CHAPTER-ONE

Introduction

“Discourage litigation, persuade your neighbors to compromise whenever you can point out to them how the normal winner is often a loser in fees, cost and time. As a peace maker, the lawyer has a superior opportunity of being a good man”.

Abraham Lincoln

1.1. General Meaning

Human conflict mushroomed with the growth of society because it has been said that where there is two minds there will be three opinions. Due to growth of the society human conflicts are inevitable, because of this unwanted situation it is needed that, there should be a strong, easy and quick mechanisms for resolutions of such disputes. It is also required that disputes must be resolved at minimum cost and quickly, so that the overburden on judiciary may reduced and speedy justice may insure for such unavoidable situations.

Since, the ages, the civilization has recognized the light of every person to seek redressal through courts and tribunals. Traditional concept of “access to justice” as understood by common man is access to courts of law. For a common man a court is where justice is meted out to him. But the courts have become inaccessible due to various barriers such as poverty, social and political backwardness, illiteracy, ignorance, procedural formalities and the like. To get justice through courts one has to go through the complex and costly procedures involved in litigation

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particularly in International Commercial Arbitration. This made the people to think about a system to resolve their disputes outside courts amicably.

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

Alternative Dispute Resolution or ADR refers to an assortment of dispute resolution procedures that primarily serve as alternatives to litigation and are generally conducted with the assistance of a neutral and independent third party. The basic rationale of ADR as the expression itself

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3 Pruitt describes conflict as an episode in which one party tries to influence the other or an element of the common environment and the other resists.
4 Scott Pettersson, “e=mc3/ADR”, 1(6) The Indian Arbitrator 5 (July 2009)
5 Jitendra N. Bhatt, “Round Table Justice through Lok Adalat (People’s Court) – A Vibrant ADR in India”, 1 SCC (Journal) 11 (2002).
7 This is the accepted connotation in which Alternative Dispute Resolution is understood the world over. The National Alternative Dispute Resolution Advisory Council, Australia defines ADR as: “ADR is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.”, available at: http://www.nadrac.gov.au (last visited on 21.06.2014). In the United States of America, the Alternative Dispute Resolution Act, 1998 which has amended s. 651 of title 28, United States Code inter alia enunciates that ‘….. an alternative dispute resolution
implies is to resolve disputes outside the conventional judicial system and therefore during the entire process of appreciation of ADR, the baseline remains to be litigation. ADR procedures have thus emerged as distinct alternatives to the courts established under the writ of the state and hence the epithet ‘alternative’ has been coined.\(^8\)

The alternative dispute resolution system provide more speedy and cheaper solution for disputes which are referred for outside court settlements.

ADR processes are conducted with the assistance of an ADR neutral, who is an unbiased, independent and impartial third party not connected with the dispute, and helps the disputant parties to resolve their disputes by the use of the well established dispute resolution processes.\(^9\) ADR processes can broadly be divided into two categories – non adjudicatory and adjudicatory processes. The non adjudicatory ADR processes are those dispute resolution procedures falling within the umbrella of ADR, which, do not involve any final and binding determination of factual or legal issues of the dispute by the ADR neutral, but involve exploration of a mutually acceptable solution with the cooperation of the parties who are assisted by the ADR neutral. The non adjudicatory ADR processes are the true exponents of the philosophy of ADR, that a dispute is a problem to be solved together rather than a combat to be won.\(^10\)

One of the basic principles of ADR is cooperative problem solving.\(^11\) The ultimate objective is to resolve the dispute by arriving at a compromise with the participation and collaborative effort of the parties, facilitated by the ADR neutral. ADR methods aim at blunting

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\(^9\) Ashwanie Kumar Bansal, Arbitration and ADR (Universal Law Publishing Co. Pvt. Ltd., Delhi, 2005)

\(^10\) Woodrow Wilson has said that a dispute is a problem to be solved together rather than a combat to be won.

\(^11\) S. B. Sinha, “Courts and Alternatives”.
the adversarial attitude and encouraging more openness and better communication between the parties leading to a mutually acceptable resolution.\textsuperscript{12} In that sense ADR methods are definitely more cooperative and less competitive than adversarial litigation.\textsuperscript{13} The ADR methodology focuses on purging the adversarial constituent from the dispute resolution process, steering the parties to appreciate their mutual interests, dissuading them from adopting rigid positions and persuading them towards a negotiated settlement. The parties control the dispute resolution process as well as the outcome of the process and they themselves are responsible for finding an effective, practical and acceptable solution to the dispute.\textsuperscript{14} The emphasis in ADR, which is informal and flexible, is therefore on “helping the parties to help themselves”.\textsuperscript{15}

The general approach in ADR (non adjudicatory) can be illustrated by the story of two cooks fighting over an orange. The judge selects some reason for giving it to the first cook. The arbitrator divides it in to half. The mediator asks each cook why they want it – to learn that the first wants the peel for marmalade and the other wants the flesh for the juice. The mediator gives the peel to the first and the flesh to the other. The result is optimization for both parties. The cooks and the mediator have looked at the problem form the point of view of interest together rather than rights and positions.\textsuperscript{16}

Mahatma Gandhi had also advocated this approach which forms the backbone of ADR and observed. “\textit{I realized that the true function of a lawyer was to unite parties riven asunder. The}

\textsuperscript{12} Alexander Bevan, Alternative Dispute Resolution 2 (Sweet and Maxwell, London, 1992): ADR methods are in fact participatory solution finding processes; Law Commission of India, 246\textsuperscript{nd} Report, Amendments to the Arbitration and conciliation Act,1996.
\textsuperscript{15} K. S. Chauhan, “Alternative Dispute Resolution in India”, In fact, party autonomy is the fundamental principle of ADR. See Dushyant Dave, “Alternative Dispute Resolution Mechanism in India”, XLII (3 & 4) ICA Arbitration Quarterly 22 (October – December 2007 & January – March 2008).
\textsuperscript{16} Alexander Bevan, Alternative Dispute Resolution 2 (Sweet and Maxwell, London, 1992)
lesson was no indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing out private compromises of hundreds of cases. I lost nothing thereby – not even money; certainly not my soul.”

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

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

ADR is sometimes sought to be strictly and hypertechnically construed as a process which is bereft of the trappings of adjudication and does not finally result into a binding decision on the will of the parties. However, since the adjudicatory ADR processes also operate outside the realm of the courts established under the writ of the state and are essentially substitutes for the conventional litigative process they find themselves seated within the galleries of ADR. Further the adjudicatory ADR processes are also consensual in the sense that recourse to such

processes cannot be had unless the parties are ad idem, but once the parties have entered the fray they must suffer a binding determination at the hands of the ADR neutral and they cannot unilaterally withdraw from the same.

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

1.2. Origin and Development of Alternative dispute resolution system

ADR In India is not a new dimension of dispute resolution system, it has a very long history. In India amicable solution has been a most preferred tool for the settlement of particular disputes. It is a tool of mechanism for resolution of dispute which are generally choosen by the parties themselves. Indian legal system is popular as a peoples court system which is commonly known as ‘Panchayat’.

The contemporary ADR mechanism which is prevalent in India is primarily based on the western model and is inspired by the experiences of the western countries. The fundamentals of ADR methods, however, are not new to Indian legal system and have been in existence in some form or the other in the days before the modern justice delivery system was introduced by the colonial British rulers\(^\text{19}\). In fact, the Panchayat, in its original beginning was, primarily, an instrument of law and order, a means of conciliation and arbitration within the community.\(^\text{20}\) In

\(^{19}\) Law Commission of India, 222\textsuperscript{nd} Report on Need for Justice-dispensation through ADR etc., (2009).
\(^{20}\) Ashwanie Kumar Bansal, Arbitration and ADR p. 44, 2005
ancient India Disputes were peacefully decided by the intervention of Kulas (family assemblies), Srenis (guilds of men of similar occupation), Parishad, etc.21

Article 39A22 was inserted into the Constitution of India23 and within few years the Constitutional mandate of Article 39A manifested itself in the enactment of the Legal Services Authorities Act, 1987 which inter alia provides was organizing Lok Adalats which are important aspect of ADR 24.

In 1989, the Government of India, constituted a committee, popularly known as the Malimath Committee25 to inter alia propose remedial measures to manage and ease out the judicial dockets. The Malimath Committee submitted its comprehensive report in August, 1990 inter alia identifying various causes of accumulation of arrears and endorsed the recommendations made under the 124th, 129th reports of Law commission as well under 246th reports for making Indian arbitration law more and more effective. Justie Sharaf committee has also recommended for the amendment in the arbitration law as required for the speedy justice and for the end of the litigation based upon amicable solutions.

For the purpose to strengthen and to streamline the arbitration law a movement has been initiated in most of the countries under the patronage of the United Nations Commission on International Trade Law (UNCITRAL) model law. In this background the Arbitration and

22 Article 39 A of the Constitution of India directs that “The State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disability.
23 Vide the Constitution (Forty-second Amendment) Act, 1976 (w.e.f. 3-1-1977).
24 The Legal Services Authorities Act, 1987 was amended in the year 2002 and Chapter VI-A pertaining to Permanent Lok Adalats was introduced with the title “Pre-litigation Conciliation and Settlement”.
25 As Justice V. S. Malimath, Chief Justice of Kerala High Court was the Chairman of the Committee.
Conciliation Act, 1996 was enacted by the Indian Parliament, which unequivocally demonstrates the legislative consciousness and concern towards the necessity and importance of ADR in India.

The turning point in the ADR movement was, however, the legislative mandate articulated with the amendment in Code of Civil Procedure, 1908 through the insertion of section 89 of CPC26 followed by an extraordinary, committed and concerted judicial endeavour, which triggered an ADR revolution in India of a stature which was unprecedented and preeminently unmatchable. The legislative gave statutory recognition to the importance of ADR, in respect of sub judice matters, by empowering the courts to refer the parties to ADR for resolution of pending lawsuits. The Supreme Court of India reiterated the importance of ADR while meticulously analyzing and expounding the provisions of section 89 of the Code of Civil Procedure, 1908.27 The Supreme Court and the High Courts have vociferously advocated the pervasive use of ADR and have themselves taken myriad initiatives for popularizing and promoting ADR in India. Since then there has been no looking back and ADR flourishes in India and continues to attain greater echelons day by day.

1.3. Objectives of ADR

ADR (non adjudicatory) is a purely voluntary process and the parties are free to opt out of the same at any point of time as per their own volition. If a party does not accede to the settlement or to the continuance of ADR proceedings. It is open to him to unilaterally terminate the ADR process and initiate the formal legal process. Thus there is nothing to loose in ADR and even if ADR is unsuccessful, the time and expense spent in ADR is put to

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good use as trial preparation is advanced, issues are narrowed and thoughts are clarified. On the other hand adjudicatory ADR also affords an expeditious, efficacious and convenient mode of resolution of disputes outside the courts. But the biggest advantage in ADR is finality since the dispute is finally resolved, thereby obviating the possibility of successive appeals.

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

The primary objective of every legal system is to render justice and access to justice is one of the cherished goals, which is also the sine qua non for the existence of a democratic and civilized state. The quest for justice has been an ideal which mankind has been aspiring for generations down the line. The expression “access to justice” focuses on two basic purposes of the legal system – firstly the system must be equally accessible to all and secondly it must lead to results that are individually and socially just. However access to justice, in its true sense postulates

29 In the empirical research conducted majority of the respondents asserted that finality was the biggest advantage associated with individual ADR processes.
31 Justice is a guarantee which, even the Preamble to the Constitution of India seeks to secure to all the citizens of India.
33 Law Commission of India, 246th Amendments to the Arbitration and Conciliation Act 1996.
effective and judicious resolution of disputes and that is vital for realization of the fundamental rights of individuals in a welfare state.

The natural and necessary concomitant is that one of the prime functions of a welfare state is to provide an effective dispute-resolution mechanism\textsuperscript{34} to which all citizens have equal access for judicious resolution of their disputes and realization of their fundamental and legal rights.\textsuperscript{35} Indeed, in a democratic society people should have proper access to the dispute resolution mechanism/process as the legal maxim ubi jus ibi remedium\textsuperscript{36} cannot be permitted to be reduced to an empty promise. However when we speak of access to the dispute resolution mechanism/process it is implicit that the process must yield fruitful results in an efficacious manner.

The emergence of ADR in India, in its modern setup, may be said to be primarily attributable to the inadequacies of the justice delivery system to deliver expeditious and effective justice and cope up with the swelling judicial dockets. There can also be no denial of the fact that the process of underling the need for ADR inevitably involves an invariable rhetoric aimed at highlighting these lacunae and inadequacies of the judicial system. This, however, is not peculiar to India alone as throughout the world, ADR is perceived as a method for channelizing disputes outside the formal justice system\textsuperscript{37} and is promoted as an alternative route to the wearisome path of litigation.

\textsuperscript{34} The justice delivery system, is under an obligation to deliver prompt and inexpensive justice to its consumers, without in any manner compromising on the quality of justice or the elements of fairness, equality and impartiality. Lecture of Justice Y.K. Sabharwal at Justice Sobhag Mal Jain Memorial Lecture on Delayed justice delivered on 25\textsuperscript{th} July, 2006.

\textsuperscript{35} In the Magna Carta also it is stated “To no man will we deny, to no man will we sell, or delay, justice or right”.

\textsuperscript{36} Latin maxim meaning “where there is a right, there is a remedy”.

\textsuperscript{37} Jethro K. Lieberman & James F. Henry, “Lessons from the Alternative Dispute Resolution Movement”, 53 U. Chi. L. Rev. 424 (1986); The impetus behind the rising of ADR is the failure of the legal system to fulfill its
This is, however only one side of the coin. The pitfalls of the traditional justice delivery system may have been one of the prime propellants for the advent of the ADR\textsuperscript{38} but the ADR revolution has gained momentum on account of its own virtues. ADR offers an effective alternative to the disputants bereft of the rigours, complexities and flaws of formal adjudication. It offers an additional remedy for resolution of disputes outside the conventional litigative process and enables the parties to choose a remedy which is most appropriate in the given circumstances.

ADR has distinct advantages and it offers a comparatively \textbf{speedier} and \textbf{inexpensive} mode of dispute resolution than conventional litigation. It offers a system with procedural flexibility, a broad range of remedial options and a focus on individualized justice.\textsuperscript{39} The flexibility is available not only in terms of procedure but also in terms of the solutions to the dispute. ADR, in contradistinction to a judicial adjudication can provide creative solutions – novel ways of resolving disputes.\textsuperscript{40}

The enormous cost of litigation is also a major burden upon the litigant. The litigant not only has to take care of skyrocketing lawyers’ fees and court fees\textsuperscript{41} but also the attendant and ancillary miscellaneous expenditures, which go on multiplying with successive appeals and revisions and this makes litigation a costly affair, which is gradually moving beyond the reach of an ordinary litigant. This towering cost of snail paced and fruitless litigation totally frustrates the

\textsuperscript{38} As a movement, ADR has grown out of a general concern that courts are burdened with too many cases. See Chandana Jayalath, “Courts and ADR – For a Harmonious Co-habitation”, 3 (10) The Indian Arbitrator 5 (October, 2011).


\textsuperscript{40} George Applebey, What is Alternative Dispute Resolution?, 15 Holdsworth L. Rev. 20 (1992).

\textsuperscript{41} The Delhi Legislative Assembly has recently passed the Court Fees (Delhi Amendment) Act, 2012 which provides for manifold increase in existing court fee rates in Delhi.
litigant. Litigation has, therefore come to be regarded as costly, time consuming, unproductive and full of complications and associated with the perception that it destroys both the parties in terms of money, time, energy and good relations.

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

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

India, also followed pursuit and learning from the experiences of the western nations, introduced ADR in its contemporary form. The existing milieu – problems of the legal system

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and the experiences of establishing for an alternate to regular courts – seemed to be perfect for the introduction of ADR as an alternate to the mainstream litigative process.\textsuperscript{46} This led to the advent of ADR in its contemporary incarnation in India.

1.4. Various aspects of Alternative Disputes Resolution System

There are various different aspects/mechanisms of Alternative Dispute Resolution which are commonly used for alternative dispute settlement in practice. Although all these mechanisms are initiated by the parties themselves but has some specific features in its scope and utility. Some popular mechanisms of ADRs are as follows.

\begin{itemize}
  \item \textbf{Dispute Settlement through Conciliation}\textsuperscript{47}
  \begin{itemize}
    \item It is a mechanisms of resolution of referred disputes with the help of third party, who is popularly known as conciliator. In a broader sense it may be expresses as an outside court settlement involving a resolution process in which an neutral third party (conciliator) facilitate and suggest the parties to achieve a desired objectives. The process of conciliation aims at bringing the parties together before a third person whom they have chosen for the purpose of assisting them in settling their dispute.\textsuperscript{48} Means conciliation procedure provides an amicable decision not a forced decisions to the parties.\textsuperscript{49} as well Successful conciliation proceedings culminate into a binding settlement agreement.
  \end{itemize}
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\textsuperscript{48} V. A. Mohta and Anoop V. Mohta, Arbitration, Conciliation and Mediation 483 (Manupatra, Noida, 2\textsuperscript{nd} Edn. 2008).
Part III of the Arbitration and Conciliation Act, 1996, which is related with the conciliation proceedings is deemed to be an arbitral award on agreed terms and conditions given under section 73 of the Act. The fundamental philosophy is the same in both mediation and conciliation, in the sense that a neutral third party facilitates negotiations between the disputant parties in their pursuit of an acceptable resolution. However there is fine line of distinction amongst the two. Moreover in India the introduction of the two terms separately under section 89 of the Code of Civil Procedure, 1908 clearly indicates that the two terms are to be understood characteristically.

- **Dispute Settlement through Mediation**

  The Black’s Law Dictionary defines mediation as a method of non binding dispute resolution involving a neutral third party (mediator) who tries to help the disputing parties to reach a mutually agreeable solution. In general it indeed a negotiation process by a third party, who suggest the parties for mutually agreed settlements. Mediation is, however, a structured process and involves different stages viz. introduction, joint session, caucus, agreement, etc.

- **Dispute Settlement through Lok Adalats and Permanent Lok Adalats**

  The term Lok Adalat means ‘People’s Court’. However, a Lok Adalat is not a court in its accepted connotation as it not an adjudicatory body, but an ADR forum established under the

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50 For a detailed analysis of Mediation see Chapter II.
53 H. E. Chodosh, N.J. Bhatt, F. Kassam, Mediation in India: A Toolkit (U.S. Educational Foundation in India, Fulbright House, New Delhi, Feb. 2004); See also Delhi High Court Mediation and Conciliation Centre, Mediator’s Tool Box (Volume I).
54 For a detailed analysis of Lok Adalats and Permanent Lok Adalats see Chapter III.
aegis of the Legal Services Authorities Act, 1987. Such Lok Adalats are organize after every fix periodical and place where the court fix it. 55 and have the jurisdiction in respect of any case pending before any court for which they are organized.56

The Lok Adalat system is basically meant for the resolution of people’s disputes by using conciliatory and persuasive techniques and voluntary participation and discussion for arriving at a mutually acceptable solution and the whole emphasis is on conciliation rather than adjudication.57 Thus settlement or compromise can only form the basis of dispute resolution by Lok Adalats.58 The settlement arrived before a Lok Adalat gets crystallized into the award of the Lok Adalat which is deemed to be a decree of a civil court59 and is final and binding upon the parties and no appeal lies against such award.60

Permanent Lok Adalats, on the other hand are permanent pre litigation ADR for a established for resolution of disputes pertaining to public utility services only.61 Any party to a dispute may, at the pre litigation stage, make an application to the Permanent Lok Adalat for the settlement of the dispute.62 However where a matter before a Permanent Lok Adalat cannot be settled mutually the Permanent Lok Adalat is enjoined to decide the dispute on merits and thus the Permanent Lok Adalat must pass an award, either on the basis of a mutual settlement

56 However the Lok Adalats have no jurisdiction to deal with cases pertaining to non compoundable criminal offences.
59 S. 21(1), Legal Services Authorities Act, 1987
60 S. 21(2), Legal Services Authorities Act, 1987.
61 Ss. 22A & 22B, Legal Services Authorities Act, 1987
62 S. 22C, Legal Services Authorities Act, 1987
or on merits.\textsuperscript{63} The award passed by the Permanent Lok Adalat is also deemed to be a decree of a civil court and is final and binding upon the parties.\textsuperscript{64}

\textbf{Dispute Settlement through Arbitration}

Arbitration is a recognized private legal procedure used to resolve disputes between two or more parties where the parties entrust the dispute resolution process and the outcome of the dispute to a private neutral third party i.e. the arbitrator (or the arbitral tribunal) who hears and considers the merits of the dispute and renders a final and binding decision on merits called the arbitral award.\textsuperscript{65} Arbitration is therefore an adjudicatory ADR mechanism.\textsuperscript{66}

The primary aim of arbitration is a just resolution of the dispute by a private judge outside the conventional litigative process, expeditiously and conveniently. The parties are free to agree how their disputes are to be resolved and intervention by the courts is restricted.\textsuperscript{67} However unlike litigation, arbitration is consensual and the existence of an arbitration agreement is a condition precedent for the initiation of the arbitral process. But once the parties enter the arbitral process they cannot unilaterally opt out of the same and must suffer a binding decision on merits. In India arbitration is governed by the Arbitration and Conciliation Act, 1996.

\textbf{Dispute Settlement through Mini Trial}

\textsuperscript{63} S. 22C(8), Legal Services Authorities Act, 1987; See also Pu Lalkanglova Sailo v. Pi (2011) 7 SCC 463 the Supreme Court has opined that the procedure adopted by Permanent Lok Adalats is what is popularly known as ‘CON-ARB’ (conciliation cum arbitration).

\textsuperscript{64} S. 22E, Legal Services Authorities Act, 1987.


\textsuperscript{67} Davit St. John Sutton, Judith Gill, Mathew Gearing (Eds.) Russel on Arbitration 4 (Sweet and Maxwell, London, 23rd Edn., 2007)
A Mini Trial consists of an abbreviated adjudication like presentation of evidence and arguments to a neutral joined by the high level principals of each of the disputant parties, which is then followed by negotiations between the principals. Mini Trial is therefore a non-binding ADR method of resolving disputes, primarily business disputes that combines the techniques of negotiation, mediation and advisory arbitration. Initially developed in a 1977 patent infringement case, Telecredit v. T.R.W., the Mini Trial concept has now spread through the corporate world.

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

The tribunal, thereafter, gives a decision on merits on the basis of the material produced and the arguments advanced. The decision rendered by the tribunal is confidential and non-binding in nature, however, it becomes the baseline for negotiation or conciliation between the parties for settlement of the dispute. The objective of this simulated procedure is to

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71 The negotiations are benefitted from the fact that the senior executives of the parties have already made an in depth assessment of the merits and demerits of not only their own case but also the case of the adversary and this pre
enable a concentrated judicial contest before the negotiations start between the parties.\textsuperscript{72} The neutral may also be requested to give an opinion as to the most likely outcome of the case in case the parties go in for a full dressed trial.

After the decision has been rendered the neutral may also be called upon to assist the parties in their pursuit of an acceptable solution and for facilitating negotiations between them. The neutral then becomes the mediator and attempts to facilitate the discussion and induce a settlement between the parties.\textsuperscript{73} Since the neutral has been a part of the tribunal and has also already heard, understood and evaluated the entire dispute, he is in a better position to facilitate the settlement process.

The process may thereafter culminate into a settlement agreement based on the recommendations given in the Mini-Trial. The effect of a mini trial is therefore to convert a dispute from a legal problem to a business problem by putting the resolution of the dispute back into the hands of the disputants directly.\textsuperscript{74} However if no settlement is achieved the procedure has no evidentiary effect and the case is to be sorted out in the court or through arbitration.\textsuperscript{75}

\begin{itemize}
\item \textbf{Dispute Settlement through Med-Arb}
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‘Med-Arb’ is a hybrid ADR process, an admixture of mediation and arbitration, wherein the parties consensually permit a neutral third party to mediate their dispute and if no settlement materializes to thereafter arbitrate the dispute on merits. The ADR neutral who is appointed by the parties, therefore, first attempts to resolve all or some of the issues by evaluation helps them to negotiate better. See also Arunvir Vashista, “Emerging Trends in ADR as Dispute Resolving Techniques”, XLIX ICA Arbitration Quarterly 31 (January – March, 2011).
\textsuperscript{72} G. K. Kwatra, Arbitration & Alternative Dispute Resolution 42 (Universal Law Publishing Co. Pvt. Ltd., Delhi, 2008).
\textsuperscript{74} Joanne Goss, “An Introduction to Alternative Dispute Resolution”, 34 (1) Alta. L. Rev. 1 (1995) (Can.).
facilitating a mutually acceptable solution through the persuasive and facilitative process of mediation and thereafter in case some or all issues remain unresolved he proceeds to decide them on merits functioning as an arbitrator.\textsuperscript{76}

In Med-Arb generally the same neutral person performs both the roles. This kind of a process has its own pitfalls and it may complicate things as the third party neutral muddies the adjudicative waters by delving into mediation and learning about matters which are irrelevant and prejudicial to the decision making function.\textsuperscript{77} However the advantage of the process is clearly visible if the process is essentially visualized as an arbitral process preceded by an option for consensual resolution.

\section*{Dispute Settlement through Early Neutral Evaluation}

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

ENE is a non-binding, flexible and confidential ADR process in which a neutral third party, generally having expertise in the subject matter of the dispute is appointed by the parties for the purpose of evaluation of the dispute on merits at the initial stages of the dispute. The parties provide the evaluator with written submissions on the substance of their respective cases along with the material on which they are placing reliance. The process may be conducted even without an oral hearing, however, if the parties desire a brief hearing can be given. Again the emphasis is on brevity and precision and limited time is given to the


\textsuperscript{77} Alexander Bevan, Alternative Dispute Resolution 9 (Sweet and Maxwell, London, 1992)
parties so that the hearing is completed expeditiously. Thereafter the neutral assesses each disputant’s case and makes an evaluation as to the likely outcome of litigation. ENE, therefore, provides the parties with an early and confidential evaluation of the merits of a dispute at the initial stage.

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

Thereafter based on his assessment the evaluator also explores the possibilities of a settlement between the parties and may also make recommendations so as to assist the parties. The parties may thereafter arrive at a settlement on the basis of the evaluation made by the evaluator or with the necessary modifications thereof as are acceptable to the parties. In case the dispute is not settled the parties are free to litigate or arbitrate for a final binding adjudication.

- Dispute Settlement through Dispute Review Boards and Dispute Adjudication Boards

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

**Dispute Settlement through Expert Determination**

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

**Dispute Settlement through Negotiation**

Negotiation – Communication for the purpose of persuasion – is the preeminent mode of dispute resolution. Although negotiation is not conducted with the assistance of a third party yet it is classified as an ADR process because it is still an alternative to litigation. Negotiation is an ADR process by which the parties resolve their disputes themselves by arriving at a mutually acceptable amicable solution. In this mode of settlement the parties or

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


82 The term ADR is also used so as to include approaches that enable parties to prevent or manage disputes without outside assistance. See [http://www. Nadrac.gov.au](http://www.Nadrac.gov.au) (last visited on 12.05.2011).
their representatives\textsuperscript{83} voluntarily sit together themselves and negotiate directly by putting the factual content of the dispute and discuss their claims and counter claims, earmarking the extent to which they can forego their claims and their readiness to accommodate each other.\textsuperscript{84}

The parties mutually agree upon a course of action and bargain for advantage.

The aforesaid list of ADR processes is not exhaustive. There are various other ADR processes\textsuperscript{85} which are employed all over the globe for resolution of disputes. Some of them are MEDOLA\textsuperscript{86}, summary jury trial\textsuperscript{87}, neutral expert fact finding\textsuperscript{88}, neutral listener’s agreement\textsuperscript{89}, fast track arbitration\textsuperscript{90}, final offer arbitration\textsuperscript{91} etc. and even new techniques are being evolved. Thus the horizon of ADR is ever expanding and it has become an indispensable part of the justice delivery system.

1.5. Arbitration process in general & International Commercial Arbitration

\textbf{Arbitration}

\textsuperscript{84} See S. S. Mishra, Law of Arbitration and Conciliation in India (With Alternative Dispute Resolution Mechanisms (Central Law Agency, Allahabad, 1\textsuperscript{st} Edn., 2007).
\textsuperscript{85} They are however rarely employed in India.
\textsuperscript{86} MEDOLA or Mediation and Last Offer Arbitration is an ADR procedure where if the parties fail to reach an agreement through mediation, the ADR neutral (mediator or an arbitrator) will select between the final negotiated offers of the parties and such selection is binding on the parties.
\textsuperscript{87} The idea behind a summary jury trial is to see as to how a mock jury would deal with the case after a brief presentation of the cases of both the parties. See Alexander Bevan,
\textsuperscript{88} The process is employed in complex technical cases where the two experts engaged by the parties express conflicting opinions and therefore a neutral expert is appointed to reevaluate the technical evidence and encourage the parties to reassess the issue so as to arrive at an agreement. See Alexander Bevan, Alternative Dispute Resolution 17 (Sweet and Maxwell, London, 1992).
\textsuperscript{89} In this method parties to a dispute discuss their respective best settlement offers with a neutral third party who, after his own analysis and evaluation, suggests settlements options to enable the parties to arrive at a negotiated settlement.
\textsuperscript{90} This is basically an arbitration process only which has been expedited so as to achieve the end result in a fast tract manner.
\textsuperscript{91} In this ADR mechanism the parties submit their best and final offers to the neutral arbitrator who then chooses one of the two submitted offers which in his decision is the most appropriate in the given facts.
‘Arbitration’ is a mechanism to solve the dispute amicably in presence of third party who is commonly known as an arbitrator, deliver a judgment (Award) after hearing both the parties.\(^{92}\) Arbitration is a consensual process. It is not a matter of coercion. No arbitration statute can require parties to arbitrate when they have not agreed to do so. Nor can it prevent them from excluding certain claims from the scope of arbitration agreement in any manner they choose. In a case *Volt Information Sciences, Inc v. Leland Stanford University*, it was held that if requires Courts can pursue and enforce the mutual agreements for arbitration, under the certain terms and conditions agreed between the parties.\(^{93}\)

The term ‘Arbitration’ word has not been defined under the Arbitration and Conciliation Act, 1996 but it has been explained under Section 2(1) (a) of the said Act, that arbitration may be Institutional or permanent as well as ad-hoc in nature. It also emphasizes that arbitration proceedings must be governed and initiated through the arbitration agreement or by arbitration clause. The parties have to clearly refer or mentioned the disputes which they want to refer for the settlement through the arbitration. Further the decisions of the third party shall have equal status of decree of a civil court and it shall be binding upon the parties.

In *Jivaji Raja v. Khimiji Poonja & Company*\(^{94}\), held that, the arbitration proceeding may initiate through the reference to appointed arbitrator or to the court for the appointment of such authorities.

**ARBITRATION AND ITS VARIOUS FORMS**

In practice some popular kinds of arbitration are as follows

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\(^{93}\) 489 US 468(1989)

\(^{94}\) AIR 1934 Bom 476.
**Ad-hoc Arbitration**: it is a kind of arbitration where the disputes may refer for arbitration even in the absence of arbitral agreement. Under such arbitration disputes are refer as it arises and chosen for amicable solutions. It is found suitable for International as well as for domestic arbitration both. 95

**Domestic arbitration**: where both the parties for arbitration belongs from Indian territory and place of arbitration is also within the territory of India. In domestic arbitration all the proceeding for arbitration is governed and influenced by the substantive law of the India.

**International Arbitration**: When one of the party to the arbitration belongs outside the country or where the subject matter of arbitration is situated or registered or regulated by an authority of foreign national. The laws applicable in International arbitration are governed by the law chosen by the contracting parties.

1.6.**Statement of Problem**

In International trade and commerce, every commercial activity is generally preceded by a contract fixing the obligations of the parties to avoid legal disputes. But in this, No matter how carefully a contract is drafted, one party to the contract may understand his right and obligations in a different way. Often international trade involves traders belonging to different countries whose legal systems may differ in many ways to that of the other, presenting complicated and even conflicting features. The law courts of each country have jurisdiction only within the territorial limits of the concerned country. Therefore, arbitration came to be

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preferred as an effective means of resolving disputes between the parties belonging to different nations.

In India, the statutory provisions relating to International Commercial Arbitration are governed and enforced according to the provisions of Part II of the Arbitration and Conciliation Act, 1996 which is based upon the United Nations Commission on International Trade Law, model law of, as well as the guidelines of New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, Geneva Convention etc.

**Rationale of the study**

The growth of international trade is bound to give rise to international disputes which transcend national frontiers and geographical boundaries. For the resolution of such disputes the preference to international arbitration vis-à-vis litigation in national courts is natural because of arbitration being preferred to litigation in courts and the foreign element being preferred in the international arbitration to the domestic element in the national courts. This is also because there are no International Courts to deal with International Commercial Disputes. In situation of this kind, recourse to international arbitration in a convenient and neutral forum is generally seen as more acceptable than recourse to the courts as a way of solving any dispute which cannot be settled by negotiation.

The rationale and purpose of international arbitration should be to provide a convenient, neutral, fair, expeditious and efficacious forum for resolving disputes relating to international commerce.
Basic features which are uniform in the legal framework for resolution of international commercial disputes “can be broken down into three stages: (1) Jurisdiction (2) choice of law and (3) the recognition and enforcement of arbitral Award.

In International Commercial Arbitration, when the parties are of different legal systems, there automatically arises a conflict of laws, and a choice of the substantive law to be applied in a given dispute has to be made. Many a time, the substantive law to be applied in arbitration may be specified by the parties in their original agreement. But problems arise in determining the applicable law in situations when the parties fails to agree upon a choice of law for the settlement of their dispute.

The trend towards growing judicial intervention which tends to interfere with arbitral autonomy as also finality is a significant factor to be kept in view. The need is to reconcile and harmonize arbitral autonomy and finality with judicial review of the arbitral process. The National laws differ on this issue. UNCITRAL Model Law attempts to promote harmony and uniformity in this sphere.

In different International commercial issues, the total exclusion of judicial intervention does not match with the current trend but the scope of judicial supervision needs to be reduced to the minimum.

The source of authority of the international arbitral tribunal is the agreement of the parties and not the mandate of the State. The choice of law applicable is also determined by the provision in the arbitration agreement. With the increased arbitral autonomy the requirement of reasons for the award is greater. Apart from transparency in the arbitral process it also acts as an inherent check on the arbitrators and discloses to the party the basis of the award and the logical
process by which the conclusion was reached by the arbitrators. The presence of reasons also regulates the scope of judicial supervision.

With all these purposes and increasing International commercial disputes for effective implementation of economic reforms, it is necessary to recognize the demand of the business community in country like India and to expand the Indian foreign trade at global level as well as to attract the foreign investors, the Importance of an effective International arbitration laws for amicable solution for International commercial disputes, is much required. For this vary purposes it is observed by Supreme Court in the case of *food corporation of India v. joginderpal Mohinderpal*, That, the arbitration law should be less complex and satisfactory and its principles to provide justice should be based upon principles of fair play and mutual settlement.

In light of the recent judgment, parties to arbitration are no longer at liberty to either include or exclude the jurisdiction of the Indian courts in cases of international commercial arbitrations. whereas *Bharat Aluminum Co v. Kaiser Aluminum Technical Services Inc* judgment provides much-needed relief to international players and also rightly recognizes the principle of territorial criterion, which is a cornerstone of arbitration. Even than there are so many issues in international commercial disputes, which are raised or may arise in future, due to lack of clear and effective guidelines it cannot resolve through International commercial arbitration mechanisms. Some major issues are as follows:

**ISSUES INVOLVE IN INTERNATIONAL COMMERCIAL ARBITRATION**

- Enforceability of Arbitration clause/ Arbitration agreement
- The place of Arbitration and hearing.
- Conflict of laws
• Country to country difference in substantive and procedural laws.
• The selection procedures and numbers of Arbitrators.
• Public policy of different countries.
• Recognition and Enforcement of Award.

There is no doubt that the judgments discussed here have been welcomed in international commercial arbitration domain. But on the same time because of ineffective arbitration laws it has made to revisit the long standing notion of getting foreign awards enforced in India as a time-consuming process with possibilities of judicial interference at various stages.

The latest decisions by the Indian courts wherein the grounds to challenge a foreign award have been restricted will result in faster resolution of disputes through arbitral processes. A hope ensues that with the present judicial scenario on the subject the confidence of the international community in commercial arbitration strengthens as being a plausible ADR mechanism in India.

**Objectives of the present work**

• To study about the legal system of International Arbitration and analyze the flaws relating to International Arbitration in International Instruments.

• To analyze the ability of International arbitration laws in building trust and in attracting the foreign investment into country.

• To analyze the procedural problems in implementation of International Awards in the different countries of the world.

• To assess the complexities of International Arbitration at global Level and suggest some measures for improvement in the present International Arbitration Laws.
To draw conclusion and suggestions on the basis of Study.

To suggest effective measures for the amendment in the present setup of International Commercial Arbitration in India, so as to develop India as a hub for International Commercial Arbitration.

**Hypothesis**

The proposed research work will be based on following Hypothesis:

HYPOTHESIS 1: A procedural aspect of International Commercial Arbitration differ significantly amongst the different countries of the world.

HYPOTHESIS 2: International Arbitration Law in India is capable to attract the foreign investment in the country.

HYPOTHESIS 3: Present setup of International Commercial Arbitration in India, is sufficient to develop India as a hub for International Commercial Arbitration.

**1.7. Conclusion**

Therefore a moment started throughout the world for Alternative Dispute Resolution and Arbitration is one among them because with Economic Liberalization and the opening up of the market, there is a phenomenal growth of international trade: commerce, investment, transfer of technology, developmental and construction works, banking activities and the like. To cope with the changing scenario, India has updated its arbitration legislation in order to provide a level playing field for both domestic and foreign entrepreneurs. Indian arbitration law ensures fairness and justice to all the concerned parties. With the increase in business transactions both international and domestic contracting activities are rising.
The potential for commercial arbitration accordingly has also shown a significant rising trend. India has undertaken major reforms in its arbitration law in recent years as part of the economic reforms initiated in 1991. Simultaneously many steps have been taken to bring judicial reforms in the country, the thrust being on the minimization of court’s intervention in the arbitration process by adoption of United Nations Commission on International Trade Law. It is a Model Law on international commercial arbitration. The focus of the government has been as much on the simplification of the law as on its rationalization in order to meet the requirements of a competitive economy. These reforms have resulted in increased Foreign Direct Exchange (FDI).

India has recently entered into bilateral investment protection agreements with the United Kingdom, Germany, Russian Federation, The Netherlands, Malaysia and Denmark. Each agreement makes provision for the settlement of dispute between an investor of one contracting party and an investor of the other contracting party through the following alternative dispute resolution procedures.

International Arbitration can initiate either within India or outside India in cases where there are ingredients of foreign nationals relating to the parties or the subject matter to the issues. The law pertinent to the conduct of the arbitration and the merits of the dispute may be Indian Law or Foreign, based upon the contract for such purposes and the rules of conflict of laws.

Foreign arbitration are the form of arbitration, where the arbitration proceedings are initiated and concluded outside India whereas the arbitral award is mandatorily enforced within the territory of India. The proceedings are conducted and the procedures are adopted by the arbitrators as per the agreement or with the concurrence with the parties. It can be a domestic, international or foreign arbitration. In this type of arbitration parties bear the responsibility of
setting up, on their own, the arbitral tribunal that will settle their dispute and they must stipulate the rules that will govern the conduct of the arbitration proceedings. In case of difficulties, the parties may sometime call for the intervention of a competent state court to assist them in this respect. As parties are, more or less on their own in ad hoc arbitration, they will have to agree items such as fees and expenses directly with the arbitrators themselves.

In institutional arbitration the parties call upon an arbitration center or an arbitral institution that they will have chosen to administer the proceedings in accordance with the institutions arbitration rules. The extent of administration of the arbitration process varies from one institution to another. Generally, the arbitral institution administers the arbitral process partially and limits of its assistance to the constitution of the arbitral tribunal (appointment of arbitrators), taking into account the desiderata of the parties as well as its own arbitration rules.

An institution may notify a request for arbitration to the other party asking it to state its position on the case and on the constitution of the arbitral tribunal. The institution sometimes has the power to fix a sum of money estimated to be sufficient to cover the cost of arbitration, to claim its payment and at the end of the proceedings to determine the cost. It may also look after the process of notifying the parties of the award rendered by the arbitrators. The institution may on the other hand do much less this type of arbitration is generally referred as partly administered arbitration. Institutional arbitration may also be fully administered arbitration. In such type of arbitration, the institution not only takes care of receiving the request for arbitration for notification to the other party but also actually constitutes the arbitral tribunal, fixes an advance on cost and fixes the place arbitration. Once the advance on cost has been paid, the arbitration institution sends the file to the arbitrators and supervises the conduct of proceedings until the rendering of the award. It thereby keeps control over the proceeding and will resolve certain
difficulties, such as deciding on the replacement of biased arbitrators. It sometimes even ensures that the content of the award is acceptable, with regard to its form and may draw the arbitrators’ attention to certain points regarding the merits of the case. It looks after notification of the award to the parties after having fixed the cost of arbitration and it ensured that arbitrators paid. Finally, the arbitration institution ensures that the different steps of the proceeding have been accomplished within the time limit prescribed by its arbitration rules. A good example of an administered arbitration system is ICC Arbitration.