CHAPTER -6

COMPARATIVE STUDY

STUDY OF THE ALTERNATIVE DISPUTE REDRESSAL INSTITUTIONS FUNCTIONING IN OTHER COUNTRIES

6.1 INTRODUCTION

Charles Dickens in his book Bleak House narrates that, “In the High Court of Chancery, the solicitors are mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities and making a pretence of equity with serious faces… This is the Court of Chancery… which exhausts finance, patience, courage, hope, so overthrows the brain and breaks the heart: that there is not an honorable man among the practitioners who does not give – who does not often give – the warning, ‘Suffer any wrong that can be done to you rather than come here’.” These events are identifiable to that of the Courts in India, which are facing the problem of judicial delays and arrears which emphasis the need for alternative dispute redressal methods.

Abraham Lincoln, then President of the United States of America has once said that, “Discourage litigation; persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.”

The world is converging as a result of ‘globalization’. Its legal effect are seen from the increasing multilateral treaties, conventions and

578 Charles Dickens, Bleak House,(1853), PC Rao, ADR,1997 p,103( M. Jagannadha Rao “Need for more ADR centers and training for lawyers and personals”)
agreements within WTO, the EU, as a result of which there is changes being introduced to domestic law for performance of both the international and regional obligations. Understanding the profile of individual legal system of the different Countries around the world is essential, but a “Regional” and a wide “Global” approach to the dispute resolution and law is probably a futile exercise. The researcher has made a restricted study on the ADR methods of different Countries. The study is about the uniqueness of the ADR methods successfully functioning in the countries like United States Of America (US), United Kingdom (UK) Australia and China, Japan, which can possibly be made popular and be adopted as per the Indian dispute resolution systems.

6.2 UNITED STATES OF AMERICA (USA)

The development and use of alternative dispute redressal mechanisms in USA pre-dates both the declaration of Independence and the Constitution. Arbitral tribunals were established as early as 1768 in New York and shortly thereafter in other cities primarily to settle disputes in the clothing, printing and merchant seaman industries579. The United States law has strongly recognised and favored recognition of agreement to arbitrate and enforcement of arbitral awards, both in domestic and international commerce. In 1854, the United States Supreme Court held that arbitration as a mode of settling dispute should get every encouragement from the Courts and the Court upheld the right of an arbitrator to issue binding judgments580. Writing for the Court, Justice Grier said that the arbitrators are the judges chosen by the parties to decide the matter submitted to them, finally and without appeal581.

580 Burchell Vs Marsh, 58 U.S. 344.
581 Burchell Vs Marsh, 58 U.S. at 349.
Arbitration law in United States arises from both National laws i.e. the Federal Law and the law of various States. The National Congress enacts federal statutory laws and they govern matters within federal jurisdiction.

The federal statutory law of arbitration contained in the Federal Arbitration Act, which was first enacted in 1925, has been amended several times since then. It is confined to disputes in Federal Courts. The 1970 amendment was made to implement the accession by the United States to the United Nation Convention on the Recognition and Enforcement of Foreign Arbitral Awards\textsuperscript{582}. In addition, almost all the States comprising the United States have their own arbitration statutes, enacted by their State legislatures. The State statutes are patterned on the model law of Uniform Arbitration Act that was first adopted in 1955 and amended in 1956. Most State statute, while differing in some detail, follow the general principles as those embodied in Federal Arbitration Act.

The arbitration law began in United States in early rule of the English Government. There are numerous references in the Statute Books of Arbitration of particular cases such as disputes against Stockholders of Corporations, but the New York Chamber of Commerce had arbitration facilities from 1761 to 1920 and New York Stock Exchange provided for arbitration of member’s disputes in its Constitution of 1817. The question of constitutionality of arbitration was raised in Courts of law\textsuperscript{583}. Compulsory arbitration unless accompanied by sufficient provisions for an appeal to the ordinary Courts has been deemed unconstitutional\textsuperscript{584}. Despite observation of the Courts and interference by the Legislature, use of arbitration has been in trend in United States for commercial matters

\textsuperscript{582} U.S.Code, Title 9, Chapter 1 and 2.
\textsuperscript{583} Exall Vs Bombay Mountain Beam, Colorado 1928,232 Specific Report 680.
\textsuperscript{584} St.Lewis, I.H and S. Rly.Co.Vs William (1887) 49 Arm 492.
largely due to the influence of Chamber of Commerce and other Trade Associations. The New York State Chamber of Commerce has printed its earliest arbitration records consisting of Minutes of its Committee from 1779 to 1792. Some States in the USA have passed Acts for compulsory arbitration so as to avoid delay in the Court proceedings in respect of certain claims, such as motor accidents and small claims. These statutes exclude the traditional jurisdiction of Courts based on equity. The Yearbook on commercial arbitration in the United States for 1927 contained provisions for arbitration including forms, rules and regulation and panel of arbitrators in Trade Association for thirty principal branches of commerce, and a comprehensive list of Chamber of Commerce Exchanges, Municipal Courts, Legal Aid Society and Bar Associations Furnishing arbitration facilities in every part of the country.

The Federal Arbitration Act applies generally to arbitration that relates to maritime transactions and to contracts evidencing transactions involving commerce among the several States of United States or with Foreign Nations. The arbitration law of the State where the arbitration takes place is generally applicable to other cases. However, in any specific case, the parties should consider whether the arbitration law of a particular State is applicable and should consult that law. This is important even when the case is before a Federal Court because of a doctrine, which requires that the Federal Court in many cases must determine certain questions relating to arbitration in accordance with the laws of the State in which the Federal Court is located.

585 Frank.e. Dispute resolution within and outside the Courts- An overview of US Experience p123.
586 Federal Arbitration Act Section 1 and Section 2.
In USA, mediation as a method of dispute resolution was used in an ad hoc way since long time, though litigation was the primary method of dispute resolution. In 1976, Pound Conference was held to commemorate the 70th Anniversary of Dean Rosco Pound’s dissertation on the “Public dissatisfaction with American legal system”. The conference took a close view as to the reasons as to why American Courts were criticized. One of the reasons why justice administration in America was criticized was because of overcrowded and costly Court system. The ADR movement of America started with Pounds Conference 1976. Arbitration is used extensively in United States of America in commercial disputes, including disputes over the performance of contracts, quality of goods and wide variety of other controversies that are amenable to agreement between the disputed parties. Since the enactment of the Civil Justice Reforms Act (CJRA) 1990, which calls for every federal district Court to implement a civil justice expense and delay reduction plan, there has been tremendous growth in the creation of ADR programs and the use of ADR by federal and State Courts. A growing number of Courts have promulgated rules that mandate or authorize judges to recommend, or require litigants to participate in, ADR procedures such as summary jury trials, early mediator evaluation, mini-trials, mediation and arbitration. As of September 1995, 80 of 94 Federal District Courts had authorized or established some form of ADR program. Alternative dispute redressal methods have been so successful in America that the District Court of Colombia introduced a voluntary mediation program in 1989 and in the year 1997, it is said that more than 1,000 cases have completed mediation. Moreover, the program boasts a 50% settlement rate.

In the Native American culture, peace making is the primary method of problem solving. Disputes are handled in a way, which deals with the underlying cause of conflict, and mends relationships\textsuperscript{590}. The institutionalization of ADR in America can be said to be with the establishment of American Arbitration Association. The principal arbitration institution is the American Arbitration Association (AAA), which was found in 1926 in response to the need for an arbitration institution able to administer all kinds of cases in all parts of United States of America\textsuperscript{591}. It is an independent, non-governmental, non-profit organisation. It is governed by a Board of Directors chosen from a wide range of industries, professions and social groups throughout the nation. A full-time professional staff of experts in arbitration procedure and law administers it.

The Court of Appeals for the District Court of Columbia also has implemented a mediation program in an effort to supplement the Court’s 1986 Case Management plan, which was undertaken to accommodate a 60% increase in filing and pending cases over the prior two years period. The key difference between these two programs is that the Court’s Chief Staff Counsel selects cases in the Appeals Court program for mediation, where as the District Court program is strictly voluntary\textsuperscript{592}. In 1994, the CPR Institute for Dispute Resolution conducted a survey of 244 of the largest law firms in United States ,all of which had demonstrated interest in alternative dispute redressal methods through membership in the CPR Institute and found that 65% of the 124 responding firms had formalized their delivery of ADR services with 68% having adopted two or more of

the following organizational strategies. The strategies like designation of an ADR specialist or partner (58%), the organization of an ADR committee or department (47%), strategic profiling of one or more prominent partners a neutrals (27%) and creation of a distinct provider group within the form, or affiliated with but distinct from the firm (14%)\textsuperscript{593}. It has revealed that there are significant differences in perceived gains from ADR between firms that had formalized their ADR organization and those that had not done so. 59% of the organized firms verses 35% of unorganized firms reported positive client comments from their alternative dispute redressal methods initiatives and 49% of the organized firms verses 21% of the unorganized firms reported that ADR has had an appreciable, positive impact on the firms lawyers, clients and practice. New business or new clients resulting from the firm’s ADR expertise were reported by 37% of the organized firm and only 2% of the unorganized firms\textsuperscript{594}.

In different States of United States of America such as Columbia, New Jersey, Houston, Philadelphia, and a number of American cities and States now offer multi-door programs. The program enables a member of the public to contact the Court in person or by telephone, with a complaint or dispute. Where, a preliminary analysis of the case is done of the case in order to be able to recommend which dispute resolution process is most suitable to resolve it. Various criteria will be applied for this process, for example, the kind of issues involved, what kind of compensation is likely to be awarded if successful, whether witnesses or other evidence will be needed, whether rights need to be protected and


what services are available. The inquiring party is then advised about the processes that might be most appropriate to the case and is given relevant referral details, which may be to departments within the Court, or may perhaps be to outside agencies.

Moreover, the judges of the Supreme Court increasingly encourage litigants to use both public and private alternative dispute redressal methods to resolve their disputes. In addition to the State programs discussed above, Special Courts offering relatively expeditious processing of commercial disputes have been set up in three major cities namely New York, Chicago and Wilmington. The Commercial Division of the New York State Supreme Court is exclusively devoted to commercial disputes, committed to expedited process and encouragement of settlement. Four judges hear cases in this Court from start to finish. This offers several advantages, the most obvious of which is speed. Specialization also allows these judges to develop subject-matter expertise. Prior to its implementation, each judge was assigned approximately 1,000 pending cases. Because of the Court’s commitment in expediting proceedings and encouraging settlement at every opportunity, within one year, the average caseload reduced to 400 cases per judge.

In U.S.A., judicial settlement conferences and settlement weeks have resulted in a high success rates. In some of the Federal States of U.S.A., legislation has been passed to provide for private judging (also

---

595 Filner, Dispute resolution Options in State Courts: NIDR News Vol.II No.2 at 1
known as 'rent a Judge') such as Texas, California, New York, Ohio and Oregon. Multi-Door Courthouse system which has been developed in U.S.A., if followed, could offer the prospect of greater access to justice and more economical and faster resolution of disputes.

In USA, where ADR has been practiced in every Court at the State level since the 1970s, more than 90% of all pending cases are settled through advocate and judicial mediation and hardly a few percent of all cases actually proceed to trial. However, it took the American justice delivery system over 20 years to achieve this success rate. Mediation was introduced in USA first through judicial mediation and, once accepted, then advocate mediation. The broad pool of qualified advocate-neutrals is essential to this success rate in USA. In the USA high volume Court systems, advocate neutrals are relied upon to resolve the majority of cases and judicial mediators are reserved for the most complex cases and cases that advocate neutrals have been unable to resolve. The alternative dispute redressal methods in United States of America is multifaceted and diverse. The growth in the use and the development of different alternative dispute redressal methods has resulted from initiatives at all levels and from all branches of the government- executive, legislatures, and judiciary and from many corners of the private sectors, community organization, corporations and the bar. With these increased inclusion of alternative dispute redressal methods in domestic as well as international commercial agreements and the wide publication of ADR success, the alternative dispute redressal methods is continuously expanding.

6.3 UNITED KINGDOM (UK)

Arbitration in England is as old as its legal history. At Common Law the parties could at any time before award revoke the authority of the arbitrator even where the agreement expressly made the submission irrevocable. The subject matter of disputes was mainly confined to Chattel and Tort. With the expansion of the British Empire and the growth of trade, disputes with merchants and traders increased and commercial matters were frequently referred to arbitration. This resulted in substantial reduction of trial of commercial business in Courts. English Courts felt greatly prejudice against arbitration. It was thought that arbitration was an attempt to oust the jurisdiction of Court. The Statute of 1698 was the first legislation towards encouragement of arbitration. The Statute of 1833 followed it. The Common Law Procedure Act of 1854 and the England Arbitration Act of 1889 codified the general law relating to arbitration. It sub-divided the subject-matter of arbitration into the one where references are by consent of parties out of Court, and the other reference under the order of the Court. With regard to the former, the Act required a submission to arbitration to be in writing. The submission unless a contrary intention was expressed in it, was irrevocable except by leave of the Court or a judge. An arbitrator was not liable for want of skill or for neglect in conducting the arbitration. An arbitrator had power to administer oath. In the absence of any express provision in the submission, an award was required to be made within three months from the date of entering upon the reference. All the disputes referred to arbitration had to be disposed of by the award. With regard to reference under order of Court, a Court or a Judge could refer any question arising in any cause or matter to an official of Special Referee whose

599 9 and 10 William III C 15.
600 3 and 4 William IV C 42.
report could be enforced like a judgment or order. The Act of 1889 was the foundation of subsequent legislations relating to arbitration in England.

The England Arbitration Act of 1889 and the subsequent legislations relating to arbitration, however, cannot be said to contain the whole law of arbitration in England. Many of the statutory provisions could be excluded. The parties were free to agree to the procedure to be followed by the arbitrator and the powers to be vested in him. The parties by agreement could determine the constitution of the arbitral tribunal that was to decide the dispute. All the legal defenses available to the party before the Court were also available in arbitration.

The Arbitration Clauses (Protocol) Act, 1924 was passed to ratify and give effect to the Protocol signed at the assembly of the League of Nations and in regulating the procedure to be adopted in commercial arbitration between parties to the jurisdiction of the signatory States. In 1925 the Supreme Court of Judicature (Consolidation) Act repealed and replaced certain section of Arbitration Act ,1889. The Arbitration(Foreign Awards) Act, 1930 gave effect to a convention on the execution of the arbitral award and made amendments of the Protocol Act, 1924. The Arbitration Act of 1934 made substantial changes by supplementing the Act of 1889. These two statutes were consolidated in the Arbitration Act of 1950. The Arbitration Act, 1950 came into force with effect form 1st September 1950. It provided for the procedure regulating arbitration made as a result of a written agreement between the parties as well as certain arbitrations conducted under statutory provisions. If the parties to a dispute agree, many provision of the 1950 Act need not be observed. The Departmental Advisory Committee (DAC) reported that there were fundamental problems in the presentation of Arbitration Law of England
due to some uncertainty and confusion in English arbitration law. DAC advises that there should be new improved legislation relating to arbitration. Thus, the idea of the Arbitration Act 1996 was conceived. The Arbitration Act of 1950 has been repealed by the Arbitration Act 1996 with the exception Pt II, which relates only to enforcement of a limited number of Foreign Awards. The rest of the provisions with suitable modifications have been re-enacted in the Act of 1996. This Act 1996 does not adopt the UNICTRAL Model Law in its entirety, its structure and content is mainly based on it. The Arbitration Act of 1996 received the Queen’s assent on 17 June 1996 and came into force from 31 January 1997. This Act compounds the doctrine of arbitration law with realities of institutional practices, and integrates the largest developments into regulatory provisions. The amalgamation of doctrine and practice with comprehensiveness of the 1996 Act, qualifies it to be a prototype statutory framework for governing an international arbitration proceeding. The Act 1996 functions with the principle of speedy, inexpensive and fair trial by an impartial tribunal, party autonomy and minimal Court intervention. In case of ambiguity as to the meaning of any provision of the Arbitration Act 1996, regard is to be given to these principles. The English Common Law of Arbitration and the English Arbitration Act form the main source of the law of the Arbitration in most of the Commonwealth Countries and the United States of America.

With the Woolf Reforms, it seems likely that mediation will become a more prominent fixture on the dispute resolution landscape in England and Wales. Civil Procedure Rule 1.4(2) (e) now requires the Court, as part of its responsibility to actively manage cases, to encourage

---

the parties to use an ADR procedure if the Court considers it appropriate and to facilitate the use of such procedure.

Although City of London lawyers and others have embalmed mediation as a technique to resolve large commercial cases, the cost savings that can be achieved through effective and early use of ADR are such that very few types of dispute cannot be assisted by ADR.

With the opportunity for creative solutions, for a fast and inexpensive resolution that the parties develop and buy into, and for a process that enhances rather than destroys on-going business relationships, alternative dispute resolution method is likely to grow rapidly in popularity over the next few years in the UK. As lawyers become more sophisticated consumers of alternative dispute resolution services they and their clients will select mediators best suited for a given dispute and the number and range of competent, qualified mediators will expand.

6.4 AUSTRALIA

Australia is a Federal State. Under the Constitution of Commonwealth of Australia, powers are divided between the Central Government and the State Government. Arbitration is a matter that is traditionally been covered by State and Territory, rather than Commonwealth, legislation. The Commonwealth Parliament legislates with respect to external affairs, and to trade and commerce with other countries, and in international commercial arbitration. It has done so in the Arbitration (Foreign Awards and agreements) Act 1974, which gives effect to the 1958 New York Convention. All other law affecting commercial arbitration is to be found in the statutes and common law of the States and territories. Arbitration is commonly used to settle building
disputes arising out of insurance policies. In agreements between Australia and other parties, which contain an international element, arbitration is increasingly accepted, as it may lead to the avoidance of problems arising from the conflict of law, especially since the adoption of the 1958 New York Convention, the recognition and enforcement of foreign arbitral awards. Thus, Australian law on arbitration is based on international conventions, legislations both federal and State and common law which is the judge made law. Australia being party to three international conventions on international arbitration has given effect to it within Australia by federal International Arbitration Act 1974 (IAA). The Part II of the IAA contains the provisions for implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958 (New York Convention). Part III of IAA gives the UNCITRAL Model Law on International Commercial Arbitration of 1885 a force of law in Australia. Part IV gives effect to the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1975 (Washington Convention). The State and Territories of Australia all have their own uniform legislation on arbitration, which is called the Commercial Arbitration Act (CAA).

Australia had no national accreditation system for alternative dispute resolution mechanisms. However, following the National Mediation Conference in May 2006, the National Mediation Accreditation Standards system has apparently started to move to its implementation phase. Mediation is now accepted procedure for resolution of domestic disputes in Australia. Its popularity has grown remarkably over the past few years. In the area of neighborhood disputes and family law disputes, it has assumed particular importance. It is also

---

604 Pryles Michale, Dispute Resolution In Asia, (2002), Kluwer Law International (Australia-p29)
605 Pryles Michale, Dispute Resolution In Asia, (2002), Kluwer Law International (Australia-p62)
used in commercial disputes for a contractual and non-contractual nature. Specialist bodies have been set up for promoting or foster mediation and numbers of instructional courses are offered on mediation skills and techniques\textsuperscript{606}. ADR practitioners recognize that mediators (as distinct from arbitrators or conciliators) need to be recognized as having professional accreditations the most. There are a range of organizations within Australia that do have extensive and comprehensive accreditations for mediators but people that use mediation are unsure as to what level of accreditation is required for the quality of service that they receive. Standards will tend to vary according to the specific mediation and the level of specificity that is desired. Due to the wide range of ADR processes that are conducted, it would be very difficult to have a set of standards that could apply to all ADR processes, but standards should be developed for particular ADR processes\textsuperscript{607}.

The clients need the assurance that mediators have some form of ongoing assessment and training throughout their careers. Mediators must satisfy different criteria to be eligible for a variety of mediator panels. In addition, different mediator organizations have different ideals of what makes a good mediator that in turn reflects the training and accreditation of that particular organization. Selection processes for ADR practitioners are based on the needs of the service, but a problem is posed when organizations, such as the Court want to refer a client to mediation and they usually have to rely on their in-house mediators or rely on word of mouth. There are inconsistent standards. A National Accreditation System could very well enhance the quality and ethics of mediation and lead mediation to become more accountable. There is a need for a unified

\textsuperscript{606} Goldberg, S, Sander, F and Rogers, N, Dispute Resolution: Negotiation Mediation and Other Process,(1992)p265.

\textsuperscript{607} The law institute of Victoria has produced a Code of Practice for Mediation and a draft Mediation Agreement.
accreditation system for mediators across Australia to establish clarity and consistency. Suitable education and training for mediators becomes a complex issue, largely due to the breadth of areas, which may call on mediation as a means of dispute-resolution. The educational requirements for accreditation as a mediator differ between accrediting groups and from Country to Country. In some cases, legislation mandates these requirements; whilst in others, professional bodies impose standards and applicants must comply prior to becoming accredited by them.

In Australia, professionals wanting to practice in the area of family law must have tertiary qualifications in law or in social science, undertake 5 days training in mediation and engage in at least 10 hours of supervised mediation. Furthermore, they must also undertake 12 hours of mediation-education or training every 12 months. Tertiary institutions globally offer units in mediation across a number of disciplines such as law, social science, business and the humanities. In Australia, not all fields of mediation-work require academic qualifications, as some deal more with the practical skills rather than with theoretical knowledge: to this end membership-organization such as LEADR provide training-courses to further the adoption and practice of mediation. Internationally the organisation CEDR takes a similar approach to mediator training. No legislated national or international standards on the level of education, which should apply to all mediation practitioners’ organizations, exist. However, organisations such as the National Alternative Dispute Resolution Advisory Council (NADRAC) in Australia continue to advocate for a wide scope on such issues. Other systems apply in other

608 Mortensen R(2006), Private International Law in Australia, p92-102, Lexis Butterworths, Australia
609 www.leadr.com.au

350
jurisdictions such as Germany, which advocates a higher level of educational qualification for practitioners of mediation\textsuperscript{610}.

A tendency exists for professional to develop their own codes of conduct, which apply to their own members. Examples of this in Australia include the mediation codes of conduct developed by the Law Societies of South Australia and Western Australia and those developed by organisations such as Institute of Arbitrators & Mediators Australia (IAMA) and LEADR for use by their members. Other organizations such as the American Center for Conflict Resolution Institute have developed both classroom and distance learning courses, which subscribe to its mission of promoting peace through education\textsuperscript{611}. The CPR Georgetown Ethics Commission, the Mediation Forum of the Union International des Avocats, and the European Commission have also promulgated Codes of Conduct for mediators\textsuperscript{612}.

The most common aspects of a mediator Code of Conduct include a commitment to inform participants as to the process of mediation, the need to adopt a neutral stance towards all parties to the mediation, revealing any potential conflicts of interest. The requirement for a mediator to conduct the mediation in an impartial manner within the bounds of the legal framework under which the mediation is undertaken any information gained by the mediators should be treated as confidential. The mediators should be mindful of the psychological and physical wellbeing of all the mediations participants. The mediators should not offer legal advice, rather they should direct participants to appropriate sources for the provision of any advice they might need. The mediators should seek to maintain their skills by engaging in ongoing

\textsuperscript{610} www.parliament.vic.gov.au/lawreform
\textsuperscript{611} www.accri.org
\textsuperscript{612} www.cpradr.org
training in the mediation process. The mediators should practice only in those fields in which they have expertise gained by their own experience or training\textsuperscript{613}.

Australia has incorporated mediation extensively into the dispute-settlement process of family law and into the latest round of reforms concerning industrial relations under the Work Choices amendments to the Workplace Relations Act 1996. Where prospects exist of an ongoing disputation between parties brought on by irreconcilable differences stemming from such things as a clash of religious or cultural beliefs, mediation can serve as a mechanism to foster communication and interaction. Mediation can function not only as a tool for dispute resolution but also as a means of dispute prevention. Mediation can be used to facilitate the process of contract negotiation by the identification of mutual interests and the promotion of effective communication between the two parties. Examples of this use of mediation can be seen in recent enterprise bargaining negotiations within Australia\textsuperscript{614}.

The Governments can also use mediation to inform and to seek input from stakeholders in formulation or fact-seeking aspects of policy-making. Mediation in wider aspect can also be used in to prevent conflict or develop mechanisms to address conflicts as they arise\textsuperscript{615}.

The Australian Government sought to alleviate the concerns of a wide section of the population and industry on the decisions implications on land tenure and use by enacting the Native Title Act 1993. A cornerstone of the Act is the use of mediation as a mechanism to

\textsuperscript{613} Nadja Marie Alexander Global trends in mediation p.36, Sourdin Tania ,Mediation in Australia: Kluwer Law International, 2006
\textsuperscript{614}www.ag.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Frame work_for_ADR_Standards
determine future native title rights within Australia. Although not barring litigation, the Act seeks to promote mediation through a process incorporating the Federal Court and the National Native Title Tribunal (NNTT). This has a better long term success by providing flexible and practical solutions to the needs of the various stakeholders. The extensive use of mediation in the resolution of native title matters does not stop the referral of matters to the Courts for resolution, nor is mediation precluded from occurring whilst legal challenges are being pursued. In the cases where native title rights is found to exist over a large portion of the City there is simultaneous use of mediation and formal legal appeals processes. A key feature of Native Title mediation lies in the use of Indigenous Land Use Agreements (ILUAs). These binding agreements are negotiated between native title claimant groups and others such as pastoralists, miners and local governments and cover aspects of the use of the land and any future act such as the granting of mining leases.616

6.5 CHINA

The basic framework of civil litigation in China is set forth in the Civil Procedure Law of the People’s Republic of China, adopted by the National Peoples Congress on 9 April 1991617. The general rule is that civil actions against citizens, legal person and organizations come under the jurisdiction of the Chinese Court in the place where the defendant is domiciled618. Certain actions, however, fall within the jurisdiction of the Chinese Court of the place where the plaintiff is domiciled, including

---

616 Tania Sourdin Avoiding the Credentialising Wars - Mediator Accreditation in Australia, The Arbitrator and Mediator, Volume 27, Number 2, September 2008
cases concerning personal relationships where the defendants are not resident within PRC⁶¹⁹.

The Chinese jurisprudence has two major philosophical traditions: Confucianism and Legalist thought. Unlike Confucian thought (li) which seeks to make the enforcement of law flexible and adaptable, the legalist tradition (fa) stresses that society can achieve harmony only where transgressions are met with firm and swift punishment. Folsom and Minan, held that in China mediation and conciliation remain the predominant forms of civil and commercial dispute settlement in both domestic and international affairs⁶²⁰. This preference derives from the Confucian philosophy’s exaltation of harmonious relationships⁶²¹. The 1949 Revolution and establishment of the PRC, while annulling many old systems and tradition, institutionalized informal mediation systems. However, the Communist blessed and co-opted mediation not only as a form of dispute, but also as a tool for the Communist Party to exert political, economic and social pressure⁶²². Mediation is so pervasive in China that it may be useful to distinguish its context, namely whether it is prescribed by law, extra–judicial or judicially required⁶²³.

Mediation is the first choice for dispute settlement in China. China’s principle use of mediation is a direct result of the Confucian view of natural harmony and dispute resolution by morals rather than coercion. Chinese mediation boards or committees made up of several individuals

---

from each local community resolve more than 80 per cent of all civil disputes. Mediation is the cornerstone of the Chinese system of dispute resolution. It has played a prominent role in both traditional and contemporary China. It has also been employed to deal with disputes arising from Chinese-Foreign business contracts. Mediation is used as an independent method for dispute settlement and in some places it is employed in combination with litigations of arbitration proceedings.

China has extended the use of mediation to its arbitration and litigation proceedings. The China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC) permit an arbitral tribunal to mediate a case during arbitration if both parties desire or one party so desires and the other does not object when consulted by the tribunal. Although arbitration is frequently designated as a means of international dispute settlement contracts with Chinese agencies or corporations may simply refer to consultation and mediation between the parties as the means to resolve disputes. Under Chinese law, the settlement agreement is deemed to constitute a private contract. One of the unique characteristics of arbitration in China is that proceedings before the international arbitration bodies frequently involve conciliation. In general, at any time during the course of the proceedings, with the consent of the parties, the arbitrators may resort to conciliation in an effort to resolve the disputes. If their efforts are unsuccessful, the arbitrators are then permitted to resume the arbitral proceedings and render an award.

624 L.L.N.2005 (5)Mar 465 (J 66)
The emphasis on mediation carries over not only to arbitration, but to litigation proceedings as well. Under the Civil Procedural Law, Courts can attempt mediation during the proceedings and may invite relevant parties and individuals to assist. Any mediation agreement must be reached voluntarily between the parties. The general rule regarding the legal effect of a mediated settlement is that Court mediated agreements are legally binding in the same way as a Court judgment.

In any case, Chinese prefer negotiation, conciliation and joint conciliation with non-binding recommendations for settlement. The use of arbitration in China has increased and come more in line with international standards. Not surprisingly, arbitration tribunals frequently convert the arbitration into mediation. Two different types of mediation services have developed to deal specifically with Chinese-Foreign business disputes. The first is mediation under the auspices of the Beijing Conciliation Center (Established in 1987) and provincial – level conciliation centers guided by the Beijing Conciliation Center. The second type is ‘Joint Conciliation’ carried out in accordance with arrangements between Chinese and foreign dispute settlement bodies. The Beijing Conciliation Center conducts institutional conciliation services pursuant to its own rules; called the Conciliation Rules of the Beijing Conciliation Center (BCC) of China Council for the Promotion of International Trade. The center maintains its own panel of conciliators who carry out their functions in accordance with the rules concerning

---

handling of cases. Fees for the services performed by the Center levied in accordance with the fees schedule set forth in the BCC conciliation rules. In contrast to conciliation under the Beijing Conciliation Center, which is handled exclusively by Chinese conciliators, joint conciliation involves both foreign and Chinese conciliators. The procedure for joint conciliation in China was first developed in the 1970s pursuant to an agreement between China’s international arbitration body and American Arbitration Association. China has also entered into a conciliation agreement to handle disputes between Chinese and Taiwanese parties. Like ad hoc conciliation, joint conciliation is non-binding. In cases where the conciliation is successful, a settlement agreement or conciliation agreement will be drawn up, signed by the parties and may be witnessed by the conciliators. Such agreements are not enforceable except as private contracts between the parties.

The legislation governing arbitration in China is the Arbitration Law of the People’s Republic of China (the Arbitration Law). The Arbitration Law is a unified law applicable to both foreign and domestic arbitration. It calls for the creation of the China Arbitration Association to serve as a non-governmental, self-regulating organization of arbitration Commission. The establishment of foreign related arbitration commissions and the formulation of arbitration commission rules fall under the responsibility of the China Council for the Promotion of International Trade (CCPIT). After introduction of the Arbitration Law there are almost 93 arbitral bodies established in China as per the report of the Chinese International Economic and Trade Arbitration

633 The Arbitration Law of the People’s Republic of China was adopted on 31 August 1994, it came into effect on 1 September 1995.
635 The Arbitration Law of the People’s Republic of China, Art.66 and 73.
Commission (CIETAC). Under the amended Rules of Chinese International Economic and Trade Arbitration Commission, CIETAC may accept cases between foreign investment enterprises and other Chinese legal persons as well as other cases that are not foreign-related\textsuperscript{636}.

International arbitration in China is conducted predominantly before two institutions: CIETAC and the China Maritime Arbitration Commission (CMAC). Both CIETAC and CMAC operate under the umbrella of the China trade promotion body, the CCPIT, also known as the China International Chamber of commerce. The general, CIETAC’s jurisdiction extends to all types of commercial disputes whereas CMAC’s jurisdiction is limited to maritime disputes. The cases heard by the Arbitration tribunal of three arbitrators are decided by majority vote. If a majority opinion cannot be reached, the award will be based on the opinion of the presiding arbitrator\textsuperscript{637}.

The Arbitration Law of the People’s Republic of China Art 55 and 56 insists that arbitral award must be in written form, dated, identifying the place of issuance and be signed by a majority of the arbitrators. The award must contain reasons unless the parties agree otherwise or unless the ruling is made in accordance with a conciliation agreement\textsuperscript{638}. Under the CIETAC Rules, awards are final and binding on the parties\textsuperscript{639}.

**6.6 JAPAN**

Japanese business practice emphasizes autonomy in disputes, privacy for disputing parties, and case specific solutions. In west, parties turn to alternative dispute redressal methods to avoid crowded Courts

\textsuperscript{637} The Arbitration Law of the People’s Republic of China, Art.54.
\textsuperscript{638} The Arbitration Law of the People’s Republic of China, Art 55 and 56.
\textsuperscript{639} The Arbitration Law of the People’s Republic of China, Art.60.
dockets and high litigation costs. Confucian philosophy has long influenced Japanese society. Confucianism’s moral philosophy emphasizes the ethical meaning of human relationships. Harmonious relationships with others achieve the basic Confucian value of jen, which is often translated as compassion, human-heartedness or man-to-manners. The Japanese express this spirit of harmony as the virtue of wa. If people abide by wa, disputes would not arise. It is one’s duty to avoid discord. En is the principle of social tie. Maintaining the relationship bound together by these forces is the paramount concern. Confucianism emphasized filial piety and the notion that individual interests are subordinate to group welfare. Thus, under this model, when individual disputes arose, compromise or the predisposition to yield was morally superior to the predisposition to insist. Reflecting these values, Japanese dispute resolution procedures are characterized by conciliation, less litigation, and very few lawyers.

With the arrival of Admiral Perry in Japan the development of commercial relations between Japanese and Westerners started. The westerners did not conduct these relationships under the principle of social harmony. In response, Japan developed a Civil Code based on the German model. The imposition of an American-style Constitution on Japanese during the post World War II occupation, opened the door for more American-Style revisions to the Japanese Civil Code. However, the Confucian principle of social harmony continues to define how groups interact with each other.

---

641 Andrew M. Pardieck. Virtuous Ways and Beautiful Customs: Role of Alternative Dispute Resolution in Japan”.11Temp Int’l Comp L J at 35(1997)
Dispute resolution in Japan encourages and protects social rights, which includes one individual owes to another. Yet there is no concept of individual rights in Japanese society. Rather the emphasis has been on the duty to maintain harmonious relationships. Thus, the Japanese, in their approach to dispute resolution, prefer extra-judicial, informal means rather than litigation. Litigation is seldom utilised by the Japanese as a dispute resolution mechanism. It does not necessarily follow that, the Japanese are truly non-litigious; in fact, litigation in Japan is increasing. However, it means the dispute resolution mechanism of last resort. 644

Dispute resolution through extra-judicial means is closely akin to negotiation. Most Japanese start from the premise that agreement can be reached. This premise derives from the desire to preserve harmonious relationships. Robert March suggests that the Japanese negotiation style is to patiently pursue the goal by defending their position645. Commentators note that the Japanese consider a contract a document that sets forth a relationship and not a description of the rights and obligation of each party646. Many arrangements are left vague and open-ended so that discussions, in the context of an ongoing relationship, can be held to adjust to changing conditions. There is a strong expectation that dispute should not arise, and if they do, resolution should be through mutual agreement. The Japanese will generally make a sincere effort to find an amicable solution. Settlement negotiations through mutual concessions are called Jidan. Both make suggestions on how to improve communications. The parties generally attempt to find out why the failure occurred and how to rectify it. It is not considered a weakness in Japan to

keep talking. Over 95 percent of all disputes in Japan are resolved through negotiation and compromise\textsuperscript{647}.

These informal methods may involve third party mediators. Conciliators (Chotei) are generally more active in making suggestions as to how to resolve the dispute and may feel morally bound to do so. Mediators (assen) may not insist on resolving the dispute. The disputants never need to accept the recommendations of the third party in either conciliation or mediation. Mediators and conciliators range from common friends, to businessmen, with a commercial relationship with both parties, to government officials. The body of informal dispute resolution also includes consultation, a cross between negotiation and mediation\textsuperscript{648}.

In Japan, conciliation was historically the primary means of dispute resolution with village leaders serving as mediators. Most of the commercial disputes are not brought into Courts but also not into arbitration, they are resolved by conciliation. There are two kinds of conciliation is available in Japan. One is conciliation outside Court and the other is conciliation before the Court, and conciliation outside the Court is further divided into ad-hoc conciliation and institutional conciliation. In ad-hoc-conciliation a conciliator is appointed by the parties agreement and mediates between the parties with or without showing its own idea for settlement. If the parties agree on an amicable settlement, it legally becomes a compromise outside the Court. If the parties fail, they are free to refer their dispute to arbitration or to Court litigation. In case of Institutional conciliation the institutions like The Japan Shipping Exchange, The Japan Commercial Arbitration Association(JCAA) and the Japanese Bar Association (JBA) offer

\textsuperscript{647} Joseph W.S Davis, Dispute Resolution in Japan.p151-152 (1996)

\textsuperscript{648} Joseph W.S Davis, Dispute Resolution in Japan.p152 (1996)
necessary services for managing conciliation of international or domestic business disputes under their Conciliation Rules. The Japanese negotiation style places emphasis on the relationship and is often regarded as a purely conciliatory style. Thus, the alternative dispute redressal methods place emphasis on peace and harmony over conflict, litigation and victory. Japan has become a party to the protocol on Arbitration Clause of 1923 and the Convention of Enforcement of Foreign Arbitral Awards in 1927. In Japan a distinction has been made between reference to arbitration and existing difference and reference to arbitration in future differences. The parties under the Arbitration Law of Japan have a right to challenge, for instance, an arbitrator on a presumption of bias, disqualifications in performing imparting and delay in his duties. Besides, law prescribed that in case an arbitrator nominated otherwise than by an Arbitration Agreement dealt with the proceedings, he could be removed. In absence of any agreement with regard to the procedure to be followed in the arbitration, the arbitrator could proceed as he thought best.

In Japan, Judges intervene extensively during the in-Court settlement; every Japanese Judge is expected, both by law and by litigants, to move a case towards settlement. This has the force of statutory law. At least 40% of the cases are settled. The Judge, who decides to switch the litigation to a settlement mode, takes off his robe and acts as mediator. The Japanese do not favour arbitration as a method of dispute resolution. Because it is a third party’s adjudication and it cannot fully restore the harmony disrupted by the dispute. However, in disputes involving international business transactions, arbitration has gained widespread acceptance. Arbitration allows Japanese concerns to

---

649 Michale Pryles, Dispute Resolution In Asia, p.203, (2002), Kluwer Law International
650 L.L.N.2005 (5)Mar 465 (J 67)
negotiate equitable positions as opposed to purely legal technicalities and to avoid extensive pre-trial discovery battles that serve only to exacerbate the conflict.\textsuperscript{651}

While Japanese have established arbitration institutions, including the Japanese Commercial Arbitration Association (JCAA) and have adopted modern arbitration rules, Japanese arbitration follows Japanese cultural aversion to an adversary process. For example, JCAA recognizes the power of an arbitrator to make decisions regardless of law. The arbitrator is to strive for a fair result. Arbitrators through mediation and conciliation frequently settle the dispute submitted to arbitration. Many Western commentators describe Japanese arbitration as an effort to persuade the parties to settle rather than to render an award\textsuperscript{652}.

A brief look at the international scenario of alternative dispute resolution mechanism reveals the popularity of alternative dispute resolution methods and its usage in these countries. These unique experiences and techniques can help the disputed parties, the institutions and Individuals in their adoption, use and choice of the relevant form of resolution of disputes methods. These uniqueness can be adopted with due modification in India as per the existing facts and circumstances of the Country. This will ultimately help the social, economic and legal development of the Country and its people. The apt use of different alternative dispute resolution method by the disputed parties, can give quick, economical and win-win result in the dispute resolution process and thus, reinforcing the peace and harmony of the society and reducing the problem of judicial delays and arrears before the Courts.

\textsuperscript{651} Andrew M. Pardieck, Virtuous Ways and Beautiful Customs: Role of Alternative Dispute Resolution in Japan”\textsuperscript{11}Temp Int’l Comp L J at 45(1997)

\textsuperscript{652} Joseph W. S Davis, Dispute Resolution in Japan, p171-173 (1996)