitration and Conciliation Act, 1996 did not deal with international arbitration or with international conciliation in general in relation to States that were not parties to the Geneva or New York Conventions. Arbitral awards given in the States that are not parties to those conventions are treated as non-convention awards, but even the awards made in States that are parties to the conventions but are not covered by the reciprocity reservation might fall outside the purview of Part II.

\textsuperscript{293} The Arbitration and Conciliation Act, 1996. Part III, Chapter I and Schedule I
\textsuperscript{294} The Arbitration and Conciliation Act, 1996. Part III, Chapter II and Schedules II and III
The foreign awards, which can be enforced in India, are The New York convention award made after 11 October 1960 and The Geneva convention award made after 28 July 1924, but before the concerned Government signed the New York convention. Since most of the countries have signed New York convention, normally, New York convention awards are enforceable in India. New York convention was drafted and kept in United Nations for signature of member countries on 21st December, 1958. Each country became party to the convention on the date on which it signed the convention.

The party which intends to enforce a foreign award has to produce the arbitral award and agreement of arbitration in original or its certified copy to the District Court having jurisdiction over the subject matter of the award. Court can refuse the enforcement of award only in cases specified in section 48. Section 48 of the 1996 Act enumerates the conditions for the refusal to enforce a foreign award in an Indian Court. Thus, if the subject matter of the dispute or difference is not capable of settlement by arbitration in India or if the enforcement of the award was contrary to public policy of India, the Court may refuse to enforce the award. Otherwise, the foreign award is enforceable through Court as if it is a decree of the Court. If the Court declines to enforce the arbitral award, appeal can be made to the Court where appeal normally lies from the District Court. However, no further appeal can be made except appeal to Supreme Court. Probably, the aggrieved party may be able to approach International Court of Justice, as the convention is an international convention, signed by many of the member countries. One advantage of foreign award, according to foreign parties, is that Indian

Courts come into picture only at the time of implementation of award. The Courts can refuse to implement the award only on limited grounds.

In Shin Estu Chemicals Co Ltd Vs Aksh Optifiber Ltd\textsuperscript{298} case, the Supreme Court ruled that any objection raised about the agreement being null and void, inoperative or incapable of being performed raised before a judicial authority is required to be decided by the Court by taking a prima-facie view merely for the purpose of making reference and leaving the parties to a full trial before the arbitral tribunal itself or before the Court at the post award stage.

The Supreme Court of India in Thyssen Stahluunion Gmbh Vs Steel Authority of India Ltd\textsuperscript{299} Case held that a foreign award given after the commencement of the 1996 Act could be enforced only under the Arbitration and Conciliation Act, 1996. There is no vested right to have the foreign award enforced under the Foreign Awards (Recognition and Enforcement) Act, 1961. After the Arbitration and Conciliation Act, 1996 has come into force, parties cannot agree to the applicability of the Arbitration Act, 1940. The Arbitration and Conciliation Act, 1996 would be applicable on or after the Act came into force. In cases where arbitral proceedings have commenced before the coming into force of the 1996 Act and are pending before the arbitrator, it is open to the parties to agree that the 1996 Act be applicable to such arbitral proceedings and they could so agree even before the coming into force of the 1996 Act. There is nothing in the language of Section85 (2) (a) which barred the parties from so agreeing.

\textsuperscript{298} 2005(3) Arb LR 1 (SC).
\textsuperscript{299} 1999 (9)SCC 334
In Kalpana Kothari Vs Sudha Yadav case Supreme Court of India held that, the fact that the earlier application under the Arbitration Act 1940 was got dismissed as not pressed in the teeth of the repeal of the said Act cannot constitute any legal impediment for having recourse to and avail of the avenue thrown open to parties under the Arbitration and Conciliation Act, 1996.

**4.5 SALIENT FEATURES OF PART III OF THE ARBITRATION AND CONCILIATION ACT, 1996**

The Arbitration and Conciliation Act, 1996 Part III comprises of 21 sections dealing with various aspects of the process of Conciliation. No such provision existed in the Arbitration Act 1940. The Statement of Objects and Reasons of Arbitration and Conciliation Bill, 1995 was, “Like arbitration, conciliation is also getting increasing worldwide recognition as an instrument for settlement of disputes. There is, however, no general law on the subject in India…Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a mode for legislation on domestic arbitration and conciliation”.

The Part III of the Arbitration and Conciliation Act, 1996 adopts, with minor contextual variation, the UNCITRAL Conciliation Rules 1980. One of the important innovations is the intent to avoid formal proceedings and provides that the Code of Civil Procedure 1908 or the Indian Evidence Act 1872 do not bind the conciliator. The provisions under Part III of Arbitration and Conciliation Act, 1996 confer same status and effect on the ‘settlement agreement as if it is as award on

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300 2002 (1) SCC 203.
agreed terms on the substance of the disputes rendered by an arbitral tribunal under Section 30.\textsuperscript{302} There are three main exceptions to the application of this part.\textsuperscript{303} Firstly, in the cases where any law for the time being in force provides otherwise. Secondly in the cases where the parties agree not to be governed by the provisions of Part III and agree to the effect that not to settle their disputes by conciliation. Thirdly, where any law for the time being in force in India prohibits certain disputes to be submitted to conciliation. Subject to these three statutory exceptions, disputes arising out of contractual or tortious relationship may be resolved by conciliation in accordance with the procedure prescribed under Part III of the Arbitration and Conciliation Act, 1996.

4.5.1 DIFFERENCES BETWEEN THE PROCESS OF CONCILIATION AND MEDIATION

Is there any difference between Conciliation and Mediation is a question that can trigger the mind of a common man when the meaning of the term Conciliation is read. Conciliation means the adjustment and settlement of a dispute in a friendly, un-antagonistic manner.\textsuperscript{304} This meaning of the term Conciliation does not make it clear as to whether the two concepts of conciliation and mediation would have different connotation or they would refer to the same mode. In order to understand this concept the researcher has studies it in relation to the legislations Arbitration and Conciliation Act, 1996 and The Civil Procedure Code (Amendment) Act, 1999 where it is used.

The Arbitration and Conciliation Act, 1996 under Part I, Section 30, of the Act, provides that an arbitral tribunal may try to have the

\textsuperscript{302} The Arbitration and Conciliation Act, 1996. Section 74.
\textsuperscript{303} The Arbitration and Conciliation Act, 1996. Section 61(1)&(2)
\textsuperscript{304} Black's Law Dictionary, 6th edn. (1990), West Publishing Co., p. 289.
dispute settled by use of ‘mediation’ or ‘conciliation’. Sub-Section (1) of Section 30 permits the arbitral tribunal to “use mediation, conciliation or other procedures”, for the purpose of reaching settlement.

The Civil Procedure Code (Amendment) Act, 1999 that introduced Section 89, speaks of ‘Conciliation’ and ‘Mediation’ as different concepts. Order 10 Rules 1A, 1B, 1C of the Code also go along with Section 89. Thus, the Parliament of India has made a clear distinction between Conciliation and Mediation. In Part, III of the Arbitration and Conciliation Act, 1996 in Sections 61 to 81 deals with ‘Conciliation’ but there is no definition of the term ‘Conciliation’. Nor is there any definition of ‘Conciliation’ or ‘Mediation’ in Section 89 of the Code of Civil Procedure, 1908 and as amended in 1999. As the two have been used in the Acts as two different forms of dispute resolving techniques, it can thus be held that the process of Conciliation is different from that of Mediation.

The concept of Conciliation has now been given a statutory recognition under the Arbitration and Conciliation Act, 1996. However, the expression conciliation is not defined in this Act. It only states that conciliation could take place not only in contractual and commercial disputes but also in all disputes arising out of legal relationship. The expression ‘conciliation’ is defined by the International Labour Organisation (ILO) in the year 1983, and the said definition is also adopted by the Advisory, Conciliation and Arbitration Service. The process of conciliation has been defined as, “The practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to reduce the extent of their difference and to
arrive at an amicable settlement or agreed solution. It is a process of orderly or rational discussion under the guidance of the conciliator.”

Article 1(3) of UNCITRAL Model Law on International Commercial Conciliation 2002 defines conciliation to mean “a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons called 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”.

Conciliation is also said, to be a procedure like mediation but the third party, the conciliator, takes a more interventionist role in bringing the two parties together and in suggesting possible solutions to help achieve a settlement. However, the term ‘conciliation’ is gradually falling into disuse and a process, which is pro-active, is also being regarded as a form of mediation.

The Advisory, conciliation and arbitration service makes a distinction between conciliation and mediation in the following words, “Mediation may be regarded as a half way house between conciliation and arbitration. The role of the conciliator is to assist the parties to reach their own negotiated settlement and he may make suggestions as appropriate. The mediator proceeds by way of conciliation but in

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306 Lord Chancellor’s Department on Alternative Dispute Resolution (http://www.lcd.gov.uk/Consult/cir-just/adi/annexaldf/htm)
addition is prepared and expected to make his own formal proposals or recommendations which may be accepted".

Under Part III of the Arbitration and Conciliation Act, 1996 the Conciliator’s powers are larger than those of a ‘mediator’ as he can suggest proposals for settlement. Hence, the above meaning of the role of ‘mediator’ in India is quite clear and can be accepted, in relation to Section 89 of the Code of Civil Procedure also. The difference lies in the fact that the ‘conciliator’ can make proposals for settlement, ‘formulate’ or ‘reformulate’ the terms of a possible settlement while a ‘mediator’ would not do so but would merely facilitate a settlement between the parties.

4.5.2 CONCILIATOR

A Conciliator is basically different from that of a Judge or an Arbitrator. The role of the Conciliator is to assist the parties to reach their own negotiated settlement and he may make suggestions as appropriate. Conciliator does not impose a decision on the parties but, on the contrary, his role is to assist the parties to resolve the dispute themselves. He may give opinion on issues in dispute but his primary function is to assist in achieving a negotiated solution.

A conciliator can suggest terms upon which a settlement can be arrived at, but cannot impose a settlement conceived by him on the parties. His role is merely advisory and not creative or decisive, like the role of an arbitrator or an adjudicator. In practice, conciliation covers

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different fields of activity, each with its own traditions, ethos and culture. The skill and technique adopted by the conciliator in enabling the parties to come to a voluntary settlement of dispute between them and thereby avoiding adjudication and in due course bringing about a negotiated settlement vary. A conciliator, dealing with a commercial dispute, may have to adopt altogether different procedure, technique and approaches, from that of a conciliator dealing with family disputes or labour disputes. Nevertheless, all the fundamental principles and procedure prescribed under the Arbitration and Conciliation Act, 1996 is the same.

A conciliator is as an independent and impartial person and he must enjoy confidence of both the parties. The parties should be able to repose trust and confidence on him so as to enable them to share their secrets and their thinking process with the conciliator with the belief that the same should not be divulged to other party without specific instructions in that regard. Therefore, a conciliator is bound by rules of confidentiality and not by the strict rules of the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872. Though Section 66 is not governed by the provisions of Section 18, the provisions of Section 67, requires the conciliation to be aided by the principles of objectivity, fairness and justice are applicable to it. This ensures that the conciliator will conduct the proceedings in a fair and judicious manner, in order to do justice to each one of the parties. The number of conciliator generally appointed for a conciliation proceeding is one unless the parties agree and give mutual consent to have more conciliators than one.

4.5.2.1 ROLE OF CONCILIATOR

The role of the ‘Conciliator’ is pro-active and interventionist. The conciliator records the evidence of the parties and hears their arguments on the question of fact and law, the conciliator forms his opinion and stops just short of making a decision because that does not fall in his territory. Conciliator then proceeds to persuade the parties to come to a settlement in the light of his opinion. Conciliator can suggest certain terms for the acceptance of the parties on which the dispute can be resolved. Conciliator has to use his best endeavor to conclude the conciliation. Section 67, of the Arbitration and Conciliation Act, 1996 requires the conciliator to play the following part in the process of conciliation: First, the conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute. Secondly, the conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. Thirdly, Section 67(3), provides that, the conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute. The conciliator may, at any stage of the conciliation proceedings can make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefore. Thus, the primary

312 The Arbitration and Conciliation Act, 1996. Section 67(1)
313 The Arbitration and Conciliation Act, 1996. Section 67(2)
314 The Arbitration and Conciliation Act, 1996. Section 67(4)
role of a conciliator is to act as a facilitator though he should not coerce the parties to accept his opinion. The above provisions in the 1996 Act make it clear that the ‘Conciliator’ under the said Act, apart from assisting the parties to reach a settlement, is also permitted to make “proposals for a settlement” and “formulate the terms of a possible settlement” or “reformulate the terms”.

4.5.3 CONDUCT OF CONCILIATION PROCEEDING

A conciliation proceeding could be initiated in India when, one of the parties to the dispute arising out of legal relationship invites the other parties to get the dispute resolved through conciliation. The conciliation can start only if other party accepts in writing the invitation to conciliate. If, however, the other party rejects the invitation for settlement through conciliation, no such proceeding would be initiated. Even if no response were sent within thirty days to the invitation, it would be deemed that the said request is rejected.

A statement of their respective cases is to be submitted by the parties to the conciliator in order to enable the conciliator to understand the case of the parties and to form an opinion. He can call for additional statement of facts and information in order to enable him to give his suggestion to the parties.

The Conciliation proceeding could be classified into two types namely, facilitative conciliation and evaluative conciliation. In facilitative conciliation, the conciliator avoids opinion and judgments and he merely assists the parties to clarify their communications, interest and priorities. On the other hand, in evaluative conciliation, the conciliator expresses his

315 The Arbitration and Conciliation Act,1996. Section62(1)to (4)
316 The Arbitration and Conciliation Act,1996. Section65(2)
317 The Arbitration and Conciliation Act,1996. Section65(3)
opinion on the merit of the issues so as to enable the parties to approach settlement. His opinion is a third party view on the merit but such opinion would not be conclusive and binding\textsuperscript{318}.

The section 69 of Arbitration and Conciliation Act, 1996 contains the provision regarding communication between conciliator and parties whether orally or in writing and about place of meeting. The conciliator may meet or communicate with the parties together or with each of them separately. Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings. When the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation, which he considers appropriate. In the proviso to the section 70, it is stated that when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party\textsuperscript{319}. The Supreme Court of India in Haresh Dayaram Thakur Vs State of Maharashtra \textsuperscript{320} case reinstated that under the provisions of section 72 each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

The success of a conciliation proceeding depends upon the genuine and honest desire of the parties to settle the dispute amongst themselves with the assistance of the conciliator. The parties shall in good faith

\textsuperscript{318} Mackie, Miles, Marsh and Allen. The Alternative Dispute Redressal methods Practice Guide; Commercial Dispute Resolution, 2\textsuperscript{nd} edn, 2000, p 12, para 1.3.3.

\textsuperscript{319} The Arbitration and Conciliation Act, 1996. Section 70

\textsuperscript{320} 2000(6) SCC 179.
cooperate with the conciliator and, in particular, shall endeavor to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings\textsuperscript{321}. Thus, good faith of the parties in cooperation with the conciliator in the conciliation proceeding, is a sine qua non for arriving at an amicable settlement of the dispute and in the absence of good faith and bona fide co-operation by the parties, no conciliator can succeed in bringing about an amicable settlement.

The parties are entitled to suggest terms of settlement, which would be discussed by the parties wherein suggestions could be given by the conciliator on such terms for their observations but the conciliator, cannot impose a settlement as conceived by him on the parties\textsuperscript{322}. Under Section 73 of Arbitration and Conciliation Act, 1996 it is provided that, after considering the reformulated terms of possible settlement, if the parties reach a settlement of the dispute, they may draw up and sign a written agreement. Otherwise, the parties may request the conciliator to draw up or to assist them in drawing up the settlement agreed upon by them. The parties shall sign the settlement agreed upon by them. Such settlement shall be final and binding on the parties and persons claiming under them respectively. The conciliator is then required to authenticate the settlement agreement and furnish a copy of it to each one of the parties.

The Supreme Court of India in Haresh Dayaram Thakur VS. State of Maharashtra\textsuperscript{323} case held that, a successful proceeding comes to an end only when the settlement agreement signed by the parties comes into existence. It is such an agreement, which has the status and effect of legal sanctity of an arbitral award under Section 74 of Arbitration and

\textsuperscript{321} The Arbitration and Conciliation Act, 1996. Section 71.

\textsuperscript{322} The Arbitration and Conciliation Act, 1996. Section 72.

\textsuperscript{323} AIR 2000 SC 2281.
Conciliation Act, 1996. In Mysore Cements Ltd Vs Svedal Barmac Ltd\textsuperscript{324} the Supreme Court noted that from the Memorandum of Conciliation Proceedings and Letter of Comfort, it did appear that parties had agreed to certain terms, but they could not straightaway be enforced by taking up the execution proceedings. It falls short the essential legal pre-requisites to be satisfied for being assigned the status of a legally enforceable agreement of settlement between the parties. In case the parties arrive at a settlement during the discussion and the proceeding, a settlement agreement is drawn up which would have the same effect and status as an arbitral award on agreed terms as envisaged under section 30 of the Act\textsuperscript{325}. The same thereafter could be enforced as a decree of the Court under the Code of Civil Procedure 1908.

A party desiring to avail the remedy could take resort to the said procedure during pre-litigation and even during the pendency of litigation. If the effort does not succeed, the parties can always come back to litigation.\textsuperscript{326} However, during the pendency of conciliation preceding a party is not entitled to pursue any arbitral or judicial proceedings in respect of a dispute that is the subject matter of the conciliation proceedings. This is subject to one exception that, a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for the preserving his rights\textsuperscript{327}.

\textbf{4.5.4 CONFIDENTIALITY}

The conciliator as well as the parties shall keep confidential all matters relating to the conciliation proceeding. Section 75 of Arbitration and Conciliation Act, 1996 has extended the confidentiality to the

\textsuperscript{324} 2003 (10) SCC 375.
\textsuperscript{325} The Arbitration and Conciliation Act, 1996. Section 74.
\textsuperscript{326} Conciliation and Mediation By Justice Dr. M.K. Sharma. Judge, High Court of Delhi, p1-4
\textsuperscript{327} The Arbitration and Conciliation Act, 1996. Section 77.
settlement agreement except where ‘its disclosure is necessary for the purpose of its implementation and enforcement’ despite anything contained in any other law for the time being in force in India. This provision is expressly subjected to party autonomy to meet concerns expressed that it might be inappropriate to impose upon the parities a rule that would not be subject to party autonomy, and could be difficult to enforce. Evidently, this provision is inconsistent with the provisions of Section 70 of Arbitration and Conciliation Act, 1996 that is not subject to party autonomy. Under Section 70 when a conciliator receives factual information concerning the dispute from one party, he shall disclose the substance of that information to the other party in order that the other party has the opportunity to present any explanation which he considers appropriate.

Section 75 and 81 of Arbitration and Conciliation Act, 1996 are closely related. Section 80 prohibits the parties from relying on or introducing, the matters catalogued in it as evidence in any arbitral proceedings irrespective of the fact that such proceedings relate to the dispute that is the subject matter of the conciliation proceedings. In other words, the reliance on or introduction of these items will be inadmissible as evidence in any arbitral or judicial proceedings. Together they ensure that all information relating to and emanating from the conciliation remains confidential, and is not relied on or introduced as evidence in subsequent dispute resolution proceedings. The violation of these requirements will vitiate the award as being in conflict with the public policy of India, and render it liable to be set aside.

In Hassneh Insurance Co of Israel Vs Steuart J Mew\textsuperscript{329}, it was held that the duty of confidence is qualified in relation to the award when disclosure is reasonably necessary to establish or protect a party’s legal rights as against a third part. For instance, if the disclosure is necessary for a party to pursue a subsequent claim against his insurers in respect of the same loss, by founding a cause of action or a defence to a claim. In such situations disclosure of the award, including the reason stated therein will not constitute a breach of the duty of confidentiality. In Ali Shipping Corp Vs Shipyard Trogir\textsuperscript{330} case it is held that, it also covers pleadings, written submissions, proof of witnesses, transcripts and notes of the evidence, provided of course disclosure is reasonably necessary to establish or protect a party’s legal rights as against a third party. It is subject to an exception that in case where a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party, or any one else.

The violation of the requirement of confidentiality will render the award liable to be set aside being ‘in conflict with the public policy of India\textsuperscript{331}, except where its disclosure is necessary for purpose of its implementation and enforcement.’ In London and Leeds Estates Ltd Vs Paribas Ltd (No 2)\textsuperscript{332} held that, in the interest of justice if any disclosure is required it is just and valid disclosure. In ensuring that it was held that the judicial decision in the particular case is to be based on accurate evidence rather than any public interest in the broader sense\textsuperscript{333}.

\textsuperscript{329} 1986 Revue de l’ Arbitrage 583.
\textsuperscript{330} 1998(2) AII ER 136,147.
\textsuperscript{331} Section 34(2)(b)(ii) of Arbitration and Conciliation Act,1996 provides that an arbitral award may be set aside by the Court, if it finds that the award in conflict with public policy of India.
\textsuperscript{332} 1995 (1) EG 134.
In the agreement to arbitrate the parties may bring witnesses to the hearing to give evidence and legal or other representatives to present their case. Thus, a definition of the word ‘stranger’ is, therefore, required. The term ‘stranger’ has been defined as meaning ‘person whose presence is not necessary or expedient for the proper conduct of the proceeding’\(^{334}\). Thus, each of those individuals is considered to be subject to the duty of confidentiality on behalf of the party they are representing\(^{335}\). In Oxford Shipping Co Ltd Vs Nippon Yusen Kaishs, (The Eastern Saga)\(^{336}\) case it was held that, the concept of privacy in arbitration ‘derives from the fact that the parties have agreed to submit to arbitration particular dispute arising between them and only between them’.

4.5.5 TERMINATION OF CONCILIATION PROCEEDING

The provision of the Arbitration and Conciliation Act, 1996 set forth the situation and the point of time at which the conciliation proceedings terminate. Accordingly, the conciliation proceedings shall be terminated\(^{337}\) primarily by settlement. The conciliation proceeding are terminated on the date the parties sign the ‘settlement agreement’. The proceeding shall be terminated by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration. The conciliation proceeding can be terminated by the parties on the date when they make a declaration in writing addressed to the conciliator to the effect that the conciliation proceeding are terminated. The conciliation proceeding can be terminated by a party on the date when it makes a

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\(^{336}\) 1984 (3) ALL ER 835,842.

\(^{337}\) The Arbitration and Conciliation Act,1996. Section76.
declaration in writing to the other party and to the conciliator, if appointed to the effect that the conciliation proceedings are terminated.

On the termination of the conciliation proceeding in any of the situation enlisted above under Section 76; the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties. Costs means reasonable costs incurred during the conciliation proceeding. The costs shall include the fee and expenses of the conciliator and witnesses requested by the conciliator with the consent of the parties, the expenses in relation to any expert advice requested by the conciliator with the consent of the parties, expenses incurred for the assistance of an institution or a person in connection with the appointment of a conciliator and the administrative assistance to facilitate the conduct of the conciliation proceedings. In addition to this, it also includes any other incidental expenses incurred in connection with the conciliation proceedings and the settlement agreement. The settlement agreement may provide the mode and the manner of apportionment of the costs to be fixed by the conciliator after the termination of the conciliation proceeding. In the absence of such provisions in the settlement agreement, the cost shall be borne equally by the parties. All the expenses incurred by a party shall be borne by that party.

Section 38 if the Arbitration and Conciliation Act, 1996 empowers an arbitral tribunal to call for deposits in an arbitral proceeding. The conciliator may direct each party to deposit an apportioned amount as an advance for the costs referred to under section 78(2) which he expects
will be incurred during the conciliation proceeding. By Section 79 (2), the conciliator during the course of the conciliation proceedings, if he considers it expedient to call for further deposits, he may ‘direct supplementary deposits in equal amount from each party’. If both the parties default in paying the amount called for by the conciliator within 30 days from the date of direction to deposit, the conciliator may suspend the proceedings. Alternatively, he may make a declaration to the parties in writing that the conciliation proceedings stands terminated.

Under Section 79 (4) it is provided that, after termination of the conciliation proceedings, the conciliator is required to render an accounting to the parties of the deposits received by him and the conciliator shall refund any unexpended balance to the parties. The Arbitration and Conciliation Act, 1996 under Section 80, prohibits the conciliator from acting as an arbitrator or as a representative or council of any party, in any arbitral or judicial proceedings in, respect of a dispute that is the subject matter of the conciliation proceedings. The provision further prohibits the parties from presenting a conciliator as a witness in any arbitral or judicial proceeding.

There is no conflict between litigation and a conciliation or mediation proceeding. Thus, they can be said to be complimentary to each other, like a bye pass. Choice is of the parties to choose one but one has a choice to come back to the main thoroughfare the litigation also, when so intended. Moreover, when a reference is made by the Court under section 89 Code of Civil Procedure, 1908 to a conciliator or a mediator, not only the Court retains the supervisory jurisdiction over the matter but the lawyers and the litigants continue to be participants therein.

342 Section 79 (1), The Arbitration and Conciliation Act, 1996
343 Section 79 (3), The Arbitration and Conciliation Act, 1996
344 The Arbitration and Conciliation Act, 1996. Section 80(a) and (b).
It is with the active support of all the three participants along with an additional player, namely, the mediator or conciliator that a negotiated mutual settlement is arrived at. Therefore, the system of alternative dispute resolution through mediation and conciliation may not and should not be seen as competitive to litigation in Court\textsuperscript{345}.

The mechanism of conciliation has also been introduced for settling industrial disputes under Industrial Disputes Act, 1947 and by the Arbitration and Conciliation Act, 1996. The City Disputes Panel, UK which offers a range of dispute resolution processes, facilitative, evaluative and adjudicative stated that conciliation “is a process in which the Conciliator plays a proactive role to bring about a settlement” and mediator is “a more passive process”\textsuperscript{346}.

\textbf{4.5.6 COMPARATIVE ASSESSMENT OF THE PROCESS UNDER THE ARBITRATION AND CONCILIATION ACT, 1996}

The process of arbitration is more privatised than judicial settlement and conciliation is more privatised than arbitration. As judicial settlement and arbitration are species of adjudication, the judge and the arbitrator render their verdicts and impose them, with or without the consent or in spite of dissent, on the part of the parties. While the parties to arbitration are given considerable freedom to regulate the modalities, barring some non-derogable provisions, at various stages of the arbitral proceedings, they have no control over the decision making process except in the case of award on agreed terms.

The Section 7(2) of the Arbitration and Conciliation Act, 1996 requires that “an arbitration agreement shall be in writing”, there is no

\textsuperscript{345} Peter Binder, International Commercial Arbitration And Conciliation in UNCITRAL Model Law Jurisdictions, 2\textsuperscript{nd} edn 2005, p 328.

\textsuperscript{346} Brown, Handbook of the City Disputes Panel, UK.1997 (p 127)
such express provision in Part III regarding conciliation. However, that does not make any practical difference as the process of conciliation starts with the written offer and written acceptance to conciliate on the part of the parties. Conversely, in arbitration, even in the absence of a prior written agreement, if the parties appoint the arbitrator and proceed with the submission of written claim and defense and continue with the proceedings till they culminate in the award, the requirement of Section 7(2) under 4 (c) should be taken as complied with.

It is possible to the parties to enter into an arbitration agreement, even before the dispute has arisen under Section 7 (1) (“all or certain disputes which have arisen or which may arise”), it would appear from the language of Section 62 that, it would not be possible for the parties to enter into conciliation agreement even before the dispute has arisen. Section 62 provides that, the party initiating conciliation shall send to the other party a written invitation to conciliate under this part, briefly identifying the subject of the dispute. The Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

The above provision clearly requires that the conciliation agreement should be an ad hoc agreement entered into after the dispute has arisen and not before. A conciliation agreement entered into before the dispute has arisen may have the effect of ousting the jurisdiction of the Courts in relation to the subject matter of the dispute and such an agreement can be saved only by making an amendment to Section 28 of the Indian Contract Act as it was done in 1972 to save the arbitration agreement. After the enactment of the 1996 Act covering both arbitration and conciliation, there can be no objection, either theoretical or practical, for not permitting the parties to enter into a conciliation agreement
regarding the settlement of even future disputes ousting the jurisdiction of the Courts. This is particularly so in the light of the fact that the Act treats the conciliation settlement agreement authenticated by the conciliator on par with award on agreed terms, which in turn is treated on par with any arbitral award. Evident from Section 74 and 30 of Arbitration and Conciliation Act, 1996.

While, Section 30 of the Arbitration and Conciliation Act, 1996 permits the parties to engage in conciliation process even while the arbitral proceedings are on. They may do so on their own and settle the dispute through conciliation or authorize the arbitrator himself to use mediation or conciliation and settle the dispute. The arbitrator would record the settlement in the form of an arbitral award. However, Section 77 of the Act bars the “initiation” of any arbitral or judicial proceedings in respect of a dispute that is the subject matter of conciliation proceedings, except for the purpose of “preserving” their rights. The term “initiation” in Section 77 clearly supports the provision in Section 30. That is, when the arbitral or judicial proceedings are on, the parties are even encouraged to initiate conciliation proceedings but when the conciliation proceedings are on they are barred from initiating arbitral or judicial proceedings. The raisons de etre of the provision (16 of the Draft) were given in the “Commentary on the Revised Draft UNCITRAL Conciliation Rules: Report of the Secretary General” as follows, the Article 16 deals with the delicate question whether a party may resort to Court litigation or arbitration whilst the conciliation proceedings are under way…. Article 16 emphasizes the value of serious conciliation effort by expressing the idea that, under normal circumstances, Court or arbitration proceedings should not be initiated as might adversely affect the prospects of an amicable settlement. However, the Article also takes
into account that resort to Courts or to arbitration does not necessarily indicate unwillingness on the part of the initiating party to conciliate. In view of the fact that, under article 15(d), an unwilling party may terminate the conciliation proceedings at any time, it may well be that, if a party initiates Court or arbitral proceeding, he does so for different reasons. For example, a party may want to prevent the expiration of a prescription period or must meet the requirement, contained in some arbitration rules, of prompt submission of a dispute to arbitration. Instead of attempting to set out a list of possible grounds, Article 16 adopts a general and subjective formula: “…except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.”

From the above study, it is evident that the real purpose of provisions in Sections 30 and 77 of the 1996 Act is, to encourage resort to non-formal conciliation in preference to the formal Court and arbitral proceedings. Secondly, resort to arbitral or judicial proceedings was permitted as an exception to meet the cases of requirements of the general law of limitation or of “time-bar clauses” like the Atlantic Shipping Clause Atlantic Shipping and Trading Company Vs Dreyfus and Company\(^{347}\) or interim measures of protection.

4.5.7 CONCILIATION UNDER THE CIVIL PROCEDURE CODE AMENDMENT ACT 1999

The amendments made in 1999 to the Civil Procedure Code have introduced provisions to enable the Courts to refer pending cases to arbitration, conciliation and mediation to facilitate early and amicable resolution of disputes. The Arbitration and Conciliation Act, 1996 do not

\(^{347}\) (1992) 2 AC 250
contain any provision for reference by Courts to arbitration or conciliation in the absence of the agreement between the parties to that effect. Under that 1996, Act, the process of arbitration and conciliation are purely consensual and not compulsory. But under the newly added Section 89 of CPC, the Court can refer the case to arbitration, conciliation, mediation..., etc “where it appears to the Court that there exist elements of settlement which may be acceptable to the parties.” The Court can formulate the terms of settlement and give them to the parties for their observation and after receiving the observations; the Court may reformulate the terms of a possible settlement and refer the same for arbitration, conciliation, mediation etc. At this juncture, the Court is not ascertaining the agreement of the parties but only their observations, because if there is agreement between the parties at the stage of formulation of possible terms of settlement, the Court can as well make it the basis of its judgment and there would be no need for further negotiations under the aegis of arbitration or conciliation. However, once the Court refers the case to arbitration or conciliation, that reference creates a legal fiction that it is deemed to be a reference under the provisions of the Arbitration and Conciliation Act, 1996 and the provisions of that Act would take over from the provisions of the CPC under which the reference was made. Thus, if the parties choose to do so, the parties or the conciliator under Section 76 of the 1996 Act can terminate the conciliation proceedings so commenced by Court’s reference under Section 89 of CPC.
4.5.8 CONCILIATION UNDER THE INDUSTRIAL DISPUTES ACT, 1947.

In the year 1920, the first Trade Disputes Act was enacted constituting Courts of Inquiry and Conciliation Boards. The law did not make any provision for creating or establishing any machinery for the settlement of “industrial disputes”; its focus was the regulation of strikes that could potentially cripple the economy. This law was repealed and replaced by the Trade Disputes Act, 1929, which was the precursor to the present Industrial Disputes Act, 1947. Trade Dispute Act, 1929, facilitated State intervention in the settlement of industrial disputes by arming the government with powers that could be used whenever it considered fit to intervene in any industrial dispute. While it also addressed strikes in public utility services and general strikes affecting the community as a whole, its main purpose was to create a conciliation machinery to facilitate the peaceful resolution of industrial disputes. Initially, the law made provision for only ad hoc Conciliation Boards and Courts of Inquiry. However, in the year 1938, an amendment authorized the Central and Provincial Governments to appoint Conciliation Officers for mediating in or promoting the settlement of industrial disputes. The National Commission on Labour, 1969 noted, “This Act, however, was not used extensively, as the government policy at that time continued to be one of laissez faire and selective intervention at the most. Where Government intervened, the procedure consisted of appointing an authority which would investigate into the dispute and make suggestions to the parties for settlement or allow the public to react on its merits on the basis of an independent assessment.” Thus the main defect is that

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while restraints have been imposed on the right of Strike and Lock-out in public utility services no provision has been made to render the proceedings instittutable under the Act for the settlement of an industrial dispute, either by reference to a Board of Conciliation or to a Court of Inquiry, conclusive and binding on the parties to the dispute. This defect was overcome during the war by empowering under Rule 81 A of the Defence of India . The Second World War led to the promulgation of the Defence of India Rules. Rule 81 (A) empowered the Central Governments to intervene in industrial disputes, adjudication and to enforce their award. In other words, this Rule was intended to provide speedy remedies for industrial disputes by referring disputes compulsorily to conciliation or adjudication. There by, making the awards legally binding on the parties, prohibiting strikes/lock-outs during conciliation or adjudication proceedings and placing a blanket ban on strikes not arising out of genuine trade disputes. Rule 81 A, which was to lapse on 1st October 1946, is being kept in force by Emergency Powers (Continuance) Ordinance, 1946, for a further period of six months. As in checking the Industrial unrest Rule 81 A, proved useful and gained momentum due to the stress of postindustrial re-adjustment, thus, the need of permanent legislation in replacement of this rule was evident. The Government of India passed The Industrial Disputes Bill . This Bill embodied the essential principles of Rule 81 A, which have proved generally acceptable to employer and the workmen, relating intact, for the most part, the provisions of the Trade Disputes Act 1929. The Industrial Disputes Bill was introduced in the Central Legislative Assembly on 8 October 1946. The Bill passed by the Legislature received its assent on 11 March 1947 and it came into force from 1 April 1947 as The Industrial Disputes Act 1947. The two institutions for the prevention and settlement of industrial disputes provided under this are the Works Committees consisting of
representatives of employers and workmen, Industrial Tribunal consisting of one or more member possessing qualifications ordinarily required for appointment as Judge of a High Court. Power has been given to the appropriate Government to require Works Committees to be constituted in every industrial establishment employing 100 workmen, or more and their duties will be to remove causes of friction between the employer and the workmen in the day-to-day working of the establishment and to promote measure for securing amity and good relation between them. Industrial peace will be most enduring where it is found on voluntary settlement and the Works Committees rendered recourse to the remaining machinery provided under the Act, 1947 for the settlements of disputes infrequent. A reference to an Industrial tribunal can lie where both the parties to an Industrial Dispute apply for such reference and where the appropriate Government considers it expedient to do so. Conciliation will be compulsory in all disputes in public utility service and optional in the case of the other industrial establishment. With a view to expedite conciliation proceedings time limits have been prescribed for conclusion thereof 14 days in case of conciliation officer and two months in the case of Board of Conciliation from the date of notice of strike. A settlement arrived at in the course of conciliation proceeding will be binding for such period as may be agreed upon by the parties and where no period has been agreed upon, for a period of one year, and will continue to be binding until revoked by a 3 months notice by either party to the dispute. The Act provided, for the first time, a compulsory adjudication of industrial disputes. The principal techniques of dispute statement provided in the Industrial Disputes Act are Collective Bargaining, Mediation and Conciliation, Investigation, Arbitration, Adjudication.

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350 Industrial Disputes Act 1947 Section,3.
351 Industrial Disputes Act 1947 Section, 10.
352 Industrial Disputes Act 1947 Section,10 (2A)
Section 11 of the Industrial Disputes Act provides that, industrial adjudicators and authorities constituted under the Industrial Disputes Act such as Conciliation Officers, Boards, Courts and Tribunal could follow such procedure as they thought fit. With reasonable notice, they can enter into any premises. They can exercise powers of a Civil Court in respect of enforcing attendance of witnesses, production of documents, etc. and they can appoint one or more persons having special knowledge of the matter under consideration as an assessor or assessors to advise them. Section 12 of the Industrial Disputes Act, addressing the duties of Conciliation Officers, clearly stated that a conciliation officer could do all such things as he thought fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute.

In General Manager, Security Paper Mill, Hoshangabad Vs. RS Sharma\(^\text{353}\) case, Supreme Court summed up the role of a Conciliation Officer as, “Even though a conciliation officer is incompetent to adjudicate upon the dispute between the management and its workmen, he is expected to assist them to arrive at a fair and just settlement. He is to play the role of an adviser and friend of both parties and should see that neither party takes undue advantage of the situation.” This indicates the wide sweep of powers conferred upon the conciliation authorities constitute under the Industrial Disputes Act 1947, who had full liberty and discretion to secure a peaceful settlement of industrial disputes.

The process of conciliation as an alternative disputes redressal mechanism is advantageous to the parties in the sense that it is less costly and less time consuming. It is relatively simple and flexible, it obviates cumbersome litigation procedure and it eliminates the scope for

\(^{353}\) 1986 (Lab).IC 667 (670) SC.
corruption and malpractices and leave parties free to withdraw from Conciliation at any stage of the proceeding.

4.6 AMBIGUITIES FOUND IN THE ARBITRATION AND CONCILIATION ACT, 1996

There are few ambiguities in the Arbitration and Conciliation Act, 1996. This Act provides for procedural law on arbitration and conciliation mechanism for resolution of disputes in India. The Law Commission of India has recommended various amendments to the Arbitration and Conciliation Act, 1996 by its 176th Report. The proposed amendment seeks to make arbitration more effective and speedy.

Ever since the commencement of the Arbitration and Conciliation Act, 1996, requests have been voiced for its amendment. The main problem with this Act is that the UNCITRAL Model, which was meant as a Model for international arbitration, was adopted also for domestic arbitration between parties in India. In several countries, the laws of arbitration for international and domestic arbitration are governed by different statutes. In addition, in many cases, the legislative provisions have lost the letter and the spirit, and in some cases, it has kept the letter, but lost the spirit of the UNCITRAL Model Law in the Arbitration and Conciliation Act, 1996.

The areas where the Arbitration and Conciliation Act, 1996 is to be made more clear is highlighted herein. The Act, does not provide for any prescribed period within which a conciliation proceeding is to be concluded. For without a reasonable ultimatum in relation to the time limit, an inordinate delay in arriving at a settlement might result in the termination of the conciliation proceeding by an aggrieved party owing to
frustration or in a settlement that is not in the best interest of a party owing to desperation.

It is pertinent to note that, Section 13 of the Arbitration and Conciliation Act, 1996 which states that, the challenge procedure to remove an arbitrator from the tribunal, the arbitrator who is being challenged, remains in the arbitral tribunal and hence decides about his own competence as an arbitrator. Equity is regarded as a synonym for Natural Justice and fairness is an integral part of it. The principle of “Nemo Judex in Causa Sua” that is no man shall be the judge of his own cause remains as one of the bedrocks of natural Justice. Thus, it can be said that this section is completely against the principle of natural justice. Under Section 13(3) of the Act, the Arbitrator himself would adjudicate his own competence by being part of the tribunal, thereby creating doubts of biasness and unfair justice. The test of likelihood of bias is whether a reasonable person, in possession of relevant information would have thought that bias was likely and whether the person concerned was likely to be disposed to decide the matter only in a particular way. Therefore, it is to be carefully perceived that the challenge to the arbitrator adjudicating his own competence is in no manner a doubt or imputation to the character of the arbitrator; instead, it is the apprehension of biasness that forms the ground of appeal that has arisen from a situation. Hence, it has to be acknowledged that Section 13(2) is speculative and needs more clarity.

Section 30 of the Arbitration and Conciliation Act, 1996 provides for encouragement of settlement of dispute before the arbitral tribunal and sub-section (4) thereof provides that an arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute. Section 35 of the 1996 Act gives finality to an
arbitral award and states that it shall be final and binding on the parties and persons claiming under them respectively. Section 36 of the 1996 Act provides that, the arbitral award shall be enforced under the Code of Civil Procedure, 1908 (V of 1908) in the same manner as if it were a decree of the Court after the time for making an application to set aside the award under Section 34 has expired, or such application having been made, it has been refused.

It thus appears that Section 36 is applicable to all arbitral awards, particularly those that are rendered by the arbitration tribunal on merits. In pursuant to the suggested amendments to Section 89 of the Code of Civil Procedure, 1908 it appears that arbitral awards on agreed terms between the parties to the dispute need not be exposed to any possibility of an application to set aside the arbitration award under Section 34. Hence, there needs a clarity in the provision providing for application for setting aside of the awards.

There is no provision in the Arbitration and Conciliation Act, 1996 for expediting awards or the subsequent proceedings in Courts where applications are filed for setting aside awards. An aggrieved party has to start again from the District Court for challenging the award. No provision is available so as to enable the Indian parties to obtain interim measures from Indian Courts before a foreign arbitration could commence outside India. Multinational companies can stipulate that foreign laws could apply even if the entire contract had to be implemented in India. This provision is inconsistent with the sovereignty of Indian Laws.
4.6.1 THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2003

The Arbitration and Conciliation (Amendment) Bill, 2003, which was introduced in the Rajya Sabha on the 22nd December, 2003 is greatly influenced by the Law Commission of India recommendation on various amendments to the Arbitration and Conciliation Act, 1996 by its 176th Report. The Bill seeks to amend various provisions of the Arbitration and Conciliation Act, 1996, to remove certain shortcomings in the existing Act and to speed up arbitrations under the Act.

The Arbitration and Conciliation (Amendment) Bill, 2003 provided that, where the place of arbitration is in India, Indian Law would apply whether the arbitration is between the Indian Parties or an International arbitration in India. There is also proposal for Fast Track Arbitrations. It has also stressed that there is a need for empowerment to the arbitral tribunal to pass pre-emptory orders for implementation of interlocutory orders of the arbitral tribunal and if they are not implemented to empower Courts to, order costs or pass other orders in default.

There is no provision under the Arbitration and Conciliation Act, 1996 that provides for the provision for the Arbitration Division in the High Courts and also for its jurisdiction and special procedure for enforcement of awards made under the Arbitration Act, 1940 including awards made outside India. The bill stressed the need for the provision for speeding up and completing all arbitrations under the existing 1996 Act, including those arbitrations under the repealed Arbitration Act, 1940 within a stipulated time.

The Bill has also proposes for a single member fast track arbitral tribunal wherein filing of pleadings and evidence will be on fast track
basis to pronounce award within six months and specification of procedures to be followed by such fast track arbitral tribunal. The Bill proposes to introduce a new Section 8A in 1996 Act to enable reference to arbitration at any stage of a civil suit pending in the City Civil Court or in the High Court or in the Supreme Court if all the parties to the dispute enter into an arbitration agreement to resolve their dispute and pray to that effect. The new provision provides for absolute liberty to the litigants to refer to arbitration the civil disputes pending at various stages such as, at the institution, appeal, revision, including those instituted under Articles 226 and 227 of the Constitution and appeals there from to the Supreme Court.

The Bill proposes very high degree of disclosures to be made by the arbitrator under Section 12 informing the party about his past, present, direct or indirect relationship with the parties to the arbitration in any of their financial, business, professional or social dealings apart from the subject matter of the dispute. Section 9 of the Arbitration and Conciliation Act, 1996 corresponds to Section 41 of the Second Schedule of the Arbitration Act, 1940 and Article 9 of the UNCITRAL Model Law. Section 9 of the 1996 Act provides for interim measures by Court whereby a party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court. According to Section 9 of the 1996 Act, A party or person is entitled to interim protection if action of the other party is either in breach of the terms of the agreement or militates against equity, fair play or natural justice, otherwise not. This is in contrast to the power given to the arbitrators who can exercise the power under Section 17 only during the tenure of the tribunal. Once the mandate of the arbitral tribunal terminates, Section 17 cannot be pressed
into service. The party may misuse provisions in Section 9 of the Act, for a party may not take an initiative to have the arbitral tribunal constituted, after obtaining an interim measure and may unnecessarily delay the process. Thus, if the Amendment Bill is passed, it will be then mandatory on the part of the party who has obtained interim relief from a Court to constitute the arbitral tribunal expeditiously. If not, a party may run the risk of automatic vacation of the interim measure. The system of dual agency needs to be abolished or otherwise some enforcement mechanism must be provided for enforcement of the interim measures of protection ordered by the Arbitral Tribunal.

The Amendment Bill 2003 was introduced as a measure to fill up the lacunae in the provisions of the Arbitration and Conciliation Act, 1996. Nevertheless, in conclusion the process of amending the Act must be in the direction of minimizing the intervention of the Courts to uphold the very spirit of the Arbitration and Conciliation Act, 1996.

4.6.2 CRITICISMS

The study shows that some of the provisions of the Arbitration and Conciliation (Amendment) Bill, 2003 are inconsistent with the spirit of the Law. Clause 8 of the Bill provides that any written communication by one party to another and accepted expressly or by implication by the other party will also be treated as an arbitration agreement. The clause deprives the parties of their basic right to go to the Court. Such an agreement should be only in some written form and it shall not be inferred by implication.

A proposed amendment to section 8 by Clause 9 of the bill enables the judicial authority to decide on preliminary issues like the non-existence of any dispute, arbitration agreement. The clause is null and
void as any arbitration agreement being incapable of performance will
give rise to prolonged litigation in the Courts. In addition to it, this clause
will also effectively introduce Court intervention at pre-arbitration stage
and retard the arbitration process. This would defeat the main purpose of
the 1996 Act, which is minimization of Court intervention.

With respect to Clause 12 of the Bill, that confers the power of
appointment of arbitrator, in default of the parties or the agreed
procedure, on the Court, for determination of the issues arising in that
connection on the judicial side is not an apt step. In the present scenario
of huge pendency of cases in the Courts, it may take years to get the
arbitrator appointed. If the parties are unable to appoint an arbitrator
within the stipulated time, the power of appointment should not
automatically devolve on the Courts. Nevertheless, if the parties apply for
the appointment of an arbitrator, then the Court can do so. In addition to
it, the thirty days time stipulated in the Arbitration, Conciliation Act,
1996 is more than sufficient for appointment of an arbitrator by the
parties, and there is no need to extend the same.

Clause 13 of the Bill, under which there has been an attempt to
elucidate the 'circumstances' which is likely to provoke unnecessary time
consuming challenge to the impartiality of the arbitrator on the ground
that he had some relation of the type set out in the illustration with the
parties or their lawyers. There is a high chance of abuse of such a
provision by a party who wants to delay or derail the arbitration
proceeding.

Clause 17 of the Bill provides that if the parties to arbitration are
Indian nationals or companies, then the arbitration venue have to be in
India. This proposed amendment is directly against the common law
principle that parties are free to contract as they deem fit provided no provision is against public policy or in violation of any applicable law or procures a breach of any applicable law. In addition, the clause that arbitration between domestic parties should be conducted only in India is entirely opposite to the rationale for adopting the New York Convention. If arbitration outside India was acceptable at the time of adoption of the New York Convention, then it should be all the more acceptable now, given that India has come so far in the international arena and has adopted the policy of Globalisation.

Clause 18(1A) states that the arbitral tribunal shall endeavor to expedite the arbitral process subject to such rules as may be made by the High Court in this behalf, is against the principle of party autonomy which is the pillar on which consensual arbitration rests. Thus, this clause enables the Court intervention that has to be minimized as far as possible.

Clause 29 A (1) provides for fixation of statutory time limit for completion of arbitral proceedings. This provision cannot work automatically and give quick disposal of the arbitration proceedings. This provision will yield results only if consequences of non-compliance of such a time limit are provided along with it. It must be accompanied with the principle of reasonableness or else it will prove harmful to the independence and fair arbitral proceedings.

The review committee on the bill constituted by the Parliament of India reports that, The Arbitration and Conciliation (Amendment) Bill, 2003 would lead not only to greater interference by Courts in the process of arbitration but also end up having arbitration being conducted under the supervision of the Courts. The Bill would have the Courts sitting in judgment over the arbitrators before arbitration, during arbitration and
after arbitration. There was a broad consensus that the provisions, if accepted, will make the arbitral tribunal an organ of the Court rather than a party-structured dispute resolution mechanism.

In addition, many amending provisions are likely to create confusion and unnecessary litigation. Bringing back Court control and supervision in arbitration and the choice of the arbitrator subject to High Court rules and supervision and control of the Court, is neither in the interest of growth of arbitration in India nor in tune with the best international practices. It was felt that they are contrary to the best international practices in the field of arbitration.

Hence, the adoption of this Bill may hamper further development of international trade relations and diminish the confidence of the international community in the Indian system of arbitration.

As far as domestic arbitration in India is concerned, there are a large variety of tribunals created by the State under different statutes as alternative to the traditional Court litigation, for settling various types of disputes such as labour disputes, service matters, antitrust matters, consumer protection, taxation, excise etc. In addition, there are Lok Adalats acting under the Legal Services Authorities Act, 1987, to deal with subjects like disputes arising out of the use of electricity, telecommunications, insurance etc. Therefore, the need of the hour is a system to deal with international arbitration and the institutionalised arbitration in India can ensure that parties to international arbitration opt for India as the venue for arbitration.

The growing tendency to take undue advantage of Court procedure to gain time and delay arbitration or implementation of award is certainly undesirable. If the Court procedure is used in such a manner for the
promotion of unfair objective, the remedy seems to be worse than the evil. The parties who entered into an arbitration agreement with a view to avoid the lengthy and expensive Court procedure find themselves fighting a battle on both the fronts-in arbitration proceedings and in the Court of law. This is indeed the fate of several arbitration proceedings in India today.

Non-resident Indians and Foreign Institutional Investors are entering the Indian market in a big way. The Indian law relating to international commercial arbitration has to be made responsive to these changes in the Indian economic scene. There is a need to harmonize the Indian law with the concepts on arbitration and conciliation of the legal systems of the world. An arbitral institution with conscious office bearers can ensure that the proceedings are conducted in the interest of the parties. India has a number of small arbitration institutions all over the country, but there is an urgent need for an institution in India which would match international standards.

The present Arbitration and Conciliation (Amendment) Bill, 2003 tends to allow greater intervention by the Courts than the Arbitration and Conciliation Act, 1996 and it may not be suffice in achieving the desired objectives.

4.7 SALEM BAR ASSOCIATION CASE AND THE DRAFT ADR AND MEDIATION RULES, 2003

The Hon'ble Supreme Court of India has in the landmark decision of Salem Advocate Bar Association, Tamil Nadu Vs Union of India354 case, directed that all Courts shall direct parties to alternative dispute resolution methods like arbitration, conciliation, judicial settlement or

354 2003 (1)SCC 49
mediation. The draft "Civil Procedure Alternative Dispute Resolution and Mediation Rules 2003" was also considered by the Supreme Court, for enactment by respective High Courts. Direction was issued to all High Courts, Central Government and State Governments for expeditious follow-up action. The Courts can refer the case to mediation under Section 89, 1(d) and 2(d). When the Court decides to refer the case to mediation, “the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed”. This provision is amenable to the interpretation that it is for the Court itself to “effect a compromise” and follow the procedure prescribed for the purpose. If the Court for one reason or the other cannot itself effect a compromise, the only option it would have is to refer the parties to conciliation etc.

In a historic judgment in Salem Bar Association case, the Supreme Court directed the constitution of a committee to frame draft rules for mediation under Section. 89(2) (d) of the CPC. Consequently, the Committee presided over by Justice M. Jagannadha Rao, Chairman of the Law Commission of India prepared a comprehensive code for the regulation of ADR process initiated under Section 89 of CPC. It consists of two parts, Part I: ADR Rules 2003 consisting of “the procedure to be followed by the parties and the Court in the matter of choosing the particular method of ADR” and Part II: Mediation Rules, 2003 consisting of “draft rules of mediation under section 89(2) (d) of the Code of Civil Procedure”.

It is to be noted that Rule 2(b), proviso clearly states that the Court in the exercise of its powers under Section.89(1)(a) to (d) read with Rule 1A of Order X “shall not refer any dispute to arbitration etc without the

355 Civil Procedure Alternative Dispute Resolution And Mediation Rules, 2003 is affixed as ANNEXTURE-A
written consent of all the parties to the suit" and Rule 4 calls this the
exercise of the option by the parties. But, under Rule 5 (f) and (g), the
Court is given the power to refer the parties under certain circumstances
to alternative dispute redressal methods even if all the parties do not
agree. This is in consonance with the letter and spirit of Section. 89 of
CPC. Rule 4 also requires the Court to do a sort of counseling in enabling
the parties to choose the correct form of alternative dispute redressal
method depending on the nature of the case and the relationship between
the parties that needs to be preserved. Rule 4(iv) may be reformulated to
say, “Where parties are interested in reaching a compromise which might
lead to the final settlement”. Unlike the Arbitration and Conciliation Act,
1996, Rule 4 gives a workable definition of the terms arbitration,
conciliation, mediation and judicial settlement. Under Rule 6(2), if the
alternative dispute redressal method does not succeed and the case is
referred back to the Court, the Court shall proceed with the case in
accordance with law.

A welcome feature of these Rules is that they provide for a detailed
scheme for the conduct of training courses in alternative dispute redressal
methods for lawyers and judicial officers under the auspices of the High
Courts and the District Courts, and the preparation of a detailed manual
of procedure for alternative dispute redressal methods. The manual will
describe various methods of alternative dispute redressal mechanisms, the
choice of a particular method, the suitability of a method for any
particular type of dispute etc. The Manual shall particularly deal with the
role of conciliators and mediators in disputes which are commercial or
domestic in nature or which relate to matrimonial, maintenance and child
custody cases. With a view to enhancing awareness of alternative dispute
redressal procedures and for imparting training in them, the Rules provide
for the conduct of seminars and workshops periodically (Rule 7). Thus, these provisions prepared a blueprint for the building up of a body of trained professionals who are sensitised to efficiently handle cases in future, as that task requires specialized training and expertise of a high order.

Part II of the Rules contain a carefully prepared scheme for the appointment of mediators, empanelling of mediators, their qualifications and disqualifications and the proper selection of the mediator to suit a particular case etc. They also contain provisions regarding the actual conduct of mediation that, mutatis mutandis, apply some of the provisions of the 1996 Act relating to conciliation. A notable feature of these provisions is that Rule 19 imposes an obligation on the part of the parties to make an effort in good faith to arrive at a settlement, and this is intended to prevent the whole process from being reduced to a sham. The Rules also deal with cases where the parties succeed in arriving at a solution through the alternative dispute redressal processes only regarding some of the issues and not all. In such cases, the Court may incorporate the partial settlement in its judgment and decide the other issues according to law. Very importantly, the Rules also lay down a code of ethics to be followed by the mediator in the proper conduct of the proceedings so as to arrive at a fair and just settlement in an impartial and dignified manner so as to instill confidence in the parties in himself and the credibility of the process in general.

4.8 OTHER MAJOR FORMS ALTERNATIVE DISPUTE REDRESSAL METHODS

The study of the evolutionary history of the alternative dispute redressal methods in the earlier chapters proves the fact that, in many
cultures including Indian, mediation has been a standard mode of dispute redressal methods for generations, typically presided over by a town elder or a respected figure in the community, or through something akin to a Panchayat. On studying the different dispute redressal methods adopted by different countries it is seen that mediation is practiced worldwide and has emerging globally as one of the dispute redressal methods in addition to the existing formal litigation system\textsuperscript{356}. The Parliament of India has recommended recourse to alternative dispute redressal methods by the enactment of the Legal Services Authorities Act, 1987, The Arbitration and Conciliation Act, 1996, the Legal Services (Amendment) Act, 2002 and Section 89 of the Code of Civil Procedure and such other legislations. Existing systems of Arbitration, Conciliation and Lok Adalats are statutorily regulated but there is no independent mechanism for regulating mediation. The awareness of mediation as a dispute resolution mechanism among the stake holders is the need of the time to, assist in quick resolution of pending cases and in resolution of disputes at pre-litigation stages.

4.8.1 MEDIATION

In order to emphasize the need of mediation in the process of resolving the disputes, it is significant to know the characteristic features of this method. At the simplest mediation is an informal, voluntary process in which an impartial person, trained in facilitation and negotiation techniques, helps the parties to reach at a mutually acceptable resolution\textsuperscript{357}. It can also be defined as a process of resolving dispute by which the ‘mediator’ a neutral person, works with the parties to a dispute

\textsuperscript{356} Conflict resolution theory and Practice, Dennis J.D.Sandole (p2-5)
\textsuperscript{357} Brown and Marriott, Alternative Dispute Redressal methods Principles and Practice, 2\textsuperscript{nd} edn , 1999,p 5,para 1-017,6-7,1-022
to bring them to an agreement that they can all accept. It is thus, impracticable to provide a final definition of the process of mediation.

The former President of India Dr. A.P.J. Abdul Kalam has been supportive of amicable settlement of disputes and has advocated the need to encourage mediation as an alternative dispute resolution mechanism in the following words, “Mediation and Conciliation is definitely a faster method of dispute resolution compared to the conventional Court processes. Only thing is that we have to have trained mediators and conciliators, who can see the problem objectively without bias and facilitate affected parties to come to an agreed solution. In my opinion, this system of dispute resolution is definitely a cost effective system for the needy... Mediators must possess the qualities of being a role model in the society, impeccable integrity and ability to persuade and create conviction among the parties.”

In some situations, mediation is a form of negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties. Despite the lack of ‘teeth’ in the mediation process, the involvement of a mediator alters the dynamics of negotiations. Thus, the role of the ‘mediator’ is restricted to that of a ‘facilitator’ and the process of ‘mediation’ is a way of settling disputes by a third party who helps both sides to come to an agreement, which each considers acceptable. Prof. Robert Baruch Bush and Prof. Joseph Folgen say that, “In a transformative approach to mediation, mediating persons consciously try

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to avoid shaping issues, proposals or terms of settlement, or even pushing for the achievement of settlement at all. Instead, they encourage parties to define problems and find solutions for themselves and they endorse and support the parties’ own efforts to do so.”

On studying, the above definitions with respect to the characteristic features of mediation it can be evaluated that mediation, as one of the alternative dispute redressal methods is flexible and creative. The process varies from case to case depending largely on the parties' needs and the mediator's style. Usually, the parties meet to discuss the issues face-to-face. The mediator helps the discussions remain focused and productive. The mediator may hold private caucuses with each party separately, and carry the messages, clarifications, questions, proposals, offers, and counter offers back and forth between them. The mediator can use private group or the discussion groups and other techniques to facilitate the process of negotiation among the disputed parties.

A mediator does not impose a solution but creates a conducive atmosphere in which the parties to the dispute can find a resolution to their problems. Mediation in India is still at its formative years, though it has existed and still exists in India from Vedic periods in some form or the other and with different names, which is evident from the study of the evolutionary history of dispute redressal methods in India. However, the fact is that, still there is no code or enactment existing in India, which specifically pertains to the process of mediation. Mediation in a dispute has to be adopted, as a basic method of resolving the conflict, mainly the government, and the public authorities who are the main litigants before


178
the Courts of law should include these processes in the establishment of the legal order and encourage the quick settlement of disputes.

4.8.1.1 DEFINITION AND SCOPE OF MEDIATION

Mediation is a fundamental procedure for resolving controversies. It is a process in which a neutral intervener called the mediator assists two or more negotiating parties, to identify matters of concern, develop a better understanding of their situation, and, based upon that improved understanding, develop mutually acceptable proposals to resolve those concerns. Thus, Mediation can be said to embraces the philosophy of democratic decision-making.

The process of mediation can be ‘evaluative’ as well as ‘facilitative.’ Henry J. Brown and Arthur L. Mariot say that ‘mediation’ is 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. The mediator has no authority to make any decisions that are binding on them, but uses certain procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication.”

In the Bhagavad Gita the holy book of Hindu’s it is said, “When meditation is mastered, the mind is unwavering like the flame of a lamp

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363 Alfini, Press, Sternlight, and Stulberg, MEDIATION THEORY AND PRACTICE, 2d Edition (LexisNexis 2006) at 1; Mediation is defined in various ways; for example: Mediation is a process in which an impartial third party acts as a catalyst to help others constructively address and perhaps resolve a dispute, plan a transaction, or defined the contours of a relationship. A mediator facilitates negotiation between the parties to enable better communication, encourage problem-solving, and develop an agreement or resolution by consensus among the parties. Menkel-Meadow, Love, and Schneider, Mediation: Practice, Policy, and Ethics (Aspen 2006) at 91; AND exact same definition found in Menkel-Meadow, Love, Schneider, Sternlight, Dispute Resolution: Beyond the Adversarial Model (Aspen 2005) at 266.
364 Lord Chancellor’s Department on Alternative Dispute Resolution (http://www.lcd.gov.uk/annexald/htm)
in a windless place.” Lord Buddha who spread the message of peace and unity has also stated that “Meditation brings wisdom; lack of Mediation leaves ignorance. Know well what leads you forward and what holds you back, and choose the path that leads to wisdom”. Pantanjali one of the renowned yogis who taught the method of uniting the body, mind and sole with the practice of yogic living has also pointed out, that the progress in mediation comes swiftly for those who try their hardest.\textsuperscript{366}

The process of mediation incurs minimal procedural and evidentiary requirements while providing unlimited opportunity for the parties to exercise flexibility in communicating their underlying concerns and priorities regarding the dispute.”\textsuperscript{367} Thus, mediation can be practiced in various ways. For example, in the United States of America, the purest of its form is still considered to be facilitative. Undoubtedly, many practitioners and scholars differ on the “role” of mediator in mediation. One view is that the process of resolving disputes shall be called mediation only if the mediator limits his or her role to that of a facilitator\textsuperscript{368}. Whereas in the evaluative method, the mediator assumes more control of the process and the parties may be ordered to participate in a particular way that may influence the outcome of the process\textsuperscript{369}.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{366} The center for Mediation in Law.p1(www.mediationinlaw.org/html)
\item\textsuperscript{367} Brien Wassner, A Uniform National System of Mediation in the United States: Requiring National Training Standards and Guidelines for Mediators and State Mediation Programs, 4 Cardozo Online J. Conflict Resol. 3 (2002), See also John W. Cooley, Mediation Advocacy (National Institute for Trade Advocacy) 6 (1996)
\item\textsuperscript{368} Mediation is a private and consensual process in which an impartial person, a mediator, works with disputing parties to help them explore settlements, reconciliation, and understanding among them....The primary responsibility for the resolution of a dispute rests with the parties....A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement....He may assist them in making informed and thoughtful decisions, but shall not impose his judgment for that of the parties concerning any aspect of the mediation [N.C. Standards of Professional Conduct, 1996]
\item\textsuperscript{369} The Process of resolving a dispute with the assistance of a mediator outside of a formal Court proceeding. Okla. Stat. Ann. tit. 12 § 1802 (West 1993)
\end{enumerate}
\end{footnotesize}
Moreover, from the standpoint of the Court’s responsibilities, the use of mediation reduces the heavy caseload so common with litigation.\textsuperscript{370} The disputes referred to mediation can be settled in accordance with reason, equity, and the actual circumstances of the case.\textsuperscript{371} Both equity and mediation offer a form of "individualised justice" unavailable in the official legal system. However, through the mediation process a resolution or result to the dispute can be achieved without a right-wrong determination and without a factual finding.\textsuperscript{372} Thus, mediation when adopted as alternative dispute redressal method helps in dissolving bitterness and rivalry and creates the circumstance, which helps in the amicable development of the concept peace and unity through the win-win situation among the disputants.

4.8.1.2 DIFFERENCE BETWEEN THE MEDIATION AND OTHER DISPUTE REDRESSAL PROCESS

The alternative dispute resolution procedures can be broadly classified into two groups, first those that are adjudicative and adversarial, and second those, which are consensual and non-adversarial. The latter group includes mediation.\textsuperscript{373} Sir Robert A. Baruch Bush and Joseph P. Folger, in, “The promise of mediation” say that, in any conflict, the principal objective ought to be to find a way of being neither victims


\textsuperscript{372} Kimberlee Kovach, Teaching a New Paradigm: Must Knights Shed their Swords and Armor to Enter Certain ADR Arenas? 1 Cardozo Online J. Confl. Resol. 3 (2000)

\textsuperscript{373} Manka, ADR: What Is It And Why Do You Need To Know? 47 J Mo Bar 623, 625.

181
nor victimisers, but partners in an ongoing human interaction that is always going to involve instability and conflict.\textsuperscript{374}

There are several types of different dispute redressal methods that have evolved owing to the different needs and circumstances of the society. The study of the differences between them will help the disputant in choosing the best and the apt method of resolving their disputes according to their needs. The dominant form of dispute redressal method that is broadly adopted for the resolution of a dispute is, by filing of case before the Court of law. With the bird eye view, it can be said that, in the process of adjudication through Court of law, someone has to lose among the disputing party. The litigation route has now become slow, expensive, and uncertain in its outcome. The Courts and Tribunals do not ‘resolve’ a dispute, but they only “decide” a dispute or “adjudicate” on them. Whereas, in the case of mediation, the parties can try to agree with one another, were a mediator acts as a facilitator. Mediation has the advantage as it can lead to finality because, it allows for an informed and un-coerced decisions to be taken by everyone involved. Disputes are resolved in the process of mediation through consensual interaction between the disputants\textsuperscript{375}. The mediator in promoting or in other words, facilitating resolution of the dispute by the parties themselves does not purport to decide the issue between them. Mediation is more flexible, quick and less expensive than the process of adjudication through Court of Law. Thus, the study reveals that, litigation produces provides for fair and just results, but it is procedurally disadvantages as compared to mediation. Mediation affords a far greater degree of flexibility, relative informality, confidentiality and control over its resolution.

\textsuperscript{374} See Robert A. Baruch Bush and Joseph P. Folger, The promise of mediation (1994) at 229-59.
\textsuperscript{375} Tania Sourdin, Alternative Dispute Resolution,(2002) p 2,3.
Comparative study of the process of ‘mediation’ and ‘arbitration’ shows that, mediation is a form of expedited negotiation. The parties control the outcome. Mediator has no power to decide. Settlement in the dispute is done only with party approval. Exchange of information is voluntary and is often limited. Parties exchange information that will assist in reaching a resolution. Mediator helps the parties define and understand the issues and each side’s interests. Parties vent feelings, tell story, and engage in creative problem solving. Mediation process is informal and the parties are the active participants. Joint and private meetings between individual parties and their counsel are held in this process. Outcome based on needs of parties. Result is mutually satisfactory and finally a relationship may be maintained or created. Mediation when compared with arbitration is of low cost. It is private and confidential. Facilitated negotiation is an art. Mediator is not the decision-maker. Mediator is a catalyst. He avoids or breaks an impasse, diffuse controversy, encourages to generate viable options. He has more control over the process. The process of mediation gives the parties many settlement options. Relationship of parties is not strained in the process of mediation. There is a high degree of commitment to settlement. Parties’ participation is there in the decision making process. Thus, there is no winner and no loser in this process, only the problems are resolved. In this process the disputed parties maintains the confidentiality of proceedings.\textsuperscript{376}

The Arbitration and Conciliation Act, 1996 has provided for the legislative framework of the processes of arbitration and conciliation in India. The process of ‘arbitration’ is adjudicative in nature as the arbitrators control the outcome. Arbitrator is given power to decide.

\textsuperscript{376} L. Boulle, Mediation: Principles, process, practice (Butterworths, Sydney, 1996) p10-14
Arbitration award is final and is a binding decision. Often extensive discovery is required in this process. Arbitrator listens to facts and evidence and renders an award. The parties present the case, and testify under oath. The process of arbitration is formal. The attorneys can control the party participation. Evidentiary hearing is given in this process. No private communication with the arbitrator is possible. Decision is in the form of award based on the facts, evidence, and law. The process of arbitration is more expensive than mediation, but less expensive than traditional litigation. It is a private process between the arbitrator and the disputed parties but in some cases, decisions are publicly available. Thus, it is an informal procedure, which involves decision-maker impasse when it is submitted to an Arbitrator. The parties have less control in the proceedings and the final award, as the decision making process is with the arbitrator.  

The ‘Conciliator’ under the Arbitration and Conciliation Act, 1996, apart from assisting the parties to reach a settlement, is also permitted to make “proposals for a settlement” and “formulate the terms of a possible settlement” or “reformulate the terms”. ‘Conciliation’, is a procedure like mediation but the third party called the conciliator, takes a more interventionist role in bringing the two parties together and in suggesting possible solutions to help the disputed parties to reach a settlement. The difference between the process of mediation and conciliation lies in the fact that, the ‘conciliator’ can make proposals for settlement, ‘formulate’ or ‘reformulate’ the terms of a possible settlement, while a ‘mediator’ would not do so but would merely facilitate a settlement between the parties. Under Section 30 and Section 64(1) and Section 73(1) of the Arbitration and Conciliation Act, 1996, the conciliator has a greater or a

A mediator is a neutral third party who facilitates the disputing parties in arriving at a win-win settlement for both of them. The mediator assists and guides the parties toward their own solution by helping them to define the important issues and understand each other's interests. The mediator focuses each side on the crucial factors necessary for settlement and on the consequences of not settling. The mediator does not decide the outcome of the case and cannot compel the parties to settle.

The mediator can defuse hostile attitudes and remedy miscommunications. The mediator is a mirror of reality, which can help soften or eliminate extreme negotiating positions. Through the mediator, parties assess the weaknesses in their own case and recognise potential strengths of the other side. The parties can more clearly view matters previously distorted by anger and emotion.

Mediator in general is a knowledgeable person with respect to the subject matter of the controversies. Within the privacy of the caucus, mediators can help each party analyses the strengths and weaknesses of pro-active role in making proposals for a settlement or reformulating the terms of a settlement. A mediator is a mere facilitator. The meaning of these words in India is the same in the UNCITRAL and Conciliation Rules and in UK and Japan. Conciliation and Mediation process is distinguishable from Arbitration as the parties’ willingness to submit to mediation or conciliation does not bind them to accept the recommendation of the conciliation or mediator but an arbitrator’s award, by contrast, is binding on the parties.

4.8.1.3 MEDIATOR

“Mediator” is a neutral third party who facilitates the disputing parties in arriving at a win-win settlement for both of them. The mediator assists and guides the parties toward their own solution by helping them to define the important issues and understand each other's interests. The mediator focuses each side on the crucial factors necessary for settlement and on the consequences of not settling. The mediator does not decide the outcome of the case and cannot compel the parties to settle.

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their complete case. Most significantly, the mediator can explore creative and innovative solutions that the parties who are caught up in adversarial negotiations might never contemplate. The mediator does not impose a solution but rather works with the parties to create their own solution, this characteristic of mediation differentiates it from other forms of dispute resolution processes and principally, with that of the process of arbitration and litigation 381.

4.8.1.4 THE TASKS OF THE MEDIATOR

The mediator has to play a very significant role in the process of Mediation. Mediator is not responsible for the content of any resolution or agreement, but only for the way it is arrived at. Mediator helps the parties to think through and state their own views of the problem and their own preferred solutions. Mediator ensures that all the parties have an equal chance to think through and state their own views of the problem. Mediator may challenge these initial explorations as appropriate. Mediator explores and tests possible agreement with the parties separately and together. Mediator can help if asked with the preliminary drafting of any agreement. Mediator helps if asked with the drafting of any feedback to the institution designed to assist it to avoid similar disputes in future. Mediations protect the 'safe place' by means of a pre-mediation agreement. One of its features is an agreement that whatever takes place or is said in the mediation will have to be confidential. It is subject to the recognition by everyone involved in the process that, if it emerges that there has been criminal activity confidentiality cannot be maintained. The pre-mediation agreement is separate from any agreement arrived at as a result of the mediation, and

381 www.adrr.com /mediation information and resource Center.
it is for the parties to decide whether all or part of what is agreed is to remain confidential.\(^{382}\)

**4.8.1.5 THE MEDIATION PROCESS**

There is no definite procedure to be adopted by the mediator for conducting mediation. Stephen B. Goldberg, Frank E.A. Sander and Nancy H. Rogers had highlighted this fact by saying that, depending on the terms of agreement, the mediator may attempt to encourage exchange of information, provide new information, and help the parties to understand each other’s views. Mediator can let the parties know that their concerns are understood and thereby promote a productive level of emotional expression. He has to deal with the differences in perceptions and interest between negotiations and constituents (including lawyer and client). This will help the negotiators realistically assess the alternatives to settlement and learn about those interests, which the parties are reluctant to disclose to each other. This is often possible in separate sessions with each party to the dispute. Thereby the mediator invents solutions that meet the fundamental interests of all parties to the dispute.\(^{383}\)

The parties may agree on the procedure to be followed by the mediator in the conducting the mediation proceeding. If the parties do not agree on any particular procedure to be followed, the mediator follows the procedure, which shall be guided by the principles of fairness and justice, having regard to the rights and obligations of the parties, usages of trade, if any, and the circumstances of the dispute.

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The process of mediation generally starts with one of the disputing party suggesting for mediation or if there is a mediation clause in the agreement then the disputed parties go for mediation by selecting one mediator by consent or each party selecting a mediator and the two select a third mediator. The parties can also choose an institute for mediation, which will have a panel of mediators, and the parties can make the appointment or the institute itself from among the names on the panel selects a mediator. Where a Court directs the mediation, the Court will on its own, or the body handling Court referrals for mediation will appoint the mediator.

The participation in the process of mediation is a voluntary process and requires the consent of the parties to come to the mediation table and in participate in the process mediation. If, at any time, a party feels that its interest are not served by the process or the party is in any way uncomfortable with the mediator, the party may terminate its participation at the mediation without any adverse consequences. The mediator and the parties select a mutually convenient date and location for the mediation. Subject to the availability of the participants, meetings can be conducted in person, by telephone, video conference, or any other method agreeable to the parties and the mediator. The parties will be responsible for charges incurred in dispute resolution process.384

The process of mediation can follow a general procedure that is, at first, the mediator receives from each party a brief summary of the case. At the first session, each party can make an opening statement giving its version. It can help in venting of their felling and enable each party to understand the point of the other. The process can starts with establishing

384 Tweedal & Tweeddale, Arbitration Of Commercial Disputes, International and English Law and Practice, 1st edn,2005,p6
the basic facts of the dispute, identifying the issues for resolution, getting parties to be realistic about their case. The issues needing resolution can thereby be clarified.

Thereafter the mediator can start communicating with the parties. This could be in joint sessions with all the parties or in separate sessions with each party at a time. In these sessions mediator can focus parties on their long-term interests, as distinct from the position they have taken in the dispute. Long-term interests usually dictate that parties should adopt harmonious method of resolving dispute. These steps can make the parties to get more realistic about the strengths and the weaknesses of their case. This shows up the facts that are not in a party’s favour, difficulties of proving matters asserted as facts, and those statutes and case law, which may not support their stand. At this stage, disputants can become more amenable to settlement after seeing the problem with their case. Thereby making the parties examine their alternatives in reaching at a mediated settlement. The mediator can then encourage the parties to come up with options for settlement, assuring them that they have full freedom to put out whatever suggestions they like, that this is like a brainstorming session. Putting an idea on the table will not mean a commitment has been given or the disputing parties make a binding statement. This liberty enables many different ideas for solution to emerge. The mediator then makes the parties focus on these lines of solutions, which have opened up by then. The energies are focused on these ideas for possible settlement. Now and again, it will be necessary for the mediator to remind the disputing parties of the reasons why it is beneficial for them to reach agreement at the mediation table. Giving the parties the freedom to create options for settlement, and refining their

suggestion. Once consensus is reached, the mediator can then ensure that it is properly reflected in the written agreement, which loose ends are tied up, that a proper review mechanism is put in place, if necessary. On reaching for an agreement of settlement between the disputed parties and the mediator and the parties can sign it and the mediator can thereby declares the mediation closed. Once the settlement agreement is signed, it is final and binding on the parties. The process of mediation can also end if a party withdraws from the mediation or in case where all the parties agree that, the mediation is unsuccessful and in cases where the mediator terminates the mediation as unsuccessful.

4.8.1.6 THE TYPES OF DISPUTES NOT SUITABLE FOR MEDIATION

The attempt to arrive at an interests-based resolution through mediation may not be the best approach in each and every kind of dispute arising between the parties. The process of mediation is not a way for resolving a dispute if there is a matter of policy at stake, if there is an issue on which it is desirable to establish a precedent, if there are legal restrictions as statutes impose restrictions on its actions and on a point which is 'non-negotiable' for the complainant. Where order of the Court is necessary to enforce a right and where an interpretation of a law is called for, in cases of serious criminal offences, mediation is not a possible dispute resolution method. Where there is a statutory violation and in the cases where not all the parties are willing to make the 'voluntary' attempt towards resolving the issues mediation will be unsuccessful.

If a party is acting in bad faith, for example, trying to give the appearance of 'having tried' to avoid the displeasure of a Court or to

comply with a mandatory or contractual requirement to attempt mediation, in such cases also the purpose will not be solved. If there are, going to be consequences that are detrimental to those not involve or in other words, will be unfair to them by comparison with that of other dispute redressal methods, in such cases the process of mediation will not serve the purpose and thus cannot emerge as a successful alternative to that of litigation in resolving disputes. Criminal matters (other than those under Section 498A Indian Penal Code, Section 125 Code of Criminal Procedure and Section 138 Negotiable Instruments Act) cannot be referred for mediation under any circumstances.

4.8.1.7 THE TYPES OF DISPUTES SUITABLE FOR MEDIATION

It is evident that, mediation belongs to the disputing parties called disputants. The disputing parties control the process, scheduling, costs, and outcome of the dispute. Mediation is less adversarial. The process of mediation is informal. It is less confrontational than arbitration or litigation. The process of mediation preserves options in a way where parties can enter into mediation without jeopardising their option to arbitrate or litigate. Mediation makes way for swift settlement. Most of the mediations are successfully concluded in a single day. Since mediation can be scheduled soon after a dispute arises, parties reach settlement much earlier than in arbitration or litigation. In many cases, mediations conclude before a formal arbitration claim is filed. It is of lower cost when compared to the other dispute redressal methods. Mediation usually entails lower legal and preparatory costs, there is minimal interruption of business or personal life, lost productivity is kept

387 LEADER’s Scheme for Accreditation of Mediation, Issue 27th Nov 1997. Ch (iii)-(iv),
388 www.spidr.org/ethic.htm- Society of professionals in dispute resolution.1986 (14th may 2001)
to a minimum, and the fees and expenses of mediation are modest. Mediation paves way for preservation of business relationships.

As a result of reaching an early resolution with minimal financial or other strain on either party, the chances for preserving business relationships are greatly enhanced. Sometimes parts of a dispute are resolved in mediation, leaving fewer or less extreme differences to be resolved in arbitration or litigation. Gaining agreement on collateral issues can translate into significant savings of time and money for everyone involved. This method protects privacy of the facts revealed during the mediation proceeding by the disputed parties. Mediation offers greater confidentiality than arbitration. This means that any party may not use what is revealed in the discussion in any future proceedings without the consent of those affected, and that the discussion is confidential. The confidentiality of any resulting agreement is for the parties to decide together. The view, suggestions, admissions, proposals made during the mediation or conciliation proceedings cannot be used in any legal proceedings. It is to be noted that a document that is otherwise admissible and can be summoned does not cease to be so because it is introduced in mediation proceedings\textsuperscript{389}.

Thus, the above study shows that, mediators help the parties craft creative solutions. Settlement potential is high in this process. The case proceeds promptly. The cost is modest and there are benefits even if a settlement is not reached. The disposal of cases through mediation has a direct advantage of not only reducing the number of pending cases in the Courts but also a collateral advantage of reducing the number of appeals and revisions made to the superior Courts. In other words, the advantage

\textsuperscript{389} LEADRE’s model “agreement to mediate” in S.Duncombe and J heap ADR (LBC,1995)para 9.70-9.80.
of a settlement through judicial mediation benefits not only the Trial Court but also the Appellate Court, which has then to deal with a lesser number of cases. The expected outcomes will not only directly benefit the Trial Courts but also collaterally benefit the Appellate Courts. Another collateral advantage is that one case being settled settles a large number of connected cases. Once parties reach an agreement and sign it, it becomes enforceable under the provisions of the Arbitration and Conciliation Act, 1996 and the Code of Civil Procedure. The Court will enforce the agreement by legal process of execution.

Advantages that are unique to the process of mediation is that, in this process, creative solutions are possible, including options that are not available to Courts or tribunals. Mediation can especially be helpful in the, resolution of family disputes, which includes the matrimonial disputes, maintenance disputes, partition cases, and such other matters that are possible to be resolve among the parties themselves without publicity. The process of mediation can also be advantageous where financial compensation may not be all that is sought. It is possible to rebuild trust and improve damaged working relationships. Misunderstandings can be cleared up during the process of mediation. 'Unfinished business' can be 'finished'. There is flexibility in the way the problem solving is approached, without a requirement to go through fixed stages as in the case of litigations in Court.

4.8.1.8 MEDIATION IN OTHER COUNTRIES

The study of mediation process, which is functioning in different countries as a dispute redressal method, is necessary to acquire a better understanding of the process as such and for its adoption, if needed in an
appropriate form as alternative dispute redressal method according to the India situation.

Mediation has been a time tested dispute resolution mechanism for the last about 30 years in USA and for about 20 years or so in UK and Australia etc. American lawyers and judges have warmly embraced mediation as a primary tool for resolving conflicts in Court and out of Court. While in India the lawyers and judges are still warily examining mediation, discussing whether and in which types of cases mediation should be used. In India, litigants, lawyers and judges should there by quickly recognised the use of mediation as a helpful mechanism for reducing case backlogs and delays, but they should not be rushed to embrace mediation. Chief Justice Warren E. Burger of the United States Supreme Court said that, “The entire legal profession (lawyers, judges, law school teachers) has become so mesmerized with the stimulation of the Courtroom contest that we tend to forget that we ought to be healers of conflicts. For many claims, trial by adversarial contests must, in time, go the way of the ancient trial by battle and blood.”

In the United States, lawyers and the local and state bar associations, as well as the American Bar Association the Federal Bar Association, and the judges were enthusiastic in their promotion and utilisation of mediation. American lawyers understood that the legal system was overloaded and on the point of collapse from the Courts, being wrongly utilised for disputes that could be better and more efficiently handled by mediation and other alternative dispute redressal procedures. By the mid-1980's, lawyers and State Bar Associations had professionalised mediation in the US, by developing mediator training

390 Frank E.A.Sander, Dispute Resolution within and outside the Courts-An Overview of the U.S Experience. P123
391 State Justice Institute, National Standard for Court-Connected Mediation Programs, US, 1994,(4-2)
standards, by providing lawyer training in mediation and by prescribing ethical standards for lawyers when acting as mediators and when acting as advocates in mediation. As a result, trained lawyer mediators made mediation a substantial part of their law practice. By responding positively and emphatically, to incorporate mediation as a useful alternative dispute redressal method in the American legal system, lawyers have not lost business to mediation, but have rather become ensconced as mediators and as the gatekeepers for mediation in the US legal systems. In the US, although lawyers initially felt threatened by mediation and resisted it as an unwanted change in the status quo, the lawyers quickly realised that mediation was just another tool in their lawyer tool bag. While judges and the Courts provided the initial impetus toward mediation in the United States, it was the lawyers' and law schools' acceptance of the Court's challenge to find better ways of resolving disputes that lead to rapid and widespread acceptance of mediation in the United States.

Like the American lawyers in the early 1980's, Indian lawyers are conservative. They are reluctant to expose their clients to the uncertain risks of alternative dispute redressal methods. The lawyers view mediation as potentially depriving them of income by settling cases prematurely and thereby obviating legal fees that would otherwise be earned. The same has been true for American lawyers during the growth of mediation in the US over the last twenty years. But the fact is, with acceptance and use of mediation, lawyers can became not only the best trained and most qualified mediators and incorporating their mediator

393 Indian Institute of Arbitration & Mediation www.arbitrationindia.org Journal of public law & policy [vol. 27. 6]
work into their law practices, mediated and choose mediators for such cases.394

Globally, however, corporations are spearheading the explosion of mediation in Europe and in Asia, as multi-national corporations seek quicker, cheaper and less disruptive means for settling internal employer, management and shareholder disputes and external commercial disputes with trade and distribution partners around the world. At the first annual European Business Mediation Congress395, was attended by 140 attendees, which included representatives from most of the world’s largest law firms indicated that, 60% multi-national corporations are leading the Globalisation of mediation, while, 25% viewed lawyers as the leaders, and only 7% viewed Courts as the leaders in mediation on the international commercial scene. Now that major corporate clients have discovered mediation and are pushing for it, lawyers who resist the increased use of mediation in India will likely lose credibility with existing or potential multi-national corporations clients. Mediation is intended to complement and not replace the judicial process, it is highly adaptable to different contexts, and thus expertise in India is already growing rapidly, the apprehensions may quickly fritter away.

Consequently, the above study shows that in future litigants may harbor anxiety about mediation as an alternative to the Court system. But the fear of exploitation, distrustful of private proceedings, comforted by the familiarity of the Court system, insecure about making decisions about their own interests, or interested in vexatious litigation or in delaying the case for economic reasons, some litigants may prefer the

394 www.mediationuk.org.uk/-Mediation UK Homepage. wwwiimcr.org/-Institute of International Mediation and Conflict Resolution.
395 European Business Mediation Congress, October 21-23, 2004 by CPR Institute of Dispute Resolution.
lawyer dominated, public, formal, and evaluative judicial process. These impressions will prove to be inaccurate if the alternative dispute redressal methods like mediation are duly understood and adopted by the disputant for a variety of reasons. First, mediation will not frustrate the preferences of such litigants and, their right to trial will be preserved. Litigants involved in the process are much less likely to be exploited. Litigants will quickly understand that the mediator has no power or social control over them or their resolution of the dispute. Second, effective facilitators will gain their trust over time. Third, if the parties still feel the need for an evaluation of the legal issues, the mediation can be designed accordingly to deliver that service. At times, litigants can better save face with members of their family, community, or organisation, if they can cast responsibility for the result on a neutral third party, and for this group, a strong evaluative process may be appropriate.

4.8.1.9 COURT ANNEXED MEDIATION

The main obstacles to growth of mediation in India is due to the lack of clarity in procedural framework, unclear statutory framework, budgetary constraints due to lack of funds with the High Courts and lack of proper institutional support contributes to the poor rate of settlements of settlements in India. Family and matrimonial mediation is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by bringing the participant's to voluntary agreement. Mediation is the very basis of every society to maintain harmony in the social fabric. In the context of matrimonial dispute, the mediators are often performing the role of counselors. Even before mediation was talked about for solution of disputes in Courts for reducing the pendency

396 Justice Manju Goel, Judge High Court of Delhi, Successful mediation in matrimonial disputes (p-1-5)
of cases in Courts, mediation for matrimonial disputes was in existence. Initially such counselors were benevolent elders and were available to the parties’ right in the families. Elders or others who commanded respect from disputing parties became the mediators. The counseling centers have merged into the Family Court system and are looked upon as a model system for a Family Court\textsuperscript{397}. Section 9 of the Family Courts Act, 1984, Section 89 and Order XXXII-A of the Code of Civil Procedure, 1908 make it obligatory for the Court to give a fair chance to a conciliated or negotiated settlement before adjudication is embarked upon. Section 23 of the Hindu Marriage Act, 1955 focuses on Judge's role in attempting reconciliation.

4.8.1.10 THE INSTITUTIONALISATION OF MEDIATION

Institutionalisation of mediation refers to any entity, which adopts mediation procedures as a part of doing service and in some cases adopted as a form of their livelihood business\textsuperscript{398}. For example, Courts that establishes rules to govern referral to mediation procedures, or a government agency that incorporates mediation processes in developing rules and regulations. The conceptualization of Court connected mediation was with the objective of streamlining the extended procedures of litigation and conserving judicial resources by shifting the burden of pending cases, evidences of success of such programs can be gathered from the its popularity in the United States and other developed countries. Unlike litigation or any other form of alternative dispute redressal methods, mediation brings to the resolution process not only a methodology to end a dispute, but also peace and healing between the

\textsuperscript{397} The Tata Institute of Social Sciences to run a counselling centre at Bombay was a fore-runner of the family Courts in Bombay

parties. Courts must change to accommodate a consensual, private case resolution process that does not rely on judicial decisions as its focal point.

In Indian context, the Committee headed by Justice Jagannadha Rao initiated institutionalisation of Court-connected mediation with the framing of model rules. These model rules have to be framed under the guidelines of the Supreme Court of India and require adoption by all the High Courts, the next step in the process is sanctioning of finances to meet infrastructural pre-requisites and employment of mediators and conciliators. There is an increasing concurrence over the fact that the current state of affairs of widespread backlog and delay can only be settled with adoption of modern dispute resolution processes such as mediation. This section has attempted to capture the developments on the front of infrastructural prerequisites for Court connected mediation across Indian states and also enlists various innate features other than infrastructure for successful institutionalization of Court connected mediation in India.

The first Court annexed mediation centre in India was established in Tamil Nadu, a similar centre in the Delhi High Court and the Bombay High Court was instituted on the lines of the Tamil Nadu model. These centres are technologically state-of-the-art facilities and located well within the Court premises, sending a psychological message to the

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400 Symposia: The State of the States: Dispute Resolution in the Courts 1 Cardozo Online J. Conflict Resol. 4, 7
402 A joint Conference of Chief Ministers of the States and Chief Justices of High Courts was held on 4th December, 1993 at New Delhi under the Chairmanship of the then Prime Minister of India and presided over by the Chief Justice of India. The resolution adopted in this conference was that Courts are not in a position to bear the entire burden of justice system and that a number of disputes lent themselves to resolution by alternative modes such as arbitration, mediation and negotiation.
disputants and general public that they are under the umbrella of the Court. The mediation movement in these States has picked up substantially with establishment of these centres. Delhi District Courts are equipped with the Court-annexed mediation facilities and have shown exceptional results in such short time span. It is imperative that this process of establishing such mediation centres is carried forward to the other States High Courts and District Courts as well. Another important aspect is that with the opening of such facilities, the quality and supply of mediators is not to be compromised.

The Chief Justice of India Hon’ble Shri Y.K. Sabharwal discussed the actual implementation of a mediation program in the following words, “Senior Judicial Officers having aptitude for Alternative Dispute Redressal methods should be trained in mediation, conciliation etc. and made in charge of mediation and conciliation centers. They can also be asked to provide training to prospective mediators and conciliators who can then undertake the task of settlement of disputes by way of mediation or conciliation. However, ultimately the responsibility of mediation has to be on the shoulders of members of Bar.”

The Courts handling criminal cases under Section 498 A make their own efforts for a consolidated settlement. So do the matrimonial Courts. In view of the shortage of time in the hands of the judicial officer,
a need is always felt that the work of counseling at different levels be taken over by a professional counselor or mediator. The basic difference among the police, the judge and the mediator is that the police are trained to frame or prove a charge, a judge is to focus his attention on right or wrongdoing but a mediator is to focus on restoration of equilibrium and remain non-judgmental all through. The mediator remains on guard against his temptation to belittle or give lift to one or other party.

Thus, mediation is a process of structured negotiation conducted by a facilitator with skill, training and experience necessary to assist the litigating parties in reaching a resolution of their dispute. A process is confidential, non-coercive and geared to aid them in arriving at a mutually acceptable resolution to their dispute of any nature. A mediator helps the disputed parties in reaching a negotiated resolution in an informal process. Thus, one of the advantages of the mediation process is its flexibility. A mediation session can be designed in any manner that the parties believe would be most useful to the resolution of their dispute. Mediation is non-binding. However, if the parties cannot negotiate an acceptable settlement, they may still benefit from the process by narrowing the issues to be arbitrated or litigated. The ‘mediator’ is a facilitator and does not have a pro-active role. It is a fact that the justice delivery system today needs “healers of conflicts” for a viable alternative to the adjudication process. It is also necessary to spread awareness of these alternative methods, particularly mediation, and to facilitate the rights of common people to speedy and inexpensive justice. Mediation can thus be adopted as one of the effective method of solving the crisis arising out of judicial delay and arrears before the Court of laws.
4.9 NEGOTIATION

It is true that, nothing is more satisfying and more soothing than a cordially negotiated amicable settlement because, it protects and preserves personal and business secrets, relationships and reputations that might otherwise be impaired by the adversarial process. The process of negotiation does not fall either in the concept of ‘arbitration’ or ‘conciliation’. Strictly, negotiation by itself, is not an alternative dispute resolution procedure because it is a bipartite process and does not require a third party to facilitate and promote the settlement, where as alternative dispute resolution methods essentially involves a third person for facilitating the resolution of the dispute by settlement. However, it is the most fundamental way of dispute resolution and is generally treated as one of the main components of alternative dispute resolution processes. It is only when the process of negotiation does not succeed, that it transforms into alternative dispute resolution method by intercession of a neutral and more structured process framework 406.

Justice Krishna Iyer J accentuated the need for settling disputes between parties particularly in commercial matters, by mutual negotiation in preference to Court litigation in the following languages, ‘Commercial causes…, should, as far as possible be adjusted by non-litagitative mechanisms of dispute –resolution since forensic process, dilatory and contentious , hamper the flow of trade and harm both sides, whoever wins or loses the lis… A legal adjudication may be flawless but heartless but a negotiated settlement will be satisfying, even if it departs from strict law’ 407. The parties should be encouraged, so far as possible, to settle their

disputes without reference to litigation. The Arbitration and Conciliation Act, 1996 gives legislative recognition to this concept under Section 30. Section 30 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’. In India, the process of negotiation as a preferred dispute resolution method is yet to make an impact. Nevertheless, in many countries it has made a remarkable impact. In Sweden the disputed parties meet in a spirit of determination to agree, and they are said to consider the non arrival at an amicable settlement almost a disgrace to themselves.

4.9.1 MEANING

Negotiation is the simplest and most purposeful method of settling commercial disputes between the parties. The disputants themselves are in the best position to know the strengths and weaknesses of their respective cases. If there is any need of advice felt by them on such points of difficulty or controversy, the disputed parties can seek the needed advice from the competent persons or from the experts of such field. The process of Negotiation thus enables the parties to iron out their differences and dispute by direct face-to-face interaction. It avoids unnecessary acrimony, anguish and expense. The process of negotiation can help in healing the wounds and thus remedies pains caused by inter-party frictions. Thus, Negotiation can take place in business, non-profit organisations, Government branches, legal proceedings, among nations and in personal situations such as marriage, divorce and parenting.

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408 Cutts Vs Head 1984 Ch 290.  
4.9.2 PROCEDURE

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. It is not confined to the core points of the dispute alone. In order to facilitating overall settlement of the dispute, parties can introduce other issues as trade-offs.

Negotiation is an interaction of influences. Such interactions, for example, include the process of resolving disputes, agreeing upon courses of action, bargaining for individual or collective advantage and of crafting outcomes to satisfy various interests.

The process of negotiation gives the parties an option to go over a wide range of issues. In business disputes, the disputed parties try to reach a settlement by adopting a give and take process, understanding each other’s point of view, as they best know the strength and weakness of their respective cases and the parties have their market reputation at stake. This gives a greater chance of reaching an amicable settlement by negotiations.

Negotiation involves three basic elements: process, behavior and substance. The ‘process’ refers to how the parties negotiate, the context of the negotiations, the parties to the negotiations, the tactics used by the parties, and the sequence and stages in which all of these play out. ‘Behaviour’ to the relationships among these parties, the communication between them and the styles they adopt. The ‘substance’ refers to what the parties negotiate over: the agenda, the issues in their respective
positions and more helpfully in interests of the parties, the options, and the agreements reached at the end by them 410.

Skilled negotiators may use a variety of tactics ranging from a straightforward presentation of demands or setting of preconditions to more deceptive approaches such as intimidation and salami tactics may also play a part in arriving at the outcome of negotiations. The key to Negotiation is information.

Emotions have the potential to play either a positive or a negative role in negotiation. During negotiations, the decision as to whether or not settle rests in part on emotional factors. Negative emotions can cause intense and even irrational behavior, and can cause conflicts to escalate and negotiations to break down, while positive emotions facilitate reaching an agreement and help to maximize joint gains.

Negative affect has detrimental effects on various stages in the negotiation process. Although various negative emotions affect negotiation outcomes. Angry negotiators plan to use more competitive strategies and to cooperate less, even before the negotiation starts. These competitive strategies are related to reduced joint outcomes. During negotiations, anger disrupts the process by reducing the level of trust, clouding parties' judgment, narrowing parties' focus of attention and changing their central goal from reaching agreement to retaliating against the other side. Angry negotiators can pay less attention to opponent’s interests and can be less accurate in judging their interests, thus achieve lower joint gains. Moreover, because anger makes negotiators more self-centered in their preferences, it increases the likelihood that they will reject profitable offers. Anger does not help in achieving negotiation

410 http://en.wikipedia.org/Negotiation
goals either: it reduces joint gains and does not help to boost personal gains, as angry negotiators do not succeed in claiming more for themselves. Moreover, negative emotions leads to acceptance of settlements that are not in the positive utility function but rather have a negative utility. However, expression of negative emotions during negotiation can sometimes be beneficial: legitimately expressed anger can be an effective way to show one's commitment, sincerity, and needs.

4.9.3 ADVANTAGES

A negotiated settlement is conducive in preserving relations between the parties as also their market reputation, which justifies the preference of the process of negotiation over other alternative dispute resolution methods. The process of negotiation and the negotiated settlement is possible at any time, even after the other methods of dispute resolution have been initiated.\footnote{The Arbitration and Conciliation Act, 1996 Section33 and Section 73}

The negotiated settlement is based on bipartite agreements, and as such, is superior to any procedure involving third party intervention in matters that essentially concern the parties.

As against ‘arbitration’ and ‘conciliation’, the process of negotiation is most flexible and informal, and provides ample scope for the parties to direct the proceedings suited to the facts and circumstances of the case. For instance, parties are free to choose the location, timing, agenda, subject matter and the participants. It is quick, inexpensive, private and less cumbersome in comparison to other dispute resolution methods. It is a voluntary and non-binding process, wherein the parties control the result and the procedure for coming to an amicable agreement. The main advantage of negotiation can be said to be that, a settlement by
way of negotiation is always possible, even after other method of resolving the dispute have been set in motion or having been set in motion, have not resulted in an amicable settlement of the disputes.\textsuperscript{412}

4.9.4 DISADVANTAGES

It is a common practice for the parties to an international contract to stipulate that before embarking upon arbitration, the parties will endeavour to settle any dispute by negotiation or some other form of alternative dispute resolution method. The essence of negotiation that it is basically a business deal involving reluctant exchange of commitments where both parties want to yield less and get more. It is akin to the practice of diplomacy.

The evolution and adoption of the modern systems of Information, communication technologies and the concept of Cyber era has made the business and trade negotiations a highly sophisticated science, involving a complex interchange of ideas combining arguments, horse-trading and bluff. The businesspersons and traders use negotiation as a device for trying to persuade the other to give him what he needs or wants and gives up something in return.

The process of negotiation can sometimes become highly complicated, particularly because the process of negotiation have emphasized a greater and extensive possibilities for joint gains and interest base outcome. The final outcome of negotiation would depend upon the art, skill and dexterity of displaying strength by one party to the other. Where the other determinants of strength are reasonably balanced, conviction can easily be the decisive factor.

\textsuperscript{412} Redfern and Hunter, Law and Practice of International Commercial Arbitration, 4\textsuperscript{th} edn 2004, p35, para 1-69.
The process of negotiation can start with easy bargaining slowly adopting a pleading manner or in some cases the parties may hector, cajole or threaten the other party. The powerful party to the dispute has an option to use the tactic of avoiding the process of negotiation or withdrawing from the situation, which involve confronting others in resolving differences. There by the party may use the threat of withdrawal as a strategy in his favour and disadvantageous to that of the opposite party. Negotiations can culminate into an amicable settlement only if the parties have a genuine eagerness and will, followed by earnest honest efforts and cooperation, to settle the dispute. However, it is unlikely to succeed unless those involved are capable of a certain degree of detachment and objectivity. In long term agreements it is common to find a formula that the, in the event of a dispute arising, the parties will first endeavour to settle their differences by negotiations ‘in good faith’. Lord Ackner in Walford Vs Miles has said that ‘an agreement to negotiate, like an agreement to agree, is unenforceable… because it lacks the necessary certainty. A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of the negotiating parties’.

Broadly speaking, negotiation is an interaction of influences. Such interactions, for example, include the process of resolving disputes, agreeing upon courses of action, bargaining for individual or collective advantage, or constructing outcomes to satisfy various interests. Negotiation can thus be considered as another form of alternative dispute resolution mechanism along with that of arbitration, conciliation and mediation mechanisms.

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413 Brown and Marriott, Alternative Dispute Redressal methods Principles and Practice, 2nd 1999, p103, para 6-03.
4.10 INFORMATION TECHNOLOGY IN ADR

In this area, the researcher has analyzed the potential of alternative dispute redressal methods when amalgamated and merged with the information technology and the ad-hoc and institutional forms in which arbitration is adopted as alternative dispute redressal methods. From the study of the preceding chapters, it is evident that alternative dispute redressal mechanism is a better platform to redress grievances of civil nature. Alternative dispute redressal methods techniques are extra-judicial in nature. They can be used in almost all contentious matters, which are capable of being resolved, under law, by agreement between the parties. They can be employed for getting some very encouraging results in several categories of disputes, especially civil, commercial, industrial and family disputes. These techniques can work across the full range of business disputes like banking, contract performance, construction contracts, intellectual property rights, insurance, joint ventures, partnership differences etc. Alternative dispute redressal methods can offer the best solution in respect of commercial disputes. However, alternative dispute redressal methods is not intended to supplant altogether the traditional means of resolving disputes by means of litigation. It only offers alternatives to litigation. This is more so with the use of information and communication technology in online dispute redressal methods, because it is not only instantaneous but also equally cheap and convenient. The companies and individuals engaged in the business of e-commerce and web dealings can avail its services in resolution of their disputes. The awareness, popularity and use of different alternative dispute redressal mechanism are to be increased, and these methods can achieve its best in the present scenario where information technology is dominating every field only if the same is
integrated with the information technology. Mediation followed by arbitration also referred to as Mediation-Arbitration is a combination of mediation and arbitration is one of the newly developed hybrids methods, which can also be adopted for an effective dispute redressal purpose. The necessity of evolution of such different dispute resolution methods has arisen due to the growing problem of judicial arrears and judicial delay faced globally by developed as well as developing counties Courts. Thus, there is evolution and use of newer alternative dispute resolving mechanism world wide with the aim to reduce the burdening of the already overburdened Courts in India.

4.10.1 ONLINE DISPUTE RESOLUTION IN INDIA

Decision based on the law, which does not fulfill the requirements of the ever-changing dynamic environment of the society is meant to be shunned. Thus, a purposive, modernized and a continuing interpretation of the Courts is necessary because the interface of justice delivery system with the information technology is becoming inevitable. Law is not static, it must change with the changing social concepts and values for the maintains of social order in the society. Otherwise, either the old law will suppress the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law, which stands in the way of its growth. Law must therefore constantly keep on adapting itself to the fast changing society and not lag behind\[415\]. It is a requirement of the society that the law must respond to its need. The greatest virtue of the law is its flexibility and its adaptability; it must change from time to time so that it answers the cry of the people, the need of the hour and the order of the day. Thus, the justice delivery system cannot afford to take the

\[415\] Justice Bhagwati in National Textile Worker’s Union Vs. P.R.Ramakrishnan, (1983) 1 SCC 228, at p. 236
information technology revolution lightly. The judiciary in India has not only recognised this need but has also utilised the information technology to do complete justice. The Supreme Court has on various occasions encouraged the use of information technology for meeting the ends of justice and to do complete justice. The Supreme Court has encouraged the use of alternative dispute redressal methods in India and very soon, the same will be extended to online dispute redressal method as well. The need and necessity of online dispute redressal method is in near future and if Indian government and the people is encouraging online dispute redressal method it is thereby assisting in the attainment of a speedier, economical and convenient justice system. Thus, the sooner online dispute redressal method is adopted the better it will be for the nation in general and the justice seeker in particular.

Dispute resolution can take place on-line by using information technology in certain cases. Online dispute resolution, is a growing field of dispute resolution, where newer forms of communication technologies can be used to solve disputes. Online Dispute Resolution is also called as "ODR". Online Dispute Resolution or ODR also involves the application of traditional dispute resolution methods to disputes which arise online.

The swift growth of e-commerce and web site contracts has increased the potential for conflicts over contracts, which have been entered into online. This has necessitated a solution that is compatible with online matters with the use of internet technology. This challenging task can be achieved by the use of online dispute redressal method in India. It can be used to resolve such e-commerce and web site contracts disputes that are crucial for building consumer confidence and permitting access to justice in an online business environment.

The online dispute redressal method are not part and parcel of the
traditional dispute resolution machinery popularly known as “judiciary”,
but is an alternative and efficacious institution known as alternative
dispute redressal mechanism. Introduction of information and
communication technology in the traditional Courts has given way to the
introduction of the concept of E-Courts.

4.10.2 NEED FOR ONLINE DISPUTE RESOLUTION

The alternative form of dispute redressal mechanisms can be
effectively used to settle online disputes by modifying it as per the needs.
It is time effective and cost efficient. The unique feature of this method is
that, it can also overcome the geographical hurdles. However, the
effective implementation of this method requires the need for personnel
with knowledge of information technology, the different alternative
dispute redressal methods and law, technical concerns, legal sanctity of
proceedings, industry support etc. The use of alternative dispute redressal
methods for resolving online disputes is to be increased day by day.
Number of web sites provide for different type of online dispute
resolution method like arbitration, conciliation and mediation with certain
conflict management services. The demand for these services will
increase as the Arbitration and Conciliation Act, 1996 has given
paramount importance to “party autonomy” by accepting the intention of
parties as a platform for form of dispute resolution. Thus, what law will
be applicable will depend on the intention of parties. If the parties have
adopted the mechanism of online dispute redressal method then it will
definitely apply with necessary minor modifications. The language used
in various sections of the 1996 Act, as evident from the last chapter on
Arbitration and Conciliation Act, 1996, gives options to the parties to opt
for the procedure as per their agreement during the arbitral proceedings.
before the arbitrator\textsuperscript{417}. However, the appellate procedure would be
governed as per the statutory provisions and parties have no right to change the same\textsuperscript{418}.

There is a rapid growth of e-commerce, e-business and web site
with the easy prologue of internets at every domestic and business front. Contracts entered through internet as a basis of communications has increased the potential for conflicts over contracts that have been entered into online. This has necessitated a solution that is compatible with online matters. This challenging task can be achieved by the use of online dispute redressal method in India. The use of online dispute redressal method to resolve such e-commerce and web site contracts disputes are crucial for building consumer confidence and permitting access to justice in an online business environment.

Thus, it is high time that for understanding and building a base for
offline alternative dispute redressal mechanism as well as online dispute redressal methods in India. It must be noted that every new project needs time to mature and become successful. Thus, the success of alternative dispute redressal mechanisms and online dispute redressal methods depends upon a timely and early base building by creating awareness of the use of such new reliable dispute redressal methods for the present global economy.

4.10.3 THE JUDICIAL RESPONSE WITH REFERENCE TO
INFORMATION AND COMMUNICATION TECHNOLOGY

The concept of speedy trial would cover all the stages including investigation, inquiry, trial, appeal, revision and re-trial in short

\textsuperscript{417} Praveen Dalal, “Online dispute resolution in India”,(2005)p.11
\textsuperscript{418} N S Nayak Vs.State of Goa, 2003 (6) SCC 56
everything commencing with an accusation and expiring until the final verdict and its enforcement. The study of the following cases reveal that the Indian Judiciary has emphasized that use of information technology and communication technology in dispute resolution process is positive and technology friendly concept, which would help the dispute redressal machineries in solving the problem of judicial delay and the problem of judicial arrears.

In M/S SIL Import, USA Vs. M/S Exim Aides Silk Exporters\(^{419}\) the words "notice in writing", in Section 138 of the Negotiable Instruments Act, were construed to include a notice by fax. The Supreme Court observed that, “a notice envisaged under section 138 can be sent by fax. Nowhere is it said that such notices must be sent by registered post or that it should be dispatched through a messenger. Chapter XVII of the Act, containing sections 138 to 142 was inserted in the Act as per Banking Public Financial Institution and Negotiable Instruments Laws (Amendment) Act, 1988. Technological advancements like Fax, Internet, E-mail, etc were on swift progress even before the Bill for the Amendment Act was discussed by the Parliament. When the legislature contemplated that notice in writing should be given to the drawer of the cheque, the legislature must be presumed to have been aware of the modern devices and equipments already in vogue and also in store for future. If the Court were to interpret the words "giving notice in writing" in the section as restricted to the customary mode of sending notice through postal service or even by personal delivery, the interpretative process will fail to cope up with the change of time. So if the notice envisaged in clause (b) of the proviso to section 138 was transmitted by Fax, it would be compliance with the legal requirement".

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\(^{419}\) AIR 1999 SC 1609.
Thus the requirement of a written notice will be satisfied if the same is given in the form of a fax, e-mail etc, using the information technology. It must be noted that a notice by e-mail can be send instantaneously and its delivery is assured and acknowledged by a report showing the due delivery of the same to the recipient. This method is more safe, accurate, economical and lesser time consuming as compared to its traditional counterpart, popularly known as "Registered post with acknowledgement due".

In Basavaraj R. Patil Vs.State of Karnataka\textsuperscript{420} the question was whether an accused need to be physically present in Court to answer the questions put to him by the Court whilst recording his statement under section 313. The majority held that the section had to be considered in the light of the revolutionary changes in technology of communication and transmission and the marked improvement in the facilities of legal aid in the country. It was held that it was not necessary that in all cases the accused must answer by personally remaining present in the Court. Once again, the importance of information technology is apparent from this decision. If a person residing in a remote area of South India is required to appear in the Court for giving evidence, then he should not be called from that place, instead the medium of "video conferencing" should be used. In that case, the requirements of justice are practically harmonized with the ease and comfort of the witnesses, which can drastically improve the justice delivery system.

In State of Maharashtra Vs.Dr.Praful.B.Desai\textsuperscript{421} the Supreme Court observed that, "The evidence can be both oral and documentary and electronic records can be produced as evidence. This means that

\textsuperscript{420} (2000) 8 SCC 740.
\textsuperscript{421} 2003 (3) SCALE 554.
evidence, even in criminal matters, can also be by way of electronic records. This would include video conferencing. Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. Thus, it is clear that so long as the accused or his pleader is present when evidence is recorded by video conferencing that evidence is recorded in the "presence" of the accused and would thus fully meet the requirements of section 273, Criminal Procedure Code. Recording of such evidence would be as per "procedure established by law". The advancement of science and technology is such that now it is possible to set up video conferencing equipments in the Court itself. In that case, evidence would be recorded by the magistrate or under his dictation in the open Court. To this method there is however a drawback. As the witness is not in the Court, there may be difficulties if he commits contempt of Court or perjures himself. Therefore, as a matter of prudence evidence by video conferencing in open Court should be only if the witness is in a country which has an extradition treaty with India and under whose laws contempt of Court and perjury are also punishable.

This judgment of the Supreme Court is a landmark judgment as it has the potential to seek help of those witnesses who are crucial for rendering the complete justice but who cannot come due to "territorial distances" or even due to fear, expenses, old age, etc. The Courts in India have the power to maintain anonymity of the witnesses to protect them from threats and harm and the use of information technology is the safest bet for the same. The testimony of a witness can be recorded electronically the access to which can be legitimately and lawfully denied by the Courts to meet the ends of justice.
The above study shows that the judiciary in India is aware of the advantages of information technology and is actively and positively using it in the administration of justice. It is an undeniable fact that the "E-justice system" has found its existence in India. It is not at all absurd to suggest that online dispute redressal method will also find its place in the Indian legal system very soon.

4.11 FORMS OF ARBITRATION

Arbitration is one of the popular modes of alternate dispute resolution in the commercial world and one can find an arbitration clause incorporated in the majority of business contracts. This can be said to be available to the parties in two major forms namely, ad hoc and institutional arbitration. The characteristic features and their advantages and disadvantages over each other are studied here under. The disputed parties are entitled to choose the form of arbitration, which they deem appropriate in the facts and circumstances of their dispute, by consideration & evaluation of the various features of both forms of arbitration, as both forms have their own merits and demerits.

4.11.1 AD HOC ARBITRATION

An ad hoc arbitration is one, which is not administered by an institution, and therefore, the parties are required to determine all aspects of the arbitration like the number of arbitrators, manner of their appointment, procedure for conducting the arbitration, etc.

Ad hoc arbitration is a proceeding that is not administered by others and requires the parties to make their own arrangements for selection of arbitrators and for designation of rules, applicable law, procedures and administrative support. Provided the parties approach the
arbitration in a spirit of cooperation, ad hoc proceedings can be more flexible, cheaper and faster than an administered proceeding. The absence of administrative fees alone makes this a popular choice.

The arbitration agreement, whether arrived at before or after the dispute arises, might simply state that "disputes between the parties will be arbitrated", and if the place of arbitration is designated, that will suffice. If the parties cannot agree on arbitral detail, all unresolved problems and questions attending implementation of the arbitration, for example "how the arbitral tribunal will be appointed", "how the proceedings will be conducted" or "how the award will be enforced" will be determined by the law of the place designated for the arbitration, i.e., the "seat" of the arbitration. Such an abbreviated approach will work only if the jurisdiction selected has an established arbitration law. The ad hoc proceeding need not be entirely divorced from its institutional counterpart. Very often, the appointment of a qualified and impartial arbitrator can constitute a sticking point in ad hoc proceedings. In such case, the parties can agree to designate an institutional provider as the appointing authority. Further, the parties at any time in the course of an ad hoc proceeding can decide to engage an institutional provider to administer the arbitration.

Parties wishing to include an ad hoc arbitration clause in the principal contract between them, or seeking to arrive at terms of arbitration after a dispute has arisen, have the option of negotiating a complete set of rules, establishing procedures, which fit precisely their particular needs. Experience has shown that this approach can require considerable time, attention and expense without providing assurance that the terms agreed will address all eventualities.
Other options available to parties wishing to proceed with the ad hoc arbitration, who are not in need of rules drawn especially for them, or of formal administration and oversight, include the adoption of the rules of an arbitral institution, amending provisions for selection of the arbitrators and removing provisions for administration of the arbitration by the institution. Incorporating statutory procedures such as the Arbitration and Conciliation Act, 1996. Adopting rules crafted specifically for ad hoc arbitral proceedings such as the UNCITRAL Rules (U.N. Commission on International Trade Law) or CPR Rules (International Institute for Conflict Prevention and Resolution), which may be used in both domestic and international disputes, and adopting an ad hoc provision copied from another contract. Risks accompanying two of the available options are worthy of particular note. The World Intellectual Property Organisation (WIPO) and World Trade Organisation (WTO) are good examples of Institutions that are using alternative dispute redressal methods and online dispute redressal method for Intellectual Property Rights dispute resolution.\textsuperscript{422} The Domain Name Dispute Resolution Segment of WIPO is resolving domain names disputes in an effective and speedier manner.

Incorporating rules drawn by an institutional arbitration provider, amending provisions for appointment of the arbitrators and excising provisions requiring administration by the provider carries with it the risk of creating ambiguities in the institutional rules as amended, despite efforts to redraw them to suit an ad hoc proceeding. It is also possible that in the adaptation process the parties will inadvertently create an institutional process. Copying an ad hoc arbitration clause from another contract may also result in later grief if the purloined clause was

\footnote{422}http://www.wipo.int/amc/en;http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm
originally crafted for a particular, possibly unique, set of circumstances and was drafted taking into account different applicable arbitration law.

4.11.1.1 ADVANTAGES AND DISADVANTAGES OF AD HOC ARBITRATION

Properly structured, ad hoc arbitration should be less expensive than institutional arbitration and, thus, better suit smaller claims and less affluent parties. Ad hoc arbitration places more of a burden on the arbitrators, and to a lesser extent upon the parties, to organize and administer the arbitration in an effective manner. A distinct disadvantage of the ad hoc approach is that its effectiveness may be dependent upon the willingness of the parties to agree upon procedures at a time when they are already in dispute. The letdown of one or both of the parties to cooperate in facilitating the arbitration can result in an undue expenditure of time in resolving the issues. The savings contemplated by use of the ad hoc arbitral process may be somewhat illusory if delays precipitated by a recalcitrant party necessitate repeated recourse to the Courts in the course of the proceedings.

The primary advantage of ad hoc arbitration is flexibility, which enables the parties to decide upon the dispute resolution procedure. This necessarily requires a greater degree of effort, co-operation and expertise of the parties in determination of the arbitration rules. Very often, the parties may misunderstand each other since they are of different nationalities and come from different jurisdictions, and this can delay the arbitration. In addition, once a dispute arises, parties tend to disagree and lack of co-operation required may frustrate the parties’ intention of resolving their dispute by ad hoc arbitration. However, such situations can be avoided, if the parties agree that the arbitration should be
conducted under certain arbitration rules. This results in reduced deliberation and legal fees and also facilitates early commencement of the arbitration, as the parties do not engage in the time consuming process of determining complex arbitration rules. There are various sets of rules suitable to ad hoc arbitration, of which the UNCITRAL rules are considered most suitable.

By reason of its flexibility, ad hoc arbitration is preferred in cases involving state parties who consider that a submission to institutional arbitration devalues their sovereignty and they are therefore reluctant to submit to institutional control. Ad hoc arbitration also permits the parties to shape the arbitration in a manner, which enables quick and effective resolution of disputes involving huge sums of public money and public interest. In the Aminoil ad hoc arbitration, the flexibility of the method permitted the parties to define issues in a manner, which enabled quick resolution of the dispute. Further, the adopted procedure provided that the parties would file their pleadings at the same time. Consequently, neither party was a respondent, a title that parties resent when they believe that they have justifiable claims against the other party.

The ad hoc arbitration is less expensive than that of the institutional arbitration. The parties only pay fees of the arbitrators, lawyers or representatives, and the costs incurred for conducting the arbitration i.e. expenses of the arbitrators, venue charges, etc. They do not have to pay fees to an arbitration institution, which, if the amount in dispute is considerable, can be prohibitively expensive. In order to reduce costs, the parties and the arbitrators may agree to conduct arbitration at the offices of the arbitrators and such proposal would not be acceptable to an institutional arbitration.

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423 Government of Kuwait and Aminoil (1982, 21 International legal materials 976)
In ad hoc arbitration, parties can negotiate and settle fees with the arbitrators directly, unlike institutional arbitration wherein the parties pay arbitrators’ fees as stipulated by the institution. This allows them the opportunity of negotiating a reduction in fees. However, the drawbacks are that, the above factors can involve some uncomfortable discussion and in certain cases, the parties may not be able to negotiate a substantial reduction or for that matter, any reduction at all. The arbitrators are the judges in the cause and no party desires to displease the judge, even before the proceedings have commenced. Ad hoc arbitrations in some cases can be said to be not be less expensive than institutional arbitration, as primarily the parties are required to make arrangements to conduct the arbitration but they may lack the necessary knowledge and expertise. It can also be said that many laymen have to participate in arbitration and many arbitrations have to be conducted by persons who are not lawyers. This would result in misinformed decisions, especially in international commercial arbitration as the parties come from different countries and consequently, in increased costs.

Along with these factors, where there is lack of co-operation between the parties or delay on part of the tribunal in conducting the arbitration or in writing the award, a party may seek Court intervention and the litigation costs negate not only the cost advantage of ad hoc arbitration but also the parties’ intention to arbitrate. The tribunals, in complex cases involving considerable administrative work, may appoint a secretary to administer the arbitration, whose fees will have to be borne by the parties and this can add to the cost burden of the arbitration.

It can therefore, in the ad hoc arbitration if required co-operation in accommodating and if the parties are conversant with arbitration procedures or if the arbitration is conducted by experienced arbitrators,
“the difference between ad hoc and institutional arbitration is like the difference between a tailor-made suit and one that is bought off-the-peg”. Thus, it is to say that, if ad hoc arbitration is tailored to the needs of the parties, it will be more cost effective than institutional arbitration.

4.11.2 INSTITUTIONAL ARBITRATION

An institutional arbitration is one in which a specialized institution with a permanent character, intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of that institution. It is pertinent to note that these institutions do not arbitrate the dispute, it is the arbitrators who arbitrate, and so the term arbitration institution is inappropriate and only the rules of the institution apply. Often in such cases, the contract between the parties will contain an arbitration clause, which will designate an institution as the arbitration administrator. The institutional administrative charge, which may be substantial, makes way for which the institutional approach is preferred.

In institutional arbitration, the first issue arising for agreement of the parties is choice of the institution, appropriate for the resolution of disputes, arising out of their contract. Whilst making such choice, there are various factors to be considered i.e. nature & commercial value of the dispute, rules of the institution as these rules differs, the past record and reputation of the institution and also that the institutional rules are in tune with the latest developments in international commercial arbitration practice. There are many institutional arbitration administrators, some of which are associated with a trade association and many of which are independent. The London Court of International Arbitration, The Chartered Institute of Arbitrators (UK), The National Arbitration Forum (USA) and The International Court of Arbitration (Paris) are four such
institutions providing for arbitration as the mode of resolution of the disputes. There are approximately 1,200 institutions, organizations and businesses worldwide offering institutional arbitral services. Many arbitral institutions are operating under rules not artfully drawn or rules which may be applicable to a particular trade or industry, but not to the existing or prospective needs of one or more of the parties. The greatest threat of a less prestigious arbitral institution is the possibility that the institutional provider will be unable to deliver what motivated the parties to select institutional arbitration over ad hoc proceedings, i.e., a proper degree of supervision, which often is the key to whether the arbitration will prove successful. The drawbacks of the institutional approach are also that, in some situations the administrative fees for services and use of institutional facilities may be high in disputes over large amounts, especially where fees are related to the amount in dispute. For lesser amounts in dispute, institutional fees may be greater than the amount in controversy and the institution's bureaucracy may lead to added costs and delays and the disputants may be required to respond within unrealistic time frames.

4.11.2.1 ADVANTAGES OF INSTITUTIONAL ARBITRATION

The advantage of institutional arbitration is that it saves party’s and their lawyer’s effort of determining the arbitration procedure and the effort of drafting an arbitration clause, which is provided by the institution by the availability of pre-established rules and procedures which assure that arbitration will get off the ground and proceed to conclusion with dispatch. Once the parties choose the institution, all they need to do is incorporate the draft clause of that institution into their contract. This expresses their intention to arbitrate under the institution’s
rules, which provide for every conceivable situation that can arise in an international commercial arbitration.

The draft clauses would be revised periodically by the institution, on experience drawn in the process of conducting arbitrations regularly and those approved by arbitration experts, while taking account of the latest developments in arbitration practice. This ensures that there is no ambiguity in relation to the arbitration process. On the other hand, ambiguous arbitration clauses in the case of an ad hoc arbitration can in turn compel the aggrieved parties to seek Court intervention in order to commence or continue the arbitration.

The institutional arbitration relates to selection of the arbitrators. The parties from the institution’s panel of arbitrators select the arbitrators. The panel would constitute of the expert arbitrators, drawn from the various regions of the world and from across different vocations. This enables selection of arbitrators possessing requisite experience and knowledge to resolve the dispute, thereby facilitating quick and effective resolution of disputes. Whereas in ad hoc arbitration, the appointment of arbitrators is generally based on the party’s faith and trust in the arbitrators, and not necessarily based on their qualifications and experience. Thus, an incompetent arbitrator may not conduct the proceedings smoothly and this could delay dispute resolution, lead to undesirable litigation and increased costs. It is significant to note that the parties do not appoint the arbitrators. They only select and nominate the arbitrators for appointment by the institution, which may refuse to appoint a nominated arbitrator if he lacks the requisite qualifications or impartiality or independence.
In institutional arbitration, the parties and the arbitrators can seek assistance and advice from the institutional staff, responsible for administrating international commercial arbitrations under the institutional rules. Thus, doubts can be clarified or a deadlock can be resolved without Court intervention. Whereas in ad hoc arbitration, the parties would be compelled to approach the Court, in order to take the arbitration forward and consequently, the litigation expenses would negate the perceived cost advantage of ad hoc arbitration. In addition to it, the institutional staff constantly monitors the arbitration to ensure that the arbitration is completed and an award is made within reasonable time and without undue delay.

Arbitration provides for final and binding determination of the dispute between the parties. In other words, no review or appeal lies against an arbitral award to ensure finality. This involves an inherent risk that mistakes committed by the tribunal cannot be corrected, whereby one party would inevitably suffer. However, some institutional rules provide for scrutiny of the draft award before the final award is issued and some provide for a review procedure. The latter entitles the dissatisfied party to appeal to an arbitral tribunal of second instance, which can confirm, vary, amend or set aside the first award and such decision in appeal is considered to be final and binding upon the parties. In ad hoc arbitration, there is no opportunity for appeal or review and the parties have to be prepared to suffer for the mistakes of the arbitrators. It is a redeeming feature of institutional arbitration as it allows the parties a second chance of presenting their case and permits the rectification of mistakes made by the tribunal of first instance. It also serves as a check on the actions of the arbitrators and restrains them from making arbitrary awards.\footnote{Brown and Marriott, ADR Principles and Practice, 2\textsuperscript{nd} edn, 1999, p362.}
It is perceived that national Courts tend to grant enforcement of awards made in institutional arbitration, though doubts can be raised, since international arbitration institutions enjoy worldwide recognition and their professional expertise adds to the certainty and finality of the proceedings. Courts are more likely to even enforce an award obtained in default of the other party, which they would refuse had it been obtained in ad hoc arbitration, in view of the strict arbitration procedures followed by these institutions. One of the criticisms of institutional arbitration is that, parties need to comply with the procedural requirements, resulting in unnecessary delays in the arbitration. However, such requirements, in fact, avoid delay. For instance, the ICC draws up the terms of reference, criticised as being time consuming and unnecessary, containing provisions to ensure that default of a party does not stall arbitration. In default of a party in ad hoc arbitration, the other party may seek Court intervention to compel the defaulting party to commence or continue the arbitration and this may result in longer delays, than that involved in complying with these procedural requirements, intended to ensure smooth and effective dispute resolution.\footnote{Redfern and Hunter, Law and Practice of International Commercial Arbitration, 4th edn, 2004,p40.}

Thus, the parties are the masters of the arbitration but in institutional arbitration, the institutions virtually acquire certain powers of the parties’ such as appointment of arbitrators, the procedure to be followed and such other related facts as the case needs and are in a position to impose their will upon the parties. This seems to be against the very spirit of arbitration and one may say that this is not arbitration in the true sense. Though ad hoc arbitration would then be preferred, it can be argued that in today’s modern and complex commercial world, ad hoc arbitration is suitable only to disputes involving smaller claims and less
affluent parties and to domestic arbitrations, excepting where state parties are involved, for the reasons stated hereinabove. One may quote in support thereof that “Whatever its merits in a purely domestic situation, ad hoc arbitration in an international setting frequently frustrates the party seeking to enforce the contract” since international commercial arbitrations involve complicated legal issues, which parties coming from different jurisdictions may be unable to deal with.

In international commercial disputes, institutional arbitration is more suitable, even though apparently it is more expensive, time consuming and rigid than ad hoc arbitration, keeping in mind the fact that it provides established and updated arbitration rules, support, supervision and monitoring of the arbitration, review of awards and most importantly, strengthens the credibility of the awards. Nevertheless, it is hard to claim that institutional arbitration is superior to ad hoc proceedings or vice versa. Multi-fold approach has to be made according to the circumstances and type of the dispute and parties to the dispute with an aim to reduce the backlog problem in the judiciary.

4.12 MEDIATION - ARBITRATION (MEDIATION FOLLOWED BY ARBITRATION) \(^{426}\)

Mediation followed by arbitration also referred to as Mediation-Arbitration (‘med-arbiter’), is a hybrid between both mediation and arbitration. As a result, there are no fixed rules on how the process should be conducted. As a result, there are no fixed rules on how the process should be conducted. The parties to the dispute submit the matter to mediation and after an agreed amount of time or an unbreakable deadlock the matter is converted to arbitration and an arbitrator decides the matter.

\(^{426}\) Also known as ‘Binding Mediation’ or ‘med-arb’
Mediation during the course of the arbitration or mediation after arbitration hearing have been concluded but before an award has been issue is also possible. In some cases mediation of discrete items in order to narrow the issues in the dispute in the arbitration is also done. Mediation followed by arbitration is a means, which provides a total dispute resolution system, which means the expense, and delay of the judicial system is avoided entirely

4.12.1 ADVANTAGES OF MEDIATION-ARBITRATION

The method of Mediation-Arbitration has the advantage of offering both the possibility of resolution by the parties’ own agreement and, failing such agreement, the certainty of resolution by the binding decision of the arbitrator in the form of the arbitral award.

Where the mediator has the skills necessary to conduct both processes, there is a saving in both time and money in combining them, since the mediator is already “up to speed” when changing from one role to another and may gain insights during the mediation phase that could contribute to a more appropriate award.

If agreement is reached in the process of mediation, the parties may sign a binding settlement agreement or the neutral third party called mediator may, by consent, convert their settlement into an arbitral award. If the mediation does not produce agreement on all issues, the mediator becomes arbitrator, then hears, and determines the unresolved issues. The award may be non-binding or binding depending upon the agreement entered into by the disputants.

428 Alan L. Limbury, MA (Oxon), MDR (UTS), MIAMA, FCIArb., QDR, Chartered Arbitrator and Specialist Accredited Mediator, Managing Director, Strategic Resolution: <www.strategicresolution.com>
The concept of Mediation-Arbitration is thought to be a novel process, but Professor Derek Roebuck has traced its use back to the ancient world: “Everywhere in the Ancient Greek world, including Ptolemaic Egypt, arbitration was normal and in arbitration the mediation element was primary”. 429

4.12.2 CRITICISMS OF MEDIATION-ARBITRATION

Common criticisms of method of Mediation-Arbitration (‘med-arbiter’) are both behavioral and procedural. The researcher has studied the criticisms to the process of Mediation-Arbitration, under those following heads.

In the cases of behavioral criticisms, the disputants are likely to be self-conscious in their discussions with the mediator if they know that the mediator might be called upon to act as arbitrator in the same dispute. In particular, they are unlikely to let the mediator know what the settlement proposals they are likely to accept are. 430 The disputants will be forthcoming with the mediator to the extent as they think appropriate. If no mediated agreement is reached, the dispute will still be resolved by arbitration within the pre-arranged time. Experience alone will show whether the opportunity to mediate before arbitrating with the same neutral turns out to be useful. Choosing the kind of dispute most conducive to private discussion with the mediator about issues other than who is right and who is wrong may be critically important here.

Disputants may use the mediation phase as mere preparation for arbitration, thereby making it more probable that the dispute will reach arbitration. Finding the right kind of dispute will be important here. If

there are no apparent ‘creative problem-solving’ possibilities, the parties may be better off going straight to arbitration. Mediators can try to facilitate a party to make or accept an offer. In the context of Mediation-Arbitration, this may be taken as pressure, in the form of an implied threat to make an adverse decision as arbitrator if the party is perceived as unreasonable during the mediation. Mediators engaging in Mediation-Arbitration will have to be careful not to make suggestions, or at least not to make them in ways that could be so interpreted. This may be easier for facilitative mediators than for evaluative ones.

The procedural criticisms are in the cases where, the arbitrator may appear to be and may actually be biased if the arbitrator had received private representations from the parties when acting as mediator\textsuperscript{431} and procedural fairness in the arbitration would also require full disclosure to the parties of any such private representations. Apparent or actual bias in the arbitrator and lack of procedural fairness will attract the supervision, which the Courts may exercise over the arbitrator’s conduct of the proceedings. In international commercial arbitration, awards may be set aside by the Courts in the country in which the arbitration takes place and enforcement may be refused wherever the award was made if, among other things, ‘the arbitral procedure was not in accord with the agreement of the parties’\textsuperscript{432}.

\textsuperscript{432} UNCITRAL Model Law, Articles 34(2)(a)(iii) and 36(a)(iv) and New York Convention, Article V(1)(d).
4.12.3 ESSENTIAL FEATURES OF MEDIATION COMBINED EFFECTIVELY AND ECONOMICALLY WITH ARBITRATION

While a competent ‘med-arbiter’ can exclude from consideration confidential information in the same way as a competent arbitrator or judge can exclude from consideration evidence he or she has heard but ruled inadmissible, there is an important difference between the two situations. All parties in arbitration are aware of the evidence that has been ruled inadmissible, while in Mediation-Arbitration only one party knows what confidential information he has confided in the process of ‘med-arbiter’.

One of the fundamental principles of natural justice is that a party has a right to know the case it has to meet and to be given an opportunity to respond to it. Yet one of the greatest advantages of mediation is that the parties may make private disclosures to the mediator, which might enable the mediator to see opportunities to make progress when everyone else is stuck. Civil Procedure Alternative Dispute Resolution And Mediation Rules, 2003 under Section 27(3) allows the parties to waive their right to procedural fairness in the mediation phase, thereby allowing private sessions. Section 27(4) requires procedural fairness to be observed in the subsequent arbitration phase but under section 27(2), where the parties agree that private sessions may be held during the mediation, no objection may be taken in the arbitration that the parties were not informed as to what occurred privately in the mediation.

Similarly, where the parties consent to private meetings in the mediation, section 27(2)\(^\text{433}\) also precludes objection to the conduct of the

\(^{433}\) Civil Procedure Alternative Dispute Resolution And Mediation Rules, 2003
arbitration or the content of the award on the ground of bias and the appearance of bias merely because the arbitrator held private meetings as mediator. However, the parties are always free, to object that the conduct of the arbitration or the content of the award reveal apparent or actual bias. In the present context, this would apply to apparent reliance by the arbitrator on extraneous information, such as information gained privately during the mediation.

During the mediation phase it is important for the mediator to be cautious, “An arbitrator when acting as mediator must therefore be careful not to express any definite opinion as to an appropriate outcome as that might create an impression of bias in a subsequent arbitration”.

During the arbitration phase the arbitrator must be careful to avoid any reliance on information not provided openly to all parties. The Duke Group case and the UK case of Glencot Vs. Barrett confirm that the mere holding of private sessions in the mediation phase creates the appearance of bias in the arbitrator. However, those and other cases also establish that an objection on that ground may be waived. Debelle J in the Duke Group case cited the following relevant principles, “…one of the cardinal principles of the law is that a judge tries the case before him on the evidence and arguments presented to him in open Court by the parties or their legal representatives and by reference to those matters alone, unless Parliament otherwise provides. It would be inconsistent with basic notions of fairness that a judge should take into account, or even receive, secret or private representations on behalf of a party or from a stranger with reference to a case, which he has to decide. …save in the most exceptional cases, there should be no communication or association

between a judge and one of the parties or the legal advisers or witnesses of such a party otherwise than in the presence of or with the previous knowledge or consent of the other party”.

In the above case, the words “or consent”, clearly indicates that, apart from statute, the law will allow private communications with an arbitrator where the parties consent beforehand. The procedural fairness creates more difficult problems in the UK because of the unresolved question whether the Human Rights Act 1998 may preclude waiver of the right to procedural fairness. In contrast, the Section 27 of the Commercial Arbitration Act expressly permits waiver of that right.

4.12.4 A FESABLE HYBRID PROCESS OF MEDIATION-ARBITRATION

In this mediation-arbitration method, the parties can appoint a person as a mediator cum arbitrator. In the first instance, he tries to settle the issue in mediation, and if that is not successful, he acts as an arbitrator. The parties agree to the effect that if mediation does not produce a negotiated agreement, the mediator will change his identity and adopt the role of the arbitrator to decide the dispute. Unlike a non-binding mediation, the mediator becomes an arbitrator and renders an enforceable decision following the mediation process on all issues where the parties fail to reach an agreement. Med-arb thus blends the elements of mediation and arbitration in the process of negotiating a dispute. Linking these processes encourages the parties to create their own best settlement

436 R. Vs. Magistrates’ Court at Lilydale; Ex parte CIL (1986) 161 CLR 342 at 346 and 350.
under the threat of having one imposed by an arbitrator. In this aspect the following precautions are necessary\textsuperscript{438}.

Mediation followed by arbitration by the same person will not be objectionable unless apparent or actual bias is shown in the arbitration phase. The parties should enter into an arbitration agreement at the outset, in order to attract the operation of Section 27 and that agreement should provide inter alia that, the arbitrator might mediate before conducting any arbitration.

During the mediation, the arbitrator may hold private sessions with the parties. Both during the mediation and thereafter the arbitrator must keep confidential all information imparted in confidence during the mediation.

Upon the conclusion of the mediation, the neutral third party (the mediator) must tell the parties whether he or she feels able to conduct the arbitration impartially including, in formulating the award, putting out of consideration all such confidential information. If the arbitrator informs the parties that he or she does not feel able to ignore the confidential information, the arbitration must be conducted by another arbitrator or the parties must expressly permit the arbitrator to use the confidential information\textsuperscript{439}.

Whether or not the arbitrator feels able to conduct the arbitration impartially, any party may object to the arbitrator conducting the


\textsuperscript{439} The med-arb conducted by Israeli Professor Mordehai (Moti) Mironi, reported in (2007) Arbitration 1, 52 at 58: “Special provisions were added to the agreement to protect the mediators and their award against a party’s attempt to quash our decision for lack of neutrality. The provisions stipulated that the parties had selected the mediators as arbitrators knowing that we had acted previously as mediators, had conducted private caucuses and had received confidential information. The parties agreed that we would use all this confidential information for our decision, waiving any right they had to attack the award for that reason”.
arbitration, in which case the arbitration must be conducted by another arbitrator to be appointed by the parties or, failing their agreement, by an appropriate institution identified beforehand. Later, no party should object to the arbitrator conducting the arbitration after having mediated, each party must expressly consent in writing to that course. This builds in the opportunity for both the parties and the arbitrator to opt out of having the arbitration conducted by the person who mediated, once they have considered how the mediation went. It nevertheless still commits the parties to an arbitrated outcome within the previously agreed or any extended time, at the cost of bringing a new arbitrator up to speed.\footnote{Russell on Arbitration, 22\textsuperscript{nd} edn, 2003, p 42}

If any arbitrator manifests bias during the arbitration phase or in the content of the award, the Court will set aside the award and/or disqualify the arbitrator. Accordingly, unless the parties agree otherwise, the arbitrator will need to ensure that no reliance is placed on anything learned in confidence during the mediation. This could be assisted if the arbitrator provides at the outset of the arbitration phase a written statement of what the arbitrator apprehends to be the issues to be determined and the facts as then understood, and invites the parties to comment on it.\footnote{Redfern and Hunter, Law and practice of International Commercial Arbitration, 4\textsuperscript{th} edn 2004, p40}

Choosing the kinds of dispute that are best suited to mediation-arbitration. The ideal is the kind of case in which there appear to be possible outcomes involving arrangements, which only the parties can make, such as continuing or adjusted business relations. Thereby, making it more likely that, they will discuss their interests and needs frankly with the mediator in caucus and confine their submissions as to their rights to the subsequent arbitration phase.
Commenting on the success of mediation, one of the UK’s top mediators, Philip Naughton QC has said that, \textsuperscript{442} “Perhaps the next step will be the recognition that this new process need not be fenced off from arbitration so that at least any fencing should be interrupted by some well-placed gateways”. \textsuperscript{443}

The use of med-arb is not accepted in all countries. In England, the High Court was skeptical about the med-arb process in Glencot Development and Design Co Ltd Vs Ben Barreyy and Son (Contractors) Ltd\textsuperscript{444}, and held that in assuming the role of the mediator, the adjudicator had exposed himself to hearing information and forming opinions about individuals that would not have occurred in his role as adjudicator. Although the Court did not rule that a med-arb procedure could never be successful, the decision will certainly make arbitrator consider carefully how they will conduct a mediation process. It may be possible for an agreement to be reached that no confidential information will be passed to the mediator during the mediation. Alternatively, the mediation process could take place after the arbitrator has completed the arbitration and has written his award but not published it.\textsuperscript{445}

\textbf{4.13 ARBITRATION-MEDIATION}

Another hybrid as a combination of two dispute redressal methods which has recently developed is one where an arbitrator is allowed to act as a mediator after he has heard the arbitration which is known as Arbitration- Mediation (arb-med).

\textsuperscript{442} His remarks were made before publication of Professor Roebuck’s debunking of the ‘Myth of Modern Mediation’ in (2007) 73 Arbitration 1 at 105.
\textsuperscript{444} 2001 BLR 207.
\textsuperscript{445} Tweeddale & Tweeddale , Arbitration of Commercial Disputes, International and English Law and Practice, 1\textsuperscript{st} edn, 2005 p 25-26.
Arbitration before mediation became widely used in commercial disputes. Section 27 of the Commercial Arbitration Act (NSW) 1984 provides that parties to an arbitration agreement may authorize an arbitrator to act as a mediator between them before or after proceeding to arbitration. Under the subsection (3) of section 27, unless the parties otherwise agree in writing, an arbitrator is bound by the rules of natural justice when seeking a settlement by mediation. If the dispute is not settled in the mediation, no objection shall be taken to the conduct by the arbitrator of the subsequent arbitration proceedings solely on the ground that the arbitrator had previously acted as mediator in the dispute.

In this process, the arbitrator reveals the results of the arbitration only if there is no agreement that could be finally reached between the disputed parties during the process of mediation. This gives the arbitrator-mediator considerable power in facilitating the negotiation. The origin of this method can be traced as based on Art 1 (1) of UNCITRAL, Conciliation Rules 1980. A model procedure first of this kind was formulated in Article 30 of the Model Law which has been now codified.

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446 Commercial Arbitration Act (NSW) 1984. Section 27. Settlement of disputes otherwise than by arbitration (1) Parties to an arbitration agreement —
(a) may seek settlement of a dispute between them by mediation, conciliation or similar means; or
(b) may authorize an arbitrator or umpire to act as a mediator, conciliator or other non-arbitral intermediary between them (whether or not involving a conference to be conducted by the arbitrator or umpire), whether before or after proceeding to arbitration, and whether or not continuing with the arbitration.
(2) Where —
(a) an arbitrator or umpire acts as a mediator, conciliator or intermediary (with or without a conference) under subsection (1); and
(b) that action fails to produce a settlement of the dispute acceptable to the parties to the dispute, no objection shall be taken to the conduct by the arbitrator or umpire of the subsequent arbitration proceedings solely on the ground that the arbitrator or umpire had previously taken that action in relation to the dispute.
(3) Unless the parties otherwise agree in writing, an arbitrator or umpire is bound by the rules of natural justice when seeking a settlement under subsection (1).
(4) Nothing in subsection (3) affects the application of the rules of natural justice to an arbitrator or umpire in other circumstances.
(5) The time appointed by or under this Act or fixed by an arbitration agreement or by an order under section 48 for doing any act or taking any proceeding in or in relation to an arbitration is not affected by any action taken by an arbitrator or umpire under subsection (1).
(6) Nothing in subsection (5) shall be construed as preventing the making of an application to the Court for the making of an order under section 48.
under section 30 of the Arbitration and Conciliation Act, 1996. Section 30 (1) states 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. The settlement agreement has the same status as of an arbitration award under Section 31 of the Arbitration and Conciliation Act, 1996.

Consequently, Mediation-Arbitration or the Arbitration-Mediation combines the processes of mediation and arbitration, utilizing the same person to serve as mediator and arbitrator. If the parties are not able to agree on a resolution in mediation, the mediator or the arbitrator as the case may be is empowered to make a binding decision. Mediation alone may not break the impasse. The cost and time needed to get a hearing in Court can be prohibitive relative to the issues at hand. The hybrid combination of the mediation and arbitration process provides an opportunity to the parties to reach their own solution, while at the same time guaranteeing that a timely decision will be made. The types of issues to the hybrid combinations are mainly related to the choice of a school, changes in the parenting time arrangements, holidays, vacations, health care, and religious training. These methods can be utilised by parents who have shared decision-making responsibility as well as in situations in which one parent has the sole decision making authority\textsuperscript{447}.

Resolutions can be reached in a manner that minimizes the destructive effect of the ongoing conflict on the children and on the co-parenting relationship. These hybrid methods will benefit the disputants in terms of time, money and with satisfactory outcomes. This will in turn

benefit mediator and arbitrator as the case may be, by encouraging them to bring together in the same person, the skills of both mediator and arbitrator thus, benefiting everyone.

Thus, from the above study of the process of Arbitration and Conciliation under the Arbitration and Conciliation Act, 1996 and other alternative dispute redressal methods it can be summarised that, the technique of dispute resolution is not static, as it is also evident from the study undertaken about the historical evolution of dispute redressal methods in India. This has been developing and will develop into different forms as per the changing needs of the society. The crises of judicial delay, judicial arrears, the high litigation costs, time-consuming and complicated nature of lawsuits would at some stage discourage parties from approaching the Court of law for redressal of their disputes. If no other adequate and alternative means were provided to the disputants for redressing their disputes, it would in due course lead to lawlessness in the society, as the people will opt for illegal methods as means of enforcement of the rights and duties. All these factors have necessitated the need of a widespread evolution and acceptance of different alternative dispute resolution mechanisms like arbitration, conciliation, mediation and their different hybrids by the disputants, for the peace, prosperity and development of the society as a whole.