Ahmednagar Jilha Maratha VidyaprasarakSamajas
New Law College, Ahmednagar

Study Material For

Introduction to Alternative Dispute Resolution

Course No. LW-304.

Ll..M. II. SEM III

By

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Optional Paper

Paper 1

INTRODUCTION TO ALTERNATIVE DISPUTES RESOLUTION

Objective s:

I Evolution and concept of Disputes

II Methods adopted in Dispute Resolution

III Meaning and philosophy of ADR

IV Process and Procedures of ADR

In the era of globalization where time and resources a e precious, the main aim and objective of the course is to equip a candidate in the alternative disputes that exists both nationally and internationally. The significant aspect of the course is that it vastly covers all the potential issues relating to ADR and helps a candidate in whatever profession or filed works to help the organization in resolving the disputes with in the organization in an amicable manner in a judicious way in the possible shortest time than awaiting long time for a judicial settlement.
(a) Historical Perspectives of ADR in the International Perspective

(b) Meaning and Conceptual Perspectives of a Dispute

(c) Types of disputes-Justiciable and Non-justiciable disputes

(d) Players involved in Disputes-Individuals-Organizations-States-Inter-state-Multilateral and

Legal Disputes

(e) Impact of Disputes on Socio-Economic –Political-Legal and Cultural Issues

(a) Traditional methods of dispute resolution

(b) Methods adopted in dispute resolution-Judicial and Non-Judicial methods

(c) Role of Law in Settling Disputes—National and International Legal aspects

(d) Disputes settlement at the Gross roots and local level

(a) The significance of ADR-Current Trends

(b) Over view of the Process of ADR

(c) Planning and Strategies of ADR

(d) Legal Recognition to ADR

(e) Comparative perspective of ADR-USA-UK-India-EEC

(a) Procedural Aspects of ADR

(b) Types of ADR-Negotiation-Mediation-Conciliation-Arbitration

(c) Theoretical perspectives of ADR

(d) Significance of Private International Law –Choice of Law RulesPage 53 of 70

V ADR and Contemporary Issues (d) Suggested Readings:

Further readings

(a) Information Technology and ADR

(b) Dispute Resolution in Cyber space

(c) ADR and Online Dispute Resolution

ADR and Scientific Issues-IPR and Bio-Technology

Shiv Sahai Singh, . 2004.

Phillippe Culet, , 2004

W R Cornish, , 1996

JayantiBagachi , (2000).

Narayanan, P., Intellectal Property Rights

_ UNCTAD-ICTSD , Cambridge University Press, 2005

_ Surendra Bhandari , W , 1998

_ Bleir, F.K., Crespi, R.S. and Straus, J. ,, OECD _ JayashreeeWatal

The Law of Intellectual Property Rights,

Intellectual Property Protection and Sustainable: Development

Intellectual Property: Patents, copyright, Trademarks d allied rights

World Trade organization; an Indian Perspective

, Resource book on TRIPs and Development

orld Trade organisation and Developing Countries

, Intellectual Proprty right s in the WTO and Developi g Countries ,2003

Niotechnology and Patent Protection- an

international review

Contents

ALTERNATIVE DISPUTE RESOLUTION INTERNATIONAL AND NATIONAL PERSPECTIVE

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 LokAdalat in detail with its practical implications and conclusion of this chapter.

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. 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, Nelson "Adapting ADR to Different Culture" (Dec 15, 2001). 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.

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 Burchell v. Marsh 58 US 344. 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". See Shone, "Law Reform and ADR: Pulling Strands in the Civil Justice Web" Paper presented at the Australasian Law Reform Agencies Conference April 2006 Wellington New Zealand at Available at http://www.lawcom.govt.nz/UploadFiles/SpeechPaper/8208298e-fef7-4c6b-a38 9e65ed2f99f9//Session%202B%20-%20ADR%20-%20Shone.pdf. Stempel, "Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty; Fait Accompli, Failed Overture, or

Fledging Adulthood?" (1996) 11 Ohio St J on Disp Resolution at 297, www.lawreform.ie. Sander , "Varieties of Dispute Processing" (1976) Federal Rules Decisions 79 at 112-113. Ibid, note 5 at 13186

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. 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." 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. 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 Ibid, note at

Benham& Boyd Barton, "Alternative Dispute Resolution: Ancient Models Provide Modern

Inspiration" (1995-1996) 12 Ga St U L Rev 623 at 635.87 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. Marsh12 , Justice Grier stated that "Arbitrators are judges' choosen 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 form 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 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."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.

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.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 See, STEPHEN B. GOLDBERG ET. AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES, 3rd ed.,1999 page 8 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.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 Roger Fisher, William Ury and Bruce Pattou, Getting Yes Negotiating Agreement without Giving In,1992 P xiii.90 sides.16 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.17 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 16 P. Gulliver, Disputes and Negotiations. A cross cultural perspective,1979, PP 3-7. 17 Cf. R. Mnookin and L. Kornhauser, " 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 incipent 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 which then renders an advisory verdict that is used as a basis for settlement. 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.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 See S.Goldberg, F.Sander and N. Rogers, Dispute Resolution P.235 (Little Brown 1992) Brazil, W. D., Effective Approachers to Settelment: A Handbook for Lawyers and Judges,P.2692 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 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 400093 schools throughout the United States have developed mediation programs to resolve the disputes among the students peaceably.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. 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)].21 Proposed final Report of the Chief judge's New York state court Alternative Dispute Resolution Project, P.12 (Sept.1,1995) - From P.C.Rao' and William Sheffield, ADR what it is How it works, 2003.

Dispute Resolution Programs: United States District Court for the District of Columbia (November 1995). From P.C.Rao' and William Sheffield, ADR what it is How it works, 200294 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. 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 Bank 25, 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. Rauma, D. and Krafka, C., Voluntary Arbitration in Eight-Federal District Courts: An Evaluation (1994). From P.C.Rao' and William Sheffield, ADR what it is How it works, 2003.24 Ibid at 6 25 695 F. Supp. 1343, 1347 (D. Mass. 1988) 26 871 F.2 648 (7th cir 1989)

Filner, "Dispute Resolution Options in State Courts: NIDR Survey Reveals Significant Growth," NIDR News, Vol.II No. 2 at1 (Mar/April 1995) From P.C.Rao' and William Sheffield, ADR what it is How it works, 2003.95The 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.

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 Unites 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. Sherman, E., "Policy Issues for State Court ADR reform", 13 Alternatives 142 (November 1995)- From P.C.Rao' and

William Sheffield, ADR what it is How it works, 2003.96 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 "Major Food Companies Agree to CPR plan to try ADR for 90 days before filing how suits", Alternation 23 (Feb.1993). Dana H. Frayer, The American experience in the field of ADR, ADR what it is and how it works? 2003 PP 108-122.

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 Frank E.A. Sander, Disputes Resolution within and outside the courts –An Overview of the U.S. Experience, attorney general and new methods of dispute resolution, 13, 24 (National Association of Attorneys General and ABA, 1990). S. Goldberg F. Sander, and N.Rogers, Dispute Resolution Ch. 6 (Little Browen 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."33 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.34 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.

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 see, STEPHEN B. GOLDBERG ET. AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES, (3rd ed., 1999), p.8. Justice S, B. Sinha, Judge, Supreme Court of India from (http://delhimediationcentre.gov.in/ article.htm, 18/3/201199long it will last induces the fear of the unknown; and it is incomprehensible to many litigants.

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

See Lord Woolf, Access to Justice, Interim Report (1995) and Lord Woolf, Access to Justice Final Report (1996). From www.lawreform.ie 36 Ibid 37 CPR 1.1(1).38 CPR 1.1(2).100 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 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. 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;

[2001] EWCA Civ 1935; [2002] 1 W.L.R. 803. [2002] EWCA Civ 303; [2002] 2 All E.R. 850. 41 CPR r. 44.5(3)101

(4) The Government itself adopts a policy of willingness to proceed to mediation in disputes to which it is a party;

(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.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.

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. 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. Speech by Mr Justice Lightman Mediation: An Approximation to Justice 28 June 2007. Available at http://www.judiciary.gov.uk/docs/speeches/berwins_mediation.pdf.102

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.

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.'

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:

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 Service107

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

European Developments Council of Europe

In 1998 the Committee of Ministers of the Council of Europe adopted a Recommendation on Family Mediation in Europe.45 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.

European Commission

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

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.

ADR in UK www.google.in search Family Mediation in Europe Recommendation No. R (98)1, www.google.in 46 Green Paper on alternative dispute resolution in civil and commercial matters COM/2002/0196 Final. Available at http://eurlex.europa.eu/.

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)

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. 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 society48. Article 21 of the constitution of India guarantees the fundamental right to life and liberty which includes right to speedy trial49. 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.50 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 mode available to the litigants at then door steps51. Efforts are also being made at state, District and Taluka level.

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. Dr. J. N. Pandey, Constitutional Law of India, 47th edition, 2010, Central Law Agency, p 232. 49 Hussainara khatoon V. Home Secretary, State of Bihar AIR 1979 SC 1360. P. Ramachandra V. State of Karnataka (2002) 4 SCC 578 51 Ibid M. P. Jain, Indian Constitutional law, 5th ed., 2003, Wadhawa publication, Nagapur, p 221.

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.

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. 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 Brhadaranayaka 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 parties54. Though these bodies were non governmental and the proceeding before them were of informal nature, their decisions were receivable by municipal courts.

Chanbasappa Hiremath AIR 1927 Bom 565-568-69(F.B)54 Kane, History of Dharmashastra ,Vol. III,1946 P 242112 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 absense 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. Viranna55 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 Baxi56 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 AIR 1934 PC 105,107 Marc Galanter and Upendra Baxi, Panchayat Justice : An Indian Experiment in Legal Access in Pre- British India 1997113 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.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.

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 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 Madabhush Sridhar, Alternative dispute Resolution- Negotiation and Mediation, 1st edition, LexisNexis, Butterworths, New Delhi, India, 2006, page 85. O. P. Malhotra, The law and practice of Arbitration and Conciliation, 2nd ed., Indu Malhotra ,2006 LexisNexis Butterworth,p.125114

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.

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,60 Bombay61 and Madras62 these regulations lacked uniformity of details and clarity. However, they introduced substantial changes in the Panchayat Systems in Basic law of Muslim Comprised of Quran , Sunnah, Ijma and Qiyas

60 Bengal Regulations I of 1772 IX 1833 etc. Bombay regulations I of 1799, IV and VI of1827 Madras Regulations I of 1802 and regulations IV, VI and VII of 1822115 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).

Enactment of the Code of Civil Procedure

After establishment of the legislative council for India in 1834, the code of Civil Procedures 185963 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 63 Act No. 8 of 1859116 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.

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,

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 194065. 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 arises66. 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 Act 10 of 1940 6 M/s Tractor export, Moscow V. Tarapore and Co. AIR 1971 SC 1 at 11118 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.

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.

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 Almost all the democratic countries of the world have faced this situation. United States was the first in introducing law reforms about 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.

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 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 68 Source: www.supremecourtofindia.nic.in, also see Bar & Bench News Network Jul 15, 2010 Google search Table No. 3.1 Pending Cases Courts 2008 2009 2010 Supreme court*

Admission 26,863 30,834 33,352

Regular 19,024 19,329 21,512

Total 45,887 50,163 54,864

High Courts * 3,743,060 3,874,090 4,060,709

Lower Courts** 25,418,165 26,409,011 27,275,953

Total (All Courts) 29,207,112 30,333,264 31,391,526

*Statistics as of march 31, 2010

** Statistics as of December 31, 2009.

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

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

Courts 2008 2009 2010

Supreme Court* Sanctioned 26 31 31

Vacancies 1 7 2

High Courts** Sanctioned 876 886 895

Vacancies 282 251 267

Lower Courts** Sanctioned 15,917 16,685 16,880

Vacancies 3,393 3,129 2,785

*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*

Country Ratio of judges to population (per 10 Lac population)

USA 107 Judges

Canada 75 Judges

Australia 57.7 Judges

England 50.9 Judges

India 10.5 Judges

*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."70 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: 120th Report of the Law Commission of India on Manpower Planning in the Judiciary: A Blueprint, Ministry of Law, Justice and Company Affairs, Government of India (1987) 39.

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

Ability of Courts to disposal off the Cases

There is yet another aspect which the speed that the 21st century's demands and that is the complicated and burdensome procedural details which are inherently very slow proving. Filing of the plaint, serving the Subhash Kothari, Courting Disaster: A case for Judicial Reform, Times of India, 28-6-2000, p.14. Madabhushi Sridhar, ALTERNATIVE DISPUTE RESOLUTION NEGOTIATION AND MEDIATION, First edition,2006, LexisNexis Butterworths Wadhawa, Nagpur, 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. 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.

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 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 haves and the have note 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 overland 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.

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 to the second laws commission 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 The Arbitration Act 1940 replaced the previous act75. 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. J. Beatson Anson's Law of contract, 28th edition, 2002, Oxford University Press, P. 366. Arbitration Act 1899 Justice Dr. B. P. Saraf, Justice S. M. Jhunjhunwala, Law of Arbitration and Conciliation, 3rdedition, 200, Snow White Publication, p. 97. 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 Section 7(h b) of the Notaries Act, 1952, states function of a notary is to act as arbitrator, conciliator, if so required 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). 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 proceedings80. 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 S.K. Mishra, Labour and Industrial Law of India, third edition, 2005, Allahabad law Agency, p.60. 78 Professional's Bare Act, Notaries Act, 1952, Professional book publishers, 2003, p.23. 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. K.A. Abdul Jalees V. T.A. Sahida (2003) 4 SCC 166129

adjourn the proceedings for any reasonable period to enable attempts to be made to effect settlement it 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 India83 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 Professional's Family Court Act Bare Act, 1984, Professional book publishers, 2005, p.45. Ghanshyam Dass V. Domination of India (1984) 3 SCC 46 83 AIR 1969 SC 674

84 Dr. S. R. Myneni, Code of Civil procedure and Limitation Act, First edition, 2006, Asia Law House,p.114.130 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; or131

(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. Professional's, code of Civil Procedure Bare Act, 2003, Professional Book Publishers, p. 37.132 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.86 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 C. K.Takwani, Civil Procedure, sixth edition, Eastern Book co., 2009, p. 215. court concerned or the parties were advised to seek remedy before the competent forum Lok Adalat did not posses the power to decide the diputes 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 notices to parties. The preliminary jurisdiation 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 Act87 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. Dr. Mamta Rao, Public interest litigation, Legal aid and Lok Adalat, 3rd edition, 2010.

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 record88

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 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.

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 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,91 dispute was between govt. dept and P. S. U. Report was Supra Foot Note 1992 supp. 2 SCC 432 Supp. 4 SCC 541138

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, 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 Bank93, it was held that the direction of the Supreme Court in Oil and Natural Gas Commission Case III,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 Rajsthan State Road Transport Corporation V. Krishna Kant95, the Supreme Court observed: "The policy of law emerging from (2003) SCC 472 2006(3) SCALE 557 (2004) 6 SCC 437 1955 (5) SCC 75139

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 disputes96. In the M/s Guru Nayak Foundation V. Rattan Singh and Sons97, 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 Mohinderpal98, 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. 98 AIR 1989 SC 1263 at 1267, (1989) 2 SCC 347140

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 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 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.101, Supreme Court has summarized evolvements 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

99 (2002)2 SCC 178 100 (2002) 1 SCC 203 101 2006 (6) SCALE 71141

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' choice103. 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 Law commission of India, Report No.222, April 2009, Need for justice dispensation through ADR etc. Union of India v. M/S Singh Builders Syndicate 2009(4) SCALE 491. 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 189145

"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 India106 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 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".

The position was reiterated by this Court in Jagdish Chander V. Ramesh Chander108 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 .Vs. Cherian Varkey Construction Co. (P) ltd and other109 J. R. V. Raveendran, J., has discussed error in drafting section89 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 referrd 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.

2. The civil court should invariably refer cases to ADR process except in certain recognized excluded categories by giving reasons.

3. 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.

4. 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' 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 (d) 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.

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

(i) 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 agreeble 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 tomediation. 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.

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.

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 . 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 . 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

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) 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.

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.

In Chanbasappa Gurushantappa v. Baslinagayya Gokurnava Hiremath114, 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 Sirojexport Company Ltd. V. I.O.C. Ltd. (AIR 1997 Raj 120) In Pestonjee V. Manockjee116 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 Enforcement) Act 1961 was passed. In the landmark judgment in Ranusagar Power Co. Ltd. V. General Electric117 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 America118 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 Sons119, 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.

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 UNICITRAL model law was designed to apply only to international commercial arbitrators120. Second the 1996 Act does beyond the UNICITRAL 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 See Article 1 of UNICITRAL model law the 1996 Act apples both to international and domestic arbitrations.

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 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 manner125. The Law Commission of India prepared a report on the experience of the 1996 Act and suggested a number of amendments Based on recommendations of the commission the government of India introduced the arbitration and conciliation (Amendment) Bill 2003. In Parliament for amending the 1996 Act127, 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 176th 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 176th Report of Law Commission of India, www.lawcomissionofindia.nic.in. favour of institutional arbitration in recent times, with the realization of its several advantages over ad hoc arbitration

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 G. K. Kwatra, Arbitration and ADR How to settle international business disputes with supplement on Indian Arbitration law, 2004, International Trade center (Publication), New Delhi.164 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.

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, Inaugural address by Justice K.G. Balakrishnan, Chief Justice of India, on International conference on 'Institutional Arbitration in infrastructure and construction', New Delhi, Oct. 16, 2008., 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.

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 million131. 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 Dr. M. V. Parnajape, Arbitration and alternative dispute resolution, 3rd edition, Central law Agency, p 16 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 Act132. 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. 'Fast Track Arbitration', ICA's Arbitration Quarterly, ICA, 2006 Vol. XLI /No. 1 at p.8170

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.

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 Madhusudan Sharay, Arbitration and Conciliation Act, with Alternative Dispute Resolution, 2nd edition., 2008, Allahabad agency, process. 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 eroded135. The decision of the Supreme Court in the Saw Pipes case136 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 case137 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 Arbitration and Conciliation Act, 1996, Statement of Objects and Reasons. 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. Ashok H Desai, 'Challenges to an award – use and abuse', ICA's Arbitration Quarterly, ICA, 2006, vol. XLI/No.2, p 4.172 wrong, when the trend in international arbitrations is to reduce the scope and extent of 'public policy'139. 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 Act140. 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.'141 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,143 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 Pravin H Parekh, 'Public Policy as a ground for setting aside the award', ICA's Arbitration Quarterly, ICA, 2005, vol. XL/No.2, p. 19. 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. Sumeet Kachwaha,'Enforcement of Arbitration Awards in India', Asian International Arbitration Journal, 2008, vol. 4, number 1, p. 68. not only under the 1996 Act, but even under the 1940 Act144. In the case of Indian Oil Corporation Ltd. and Langkawi Shipping Ltd., the court held that to accept a literal construction on 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 Dealim Industrial Co. vs. Numaligarh Refinery Ltd.146 held that the ONGC vs. Saw Pipes, 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 ONGC case148, which has widened the ambit of 'public policy.' Violation of public policy of India is one of the grounds for challenge of an award Arbitration Appeal No. 1 of 2002 (August 24, 2006). under the 1996 Act149. 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.

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 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 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 Act152. 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 Section 34(2) (b) (ii) of the Arbitration and Conciliation Act, 1996. 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. Sunil Malhotra, 'Enforcement of Arbitral Awards', ICA's Arbitration Quarterly, ICA, 2006, vol. XL/No.4 at p 20. 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 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.

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. 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 gobalisation, liberalization and privatization in the 21st 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. Theydo not want 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. S. K. Dholakia, 'Analytical Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003', ICA's Arbitration Quarterly, ICA, 2005, vol. XXXIX/No.4 at p 23. Professor Anurag Agarwal, 'Resolving Business Disputes in India by Arbitration: Problems due to the Definition of 'Court', Indian Institute of Management, Ahmedabad, 2008 at p10.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 enfocment 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 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 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.

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. 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 onstruction 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 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 adjournments159. 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. 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. This is in addition to the other costs involved. In contrast, law suits, if admitted, are certainly cheaper, even

Samar Bhoite, 'Mediation, a process less practiced in India in Business Disputes Resolution' published in the website www.manupatra.com. Law Commission of India, 176th Report on Arbitration and Conciliation (Amendment) Bill, 2001 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.

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. 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".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 nature and concept of dispute

Mavrommatis Palestine Concessions case, the Permanent Court gave the following broad definition:'A dispute is a disagreement on a point of law or fact, a confl ict of legal views or of interests between two persons.' In another case, the ICJ referred to 'a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations.'The Tribunal in Texaco v. Libya referred to a 'present divergence of interests and opposition of legal views'. ICSID tribunals have adopted similar descriptions of 'disputes', often relying on the PCIJ's and ICJ's definitions. Gerhard Hafner has described these definitions as too wide and too narrow at the same time. A look at judicial practice proves him right. Whether a dispute in the technical sense exists is rather more complex than these defi nitions would suggest. Practice also demonstrates that, far from being a purely academic issue, the existence vel non of a dispute can be decisive to determine a court's or tribunal's jurisdiction.The present contribution seeks to shed some light on the concept of disputes, particularly legal disputes, by reference to the practice of the International Court and investment tribunals. Taking the PCIJ's defi nition in Mavrommatis as a starting point, it addresses the following issues:— Under what circumstances does 'a disagreement' or 'conflict' become a dispute? Does the communication between the parties need to reach a certain level of intensity to qualify as a dispute? Mavrommatis Palestine Concessions (Greece v. Great Britain), Judgment of 30 August 1924, 1924 PCIJ (Ser. A) No. 2, at 11.Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory

Opinion of 30 March 1950 (fi rst phase), 1950 ICJ Rep. 65, at 74 Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Libyan Arab Republic, Preliminary Award of 27 November 1975, 53 ILR 389, at 416 (1979). Maffezini v. Spain, Decision on Jurisdiction of 25 January 2000, 40 ILM 1129, at paras. 93, 94 (2001); Tokios Tokelės v. Ukraine, Decision on Jurisdiction of 29 April 2004, at paras. 106, 107; Lucchetti v. Peru, Award of 7 February 2005, at para. 48; Impregilo v. Pakistan, Decision on Jurisdiction of 22 April 2005, at paras. 302, 303; AES v. Argentina, Decision on Jurisdiction of 26 April 2005, at para. 43; El Paso Energy Intl. Co. v. Argentina, Decision on Jurisdiction of 272 April 2006, at para. 61; Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina, Decision on Jurisdiction of 16 May 2006, at para. 29; M.C.I. v. Ecuador, Award of 31 July 2007, at para. 63.G. Hafner, 'The Physiognomy of Disputes and the Appropriate Means to Resolve Them', supra note 1, at 560.46 – WHAT IS A LEGAL DISPUTE — Who determines whether the dispute is 'on a point of law or fact or a conflict of legal views'? What if a party describes the dispute as political and hence as non-legal? — How does the court or tribunal determine whether the dispute represents a confl ict 'of interests between' the parties? How does it deal with the argument that the issue before it is hypothetical and not suffi ciently concrete to be susceptible of judicial resolution?In addition to definitional issues, certain jurisdictional arguments are closely related to the existence of a dispute: — One party may argue that the dispute, if indeed there is one, is with a third party to which the claimant should turn. — The existence of a dispute may be uncontested but it may be disputed whether it has arisen before a date critical for the jurisdiction of a court or tribunal.

II. The Process of Communication Leading to a Dispute

The existence of a dispute presupposes a certain degree of communication between the parties. The matter must have been taken up with the other party, which must have opposed the claimant's position if only indirectly. Practice demonstrates that the threshold required in terms of communication between the parties for the existence of a dispute is fairly low. In certain situations a dispute may exist even in the absence of active opposition by one party to the claim of the other party.

A. Intensity of Communication

In a number of cases the question arose as to whether the communications between the parties, before the initiation of proceedings, had reached an intensity that deserved the

designation as a dispute. In the Interpretation of Peace Treaties case the ICJ was confronted with the question as to whether the diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand, and certain Allied and Associated Powers signatories to the Peace Treaties on the other, amounted to a dispute. The Court gave an affi rmative response on the basis of a fi nding that the two sides had expressed clearly opposing views concerning their treaty obligations. The Court said:'Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence. In the See also Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion of 26 April 1988, 1988 ICJ Rep. 12, at para. CHRISTOPH SCHREUER

diplomatic correspondence submitted to the Court, the United Kingdom, acting in association with Australia, Canada and New Zealand, and the United States of America charged ulgaria, Hungary and Romania with having violated, in various ways, the provisions of the articles dealing with human rights and fundamental freedoms in the Peace Treaties and called upon the three Governments to take remedial measures to carry out their obligations under the Treaties. The three Governments, on the other hand, denied the charges. There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen.'

In the South West Africa cases, the ICJ found that it had to address the preliminary question as to the existence of a dispute since its competence under the Mandate and under Articles 36 and of its Statute depended on a positive fi nding on this issue. After quoting the well-known definition from Mavrommatis it said:'In other words it is not suffi cient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its nonexistence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other. Tested by this criterion there can be no doubt about the existence of a dispute between the Parties before the Court, since it is clearly constituted by their opposing attitudes relating to the performance of the obligations of the Mandate by the Respondent as Mandatory.' In the Certain Property case, there had been bilateral consultations between Germany and Liechtenstein. Germany argued that 'a discussion of divergent legal opinions should not be considered as evidence of the existence of a dispute in the sense of the Court's

Statute “before it reaches a certain threshold”’.12 After quoting from the South West Africa cases and briefly describing the divergences between the parties, the Court said:‘The Court thus fi nds that in the present proceedings complaints of fact and law formulated by Liechtenstein against Germany are denied by the latter. In conformity with well-established jurisprudence (…), the Court concludes that ‘[b]y virtue of this denial, there is a legal dispute’ between Liechtenstein and Germany.’

These cases indicate that the threshold for the existence of a dispute in terms of prior communication between the parties is fairly low. The exchanges between the parties Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, supra note 5, at 74.South West Africa (Ethiopia v. South Africa; Liberlia v. South Africa), Preliminary Objections, Judgment of 21 December 1962, 1962 ICJ Rep. 319, at 328. Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment of 10 February 2005, 2005 ICJ Rep. 6, at para. 23

WHAT IS A LEGAL DISPUTE

do not require a high degree of intensity or acrimony. The formulation of opposing positions by the parties is sufficient.B. Absence of Opposition If a dispute and hence the jurisdiction of international courts and tribunals depends on the formulation of opposing positions, what if the respondent simply acknowledges the position of the claimant yet fails to provide a remedy? The mere admission of liability cannot be a valid defence in legal proceedings and will not deprive the court or tribunal of its jurisdiction. Under these circumstances, the absence of an overt disagreement between the parties will not negate the existence of a dispute.Sir Robert Jennings has described this dilemma in the following terms with respect to the ICJ:‘[C]an the Court, in its contentious jurisdiction, pass upon a question of law or fact, even if that point is not strictly disputed between the parties? For it is not difficult, certainly in municipal law, to imagine cases in which there is no real legal dispute between two persons; yet a court might have undoubted competence. If a debtor freely acknowledges the sum and due day of a debt but simply does nothing about it, the creditor can surely sue and get the court to enforce payment of the debt, even if there is no true ‘legal dispute’ or even dispute about fact, before the Court. [...] Even in a case which follows normal procedures there is often agreement between the parties on certain points of law or fact, often quite important ones. It has never been suggested that this absence of dispute removes the point from the Court’s competence.’ The Headquarters Agreement case concerned the

Headquarters Agreement between the United Nations and the United States. The United Nations, noting the existence of a dispute, invoked the Agreement's Article 21 that provides for arbitration. The United States took the position that it 'had not yet concluded that a dispute existed'. The General Assembly requested an advisory opinion from the ICJ on the question as to whether the United States was under an obligation to enter into arbitration under Article 21 of the Agreement.17 One of the questions before the Court was whether there was, in fact, a dispute triggering the obligation to go to arbitration. The United Nations had on several occasions asserted the incompatibility of certain US legislation with the Headquarters Agreement. But the United States had never formally contested that 14 R. Jennings, 'Reflections on the Term "Dispute"', in R. St. J. Macdonald (ed.), Essays in Honour of Wang Tieya 401, at 404 (1993). Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Head-quarters Agreement of 26 June 1947, supra note 9.16 Ibid., 29, para. 39

CHRISTOPH SCHREUER position. The Court found that the lack of refutation of the UN position by the United States did not negate the existence of a dispute. The Court said:'37. The United States has never expressly contradicted the view expounded by the Secretary-General and endorsed by the General Assembly regarding the sense of the Headquarters Agreement. Certain United States authorities have even expressed the same view, but the United States has nevertheless taken measures against the PLO Mission to the United Nations. It has indicated that those measures were being taken 'irrespective of any obligations the United States may have under the [Headquarters] Agreement' […].

In the view of the Court, where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty.'

In AGIP v. Congo, the Government had expropriated the Claimant's assets without compensation in violation of a prior agreement. Before the ICSID Tribunal, the Government declared that there was no longer any dispute since it had recognised the principle of compensation.20 The Tribunal found that the declarations made by the Government were so lacking in precision that the continuing existence of the dispute was not in doubt. It noted that the Claimant had not, in fact, received any compensation. In addition, the claim was directed

not only at compensation for the nationalisation but also at damages for losses resulting from the Government's violations of its contractual obligations.

C. Failure to Respond

Failure to respond to the demands of the other party will not exclude the existence of a dispute. Silence of a party in the face of legal arguments and claims for reparation by the other party cannot be taken as expressing agreement and hence the absence of a dispute. In the Headquarters Agreement case, the ICJ, referring to the Teheran Hostages case,22 noted the lack of appearance of Iran in that case. It saw no obstacle AGIP v. Congo, Award of 30 November 1979, 1 ICSID Rep. 306 (1993). United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment of 24 May 1980, 1980 ICJ Rep. 3, at 24.46 – WHAT IS A LEGAL DISPUTE the existence of a dispute and hence to its jurisdiction in the lack of response to the claims of the United States on the part of Iran. The Court said:'Iran, which did not appear in the proceedings before the Court, had acted in such a way as, in the view of the United States, to commit breaches of the Conventions, but, so far as the Court was informed, Iran had at no time claimed to justify its actions by advancing an alternative interpretation of the Conventions, on the basis of which such actions would not constitute such a breach. The Court saw no need to enquire into the attitude of Iran in order to establish the existence of a 'dispute'; in order to determine whether it had jurisdiction […].'Investment tribunals have similarly noted the lack of response by a party to the demands of the other. This did not affect the existence of a dispute between them.It follows that normally a dispute will be characterized by a certain amount of communication demonstrating opposing demands and denials. This is obviously what the PCIJ had in mind in Mavrommatis when it referred to a 'confl ict of legal views or of interests between two persons'. But an acknowledgement of the other side's position unaccompanied by a remedy or even a simple failure to respond will not exclude the existence of a dispute. The decisive criterion for the existence of a dispute is not an explicit denial of the other party's position but a failure to accede to its demands.

The Legal Nature of the Dispute

If dispute settlement is to be achieved by judicial means, such as the ICJ or investment arbitration, the use of these means is conditioned on the existence of a legal dispute. Article 36(3) of the UN Charter states that legal disputes should, as a general rule, be referred to the ICJ.25 Article 36(2) of the ICJ's Statute refers to legal disputes when providing for

submission by States under the so-called optional clause. Article 38(1) of the Statute states that the ICJ's function is to decide the disputes submitted to it in accordance with international law. The ICSID Convention in Article 25(1) refers to legal disputes that may be resolved by conciliation or arbitration. Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Head-quarters Agreement of 26 June 1947, supra note 9, at 28, para. 38.24 Tradex v. Albania, Decision on Jurisdiction of 24 December 1996, 5 ICSID Rep. 60, at 61 (2002); AAPL v. Sri Lanka, Award of 27 June 1990, 4 ICSID Rep. 251 (1997). 1945 Charter of the United Nations, art. 36(3): 'In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.' 1945 Statute of the International Court of Justice, art. 38(1): 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: […].'1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965 ICSID Convention), 575 UNTS 159, 4 ILM 524 (1965), art. 25(1): 'The CHRISTOPH SCHREUER Even where the existence of a dispute is admitted, its legal nature may be contested. Some respondents have argued that the nature of the dispute at issue was not legal and that hence the court or tribunal lacked jurisdiction. The legal nature of disputes is sometimes described in terms of factual situations and the consequences engendered by them. Examples are the use of force,

application of a treaty, expropriation or breach of an agreement. But fact patterns alone do not determine the legal or non-legal character of a dispute. Rather, it is the type of claim that is put forward and the prescription that is invoked that decides whether a dispute is legal or not. Thus, it is entirely possible to react to a breach of an agreement by relying on moral standards by invoking concepts of justice or by pointing to the lack of political wisdom of such a course of action. The dispute will only qualify as legal if legal rules contained, for example, in treaties or legislation are relied upon and if legal remedies such as restitution or damages are sought. Consequently, it is largely in the hands of the claimant to present the dispute in legal terms. The ICJ has looked unfavourably upon the argument that disputes before it were of a political rather than legal nature and were hence outside its jurisdiction. It has stated repeatedly, both in contentious proceedings and in proceedings leading to advisory opinions, that it will not abdicate its function, merely because a case before it has political implications.In the Teheran Hostages case, Iran advanced the argument that the question before the ICJ represented only a marginal and secondary aspect of an overall situation

containing much more fundamental and complex elements. The Court should examine the whole political dossier of the relations between Iran and the United States over the last 25 years.29 The Court rejected this argument. After noting that the seizure of the US Embassy and Consulate and the detention of internationally protected persons as hostages cannot be considered as something marginal or secondary, it said:'legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and longstanding political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.'ju ris diction of the Centre shall extend to any legal dispute arising directly out of an invest-ment […].'

United States Diplomatic and Consular Staff in Tehran, supra note 22.29 Ibid., 19, para.

– WHAT IS A LEGAL DISPUTE In the Nicaragua case, the United States objected to the claim not because the dispute was political but because the matter was essentially one for the Security Council since it involved a complaint involving the use of force.32 This argument also did not find favour with the ICJ: '[T]he Court is of the view that the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued pari passu. […] The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore per-form their separate but complementary functions with respect to the same events. It must also be remembered that, as the Corfu Channel case (I.C.J. Reports 1949, p. 4) shows, the Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force.' The ICJ restated its dismissal of a 'political questions doctrine' in 2004 in an advisory opinion. In the Israeli Wall case, it rejected the view that it had no jurisdiction because of the political character of a question put before it. The fact that a legal question also has political aspects was not sufficient to deprive it of its character as a legal question. The Court summarized its own practice in the following terms:'[T]he Court cannot accept the view, which has also been advanced in the present proceedings, that it has no jurisdiction because of the 'political'

character of the question posed. As is clear from its long standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects,"as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a "legal question" and to deprive the Court of a competence expressly conferred on it by its Statute' (Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J, Reports 1973, p. 172, para. . Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947 1948, pp. 61 62; Competence of the General Assembly for 31 Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment of 26 November 1984, 1984 ICJ Rep. 293. 32 Ibid., 431-436, paras. 89-98. Ibid., paras. 93, 95, 96; see also Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14, at 26-28, paras. 32-35.34 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, 2004 ICJ Rep. 136.968 CHRISTOPH SCHREUERthe Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, pp. 6 7; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 155)." (Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I), p. 234, para. 13.)In its Opinion concerning the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, the Court indeed emphasized that," in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate …". (I.C.J. Reports 1980, p. 87, para. 33).Moreover, the Court has affi rmed in its Opinion on the Legality of the Threat or Use of Nuclear Weapons that"the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion" (I.C.J. Reports 1996 (I), p. 234, para. 13). The Court is of the view that there is no element in the present proceedings which could lead it to conclude otherwise.'The ICSID Convention specifically refers to a 'legal dispute' when circumscribing the competence of

tribunals.36 The legal character of disputes gave rise to some debate in the Convention's drafting.37 The Report of the Executive Directors offers the following clarification:

'. [...] The expression 'legal dispute' has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere confl icts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.'Investment tribunals were also confronted with the argument that disputes before them, or certain aspects of these disputes, were not legal in nature and hence outside ICSID Convention, art. 25(1): 'The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.' C. Schreuer, The ICSID Convention: A Commentary, art. 25, at paras. 39, 40 (2001). Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), adopted by Resolution No. 214 of the Board of Governors of the International Bank for Reconstruction and Development on 10 September 1964, 1 ICSID Rep. 23, at 28 (1993).970 CHRISTOPH SCHREUER

over the effects of the devaluation measures was one over policy and fairness and hence not legal in nature. The Tribunal rejected this objection and said:'A legal dispute, in the ordinary meaning of the term, is a disagreement about legal rights or obligations. [...] In the present case, the Claimants clearly base their case on legal rights which they allege have been granted to them under the bilateral investment treaties that Argentina has concluded with France and Spain. In their written pleadings and oral arguments, the Claimants have consistently presented their case in legal terms. [...] [T]he dispute as presented by the Claimants is legal in nature.' Other ICSID tribunals have similarly held that the decisive factor in determining the legal nature of the dispute was the assertion of legal rights and the articulation of the claims in terms of law. It follows from the practice, as set out above, that the legal nature of a dispute depends not on the factual circumstances of a case but on the position taken by the claimant. If the claimant presents its claim in terms of rights and legal remedies, the argument that the dispute is not legal will be to no avail.

Hypothetical Disputes

In order to amount to a dispute capable of judicial settlement, the disagreement between the parties must have some practical relevance to their relationship and must not be purely theoretical. It is not the task of international adjudication to clarify legal questions in abstracto. The dispute must relate to clearly identifi ed issues between the parties and must be more than academic. This is not to say that a specifi c action must have been taken by one side or that the dispute must have escalated to a certain level of confrontation, but merely that it must be of immediate interest to the parties. Actual or concrete damage is not required before such a party may bring legal action. But the dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim.46 Ibid., paras. 34, 37reparation to be made for breach of a legal obligation.'Investment tribunals were also confronted with the argument that disputes before them, or certain aspects of these disputes, were not legal in nature and hence outside ICSID Convention, art. 25(1): 'The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.' C. Schreuer, The ICSID Convention: A Commentary, art. 25, at paras. 39, 40 (2001). Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), adopted by Resolution No. 214 of the Board of Governors of the International Bank for Reconstruction and Development on 10 September 1964, over the effects of the devaluation measures was one over policy and fairness and hence not legal in nature. The Tribunal rejected this objection and said:'A legal dispute, in the ordinary meaning of the term, is a disagreement about legal rights or obligations. [...] In the present case, the Claimants clearly base their case on legal rights which they allege have been granted to them under the bilateral investment treaties that Argentina has concluded with France and Spain. In their written pleadings and oral arguments, the Claimants have consistently presented their case in legal terms. [...] [T]he dispute as presented by the Claimants is legal in nature.' Other ICSID tribunals have similarly held that the decisive factor in determining the legal nature of the dispute was the assertion of legal rights and the articulation of the claims in terms of law. It follows from the practice, as set out above, that the legal nature of a dispute depends not on the factual circumstances of a case but on the position taken by the claimant. If the claimant presents its claim in terms of rights and legal remedies, the argument that the dispute is not legal will be to no avail.

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• Increased likelihood of the preservation of relationships between the parties, with ADR providing a less adversarial environment than formal litigations procedures

• Success in both civil and common law systems

Philosophy of ADR INTRODUCTION

. AN OVERVIEW OF ALTERNATIVE DISPUTE RESOLUTION

THE CONCEPT OF A.D.R.

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.2 The basic rationale of ADR as the expression itself 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.3 ADR techniques are extra judicial in character and can be used in almost all contentious matters which are capable of being resolved, under law by agreement between the parties. Bryan A. Garner (Ed.), Black’s Law Dictionary 112-113 (West Publishing Company, St. Paul, Minnesota, 8th Edn., 2004) also defines ADR as a procedure for settling a dispute by means other than litigation; In fact all ADR processes share one essential characteristic that they differ from litigation in a court of law. See Katherine V.W. Stone, “

Alternative Dispute Resolution:

Encyclopedia of Legal History", research paper, University of California, Los Angeles School of Law, available at: http://papers.ssrn.com (last visited on 11.04.2012).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 12.05.2011). 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 process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy ….''; See also Alternative Dispute Resolution Act, 2004 (Republic of Philippines).

Sarvesh Chandra, "ADR: Is Conciliation the Best Choice" in P.C. Rao and William Sheffield (Eds.), Alternative Dispute Resolution 82 (Universal Law Publishing Company Pvt. Ltd., Delhi, 1997); See also ArunvirVashista, "Emerging Trends in ADR as Dispute Resolving Techniques", XLIX ICA Arbitration Quarterly 31 (January – March 2011).P.C. Rao, "Alternatives to Litigation in India", in P.C. Rao and William Sheffield (Eds.), Alternative Dispute Resolution 24 (Universal Law Publishing Company Pvt. Ltd., Delhi, 1997).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.

CLASSIFICATION OF ADR PROCESSES

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, Ashwanie Kumar Bansal, Arbitration and ADR 17 (Universal Law Publishing Co. Pvt. Ltd., Delhi, 2005).

ADR NON ADJUDICATORY ADJUDICATORYMEDIATION CONCILIATION LOK ADALTAS,Etc. ARBITRATION BINDING EXPERT DETERMINATION Etc.

Hybrids Eg. Med-Arb, PLA that a dispute is a problem to be solved together rather that a combat to be won. One of the basic principles of ADR is cooperative problem solving. 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 the adversarial attitude and encouraging more openness and better communication between the parties leading to a mutually acceptable resolution.8 In that sense ADR methods are definitely more cooperative and less competitive than adversarial litigation. 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. The emphasis in ADR, which is informal and flexible, is therefore on "helping the parties to help themselves".The general approach in ADR (non adjudicatory) can be illustrated by the story of two cooks fighting over an orange. The judge selects some Woodrow Wilson has said that a dispute is a problem to be solved together rather that a combat to be won. S.B. Sinha, "Courts and Alternatives" available at: www.delhimediationcentre.nic.in (last visited on 05.09.2010). See also UjwalaShinde, "Challenges Faced by ADR System in India", The Indian Arbitrator 6 (February 2012).Alexander Bevan, Alternative Dispute Resolution (Sweet and Maxwell, London, 1992); ADR methods are in fact participatory solution finding processes. See Law Commission of India, 222nd Report, Need for Justice-dispensation through ADR, etc. (2009). S.N.P. Sinha and P.N. Mishra, "A Dire Need of Alternative Dispute Resolution System in a Developing Country like India", XXXI (3 & 4) Indian Bar Review 297 (2004). 10 It is very important that the parties place themselves in a position of responsibility and create their own solutions, thus maximizing the probability of their long-term success, since no one can really comprehend what is best for the parties better than the parties themselves. See Michael Tsur, "ADR — Appropriate Disaster Recovery", Cardozo J. Conflict Resol. 371 (2008).K.S. Chauhan, "Alternative Dispute Resolution in India", available at: http://icadr.ap.nic. in/articles/articles.html (last visited on 08.01.2009). 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).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 from the point of view of interest together rather than rights and positions."…I realized that the true function of a lawyer was to unite parties riven asunder. The 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."Mahatma Gandhi had also advocated this approach which forms the backbone of ADR and observed: Alexander Bevan, Alternative Dispute Resolution 2 (Sweet and Maxwell, London, 1992). Mahatma Gandhi, An Autobiography: The Story of My Experiments with Truth 134 (Beacon Press, Boston, 1993); In B.S. Krishna Murthy v. B.S. Nagaraj, AIR 2011 SC 784 the Supreme Court after quoting various passages from Mahatma Gandhi's book 'My Experiments with Truth' referred the dispute to mediation. ADR processes are, mostly, non adjudicatory and they are bound to be since ADR is primarily an alternative 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 sans the will of the parties.14 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. ADR, albeit, is primarily understood as Alternative Dispute Resolution, however, ADR is not an alternative in the sense that it may be a complete substitute for the entire judicial system. It is not in competition with the

established judicial system 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 LokAdalats are examples of such hybrid procedures.

ADR = ADDITIONAL/ APPROPRIATE DISPUTE RESOLUTION

On these lines, sometimes a distinction is sought to be drawn between arbitration on the one hand and ADR on the other. See also V.A. Mohta&Anoop V. Mohta, Arbitration, Conciliation and Mediation (Manupatra, Noida, 2nd Edn., 2008). nor is it intended to supplant altogether the traditional mechanism of resolving disputes by means of litigation in the 15 Luke R. Nottage, "Is (International) Commercial Arbitration ADR?", 20 The Arbitrator and Mediator 83 (2002) available at: http://papers.ssrn.com (last visited on 12.04.2012). See also D.K. Jain, "Arbitration as a Concept and as a Process", XLI (4) ICA Arbitration Quarterly (January – March 2007); See also P.C. Rao, "Alternatives to Litigation in India", in P.C. Rao and William Sheffield (Eds.), Alternative Dispute Resolution (Universal Law Publishing Company Pvt. Ltd., Delhi, 1997).Laurence Street, "The Language of Alternative Dispute Resolution" 66 Australian L.J. 194 (1992).courts.

The ADR movement therefore does not advocate abandoning or replacing the judicial dispute resolution system; it simply means understanding the alternatives to litigation, their advantages and disadvantages and considering how they can be most effectively utilized. Thus ADR techniques therefore, in essence, offer only an additional mode of dispute resolution other than litigation to the disputant parties. Hence ADR is also sometimes referred to as Additional Dispute Resolution as it supplements and complements the traditional dispute resolution process of litigation. It happens, quite often that it is not apt for the parties to have their disputes resolved through the conventional litigative process or such litigative process is not likely to yield timely fruits in the given facts and circumstances and this steers the disputant parties to opt for ADR. ADR processes are therefore consensual and voluntary processes which are chosen by the parties to the dispute for effective resolution of their

disputes. The prime object of ADR movement is avoidance of vexation, expense and delay and promotion of the ideal of access to justice for all.

V.R.R. Vara Prasad, "Alternative Dispute Resolution (ADR) System in United States of America", Andhra L. T. (Journal) 18 (2000); See also Bruce E. Meyerson, "The Dispute Resolution Profession should not Celebrate the Vanishing Trial", 7 Cardozo J. Conflict Resol. (2005).Joanne Goss, "An Introduction to Alternative Dispute Resolution", 34 (1) Alta. L. Rev. 1(1995) (Can.).

ADR permits the parties to K.D. Raju, "Alternative Dispute Resolution System: A Prudent Mechanism of Speedy Redress in India", available at: http://papers.ssrn.com (last visited on 21.04.2012); See also Rashmi Desai, "Mediation as a form of ADR" XLI (3) ICA Arbitration Quarterly 1 (October –December 2006); ADR has become a cornucopia of processes, procedures and resources for responding to disputes, all of which supplement rather than supplant traditional approaches to conflict. See Law Reform Commission, Ireland, Report on Alternative Dispute Resolution: Mediation and Conciliation, LRC 98-2010, November 2010 available at: http://www. lawreform.ie (last visited on 10.04.2010). Ashwani Kumar Bansal, Arbitration and ADR 17 (Universal Law Publishing Co. Pvt. Ltd., Delhi, 2005); However parties may be required to engage in ADR due to legislation and this requirement may be part of a system of pre-litigation compulsory dispute resolution or may be a step in the process of case management in courts. See Kathy Douglas, "Shaping the Future: The Discourses of ADR and Legal Education", 8 (1) QUT Law and Justice J. 118 (2008). In India also section 89 CPC mandates that the parties be referred to an ADR process prior to commencement of trial. P.C. Rao, "Alternatives to Litigation in India", in P.C. Rao and William Sheffield (eds.), Alternative Dispute Resolution 24 (Universal Law Publishing Company Pvt. Ltd., Delhi, 1997); Warren E. Burger, Former Chief Justice, United States Supreme Court in his keynote address in the "National Conference on the Causes of Popular Dissatisfaction with Administration of Alternative Dispute Resolution (ADR) Procedures The background – Traditional dispute resolution procedures

Private Negotiation

A lost skill, negotiation is a process of the parties themselves or via skilled representatives, negotiating a deal with the other disputant. Any settlement must be reduced to writing, which requires the skill of lawyers/legal counsel. There are no procedural rules here. Few parties

have training in this art, although counsel (Barristers) are in fact formally trained and regularly deploy this skill and are able to reduce any agreement to writing.

Public Litigation

Litigation is a (mostly) non-private, structured, expensive, adversarial, process where a Judge will decide a case based upon the issues and evidence put before the court by skilled counsel. It is not however a very flexible process: each party must formally put their case in statements of case and in witness statements and expert reports. The conduct of litigation is a skilled business. Evidence will be tested by way of cross examination of witnesses (including experts) by skilled counsel, and the Judge will decide the issues put to the court. The losing party will have to bear his/her/its own costs and those of the opposition. The rule book is the Civil Procedure Rules which can be found at the Secretary of State for Constitutional Affairs we site. The overwhelming majority of litigation is heard in public.

Private Arbitration

Arbitration in practice is not dissimilar to litigation but ought to be private in that the proceedings are held in private. Arguably it is more expensive than litigation, in that the loser

pays the arbitration costs (venue and the considerable fees of the arbitrator). For arbitration to be binding, there must be an agreement which must be in writing if the Arbitration Act 1996 is to apply. In addition to the Arbitration Act 1996 there may also be rules agreed in the arbitration agreement (whether contractual or ad hoc). Arbitrators come from the ranks of lawyers and other professionals and sometimes, as in my case, from dually qualified and experienced professionals.

Private alternative dispute resolution (“ADR”) - an introduction.

On the other hand, ADR is, by definition, not a court procedure. ADR is a set of dispute resolution processes for finding a solution of the parties' own devising. It is an alternative to both arbitration and litigation, and its most important distinction from both of these is that, except in the case of expert determination, there is no judge, arbitrator or tribunal to tell the parties what the answer is or will be. There is therefore, no award or judgment handed down, and no statement of what is the 'right' or 'just' answer. Instead, the parties themselves choose the form of their preferred resolution process, appoint a neutral intermediary or facilitator to assist them, and then negotiate an appropriate solution which they both find acceptable.

Where expert determination is used the independent third party makes the decision but the parties resolve their dispute more quickly by avoiding the formalities of litigation or arbitration.

Some more modern approaches

The court may not order parties to use ADR as this might be an obstruction of the right of access to court. The Court of Appeal has recognised that although a court may not compel the parties to use ADR, the court may use robust encouragement and it has recognised the success rate of mediation at an early stage of the dispute. Research suggests that the success rate of ADR will be higher where the process is of the parties' own choosing and design.

Types of ADR mostly deployed in the UK

Mediation

Mediation is the most well known and most frequently used form of ADR. Mediation is a form of neutrally assisted (or facilitated) negotiation. It is a process in which the parties to the dispute select a mutually acceptable independent third party, the mediator, who will assist them in arriving at an acceptable solution to their conflict or dispute. In a typical mediation, the mediator will discuss the problem with the parties, both together in open forum, and separately in private sessions. The mediator's training and experience should permit him or her to use all the tools of 'shuttle diplomacy' and lateral thinking to attempt to assist the parties in focusing on underlying real interests and needs, rather than rights or liabilities, and to enable them to construct a solution which both find acceptable. In light of this the mediator plays a key role and careful consideration must be given to the selection of the most appropriate mediator.

Conciliation

Conciliation is very similar to mediation in its procedures and first stages, and in the lateral thinking about possible solutions which a conciliator tries to engender. This process differs from mediation in that the neutral (the conciliator) may express an opinion on the merits of the dispute and will himself recommend a resolution of the dispute if he cannot persuade the parties to create their own. Whether or not this recommended resolution is binding on the parties is for them to determine as a matter of contract. If all or any of the parties believes in advance that they will need or want to rely on the conciliator's recommendation, it would be

prudent to specify in advance in the agreement to conciliate that the conciliator's recommendation will be binding as a contract. If it is not, the agreement to be bound by it should be recorded in writing when the conciliation settlement agreement is drawn up. It is possible, if either party considers that enforcing the agreement may present difficulty, for the settlement agreement to be drawn up as a consent award to make it enforceable by the courts as if it were an arbitration award. Conciliation is often to be preferred to mediation when the parties need or want the benefit of the mediator's intervention and assistance in the particular confidential form provided, but also need to be able to define in advance the duration of the process, providing a point at which it may be possible to say that the process has been tried in good faith, but has been completed whether with or without a settlement. Because of this, many contractual ADR provisions which stipulate ADR as a precursor to arbitration or litigation will specify conciliation rather than mediation. Like mediation, conciliation is a "without prejudice" procedure, and is non-binding in that at any time before a settlement is achieved any of the parties, or the conciliator, may terminate the procedure. All the characteristics of privacy, confidentiality and economy which mediation exhibits are also true of conciliation. This definition of conciliation is becoming generally adopted in the ADR world with one notable exception. The Advisory, Conciliation and Arbitration Service (ACAS) means by 'collective conciliation' a process identical to mediation as defined above. The process described here as conciliation is called 'advisory mediation' by ACAS.

Neutral or expert evaluation.

These processes are sometimes referred to as early neutral evaluation, because of the stage in dispute in which they are commonly utilised, but they do not have to be early and could be adopted at any stage, or even be determinative of the dispute. For early neutral evaluation, the parties appoint a mutually acceptable neutral third person to evaluate their dispute and, usually, produce an opinion on its likely, or possible, outcome. The neutral's precise instructions, and the consequent nature of his report, will depend on his instructions as drafted by the parties (and their advisers). They may request an evaluation of their positions as a matter of law, and of liability, or of the likely outcome of a trial or arbitration (not necessarily the same thing as their legal positions), the possible reaction of a jury or other tribunal to their evidence, or a recommended best course of action to resolve or progress matters. The parties, having chosen and instructed their neutral (and agreed his terms), each submit their view of the dispute to him, together with such evidence and documents as they see fit. The process may be (and most usually is) conducted with documents only, but the

neutral may choose to interview either or both parties separately, or he may conduct an informal hearing with both parties present together at which solicitors or other advisers may or may not also be present. The decision as to how to conduct the process will probably be for the neutral, although it is likely that he will also consult the parties before making his choice. In seeking neutral evaluation of their dispute, the parties will need to appoint a skilled negotiator, experienced in dispute resolution and particularly in the practice and procedure in the forum in which it is expected that the dispute will eventually be heard. They may decide that they need to have their dispute evaluated by someone who is also expert in its subject matter in which case the process becomes expert evaluation. Whether a purely neutral or an expert evaluation is preferable will depend on the circumstances of the case and its subject matter, and is a decision for the parties and their solicitors. Particularly technical matters may well be better evaluated by an expert in the field, assuming that one can be found who is acceptable to both parties. Even in an expert evaluation, however, it is desirable that the chosen expert evaluator is also familiar with conventional dispute resolution in the technical subject, if he is to be asked for a view on the probable or possible outcome of the dispute in such a forum. By definition, evaluation of a dispute need not be binding on the parties, unless they so agree in which case the procedure is more nearly neutral or expert determination. This does not make it worthless. A clear understanding of the likely outcome of a dispute in law in the form of a disinterested analysis, or an independent assessment of the merits of each side's arguments, evidence and positions can be of assistance in producing an agreement, if only in producing for each party a realistic appraisal of his worst case and his prospects without a voluntary settlement. A mediator (or conciliator) will often work towards producing such an evaluation of each party's case during a mediation, although he will preserve confidentiality and not reveal his assessment of any one party's position to any other party without permission. He will instead try and use his neutral evaluations of each side's argument to encourage realistic negotiating positions from both.

As an ADR process, neutral or expert evaluation implies that both parties participate in the procedure and mutually instruct the evaluator and agree his terms of reference. Due to the assistance which a disinterested or independent assessment can provide in weighing up a position, however, it is quite possible for either party to commission such a view privately without informing the other, although in that case he cannot be said to be participating in any

ADR-style negotiation.

The Commercial Court offers parties the option, when making an ADR order, of early neutral evaluation before a Commercial Court judge. If settlement is not reached by this process, that judge will not take any further part in the case before the court, unless the parties agree otherwise. Neutral or expert determination. These processes are similar to neutral or expert evaluation, and conducted in a similar manner, except that the neutral or expert will be asked not to opine on what the outcome of a dispute might be in any given context, but to say what it should be. It has been held that clauses in a contract which require the parties to resolve a dispute by expert determination are valid and binding. The parties must comply with all of their provisions and the parties have no recourse to the courts. Where a defendant has refused to comply with an expert determination clause in the contract, the claimant may recover damages if it has to issue legal proceedings. In an expert determination there need not be pleadings, disclosure or formal hearing with cross-examination or formal oral submissions. If the parties wish, the expert determiner can be limited to the material they put before him, although this is not necessarily the case in arbitration. As in other alternative dispute resolution processes the agreed determination should be reduced to writing and signed by all parties as well as the determiner. If an expert determination clause provides that the expert should give reasons for his decision(s) the court will order that adequate reasons be given. It is important to note that the decision of the neutral or expert will not be binding unless the parties agree so beforehand. The agreement to seek neutral or expert determination of a dispute should as far as possible ensure that the parties will be bound, or if absolutely necessary should specify a time limit and method for challenging the determination by court proceedings.. Careful consideration of the best determiner of the dispute will be crucial to the acceptability of his findings and the likelihood that both parties will continue to be bound by them after the event. An expert cannot, unlike an arbitrator, make an award or order, and it is possible that the parties may agree only to be bound by his determination for a limited time, or pending some other eventuality or finding. The court may decline to overturn an expert determination or to disqualify the parties' appointed expert.

Adjudication

Non - Housing Grants, Construction and Regeneration Act 1996 adjudication is another process in which the parties appoint a neutral, who may also be expert in the subject matter of the dispute, to decide the dispute. The adjudicator's decision can be finally binding, of temporary or interim effect, or advisory only, depending on the parties' terms of reference to him. Adjudication is therefore conceptually and practically very similar to expert

determination and to informal arbitration. How any given ADR procedure is categorised between these three is largely a matter of degree, and personal preference. Arbitration, however informal, is nonetheless constrained by statutory and common law, and expert determination has been the subject of several judicial decisions. If the process is described as 'adjudication', however, it will be free of any of these controls and the parties retain control of procedure, timing, evidence and costs. The adjudication is enforceable only as a matter of contract between the parties, and therefore the agreement to have a dispute adjudicated should be drawn up carefully and signed by all parties to the dispute. It is important to ensure that the appointed adjudicator has jurisdiction to act. Similarly, the eventual adjudication should be reduced to writing and signed by the adjudicator and all parties. A party to a construction contract has the right to refer a dispute arising under the contract to an adjudicator by virtue of Housing Grants, Construction and Regeneration Act 1996.Executive hearings or 'mini-trials'. These are also sometimes known as 'supervised settlement procedures'. These hearings may be binding if the parties so agree. The process consists of a semi-formal hearing, by senior decision making executives of both parties who hear each side's arguments presented either by lawyers for each side, or by lower ranking managers of each side. They are usually assisted by a third, neutral, tribunal member frequently a lawyer or technical expert, who will chair the hearing. Procedural rules, timing and duration of the hearing are all subject to agreement in advance by the parties but the general practice is constant. The tribunal receives an oral submission, from the advocate for each side, of the case as he sees it, with facts and arguments appropriately marshalled. Expert or other witnesses may give evidence, in person if desired, and the tribunal may question any or all of those appearing before them, as they see fit. There may have been an agreed exchange of documents in advance, or for an agreed bundle of documents to be provided to the tribunal. It is generally left to each advocate to choose how his presentation may be made. The normal rules of evidence will not usually be applied, but each advocate will have the opportunity at the end of the submissions and expert and witness statements to sum up. The tribunal then determine the dispute, producing a binding settlement or an evaluation, as the parties have previously agreed. At this stage the neutral may adopt either an advisory role, on technical or legal matters or a facilitative role assisting the other two members to reach a resolution. One of the advantages of the mini-trial is that it is often the first time that the top management of the two parties have any knowledge, and in any detail, of the dispute apparently existing in their names. As a process the mini-trial combines the characteristics of several other forms of ADR, allowing the advocates and representatives of the parties who have been most closely

involved in the dispute an opportunity to present their cases for expert determination or a form of adjudication. At the same time, because the parties are the tribunal, the final outcome of the dispute remains in the parties' control, assisted by the facilitative and advisory skills of the neutral third member of the tribunal. Typical mini-trials are short, a day or so, and therefore provide all the savings in costs and time associated with ADR generally. There are a variety of Ombudsman schemes which were all founded on the need for consumer protection and assistance in the event of disputes with suppliers of goods and services. Although not commonly described as ADR, they represent a range of methods of dispute resolution from neutral or expert evaluation or determination to informal adjudication. In general, they are documents-only procedures. In addition, some providers, such as the Financial Ombudsman Service, will utilise mediation or conciliation for selected disputes. Recourse to the appropriate ombudsman is usually voluntary for the consumer or complainant, and usually is only available when the subscribing respondent's own internal complaints handling procedures have been exhausted. The ombudsmen's decisions are binding to varying degrees, some being binding on both parties, some on neither and some such as the Financial Ombudsman scheme binding on the member company only if the complainant accepts the complaint. The precise rules as to operation of and eligibility for each scheme vary, and should be checked with the appropriate office. Nonetheless, their common characteristics mean that all the Ombudsmen's Schemes should properly be considered as ADR and should be included in the range of dispute resolution methods to be considered when a dispute on a covered matter first arises. Selecting the most appropriate ADR process: the types compared. Mediation is a well-known and commonly discussed form of ADR. However, it also appears first in this list of ADR options because it is the one which grants the most control to the parties themselves over the final form of the settlement or resolution of their dispute. The other ADR processes described above reveal in increasing order, insofar as exact comparison is possible, a gradual relinquishing of that control to the neutral or tribunal. Which ADR process to choose in a given dispute will obviously depend in part on the nature of the dispute. Very often that decision will be affected by the size of the amount in dispute, or its importance to one or both of the parties. Some disputes will lend themselves naturally to a given form of ADR. Family and employment disputes will often be suitable for some style of mediation or conciliation, perhaps combined with some form of counselling. Disputes as to causation of a problem, collapse of a building, or an illness may best be resolved by expert determination or adjudication. Complicated contractual performance disputes may benefit from either expert determination or a mini-trial. A creative approach to drawing up such a

strategy will recognise that ADR processes are adaptable, and amenable to change to suit the circumstances. There is no need to be confined by the separate definitions of ADR processes described above. A hybrid form of ADR, or the use of two or more forms together, may be the best approach. For example, an early evaluation of liabilities, or of the probable outcome of a full hearing, might then enable mediation or conciliation from a more informed starting point. Some aspects of a dispute such as the cause of structural damage, or legal liabilities or remedies might best be established by expert determination or adjudication. Such adjudication might be of temporary effect only, to enable progress to a final settlement which then replaces the adjudication as part of that settlement. The Court of Appeal has also considered other cases in which ADR may not be suitable. If a party's case has merit, an application for summary judgment may be more appropriate. If the claim or defence is without merit, ADR should not be used as a tactical device by a claimant to extract a settlement or by a defendant to delay court proceedings. Where other settlement methods, such as without prejudice correspondence, have been attempted and failed, it may not be worth incurring the additional costs on an ADR process or where other factors, such as an unreasonably obdurate stance demonstrated by one party, suggest that ADR does not have a reasonable prospect of success. Alternative dispute resolution may not be appropriate if it is proposed at a late stage in court proceedings and will have the effect of delaying a trial. The following table attempts a comparison of the characteristics of litigation, arbitration and mediation.

Litigation Arbitration ADR

Control of proceedings Limited as subject to CPR Subject to arbitral agreement, institution rules and arbitrator Parties determine procedure in conjunction with neutral facilitator Choice of tribunal or neutral

Impact of dispute on economy

INTRODUCTION : No society is immune from the darkest impulses of man.” — Baracdevelopment and social conflict. By economic development, we refer broadly to aggregate changes in per capita income and wealth or in the distribution of that wealth. By social conflict, we refer to within-country unrest, ranging from peaceful demonstrations, processions, and strikes to violent riots and civil war. In whatever form it might take, the key feature of social conflict is that it is organized: It involves groups and is rooted—in some way or form—in within-group identity and cross-group antagonism. Our review is organized

around the critical examination of three common perceptions: that conflict declines with ongoing economic growth; that conflict is principally organized along economic differences rather than similarities; and that conflict, most especially in developing countries, is driven by ethnic motives. Although these perceptions are not necessarily wrong, they are often held too closely for comfort; hence the qualification "critical" in our examination. Within-country conflicts account for an enormous share of the deaths and hardships in the world today. Since World War II, there have been interstate conflicts with more than battle-related deaths per year; 9 of these conflicts have killed at least 1,000 people over the entire history of the conflict (Gleditsch et al. 2002). The total number of attendant battle deaths in these conflicts is estimated to be around 3 to 8 million (Bethany &Gleditsch 2005). The very same period has witnessed 240 civil conflicts with more than battle-related deaths per year, and almost half of these conflicts killed more than 1,000 people (Gleditsch et al. 2002). Estimates of the total number of battle deaths in these conflicts are in the range of 5 to 10 million (Bethany & Gleditsch 2005). To the direct count of battle deaths, one would do well to add the mass assas-sination of up to 25 million noncombatant civilians (Center for Systematic Peace, http://www.systemicpeace.org/inscrdata.html) and indirect deaths due to disease and malnutrition, which have been estimated to be at least four times as high as violent deaths (http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html), not to mention the forced displacements of 60 million individuals by 2015 (UNHCR 2015).2 In 2015, there were 29 ongoing conflicts that had killed 100 or more people in 2014, with cumulative deaths for many of them climbing into the tens of thousands. Figure 1 depicts global trends in inter- and intrastate conflict and Figure 2 the distribution of these conflicts over the world regions. Of course, things were probably worse in the past. For instance, Steven Pinker's book The Better Angels of Our Nature (Pinker 2011) is a delightfully gruesome romp through the centuries in an effort to show that violence of all forms has been on the decline. And he is undoubtedly correct: Compared to the utter mayhem that prevailed in the Middle Ages and certainly earlier, we are surely constrained—at least relatively speaking—by mutual tolerance, the institutionalized respect for cultures and religions, and the increased economic interactions within and across societies. To this one must add the growth of states that seek to foster those interactions for the benefit of That is not to argue that individual instances of violence, such as (unorganized) homicide, rape, or theft, are unimportant, and indeed, some of the considerations discussed in this review potentially apply to individual violence as well. But social conflict has its own particularities, specifically, its need to appeal to and build on some form of group identity: religion,

caste,kin, or occupational or economic class. In short, social conflict lives off of both identity and alienation.Such displacements also have a high cost in lives due t endemic sicknesses the newly settled population is not immune to (see Cervellati&Sunde 2005, Montalvo &Reynal-Querol 2007).Armed conflicts by type, 1946–2015. Conflicts include cases with at least 25 battle deaths in a single year. Figure taken from Melander et al. (2016). their citizens and that internalize the understanding that violence—especially across symmetric participants—ultimately leads nowhere. And yet, it is not hard to understand why this sort of long-run celebration seemingly flies in the face of the facts. We appear to live in an incredibly violent world. Not a day appears to go by when we do not hear of some new atrocity: individuals beheaded, planes shot from the sky, suicide bombings of all descriptions, mass killings, and calls to even more escalated violence. True, perspective is important: We did not live a century ago, nor in the Middle Ages, nor in the early days of Christendom. Nor did those eras have access to the Internet, where each act of savagery can be played on YouTube or by media outlets specializing in breaking news. With the calm afforded by a longer historical view, a perspective that Pinker correctly brings to the table, we can place our tumultuous present into context. What today's violence does show, however, is that there are limits to peace and civility as long as there are enormous perceived inequities in the world, and, as we try to argue in this review, high on that list of perceived inequities are economic considerations. Even the most horrific conflicts, those that seem entirely motivated by religious or ethnic intolerance or hatred, have that undercurrent of economic gain or loss that flows along with the violence, sometimes obscured by the more gruesome aspects of that violence but never entirely absent. From the great religious struggles of the past to modern civil wars and ethnic conflicts, we can see—if we look hard enough—a battle for resources or economic gain: oil, land, business opportunities, or political power (and political power is, in the end, a question of control over economic resources). This sort of economic determinism is unnecessarily narrow to some sensibilities, and perhaps it is. Perhaps conflict, in the end, is a "clash of civilizations" (Huntington 1996), an outcome of www but that sort of reasoning is incomplete. Is anti-Semitism a fundamental construct; or is racism just a primitive abhorrence of the Other; or is the caste system born from some primeval, intrinsic desire to segregate human beings? In all of these queries, there is a grain of truth: Anti-Semitism, racism, or ethnic hatred is deeply ingrained in many people, perhaps by upbringing or social conditioning. Often, we can get quite far by simply using these attitudes as working explanations to predict the impact of a particular policy or change (and we do so in Section 5). But stopping there prevents us from seeing a deeper common thread that, by creating and

fostering such attitudes, there are gains to be made, and those gains are often economic. By following the economic trail and asking cui bono?, we can obtain further insights into the origins of prejudice and violence that will—at the very least—supplement any noneconomic understanding of conflict. This review, therefore, asks the following questions: 1. How is economic prosperity (or its absence) related to conflict? What is the connection between economic development and conflict? Does economic growth dampen violence or provoke it?

2. Is the main form of economic violence between the haves and the have-nots? Is conflict born of economic similarity or difference?

3. Is there evidence for the hypothesis that "ethnic divisions"—broadly defined to include racial, linguistic, and religious differences—are a potential driver of conflict? And if so, does this rule out economic motives as a central correlate of conflict?

THREE COMMON PERCEPTIONS ABOUT CONFLICT

We organize the themes of this review around three common perceptions.

Perception 1: Conflict Declines with Per Capita Income Perhaps the most important finding of the literature on the economics of conflict is that per capita income is systematically and negatively correlated with civil war, whether one studies "incidence" or "onset." This is a result that appears and reappears in the literature, especially in large-scale cross-country studies of conflict (see, e.g., Collier & Hoeffler 1998, 2004a,b; Fearon & Laitin 2003a; Hegre & Sambanis 2006). Yet even this seemingly robust finding is fraught with difficulties of interpretation. Although there is no doubting the correlation between these two variables, there is also little doubt that countries with a history of active conflict are likely to be poor or that there are omitted variables, such as the propping up of a dictatorship by international intervention or support, that lead to both conflict and poverty. There are also issues of conceptual interpretation that we discuss in Section The argument we make in this review is that economic development is intrinsically un-even. That tranquil paradigm on which generations of economists have been nurtured—balanced growth—must be replaced by one in which progress occurs in fits and starts via processes in which one sector and then another takes off, to be followed by the remaining sectors in a never-ending game of catch-up. Thus, it is often the case that overall growth is made up of two kinds of changes: one that creates a larger pot to fight over, and therefore increases conflict, and another that raises the opportunity cost to fighting, and therefore decreases conflict. Whether conflict is positively or

negatively related to growth will therefore depend on the type of growth, specifically, how uneven it is across sectors or groups. Cross-country studies are too blunt to pick these effects up in any detail.

Perception 2: Conflict Is Created by Economic Difference, Rather Than Similarity This review, therefore, asks the following questions:

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Perception 2: Conflict Is Created by Economic Difference, Rather Than Similarity The great revolutions of the twentieth century were born of economic difference and of the realization that a relatively small elite reaped most of the rewards while a large, struggling proletariat suffered under a disproportionately small share of the pie. The traditional literature on crisis and revolution, in which the contributions of Karl Marx are central, focuses nearly exclusively on class conflicts. More recently, Piketty (2014) documents the rise of economic inequality in the second half of the twentieth century. Movements such as Occupy have rehighlighted the awareness of economic differences and the connections between those differences and social unrest. And yet, there are eerie lines along which conflict occurs across economically similar, rather than different, groups. This conflict is over resources that are explicitly and directly contested: a limited pool of jobs (e.g., natives versus immigrants), the same customers (business rivalries across organized groups), or scarce land. Because the conflict is over the direct use of a resource, the groups are often remarkably similar in their economic characteristics, although there are exceptions to this rule.3 The gains from conflict are immediate: The losing group can be excluded from the sector in which it directly competes with the winners. This is the second theme of our article. It leads naturally to the view that ethnicity is possibly a marker for organizing similar individuals along opposing lines, which takes us to our third and final perception. For instance, the land acquisition debates in India feature very different groups because buyers and (potential) sellers see the land as being put to very different uses.

Perception 3: Conflicts in Developing Countries Are Based on Ethnic Differences Conflicts in postcolonial developing countries, although certainly not immune to the gravitational pull of class, have often been organized along ethnic lines. Specifically, many conflicts appear to be largely ethnic, geographical, and religious in nature, whereas outright economic class struggle is relatively rare. Indeed, as noted by Fearon (2006), 100 of the 700 known ethnic groups participated in rebellions over the period 1945–1998. Observations such as these led Horowitz (1985, p. 92), a leading researcher in the area of conflict, to remark that “in much

of Asia and Africa, it is only modest hyperbole to assert that the Marxian prophecy has had an ethnic fulfillment." This perception is the subtlest of all to analyze. The facts, as laid down by Horowitz and others, are certainly correct. But there are two puzzles to confront. First, if conflicts are ethnic, then "ethnic divisions" must somehow bear a strong statistical relationship to conflict. It turns out that the answer to this question is somewhat involved and, in part, fundamentally rests on a proper conceptualization of what "ethnic divisions" entail. Second, if such a result were indeed to be true, how would one interpret it? One approach is based on the primordialist position that at the heart of all conflicts is intrinsic hatred and that conflict is a Huntingtonian "clash of civilizations." A second approach instrumentalist: Noneconomic divisions can be and frequently are used to obtain economic or political gains by violent means, often through exclusion. And this takes us back to Perception 2. Nothing dictates that the groups in conflict must be economically distinct. Indeed, we have argued the contrary. If two groups are very similar economically, it is more likely that they will intrude on each other's turf: The motives for exclusion and resource grabbing—and therefore for violence—may be even higher. In such situations, organized violence will necessitate the instrumental use of markers based on kin, religion, geography, and other possibly observable differences, in a word, on ethnicity. In short, there is no contradiction between the use of noneconomic markers in conflict and the view that conflict may be driven by economic forces

ECONOMIC DEVELOPMENT AND CONFLICT

Systematic empirical studies of conflict begin with the work of Collier &Hoeffler (1998, 2004a) and Fearon&Laitin (2003a). These are cross-sectional studies (presumably) aimed at establishing the correlates of civil war, though causal interpretations have all too readily been advanced. Perhaps the most important finding from this literature is that conflict is negatively related to per capita income. In this section, we discuss alternative interpretations of this finding, but we also critically examine the finding itself.

The Empirical Finding

Collier &Hoeffler (1998, 2004a) and Fearon&Laitin (2003a) observe that per capita income and conflict are significantly and negatively correlated. Table 1 reproduces the central table used by Fearon&Laitin (2003a). They study the onset of "civil war," which they define as (a) "fighting between agents of (or claimants to) a state and organized, nonstate groups," having (b) a yearly average of at least 100 deaths, with a cumulative total of at least 1,000 deaths and

(c) at least Economic similarity across groups is just one of many possible arguments for the salience of ethnic violence 268 Ray · EstebanEC09CH11-Ray ARI 28 April 2017 14:54 Table 1 Logit analyses of determinants of civil war onset, 1945–1999 [1] [2] [3] [4]

Variable Civil war Ethnic war Civil war Civil war (COW) Prior war ∗∗−0.954 (0.314) ∗−0.849 (0.388) ∗∗−0.916 (0.312) −0.551 (0.374) Per capita income ∗∗∗−0.344 (0.072) ∗∗∗−0.379 (0.100) ∗∗∗−0.318 (0.071) ∗∗∗−0.309 (0.079) log(Population) ∗∗∗0.263 (0.073) ∗∗∗0.389 (0.110) ∗∗∗0.272 (0.074) ∗∗0.223 (0.079) log(% mountain) ∗∗0.219 (0.085) 0.120 (0.106) ∗0.199 (0.085) ∗∗∗0.418 (0.103) Noncontiguous state 0.443 (0.274) 0.481 (0.398) 0.426 (0.272) −0.171 (0.328) Oil exporter ∗∗0.858 (0.279) ∗0.809 (0.352) ∗∗0.751 (0.278) ∗∗∗1.269 (0.297)30

“productive forces,” whereas what we observe is that higher GDP reduces the likelihood of conflict. www.annualreviews.org • Conflict and Development Traditional methods of dispute resolution. Though documentation is scant, it is believed that nearly every community, country, and culture has a lengthy history of using various methods of informal dispute resolution. Many of these ancient methods shared procedural features with the process that has coalesced in the form of contemporary mediation. In India, as in other countries, the origin of mediation is obscured by the lack of a clear historical record. In addition, there is a lack of official records of indigenous processes of dispute resolution due to colonization in India over the past 250 years. There is scattered information, set forth below, that can be gathered by tracing mediation in a very elementary form back to ancient times in the post-Vedic period in India. Tribal communities practiced diverse kinds of dispute resolution techniques for centuries in different parts of the world, including India. In China government-sponsored mediation has been used on a widespread basis to resolve disputes based on aged societal principles of peaceful co-existence.Native Americans are known to have adopted their own dispute resolution procedures long before the American settlement.

HISTORICAL PERSPECTIVE

As recorded in Mulla's Hindu Law, ancient India began its search for laws since Vedic times approximately 4000 to 1000 years B.C. and it is possible that some of the Vedic hymns were composed at a period earlier than 4000 B.C. The early Aryans were very vigorous and unsophisticated people full of joy for life and had behind them ages of civilized existence and thought. They primarily invoked the unwritten law of divine wisdom, reason and prudence,

which according to them governed heaven and earth. This was one of the first originating philosophies of mediation - Wisdom, Reason and Prudence, which originating philosophy is even now practiced in western countries. The scarcely available ancient Indian literature reflects the cultural co-existence of people for many centuries. This reality necessitated many of the collaborative dispute resolution methods adopted in the modern mediation process. Towards the end of the Vedic epoch, philosophical and legal debates were carried on for the purpose of eliciting truth, in assemblies and parishads, which are now described as conferences. India has one of the oldest cultural histories of over 5000 years and a recent history of about 1000 years during which it wasinvaded by the Iranian plateau, Central Asia, Arabia, Afghanistan and the West Indian culture has absorbed the changes and influences of these aggressions to produce remarkable racial and cultural synthesis. The 29 Indian States have different and varying social and culture traditions, customs and religions. The era of Dharma Shashtras [code of conduct] followed the Vedic epoch, during which period scholastic jurists developed the philosophy of basic laws. Their learned discourses recognized existing usages and customs of different communities, which included resolution of disputes by non-adversarial indigenous methods. One example is the tribunal propounded and set up by a brilliant scholar Yagnavalkya, known as KULA, which dealt with the disputes between members of the family, community, tribes, castes or races. Another tribunal known as SHRENI, a corporation of artisans following the same business,12 Development of ADR / Mediation in India dealt with their internal disputes. PUGA was a similar association of traders in any branch of commerce. During the days of Yagnavalkya there was an unprecedented growth and progress of trade, industry and commerce and the Indian merchants are said to have sailed the seven seas, sowing the seeds of International Commerce. Another scholar Parashar opined that certain questions should be determined by the decisions of a parishad or association or an assembly of the learned. These associations were invested with the power to decide cases based on principles of justice, equity and good conscience. These different mechanisms of dispute resolution were given considerable autonomy in matters of local and village administration and in matters solely affecting traders' guilds, bankers and artisans. The modern legislative theory of arbitrage by domestic forums for deciding cases of members of commercial bodies and associations of merchants finds its origin in ancient customary law in India. Cases were decided according to the usages and customs as were approved by the conscience of the virtuous and followed by the people in general. The parishad recognized the modern concept of participatory methods of dispute resolution with a strong element of voluntariness, which another founding principle of

modern mediation. Buddhism propounded mediation as the wisest method of resolving problems. Buddha said, "Meditation brings wisdom; lack of mediation leaves ignorance. Know well what leads you forward and what holds you back; choose that which leads to wisdom". This Buddhist aphorism reflects acceptance of the principle that mediation focuses on the future instead of dwelling in the past. Ancient Indian Jurist Patanjali said, "Progress comes swiftly in mediation for those who try hardest, instead of deciding who was right and who was wrong". It is a recorded fact that complicated cases were resolved not in the King's courts but by King's mediator. Even during the Mughal rule, Emperor Akbar depended upon his mediator minister Birbal. The most famous case was when two women claimed motherhood of a child, the Mediator suggested cutting the child into two and dividing its body and giving one-half to each woman. The real mother gave up her claim to save the child's life whereas the fake mother agreed to the division. The child was then given to the real mother. Though this was not a fully-developed example of modern mediation, it is an example of interest-based negotiation where the neutral third party seeks to identify the underlying needs and concerns of the parties. It is widely accepted that a village panchayat, meaning five wise men, used to be recognized and accepted as a conciliatory and / or decision- making body. Like many of the ancient dispute resolution methods, the panchayat shared some of the characteristics of mediation and some of the characteristics of arbitration. As societies grew in size and complexity, informal decision-making processes became more structured and they gradually took the shape of a formal justice delivery system. In fact, societies could not grow larger in size and complexity without first evolving a system of resolving disputes that could keep the peace and harmony in the society and keep trade and commerce growing efficiently. Mediation in the United States has developed in several distinct directions. Community mediation emerged in the 1960's in response to racial tensions and integration issues.Neighbourhood Justice Centers were established to address those issues. Later, community mediation expanded in application to neighbourhood disputes, family disputes, and other disputes where the issues were predominantly interpersonal. This view held that mediation should be community-based and independent of the legal system, opining that Development of ADR / Mediation in India mediation could deliver a high rate of satisfying settlement results if it were separate from the legal bureaucracy. In the 1980's, private mediation caught on when insurance companies realized the cost benefits of resolving insurance claims informally and expeditiously. Private mediation took hold in a variety of ways, including the emergence of private/independent mediators, non-profit mediation programs and agencies, and for-profit mediation providers. Private mediation was applied to

pre-litigation disputes, litigated disputes, and, more recently, commercial and international disputes. Court-annexed mediation, which was the subject of experimental usage in the 1970's and 1980's, began to expand significantly in the 1990's. This school of thought concluded that mediation should be an extension of the legal system, even seeing mediation as an effective means of narrowing issues for litigation in courts.Currently, court-annexed mediation is offered by most courts at the trial and appellate levels. All three forms of mediation, community mediation, private mediation, and court-annexed mediation continue to co-exist, thrive, and to meet the needs of disputing parties in the United States. A turning point in the use of alternative dispute resolution in the United States occurred in 1976, at a nationwide conference of lawyers, jurists, and educators called the Pound Conference. The conference was convened to address the urgent problems of over-crowding in the jails, lengthy delays in the courts, and the lack of access to justice due to the prohibitive costs of litigation. The need for alternatives to litigation generated in the new concept of a "Multi-door Court-house," and reinforced the importance of "Neighbourhood Justice Centers". The Multi-door Court-house concept, originated by Harvard professor Frank Sander, envisioned a scenario in which an aggrieved party could simply go to a kiosk at the entrance of a courthouse where a facilitative attendant would direct the disputant to one of the doors providing alternative or traditional dispute resolution processes. Prof. Sander described it as fitting the forum to the fuss. In this manner, the legal system could help the litigants achieve the most satisfactory result, in effect placing responsibility for providing alternative processes, including mediation, in the hands of the judicial system. The idea of a neutral assisting the disputants in arriving at their own solution instead of imposing his solution was introduced. Professors Ury, Brett and Goldberg opined that reconciling interests was less costly and probing for deep-seated concerns, devising creative solutions and making trade-offs was more satisfying to the disputants than the adjudicatory process.

MEDIATION IN INDIA

Mediation, Conciliation and Arbitration, in their earlier forms are historically more ancient than the present day Anglo-Saxon adversarial system of law. Various forms of mediation and arbitration gained a great popularity amongst businessmen during pre-British Rule in India. The Mahajans were respected, impartial and prudent businessmen who used to resolve the disputes between merchants through mediation. They were readily available at business centres to mediate the disputes between the members of a business association. The rule in the constitution of the Association made a provision to dismember a merchant if he resorted

to court before referring the case to mediation. This was a unifying business sanction. This informal procedure in vogue in Gujarat, the western province of India, was a combination of Mediation and Arbitration, now known in the western world, as Med-Arb. This type of mediation had no legal sanction in spite of its wide common acceptance in the business world. The14 Development of ADR / Mediation in India East India Company from England gained control over the divided Indian Rulers and developed its apparent commercial motives into political aggression. By 1753 India was converted into a British Colony and the British style courts were established in India by 1775. The British ignored local indigenous adjudication procedures and modeled the process in the courts on that of British law courts of the period. However, there was a conflict between British values, which required a clear-cut decision, and Indian values, which encouraged the parties to work out their differences through some form of compromise. The British system of justice gradually became the primary justice delivery system in India during the British regime of about 250 years. Even in England it was formed during a feudal era when an agrarian economy was dominant. While India remained a colony, the system thrived, prospered and deepened its roots as the prestigious and only justice symbol. Indigenous local customs and community-based mediation and conciliation procedures successfully adopted by business associations in western India were held to be discriminatory, depriving the litigants of their right to go to courts. The British Courts gradually came to be recognized for its integrity and gained peoples' confidence. Even after India's independence in 1947, the Indian Judiciary has been proclaimed world over as the pride of the nation. Until commerce, trade and industry started expanding dramatically in the 21st century, the British system delivered justice quicker, while maintaining respect and dignity. Independence brought with it the Constitution, awareness for fundamental and individual rights, governmental participation in growth of the nation's business, commerce and industry, establishment of the Parliament and State legislatures, government corporations, financial institutions, fast growing international commerce and public sector participation in business. The Government became a major litigant. Tremendous employment opportunities were created. An explosion in litigation resulted from multiparty complex civil litigation, expansion of business opportunities beyond local limits, increase in population, numerous new enactments creating new rights and new remedies and increasing popular reliance on the only judicial forum of the courts. The inadequate infrastructure facilities to meet with the challenge exposed the inability of the system to handle the sheer volume of caseloads efficiently and effectively. Instead of waiting in queues for years and passing on litigation by inheritance, people are often inclined either to avoid litigation or to

start resorting to extra-judicial remedies. Almost all the democratic countries of the world have faced similar problems with court congestion and access to justice. The United States was the first to introduce

DISPUTE RESOLUTION AT THE GRASSROOT LEVEL INTRODUCTION

Eminent jurist, Nani Palkhivala has reflected on the irony of the judicial system, in this fashion: "If longevity of litigation is made an item in Olympics, no doubt the Gold will come to India" Our judicial system has been embroiled in fierce criticism for its tremendous backlog, rigidity of procedure, exorbitant costs and interminable delays in adjudication of disputes. The adversarial character of litigation in conjunction with the formality of procedure renders the judiciary inept to address the longstanding problem of court congestion. The abysmal state of affairs as reflected in the statistics reveal that there are 35.4 lakh cases pending in 21 High courts in the country. On the other hand, the subordinate courts are plagued with a backlog of over 2 crore cases for as long as 25 to 30 years. Amid such a dismal state of affairs, Alternative method of dispute resolution presents itself as a panacea of most ills embossed in the traditional litigation mechanism. Alternative Dispute resolution (hereinafter referred to as "ADR") a term used to refer to a wide array of non-judicial dispute resolution processes ranging from arbitration, mediation, negotiation, minitrials, and private judging has become the cynosure of attention of the legal fraternity. The exponential rise in the prominence of ADR has been due to a combination of factors, such as saving of monetary, time and emotional costs, preservation of privacy and confidentiality, and party's control over the resolution process. In contrast to the court's fixation for procedural rules, ADR rests on an effective problem solving approach wherein the parties adopt creative and innovative strategies to fashion relief particular to the substance of dispute. The above context of ADR motivates the aim of this essay. First, it explores the historical origin of the ADR system in India coupled with an examination of the existing ADR machinery. Second, it develops an understanding of the reasons owing to which the utilization of ADR machinery is confined to corporations and denied to common man. Thirdly, it undertakes an analysis of the proposed legislative Bills to present a framework for induction of Ancient India's Nyaya Panchayats Annual Report, 2005-06, Law Ministry, Government of India in the grass root level. Fourthly, it remarks on the lacunas in the proposed bills and presents suggestions to strengthen the system of delivery of justice in the village level for the benefit of Aam Aadmi.

EXISTING ADR MACHINERY IN INDIA

A glimpse of the dispute resolution system prevalent in ancient times reveals that the philosophy of amicable and speedy ADR based on the premise of participatory justice is firmly entrenched in the legal history of India. Ancient Hindu Jurists laid more importance on the determination of disputes by arbitrators or tribunals not established by the king. Yajnavalkaya and Narada state that village councils (kulani), corporation (sreni) and assemblies (puga) used to decide lawsuits. The decision of Kula was subject to revision by Sreni, which in turn could be revised by the Puga. These arbitral tribunals assumed the form of "Panchayats" in the villages wherein the "Panches" decided matters informally untrammeled by the technicalities of procedure and evidence. The Panches were village elders elected according to their wealth, social standing and influence in their village. Fear of social ostracism corroborated the binding value of the decisions delivered by the Panches in rural India. However, with the change in social and economic conditions, the functioning of such arbitral bodies became inadequate and outmoded, albeit in some form or another, even today, some variants of such arbitral bodies are prevalent in the rural areas. The resurgence of interest in ADR owing to rapid advancements in the commercial arena led to the enactment of a consolidated and comprehensive legislation, namely, the Arbitration Act of 1940 (Act No. 10). Post independence in 1947, the growing inclination of the business community towards arbitration for settlement of disputes as against court – litigation, led to the revelation of certain deficiencies lacunas in the 1940 enactment. It was felt that the provisions of the 1940 Arbitration Act, about the duties and powers of arbitrators or about the procedure for conducting the proceedings after a reference, were notably inadequate. Hence, the law on ADR was revamped by enactment of the Arbitration and Conciliation Act of 1966 (hereinafter referred as "The Act"), wherein statutory recognition was allotted to conciliation as a mode of dispute resolution. P.V.Kane, History of Dharmashastra, Vol.III, (1946) p.242Chanbasappa v. Baslingyya, AIR 1927 Bom 565 O.P. Malhotra, The Law and Practice of Arbitration and Conciliation, ed. (2002) p. 4.In the 1980's,

Lok Adalats were setup with an intent to provide free and competent legal services to the economically deprived sections of the society which subsequently received statutory recognition by the enactment of the Legal Service Authorities Act, 1987.5 This noble initiative was implemented to secure the faith of the rural masses in social justice and promote the ideals of equality before law and equal protection before law as embedded in our constitution. In such village level people's courts, trained mediators presided over the dispute resolution process and ensured the participation of village men in arriving at a mutually

agreeable decisions sans onerous litigation costs and delay. The statutory foundation provided by the Act awarded legal recognition to the decisions made by the Lok Adalats and conspicuously helped to uphold the cause of quick and inexpensive justice to the poor and needy. Introduction of section 89 and Order X Rule 1A, 1B and 1C by way of the 1999 Amendment in the Code of Civil Procedure, 1908 is a radical advancement made by the Indian Legislature in embracing the system of "Court Referred ADR". Section 89 confers on the court the authority to refer certain disputes for resolution if there exists an element of settlement which may be acceptable to the parties. The law codified in section 89 recognizes four different types of methods under ADR stated as follows.

1. Arbitration

Arbitration involves procedurally simplified and expedited fact finding and decision by a neutral third party, which decision is only binding on the parties in the instant case and carries no precedential effect.

2. Conciliation

Conciliation involves direct discussion and bargaining between disputing parties to arrive at a mutually acceptable resolution of disputed issues. Part III of the Act comprising sections to deal with the procedure for conciliation.

3. Mediation

Mediation is a voluntary and consensual process wherein the disputing parties are assisted in reaching a mutually agreeable settlement by a neutral third party, whose role is to facilitate communications and discussions, but who has no decision making power Marc Galanter and Jayanth K. Krishnan, "Bread for the Poor: Access to Justice and the Rights of the Needy in India" Hastings Law Journal, Vol. 55, p. 789, 20044. Judicial settlement including settlement through Lok Adalat As elaborated above .Delving into the nuances of arbitration, there are essentially four kinds of arbitration mechanisms functioning in India. Firstly, The Indian Council of Arbitration (hereinafter referred as "The ICA"), established in 1965 is the Specialized Arbitration organization at the national level, promotes the amicable settlement of disputes through arbitration. Disputes between the Government of India, State Governments and Public Sector Undertakings with foreign governments, trading organizations are referred to arbitration under the rules formulated by the ICA. Secondly, Ad Hoc Arbitration refers to proceedings which guarantee full autonomy to the parties to

determine all aspects of the arbitration such as number of arbitrators, manner of their appointment, procedure for conducting the arbitration etc. Parties wishing to include an ad hoc arbitration clause may avail the option of negotiating a completely new set of rules and procedures tailored to their specific needs. Thirdly, there are 23 recognized arbitral institutions in India which come under the head of Institutional Arbitration, the most prominent ones being the Federation of Indian Chambers of Commerce and Industry (FICCI), the Bengal Chamber of Commerce and Industry (BCCI), Indian Chamber of Commerce etc. Fourthly, apart from the Code of Civil Procedure, 1908 and Arbitration and Conciliation Act, 1966 many central and state Acts signifying Statutory Arbitration provide for arbitration in respect of disputes arising on matters covered under those Acts. The Railways Act, 1890, the Land Acquisition Act, 1894, the Indian Electricity Act, 1910, the Cantonment Act, 1924 and the Forward Contracts Regulation Act 1956 illustrate the position on statutory arbitration.

CORPORATE CENTRIC ADR: NEED FOR EXPANSION

In the wake of globalization and liberalization of economic policies, India has witnessed a marked increase in complicated and intricate contractual and commercial disputes involving international investment firms, foreign banks and transnational corporations. Furthermore, the presence of an international party to a dispute unfolds complex issues relating to choice of forum, choice of law, and judgment enforcement in foreign jurisdiction. Hence, Multinational Corporations remain reluctant about litigating in a foreign jurisdiction owing to fears of bias being exercised in courts in favour of the national party. In such a scenario, ADR presents itself as a ready solution to such time consuming legal questions and offers promptness in dispute resolution leading to cost effective, creative business driven solutions.ADR process provides an opportunity to the parties to maintain privacy and confidentiality on the nature of proceedings. The tenets of ADR cater to the needs of the business community as they are able to escape public eye and maintain public confidence in their products and services. ADR also helps in the preservation of the business relations between disputing parties as they retain the discretion of choosing the applicable rules of dispute resolution coupled with control over the nature of outcome. Thus, ADR being less hostile than traditional litigation is considered to be most pertinent for resolution of international and national commercial and business disputes. In the globalized world, the astronomical surge in foreign direct and portfolio investment, capital mobility, trade and commerce has attained central focus and simultaneously stoked the development of commercial mediation and arbitration. ADR has become a rich man’s domain as the big corporations are willing to shell out exorbitant sums to engage professional

arbitrations in exchange for speedy resolution of disputes. With Ad Hoc arbitration being the most prominent mode in India, in contrast to Institutional Arbitration, arbitrators operate independently and exercise their discretion to charge higher "sitting fees" from their cash-rich clients. Furthermore, the demand of skilled, trained and professional mediators and arbitrators in India has outstripped the supply. News reports reveal that arbitrators tend to capitalize on the deficient supply and prolong proceedings to remain on the payrolls of corporations with deep pockets. With the resources of ADR mechanism being solely utilized for resolution of commercial disputes, the common man is denied a chance to avail the benefits of amicable and mutually acceptable forms of dispute resolution. As a result, the economically weaker sections of the society continue to battle the travails of judicial system and face the brunt of "litigation explosion" while the corporations enjoy the luxuries of ADR. The expenses involved in litigation such as court fees, lawyer fees, added expenses from inordinate delay in adjudication etc handicap the poor litigants from accessing the judicial remedies, whereas it these poor people who are in greatest need of it. In such a dismal scenario, the government needs to take urgent action to enforce the fundamental rights of the economically and socially disadvantaged sections as enshrined under Article 14 and 21 of the Constitution and chart a legislative framework for extension of ADR mechanism to the grass root level.

ADR FOR AAM AADMI

To combat the longstanding grievance of AamAadmi with respect to access to justice, we need to revitalize the ancient times practice of decentralized and participatory justice and resurrect "Nyaya Panchayats" in the villages of every state in India. The formulation of these village level dispute resolution forums will lead to the fulfillment of the constitutional goal under Article 39A of the Constitution. Nyaya Panchayats will empower more than 70% of the total India population, which resides in villages to exercise control over the nature of proceedings (to be conducted in local language thereby disrupting linguistic barriers) to amicably arrive at a mutually agreeable solution via the ADR methodology. The reinstatement of these village courts in every panchayat area of the village will lead to doorstep access to low cost justice by the common man and positively impact the village economy in the long run. These Nyaya Panchayats will function as a "Community Based ADR" mechanism which is designed to be independent of a conventional court system that may be biased, expensive, distant or otherwise inaccessible to the economically disadvantaged rural population. Considering the rampant illiteracy and ignorance of law in rural India, the uncomplicated ADR procedure devoid of technical and formalistic court

procedure will lead to the establishment of seamless communication symmetry between the Panchayat and the aggrieved rural masses. The procedural law such as Code of Criminal Procedure, Code of Civil Procedure, Evidence Act, and Limitation Act shall not apply to ADR proceedings before the Nyaya Panchayats. Furthermore, petty disputes such as the disputes over agricultural land, the rights to cultivation and grazing on common pastures, disputes over cultivation, the right to draw water from canals or tube wells or incidental questions arising in villages are most suited to be determined by ADR procedure at village level. The members of the Panchayat, being the residents of the village, and fully abreast of the Nyaya Panchayats have been in operation since pre – independence era however the institution was not awarded a clear governmental recognition. Even in the 73rd Constitution Amendment Act, which conferred constitutional sanctity to Panchayati Raj Institutions there was no specific mention of establishing a Nyaya Panchayat. Post the instant amendment, few states such as Bihar, Himachal Pradesh, Punjab, Uttar Pradesh and West Bengal inserted the provision for Nyaya Panchayats in their new Panchayati Raj Acts.affairs of co-villagers, are adequately capacitated to carry out extensive fact finding of the land involved in land disputes and examine the nuances of a particular dispute for an effective solution in contrast to the examination undertaken by the court established commissions. Such a mobile dispute resolution forum will provide protection against fabrication of evidence, misrepresentation of key facts and perjury. The Nyaya Panchayat Bill, 2006 reflects that the Panchayat should have five members, including one woman and one reserved post rotating between SC/ ST and OBC, which are elected directly by the voters of a territorial constituency. Reservation for women and socially backward classes in the village court will pave the path for equal opportunity to every person regardless of their caste and fair dispensation of justice. There is no requirement for members to possess legal education as a prerequisite to contest for elections for the Nyaya Panchayat. Induction of one legally trained person would inspire confidence in the rural people and safeguard the application of substantive law. Furthermore, to avoid partisan influences and undue political considerations from creeping into dispute resolution process, it must be ensured that no member is affiliated to any national or state political party. To ensure the accountability of Nyaya Panchayats to the state, the proposed legislative framework should include a provision for documentation of disputes resolved by the Panchayats, and provide for submission of these reports to the State Government. Another significant advance towards instilling ADR at grass root level may be made by the establishment of Gram Nyayalayas as the lowest tier of judiciary in the rural areas. The State Government is expected to establish one or more Gram Nyayalayas for every Panchayat or

group of contiguous Panchayat at an intermediate level. Each Gram Nyayalayas shall be headed by a Nyayaadhikari, who shall have the qualifications of a first class magistrate and possess exclusive and original jurisdiction over certain civil and criminal disputes. The key highlight of this Bill is that it seeks to introduce "Court Annexed ADR" process at the village level by way of these Gram Nyayalayas. In civil disputes the Nyayadhikari will be empowered to adjourn proceedings and allow for conciliation between parties, subject to the rules devised by High Court. The District Judge, in Gram Panchayat Bill, 2007 introduced in the Rajya Sabha on May 15th, 2007 and referred to the Standing committee on Public Grievances, Law And Justice D Bandyopadhyay, Nyaya Panchayats, Economic and Political Weekly, December 17, 2005, pp 5372-75In Court Annexed ADR, the ADR services are provided by the court as a part and parcel of the same judicial system as against Court Referred ADR, wherein the court merely refers the matter to a mediator. Law Commission of India, 114th Report on Gram Nyayalaya, August 1986consultation with the District Magistrate shall prepare a panel of people who can act as Conciliators. These shall be social workers at the village level with the required qualification prescribed by the High Court. Hence, this bill, if enacted, will decentralize the tiers of justice delivery and reduce the burden of cases on the lower judiciary thereby paving the path for speedier and inexpensive justice for the economically and socially underprivileged people in India.

CONCLUDING REMARKS

Under the proposed Gram Nyayalayas, a self encompassing tier of judicial machinery is made available for every 50,000 rural people in villages. The benefits which will be accrued to the rural people by organization of these village courts are unprecedented. Moreover, the installation of court annexed mediation in the village level will facilitate greater access to justice and encourage the rural people to reinforce their belief in the integrity and efficiency of the judicial system. With the ADR model being directed under the control, supervision and guidance of the court, the effort of dispensing justice will become more coordinated and harmonized. It will induce the rural masses to think that conciliation is complementary and not competitive to the court system. However, on the flip side, the Gram Nyayalayas Bill, 2007 envisages the appointment of over 6,000 Nyayaadhikaris to be selected from a judicial cadre created by the Governor and High Court of the particular state. It is pertinent to note that 10% of judicial posts are currently vacant in our legal system which casts a shadow of uncertainty over the availability of trained judicial officers.10 Thus, the formulation of judicial cadre for Gram Nyayalayas may prove to be onerous and further impair the delivery

of justice. The organization of Nyaya Panchayats as a limb of local self government under Panchayati Raj system will herald the introduction of ADR at the grass root level and become a tool of empowerment for the rural masses. Additionally, these adjudicatory forums will prove to be a much needed respite for the aggrieved villagers facing the insuperable impediments posed by the decrepit civil justice system. However, a system of checks and balances needs to be put in place by the state government to check the misuse of power by dominant classes against the lower costs and prevent As of April 1,2007 there were 126 vacancies out of 725 seats in the High Courts, and 2,722 vacancies out of a 14, 679 seats in the district and subordinate courts, about 18 percent of the total. See Annual Report 2005-06, Ministry of Panchayati Rajthe rise of caste, political, gender and religious considerations. Also, the dimension of accountability of the Nyaya Panchayats to the State Governments needs to be revisited by policy makers. There has been considerable debate in the legal community over the Nyaya Panchayat Bill, 2006 being unconstitutional owing to violation of Article 50 of the Constitution which mandates the separation of judiciary from the executive. However, it must be understood that Nyaya Panchayats possess strictly judicial character and are in addition to the Gram Panchayats (which performs executive functions). The functions are of the two are clearly demarcated and thus, the organization of Nyaya Panchayats is in pursuance of the Directive Principles of State Policy engrained under Art. 39A of the Constitution. The Supreme Court ruling in State of U.P. v. Pradhan SanghKshetraSamiti and others. may be examined to corroborate the above stated view on panchayati raj system. The underlying essence of the instant essay is reflected in the poignant words of Justice Brennan of the U.S. Supreme Court: “Nothing rankles more in the human heart than a brooding sense of injustice…when only the rich enjoy the law as a luxury and the poor who need it the most cannot have it because its expenses put it beyond their reach.” ADR and emerging trends.government have resulted in litigation by the civil society in larger public interest. A nine judge bench of the supreme court in K. S. Puttuswamy case held privacy to be a fundamental right, including the privacy of personal data. We list below some of the privacy related developments.

Aadhaar: In a challenge before the supreme court regarding the use of aadhaar cards in verification was challenged before the supreme court. A five judges bench of the supreme court upheld the validity of the aadhaar act, with restrictions on use of aadhaar information by the private sector. The Central government has now introduced a bill (amending the Aadhaar Act) to allow private entities to use Aadhaar information for verification. However, the

private entity must obtain prior approval from UIDAI, which must be satisfied that the private entity has complied with standards of privacy and security. Data Protection: The Central government has also introduced the personal data protection bill recently, which seeks to regulate intrusions into the privacy of an individual which may be caused by the processing and use of personal sensitive data by the government and private entities. The bill also provides that the person whose data will be processed must give clear consent for the processing of such personal sensitive data. However, the individual's consent may not be needed where data processing is done in the interest of national security, or for legal proceedings or for journalistic purposes. Surveillance: Recently, the Central government issued an order dated December 20, 2018 under Section 69 of the information technology act authorising security and intelligence agencies to intercept or monitor information through computer resources. The notification has been challenged in the Supreme Court by way of a batch of public interest litigations on the ground of infringement of fundamental rights due to unfettered powers being placed in the hands of intelligence agencies. Commercial Surrogacy – The government and courts have been concerned with reform and regulation in social and personal laws in the past few years, to reflect the needs of a changing society. In the past decade, India had emerged as a hub for surrogacy related fertility tourism due to the availability of low-cost commercial surrogates and excellent medical care. In August 2017, the 102nd Parliamentary Report by a Rajya Sabha Standing Committee had stated that the potential for exploitation of surrogate mothers is linked to the lack of regulatory oversight for the protection of surrogates. However, the surrogacy (regulation) bill which is pending in Parliament seeks to promote a stringent regime whereby commercial surrogacy is completely banned and altruistic surrogacy is being promoted for intending couples through close relatives only. The bill also provides for a regulatory structure to oversee the surrogacy industry, including the clinics and medical professionals undertaking procedures, by making registration and licensing compulsory. The bill also lays down stringent punishments for violation of its provisions, including imprisonment for commercial surrogacy for a period extending up to ten years with fine. The bill has been criticized for restricting surrogacy only to married couples who are infertile and not allowing unmarried people or LGBT couples to reproduce through surrogacy. The bill permits only a close married female relative who has her own child to be the surrogate mother. The complete ban on commercial surrogacy also seems more harmful than good, as it has the potential to drive the commercial surrogacy industry into the black market. Instead, the onus should be on the government to create a framework for commercial surrogacy that eliminates exploitation.

Trend 3: The Supreme Court has evolved over time both in terms of administrative aspects and its jurisprudence. On the administrative side the court is still struggling with the appointment of judges through a collegium system which is an independent process with no interference from the executive. However, the appointments through this system have recently been criticised by many because of the lack of transparency and arbitrariness in appointments. The government had a few years back proposed a National Judicial Appointments Commission (NJAC) for appointment of judges through a process which was struck down by a five judges bench of the Supreme Court as being unconstitutional and impinging on the independence of the judiciary. On the jurisprudence side the court has been concerned with the issues of the economy and failure of proper regulation and policy making. The court has recently dealt with issues of corruption that are rampant, social issues concerning womens' rights, child rights and human rights and has also struck down laws made by parliament which are arbitrary. On the technology side the court struck down a section of the IT act which provided for arrest for posting offensive content on the internet. If you see some of the past trends that we have cited it would show that courts are responding to the general feeling that high profile corruption cases have not been properly investigated. Some of the social trends reflect the concerns of that time. The court has struck down legislations which are against the basic structure of the Constitution by upholding the rule of law, by exercising its power to judicial review and by protecting the right of the independence of the judiciary. Though the judiciary has been at the forefront of criticism by the media and civil society it has still been active and has passed decisions and has stepped up when the executive has failed. disruptive technology (blockchain, cryptocurrency and smart contracts)Some pointers to future trends: accident claims (compensation) third party funding in disputes matrimonial disputes (alimony) 2 RBI White Paper; Applications of Blockchain Technology to Banking and Financial Sector in India'; January 20173 RBI White Paper; Applications of Blockchain Technology to Banking and Financial Sector in India'; January 2017

CONCLUSION

As may be seen from the foregoing review there has been change in the legal system but it has been slow and a gradual process, however pace of change in technology, pace of social change and maturity of the Indian economy are pushing the system to respond faster. We need to consider what major changes in the near future can be made that will help us to deal with these major trends.Blockchain, cryptocurrency and smart contracts: Because of

modernization the contractual obligations are also rapidly changing. Blockchain technology and smart contracts seems to be one of the recent ways of doing business between parties. In its most abstract form, a blockchain may be described as a tamper-evident ledger shared within a network of entities, where the ledger holds a record of transactions between the entities . One of the prominent uses of blockchain technology is in the area of cryptocurrency. Currently India does not allow the use of cryptocurrency like bitcoin by the traditional banking system. sufficient to deal with issues arising out of such transactions. In case of any lack of regulation the court will have to step up and look at issues arising out of such contracts. Third party funding:

Another area which we feel the court may start looking at would be third party funding in disputes. There is no regulation in India which prevents third party funding nor any regulation that allows it. However recently the supreme court while dealing with issues of foreign lawyers held that the Indian advocates act does not bar third party funding. The court in this case was not dealing with the issue of third party funding but it definitely sets the stage for companies to get their awards / judgments enforced in countries where the enforcement regime is weak or it is not a reciprocating territory. Compensation in accident claims and alimony: As the Indian economy is developing at a fast pace, the standard of living is also moving up steadily. Compensation in India in accident claims and alimony has always been low compared to many developed countries in the world. However, matrimonial alimony and accidental claims may see a rise in compensation standards. These will be some of the trends that we may see in the courts. This trend is slow but may pick up as one of the emerging areas of disputes like other developed countries. These are some of the pointers to the future trends and courts may be dealing with new issues, new ways of doing business and new laws. The courts will respond to the changes that are taking place due to the emergence of new technology, lack of regulation and evolving society.

Theoretical perspective of ADR

Theoretical Framework of Dispute Resolution Introduction The occurrence of disputes in human society IS endemic smce the time immemorial. Divergence of interests has been causative of such disputes in different spheres of human activity. Human ingenuity has led to crafting of modalities to address disputes of different types and at different levels. Dispute resolution was not a serious factor when the society did not have to grapple with complex issues. Disputes of personal nature were amenable to resolution through an informal process

something akin to what now carries the label of negotiation or mediation or even some kind of arbitration through a mutually acceptable third party. Disputes of a serious nature would land in some formal forum for resolution. According to John Dunlop2 (1984), in western societies, "give and take of market place" and "government regulatory mechanism established by the political process" ranging from courts to administrative tribunals constituted "two approved arrangements over the past 200 years" for resolution of disputes among groups and organizations. The inability of market place mechanism to achieve social purpose and a general dissatisfaction of the stakeholders with government's regulatory role prompted the policy makers to seek alternatives that led to the establishment of an independent regulatory and dispute settlement mechanisms. Even with these institutions, the question remains as to how do we assess the quality of dispute systems and how do we rate one against the other. Scholars have variously described the attributes of an efficient dispute system. Susskind(1987) lays stress on attributes such as fairness of the process and judiciousness of the outcome. Ury, Brett and Goldberg\1988) view the efficacy of the process in terms of cost, outcome and durability of conflict resolution. The other views lay stress on providing for multiple options, involvement of the stakeholders in the dispute system design, flexibility available to the parties to choose a particular process John T. Dunlop, Dispute Resolution-Negotiation and Consensus Building, Auburn House Publishing Company, Dover, Massachusetts, 1984. Lawrence Susskind & Jeffrey Cruishank, Breaking the Impasse: Consensual Approaches to Resolving Disputes (1987) 4 William L. Uryet al, Getting Disputes Resolved: Designing Systems To Cut The Costs of Conflict (1988) and then move over to another process and features like transparency and accountability of the process. Since all these attributes are not uniformly present in a dispute system, and a trade-off between different attributes is usually seen, the task of determining an appropriate process becomes difficult to that extent. Hence, it is important to analyze the framework of a sound practice. The framework should address some key elements like the objective behind the system, its structure, identification of parties that have a stake in the system, resources available to them and the nature of its accountability. Managing Contingencies and Flexibility in Telecommunications Telecommunications' domain has been ever widening with an expanding list of partners and management strategy. This brings the challenge of addressing varying types of disputes from being very technical to being extremely community rights oriented with roots in sociological theory of poverty reduction. Contingency theorists like Vroom , discussing ingredients of decision making process, highlight the importance of two factors, namely, quality decisions and acceptance. In their

view, apart from the quality of decisions, a participatory process contributes towards acceptance of such decisions. Goldhaber6 lays stress on communication effectiveness and discusses the extent to which internal contingencies , such as, structural contingencies, output and external contingencies, having economic, technological and environmental dimensions affect communication needs. Contingency theories of leadership, including that of Fiedler relates leadership to organizational needs under different situations. Contingency theorists emphasize the importance of environment in designing an organization and advocate an appropriate between the two. Cybernetics has emerged as a tool to hone up organizations through a better understanding of the functions and processes of various systems and helps organizations to adapt to changing situations through the mechanism of feedback. Cybernetics has influenced a wide range of disciplines Louis Couffignal a known authority on Vroom,V.H., &Jago, A.G. (1988). The new leadership: Managing participation in organizations. Englewood Cliffs, NJ: Prentice Hall 6 Goldhaber, G.M. (1993), Organizational Communication. Sixth edition, New York: McGraw-Hill 7 Louis Couffignal, "Essaid'une definition generale de la cybernetique" The First International Congress on Cybernetics, Namur, Belgium, June, 1956, Gauthier Villars, Paris, 1958 34cybernetics, describes cybernetics as" the art of ensuring the efficacy of action". John D. Steinbruner explains how formulation and implementation of public policy are influenced by "organized behavior" and how new perspectives on decision making pose a challenge to established theory of decision making which "underlies general understanding of political events". According to him, technological advances and shrinking of distance through rapid communication networks and other factors associated with modem societies have seen the emergence of interactive societies, generation of new political issues and new demands on government for a positive response and provided occasiOns for increased governmental intervention .. Such a situation, invested with "complex decision problems and with government performance" call for a better understanding of decision processes than one offered by the prevailing paradigm of rational thesis which accords high degree of importance to man's propensity "to maximize his values under the constraints he faces". However, the theory of decision under rational paradigm is under challenge and a "theoretical base fundamentally different from rational theory has been constructed" -and it is being applied in a wide range of disciplines such as information theory and the psychology of learning. This new process is cybernetic paradigm which holds promise in "understanding how men and organizations comprised of men actually operate in complex environments ..... And does promise a more realistic and more appropriate analysis of the requirements of change". When we test these attributes against the

dispute resolution practice in the telecommunications sector, particularly, in India, it fails the test in many respects. First, the involvement of the stakeholders (operators and consumers) is almost negligible in designing an appropriate practice. It is the prerogative of the government and the legislature to enact appropriate legislation for creation of a regulatory and dispute settlement bodies. These institutions lack the requisite measure of flexibility being bound by the provisions under the statute. The accountability is there to institutions that created these bodies but not to the stakeholders or consumers. Telecommunications is an important infrastructure sector and a life line for a country's economy. Disputes have now become ubiquitous threatening the equanimity of this sector. It is, therefore, 8 The Cybernetic Theory of Decision: New Dimensions of Political Analysis, John D. Steinbruner, Paper, 2002, Princeton University Press, NJ important to analyze the framework of dispute resolution in the telecommunications with reference to the processes used to manage or resolve disputes and whether the structure of such a body supports the nature of responsibilities entrusted to it. These are the issues that we will discuss in the chapters dealing with cross country practices and features of a sound practice. At this stage we discuss the various other theories of disputes to help our understanding of the subject in order to appropriately address disputes arising in the telecommunications sector .. Leonard Riskin et al9(2005) defines disputes as manifestations of conflict arising from "a clash of interest or aspirations, actual or perceived". Professor Schellenberg10(1996) seeks to explain sources of conflict in three sets of theories. These are i) Individual Characteristics theories; ii) Social Process theories; and iii) Social Structure theories. The first theory explains conflict as something ingrained in human nature arising from unfulfilled needs. Abraham Maslow explains human needs in terms of a hierarchy ranging from physical to psychological to self-actualization and conflict arises if any of these needs are not met. Social process theorists maintain that competition for resources lead to conflict. There is more emphasis here on distributional aspect in social relationship. Social structure theorists , among whom Karl Marx is a prominent example, put the onus for conflicts on the nature of social system. Social Structure theories are akin to critical theory which point to disparities in social framework as the main source of conflict. These theories help in a better understanding of various dimensions of conflict . If a conflict is not resolved it usually assumes the form of a dispute. Bernard Meyer (2000) maintains that a human being experiences conflict along three dimensions which are based on his perception of the situation, the feeling it generates within him and finally impels him to react. At the root of conflict and disputes lie asymmetric information which a disputant possesses about his adversary and which makes him over confident about his position thereby reducing the

prospect of a settlement. These theories are equally applicable in the telecom sector where disputes arise due to a clash of interests among the parties involved and an urge to gain greater market share on the part 9 Leonard L Riskin, J.E Westbrook, C.Gutherie, T.J. Heinsz, Richard C. Reuben, J.K. Robbennolt, Dispute Resolution and Lawyers, 3'd Edition, Thomson West, 2005. MN. 10 James A. Schellenberg, Conflict Resolution, Theory, Research and Practice, State University New York Press, 1996 Bernard Meyer, The Dynamics of Conflict Resolution: A Practitioner's Guide, 2000 36of telecom service providers and equally great determination on the part of consumers to obtain a fair deal.

Approaches to Dispute Resolution

The concepts of interest-based, rights-based and power-based approaches to dispute resolution advocated by.Ury, Brett and Goldberg12(1998)) further provide an insight into how a combination of these approaches impact the dispute resolution process in the telecom sector. Interest-based approach essentially relies on mutual interest of the parties in a dispute to seek mutually satisfactory resolution of the problem directly or by involving a third party. This process focuses on vital issues concerning the parties ; is cost- effective, flexible and less time consuming. Jeremy D. Fogel 1\2006) maintains that the evolution of the interest-based approach is " in large part because of the persistent client dissatisfaction with the costs and limitations of the traditional approach" which accounts for the emergence of " a paradigm of interests" in court-annexed ADR programmes during the nineties. This approach provides an alternative to traditional court-based adjudication. Rights-based approach emphasizes more on procedural aspect of justice and legality of action in resolution of a dispute. This approach is amenable to court system where the parties in a dispute focus on the legal aspects of the dispute and whether the parties have adhered to due procedure. In some cases, rights and interests of the parties may not be mutually exclusive. The operation of contracts and agreements is an apt example in this respect. The parties in a contract have an inherent right to pursue a particular course of action and also have an inherent interest in deriving benefits in terms of a contract. The power-based approach determines the outcome of a dispute on the basis of relative strengths of the parties. It assumes that the decision is likely to be favourable for the party who prevails on the basis of its strength. It is more expensive than opting for interest-based processes. Choice of a particular approach depends much on the type of dispute and the kind of outcomes which the parties seek. An increasing trend among the large telecom 12 Ury, W.L., Brett, J.M. and Goldberg, S.B., Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict, Jossey-Bass Publishers, 1998, SanFrancisco, CA 13

Jeremy D. Fogel, "Strategy for Effective ADR Advocacy" in a Litigator's Guide to Effective Use of ADR in California, CEB, 2006, pp 1-24 companies m India is to secure the desired outcome, say, bigger market share and discourage entry of smaller players in the field, by using financial muscle or indulging in protracted litigations on issues like interconnection, infrastructure sharing. In the telecommunications sector, which is capital intensive and gives good returns on investments, the stakes are usually high. Therefore, interests of big and small players or even among the big players do not necessarily converge. In such cases, recourse to interest-based approach does not really work. This may work better in situations where the relative strengths of the parties are more or less evenly balanced. Furthermore, it is generally seen in the telecom sector that the litigants use a combination of these three approaches in the legal process as a matter of strategy to secure the desired outcome. The Indian telecom scene is no different in this respect. While advocating their case, the litigants often take a normative approach to focus on the need to settle disputes in larger public interest, and at the same time try to provide evidence how the opposite party's case does not hold water on the ground of non-adherence to due procedure, which is the essence of rights based approach. While using these two approaches, they also try to subdue the opposite party or compel it to seek out a compromise through use of their financial power and greater influence. The power-based approach is much in evidence in the ability of a party to engage top lawyers on exorbitant fees to plead its case and also try to bring in extraneous considerations and influence to secure a decision in its favour. As in the case of general disputes, both formal and informal methods are used for resolving telecom disputes that result in decisions of a binding or non-binding nature. A study1\2004) commissioned by the International Telecommunications Union (ITU) and the World Bank on dispute resolution in telecommunications sector has identified three chief methods of dispute resolution. These are court-based and regulatory-based adjudication, that according to this study ,come under the category of formal methods and Dispute Resolution in Telecommunications Sector- Current Practices and Future Directions, lTV-World Bank-Geneva,2004 arbitration, mediation and negotiation (alternative dispute resolution mechanism) coming under the category of informal methods. Mediation has come to be regarded as a highly flexible process which can be used in a variety of contexts. It is fast emerging as a powerful tool for dispute resolution due to the capability of this process to "integrate on line and other electronic communication technologies"

15 • Arbitration , though less flexible than the mediation process, has features such as procedural flexibility, disputants' involvement in the selection of an arbitrator, that make it

less adversarial than court proceedings. Many arbitration proceedings have become quite formalized with specified hearing and decision procedures and these have added efficacy to such proceedings. Changes are also being incorporated in arbitration practice to turn it into an effective tool for dispute resolution. A case in point is India's Arbitration and Conciliation Act, 1996 which attempts to harmonize Indian arbitration law with international practice. Under section 30 of the Act, it is not deemed incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute with the agreement of the parties. The arbitral tribunal is competent to use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement. Each of these methods, formal or informal, has its advantages and disadvantages that will be discussed later. Goldberg, Sander, Rogers, and Cole, 16(2003) have described the concept of "Hybrid dispute resolution processes" that involve the usage of existing methods in different combinations, such as ombudsman with "the summary jury trial" or arbitration with adjudication. They maintain that these hybrid processes improve the efficacy of dispute resolution processes and are cost-effective and less time consuming and also reduce the burden of case loads on judiciary. Thus, there are multiple approaches that are employed for dispute resolution, some of which are stand-alone and some of which can be employed in combination with others. A View of Mediation in the Future: James Melamed, The Indian Arbitrator, Vol. 1 Issue 9, Oct 2009 16Dispute Resolution, Negotiation, Mediation, and Other Processes, Stephen B. Goldberg, Frank E. A. Sander, Nancy H. Rogers and Sarah Rudolph Cole Aspen Publishers, N.Y. Fourth Edition, 2003

Some important considerations need to be kept in view while opting for a particular method . These are: a) the nature of dispute; b) issues involved; c) the resources and time available; d) strategies of disputants and e)the outcome that is sought to be achieved. Other important variable in this regard is whether the process subscribes to the principle of natural justice. Disputants repose more confidence in such processes where they have an opportunity to air their point of view and where they feel that their concerns would be taken into account while rendering a decision on the issue. Emphasizing the importance of perceptions of procedural justice for the disputants, Prof. Nancy Welsh17(2001) maintains that this enhances their confidence in the process and facilitates acceptance of outcomes. According to Riskin et al 18(2005) " each dispute resolution process threatens or promotes different values or interests and within each process we find many variations". Formal method of adjudication places more emphasis on interpretation of statutes. Where the case requires a formal method of

adjudication, the disputants seek out courts for this purpose. This process has two main advantages: a) Proceedings are open and the public can participate; and b) decisions of courts create precedents for the future. It serves a wider social purpose of keeping the people apprised of general implications of such decisions. As opposed to this, a settlement process is essentially private in nature with focus on the mutual interests of the parties involved. One of the major disadvantages, however, of the court process is its adversarial character which does not contribute towards building long term commercial relationships between the disputing parties which happens in a settlement process. In telecommunications, too, disputants seek such processes which ensure them a fair outcome in a speedy manner and save on cost. They would generally prefer not to engage in an adversarial process unless no other options are available to resolve the issue or if they feel that a permanent resolution of the dispute is possible only through an adversarial process.Nancy A. Welsh, Making Deals in Court-Connected Mediation: What's Justice Got to Do With It? 79 Wash. U LQ, 2001. 18 Leonard L. Riskin,J.E. Westbrook, C. Gutherie, T.J. Heinsz, Richard C. Reuben, J.K. Robennolt: Dispute Resolution and Lawyers, Third Edition, 2005, Thomson West MN

The efficiency of dispute settlement mechanism, in general, depends on many factors. The efficacy of each of the processes depends upon the quality of dispute resolver and his ability to effectively discharge the assigned role in different processes. For example, in the case of regulatory based adjudication, the efficacy to a large extent depends upon whether the regulatory body is structurally and functionally independent; whether its independence is secured through a statute and independent funding; whether it enjoys enforcement powers and whether its apex functionaries are qualified, possess the requisite experience and enjoy tightly secured tenure and whether it has a trained pool of staff in requisite number matching functions and responsibilities assigned to it. Even if all these ingredients are present, the growth of telecommunications will be impaired if the dispute resolution process is not efficacious, speedy and transparent. A speedy resolution of a dispute is impeded broadly for two reasons: first, telecom disputes have become varied and very complex in the wake of liberalization and advancements in technology. Secondly, it has become a lawyers' paradise, since high stakes are involved and vested interests are at play to delay or hinder timely resolution of disputes or to subvert the process of mutually acceptable outcome. Hence, efficacy of dispute resolution mechanism has become a necessity for the growth of the sector. Conversely, an ineffective and sluggish dispute settlement process is a matter of growing concern to all stakeholders alike. The critical attributes of an efficient dispute resolution

mechanism are degree of independence it enjoys, transparency of the process, quality of personnel maiming the system, cost and time involved in securing a fair outcome. Dispute

Systems Design:

In the context of these attributes, the design of a dispute system as discussed earlier, is of critical importance. Kent Amold, 1\1994) identifies factors that should be taken into account while designing a dispute system. These are "contents of various types of disputes, why they recur, how they impact the system, how they are handled, and why certain conflict management procedures are used and others abandoned." Moore et 19 Conflict Research Consortium Working Paper,1994 41al.20(1992) focus on identification of the nature and recurring theme of disputes and relating the disputes to appropriate resolution procedures and favor interest-based approach on two parameters i) its stress on reconciliation of mutual interests of the parties involved and ii) delivery of resolution of a durable nature. Hence, an appropriate dispute system design should have two features, namely, i) whether it offers multiple choices to disputants and ii) whether it focuses on reconciling interests of concerned parties. Equally important is to keep in view factors like availability of resources and skilled and trained personnel to operate the system and provide for accountability through periodic performance evaluation. Each of the variables identified above by scholars holds good for dispute system design in the telecom sector also. The special features obtaining in the telecom sector, warrant a design that provides multiple choices to disputants, and also takes into account the interests of consumers, considerations for telecom growth and reasonable returns to regulated companies on their investment. The need for cost and time effective procedures to address telecom disputes can not be over-emphasized in the context of the existing practice which takes unusually long time to resolve disputes and involves high cost. The existing procedures in some countries also do not identify disputes that may be better resolved through a particular process or provide options to the disputants in this regard. Although there is usually a time frame for resolution of disputes, but that is generally not adhered to. Periodic performance evaluation is also not provided for which makes it difficult to assess the efficacy of the system. Employing processes for pre-empting a dispute and exploring processes for containing a dispute should receive due attention in designing a dispute resolution system in the telecom sector. The role of regulatory institutions entrusted with the dispute resolution responsibility is circumscribed, according to David Baron 21 , by various factors , such as, "the limits of the authority delegated to it," "procedural requirements" and "procedures established by the regulatory body itself' and added to these

are the companies' pursuit to maximize their profits and the regulatory concern with broader "distributional" objective such as 20 Moore, C.W, Priscoli, J. Wildau, S.T., Smart, L.E. and Mayer, B.S., "Introduction to Dispute Systems Design", CDR Associates, Boulder, Colorado, 1992 21David P. Baron Handbook oflndustrial Organizations Vol. II, edited by R. Schmalensee and R.D. Willig 42"maximizing the surplus of consumers." Therefore, the challenge involved in designing an effective system for the telecom sector is to find an appropriate fit between the two concerns notwithstanding regulatory constraints. Two distinct trends are discernible in the evolving telecommunications environment. First, telecommunications sector has witnessed a phenomenal growth due to advancements in technology. Secondly, it has given rise to complex issues leading to a variety of disputes, previously unknown, in the sector. The disputes arising in the sector present a mixed bag. Predominantly, issues, such as, parameters for regulation of new technology based services, issues of infrastructure sharing, interconnection and methodology for spectrum allocation, to name a few, afflict the sector. Resolution of such issues require a dispute resolution system that has neutral and technically qualified decision makers. As to the question of judging neutrality, one of the standards could be non-affiliation with commercial interest in telecommunications sector for, say, five years. Similarly, one of the standards for measuring technical expertise may be proven experience of technical issues in telecommunications at senior level for five years or so. Secondly, dispute resolution process should have certain key features, such as, procedural flexibility , multiple options for the disputants, time and. cost effectiveness,adherence to the principle of natural justice, and a process that is transparent and provides an assurance of a fair outcome. Here also, the issue will be how to measure speed and time taken for resolution of a dispute and what should be a reasonable time-frame for resolution. Then again, the question will be regarding the cost involved in settling a dispute. These are the issues for which it is difficult to provide a rigid norm. Much will depend on the complexity of the issue, cooperation of the disputants and the nature of dispute resolution system. These will vary from countries to countries. Despite these limitations, one can lay down some guidelines in this respect drawing from country practices. For instance, certain timeframe for settling disputes emerges from the European Commission's directive which provides a limit of four months. This practice can be replicated in other countries also where cases drag on for considerably longer period. On cost-effectiveness, also introducing new features like judicial mediation or court-annexed mediation or involving industry in dispute resolution process would reduce litigation time and cost currently being incurred through regulatory or tribunal or court 43processes. The theories of dispute discussed earlier

and discussion on dispute system design have given an insight into factors that are causative of disputes and efficacy or otherwise of different approaches to dispute resolution. In the telecommunications sector, a combination of such approaches may need to be adopted since no single approach can provide the answer for all the issues. Hence, there will be a need to categorize disputes and provide a linkage to the most workable approach, as also keeping in view the strength of contending parties. A system based on attributes, discussed above, would contribute towards achieving the objective of consumer protection, fair competition, and strengthening telecom industry. Conflict of interest is inevitable in a high stake industry like telecommunications but conflicts should not be allowed to acquire the dimension of a dispute. The Indian practice does have some attributes of a sound practice like adherence to the principle of natural justice and providing an assurance of a fair outcome through its non-partisan character, but some other features, though equally important, are missing. This will be obvious when we discuss various aspects of the Indian practice in detail later in this chapter and in chapter iv. It is equally important to appreciate that an ideal dispute resolution process having all the requisite features, has not yet become a reality and there may also be no such possibility in the near future. Hence, one has to think in terms of trade-offs between different attributes of a sound practice. For example, such trade-offs could be between speedy decisions and cutting cost on the one hand and decisions arrived through compliance with due procedure and adherence to the principle of natural justice which may take longer time in rendering a decision. The trade-offs have to relate to issues in a country specific situation and there is no universal practice in this regard.

Summing Up

This chapter discusses dispute theories and modality for assessing the quality of dispute systems and in this context, views of various scholars have been highlighted. Scholars have variously described dispute theories and the attributes of an efficient dispute system. Susskind (1987) lays stress on attributes such as fairness of the process and judiciousness of the outcome. Ury, Brett and Goldberg (1988) view the efficacy of the process in terms of cost, outcome and durability of conflict resolution.