CHAPTER- I

INTRODUCTION

Arbitration is a method of settlement of disputes as an alternative to the normal judicial method. It is one of the methods of alternative dispute resolution (ADR). Of all the forms of ADR like conciliation, mediation, negotiations, etc, arbitration has become the dominant form of ADR. It is more firmly established in its utility. Alternative Dispute Resolution was conceived of as a dispute resolution mechanism outside the court of law established by the Sovereign or the State. ADR can be defined as a collective description of process or mechanisms that parties can use to resolve disputes rather than bringing a claim through the formal court structure. ADR is a part of civil justice system with the United Kingdom. It is a key aspect of the civil justice system and has grown over the past forty years.

The law relating to arbitration is contained in the Arbitration and Conciliation Act, 1996. It came into force on the 25th of January, 1996. It provides for domestic arbitration, international commercial arbitration and also enforcement of foreign arbitral awards. It also contains the new feature on conciliation. Like arbitration, conciliation is also getting increasing worldwide recognition as an instrument for settlement of disputes. However, with the passage of time, the phrases "Arbitration and ADR" came in vogue, which implied that arbitration was distinct from other ADR forms.

Before the enactment of Arbitration and Conciliation Act, 1996 the practice of amicable resolution of disputes can be traced back to historic times, when the villages' disputes were resolved between members of particular relations or occupations or between members of a particular locality. ***"Of all mankind's adventures in search of peace and justice, arbitration is amongst the earliest. Long before law was established or courts were organised, or judges has formulated principles of law, man had resorted to arbitration for resolving disputes."*** With the advent of the British rule and the introduction of their legal system in India starting from the Bengal Regulation of 1772, the traditional system of dispute resolution methods in India gradually declined. The successive Civil Procedure Codes enacted in 1859, 1877 and 1882, which codified the procedure of civil courts, dealt with both arbitration between parties to a suit and arbitration without the

intervention of a court. The first Indian Arbitration Act was enacted in 1899.

The year 1940 is an important year in the history of law of arbitration in British India, as in that year the Arbitration Act, 1940 was enacted. It consolidated and amended the law relating to arbitration as contained in the Indian Arbitration Act, 1899 and the Second Schedule to the Code of Civil Procedure, 1908. It was largely based on the English Arbitration Act, 1934. Later on this was repealed and thus The Act of 1996 was enacted due to some misconstruction of the before Act of 1940.

The Arbitration Act, 1940 dealt with only domestic arbitration. In so far as international arbitration was concerned, there was no substantive law on the subject. However, enforcement of foreign awards in this country was governed by two enactments, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. These two statutes, in their entity, except for Section 3 (in both of them) did not deal with international arbitration as such but merely laid down the conditions for 'enforcement of foreign awards' in India.

Though the Act of 1940 was a good piece of legislation but it was considered to be ineffective. In ***M/S Guru Nanak Foundation v. M/S Ratan Singh & Sons***,[1] the Hon'ble Supreme Court observed that the Act was ineffective and the way the proceedings under this Act were conducted in the Courts made the lawyers laugh and legal philosophers weep.

In India, ADR has an important place, because of historical reasons. In regard to the global perspective, the international business community realised that court cases was not only time consuming but also very expensive. Various methods were adopted to solve the disputes. They are arbitration, conciliation, mediation, negotiation and the Lok Adalats.

Alternative Dispute Resolution is today being increasingly acknowledged in the field of law as well as in the commercial sector. The very reasons for origin of Alternative Dispute Resolution are the tiresome processes of litigation, costs and inadequacy of the court system. It broke through the resistance of the vested interests because of its ability to provide cheap and quick relief. In the last quarter of the previous century, there was the phenomenal growth in science and technology. It made a great impact on commercial life by increasing competition throughout the

[1] *(1981) 4 SCC 634*

world. It also generated a concern for consumers for protection of their rights.

The purpose of ADR is to resolve the conflict in a more cost effective and expedited manner, while fostering long term relationships. ADR is in fact a less adverse means, of settling disputes that may not involve courts. ADR involves finding other ways (apart from regular litigation) which act as a substitute for litigation and resolve civil disputes, ADR procedure are widely recommended to reduce the number of cases and provide cheaper and less adverse form of justice, which is a lesser formal and complicated system. Off late even Judges have started recommending ADR to avoid court cases. In essence the system of ADR emphasizes upon:

- Mediation rather than winner take all.
- Increasing Accessibility to justice.
- Improving efficiency and reducing court delays.

ADR aims to provide the parties with cheap, speedy and less formalistic remedy to the aggrieved party. It aims at providing a remedy which is most appropriate in the circumstances of the case. This makes ADR a viable substitution for arbitration or litigation. ADR is an umbrella term for a variety of processes which differ in form and application. Alternative Dispute Resolution, as the name suggests, is an alternative to the traditional process of dispute resolution through courts. It refers to a set of practices and techniques to resolve disputes outside the courts. It is mostly a non-judicial means or procedure for the settlement of disputes. In its wider sense, the term refers to everything from facilitated settlement negotiations in which parties are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or mini trials that look and feel very much like a court room process.

The search for a simple, quick, flexible and accessible dispute resolution system has resulted in the adoption of ‘Alternative Dispute Resolution’ mechanisms. The primary object of ADR system is avoidance of vexation, expense and delay and promotion of the ideal of “access to justice”. ‘Alternative Dispute Resolution’ or ADR is an attempt to devise machinery which should be capable of providing an alternative to the conventional methods of resolving disputes. An alternative means the privilege of choosing one of two things or courses offered at one’s choice. It does not mean the choice of an alternative court but something which is an alternative to court procedures or something which can

operate as court annexed procedure. The ADR techniques mainly consist of negotiation, conciliation, mediation, arbitration and a series of hybrid procedures.

ADR has many advantages and disadvantages. Few of the advantages are- it can be used at anytime, reduces the number of contentious issues, it costs less than regular litigation, it is flexible, ADR can be used with or without a lawyer, it helps in reduction of work load of courts, etc. Besides advantages there are various drawbacks of ADR, some of them are follows- ADR may not be appropriate, and may even carry a degree of risk for one of the parties, imbalance of power between the parties which could make face-to-face mediation unfair, legal rights and Human rights cannot be relied on in ADR processes, Ombudsmen investigations can be very slow, etc.

“It is settled law that free legal aid to the indigent persons who cannot defend themselves in a Court of law is a Constitutional mandate under Article 39-A and 21 of the Indian Constitution. The right to life is guaranteed by Article 21.” The law has to help the poor who do not have means i.e. economic means, to fight their causes.

The history of Alternative Dispute Resolution forum at international level can be traced back from the period of Renaissance, when Catholic Popes acted as Popes as arbitrators in conflicts between European countries. Many international initiatives are taken towards alternative dispute resolution. The growth of international trade is bound to give rise to international disputes which transcend national frontiers and geographical boundaries. ADR has given fruitful results not only in international political arena but also in international business world in settling commercial disputes among many co-operative houses. ADR is now a growing and accepted tool of reform in dispute management in American and European commercial communities. ADR can be considered as a co-operative problem-solving system. The biggest stepping stone in the field of international ADR is the adoption of UNCITRAL (United Nations Commission on International Trade Law) model on international commercial arbitration. An important feature of the said model is that it has harmonised the concept of arbitration and conciliation in order to designate it for universal application. General Assembly of UN also recommended its member countries to adopt this model in view to have uniform laws for ADR mechanism. Many international treaties and conventions have been enacted for establishing ADR worldwide. Some of the important international conventions on arbitration are:

- The Geneva Protocol on Arbitration clauses of 1923.
- The Geneva Convention on the execution of foreign award, 1927.
- The New York Convention of 1958 on the recognition and enforcement of foreign arbitral award.

In India, Part III of Arbitration and Conciliation Act, 1996 provides for International Commercial Arbitration.

Another step in strengthening the international commercial arbitration is the established of various institutions and organizations such as:

- International Court of Arbitration of the International Chamber of Commerce (ICC).
- Arbitration and Mediation Centre of World Intellectual Property Organization.
- American Arbitration Association (AAA).
- Tehran Regional Arbitration Centre (TRAC).
- International Centre for Dispute Resolution (ICDR).
- Organization of American States (OAS), etc.

The alternative modes of disputes resolution include- Arbitration, Negotiation, Mediation, Conciliation, Lok Adalat, National and State Legal Authority. ADR strategies which facilitate the development of consensual solution by the disputing parties are therefore considered a viable alternative. ADR methods such as mediation, negotiation and arbitration along with many sub-strategies are increasingly being employed world over in a wide range of conflict situations, ranging from family and marital disputes, business and commercial conflicts, personal injury suits, employment matters, medical care disputes, construction disputes to more complex disputes of a public dimension such as environmental disputes, criminal prosecutions, professional disciplinary proceedings, inter-state or international boundary and water disputes.

The Arbitration and Conciliation Act, 1996 contains 85 Sections, besides the Preamble and three Schedules. The Act is divided into four Parts. Part-I contains general provisions on arbitration. Part-II deals with enforcement of certain foreign awards. Part-III deals with conciliation. Part-IV contains certain supplementary provisions. The Preamble to the Act explains the biases of the proposed legislation. The three Schedules reproduce the texts of the Geneva Convention on the Execution of Foreign Awards, 1927; The Geneva Protocol on Arbitration Clauses, 1923; and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 respectively.

The establishment of the International Centre for Alternative Dispute Resolution (ICADR), an independent non-profit making body, in New Delhi on May 1995 is a significant event in the matter of promotion of ADR movement in India. Lastly, to make arbitration and conciliation a success story in India, three things are needed:

1) A good law that is responsive to both domestic and international requirements.
2) Honest and competent arbitrators and conciliators without whom any law or arbitration or conciliation can succeed.
3) Availability of modern facilities and services such as meeting rooms, communication facilities, administrative and secretariat services.

Chapter VII reflects the role of judiciary in the field of dispute settlement. With the increasing population, complications and disputes are increasing day by day between the parties regarding various matters and as the courts are having a huge number of cases pending in there, this method is put into practice for reducing the burden of cases and to solve the matters quickly in parallel with the fast running of the life in the society. Dispute resolution is one of the main functions of the stable society. States function through different organs and the judiciary is one that is directly responsible for the administration of justice. Resolving disputes is fundamental to the peaceful existence of society. The only field where the Courts in India have recognized ADR is in the field of arbitration.

Preamble to our Constitution reflects such aspiration as “justice-social, economic and political”. Article 39A of the Constitution provides for ensuring equal access to justice. Administration of Justice involves protection of the innocent, punishment of the guilty and the satisfactory resolution of disputes.

In order to overcome the much criticised delay in justice delivery, the adoption of Alternative Dispute Resolution (ADR) mechanisms like *Lok Adalats*, arbitration, mediation and conciliation was thought of and subsequently practised with commendable success. Although the alternative mechanisms have delivered speedy justice to the people, yet the exercise has raised some pertinent questions by some legal luminaries.

The Apex Court in the case of **Food Corporation of India v. Joginder Pal,**[2] also laid emphases on ADR system of adjudication through arbitration, mediation and conciliation is a modern innovation into the

[2] *AIR 1989 SC 1263*

arena of the legal system and it has brought revolutionary changes in the administration of justice. It can provide a better solution to a dispute more expeditiously and at a lesser cost than in regular litigation.

The Supreme Court realized the scope of ADRM in procedural as well in family law in **Jag Raj Singh v. Bripal Kaur,**[3] the Court affirmed and observed that the approach of a court of law in matrimonial matters is much more constructive, affirmative and productive rather than abstract, theoretical or doctrinaire. The Court also said that in matrimonial matters must be considered by the courts with human angle and sensitivity and to make every endeavour to bring about reconciliation between the parties.

Since law is changing with the changing demand of time, to meet with the needs of the peoples. ADR mechanisms would certainly supplement the existing adjudicatory machinery so as to develop the confidence of common man in the justice delivery system.

Recently, in the past few years E- Commerce has become very important and is inevitable. The advent of internet has created challenges and opportunities for dispute resolution mechanisms and particularly ADR. However, the lack of dispute resolution mechanisms in cyberspace will constitute a serious obstacle in the growth and development of e-commerce. Alternative Dispute Resolution (ADR) and the internet are two very topical issues. Online Alternative Dispute Resolution (OADR) or ADR online, refers to the use of internet technology, wholly or partially, as a medium by which to conduct the proceedings of ADR in order to resolve commercial disputes that arise from the use of the Internet. Neutral private bodies operate those proceedings under published rules of procedure. Thus ADR emerged as a powerful weapon for resolution of disputes at domestic as well as international level. It is developing as a separate and independent branch of legal discipline.

Chapter VIII reflects the new growing concept of Online Dispute Resolution (ODR). After a good and keen study of the new advent of the concept of ODR, ODR is defined as a method for resolving dispute that were arising online, and for which traditional means of dispute resolution were inefficient or unavailable. Online Dispute Resolution is an automatised platform or rather a trendy tool for the development of e-commerce and to solve dispute easily. Due to increasing use of the Internet worldwide, the number of disputes arising from Internet commerce is on arises. Numerous websites have been established to help

[3] *(2007) 2 SCC 564*

resolve these types of disputes. It is becoming an increasingly effective mechanism for resolving disputes as technology advances.

Using computer-networking technology, ODR brings disputing parties together "online" to participate in a dialogue about resolving their dispute. ODR also involves the modes of arbitration, mediation and conciliation to solve such disputes online.

The growth of ODR is very recent. With the fast and quick lifestyle and with the increase of various e-commerce problems, this method is adopted as it can solve the disputes very fast and is easily accessible at a low cost. The whole procedure is carried over online, no matter wherever the parties are. Distance does not cause any barrier in solving such disputes whether it is business related or consumer related, whether related to marital separation or interstate conflicts. The concept of Online Dispute Resolution (ODR) has been accepted in many countries worldwide.

In India, to reduce the burdening of the already overburdened courts the Alternative Dispute Resolution Mechanism has been put into practice and is gaining its popularity as days are passing by. The importance of **Information and Communication Technology (ICT)** for resolving contemporary electronic commerce (e-commerce) and other disputes. The best example of the same is the use of **Online Dispute Resolution (ODR)** for resolving these disputes and misunderstandings. The swift growth of e-commerce and website contracts has increased the potential for conflicts over contracts which have been entered into online. The use of Online Dispute Resolution Mechanism (ODRM) to resolve such e-commerce and web site contracts disputes are crucial for building consumer confidence and permitting access to justice in an online business environment. These ODRM are not part and parcel of the traditional dispute resolution machinery popularly known as **judiciary** but is an alternative and efficacious institution known as ADRM. Thus, ADR techniques are extra-judicial in character.

The term Online Dispute Resolution (ODR) has emerged as the most used term in the recent years but it is also termed as internet dispute resolution, electronic dispute resolution, electronic ADR, Online ADR. Various methods of Online Dispute Resolution adopted such as- Automated Negotiation, Assisted Negotiation, Online Arbitration, Uniform Domain Names Dispute Resolution Policy, Chargeback’s.

If we need to relate the practice of Online Dispute Resolution Mechanisms with the Legal framework then we need to go through the provisions of the Information Technology Act, 2000 (IT Act, 2000) for

establishing an ICT base that may be conducive for the development of ODRM in India. The Government must appreciate the need of ODRM for resolving disputes originating due to the liberalisation of its economy. It is also important to remember that the foreign countries are very particular about getting their disputes resolved through ADR/ODR methods and India may find itself in an embarrassing situation if its ICT strategies are not modified accordingly.

As this is a growing up method of dispute settlement and is in process, so it can be considered that there are a lot of advantages. And thus, it shall be glad to mention some of the advantages, they are- hassle-free process, information is kept confidential, speedy outcome, highly economical, etc.

Actually the main aim or rather the mission in using ODR is to increase integrity and accountability in the Internet community, both locally and worldwide. ODR is firstly, concerned with the civilized (i.e. peaceful) resolution of disputes between private parties, and, secondly, with the prevention of such conflicts through the provision of legal certainty.

The judgment of the Supreme Court in **State of Maharashtra v. Dr. Praful B. Desai** is a landmark judgment as it has the potential to seek help of those witnesses who are crucial for rendering the complete justice but who cannot come due to “territorial distances” or even due to fear, expenses, old age, etc. The Courts in India have the power to maintain anonymity of the witnesses to protect them from threats and harm and the use of information technology is the safest bet for the same. The testimony of a witness can be recorded electronically the access to which can be legitimately and lawfully denied by the Courts to meet the ends of justice.

The judiciary in India is not only aware of the advantages of information technology but is actively and positively using it in the administration of justice, particularly the criminal justice. Thus, it can be safely concluded that the “E-justice system” has found its existence in India. It is not at all absurd to suggest that ODRM will also find its place in the Indian legal system very soon.

Recently many initiatives are taken by the governments around the world, industry groups, consumer advocacy groups and dispute resolution professionals devoted great attention to the development of ODR services and the standards and oversight over these ODR providers. The Internet will work out for arbitration online what Google did for the retrieval of information. By bringing the concept of ODR to our home, office or cell phone, time and inconvenience are no longer an obstacle to justice worldwide.

In court system, time zones and physical locations are obstacles to justice. It is very expensive as well as time consuming. Whereas, in Online Dispute Resolution Mechanisms (ODRM) all the procedures is carried over through online and so the matter is solved or rather settled within a few days or which may take a week or so, but shall not extend to months or year after years. With the help of ODR a wide range of disputes are solved in a very short time, where disputes includes inter-personal disputes i.e. consumer to consumer, business to business, business to consumer; marital separation; court disputes and inter-state disputes.

CHAPTER- II

ORIGIN OF ALTERNATIVE DISPUTE RESOLUTION SYSTEM IN INDIA

1. *Ancient India:*

It was since the ancient India; law of arbitration was very popular and were highly accessible. While dealing with such cases on arbitration, the awards were known as decisions of *Panchayats*, commonly known as Panchats. The decisions of Panchayats were of binding nature in law in force in those times. The head of a family, the chief of a community or selected inhabitants of a village or town might act as Panchayat.[4]

In words of *Martin, C.J.,* "arbitration was indeed a striking feature of ordinary Indian life and it prevailed in all ranks of life to a much greater extent than was the case of England. To refer matters to a Panch was one of the natural ways of deciding many disputes in India".[5]

The Hindu idea of Panchayats was that a Panchayat was the lowest tribunal and as such its award was subject to appeal. The Bengal Regulation of 1781 imported the idea that it was the tribunal of the parties' own choice, hence in the absence of misconduct the parties were bound by its decision. Accordingly, the only course left open to the aggrieved parties was that they had to impeach the awards on the grounds of misconducts of the Panchayats. The known misconduct was gross corruption or partiality. This caused the respectable persons to be reluctant to become Panches and the Panchayat system fell in disuse or public infancy. Then the Regulation of 1787 empowered the Courts to refer certain suits to arbitration, but no provision was made in the Regulation for cases wherein difference of opinion among the arbitrator arose. The Bengal Regulation of 1793 (XVI of 1793) empowered courts to refer matters to arbitration with the consent of the parties where the value of the suit did not exceed Rs. 200/- and the suits were for accounts, partnership, debts, non-performance of contracts, etc. In this Regulation, the procedure for conducting an arbitration proceeding was also provided. Regulation XV of 1795 extended the Regulation XVI of 1793 to Benaras. Similarly, the Regulation XXI of 1803 extended the Regulation XVI of the territory ceded the Nawab Vazeer.[6]

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[4] Tewari, O.P, The Arbitration & Conciliation Act with Alternative Dispute Resolution, 4th Edition(2005) Reprint 2007, Allahabad Law Agency, Faridabad, pp. 2- 4
[5] *Ibid*
[6] *Ibid*

Since by then the Madras Regulation IV of 1816 and V of 1816 empowered the Panchayats to settle disputes by them. In Bombay Regulations IV and VII of 1827 similar provisions were made.

2. *British Period:*

Thereafter, the Civil Procedure Code, 1859; the Indian Contract Act, 1872 and the Specific Relief Act, 1877 mandated that no contract to refer the present or further differences to arbitration could specifically enforce. A party refusing to reform his part of the contract was debarred from bringing a suit on the same subject-matter. The Arbitration Act, 1877 came as a complete code in itself. It made rules as to appeals and the Code of Civil Procedure aforesaid was not applicable to matters covered by the Arbitration Act, or the second schedule to the Code of Civil Procedure. The Code of Civil Procedure, 1859 (VII of 1859), was the first Civil Code of British India. The law relating arbitration was incorporated in Chapter VI of the Code (Sections- 312 to 327). It was, however, not applicable to the Supreme Court or to the Presidency Small Cause Courts or to non- Regulation Provinces. This Act was repealed by Act X of 1877 which consolidation the law of Civil Procedure which was further replaced by Act XIV of 1882. This Code of Civil Procedure also was replaced by the Code of Civil Procedure, 1908 (V of 1908), the present Code. The Second Schedule of the Code comprised the law regarding arbitration.[7]

The law of Arbitration in the British Rule in India was comprised in two enactments. One was the Indian Arbitration Act, 1899, which was based on the English Arbitration Act, 1899. Many sections of the Indian Act were the verbal reproduction of the schedule to the Code of Civil Procedure Code, 1908. The Arbitration Act, 1899 extended to the Presidency Towns and to such other areas as it might be extended by the appropriate Provincial Government. Its scope was confined to 'arbitration' by agreement without the intervention of a Court. Outside the scope of operation of Arbitration Act 1899, the Second Schedule to the Code of Civil Procedure Code, 1908 was applicable. The Schedule related mostly to arbitration in suits. The Schedule contained an alternative method also, whereby the parties to a dispute or any of them might file the concerned arbitration agreement before a Court having jurisdiction, which Court following a certain procedure referred the matters to an arbitrator.[8]

[7] *Ibid*
[8] *Ibid*

The Arbitration Act, 1940 consolidated and amended the law relating to Arbitration very exhaustively. This Act repealed Section 89, clauses (a) to (f), of sub-section (1) of Section 104 and the Second Schedule to the Code of 1908. The Civil Justice Committee had recommended various changes in the Arbitration Law. Since the Arbitration Act of 1899 was based on the English Law then in force, to which several substantial amendments were affected by the Amendment Act of the British Parliament in 1934. The recommendations of the Civil Justice Committee were scrutinized together and the Arbitration Bill sought to consolidate and standardise the law relative to arbitration throughout British India in details. This Bill received the assent of the Governor-General on 11th March, 1940 and was called the Arbitration Act, 1940. This Act was passed mainly to consolidate and amend the law relating to arbitration.[9]

The Arbitration Act, 1940 had been described in the oft-quoted passage from the ***Guru Nanak Foundation vs. Rattan Singh and Sons***[10] as follows-

"However, the way in which the proceedings under the act are conducted and without an exception challenged in courts, has made lawyers laugh and legal philosophers weep. Experience shows and laws reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary".[11]

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 and this led them to Arbitration Act, 1940.[12]

The system of resolving disputes by an Arbitrator was not only confined to India but elsewhere in the world also. Since ages, the practice was prevalent in several parts of the world. Greek and Romans attached greater importance to arbitration.[13]

The Arbitration Act, 1940 dealt with only domestic arbitration. In so far as international arbitration was concerned, there was no substantive law on the subject. However, enforcement of foreign awards in this country was governed by two enactments, the Arbitration (Protocol and

[9] *Ibid*
[10] (1981) 4 SCC 634: AIR 1981 SC 2073
[11] Sh. Venugopal K.K. "Rendering Arbitration in India Swift Effective", NYAYA DEEP, Vol. VI, Issue: 01, Jan. 2006 at p. 125
[12] Popat D.M. "ADR And India: An Overview", Dec. 2004, at p. 751, viewed at www.globaljurix.com (last accessed on 15.04.2012)
[13] Medha Nishita "Alternative Dispute in India", viewed at www.fdrindia.org (last accessed on 06.05.12)

Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. These two statutes, in their entity, except for Section 3 (in both of them) did not deal with international arbitration as such but merely laid down the conditions for 'enforcement of foreign awards' in India.[14]

The Arbitration Act of 1940, though a good piece of legislation, in its actual operation and implementation by all concerned – the parties, arbitrators, lawyers and the courts- proved ineffective. In ***M/S Guru Nanak Foundation v. M/S Ratan Singh & Sons,***[15] the Hon'ble Supreme Court observed that the Act was ineffective and the way the proceedings under this Act were conducted in the Courts made the lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of the disputes has by the decision of the courts been clothed with "legalese" of unforeseeable complexity.

A few years later, the Court suggested simplification of the law of arbitration releasing the law from the shackles of technical rules of interpretation. The Hon'ble Court observed in ***Food Corporation of India v. Joginderpal Mohinderpal,[16]:***

The law of arbitration should be simple, less technical and more responsible to the actual realities of the situations, but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating sense that justice appears to have been done.[17]

3. <u>Modern India</u>:

The Arbitration Act, 1940 was holding the field for nearly half a century but with the phenomenal growth of commerce and industry the effect of globalization required substantial changes. The Alternative Dispute Redressal mechanism was increasingly attracting serious notice and that led to the enactment of Arbitration and Conciliation Act, 1996 and the

[14] Ganguli A.K. "The Proposed Amendments To The Arbitration And Conciliation Act, 1996- A Critical Analysis", *45 JILI (2003),*pp. 3-4
[15] *(1981) 4 SCC 634*
[16] *(1981)2 SCC 349*
[17] Ganguli A.K. "The Proposed Amendments To The Arbitration And Conciliation Act, 1996- A Critical Analysis", *45 JILI (2003),* p. 4

incorporation of Section 89 of the Code of Civil Procedure, 1908 i.e. 1st July, 2002 as a part of this mechanism.[18]

The Arbitration Act, 1940 was not meeting the requirements of either the international or domestic standards of resolving disputes. Enormous delays and court intervention frustrated the very purpose of arbitration as a means for expeditious resolution of disputes. The Supreme Court in several cases repeatedly pointed out the need to change the law. The Public Accounts Committee too deprecated the Arbitration Act of 1940. In the conferences of Chief Justices, Chief Ministers and Law Ministers of all the States, it was decided that since the entire burden of justice system cannot be borne by the courts alone, an Alternative Dispute Resolution system should be adopted. Trade and industry also demanded drastic changes in the 1940 Act. The Government of India thought it necessary to provide a new forum and procedure for resolving international and domestic disputes quickly.[19]

Alternative Dispute Resolution is today being increasingly acknowledged in the field of law as well as in the commercial sector. The very reasons for origin of Alternative Dispute Resolution are the tiresome processes of litigation, costs and inadequacy of the court system. It broke through the resistance of the vested interests because of its ability to provide cheap and quick relief. In the last quarter of the previous century, there was the phenomenal growth in science and technology. It made a great impact on commercial life by increasing competition throughout the world. It also generated a concern for consumers for protection of their rights. The legal system did not give any response to the new atmosphere and problems of the commercial world. Thus ADR emerged as a powerful weapon for resolution of disputes at domestic as well as international level. It is developing as a separate and independent branch of legal discipline.[20]

It offers to resolve matters of litigants, whether in business causes or otherwise, who are not able to start any process of negotiation and reach any settlement. Alternative Dispute Resolution has started gaining its ground as against litigation and arbitration.[21]

In modern India for the first time where Alternative Dispute Resolution as a method of conciliation has been effectively introduced and

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[18] Pasayat Arijit, Dr. J.; "Arbitration And Courts Harmony Amidst Disharmony, NYAYA DEEP, Vol. VIII, Issue: 4, Oct. 2007, pp. 36-37

[19] Dixit Sujoy, "Alternative Dispute Resolution Mechanism", viewed at www.legalserviceindia.com (last accessed on 15.04.12

[20] Singh, Dr. Avtar, Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 7th Edition(2006), p. 393

[21] *Ibid*

recognised by law was in Labour Law, namely Industrial Dispute Act, 1947. Conciliation has been statutorily recognized as an effective method of dispute resolution in relation to disputes between workers and the management. All parties to an industrial dispute who have had the misfortune of going through litigation knew that it is a tedious process and one which could go well beyond the life time of some of the beneficiaries. It is this factor that has contributed greatly to the success of conciliation in industrial relations.[22]

Thus "The Arbitration and Conciliation Act, 1996"came into being. The law relating to Arbitration and Conciliation is almost the same as in the advanced countries. Conciliation has been given statutory recognition as a means for settlement of the disputes in terms of this Act. In addition to this, the new Act also guarantees independence and impartiality of the arbitrators irrespective of their nationality. The new Act of 1996 brought in several changes to expedite the process of arbitration. This legislation has developed confidence among foreign parties interested to invest in India or to go for joint ventures, foreign investment, transfer of technology and foreign collaborations.[23]

The emergence of alternative dispute resolution has been one of the most significant movements as a part of conflict management and judicial reform, and it has become a global necessity. Such specially devised machinery can also be described as “Appropriate Dispute Resolution” or “Amicable Dispute Resolution” so as to stress upon its non-adversarial objectives. In disputes arising across national frontiers covering the field of private international law ADR is of special significance to combat the problems of applicability of laws and enforcement.[24]

ADR has thus been a vital, vociferous, vocal and vibrant part of our historical past. Undoubtedly, the concept and philosophy of Lok Adalat or “People’s Court Verdict” has been mothered by the Indian contribution. It has very deep and long roots not only in the recorded history but even in pre-historical period. It has proved to be a very effective alternative to litigation. People’s Court is one of the fine and familiar fora which has been playing an important role still today in settlement of disputes.[25]

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[22] *Ibid.*

[23] Dixit Sujoy, “Alternative Dispute Resolution Mechanism”, viewed at www.legalserviceindia.com (last accessed on 15.04.12)

[24] Dr. Singh Avtar, Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 7th Edition(2006), p. 393

[25] Deshmukh Raosaheb Dilip, J. “Efficacy Of Alternative Disputes Resolution Mechanisms In Reducing Arrears Of Cases”, NYAYA DEEP- Vol. X, Issue: 2, April 2009, pp. 26-27

Modern ADR is a voluntary system, according to which the parties enter a structured negotiation or refer their disputes to a third party for evaluation and/or facilitation of resolution. Especially in the light of the facts that the justice system is flooded by disputes of variable importance and complexity, and that the parties are almost invariably intimidated by the atmosphere in the courtroom and the litigation process itself. ADR has now become an acceptable and often preferred alternative to judicial settlement and an effective tool for reduction of arrears of case. The alternative modes of dispute resolution include arbitration, negotiation, mediation and conciliation. The ADR system by nature of its process is totally different from Lok Adalat.[26]

CHAPTER- III

[26] *Ibid*

OBJECT AND SCOPE OF ALTERNATIVE DISPUTE RESOLUTION

It is the spirit and not the form of law that keeps the justice alive" – LJ Earl Warren[27]

The concept of Conflict Management through Alternative Dispute Resolution (ADR) has introduced a new mechanism of dispute resolution that is non adversarial. A dispute is basically 'lis inter partes' and the justice and the justice dispensation system in India has found an alternative to Adversarial litigation in the form of ADR Mechanism.[28]

"Alternative Dispute Resolution" (ADR) is supposed to provide an alternative not only to civil litigation by adjudicatory procedures but includes also arbitration itself. The institution of arbitration came into being as a very useful alternative to litigation. But it is now being viewed as closer to litigation because it has to be in accordance with statutory provisions and becomes virtually an adjudicatory process with all the formalities of the functioning of a court. A method of dispute resolution would be considered as a real alternative only if it can dispense with the adjudicatory process, even if it is wholly a consensual process. It may be worked by a neutral third person who may bridge the gap between the parties by bringing them together through a process of conciliation, mediation or negotiations.[29]

Nevertheless, arbitration has also been considered as an alternative to litigation and is generally included in the study of all other alternatives. This is so because arbitration has been the mother source of other alternatives not only in substance but also in the procedural working of the alternative methods. The principles and procedure of arbitration have influenced the growth of many of the ancillary and hybrid processes used in the alternative methods of dispute resolution.[30]

ADR can be defined as a technique of dispute resolution through the intervention of a third party whose decision is not legally binding on the parties. It can also be described as a mediation though mediation is only one of the modes of ADR. ADR flourishes because it avoids rigidity and

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[27] Dixit Sujoy, "Alternative Dispute Resolution Mechanism", viewed at www.legalserviceindia.com (last accessed on 15.04.12
[28] *Ibid*.
[29] Dr. Singh Avtar, Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 7th Edition(2006), p. 394
[30] *Ibid*.

inflexibility which is inevitable in litigation process apart from high lawyer and court fee and long delays. [31]

ADR aims to provide the parties with cheap, speedy and less formalistic remedy to the aggrieved party. It aims at providing a remedy which is most appropriate in the circumstances of the case. This makes ADR a viable substitution for arbitration or litigation. In ADR, in this sense, it is not the 'dispute' or 'difference' between the parties that is parties, so that with gradual change in the mindset eventually both sides come to a meeting point. The most practiced forms of ADR, in this sense, are "conciliation" and "mediation". In western countries, neutral evaluation is also frequently resorted to but in India this or other forms of ADR have not yet come in vogue. Conciliation and mediation are often used as interchangeable terms although there is a subtle difference between the two.[32]

As previously noted, ADR is a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which a involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes. ADR is an umbrella term for a variety of processes which differ in form and application. Differences include: levels of formality, the presence of lawyers and other parties, the role of the third party (for example, the mediator) and the legal status of any agreement reached. Some common features relating to the acronym ADR. For example:

i. There is a wide range of ADR processes;

ii. ADR excludes litigation;

iii. ADR is a structured process;

iv. ADR normally involves the presence of an impartial and independent third party;

v. Depending on the ADR process, the third party assists the other two parties to reach a decision, or makes a decision on their behalf; and

vi. A decision reached in ADR may be binding or non-binding.[33]

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[31] *Ibid*.

[32] Jangkama, D.N. "Alternative Dispute Resolution At A Glance" viewed at www.duhaime.org (last accessed on 30.04.2012

[33] Agarwal K. Anurag, "Role Of Alternative Dispute Resolution Methods For The Development In The Society", Indian Institute Of Management, W.P. No. 2005-11-01, Research & Publications viewed at www.iimah.com (last accessed on 13.04.2012)

Time has come to think to provide a forum for the poor and needy people who approach the Law Courts to redress their grievance speedily. As we all know the delay in disposal of cases in Law Courts, for whatever reason it may be, has really defeated the purpose for which the people approach the Courts to their redressal. Justice delayed is justice denied and at the same time justice hurried will make the justice buried. So we will have to find out a via media between these two to render social justice to the poor and needy who wants to seek their grievance redressed through Law Court. Considering the delay in resolving the dispute Abraham Lincoln has once said:[34]

"Discourage litigation. Persuade your neighbours to compromise whenever you can point out to them how the nominal winner is often a real loser, in fees, expenses, and waste of time".

A committee was formed under Indira Gandhi Government, to recommend measures at national level to secure for the people a democracy of remedies and easy access to justice. In one of such committee meetings a dialectical diagnosis of the Pathology of Indo Anglican Judicial Process was presented by the committee as follows:

Where the bulk of social and economic justice, the rule of law, notwithstanding its mien of majestic equality but fail its mission in the absence of a scheme to bring the system of justice near to down-trodden. Therefore it becomes a democratic obligation to make the legal process a surer means to Social Justice". [35]

All the above has made us to think and find out a way to resolve the dispute between the parties otherwise than by going to law Court which is called the Alternate Dispute Resolution.

SALIENT FEATURES OF ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution, as the name suggests, is an alternative to the traditional process of dispute resolution through courts. It refers to a set of practices and techniques to resolve disputes outside the courts. It is mostly a non-judicial means or procedure for the settlement of disputes. In its wider sense, the term refers to everything from facilitated settlement negotiations in which parties are encouraged to negotiate directly with each other prior to some other legal process, to arbitration

[34] Ramakrishnan K, J. "Scope of Alternative Dispute Resolution in India", *2005(1) JV,* pp. 1-2
[35] *Ibid*

systems or mini trials that look and feel very much like a court room process. The need for public adjudication and normative judicial pronouncements on the momentous issues of the day is fundamental to the evolution of the land. ADR is necessary to complement and preserve this function of the courts. It has some instrumental and intrinsic functions; it is instrumental in so far as it enables amicable settlement of disputes through means which are not available generally through courts. It is intrinsic because it enables the parties themselves to settle their disputes.[36]

Our Constitutional goal is to achieve justice- social, economic and political. Access to fast, inexpensive and expeditious justice is a basic human right. Equal access to justice for all segments to society is important to engender respect for law and judicial system. Access to justice would be meaningful, if the judicial system yields result through a fair process and within a prescribed time. Amicable settlement of disputes is very essential for maintenance of social peace and harmony in the society. Our Constitution mandates that the *"state shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that the opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."*[37]

ADR has been a spoke in the wheel of the larger formal legal system in India since time immemorial. If we look back in to our history, we find that during ancient and medieval period the disputes were being resolved in an informal manner by a neutral third person, who would be either an elderly person or a chief of a village or a clan or by a panchayat. The adversarial system of justice, which we adapted later, has proved to be costly and time consuming. To a great extent time is consumed over procedural wrangles, technicalities of law and the inability of large number of litigants to engage lawyers. The problem of delay in deciding the matters has resulted in long pendency. [38]

The mounting arrears in the courts, inordinate delays in the administration of justice and expenses of litigation have the potential to erode public trust and confidence in the judicial system, which is the

[36] Prof. Aggarwal Nomita "Alternative Dispute Resolution: Concept and Concerns", NYAYA DEEP, Vol. VII, Issue: 01, Jan. 2006, p. 68
[37] Sabharwal Y.K, J. "Alternative Dispute Resolution"; Article- 39A of the Constitution of India, NYAYA DEEP, Vol. VI, Issue: 01, Jan. 2005, p. 48
[38] Sinha S.N.P and Dr. Mishra P.N. "A Dire Need Of Alternative Dispute Resolution System In A Developing Country Like India", INDIAN BAR REVIEW, Vol. XXXI (3&4) 2004, p. 298

pillar of our democracy. Delay also gives rise to corruption and other evils. Ideally speaking judicial system is blind to power, wealth and social status. Courts are supposed to offer a forum, where the poor, powerless and marginalized can stand with all others as equals before the law. With the present state of affairs, many of our poor fellow citizens have chosen to avoid courts rather than face intimidation cost and time in legal proceedings. The legal problems faced by the poor and down trodden are compounded by their lack of awareness of whom to approach to redress their grievances.[39]

The need to get away from the conception that court is the only place to settle disputes has led to exploring the possibility of creating a dispute resolving mechanism which would be flexible and saves valuable time and money. In its 14th Report, Law Commission of India recommended devising of ways and means to ensure that justice should be simple, speedy, cheap effective and substantial. In its 77th Report Law Commission of India observed that the Indian society is primarily an agrarian society and is not sophisticated enough to understand the technical and cumbersome procedures followed by the courts.[40]

The search for a simple, quick, flexible and accessible dispute resolution system has resulted in the adoption of 'Alternative Dispute Resolution' mechanisms. ADR represents only a change in forum, not in the substantive rights of the parties. ADR is not intended to supplant altogether the traditional means of resolving disputes by means of litigation. The primary object of ADR system is avoidance of vexation, expense and delay and promotion of the ideal of "access to justice".[41]

There are three important factors in every arbitration arrangement. The first relates to nomination, second relates to legality of the award given by the arbitrator and third the permissible area of challenge to the arbitrator's award. Accepting the award is the normal excepted code of conduct of the parties who have chosen an arbitrator. It is but natural that they have initially reposed faith on the arbitrator or the arbitrators, as the case may be. If the award is not to the choice of the parties or any one of them, it would be unfair to the arbitrator or the arbitrators, as the

[39] Alternative Dispute Resolution viewed at www.fresnosuperiorcourt.org (last accessed on 13.04.2012)
[40] Sinha S.N.P and Dr. Mishra P.N. "A Dire Need Of Alternative Dispute Resolution System In A Developing Country Like India"; Law Commission of India (14th Report on "Report on Reform of Judicial Administration, 1958 & 77th Report on Delay and Arrears in Trial Courts, 1979) INDIAN BAR REVIEW, Vol. XXXI (3&4) 2004, p. 299
[41] Sinha S.N.P and Dr. Mishra P.N. "A Dire Need Of Alternative Dispute Resolution System In A Developing Country Like India", INDIAN BAR REVIEW, Vol. XXXI (3&4) 2004, p. 299, Para. 3&4

case may be, to term the award as the outcome of the malafide. It is, therefore, very unfortunate that increasingly misconduct by the arbitrator or the arbitrators as the case may be is alleged. Sometimes obnoxious allegations are made. The image should be untarnished. There may be black sheep like any other sphere of human life. But then that fallacy can be remedied by making a wise choice at the threshold.[42]

I. MEANING AND DEFINITION OF ALTERNATIVE DISPUTE RESOLUTION

Human conflicts are inevitable. Disputes are equally inevitable. It is difficult to imagine a human society without conflict of interests. Disputes must be resolved at minimum possible cost both in terms of money and time, so that more time and more resources are spared for constructive pursuits.[43]

'Alternative Dispute Resolution' or ADR is an attempt to devise a machinery which should be capable of providing an alternative to the conventional methods of resolving disputes. An alternative means the privilege of choosing one of two things or courses offered at one's choice. It does not mean the choice of an alternative court but something which is an alternative to court procedures or something which can operate as court annexed procedure.[44]

ADR originated in the USA in a drive to find alternatives to the traditional legal system, felt to be adversarial, costly, unpredictable, rigid, over-professionalized, damaging to relationships and limited to narrow right-based remedies as opposed to creative problem-solving. The American origin of the concept is not surprising, given certain features of litigation in that system, such as: trial of civil actions by a jury, lawyers' contingency fees, and lack of application in full of the rule "*the loser pays the costs*". [45]

Alternative Dispute Resolution is an alternative to the traditional process of dispute resolution through courts. It refers to set of practices and techniques to resolve disputes outside the courts. It

[42] Pasayat, Dr. Arijit, J.; "Arbitration And Courts Harmony Amidst Disharmony, NYAYA DEEP, Vol. VIII, Issue: 4, Oct. 2007, p. 37
[43] Singh, Dr. Avtar, Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 7th Edition(2006), p. 391
[44] *Ibid*
[45] Medha Nishita "Alternative Dispute in India", viewed at www.fdrindia.org (last accessed on 06.05.12)

is mostly a non-judicial means or procedures for the settlement of disputes. ADR has been a spoke in the wheel of the larger formal legal system in India since time immemorial. The search for a simple, quick, flexible and accessible dispute resolution system has resulted in the adoption of 'Alternative Dispute Resolution' mechanisms. The primary object of ADR system is avoidance of vexation, expense, and delay and the promotion of the ideal of "access to justice".[46]

The ADR techniques mainly consist of negotiation, conciliation, mediation, arbitration and a series of hybrid procedures. Arbitration is adjudicatory and the result is binding, where as conciliation is consensual and very helpful in making the parties in setting their disputes mutually with the help of a neutral third person. The success of conciliation depends on the mental attitude of the parties, the skill of the conciliator and creation of proper environment which is most essential in matrimonial disputes. Negotiation is a non-binding procedure resorted to buy the parties for arriving at a negotiated settlement. Willingness to resolve the dispute and objectivity necessarily becomes essential to arrive at a negotiated settlement. Mediation is a decision- making process in which the parties are assisted by a third party, the mediator. The mediator attempts to improve the process of decision making and to assist the parties' reach an outcome to which each of them can consent.[47]

ADR is based on more direct participation by the disputants rather than being run by lawyers and judges. This type of involvement is believed to increase people's satisfaction with the outcome as well as their compliance with the settlement reached. Most ADR processes are based on an integrative approach. They are more cooperative and less competitive than adversarial court based methods like litigation. For this reason, ADR tends to generate less escalation and ill-will between parties. This is a key advantage in situation where the parties most continue to interact after settlement is reached, such as in matrimonial cases of labour-management cases.[48]

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[46] Prof. Aggarwal Nomita "Alternative Dispute Resolution: Concept and Concerns", NYAYA DEEP, Vol. VII, Issue: 01, Jan.2006

[47] Sinha, S.N.P and Mishra, Dr. P.N. "A Dire Need Of Alternative Dispute Resolution System In A Developing Country Like India", INDIAN BAR REVIEW, Vol. XXXI (3&4) 2004, p. 300

[48] *Ibid*

Alternative Dispute Resolution System (ADR) has been a spark in the wheel of larger formal legal system in India since time immemorial. If we look back in to our history, we find that during ancient and medieval period the disputes were being resolved in an informal manner by a neutral third person, who would be either an elderly person or a chief of a village or a clan or by a panchayat. The adversarial system of justice, which we adopted later, has proved costly and time consuming. To a great extent time is consumed over procedural wrangles, technicalities of Law and inabilities of large number of litigants to engage lawyers. The problem of delay in deciding the matters has resulted in long pendency.[49]

A time had come when litigants were afraid of approaching the courts with their civil and other types of disputes, as they have no assurance that the claims would be settled within the near foreseeable future. Equally, the time had come when parties or clients to a contract, which had an alternative dispute settlement clause or arbitration clause were wondering whether it would not be safer and quicker to resort to the civil and other courts. Recently in this regard the Arbitration and Conciliation (Amendment) Bill, 2003 when passed would be a true panacea to cure these ills.[50]

The search for a simple, quick, flexible and accessible dispute resolution system has resulted in the adoption of '*Alternative Dispute Resolution*' mechanisms. Most simply put, Alternative Dispute Resolution denotes all forms of dispute resolution other than litigation and adjudication through courts.[51]

However, Carrow defined "Alternative Dispute Resolution as including binding arbitration in the minds of some since it qualifies as an alternative to court litigation. The better view is that the distinguishing feature of ADR is that the parties with few exceptions, determine their own destiny rather than having the decision of another imposed upon them".[52]

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[49] Sinha, S.N.P and Mishra, Dr. P.N. "A Dire Need Of Alternative Dispute Resolution System In A Developing Country Like India", INDIAN BAR REVIEW, Vol. XXXI (3&4) 2004, p. 298
[50] *Ibid,* p. 298
[51] *Ibid,* p. 299
[52] Jangkama D.N. "Alternative Dispute Resolution At A Glance", p. 1041 viewed at www.duhaime.org (last accessed on 30.04.12)

According to Akinsaya, “ADR is the abbreviation of Alternative Dispute Resolution and is generally used to describe the methods and procedures used to resolve disputes either as an alternative to the traditional disputes resolution mechanism of the court or in some cases as supplementary to such mechanism”. In other words, these processes are designed to aid parties in resolving their disputes without the need for a formal judicial proceeding.[53]

He went further to say that Alternative Resolution Resolution is also known as PDR- Preferred Dispute Resolution. Many writers are of the view that ADR is strictly not a new idea because from idea because from time immemorial people have settled their disputes through third party intervention using alternative fora.[54]

Mr. Aina defines Alternative Dispute Resolution in these words[55]:-

“The letters ADR stands for ‘Alternative Resolution Dispute’- a new approach to dispute processing. It refers to a range of mechanisms designed to assist disputing parties in resolving an ongoing dispute.

In other words, ADR thus involves not only the application of new or different methods to resolve disputes, but also the selection or design of a process which is best suited to the particular dispute and to the parties in dispute”.

The term “ADR” or “Alternative Dispute Resolution” has different meanings in different contexts. The literature review did not reveal an accepted definition of the term, but rather suggested that it is commonly used as an umbrella term for practices that go beyond the resolution of specific disputes between parties. ADR may not refer to a specific process, but rather to a shared set of methods, goals assumptions or values.[56]

As of the early 2000s, ADR techniques were being used more and more, as parties and lawyers and courts realized that these techniques could often help them resolve legal disputes quickly and

[53] *Ibid*
[54] *Ibid*
[55] *Ibid*
[56] Alternative Dispute Resolution, viewed at www.ebc-india.com (last accessed on 30.04.12)

cheaply and more privately than could conventional litigation. Moreover, many people preferred ADR approaches because they saw these methods as being more creative and more focused on problem solving than litigation, which has always been based on an adversarial model.[57]

The term alternative dispute resolution is to some degree a misnomer. In reality, fewer than 5% of all lawsuits filed go to trial; the other 95% are settled or otherwise concluded before trial. Thus, it is more accurate to think of litigation as the alternative and ADR as the norm. Despite of this fact, the term alternative dispute resolution has become such a well-accepted shorthand for the vast array of non-litigation processes that its continued use seems assured.[58]

II. JUSTICE MALIMATH COMMITTEE REPORT

Justice Mali math Committee in its Report recommended:[59]

If a law is enacted giving legal sanction to such machinery for resolution of disputes and resort thereto is made compulsory, much of the inflow of commercial litigation in regular civil courts gradually moving up hierarchically would be controlled and reduced.

This Committee agreeing with the Law Commission recommended that Conciliation Courts should be established all over the country with power, authority and jurisdiction to initiate conciliation proceedings in all types of cases at all levels and that the amendment suggested by the Law Commission should be carried out to enable the Scheme to function effectively. The conciliation procedure should also be made applicable to the Motor Accident Claims Tribunal.

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[57] Free Online Law Dictionary, viewed at www.freedictionary.com (last accessed on 30.04.12)
[58] *Ibid*
[59] Singh, Dr. Avtar; Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 7th Edition(2006), p. 397

III. CONSTITUTIONAL BACKGROUND OF ALTERNATIVE DISPUTE RESOLUTION

"It is settled law that free legal aid to the indigent persons who cannot defend themselves in a Court of law is a Constitutional mandate under Article 39-A and 21 of the Indian Constitution. The right to life is guaranteed by Article 21."[60] The law has to help the poor who do not have means i.e. economic means, to fight their causes.

Indian civilisation put at about 6000 years back, at the dawn of civilisation (i.e. the age of the Vedas), when habitation was growing at river banks, was devoid of urbanisation, where the Creator was presumed to be the head of humanity. With the dawn of industrialisation, man was walking into orderly society, State and nation, dependence on law for orderly conduct gained momentum. Then came on the horizon of social dispute resolution mechanism. With Indian Courts piling up cases for millennium (in the place of indigenous system which was cheap and quick), alternative dispute systems had to be found. Thus this system took birth. Once the dispute was resolved, there was no further challenge.[61]

The Constitutional mandate rescue operation began with Justice V.R Krishna Iyer and Justice P.N. Bhagawati's Committees' report; weaker section thus became enabled to approach law courts, right from Munsiff Courts to the Supreme Court. Committee for the Implementation of Legal Aid Services (CILAS) also came on to the scene and initiated methods of solving civil disputes in non-legal for a and non-formal fora.[62]

Based on this, States adopted (through State Legal Aid and Advice Boards) Lok Adalats and Legal Aid Camps, Family Courts, Village Courts, Mediation Centres, Commercial arbitration, Women Centres, Consumer Protection Forums, etc which are but various facets of effective Alternative Dispute Resolution systems.[63]

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[60] *Ibid.* Para. 6 Ramaswamy K, J while delivering his key note address at Law Ministers' Conference, at Hyderabad on Sat. 25-11-1975
[61] *Ibid.* Para. 7
[62] *Ibid.* Para. 8
[63] *Ibid*

The soul of good Government is justice to people. Our Constitution, therefore, highlights triple aspects of Economic Justice, Political Justice and Social Justice. This requires the creation of an ultra-modern disseminating infrastructure and man-power; sympathetic and planned; need for new judicare technology and models; and remedy-oriented jurisprudence.[64]

IV. LEGISLATIVE RECOGNITION OF ALTERNATIVE DISPUTE REDRESSAL

Alternative Dispute Redressal or Alternative Dispute Resolution has been an integral part of our historical past. Like the zero, the concept of Lok Adalat (Peoples' Court) is an innovative Indian contribution to the world of Jurisprudence. The institution of Lok Adalat in India, as the very name suggests means, Peoples' Court. 'Lok' stands for 'people' and the vernacular meaning of the term 'Adalat' is the Court. India has long tradition and history of such methods being practiced in the society at grass root level. These are called panchayat, and in legal terminology these are called arbitration. These are widely used in India for resolution of disputes both commercially and non-commercially.

The ancient concept of settlement of disputes through mediation, negotiation or through arbitral process is known as "Peoples' Court Verdict" or "Nyaya-Panch" which is conceptualized and institutionalized in the philosophy of Lok Adalat. Some people equate Lok Adalat to conciliation or mediation, whereas some treat it with negotiation or arbitration. Those who find it different from all these, call it "Peoples' Court". It involves people who are directly and indirectly involved by dispute resolution.[65]

The concept of Lok Adalat was pushed back into oblivion in last few centuries before independence and particularly during the British regime. Now this concept has once again been

[64] *Ibid*
[65] V. Karthyaeni and Bhatt Vidhi, "Lok Adalat and Permanent Lok Adalats- A Scope for Judicial Review: A Critical Study", viewed at www.legalserviceindia.com (last accessed on 25.04.12)

rejuvenated. It has once again become familiar and popular amongst litigants.[66]

The movement towards Alternative Dispute Redressal (ADR) has received Parliamentary recognition and support. The advent of Legal Services Authorities Act, 1987 gave a statutory status to Lok Adalats, pursuant to the constitutional mandate in Article-39A of the Constitution of India, which contains various provisions for settlement of disputes through Lok Adalat. It is an Act to constitute legal service authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic and other disabilities, and to organise Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity. Before the enforcement of the Act, the settlements of disputes were in the hands of the Panchayat head or the tribal head. But when statutory recognition had been given to Lok Adalat, it was specifically provided that the award passed by the Lok Adalat formulating the terms of compromise will have the force of decree of a court which can be executed as a civil court decree.[67]

In India, laws relating to resolution of disputes have been amended from time to time to facilitate speedy dispute resolution. The Judiciary has also encouraged out of court settlements to alleviate the increasing backlog of cases pending in the courts. To effectively implement the ADR mechanism, organizations like ICA, ICADR were established, Consumer Redressal forums and Lok Adalats revived. The Arbitration Act, 1940 was repealed and a new and effective arbitration system was introduced by the enactment of the Arbitration and Conciliation Act, 1996.This law is based on the United Nations Commission on International Trade Law (UNCITRAL) model law on International Commercial Arbitration.[68]

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[66] *Ibid*

[67] Singh, Dr. Avtar; Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 7th Edition(2006), p. 394; *Ibid*

[68] Alternative Dispute Resolution, viewed at www.sethassociates.com (last accessed on 14.05.12)

In ***Sitanna v. Viranna***[69], the Privy Council affirmed the decision of the Panchayat and Sir John Wallis observed that the reference to a village panchayat is the time-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.[70]

The legislative sensitivity towards providing a speedy and efficacious justice in India is mainly reflected in two enactments. The first one is the **Arbitration and Conciliation Act, 1996** and the second one is the incorporation of section 89 in the traditional **Civil Procedure Code (CPC).**[71]

The adoption of the liberalized economic policy by India in 1991 has paved way for integration of Indian economy with global economy. This resulted in the enactment of the **Arbitration and Conciliation Act, 1996** (new Act) by the legislature as India had to comply with well-accepted International norms. It superseded the obsolete and cumbersome Arbitration Act, 1940. The new Act has made radical and uplifting changes in the law of arbitration and has introduced new concepts like conciliation to curb delays and bring about speedier settlement of commercial disputes. The new Act has been codified on the lines of the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law (UNCITRAL). One of the most commendable objects of the new Act is to minimize the role of the courts in the arbitration process. The Arbitration and Conciliation Act, 1996 laid down the minimum standards, which are required for an effective Alternative Dispute Resolution Mechanism.[72]

Further, the recent amendments of the Civil Procedure Code will give a boost to ADR. Section 89 (1) of CPC deals with the settlement of disputes outside the court. It provides that where it appears to the court that there exist elements, which may be acceptable to the parties, the court may formulate the terms of a possible settlement and refer the same for arbitration,

[69] *AIR 1934 SC 105*
[70] Justice Dispensation through ADR Systems in India, viewed at www.legalindia.in (last accessed on 17.05.12)
[71] Singh, Dr. Avtar; Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 7th Edition (2006), pp. 394- 395
[72] Justice Dispensation through ADR Systems in India, viewed at www.legalindia.in (last accessed on 17.05.12)

conciliation, mediation or judicial settlement.[73] While upholding the validity of the CPC amendments in ***Salem Advocate Bar Association, Tamil Nadu v. U.O.I,***[74] the Supreme Court had directed the constitution of an expert committee to formulate the manner in which section 89 and other provisions introduced in CPC have to be brought into operation. The Court also directed to devise a model case management formula as well as rules and regulations, which should be followed while taking recourse to alternative dispute redressal referred to in Section 89 of CPC. All these efforts are aimed at securing the valuable right to speedy trial to the litigants.[75]

ADR was at one point of time considered to be a voluntary act on the apart of the parties which has obtained statutory recognition in terms of ***Civil Procedure Code (Amendment) Act, 1999; Arbitration and Conciliation Act, 1996; Legal Services Authorities Act, 1997 and Legal Services Authorities (Amendment) Act, 2002***. The access to justice is a human right and fair trial is also a human right. In India, it is a Constitutional obligation in terms of Art.14 and 21. Recourse to ADR as a means to have access to justice may, therefore, have to be considered as a human right problem. Considered in that context the judiciary will have an important role to play.[76]

The Supreme Court of India has also suggested making ADR as 'a part of a package system designed to meet the needs of the consumers of justice'. The pressure on the judiciary due to large number of pending cases has always been a matter of concern as that being an obvious cause of delay. The culture of establishment of special courts and tribunals has been pointed out by the Hon'ble Supreme Court of India in number of cases. The rationale for such an establishment ostensibly was speedy and efficacious disposal of certain types of offences.[77]

Industrial Disputes Act, 1947 provides the provision both for conciliation and arbitration for the purpose of settlement of disputes. In ***Rajasthan State Road Transport Corporation v. Krishna Kant***, the Supreme Court observed: "The policy of law

[73] *Ibid*
[74] *(2005) SCC 6 (344)*
[75] Singh Sunil, Alternative Dispute Resolution in India viewed at www.ijtr.nic.in (last accessed on 14.05.12)
[76] Justice Dispensation through ADR Systems in India, viewed at www.legalindia.in (last accessed on 17.05.12)
[77] *Ibid*

emerging from 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 revisions applicable to civil courts. Indeed, the powers of the courts and tribunals under the **Industrial Disputes Act** are far more extensive in the sense that they can grant such relief as they think appropriate in the circumstances for putting an end to an industrial dispute."[78]

Section 23(2) of the **Hindu Marriage Act, 1955** mandates the duty on the court that before granting relief under this Act, the Court shall in the first instance; make an endeavour to bring about 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 the direction to report to the court as to the result of the reconciliation [Section 23(3) of the Act].[79]

The Family Court Act, 1984 was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matter connected therewith by adopting an approach radically different from the ordinary civil proceedings . Section 9 of the Family Courts Act, 1984 lays down the duty of the family Court to assist and persuade the parties, at first instance, in arriving at a settlement in respect of subject matter. The Family Court has also been conferred with the power to adjourn the proceedings for any reasonable period to enable attempts to be made to effect settlement if there is a reasonable possibility.[80]

Shri M.C. Setalvad, former Attorney General of India has observed: "....equality is the basis of all modern systems of jurisprudence and administration of justice... in so far as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal, ...Unless some provision is

[78] *Ibid*
[79] *Ibid*
[80] *Ibid*

made for assisting the poor men for the payment of Court fees and lawyer's fees and other incidental costs of litigation, he is denied equality in the opportunity to seek justice."[81]

V. ADVANTAGES AND DISADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution System (ADR) has been a spoke in the wheel of larger formal legal system in India since time immemorial. Mahatma Gandhi, the Father of the Nation, wrote in his autobiography about the role of law and the lawyer-

"I had learnt the true practice of law. I had learnt to find out the better side of human nature, and to enter man's heart. I realised that the true function of a lawyer was to unite parties riven as under. The lesson was so indelibly burnt into me that the large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromise of hundreds of cases. I lost nothing thereby not even money, certainly not my soul."[82]

Any conflict is like cancer. The sooner it is resolved the better for all the parties concerned in particular and the society in general. If it is not resolved at the earliest possible opportunity, it grows at a very fast pace and with time the effort required to resolve it increases exponentially as new issues emerge and conflicting situations galore. One dispute leads to another. Hence, it is essential to resolve the dispute the moment it raises its head. The method to achieve this goal must be agreeable to both the parties and it should achieve the goal of resolving the dispute speedily.[83]

As Justice Warren Burger, the former Chief Justice of the American Supreme Court observed in the American context[84]:

[81] *Ibid*
[82] Agarwal, K. Anurag, "Role of Alternative Dispute Resolution Methods in Development of Society: Lok Adalat in India, Indian Institute Of Management Ahmadabad, India; Research & Publications, W.P. No. 2005-11-01, Nov. 2005 viewed at www.iimahd.in (last accessed on 13.04.12)
[83] *Ibid*
[84] Medha, Nishita; "Altenative Dispute Resolution in India", p. 27, viewed at www.fdrindia.org (last accessed on 06.05.12)

"The harsh truth is that we may be on our way to a society overrun by hordes of lawyers, hungry as locusts, and bridges of judges in numbers never before contemplated. The notion that ordinary people want black-robed judges, well-dressed lawyers, and fine panelled courtrooms as the setting to resolve their disputes is not correct. People with legal problems like people with pain, want relief and they want it as quickly and inexpensively as possible."

This observation with greater force applies in the Indian context.

Alternative Dispute Resolution consists of several techniques being utilized to resolve disputes involving a structural process with third party intervention. ADR system avoids the rigidity and inflexibility of traditional and orthodox procedures. Technique of ADR is an effort to design workable and fair alternative to our traditional judicial system.[85] The traditional system of dispute resolution is doing away with delays and congestion in courts. With the drastic increase in population, such number of cases is also increasing day by day. So quick disposal of cases is required so that the court does not remain over burdened with cases. And so for this reason ADR mechanisms are proceeded with for quick disposal of cases.[86]

The framework of ADR mechanism that has emerged is comprehensive. But its success depends much on the will of the people to work it up in the right spirit and with good faith. The parties have to be made aware and educated about the advantage of adopting ADR mechanism.[87] The reason given to the ADR mechanisms is that the society, state and the party to the dispute are equally under an obligation to resolve the dispute as soon as possible before it disturbs the peace in the family, business community, society or ultimately humanity as a whole.[88]The system of dispensing justice in India has come under a great stress of several reasons mainly because of the

[85] Sathe, S.P.; "Judicial Activism in India- Transgressing Borders and Enforcing Limits", Oxford India Paperbacks(2003), Motiwal O.P. "Alternative Dispute Resolution", p. 230
[86] Prof. Agarwal, Nomita, "Alternative Dispute Resolution: Concept and Concerns", NYAYA DEEP, Vol. VII, Issue: 01, Jan. 2006, p. 69
[87] Sabharwal, Y.K, J.; "Alternative Dispute Resolution", NYAYA DEEP, Vol. VI, Issue:01, Jan. 2005, p.56
[88] Medha, Nishita, "Alternative Dispute Resolution in India", p. 26, viewed at www.fdrindia.org (last accessed on 06.05.12)

huge pendency of cases in courts. In India, the number of cases filed in the courts has shown a tremendous increase in recent years resulting in pendency and delays underlining the need for alternative dispute resolution methods. While discussing in brief about the need for Alternative Dispute Resolution in India, it is to mention that a resolution was adopted by the Chief Ministers and Chief Justices of the States in a conference which was held in New Delhi on 4th Dec. 1993 under the chairmanship of the then Prime Minister and presided over by the Chief Justice of India. Thereby, the Chief Ministers and the Chief Justices were of the opinion that the Courts were not in a position to bear the entire burden of justice system and the number of disputes lent themselves to resolution by alternative modes such as arbitration, conciliation, mediation and negotiation. They emphasized the desirability of disputants taking advantage of alternative dispute resolution which provided procedural flexibility, saved valuable time and money and avoided the stress of a conventional trial.[89]

Globalization has been a great stimulation in the process of integration of economics and societies of different countries across the globe. It has been a great tool for breaking economic barrier and envisioning world as a market for trade. When economies and societies integrate it indubitably leads to the rise in various types of disputes such as- industrial disputes, commercial disputes, international disputes etc. The remedy is not in avoidance of these disputes but rather in building mechanisms to resolve these disputes amicably. It is a *sine quo non* for growth and for maintaining peace and harmony in every society. ADR is being increasingly acknowledged in the field of law and commercial sectors both at national and international levels. Its diverse methods have helped parties to resolve their disputes at their own terms cheaply and expeditiously.[90]

- *Advantages:*

Alternative Dispute Resolution is based on more direct participation by the disputants rather than being run by lawyers and Judges. This type of involvement is believed to

[89] Dixit Sujoy, "Alternative Dispute Resolution Mechanism", viewed at www.legalserviceindia.com (last accessed on 15.04.12)
[90] Perspective of Alternative Dispute Resolution, viewed at www.legalserviceindia.com (last accessed on 13.04.12)

increase people's satisfaction with the outcome as well as their compliance with the settlement reached. Most ADR processes are based on an integrative approach. They are most co-operative and less competitive than adversarial court based methods like litigation. For this reason, ADR tends to generate less escalation and ill-will between parties. This is a key advantage in situations where the parties must continue to interact after settlement is reached, such as in matrimonial cases or labour-management cases.[91] Following are the advantages of ADR[92]:

1. It can be used at any time, even when a case is pending before a Court of Law.
2. It can be used to reduce the number of contentious issues between the parties; and it can be terminated at any stage by any of the disputing parties.
3. It can provide a better solution to dispute more expeditiously and at less cost than regular litigation.
4. It helps in keeping the dispute a private matter and promotes creative and realistic business solutions, since parties are in control of ADR proceedings.
5. The ADR is flexible and not governed by the rigorous of rules or procedures.
6. The freedom of parties to litigation is not affected by ADR proceedings. Even a failed ADR proceeding is never a waste either in terms of money or times spent on it, since it helps parties to appreciate each other's case better.
7. The ADR can be used with or without a lawyer. A lawyer however, plays a very useful role in identification of contentious issues, position of strong and weak points in a case, rendering advice during negotiations and overall presentation of his client's case.
8. ADR helps in reduction of work load of courts and thereby helps them to focus attention on other cases.
9. The ADR procedure permits to choose neutrals who are specialists in the subject-matter of the dispute.
10. The parties are free to discuss their difference of opinion without any fear of disclosure of facts before a Court of Law.

[91]Sinha, S.N.P and Mishra, Dr. P.N.; "A Dire Need Of Alternative Dispute Resolution System In A Developing Country Like India", INDIAN BAR REVIEW, Vol. XXXI (3&4) 2004, p. 300

[92] Sathe, S.P.; "Judicial Activism in India- Transgressing Borders and Enforcing Limits, Oxford India Paperbacks(2003), Motiwal O.P "Alternative Dispute Resolution", p. 233

11. The last but not the least is the fact that parties are having the feeling that there is no losing or winning feeling among the parties by at the same time they are having the feeling that their grievance is redressed and the relationship between the parties is restored.
12. The ADR system is apt to make a better future. It paves the way to further progress.

- *Disadvantages:*

There are some ADR does not have many potential advantages, but there are also some possible drawbacks and criticisms of pursuing alternatives to court-based adjudication. Some critics have concerns about the legitimacy of ADR outcomes, charging that ADR provides "second-class justice." It is argued that people who cannot afford to go to the court are those most likely to use ADR procedures. As a result, these people are less likely to truly "win" a case because of the co-operative nature of ADR.[93] Following points may be dealt as some of the disadvantages of ADR[94]:

1. Situations when ADR may not be appropriate, and may even carry a degree of risk for one of the parties. It is important for the advisers to use their professional judgement in each case, but this section outlines key factors for consideration.
2. There may be an imbalance of power between the parties, which could make face-to-face mediation unfair. This could include family or neighbour mediation where there has been violence or the threat of violence; or mediation between an individual and a large organisation such as a local authority, where the size and resources of the organization would put the individual at a disadvantage.
3. There may be an urgent need (for example to prevent eviction) which requires an immediate legal remedy.

[93] Spangler, Brad "Alternative Dispute Resolution", viewed at www.beyondintractability.org (last accessed on 13.04.12)
[94] Val Reid, A Practical Guide to ADR, The Advice Services Alliance, "Alternative Dispute Resolution", pp. 9-10, viewed at www.hg.org (last accessed on 20.04.12)

4. Mediation and Ombudsmen do not provide a legally binding, enforceable outcome, and decisions do not act as precedents in future cases.
5. Legal rights and Human rights cannot be relied on in ADR processes, which are private, confidential and not open to public scrutiny.
6. Ombudsmen investigations can be very slow.
7. Although Ombudsmen can make compensation awards, they are often lower than is likely to be achieved in court.
8. There are no consistent quality standards or regulation for ADR providers, so it can be hard for the advisers or their clients to know how to choose a good service.
9. Where a dispute involves difficult legal points a mediator or an arbitrator is unlikely to have the same legal expertise and knowledge as a judge. Disputes can be of various situations such as- commercial conflicts, social conflicts, legal conflicts and many others which require specialized mediator. Most of the cases the mediator possess a judge's point of view.
10. The arbitrator's decision can require a court action if one of the parties refuse to accept the arbitrator's decision. This would not only create chaos but also a mandatory review by the court. Thus ADR sometimes raises the question of biasness of arbitrator's decision. Also there is very limited opportunity for judicial review of an arbitrator's decision. A court might also overturn an arbitrator's decision if its decided issues were not within the scope of the arbitration agreement.
11. Alternative Dispute Resolution generally resolves only issues of money or civil disputes. Alternative Dispute Resolution proceedings will not result in injunctive orders. They cannot result in an order requiring one of the parties to do or cease doing a particular affirmative act.
12. ADR generally proceed without protections offered to the parties in litigation, such as those rules governed through discovery. Courts generally allow a great deal of latitude in the discovery process, which is not active in alternative dispute resolution.[95]

[95]Discuss the characteristics, advantages and disadvantages of Alternative Dispute Resolution, viewed at www.lawyersnjurists.com (last accessed on 15.05.12)

It is important to consider these advantages and disadvantages before agreeing to arbitration, or any other kind of alternative dispute resolution. Chances are that we have already agreed to arbitration in many situations, without even knowing it. Many lease agreements and employment contracts have mandatory arbitration provisions, and they are usually enforced, as long as certain standards are met (generally, they must not deprive a person of a constitutional right, and they should be reciprocal).[96]

CHAPTER- IV

[96] Lamance Ken "Advantages and Disadvantages of Alternative Dispute Resolution" viewed at www.informlegal.com (last accessed on 17.05.12)

INTERNATIONAL INITIATIVES TOWARDS THE DEVELPOMENT OF ALTERNATIVE DISPUTE RESOLUTION

INTRODUCTION:

The history of Alternative Dispute Resolution forum at international level can be traced back from the period of Renaissance, when Catholic Popes acted as arbitrators in solving conflicts arising between European countries. International law can be determined through a great variety of procedures of which the main classes are both the national and the international adjudicative bodies. In particular, in the context of international courts and tribunals the character of most interstate adjudication as a kind of arbitration agreed between the states concerned became visible. Traditional interstate adjudication provides the procedural means which the state parties consider appropriate to facilitate their desire to settle the issue in a flexible manner. Although the procedural authority lies generally with the international courts reflecting the national model of a fixed and unalterable *lex fori proceduralis* it is never authoritatively exercised against the state parties. The basic idea is to facilitate dispute settlement rather than executing and enforcing an overarching international legal order. One major reason for this character of international adjudication is the lack of authority granted to international courts reflected in the most meagre and rare submission of states to jurisdiction according to Article 36(2) of the ICJ Statute. No enforcement of judgments against the will of the judgment debtor may be expected. The other major reason is that international law's incoherent structure is more apt and ready to settle disputes than to enforce coherent doctrines rarely endorsed by the states as the ultimate standard of their international behaviour.[97]

ADR has given fruitful results not only in international political arena but also in international business world in settling commercial disputes among many co-operative houses for e.g. settling of long standing commercial dispute between General Motors Company and Johnson Matthey Inc. which was pending in U.S District Court since past few years.[98]

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[97] International Alternative Dispute Resolution viewed at www.unich.edu (last accessed on 15.04.12)

[98] Alternative Dispute Resolution viewed at www.legalserviceindia.com (last accessed on 15.04.12)

ADR is now a growing and accepted tool of reform in dispute management in American and European commercial communities. ADR can be considered as a co-operative problem-solving system. ADR is an alternative to adjudication, for example, court annexed arbitration or court annexed conciliation, but it may be complimentary to the court procedures. There was a time when civil litigation was considered to be time consuming and costly method of dispensing justice and commercial people preferred to resort to arbitration. Now ADR has become popular and desirable in USA, UK, Canada, Hong Kong and Australia as it is effective, cost efficient and speedy form of dispute resolution. It has been observed that ADR is able to produce better outcomes than the traditional courts because firstly different kinds of disputes may require different kind of approaches which may perhaps be not available in the courts. Second factor for resorting ADR techniques to resolve the disputes is direct involvement and intensive participation by the parties in the negotiation to arrive at a settlement. Third advantage of accepting ADR is the intervention of a skilled neutral Adviser which is always very helpful in arriving at a settlement.[99]

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 (ADRS), 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 Law of International Commercial Arbitration and since then a number of countries has given recognition to that model in their respective Legislative systems. An important feature of the said model is that it has harmonized the concept of arbitration and conciliation in order to designate it for universal application.[100]

TREATIES AND CONVENTIONS:

1. 1923 Geneva Protocol on Arbitration Clauses[101]:

[99] Sathe S.P. "Judicial Activism in India- Transgressing Borders and Enforcing Limits", Oxford India Paperbacks (2003), Motiwal O.P "Alternative Dispute Resolution", p. 232
[100] Dilip, B. Bhosale J. "Alternative Dispute Resolution: An Effective Alternative", INDIAN BAR REVIEW, Vol. XXX (1) 2003, p. 1
[101] 1923 Geneva Protocol viewed at www.arbitration_icca.org (last accessed on 15.04.12)

In this Geneva Protocol each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Thereby in this present Protocol, each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law.

The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles. The tribunals of the Contracting Parties on being seized of a dispute regarding a contract made between persons shall refer the parties on the application of either of them to the decision of the arbitrators.

The ratifications of the present Protocol shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the Signatory States.

The present Protocol may be denounced by any Contracting State on giving one year's notice. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

The Contracting States declare that their acceptance of the present Protocol does not include any of the mentioned territories, i.e. their colonies, overseas possessions or territories protectorates or the territories over which they exercise a mandate.

The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all Signatory States. They will take effect one month after the notification by the Secretary-General to all Signatory States. The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. A certified copy of the present Protocol will be transmitted by the Secretary-General to all the Contracting States.

2. 1927 Geneva Convention on the Execution of Foreign Arbitral Awards[102]:

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923 shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties. Besides this some necessary conditions are to be fulfilled to obtain such recognition or enforcement.

In this Geneva Convention, it is stated that even if the conditions led down in Article 1 are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied that certain grounds as mentioned in Article 2 are not fulfilled. They are that the award has been annulled in the

(a) That the award has been annulled in the country in which it was made;

(b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

(c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that

[102]1927 Geneva Convention viewed at www.arbitrationlaw.com (last accessed on 15.04.12)

authority may decide. If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground which entitles him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which the award must be annulled by the competent tribunal. The party relying upon an award or claiming its enforcement must supply, in particular: the original award or a copy duly authenticated, documentary or other evidence to prove that the award has become final and such other documents to be fulfilled.

The present Convention applies only to arbitral awards made after the coming-into-force of the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923. It does not apply to the Colonies, Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

3. 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention):

Recognising the growing importance of international arbitration as a means of settling disputes, the ***Convention on the Recognition and Enforcement of Foreign Arbitral Awards*** or rather can also be recognised as ***New York Convention*** seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition, are treated as “foreign” under its laws because of some foreign element in the proceedings.

The Convention’s principle aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges parties to ensure such awards are recognised and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.[103]

The Convention deals with the field of application, i.e. the recognition and enforcement of foreign arbitral awards (arbitral awards made in the territory of another State).

[103] New York Convention viewed at www.uncitral.org (last accessed on 15.04.12)

It sets forth the obligation for the Contracting States to recognize an arbitration agreement in writing. That obligation plays a role in the two actions contemplated by the Convention. It defines the term “agreement in writing” as “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in exchange of letters or telegrams”.

However, only defines its field of application in respect of the arbitral award, a foreign award, i.e., an award made in another State. The Convention deals with the provisions relating to the enforcement of arbitral awards falling under the Convention. Generally speaking three possibilities exist in the Contracting States for regulating the procedure for enforcement of a Convention award:

i. Enforcement procedure according to specific provisions laid down in the Act,
ii. Enforcement procedure for a foreign award in general, and
iii. Enforcement procedure as for a domestic award.

The Convention sets up to facilitate a minimum of conditions to be fulfilled by the party seeking enforcement of a Convention award. That party has only to supply the duly authenticated original award or a duly certified copy and the original arbitration agreement or a duly certified copy. The authentication of a document is the formality by which the signature thereon is attested to be genuine. It provides that a party seeking enforcement has to produce a translation of the arbitral award. This has led down grounds for refusal of enforcement in general. Those grounds are as follows:

i. Lack of valid arbitration agreement,
ii. Violation of due process,
iii. Excess of the arbitral tribunal’s authority,
iv. Irregularity in the composition of the arbitral tribunal or arbitral procedure,
v. The award “has not yet become binding”,
vi. The award “has been set aside”,
vii. The award has “has been suspended”.

The distinction between domestic and international public policy means that what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. According to this distinction, the number of matters considered as falling under public policy in international cases is smaller than that in domestic ones. The distinction is justified by the differing purposes of domestic and international relations.

The Convention deals with the adjournment of the decision on enforcement if the setting aside or suspension of the award is requested in the country in which, or under the law of which, the award was made, the court may adjourn, "if it considers it proper", the decision on the enforcement and may also, on the application of the petitioner, order the respondent to put up suitable security. The words "may adjourn" and "if it considers it proper" indicate that the court has discretionary power to adjourn its decision on enforcement of the award and to order the respondent to provide security, pending the setting aside or suspension proceedings in the country of origin. It offers a balanced solution between the application for setting aside made for reasons of delay only and the right of a bona fide party to contest the validity of the award in the country of origin. Howsoever, deals with two provisions. The first provision is that the New York Convention does not affect the validity of other treaties in the field of arbitration. This provision may be called the *compatibility provision*. The second provision provides for the freedom of a party to base its request for enforcement of an arbitral award on the domestic law concerning enforcement of foreign arbitral awards or other treaties, instead of the New York Convention. This provision may be called the *more-favourable-right provision.*

4. 2006 Recommendation regarding Interpretation of Article II (2) and Article VII (1) of the New York Convention:[104]

The Recommendation was adopted by UNCITRAL on 7th July, 2006. It was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention is respect is respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards.

It encourages State to apply Article II (2) of the New York Convention "recognizing that the circumstances described therein are not exhaustive". In addition, the Recommendations encourage States to adopt the revised Article 7 of the UNCITRAL Model Law on International Commercial Arbitration. Both options of the revised Article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention. By virtue of

[104]2006 Recommendation of New York Convention viewed at www.uncitral.org (last accessed on 15.04.12)

the "more favourable law provision" contained in Article VII (1) of the New York Convention, the Recommendation clarifies that "any interested party" should be allowed "to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

5. 1961 European Convention on International Commercial Arbitration (Geneva Convention):[105]

This Convention shall apply to:

> Arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States.

For the purpose of this Convention,

i. The term "arbitration agreement" shall mean either an arbitral clause in a contract or an arbitration agreement, the contract or arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprompter and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorised by these laws,

ii. The term "arbitration" shall mean not only settlement by arbitrators appointed for each case (ad hoc arbitration) but also by permanent arbitral institutions,

iii. The term "seat" shall mean the place of the situation of the establishment that has made the arbitration agreement.

Right of legal persons of public law to resort to arbitration:

i. In this Convention, legal persons considered by the law as "legal persons of public law" have the right to conclude valid arbitration agreements,

[105] Geneva Convention viewed at www.uncitral.org / www.jus.uio.no (last accessed on 15.04.12)

ii. On signing, ratifying or acceding to this Convention any State shall be entitled to declare that it limits the above such conditions as may be stated in its declaration.

In this Convention foreign nationals are given the right to be designated as arbitrators. The Convention in this Article deals with the organization of the arbitration. The arbitrator's decision on the delay in raising the plea, will, however, be subjected to judicial control.

Subject to any subsequent judicial control provided for under the *lex fori*, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part.

It deals with the jurisdiction of courts of law. In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall, examine the validity of such agreement with reference to the capacity of the parties, under the laws applicable to them. The court may also refuse recognition of the arbitration agreement, if under the law of their country the dispute is not capable of settlement by arbitration. This Convention states that the parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. The arbitrators shall act as *amiables compositeurs* if the parties so decide and if they may do so under the law applicable to the arbitration.

Under this Convention the parties shall be presumed to have agreed that reasons shall be given for the award unless they have expressly declared that reasons shall not be given, or have assented to an arbitral procedure under which is not customary to give reasons for awards, provided that in this case neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given.

It also provides with certain grounds for setting aside the arbitral award. Lastly under this Convention the article deals with the final clauses.

6. 1962 Agreement relating on Application of the European Convention on International Commercial Arbitration (Paris Agreement):[106]

This Agreement shall be open for signature by the member States of the Council of Europe. It shall be ratified or accepted. Instruments of ratification or acceptance shall be deposited with the Secretary-General of the Council of Europe.

After the entry into force of this Agreement, the Committee of Ministers of the Council of Europe may invite any State which is not a member of the Council and in which there exists a National Committee of the International Chamber of Commerce to accede to this Agreement.

Accession shall be effected by the deposit with the Secretary-General of the Council of Europe of an instrument of accession, which shall take effect, thirty days after the date of its deposit.

The entry into force of this Agreement in respect of any State after ratification, acceptance or accession shall be conditional upon the entry into force of the European Convention on International Commercial Arbitration in respect of that State.

Any Contracting Party may, in so far as it is concerned, denounce this Agreement by giving notice to the Secretary-General of the Council of Europe. Denunciation shall take effect six months after the date of receipt by the Secretary-General of the Council of such notification.

The Secretary-General of the Council of Europe shall notify member States of the Council and the Government of any State which has acceded to this Agreement of:

(a) Any signature;

(b) The deposit of any instrument of ratification, acceptance or accession;

(c) Any date of entry into force;

(d) Any notification received in pursuance of the provisions of Article 5.

[106] Paris Agreement viewed at www.uncitral.org (last accessed on 15.04.12)

7. 1965 Convention on the Settlement of Investment Disputes Between States And Nationals of Other States (Washington or ICSID Convention):[107]

The Convention on the Settlement of Investment Disputes between States and Nationals of other States signed in Washington on 18 March 1965, established the International Centre for Settlement of Investment Disputes (ICSID) within the World Bank Group. The purpose of the Centre is to resolve, through conciliation and arbitration, disputes arising between Contracting States and foreign investors.

ICSID arbitration and conciliation allows States and foreign investors to settle their disputes on an equal footing within an international institutional framework.

Arbitration under the ICSID rules protects Contracting States, with regard to investment disputes, against any diplomatic protection or intervention emanating from the State where the investor has his place of business. In return, the Contracting States commit themselves to recognizing and enforcing arbitral awards rendered against them under the ICSID Rules.

The Centre's jurisdiction over disputes is based on an agreement of the parties to resolve an existing or future dispute in accordance with the ICSID's rules. The agreement is generally made in the form of an arbitration clause inserted in a contract. Unilateral withdrawal by parties from their given consent to submit their dispute to ICSID's jurisdiction is expressly excluded. The subject of the dispute should be related to an "investment" and must involve a Contracting State and a national of another State. Reference to ICSID arbitration has been made by States in their "Investment Codes", which may specifically provide for recourse to ICSID facilities in case of disputes regarding investments. In addition, several bilateral investment treaties refer to ICSID arbitration. It provides for a mechanism of conciliation as well as for an arbitral procedure.

In this Washington Convention, the seat of the Centre shall be at the principal office of the International Bank for Reconstruction and Development (hereinafter called the Bank). The seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members. The Centre shall have an

[107] Washington Convention viewed at www.uncitral.com (last accessed on 15.04.12)

Administrative Council and a Secretariat and shall maintain a Panel of Conciliators and a Panel of Arbitrators.

The ICSID Convention forms the Administrative Council which shall be composed of one representative of each Contracting State. An alternate may act as representative in case of his principal's absence from a meeting or inability to act. In the absence of a contrary designation, each governor and alternate governor of the Bank appointed by a Contracting State shall be *ex officio* its representative and its alternate respectively.

The President of the Bank shall be *ex officio* Chairman of the Administrative Council (hereinafter called the Chairman) but shall have no vote. During his absence or inability to act and during any vacancy in the office of President of the Bank, the person for the time being acting as President shall act as Chairman of the Administrative Council in this present Convention.

In this Washington Convention, the Administrative Council has been vested with the powers and functions to - adopt the administrative and financial regulations of the Centre; adopt the rules of procedure for the institution of conciliation and arbitration proceedings; adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules); approve arrangements with the Bank for the use of the Bank's administrative facilities and services; determine the conditions of service of the Secretary-General and of any Deputy Secretary-General; adopt the annual budget of revenues and expenditures of the Centre; approve the annual report on the operation of the Centre. Some of the powers and functions are adopted by a majority of two-thirds of the members of the Administrative Council.

The Administrative Council may appoint such committees as it deems fit for the Convention. Besides the above functions the Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention. Here, the Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than five members of the Council. The Administrative Council may establish, by a majority of two-thirds of its members, a procedure whereby the Chairman may seek a vote of the Council. The vote shall be considered valid only if the majority of the members of the Council cast their votes within the time limit fixed

by the said procedure. Members of the Administrative Council and the Chairman shall serve without remuneration from the Centre. Hereafter, panel members shall serve for renewable periods of six years. In case of death or resignation of a member of a Panel, the authority which designated the member shall have the right to designate another person to serve for the remainder of that member's term. Panel members shall continue in office until their successors have been designated.

Each member of the Administrative Council shall have one vote and, all matters before the Council shall be decided by a majority of the votes cast. A quorum for any meeting of the Administrative Council shall be a majority of its members.

In this present Convention, the Secretariat shall consist of a Secretary-General, one or more Deputy Secretaries-General and staff. The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of its members upon the nomination of the Chairman for a term of service not exceeding six years and shall be eligible for re-election. After consulting the members of the Administrative Council, the Chairman shall propose one or more candidates for each such office.

During the Secretary-General's absence or inability to act, and during any vacancy of the office of Secretary-General, the Deputy Secretary-General shall act as Secretary-General. If there shall be more than one Deputy Secretary-General, the Administrative Council shall determine in advance the order in which they shall act as Secretary General. The Secretary-General shall be the legal representative and the principal officer of the Centre and shall be responsible for its administration, including the appointment of staff. He shall perform the function of registrar and shall have the power to authenticate arbitral awards rendered pursuant to this Convention, and to certify copies thereof. The panel of Conciliators and the Panel of Arbitrators shall each consist of qualified persons. Each Contracting State may designate to each Panel four persons who may but need not be its nationals. The Chairman may designate ten persons to each Panel. The persons so designated to a Panel shall each have a different nationality.

The persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, which may be relied upon to exercise independent judgment.

In this Washington Convention, if the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank, and by Contracting States which are not members of the Bank in accordance with rules adopted by the Administrative Council.

The Centre shall have full international legal personality. The legal capacity of the Centre shall include the capacity: to contract; to acquire and dispose of movable and immovable property; to institute legal proceedings. The Centre as well the members of the Administrative Council enjoys the immunities and privileges as set forth in the Articles.

The Centre, its assets, property and income, and its operations and transactions authorized by this Convention shall be exempt from all taxation and customs duties. The Centre shall also be exempt from liability for the collection or payment of any taxes or customs duties.

"National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention. No Contracting State shall give

diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings shall address a request in writing to the Secretary-General who shall send a copy of the request to the other party. The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings. The Secretary-General shall verify every information. He shall forthwith notify the parties of registration or refusal to register.

In this Washington Convention, the Conciliation Commission shall be constituted soon after the registration of a request. The Commission shall consist of a sole conciliator or any uneven number of conciliators appointed as the parties shall agree. Where the parties do not agree upon the number of conciliators and the method of their appointment, the Commission shall consist of three conciliators, one conciliator appointed by each party and the third, who shall be the president of the Commission, appointed by agreement of the parties. If the Commission shall not have been constituted within 90 days after notice of registration, the Chairman shall, at the request of either party and after consulting both parties, appoint the conciliator or conciliators. Conciliators may be appointed from outside the Panel of Conciliators. Conciliators appointed from outside the Panel of Conciliators shall possess the qualities stated in Article 14.

The Commission shall be the judge of its own competence. If there is any objection by a party to the dispute then that dispute shall be determined by the Commission whether it is to be dealt with as a preliminary question or to join it to the merits of the dispute. If any question of procedure arises which is not covered by this Section or the Conciliation Rules or any rules agreed by the parties, the Commission shall decide the question.

It shall be the duty of the Commission, to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms. The parties shall cooperate in good faith with the Commission in order to enable the Commission to

carry out its functions, and shall give their most serious consideration to its recommendations. Here, if the parties reach agreement, the Commission shall draw up a report noting the issues in dispute and recording that the parties have reached agreement. If, at any stage of the proceedings, it appears to the Commission that there is no likelihood of agreement between the parties, and if one party fails to appear or participate in the proceedings then it shall close the proceedings and shall draw up a report noting the submission of the dispute and recording the failure of the parties to reach agreement.

In this Washington Convention, the Arbitral Tribunal shall be constituted as soon as possible after registration of a request. The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree. Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

In this ICSID Convention, the majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties. Arbitrators may be appointed from outside the Panel of Arbitrators. Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities as stated under Article 14.

The Tribunal shall be the judge of its own competence. Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute. The Tribunal shall decide a dispute in accordance

with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. The Tribunal may not bring in a finding *of non liquet on* the ground of silence or obscurity of the law.

The Tribunal may, if it deems it necessary at any stage of the proceedings,

(a) Call upon the parties to produce documents or other evidence, and

(b) Visit the scene connected with the dispute, and conducts such inquiries there as it may deem appropriate.

If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

(1) The Tribunal shall decide questions by a majority of the votes of all its members.

(2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.

(3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.

(4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

(5) The Centre shall not publish the award without the consent of the parties.

The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched. The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award.

In this Convention, if any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General. The request shall, be submitted to the Tribunal which renders the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant. The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered. The request shall, be submitted to the Tribunal which rendered the award. If this is not possible, then a new Tribunal shall be constituted in accordance with Section 2.

Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more grounds as so mentioned here. The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered. On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an ad hoc Committee of three persons. The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee. If the award is annulled the dispute shall be submitted to a new Tribunal at the request of either party.

The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention. For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A party seeking recognition or enforcement in the territories of a Contracting State for this purpose shall furnish to a competent court or other authority a copy of the award certified by the Secretary-General which the State has designated. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation. Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

In this Washington Convention, it is stated that-

After a Commission or a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged; provided that if a conciliator or an arbitrator dies, become incapacitated, or resigns, the resulting vacancy shall be filled in accordance with the provisions. A member of a Commission or Tribunal shall continue to serve in that capacity. If a conciliator or arbitrator appointed by a party shall have resigned without the consent of the Commission or Tribunal of which he was a member, the Chairman shall appoint a person from the appropriate Panel to fill the resulting vacancy.

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV of the Washington Convention.

The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a

majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions as stated in Chapter III or Chapter IV.

The charges payable by the parties for the use of the facilities of the Centre shall be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council. Each Commission and each Tribunal shall determine the fees and expenses of its members within limits established from time to time by the Administrative Council and after consultation with the Secretary-General.

In the case of conciliation proceedings the fees and expenses of members of the Commission as well as the charges for the use of the facilities of the Centre shall be borne equally by the parties. And in the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

Conciliation and arbitration proceedings shall be held at the seat of the Centre. Conciliation and arbitration proceedings may be held, if the parties so agree,

(a) At the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or

(b) At any other place approved by the Commission or Tribunal after consultation with the Secretary-General.

Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

Any Contracting State may propose amendment of this Convention. The text of a proposed amendment shall be communicated to the Secretary-General not less than 90 days prior to the meeting of the Administrative Council at which such amendment is to be considered and shall forthwith be transmitted by him to all the members of the Administrative Council.

If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment.

This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.

8. 1966 Convention Providing a Uniform Law on Arbitration (Strasbourg Convention):[108]

Each Contracting Party undertakes to incorporate in its law, within six months of the date of entry into force of this Convention in respect of that Party, the provisions of the uniform law contained in Annex I to this Convention. Each Contracting Party has the right, in its law to supplement the uniform law by provisions designed to regulate questions for which no solutions are provided, on condition that such provisions are not incompatible with the uniform law.

In respect of specific matters, each Contracting Party in its law has the right to provide that disputes may not be referred to arbitration or may be submitted to arbitration according to rules other than those laid down in the uniform law. Each Contracting Party has the right to declare, at the time of signature of this Convention or at the time of deposit of its instrument of ratification, acceptance or accession, that it will apply the uniform law only to disputes arising out of legal relationships which are considered as commercial under its national law.

[108] Strasbourg Convention viewed at www.uncitral.org (last accessed on 15.04.12)

Each Contracting Party shall, for the purposes of the provisions of the uniform, law define "judicial authority", "competent authority" and, if need be, "registry of the court". Each Contracting Party who may represent or assist the parties before the arbitral tribunal and, to the end, retains the right to determine the conditions to be fulfilled by persons to amend the provisions of the uniform law.

Each Contracting Party shall have the right, in its law, to make provision for and to regulate the provisional enforcement of arbitral awards which are still appealable before arbitrators. The provisions of the present Convention shall not affect the application of bilateral or multilateral conventions on arbitration which have been or may be concluded. Each Contracting Party shall communicate to the Secretary General of the Council of Europe the texts which, in implementation of this Convention, will govern arbitration after the entry into force of the Convention in respect of that Party. The Secretary General shall transmit these texts to the other member States of the Council of Europe and to any State.

This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State to accede thereto. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession, which shall take effect three months after the date of its deposit.

Any Contracting Party may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory or territories to which this Convention shall apply.

9. 1972 Convention on the Settlement by Arbitration of Civil Law Disputes resulting from Relations of Economic And Scientific Technical Cooperation (Moscow Convention):[109]

In this Moscow Convention all disputes between economic organizations resulting from contractual and other civil law cases arising between them in the course of economic and scientific-technical cooperation of

[109]Moscow Convention viewed at www.uncitral.org (last accessed on 15.04.12)

the countries-parties to the present Convention shall be subject to arbitration proceedings with the exclusion of the above disputes from jurisdiction of the courts of law.

The term "cases" referred to shall mean those arising from contracts of purchase, contracts of specialization and cooperation of production, carrying out of building industrial and construction industry works, on assembling, projecting, prospecting, research, designing and exploratory development, transport, forwarding and other services as well as other civil law cases arising in the course of economic and scientific-technical cooperation of the countries-parties to the Convention.

For the purpose of the term "economic organization" shall mean enterprises, trusts, associations, combines, main boards on the basis of profit-and-loss accounting, as well as scientific research institutes, planning and design bureaux and other organizations of the same kind, which are civil law subjects and are located in different countries. The disputes, referred to as above shall be subject to arbitration by the Court of Arbitration attached to the Chamber of Commerce in the country of the respondent or, subject to agreement of the parties concerned, in a third country-party to the present Convention.

For a counterclaim and a set off originating from the same legal case as the principle claim, the same arbitration court which deals with the principle claim shall be competent. In this Moscow Convention, claims concerning demands for the conclusion of a contract or for the acceptance of special contractual clauses shall not be submitted to arbitration courts. This shall not affect the competence of the arbitration court to deal with the claim of the aggrieved party for payment of liquidated damages as provided for a breach of the agreement to make a contract in future or for compensation of losses caused by the said breach.

The arbitration awards rendered by arbitration courts shall be final and binding. The parties shall execute them voluntarily. These awards shall be recognized without any further procedure and shall be subject to enforcement in any country party to the Convention in the same manner as judgments passed by the state courts of the country of execution and which have come into legal force.

The enforcement of an arbitral award may be refused by the judicial executive body of the country of enforcement only if there is any violation of the rules as established by the Convention. The provisions of previously concluded bilateral and multilateral agreements of the

countries-parties to the Convention shall not be applied to the cases treated by this Convention with the exclusion of agreements in accordance with which certain categories of civil law disputes are subject to exclusive jurisdiction of specified authorities. The present Convention shall not be applied to civil law disputes which in accordance with the national legislation effective at the moment of signing of the Convention fall under exclusive jurisdiction of courts of law or other state authorities.

The present Convention shall not be applied to the cases being under consideration on the day of entry into force of the Convention. It shall be subject to ratification by signatory countries. Instruments of ratification shall be deposited with the Secretariat of the Council for Mutual Economic Assistance which is to perform the duties of the depositary. Any country may accede to the present Convention after its entry into force with the consent of the countries parties to the Convention by submitting to the depositary the instrument of accession. Accession is considered to be in force 90 days after receipt by the depositary of the last notice of consent of such accession.

Any country-party to the present Convention may withdraw from the Convention by notice to that effect given to the depositary. Denunciation becomes effective 12 months after the receipt of this notice by the depositary. Withdrawal of a country from the Convention shall not affect the cases which are under consideration in accordance with this Convention on the day of entry into force of the denunciation. The depositary shall immediately inform all signatory and acceding countries about the date of deposit of each instrument of ratification or document of accession, the date of entry of the Convention into force and all other notices it has received, specified by the present Convention.

The depositary of the present Convention shall take the necessary measures to effect the registration of this Convention at the Secretariat of the United Nations Organization pursuant to the Charter of the United Nations. The present Convention shall be deposited with the depositary which shall send duly certified copies of the Convention to the signatory and acceding countries.

10. 1975 Inter- American Convention on International Commercial Arbitration (Panama Convention):[110]

The Inter-American Convention on International Commercial Arbitration, signed in Panama on 30 January 1975, is one of the main arbitral conventions for the American continent. As for the others, these are the New York Convention of 12 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and the Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards, signed in Montevideo on 8 May 1979.

The Panama Convention lays down the principle of validity of the arbitration agreement. Any such arbitration agreement must be in writing. As regards the constitution of the arbitral tribunal, the Convention specifies that national or foreign arbitrators may be appointed, by the parties themselves or by a third party. The third party may be either a person or a juridical institution. The parties themselves can establish the procedural rules of the arbitration by agreement. In the absence of agreement, the rules of procedure of the Inter-American Commercial Arbitration Commission should be followed.

According to the Convention the arbitral award has the force of a final judicial judgement. Finally, the Convention provides for a limited number of grounds for the refusal of recognition and execution of foreign arbitral awards, taken directly from Article V of the New York Convention. These grounds are as follows: legal incapacity of one of the parties to the arbitration agreement; procedural fairness and due process were not followed by the arbitral tribunal; the tribunal based its decision on a dispute not envisaged by the agreement of the parties; the arbitral tribunal was not constituted in accordance with the agreement of the parties, or it followed a procedure which was contrary to their agreement; the award has not yet become binding upon the parties.

The Convention mentions two other exclusions which can be considered ex officio by the judicial authority requested to recognize or enforce the decision: under the law of the State, the subject of the dispute cannot be settled by arbitration, or; the decision goes against the public policy of the State where it is expected to be recognized or enforced.

An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them

[110] 1975 Inter-American Convention viewed on www.uncitral.org (last accessed on 15.04.12)

with respect to a commercial transaction is valid. The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications. Arbitrators shall be appointed in the manner agreed upon by the parties. Their appointment may be delegated to a third party, whether a natural or juridical person. Arbitrators may be nationals or foreigners.

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them. Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

11.1976 UNCITRAL Arbitration Rules:[111]

Adopted by UNCITRAL on 28 April 1976, the UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings and establishing rules in relation to the form, effect and interpretation of the award.

12.1979 Inter- American Convention on Extra- Territorial Validity of Foreign Judgements and Arbitral Awards (Montevideo Convention):[112]

This Convention shall apply to judgments and arbitral awards rendered in civil, commercial or labour proceedings in one of the States Parties, unless at the time of ratification it makes an express reservation to limit the Convention to compensatory judgments (sentencias de condena)

[111]1976 UNCITRAL Arbitration Rules viewed on www.uncitral.org (last accessed on 15.04.12)
[112] Montevideo Convention, *Ibid*.

involving property. In addition, any one of them may declare, when ratifying the Convention that it also applies to rulings that end proceedings, to the decisions of authorities that exercise some jurisdictional function and to judgments in penal proceedings ordering compensation for damages resulting from an offence.

The rules of this Convention shall apply to arbitral awards in an 11 matters not covered by the Inter-American Convention on International Commercial Arbitration, signed in Panama on January 30, 1975. The foreign judgments, awards and decisions referred to in Article 1 shall have extraterritorial validity in the States Parties if they fulfil the conditions as so mentioned in this Convention. The documents of proof required to request execution of judgments, awards and decisions are as follows:

a. A certified copy of the judgment, award or decision;
b. A certified copy of the documents proving that the provisions of items of the foregoing article have been complied with; and
c. A certified copy of the document stating that the judgment, award or decision is final or has the force of *res judicata.*

If a foreign judgment, award or decision cannot be executed in its entirety, the judge or tribunal may agree to its partial execution at the request of an interested party.

A declaration in *forma pauperis* recognized in the State of origin of the judgment shall be recognized in the State of destination.

The procedures for ensuring the validity of foreign judgments, awards and decisions, including the jurisdiction of the respective judges and tribunals, shall be governed by the law of the State in which execution is sought.

Each State may, at the time of signature, ratification or accession, make reservations to this Convention, provided that each reservation concerns one or more specific provisions and is not incompatible with the object and purpose of the Convention.

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them. Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which this Convention applies. Such subsequent

declarations shall be transmitted to the General Secretariat of the Organization of American States and shall become effective thirty days after the date of their receipt.

13.1980 UNCITRAL Conciliation Rules:[113]

Adopted by UNCITRAL on 23 July 1980, the UNCITRAL Conciliation Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of conciliation proceedings arising out of their commercial relationship. The Rules cover all aspects of the conciliation process, providing a model conciliation clause, defining when conciliation is deemed to have commenced and terminated and addressing procedural aspects relating to the appointment and role of conciliators and the general conduct of proceedings. The Rules also address issues such as confidentiality, admissibility of evidence in other proceedings and limits to the right of parties to undertake judicial or arbitral proceedings whilst the conciliation is in progress.

14.1982 Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules:[114]

Adopted by UNCITRAL in 1982, the Recommendations are designed to provide information and assistance to arbitral institutions and other relevant bodies, such as chambers of commerce, in using the Arbitration Rules. This may include cases where the Arbitration Rules are being used as the basis for preparing or revising institutional rules, where arbitral institutions or other bodies are acting as an appointing authority as envisaged under the UNCITRAL Arbitration Rules, or in the provision of administrative services of a secretarial or technical nature for an arbitration conducted pursuant to the UNCITRAL Arbitration Rules.

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[113] 1980 UNCITRAL Conciliation Rules viewed at www.uncitral.org (last accessed on 15.04.12)
[114] 1982 Recommendations, *Ibid*.

15.1985 UNCITRAL Model Law on International Commercial Arbitration:[115]

The UNCITRAL Model Law on International Commercial Arbitration was prepared by UNCITRAL¸ and adopted by the United Nations Commission on International Trade Law on 21st June 1985. The model law is not binding, but individual states may adopt the model law by incorporating it into their domestic law. The UNCITRAL Model Law provides a pattern that law-makers in national governments can adopt as part of their domestic legislation on arbitration. The Model Law is directed at States.

UNCITRAL Model Law on International Commercial Arbitration under this Article provides with the receipt of written communications. Unless agreed by the parties that the receipt has been delivered by following proper manner the communication is deemed to have been received on the day it is so received. The communication is deemed to have been received on the day it is so received. This is not applied to communications in court proceedings.

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object.

This Law mentions certain functions of arbitration assistance and supervision to be performed by the Courts or other authority.

It deals with the definition and form of arbitration agreement. It also deals with the number of arbitrators where the parties are free to determine the number of arbitrators but actually they should be three in number.

This Model Law deals with the appointment of the arbitrators and also with the appointment of the substitute arbitrator. It mentions the different grounds for challenge:

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[115] 1985 UNCITRAL Model Law viewed at www.wikipedia.org / www.uncitral.org / www.international-arbitrator.net (last accessed on 15.04.12)

1. When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

2. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

This Law deals with the provision where there is a failure in performing the act if an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination.

UNCITRAL Law Model on International Commercial Arbitration deals with the competence of arbitral tribunal to rule on its jurisdiction. It also states with the power of the arbitral tribunal to order interim measures.

This Law states that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. It deals with a particular provision for determining the rules of procedure and also mentions the place of arbitration.

UNCITRAL Model Law on International Commercial Arbitration states that the parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal. The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

UNCITRAL Model Law on International Commercial Arbitration presents the statements of claim and defence. It deals with the hearing ad written proceedings.

While dealing with the procedure if it is seen that there is a default of a party, the arbitral tribunal shall either terminate the proceedings, or shall continue the proceedings without treating such failure as an admission of the claimant's allegation, or may continue the proceedings and make the award on the evidence before it.

UNCITRAL Model Law on International Commercial Arbitration provides with an expert appointed by arbitral tribunal. It provides with those rules applicable to substance the dispute.

1. The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

2. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

3. The arbitral tribunal shall decide *ex aequo et bono* or as amiable *compositeur* only if the parties have expressly authorized it to do so.

4. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

It states that in arbitral proceedings the decision is to be taken by a panel of arbitrators if the parties agree to it. However, questions of procedure may be decided by a presiding officer, if so authorised by the parties or by all members of the arbitral tribunal.

UNCITRAL Model Law on International Commercial Arbitration deals with the provision of settlement of disputes.

It presents with the forms and contents of the award. UNCITRAL Model Law on International Commercial Arbitration deals with the provision when the arbitral proceedings can be terminated by the arbitral tribunal.

UNCITRAL Model Law on International Commercial Arbitration states that if there is any error in the award then within thirty days of the receipt of the award a party has to send a request to the arbitral tribunal to give an interpretation to that particular error and correct such error.

If needed the parties, where one party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings. If the arbitral tribunal considers the request to be justified then it shall make the additional award within sixty days.

It presents with the provision where recourse to a court against an arbitral award may be made only by an application for setting aside certain matters. It provides certain grounds for refusing recognition or enforcement.

1. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

    a. at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

        i. a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

        ii. the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitrator proceedings or was otherwise unable to present his case; or

        iii. the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

        iv. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

v. the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made;

b. if the court finds that:

i. The subject matter of the dispute is not capable of settlement by arbitration under the law of the State,

ii. The recognition or enforcement of the award would be contrary to the public policy of this State.

2. If an application for setting aside or suspension of an award has been made to a court referred to in paragraph 1(a) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

16.1987 Arab Convention on Commercial Arbitration:[116]

This Convention applies to commercial disputes between natural or juristic persons of any nationality, linked by commercial transactions with one of the contracting States or one of its nationals, or which have their main headquarters in one of these States.

"All disputes arising out of this Contract shall be settled by the Arab Centre for Commercial Arbitration in compliance with the provisions of the Arab Convention on Commercial Arbitration."

By virtue of this Convention, a permanent organization called Arab Centre for Commercial Arbitration is created. It shall be an independent juristic person which is administratively and financially linked to the Secretariat General of the Council of Arab Ministers of Justice. The

[116] 1987 Arab Convention viewed at www.jurisint.org / www.uncitral.org (last accessed on 15.04.12)

Secretary General appoints the officials of this Centre in compliance with the provisions of the statutes of the Council and its implementation rules.

In the Arab Convention on Commercial Arbitration the Centre shall have a Board of Directors made up of Arab personalities experienced in matters of law and arbitration and who are appointed by each of the contracting States for a period of three years. The Board of Directors chooses a President for the Centre and two Vice-Presidents elected for a period of three years. The President thus elected shall also be the Chairman of the Board of Directors. The Centre shall dispose of a Bureau made up of the Chairman and the two Vice-Presidents. The Council determines the fees of the Chairman, the two Vice-Presidents of the Centre and the members of the Board of Directors.

The Board of Directors shall meet each year in an ordinary session but it can also meet in extraordinary sessions if necessary. The quorum is deemed to have a majority of two-thirds members of the Board of Directors. The meeting is to be conducted by the Chairman of the Board. The Chairman of the Board of Directors of the Centre is also its legal representative. The Board of Directors has the following functions: to make sure of the execution of the provisions of this Convention, to establish internal rules for the Centre, to examine the annual report on the activities of the Centre and to refer them to the Council for approval, to establish the roster of arbitrators, to exercise the other functions foreseen in this Convention, to establish a list of fees and expenses.

The Bureau organizes commercial arbitration, fixes its bases, drafts model agreements to arbitrate in international commerce, establishes rules for commercial transactions, summarizes the principles on which awards were based and classifies, prints and edits them.

The seat of the Centre is that of the Secretariat General of the Council in Rabat, capital of the Kingdom of Morocco.

The Board of Directors shall establish each year a roster of arbitrators chosen amongst lawyers or jurists or persons having a large experience and knowledge of commerce, industry and finances and of good reputations and morals for the arbitral tribunal. Before performing their mission, the arbitrators must take an oath before the President of the Centre or his deputy. This oath shall be as follows:

"I swear before God almighty that I shall judge fairly and that I shall respect the law applicable and that I shall exercise my mission with fidelity, fairness and impartiality."

In this Convention the arbitral tribunal shall be made up of three members, but the parties may agree on a sole arbitrator. It states that the claimant must:

1. Present to the Chairman of the Centre a claim containing:

(a) Its names, first name, qualifications, nationality and address;

(b) The names, first name, qualifications and nationality of the defendant;

(c) A summary of the dispute and the facts relating thereto;

(d) Its claims;

(e) The name of the proposed arbitrator.

2. Join to its claim the agreement to arbitrate and all documents and evidence relating to the dispute.

3. The request for arbitration is only accepted after payment of the dues.

In this Convention, it is stated that-

1. As of receipt of the request, the chairman of the Centre acknowledges receipt thereof and notifies a copy of this to the defendant.

2. The defendant must, within thirty days following this notification, present its defence and counterclaims, if any, as well as the name of the arbitrator which it had chosen. To this must be added all documents of which this party disposes. Upon its request, the Bureau may grant it an additional time-period not exceeding thirty days.

Thereby it is presented in this Convention that once the arbitral tribunal has been set up, the chairman of the Centre transmits the file to it so that it starts to perform its mission.

The present Convention states that-

1. The arbitral tribunal shall settle the dispute in compliance with the contract entered into between the parties and the provisions of the law on which they might expressly or tacitly have agreed, else with the law which has the closest relation with the subject matter of the dispute provided that the well-established rules of international commercial usages are respected.

2. The arbitral tribunal must settle the case ex aequo, et bono if the parties expressly so agree.

In this Arab Convention it is stated that-

1. The language of the proceedings, pleadings and the award is Arabic.

2. The arbitral tribunal may decide to hear parties; witnesses and experts who do not speak Arabic by resorting to a translator after having him take an oath.

3. The arbitral tribunal may authorize that pleadings and evidence as well as all submissions be made in languages other than Arabic provided that they be translated into Arabic.

Through this Convention it is viewed that at any time after the closure of the hearing and before the award is made, the arbitral tribunal may, by its own motion or upon request of one of the parties, decide to re-open the hearings for serious grounds.

Arbitration under the provisions of this Convention shall have the effect to forbid reference of the dispute to the courts of law as well as recourse against the award before these courts.

Thus, hereby it is stated that-

1. If one of the parties refrains from appearing without valid grounds during any stage of the proceedings, the proceedings shall take place in its absence.

2. If a party does not appear and does not submit any defence before the arbitral tribunal, this shall not be considered as an acknowledgment (by such party) of the truth of the other party's allegations.

Thereby through this Convention it is stated that upon request of any of the parties, the arbitral tribunal may take any interim measure of protection it deems necessary. A party who is aware of a breach of any of the provisions or conditions of this Convention and continues the arbitration without objecting to this shall be deemed to have waived its right to put this forward.

It presents in this, that-

1. Once the hearing is closed, the arbitral tribunal shall meet to deliberate and make the award.

2. The award is made by mutual agreement or by a majority within six months following the date of transmission of the file to the arbitral tribunal.

3. Upon request of the arbitral tribunal, the Bureau may extend the above-mentioned time.

4. If the Bureau is not convinced by the reasons put forward by the arbitral tribunal to request an extension of time, the Bureau fixes a time in which the arbitral tribunal must make its award and once this time has expired, the mission of the arbitral tribunal shall be terminated.

5. If the arbitrators cannot agree, the award is made according to the opinion of the Chairman and it is signed by the latter but this must be mentioned in the award.

6. A dissenting arbitrator may mention his dissenting opinion on a separate page which is joined to the award.

If there is a material error in the award, the arbitral tribunal, either by its own motion or upon written request of one of the parties, may correct this error after having notified this request to the other party and provided that this request is made within fifteen days following the date at which the written award was received. The decision to correct a material error is made on the award itself and is deemed to be an integral part thereof. Both parties must be notified of the decision to correct.

Here it is viewed that the Supreme Court of each contracting State must give leave to enforce to awards of the arbitral tribunal. Leave may only be refused if this award is contrary to public order.

By exception to the provisions of paragraph 2 of Article 5 and the provisions of Articles 11 and 13 of this Convention, the Secretariat General of the Council shall be the Chairman of the Bureau and shall appoint two vice-presidents chosen amongst the officials of the Secretariat General of the Council. He also chooses the Director of Authentifications amongst the officials of the Secretariat General holding at least a law degree ("licence en droit") until the Centre has sufficient financial capacity to cover its expenses.

This Convention is subject to approval, acceptance and ratification of the signatory parties. The instruments of approval, acceptance and ratification shall be deposited with the Secretariat General of the League of Arab States within thirty days following the date of approval, acceptance and ratification. The Secretariat General must notify the other member States of the deposit of these instruments and its date, as well as the Secretariat General of the Council and the President of the Centre.

A State wishing to accede to the Convention is held to be bound by this Convention due to the sole fact that he has deposited the instrument of approval, acceptance or ratification and 30 days after the date of this deposit.

17.1993 Ohada Treaty on the Harmonization of Business Law in Africa:[117]

The objective of the present Treaty is the harmonisation of business laws in the Contracting States by the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and by encouraging arbitration for the settlement of contractual disputes.

So as to implement the present Treaty, it is to be understood by Business Law regulations concerning Company Law, definition and classification of legal persons engaged in trade, proceeding in respect credits and recovery of debts, means of enforcement, bankruptcy, receiverships, arbitration; are also included the following laws: Employment law, Accounting law, Transportation and Sales laws, and any such other matter that the Council of Ministers would decide, unanimously, to so include as falling within the definition of Business Law, in conformity with the objective of the present Treaty and of the provisions of Article 8.

The realisation of the tasks planned in the present Treaty shall be implemented by an organisation called the Organisation for the Harmonisation of Business Law in Africa (OHBLA), consisting of a Council of Ministers and a Common Court of Justice and Arbitration. The

[117] OHADA viewed at www.wikipedia.org / www.bumbow.com / www4.worldbank.org / www.ohadalegis.com / www.igbanugolaw.com (last accessed on 15.04.12)

Council of Ministers shall be assisted by a Permanent Secretary Office to which is attached a Regional High Judiciary School.

Regulations for the implementation of the present Treaty will be laid down if necessary by an overall majority of the Council of Ministers.

Acts enacted for the adoption of common rules as provided for in Article 1 of the present Treaty are to be known as "Uniform Acts". Uniform Acts may include provisions to give rise to criminal liabilities. Contracting States commit themselves to enforce sentences of offences. Uniform Acts are to be prepared by the Permanent Secretary Office in consultation with the Governments of Contracting States. They are to be debated and adopted by the Council of Ministers on consultation with the Common Court of Justice and Arbitration.

18.1996 UNCITRAL Notes on Organizing Arbitral Proceedings:[118]

Finalized by UNCITRAL in 1996, the Notes are designed to assist arbitration practitioners by providing an annotated list of matters on which an arbitral tribunal may wish to formulate decisions during the course of arbitral proceedings, including deciding on a set of arbitration rules, the language and place of an arbitration and questions relating to confidentiality, as well as other matters such as conduct of hearings and the taking of evidence and possible requirements for the filing or delivering of an award. The text may be used in both ad hoc and institutional arbitrations.

19.2002 UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use:[119]

Adopted by UNCITRAL on 24 June 2002, the Model Law provides uniform rules in respect of the conciliation process to encourage the use of conciliation and ensure greater predictability and certainty in its use. To avoid uncertainty resulting from an absence of statutory provisions,

[118] 1996 UNCITRAL viewed at www.uncitral.org (last accessed on 15.04.12)
[119] 2002 UNITRAL Model Law, *Ibid*.

the Model Law addresses procedural aspects of conciliation, including appointment of conciliators, commencement and termination of conciliation, conduct of the conciliation, communication between the conciliator and other parties, confidentiality and admissibility of evidence in other proceedings as well as post-conciliation issues, such as the conciliator acting as arbitrator and enforceability of settlement agreements.

20. 1985 UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006:[120]

The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral.

Amendments to articles 1 (2), 7, and 35 (2), a new chapter IV A to replace article 17 and a new article 2 A were adopted by UNCITRAL on 7 July 2006. The revised version of article 7 is intended to modernize the form requirement of an arbitration agreement to better conform to international contract practices. The newly introduced chapter IV A establishes a more comprehensive legal regime dealing with interim measures in support of arbitration. As of 2006, the standard version of the Model Law is the amended version. The original 1985 text is also reproduced in view of the many national enactments based on this original version.

21.2010 - UNCITRAL Arbitration Rules (as revised in 2010):[121]

[120] UNCITRAL Model Law viewed at www.uncitral.org (last accessed on 15.04.12)
[121] UNCITRAL viewed at www.uncitral.org (last accessed on 18.05.12)

The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award.

The original UNCITRAL Arbitration Rules were adopted in 1976 and have been used for the settlement of a broad range of disputes, including disputes between private commercial parties where no arbitral institution is involved, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions. In 2006, the Commission decided that the UNCITRAL Arbitration Rules should be revised in order to meet changes in arbitral practice over the last thirty years. The revision is aimed at enhancing the efficiency of arbitration under the Rules and does not alter the original structure of the text, its spirit or drafting style.

The UNCITRAL Arbitration Rules, as revised, have been effective since 15 August 2010. They include provisions dealing with, amongst others, multiple parties arbitration and joinder, liability, and a procedure to object to experts appointed by the arbitral tribunal. A number of innovative features contained in the Rules aim to enhance procedural efficiency, including revised procedures for the replacement of an arbitrator, the requirement for reasonableness of costs, and a review mechanism regarding the costs of arbitration. They also include more detailed provisions on interim measures. It is expected that the Rules, as revised, will continue to contribute to the development of harmonious international economic relations.

SOME INTERNATIONAL ADR INSTITUTIONS AND ORGANIZATIONS:

1. ***Arbitration Chambers, Singapore*** is a commercial company whose main business is to provide an independent source of expertise to parties in dispute. It is a firm of professional arbitrators and mediators who are available to undertake resolution of commercial

disputes through arbitration or mediation. There is a large network of office in various cities of Asia and the Pacific.[122]

2. ***Singapore International Arbitration Centre, Singapore*** was established in 1991. SIAC is now one of the premier international arbitration institutions. It provides a neutral, efficient and reliable dispute resolution service in the regional hub that is the Centre of Asia's legal and business activity.[123]

3. ***Tehran Regional Arbitration Centre (TRAC)***[124] is an independent international institution established pursuant to an agreement between the Islamic Republic of Iran and the Asian-African Legal Consultation Organisation. Its objectives are:
    - Conducting arbitrations;
    - Promotion of international commercial arbitration;
    - Coordinating the activities of, and offering assistance to, the existing arbitration institutions in the region;
    - Providing assistance to ad hoc arbitrations, including acting as appointing authority, particularly in cases where they are taking place in accordance with the UNCITRAL Rules;
    - Providing assistance in the enforcement of arbitral awards;
    - Providing assistance in the settlement of disputes.

4. ***American Arbitration Association (AAA)***[125] was founded in 1926. It is a private enterprise in the business of arbitration, and one of several arbitration organizations that administers arbitration proceedings. The American Arbitration Association also administers mediation and other forms of alternative dispute resolution. It is headquartered in New York City.

   Many contracts include an arbitration clause naming the American Arbitration Association as the organization that will administer arbitration between the parties. The American Arbitration Association

[122] Arbitration Chambers viewed at www.w3.org (last accessed on 18.05.12)
[123] Singapore International Arbitration Centre viewed at www.siac.org.sg (last accessed on 18.05.12)
[124] Tehran Regional Arbitration Centre, viewed at www.w3.org (last accessed on 19.05.12)
[125] American Arbitration Association, viewed at www.wikipedia.org (last accessed on 19.05.12)

does not itself arbitrate disputes, but provides administrative support to arbitrations before a single arbitrator or a panel of three arbitrators. The arbitrators are chosen in accordance with the parties' agreement or, if the parties do not agree otherwise, in accordance with the AAA rules. Under its rules, the American Arbitration Association may appoint an arbitrator in some circumstances, for example, where the parties cannot agree on an arbitrator or a party fails to exercise its right to appoint an arbitrator.

The American Arbitration Association role in the dispute resolution process is to administer cases, from filing to closing. The American Arbitration Association provides administrative services in the U.S., as well as abroad through its International Centre for Dispute Resolution (ICDR). The American Arbitration Association's administrative services include assisting in the appointment of mediators and arbitrators, setting hearings, and providing users with information on dispute resolution options, including settlement through mediation. Ultimately, the American Arbitration Association aims to move cases through arbitration or mediation in a fair and impartial manner until completion.

Additional AAA services include the design and development of alternative dispute resolution (ADR) systems for corporations, unions, government agencies, law firms, and the courts. The Association also provides elections services as well as education, training, and publications for those seeking a broader or deeper understanding of alternative dispute resolution.

5. **International Centre for Dispute Resolution (ICDR)**[126], established in 1996 by the American Arbitration Association, administers international arbitration proceedings initiated under the institution's rules. ICDR currently (as of 2007) is headquartered in New York City. It also has offices in Ireland, Bahrain, Dublin, and Mexico City, and is scheduled to open an office in Singapore.

   ICDR's administrative services include assisting in the appointment of mediators and arbitrators, setting hearings, and providing users with information on dispute resolution options, including settlement through mediation.

[126] International Centre for Dispute Resolution viewed at www.wikipedia.org (last accessed on 19.05.12)

The ICDR is responsible for administering arbitration proceedings. As an administrative body, the ICDR processes a case from filing to closing, by:

- Providing arbitration rules;
- Appointing arbitrators;
- Assigning case managers;
- Setting hearings;
- Transmitting documents; and,
- Scheduling conference calls.

The ICDR also maintains a worldwide panel of more than 650 independent arbitrators and mediators, who are assigned to hear and resolve cases.

6. ***International Chamber of Commerce (ICC)***[127] is an international business organization with hundreds of thousands of member companies in over 130 countries spanning virtually every sector of private enterprise.

   A key benefit offered by the ICC is its International Court of Arbitration, which allows businesses to resolve international disputes without facing the potential risks and biases of foreign courts and foreign laws. The International Court of Arbitration is a branch of the International Chamber of Commerce (ICC) and one of the world's leading institutions for providing international arbitration services. The International Court of Arbitration is known for resolving international commercial and business disputes, administering more than half of all arbitration disputes worldwide. The ICC International Court of Arbitration is the world's foremost institution in the resolution of international business disputes. Truly international, the ICC Court is composed of members from almost 90 countries. ICC International Court of Arbitration becomes involved in a dispute because arbitration is a consensual process, the parties must first agree on ICC arbitration before the International Court of Arbitration will become involved in a dispute. This pre-existing agreement is usually found in an ICC arbitration clause within a business contract, but it can also be entered into by the parties after the dispute arises, if it arises in connection with a business contract.

[127] International Chamber of Commerce viewed at www.internationalarbitrationlaw.com (last accessed on 20.05.12)

ICC arbitration proceedings are conducted under the ICC Rules of Arbitration. There are no restrictions in the ICC system as to nationality of parties and arbitrators, or place, language or law of arbitration.

7. ***World Intellectual Property Arbitration and Mediation Centre***[128] based in Geneva, Switzerland, the WIPO Arbitration and Mediation Centre was established in 1994 to offer Alternative Dispute Resolution (ADR) options for the resolution of international commercial disputes between private parties.

   The Rules governing the WIPO dispute-resolution procedures contain features that are especially suitable for disputes involving intellectual property, such as licensing agreements or other forms of transaction relating to patents, trademarks, copyright or know-how. However, the Rules can be used for the resolution of all commercial disputes, including those not involving intellectual property.

8. ***Organization for the Harmonization of Business Law in Africa:*** With the globalization of world markets, competition is consequently rampant. The emergence of the new global village means that nations around the world are looking for ways to be more competitive and more open to foreign investments. It creates a denationalisation of economic conflicts. Alternative dispute resolution and supranational organizations became the two legal solutions to the new economic needs. Nations began coupling the two and many trade treaties have been signed. The most well-known system is the European Union, which promotes a unified continent. As in Europe, several African countries, most of them being former French colonies, joined forces to harmonize and unify their business laws by creating the Organization for the Harmonization of Business Law in Africa (OHADA). OHADA was signed on September 17th, 1993.[129]

   OHADA is a system of business laws and institutions adopted by sixteen West and Central African nations to establish a uniform legal framework governing commerce and investment in the region.[130]

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[128] World Intellectual Property Arbitration and Mediation Centre viewed at www.baseswiki.org (last accessed on 19.05.12)
[129] OHADA viewed at www.slaw.ca (last accessed on 31.05.12)
[130] OHADA viewed at www.isu.ethz.cu (last accessed on 31.05.12)

OHADA is open to all members of the African Union; its current seventeen members are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Côte d'Ivoire, Comoros, Democratic Republic of the Congo, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Republic of the Congo, Senegal, and Togo.[131] But it is headquartered in Ivory Coast, the Common Court of Justice and Arbitration (CCJA) is both a judicial court and an arbitration institution responsible for supervising the administration of arbitration proceedings in OHADA member states. In cases concerning OHADA law, the CCJA takes precedence over member states' courts.[132]

Its purpose is to promote regional integration and economic growth and to ensure a secure legal environment through the harmonization of business law. Under OHADA, the following Uniform Acts have been adopted, superseding any existing laws of the member states governing the same areas:[133]

- General commercial law
- Company law
- Secured transactions
- Debt recovery and enforcement law
- Bankruptcy law
- Arbitration law
- Accounting law
- Law relating to the transportation of goods by road

The Uniform Act on Cooperative companies was adopted on December 15th, 2010 and will be enforced on May 15th, 2011 according to Section 9 of the OHADA treaty. Labour Law, contract law and consumer sale law are the next areas to be harmonized. They also have plans to harmonize many other aspects of law that have an impact on Business. The main purpose of the system is to secure all of the aspects of the business, legal and judicial systems, which explains why the state parties accepted to relinquish a part of their sovereignty to OHADA. The Unified laws are automatically part of the domestic laws of the states and the decisions of the Common Court of Justice and Arbitration are automatically enforceable in any of the states of the Union.[134]

[131] OHADA viewed at www.internationalarbitration.law (last accessed on 31.05.12)
[132] Supra note (128)
[133] *Ibid*
[134] *Supra* note (127)

9. ***Association of International Arbitration (AIA)***[135] is a non-profit organization which was founded in 2001. It works towards promotion of ADR in general and Arbitration in particular, as a means of dispute resolution and strives to bring together the global community in this field, be it as professionals in the form of Judges, Lawyers, Arbitrators, Mediators or as Academicians as well Research Scholars and Students. With this unique blend of people, it is our endeavour to inculcate an interest in ADR, not only in the professional sphere but also create awareness and interest in it among budding professionals in law schools/universities all around the globe.

10. ***Cairo Regional Centre for International Commercial Arbitration (CRCICA)***[136] is an International Organization operating in Egypt since 1979 by virtue of an international agreement signed between the Egyptian Government and the Asian African Legal Consultative Organization (having more than 45 member-states). Since that time, CRCICA has administered domestic and international cases – on the basis of the UNCITRAL Arbitration Rules (institutionally adapted and slightly amended) with parties from all around the world. The Centre has a branch which deals exclusively with maritime cases: the Alexandria Centre for Maritime Arbitration (ACIMA).

    It administers both domestic and international arbitration cases. To help promote arbitration and other ADRs, CRCICA has developed since the early 80s continuous educational programs. Besides holding regular arbitration training courses on the peaceful settlement of international commercial and investment disputes, CRCICA holds international investment and trade related conferences.[137]

    The objectives of CRCICA as announced by AALCO during the Doha Session in 1978 are:[138]

    - Promoting international commercial arbitration in the Asian and African regions;
    - Providing for arbitration under the auspices of the centre;

[135] Global Legal Resources viewed at www.hg.org (last accessed on 31.05.12)
[136] Cairo Regional Centre for International Commercial Arbitration viewed at www.jurisint.org (last accessed on 31.05.12)
[137] *Ibid*
[138] CRCICA viewed at www.jurispub.com (last accessed on 31.05.12)

- Rendering assistance in the conduct of Ad-Hoc arbitrations, particularly those held under the UNCITRAL Arbitration Rules;
- Coordinating and assisting the activities of existing arbitral institutions, particularly among those within the two regions; and
- Assisting in the enforcement of arbitral awards.

CRCIA has established the following branches:

• The Alexandria Centre for International Maritime Arbitration (ACIMA), 1992;
• The Alexandria Centre for International Arbitration (ASIA), 2001;
• The Mediation and Alternative Dispute Resolution Centre, 2001; and
• The Port Said Centre for Commercial and Maritime Arbitration, 2004.

Recently, the CRCICA has brought into force the new Arbitration Rules (the "**2011 Rules**") with effect from March 1, 2011, which is based upon the revised UNCITRAL Arbitration Rules of 2010 (with a few adaptations stemming from CRCICA's position as an arbitral institution and an appointing authority). Accordingly, pursuant to the said date, the 2011 Rules should apply to all arbitral proceedings that have commenced under the CRCICA.[139]

11. ***Commercial Arbitration and Mediation Centre for the Americas (CAMCA)***[140] was created jointly by the American Arbitration Association, the British Columbia International Commercial Arbitration Centre, the Mexico City National Chamber of Commerce and the Quebec National and International Commercial Arbitration Centre. CAMCA operates with uniform rules, policies and administrative procedures.

CAMCA offers uniform rules of procedure for the out of court settlement of disputes administered by representatives from each of the member institutions. Cases may be filed by the parties with any of the offices of the member institutions. A multi-national panel of

[139] CRCICA Rules, 2011 viewed at indiacorplaw.blogspot.com (last accessed on 31.05.12)
[140] CAMCA viewed at www.jurisint.org (last accessed on 31.05.12)

arbitrators and mediators is available to serve under these rules. To resolve local issues, impartial committees, representative of the nationalities of the parties and chaired by a national of a country other that of any of the parties, are available.

12. ***European Court of Arbitration***[141] is a legal entity under the Alsace- Moselle law, formed in 1959. It promotes arbitration and mediation. It is a branch of European Centre of Arbitration which promotes arbitration and administers domestic and international arbitration. Its branches are spread over Europe including Eastern Europe, the Mediterranean, the Middle East and the Black Sea countries.

The mission of European Court of Arbitration is-

- To contribute in a friendly way with any other similar institution to create a culture of arbitration and of mediation;
- To help litigants, who look for alternative solutions, in a spirit of service to them or any other goal.

13. ***Free Trade Area of the Americas (FTAA)***[142] In December 1994, at the first Summit of the Americas, the 34 democratically-elected Heads of State of the Western Hemisphere agreed to create a Free Trade Area of the Americas (FTAA) by 2005. The FTAA envisions the elimination of trade and investment barriers on virtually all goods and services traded by member countries, reducing prices for consumers and creating new markets for producers throughout the hemisphere. FTAA would be the world's largest free market, with a combined economic output of nearly $13 trillion in 34 countries, and nearly 800 million consumers from Alaska to the tip of South America.

The initial structure for the FTAA consisted of a vice-ministerial level Trade Negotiations Committee (TNC) to oversee the negotiations, as well as nine negotiating groups (NG), and three non-negotiating entities. Each NG is responsible for negotiating a portion of the overall FTAA agreement. NGs meet regularly to negotiate the reduction of trade barriers in their issue area. Whenever these

[141] European Court of Arbitration viewed at en.wikimediation.org (last accessed on 31.05.12)
[142] Free Trade Area of the Americas viewed at www.exportvirginia.org (last accessed on 29.05.12)

different negotiating groups come together, the meetings are referred to as Ministerial. To date, there have been 8 FTAA Ministerial. NGs were expected to develop a draft text by 2005 of their respective chapters that would serve as the basis for the FTAA agreement. That deadline was not met, however, due to stalled negotiations.

14. ***Gulf Cooperation Council Commercial Arbitration Centre (GCCCAC)***[143] was established on 19th March 1995 by GCC leaders, one of the main objectives of G.C.C. Commercial Arbitration Centre is fill the vacuum in the region by providing expeditious and effective Arbitration services.

The GCC arbitration center is established to services commercial cases, including cases in the region related to banks, financial institutions, insurance, reinsurance, constructions, engineering, various contracting, intellectual property covering commercial and industrial, copyrights, and all types of international commercial contracts.

The GCC Charter states that the basic objectives are to effect coordination, integration and inter-connection between Member States in all fields, strengthening ties between their peoples, formulating similar regulations in various fields such as economy, finance, trade, customs, tourism, legislation, administration, as well as fostering scientific and technical progress in industry, mining, agriculture, water and animal resources, establishing scientific research centre, setting up joint ventures, and encouraging cooperation of the private sector.

15. ***Kuala Lumpur Regional Centre for Commercial Arbitration***[144] was established in 1978 under the auspices of the Asian-African Legal Consultative Committee (an inter-governmental organization) with the assistance of the Government of Malaysia. The Centre is non-profit and serves the Asian and the Pacific Region. It was established with

[143] G.C.C Commercial Arbitration Centre viewed at en.wikimediation.org (last accessed on 29.05.12)
[144] Juris International Arbitration & Mediation Centres, KLRCA viewed at en.wikimediation.org (last accessed on 29.05.12)

the objective of providing a system for the settlement of disputes for parties engaged in trade and commerce with and within the region.

The Centre promotes international commercial arbitration in the region. It administers international arbitrations. It renders assistance for the enforcement of awards. It provides advice and assistance to businesses on dispute resolution. Besides arbitration, it provides other options for the settlement of disputes such as mediation/conciliation under the Conciliation Rules of the Centre. Domestic arbitrations may be referred to the Centre. The Centre also provides technical facilities and assistance for holding ad-hoc arbitrations. As to the arbitration rules, the Centre applies the UNCITRAL Arbitration Rules with some minor modifications.

16. ***Hong Kong International Arbitration Centre (HKIAC)***[145] was established in 1985 to assist disputing parties to solve their disputes by arbitration and by other means of dispute resolution. It was established by a group of the leading business and professional people in Hong Kong to be the focus for Asia of dispute resolution. It has been generously funded by the business community and by the Hong Kong Government but it is totally independent of both and it is financially self-sufficient.

17. ***North America Free Trade Agreement (NAFTA)***[146] is an agreement signed by the governments of Canada, Mexico, and the United States, creating a trilateral trade bloc in North America. The agreement came into force on January 1, 1994. It superseded the Canada – United States Free Trade Agreement between the U.S. and Canada. In terms of combined GDP of its members, as of 2010 the trade bloc is the largest in the world.

NAFTA has two supplements: the North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labor Cooperation (NAALC).

[145] HKIAC viewed at www.wikipedia.org & www.aprag.org (last accessed on 29.05.12)
[146] NAFTA viewed at www.wikipedia.org (last accessed on 31.05.12)

18. ***Organization of American States (OAS)***[147] is the world's oldest regional organization, dating back to the First International Conference of American States, held in Washington, D.C., from October 1889 to April 1890. That meeting approved the establishment of the International Union of American Republics, and the stage was set for the weaving of a web of provisions and institutions that came to be known as the inter-American system, the oldest international institutional system.

The OAS came into being in 1948 with the signing in Bogotá, Colombia, of the Charter of the OAS, which entered into force in December 1951. It was subsequently amended by the Protocol of Buenos Aires, signed in 1967, which entered into force in February 1970; by the Protocol of Cartagena de Indies, signed in 1985, which entered into force in November 1988; by the Protocol of Managua, signed in 1993, which entered into force in January 1996; and by the Protocol of Washington, signed in 1992, which entered into force in September 1997.

The Organization was established in order to achieve among its member states—as stipulated in Article 1 of the Charter—"an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence."

Today, the OAS brings together all 35 independent states of the Americas and constitutes the main political, juridical, and social governmental forum in the Hemisphere. In addition, it has granted permanent observer status to 67 states, as well as to the European Union (EU).

The Organization uses a four-pronged approach to effectively implement its essential purposes, based on its main pillars: democracy, human rights, security, and development.

Article 2 defines eight essential purposes:[148]

- To strengthen the peace and security of the continent.
- To promote and consolidate representative democracy, with due respect for the principle of nonintervention.
- To prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the member states.

[147] Organization of American States viewed at www.oas.org (last accessed on 29.05.12)
[148] OAS viewed at en.wikipedia.org (last accessed on 29.05.12)

- To provide for common action on the part of those states in the event of aggression.
- To seek the solution of political, judicial, and economic problems that may arise among them
- To promote, by cooperative action, their economic, social, and cultural development.
- To eradicate extreme poverty, this constitutes an obstacle to the full democratic development of the peoples of the continent.
- To achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the member states.

ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN SOME COUNTRIES:

I. THE AMERICAN EXPERIENCE IN THE FIELD OF ALTERNATIVE DISPUTE RESOLUTION:[149]

HISTORICAL BACKGROUND

Although the process and the concept of Alternative Dispute Resolution is not a new procedure, but it has been developing and the use of ADR mechanisms have proliferated in the recent years. Its use in the United States pre-dates both the Declaration of Independence and the Constitution.

Arbitration first received the endorsement of the Supreme Court in 1854 when the Court upheld the right of an arbitrator to issue binding judgements in ***Burchell v. Marsh***.[150] Justice Grier stated that "Arbitrators are judges chosen by the parties to decide the matter submitted to them, finally and without appeal. As a mode of settling

[149] Rao, P.C & Sheffield William "Alternative Dispute Resolution- What it is and how it works?", Universal Law Publishing Co. Pvt. Ltd. New Delhi- India, 1997 Edition, Reprint 2011; Freyer H. Dana "The American Experience In The Field Of ADR", pp. 108-122
[150] *58 U.S. 344 (1854)*

disputes, it should receive every encouragement from the courts of equity."[151]

In 1920, New York passed the first state law in the United States that recognized voluntary agreements to arbitrate. Two years later, business leaders created a new educational organization- The Arbitration Society of America- which significantly influenced the enactment of the Federal Arbitration Act (FAA) in 1925. The FAA provided the statutory framework to enforce arbitration clauses in interstate contracts and created the foundation upon which modern agreements are built today. In 1926, the Arbitration Society merged with another foundation to form the American Arbitration Association (AAA) which is now one of the largest private ADR service providers in the United States.

Despite of the various early initiatives, arbitration was not readily accepted everywhere in the United States. But in the 1970's broad based-advocacy for increased use of ADR techniques emerged. The United States did not ratify the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 until 1970, i.e. twelve years after it was promulgated. This trend was described in the United States as the 'alternative dispute resolution movement,' when the American Bar Association recognised it officially as soon as a Special Committee on Minor Disputes (now called the Dispute Resolution Section) was established.

With the ADR movement not only increased the use of arbitration but also the development and application of other ADR techniques such as mediation, conciliation, facilitation, mini-trials, summary jury trials, expert fact-finding, early neutral evaluation and variations thereof.

COMMUNITY-BASED DISPUTE RESOLUTION

The community dispute resolution movement spawned from the social activism of the 1960s and helped to propel the ADR movement. With the promulgation of the Civil Rights Act in 1964 came the creation of the Community Relations Services (CRS) which utilized mediation and negotiation to assist in preventing violence and resolving community-wide racial and ethnic disputes. The CRS helped to resolve numerous disputes involving schools, police, prisons and other government entities throughout the 1960s.

[151] *Ibid*.

In the late 1960s and early 1970s, the federal Law Enforcement Assistance Administration (LEAA) funded both an arbitration program and a mediation program, each in an urban United States city, designed to help resolve disputes within these communities. These programs helped to settle thousands of cases. By 1980, more than eighty community-based alternative dispute resolution centres were in operation.

The increased support from the private sector, together with successful alignments of certain federal and state agencies and non-profit organizations, has helped to grow a number of such programs to about more than 400 local community justice centres which has been presently operating throughout the United States. Recent estimates indicate that more than several hundred thousand cases per year are being handled by such community-based dispute resolution programs.

This community-based ADR trend has been further expanded to reach public and private school system. Presently, more than 4,000 schools throughout the United States have developed successful peer mediation programs.

Underscoring these successful schools programs, the American Bar Association Section on Dispute Resolution declared its theme for 1995-96 to be “Children, Courts and Dispute Resolution”. The goal of this program is to expand the use of ADR both in the schools and in the courts for the benefit of children.

DISPUTE RESOLUTION IN THE JUDICIAL SYSTEM

Federal Courts

Since the enactments in 1990 of the Civil Justice Reform Act (CJRA), this call for every federal district court to implement a civil justice expense and delay reduction plan, there has been tremendous growth in the creation of ADR programs and the use of ADR by federal and state courts.

A growing number of courts have promulgated rules that mandate or authorize judge to recommend, or require litigants to participate in, ADR procedures such as summary jury trials, early neutral evaluation, mini-trials, mediation and arbitration.

The Court of Appeal for the District Court of Columbia also has implemented a mediation program in an effort to supplement the Court's 1986 Case Management Plan (which was undertaken to accommodate a 60% increase in filling and pending cases over the prior two-year period). The key difference between these two programs is that cases in the Appeals Courts program are selected for mediation by the Court's Chief Staff Counsel, whereas the District Court program is strictly voluntary.

Although the Appellate mediation program handles fewer than 100 cases per year, it has significantly reduced the court's workload.

In 1988, Congress formally authorised ten pilot courts to conduct mandatory court-annexed arbitration programs, according to the rules given in the Judicial Improvements and Access to Justice Act of 1988, and authorised the Judicial Conference to designate ten additional districts to conduct voluntary non-binding, court-annexed arbitration programs. The mandatory court-annexed arbitration programs require that certain categories of civil cases- typically those cases below a threshold amount ranging from $ 50,000 to $ 150,000- is automatically referred to arbitration. Moreover, most of the cases in which a demand for trial *de novo* was made, settled after the hearing and before going to trial. In addition, 97% of the judges agreed that the Court's caseload burden was reduced as a result of the arbitration program.

As of 1994, eight of the ten districts authorised to adopt voluntary arbitration programs which had implemented such programs. These eight programs use one of the two systems for referring cases to arbitration- the 'opt-in' system, in which the courts simply notify litigants that the arbitration program is available if they wish to participate, and the 'opt-out' system, in which the court automatically places all eligible cases in the arbitration program, from which litigants can 'opt-out'.

Less formal ADR programs abound in the federal court system, as of *ad hoc* resort to ADR by judges in courts throughout the country. For example, judges in the United States District Court in the District of Massachusetts utilized an "array of alternative choices such as- summary jury trial, trial before a magistrate, trial before a retired Massachusetts Superior Court Justice, and the Court Mediation project",[152] prior to the enactment of formal court rules for all these procedures. With mounting frequency, even without a court- rule, judges are ordering or suggesting to parties that they participate in or consider utilizing ADR.[153]

[152] Home Owners Funding Corp. of America v. Century Bank, 695 F. Supp. 1343, 1347
[153] e.g. In Local 715 v. Michelin America Small Tire, 840 F. Supp. 595 (Court can order vote of Union to determine participation in pre-trial settlement conference)/ G.

State Courts

The use of various forms of ADR in state courts also has increased:

- 28 State Courts now have mandatory, non-binding arbitration programs.
- More than half the States have formally incorporated ADR methods other than arbitration into their systems through State-wide legislation, court rules or policies.
- Most States offer mediation for custody, visitation or other family issues on a voluntary or mandatory basis.
- Virtually every State has experimented with ADR in one or more of its courts.

In addition, many State and Federal local court rules encourage ADR use by requiring attorneys to discuss ADR issues with clients and opponents, to address the appropriateness of

ADR in case of management plans. It has also been recently observed that at least 50 State Appeal Courts use mediation with considerable success. Some examples of State Court ADR programs are:

- California:

  A recent legislation came effective on August 1, 1995 which brings in that Los Angeles Country requires judges to order non-binding mediation of all cases in which the amount in controversy is $50,000 or less. Judges in other California courtrooms have the same option and thereby encourage parties to consider using mediation in most civil cases.

- Minnesota:

  The Minnesota Supreme Court also has adopted rules that encourage the use of ADR mechanisms. Under these rules, parties to specific types of civil suits and their attorneys must be advised of ADR options when they file a suit.

Heileman Brewing Co. v. Joseph Oat Corp., 871 F. 2d 648 (7th Cir. 1989) where it was observed that the court can order client's attendance at non-binding ADR process.

- New Jersey:

  In 1991, a New Jersey Supreme Court task force sketched out a comprehensive plan for the implementation and use of a full range of ADR processes in most courts throughout the state. The development of Complementary Dispute Resolution (CDR) was approved by the New Jersey Supreme Court. The goal of CDR is to assure the regular and routine use of the alternative process. And it has proved to be very successful and is an integral part of the New Jersey's Supreme Court and Municipal Courts.

- Texas:

  The Texas Alternative Disputes Act, 1996 provides a comprehensive framework for voluntary, non-binding ADR processes. A judge may, upon his or her own motion of a party, refer a case for resolution by mediation, mini-trial, moderated settlement conference, summary jury trial and arbitration. Texas also mandates two Settlement Weeks each year in which courts in the larger countries close and local lawyers, judges and parties try to mediate settlements of long-pending cases.

Besides the discussion and mention of some of the State Courts offering state programs, there are also some Special Business Courts, offering expeditious processing of commercial disputes established in three major cities- i.e. New York, Chicago (Illinois) and Wilmington (Delaware).

FEDERAL AGENCY USE OF ADR

Government agencies have been rapidly increasing the ADR options available to the parties with which they can settle their disputes. Some of its part is based on legislation such as the Alternative Dispute Resolution Act of 1990 (ADRA) and the Negotiated Rulemaking Act of 1990.

The ADRA authorized federal agency use of ADR, including binding arbitration, and required every agency to adopt an ADR policy for all types of actions, including formal and informal adjudications, rule making, enforcement actions, license or permit issuance and revocation, contract administration and litigation. Each agency was required to-

i. Designate a dispute resolution officer,

ii. Provide ADR training for agency employees,

iii. Review all standard agency agreements and grants to determine whether or not an amendment to include ADR would be appropriate.

In response, almost every agency appointed a dispute resolution officer and developed pilot programs and policies to make ADR a compatible and desirable option for resolving controversies.

An example of a program spurred by the ADRA is the mediation program introduced by the United States Equal Employment Opportunity Commission (EEOC) (the governmental agency responsible for enforcing federal laws prohibiting discrimination in employment) in 1995 in an effort to encourage to the use of ADR. This program is based on a classic mediation model in which a charging party and the respondent meet with a neutral third party to resolve the dispute. Both parties must agree to mediation which is available after a charge is field but before EEOC commences any investigation. The goal is to resolve 10% of the cases through ADR.

On October 1, 1995 the ADRA expired. Despite of the ADRA's lapse, a recent Executive Order reaffirms the Government's intent to expand the use of ADR. The Order, which was signed by President Clinton on February 5, 1996, requires federal agencies and litigation counsel to attempt to settle disputes before commencing litigation and to suggest ADR procedures in appropriate civil cases involving the United States Government. It also requires litigation counsel to be trained in ADR techniques.

In addition to reducing the number of lawsuits filed challenging regulations, there appears to be a widely viewed by the agencies and other participants that the reg-neg process has resulted in "better" rules-that is, agencies are making decisions based on more complete and accurate information that take into consideration real world consequences.

CORPORATE USE OF ADR

Many United States companies have developed and implemented ADR programs to handle complaints and disputes involving customers, franchises, employees and others. Such programs include multi-level

review by peers of the employees, confidential employee advisers, ombudspersons, voluntary arbitration and third party mediation programs. These procedures, in certain circumstances, have proven to be a relatively inexpensive and expeditious alternative to litigation, particularly if they include mechanisms that are perceived as fair, impartial and procedurally adequate.

Almost eight major banks have subscribed to the CPR Institute for Dispute Resolution Banking Industry Dispute Commitment (the CPR Commitment), which is an agreement between participating banks to negotiate and mediate inter-institutional disputes. CPR thus observed that with the help of the agreement it has been successful in solving various common transactional disputes between the banks.

Although banking industry use of ADR is varied, several banks include mandatory arbitration clauses in all agreements governing certain types of transactions, including commercial loan agreements, loan agreements secured by real estate, construction loan agreements and related guaranties, consumer loan agreements, depositor agreements, credit cards accounts, safe deposit box renter agreements, letters of credit, equipment leases, and asset based loans.

Besides this, two relatively recent initiatives by a number of leading food and pharmaceutical companies have subscribed to CPR Commitment, i.e. sixteen major food companies and ten leading manufacturers of non-prescription drugs, and entered into ADR Commitment. Again under the auspices of the CPR Institute, a number of franchisors launched the National Franchise Mediation Program in February, 1993. The program involves negotiations among senior executives of the parties followed, if necessary, by mediation.

U.S companies generally are increasingly including dispute resolution clauses in contracts with employees, customers, suppliers, and joint ventures that require a ‘cooling-off period,’ good-faith negotiation, and/or procedures for some form of non-binding dispute resolution procedure such as mediation before the parties litigate or arbitrate.

Another approach to the resolution of inter-corporate disputes has been a pledge by corporations to explore alternative means of settling disputes with other pledge signatories before initiating litigation. More than 850 corporations, on behalf of 3000 subsidiaries, have signed one such pledge which was drafted, and is circulated by the CPR Institute for Dispute Resolution. The pledge is a corporate policy statement, not an enforceable contract, which means that a signatory could, go directly to

court to resolve the dispute. However, the pledge has a helpful tool for initiating settlement negotiations with another signatory.

At the state level, a similar pledge initiated by the Ohio State Bar Association and Ohio Chamber of Commerce reportedly has in excess of 175 signatories.

LAW FIRM RESPONSES

It has been observed that around January 1996, more than 1560 United States law firm had responded to heightened client expectations regarding ADR use by subscribing to the CPR Institute for Dispute Resolution's Law Firm Policy Statement on Alternatives to Litigation.

U.S lawyers' development of ADR expertise has been promoted in a number of jurisdictions (e.g. Arkansas, Colorado, Kansas, Hawaii and Georgia) by the recent issuance of ethics rules or opinions that require or encourage attorneys to advice clients about the availability of ADR under certain circumstances.

The ADR landscape in the United States is multifaceted and diverse. The growth in both the use and development of ADR mechanisms has resulted from initiatives at all levels and from all branches of government- executive, legislative and judiciary; and from many corners of the private sector- community organizations, corporations and the bar. With the increased inclusion of ADR clauses in domestic and international commercial agreements and more widespread publication of ADR successes, it can be picturised that the use of ADR in the US will continue to expand.

II. ALTERNATIVE DISPUTE RESOLUTION IN NEW ZEALAND:[154]

INTRODUCTION

[154] Rao, P.C & Sheffield, William "Alternative Dispute Resolution- What it is and how it works?", Universal Law Publishing Co. Pvt. Ltd. New Delhi- India, 1997 Edition, Reprint 2011; T.W.H. Kennedy-Grant, Alternative Dispute Resolution in New Zealand.

Alternative Dispute Resolution (ADR) is well established in New Zealand. There has been an Indigenous Arbitration Act since 1899 (prior to that date, the English legislation current from time to time applied).[155]In addition, there has been a history of statutory provision for the arbitration of particular type of disputes.

ARBITRATION

Arbitration is undoubtedly the longest-standing formal method of dispute resolution in New Zealand outside the court system. The New Zealand system has been based throughout on the Common Law and on English legislation including the Arbitration Act, 1950.

Current Legislation comprises the Arbitration Act, 1908 and the Arbitration Amendment Act, 1938 (both as amended by subsequent Acts) in relation to domestic arbitrations and the Arbitration (International Investment Disputes) Act, 1979 and the Arbitration (Foreign Agreements and Awards) Act, 1982, giving effect to the Washington Convention of 1965 and the New York Convention of 1965 respectively, in relation to international arbitrations.

There have been a number of cases in which proceeding have been stayed because of the existence of an arbitration agreement to which the New York Convention, as incorporated in New Zealand, was applied.[156]The ICSID arbitration became the subject of a successful application by the claimants for a stay under the Arbitration (International Investment Disputes) Act, when the New Zealand Government in *Mobil Oil Corp. and Others v. New Zealand Government,*[157] sought to inject the arbitration proceedings before the International Centre.

In 1988, the New Zealand Law Commission published a preliminary paper on the reform of the arbitration process. In that paper the Law Commission reviewed the law relating to the different stages of arbitration, comparing the present New Zealand, English and Australian Acts and the UNCITRAL Model Law on International Commercial Arbitration, and expressed a preference for the adoption in New Zealand

[155] *Brett v. Young (1882) 1 NZLR 262*
[156] *For example: Baltimar Aps Ltd. v. Nalder & Biddle Ltd. (1994) 3 NZLR 129 (C.A); Sofrana Unilines NZ Ltd. v. Translink Pacific Shipping Ltd. (1993) 7 PRNZ 113.*
[157] *(1989) 2 NZLR 649*

of the UNCITRAL Model Law for International arbitrations and, with modifications, for domestic arbitrations.

There followed an extensive process of consultation, both public (in the form of a joint seminar with the Legal Research Foundation on "Arbitration Law- Perimeters and Parameters") and private; and then, in 1991, the Law Commission reported to the Minister of Justice. The Government accepted the recommendations of the Law Commission within a short time of its publication; but it took four years to introduce the Bill into the House. And the Bill is now before the Justice and Law Reform Select Committee.

The purposes of the Bill are stated below:

a. To encourage the use of arbitration as an agreed method of resolving commercial and other disputes;

b. To promote international consistency of arbitral regimes based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law,

c. To promote consistency between the international and domestic arbitral regions,

d. To redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards,

e. To facilitate the recognition the recognition and enforcement of arbitration agreements and arbitral awards.

The Bill seeks to achieve these purposes by providing that the Model Law, with certain modifications, shall apply to shall to all arbitrations conducted in New Zealand, whether international in their character or domestic, and that certain supplementary provisions shall apply to domestic arbitrations, unless the parties otherwise agree, and to international arbitrations, if the parties so agree.

There are over 50 statutes which provide for particular types of dispute to be determined by arbitration. Examples are:

- The Public Bodies Lease Act, 1908

- The Share milking Agreements Act, 1937

- The Employment Contracts Act, 1991
- The Resource Management Act, 1991

OTHER ADR PROCEDURES

Statutory Systems:

Mediation, or its close relative conciliation, has had an important role in the resolution of industrial disputes since the passing of the Industrial Conciliation and Arbitration Act, 1894.

For almost a century after the passing of that Act (until 1991), New Zealand had a highly regulated industrial relations system based on a series of annually negotiated collective agreements or awards. From 1987 to 1991 the service was provided by the Mediation Service established under the Labour Relations Act, 1987.

Under the Employment Contracts Act, 1991 the former system of national collective agreements or award was placed by a system under which it is open to employers and employees to enter into either individual employment contracts or collective employment contracts. The Mediation Service has been abolished. In its place there has been established an Employment Tribunal. Outside the industrial relations area, mediation was not incorporated in any statutory scheme until the 1980's.

In 1981, a Family Court was established and provision was made in the accompanying Family Proceedings Act, 1980 for mediation conferences, chaired by a Family Court Judge.

In 1986, the Residential Tenancies Act provided for the appointment of Tenancy Mediators, whose functions include- "where; an application has been made for the exercise of the Tribunal's jurisdiction in respect of any dispute…….their services to the parties to the dispute and the parties in bringing about a settlement."

In 1988 the Treaty of Waitangi Act, 1975 which was passed to enable the investigation of claims by Maori of breach by the Crown or by Parliament since 1840 of the obligations undertaken on behalf of the Crown in the Treaty of Waitangi signed between the Crown's representative and certain Maori Chiefs in 1840, was amended to empower the Waitangi

Tribunal, which is the body to set up to inquire into and make recommendations regarding claims, to refer claims to mediation.

Provision for conciliation or mediation has been included in a number of other statutes since then, including the Resource Management Act, 1991.

Private Use:

In addition to the statutory systems described in the last five years, as a result of an increasing awareness of the sustainability and availability of alternative dispute resolution procedures other than the arbitration, increasing use has been made of mediation and other forms of procedure of an ad hoc basis. This has been the result of a number of factors: the existence of the statutory schemes, the promotional work of the Arbitrator's Institute of New Zealand (presently known as Arbitrator's and Mediator's Institute of New Zealand), and of LEADR (Lawyers Engaged in Alternative Dispute Resolution), and the impetus to the use of ADR provided by the High Court Case Management Pilot Scheme.

Mediation is undoubtedly the most widely used method of ADR apart from arbitration. It is being used regularly in relation to a wide range of disputes. The mini-trial has been used in at least one major construction dispute, arising out of the failure of a sub-division, but it has not gained widespread acceptance.

III. DISPUTE RESOLUTION WITHIN AND OUTSDE THE COURTS- AN OVERVIEW OF THE UNITED STATES EXPERIENCE:[158]

INTRODUCTION

Beginning in the late sixties, American society witnessed an extraordinary flowering of interest in alternative forms of dispute settlement. This interest emanated from a wide variety of sources, ranging from the Chief Justice of the U.S. to corporate General Counsel, the organised Bar and various lay groups.

[158] Rao, P.C & Sheffield, William "Alternative Dispute Resolution- What it is and how it works?", Universal Law Publishing Co. Pvt. Ltd. New Delhi- India, 1997 Edition, Reprint 2011; Sander E.A. Frank "Dispute Resolution Within And Outside The Courts- An Overview Of The U.S. Experience", pp. 123-134.

In the Alternative Dispute Resolution Mechanisms, if the disputants are unable to resolve the dispute by negotiation, a third person who may be referred to as a mediator, conciliator, or facilitator, might be called in to help them. Alternatively, the matter may be submitted to a third party who decides the dispute for the parties, such as a Judge or Arbitrator. The distinction between these two types of third party dispute resolvers is critical. The important point with respect to both negotiation and mediation is that the disputants themselves retain control over the process and the outcome. They decide what the important facts are and they decide together on the best solution. Consequently, it is not surprising that there are increasingly persuasive data to indicate that negotiated or mediated resolutions have greater durability than adjudicated ones. This is, disputants are more likely to live up to an agreement that they themselves (perhaps with the aid of a third party) have worked out, than if the solution is imposed upon them from the outside. Indeed the very process of negotiation and mediation can be educational only that may help the parties to learn how to handle conflicts better and hence to be able to resolve future disputes more effectively by themselves. This is of course of particular importance where the disputants have an ongoing relationship, such as exists between family members or landlords and tenant or between suppliers and distributors.

In the United States we have several kinds of adjudication. In addition to the familiar court adjudication, we have two kinds of private adjudication (arbitration). The parties may voluntarily submit their disputes for a final and binding decision to a private arbitrator, either on an *ad hoc* basis for the present dispute or pursuant to a clause in their contract that provides for such dispute resolution. This is the kind of arbitration that has been practiced very widely in the United States, particularly in commercial disputes between companies that have a continuing relationship and in labour disputes between union and employers. Here arbitration provides an opportunity for a fairly prompt and inexpensive decision, often by specially selected experts. Under American Law such decisions are normally final and binding (i.e. there can be no appeal). But if appropriate care is taken in selecting the arbitrator (or arbitrators), then the parties are willing to put all their eggs in this one basket.

A different kind of arbitration has become increasingly common in United States in the last few decades. A number of States, as well as some federal courts, provided by law that money claim disputes below a certain amount. In view our constitutional right to trial by a court, if not to trial by a jury, such a mandatory referral to arbitration cannot

constitutionally be made final and binding. The looser must be entitled to seek review in court. But some jurisdictions provide for sanctions if the looser in the arbitration appeals to court and does not do better in court. Generally, if these programs are set up in a sophisticated way then they can result in diverting a large number of creativity cases to more expeditious process. At the same time the courts are saved from the really sophisticated and complex cases for which their techniques were designed.

One of the significant developments of the dispute resolution movement in the United States has been the spawning of various 'hybrid' dispute resolution processes, each of which blends in some way the particular features of the basic processes. The mini-trial, for example, was developed in 1976 in a complex patent and trademark infringement case.

Another device is early neutral evaluation. This is sometimes accomplished by one or more attorneys who hear an abbreviated presentation by each side and then decide, on the basis of their extensive experience, what the case is worth. This method has been used very successfully as a settlement device in the United States District Court of Northern California and is particularly suitable for tort or other money-claim cases where liability is not an issue. In Cambridge, Massachusetts, called children's Hearings, where serious disputes between parents and children (e.g. involving runaways or failure to attend school) are mediated. Private mediation in divorce cases is also becoming increasingly common. We also have a variety of out-of-court mechanisms (including some provided by industry) for resolving consumer disputes. Over 300 Neighbourhood Justice Centres where various minor disputes (e.g. criminal, consumer, family, landlord-tenant) are mediated, sometimes by trained volunteers. Finally, many companies and other institutions have their own internal dispute resolution mechanism (such as an Ombudsman or a mediator) to handle disputes arising within the institution.

THE MULTIDOOR COURTHOUSE APPROACH

The key feature of the multi-door courthouse is the initial procedure: intake screening and referral. Hence disputes would be analysed according to various criteria to determine what mechanisms or sequence of mechanisms would be best suited for the resolution of the problem. For example, if we are dealing with a case like the inventor/ capital supplier dispute mentioned earlier, then the case might be initially

referred to mediation, because that process is particularly helpful in restructuring a frayed relationship between parties who have ongoing connections. On the other hand, while dealing with a one-time simple tort case presenting a novel question of statutory interpretation, then, most likely, the case would be directly referred to court because courts are the agencies that are charged with the task of giving meaning to statutes, thus providing guidance to others as well as an answer to the immediate disputants. Numbers of factors are looked over in the jurisdiction of United States while dealing with the cases, i.e. nature of case, relationship of parties, history of negotiations between disputants, nature of relief sought by plaintiff, size and complexity of claim.

INSTITUTIONALIZATION OF DISPUTE RESOLUTION

The Multi-door approach is one way of institutionalizing a multifaceted approach to dispute resolution. The American Bar Association has been instrumental in initiating pilot experiments in Tulsa, Oklahoma, Houston, Texas and Washington, D.C. In Houston and Washington these experiments have become permanent parts of the dispute resolution landscape, financial in Washington as part of the regular court budget and in Houston through funds accumulated from an ADR surcharge on the regular court filing fee. The ABA Section of Dispute Resolution is currently seeking to spread the world to other interested jurisdictions around the United States and it has developed extensive materials for this purpose.

Some U.S jurisdictions, though not yet having anything as well all-encompassing as the Multi-door 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 latest development in dispute resolution planning is the emergence of the concept of dispute systems design. In one sense the multi-door courthouse notion is a systematic one. Another facet of this approach is to look at all the kinds of disputes that arise within one organization.

IV. <u>ALTERNATIVE RESOLUTION IN CHINA</u>:

HISTORICAL ORIGIN

Traditionally, it is generally agreed that there are four ways of resolving commercial disputes of international character in China, i.e. negotiation, conciliation (mediation), arbitration and litigation. Among the above, conciliation is the most widely used alternative way of dispute settlement to litigation arbitration. The perceived failure of litigation and arbitration, first in the United Sates, and then in other jurisdictions, which has encouraged the rise of ADR, no doubt has also given rise to wide spread criticism on its length, complexity and cost in China. In addition, the development of ADR in China can be traced back to its unique cultural background. In China, there exists a deep-rooted historical preference for informal and non-adversarial means of dispute resolution which has evolved on the basis of cultural tradition which extends from ancient times. By such non confrontational dispute resolution procedures, face could be reserved and commercial relationships maintained. This has served to support a firm commitment to conciliation in dispute resolution process in China and may help to explain the existence of various forms of conciliation in litigation and arbitration proceedings. Accordingly, in China, many forms of ADR are combined with litigation and arbitration, what can be called hybrid processes, which ultimately lead to legally binding outcome under proper circumstances. Therefore, in Chinese legal practice, the definition of ADR shall be slightly different from that given above i.e. the outcome of ADR can lead to a legally binding outcome, in the hybrid processes, if agreed by both parties in dispute. What has to be clarified here is that a new agreement or contract reached under an ADR process is
of course legally binding to both parties, but the obligations cited in the contract cannot be directly enforceable in court. In the Chinese legal practice, the so-called “legally binding outcome” in this particular context shall be defined as a legal document or any obligation expressed in whatever form, which is enforceable by court upon one party’s application.

In China, it is widely accepted that a third party intervention to a dispute, whatever the degree, is an indispensable factor to ADR. Therefore, negotiation without a third party’s intervention is not regarded as a form of ADR. In the meantime, arbitration, notwithstanding its many advantages and similarities to other forms of ADR, because of its intrinsic nature of ultimately leading to a legally binding outcome imposed on the parties in the form of enforceable arbitral award, arbitration is not seen as a form of ADR by many people. Rather, Alternative Dispute Resolution has been regarded, as the name itself suggests, as a dispute resolution process which is used as an

alternative to litigation and arbitration. In addition to the reasons stated above, a strong incentive of developing more efficient and effective alternative to litigation and arbitration in business community and legal commentators is the difficulty of enforcing court judgment and arbitral awards in China, particularly in the less developed regions. It is notable, however, a great importance has been attached to the problem in the enforcement of court judgment and arbitral awards by both the Chinese legislature and executive and significant achievements can be identified in recent years.[159]

DEFINITION OF ADR IN CHINA

In China, the ADR theory is quite different from that under the Western legal system. Although a similarly independent ADR institution now exists in China, the general idea of ADR under the PRC legal system is actually amalgamated into the judicial or arbitration process in hearing. The People's Mediation System is the ADR formality for Chinese parties and its 'oriental experience' has won high praise in international judicial circles. Unlike Western-style ADR, ADR in China is more often conducted by the same court or tribunal during or after the hearing rather than by an independent organ before the hearing. The less confrontational nature of such mediation methods can also help preserve the commercial relationship between the dispute parties.[160]

TYPES OF ADR

China's economy and society have developed rapidly, benefiting from three decades of reform and opening up. At the same time, the number of civil and business disputes in China has also increased apace. Three alternative methods are available for domestic and foreign investors to resolve their disputes in China: mediation, arbitration and litigation. Mediation is conducted between the concerning parties on a voluntary basis and has no legal binding effect. Compared with arbitration, in China, court litigation remains the most traditional way of resolving disputes and litigation is much stronger to protect investor's interests though it is more complex, unpredictable and time-consuming. But

[159] Rungao Zheng; "ADR in P.R. China viewed at www.softic.or.jp (last accessed on 06.07.12)
[160] Yamming Wei; " New Development of ADR in China" viewed at www.stf.jus.br (last accessed on 06.07.12)

arbitration has been widely used in commercial disputes, particularly those involving foreign elements.[161]

According to the degree to which the parties have control over the process and the outcome, ADR, can be classified as unilateral action, negotiation, mediation, conciliation, early neutral evaluation, adjudication, summary jury, the mini-trial, etc., it must be noted that all legal systems have their own traditions and their own practices; and different legal systems may develop different ways of ADR. Among the above, summary jury does not exist in China because there is no jury system in the Western sense. Also in China, as stated above, negotiation without an intervention, whatever the degree, of a third party is not regarded as ADR. The most commonly seen and widely used forms of ADR are mediation and conciliation. In China, ADR processes can be classified into hybrid processes i.e. ADR combined with court proceedings and arbitration proceedings and non-hybrid processes, i.e. ADR conducted by ADR institutions; therefore, it is helpful to review the types ADR in accordance with the organizations which deal with ADR.[162]

With the development of reform and opening-up and market economy, arbitration is become increasingly vibrant in China and has become one of the important methods to resolve disputes. In allusion to the division of objects for the dispute resolution, arbitration can be divided into domestic economic contract arbitration, foreign trade and maritime arbitration as well as labour arbitration. China's unique cultural tradition formed the fine tradition for resolving disputes through arbitration. The Chinese law regards arbitration as an effective method of resolving the international trade and investment disputes, and practice has proved that the commercial transaction is also prone to resolve disputes through arbitration.[163]

Mediation is an independent third-party technique in which a mediator assists parties to focus on their real interests and strengths as opposed to their emotions in an attempt to draw them together towards possible settlement. Crucial to the mediation process is that the independent third party ordinarily does not make recommendations as to what would be an appropriate settlement but is merely there to assist the parties to assist the parties to find and settle their own agreement.[164]

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[161] *Ibid*
[162]Rungao Zheng; "ADR in P.R. China viewed at www.softic.or.jp (last accessed on 06.07.12)
[163] *Ibid*
[164] *Ibid*

The conciliator, in conciliation, on the other hand, is usually more interventionist than the mediator while still endeavours to bring disputing parties together and assist them to focus on the key issues. No matter which one applies, party autonomy reigns supreme. Failing an agreement to conciliate or mediate, judges and arbitrators in hybrid proceedings, i.e. court proceedings and arbitration proceedings, or conciliators in non-hybrid conciliation proceedings cannot force the parties to conciliate. The parties may exercise this freedom in two ways. They may agree to participate conciliation proceedings; they may also retreat from the conciliation proceedings at any time so long as the outcome of conciliation has not yet taken binding legal effect. The scope of disputes which can be conciliated under the CCPIT conciliation includes disputes of contractual or non-contractual nature relating to trade, finance, security, investment, intellectual property, technology transfer, real estate, construction contract, transportation, insurance and other commercial and maritime business.[165]

ALTERNATIVE DISPUTE RESOLUTION ORGANIZATIONS[166]

The first two international arbitration institutions, China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC) were founded in 1956 and 1959 respectively under the auspices of China Council for the Promotion of International Trade (CCPIT)/ China Chamber of International Commerce (CCOIC) (hereinafter referred to as the Conciliation Centre) was established in 1987, and then called Beijing Conciliation Centre. Conciliation Centre of China Council for the Promotion of International Trade (CCPIT) / China Chamber of International Commerce (CCOIC), the most prominent promoter of ADR in China.

From 1992, it has established 40 sub-centres mainly within the sub-councils of CCPIT in various provinces, municipalities and major cities. The conciliation centres scattered throughout China has formed the so-called conciliation network. The network chiefly deals with international (foreign-related) cases, using a set of uniform conciliation rules, i.e. the CCPIT Conciliation Rules. The mission of the Conciliation Centre and its sub-centres is to provide a formal conciliation framework which accords with international practices and standards, thereby improving trading and investment environment of China. The conciliation network that covers the entire Chinese mainland has, down till 2001, accepted more

[165] *Ibid*

[166] Yamming Wei; " New Development of ADR in China" viewed at www.stf.jus.br (last accessed on 06.07.12)

than 3000 cases. Parties involved in the conciliation spread over more than 30 countries and regions. The collective and strenuous efforts all these years have resulted in a high degree of professionalism and the resolution of 80% of the cases the conciliation network deal with. With the high quality conciliation service by professional conciliators and support teams and case management service, the Centre has kept as the major international ADR centre in China for years.

V. ALTERNATIVE DISPUTE RESOLUTION IN FRANCE:[167]

INTRODUCTION

The concept of ADR as an extrajudicial way to resolve disputes was originally developed in North America. In the USA, it was first experienced in commercial matters. Its main impetus was the high cost of American litigation and the desire of litigants to retain business relationships rather than destroy them after a court sentence.

Later, ADR started to be used in the form of "community mediation" in neighbourhood disputes and in family conflicts. In neighbouring Canada, ADR initially began to be used in family law. In the mid 1980s' the use of mediation began to be spread into civil non-family cases- mostly vigorously in personal injury cases. Some federal states like Quebec, today require mediation in any family law case before an issue of custody or access can go to the courts.

In most parts of Europe, particularly in UK, mediation was introduced from the USA. The major francophone countries- France, Belgium and Switzerland however took it over from Quebec.

From the very first, mediation associations and mediators had two main aims for the new profession- professionalization and legalization.

Legal recognition of mediation in francophone Europe started in the early 1990s'. A huge increase in the number of divorces in the 1980s' and the concern of public authorities of the cost of these procedures was one important factor for a rapid introduction of mediation into civil law procedures.

[167] ADR and Mediation: The Experience of French Speaking Countries; viewed at www.dhdi.free.fr (last accessed on 07.07.12)

MEDIATION IN FRENCH LAW

In France, mediation was formally recognised by the Loi. Under this law, a judge hearing a matter can appoint a third person for up to three months with the consent of the parties. If the mediator requests it, another three months can be granted. The mediation can apply to a part or the whole of a matter and the judge can stop the mediation at any time if the mediator or either party requests it. Mediator is always optional.

The mediator's remuneration is set by the judge and is the responsibility of the parties who must make a provisional payment at the start of the procedure. Impecunious parties are eligible for legal aid. When mediation takes place out of the court, there are no general regulations governing it.

JUDICIAL CONCILIATION IN FRENCH LAW

Besides mediation, conciliation has existed long time as before as another alternative way to resolve disputes in France. Unlike mediation, conciliation is a free service. Conciliators are no professionals. They are voluntary legal assistants registered on a list drawn up by the First President of the Court of Appeal following a proposal by the court of first instance. The law on guidance and planning for legal proceedings allows the court of first instance and the local courts to order the parties to meet a conciliator to inform them about the aims and procedures of the conciliation process.

OUT OF COURT CONCILIATION AND FRENCH LAW

Out of court, the parties may resort to conciliation before a legal conciliator, if their disputes concerns rights that they are free to exercise. The conciliators receive the parties, who may have assistance. They act in complete confidentiality; that is to say the reports and declarations that they obtain may not be produced or cited later in subsequent proceedings without the consent of the parties. The memorandum of agreement may become equally enforceable if the parties ask the presiding judge of a court of first instance to order this (Section 1441-4 of the New Code of Civil Procedure). These agreements

therefore have the same legal force as a judgement. In other cases, the agreement will have the same value as a contract between the parties. If the agreement is not enforced, the party so requiring may bring the dispute before the judge.

ARBITRATION IN FRENCH LAW

Arbitration in civil and commercial affairs is mainly organised in Sections 1442-1491 of the New Code of Civil Procedure. Unless the litigants did not convene on it, arbitrators are relatively free to fix the arbitration procedure. They have important rights to exercise their instructions and are assimilated in many regards to regular magistrates. The arbitration sentence is legally enforceable. Appeals are possible before the ordinary courts of appeal.

PARTICULAR CASES OF ADR MECHANISMS IN FRENCH LAW

Besides the general provisions on conciliation, mediation and arbitration, various compulsory or optional extrajudicial conflict settlement mechanisms exists in French Law for particular types of disputes. They are:

1. Conflicts between employers and employees;
2. Conflicts between landlords and tenants;
3. For conflicts between consumer and business;
4. Where insurance is concerned;
5. In matters involving banks

ADR IN FRANCOPHONE EUROPE: ADVANTAGES

Within ten to fifteen years, ADR has become an important element of the European legal systems. In comparison to long and cost-intensive procedures before court, its advantages are generally perceived as follows:

1. Preservation of existing relationships;
2. Arrangements may be made quickly; process usually takes one day or less;
3. Simple and easy process;

4. Confidentiality;
5. Process non-binding; the outcome is within the control of the parties;
6. High level of satisfaction.

RECENT DEVELOPMENTS:[168]

London Court of International Arbitration (the "LCIA") in India Goes Alive

In April 2009 the LCIA launched its first independent subsidiary in New Delhi. The LCIA is one of the longest-established arbitral institutions in the world and the LCIA in India offers all the services offered by the LCIA in the UK and is expected to extend the same care to ensure the expeditious, cost effective and totally neutral administration of arbitration and other forms of alternate dispute resolutions (ADR). Disputes can be resolved according to LCIA India's own rules, or the UNCITRAL rules, or any other procedures agreed by the parties. The LCIA published the LCIA India Arbitration Rules and the LCIA India Mediation Rules (both adopted to take effect for arbitrations/mediations commencing on or after 17 April 2010) rendering the LCIA India operational with this. Currently the following options are available to resolve disputes in India: the Indian court system, which is well-known to be a lengthy process; ad hoc arbitration in India, also subject to delays, expense and excessive judicial intervention; and arbitration using an offshore institution, notably the LCIA, ICC and SIAC in Singapore. The effectiveness of the LCIA in India will go a long way in allaying the fear of litigation delays in India and will help reduce litigation costs for the parties.

New Dispute Resolution Opportunities Offered By Investment Treaties

India has entered into bilateral investment treaties with a number of countries including Australia, France, Japan, Korea, the UK, Germany, Russian Federation, The Netherlands, Malaysia, Denmark and OPIC of the U.S.. Each agreement makes provision for settlement of disputes between an investor of one contracting party and an investor of the other contracting party through negotiation, conciliation and arbitration. India is a party to the Convention establishing the Multilateral Investment

[168] Alternative Dispute Resolution viewed at www.jurisonline.in (last accessed on 24.05.12)

Guarantee Agency (MIGA), which provides for settlement of disputes between parties of members states under the Convention and the MIGA through negotiation, conciliation and arbitration. Under Indian law, the following types of differences cannot be settled by arbitration, but must be settled only through civil suits: matters of public rights; proceedings under the Foreign Exchange Management Act, 1999 which are quasi-criminal in nature; validity of IPR granted by statutory authorities; Taxation matters beyond the will of the parties; winding up under the Companies Act, 1956; and disputes involving insolvency proceedings.

Mandatory Submission to Alternate Dispute Resolution Mechanism ("ADRM")

Since arbitration in India is expensive and time consuming given the delays and lack of arbitrators, businesses are resorting to innovative methods of resolving disputes. It has now become imperative to resort to ADRM as contemplated by Section 89 of the Code of Civil Procedure 1908. There is a requirement that the parties to the suit must indicate the form of ADR, which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Act will apply and that will go outside the stream of the court. (*Shree Subhlaxmi Fabrics Pvt. Ltd. v Chand Mal Baradia*, Civil appeal no: 7653 of 2004). The popularity and use of ADRM is increasing but it can achieve its best only if the same is integrated with the information technology. The ADR techniques are extra-judicial in character. ADRM is not proposed to displace in total the long-established means of resolving disputes by means of litigation. "It Only Offers Alternatives To Litigation". Constitutional law and criminal law are areas, where ADR cannot surrogate courts - one has to take route of the existing traditional modes of dispute resolution.

Online Dispute Resolution in India ("ODRM")

Section 16 of the Act provides that the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or authority of the arbitration agreement. Thus, the base provided by the Act is sufficient to accommodate the mandates of ODRM. The ADR system can be efficiently used to settle online disputes by modifying it as per the requirement. It is time effective and cost efficient. It can also conquer the geographical obstacles. A complete techno-legal support is recognized and is being geared up before hand.

Dispute Resolution Panel Gets Life in India to Settle Transfer Pricing Disputes

Speedy resolution of tax disputes and certainty in tax aspects has been a long-standing demand of foreign companies doing business with/in India. The Indian Government finally reacted to this demand and announced ADRM in the form of a Dispute Resolution Panel (DRP) in the last budget. The DRP mechanism applies to Indian companies where the tax authorities have proposed to make an adjustment to the arm's length price in relation to their transactions with overseas affiliates. It also applies to all foreign companies who are assessed to tax in India. However, it does not apply to withholding tax orders passed by the tax authorities. The DRP as an ADRM would be welcomed by MNCs who either are reeling under the cumbersome, time consuming and expensive tax litigation process or have heard about India's reputation as a notorious tax jurisdiction. If the government can iron out procedural lacunas and provide sufficient capacity and competent officers to the DRP, it will finally be walking the talk on an ADRM.

Consultation Paper on Changes to the Indian Arbitration Act, 1966

In April this year, the Indian Ministry of Law and Justice tabled a consultation paper on changes to the Indian Arbitration Act, 1966. The consultation paper acknowledges that in certain cases the Arbitration Act has been interpreted in ways that "defeated the main object" and also recognizes issues in the current law. In view of this several amendments have been proposed and some important changes are listed below:

- A clearer definition of "public policy" as a ground for refusing enforcement of a foreign arbitral award. This will be a welcome change as an earlier Supreme Court decision had been viewed as authorising greater judicial interference in foreign awards;
- stricter timelines in arbitration; and
- Mandatory institutional arbitration in disputes of over Rs 5 crore (US$1.11 million) unless expressly excluded by the parties in writing.

It is unclear as to when proposed legislation based on the consultation paper will be tabled before Parliament. In the meantime, the consultation paper has for the large part evoked positive reactions from the legal community. However, not all the proposals are well received. For instance the last proposal, which is against the well-established principle of party autonomy in arbitration, is controversial.

CONCLUSION:

Actually informal dispute resolution has a long tradition in many of the world societies dating to 12th century in China, England and America. The business world has rightly recognised the advantages that the ADR in one form or the other is a right solution. It is felt that it is less costly, less adversarial and thus more conducive to the preservation of business relationships which is of vital importance in the business world. The use of ADR has grown tremendously in the international including tremendous expansion of international commerce and the recognition of global economy. Many governments around the world have supported the demand for ADR as an efficacious way of handling international commercial disputes. ADR has also become a common provision in the United States trade treaties and the United States has been the strongest supporter of international commercial ADR. Many experts in this field are of the strong opinion that the impact of ADR on international commerce is great and will continue to expand. Numbers of ADR institutions are being established. In this background, the number for setting up the International Centre for Alternative Dispute Resolution, though was felt sometime, came to be true by the inauguration of the International Centre in India.[169]

Even in international commercial arbitration with the risk of enforcement of the awards being held up indefinitely in the courts of the country where the award is sought to be executed, there is an increasing awareness of the utility of conciliation.[170]

In the Far East, in particular in Japan and China, conciliation has long since been a preferred method for resolving disputes- this applies also to commercial disputes.

It is generally accepted that *res judicata* doctrine is also applied in the context of international arbitration, such that a final award has *res*

[169] Rao, P.C & Sheffield, William "Alternative Dispute Resolution- What it is and how it works?", Universal Law Publishing Co. Pvt. Ltd. New Delhi- India, 1997 Edition, Reprint 2011; Reddy Jayachandra K. "Alternative Dispute Resolution", pp. 79-80

[170] Rao, P.C & Sheffield, William "Alternative Dispute Resolution- What it is and how it works?", Universal Law Publishing Co. Pvt. Ltd. New Delhi- India, 1997 Edition, Reprint 2011; Nariman F.S. "Arbitration And ADR In India", pp. 53-54

judicata effect. *Res judicata* has been identified as a legally binding principle. There are four pre-conditions for the doctrine of *res judicata* to apply in international law, they are-

i. Proceedings must have been conducted before courts or tribunals in the international legal order.

ii. Involve the same relief.

iii. Involve the same grounds.

iv. Between the same parties.[171]

Res judicata in international law relates only to the effect of a decision of one international tribunal on a subsequent international tribunal.

The ICJ has recognised and applied the principle of *res judicata* in various cases. Few cases are as such:[172] In 1960, ***Honduras v. Nicaragua*** arbitral award case concerning the arbitral award made by the King of Spain.

In its most recent practice the ICJ has relied on the res judicata principles in a matter of course fashion in the request for interpretation of the judgement of 11th June, 1998 in the Land and Maritime Boundary case between Cameroon and Nigeria and in the boundary dispute between Qatar and Bahrain case.

[171] Malhotra, Indu; "Res judicata in Arbitration", NYAYA DEEP, Vol. V, Issue: 01, Oct. 2004, p. 117
[172] *Ibid*

CHAPTER- V

DIFFERENT ALTERNATIVE METHODS OF DISPUTE SETTLEMENT

Modern ADR is a voluntary system, according to which parties enter a structured negotiation or refer their disputes to a third party for evaluation and/or facilitation of resolution. Especially in the light of the facts that the justice system is flooded by disputes of variable importance and complexity, and that the parties are almost invariably intimidated by the atmosphere in the courtroom and the litigation process itself. ADR has now become acceptable and often preferred alternative to judicial settlement and an effective tool for reduction of arrears of cases. The alternative modes of disputes resolution include- Arbitration, Negotiation, Mediation, Conciliation, Lok Adalat, National and State Legal Authority.

ADR strategies which facilitate the development of consensual solution by the disputing parties are therefore considered a viable alternative. ADR methods such as mediation, negotiation and arbitration along with many sub-strategies are increasingly being employed world over in a

wide range of conflict situations, ranging from family and marital disputes, business and commercial conflicts, personal injury suits, employment matters, medical care disputes, construction disputes to more complex disputes of a public dimension such as environmental disputes, criminal prosecutions, professional disciplinary proceedings, inter-state or international boundary and water disputes.

A. ARBITRATION:

According to Russell, "the essence of arbitration is that some disputes are referred by the parties for settlement to a tribunal of their own choice instead of to a court." Arbitration is a procedure for the resolution of disputes on a private basis through the appointment of an arbitrator, an independent, neutral third person who person who hears and considers the merits of the dispute and renders a final and binding decision called an award.[173] The parties to the arbitration have some control over the design of the arbitration process. In the Indian context the scope of the rules for the arbitration process are set out broadly by the provisions of the Arbitration and Conciliation Act, 1996 and in the areas uncovered by the Statute the parties are free to design an arbitration process appropriate and relevant to their disputes. There is more flexibility in the arbitration process than in the traditional courts system as the parties can facilitate the creation of an arbitral process relevant to their disputes. Once the process is decided upon and within the parameters of the Statute, the Arbitrator assumes full control of the process. Among the advantages of the arbitration process are considerable saving in time and money compared to a trial; the limited possibility for challenging the award which again contribute the lower costs and finality of outcome; and greater participation by the parties than is case in the courts/tribunal system. Arbitration may be *ad-hoc*, contractual, institutional or statutory.[174]

Arbitration is thus defined by ROMILLY MR. in the well- known case of *Collins vs. Collins:*[175]

"Arbitration is a reference to the decision of one or more persons, either with or without an umpire, of a particular matter in difference between the parties."

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[173] Prof. Agarwal, Nomita; "Alternative Dispute Resolution : Concept & Concerns", NYAYA DEEP, Vol. VII, Issue: 01, Jan. 2006, p.73
[174] Raghuram, Goda, J.; "Alternative Dispute Resolution", NYAYA DEEP, Vol. VIII, Issue: 02, April- 2007, pp. 19-20
[175] 28 LJ Ch. 186: (1858) 26 Beav 306

B. CONCILIATION:

Conciliation is a private, informal process in which a neutral third person helps disputing parties reach an agreement. This is a process by which resolution of disputes is achieved by compromise or voluntary agreement. Here the parties, together with the assistance of the neutral third person or persons, systematically isolate the issues involved in the dispute, develop options, consider alternatives and reach a consensual settlement that will accommodate their needs.[176] In contrast to arbitration, the conciliator does not render a binding award. The parties are free to accept or reject the recommendations of the conciliator. The conciliator is, in the Indian context, often a Government official whose report contains recommendations. The conciliation process is sometimes considered synonymous to mediation. Where a third party is informally involved without a provision under any law, which is mediation. In other words a non-statutory conciliation is what mediation is. Essentially however in effect and structure, conciliation and mediation are substantially identical strategies where assistance is provided to parties to a dispute by a stranger to the dispute. Both the conciliator and mediator are required to bring to the process of dispute resolution fairness, objectivity, neutrality, independence and considerable expertise, to facilitate a resolution of the conflict.[177]

Part III of the Arbitration and Conciliation Act, 1996 deals with conciliation. Conciliation means "the settling of disputes without litigation." The main difference between arbitration and conciliation is that in arbitration proceedings the awards is the decision of the Arbitral Tribunal while in the case of conciliation the decision is that of the parties arrived at with the assistance of the conciliation.[178]

Section-63 fixes the number of conciliators. There shall be one conciliator. But the parties may by their agreement provide for two or three conciliators. Where the number of conciliators is more than one, they should as a general rule act jointly. In a conciliating proceeding if there is one conciliator, then the parties agree on the name sole conciliator. And if there are two conciliators then each party may appoint one conciliator, whereas if there are three conciliators then each party

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[176] Prof. Agarwal, Nomita "Alternative Dispute Resolution : Concept & Concerns", NYAYA DEEP, Vol. VII, Issue: 01, Jan. 2006, p. 73

[177] Raghuram, Goda, J.; "Alternative Dispute Resolution", NYAYA DEEP, Vol. VIII, Issue: 02, April-2007, pp. 21-22

[178] Singh, Dr. Avtar; Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 7th Edition(2006), p. 471

may appoint one conciliator and the parties may appoint the third one who shall act as the presiding conciliator.[179]

It is the conciliator who fixes the costs of the conciliation proceedings upon their termination and gives written notice of it to the parties. The costs are borne by the parties in equal shares.[180]

'Conciliation' is term used interchangeably with mediation and sometimes used to distinguish between one of these processes (often mediation) involving a more pro-active mediator role, and the other (conciliation) involving a more facilitative mediator role; but there is no consistency in such usage.[181]

C. MEDIATION:

It is an informal process in which a neutral third party without the power to decide or usually to impose a solution helps the parties resolve a dispute or plan a transaction. Mediation is voluntary and non-binding, although the parties may enter into a binding agreement as a result of mediation. It is not an adjudicative process.[182] The process of mediation aims to facilitate their negotiations. The mediator has no independent decision-making power, jurisdiction or legitimacy beyond what is voluntarily offered by the parties themselves. Mediation is a process of structured negotiation conducted by a facilitator with skill, training and experience necessary to assist the litigating parties in reaching a resolution of their dispute. It is a process that is confidential, non-coercive and geared to aid them in arriving at a mutually acceptable resolution to their dispute of any nature. One of the advantages of the mediation process is its flexibility. It is not as if one party wins and the other party looses. But the parties arrive at an equitable solution that is why mediation is said to be a win-win situation. Mediation employs several strategies, sub-strategies and techniques to encourage the parties to reach an agreement.[183]

Mediation like many ADR strategies has distinct advantages over the traditional courts/ tribunals format of dispute resolution. The advantages

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[179] *Ibid,* p. 472
[180] *Ibid*, p. 479
[181] Sathe, S.P; "Judicial Activism in India- Transgressing Borders and Enforcing Limits", Oxford India Paperbacks, 4th Edition- Reprint 2007, O.P Tewari "Alternative Dispute Resolution", p. 236
[182] Sinha, S.B. J.; "Mediation: Constituents, Process and Merit", NYAYA DEEP, Vol. VII, Issue: 04, Oct. 2006, p. 35
[183] Raghuram, Goda, J. "Alternative Dispute Resolution", NYAYA DEEP, Vol. VIII, Issue: 02, April-2007, pp. 20-21

of ADR including mediation are the informality of the process, the speed in dispute resolution, relatively low cost, the ability of the process to focus on the disputing parties interests and concern rather than exclusively on their legal rights; encouragement to the parties to fashion their own solutions; much greater involvement of the parties in the process; the essential confidentiality of the process and the high success rate.[184]

The appropriate case for mediation are those where-

1. Parties want to control the outcome.
2. Communication problem exist between parties or their lawyers.
3. Personal or emotional barriers prevent settlement.
4. Resolution is more important than vindicating legal or moral principles.
5. Creative possibilities for settlement exist.
6. Parties have an ongoing or significant past relationship.
7. Parties disagree about the facts or interpretation.
8. Parties have incentive to settle because of time, cost of litigation, drain on productivity, etc.
9. A formidable obstacle to resolution appears to be the reluctance of the lawyers, not the parties.[185]

Practitioners in this field adopt their own perfected styles. They differ in their basic steps. A lot depends upon their nature of the dispute. The more complicated the matter, the more private meetings would be necessary to pave the ground for a joint meeting.[186]

A mediator may adopt either an Evaluative Approach or Facilitative Approach. Mediators try to avoid opinions and judgements. They either facilitate or encourage parties to open upon their communications and disclose their interests and priorities. In this process the mediator gets the opportunity of locating the points of difference and the area of controversy or dispute. He may then help the parties to parties to bridge the gap between them. Mediation may also take the shape of mini-trial. This is a more formal type of mediation practice. Still another method of mediation is Consensus Building. There are certain matters of general public interest, e.g. road building, canal digging or the location of a factory. They affect public in general and not just only one or two individuals. Pollution problems may have to be taken care of. A public

[184] *Ibid*, p. 21
[185] Sinha, S.B. J. "Mediation: Constituents, Process and Merit", NYAYA DEEP, Vol. VII, Issue: 04, Oct. 2006, p. 35
[186] Singh, Dr. Avtar, Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 7th Edition(2006), p. 533

consensus may become necessary. Mediators have to play their role for all the above purpose.[187]

The Chief Justice of Supreme Court of New South Wales has observed that:[188]

"*Mediation is an integral part of the Courts adjudicative processes and the 'shadow of the Courts' promotes resolution.*"

D. NEGOTIATION:

Negotiation in principle is any form of communication between two or more people for the purpose of arriving at a mutually agreeable situation.[189] Negotiation has been defined as "the process we use to satisfy our needs when someone else controls what we want." Most of the disagreements or differences are dealt with in one way or the other by negotiation between the principals themselves; relatively few involve legal intervention.[190] In this form of ADR the disputants or their agents maintain control over the negotiation process. There are several techniques of negotiation such as competitive bargaining, cooperation bargaining and principled negotiation which are but different facets and styles of negotiations. In the competitive bargaining method the negotiators are essentially concerned with substantive results and advocate extreme positions, create extravagant issues, mislead the other negotiator or even bluff in order to gain an advantage and to ascertain the other negotiator's bottom line.[191]

In cooperative bargaining both negotiations focus on building up a relationship of trust and cooperation. In this strategy the negotiators are prepared to make concessions even on substantives issues as the endeavour is to preserve the relationship. In principled negotiations the negotiator focus on the interests of each of the disputants, with the goal of creating satisfactory and elegant options for resolutions, which may be assessed by objective criteria.[192]

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[187] *Ibid,* pp. 533-534
[188] Balakrishnan K.G. J.; "Mediation and Conflict Resolution", NYAYA DEEP, Vol. IX, Issue: 02, April-2008, pp. 11-12
[189] Raghuram, Goda, J. ; "Alternative Dispute Resolution", NYAYA DEEP, Vol. VIII, Issue: 02, April-2007, p. 20
[190] Sathe, S.P.; "Judicial Activism in India- Transgressing Borders and Enforcing Limits", Oxford India Paperbacks, 4th Edition- Reprint 2007, O.P Tewari "Alternative Dispute Resolution", pp. 234-235
[191] *Supra* note (177)
[192] *Ibid*.

This is the business method that can be said to be used more than any other, and with good cause- it is the most flexible, informal and party directed, closest to the parties' circumstances contrast and can be geared to each party's own concerns.[193]

Negotiation occurs in business, non-profit organizations, government branches, legal proceedings, among nations and in personal situations such as marriage, divorce, parenting, and everyday life. The study of the subject is called negotiation theory. Those who work in negotiation professionally are called negotiators. Professional negotiators are often specialized, such as union negotiators, leverage buyout negotiators, peace negotiators, hostage negotiators, or may work under other titles, such as diplomats, legislators or brokers.[194]

E. LOK ADALAT:

Equal Justice for all is a cardinal principle on which the entire system of administration of justice is based. It is deep rooted in the body and spirit of common law as well as civil law jurisprudence. This ideal has always been there in hearts of every man since the dawn of civilisation. It is embedded in Indian ethos of justice- '*dharma*'. The ideal of justice was even inserted in "*Magna Carta*" where it was stated that:

> "To no man will we deny, to no man will we sell, or delay, justice or right."[195]

Legal Aid as a human right is implicit in Articles: 7, 8 and 10 of the **Universal Declaration of Human Rights (UDHR)**, and is also observed under clause 3(d) of Article 14 of the **International Covenant on Civil and Political Rights**. Under the **Indian Constitution**, Article: 39A has been inserted by the Forty-second Amendment of the Constitution in 1976 which states:

"*Equal Justice and free Legal Aid:* The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities

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[193] *Ibid.*

[194] Alternative Dispute Resolution (ADR Mechanism in India) viewed at www.legalserviceindia.com (last accessed on 15.04.12)

[195] Rao, P.C & Sheffield, William "Alternative Dispute Resolution- What it is and how it works?", Universal Law Publishing Co. Pvt. Ltd. New Delhi- India, 1997 Edition, Reprint 2011, Ramaswamy K. "Settlement of Disputes Through Lok Adalat Is One Of The Effective Alternative Dispute Resolution (ADR) On Statutory Basis", p. 93

for securing justice are not denied to any citizen by reason of economic or other disabilities."[196]

ADR (Alternate Dispute Resolution) system has been an integral part of our historical past. The concept of Lok Adalat (Peoples' Court) is an innovative Indian contribution to the world jurisprudence. The institution of Lok Adalat in India, as the very name suggests, means, People's Court."Lok" stands for "people" and the term "Adalat" means court. India has a long tradition and history of such methods being practiced in the society at grass roots level. In ancient times the disputes were used to be referred to "panchayat" which were established at village level. Panchayat's used to resolve the dispute through arbitration. It has proved to be a very effective alternative to litigation. This very concept of settlement of dispute through mediation, negotiation or through arbitral process known as decision of "Nyaya-Panchayat" is conceptualized and institutionalized in the philosophy of Lok Adalat. It involves people who are directly or indirectly affected by dispute resolution.[197]

The evolution of movement called Lok Adalat was a part of the strategy to relieve heavy burden on the Courts with pending cases and to give relief to the litigants who were in a queue to get justice.[198]

"While Arbitration and Conciliation Act, 1996 is a fairly standard western approach towards ADR, the Lok Adalat system constituted under National Legal Services Authority Act, 1987 is a uniquely Indian approach."[199]

It roughly means "People's court". India has had a long history of resolving disputes through the mediation of village elders. The system of Lok Adalats is an improvement on that and is based on Gandhian principles. This is a non-adversarial system, where by mock courts (called Lok Adalats) are held by the State Authority, District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee, or Taluk Legal Services Committee, periodically for exercising such jurisdiction as they thinks fit. These are usually presided by retired judge, social activists, or members of legal profession. It does not have jurisdiction on matters related to non-compoundable offence.[200]

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[196] *Ibid*. pp. 93-94
[197] Kumar Sanjeev "Lok Adalat and Free Legal Aid" viewed at www.legalindia.in (last accessed on 15.04.12)
[198] *Ibid*.
[199] Alternative Dispute Resolution Mechanism viewed at www.legalserviceindia.com (last accessed on 15.04.12)
[200] *Ibid*.

There is no court fee and no rigid procedural requirement (i.e. no need to follow process given by Civil Procedure Code or Evidence Act), which makes the process very fast. Parties can directly interact with the judge, which is not possible in regular courts. Cases that are pending in regular courts can be transferred to a Lok Adalat if both the parties agree. A case can also be transferred to a Lok Adalat if one party applies to the court and the court sees some chance of settlement after giving an opportunity of being heard to the other party.[201]

The focus in Lok Adalats is on compromise. When no compromise is reached, the matter goes back to the court. However, if a compromise is reached, an award is made and is binding on the parties. It is enforced as a decree of a civil court. An important aspect is that the award is final and cannot be appealed, not even under Article 226 because it is a judgement by consent. All proceedings of Lok Adalat are deemed to be judicial proceedings and every Lok Adalat is deemed to be a Civil Court. Lok Adalat i.e. the People's court is established by the Government which settles disputes through conciliation and compromise. The first Lok Adalat was established in Chennai in 1986. Lok Adalat accepts those cases which can be settled by conciliation and compromise and pending in the regular courts within their own jurisdiction.[202]

The Lok Adalat is presided over by a sitting or a retired judicial officer as the Chairman, with two other members, usually a lawyer and a social worker. There is no court fee. If the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the Lok Adalat. The procedural laws and the Evidence Act are not strictly followed while assessing the merits of the claim by the Lok Adalat. The main condition required to solve a dispute in the Lok Adalat is that both the parties should agree for settlement. The decision of the Lok Adalat is binding on the parties to the dispute and its order is capable of execution through legal process. No appeal lies against the order of the Lok Adalat.[203]

The Institution of Lok Adalat tries to resolve the people's disputes by discussions, counselling, persuasions and conciliation, which results in quick and cheap justice. Initially, civil, revenue and criminal disputes, which were compoundable, were taken up by the Lok Adalats. Types of cases taken up by Lok Adalat prior to 2002 amended Act are: Insurance cases, Motor Accident Claims Tribunal cases, Mutation of Land, Land Pattas, Electricity cases, Forest land cases, Bonded Labour cases,

[201] *Ibid.*
[202] *Ibid.*
[203] *Ibid*

Acquisition cases, Matrimonial and Family Disputes, Bank Loan cases, etc.[204]

Recently, the Parliament amended the Legal Services Authorities Act, 1987 with the intention to constitute 'Permanent Lok Adalat' for deciding the disputes concerning 'Public Utility Services' which means transport services; postal or telephone services; supply of power, light or water; system of public conservancy or sanitation; services in hospital or dispensary; Insurance services.[205]

In 1987 Legal Service Authorities Act was enacted to give a statutory base to legal aid programmes throughout the country on a uniform pattern. This Act was finally enforced on 1995 after certain amendments were introduced therein by the Amendment Act of 1994. National Legal Service Authority (NALSA) was constituted on 5th December, 1995. It is a statutory body constituted under the National Legal Services Authorities Act, 1986 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 equal opportunity. NALSA is engaged in providing legal services, legal aid and speedy justice through Lok Adalats. The Authority has its office at New Delhi and is headed by the Chief Justice of India, who is the *ex-officio* Patron-in-Chief.[206]

Similarly, the State Legal Service Authorities have been constituted in every State Capital. Supreme Court Legal Services Committee, High Court Legal Services Committees where it is headed by Chief Justice of the State High Court who is the Patron-in-Chief and a serving or retired Judge of the High Court is its *ex-officio* Chairman, District Legal Services Authorities where it is headed by the District Judge of the District and acts as the *ex-officio* Chairman, Taluk Legal Services Committees have also been constituted in every State. Every Taluk Legal Services Committee is headed by a senior Civil Judge operating within the jurisdiction of the Committee who is its ex-officio Chairman.[207]

Up to 31st March, 1996, more than 13,000 Lok Adalats have been held in the country, where over 5 million cases have been settled. Out of these, 2, 78,801 Motor Accident Claims Tribunal cases have been settled where compensation amounting to over 8,612 million rupees has been paid to the claimants. Lok Adalat is a boon to the litigant public.[208]

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[204] Dilip B. Bhosale, J.; "Alternative Dispute Resolution, An Effective Alternative", INDIAN BAR REVIEW, Vol. XXX (1) 2003, p. 50
[205] *Ibid.* pp. 50-51
[206] Role of ADR Methods in Development of Society: Lok Adalat in India viewed at www.iimahd.in (last accessed on 18.04.12)
[207] *Ibid.*

CHAPTER- VI

THE ARBITRATION AND CONCILIATION ACT, 1996: THE SHADOW OF LAW

[208] Rao, P.C & Sheffield, William; "Alternative Dispute Resolution- What it is and how it works?", Universal Law Publishing Co. Pvt. Ltd. New Delhi- India, 1997 Edition, Reprint 2011, Ramaswamy K. "Settlement of Disputes Through Lok Adalat Is One Of The Effective Alternative Dispute Resolution (ADR) On Statutory Basis", p. 99

1. EVOLUTION OF THE ACT:

Arbitration as an institution for settlement of disputes has been known and practiced in all civilised societies from time immemorial. "Of all mankind's adventures in search of peace and justice, arbitration is amongst the earliest. Long before law was established or courts were organised, or judges has formulated principles of law, man had resorted to arbitration for resolving disputes." Traces of the practice of settling disputes through the method of arbitration was found in the institutions of Panchas and Panchayat which were practiced in many village communities and tribal areas in India. But with the advent of the British rule and the introduction of their legal system in India starting from the Bengal Regulation of 1772, the traditional system of dispute resolution methods in India gradually declined. The successive Civil Procedure Codes enacted in 1859, 1877 and 1882, which codified the procedure of civil courts, dealt with both arbitration between parties to a suit and arbitration without the intervention of a court.[209]

The first Indian Arbitration Act was enacted in 1899. This Act was largely based on the English Arbitration Act of 1889 and applied only to cases where, if the subject matter of a suit, the suit could, whether with leave or otherwise, be instituted in what was then known as a Presidency town. The scope of this Act was confined to arbitration by agreement without the intervention of a court.[210]

The Code of Civil Procedure, 1908 originally omitted the arbitration proceedings in the hope that they would be transferred to the comprehensive Arbitration Act.

The year 1940 is an important year in the history of law of arbitration in British India, as in that year the Arbitration Act, 1940 was enacted. It consolidated and amended the law relating to arbitration as contained in the Indian Arbitration Act, 1899 and the Second Schedule to the Code of Civil Procedure, 1908. It was largely based on the English Arbitration Act, 1934. But it was noticed or rather observed that certain cases were still pending and there were some drawbacks on the enactment of this Act. Thus then led to the enactment of the Arbitration and Conciliation Act, 1996.[211]

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[209] Rao P.C & Sheffield William "Alternative Dispute Resolution- What it is and how it works?", Universal Law Publishing Co. Pvt. Ltd. New Delhi- India, 1997 Edition, Reprint 2011, Unni A.C.C. "The New Law of Arbitration and Conciliation in India", pp. 68-69

[210] *Ibid*.

[211] Rao P.C & Sheffield William "Alternative Dispute Resolution- What it is and how it works?", Universal Law Publishing Co. Pvt. Ltd. New Delhi- India, 1997 Edition, Reprint 2011, Rao P.C "The Arbitration and Conciliation Act, 1996: The Context", pp. 33-44

2. THE FORM AND CONTENT:

This Act contains 85 Sections, besides the Preamble and three Schedules. The Act is divided into four Parts. Part-I contains general provisions on arbitration. Part-II deals with enforcement of certain foreign awards. Part-III deals with conciliation. Part-IV contains certain supplementary provisions. The Preamble to the Act explains the biases of the proposed legislation. The three Schedules reproduce the texts of the Geneva Convention on the Execution of Foreign Awards, 1927; The Geneva Protocol on Arbitration Clauses, 1923; and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 respectively.[212]

Part-I closely deals with the provisions of the UNCITRAL Model Law but some of them differs from that of the Model Law. Some of the Sections are mentioned below:[213]

a) Section-10(1) deals with the number of arbitrators in an arbitral tribunal and provides that that the number of arbitrators shall not be of even number. Section-10(2) provides that the arbitral tribunal shall consist of a sole arbitrator.

b) Section-11(10) empowers the Chief Justice of India or the Chief Justice of the High Court, as the case may be, to make such scheme as he deem appropriate for dealing with the appointment of arbitrators.

c) Section-13 does not permit the challenging party to approach the Court when the challenge made to the arbitral tribunal is not successful. However after the award is made, the party could challenge the award on the ground that the arbitrator has wrongly rejected the challenge.

d) Section-16 states that if the arbitral tribunal turns down the plea that it has no jurisdiction then the Act does not make the provision for approaching the Court at that stage.

e) Section-31(7) contains detailed provisions on award of interest by the arbitral tribunal. It deals with the costs of arbitration.

[212] *Supra* note (197)
[213] *Supra* note (200)

f) Section-36 provides that under two situations, namely- a) where an award is not challenged within the prescribed period, or b) where an award has been challenged but the challenge is turned down, the award shall be enforced in the same manner as if it were a decree of the court.

g) Section-37 makes provision for appeals in respect of certain matters

h) Section-38 enables the arbitral tribunal to fix the amount of deposit or supplementary deposit, as the case may be, as an advance for the cost of arbitration.

i) Sections 39 to 43 are largely based on the corresponding provision in 1940 Act.

Part-II contains sections 44-60. It incorporates provisions of the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. It states that any award given outside India, whether or not made in an arbitration agreement covered by the law of India, will henceforth be treated as a foreign award.[214]

Part-III deals with conciliation. It does not define what conciliation is. Conciliation is one of the non-litigative dispute resolution processes. Conciliation process aims at securing a compromise solution rather than solution according to the law. It is a voluntary, non-judicial, speedy and confidential process. The cost of conciliation is much less than the costs of litigation. Above all, conciliation process allows the parties to be more directly involved in the resolution of the dispute; consequently in this process, the parties retain freedom of action with regard to initiating, conciliation, adapting the proceedings to their particular case, and discontinuing it if there is any such violation.[215]

Thus to make arbitration and conciliation a success story in India, three things are needed:

4) A good law that is responsive to both domestic and international requirements.

[214] *Supra* note (200)
[215]Rao P.C & Sheffield William "Alternative Dispute Resolution- What it is and how it works?", Universal Law Publishing Co. Pvt. Ltd. New Delhi- India, 1997 Edition, Reprint 2011, Nariman F.S. "Arbitration and ADR In India", pp. 45-56

5) Honest and competent arbitrators and conciliators without whom any law or arbitration or conciliation can succeed.
6) Availability of modern facilities and services such as meeting rooms, communication facilities, administrative and secretariat services.

Lastly, the establishment of the International Centre for Alternative Dispute Resolution (ICADR), an independent non-profit making body, in New Delhi on May 1995 is a significant event in the matter of promotion of ADR movement in India. [216]

CHAPTER- VII

JUDICIAL EFFORTS TOWARDS ALTERNATIVE DISPUTE RESOLUTION IN INDIA

Justice is the foundation and object of any civilized society. The quest for justice has been an ideal which mankind has been aspiring for generations down the line. Dispute resolution is one of the major functions of a stable society. Through the medium of the State, norms and institutions are created to secure social order and to attain the ends of justice or the least to establish dispute resolution processes. States function through different organs and the judiciary is one that is directly responsible for the administration of justice. In commonplace perception judiciary is the tangible delivery point of justice. Resolving disputes is fundamental to the peaceful existence of society. The only field where the Courts in India have recognized ADR is in the field of arbitration. The arbitration was originally governed by the provisions of the Indian Arbitration Act, 1940. The Courts were very much concerned over the supervision of Arbitral Tribunals and they were very keen to see whether the arbitrator has exceeded his jurisdiction while deciding the issue, which has been referred to him for arbitration.

Preamble to our Constitution reflects such aspiration as “justice-social, economic and political”. Article 39A of the Constitution provides for ensuring equal access to justice. Administration of Justice involves

[216] *Ibid*

protection of the innocent, punishment of the guilty and the satisfactory resolution of disputes.

Indian judicial system, for all intents and purposes, is highly tedious, tardy and tiring. Not only is the judicial process extremely expensive for an ordinary person but also takes years and years to deliver justice. In order to overcome the much criticised delay in justice delivery, the adoption of Alternative Dispute Resolution (ADR) mechanisms like *Lok Adalats*, arbitration, mediation and conciliation was thought of and subsequently practised with commendable success. Although the alternative mechanisms have delivered speedy justice to the people, yet the exercise has raised some pertinent questions by some legal luminaries.

In **Baba Ali, Petitioner v. Union of India and Others**,[217] the validity of the Act was challenged on the ground that under the Act of 1996 the question of jurisdiction of the arbitrator can only be considered by the appropriate court after the award is passed and not any penultimate stage. The Delhi High Court rejected the plea. Against this decision a Special Leave Petition was filed in the Supreme Court. The Supreme Court of India dismissed the Special Leave Petition and held that there is no question of the Arbitration and Conciliation Act, 1996 being unconstitutional or in any way offending the basic structure of the Constitution of India, as the High Court has rightly observed that judicial review is available for challenging the award in accordance with the procedure laid down therein. The time and manner of judicial scrutiny can legitimately be laid down by the Act passed by the Parliament.

In **Sundaram Finance Ltd. v. NEPC India Ltd.**[218], the Supreme Court explicitly made it clear that the 1996 Act is very much different from that of Act, 1940. The provisions made in Act of 1940 lead to some misconstruction and so the Act of 1996 was enacted or rather repealed. In order to get help in construing these provisions made in Act of 1996, it is more relevant to refer to the UNCITRAL Model Law besides the Act of 1996 rather than following the provisions of the Act of 1940.

[217] *1999 (Suppl.) Arb. LR 433 (SC)*
[218] *AIR 1999 SC 565; 1999 (1) Arb. LR 305 (SC)*

In **Grid Corp. of Orissa Ltd. v. Indian Charge Chrome Ltd.**[219], Section-37(1) of the Indian Electricity Act, 1910 provides for arbitration by the Commission or its nominee any dispute arising between the licensees or in respect of matters provided under Section-33. The Orissa High Court held that Section-7 of the Arbitration Act, 1996 would apply to the present case in view of the fact that the scope of the Arbitration Act, is very wide and it not only contains arbitration agreement in writing but also other agreements as mentioned in sub-section (4). It also held that if there is any arbitration agreement in any other enactment for the time being in force i.e., statutory agreement, provisions of Arbitration Act, 1996 shall apply except sub-section (1) of Section-40 and Sections 41 and 43.

In **Ashalata S. Lahoti v. Hirala Lilladhar**[220], the Bombay High Court has taken a stand in a few matters, wherein the number of arbitrators was even. It was held that under Section 14 of the Act 0f 1996 the mandate of Arbitrator should terminate, if he becomes *de facto* or *de jure* to perform his functions. It was held that if the Tribunal is constituted contrary to Section-10 of the Act of 1996, the Arbitrators *de jure* will not be able to perform those functions. In that case, the parties can move the Court for decision to decide whether the mandate has been terminated or not. And thus this matter is to be dealt by the Court having a jurisdiction under Section-14(2). So, once it is so treated it will be so held that the Arbitrators de jure cannot proceed with the Arbitration.

In **ITC Classic Finance Ltd. v. Grapeo Mining and Co. Ltd.**,[221] the arbitration clause in a contract provided for ".....sole arbitration of a person appointed by..... (left blank)....". It was held by the Calcutta High Court that neither Section- 11(5) nor 11(6) are relevant. The arbitration clause was held to be vague and uncertain.

In **Hasmukhlal H. Doshi v. Justice M.L. Pendse**,[222] it was urged that Section 12 only deals with pre-referential challenges and not challenges arising in course of tribunal proceedings. Rejecting the contention the Bombay High Court observed that Section 12 (2) incorporates the words

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[219] *1998 (2) Arb. LR 128 (Orissa)*
[220] *1993 (3) Arb. LR.462 (Bombay)*
[221] *AIR 1997 Calcutta 397; 1998(1) Arb. LR 1(Cal)*
[222] *2001 (1) Arb. LR. 87 (Bombay)*

'throughout the arbitral proceedings' and therefore Section 12 cannot be restricted to pre- reference challenges alone.

In **Sri Venkateshwara Construction Co. v. Union of India**,[223] Andhra Pradesh High Court, in an application filed under Section 11, referred to the provisions of Section 10, sub-section (1) and (2) and held that after a close reading of the aforesaid provision it clearly shows that the parties are free to determine the number of Arbitrators, but such number shall not be an even number. Sub-section (2) further provides that if the parties fail to provide for an odd number of arbitrators, the arbitral tribunal shall be constituted by a sole arbitrator.

In **Indowind Energy Ltd. v. Wescare (I) Ltd. & Subuthi Finance Ltd.**, the Supreme Court of India held that the 'third party' to an arbitration agreement is not bound by an arbitration clause in an agreement to which it is not a party. In addition the Supreme Court categorically stated that once a High Court renders a decision under the Act holding that there is an arbitration agreement between the parties, arbitrators are not permitted to re-consider or re-examine the same issue. It is clear that only the parties who have signed or accepted the agreement can be considered as the parties to the arbitration agreement. In this context, it may be quite pertinent to state that the Sec. 82 (2) of the U.K Arbitration Act, 1996 has a broader scope by increasing the definition of 'parties' to include any person claiming under or through a party to the agreement.

In **Dolphin Drilling Ltd. v. M/s. Oil and Natural Gas Corporation Ltd.** Order dated February 17, 2010 in Arbitration Petition No. 21 of 2009, the Supreme Court of India (Court) has, amid additional things, held that the fact that there is already a continuing arbitration in respect of other disputes between the same parties under the same agreement, would not come in the way of either party invoking a fresh arbitration in respect of other disputes that can be arbitrated under the same agreement. Thus, multiple arbitration proceedings for different disputes under one agreement can be possible.

[223] *2001 (2) Arb. LR 619 (AP)*

In **Mahesh Kumar Agarwal v. Raj Kumar Agarwal**,[224] the Madhya Pradesh High Court held: ".....once the parties have appointed an Arbitrator or Arbitrators right or wrong, there is procedure provided in the Act to challenge his authority. The applicant cannot bypass that procedure and directly file an application under Section 11 of the Act before the Chief Justice or the person or institution designated by him. This is clear from Section 12 of the Act read with Section 13 thereof. That apart, the jurisdiction of the Arbitration Tribunal can be challenged under Section 16(1) of the Act. Therefore, once the Arbitrator has already been appointed then there is no occasion for the Chief Justice or his designate to exercise his powers under Section 11 of the Act. The Arbitrator is already seized of the matter and it is for him to decide whether he was validly or invalidly appointed."

In **Guru Nanak Foundation v. M/s Rattan Singh & Sons**,[225] the Supreme Court held "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 and this led them to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by chosen by the parties for expeditious disposal of their disputes has, by the decisions of the Courts been clothed with 'legalese' of unforeseeable complexity."

In **Godrej Properties & Investments Ltd. v. Tripura Construction**,[226] the Bombay High Court it was held that Section- 18 itself is not a ground of challenge; a challenge to an award can only be under Section 34(2). Section 18 could at the highest be invoked to point out denial of opportunity.

In **Orient Paper Mills v. Civil Judge**,[227] the Orissa High Court did not permit the summoning of the Chairman of Arbitral Tribunal as a witness.

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[224] *2000(3) Arb. LR 401 (MP)*
[225] *AIR 1981 S.C. 2075*
[226] *2003(2) Arb. LR 195 (Bombay)*
[227] *(2003) 4 RAJ 479 (Orissa)*

The application was made under Articles 226 and 227 of the Constitution for a direction to the Civil Judge for issuing summons. The award was submitted by the Tribunal. It rejected the claim with a full statement of reasons. The ground on which the Chairman was sought to be summoned was that the Tribunal considered certain document behind the back of the party. The Court said that this ground, if established, would have enabled the party to get the remedy of setting aside. In the presence of such a clear remedy, there was hardly any need for summoning the arbitrator as a witness.

In **Hindustan Petroleum Corporation Ltd. v. Batliboi Environmental Engineers Ltd.**,[228] after addressing the law, this Court took the view that the expression 'public policy' can be found from the constitutional principles and more so the trinity of the Constitution viz., preamble, fundamental rights and the directive principles. Under the circumstances, it would be possible to confine the public policy to those heads, which a writ Court could exercise while exercising the extra ordinary jurisdiction under Article 227 of the constitution of India. A writ Court exercises jurisdiction in a case where an order is without jurisdiction an order is in excess of jurisdiction or the orders suffer from an error of law apparent on the face of record and not a mere error of law and must shock the conscience of the Court.

Now highly controversial judgment given in case of **Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd.**,[229] their Lordships of the Supreme Court interpreted the provisions of Section 34(2)(b) and observed: "Therefore, in our view, the phrase public policy of India used in Section 34 in text is required to be given a wider meaning. It can be stated that the concept of public policy denotes some matter, which concerns public and the public interest. What is for public or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the Award, which is, on the fact of it, patently in violation of statutory provisions cannot be said to be in public interest. Such Award/judgment decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'Public Policy' in **Renusagar's** case, it is required to be held that the Award could set

[228] *2001 (Suppl. 2) Bom. CR 547*
[229] *(2003) 2 CLT 242; 2003(2) Arb. LR 5 (SC)*

aside, if it is patently illegal. Result would be Award could be set aside if it is contrary to:

(a) Fundamental policy of Indian Law; or
(b) The interest of India; or
(c) Justice or morality; or
(d) In addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that Award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such Award is opposed to public policy and is required to be adjudged void." In view of the above judgment in case of **ONGC Vs. SAW Pipes Ltd.**, it is quiet probable that the litigant will get chance to challenge an award under section 34 of the Act. This anomaly may multiply
court litigation instead of minimizing it since the meaning of the words "only if " referred in section 34(2) has lost its importance and now it is open to the litigant to make his case under section 34 (2) (b) (ii). However it is learnt that the larger bench of Supreme Court is going to take up the issue and will find its practical solution, which will minimize litigation and that, might mitigate the wider meaning of the judgments. The same will protect the interest of public and also may protect the very base and object of the Act itself. However till that time we have to wait and watch that how many arbitral awards are going to be challenged in the higher courts in the time to come. In spite of this, the silver line of the thunder cannot be ignored and the recent attitude of the Chief Justice of India and the high court judges to promote and implement ADR (Alternative Dispute Resolution) cannot be overlooked. We all should be positive to bring the best possible resolutions by adopting different mechanisms of A.D.R. and our attempt should be to make India a peaceful country.

In **Venture Global Engg. v. Satyam Computer Services Ltd.**[230], the decision given by the Hon'ble Supreme Court in **Bhatia International v. Bulk Trading SA**,[231] in relation to the applicability of Part I to international commercial arbitrations. Here, in this case the Court said that the provisions of Part I are equally applicable to international commercial arbitrations held outside India, unless any or all such

[230] *AIR 2008 SC 1061; (2008) 4 SCC 190*
[231] *(2002) 4 SCC 105; AIR 2002 SC 1432*

provisions have been excluded by agreement between the parties, expressly or by implication. Thus following the above decision in Bhatia International case, it was observed that unless the applicability of Section 34 has been excluded, the parties may challenge the award before a court in India. The judgement- debtor cannot be deprived of his right under Section 34 to invoke the public policy of India, nor can the decree-holder seek to evade compliance with the legal and regulatory scrutiny that might be necessary in India in case of enforcement of the award in India. The court clarified that Sections 45, 48, 52 or any other provision of Part II do not exclude the application of Part I to foreign awards.

An arbitral award is at par with a judgement of the court as recognized by the Supreme Court in the case of **Ras Pal Gazi Construction Company Ltd. v. FCDA**,[232] where Hon'ble Justice Katsina- Alu pronounced that "arbitration proceedings are not the same thing as negotiations for settlement out of court. An award made, pursuant to arbitration proceedings constitute the final judgement on all matters referred to the arbitrator. It has a binding effect and it shall upon application in writing to the court be enforceable by the court."

The **first case** that has seen the Supreme Court passing an interesting and somewhat complicated judgment is the **Yograj v. Ssang Yong Engineering** case where the principal reason for dispute between the two parties was a decision by a lower court which asked Yograj to give away machineries and equipments. On reaching the highest judicial authority, it was ruled by the Supreme Court that though the agreement was to be governed by the Indian laws, the presence of "curial laws" of Singapore (which incidentally was also the seat of arbitration) made way for the agreement to be governed by the laws of Singapore. The judgment passed by the Supreme Court has faced criticism mainly because Singapore being the seat of arbitration seems to have affected the judgment. Given the Supreme Court's stature, such a judgment is highly contradictory.

In the case of **Olympus Superstructure Pvt. Ltd. v. Meena Vijay Khetan**,[233] it was held that under sub clauses 2 (a)(iv) to Section 34

[232] *(2001) 10 NWLR*
[233] *AIR 1999 SC 2102; 1999(2) Arb. LR 695 (SC)*

Arbitral Award may be set aside by the Court if the Award deals with the dispute not contemplated by or not falling within the terms of the submission to Arbitrator.

In the case of **Videocon v. Union of India**, the reason of dispute was similar. The agreement clearly stated that the Indian laws are to govern the agreement in case of a dispute. To ensure that this was followed, the agreement clearly stated that under all circumstances, these rules were to be abided by. But surprisingly, the Supreme Court maintained that the first part of the agreement for some reason is not legally valid and Indian laws were not allowed to govern the agreement. This judgment once again surprised lawyers and legal professionals alike as the Supreme Court confused the role of the judiciary in cases of arbitration.

In case of **Food Corporation of India v. Surendra, Devendra and Mahendra Transport Co.**,[234] it was held that raising of claim before the Arbitrator regarding transit loss, demurrage and wharfage charges if barred under the agreement and adjudication of such claim by the Arbitrator amount to exceeding jurisdiction. The matters, which were excluded from the reference to the Arbitrator, therefore, should not be referred to or decided by the Arbitrator.

The Supreme Court's strange judgments related to arbitration cases continued in its verdict on **Dosco v. Doozan** as it excluded the first clause of the agreement which clearly stated Indian laws were supreme when it came to governing the agreement. It remains unknown as to why the highest judicial authority itself seems to be so confused regarding the legal position of arbitration and whether Indian laws are permitted to govern arbitration agreements or not. Examples can be found of certain cases where the Supreme Court has agreed to the fact that Indian laws are final when it comes to governing an arbitration agreement.

In the case of Indtel Technical Services; **Infowares v. Equinox** the Supreme Court held that the governing of the Indian laws should not be excluded and all disputes should be governed by the arbitrary laws under the A&C Act of 1996. The judgment was again highly surprising because the clauses of the agreement were similar to that of the above mentioned

[234] *2003 AIR SCW 845; 2003(1) Arb. LR 505 (SC)*

cases, but the Supreme Court decided that Indian laws are to govern the arbitration agreement in case of any dispute. It fact that the agreement was presumed to follow arbitration proceedings according to the foreign laws was rejected by the Court in its decision. Questions have been asked regarding this judgment as the Court's decision remains confusing and contradictory. The Indian legal field is still looking for answers regarding the alliance of Indian laws and arbitration from the Supreme Court.

The scope of Interference of the award passed by arbitration was dealt with by the Apex Court in the decision reported in **Food Corporation of India v. Jogindarial Mohindarpal**[235] as follows: "Arbitration as a mode for settlement of disputes between the parties has a tradition in India. It has a social purpose to fulfil today. It has a great urgency today when there has been an explosion of litigation in the Courts of law established by the sovereign power. However in proceedings of arbitration, there must be adherence to justice, equality of law and fair play in action. The proceedings of arbitration must adhere to the principles of natural justice and must be in consonance with such practice and procedure, which will lead to a proper resolution of the dispute and create confidence of the people, for whose benefit these procedures are resorted to. It is therefore, the function of the Court of law to oversee that the arbitrator acts within the norms of justice. Once they do so and the award is clear, just and fair, compel to adhere and obey the decision of their chosen adjudicator. It is in this perspective that one should view the scope and limit of corrections by the Court on an award made by the arbitrator. The law of arbitration must be made simple, less technical and more responsible to the actual realities of the situation but must be responsible to the canon of justice and fair play. The arbitrator should be made to adhere to such process and norms which will create confidence not only doing justice between parties but by creating a sense that justice appears to have been done".

It is not only the Supreme Court's decisions that have been confusing and questioned by Indian legal professionals. Questions regarding the legal position of arbitration agreements and judicial intervention in arbitration related disputes have been asked. The questions remain largely unanswered and askers have been further confused by Supreme Court's decision on the case of **Deutsche Post Bank Home Finance**

[235] *1989(2) SCC 347*

Ltd v. Taduri Sridhar where it was decided that only parties under the agreement can be part of the arbitration proceedings. The bank was not included during the arbitration proceedings and the only two parties were the purchaser provided with the loan and the developer. This poses a problem for a lot of legal professionals because the arbitration proceedings remain complicated and unclear since it still remains unknown as to who can be a part of the arbitration proceedings.

The case of **PR Shah Shared & Stock Brokers v. BHH Securities** was another case involving highly complex legal issue because the agreement of arbitration involved rules and regulations of the Mumbai Stock Exchange. The Court was to decide whether a single set of proceedings were enough to solve the dispute between the two parties. This legal question is a highly complicated one since a single set of proceedings might not be enough to address all the issues of dispute. Further, during arbitration each party is entitled to present the case properly and a single proceeding will obviously not be sufficient enough.

Though some good has come out of the ADR mechanism, it is also a fact that *Lok Adalats* have put pressure on judicial officers, affecting their routine work. If the ADR mechanism is to succeed in letter and spirit, the vacancies of judicial officers should be filled in a judicious and transparent manner. This way the judiciary could share some of its officers exclusively for ADR purposes. In order to see that the regular work of the courts does not suffer, the proposal to have Evening and Rural Courts could be given practical shape by setting up such courts presided over by competent and qualified judicial officers.

As per latest available information, 57,179 cases were pending in the Supreme Court of India as on 30.6.11. The number of cases pending in the High Courts were 42, 17,903 as on 30.9.2010. Shri Salman Khurshid, Minister of Law & Justice said that in order to facilitate expeditious disposal of cases in courts, Government has taken a number of measures as mentioned below:[236]

The Government has approved setting up of 'National Mission for Justice Delivery and Legal Reforms'. The major goals are:

- Increasing access by reducing delays and arrears in the system;

[236] Justice Dispensation Through Alternative Dispute Resolution System in India viewed at www.legalindia.in (last accessed on 22.05.12)

- Enhancing accountability through structural changes and by setting performance standards and capacities.

Enactment of the Gram Nyayalayas Act, 2008 which provides for establishment of Gram Nyayalayas to improve access to justice to marginalised. The current year allocation has been increased from Rs. 40 crore to Rs. 150 crore. So far 151 Gram Nyayalayas have been notified by the states. In order to computerise the justice delivery system Government is implementing e-Courts Project for the District and Subordinate Courts in the country.

The Government has accepted the recommendations of the Thirteenth Finance Commission to provide a grant of Rs. 5000 crore to the States for improving the justice delivery system in the country over a five year period 2010-15. With the help of these grants, the States can, inter-alia, set up morning / evening / shift / special magistrates' courts, appoints court managers, establish ADR centres and provide training to mediators / conciliators, organise more Lok Adalats to reduce pendency. The grants also provide for training of judicial officers, strengthening of State Judicial Academies, and training of public prosecutors and maintenance of heritage court buildings.[237]

The 'National Litigation Policy' (NLP) was announced to reduce the average time of pending cases in India. The NLP aims at reducing government litigation in courts. Launching the NLP to make government an "efficient and a responsible" litigant, Moily said, "Monitoring and review mechanism proposed under it would prevent delay or neglect of important cases such as the Bhopal gas tragedy." The Law Minister, Veerappa Moily had in October 2009 released a vision statement at a two-day conference on National Consultation for Strengthening the Judiciary towards Reducing Pendency and Delays to reduce the backlog of cases. However, some of the suggestions laid out in the vision statement have not been included in the NLP such as introduction of night courts, appointment of judges on a contractual basis and establishment of a National Arrears Grid.[238]

Unless we can do something about the problem of delay and huge arrears, the whole system would get crushed under its weight. We must guard against the system getting discredited and people losing faith in it and taking recourse to extra legal remedies.

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[237] *Ibid.*
[238] *Ibid.*

CHAPTER- VIII

ONLINE DISPUTE RESOLUTION

A. CONCEPT OF ONLINE DISPUTE RESOLUTION:

Online Dispute Resolution (ODR) was born from the synergy between Alternative Dispute Resolution (ADR) and Information & Communication Technology (ICT) as a method for resolving dispute that were arising online, and for which traditional means of dispute resolution were inefficient or unavailable. Online Dispute Resolution is an automatised platform or rather a trendy tool for the development of e-commerce and to solve dispute easily. Due to increasing use of the Internet worldwide, the number of disputes arising from Internet commerce is on arises. Numerous websites have been established to help resolve these Internet disputes, as well as to facilitate the resolution of disputes that occur offline. It is becoming an increasingly effective mechanism for resolving disputes as technology advances.[239]

As of date, there have been several Internet service providers who have provided platforms for Online Resolution of disputes by parties, which they can pursue irrespective of their geographical locations. Quite a few of these have closed down, may be due to theirs being a bad business model or probably due to their system/platform not living up to the

[239] Online Dispute Resolution viewed at www.wikipedia.org (last accessed on 26.03.12)

expectations of the end user. But this certainly does not reflect on the popularity or utility of the concept of ODR (Online Dispute Resolution), in some places also referred to as “eADR” (electronic Alternative Dispute Resolution). This is evident from the fact that the number of service providers has increased in 2004 to over a hundred.[240]

Online Dispute Resolution (ODR) utilizes the Internet as a more efficient medium for parties to resolve their disputes through a variety of ADR methods similar to traditional ADR. Using computer-networking technology, ODR brings disputing parties together "online" to participate in a dialogue about resolving their dispute.[241]

ODR is still a fairly recent industry. Many new ODR providers have arisen while others have stopped operating. ODR providers include private sector companies, public sector agencies and academic institutions. Currently, the majority of ODR providers are private sector companies.[242]

Generally, the complainant begins the ODR process by registering the complaint online with an ODR provider. The ODR provider will then contact the other party using the information provided, and invite that other party to participate in the ODR process. If the other party accepts the invitation, he or she will file a response to the complaint. The ODR providers employ one or more of the following dispute resolution techniques or mechanisms - (1) arbitration, (2) mediation, or (3) negotiation, which may be assisted by software or rules, and includes blind bidding. Some providers incorporate a technique that has been called "peer pressure" services. "Peer pressure" services involve the use of publicity about the ongoing dispute to create an incentive for the online merchant to resolve the dispute. An example of an ODR provider that utilizes this technique is iLevel.[243]

Arbitration involves a decision by an arbitrator, which parties have agreed by contract to be binding. Mediation involves facilitation of communication and problem-solving by a mediator. A settlement is reached only if both parties consent. The arbitration and mediation processes utilize email, chat or messaging software, audio-conferencing

[240]D.M. Popat, “ADR And India: An Overview” viewed at www.legalindia.in (last accessed on 08.04.12)
[241] Online Dispute Resolution viewed at www.onlineresolution.com (last accessed on 11.06.12)
[242] *Ibid.*
[243] *Ibid.*

or video-conferencing software for communication between the arbitrator/mediator and the parties.[244]

Online negotiation may involve use of email or messaging, or may utilize heavily automated systems. Blind bidding refers to a system of settlement in which the ODR provider's software accepts confidential offers and demands from the parties, and records a settlement if the offer and demand are within a pre-specified range from each other. If there is no settlement, the other party will not know what the submitted bids were.[245]

B. THE GROWTH AND EVOLUTION OF ONLINE DISPUTE RESOLUTION:[246]

The growth of Online Dispute Resolution is very recent. While the Internet began in 1969, a need for ODR did not emerge until the early 1990s. For its first two decades, the Internet was used by a limited number of people in a limited number of ways. Those with Internet access were associated either with the military or with academic institutions, and even in those environments; relatively few computers had Internet access. While screens with images and email with advertisements are commonplace today, they were unknown at that time. The World Wide Web was not invented until 1989 and, perhaps even more significantly, the National Science Foundation banned commercial activity from the Internet until 1992.

In the early 1990s, groups used “listservs” to communicate, and this form of online discussion soon generated “flaming” and violations of “netiquette,” personal attacks that violated generally accepted norms for online discussions. Disputes also arose involving participants in role playing games that allowed one to create an online identity and interact with others in a virtual “space.” Various online mechanisms were employed to deal with these conflicts, but there were no organized dispute resolution institutions devoted specifically to ODR. Indeed, the acronym ODR had not yet been invented. The decision by the National Science Foundation in 1992 to lift its ban on Internet-based commercial activity was highly controversial and enormously significant. After the ban’s removal, disputes related to online commerce began to surface. In

[244] *Ibid.*
[245] *Ibid.*
[246] Ethan Katsh, “Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace” viewed at www.lex-electronica.org (last accessed on 11.06.12)

1994, for example, the first commercial spam occurred when two lawyers tried to recruit clients to participate in an immigration scam. A few months later, the U.S. Federal Trade Commission filed its first case alleging online fraud. The case involved an American Online subscriber who advertised the following:

"FOR JUST $99.00 WE WILL SHOW YOU HOW TO CREATE A BRAND NEW
CREDIT FILE AT ALL 3 OF THE MAJOR CREDIT BUREAUS...100% LEGAL
AND 200% GUARANTEED."

The FTC did not consider the process to be legal or guaranteed. As a result of the FTC action, the subscriber agreed to stop advertising credit repair programs and to provide compensation to consumers. The need for a sustained ODR effort to respond to growing number of disputes arising out of online activities prompted the National Centre for Automated Information Research (NCAIR) to sponsor a conference on online dispute resolution in 1996. The conference was the most significant development during the mid-1990s, as it led to the funding of three experimental ODR projects. The Virtual Magistrate project aimed at resolving disputes between Internet Service Providers and users. The University of Massachusetts Online Ombudsman Office hoped to facilitate dispute resolution on the Internet generally. Finally, the University of Maryland proposed to see if ODR could be employed in family disputes where parents were located at a distance.

In 1997, the Hewlett Foundation provided funding for the establishment of a Centre for Information Technology and Dispute Resolution at the University of Massachusetts and in 1999, the online auction site eBay, asked the Centre to conduct a pilot project to determine whether online mediation could assist in the resolution of disputes between buyers and sellers. eBay currently has over one hundred and sixty million registered users and over twenty five million transactions take place each week. eBay itself is not a party to any transaction and, in general, assumes no responsibility for problems that arise between buyers and sellers. While the percentage of transactions that lead to disputes is low, the number of such disputes is considerable. ODR has been assumed by many to be negotiation via email. Email allows easy and quick communication but email software provides limited information management resources and places most of the responsibility for organizing the information in emails on the user.

In 1998, the United States government agreed to allow a new organization, the Internet Corporation for Assigned Names and Numbers (ICANN) to manage the domain name system. One of the first things ICANN did was enact the Uniform Dispute Resolution Policy establishing both a process and a set of rules for deciding domain name disputes.17 Both the approach ICANN chose, a modified arbitration process, and the systems which have implemented this approach, represent another choice in moving dispute resolution online. The process employed to resolve domain name disputes. Both current providers, the World Intellectual Property Organization (WIPO) and the National Arbitration Forum (NAF) have online systems that could be employed and probably will be employed in the future. Currently, online filings are occurring with increasing frequency and email is employed sometimes.

Thus, it can be briefly observed that the increase in online transactions, especially economic transactions, led to the rise of new type of disputes, either not resolvable in physical world situation or demands a new, speedier and effective system to address the issue. The demand for new system may be directly linked to the several factors affected by the technology itself. Due to the increasing use of the Internet worldwide, the number of disputes arising from e-commerce, domain names registrations, and the like, is on the rise. Traditional mechanisms of dispute resolution, including "offline arbitration", are often inappropriate to resolve them; they tend to be time-consuming, expensive and raise the serious problems related to jurisdiction and enforcement. Hence the point of departure for the development of *online arbitration* consists in saying: ***"conflicts arising online should be resolved online."***

C. MEANING OF ONLINE DISPUTE RESOLUTION:

Online dispute resolution (ODR) is a branch of dispute resolution which uses technology to facilitate the resolution of disputes between parties. It primarily involves negotiation, mediation or arbitration, or a combination of all three. In this respect it is often seen as being the online equivalent of alternative dispute resolution (ADR). However, ODR can also augment these traditional means of resolving disputes by applying innovative techniques and online technologies to the process.[247]

ODR is still a fairly recent industry. Many new ODR providers have arisen "Allsettle.com" or "Settlementonline.com". The provider then uses the information provided by the claimant to contact the defendant party

[247] Online Dispute Resolution viewed at www.wikipedia.org (last accessed on 06.06.12)

and invite them to participate in online dispute resolution. ODR providers include private sector companies, public sector agencies and academic institutions. Currently, the majority of ODR providers are private sector companies. ODR is a wide field, which may be applied to a range of disputes; from interpersonal disputes including consumer to consumer disputes (C2C) or marital separation; to court disputes and interstate conflicts. It is believed that efficient mechanisms to resolve online disputes will impact in the development of e-commerce. While the application of ODR is not limited to disputes arising out of business to consumer (B2C) online transactions, it seems to be particularly apt for these disputes, since it is logical to use the same medium (the internet) for the resolution of e-commerce disputes when parties are frequently located far from one another.[248]

ODR can be defined as the deployment of applications and computer networks for resolving disputes with ADR methods. Both e-disputes and brick and mortar disputes can be resolved using ODR. At the moment there are four types of ODR systems:[249]

- Online settlement, using an expert system to automatically settle financial claims;
- Online arbitration, using a website to resolve disputes with the aid of qualified arbitrators;
- Online resolution of consumer complaints, using e-mail to handle certain types of consumer complaints;
- Online mediation, using a website to resolve disputes with the aid of qualified mediators;

Not all of these types of ODR are fully developed yet. Online settlement and online mediation are currently the most advanced.

D. ONLINE DISPUTE RESOLUTION IN INDIA:

The necessity of the same has arisen due to the growing use of Alternative Dispute Resolution Mechanism (ADRM) in India to reduce the burdening of the already overburdened courts in India. The popularity and use of ADRM is increasing but it can achieve its best only if the same is integrated with the information technology. The importance of **Information and Communication Technology (ICT)** for resolving

[248] *Ibid.*
[249] ONLINE DISPUTE RESOLUTION AS A SOLUTION TO CROSS-BORDER E-DISPUTES : *AN INTRODUCTION TO ODR* viewed at www.oecd.org (last accessed on 06.06.12)

contemporary electronic commerce (e-commerce) and other disputes. The best example of the same is the use of **Online Dispute Resolution (ODR)** for resolving these disputes and misunderstandings. The Online Dispute Resolution Mechanism (ODRM) is gaining popularity among all the countries of the World, including India.[250]

Internet is a communication tool, which facilitates free information dissemination. The growth of Internet has created various new problems as well. New forms of business practices like e-commerce, franchising, service agreements etc. are being used in international and national trade. With the explosive globalization of trade and investment, there has been a corresponding increase in commercial disputes between the parties across national boundaries. It has become difficult to resolve these disputes by applying the traditional judicial settlement mechanisms because of conflict in laws of various countries.[251] The swift growth of e-commerce and website contracts has increased the potential for conflicts over contracts which have been entered into online. This has necessitated a solution that is compatible with online matters and is netizens centric. This challenging task can be achieved by the use of ODRM in India. The use of Online Dispute Resolution Mechanism (ODRM) to resolve such e-commerce and web site contracts disputes are crucial for building consumer confidence and permitting access to justice in an online business environment. These ODRM are not part and parcel of the traditional dispute resolution machinery popularly known as **judiciary** but is an alternative and efficacious institution known as ADRM. Thus, ADR techniques are extra-judicial in character. They can be used in almost all contentious matters, which are capable of being resolved, under law, by agreement between the parties. They have been employed with very encouraging results in several categories of disputes, especially civil, commercial, industrial and family disputes. These techniques have been shown to work across the full range of business disputes like banking, contract performance, construction contracts, intellectual property rights, insurance, joint ventures, partnership differences etc. ADR offers the best solution in respect of commercial disputes. However, **ADR** is not intended to supplant altogether the traditional means of resolving disputes by means of litigation. It only offers alternatives to litigation. There are a large number of areas like constitutional law and criminal law where ADR cannot substitute courts. In those situations one has to take recourse of the existing traditional modes of dispute resolution. It is high time that we must build a base for

[250] Online Dispute Resolution viewed at www.e-arbitration-t.com (last accessed on 11.06.12)
[251] ICT Strategy in India viewed at www.cyberlawindia.blogspot.com (last accessed 09.16.12)

not only offline ADRM but equally ODRM in India. It must be noted that every new project needs time to mature and become successful. Thus, the success of ADRM and ODRM depends upon a timely and early base building.[252]

In the present globalised and decentralised world, India cannot afford to keep its economy closed and secluded. Thus, an interaction between Indian economy and world's economy is inevitable. That is not a big problem. The real problem is to make Indian economy an efficient and competitive economy. Though there are many indicators for measuring the strengths and weaknesses of an economy, but the ICT strategy of a nation is very crucial to put it on a global map. It is very important that the ICT strategy and policies of a nation must not only be suitable but should also believe in a holistic application and implementation. The ICT strategy and policy of a nation cannot afford to keep the different components of ICT separate. Their amalgamation and supplementation must be done at a priority basis otherwise the ICT strategy and policy will not bring the desired results. The present ICT strategy and policies of India are deficient and defective. It must be appreciated that the ICT is directly related to International Trade, more particularly e-commerce. Thus, when the Indian economy will be integrated with the Global economy certain disputes are bound to be there. We cannot use the traditional litigation methods to resolve those disputes. That will only put more pressure on the already overburdened courts. The fact is that the increasing backlog of cases is posing a big threat to our judicial system. The same was even more in the early 90 but due to the computerisation process in the Supreme Court and other courts that was reduced to a great extent. However, the backlog is still alarming. This is because mere computerisation of Courts or other Constitutional offices will not make much difference. What we need is a will and desires to use the same for speedy disposal of various assignments. There is a lack of training among Judges regarding use of **Information Technology (IT)**. We need a sound training of Judges first before we wish to capitalize the benefits of IT. A good initiative has already been taken by the Supreme Court. However, the same appears to be dormant for the time being. Thus, we need a public initiative as well. Besides, the use of ICT for ODR purposes is also inevitable due to the mandates of the right to speedy trial that is provided by the Constitution of India.[253]

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[252] Online Dispute Resolution viewed at www.e-arbitration-t.com (last accessed on 11.06.12)
[253] ICT Strategy in India viewed at www.cyberlawindia.blogspot.com (last accessed 09.06.12)

E. THE CONSTITUTIONAL MANDATES:[254]

Article 21 of the Constitution of India declares in a mandatory tone that no person shall be deprived of his life or his personal liberty except according to procedure established by law. The words "life and liberty" are not to be read narrowly in the sense drearily dictated by dictionaries; they are organic terms to be construed meaningfully. Further, the procedure mentioned in the Article is not some semblance of a procedure but it should be "reasonable, fair and just."[255] Thus, the right to speedy trial has been rightly held to be a part of right to life or personal liberty by the Supreme Court of India.[256] The Supreme Court has allowed Article 21 to stretch its arms as wide as it legitimately can.[257] The reason is very simple. This liberal interpretation of Article 21 is to redress that mental agony, expense and strain which a person proceeded against in criminal law has to undergo and which, coupled with delay, may result in impairing the capability or ability of the accused to defend himself effectively. Thus, the Supreme Court has held the right to speedy trial a manifestation of fair, just and reasonable procedure enshrined in Article 21. A speedy trial encompasses within its sweep all its stages including investigation, inquiry, trial, appeal, revision and re-trial. In other words, everything commencing with an accusation and expiring with the final verdict falls within its ambit.

The constitutional philosophy propounded as right to speedy trial has though grown in age by almost two and a half decades, the goal sought to be achieved is yet a far-off peak. The failures of prosecuting agencies and executive to act and to secure expeditious and speedy trial have persuaded the Supreme Court in devising solutions which go to the extent of almost enacting by judicial verdict bars of limitation beyond which the trial shall not proceed and the arm of law shall lose its hold.[258] The validity or justness of those decisions is not the matter to be decided but the seriousness of delay in the conclusion of criminal and civil matters must be appreciated at the earliest. This seriousness was appreciated and accepted by many, including the Constitutional Courts, long before. The same has got recognition from the legislature as well in the form of introduction of Alternative Dispute Resolution (ADR) Mechanism (ADRM) through various statutes.[259] There is a growing awareness among the masses as well regarding ADR/ODR and people are

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[254] Praveen Dalal, ICT Strategy of India: An ODR Perspective viewed at www.cyberlawindia.blogspot.com (last accessed on 09.06.12)
[255] *Maneka Gandhi v. U.O.I, AIR 1978 SC 597.*
[256] *Hussainara Khatoon (1) v. Home Secretary, State of Bihar, (1980) 1 SCC 81.*
[257] Article 21 is a Fundamental Right that can be directly enforced in the Supreme Court under Article 32 of
The Constitution of India.
[258] *P.Ramachandra. Rao v. State of Karnataka, (2002)4 SCC 578.*

increasingly using the same for getting their disputes settled outside the court. Thus, to make that choice a ground reality the ICT strategy of India must consider and accommodate these concerns as well.

F. METHODS OF ONLINE DISPUTE RESOLUTION:[260]

Online Dispute Resolution can take place in various forms. Before discussing about the various methods of Online Dispute Resolution it is rather to be informed about the fact that the term Online Dispute Resolution includes various other terms also. Though ODR has emerged as the most used term in the recent years but it is also termed as-

- Internet Dispute Resolution (iDR)
- Electronic Dispute Resolution (eDR)
- Electronic ADR (eADR)
- Online ADR (oADR)

The various methods are discussed below:

I. Consensual Methods:

1. Automated Negotiation

Automated Negotiation relates to those methods in which the technology takes over (aspects of) a negotiation. Most of the ODR services in this area are so-called 'blind-bidding' services. This is a negotiation process designed to determine economic settlements for claims in which liability is not challenged. The blind bidding service may be thought of as a type of auction mechanism where some or all information about the players' bids is hidden. There are two forms of automated negotiation, Double Blind Bidding, which is a method for single monetary issues between two parties, and Visual Blind Bidding, which can be applied to negotiations with any number of parties and issues. Automated negotiation has proven to be particularly successful with insurance compensations and commercial activities. It is also a valuable tool for lawyers because they too can use it without revealing what they're willing to accept (unless an agreement is reached) and more importantly, without

[259] Justice Malimath Committee in 1990 stressed the importance of ADRM to supplement the legal forum
with a view to decrease the burden of traditional courts.
[260] Online Dispute Resolution viewed at www.wikipedia.org (last accessed on 11.06.12)

waiving their right to access the court, in the case that the negotiation is unsuccessful.

a) *Double Blind Binding:* Double Blind Bidding is a negotiation method for two parties where the offer and demand are kept hidden during the negotiation. It commences when one party invites the other to negotiate the amount of money in dispute. If the other party agrees, they start a blind bidding process whereby both parties make secret offers or bids, which will only be disclosed if both offers match certain standards. They can usually submit up to three offers and if the bids of both parties come within a predetermined range (usually range from 30% to 5%) or a given amount of money, then the technology automatically settles the dispute in the mid-point of the two offers. Although, it is a simple method, it effectively encourages the parties to reveal their 'bottom line' offers and demands, splitting the difference when the amounts are close.
b) *Visual Blind Bidding:* Visual Blind Bidding is that what is kept hidden is what each party is willing to accept. This method can be effectively applied to the simplest single-value negotiations or the most complex negotiations between any number of parties and issues.

   Visual Blind Bidding commences when all parties agree to negotiate with one another. They start the process by exchanging visible optimistic proposals, which define bargaining ranges. The system then generates suggestions that fall within the bargaining ranges. Parties may continue to exchange visible proposals or contribute their own suggestions to the mix. Suggestions contributed by the parties remain anonymous, thus avoiding the face saving problem of accepting a suggestion made by another party.

2. Assisted Negotiation

In Assisted Negotiation the technology assists the negotiation process between the parties. The technology has a similar role as the mediator in a mediation. The role of the

technology may be to provide a certain process and/or to provide the parties with specific (evaluative) advice.

Mediators use information management skills encouraging parties to reach an amicable agreement by enabling them to communicate more effectively through the rephrasing of their arguments. Conciliation is similar to mediation, but the conciliator can propose solutions for the parties to consider before an agreement is reached. Also, assisted negotiation procedures are designed to improve parties' communications through the assistance of a third party or software. In fact, it has been argued that assisted negotiation, conciliation, and even facilitation, are just different words for mediation. The major advantages of these processes, when used online, are their informality, simplicity and user friendliness.

- *Square Trade:* The leading ODR provider for consumer mediation was until recently Square Trade. It was contracted by a number of market places, the largest of which was eBay. However, due to changes in the eBay feedback system in May 2008, Square Trade decided to stop resolving eBay feedback disputes from June 2008. Square Trade continues providing services to eBay users, such as warranty services and the trust mark program. It appears that in the last year these services have been taken over by eBay and PayPal dispute resolution services, but results on these services are still scarce.

  Square Trade did not handle disputes between users and eBay, only between sellers and buyers on eBay. Square Trade offered two levels of dispute resolution: assisted negotiation and mediation. Square Trade was only used after eBay's own consumer satisfaction process. In the last few years, Square Trade has resolved millions of disputes across 120 countries in 5 different languages.

  The advantage of dealing with large number of disputes is that the same issues arise many times, thus it is possible to divide the disputes into different sections. The Square Trade process started when a buyer or a seller filed a complaint. To do so, the claimant was asked to fill out a web-based standard claim form that identified the type of dispute and presented a list of

common solutions, from which the claimant selected the ones that he agreed to. The other party was contacted by email where he was informed about the Square Trade process, and asked whether he wished to participate. The parties were often keen on participating because this was the only manner by which the buyer could get redress and the seller positive feedback. The other party filed the response, selecting the resolutions. If both parties agreed on the same resolution, the dispute was resolved. When an agreement could not be reached, parties were put into a negotiation environment. A web interface was used to shape communications into a constructive and polite negotiation. This was achieved with software tools that limited the free text space, encouraged the proposition of agreements, set deadlines and even shaped the tone of exchanges.

This software was the key element of the process because it took over some of the expertise of the third party. This process could be defined as ‘mediated negotiation’.

Most disputes (over 80 percent) were resolved during the first two stages, which was an impressive success rate given that in the majority of cases, the parties had already been involved in some type of failed direct negotiation before engaging with Square Trade.

SquareTrade has proven that processes such as online negotiation and online mediation can be efficient tools to resolve e-commerce disputes. One of the key issues for the success of SquareTrade was the simplicity and convenience of this service. In addition, SquareTrade services to eBay were concentrated on a reduced number of issues, such as delays, bad descriptions and negative feedback. This made possible the development of an efficient automatic process that enhanced online negotiation. The success of consensual and automated processes depends on the nature of the dispute, the accuracy of information provided, and the capability of the software or the third neutral party in assessing and evaluating the facts and evidence. Square Trade was particularly effective because it introduced incentives that encourage parties’ participation; i.e. both parties

wished to resolve their dispute: sellers want to obtain positive feedback and buyers want redress.

II. Adjudicative Methods:

1. *Online Arbitration*

Arbitration is a process where a neutral third party (arbitrator) delivers a decision which is final, and binding on both parties. It can be defined as a quasi-judicial procedure because the award replaces a judicial decision. However, in an arbitration procedure parties usually can choose the arbitrator and the basis on which the arbitrator makes the decision. Furthermore, it is less formal than litigation, though more than any other consensual process. It is often used to resolve businesses' disputes because this procedure is noted for being private and faster than litigation. Once the procedure is initiated parties cannot abandon it. Another feature of arbitration is that the award is enforceable almost everywhere due to the wide adoption of the **1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards**. Moreover, arbitral awards prove frequently easier to enforce than court decisions from overseas.

The majority of legal studies on online arbitration agree that, neither law, nor arbitral principles, prevent arbitration from taking place online. However, there may be several aspects in online arbitration that need to be regulated. Although online arbitration seems admissible under the New York Convention and the E-Commerce Directive, this is arguably an assumption by most commentators, rather than a legal statement. Since arbitration is based on a contractual agreement between the parties, an online process without a regulatory framework may generate a significant number of challenges from consumers and other weaker parties if due process cannot be assured. Currently, most arbitration providers allow parties to carry out online only part of the arbitration process, e.g. parties may download claim forms, the submission of documents through standard email or secure web interface, the use of telephone hearings, etc.

The main challenge for online arbitration is that if judicial enforcement is required then it partly defeats the purpose of having an online process.

2. The Uniform Domain Names Dispute Resolution Policy (UDRP)

Traditionally arbitration resolves disputes by delivering a decision that will be legally binding, i.e. enforceable by the courts in the same manner as a judgment. Non binding arbitration processes may also be effective when using ODR tools because they often encourage settlements by imparting a dose of reality and objectivity. In addition, self-enforcement measures may reinforce the efficacy of non binding processes. The most significant example is the **Uniform Domain Name Dispute Resolution Policy** (UDRP) created by the **Internet Corporation for Assigned Names and Numbers** (ICANN). Some commentators have referred to the UDRP as an administrative process. In any case, the UDRP has developed a transparent global ODR process that allows trade mark owners to fight efficiently cyber squatting. The UDRP is used to resolve disputes between trade mark owners and those who have registered a domain name in bad faith for the purpose of reselling it for a profit, or taking advantage of the reputation of a trademark.

Trademark owners accessing the UDRP must prove to the panel three circumstances:

1. similarity of the domain name to the trade or service mark;
2. lack of rights or legitimate interest in the registered domain name;
3. bad faith in the registration and use of the domain name.

However, the UDRP presents its own problems that show the challenges that an online adversarial system applied to mainstream e-commerce disputes would have. The main worry is that the evaluation of the panel decisions often shows a lack of unanimous consensus in the interpretation of the UDRP. This may be due to a number of reasons, such as the lack of an

appellative review and panels composed by members from a multitude of jurisdictions and informed by different legal traditions.

On the other side, it is undeniable what ICANN with the UDRP has achieved in developing an effective ODR procedure based on contractual adherence that allows trade mark owners to transfer or cancel a domain that blatantly violates IP rights. The UDRP providers have dealt efficiently with over 30,000 domain name disputes. Their success derives from two aspects: First, the UDRP deals only with blatant disputes, which are abusive registrations made in bad faith in order to take advantage of the reputation of existing trademarks. Secondly, it has incorporated a self-enforcement mechanism, which transfers and cancels domain names without the need for judicial involvement. This is a positive accomplishment for the development of e-commerce because it favours consumers' confidence in the Internet by reducing the number of fraudulent registered domain names.

3. Chargebacks

One of the main focuses of e-commerce up until recently has been related to secure payments. Chargebacks is a remedy used to reverse transactions made with credit or debit cards when a fraudulent use has occurred, or when there is a violation of the contract terms. This method is very popular among online consumers since this is the main mechanism to transfer money online. In addition, consumers are not required to give evidence to cancel a payment. The vendor has the burden of proving that the merchandise or service was given according to the contract terms. Once this is proved the bank makes effective the payment to the vendor.

Chargebacks are largely used around the world by banks and the main credit card suppliers i.e. Visa, Mastercard and American Express. Yet, the coverage of debit and credit cards varies considerably amongst different countries. Commonly, debit cardholders have fewer protections than credit card holders, but it also varies depending on the jurisdiction.

It is then not surprising why credit cards are the major source of payments for consumers in e-commerce. They provide a remedy that reverses all transactions when a fraudulent use has occurred, or when there is a violation of the contract terms. However this method has limitations; it offers one single remedy (the return of the payment), and not all disputes imply a breach of contract or fraud.

Overall, chargebacks intends to balance the inequality of power between consumers and businesses. It is regarded as a very efficient tool for consumers because the speed, accessibility and lack of charge for their clients, who would just have to notify their banks or card issuers to cancel a transaction.

G. THE SHADOW OF LAW IN INDIA:[261]

The provisions of the Information Technology Act, 2000 (IT Act, 2000) must be used for establishing an ICT base that may be conducive for the development of ODRM in India. The following provisions of the IT Act, 2000 reflect India's commitment to use e-governance for various purposes including ODRM:

i. Legal recognition of electronic records (section 4),
ii. Legal recognition of digital signature (section 5),
iii. Use of electronic records and digital signature in governmental dealings (section 6),
iv. Retention of electronic record for certain period (section 7),
v. Establishment of electronic gazette (section 8), etc.

These provisions will go a long way in building a conducive base for ODRM in India.
However, these provisions provide only a non-absolute right to claim a sound e- governance base (section 9). This is the reason why till now no such ODRM has been

[261] ICT Strategy in India viewed at www.cyberlawindia.blogspot.com (last accessed 09.06.12)

established by the Government. Though, a grant of Rs 23,000 has been sanctioned by the Government out of the public money for e-governance purposes yet the need to establish a sound and effective ODRM has not found favour with the Government. This is another drawback of the e-governance plan of India. The Government must appreciate the need of ODRM for resolving disputes originating due to the liberalisation of its economy. It is also important to remember that the foreign countries are very particular about getting their disputes resolved through ADR/ODR methods and India may find itself in an embarrassing situation if its ICT strategies are not modified accordingly. Equally important is the security and maintenance of these ODRMs that also seems to be missing in the present e-governance plan. For a successful ODR project technology plays only 15% role, while rest 85% role is being taken care of by project management. Human resource development of the existing workforce in order to inculcate appropriate skills and attitudes is a critical factor. The establishment and set up of the basic infrastructure, which is conducive to the efficient functioning of the ODRM, is the need of the hour. A sound communication infrastructure is essential for easy access. It should be innovatively used to ensure that no section of society is deprived of the benefits arising there from.

H. BENEFITS OF ONLINE ARBITRATION:

Online Arbitration is great for resolving disputes anytime, when the parties are unable to meet face to face. The benefits are thus mentioned below:[262]

i. Hassle-free-process.
ii. Information is kept confidential.
iii. Speedy Outcome.
iv. Unbiased resolution.
v. Highly economical.
vi. Encourage International Trade.
vii. Successful resolution of all disputes.

[262] Benefits of ODR viewed at www.net-arb.com (last accessed on 11.06.12)

Actually the main aim or rather the mission in using ODR is to increase integrity and accountability in the Internet community, both locally and worldwide. Online dispute resolution ("ODR") is conceived as a means to achieve some of the most powerful legal ideals of the Western legal tradition, which include:[263]

- *Legal Certainty*: In making individual plans, decisions, and choices everyone is entitled to know what the law is in advance.
- *Access to Justice:* Everyone involved in a dispute shall be entitled to an easily accessible redress mechanism that provides for a timely resolution and effective remedies at reasonable cost.

ODR is firstly, concerned with the civilized (i.e. peaceful) resolution of disputes between private parties, and, secondly, with the prevention of such conflicts through the provision of legal certainty.

I. DISADVANTAGES OF ONLINE DISPUTE RESOLUTION:[264]

1. Legal issues:

The introduction of information technology into the dispute resolution process raises a number of legal issues. The precise nature of these issues and the manner which they are treated may vary from one system to another. Nevertheless, they are some general traits. Contracts concluded by electronic means, including dispute resolution agreement raise a number of legal issues. Other legal problems may arise in the course of the proceedings.

2. Internet-a boundless medium:

In online proceedings it may not be possible to determine a physical location where procedural acts of the ODR services provider are performed. Indeed, the Internet establishes a

[263] Online Dispute Resolution viewed at kpcraoindia.blogspot.in/favicon.ico (last accessed on 11.06.12)
[264] Isabelle MANEVY; "Online Dispute Resolution: What Future?" viewed at www.arbitration-adr.org (last accessed on 07.07.12)

technological platform for a technological platform for a multimedia and computing converge and the boundaries surrounding them collapse. As a result, the Internet creates a functional whole, a ‘virtual reality’ or a ‘cyberspace’ that effectively takes communication off the ground and relieves the activity thereon from territorial boundaries. Events in cyberspace take place “everywhere if anywhere, and hence in no place in particular.

3. Practical Issues:

The practical challenges for ODR are technical and social. The first concern involves security and confidentiality, a basic concern of ADR which becomes even more crucial in an online environment. Then, the third party neutral needs to be provided with “an array of communication capabilities for communicating and working with information in as easy a manner as one can work with information while sitting face to face with someone with a problem”. In addition, it is necessary for the parties to be computer literate and to overcome the language barriers. All these requirements show that ODR is not always the most appropriate medium to further the goals of fair and equitable dispute settlement.

4. Security of the online proceedings:

Despite of the efforts taken to secure the confidentiality of ODR processes, important technical issue remains concerning the security of the proceedings, particularly those conducted online. The Internet is an inherently insecure medium. Hackers can intercept email messages and the messages are temporarily stored on servers they pass through. Parties may accidentally type an incorrect email address and send compromising information to a competitor. Steps have been taken to protect the security of any messages or documents transmitted over the Internet. Secure servers are available to help on this problem also but they will be

studied in part three. Encryption software is also an option on this issue.

5. Lack of face-to-face encounters:

The principal practical criticism aimed at ODR involves the lack of face-to-face encounters. “There is richness in face to face meetings because interaction can occur quickly and spontaneously and often on a non-verbal level”. Without F2F, the parties may not be

satisfied with any settlement that is concluded, regardless of the speed and efficiency of the process.

It is, indeed, much more difficult for a negotiator, mediator or arbitrator to see the "real dispute" and potential solutions from written texts than from seeing the parties face to face. Indeed, "one of the drawback with email is its reliance on text. Any mediator relying solely on email will be engaged in a time consuming task, since reading many emails and composing may emails is labour intensive. Forum or conferencing software that allows for threaded conversations provide a degree of organization which is lacking with email".

Furthermore, the lack of important medias such as body language or pronunciation make it much more difficult for the parties to express their feelings and for the third party neutral to give hints and steer the parties into a direction where settlement may be possible.

6. Cross-cultural issues:

Language barriers are also challenging in a cross-cultural context whether it be in traditional ADR or an ODR. Some expressions or idioms may not translate correctly from one party in one country to someone in another. The impact of an email can also be underestimated. "Somebody may dash of quickly an email message without thinking but recipient can take the message very seriously. This can create misunderstandings and even full blown arguments". Cultural differences are also an issue in international disputes. This is especially true in business-to-consumer dispute resolution.

Online negotiators/mediators/arbitrators need to be aware of that and if they do not speak the languages involved, they should be assisted by professional translators. But working a dispute through a translator tends to be more complicated.

J. E-JUSTICE SYSTEM IN INDIA:[265]

[265] Online Dispute Resolution viewed at www.e-arbitration-t.com (last accessed on 06.06.12)

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

> Thus the requirement of a written notice will be satisfied if the same is given in the form of a fax, e-mail etc, using the information technology. It must be noted that a notice by e-mail can be send instantaneously and its delivery is assured and acknowledged by a report showing the due delivery of the same to the recipient. This method is more safe, accurate, economical and lesser time consuming as compared to its traditional counterpart, popularly known as "Registered A.D".

In **Basavaraj R. Patil v. State of Karnataka** the question was whether an accused need to be physically present in court to answer the questions put to him by the court whilst recording his statement under section 313. The majority held that the section had to be considered in the light of the revolutionary changes in technology of communication and transmission and the marked improvement in the facilities of legal aid in the country. It was held that it was not necessary that in all cases the accused must answer by personally remaining present in the court. Once again, the importance of information technology is

apparent. If a person residing in a remote area of South India is required to appear in the court for giving evidence, then he should not be called from that place, instead the medium of "video conferencing" should be used. In that case the requirements of justice are practically harmonised with the ease and comfort of the witnesses, which can drastically improve the justice delivery system.

In **State of Maharashtra v. Dr. Praful B. Desai** the Supreme Court observed: "The evidence can be both oral and documentary and electronic records can be produced as evidence. This means that evidence, even in criminal matters, can also be by way of electronic records. This would include video conferencing. Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. Thus, it is clear that so long as the accused and/or his pleader are present when evidence is recorded by video conferencing that evidence is recorded in the "presence" of the accused and would thus fully meet the requirements of section 273, Criminal Procedure Code. Recording of such evidence would be as per "procedure established by law". The advancement of science and technology is such that now it is possible to set up video conferencing equipments in the court itself. In that case evidence would be recorded by the magistrate or under his dictation in the open court. To this method there is however a drawback. As the witness is not in the court there may be difficulties if commits contempt of court or perjures him. Therefore as a matter of prudence evidence by video conferencing in open court should be only if the witness is in a country which has an extradition treaty with India and under whose laws contempt of court and perjury are also punishable".

This judgment of the Supreme Court is a landmark judgment as it has the potential to seek help of those witnesses who are crucial for rendering the complete justice but who cannot come due to "territorial distances" or even due to fear, expenses, old age, etc. The Courts in India have the power to maintain anonymity of the witnesses to protect them from threats and harm and the use of information technology is the safest bet for the same. The testimony of a witness can be recorded electronically the access to which can be

legitimately and lawfully denied by the Courts to meet the ends of justice.

The above cases show that the judiciary in India is not only aware of the advantages of information technology but is actively and positively using it in the administration of justice, particularly the criminal justice. Thus, it can be safely concluded that the “E-justice system” has found its existence in India. It is not at all absurd to suggest that ODRM will also find its place in the Indian legal system very soon.

K. INITIATIVES TAKEN FOR THE GROWTH OF ONLINE DISPUTE RESOLUTION:[266]

Recently, governments around the world, industry groups, consumer advocacy groups and dispute resolution professionals devoted great attention to the development of ODR services and the standards and oversight over these ODR providers. In June 2000, the Federal Trade Commission (U.S.) and the Department of Commerce (U.S.) held a public workshop to explore ADR for online consumer transactions.

In December 2000, the Organization for Economic Co-operation and Development (OECD), Hague Conference on Private International Law (HCPIL), and International Chamber of Commerce (ICC) jointly organized a conference entitled "Building Trust in the Online Environment: Business-to-Consumer Dispute Resolution" held at the Hague, Netherlands.

The Internet will work out for arbitration online what Google did for the retrieval of information. By bringing the concept of ODR to our home, office or cell phone, time and inconvenience are no longer an obstacle to justice worldwide.

In court system, time zones and physical locations are obstacles to justice. It is very expensive as well as time consuming. Court dockets are filled up will a huge number of cases. All the procedures is carried over through online and so the matter is solved or rather settled within a few days or which may take a week or so, but shall not extend to months or year after years. With the help of ODR a wide range of disputes are solved in a very short time, where disputes includes inter-personal disputes i.e. consumer to consumer, business to business, business to consumer; marital separation; court disputes and inter-state disputes.

[266] Articles on ODR viewed at www.net-arb.com (last accessed on 11.06.12)

- Dispute Resolution (NCTDR), is the primary portal for the field of Online Dispute Resolution.

  Disputes are inevitable by-product of the large number of transactions and relationship fostered by technology. The goal of ODR is to provide knowledge and resources for responding to conflict. NCTDR supports and sustains the development of Information Technology applications, institutional resources and theoretical and applied knowledge for better understanding and managing conflicts. Creating conflict is easy but responding to it and solving disputes efficiently is more difficult.

- According to the **ODR.INFO,** a conference was held in New Delhi on ODR and Arbitration on 14th -15th December, 2011.

  ODR mechanisms shall present various ways so that every individuals can pursue their claims online and get a binding decision in a low cost and in a less time consuming manner. It may assist in the Government and the judiciary mandate for speedy resolution of commercial disputes.

- E-Transaction Law & ODR which is a very much necessity in the Middle-East. Here, e-commerce – "the new communication technology" has led to new path of doing business. Not only it has given business opportunity to expand their markets but it has also massively affected and changed the way of business as is done today. With the growing of e-commerce, business can be derived at a cheaper cost, consumers also has the freedom to choose from a variety of sellers.

Recently, another step has been taken by the Gujarat High Court which has shown that not only the government but we Indians are glad to see and say that the judiciary is also thinking about bringing development to reduce the pendency in court cases. According to a report of Press Trust of India- in Ahmedabad on June 25, 2012, Gujarat High Court has launched an online bail application system for inmates of Sabarmati Central Jail from June 26, 2012 which has been a first step in the country. The pilot project inaugurated this system which shall be now operational through the high court's website. The step will reduce the processing time taken in normal bail procedures. In a phased manner, paper-based applications will be replaced by the online system across the state.[267]

[267] THE TELEGRAPH on 26 June, 2012

CHAPTER- IX

CONCLUSION AND SUGGESTIONS

Alternative Dispute Resolution mechanisms are in addition to courts and complement them. The traditional system of dispute resolution is afflicted with inordinate delays. However the backlog and delay appear to be more accentuated than in modern-day India. ADR mechanisms play an important role in doing away with delays and congestion in courts. The Indian civil justice system serves the interests of a diverse and exploding population, the largest democracy and the seventh largest national market in the world. This formidable responsibility, combined with the recent drive toward greater political accountability in the public administration and post-1991 market reforms, places ever-greater pressure on the civil justice system. An estimated backlog of 25 million cases and reported delays in some urban areas in excess of twenty years, currently undermine the effective enforcement of the substantive civil and commercial rights. Backlog and delay have broad political and economic implications for Indian society. If India fails to face and meet these challenges, it will not be able to realise fully its legal commitment to democratic and liberal economic policies. In cases such as motor accident claims, the victims may require the compensation to be paid without delay in order to meet medical and other expenses. In matters such as these, Alternative Dispute Resolution mechanisms like Lok Adalat can help victims obtain speedy relief.

In the ultimate analysis it may be concluded that the widening gap between the common people and the judiciary is indeed a serious cause of concern for all those who deal with the judiciary is indeed a serious cause of concern for all those who deal with the administration of justice. The effective utilization of ADR systems would go a long way in plugging the loophole which is obstructing the path of justice. The concepts of alternative modes of dispute resolution should be deeply ingrained in the minds of the litigants, lawyers and the judges so as to ensure that ADR methods in dispensation of justice are frequently adopted. Awareness needs to be created amongst the people about the utility of ADR and

simultaneous steps need to be taken for developing personnel who would be able to use ADR methods effectively with integrity.

In the Preamble, the words 'justice, liberty, equality and fraternity these four pillars form the infrastructure, supporting the whole Indian system to be built. Breaking or damaging or weakening any one of these pillars will damage the entire structure since everyone is a fundamental pillar and each is tightly interlinked to each other and these four forms a single interdependent reality.

The system of dispensing justice in India has come under great stress for several reasons mainly because of the huge pendency of cases in courts. In India, the number of cases filed in the courts has shown a tremendous increase in recent years resulting in pendency and delays underlining the need for alternative dispute resolution methods.

With the advent of the alternate dispute resolution, there is new avenue for the people to settle their disputes. The settlement of disputes in Lok Adalat quickly has acquired good popularity among the public and this has really given rise to a new force to alternate dispute resolution and this will no doubt reduce the pendency in law Courts. The scope of alternate dispute resolution system (ADR) has been highlighted by the Hon'ble Chief Justice of India in his speech in the joint conference of the Chief Ministers of the State and Chief Justice of High Courts, held at Vigyan Bhavan, New Delhi on September 18, 2004 and insisted the Courts to try settlement of cases more effectively by using alternate dispute resolution system so as to bring down the large pendency of cases in law Courts.

Alternate Dispute Resolution is rapidly developing at national and international level, offering simpler methods of resolving disputes. Increasing trend of ADR services can easily be inferred from the growth of "Arbitration clause" in majority of contracts. There has been a significant growth in number of law school courses, diplomas, seminars, etc. focusing on alternate dispute resolution and rationalizing its effectualness in processing wide range of dispute in society.

Lastly, the importance of ADR mechanism can be aptly put in the words of Abraham Lincoln:

"Discourage litigation persuade your neighbours to compromise whenever you can point out to them how the nominal winner is often a real loser, in fees, expenses, waste of time…"

After studying the topic it is observed that member country responses domestic frameworks for consumer dispute resolution and redress provide for a combination of different mechanisms. Although not available in all countries, three clear categories of mechanism were identified in this report: mechanisms for consumers to resolve their individual complaints; mechanisms for consumers to resolve collective complaints; and mechanisms for government bodies to take legal action and obtain monetary redress on behalf of an individual consumer or group of consumers. These different categories serve distinct yet complementary functions, responding to the varying nature and characteristics of consumer complaints.

Increased mobility and the growth of the online marketplace have significantly increased the possibility for consumers and businesses to engage in transactions over great distances and without regard to geographic borders, local cultures and legal frameworks. Such benefits, however, raise challenges as to how potential disputes can be resolved in an accessible, effective, and fair way. Arbitration is considered to be an essential part of dispute resolution among commercial parties these days. Even in non-commercial cases, arbitration and other alternative dispute resolution mechanisms are used these days. However, gradually even ADR mechanisms have become time consuming and expensive nowadays. Therefore, commercial world is looking towards information and communication technology (ICT) for a better opinion than ADR.

The ongoing development of information and communication technologies, especially internet-based communications (e.g. message boards, email, chat rooms, and video conferencing), have permitted ADR services to move into an online virtual arena known as online dispute resolution.

Many of the initial ODR service providers focused on resolving disputes stemming from e-commerce transactions, such as online retail or auction (e.g. e-Bay) purchases. Consequently, the majority of the research and discussion on ODR is primarily focused upon the context of resolving such disputes. Recently, ODR practitioners have begun to provide services intended to resolve more complex types of dispute (e.g. child custody and divorce settlements as well as complex, multi-party international employment disputes).

Online dispute resolution (ODR) has emerged as an alternative to ADR that is primarily technology driven. Perry4 Law and Perry4 Law Techno Legal Base (PTLB) have been working in the direction of legal enablement of ICT systems in India and worldwide and legal enablement

of e-governance in India and abroad. To strengthen the initiatives and projects of of Perry4 Law and PTLB, they have thought of taking some crucial and immediate steps for the development of E-Courts, E-Judiciary, ODR India, and Online Arbitration and so on. It has many advantages over traditional litigation methods and even over ADR methods. However, online dispute resolution (ODR) in India is still evolving. Perry4Law and PTLB suggest that India must speed up the process of adoption of ODR for resolving e-commerce and international commercial disputes. E-commerce disputes resolutions in India may be resolved using ODR in the near future. Electronic delivery of justice in India has failed. There is no second opinion that e-delivery of justice in India is needed. Further, e-courts and ODR in India are also required to be strengthened.

Suggestions:

There may be some restrictions in the existing arbitration laws on the development of online arbitration, but these restrictions are not substantial obstacles. With the development of laws about the Internet, e-commerce and arbitration, there is spacious room for the development of e-commerce and online arbitration all over. By taking appropriate precautions, arbitration agreements can be concluded by electronic means and arbitration proceedings can be conducted by electronic means, within the framework of existing national laws and international treaties. Though it is contended above that the online arbitration and its utility is a possibility without any law reform and people do not feel secure unless it is placed in proper legal frame work. Hence law reform in this regard is the urgent need. Jurisdictional issues in cyberspace have always been the matter of great concern. There is a close connection of this issue with the success of online arbitration. As online arbitration is more suitable and often resorted to in resolution of cross border disputes, no amount of law reform at national level would be the answer to the menace. At international level the suitable law reform is recommended.

Online dispute resolution system presents a realistic and practical solution to the growing needs of the Internet community. Furthermore, it provides speedy resolution, is convenient, eliminates complex jurisdictional and choice of law problems and has the potential to be economically viable. As the number of people using the World Wide Web grows, so will the disputes. The existing services are trying to come up with the demand but there are certain problems that must be addressed

first like jurisdiction, confidentiality, enforcement of decisions, etc. there is an urgent need to address these issues to maximize the benefits and to provide a better system of resolution for new breed of technology led disputes. The world today acknowledges the accomplishment of WIPO online dispute resolution system. It has extended to thousands of internet users easily accessible and reliable means of dispute resolution and delivered substantial justice in a very short span of time. There are a number of cases of domain name disputes which have been successfully resolved online. A land mark case in the Indian context is the TATA case wherein WIPO Arbitration and Mediation centre in its administrative panel decision held that the domain name "tata.org "standing in the name of the Advanced Information Technology Association, Mumbai should be transferred to the complainant being Tata Sons Ltd. As it was a bad faith registration. Another recent case decided by WIPO is the **Maruti Udyog Limited v. Maruti Software Pvt. Ltd.** wherein it was held that the respondents domain name "marutionline.com" is identical to trademark name MARUTI in which complainant has rights, the respondent has no legitimate interest in domain name and it is a bad faith registration. The panel decided that the domain name "marutionline.com" should be transferred to the complainant. In this way many e-disputes in the present times are being amicably settled without having to resort to cumbersome process of litigation and the same is done expeditiously at more convenience and at reduced costs.

The various possible steps that can be taken for the bringing in the concept and practice of Online Dispute Resolution worldwide. Advances in technology can be used in a variety of ways to help decrease the discrepancy that often exists between parties to a commercially-based alternative dispute resolution. The first, and arguably most important, use of technology would be the use of strict formats for online dispute resolutions and the creation of in-depth tutorials to guide parties to an online dispute resolution through the entire process. Technology can also serve a purpose beyond making the format of an online dispute resolution site more understandable. Advances in technology can also be used to simplify the negotiation process for different segments of the country—or for that matter the world. In addition to the benefits of new technology, the current system of online dispute resolution would benefit greatly from increased governmental involvement. This involvement can come in a variety of ways including the creation of model rules, the creation of a certification board for online dispute resolution providers, and legislation that regulates contractual clauses requiring consumers to enter into mandatory arbitration of commercial disputes.

It is definite that this journey from ADR to ODR has been extremely fascinating. While it invokes an ever challenging thought process in each one of us, it stimulates us to ponder over certain issues that are currently emerging and will very soon aid in improvisation and extension of ODR system application to new areas worldwide. Law which exists as of today in its binding force can be categorized in three layers. The basic layer which can be said to constitute the first layer is the domain of National/domestic law which is bound by territorial/physical boundaries. The third layer can be said to comprise of International legislative texts which serve as model laws and help nations modernize adapt or adopt or amend or make more uniform their domestic laws e.g UNCITRAL has framed laws on procurement of goods, construction and services, law on International credit transfers and laws that are more procedural laws by nature as that of International commercial arbitration. The second layer is a new and emerging layer that has helped bring about uniformity of laws worldwide and has a binding force and is enforceable everywhere such as the Uniform dispute resolution Policy adopted by ICANN for resolution of domain name disputes.

With the world becoming closer and free of physical boundaries through the virtual world of cyberspace and internet, there is certainly a great scope of bringing about uniformity in laws and their application and uniformity in procedures adopted to resolve disputes between individuals across the globe. Apart from success of ODR mechanisms, it would not be a farfetched idea to conceive of an online International Court of justice to meet the demands of e-disputes though it would require political reconciliation between main trading blocks and will take some time. Within European Union there have been already developments to examine provision of mediation and arbitration services for electronic commerce through National Chambers of Commerce. In some time, an organization or system of law could find its way to regulate and determine the bulk of e-disputes through uniform means. Considering the effectiveness and desirability of ODR, online arbitration/mediation should be introduced in all model international legislative texts, national laws as an internationally accepted uniform method of dispute resolution. Governments should consider their regulatory role and seek to encourage the development of effective trust mark programs standards and dispute resolution processes. Governments should also consider an accreditation process to ensure that policy goals and consumer protection are achieved. Governments should work towards international cooperation and the development of international standards and codes of best practice.

Lastly, it can be concluded by saying that as the importance and necessity of ADR along with ODR is increasing in the society both in national and international, initiatives should be taken in every way for the development in these fields so that society can be benefited and the pendency of the cases in the courts may be reduced to zero. If India wants to be a hub for international commercial dispute resolution and online commercial arbitration, then it must start investing in ODR and e-courts as soon as possible.

ODR system in essence not only offers a promising mechanism of dispute resolution worldwide, but serves as a facilitator of global harmony and a wholesome e-commerce interaction and growth.

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