CHAPTER-3

ALTERNATIVE DISPUTE RESOLUTION
INTERNATIONAL AND NATIONAL PERSPECTIVE

3.1 INTRODUCTION

In this chapter the researcher had studied the evolution and development of the concept of alternative dispute resolution mechanism at ancient time, Muslim rule, British rule and post-British period. Then the need and significance of the ADR procedures, the legislative recognition given to the ADR process for increasing its propagation and faith of the people on this new system, at the same time the judicial interpretation of the legislative enactments in favour of the implementation of the ADR process, the common modes used in ADR mechanism viz., Arbitration, Conciliation, Mediation and Lok Adalat in detail with its practical implications and conclusion of this chapter.

3.2 INTERNATIONAL PERSPECTIVE

The concept of ADR is not a new phenomenon. For centuries, societies have been developing informal and non-adversarial processes for resolving disputes. In fact, archaeologists have discovered evidence of the use of ADR processes in the ancient civilizations of Egypt, Mesopotamia, and Assyria.¹

In the late 1980s and early 1990s, many people became increasingly concerned that the traditional method of resolving legal disputes in the United States, through conventional litigation, had become too expensive,

too slow, and too cumbersome for many civil lawsuits (cases between private parties). As of the early 2000s, ADR techniques were being popular, as litigants, lawyers and courts realized that these techniques could often help them resolve legal disputes quickly and cheaply and more privately than court process also ADR approaches are being more creative and more focused on problem solving than litigation through court.

3.2.1 United States

In the United States, Chambers of Commerce created arbitral tribunals in New York in 1768, in New Haven in 1794, and in Philadelphia in 1801. These early panels were used primarily to settle disputes in the clothing, printing, and merchant seaman industries. Arbitration received the full endorsement of the Supreme Court in 1854, when the court specifically upheld the right of an arbitrator to issue binding judgments in *Burchell v Marshall*. Writing for the court, Grier J stated that - Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity.

The federal government has promoted commercial arbitration since as early as 1887, when it passed the *Interstate Commercial Act 1887*. The Act set up a mechanism for the voluntary submission of labour disputes to arbitration by the railroad companies and their employees. In 1898, Congress followed initiatives that began a few years earlier in Massachusetts and New York and authorised mediation for collective bargaining disputes. The *Newlands Act 1913* and later legislation reflected the belief that stable industrial peace could be achieved through the settlement of collective bargaining disputes; settlement in turn could be advanced through conciliation, mediation, and voluntary arbitration. Special

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3 Ibid
mediation agencies, such as the Board of Mediation and Conciliation for Railway Labor 1913 [National Mediation Board in 1943] and the Federal Mediation and Conciliation Service 1947 were formed and funded to carry out the mediation of collective bargaining disputes.

Beginning in the late 1960’s, American society witnessed the start of a significant movement in ADR, in a climate of criticism of the adversarial nature of litigation, and, perhaps, loss of faith in traditional adjudication and the competence and professionalism of lawyers. It is, however, the Pound Conference held in 1976, which is recognised as being the birthplace of the modern ADR movement. The Pound Conference full title was the ‘National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice.’ The Pound Conference picked up on the dissatisfaction with the adversarial system.

Professor Frank Sander’s speech entitled ‘Varieties of Dispute Processing’, urged American lawyers and judges to re-imagine the civil courts as a collection of dispute resolution procedures tailored to fit the variety of disputes that parties bring to the justice system. The goal, Sander argued, should be to ‘let the forum fit the fuss’. Sander criticised lawyers for tending to assume that the courts are the natural and obvious dispute resolvers, when, in point of fact there is a rich variety of different processes…that may provide far more effective conflict resolution. He advocated “a flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to different processes”.

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7 Ibid, note 5 at 131
Sander then outlined the spectrum of disputing methods he regarded as apt, these included; adjudication, arbitration, problem-solving efforts by a government ombudsman, mediation or conciliation, negotiation, avoidance of the dispute.\footnote{Ibid, note 5 at 114}

He stated that we should “reserve the courts for those activities for which they are best suited and to avoid swamping and paralyzing them with cases that do not require their unique capabilities.” He envisioned that “not simply a court house, but a Dispute Resolution Center, where the grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case.”\footnote{Ibid note. 5 at 120.} The room directory in the lobby of such a Center might look as follows:

“A screening unit at the centre would diagnose disputes, then using specific referral criteria, refer the disputants to the appropriate dispute resolution process, the door, for handling the dispute. Sander’s idea was a catalyst for what later became known as the “Multi-Door Courthouse”. Multi-door courthouses were established, initially on a pilot basis, in Tulsa (Oklahoma); Houston (Texas); and in the Superior Court of the District of Columbia. From these experiments, the idea spread to many courts throughout the world. In a relatively short amount of time, the use of ADR processes in American courts has increased to the extent that this once unusual process is now commonplace …and hailed as the most important tool available to the courts.\footnote{Benham & Boyd Barton, “Alternative Dispute Resolution: Ancient Models Provide Modern Inspiration” (1995-1996) 12 Ga St U L Rev 623 at 635.}

Arbitration as a well established alternative to litigation is not a new procedure for America. Only the development and use of alternative dispute resolution mechanism has proliferated in recent years. As early as is the
year, 1768 arbitration as a well established alternative, was made available in New York, and thereafter in other cities, to settle dispute in the clothing, printing and merchant seaman industries by setting up arbitration tribunals.

Arbitration first received the endorsement of the Supreme Court in 1854 when the court upheld the right of an arbitrator to issue binding judgements.\(^{11}\) In Burchell v. Marsh\(^{12}\), Justice Grier stated that “Arbitrators are judges’ chosen by the parties to decide the matter submitted to them, finally and without appeal. As a mode of setting disputes, it should receive every encouragement from the courts of equity.”

In 1920, New York passed the first state law recognizing voluntary arbitration agreement. In 1925, the federal Arbitration Act (FAA) was enacted to provide statutory framework to enforce arbitration clauses in interstate contracts and created the foundation upon which modern arbitration agreements are built today. In 1926, the American Arbitration Association (AAA) becomes the largest private ADR service provides in united states. Moreover, the arbitration was not accepted everywhere in the United States. In contractual arbitration clause was made revocable at the option of either party. Until 1970, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) has not ratified despite of difficulties is implementation.

At the Pound Conference, in 1976, leading jurists and lawyers expressed concern about increasing expense and delay for parties in crowded justice system. A task force resulting from the conference was intrigued by Prof. Frank Sander’s vision of a court that included a dispute resolution centre where parties would be directed to the process most appropriate for a particular type of case, the task force recommended public funding of a pilot program using mediation and arbitration and The

\(^{11}\) Burchell v. Marsh, 58 U.S.344 (1854)
\(^{12}\) 58 U.S.344 (1854)
American Bar Association’s news committee on dispute resolution encouraged the creation of three model “multidoor courthouses.”\textsuperscript{13} In the same year, 1976 the alternative Dispute resolution movements was officially recognised by the American Bar Association. It established a special Committee on Minor Disputes. Due to these initiatives, the ADR movement increased its pace. Not only use of arbitration but at the same time different ADR techniques mediation, conciliation, facilitation mini-trials, summary jury trial, expert fact-finding and early neutral evaluation etc. developed.

Presently in this global era, ADR mechanisms have proliferated and their use has expanded According to needs of communities and businesses with the support of lawyers and judges, modern laws were enacted for providing binding as well as non-binding ADR mechanisms.

\textit{3.2.1.1 Primarily used Alternative Dispute Resolution Processes}

American Society witnessed an extraordinary flowering of interest in alternative forms of dispute settlement. ADR have been developed form elements of procedural reform into an integral part of the American legal system. At present many kinds of ADR exists in United States. American lawyers count about twenty different alternative proceedings for settling legal disputes.\textsuperscript{14} There are wide away to ADR processes, but primarily there are three well known processes - negotiation, mediation and arbitration. Elements of these processes have been combined in a number of ways to create a rich variety of so-called “hybrid” dispute resolution techniques such as mini-trial, early neutral evaluation, med-arb, rent-a-judge and ombudsman etc. All these methods described as non-court or private ADR practices. In addition to private sector, ADR programs have been

\textsuperscript{13} See, STEPHEN B. GOLDBERG ET. AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES, 3\textsuperscript{rd} ed.,1999 page 8

\textsuperscript{14} See, Tom Arnold, Why ADR? Alternative Dispute resolution: How to use it to Your Advantage, ALI- ABA, COURSE OF STUDY, 19( 1996)
implemented into the public justice system. We will learn the inherent characteristics of these processes separately. Mostly adopted ADR processes are as follows:-

1) Negotiation-

Negotiation is the process most commonly used by disputants to resolve a dispute. In which the disputants retain control over both the process and the outcome. It is a vital and pervasive process. Negotiation is primarily a common mean of securing one’s expectations from others. It is a form of communication designed to reach an agreement when two or make parties have certain interests that are shared and certain others that are opposed.15

The Pepperdine University of USA has developed an explanatory definition for ‘negotiation’.

Negotiation is a communication process used to put deals together or resolve conflicts. It is a voluntary, non-binding process in which the parties control the outcome as well as the procedures by which they will make an agreement. Because most parties place very few limitations an negotiations process, it allows for a wide range of possible solutions maximizing the possibility of joint gains, [Institution for Dispute Resolutions, Pepperdine University [USA, Mediation. The art of facilitating the settlement]

P Gulliver has explained Negotiation in following words:

As a first description the picture of negotiation is one of two sets of people, the disputing parties or their representatives, facing each other across a table. They exchange information and opinion, engage in argument and discussion and sooner or later propose offers and counter offers relating to the issue in dispute between them seeking an outcome acceptable to both

15 Roger Fisher, William Ury and Bruce Pattou, Getting Yes Negotiating Agreement without Giving In.1992 P xiii.
Negotiation is an art of knowing how to exchange concessions. The parties have to develop new options so that every party gets some kind of share in the benefit of negotiation.

2) Mediation-

There are two distinct forms of mediation right based and interest based mediation. In right based, the mediator looks to the rights that the disputants to resolve the dispute within those parameters. For example- In accident claims, right the court process and then use that information to help the parties to reach to an acceptable settlement. Hence, rights based approach would look to the outcome if this case were to go to court and seeks to use that ‘shadow’ to facilitate a settlement. An interest based approach would look to the needs of the parties, regardless of what a court might decide in the particular dispute for instance if there is a dispute between two partners of a small manufacturing business, one of whom has contributed the capital and other all invention. Suppose, the inventor partner has come forth with some product which has initially rejected by other partner, but after passing 3 years he wants to appropriate this product for the partnership. In the situation, less emphasis is given to what court will decide in the matter if it will be before the court and parties more tends towards interest of both the partners complex arrangement for their settlement.

3) Adjudication-

In the United States there are several kinds of adjudication. In addition to Court redressal system then is also private adjudication i.e. arbitration. There are two kinds of private adjudication, one the parties may voluntarily submit their dispute or pursuant to a clause in their contract that

\[ \text{\textsuperscript{16}} P. \text{Gulliver, Disputes and Negotiations. A cross cultural perspective,1979, PP 3-7.} \]

\[ \text{\textsuperscript{17}} \text{Cf. R. Mnookin and L. Kornh auser, “Bargaining in the shadow of the law: The case of Divorce, 88 Yale L. J. 950 (1979) } \]
provides resolution of disputes. The later type of arbitration has been practiced in United Status, particularly in commercial disputes between companies having continuing relationship as well as in labour disputes of Unions and employers.

Presently Different kinds of arbitration has been commonly used in United States viz. Voluntary and binding arbitration, compulsory and non binding arbitration.

4) Hybrid Processes-

In US, there is significant development in dispute resolution movement by spawning up various hybrid dispute resolution processes for instance. Mini-trial Early Neutral Evaluation, Summary Jury Trial, Neutral Expert, Med-Arb etc.

Mini-trial does not require a case filed in court it can be applied just as well to an incipient dispute. It is totally flexible and can be tailored to the needs of the individual case. A jury session of mini trial is called summary jury trial. Hence the abbreviated prosecution is made to a mock jury of 6 which then renders an advisory verdict that is used as a basis for settlement.\(^{18}\) In early neutral evaluation process, one or more experienced attorneys hear abbreviated presentation by each side and then decide evaluation of case. It resembles to right base mediation and court annexed arbitration method. In United States District Court of Northern California this process is more successful as to the cases of torts or certain money claims when liability is not an issue.\(^{19}\) The med-arb is the process in which mediation is blended with its persuasive force and arbitration with its guarantee of an assured outcome. Another new techniques used by some courts in U.S. is settlement week, where a large number of lawyers in

\(^{18}\) See S.Goldberg, F.Sander and N. Rogers, Dispute Resolution P.235 (Little Brown 1992)

\(^{19}\) Brazil, W. D., Effective Approaches to Settelment: A Handbook for Lawyers and Judges,P.26
settlement skills and then use these additional personnel during a particular week to seek to settle long pending cases.

Presently ADR is quite widely used outside the courts viz voluntary arbitration in commercial and labour cases, consumer disputes. Many companies and other institutions have their own internal dispute resolution mechanisms such as an ombudsman or a mediator to handle disputes arising within their jurisdiction. Hence the ADR use in the United States will continue to expand.

3.2.1.2 Development of ADR system

A. Community Related Services

With the promulgation of Civil Rights Act in 1964, Congress established the Community Relation Service (CRS) of the Justice Department, to assist the courts to utilize mediation and negotiation in preventing violence and resolving community wide racial and ethnic disputes. During 1960s the CRS helped resolve numerous disputes involving schools, police, prisons and other government entities.

In 1970s arbitration program and mediation programs are funded by the federal Law Enforcement Assistance Administration (LEAA). These programs designed to help the resolution of disputes within these communities. Thousands of cases were being resolved utilizing these programs. By 1980 more than eighty community based alternative dispute resolution centers were formed. Recent estimates indicate that more than 400 Local Community Justice Centers handle more than several hundred thousand cases per year.

The public and private schools were not remained immune from adopting such community based justice program. Presently, more than 4000
schools throughout the United States have developed mediation programs to resolve the disputes among the students peaceably.²⁰

B. ADR through Judicial System-

i) Federal Courts- For the early and easy resolution of disputes the Civil Justice Reform Act (CJRA), 1990 was enacted. It make mandatory to every federal district court to implement a civil justice expense and delay reduction plan. Since, then there has been tremendous growth in the creation of ADR programs and the use of ADR by federal and State courts. As a result, judges were authorized to recommend or require litigants to participate in ADR procedures such as summary jury trials, early neutral evaluation, mini trials mediation and arbitration. In1995, 80 federal district courts had authorized or established some form of ADR program.²¹

In District of Columbia, the United States District Court introduced a voluntary mediation program in 1989. The Program has been running successfully having settlement rate 50% ²² The Court of Appeals for the District Court of Columbia also implemented the mediation Program in which cases are selected for mediation by the court’s Chief Staff Counsel, and not voluntary. This Program reports a settlement rate of 31%.

In 1988, Congress formally authorized ten districts courts, viz. Arizona, Middle Georgia, Western Kentucky, Northern Ohio, Western Washington to conduct mandatory court annexed arbitration programs according to the rules in Judicial Improvements and Access to Justice Act of 1988. However, these programs provide that one or more of the litigants, after an arbitration decision is rendered, many demands, and in a majority

²⁰ “Children Courts and Dispute Resolution,” Disp.Resol.Mag.2 (Fall 1995)].
of the cases have demanded, a trial de novo. Despite of these findings, most of the parties reported that arbitration was worthwhile and was a good-starting point for settlement negotiations.23 97% of the judges surveyed agreed that the county caseload burden was reduced as a result of arbitration programs.24

In 1994 some districts adopt opt-in and opt-out systems in voluntary arbitration program in which litigants are free to opt for arbitration and continue with the litigation.

Judges in the federal court system are used to resort to ADR. In Home owners funding corp. of America V. Century Bank25, Judges in the United States Districts courts in the District of Massachusetts utilized an “array of Alternative Dispute Resolution Choices such as summary jury trial, trial before a magistrate, trial before a retired Massachusetts Superior Court Justice, and the court mediation Project.” Even without a court rule, judges are ordering or suggesting to parties towards the use of ADR. In G. Heileman Brewing Co. V. Joseph Oat corp.,26 court order client’s attendance at non-binding ADR.

ii) State Courts - In 28 State courts, there is mandatory non-binding arbitration programs. Most of the courts have formally incorporated ADR method into their systems through statewide legislations.27

24 Ibid at 6
26 871 F.2 648 (7th cir 1989)
The State Court ADR programs have been implemented successfully in California, Connecticut, Minnesota, New Jersey, North Carolina, and Texas spontaneously. Also, Special business courts, offering relatively expeditious processing of commercial dispute resolution have been set up in New York Chicago and Wilmington. This court is proving to provide high quality dispute resolution service, fair and expeditious proceedings one third of the states have established high level commissions to structure and plan for ADR use and to address related confidentiality, ethics and other issues on a state wide basis.\(^{28}\)

iii) **Federal Agencies** - Court annexed ADR programs increased due to the enactment of ADR legislations within the government and industry. The Alternative Dispute Resolution Act of 1990 (ADRA) and the Negotiated Rulemaking Act of 1990 helped to adopt resolution officer is designated and ADR training imparted. ADRA expired in 1995 but by executive orders the government agencies authorized to use ADR.

iv) **Corporate Class** - Many Companies in United States have developed and implemented ADR programs to handle complaints and resolve disputes of customers’ franchisees, employees and others. Such programs include multilevel review by peers of the employee confidential employee advisers, ombudspersons, voluntary arbitration and arbitration and third party mediation programs.

The major banks, entered into an agreement subscribed to the CPR Institute of Dispute Resolution Banking Industry Dispute Resolution Commitment for resolving a number of common transactional disputes within Banks. Several banks include mandatory arbitration clause in all agreement for governing important monetary bank transaction.

Sixteen major food companies have subscribed to CPR institute “Food Industry Dispute Resolution Commitment” which provides that parties to dispute use ADR for 90 days before instituting litigation and maintain status quo while ADR is being pursued.\(^{29}\) Another approach to the resolution of inter corporate disputes has been a pledge by corporations to explore alternative means of setting disputes with other pledge signatories before initiating litigation.

v) **Law Firms in United States** - Law firms in United States had effectively incorporated ADR into their practice. Being responsive to client demands and court imposed rules, U.S. lawyer’s development of ADR expertise has been promoted in a number of jurisdictions (e.g. Arkansas, Colorado, Kansas, Hawaii and Georgia) by the issuance of ethics rules or opinions that require or encourage attorneys to advice clients about the availability of ADR under certain circumstances.\(^{30}\) e.g. Rule 2.1, Colorado Rules of Professional conduct (1995); Ark. Stat. Ann’s 16-7-204(1995); Georgia Supreme court Uniform Rule and Order for Alternative Dispute Resolution Programs and related amendment to ethical considerations 7-5 of the Rules and Regulations of the State Bar of Georgia; Hawaii Professional Conduct Rule 2.; Kansas Bar Association Professional Ethics Advisory Committee opinion 94-1, dated April 15, 1994.

vi) **The Multidoor Court House Approach** - Instead of just one ‘door’ leading to the courtroom, many doors through which individual might pass to get to the most appropriate process. Among the doors such as arbitration, such as medical malpractice screening boards or tax courts. In multidoor courthouse approach, disputes would be analyzed according to various criteria to determine what mechanism would be best suited to

\(^{29}\) “Major Food Companies Agree to CPR plan to try ADR for 90 days before filing how suits”, Alternation 23 (Feb.1993).

\(^{30}\) Dana H. Frayer, The American experience in the field of ADR, ADR what it is and how it works? 2003 PP 108-122.
resolve the dispute. While selecting the criteria among ADR mechanism the following factor are to be taken into consideration viz. nature of case, relationship of parties, history negotiations between disputants, nature of relief sought by plaintiff; size and complexity of claim etc. Some U.S. Jurisdictions, though not yet having anything as all encompassing as the multidoor courthouse, do have the functional equivalent in that they give judges the power to refer appropriate cases to any of a listed set of ADR options.

The basic thrust behind the multidoor approach is to provide more effective and responsive solutions to disputes which is important to maintain good relation between the parties. Prof. Frank E. A. Sander who was the author of the said system identified two important questions:

1) What are the significant characteristics of various alternative dispute resolution mechanisms (such as adjudication by courts, arbitration, mediation, negotiation, and various blends of these and other devices)?

2) How can these characteristics be utilized so that, given the variety of disputes that presently arise, we can begin to develop some rational criteria for allocating various types of dispute resolution processes?

Upon analyzing various factors of comparing systems the learned Professor Sander recommended: “……….. A flexible and diverse panoply of dispute resolution processes with particular types of cases being assigned to differing processes (or combination of processes) mentioned. Conceivably such allocation might be accomplished for a particular class of cases at the outset by the legislature that in effect is what was done by the

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32 S. Goldberg F. Sander, and N. Rogers, Dispute Resolution Ch. 6 (Little Brown 1992).
Massachusetts legislature, for malpractices cases. Alternatively one might envision by the year 2000 not simply a court house but a Dispute Resolution Centre where the grievant would first be channeled through a screening clerk who would then direct him to the process or sequence of processes most appropriate to his type of case.”

The theory of Prof. Sander has been tested in different States of USA such as Columbia, New Jersey, Houston and Philadelphia and a number of American cities and countries now offer multidoor programme. Presently ADR is quite widely used outside the courts viz. voluntary arbitration is commercial and labour cases, consumer disputes. Many companies and other institutions have their own internal dispute resolution mechanisms such as an ombudsman or a mediator to handle disputes arising within their jurisdiction. Hence the ADR use in the United States will continue to expand.

3.2.2 United Kingdom

The United Kingdom has three different legal systems: England and Wales, Scotland and Northern Ireland. Each system has its own. The information on ADR in the United Kingdom in this section applies mainly to the situation in England. Some comments about the ADR situation in Scotland are presented at the end of this section.

Sander’s concerns for the future of the civil justice system were echoed in the Woolf Reports on the civil justice system of the 1990’s when the system in England and Wales was viewed as … too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how


34 Justice S. B. Sinha, Judge, Supreme Court of India from (http://delhimediationcentre.gov.in/article.htm, 18/3/2011)
long it will last induces the fear of the unknown; and it is incomprehensible to many litigants.35

The then Lord Chancellor appointed Lord Woolf in 1994 to review the rules of civil procedure with a view to improving access to justice and reducing the cost and time of litigation. The aims of the review were “to improve access to justice and reduce the cost of litigation; to reduce the complexity of the rules and modernise terminology; to remove unnecessary distinctions of practice and procedure”.36 Perceived problems within the existing civil justice system, summed up by Lord Woolf in his review in England and Wales as - the key problems facing civil justice today...cost, delay and complexity.

The Woolf Reports led to the enactment of the UK Civil Procedure Act 1997 and the Civil Procedure Rules 1998 (CPR). The new CPR Rules apply both to proceedings in the High Court and the County Court. The stated objective of the procedural code is to enable the court to deal with cases justly.37 Dealing with a case justly includes, so far as practicable:

- Ensuring that the parties are on an equal footing;
- Saving expense;
- Dealing with the case in ways which are proportionate;
- Ensuring that the case is dealt with expeditiously and fairly; and
- Allotting it to an appropriate share of the court’s resources.38

36 Ibid
37 CPR 1.1(1).
38 CPR 1.1(2).
The CPR vests in the court the responsibility of active case management by encouraging the parties to co-operate and to use ADR. Under the CPR a court may either at the request of the parties or of its own initiative stay proceedings while the parties try to settle the case by ADR or other means. Since the introduction of the CPR, ADR has significantly developed in England and Wales and the judiciary has also strongly encouraged the use of ADR. The judgments of the Court of Appeal in *Cowl v Plymouth City Council*[^39] and *Dunnett v Railtrack plc*[^40] both indicated that unreasonable failure to use ADR may be subject to cost sanctions. Indeed, the CPR has also introduced the possibility for cost sanctions if a party does not comply with the court’s directions regarding ADR.[^41]

The English judge, Lightman J who is a strong supporter of incorporating mediation into the justice system, summarised the main developments in relation to ADR since the introduction of the CPR Rules as follows:

1. The abandonment of the notion that mediation is appropriate in only a limited category of cases. It is now recognised that there is no civil case in which mediation cannot have a part to play in resolving some (if not all of) the issues involved;

2. Practitioners generally no longer perceive mediation as a threat to their livelihoods, but rather a satisfying and fulfilling livelihood of its own;

3. Practitioners recognise that a failure on their part without the express and informed instructions of their clients to make an effort to resolve disputes by mediation exposes them to the risk of a claim in negligence;


[^41]: CPR r. 44.5(3)
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(4) The Government itself adopts a policy of willingness to proceed to mediation in disputes to which it is a party.\(^{42}\)

(5) Judges at all stages in legal proceedings are urging parties to proceed to mediation if a practical method of achieving a settlement and imposing sanctions when there is an unreasonable refusal to give mediation a chance; and

(6) Mediation is now a respectable legal study and research at institutes of learning.\(^{43}\)

For some time it has been UK Government policy that disputes should be resolved at a proportionate level, and that the courts should be the last resort. Although ADR is independent of the judicial system, a judge can state that parties involved in litigation should first attempt to resolve the dispute through ADR. The court may also impose sanctions if it decides that one or more of the parties has/have been unreasonable in refusing to attempt ADR. The UK courts will also take pre-litigation behavior into account including whether or not an attempt has been made to use ADR. For some types of dispute, there are specific pre-action protocols to set out the steps parties are expected to take before starting judicial proceeding. For all other types of disputes parties are expected to follow the Practice Direction for pre-action Protocols.

### 3.2.2.1 Primarily used alternative dispute resolution processes in the UK

1. Arbitration such as the Association of British Travel Agents, a scheme to deal with problems in the travel industry, in particular with package holidays.

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\(^{42}\) In March 2001, the Lord Chancellor published a formal pledge committing Government Departments and agencies to settle disputes by ADR techniques. See :\//www.ogc.gov.uk/documents/cp0077.pdf.

2. Mediation is increasingly used in commercial, personal injury and clinical negligence cases. But that short list is not restrictive.

3. Contractual adjudication less familiar methods include:

4. Neutral Evaluation where a neutral third party provides a non-binding assessment of the merits of the case.

5. Conciliation, which is similar to mediation but the third party, (conciliator) takes a more interventionist role.

6. Expert Determination where an independent expert is used to decide the issue.

7. Neutral Fact Finding is used in cases involving complex technical issues where a neutral expert investigates the facts of the case and produces a non-binding evaluation of the merits.

8. Med-Arb (a mixture of mediation and arbitration) where parties agree to mediate but refer the dispute to arbitration if the mediation is unsuccessful.

9. Ombudsmen an ombuds is a third party selected by an institution For example-A hospital, university, or constituents. The ombuds works within the institution to investigate complaints independently and impartially. For e.g., Parliamentary Ombudsman, the various Regulators like the Energy Regulator, Ofgen or the Rail Regulator.

10. Mini-trial, it is a private trial, consensual process where the attorneys for each party make a brief presentation of the case as if at a trial, the presentations are observed by a neutral advisor and representatives from each side, at the end of the presentations the representatives tries to settle the dispute. If the representatives fail to settle, the neutral advisor, at the request of the parties may issue a non-binding opinion as to the likely outcome in court.
### 3.2.2.2 Legal Provisions

The Civil Procedure Rules, introduced in 1999, place great emphasis on the fact that parties in a dispute should make every attempt to resolve cases without going to court. Judges are also strongly encouraged to facilitate that process. Extract from a speech by the then Lord Chancellor, Lord Irvine, to the Faculty of Mediation and ADR in January 1999. ‘In the UK the Centre for Dispute Resolution (CEDR) was launched with the support of the Confederation of British Industry in 1990 to promote ADR in dispute handling. CEDR promotes ADR, trains and accredits mediators and arranges mediations and they claim a 95 per cent success rate in resolving disputes. The Academy of Experts, although its main purpose is to promote the better use of experts, is also at the forefront in the development of ADR processes and was the first UK body to establish a register of qualified mediators. The British Association of Lawyer Mediators was set up in 1995 with the aim of promoting mediation in the UK and of the role of lawyers in mediation and the maintenance of high professional standards. The City Disputes Panel was founded in 1994 to settle financial disputes in the financial services industry. Its panelists are dedicated to the resolution of financial disputes through mediation, evaluation, determination and arbitration. Also the use of ADR has been established in the UK in resolving family and divorce disputes, employment disputes, environmental disputes, and community or neighbourhood disputes. The Government freely recognises that ADR has a significant part to play in the delivery of civil justice.’

### 3.2.2.3 Steps taken by Government

Government departments and agencies have made the following about the resolution of disputes involving them:

1) Alternative Dispute Resolution will be considered and used in all suitable cases wherever the other party accepts it.
2) In future departments will provide appropriate clauses in their standard procurement contracts on the use of ADR techniques to settle their disputes. The precise method of settlement will be tailored to the details of individual cases.

3) Central government will produce procurement guidance about the different options available for ADR in Government disputes and ADR might be best deployed in different circumstances. This will spread best practice and ensure consistency across Government.

4) Departments will improve flexibility in reaching agreements on financial compensation, including using an independent assessment of a possible settlement figure. At the moment these pledges do not apply to local government authorities or agencies.

Promotion of ADR became a key strategic imperative for the Department of Constitutional Affairs (DCA) following the publication of the Government’s 2002 Spending Review White Paper. The former Lord Chancellor’s Department’s Public Service Agreement (PSA) included a target to reduce the proportion of disputes resolved by resorting to the courts. In particular, two sub-targets have been set to reduce the number of allocated cases that are resolved by a civil trial. The key activities in the PSA Delivery Plan to achieve these targets are a range of initiatives to promote mediation.

There are two strands to the DCA work to meet the PSA3 target:

1. Initiatives are being developed that will help people resolve their disputes in the earliest possible stage so that they do not have to incur the costs and stress that may be involved in entering the judicial system.
2. For those people who feel it necessary to have recourse to court proceedings, mediation will be promoted as an alternative, faster method of resolving their dispute.

The following ideas are also being developed:

3.2.2.4 Court Mediation Schemes

A range of court-based and court-endorsed mediation schemes have been developed over recent years.

a) **Automatic Referral to Mediation Scheme (ARMS)-**

An automatic referral scheme is being piloted at the Central London Civil Justice Centre. Under the scheme, a selection of appropriate cases allocated to the fast- and multitracks proceedings are automatically referred to mediation. The standard directives for court proceedings are suspended while a mediation appointment is arranged. Parties can opt-out of the scheme if they feel that pursuing mediation would be fruitless. However, the reasons for opting out will be recorded in the court register, and party/parties that has/have refused mediation may find themselves subject to an adverse cost order at the end of a trial if the trial judge feels that a settlement could have been achieved earlier on. The scheme commenced in April 2004 and will run until March 2005.

b) **Mediation Advice Service**-

A civil mediation advisor has been appointed for a trial period by Manchester Combined Court Centre. The advisor is primarily available to talk to parties attending case management conferences at the court, but is also available to the general public. She does not actually mediate cases but discusses with and informs parties about the benefits mediation may bring to their case, and then sets up a mediation appointment with a local provider if they choose to try the process. The scheme commenced in March 2004 and will run as a pilot until the end of December 2004. The scheme is
currently being evaluated and a decision on its future will be made in the coming months.

c) **Proportionate Dispute Resolution**

The DCA is also developing a vision for Proportionate Dispute Resolution (PDR). PDR is about much more than ADR. The vision for PDR is that people have access to the information and the range of services they need to understand their rights and responsibilities, avoid legal problems where possible, and where not, to resolve their disputes effectively and proportionately. This vision is a radical departure from the traditional approach to civil justice, which focuses first on courts, judges and judicial procedure, and second on legal aid to pay mainly for litigation lawyers.

Mediation, however, is not compulsory. It is usual to incorporate an ADR clause in business-to-business contracts. The general consensus is that in the construction industry ADR clause in contracts is widely used. The construction industry uses adjudication as their preferred ADR method. Other industries do not yet seem to have adopted ADR so quickly.

d) **Organisations**

Numerous bodies are available in connection with dispute resolution e.g.:

a. Centre for Effective Dispute Resolution (CEDR)
b. Chartered Institute of Arbitrators
c. Permanent Court of Arbitration - The Hague
d. Academy of Experts
e. The ADR Group
f. Mediation UK
g. The Law Society
h. The Community Legal Service
In addition there are many commercial bodies providing ADR services including ‘on-line’ services.

e) Relation between judicial dispute resolution and ADR-

The DCA annual report 2003/2004, reported a significant increase in the use of ADR compared to the initial year when 49 cases were reported, in the period March 2002 to April 2003 when 619 cases were reported. The estimated saving was £17m to June 2003 (NB. This is a measure only of the cases that passed through the judicially directed system and accepted mediation as an option.). ADR and judicial litigation are seen as complementary means to resolve disputes.

Interest in alternative dispute resolution (ADR) has been growing steadily among the Judiciary and legal profession over the last decade. A significant impetus came from Lord Woolf’s Access to Justice Report (1996) that identified the need for fair, speedy and proportionate resolution of disputes. Those principles are at the heart of the Civil Procedure Rules (CPR), which came into force in April 1999. The CPR included references to ADR in rules of court and introduced pre-action protocols, with their emphasis on settlement, even before judicial proceedings are issued. (Department of Constitutional Affairs) However: DCA also note that there is a strong perception that anything that speeds up dispute resolution will reduce the amount of conventional legal work (thus competitive with the litigation process) It has been suggested in more than one report that some opposition to ADR has resulted from the idea that if resolution is not achieved by ADR then the total cost of resolution will be increased, as recourse to the courts will be necessary. Also some researchers suggest that the process of ADR can expose the parties’ arguments, which could be damaging should the matter go to court if ADR failed. On the ‘consumer’
side many parties are simply not aware of alternative methods of resolution, particularly those with smaller claims.  

3.2.3 European Developments

3.2.3.1 Council of Europe

In 1998 the Committee of Ministers of the Council of Europe adopted a Recommendation on Family Mediation in Europe. This Recommendation focused on the use of mediation in resolving family disputes. It sets out principles on the organisation of mediation services, the status of mediated agreements, the relationships between mediation and proceedings before the courts and other competent authorities, the promotion of, and access to mediation and, the use of mediation in international matters. In addition, it calls for the government of all Member States to introduce or promote family mediation and to take or reinforce measures necessary for this purpose, and to promote family mediation as an appropriate means of resolving family disputes.

3.2.3.2 European Commission

I) Green Paper on Alternative Dispute Resolutions in Civil and Commercial Law 2002

As a follow-up to the conclusions of the 1999 Tampere European Council, the Council of Justice and Home Affairs asked the European Commission to present a Green Paper on alternative dispute resolution in civil and commercial law other than arbitration. Priority was to be given to examining the possibility of laying down basic principles, either in general or in specific areas, which would provide the necessary guarantees to ensure that out-of-court settlements offer the same guarantee of certainty as court settlements.

44 ADR in UK www.google.in search  
45 Family Mediation in Europe Recommendation No. R (98)1, www.google.in  
In 2002 the European Commission published a Green Paper on Alternative Dispute Resolutions in Civil and Commercial Law. It deals with the promotion on an EU wide basis of ADR as an alternative to litigation primarily due to the ever increasing number of international disputes but also with the aim of promoting a framework to ensure that disputes can be dealt with in an efficient and cost effective manner.

II) European Code of Conduct for Mediators 2004

In 2004, a European Code of Conduct for Mediators was developed by a group of stakeholders with the assistance of the European Commission.\(^47\) It sets out a number of principles to which individual mediators can voluntarily decide to commit. It is intended to be applicable to mediation in civil and commercial matters. Organisations providing mediation services can also make such a commitment, by asking mediators acting under the auspices of their organisation to respect this code. Adherence to the code is without prejudice to national legislation or rules regulating individual professions. (Google search)

3.3 NATIONAL PERSPECTIVE

Alternative dispute resolution is a tool that refers to several different methods of resolving to business related disputes outside traditional legal and administrative forms. All countries, societies, communities, business organization and individuals have to experience conflicts at one time or the other. Instead of allowing conflicts to take a negative course, they are required to be diverted towards growth and positive solutions benefiting all the disputing parties by envisioning procedures for cooperative problems solving so as to eradicate distrust and animosity among the parties. A dispute is basically ‘lis inter partes’ and ADR mechanism is the most efficient alternative to existing adversarial system.

\(^{47}\) Available at://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.
Article 39A of the Constitution of India provides that State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disability. Articles 14 and 22(1) also make it obligatory for the State to ensure equality before law and a legal system which promotes justice on a basis of equal opportunity to all. Legal aid strives to ensure that constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the poor, downtrodden and weaker sections of the society. Article 21 of the constitution of India guarantees the fundamental right to life and liberty which includes right to speedy trial. The Supreme Court held the right to speedy trial a manifestation of fair, just and reasonable procedure. The failures prosecuting agencies and executive to act and secure expeditious and speedy trial have persuaded the Supreme Court in devising solutions which go to the extent of almost enacting by judicial verdicts bars of limitation beyond which the trial shall not proceed and the arm of laws shall lose its hold. Article 39-A of the constitution provides for ensuring equal access to justice. To achieve the objective, Lok Adalat is being hold at various places in the country. So that seedy and affordable justice could be made available to the litigants at their door steps. Efforts are also being made at state, District and Taluka level.

3.3.1 GENESIS AND DEVELOPMENT OF ADR IN INDIA

Informal dispute resolution to be prevailing in the ancient India. Alternative dispute resolution system is rooted in the haze of ancient history.

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49 Hussainara khatoon V. Home Secretary, State of Bihar AIR 1979 SC 1360.
50 P. Ramachandra V. State of Karnataka (2002) 4 SCC 578
51 Ibid
The business community has now recognised that ADR, in one form or other, is the acceptable mode of dispute resolution. The beginnings of arbitration are lost in the mists of time and substantive records survive showing to what extent and how disputes were resolved any such fashion. It has a striking feature of ordinary Indian life and it prevailed in all ranks of life.

3.3.1.1 In Ancient India

In ancient time to refer matters to a panch (neutral facilitator) has been one of the natural way of deciding a variety of disputes. In some cases the panch more resembled a judicial court because he could intervene on the complaint of one party and necessarily on the agreement of both, e.g. In a case matter however, in most cases the arbitral award was made by agreement between the parties.\(^{53}\).

Arbitration or mediation as an alternative to dispute resolution by municipal courts has been prevalent in India from Vedic times The earliest know treatise is the Brhadaranyaka Upanishad, in which sage Yajavalkya refers to various type of arbitral bodies viz. i) the puga – a board of persons belonging to different sects and tribes but residing in the same locality i.e. neighborhood Assembly ii) the sreni – an assembly of tradesmen and artisans belonging to different tribes but connected in some way with each other i.e. guilds of particular occupation. iii) the kula- a group of persons bound by family ties i.e. assembly of members of a members were known as “Panchas”. Proceedings before these bodies were of informal nature, free from technicalities of the municipal laws. The decisions of these bodies were final and binding on the parties\(^{54}\). Though these bodies were non governmental and the proceeding before them were of informal nature, their decisions were receivable by municipal courts.

\(^{53}\) Chanbasappa Hiremath AIR 1927 Bom 565-568-69(F.B)

\(^{54}\) Kane, History of Dharmashastra Vol. III,1946 P 242
Dr. Priyanath Sen in ‘The general Principles of Hindu Jurisprudence’ for exposition of the dispute resolution institutions prevalent during the period of Dharmashastra. In the absence of some serious flows of bias or misconduct by and large, the courts have given recognition and confirmation to the awards of the Panchayats. For instance, in Sitanna V. Viranna\textsuperscript{55} the Privy Council affirmed an award of the Panchayat in a family dispute challenged after about 42 years.

Sir John Wallis observed that the reference to a village panchayat is the times honoured method of deciding disputes. It avoids protracted litigation and is based on the ground realities verified in person by the adjudicators and the award is fair and honest settlement of doubtful claims based on legal and moral grounds.

As Marc Galanter and Upendra Baxi\textsuperscript{56} observed, in Pre- British India there were innumerable, overlapping local jurisdictions and many groups enjoyed some degree of autonomy in administering law to them. Disputes in villages and even in cities would not be settled by royal courts, but by tribunals of locality of caste within which the disputes arise or of guilds and association of traders or artisans are by panchayat of the locally dominant caste landowners, government officials or religious dignitaries. Panchayats used to enforce customary rules, fixed body of law and sometimes created new rules for situation in hand. The process was formal and quick. The sanctions imposed were in the nature of ex-communication which forced the wrongdoers to abide by the decision.

With the establishment of Nyayapanchayat, village Panchayat lost their adjudicatory power several efforts have been made for re-organisation of rural self government through village panchayat in British era, viz., Lord

\textsuperscript{55} AIR 1934 PC 105,107

\textsuperscript{56} Marc Galanter and Upendra Baxi, Panchayat Justice : An Indian Experiment in Legal Access in Pre- British India 1997
Rippon’s Resolution in 1882, Government of India Resolution of 1915 and Montague-Chelmsford Report of 1918. As a result, Mysore, Madras and Kerala have Nyaya-Panchayat system at the time of adoption of the Constitution. Madhya Pradesh, Uttar Pradesh States also have this system. In introducing the Nyaya-panchayat system, State made an attempt to replace the existing disputes processing institution like caste institutions and other secular or special institutions by some social working like Rangpur People’s Court.\textsuperscript{57}

These arbitral bodies dealt with number of disputes such as matrimonial, contractual as well as small crimes. The Raja was the ultimate arbiter of all disputes between his subjects. However with the change in social and economic requirements, such arbitral bodies become inadequate. But even today such arbitral bodies are prevalent in some rural and tribal areas in India.

\textbf{3.3.1.2 During Muslim Rule-}

During Muslim rule, all Muslims in India were governed by the Islamic laws. The shariah as contained in the Hedaya. The non Muslims continued to be governed by their own personal laws. However, with respect to transaction between Muslims and non-Muslims a hybrid system of arbitration laws developed\textsuperscript{58}.

The Hedaya (Commentary on the Islamic laws PP 325) Imam Abu Hanifa, his disciples Abu Yusuf and Imam Mohammad, in the commentary systematically compiled the Muslim Law which come to be known as hedaya contains provisions for arbitration between the parties. The Arabic word for arbitration is Tahkeem, while the word for an arbitrator is Hakam. An arbitrator was required to possess the qualities essential for a Kazee an

\textsuperscript{57} Madabhush Sridhar, Alternative dispute Resolution- Negotiation and Mediation, 1\textsuperscript{st} edition, LexisNexis, Butterworths, New Delhi, India, 2006, page 85.

\textsuperscript{58} O. P. Malhotra, The law and practice of Arbitration and Conciliation, 2\textsuperscript{nd} ed., Indu Malhotra ,2006 LexisNexis Butterworth,p.125
official Judge Presiding over a court of law. If two parties to a dispute appointed an arbitrator and expressed their desire to abide by his award, he would proceed with the arbitration. Any one of the parties would proceed to hear the arbitration and make the award. The award so made was binding on the parties who appointed the arbitrator, except in cases where the award was invalid on account of any legal infirmity.

Arbitration in most Islamic countries, is governed by shariah. The effect of the agreement to submit their disputes to the shari’ah law is that parties agree that Shariah will govern all aspects of arbitration to the complete exclusion of any Secular system.

However, in the area of international commercial arbitration strict application of Shari’ah has diminished with emergence of arbitration rules, UNCITRAL Model Law.

3.3.1.3 In British Rule-

The formal systems of administration of justice were introduced by the Britishers and replaced the old systems of dispensing justice through feudal set up. However, the traditional institutions such as Kula, Srenis and Pugas continue to play their role of dispute resolution, though no longer known by their old names.

The East India Company did not abrogate the law relating to arbitration as prevalent in the country at the time it came into power. The British government gave legislative form to the law of arbitration by promulgating regulations in three presidency towns Calcutta, Bombay and Madras; these regulations lacked uniformity of details and clarity. However, they introduced substantial changes in the Panchayat Systems in

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59 Basic law of Muslim Comprised of Quran, Sunnah, Ijma and Qiyas
60 Bengal Regulations I of 1772 IX 1833 etc.
61 Bombay regulations I of 1799, IV and VI of1827
62 Madras Regulations I of 1802 and regulations IV, VI and VII of 1822
the presidency towns. For Instance, the Bengal Regulations LVIII of 1781 provided that the judges do recommend and so far as he can without compulsion, prevails upon the parties to submit to the arbitration of one person to be mutually agreed upon by the parties. It further provided that no award of any arbitrator or arbitrators can be set aside except upon full proof made by oath of the credible witnesses that arbitrators have been guilty of gross corruption or partiality to the cause in which they had made their awards.

The Bengal Regulations of 1787, 1793, 1795 introduced certain procedure changes by empowering the court to refer suits to arbitration with the consent of the parties. The limits of jurisdiction of arbitration were extended by the Bengal Regulations of 1802, 1814, 1822, 1883 by making diverse procedural changes. Similarly in the presidency of Madras, the Regulations of 1816 empowered the district munsifs to convene district panchayats for settling disputes of civil nature in connection with real estate and personal property. In the Bombay Presidency town, Regulation VII of 1827 provided for settlement of civil disputes and also case name down that arbitration shall be in writing to a named arbitrator, wherein the time for making the award had to be stated [Nu-seerwanji V. Moynoodeen (1855) 6 MIA 134] There remained in force till the Civil Procedure Code 1859 (Act No. 7 of 1859).

3.3.1.4 Enactment of the Code of Civil Procedure

After establishment of the legislative council for India in 1834, the code of Civil Procedures 1859\textsuperscript{63} was passed with the object of codifying the procedure of civil courts except those established by Royal Charter, namely the High courts in the presidency town of Calcutta, Bombay and Madras. Section 312 and 327 provided for arbitration in suits while 325, 326 and

\textsuperscript{63} Act No. 8 of 1859
327 provided for arbitration without court intervention. The Regulation in the presidency towns continued to remain in force till the civil procedure code 1859 was extended to all presidency towns in the year 1862.

The Act of 1859 was repealed by the code of civil procedure 1877, which was again revised in the year 1882 by the code of civil procedure 1882 (Act No. 14 of 1882). The provisions relating to arbitration were mutatis mutandis reproduced in section 85, 506 to 526 of the new Act.

The code of Civil Procedure 1882 was repealed and new code of civil procedure 1908 (Act of 1908), where the provisions relating to arbitration were included in the schedules of the Act. The first schedule to this code contained provisions relating to the law of arbitration which extended to the other parts of India while the second schedule dealt with arbitration Act 1899.

The new section 89 has been inserted in the code in order to provide for Alternative Dispute Resolution Mechanism. Section 89, provides for the settlement of disputes outside the court. The provisions of section 89 are based on the recommendations made by the Law Commission of India and Malimath Committee.

3.3.1.5 Enactment of Arbitration Act

The legislative Council enacted the Indian Arbitration Act, 1899 (The Act No. 9 of 1899), this Act was substantially based on the British Arbitration Act of 1889. (52 and 53 Vict C 49) Its working presented complex and cumbersome problem and judicial opinion started voicing its displeasure and dissatisfaction with the prevailing state of the arbitration law. In Dinkar Rai Lakshmiprasad V. Yeshwantrai Hariprasad64 Rangneker J. Suggested to take early steps in law of arbitration.

64 AIR 1930 Bom. 98,105
The Geneva Protocol on Arbitration clauses 1923 and Geneva Convention on the Execution of Foreign Arbitral Awards 1927 were implemented in India by the Arbitration (Protocol and Convention) Act 1937. India was a signatory to the clauses set forth in the first Schedule. This Act was enacted with the object of giving effect to the protocol and enabling the convention to become operative in India.

The judicial reprimand and demands of the commercial community led to the enactment of a consolidating and amending legislation led to the enactment of the Arbitration Act 1940\textsuperscript{65}. This Act purported to be a comprehensive and self contained code, having provision for arbitration without court intervention, arbitration in suits i.e. arbitration with court intervention in pending suits, (Ch. IV SS. 21-25) and arbitration with court intervention, in cases where no suit was pending before the court (Ch. III, S.20) It then proceeded to make further provision common to all the three types of arbitration (Ch. V SS. 26-38).

After the Second World War in 1945, particularly after independence in 1947, trade and industry received a great fillip and the commercial community becomes increasingly inclined towards arbitration for settlement of their disputes, as against court litigation. With escalating emphasis on arbitration, the shortcoming and dawn in Arbitration Act of 1940 seen. For instance, the provisions about the duties and power of the arbitrators, the procedure for conducting the proceedings after a reference etc. were inadequate. The Act also did not make distinction between the ‘agreement’ made in advance to submit future differences and on ‘submission’ made after a dispute had arises\textsuperscript{66}. Arbitration Act 1940 and The Foreign Awards Act 1969 were replaced by Arbitration and Conciliation Act 1996. This Act probably is the most radical advanced and

\textsuperscript{65} Act 10 of 1940

\textsuperscript{66} M/s Tractor export, Moscow V. Tarapore and Co. AIR 1971 SC 1 at 11
sophisticated piece of legislation. As it is based on United Nations Commission on International Trade Law will be beneficial in solving domestic as well as international commercial disputes.

3.3.1.6 Enactment of Legal Services Authorities Act, 1987

The Legal Services Authorities Act, 1987 was enacted pursuant to the constitutional mandate in Article 39 A of the constitution of India, for settlement of disputes through Lok Adalat. Under Section 19 of the Act, Central, State, District and Taluka Legal Services Authority has been created who are responsible for organizing Lok Adalats. The National Legal Services Authority (NALSA), a statutory body constituted on 5th December, 1995 by Legal Services Authorities Act 1987 as amended by the Act of 1994, is responsible for providing free legal assistance to poor and weaker sections of the society on the basis of equal opportunity. Similarly the State Legal Services Authority have been constituted in every state capital. Supreme Court Legal Services Committee, High Court Legal Services Committees, District Legal Services Committees and Taluka Legal Services Committees have also been constituted in every state to give effect to the policies and directions of NALSA and give legal services to people and conduct Lok Adalats in the State. The Legal Services Authorities Act, 1987 (as amended vide Act No. 37 of 2002) provides for setting up of a “Permanent Lok Adalat” which can be approached by any party to a dispute involving “Public Utility Services.”

Any conflict leads to another conflict, therefore, curb this cycle. It is essential to resolve the dispute, the moment it raises its head. The method, agreeable to both the parties as well as resolve it as early as possible with participation of both the parties in dispute will definitely achieve the goals of alternative dispute resolution programme.
3.3.2 NEED AND SIGNIFICANCE IN INDIA

An independent, accessible and efficient justice delivery system is needed for maintaining healthy, democratic, traditions and pursuing equitable development policies. With the evolution of modern states and sophisticated legal mechanisms, the courts run on formal processes and are presided over by trained adjudicators entrusted with the responsibilities of resolution of disputes on the part of the State. The seekers of justice approach the courts of justice with pain and anguish in their hearts on having faced legal problems and having suffered physically or psychologically. They do not take the law into their own hands as they have strong faith upon the judiciary. So it is the obligation of judiciary to deliver quick and inexpensive justice shorn of the complexities of procedure. However, the reality is that it takes a very long time to get justice through the established court system. Obviously, this leads to a search for alternative, complementary and supplementary mechanism to the process of the traditional civil court for inexpensive, expeditious and less cumbersome resolution of disputes. But the elements of justice, fairness and equality cannot be allowed to be sacrificed at the cost of expeditious disposal. The hackneyed saying is that ‘justice delayed is justice denied’. But justice has to be imparted: ‘Justice cannot be hurried to be buried’. The cases have to be “decided” and not just “disposed off.” This creates the dilemma of providing speedy and true justice.

Before, the expansion of commercialization and industrialization the justice delivery system was in sound condition. As the time passes, the consciousness of fundamental and individual right, government participation in growth of the nation’s business; commerce and industry, establishment of the parliament and state legislatures, government corporations, financial institution’s fast growing international commerce and public sector participation in business, tremendous employment
opportunities were created. Multiparty complex civil litigation, the expansion of business opportunities beyond local limits, increasing popular reliance on the only judicial forum of courts brought an unmanageable expansion of litigation. The clogged courthouses have become an unpleasant compulsive forum instead of temples of speedy justice. Instead of waiting in queues for years and passing on litigation by inheritance, people are inclined either to avoid litigation or to start resorting to extra judicial remedies\textsuperscript{67}.

Almost all the democratic countries of the world have faced this situation. United States was the first in introducing law reforms about 30 years back, Australia followed the same then U.K. also adopted the ADR in its judicial system. India is no exception to it. The Great thinker Victor once said –“Stronger than armies of the world is the idea whose time has come”. It is the time for change the pattern of administration of justice and ADR is the idea whose time has come, and therefore it deserves foremost concern as per the following situations in India.

\textbf{3.3.2.1 Huge pendency of litigations}

As per statistics available in India, it is unable to clear the backlog of cases. Take a look upon the pendency figures\textsuperscript{68}.

\textsuperscript{67} Mediation and Case Management- Their co-existence and correlation- A paper presented during Indo-US Judicial exchange at U.S. Supreme court by Niranjan Bhatt on 15/12/2002

\textsuperscript{68} Source: www.supremecourtofindia.nic.in, also see Bar & Bench News Network Jul 15, 2010 Google search
The backlog has been increasing at an average rate of 34 percent annually. This huge backlog of unsolved cases, experts claim, is directly proportional to a lack of judges. Statistics released by the Supreme Court although shows a drop in vacancies of judges in the courts of the country, the number is still very high. Here are the statistics for past three years and vacancies that continue to exist

3.3.2.2 Vacancies in the Court and ratio of judges to population

As per statistics the vacancies of judges in the courts ratio of judges per 10 lac population is as follows:
Table No. 3.2
Vacancies in the Courts

<table>
<thead>
<tr>
<th>Courts</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Supreme Court</strong>*</td>
<td>Sanctioned</td>
<td>26</td>
<td>31</td>
</tr>
<tr>
<td></td>
<td>Vacancies</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td><strong>High Courts</strong></td>
<td>Sanctioned</td>
<td>876</td>
<td>886</td>
</tr>
<tr>
<td></td>
<td>Vacancies</td>
<td>282</td>
<td>251</td>
</tr>
<tr>
<td><strong>Lower Courts</strong></td>
<td>Sanctioned</td>
<td>15,917</td>
<td>16,685</td>
</tr>
<tr>
<td></td>
<td>Vacancies</td>
<td>3,393</td>
<td>3,129</td>
</tr>
</tbody>
</table>

*Statistics as of March 31, 2010

** Statistics as of December 31, 2009.

The vacancies in the Supreme Court have been reduced by new appointments this year and last year. The High Court’s statistics however, show some concerns. There have been nearly 30 percent vacancies in High Courts as well as lower courts.

In Maharashtra state, total pending cases as of 31 December, 2009 in Lower Courts is 4,158,458, i.e. 15 percent of total pendency and 338,183 in High courts i.e. 8 percent of total pendency.
Table No. 3.3
Ratio of Judges to Population*

<table>
<thead>
<tr>
<th>Country</th>
<th>Ratio of judges to population (per 10 Lac population)</th>
</tr>
</thead>
<tbody>
<tr>
<td>USA</td>
<td>107 Judges</td>
</tr>
<tr>
<td>Canada</td>
<td>75 Judges</td>
</tr>
<tr>
<td>Australia</td>
<td>57.7 Judges</td>
</tr>
<tr>
<td>England</td>
<td>50.9 Judges</td>
</tr>
<tr>
<td>India</td>
<td>10.5 Judges</td>
</tr>
</tbody>
</table>

*As per the Law Commission of India Report, 1987

The United Nations Development Programme reveals that approximately 20 million legal cases are pending in India. India is a country of 1.1 billion people. Presently it has approximately 12.5 judges for every million people compared with roughly 107 per million in the United States and Great Britain have around 150 judges for million of its population. In its 120th Report in 1988, the Law Commission of India had recommended that “the state should immediately increase the ratio from 10.5 judges per million of Indian population to at least 50 judges per million within within the period of next five years.” The recommendation is yet to be implemented.

Our justice delivery system is bursting at the seams and may collapse unless immediate remedial measures are adopted not only by the judiciary but also by the legislature and executive. It has been said by Lord Devlin:

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69 Google search

“If our business methods were as antiquated as our legal system, we would have become a bankrupt nation long back”.

3.3.2.3 State is the largest litigator

The central and state governments are the single largest litigants, abetted by government owned corporations, semi-government bodies and other statutory organizations. In Bombay High Court alone, there were as many as 1,205 writ petitions filed against these bodies between January 1 to June 7, 2000- excluding those filed on the appellate side, while total number of suits filed is 2,402.\(^71\)

According to rough estimate, 70% of all cases are either agitated by the State or appealed by it. The State fights cases against citizens at the cost of citizens. Moreover, the officers neither allow the cases to get resolved nor withdraws the same, as they have vested interest. All these facts are also responsible for increasing weight of pending cases.

Government failure in filling up the vacancies and expanding courts proportionate to the population ratio tends to work load on the existing personnel.

Financial assistance for expanding and consolidating the judiciary, is totally ignored as the state spends huge amounts on fighting frivolous cases and appeals against the citizens. Some limit on government will put litigations under controlled situation\(^72\).

3.3.2.4 Ability of Courts to disposal off the Cases

There is yet another aspect which the speed that the 21\(^{st}\) century’s demands and that is the complicated and burdensome procedural details which are inherently very slow proving. Filing of the plaint, serving the

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process filing the written statements, the time irresponsibly taken and given, the discovery procedure, recording of depositions, ineffective court management, fragmented and discontinuous trial unattractive alternatives to trial and indifferent attitudes of legal actors, namely lawyers, judges and litigants have resulted into vicious cycles of backlogs and delays. The lack of financial and political support, accountability an the will to accept, introduced and implement law reforms have resulted in a very sorry state of affairs. In this fast changing world international trade, commerce and global interactions in all fields have created an inevitable need to compare laws of different countries of the world and adopt them with advantage. The inordinate delay in disposal of cases and escalating costs of litigation are alienating faith of the people from the court system\textsuperscript{73}. To meet with the growing trade, commerce and phenomenal rise in global context as well as to cope out of fear of diversion of the business of multinational companies to other countries having a more efficient system of dispute resolution, ADR is inevitable.

3.3.2.5 ADR will serve true pace to Nation’s developmental issues

From ancient time Indian culture carry an inherent promise that ADR mechanism is most likely to succeed in India, if implemented with an administrative will and proper legal education. The economic liberalization policies of the government, establishment of large multinational companies, economic industrial and banking growth and opportunities for international commerce and industries have increased to a large extent. ADR will provide an expedited negotiated settlement to business and industry. When a dispute arises, ADR will offer an opportunity to resolve the disputes in a way that is private, fast and economical. In short, ADR provides a mechanism whereby parties can find business solution for business

\textsuperscript{73} Ancient mediation rediscovered in India with global innovations. A paper presented by Niranjan Bhatt at German Mediation Convyness at Frankfurt order on 25/09/2004.
problems, family solution for family problems and individually tailored settlement package that will become a custom more for the litigants and particular characteristics of each dispute. There is always a difference between winning a case and seeking a solution. In foreign countries literacy ratio is high and the distance between have and have not is not much, but in India, the illiterate litigants as well as the socially backward and the economically exploited have to be made aware of their legal rights. Hence, ADR process will enable the poor to meet the better off opponents on an equal footing to negotiate a settlement. When a person is called upon to abstain from exploiting the weakness of the other person, the foundation of human dignity will be laid. In cases of contract and property disputes, medial claims, motor accident claims conflicts over land and water, religious rights, family matters, environmental disputes, employer–employee disputes etc. ADR mechanism will provide satisfactory help. Thus, Indian forms of dispute resolution, which were lost during British colonial rule is now being rediscovered with global innovations in the contemporary context of ADR system and mandatory ADR process through courts has now a legal sanction.

3.3.3 LEGISLATIVE RECOGNITION TO ADR PROCEDURES

The first footstep towards taking resort to alternate method of dispute resolution in India can be traced back as early as The Bengal Regulation Act 1772 which provided that in all cases of disputed accounts, parties are to submit the same to arbitrators whose decision are deemed a decree and shall be final. The Regulation Act 1781 further envisaged that judges should recommend the parties to submit disputes to mutually agreed person and no award two witnesses that arbitrator had committed gross error or was partial to a party. A recommendation for the first time was made by Sir Charleswood to provide for a uniform laws
regarding arbitration. The code of Civil Procedure was then enacted accordingly in 1859.

Indian contract Act 1872 also recognizes arbitration agreement as an exception to section 28, which envisages that any agreement in restraint of legal proceedings is void. Later the Arbitration Act, 1899 was also enacted to apply only to presidency towns to facilitate settlements of disputes out of court.\(^{74}\)

The Arbitration Act 1940 replaced the previous act.\(^{75}\) When India became a state signatory to the protocol on arbitration under the Geneva Convention and in order to give effect to the same the Arbitration (Protocol and Convention) Act was passed. Later, India also becomes a signatory to the New York Convention and according Foreign awards (Recognition and Enforcement) Act 1961 was passed. After liberalization of Indian economy in the 1990’s Arbitration and Conciliation Act 1996 was enacted which superseded the earlier Act of 1940 and brought about radical changes in the laws of arbitration and introduced concept like conciliation (Under Part I of the Act) to ensure speedy settlement of commercial disputes. A Key feature of the act is that by virtue of section 5, the judiciary shall not intervene in all arbitration agreement between parties to dispute except as provided under the Act. The Act is a comprehensive one consisting of 39 section and provides for judicial intervention only under sections 9, 11, 14 and34 dealing with exceptional situations. This legislation has been codified along the lines of Model Laws on International Commercial Arbitration adopted by United Nations Commission on International Trade Laws (UNCITRAL) and therefore corresponds to international standards of norms.\(^{76}\)

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75 Arbitration Act 1899

Industrial Disputes Act 1947 provides the provision both for conciliation and arbitration for the purpose of settlement of disputes. The conciliators appointed under section 4 of the Act are charged with the duty of mediating in and promoting the settlement of Industrial disputes complete machinery for conciliation proceedings is provided under the Act\textsuperscript{77}.

Section 7(h b) of the Notaries Act, 1952, states function of a notary is to act as arbitrator, conciliator, if so required\textsuperscript{78}.

Section 23 (2) of the Hindu Marriage Act, 1955 mandates the duty on the court that before granting relief under this Act, the court shall in the first instance make an endeavour to bring about a reconciliation between the parties where it is possible according to nature and circumstances of the case. For the purpose of reconciliation the court may adjourn the proceeding for a reasonable period and refer the matter to person nominated by court or parties with direction report to the court as to the result of the reconciliation (Section 23(3) of the Act)\textsuperscript{79}.

The Family Court Act 1984 was enacted to provide for the establishment of family courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage a family affairs and for matter connected therewith by adopting an approach radically different from that ordinary civil proceedings\textsuperscript{80}. Section 9 of the Family Court Act, 1984 lays down the duty of the family court to assist and persuade the parting at first instance in arriving at a settlement in respect of a subject matter. Family Court has also been conferred with the power to


\textsuperscript{78} Professional’s Bare Act, Notaries Act, 1952, Professional book publishers, 2003, p.23.

\textsuperscript{79} Prof. G. C. V. Subba Rao’s FAMILY LAW IN INDIA, revised by, Dr. T. V. SUBBA RAO, Dr. VIJENDER KUMAR, Ninth edition, 2006, S. Gogia and Co., p. 217.

\textsuperscript{80} K.A. Abdul Jalees V. T.A. Sahida (2003) 4 SCC 166
adjourn the proceedings for any reasonable period to enable attempts to be made to effect settlement if there is a reasonable possibility. The Code of Civil procedures 1908, under section 80 (1) lays down that no suit shall be instituted against government of public officer unless a notice has been delivered at the government office stating the cause of action, name etc. The whole object of serving notice under section 80 is to give the government sufficient warning of the case which is of going to be instituted against it and the government if it so wished can settle the claim without litigation or afford restitution without recourse to a court of laws. In Raghunath Das V. Union of India The supreme court lay down that the object of sections 8, 80 is to give the government the opportunity to consider its or his legal position and if that course if justified to make amends or settle the claim out of court.

Under order 23 Rule 3 of Civil procedure code is a provision for making an decree on any lawful agreement or compromise between the parties during the pendency of the suit by which claim is satisfied or adjusted. The Scheme of Rule 3 of order 23 proves that if the court is satisfied that a suit has been adjusted wholly or partly by a lawful agreement or compromise the court shall pass a decree in accordance to that order 23 Rule3 gives mandate to the court to record a lawful adjustment or compromise and pass a decree in term of such compromise or adjustment.

Order 27 Rule 5B confers a duty on Court in suit against the government or a public officer to assist in arriving at a settlement. In a suit where Government or public officer is a party it shall be the duty of the court to make an endeavor at first instance where it is possible according to

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82 Ghanshyam Dass V. Domination of India (1984) 3 SCC 46
83 AIR 1969 SC 674
the nature of the case to assist the parties in arriving at a settlement. If it appears to the court in any stage of the proceedings that there is a reasonable possibility of a settlement the court may adjourn the proceeding to enable attempts to be made to effect settlement.

Order 32 A of Civil procedure code lay down the provision relating to “suit relating to matter concerning the family”. It was felt that ordinary judicial procedure is not ideally suited to the sensitive area of personal relationships. Litigations involving affairs of the family seem to require special approach in views of the serious emotional aspects involved. In this circumstances, the objective of family counseling as a method of achieving the object of preservation of family should be kept forefront. Therefore, order 32 A seeks to highlight the need for adopting a different approach where matters concerning the family at issue, including the need for effort to bring about amicable settlement. The provisions of this order applies to all proceedings relating to family, like guardianship, custody of minor, maintenance, wills, succession etc.

The concept of ADR has undergone a sea change with the insertion of section 89 of civil procedure code, 1908 by Amendment Act, No. 46 of 1999 w.e.f. 2002 :

"89. Settlement of disputes outside the court. - (1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for –

(a) arbitration;
(b) conciliation;
(c) judicial settlement including settlement through Lok Adalat; or
(d) mediation.

(2) where a dispute has been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.  

Order 10 Rule 1A. Direction of the Court to opt for any one mode of alternative dispute resolution.—After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.

Order 10 Rule 1B. Appearance before the conciliatory forum or authority.—where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

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Order 10 Rule 1C. Appearance before the Court consequent to the failure of efforts of conciliation.—Where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it.”

Section 89 (1) of civil procedure code lays down if there exists elements of settlement which may be acceptable to the parties; the court shall formulate the terms of the settlement and give them to the parties for their comments. On receiving the response from the parties, the court may reformulate the terms of settlement and refer it to either-Arbitration, conciliation judicial settlement including settlement through Lok Adalat, or Mediation. As per sub-section (2) of section 89 when a dispute is referred to arbitration and conciliation, the provision of the Arbitrations and conciliation Act, 1996 (26 of 1996) shall apply when the court refers the disputes to Lok Adalat or for judicial settlement by an institution or person, the legal services authorities Act, 1987 (39 of 1987) shall apply and lastly for mediation, court shall follow such procedure as may be prescribed.

Order X, Rules 1 A to 1C are inserted by CPC (Amendment) Act, 1999, states that after recording the admission and denials, the court shall direct the parties to the suit to opt. either mode of the settlement outside the court as specified in sub-section (1) of section 89. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties. Order X Rule 1B further, states that where a suit is referred under rule 1A the parties shall appear before such forum or authority for conciliation of the suit. According to order X Rule 1C, where a suit is referred under rule 1 A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the
matter again to the court and direct the parties to appear before the court on the date fixed by it.

Section 16 of Court Fees Act, 1870 is inserted by code of civil procedure (Amendment) Act, 1999. Accordingly to section 16 Where the court refers the parties to the suit to any one of the mode of settlement of dispute referred to in section 89 of the code of civil procedure, 1908 (5 of 1908) the plaintiff shall be entitled to a certificate from the court authorizing him to receive back from the collector, the full amount of the fee paid in respect of such plaint. The Legal Services Authorities Act, 1987 has institutionalized the organizing of Lok Adalat. Though enacted in 1987, this Act come into effect only from 1996, prior to its implementation Lok Adalat used to be organized by the committee for implementing legal Aid Schemes. The Legal services Authorities Act, 1987 by constituting the National Legal Services Authority as a Central Authority with the chief justice of India as its patron in Chief. The Central Authority has been vested with duties to perform inter alia, the following function a) to encourage the settlement of disputes by way of negotiations arbitration and conciliation. b) to lay down policies and principles for making legal services available in the conduct of any case before the court any authority or tribunal. The act was enacted with the object to constitute legal services authorities for providing free and compliant legal services to the weaker sections of the society and to organize Lok Adalat to ensure that the operations of the legal system promoted justice on a basis of equal opportunity Chapter III of the Act provides for constitution of the State Legal Services Authority and District as well as Taluka level Legal Services Authority. The original scheme of organization of the Lok Adalat under chapter VI of the Act was mainly based on compromise or settlement between the parties. If the parties did not arrive at a settlement, the case was either returned to the

court concerned or the parties were advised to seek remedy before the competent forum Lok Adalat did not possess the power to decide the disputes on merits in case the parties failed to arrive at a compromise having realized this deficiency the parliament amended the Act by Amendment Act 37 of 2002 to set up Permanent Lok Adalat for providing compulsory pre-litigation mechanism for conciliation and settlement of cases relating to public utility services. While amending section 22, Chapter VI A consisting of section 22 A to 22E has been added in the Act and it includes insurance service as well. Under the Act, we thus have Lok Adalat as well as permanent Lok Adalats, in Chapter VI and VI- A respectively.

Under Section 19(5) of the Act, a Lok Adalat shall have jurisdiction to determine and arrive at a settlement between the parties in respect of-

a. any case pending before the court

b. any matter within the jurisdiction of and is not brought before the court.

Whereas under section 22(1) of the Act, any party to a dispute may before the dispute is brought before any court make an application to the permanent Lok Adalat for settlement of dispute. Both the Lok Adalat as well as permanent Lok Adalat shall not have jurisdiction in respect of any matter relating to an offence not compoundable under any law. Both these Adalats shall consist of three persons as members and one of them being a retired or serving judicial officer who shall be the chairman. The experience and qualifications of the other two members shall be as prescribed by the state government in consultation with the chief justice of the High Court and their appointments are to be made by the state legal service Authority. Under such circumstances, the apprehension that the appointments of the other two members may result in miscarriage of justice is ill-founded. Award of the Lok Adalat or permanent Lok Adalat shall be final and binding on all the parties to the dispute. No appeal shall lie to any court.
against such award pending cases can be referred to the Lok Adalat either by consent of the parties. The lok Adalat or the permanent Lok Adalat can take up pre-litigation cases only often issuing notives to parties. The preliminary jurisdiction of Lok Adalat is Rs. 10 Lac both the Adalat shall have the same power as are vested in a Civil Court under code of civil procedure while trying a suit and it is not bound by the code of civil procedure and the Indian evidence Act.

Some of the relevant sections from the legal services Authority Act, 1987 are quoted as under-

**Section 19-**

1) Central state, District and Taluka Legal Services Authority has been created who are responsible for organizing Lok Adalat.

2) Conciliators for Lok Adalat comprise the following-
   a) A sitting or retired judicial officer
   b) Other person of repute as may be prescribed by the state Government in consultation with the chief justice of High court.

**Section 20- Reference of Cases-**

Cases can be referred for consideration of Lok Adalat as under-

1) By consent of both the parties to the disputes.

2) One of the parties makes an application for reference.

3) When the court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat.

4) Compromise settlement shall be guided by the principles of justice, equity fair play and other legal principals.

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5) Where no compromise has been arrived at through conciliation, the matter shall be returned to the concerned court for disposal in accordance with law.

Section 21-

After the agreement is arrived by the consult of the parties award is passed by the conciliators. The matter need not be referred to the concerned court for consent decree.

The Act provisions envisage as under-

1) Every award of Lok Adalat shall be deemed as decree of Civil Court.

2) Every award made by the Lok Adalat shall be final and binding on all the parties to the dispute.

3) No appeal shall lie from the award of the Lok Adalat.

Section 22-

Every proceedings of Lok Adalat shall be deemed to be judicial proceedings for the purpose of-

1) Summoning of Witnesses

2) Discovery of documents

3) Reception of evidences

4) Requisitioning of Public record

Mediating criminal cases is vague concept. As per the pendency figures of Criminal trials and percentage of new admissions, it is imperative to find out proper solution to cope up this problem.

For the purpose some legislative efforts have been taken some of them are Section 320 of Code of Criminal Procedure, 1978 which provides

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88 Dr. S.S. Sharma, Legal services, Public Interest Litigations and Para-legal services, 2nd edition, Central Law Agency, p 123.
for compounding of offences, Section 125 deals with the maintenance to widow, wife, children, parents etc. Its Chapter- XXIA allows plea bargaining in criminal cases which set the process in motion. (Code of Criminal Procedure 1978, Wadhava publication) Inclusion of Section 138 of Negotiable Instrument Act, section 498A of Indian Penal Code and the Domestic Violence (Prevention) Act requires new law mandating case management of criminal cases and recognizing the right to speedy trial under Article 21 of the Constitution of India.\textsuperscript{89}

### 3.3.4 JUDICIAL APPROACH TO ADR IN INDIA

Judiciary, in its zeal to ensure justice for all has been extremely protective about its supervisory role in the ADR process. It has played a substantial role in up gradation of ADR mechanism. The apex court has recognised the alternate forum in its various decisions.

For effective implementation of provisions relating to Alternative Dispute resolution system in various enactments, Supreme Court has taken further steps. Supreme Court started issuing various directions as so as to see that the public sector undertakings of the central government and their counter parts in the states should not fight their litigation in court by spending money on fees on counsel, court fees, procedural expenses and waiting public time.

In Oil and Natural Gas Commission V. Collector of Central Excise\textsuperscript{90} there was a dispute between the public sector undertaking and Government of India involving principles to be examined at the highest governmental level. Court held it should not be brought before the court wasting public money any time. In Oil and Natural Gas Commission V. Collector of Central Excise,\textsuperscript{91} dispute was between govt. dept and P. S. U. Report was

\textsuperscript{89} Supra Foot Note 61
\textsuperscript{90} 1992 supp. 2 SCC 432
\textsuperscript{91} 1995 Supp. 4 SCC 541
submitted by cabinet secretary pursuant to SC order indicating that instruction has been issued to all departments. It was held that public undertaking to resolve the disputes amicably by mutual consultation in or through or good officers empowered agencies of govt. or arbitration avoiding litigation. Government of India directed to constitute a committee consisting of representatives of different departments. To monitor such disputes and to ensure that no litigation come to court or tribunal without the committee’s prior examination and clearance. The order was directed to communicate to every High Court for information to all Subordinate Courts. In Chief Conservator of Forests V. Collector,\textsuperscript{92} Supreme Court relied on Oil and Natural Gas Commission Case I and II and it was said that Union/State govt. must evolve a mechanism for resolving interdepartmental controversies disputes between departments of government cannot be contested in court.

In Punjab and Sind Bank V. Allahabad Bank\textsuperscript{93}, it was held that the direction of the Supreme Court in Oil and Natural Gas Commission Case III,\textsuperscript{94} to the government to set up Committee to monitor disputes between government departments and public sector undertakings make it clear that the machinery contemplated is only to ensure that no litigation comes to court without the parties having had an opportunity of conciliation before an in house committee.

Under Industrial Disputes Act, 1947, conciliation has been statutorily recognized as an effective method of dispute between workers and management. In Rajasthan State Road Transport Corporation V. Krishna Kant\textsuperscript{95}, the Supreme Court observed: “The policy of law emerging from

\begin{itemize}
  \item \textsuperscript{92} (2003) SCC 472
  \item \textsuperscript{93} 2006(3) SCALE 557
  \item \textsuperscript{94} (2004) 6 SCC 437
  \item \textsuperscript{95} 1955 (5) SCC 75
\end{itemize}
Industrial Disputes Act and its sister enactments is to provide an alternative dispute resolution mechanism to the workmen, a mechanism which is speedy, inexpensive, informal and unencumbered by the plethora of procedural laws and appeals upon appeals and revision applicable to civil courts. Indeed the powers of the courts and tribunals under industrial disputes Act are far more extensive in the senses that they can grant such relief as they think appropriate in the circumstances for putting an end to an industrial dispute.”

The only field where the courts in India have recognized ADR is in the field of Arbitration. Their was much delay in settlement of disputes between parties in laws courts, which prevented investment of money in India by other countries. To coke up with this problem India has undertaken major reforms in arbitration and parliament enacted Arbitration and Conciliation Act, 1996 to bring substantial reforms regarding domestic as well as international disputes. In the M/s Guru Nayak Foundation V. Rattan Singh and Sons, the Supreme court observed thus-Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap.

The Government of India realized that for effective implementation of its economic reforms it was necessary to recognize the demand of the business community. Food Corporation of India V. Joginderlal Mohinderpal, the Supreme Court observed:

“We should make the law of arbitration simple, less technical and more responsible to the actual realities of the cannons of justice and fair play and make the arbitrator where to such process and norms which will

96 AIR 1981 SC 2075 at 2076.
97 AIR 1981 SC 2075.
create confidence not only by doing justice between the parties but by creating sense that justice appears to have been done.”

In case of Babar Ali V. Union of India and other\textsuperscript{99} the constitutionality of the Act of 1996 was challenged. The apex court held that the Act of 1996 was not unconstitutional and it does in any way offend the basic structure of the constitution of India. The act was further strengthened when in the case of Kalpana Kothari V. Sudha Yadav and others\textsuperscript{100} the Hon’ble Supreme Court held that as long as the arbitration clause exist, a party cannot take recourse to the Civil Courts for appointment of Receiver etc. without evincing an intention to start the arbitration proceedings.

In Konkan Railway Corporation Ltd. V. M/s Mehul Construction Co.\textsuperscript{101}, Supreme Court has summarized evolutions of Arbitration and Conciliation Act 1996 and the main provision of the Act thus: “At outset, it must be borne in mind that prior to the 1996 Act, the Arbitration Act of 1940, which was in force in India provided for domestic arbitration and no provision was there to deal with the foreign awards. So far as the Foreign Awards are concerned, the same were being dealt with by the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. The increasing growth of global trade and the delay in disposal of cases in courts under the normal system in several countries made it imperative to have the perception of an Alternative Dispute Resolution System, more particularly, in the matter of commercial disputes. When the entire world was moving in favour of a speedy resolution of commercial disputes, the United Nations Commission on International Trade Law way back in 1985 adopted the UNCITRAL Model

\textsuperscript{99} (2002)2 SCC 178

\textsuperscript{100} (2002) 1 SCC 203

\textsuperscript{101} 2006 (6) SCALE 71
Law of International Commercial Arbitration. Since then number of countries have given recognition to that Model in their respective legislative system. With the said UNCITRAL Model Law in view the present Arbitration and Conciliation Act of 1996 has been enacted in India replacing the Indian Arbitration Act, 1940, which was the principal legislation on Arbitration in the country that had been enacted during the British Rule. The arbitration Act of 1996 provides not only for domestic arbitration but spreads its sweep to International Commercial Arbitration too. The Indian law relating to the enforcement of Foreign Arbitration Awards provides for greater autonomy in the arbitral process and limits judicial intervention to a narrower circumference than under the pervious law. To attract the confidence of International Mercantile community and the growing volume of India’s trade and commercial relationship with rest of the world after the new liberalization policy of the government, Indian Parliament was persuaded to enact the Arbitration and Conciliation Act of 1996 in UNCITRAL model and, therefore, in interpreting any provisions of the 1996 Act Courts must not ignore the objects and purpose of the enactment of 1996. A bare comparison of different provision of the arbitration Act of 1940 with the provision of the Arbitration and Conciliation Act 1996 would unequivocally indicate that 1996 Act limits intervention of Court with an arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject matter of judicial scrutiny of a Court of Law. Under the new law the grounds on which an award of an Arbitrator could be challenged before the Court have been severely cut down and such challenge is now permitted on the basis of invalidity of the agreement, want of jurisdiction on the part of the arbitrator or want prior notice to a party of the appointment of the arbitrator or of arbitral proceedings. The powers of the arbitrator have been amplified by insertion of specific provisions of several matters. Obstructive tactics adopted by the
parties in arbitration proceedings are sought to be thwarted by an express provision inasmuch as if a party knowingly keeps silent and then suddenly raises a procedural objection will not be allowed to do so. The role of institutions in promoting and organizing arbitration has been recognized. The power to nominate arbitrators has been given to the chief Justice or to an institution or person designated by him. The time limit for making awards has been deleted. The existing provisions in 1940 Act relating to arbitration through intervention of Court, when there is no suit pending, have been removed. The importance of transactional commercial arbitration has been recognized and it has been specifically provided that even where the arbitration is held in India, the parties to the contract would be free to designate the law applicable to the substance of the dispute. Under the new law unless the agreement provides otherwise, the arbitrators are required to give reasons for the award. The award itself has now been vested with status of a decree, inasmuch as the award itself is made executable as a decree and it will no longer be necessary to apply to the court for a decree in terms of the award. All these aim at achieving the sole object to resolve the dispute as expeditiously as possible with the minimum intervention of a court of law so that the trade and commerce is not affected on account of litigations before a court. When United Nations established the Commission on International Trade Law it is on account of the fact that the General Assembly recognised that disparities in national laws governing international trade created obstacles to the flow of trade. The General Assembly regarded the Commission on International Trade Law as a medium which could play a more active role in reducing or removing the obstacles. Such Commission, therefore, was given a mandate for progressive harmonization and unification of the law of International Trade. With that objective when UNCIRTAL Model, it would be appropriate to bear the said objective in mind while interpreting any provision of the Act. The statement of objects and reasons of the Act clearly enunciates that the
main objective of the legislation was to minimize the supervisory role of Courts in the arbitral process.”

The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of parties’ choice. Favoring institutional arbitration to save arbitration from the arbitration cost, the Supreme Court has recently in Union of India V. M/s. Singh Builders Syndicate observed:

“When the arbitration is by a Tribunal consisting of serving officers, the cost of arbitration is very low. On the other hand, the cost of arbitration can be high if the Arbitral Tribunal consists of retired Judge’s. When a retired Judge is appointed as Arbitrator in place of serving officers, the government is forced to bear the high cost of Arbitration by way of private arbitrator’s fee even though it had not consented for the appointment of such non-technical non serving person as Arbitrator/s. There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired judge/s is Arbitrators. The large number of sitting and charging of very high fees per sitting, with several add-ons, without any ceiling, have many times resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award. When an arbitrator is appointed by a court without indicating fees, either both parties feel constrained to agree to whatever fees is suggested by the Arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the Arbitrator and one party agrees to pay such fee, the other party, who is enable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to

102 Law commission of India, Report No.222, April 2009, Need for justice dispensation through ADR etc.
103 Union of India v. M/S Singh Builders Syndicate 2009(4) SCALE 491.
104 Ibid
express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee. It is necessary to find an urgent solution for this problem to save arbitration from the arbitration cost.

Institutional arbitration has provided a solution as the Arbitrator’s fees is not fixed by the Arbitrators themselves on cases to case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the Arbitration is held. Another solution is for the court to fix the fees at the time of appointing the arbitrator with the consent of parties it necessary in consultation with the arbitrator concerned. Third is for the retired judges offering to serve as arbitrators to indicate their fees structure to the Registry of the respective High Court so that the parties will have the choice of selecting an Arbitrator whose fees are in their ‘range’ having regard to the stakes involved. What is found to be objectionable is parties being forced to agree for a fee fixed by such Arbitrator. It is fortunate that delays, high cost, frequent and sometimes unwarranted judicial interruptions at different stages a seriously hampering the growth of arbitration as an effective dispute resolution process. Delay and high cost are two areas where the Arbitrators by self regulation can bring about marked improvement.

Section 89 of Code of Civil Procedure provides for settlement of dispute outside the court was inserted by Civil Procedure Code Amendment Act 1999 and brought into force from 1/17/2002.

In Salem Advocate Bar Association V. Union of India, the Supreme Court rejected the challenge to the constitutional validity of the amendment made in Section 89 of Civil Procedure Code. In Salem Bar (I), Speaking for the Bench Kirpal, CJ, observed as follows:

105 AIR 2003 SC 189
“It is quite obvious that the reason why section 89, has been inserted is to try and see that all the cases which are filed in court need not necessarily be decided by the court itself keeping in mind the law’s delays and the limited number of judges which are available, it has now become imperative that resort should be had to alternative dispute resolution mechanism with a view to bring to an end litigation between the parties at an early date. The alternative dispute resolution mechanism as contemplated by section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediations. If the parties agree to arbitration, than the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an available settlement between the parties but it conciliation or mediation or judicial settlements not possible despite effort being made the case will ultimately go to trial.”

In the judgment of the Supreme Court of India in Salem Bar Association V. Union of India\textsuperscript{106} the apex court has upheld the constitutional validity of Section 89 of the code of civil procedure. The Court held: “Some doubt as to a possible conflict has been expressed in view of used of the word ‘may’ in Section 89 when it stipulates that “the court may reformulate the terms of a possible settlement and refer the same for” and use of the word ‘shall’ in order 10 rules 1A when it states that “the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89”. The intention of the legislature behind enacting Section 89 is that where it appears to the court that then exists on element of a settlement which may

\textsuperscript{106} (2005) 6 SCC 344
be acceptable to the parties, they at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the sections and if the parties do not agree, the court shall refer them to one or the other of the said modes. Section 89 uses both the wards “shall” and “may” whereas order 10 rules 1A uses the word “shall” but on harmonious reading of these provisions it becomes clear that the use of the word “may” in section 89 only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of ADR methods. Then is no conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarized in the terms of settlement formulated or reformulated in terms of section 89…..one of the modes to which the disputes can be referred to “arbitration”. Section 89 (2) provides that where a dispute has been referred for arbitration or conciliation Act, 1996 shall apply as if the proceeding for arbitration or conciliation were referred for settlement under the provisions of the 1996 Act. Section 8 of the 1996 Act deals with the power to refer parties to arbitration where there is arbitration agreement. As held in P. Anand Gajapathi Raju vs. V. G. Raju.\(^{107}\), the 1996 Act governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in section 89 of the code where the court asks the parties to choose one or other ADRs including arbitration and the parties choose arbitration as their option, of course, the parties have to agree for arbitration.

The Supreme Court has also requested to prepare model rules for ADR and also draft rules of mediation under section 89 (2) (d) of code of Civil procedure, 1908. The rule is formed as “Alternative Dispute Resolution and Mediation Rules 2003”.

\(^{107}\) (2000) 4SCC 539
The position was reiterated by this Court in Jagdish Chander V. Ramesh Chander\textsuperscript{108} and observed: “It should not also be overlooked that even though section 89 mandates courts to refer pending suits to any of the several alternative resolution process mentioned therein, there cannot be a reference to arbitration even under section 89 CPC unless there is a mutual consent of all parties for such reference.”

In Afcons Infrastructure Ltd V. Cherian Varkey Construction Co. (P) ltd and other\textsuperscript{109} J. R. V. Raveendran, J., has discussed error in drafting section 89 of Code of Civil Procedure 1908 and it’s proper interpretation for effective implementation ADR system. This is by now a landmark judgement of the Supreme Court, explaining and clarifying the entire scheme of Section 89 of code of civil procedure. The main points in the Judgment which answer numbers of queries and questions about S. 89 posed by lawyers and judges are as follows:

1. Under section 89 of code of civil procedure the court is only required to formulate a “short summary of disputes” and not “terms of settlement”.

There was a doubt amongst Judges as to how the Judges would formulate terms of settlement much before the matter is referred for ADR. The SC has now clarified that before referring the parties to ADR, it is not necessary for court to formulate or refer the terms of a possible settlement. It is sufficient if the court merely states the nature of dispute and makes the reference. The court can do so after receipt of pleadings of parties. Infact the Apex court has even observed that in some cases particularly matrimonial once the court can resort to ADR even before the written statement is received. Many a time once written statement is drafted and filed in the court the dispute gets flared up and the animosity between the parties increases leading to difficulties in settlement through ADR.

\begin{flushleft}\textsuperscript{108} (2007) 5 SCC 719 \\
\textsuperscript{109} (2010) 8 SCC 24\end{flushleft}
The civil court should invariably refer cases to ADR process except in certain recognized excluded categories by giving reasons.

The proper stage to refer the parties to ADR mechanism is when the matter is taken for preliminary examination of the parties’ under order 10 of the code of civil procedure.

Nothing prevents the Court from resorting to section 89 even after framing of issues, but once evidence is commenced the Court will be reluctant to refer the matter to ADR as it becomes a tool for protracting the trial.

The definition of judicial settlement and mediation in clauses (c) and (d) of section 89(2) shall have to be interchanged to correct the draftsman’s error for mediation, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act. For judicial settlement the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

Above changes made by interpretative process shall remain in force till the legislature corrects the mistakes, so that section 89 is not rendered meaningless and infructuous.

The following cases are held to be the cases not suitable for ADR process:

1. Representative suits under Order 1 Rule 8 of code of civil procedure which involve public interest or interest or numerous persons who are not parties before the court (In fact, even a compromise in such a suit is a difficult process
requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc).

(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.

(v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.

(vi) Cases involving prosecution for criminal offences.

All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes:

(i) All cases relating to trade, commerce and contracts, including - disputes arising out of contracts (including all money claims); - disputes relating to specific performance;

- disputes between suppliers and customers;
- disputes between bankers and customers;
- disputes between developers/builders and customers; - disputes between landlords and tenants/
licensor and licensees; - disputes between insurer and insured;

(ii) All cases arising from strained or soured relationships, including - disputes relating to matrimonial causes, maintenance, custody of children;

- disputes relating to partition/division among family members/co- parceners/co-owners; an

- disputes relating to partnership among partners.

(iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);

- disputes between employers and employees;

- disputes among members of societies/ associations/ Apartment owners Associations;

(iv) All cases relating to tortious liability including - claims for compensation in motor accidents/other accidents; and

(v) All consumer disputes including

- disputes where a trader/supplier/manufacturer/ service provider is keen to maintain his business/ professional reputation and credibility or `product popularity.

- The above enumeration of `suitable' and `unsuitable' categorization of cases is not intended to be exhaustive or rigid. They are illustrative, which can
be subjected to just exceptions or additions by the court/Tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

6) Choice of ADR Mechanisms

1. **Arbitration**: In the event of referral by the court to Arbitration due to arbitration agreement between the parties, the case will go outside the stream of court permanently and will not come back to the court.

2. **Conciliation**: As contrasted from arbitration, when a matter is refereed to conciliation, the matter does not go out of the stream of court permanently. If there is no settlement, the matter is returned to the court for framing of issues and proceeding with the trial.

3. **Mediation**: If the suit is complicated or lengthy, mediation will be recognized choice.

4. **Lok Adalat**: If the suit is not complicated and disputes are easily sortable or and be settled by applying clear legal principles Lok Adalat will be preferred choice.

5. **Judicial Settlement**: If the court feels that suggestion and guidance by a judge will be appropriate, it can refer it to another judge for dispute resolution.

7) Settlement

1. When a matter is settled through conciliation the settlement agreement is enforceable as it is decree of the court having regard to section 74 read with section 30 of the Arbitration and Conciliation Act 1996.
2. When settlement takes place before Lok Adalat, the Lok Adalat award is also deemed to be decree of the civil court and executable as such under section 21 of Legal Services Authorities Act, 1987.

3. Where the reference is to conciliation, mediation or Lok Adalat through court, the settlement will have to be placed before the court for making a decree in terms of it by application of principles of under order 23 R. 3 of the Code, as the Court continues to retain control and jurisdiction over the cases which it refers.

8) The Court may summarize the procedure to be adopted by a court under section 89 of the Code as under:

   a) When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties.

   b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.

   c) In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

   d) The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that
arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.

e) If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeable for reference to conciliation which will be governed by the provisions of the Arbitration and Conciliation Act. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with section 64 of the Arbitration and Conciliation Act.

f) If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three ADR processes: (a) Lok Adalat; (b) mediation by a neutral third party facilitator or mediator; and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement.

(g) If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to
mediation. Where the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.

(h) If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.

(i) If the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by Section 74 of the Arbitration and Conciliation Act, 1996 (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). This will be necessary as many settlement agreements deal with not only the disputes which are the subject matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject matter of the suit.

(j) If any term of the settlement is ex facie illegal or unforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability.

9) The Court should also bear in mind the following consequential aspects, while giving effect to Section 89 of the Code: (i) if the reference is to arbitration or conciliation, the court have to record that the reference is by mutual consent. Nothing further need be stated in the order sheet. (ii) If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may
be. There is no need for an elaborate order for making the reference. (iii) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process. (iv) If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for Judicial Settlement to another Judge. (v) If the court refers the matter to an ADR process (other than Arbitration), it should keep track of the matter by fixing a hearing date for the ADR Report. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternative forum, the nature of case etc.). Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings. (vi) Normally the court should not send the original record of the case when referring the matter for an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary.

3.3.5 COMMON MODES OF ALTERNATIVE DISPUTE RESOLUTION USED IN INDIA

After due deliberation and several trials arbitration and mediation emerged as the most common modes of ADR, though conciliation and negotiation also comprise of ADR, they are however seldom used.
3.3.5.1 Arbitration

A] Meaning and Definition:

According to Oxford English Dictionary: Arbitration means “uncontrolled decision” the settlement of a question at issue by one to whom the parties agree to refer their claims in order to obtain an equitable decision. The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay in expense.

Arbitration is a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.\(^{110}\)

Arbitration is a legal techniques for the resolution of disputes outside the courts, where in the parties to a dispute refer it to one or more persons (the “arbitrators”, ”arbiters” or “arbitral tribunal”). by whose decision (the award) they agree to be bound.\(^{111}\)

In the terms of subsection (1) (a) of arbitration and conciliation act, 1996, arbitration means any arbitration whether or administered by permanent arbitral institution.

An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction. The prominent feature of the system is that, instead of filling a case in court, the parties can refer their case to an arbitral tribunal whose decision is binding and is termed as an award.

B] Fundamental features of arbitration-

1. An alternative to formal court system.

2. A private mechanism for dispute resolution

\(^{110}\) Black’s law dictionary 17th edition.

3. Arbitrator & its proceeding is selected & controlled by the parties
4. It is final and binding determination of parties eights and obligations
5. There is easy enforceability of award passed by arbitrator
6. Neutrality is its backbone
7. Confidentiality could be maintained
8. It is expeditious method
9. It saves time, cost & energy of parties to the dispute

C] Brief ancient history of arbitration in India

During the ancient Hindu have in India, there were several arbitral machinaries for settlement of disputes between parties. They were known as kulani (village council), Sreni (corporation), Puga (assembly)\textsuperscript{112}. According to Colebrooke, panchayat was a different system of arbitration subordinate to the courts of law. Arbitration tribunal in ancient period has a status of panchayat in modern India\textsuperscript{113}.

D] Historical and Legislative Background-

Arbitration in the legal sense, that is a reference of a dispute by consent of the parties to one or more persons with or without an umpire and an award enforceable by the sovereign power were almost unknown in ancient India. Disputes were resolved through the decision of panchayat consisting of elderly and influential men. The decision of the panchayats were not conclusive and the penalty for disobedience was exclusion from religious and social functions of the community including ex-communication.

\textsuperscript{112} See P. V. Kane, History of Dharma Sastra, Vol.III, P. 242

\textsuperscript{113} See Justice S. Varadachariar, Hindu Judicial System, P. 98.
In Chanbasappa Gurushantappa v. Baslinagayya Gokurnava Hiremath\(^{114}\), Marten C. J., and State: It (arbitration) is indeed a striking feature of ordinary Indian life and I would go further and say that it prevails in all ranks of life to a much greater extent than is the case in England. To refer the matter to a Panch is one of the natural ways of deciding many disputes in India.

The technique of dispute resolution by arbitration has received legal recognition in India about two and half centuries back.

After the advent of British in India attempts were made to regulate judicial system in India. Thus, regulations and Acts were passed to formulate a system of arbitration in India such as Bengal Regulation of 1772 and 1780, Sir Elijah Impeys’ Regulation of 1781, Regulation of 1787, Regulation XVI of 1793, Regulation VI of 1813, Regulation XXVII if 1814, Bengal Regulation VII of 1822, Bengal Regulation IX of 1883, Regulation VII of 1816 for madras, Regulation VII of 1827 for Bombay governed arbitration.

Regulation gave recognition to Arbitration in suit only. References to Arbitration without the intervention of the court become possible for the first time after enactment of civil procedure code of 1859. The distinction between arbitration in suits and arbitration not in suit is a distinctive feature of the Indian Law of Arbitration. The code of civil procedure 1859 recognized three distinct kinds of arbitration a) Arbitration in suits (Sections 312-327) b) Arbitration by parties to pending suits (Sections 312-325), c) filing in court of an agreement to refer to arbitration and the distinction is still recognized\(^{115}\).

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\(^{114}\) AIR 1927 Bom. 565

\(^{115}\) Sirojexport Company Ltd. v. I.O.C. Ltd. (AIR 1997 Raj 120)
In Pestonjee V. Manockjee\textsuperscript{116} Privy council made an interesting decision the issue in this case was whether a party having agreed to refer the matter in dispute to arbitration under Section 323 of Act XIV of 1882 could revoke the submission at his sweet will their lordships were of the opinion that a proper construction of the code provided that when persons agree to submit the matters in difference between them to the arbitration of one or more specified persons, no party to such an agreement could revoke the submission unless it was for a good cause. An arbitrary revocation of the authority of an arbitrator was not permitted.”

Indian Contact Act of 1872 also recognized arbitration agreement under section 28 of the Act. Thus, it recognized agreement to refer to arbitration present as well as future parties. Section 21, specific Relief Act 1878 provided that though future disputes could not be referred as per code of civil procedure but if a person entered into a contract to refer future disputes and later tried to wriggle out of it, by going to the courts on the same matter, he would not be allowed to do so. Section 26, of the Arbitration Act of 1899 gave recognition to the reference of disputes likely to arise in future to an arbitrator. This act incorporates various section of English Act into India laws. The Geneva Protocol on Arbitration clauses 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 were implemented in India by the Arbitration (Protocol and Convention) Act 1937. This Act was enacted to give effect to protocol and enabling convention to become operative in India. Indian Arbitration Act, 1940 repealed the Arbitration act of 1899 and sections 89 and 104(1), clause (a) to (f) and the second schedule of the Code of Civil procedure 1908. It dealt with only domestic arbitration.

India was one of the signatories to the New York Convention of 1958. To give effect this convention, the foreign Awards (Recognition and

\textsuperscript{116} 12 MIA 112
Enforcement) Act 1961 was passed. In the landmark judgment in Ranusagar Power Co. Ltd. V. General Electric\textsuperscript{117} the Supreme Court said that the object of this legislation was to facilitate and promote international trade by providing for speedy settlement of disputes arising in trade through arbitration.

In Oil and Natural Gas Commission V. Western Co. of North America\textsuperscript{118} the supreme court compelled the an Indian party which has portion of the award, through it disallowed the plea of the western Co. of North America for enforcement of the award.

Law Commission of India in its Ninth report of Nov. 1978 suggested extensive amendment in Arbitration Act of 1940, taking into account commercial realities, in order to settle the conflicting decisions on various points.

In Guru Nanak Foundation V. Rattan Singh and Sons\textsuperscript{119}, the supreme court said that the proceedings under Arbitration Act of 1940, have become highly technical accompanied by an unending prolixity at every stage, providing a legal trap to the unwary. The Act nearly collapsed under the pressure of gusty winds of change due to globalization. There was wide divergence and disparity in the law relating to various aspects of business contract in different countries. Such disparities create practical difficulties and legal problems in the smooth and swift flow of international business. With a view to promote uniformity at least on fundamental principles in various business laws, the UNCITRAL (United Nations Commission on International Trade Law) Model law on arbitration and model rules on arbitration were drafted for international commercial arbitration.

\textsuperscript{117} AIR 1989 SC 1156
\textsuperscript{118} (1997) 1 SCC 496
\textsuperscript{119} AIR 1981 SC 2075-2076
To consolidate and amend the laws relating to arbitration international commercial arbitration and enforcement of foreign arbitral award, three statutes, namely, the Arbitration Act, 1940 the arbitration (Protocol and Convention) Act 1937 and the Foreign Awards (Recognition and Enforcement) Act 1961, have been repealed and replaced by a consolidated, comprehensive legislation in the Arbitration and conciliation Act, 1996. This legislation by and large adopts the UNCITRAL model law in it’s entirely.

The Arbitration and Conciliation Act, 1996 has two significant parts – Part I provides for any arbitration conducted in India and enforcement of award there under. Part II provides for enforcement of foreign awards.

The 1996 Act contains two unusual features that differed from UNCITRAL model law. First, while the UNCITRAL model law was designed to apply only to international commercial arbitrators. Second the 1996 Act does beyond the UNCITRAL model law in the area of minimizing judicial intervention. The changes brought about by the 1996 Act were so drastic that the entire case law built up over the previous fifty six years on arbitration was rendered superfluous. Unfortunately there was no widespread debate and understanding of the changes before such an important legislative change was enacted. The Govt. of India enacted the 1996 Act by an ordinance and then extended its life by another ordinance, before parliament eventually passed it without reference to a parliamentary committee a standard practice for important enactments.

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120 See Article 1 of UNCITRAL model law the 1996 Act applies both to international and domestic arbitrations.

121 S.K. Dholakia, Analytical Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003, ICA’s Arbitration Quarterly ICA, New Delhi, 2005 Vo. XXXIX/No. 4 at page 3

122 Sundaram Finance v. NEPC Ltd. (1999) 2 SCC 479

123 Ibid

124 Ibid
In the absence of case laws and general understanding of the Act in the context of international commercial arbitration several provisions of the 1996 Act were brought before the courts which interpreted the provision in the usual manner\textsuperscript{125}. The Law Commission of India prepared a report on the experience of the 1996 Act and suggested a number of amendments\textsuperscript{126}. Based on recommendations of the commission the government of India introduced the arbitration and conciliation (Amendment) Bill 2003. In Parliament for amending the 1996 Act\textsuperscript{127}, it has not been taken up for consideration. In the meantime Government of India, the Ministry of law and justice, constituted a committee popularly known as the Justice Saraf Committee on Arbitration to study in depth the implications of the recommendations of the law commission of India contained in its 176\textsuperscript{th} Report and the Arbitration and conciliation (Amendment) Bill, 2003. The committee submitted its report in January 2005; change is still in the process.

E] Working of Arbitration in India-

Arbitration in India is still evolving one of the objectives of the 1996 Act was to achieve the twin goal of cheap and quick resolution of disputes, but current ground realities indicate that these goals are yet to be achieved. The ground realities can be ascertained from the study and analysis of the various aspects in conducting arbitration.

1) Types of Arbitration practice

The various forms of Arbitration, such as ad hoc arbitration, institutional arbitration, specialized arbitration and statutory arbitration, are all practiced in India. However, no reliable and comprehensive data about them exist at present at the national level. There has been a gradual trend in

\textsuperscript{125} Ibid

\textsuperscript{126} 176\textsuperscript{th} Report of Law Commission of India, www.lawcommissionofindia.nic.in.

\textsuperscript{127} www.lawmin.nic.in
favour of institutional arbitration in recent times, with the realization of its several advantages over ad hoc arbitration\(^{128}\)

**a) Ad hoc Arbitration** - An Ad hoc arbitration is arbitration agreed to and arranged by the parties themselves without recourse to any institution. The proceedings are conducted and the procedures are adopted by the arbitrators as per the agreement or with the concurrence of the parties. It can be a domestic international or foreign arbitration. In case of disagreement on the appointment of an arbitrator under ad hoc arbitration cases, Section 11 of the 1996 Act empowers the Chief Justice of High Court or Chief Justice of India, as the case may be, to appoint arbitrators. The Ad hoc arbitration is specifically establishment for a particular agreement or dispute. When a disputes or difference arises between the parties in course of commercial transaction and the same could not be settled friendly by negotiation in form of conciliation or mediation in such case ad hoc arbitration may be sought by the conflicting parties.

**b) Institutional Arbitration** - In this 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.

Institutional arbitration is arbitration conducted under the rules laid down by an established arbitration organization. Such rules are meant to supplement provision of the Arbitration Acts in matters of procedure and other details the Act permit. They may provide for domestic arbitration or for international arbitration or for both and the disputes dealt with may be general or specific in character. In India, there are a number of commercial

organizations which provide a formal and institutional base to commercial arbitration and conciliation.

There are number of merchant associations which provide for in house arbitration facilities between the members of such associations and their customers. In all such cases, the purchase bills generally require the purchasers and seller to refer their disputes in respects of purchase or the mode of payment or recovery there of the sole arbitration of the association concerned.

Stock exchanges in India also provide for in house arbitration for resolution of disputes between the members and others.

For International arbitration cases in India there are many organizations providing facilities for settlement of international disputes among them, the most important are the Indian council of Arbitration (ICA), the Federation of Indian Chamber of Commerce and Industry (FICCI), the East India cotton Association Ltd. and the cotton Textiles Export Promotion Council.

Advantages of institutional arbitration over ad hoc arbitration there are a number of advantages of institutional arbitration over ad hoc arbitration in India of them are as follows:

I. In ad hoc arbitration, the procedures have to be agreed upon by the parties and the arbitrator. This requires co-operation between the parties and involves a lot of time. When a dispute is in existence, it is difficult to expect co-operation among the parties.

In Institutional arbitration, on the other hand the procedural rules are already established by the institution. Formulating rules is therefore no cause for concern. The fees are also fixed and regulated under the rules of the institution.
II. In ad hoc arbitration infrastructure facilities for conducting arbitration pose a problem and parties are often compelled to resort to hiring facilities of expensive hotels, which increase the cost of arbitration. Other problems include getting trained staff and library facilities for ready reference. In contrast, in institution Arbitration, the institution will have ready facilities to conduct arbitration trained secretarial/ administrative staff, library etc. There will be professionalism in conducting arbitration.

III. In institutional arbitration, many arbitral institutions such as the International Chamber of Commerce (ICC) have an experienced committee to scrutinize the arbitral awards. Before the award is finalized and given to the parties, the experienced panel scrutinizes it. As a result, the possibilities of the court setting aside the award is minimal because the scrutiny removes possible legal/technical flaws and defects in the award. This facility is not there in ad hoc arbitration, where the likelihood of court interference is higher.

In spite of numerous advantages of institutional arbitration over ad hoc arbitration process there is currently overwhelming tendency in India to resort to ad hoc arbitration an empirical survey will reveal that a considerable extent of litigation in the lower courts deals with challenges to awards given by ad hoc arbitration tribunal.\textsuperscript{129}

c) Statutory Arbitration-

Statutory arbitration is arbitrations conducted in accordance with the provision of certain special Acts which specifically provide for arbitration in respect of disputes arising from matter covered by those Acts. There are about 24 such central acts. Among them are the cantonment Act, 1924, the Electricity Act, 1910, the Land Acquisition Act 1894, the Railways Act, 1924.

1890, the Co-operative Societies Act, 1912, the Forward contract Regulation Act, 1956 and the Industrial disputes Act 1947. Likewise, many state Acts also provide for arbitration in respect of disputes covered by those Acts. It is mandatory arbitration which is imposed on the parties by operation of laws in such a case the parties have no option as such but to abide by the laws of land.

d) Domestic Arbitration-

Domestic arbitration takes place in India when the arbitration proceedings, the subject matter of the contract and the merits of all the disputes are all governed by Indian law, or when the cause of action for the dispute arises wholly in India, or where the parties are otherwise subject to Indian Jurisdiction.

e) International and Foreign Arbitration-

An arbitration in which any party belongs to other than India and the dispute is to be settled in India is termed as International Arbitration. The Arbitration and conciliation Act 1996 defines international commercial arbitration under clause (f) of sub-section (1) of Section 2, as arbitration relating to dispute arising out of legal relationship, whether contractual or not considered as commercial under the laws in force in India and where at least one of the parties is:

- An individual who is a national of or habitually resident in or any country other than in India, or
- A corporate body which is incorporated in any country other them India or
- A company or an association or a body of individual whose central management and court is exercised in any country other than India or
• The government of foreign country.

It is clear from above definition that international arbitration can take place in India in accordance with the same procedure as domestic arbitration. Foreign arbitration is an arbitration conducted in a place outside India and the resulting award is sought to be enforced as foreign award; in India.\textsuperscript{130}

2) Arbitration Practice across Industries

Generally speaking, there is no marked difference in arbitration practice from one industry to another in India; unlike in Europe where the manner of settling disputes has substantially evolved separately across various industry sectors, but the exception to this general rule is the Construction and Information Technology (IT) Industry. Due to technical complexities and long term nature of relationship between parties in these industries, arbitration in construction and IT industry dispute is quite different from other industries.

The construction/infrastructure is one of the fastest growing sectors of the Indian economy, and millions of dollars are spent in construction related disputes. According to survey, conducted in 2001 by the construction Industry Development Council, the amount of capital blocked in construction sector disputes was over INR-540,000 million\textsuperscript{131}. Ad hoc arbitration is still very popular in the construction industry. Over past decades in India there has been a great deal of construction activity both in the public and private sectors. Central and State Government; State instrumentalities; and public and private companies have all been entering into contracts with builders as part of their commercial activities. The right and obligation, privies and privileges of the respective parties are formally

\textsuperscript{130} Dr. M. V. Parnajape, Arbitration and alternative dispute resolution, 3\textsuperscript{rd} edition, Central law Agency, p 16

\textsuperscript{131} The Economic Times, April 10, 2008
written. The central and state governments and instrumentalities of the states, as well as private corporations, have their own standard terms of contract catering to their individual needs. Often these contracts provide for remedial measures to meet various contingencies. Despite these contracts, differences often arise between the parties. To meet the situations, arbitration clauses are provided.

IT projects tend to be complex and characterized by a network of responsibilities shared between parties that are dedicated to carry through a technology related, long-term relationship. Thus, IT disputes typically center on contractual or intellectual property law issues.

The Indian Council of Arbitration (ICA), an apex arbitral institution in the country, has started process of identifying and training specialized arbitration for dispute connected with IT industry.

3) Fast Track Arbitrations

Establishment of fast track arbitrations is a recent trend aimed at achieving timely results, thereby lowering the costs and difficulties associated with traditional arbitration. It is a time bound arbitration, with stricter rules of procedure, and reduced span of time makes it more cost effective. Fast track arbitration is required in a number of disputes such as infringement of patents, trademarks, destruction of evidence marketing of products in violation of patent/trademark laws, construction disputes in time bound projects, licensing contracts and franchises where urgent decision are required.

The Indian Council of Arbitration (ICA) has pioneered the concept of fast track arbitration in India. Under the rules of ICA, before commencement of the arbitration proceedings, parties may request the arbitral tribunal to settle disputes within a fixed timeframe of three to six month or any other time agreed upon by the parties. The 1996 Act has built
in provisions for fast track arbitration under section 11(2) 11(6) 13(1) 13(4) 23(3), 24(1), 25 and 29 of the Act\textsuperscript{132}. The Arbitration and conciliation (Amendment) Act, 2003, proposes to introduce a single member fast track arbitral tribunal, wherein filing of pleadings and evidence will be on fast track basis, so as to pronounce the award within six months.

4) **Disputes which can be referred to Arbitration**

   Almost all types of civil disputes can be settled by arbitration for instance-Disputes related to Business, Contract, Construction, Commercial recoveries, Family disputes, Property and insurance disputes.

5) **Disputes which cannot be referred to Arbitration are as follows**

   Matrimonial matters like divorce or maintenance, Criminal offences, Insolvency matters like declaring a person as insolvent, Dissolution or winding up to a company, Disputes outside the purview of contract, Questions as to genuineness or authenticity of a will

F] **Advantages of Arbitration as a mode of ADR**

   There are number of advantages of arbitration than court redressal mechanism

1. **Freedom of Choice of Decision Maker**

   Parties to Arbitration are free to choose a technical person as arbitrator in case of disputes involving questions of technical nature.

2. **Procedural Flexibility**

   Arbitration proceedings can be segmented, streamlined or simplified according to change of circumstances.

\textsuperscript{132} Indu Malhotra, ‘Fast Track Arbitration’, ICA’s Arbitration Quarterly, ICA, 2006 Vol. XLI /No. 1 at p.8
3. **Efficiency**

Hearings of an arbitration proceeding are finished sooner than court proceedings. In addition Arbitration proceedings are of a shorter length and preparation work is less demanding.

4. **Confidentiality**

Arbitration being a private process offers confidentiality which generally not available in court proceedings. Arbitration hearings are confidential private meeting in which attendance of media a member of public are not allowed and even decision of such proceedings is not published.

5. **Convenience**

In arbitration, the parties have the freedom to choose the applicable law, a neutral party to act as arbitrator in their dispute on such days and places convenient to parties, arbitrators and witnesses.

6. **Expert in the Subject**

In arbitration, the parties can choose an arbitrator, who is knowledgeable about the subject matter or expert in it. For example in a construction dispute, parties may appoint a person as an arbitration having vast knowledge in construction.

7. **Finality**

There is no right of appeal in arbitration even though the court has power to remit or set aside the arbitration, more or less the award of an arbitrator in final\(^\text{133}\).

### G) Extent of Judicial Intervention under the 1996 Act

One of the main objectives of the 1996 Act was to give more powers to the arbitrators and reduce the supervisory role of the court in the arbitral

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\(^{133}\) Madhusudan Sharay, Arbitration and Conciliation Act, with Alternative Dispute Resolution, 2\(^{nd}\) edition., 2008, Allahabad agency, p. 58
In effect, judicial intervention is common under the 1996 Act. Such intervention takes the form of determination in case of challenge of awards. Such a propensity to exercise their authority to intervene may be attributable to their skepticism that arbitration is not effective at resolving disputes or the judges’ vested concern that their jurisdiction will be adversely eroded. The decision of the Supreme Court in the Saw Pipes case exemplifies this inclination, and threatens to hamper arbitration’s progress toward speed and efficiency. In this case, the Supreme Court expanded the scope of ‘public policy’ from the earlier ratio laid down by a three bench judgment in the Renusagar case and that one of the grounds for challenge of an award under the 1996 Act is violation of ‘public policy’. The Renusagar case, while respecting the opinion that the definition of ‘public policy’ ought not to be widened in the interest of society, has laid down three conditions for setting aside an award which are a violation of (a) the fundamental policy of Indian law; (b) the interest of India; and (c) justice of morality.

In the Saw Pipes case, the scope of public policy was widened to include challenge of award when such an award is patently illegal. Some arbitrators have viewed the judgment in the Saw Pipes case with concern. The main attack on the judgment is that it sets the clock back to the same position that existed before the 1996 Act, and it increases the scope of judicial intervention in challenging arbitral awards. It was also criticized on the grounds that giving a wider meaning to the term ‘public policy’ was

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135 Pramod Nair, ‘Quo vadis arbitration in India?’ Business Line, October 19, 2006. Pramod Nair is a Visiting Fellow at the Lauterpatch Research Centre for International Law, University of Cambridge.


137 1969 (2) SCC 554.

wrong, when the trend in international arbitrations is to reduce the scope and extent of ‘public policy’. Jurists and experts have opined that unless the courts themselves decide not to interfere, the Arbitration and Conciliation Act, 1996, would meet the same fate as the 1940 Act. The, when enacting the 1996 Act and following the UNICITRAL Model Law, did not introduce ‘patent illegality’ as a ground for setting aside an award. The Supreme Court cannot introduce the same through the concept of ‘public policy of India.’ After the Saw Pipes case, some judicial decisions have tried to reign the effect of Saw Pipes. One instance of this is the Supreme Court decision in the case of McDermott International Inc. vs. Burn Standard Co. Ltd, where the court somewhat read down Saw Pipes. In respect of the Saw Pipes case, the Supreme Court held:

“We are not unmindful that the decision of this Court in ONGC case had visited considerable adverse comments but the correctness or otherwise of the said decision is not in question before us. It is only for a larger Bench to consider the correctness or otherwise of the said decision. The said decision is binding on us. The said decision has been followed in a large number of cases.”

A few High Court decisions have also sought to give a narrow reading of the Saw Pipes case on the ground that a literal construction of the judgment would expand judicial review beyond all limitations contained

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140 Address by Justice Santosh N Hedge, Judge, Supreme Court of India, on Indian Council of Arbitration’s National Conference on ‘Arbitrating Commercial and Construction Contracts’ held at Hotel Inter Continental, New Delhi, December 6, 2003.

141 Ibid.


143 2006(11) SCC 181 at p. 208.
not only under the 1996 Act, but even under the 1940 Act\textsuperscript{144}. In the case of \textit{Indian Oil Corporation Ltd.} and \textit{Langkawi Shipping Ltd.}\textsuperscript{145}, the court held that to accept a literal construction on \textit{Saw Pipes} would be to radically alter the statutorily and judicially circumscribed limits to the court’s jurisdiction to interfere with arbitration awards. Following the aforesaid Bombay High Court decision, the High Court of Gauhati held in \textit{Dealim Industrial Co. vs. Numaligarh Refinery Ltd.}\textsuperscript{146} held that the \textit{ONGC vs. Saw Pipes},\textsuperscript{147} does not intend to efface the time-tested legal propositions and judicial tenets on arbitration and thus ought not to be construed away from the well-established trend set by a string of decisions preceding the same.

Section 34 of the 1996 Act makes a mere challenge to an award operate as an automatic stay even without an order of the court, thereby encouraging many parties to file petitions under that provision to delay the execution proceedings. However, under the 1940 Act, there was no such automatic stay. There is an amendment proposed by the Law Ministry in the Arbitration and Conciliation (Amendment) Bill, 2003, which has not been taken up for consideration by the Parliament.

The 1996 Act narrows down the scope of grounds available for challenging awards as compared to the earlier 1940 Act. However, with gradual judicial interpretation, the scope of appeal against an award under the 1996 Act has become broader particularly after the decision of the \textit{ONGC case}\textsuperscript{148}, which has widened the ambit of ‘public policy.’ Violation of public policy of India is one of the grounds for challenge of an award.

\begin{footnotes}
\item[144] supra, note 140
\item[145] 2004 (3) Arb LR 568.
\item[146] Arbitration Appeal No. 1 of 2002 (August 24, 2006).
\item[147] Supra, note 135
\item[148] (2003) 5 SCC 705.
\end{footnotes}
under the 1996 Act\textsuperscript{149}. The ONGC case, undoubtedly, invited substantial criticism from the legal circles and fraternity. While some large corporations and bodies welcomed the decision, most of the members of the legal profession disagreed and stated that the 1996 Act will in effect become ‘old wine in new bottle’, because under the 1940 Act, it was easy to set aside awards only on the basis of public policy.

\textbf{H] Enforcement of Awards}

One of the factors for determining arbitration as an effective legal institution is the efficiency and efficacy of its award enforcement regime. Under Section 36 of the 1996 Act, an arbitral award is enforceable as a decree of the court, and could be executed like a decree in a suit under the provisions of the Civil Procedure Code, 1908\textsuperscript{150}.

An award resulting from an international commercial arbitration is enforced according to the international treaties and conventions, which stipulate the recognition and enforcement of arbitral awards\textsuperscript{151}.

Enforcement of foreign awards in India is governed by the New York Convention 1958 and the Geneva Convention 1927, which are incorporated in Chapter II, Part I and Part II, respectively, in the 1996 Act\textsuperscript{152}. The provisions of enforcement are the same under the 1940 Act and the 1996 Act. Any party interested in foreign awards must apply in writing to a court having jurisdiction over the subject matter of the award. The

\textsuperscript{149} Section 34(2) (b) (ii) of the Arbitration and Conciliation Act, 1996.

\textsuperscript{150} Section 36 of the Arbitration and Conciliation Act, 1996 – Enforcement - Where 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, 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.


\textsuperscript{152} Chapter I, Part II of the Arbitration and Conciliation Act, 1996, deals with enforcement of foreign awards pursuant to New York Convention, while Chapter II, Part II of the said Act deals with foreign awards pursuant to the Geneva Convention.
decree holder must file the award, the agreement on which it is based and evidence to establish that the award comes under the category of foreign award under the 1996 Act.\textsuperscript{153}

The rate of enforcement of arbitral awards is high. Under the 1996 Act, the Supreme Court of India declined to enforce or recognize awards in only two out of twentyfour cases relating to enforcement of arbitral awards (Section 36 of the 1996 Act) that came before it. Both cases involved Indian parties and Indian law.\textsuperscript{154}

I] A Critical Analysis of the Success of Arbitration in India

The 1996 Act was brought on the statute book as the earlier law, the 1940 Act, did not live up to the aspirations of the people of India in general, and the business community in particular.\textsuperscript{155} Even though the 1996 Act was enacted to plug the loopholes of 1940 Act, the arbitral system that evolved under it led to its failure. The main purpose of the Act was to provide a speedy and efficacious dispute resolution mechanism to the existing judicial system, marred with inordinate delays and backlog of cases. But an analysis of the arbitration system, as practiced under the 1996 Act, reveals that it failed to achieve its desired objectives.

A. Lot of international pressure to enact act of 1996:

There was lot of international pressure upon the Indian economy due to globalization, liberalization and privatization in the 21\textsuperscript{st} century. As a result of this many multinational companies has entered into Indian market. They do not want to be part of Indian judicial system. They do not want

\textsuperscript{153} Sections 37 and 56 of the Arbitration and Conciliation Act, 1996, contain provisions relating to the documents to be produced before a Court executing a foreign award.


controls or laws which which would control their contracts and activities. They do not want any interference from the state. They think that there are inordinate delays if litigation is taken to the Indian courts. They want to settle their dispute by private arbitrators. As a result of all this there was a lot of pressure on government of India to pass laws facilitating quick dispute resolutions as a result the Arbitration and conciliation Act, 1996 was enacted.

B. No need to take separate proceeding for enforcement of foreign award:

In M/s Furest Day Lawson Ltd. V. Jindal Exports Ltd.,156 Shivaraj V. Patil, Judge supreme court of India, has observed that there is no need to take separate proceeding for enfocement of foreign award. Once the award is declared by the arbitrator the court is only the executor and nothing else it no jurisdiction to look into the award. Under the old act after making award and prior to execution, there was a procedure for filing and making an award rule of court i.e. decree under the new act of 1996, the foreign award is already stamped as the decree. Practically speaking a decision taken by foreign arbitrator will be binding upon the Indian party and an Indian has no right to raise voice against it due to fear of future trade and commerce.

c. Delay:

Arbitration in India is rampant with delays that hamper the efficient dispensation of dispute resolution. Though the 1996 Act confers greater autonomy on arbitrators and insulates them from judicial interference, it does not fix any time period for completion of proceedings. This is a departure from the 1940 Act, which fixed the time period for completion of arbitration proceedings. The time frame for completion of the arbitration proceedings was done away with, on the presumption that the root cause of

156 AIR 2001 SC 2293 at 2294, 2302 and 2303
delays in arbitration is judicial interference, and that granting greater autonomy to the arbitrators would solve the problem.

However, the reality is quite different. Arbitrators, who are mostly retired judges, usually treat the arbitration proceedings in the same manner as traditional litigations, and are willing to give long and frequent adjournments, as and when sought by the parties.\textsuperscript{157}

Although the scope of judicial intervention under the 1996 Act has been curtailed to a great extent, courts through judicial interpretation have widened the scope of judicial review, resulting in the admission of large number of cases that ought to be dismissed at the first instance. Moreover, the parties usually approach arbitration with a similar mindset as for litigation, with the result that awards invariably end up in courts, increasing the timeframe for resolution of the disputes. Parties also abuse the existing provision that allows ‘automatic stay’ of the execution of the awards on mere filing of an application for challenge of the awards. So, the objective of arbitration as a mechanism for speedy resolution of disputes gets obstructed due to obtrusive delays.

\textbf{D. Expensive :}

Arbitration is generally considered cheaper over traditional litigation, and is one of the reasons for parties to resort to it. However, the ground realities show that arbitration in India, particularly ad hoc arbitration, is becoming quite expensive vis-à-vis traditional litigation. A cost analysis on arbitration vis-à-vis litigation will throw light on the higher cost of arbitration over litigation. This is a crucial factor which weighs against developing a cost effective quality arbitration practice in India. The following paragraphs analyze the cost of arbitration and litigation.

\textsuperscript{157} Supra, note 153
Arbitration costs incurred by the parties may include the arbitrator’s fees, rent for arbitration venues, administrative/clerical expenses, and professional fees for the representatives of the parties (which may include lawyers and expert witnesses). The sum of these fees may differ significantly between ad hoc and institutional arbitrations. There is no regulated fee structure for arbitrators in an ad hoc arbitration. The arbitrator’s fees are decided by the arbitrator with the consent of the parties. The fee varies approximately from INR 1000.00 to INR 50,000.00 per hearing for an arbitrator, depending upon the professional standing of the arbitrator and the size of the claim. The number of hearings required and the cost of the arbitral venue vary widely. In contrast, most institutional arbitration bodies in India, such as the Indian Council of Arbitration (ICA) or the Construction Industry Arbitration Council (CIAC), have their own schedules for arbitrators’ fees and administrative fees, based on claim amounts. They also charge a nominal non-refundable registration fee on the basis of the claim amount. For example, the ICA’s arbitrators’ fees vary from INR 30,000.00 to INR 315,000.00 for claim amounts up to INR 10,000,000.00, while administrative fees vary from INR 15,000.00 to INR 160,000.00 for claim amounts up to INR 10,000,000.00. For the CIAC, the arbitrators’ fees varies from INR 5,000.00 to INR 260,000.00 per arbitrator for claim amounts up to INR 100,000,000.00, and administrative fees varies from INR 2,750.00 to INR 62,000.00 for claim amounts up to INR 100,000,000.00.\(^{158}\)

The cost involved in court proceedings is limited to lawyers’ fees and court fees, which are calculated on the basis of claim amount or the value of the suit. In case of writ petitions or first appeals, court fees are fixed and are very nominal. High Courts across India have their own schedule, which fixes the rates for court fees. The only recurring

\(^{158}\) Source – www.ficci.in
expenditure involved is the professional fees paid to the lawyers. It may vary from a meager INR 500.00 per appearance before a district court in a small town to INR 200000.00 per appearance by senior advocates in the Supreme Court of India.

Although arbitration is considered to be a cheaper mechanism for the settlement of disputes, there is a growing concern in India that arbitration has become a costly affair due to the high fee of the arbitrators and liberal adjournments\textsuperscript{159}. This is particularly true for ad hoc arbitrations. Arbitration is more cost-effective than litigation only if the number of arbitration proceedings is limited. The prevalent procedure before the arbitrators is as follows - at the first hearing, the claimant is directed to file his claim statement and documents in support thereof; at the second hearing, the opposing parties are directed to file their reply and documents; at the third hearing, the claimant files his rejoinder. At each of these stages, there are usually at least two or three adjournments. Sometimes, applications for interim directions are also filed by either party, which increases the number of arbitration sittings for deciding such interim applications. The first occasion for considering any question of jurisdiction does not normally arise until the arbitral tribunal has issued at least six adjournments\textsuperscript{160}. If the respondent is the State or a public sector undertaking, the number of adjournments is higher as it takes more time for these parties in internally finalizing pleadings and documents that are to be filed before the arbitral tribunal. Parties pay a fee to the arbitrators for each hearing and thus spend a substantial amount of money\textsuperscript{161}. This is in addition to the other costs involved. In contrast, law suits, if admitted, are certainly cheaper, even

\textsuperscript{159} Samar Bhoite, ‘Mediation, a process less practiced in India in Business Disputes Resolution’ published in the website www.manupatra.com.

\textsuperscript{160} Law Commission of India, 176th Report on Arbitration and Conciliation (Amendment) Bill, 2001 at p 68.

\textsuperscript{161} Ibid
though they take substantial amounts of time to resolve. This is because lawyers’ fees are the only major expenditure in litigation, and lawyers usually charge the same, if not more, as per litigation hearing.

Due to these reasons, arbitration is not progressing in the manner it should in order to keep pace with the increase in commercial disputes due to the inflow of international as well as commercial transactions.

3.3.5.2 Conciliation

Though arbitration is preferred to court system generally in contractual disputes of commercial nature, it is useful to induce the litigants to conciliation in civil matters brought before a court and in industrial disputes before they are referred for adjudication.

Conciliation is an alternative dispute resolution (ADR) process whereby the parties to a dispute including future interest dispute agree to utilize the service of conciliator, who then meets with the parties separately in an attempt to resolve their differences.\(^\text{162}\)

Conciliation received statutory recognition in the code of civil procedure, 1908 (order XXXIIA rule 3), the Industrial Disputes Acts, 1947, (Section 12), and the Hindu Marriage Act, 1955. Arbitration and conciliation Act, 1996, which in essence is similar to the American concept of court annexed mediation.

A] Meaning and Definitions

Conciliation as defined in Halsbury’s Law of England, “is a process of persuading parties to reach an agreement, and is plainly not arbitration nor is the chairman of conciliation Board an arbitrator”.\(^\text{163}\)

\(^{162}\) www.wikipedia.com

\(^{163}\) Wharton’s Law Lexicon,14\(^{th}\) edition,1937,p. 227
Conciliation is a non-binding procedure in which an impartial third party, the conciliator, assists the parties to a dispute in reaching a mutually agreed settlement of the disputes.

Conciliation as a method of alternative disputes resolution has been quite instrumental in relieving congestion, particularly at trial court level; in addition it has been quite successful in reducing the inflow of cases in various courts.

B] **Historical and Legislative Recognition:**

The system of conciliation was for the first time tried in Japan, France and Norway. In India, the idea of conciliation was evolved on an experimental basis by the High Court of Himachal Pradesh. In 1984, faced with the problem of mounting arrears in subordinate courts, the Himachal Pradesh High Court evolved a project for disposal of pending cases by conciliation, insisting on pre-trial conciliation in fresh cases. The success of the Himachal experiments was widely welcomed.

The Law Commission of India in their 77th and 131st Reports, the conference of Chief Ministers and Chief Justice in their resolution of December, 1993 and the Calcutta Resolution of the Law Ministers and Law Secretaries Meeting in 1994 commended other states to follow the Himachal Project in their subordinate courts.

The success of Himachal, experiment of disputes resolution by conciliation has given a new dimension to the concept of conciliation instead of the disputing parties willing coming together with the aims of arriving at a mutually agreeable settlement of their disputes with the assistance of a neutral third party mutually chosen, the conciliation on Himachal pattern is a court induced conciliation, making it mandatory for
the parties to attempt a conciliation for settlement of their disputes and approach the court if conciliation fails.\textsuperscript{164}

Conciliation is recognized by law as one of the best methods of dispute resolution and provides for it under various statutes. The Code of Civil Procedure, 1908 under O.32 A provides for conciliation between the parties. Order XXXII A of the code provides for a judge in certain matters relating to the family, to make efforts to settle the dispute amicably and adjourn the proceedings to enable the parties to reach a settlement. Now, Section 89 of the Code of Civil procedure provides a strong base for sponsoring the conciliation process with the support of a pro-active judge, who finds the conciliators and direct the parties to them, as a matter of statutory obligation.

Section 4(1), 4(2) of the Industrial Disputes Act, 1947 deals with appointment of conciliation officer and his geographical area of jurisdiction. Section 2 (d) and (c) refers to the conciliation officer and proceedings, Section 2 (p) talks about settlement. Section 11 deals with procedure and power of conciliation officers, boards, courts and tribunals. Section 23, prohibits strikes and lockouts during the pendency of the conciliation proceedings before the board and seven days after the conclusion of such proceedings. Strikes commenced during such pendency and without notice is treated as illegal strike.\textsuperscript{165}

Under Hindu Marriage Act, 1955, the approach towards family disputes is different from ordinary civil cases. Conciliation is preferred as the first resort by the courts. Under section 23(2) of the act, provides that before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do

\textsuperscript{164} Madhabhush Sridhar, Alternative Dispute resolution, negotiation and mediation, First edition, Lexis Nexis Butterworths, Wadhava Publication, Nagpur, page. 187

consistently with the nature and circumstances of the case, to make every endeavor to bring about a reconciliation between the parties. However reconciliation cannot be resolved to when the relief of divorce is claimed based on grounds of conversion, unsound mind, virulent disease, venereal disease, renouncing the world by entering religious order, missing for seven years. These grounds are irreconcilable as per provise under section 23(2) of the Act. Also section 23(3) provides that for the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper to do so, adjourn the proceedings for a reasonable period not exceeding fifteen days and after the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person with directions to report to the court as to whether reconciliation can be and has been effected and the court shall in disposing of the proceeding have due regard to the report.

The fine fillip came from the statutory recognition accorded to conciliation in the recent Arbitration and Conciliation Act, 1996 which lays down for the first time a well structured law of conciliation. Based on UNCITRAL conciliation Rules the new law has the advantage of universal familiarity and can be used for settlement of domestic disputes as well as international commercial disputes. Part III of the Act deals with conciliation which includes section 61 to 81 which deals with commencement of conciliation proceeding appointment between conciliation and parties, confidentiality, termination of conciliation proceedings, settlement agreement etc.

166 Prof. G.C.V. Subba Rao, Family law in India, revised by T.V. Subba rao, Dr. Vijendar Kumar, 9th edition., S. Gogia and Co., p.217
C) Conciliation Rules - (Pl. See Appendix- F)

a. Conciliation Process - As already stated, conciliation is a nonbinding procedure in which an impartial third party, the conciliator, assists the parties to a dispute in reaching a mutually agreed settlement of the dispute; this is in essence similar to the American concept of court annexed mediation. However, there is no well structured process backed by statutory sanction. Thus, conciliation under CPC (O.XXXIIA r.3), In Industrial disputes Act. (S.12), Hindu Marriage Act 1955 (S.23) and Arbitration and Conciliation Act 1996 (Part III) etc. Statutes could not achieve same degree of popularity as that in USA.

b. Disputes which can be settled by conciliation - Any disputes which has arisen or may arise between the parties in respect of the defined legal relationship, whether contractual or not can be settled by conciliation. Where the parties agree to seek an amicable settlement of that dispute by conciliation except where a particular mode of settlement is prescribed by or under the law.

c. Recourse to Conciliation - Conciliation is a procedure mutually agreed to by the parties. Recourse to this procedure can be made by entering into an agreement for seeking an amicable settlement of the dispute by conciliation, even where there is no agreement between the parties, a party desiring conciliation may send to the other party a written invitation to conciliate and the other party accepts the invitation to conciliate.

d. Number of Conciliator - There is one conciliation, but the parties have freedom to agree that there should be two or three conciliators.

e. Appointment of Conciliators - The Conciliators may be appointed by the parties themselves or each party may appoint one conciliator and may mutually agree on the third conciliator or the parties may enlist the
assistance of a suitable institution or person in connection with the appointment of conciliators.

f. **Role of Conciliator** - The Conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their disputes. He is guided by the principle of objectivity fairness and justice.

The conciliator after the appointment calls both the parties to give a written summary of their respective cases with relevant documents. After that he holds a joint meeting with the both parties. Thereafter, he holds private meetings with each party separately to further clarify its case and to discuss the merits of case guiding the party in respect of legal position and the requirement of his claims. In every meeting he tries to bring the parties closer to an agreement. Any information he received in proceeding is required to be kept confidential. Sometimes he transmits the crux of the matter to the opposite party for an explanation but if the party chosen, they can instruct him to not to disclose the information. After several rounds of such separate meeting if the conciliator is of the view that there is no scope for settlement, the conciliator terminates the proceeding. When the parties agree to settle their disputes, conciliator holds a final joint sitting for drawing up and signing a settlement by parties once the settlement agreement is singed it is final and binding on the parties.

D] **Conciliation V. Arbitration**

A comparison of conciliation and arbitration sought to be made to highlight the situations in which conciliation would be preferred to arbitration. Conciliation is differed from arbitration and hence is better suited in certain situations\(^1\).

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1) Arbitration works as a corollary to the judicial process. In brief, two parties submit their disputes to arbitration; arbitration decides the case on the basis of facts, issues and evidence presented. Decision of arbitrator is binding upon the parties as if it is decree of any court. On the other hand in conciliation the disputants prepare statement containing the issue to be addressed conciliator works towards settlement agreement by negotiating between them.

2) Arbitration necessitates attorneys, a tribunal, presentation of facts, appraisal of evidence and a trial which is bound by code of civil procedure conciliator is not bound by any legal formality. The conciliator is expected to conduct the proceedings keeping in mind the principles of objectivity, fairness, justice and the circumstances of the case, wishes expressed by the parties and need for speedy settlement arbitration is more of a power play which resulted in win-lose situation. Conciliation tries to provide a win-win situation to both the parties.

3) In arbitration when both the parties are facing each other a lot of confidential information tends to get disclosed. Some of the trade secrets of a company may get disclosed. However, in conciliation the parties do not interact during the proceeding which minimizes the risk of any undisclosed information getting revealed. A section 70 provides right of the parties against disclosure of information.

4) Decisions of parties in a relationship arising out of non legal obligation, certain decisions based on unrestricted rights of the parties affecting relationship between them, Minor breaches of legal obligations that would cause a loss of faith between the
contracting parties which affect continuing relationship between the are better dealt with by conciliation rather than arbitration.

5) Conciliation brings a finality that arbitration sometimes does not.

E] Conciliation in Lok Adalat:-

Conciliation has been successful in India through a system that has become popular as Lok Adalat. There were initially ad hoc bodies composed of eminent persons, lawyers, judges, social activists, government officials who would endeavor to help the parties in process to reach a settlement.¹⁶⁸

F] Advantages of Conciliation Process:-

Conciliation is becoming popular as an alternative dispute resolution mechanism due to its obvious advantages-

1) Settlement of dispute by mutual compromise envisaged by conciliation which relives parties from heavy financial expenditure from years to year along with tension and bitterness.

2) It offers flexible alternative for a wide variety of disputes, small as well as large.

3) It reserves the right of the parties to withdraw from conciliation without prejudice to their legal position inter se at any stage of proceedings.

4) It is committed to maintenance of confidentiality throughout the proceedings and thereafter, of the dispute, the information

exchanges, the offer and counter offers of solution made and settlement arrived at.

5) It preserves the continued relationship between the parties even after the settlement. For instance, disputes arising out of construction contracts, family property, family relations or disputes among members of any business or other organization is best resolved through conciliation\textsuperscript{169}.

G] Limitations of conciliation

Though conciliation has been proved to be beneficial mode of alternative dispute resolution system, yet certain aspects of the system demand an overhaul.

1) Once litigation starts there will rarely be negotiations, as litigants have already invested some money, time and not willing to give up their chance of winning.

2) Lawyer’s of both the parties who charge their fees on the basis of their appearance and intelligence, would have no incentive for considering any possible compromise.

3) Mental attitude of the parties i.e. to start the conciliation there is first requirement of the parties assent to enter into conciliation process.

3.3.5.3 Mediation

Mediation is basically negotiations carried out with the assistance of a neutral third party; however recommendations of a mediator are not binding. In ultimate analysis the concept of mediation is based on all innate sense of decency and an acceptance of shared values in the community,

\textsuperscript{169} Dr. Sr Myneni, Arbitration, Conciliation and alternative dispute resolution system, New edition, 2004, Asia Law House, p 237.
even as they are imperiled as a result of the conflict. The basic underlying motive of mediation is to provide the parties with an opportunity to negotiate, converse and explore options aided by a neutral third party, the mediator, to exhaustively determine if settlement is possible. It is an informal process in which a trained mediator assists the parties to reach a negotiated settlement. He does not decide who is right or wrong and has not authority to impose a settlement on the parties.

A] Meaning and Definition

1) According to the Oxford English Dictionary mediation, the action of mediating between parties at variance, intercession on behalf of another.

2) According to Black’s Law Dictionary mediation a private informal dispute resolution process in which a neutral third party, the mediator helps disputing parties to reach an agreement the mediator has no power to impose a decision on the parties.

3) Christopher Moore defines mediation as under “The intervention into a dispute of negotiation by an acceptable impartial and neutral third party who has no authoritative decision making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.”

4) Mediation is a facilitative process in which disputing parties engage the assistance of an impartial third party, the mediator,

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173 Christopher Moore; The Mediation Process Practical Strategies for Resolving Conflict, 1987
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 and skills to help than to negotiate an agreed resolution of their dispute without adjudication.\(^{174}\)

5) Mediation is 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.\(^{175}\)

From above definitions it could be stated that mediation is a facilitative process in which “dispute 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. Mediation is a process in which a trained facilitator assists disputing parties in communicating their positions on issues and explore possible solutions. The mediator does not render any decision and cannot require the parties to agree to any issue. Instead, he or she facilitates the exchange of information and settlement alternatives between the parties. Mediation is characterized by a business-like but cooperative climate that sets the stage for constructive communication in the future.

The mediator contributes to the settlement process in a variety of ways. Perhaps most important, the mediator establishes and enforces procedures that are fair and even-handed, and that allow all sides the opportunity to be heard. Mediation also provides an opportunity to express emotions or frustrations that may be thwarting negotiations and to address these underlying concerns in a controlled but relaxed environment.

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Throughout the proceeding the mediator acts as an agent of reality, helping parties think through their positions and ensuring that all parties fully participate in fashioning any settlement agreement. Accordingly, mediation is used extensively in family disputes, particularly in those involving child custody issues. It is also used in business disputes and other cases involving ongoing relationships.

Dispute resolution can be attempted through persuasion, consensus building, voting, negotiation, litigation etc. Thus, mediation is only one of many forms of dispute resolution\textsuperscript{176}.

B) History of Mediation in India

Mediation is not something new to India. Centuries before Britishers arrived, India had utilized a system called the Panchayat system, whereby respected village elders assisted in resolving community disputes. Such traditional mediation continues to be utilized even today in villages. In Pre-British period mediation was popular among businessmen. Impartial and respected businessmen called Mahajans were requested by business association members to resolve disputes using an informal procedure which combined mediation and arbitration.

C) Legislative Recognition to mediation

Selection 89 of code of Civil Procedure 1908 provides that as a process for the settlement of disputes outside the court. Court way refer the dispute to mediation (section 89 (1) (d)) and for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed. (Section 89 (2) (d)).

According to Justice R.V. Raveendran, Judge, Supreme court of India, Mediation is erroneously defined in section 89 of the code as the

process where the court effects a compromise between the parties by following the prescribed procedure. “Judicial Settlement is erroneously defined in sec. 89 of the code as reference to third party who will assist or facilitate the parties in arriving at a settlement but the courts, lawyers or litigants have all recognized that mediation is the process where the court refers to a third party or institution, for facilitation the parties to the proceeding to arrive at a settlement. Amendment to section 89 is an urgent necessity, as otherwise “mediation” as defined would be completely different\textsuperscript{177}.

D] Civil Procedure Alternative Dispute Resolution And Mediation Rules

In Salem Bar Association Case\textsuperscript{178} the Apex court has drafted a guideline rules to be drafted by each High court for effective implementation of Alternative dispute resolution and mediation in Section 89 of the code of civil procedure, 1908 and approximately all the High Court has drafted the same. Summary of draft is as follows:

The Apex Court in its Judgment of Salem Advocates Bar Association mentioned above, directed the High Courts to take appropriate steps for making rules. The Apex Court accepted the draft rules suggested by the law commission in this behalf. Accordingly various State High Courts started taking steps for framing of rules for ADR. Most of the High Court’s accepted the Rules suggested by Law Commission. (See annexure- G) In Maharashtra also Bombay High Court accepted the draft rules suggested by the law commission with some modifications and framed the rules titled as “Civil Procedure ADR and Mediation Rules, 2006”, for Bombay High court and other subordinate court in Maharashtra State. (See annexure- H).

\textsuperscript{177} (2010) PL October 10

\textsuperscript{178} (2005) 6 SCC 344
Models of mediation

There are two distinct forms of mediation i) right based and ii) interest based mediation. In right based, the mediator looks to the rights that the disputants to resolve the dispute within those parameters. For example, in accident claims, right the court process and then use that information to help the parties to reach to an acceptable settlement. Hence, rights based approach would look to the outcome if this case were to go to court and seeks to use that ‘shadow’ to facilitate a settlement. An interest based approach would look to the needs of the parties, regardless of what a court might decide in the particular dispute for instance if there is a dispute between two partners of a small manufacturing business, one of whom has contributed the capital and other all invention.

E] Steps Process of Mediation and Conciliation

The basis of Mediation and Conciliation is negotiation. Negotiation as defined in oxford dictionary means to confer with another for an agreement. Mediation and Conciliation aims at reaching a settlement and a win win situation as against a judgment which creates a win lose situation in litigation. The steps and process of Mediation are generally as under –

1. Introduction
2. Joint Session with parties
3. Private Session with parties separately
4. Joint Session with parties

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Today with the advent of information technology online mediation has also been practiced\textsuperscript{181}. The next vital point is as to what ADR would offer to the Lawyers, the Judges and the litigant public.

5. Mediation Agreement

At the end of successful mediation, there may be a need for writing an agreement on the issues that were mediated upon. It is impossible to have standard format for agreement, in a mediation process, which is dynamic by nature

Referring to the need of inclusion of interest of the parties in a mediation agreement Michael Tsur, states: “An agreement, reflects the joint effort of all parties…the agreement will faithfully reflect the process that the parties themselves entered into.”\textsuperscript{182}

**BATANA, WATANA, MLATNA**

These words are most commonly used and are very effective techniques of Mediation and conciliation. They signify the following :-

- **BATANA**: Best Alternative To A Negotiated Agreement
- **WATNA**: Worst Alternative To A Negotiated Agreement
- **MLATNA**: Most Likely Alternative To A Negotiated Agreement.

A Mediator and Conciliator tries to tell the parties the best and the worst possible outcomes of their case and therefore takes them to a most likely alternative to a negotiated / settlement or agreement.

F] Cases Which Cannot Be Decided By Mediation:-

Criminal cases, cases involving public interest, cases affecting a large number of persons matters relating to taxation (direct an indirect) and


administrative law have to be decided by court by adjudicatory process. Even among civil litigations cases involving fraud, forgery, coercion, undue influence, cases where a judicial declaration is necessary as, for instance-Grant of probate letters of administration, representative suits which require declaration against the world at large and election disputes have to be necessarily decided through adjudicatory process by courts only.

G] Cases Which Can Be Decided Through Mediation\textsuperscript{183}

I) Cases relating to commerce and contracts, which include:
   a) disputes between supplier and customers,
   b) disputes arising out of contracts,
   c) disputes relating to specific performance,
   d) disputes between bankers and customers,
   e) disputes between developers/builders and customers,
   f) disputes between landlords and tenants, and licensors and licencees,
   g) disputes between insure and insured.

II) All cases arising from strained or sourced personal relationships, including:
   a. disputes relating to partition, division among family members, coparceners, co-owners,
   b. disputes of matrimonial causes, maintenance, custody of children,
   c. disputes relating to partnership among partners.

III) Cases where there to partnership among partners exiting relationship in spite for the parties:

a. disputes between employers and employees,

b. disputes between neighbours (easementory)

c. disputes among members of societies, associations, apartment owners, association.

IV) Consumer disputes and

V) Cases arising out of tortuous liability (negligence) claims for compensation in motor accidents/other accidents.

H] Conciliation V. Mediation

Though mediation and conciliation are the same in principle, in practice, conciliation and mediation are understood to be different processes. Conciliation is used as synonym for mediation, though there is a slight difference between them.

According to one view where the person facilitation the settlement merely facilitated the disputing parties to arrive at a settlement without suggesting any terms, so that the parties themselves find a solution and reconcile their differences, the process is a mediation and where the person facilitation the settlement also suggest the terms of settlement, the process becomes conciliation. Outcome of both the processes is a mutually agreed settlement, so conciliation and mediation are interchangeable expressions in other jurisdiction.

In India, however as per the provisions of Arbitration and conciliation Act, 1996 and the provisions of section 89 of the code of civil procedure the terms conciliation and mediation have different connotations. If both parties to a dispute agree to negotiate with the help of neutral third party to arrive at a settlement and appoint conciliators for that purpose, the
process is a conciliation governed by the provision of the Arbitration and Conciliation Act, 1996. Thus our parliament has made a clear distinction between conciliation and mediation. In Part III of the 1996 Act (sections 61 to 81) which deals with ‘conciliation’ there is no definition of ‘conciliation’. Nor is there any definition of ‘conciliation’ or ‘mediation’ in section 89 of the code of civil procedure 1908 (as amended by Amendment Act of 1999).

Under our laws and the UNICITRAL model the role of the mediator is not proactive and is somewhat less than the role of a conciliator, we have seen that under Part III of the Arbitration and Conciliation Act, 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.

The meanings of these words as understood in India appear to be similar to the way they are understood in U. K. While defining ‘mediation’ and ‘conciliation’ it is stated that ‘mediation’ is a way of settling disputes by a third party who helps both sides to come to an agreement, which each considers acceptable. Conciliation, it is said is 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 solution to help achieve a settlement but it is also stated that the term ‘conciliation’ is gradually falling into disuse and process which is proactive is also being
regarded as a form of mediation. This has already happened in USA and mediation is differently understood in USA.\textsuperscript{184}

I] Advantages of Mediation:

1. Mediation gives the parties ultimate control over the outcome of their dispute, which in turn lets them decide their own futures.

By choosing litigation over mediation, parties to a dispute relinquish any decision-making rights they have regarding its outcome. In the context of a divorce, this loss of control includes the parties' very futures and the manner in which they will co-parent their children after the divorce is "final". I say "final" because, given litigation's inherently hostile nature, all too often the emotional part of the divorce can and does linger for many years after a judge has signed the final decree. Litigation is frustrating. It's costly and time consuming. To make matters worse, attorneys speak a language that is unfamiliar to those outside the legal community. As vexing as all of this can be, it pales in comparison to the parties' loss of control over the ultimate outcome of their dispute. Our community is probably no different from any other . . . we have many fine judges who do their best to render fair decisions. Unfortunately, a judge or jury is going to hear only a small fraction of the "whole story" that comprises any dispute. Given the time constraints placed upon our courts, it is difficult if not impossible for any judge or jury to arrive at a decision that seems fair to the litigants. Mediation empowers the parties with the resources to make their own decisions and control their own destinies . . . instead of having it done for them by total strangers.\textsuperscript{185}

\textsuperscript{184} Supra note, 100 at 187

\textsuperscript{185} ADR practitioners guide, march 1998, Centre for democracy and governance, bearau for global progress, field support and research, US Agency for international development, Washington, D.C. 20523-3100.
2. **Mediation costs significantly less than litigation.**

   Litigation is expensive. Although the nature and complexity of the dispute controls the legal cost, it is not unusual to see five and even six figure advocate’s fees in just about any type of contested case, travelling expenses for years until final decision of court, etc. Hence, by referring the dispute to mediator may reduce the expenses of sorting out the matter.

3. **Through the use of a skilled third party neutral, the mediator, the parties have the opportunity to fully explain their positions and explore alternatives for mutual benefit.**

   Litigation constrains the parties' ability to communicate on a meaningful basis. Mediation on the other hand provides the parties with an opportunity to discuss and explore all facets of their dispute in the hope that a "win-win" result can be achieved. Although the mediation session will focus on resolving issues to the benefit of all parties concerned, the mediator only controls the process of the discussions, not the subject matter in dispute.

4. **Mediation provides an opportunity to resolve disputes in much less time than required if the courts are used.**

   It takes a long time to get to court. It is not unusual for a contested case to remain on the court's docket for many months . . . sometimes years. The mediation process is much quicker than litigation. Sessions can be scheduled on much shorter notice. The mediation process itself takes less time than litigation. Finally, the chances of a postponement are far less with mediation than with litigation.

5. **Mediation reduces the risk of future discord and endless litigation.**

   Mediation on the other hand, provides the parties with a vehicle to work together to arrive at mutually agreeable decisions . . . decisions that
will define their relationship for many years to come. In the final analysis, isn't it better to work together towards a "win-win" scenario than to abrogate your decision-making rights to a total stranger?

**J] Limitation of Mediation:-**

Mediation has its limitations. It is effective and useful only in certain types of civil litigation. It can be resorted only when the parties mutually agree.

1) Parties to the litigation have set their mind that settlement means a giving up a part of his rights or claim and showing a concession to the other side. So they are not ready for mediation.

2) The major part of the expenditure for a litigant would have been incurred when he commences the litigation by ways of court fee and lawyer’s fee and litigation does not seek any incentive for mediation. So they are man reluctant to go for mediation.

3) Some lawyers have fear in their mind that if the case is settled through mediation, they will lose the fee.

4) Lack of trained mediators in mediation process.

5) No certain procedure is prescribed by the statute for mediation.

The development of mediation in India holds enormous promise. In particular, the neutralizing communication skills and powerful bargaining strategies of facilitated negotiation can strengthen the systems capacity to bring justice to the society. Despite the demonstrable value of these techniques, however, several large obstacles block the path to mediation in India. Exposure to these facilitated negotiation processes, though spreading rapidly remains limited.
3.3.5.4 Lok Adalat

Peace is sine qua non for development. Disputes and conflicts dissipate valuable time, money and energy of the society. The courts are flooded with huge number of cases. To get out of this maze of litigation, courts and lawyer’s chambers, most of the countries encourage alternative methods of dispute resolution. India has a long tradition and history of such methods being practiced in the society at grass roots level. These are called Panchayat. There are widely used in India both for solving commercial as well as non commercial disputes.

To implement the mandate of Article 39 A of the constitution and to secure cheap and expeditious justice to all and particularly to the poor and disadvantage, the central government adopted a resolution on 26th September, 1980 to appoint a committee under the chairmanship of Justice P. N. Bhagwati of the supreme court to monitor and implement legal aid program on a uniform basis. Pursuant to this policy, the Legal Aid and Advice Boards are appointed by central government. Law commission and the Malimath committee also made recommendation in that regard. This policy was given statutory status by enactment of Legal Services Authority Act, 1987 (Act 30 of 1987). This Act inter alia introduced Lok Adalat as an alternative method of resolving disputes. However, that was purely voluntary in course of time Lok Adalat proved very successful, particularly in resolving disputes relating to motor accidents, consumer complaints, telephone bills, insurance claims, supply of power light and water etc.\(^{186}\)

With a view to remove some defects and to constitute statutory legal service authorities to monitor legal aid program this act was amended in 1995 and 2002. Now, Lok Adalat is no more voluntary. There are central

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state and District Legal Services Authority to help poor disputants to seek legal aid and to encourage disputants to have their disputes resolved by Lok Adalat, which are now permanent institutions having a presiding officer of the status of a District Judge and two members experienced in public service to give binding awards. In its endeavour to provide adequate means of dispute resolution the central government has recently amended the code of civil procedure with effect from 1-7-2002, empowering the civil courts to refer disputes either to an arbitrator, conciliator judicial settlement including Lok Adalat or mediation in case where there is more likelihood of it being settled out of court.

A] Lok Adalat:- Meaning and Concept

The Lok Adalat is an old form of adjudicating system that prevailed in ancient India and its validity has not been taken away even in modern India. The word Lok Adalat means peoples court, this system is based upon the Gandhian principles. It is one of the components of Alternative Disputes Resolution Mechanism. As Indian courts are over burdened with backing of cases and regular court decided cases involving lengthy, expensive and complex procedure, courts take years together to settle even petty cases. Lok Adalat therefore provides alternative resolution or devices for expeditious and inexpensive justice. The Lok Adalat System was introduced in India at the beginning of the 1980’s starting from state of Gujarat the Lok Adalat evolved as a means of alternative dispute resolution system.187

B] History and Evolution and Development of Lok Adalat in India

The ancient concept of settlement of dispute through mediation, negotiation or through arbitral process known as “Peoples Court Verdict” or

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decision of “Nyaya-Panch” is conceptualized and in Sitanna V. Viranna, the Privy Council affirmed the decision of Panchayat and Sir John Wallis observed that the reference to a village Panchayat of the institutionalized in the philosophy of Lok Adalat. Some People equate Lok Adalat to conciliation or mediation but it called, “Peoples Court”. It involves people who are directly or indirectly affected by dispute outs resolution. The concept of Lok Adalat was pushed back into oblivion in last few centuries before independence and particularly during the British Regime how this concept has once again, rejuvenated. This system has been deeply rooted in Indian ethos. Time honored method of deciding disputes. It avoid protracted litigation and is based on the ground realities verified in person by adjudicators and the award is fair and honest settlement of doubtful claims based on legal and moral grounds.

It is time honored method of deciding disputes. It avoids protected litigation and is based on the ground realities verified in person by adjudicators and the award is fair, hence, settlement of doubtful claims based on legal and moral grounds. The evolution of this concept was a part of the strategy to relieve heavy burden on the court with pending cases and to give relief to the litigants however in queue to get justice. Camps of Lok Adalat were started initially in Gujarat in March, 1982 at Junagarh in Gujarat the land of Mahatma Gandhi. Lok Adalats have been very successful in settlement of motor accident claim cases, matrimonial or family disputes, labour disputes relating to public service such as electricity, telephone bank recovery cases, commercial property and tenancy disputes etc.

Some statistics may give as a feeding of tremendous satisfaction and encouragement. Up to the middle of year 2004 more than 200000 Lok Adalats were conducted in whole India.

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188 AIR 1934 SC 105
189 Supra foot note - 100
Adalat have been held and therein more then 1, 63, 31, 357 cases have been settled half of which were motor accident claim cases. More than 4751 cores of rupees were distributed by way of compensation to those who had suffered accidents 66, 73, 240 person have benefited through legal aid and advice\(^{190}\).

The concept of Lok Adalat is no longer an experiment in India, but it is an effective and efficient, pioneering and palliative alternative mode of dispute resolution which is accepted as a simple, efficient, economic, informal, expeditious form of resolution of disputes. It is a hybrid or admixture of mediation, negotiation, arbitration and participation. The true basis of settlement of disputes by the Lok Adalat is the principle of mutual consent, voluntary acceptance of conciliation with the help of counselors and conciliators. It is a participative promising and potential mechanism. It alarms the society that their welfare and interest really lies arriving at amicable, immediate, consensual and peaceful settlement of the disputes.

C] Legislative Recognition to Lok Adalat

The enactment of legal Services Authorities Act, 1987 gave a statutory status to Lok Adalat, as per the constitutional mandate in Article 39 A, of the constitution of India, this act constitutes legal services authorities to provide free and competent legal services to the weaker section of the society to ensure them opportunities for securing justice and it shall not denied to any citizen by reason of economic or other disabilities.

The Legal Services Authorities Act,1987 (as amended vide Act No.37 of 2002) provides for setting up of a “Permanent Lok Adalat” which can be approached by any party to disputing involving “Public Utility Services” which have been defined in the act to include transport services

\(^{190}\) ADR workshop for court of small causes, Mumbai, on 22\(^{nd}\) September 2007, paper presented by justice B>H> Marlapalle, Judge Bombay High Court Assimilation of ADR in the activities of legal service authority page 47.
for the carriage of passengers or goods by air, road or water, postal, telegraph or telephone services, insurance service as also services in hospital or dispensary supply of power, light or water to the public, besides systems of public conservancy or sanitation. Any civil dispute with a public utility service and where the value of the property in disputes does not exceed Rupees one million, or any criminal not compounding under any laws, can be taken up in the “Permanent Lok Adalat, no party to that application can invoke jurisdiction of any court in the same dispute. Such disputes involving public utility services shall be attempted to be settled by the Permanent Lok Adalat by way of conciliation and failing that, on merit, and in doing so the Permanent Lok Adalat shall be guided by the principles of natural justice, objectivity, fair play equity and other principles of justice without being bound by the code of civil procedure and the Indian Evidence Act. Lok Adalat to secure that the operation of the legal system promotes justice on a basis of equal opportunity. Due to the statutory recognition given to Lok Adalat, it was specifically provided that the award passed by the Lok Adalat formulating the terms of compromise will have the force of decree of a court which can be executed as a civil court decree.

D] Types of Lok Adalat and its Procedure

There are following types of Lok Adalat viz.,

a) Fixed date

b) Permanent Lok adalat

The procedure followed at Lok Adalat is informal one. The Lok Adalat is presided over by a sitting or retired judicial officer as the chairman, with two other members, usually a lawyer or a social worker. Both the parties in dispute shall agree for settlement through Lok Adalat and abide by its decision.

Lok Adalat has the jurisdiction to settle by way of effecting compromise between the parties, any matter which may be pending before any court, as well as matters at prelitigative stage i.e. disputes which have not yet been formally instituted in any court of law. Such matters may be civil or criminal in nature, but any matter relating to an offence not compoundable under any laws cannot be decided by the Lok Adalat even if the parties involved therein agree to settle the same.

Lok Adalat can take cognizance of matter involving not only those persons who are entitled to avail free legal services but of all other persons also be they women, men or children and even institutions.

Any one or more of the parties to a dispute can mere by application the court where their matter may be pending or even at pre-litigative stage for such matter being taken up in the Lok Adalat, where upon the Lok Adalat Bench constituted for the purpose, shall attempt to resolve the dispute by helping the parties to arrive at an amicable solution and once it is successful in doing so, the award passed by it shall be final which has as much force as a decree of a civil court obtained after full trial.

**Advantages of Lok Adalat-**

1) Lok Adalat ensure procedural flexibility and speedy trial of dispute and there is no strict application of procedural laws like civil procedure code and evidence Act, while assessment of claims by Lok Adalat.

2) Parties to dispute can directly, through their counsel interact with the judges, which is in fact not quite possible in regular court of laws.

3) There is no court fee and even if the case is already failed in the regular court the fee paid will be refunded if the dispute is settled at the Lok Adalat.
4) Lok Adalat is a judicial body, set up for facilitating a peaceful resolution of disputes between the litigation parties. Settlements in Lok Adalats are guided by the principles of equity, justice and good conscience.

5) Where no settlement or compromise has been arrived through conciliatory methods of Lok Adalat, then the matter shall be returned to that very court which had refunded such matter to a Lok Adalat, and on such an occasion that court shall proceed to deal with such a case from the very stage which had been reached before such reference was made.

6) The Legal Services Authorities Act, 1987 has laid down that every award of the Lok Adalat shall be deemed to be equivalent to a decree of a civil court and is capable of execution through legal process. No appeal lies against the order of the Lok Adalat where as in the regular law court there is always a scope to appeal to the higher forum on the decision of the trial court which causes delay in the settlement of the dispute finally. The reason being that in a regular court, decision is that of the court but in Lok Adalat there is mutual settlement and hence no case for appeal will arise. In every respect the scheme of Lok Adalat is a boon to the litigant public where they can get their disputes settled fast and free of cost.

7) Disputes can be brought before the Lok Adalat directly instead of going to a regular court first and then to the Lok Adalat.

F) Limitation-

1) Lawyers are more reluctant to compromise the matter, for the sake of their fees which will get them final judgment of case.
2) Mental attitude of the party is that lot of time, money and energy invested in the litigation so they are not ready to give up some then rights by compromising the matter in Lok Adalat.

G) Judicial View-

The objective of the Lok Adalat is to put an end to the disputes summarily and reduce the burden of the courts. Therefore, the Lok Adalat decide the matter on consensual basis and passes order after parties have agreed on the settlement and have given consent over it. So, the award passed by Lok Adalat shall be final and no appeal shall lie from the award as per section 96 of civil procedure code, 1908.

In Panjab National Bank V. Lakshmi chand Rai, High Court held that the code of civil procedure does not provide for an appeal under section 96 against a consent decree and no appeal can be filed against award of Lok Adalat under section 96 of code of civil procedure.

In P. T. Thomas V. Thomas Job\(^{192}\) the Supreme Court held that the experiment of Lok Adalat as an alternate mode of dispute settlement has come to be accepted in India as a viable, economic, efficient and informal one.

In Jagtar Singh and another V. State of Punjab\(^{193}\) the Supreme Court has held that if there was no consent the award of the Lok Adalat is not executable and also if the parties fail to agree to get the dispute resolved through Lok Adalat the regular litigation process remains open for the contesting parties.

\(^{192}\) AIR 2005 SC 3575

The Supreme Court has also held in State of Punjab and others V. Mohinderjit Kaur\textsuperscript{194}, that “Compromise” implies some element of accommodation on each side. It is not opt, to describe it as “total surrender”. A Compromise is always bilateral and means mutual adjustment. “Settlement” is termination of legal proceeding by mutual consent. If no compromise or settlement is or could be arrived at, no order can be passed by the Lok Adalat\textsuperscript{195}

\textbf{3.3.6 INTERNATIONAL CENTRE FOR ALTERNATIVE DISPUTE RESOLUTION (ICADR)}

The ICADR was established as a Society, registered under the Societies Registration Act, 1860, for the promotion and development of Alternative Dispute Resolution (ADR) facilities and techniques. The ICADR was set up when the Arbitration and Conciliation Act, 1996 was enacted. The main objectives of the ICADR are to propagate, promote and popularise the settlement of domestic and international disputes by different modes of ADR and to establish facilities and provide administrative and other support services for holding conciliation, mediation and arbitration proceedings. It is also undertaking training/teaching in ADR and related matters and is running P.G. Diploma Courses in ADR and Family Dispute Resolution. The Government of India has been giving grants to ICADR so that a form of international standards is available for settlement of domestic and international commercial disputes. Its regional office is at Bangalore and there are number of branches of ICADR in India\textsuperscript{196}.

\textsuperscript{194} AIR SCW 552, 2005 Lab IC 852
\textsuperscript{195} State of Punjab and other v. Phulan Rani and another (AIR 2004 SC 4105)
\textsuperscript{196} www.icadr.com
OBJECTIVES OF ICADR

1. to promote studies in the field of alternative dispute resolution (ADR) and allied matters, and to promote reform in the system of settlement of disputes.

2. to undertake teaching and to provide for diffusion of knowledge of law and procedures on ADR and related matters and to award diplomas, certificates and other academic or professional distinction.

3. to impart training in ADR and related matters to those who are handling arbitration, conciliation and mediation;

4. to promote research and documentation in the field of ADR and publish books, periodicals, reports and other literature covering ADR;

5. to organize conferences, seminars and study groups on issues concerning ADR;

6. to provide facilities and administrative and other support services for holding conciliation, mediation, mini-trial and arbitration proceedings;

7. to maintain panels of appropriate persons competent and qualified to serve as arbitrators, conciliators and mediators, or willing to serve in any other specialist capacity such as experts, surveyors and investigators;

8. to cooperate with other societies, institutions and organizations, national or international, in the pursuit of all or any of the above objectives;

9. to constitute Regional Centres at convenient places in India and abroad to promote the activities of the Society;
10. to draw up and prescribe rules of the Society for different modes of ADR

3.3.7 ONLINE DISPUTE RESOLUTION

The swift growth of e-commerce and website 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 and is netizens centric. This challenging task can be achieved by the use of ODRM in India. The use of ODRM to resolve such e-commerce and website contracts disputes are crucial for building consumer confidence and permitting access to justice in an online business environment. These ODRM are not part and parcel of the traditional dispute resolution machinery popularly known as “judiciary” but is an alternative and efficacious institution known as ADRM. Thus, ADR techniques are extra-judicial in character\(^\text{197}\).

The ADR mechanism can be effectively used to settle online disputes by modifying it as per the need. It is time effective and cost efficient. It can also overcome the geographical hurdles. However, there are certain issues revolving around ADR mechanism like need for personnel with knowledge of IT, ADR and law; technical concerns; legal sanctity of proceedings; industry support etc. But these hurdles are just a passing phase. The use of ADR mechanisms for resolving online disputes is increasing day by day. A number of web-sites provide for some type of online dispute resolution method like arbitration, negotiation, mediation etc. and also certain conflict management services. These services fall into the general categories of complaint handling, negotiation, mediation and arbitration. These services will be in great demand in the future since the 1996 Act has given paramount importance to “party autonomy” by accepting the intention of

parties as a platform for dispute resolution. Thus, what law will be applicable will depend on the intention of parties. If the parties have adopted the mechanism of ODRM then it will definitely apply with necessary minor modifications. The language used in various sections of the Arbitration Act give options to the parties to opt for the procedure as per their agreement during the arbitral proceedings before the arbitrator. So if there is an agreement between the parties with regard to the procedure to be followed by the arbitrator, the arbitrator is required to follow the said procedure. However, this would not mean that in appeal parties can contend that the appellate procedure should be as per their agreement. The appellate procedure would be governed as per the statutory provisions and parties have no right to change the same. It must be noted that party autonomy presupposes the existence of an arbitration agreement. There may be a situation where the parties had not entered into an arbitration agreement. To meet such situations Sec.89 of CPC can be invoked. The reason for inserting Sec.89 has been to try and see that all the cases which are filed in the court need not necessarily be decided by the court itself. Keeping in mind the law delays and the limited number of judges, which are available, it has now become imperative to resort to ADR Mechanism as contemplated by Sec.89. There is a requirement that the parties to the suit must indicate the form of ADR, which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act 1996 will apply and that will go outside the stream of the court.


3.4 CONCLUSION

ADR processes can serve as useful vehicles for promoting many rules of law and other development objectives. Properly designed ADR programs, undertaken under appropriate conditions, can support court reform, improve access to justice, increase disputant’s satisfaction with outcomes, reduce delay, and reduce the cost of resolving disputes. In addition, ADR programs can help to prepare community leaders, increase civic engagement, reduce the level of community tension and resolve conflicts which will promote peace and harmony in the society. Therefore, alternative dispute resolution is a need, both at national and international front. Quality of justice suffers when there is a disproportionate delay in deciding piles of cases. When easier way has been resorted and found then holding on to traditional concepts is not a wiser show. This technique is useful in dispensing justice effectively, which is the basic pillar of every judicial system. Alternative dispute resolution is an appreciable step if taken, with serious concern and proper management. A common man can enjoy the real justice.

All countries, following the common law system, have faced this problem of delay and excessive expenses in the disposal of civil cases at some point or the other in their respective legal history, as also the problem of apathy of judges and lawyers. Developed countries like the U.S.A., Australia and Canada have witnessed a few decades back huge backlog of cases, excessive legal costs and expenses and litigants' misery, as we are witnessing now in our country.

Lawyers and judges of developed countries did not look upon the Government to solve what was essentially a problem of administration of justice that concerned lawyers and judges themselves. In many areas of these countries, some thirty plus years back, public-spirited judges and
lawyers put their heads together and devised a common strategy to solve the problem of huge backlog of cases, delay in the disposal of cases and excessive expenses in litigation. What they found was that the adversarial system prevalent in common law countries were no longer adequate to address the growingly complicated technical legal problems of modern day litigation. The adversarial system creates two mutually contending, exclusive, hostile, competitive, confrontational and uncompromising parties to litigation. This system does not generate a climate of consensus, compromise and co-operation. As litigation progresses it generates conflict after conflict. At the end of litigation one party emerges as the winner and the other party is put to the position of the looser. Adversarial litigation does not end in a harmony. It creates more bitterness between the parties that manifests itself in more litigation between them or even their successors. However, judges and lawyers of developed countries found that the alternative is not to do away altogether with the adversarial system. The adversarial system plays a positive role too. It settles through adversarial hearing complicated and disputed questions of fact and law. The law that superior courts lay down to be followed by subordinate courts and tribunals can never be arrived at without following the adversarial procedure. Any court cannot lay down any law by way of compromise, consent or consensus of parties to litigation.

Beyond the territory of complicated questions of fact and law there lies a vast area of litigation where the adversarial system must yield to a consensual type of dispute resolution, even though there are complicated technical legal problems in this vast area as well. The consensual type is essentially a type and a process of dispute resolution that requires judges, lawyers and the litigant public to change their century’s old mind-set and
to adjust gradually to play a combined and co-operative role in the
resolution of disputes. In an adversarial system a judge has a passive role
to play. He/she will take the evidence as it comes, hear the parties and
deliver his/her judgment without getting involved in the entire dispute
resolution process. In a consensual system the judge, the lawyers,
litigants and outside mediator or evaluator are all active parties to the
resolution of dispute. It is informal, confidential, speedy and less
expensive. It preserves the jurisdiction of the trial court to try the case on
merit, if A.D.R. fails.

To develop ADR system in India, the Central as well as the State
governments are taking necessary steps at their level. In recent years by
the Code of Civil Procedure (Amendment) Act, 1999 w.e.f. 2002 section
89 relating to settlement of dispute outside the court, is inserted, to give
legislative recognition to ADR process. The concept of arbitration and
lok Adalat is seen to be well rooted in the soil of Indian judiciary but the
conciliation and mediation are still in its initial stage of base building.
The legislature had enacted the arbitration and conciliation Act, 1996 for
the reference of dispute to arbitration in commercial, domestic etc.
disputes solving mechanism by inclusion of a clause in the agreement
that if a dispute arises the refer the matter to arbitration to solve the
dispute between the parties and Legal Services Authorities Act, 1987 for
conducting Lok Adalat at Supreme court, High court, District court and
other Subordinate courts. The alternative dispute resolution mechanism
had become a sine quo non for the present judicial system to deal with
pendency of the cases in all courts in India as well as by preserving
future relations there will be peace, order in the society.

In the words of Peter Durker, the best way to predict the future
is to create it. So, instead of blaming darkness light a candle where ever
you can and that a journey of 1000 miles always starts with the first step. So, this research work will definitely light a candle in the darkness of arrears of litigations and serves as first step to bring a ‘win win’ situation in dispute resolution at international and national level.