

Alternative Dispute Resolution in India - ADR: status/effectiveness study

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Forschungsbericht / research report

Empfohlene Zitierung / Suggested Citation:

Konoorayar, V., Pillai, K. N. C., & V. S., J. (2014). *Alternative Dispute Resolution in India - ADR: status/effectiveness study*. New Delhi. <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-410340>

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ADR: STATUS / EFFECTIVENESS STUDY

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ABBREVIATIONS

ADR	:	Alternative Dispute resolution
CPC	:	Code of Civil Procedure, 1908
Cr.PC	:	Code of Criminal Procedure, 1973
ICA	:	Indian Council of Arbitration
ICADR	:	International Centre for Alternative Dispute Resolution
ICC	:	International Chamber of Commerce
ILI	:	The Indian Law Institute
IPR	:	Intellectual Property Rights
ISDLS	:	Institute for the Study and Development of Legal Systems, California, USA
LCIA	:	London Court of International Arbitration
MACT	:	Motor Accident Claims Tribunal
NI Act	:	Negotiable Instruments Act, 1881
UNCITRAL	:	United Nations Commission on International Trade Law

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Preface

INDIA HAS a proud tradition of dispute resolution based on consensus and conciliation. The institution of *Panchayats*, the remnants of which are still found in our social system is the symbol of indigenous administration, which covered not only dispute resolution, but also other aspects of public administration. Colonisation of India had had in its sway uprooted many indigenous institutions including *Panchayats* and the very philosophy of mediation and conciliation was replaced by adjudication necessitating the establishments of courts of law based on adversarial philosophy. The blending of administration and adjudication which had been the imprint of colonial administration was resorted to suit the requirement of efficient tax collection. This approach had had its impact on the efficacy of the system in the maintenance of law and order in the society. Delay in justice delivery was rampant. Inefficiency was abundantly evident. The result was docket-explosion that continues to haunt us even today.

India despite the need could not experiment with any alternative system while other democracies like the U.S were constrained to try several modes like plea bargaining, arbitration *etc.* The need to cope with the increased volume of litigation later made India also to experiment with ADR. The Arbitration and Conciliation Act, 1996 was enforced with all earnestness. But no study worth the name on its efficacy has so far been done. Here is an attempt to do it with the help of data collected from various institutions in three metros namely, Delhi, Mumbai and Bangalore.

Purpose and scope of this study

The study is mainly focused on the effectiveness of ADR systems in India in terms of reduction of cases in courts and also to make concrete suggestions for building a strong institutional ADR mechanism in India. As per the terms of reference, the Indian Law Institute was required to study the following: -

1. Review of existing laws and regulations that provide the legal environment for resolving commercial disputes through ADR. This will include the review of the Arbitration and Conciliation Act, 1996 with a view to recommending removal of any shortcomings and the review of the implementation of the

Section 89 of the Code of Civil Procedure in order to improve its usage and ICADR's possible role in assisting in the implementation of the provision.

2. Review of enforcement mechanisms of domestic and international arbitration awards.
3. The incentive structures underlying the use of courts and ADR mechanisms to resolve certain types of disputes and the incentive structure for various stake holders to promote or to oppose certain types of ADR mechanisms for certain types of cases (stake holder analysis). It was stipulated that the study should not be data based.
4. ADR experience in three selected cities viz. Delhi, Mumbai & Bangalore and the type and number of cases currently being handled through arbitration / mediation; average period of their disposal; selection of cases for these mechanisms; existence of traditional or modern ADR methods; successful and unsuccessful attempts of introducing ADR; public awareness of ADR; formal ADR trainings and activities; pool of trained and trainable mediators/ arbitrators.
5. The nature of cases, which can be effectively, handled through arbitration/ mediation and other ADR, including their possible selection for ADR; Possibility of including Intellectual Property Rights cases under ADR mechanisms shall also be studied.
6. The impact of case disposal through arbitration/ mediation and other ADR mechanisms on the reduction of cases in courts.
7. The steps necessary to improve disposal of cases and attract more cases for dispute settlement through ADR.
8. The scope of developing institutional ADR systems in India on the lines of renowned international ADR institutions.

Methodology of the study

The study was done in a systematic manner, in three stages, viz data collection, data analysis and report writing. The challenging task in the beginning stage was the identification of research organizations in the three metros with a good track record of empirical research in law. This was sorted out by selecting the Post Graduate Department of Law, University Law College, Bangalore University and Post Graduate Department in Law, Law School, SNTD Women's University, Mumbai. In Delhi, the

work was done under the direct supervision of the research team at the Indian Law Institute. To facilitate data collection, researchers with LL.B degree were also appointed in all the three cities. They were given details as to the purposes of the study, the nature of data collection and above all the time limit of the study.

Simultaneously detailed guidelines,⁴ questionnaires and proforma⁵ for the collection of data were finalized and sent to the research teams in all the three cities. There were altogether six questionnaires and one proforma for the collection of data from different sources including case records in various courts, opinions of the general public, interview with arbitrators, lawyers and other ADR practitioners, working of training and awareness institutes, views of judges and other experts. The researchers were also instructed to consult maximum number of arbitrators and gather their opinion as to the functioning of arbitration mechanism in India. Similar interviews were also conducted to find out the better choice between institutional arbitration and *ad hoc* arbitration. For conducting interviews and consultation the help of information and communication technology was also sought. Taking in to account the capacious nature of the study, data collection was limited to the high courts, district courts and subordinate courts in these cities.

Since the collection of data from the case records in the courts is not possible without permission of the high courts concerned, request letters were written to Registrar Generals of the respective High Courts through proper channel. Since there was no response even after the lapse of one month, request letters were directly sent to the Chief Justices of the High Courts. Though belatedly, permission was duly granted thereafter for accessing to court records in Delhi, Mumbai and Bangalore.⁶ In spite of these difficulties, the researchers could satisfactorily collect the data.

Simultaneously, the researchers at ILI collected articles and books, which were analyzed for the purpose of literature review to draw the basic structure of the report.. Meanwhile a National Judges Consultation was organized in Delhi from 12th

⁴ See Annexure 1.

⁵ Annexures 2 to 8.

⁶ As reported by the researchers in Delhi and Mumbai and Bangalore, co-operation from the court staffs was not forthcoming.

April to 13th April, 2008. Fifty-one district judges from all over the country participated in the Consultation and gave inputs and made fruitful suggestions.

When collection of data was completed in each city, those data were analyzed and presented before the experts in Bangalore and Mumbai through Regional Roundtable Conferences. The consolidated data from all these cities were thereafter presented before the National Roundtable Conference held in Delhi on 13th May 2008. In the light of the views expressed in these conferences, the final report was drawn up. The report has had its limitations. For example, *ad hoc* arbitration being absolutely an unorganized sector in India, even the total numbers of arbitrators involved is difficult to be ascertained. There are no records showing the total number of arbitrations taking place in a year. Even when they are approached, these arbitrators are not ready to disclose the true facts regarding the present system of *ad hoc* arbitration in India. Due to this difficulty, the data on *ad hoc* arbitration used for making this report is largely based on the ones collected through interviews, consultations and conferences. Similarly, except for mediation, there were no separate and consolidated records of cases settled under section 89 CPC, posing great difficulty for the researchers to disaggregate the available data.

Chapterisation

The final report contains six chapters arranged in sequence. The first chapter introduces the problem of case pendency by analyzing the statistical data of cases pending in the high court and subordinate courts of these three cities. This chapter concludes that the effective functioning of the courts is seriously affected by huge backlog of cases.

The second chapter discusses the current status of ADR in India. This is a doctrinal analysis on the efficiency of the current ADR initiatives in India. This chapter among other things critically examines the provisions of Arbitration and Conciliation Act, 1996 and Section 89 of Code of Civil Procedure, 1908, in detail.

The third chapter exclusively deals with the current trends in Mediation. The analysis of the effectiveness of mediation has been done with the help of empirical and statistical data collected by the researchers.

Similarly, the fourth chapter is an attempt to analyze the working of *ad hoc* arbitration in India. An endeavor is also made to compare the efficiency of *ad hoc* arbitration with that of institutional arbitration. This study is purely based on the empirical data collected.

In the fifth chapter the effectiveness of other ADR techniques is examined using empirical data. An extensive analysis of the working of *Lok Adalats* has also been made in this chapter as it has proved itself to be an institution useful to resolve disputes mostly among the general masses.

The last chapter concludes the study and gives recommendations for improving the effectiveness of ADR mechanism in India. It mainly recommends that an ideal institutional mode of ADR should be developed in India.

Chapter 1

INTRODUCTION

THE INDIAN legal system is being criticized quite frequently because there is delay in delivering justice. Some Studies into the reasons for this delay have indeed been done and the need for developing ADR mechanisms was emphasized to cope up with this delay and arrears in courts.⁷ This chapter attempts to identify the reasons for the delay in courts on the basis of statistical data.⁸

1. A general analysis of the case pendency in India

The tables given below show the number of cases filed, disposed and were pending during the period between January 1st 2005 to December 31st 2007 in the various high courts in India. The tables and corresponding graphs show the statistics regarding civil cases and criminal cases separately.

Table 1
Institution, disposal and pendency of cases in the high courts⁹

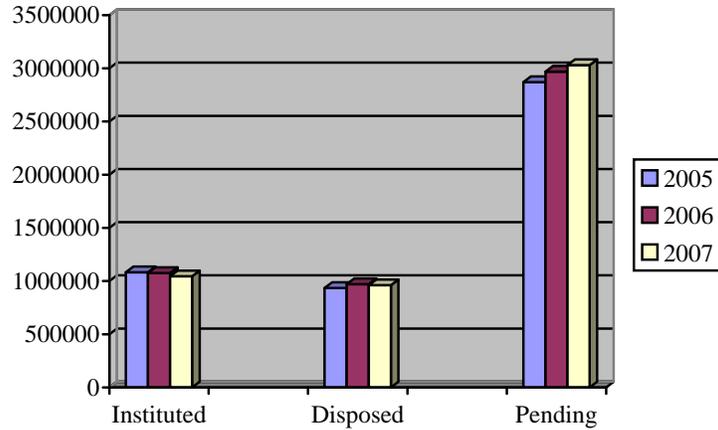
Years	Civil Cases			Criminal Cases		
	Cases instituted	Disposed Cases	Pendency of cases	Cases instituted	Disposed Cases	Pendency of cases
2005	10,82,492	9,34,987	28,70,037	4,60,398	4,03,258	6,51,246
2006	10,75,878	9,70,304	29,68,662	5,06,028	4,70,050	6,86,191
2007	10,44,534	9,60,793	30,30,549	5,23,941	4,90,403	7,12,511

⁷ See for example (1) 77th Report of the Law Commission on Delay's and Arrears in Trial Courts (1978); (2) 79th Report of the Law Commission on Delay and Arrears in High Courts and other Appellate Courts (1979); (3) 124th Report of the Law Commission on The High Court Arrears-A fresh Look (1988) *etc.*

⁸ The subsequent chapters attempt at evaluating the effectiveness of ADR mechanism using empirical and statistical data.

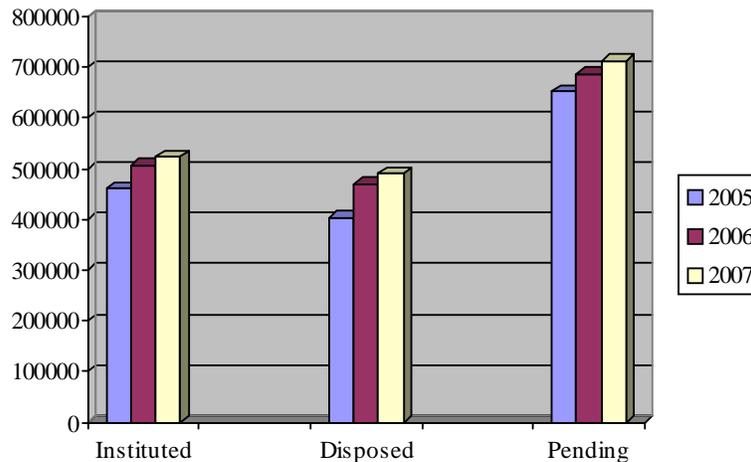
⁹ Consolidated from published statistics in *Court News*, The Supreme Court of India (from 2006 to 2008)

Graph 1
Graphical representation of institution, disposal and pendency of civil cases in the high courts



The phenomenon to be noted is that for the last three years *i.e.*, from 2005 to 2007 the rate of institution and disposal of cases are almost the same except for a minor variation in the disposal rate towards the lower side. At the same time it is interesting to note that the pendency rate still remains high. It can also be noted that there is a nominal increase in the number of pending cases in each year.

Graph 2
Graphical representation of institution, disposal and pendency of criminal cases in the high courts



As shown earlier, here also the pendency rate is very high. At the same time it can also be noted that, compared to civil cases the difference as to pendency rate on

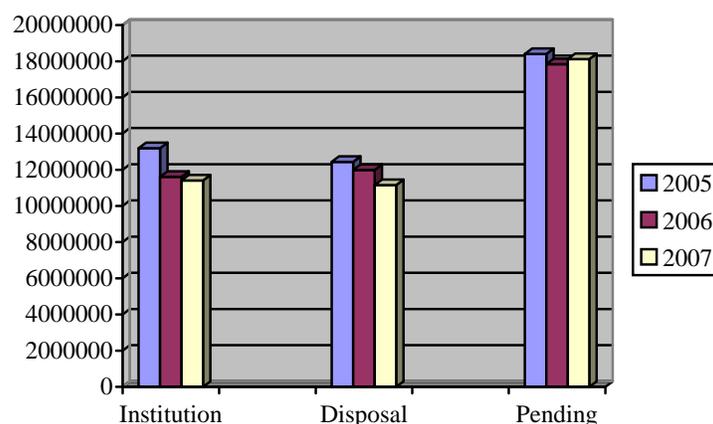
the one hand and the institution /disposal rates on the other hand, is remarkably less in criminal cases.¹⁰ The disposal rate is also shown as lesser than the filing rate. The trend that could be observed is highest pendency, more number of filed cases and low rate of disposal.

Similarly the following table and graph show the number of cases disposed of from January 1st 2005 to December 31st 2007 in the various subordinate courts in India.

Table 2
Institution, disposal and pendency in subordinate courts¹¹

Years	Civil Cases			Criminal Cases		
	Institution of cases	Disposed Cases	Pendency of Cases	Institution of cases	Disposed Cases	Pendency of Cases
2005	40,69,073	38,66,926	72,54,145	1,31,94,289	1,24,42,981	1,84,00,106
2006	40,12,250	40,20,941	72,37,496	1,16,11,462	1,19,90,086	1,78,42,122
2007	37,55,019	37,59,378	72,62,071	1,14,09,828	1,11,54,522	1,81,20,990

Graph 3
Graphical representation of institution, disposal and pendency of criminal cases in all the district and subordinate courts in the country

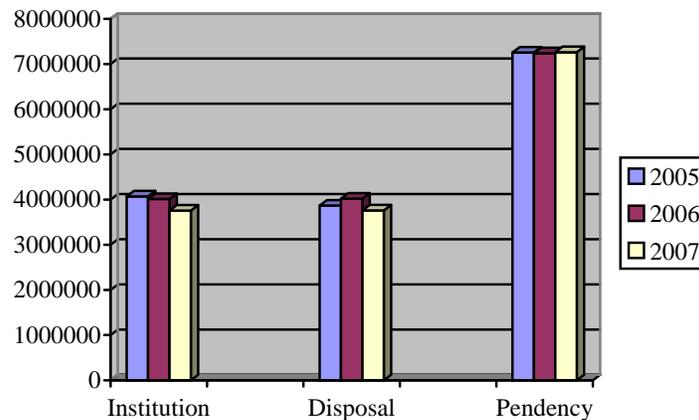


¹⁰ The cases falling under section 320 Cr.PC (Compoundable Offences), section 125 Cr. P. C, (maintenance of wives, children and parents) and section 138 of Negotiable Instruments Act, 1881 (Dishonour of cheques for insufficiency of funds.) etc. can be settled through various ADR mechanisms.

¹¹ *Supra* n. 6.

The graph brings in to light the fact that the rate of institution of cases is coming down slightly in respect of criminal cases in the subordinate courts all across the country. It also shows that there is a minor fall in the disposal rate also. At the same time, there is a little rise in the disposal rate of criminal cases in the year 2006 when compared to the number of cases instituted in that year. Consequently, there is a fall in the number of pending cases in 2006. Hence, with the help of available data it is concluded that the general trend¹² has not been followed in matters of disposal of criminal cases in the year 2006 as the disposal rate was slightly on the higher side during that year.

Graph 4
Graphical representation of institution, disposal and pendency of civil cases in all the district and subordinate courts in the country



At the subordinate courts level, pendency rate of civil cases remains the same i.e., high whereas there is a discrepancy in the rate of institution and disposal of cases. A minor variation between the rate of institution of cases and that of disposal of cases can be seen in the year 2005 only whereas in the years 2006 and 2007 the disposal rates were marginally high.

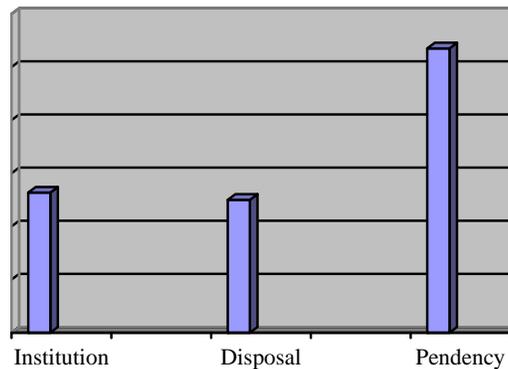
1.1. General trend of litigation in India

The analysis of the data given in the previous paragraphs lead to the following assumptions as to case pendency in the country. In the sequential order, the pendency rate is always at the top, then the institution rate and last comes the disposal rate.

¹² The general trend has always been a very high pendency rate, a fairly high institution rate and a low disposal rate. See explanation to graph 5 at page 5 for more details.

This trend may be illustrated in the following manner.

Graph 5
General trend of litigation in India



This leads to following general assumptions:

- (i) The numbers of cases disposed off in a year are marginally lesser than the number of cases instituted in that year. This will invariably result in the pendency of a few cases in every year. (This difference in institution of cases and disposal of cases in each year may be expressed by the letter, X)
- (ii) The main reason for huge number of pending cases might be backlog of cases that are filed before 2005. (This backlog may be expressed by the letter, Y)
- (iii) So the pendency in the year 2005 would be $2005 X + Y = N$.¹³ There after in the year 2006 the total pendency would be $2006 X + N = M$. In the year 2007 the pendency would be $2007 X + M$. This means the case pendency in the courts increases every year.
- (iv) This phenomenon adds to the belief in the minds of the public that court litigation results in delay and caseload and thereby creating an impression that judicial system in India is not contributing effectively to justice administration.

¹³ N is the total number of pending cases in the year 2005.

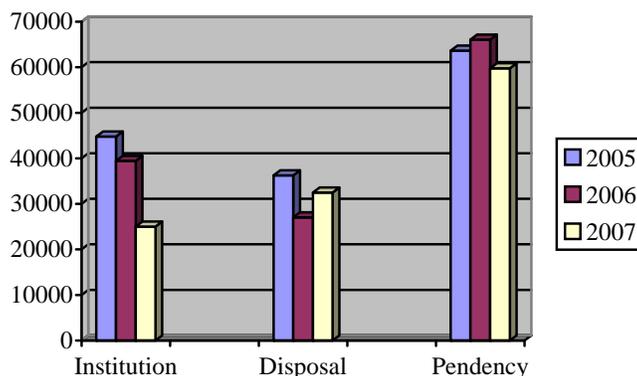
2. Case study and analysis of Delhi, Bangalore and Mumbai

The above stated fact situation needs to be analysed in detail with help of data collected from the three cities under study. The outcome of data analysis is given below in each graphical representation. To begin with, the data collected from the High Court of Delhi and various other district and subordinate courts are analyzed below.

Table 3
Case pendency in the High Court of Delhi¹⁴

Years	Civil Cases			Criminal Cases		
	Institution	Disposal	Pendency	Institution	Disposal	Pendency
2005	44789	36,268	63,655	16659	12,707	14,724
2006	39436	27029	66,062	20829	18814	16,739
2007	25017	32484	59,776	12097	12297	16,539

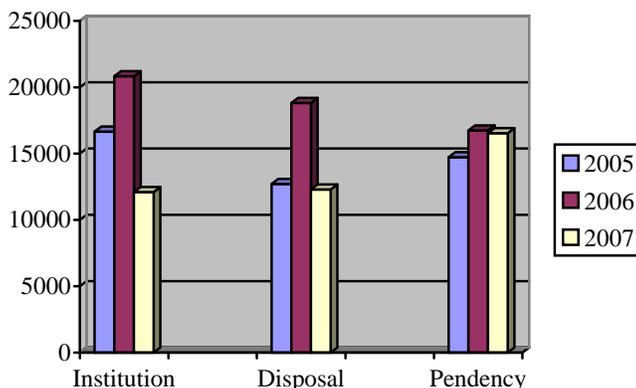
Graph 6
Graphical view of institution, disposal and pendency of civil cases in the high court of Delhi



Case analysis in respect of the High Court of Delhi shows a downward trend in the filing of cases. The disposal rate is fluctuating. But in the year 2007 it was much higher than the institution rate. The immediate effect could be seen in the pendency rate for 2007, resulting in a slight variation from the general trend across the country.

¹⁴ *Supra* n. 6.

Graph 7
Graphical representation of institution, disposal and pendency of criminal cases in the high court of Delhi



The graph shows that the disposal rate with respect to criminal cases coming to the High Court of Delhi is comparatively high. Consequently, the pendency rate is also on the lower side when compared to other high courts and even civil cases in the same high court. The general trend as stated earlier is missing here which prima-facie proves that the benches of the high court dealing with criminal cases are more efficient.

2.1. Analysis of data from the subordinate courts of Delhi

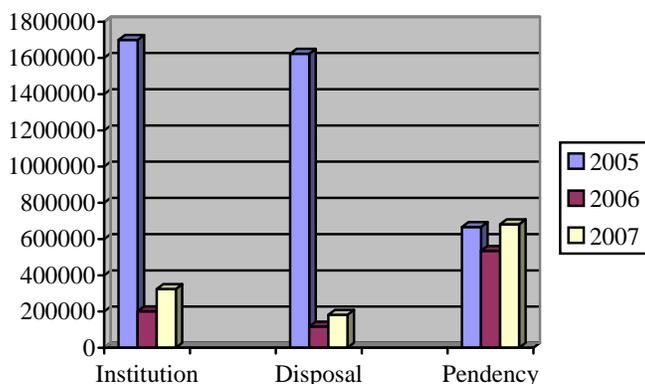
The table and graphs below show the institution, disposal and pendency rates in the various subordinate courts of Delhi.

Table 4
Pendency in subordinate courts of Delhi¹⁵

Years	Civil Cases			Criminal Cases		
	Institution	Disposed Cases	Pendency of Cases	Institution	Disposed Cases	Pendency of Cases
2005	69,718	83,458	1,19,614	16,99,479	16,22,744	6,66,850
2006	85,980	73,490	1,41,738	2,20,745	1,14,130	5,34,881
2007	75,345	74,868	1,45,043	3,24,351	1,81,789	6,86,664

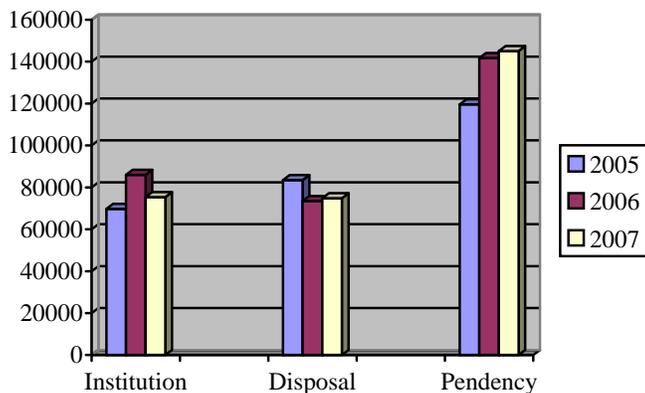
¹⁵ *Ibid.*

Graph 8
Graphical view of institution, disposal and pendency of criminal cases in the district and subordinate courts of Delhi



The graph above illustrates an unbelievable fall in the institution and disposal of criminal cases in the subordinate courts of Delhi in the year 2006. To make it clearer, it can be seen that in the year 2005 the number of cases instituted were 16,99,479 whereas in the year 2006, it was reduced to 2,20,745. Keeping in mind the fact that the total population of Delhi is approximately 1,16,80,000, it is impossible to presume that out of this, 16,99,479 persons were involved in crimes till the year 2005 and they have stopped the criminal activities from 2006. One reason could be the removal of traffic offences from the list of criminal cases from the year 2006 onwards.¹⁶

Graph 9
Graphical representation of institution, disposal and pendency of civil cases in the district and subordinate courts of Delhi



¹⁶As opined by Hon'ble Mr. Justice Madan B. Lokur, Judge, High Court of Delhi, in the National Roundtable Conference held as part of this study at New Delhi on 13-05-08.

The graph also exhibits the general trend except for the year 2005 when the rate of institution of cases was lesser than that of disposal. It is really interesting to note that the subsequent increase in the rate of institution of cases in the year 2006 immediately resulted in the high pendency rate. But later, in the year 2007 when the institution rate came down and there was a nominal rise in the disposal rate, still the pendency rate had gone up.

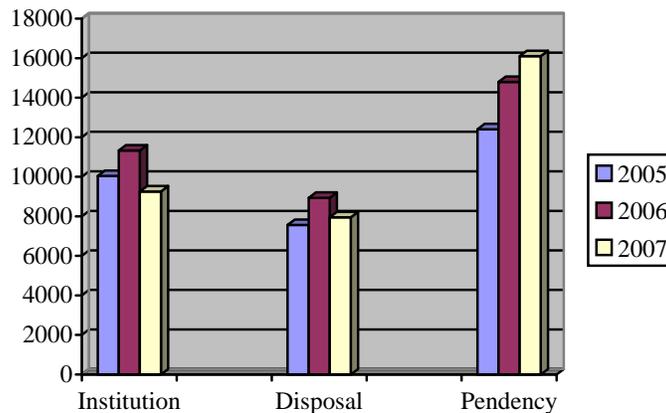
2.2. Analysis of data from the high court of Karnataka

Tables and graphs given below shows institution, disposal and pendency rates in the High Court of Karnataka

Table 5
Pendency in High Court of Karnataka¹⁷

Years	Civil Cases			Criminal Cases		
	Institution	Disposed Cases	Pendency of Cases	Institution	Disposed Cases	Pendency of Cases
2005	59,047	54,178	72,538	10,039	7,563	12,403
2006	49,176	42,877	78,837	11,329	8,935	14,797
2007	52,580	41,664	87,945	9,255	7,949	16,103

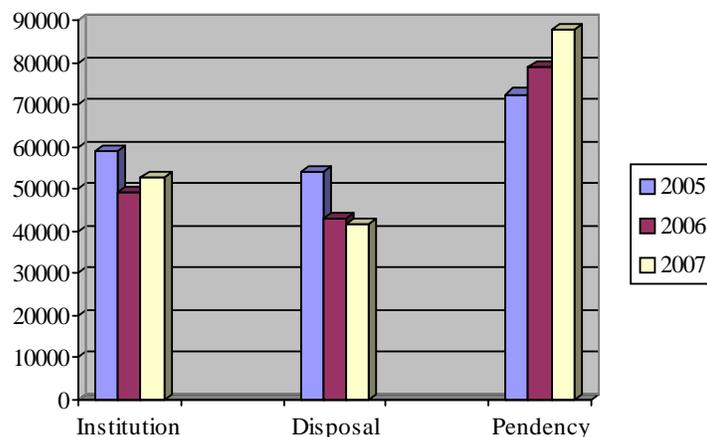
Graph 10
Graphical representation of institution, disposal and pendency of civil cases in the High Court of Karnataka



¹⁷ *Supra* n. 6.

The graph shows that in the institution, disposal and pendency of civil cases in the High Court of Karnataka, the general trend has been followed with a consequential high pendency rate.

Graph 11
Graphical representation of institution, disposal and pendency of criminal cases in the High Court of Karnataka



Similarly, the criminal cases also show the general trend that always the pendency is highest with an increased rate of institution of cases and a low level of disposal of cases.

2.3. Analysis of data from the subordinate courts in the state of Karnataka

Tables and graphs given below show the institution, disposal and pendency rates in the subordinate courts in the state of Karnataka.

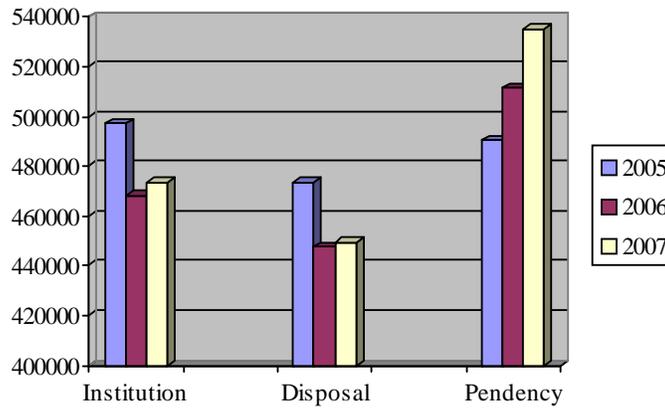
Table 6
Subordinate courts in Karnataka¹⁸

Years	Civil Cases			Criminal Cases		
	Institution	Disposed Cases	Pendency of Cases	Institution	Disposed Cases	Pendency of Cases
2005	2,75,819	2,99,936	5,77,958	4,97,102	4,73,135	4,90,338
2006	3,16,298	3,19,808	5,64,448	4,68,427	4,47,394	5,11,371
2007	2,51,922	2,52,094	5,64,276	4,73,105	4,49,475	5,35,001

¹⁸ *Ibid.*

Graph 12

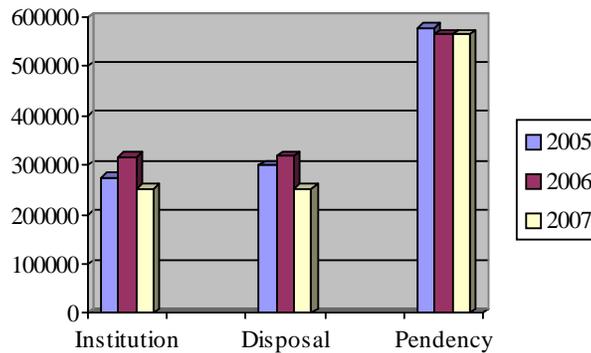
Graphical view of institution, disposal and pendency of criminal cases in the district and subordinate courts of Karnataka



Here also the general trend is visible and the pendency rate is seen to be very high. At the same time it is also revealed that there is a decrease in the institution as well as disposal rate in the year 2006 and 2007 when compared to the year 2005. This has resulted in the increase of case pendency in 2006 and 2007. It can also be seen that the pendency of cases in 2005 was lesser than the total number cases instituted in the year 2005.

Graph 13

Graphical representation of institution, disposal and pendency of civil cases in the district and subordinate courts of Karnataka



Except for the year 2005 when rate of disposal was high, the years 2006 and 2007 show that the institution and disposal rates were almost equal, resulting in a steady pendency rate in 2006 and 2007.

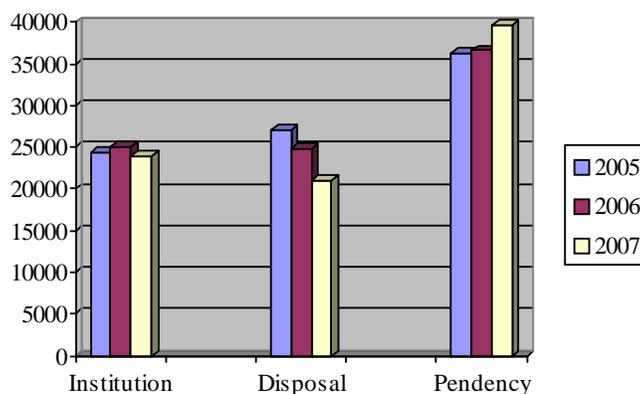
2.4. Analysis of data from High Court of Bombay

The following tables and graphs provide us with the data to analyse the status of cases that were instituted, disposed of and pending in the High Court of Bombay from the year 2005 to year 2007.

Table 7
Pendency of cases in the High Court of Mumbai¹⁹

Years	Civil Case			Criminal Cases		
	Institution	Disposed Cases	Pendency of Cases	Institution	Disposed Cases	Pendency of Cases
2005	1,12,150	1,01,811	3,11,643	24,314	27,107	36,310
2006	106144	91426	3,26,361	25042	24763	36,589
2007	115,465	1,11,428	3,30,398	23,866	20,973	39,579

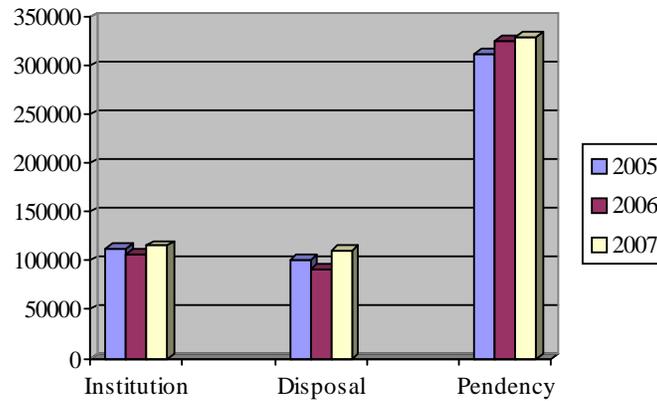
Graph 14
Graphical representation of institution, disposal and pendency of criminal cases in the High Court of Mumbai



The graph above clearly indicates that there was a steady decrease in the disposal of cases for all the three years. Disposal rate was more than that of institution in the year 2005. Compared to years 2005 and 2006, there was an increase in the pendency of cases in the year 2007.

¹⁹ *Ibid.*

Graph 15
Graphical representation of institution, disposal and pendency of civil cases in the high court of Mumbai



As it was originally, the pendency rate is still on the higher side. There is not much difference in the institution, disposal and pendency rates of cases in each year.

2.5. Analysis of data from the subordinate courts of Maharashtra

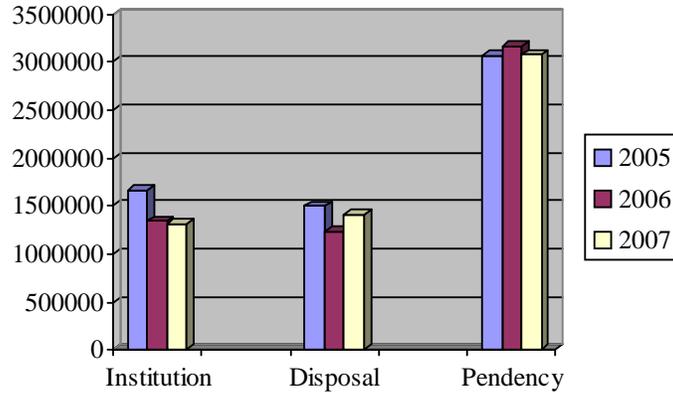
The following tables and graph show rates of institution, disposal and pendency of cases in the subordinate courts in the state of Maharashtra

Table 8
Pendency of cases in the subordinate courts of Maharashtra²⁰

Years	Civil Cases			Criminal Cases		
	Institution	Disposed Cases	Pendency of Cases	Institution	Disposed Cases	Pendency of Cases
2005	4,26,642	4,49,262	10,14,929	16,69,133	14,97,454	30,68,962
2006	3,39,445	3,74,916	9,79,460	13,39,263	12,39,858	31,68,559
2007	4,23,232	3,44,464	9,72,625	13,14,397	14,09,799	30,73,157

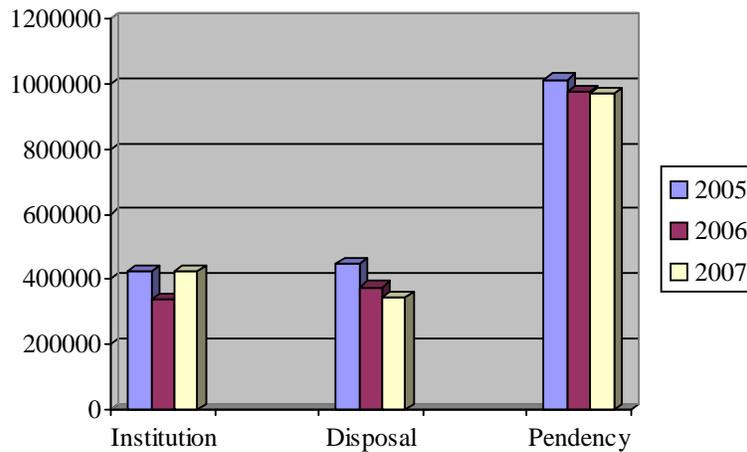
²⁰ *Ibid*

Graph 16
Graphical representation of institution, disposal and pendency of criminal cases in the district and subordinate courts in the State of Maharashtra



In all the three years there was a nominal decrease in the rate of institution as well as the disposal of cases. But it can also be seen that a marginal increase in the disposal rate in the year 2007 has immediately resulted in a corresponding recession in the pendency rate.

Graph 17
Graphical representation of institution, disposal and pendency rates of civil cases in the district and subordinate courts in the State of Maharashtra



Except as to a sudden drop in the year 2006, the rate of institution of cases remains almost steady. But the graph shows a steady fall in the rate of disposal of cases in all these years. Similarly, though the pendency rate is on the higher side, it is in the decreasing order.

3. How long it takes for a dispute to be resolved through court litigation in India and at what cost?

There have been many assumptions on the average time taken by the courts in India to resolve disputes but none is on the basis of any scientific study.²¹ In a study done in Mumbai,²² few interesting facts have been revealed. The study shows that during the period from 2006-2008 the time taken from the inception of the suit in the court till the execution of the decree is 1420 days. This period can be further disaggregated in three stages. Firstly, from filing to service of summons it takes 20 days. Secondly, the trial proceedings and subsequent decree takes 1095 days and thirdly the execution of decree takes 305 days.

Regarding the cost, the study reveals that during the same period the cost of the commercial litigation in Mumbai was 39.6% of the total claim. In this the lawyer's fee was the highest at 30.6% of the total claim. The cost incurred in the court was 8.5% and for execution of the decree, the cost involved was 0.47% of the total claim.

4. Conclusion

On the whole, the analysis of data included in this chapter shows that generally the pendency rate is much higher than the institution and disposal rate.²³ At the same time the disposal rate is fluctuating in nature and rests on a lower side when compared to the institution rate. The reasons may include insufficient infrastructure in the courts, deficient number of judicial officers, improper cadre management, lack of skill, efficiency and techniques adopted by the judicial officers, nature of the

²¹ Conducting such a study for the whole of India would be extremely difficult and time consuming. The main reason being that such a study requires examination of individual case files.

²² International Finance Corporation, "Doing Business Study" 2008, www.doingbusiness.org

²³ This is in addition to the fact that there are few isolated instances where in the institution; disposal and pendency rates are equal.

particular case, lacking in case management, non-cooperation among lawyers, lack of healthy relationship between parties; lack of effective Alternative Dispute Resolution techniques *etc.* Since the scope of this study is limited to analyzing the effectiveness of Alternative Dispute Resolution mechanisms in India, the following chapters attempt at analyzing in detail the status/effectiveness of these alternative techniques.

Scope for further study

A detailed study may be done to find out the reasons for the fluctuating rates of disposal of cases in the courts.

Chapter 2

Resolution of commercial and non-commercial disputes through ADR: A doctrinal analysis of law and policy

1. Introduction

THE ALTERNATIVE Dispute Resolution mechanisms are complementary to court proceedings and are gradually gaining recognition. The main advantage of ADR techniques is that the litigants are not bound by the technicalities of ordinary court procedure. The society, state and the parties to the dispute are equally under an obligation to resolve the dispute before it disturbs the peace in the family, business community, society or ultimately humanity as a whole, because in a civilized society the rule of law should prevail and principles of natural justice should apply and complete justice should result. The chapter attempts to study ADR mechanisms distinct from the judiciary but providing alternative means to dispute resolution through ordinary courts, through its different disciplines.

2. Traditional ADR methods

As a matter of fact, ADR has a long tradition in many countries and India too has an age-old tradition of settlement of disputes through mediation and conciliation²⁴. In ancient India, *Panchayats* continued as forum of settlement of disputes in rural India. In villages, disputes were not to be taken to law courts; instead they were referred to '*Panchayats*' consisting of village elders who commanded very high respect. The *Village Panchayats* were so called because it consisted of five elders who used to decide civil, criminal and also family disputes and they were called '*Panch Parameswar*'. This system worked successfully in the villages, and was independent of the state authority and control. The concept of parties settling their disputes in a binding manner by reference to a person or persons of their choice or private tribunals was well known to ancient and medieval India. Appeals were also often provided against the decisions of such persons or tribunals to the court of judges

²⁴ In ancient India there were three categories of arbitration viz., (i) *Puga*: Board of different sects of tribes (ii) *Sreni*: Assembly of traders and artisans of different classes (iii) *Kula*: Meeting point of family ties. This was followed by the *Panchayat* system.

appointed by the king and ultimately to the king himself. However, the law of arbitration, as it is known to modern India owes its elaboration to the British rule in India. With the advent of East India Company rule in India, the British legal system was introduced in our country. They institutionalized the justice delivery system through the establishment of courts and tribunals. Subsequently inadequacy and inefficiency of the formal court system led to the development of ADR mechanisms getting recognition in India also. The present study does the analysis of the various available modes of dispute resolution mechanisms coming under the purview of ADR.

Adjudication of disputes through courts, while unavoidable, does not in every case provide a satisfactory or amicable solution²⁵. Arbitration, mediation and conciliation are a few among the other accepted modes of alternative dispute resolution mechanisms. Even so, a common person, particularly in the rural area, may hardly be benefited by these mechanisms, unless persons who understand his mind-set interact with him in a suitable and congenial environment, to solve disputes with the minimum of costs. Certain kinds of disputes such as matrimonial disputes, family disputes, disputes with neighbors, particularly in rural areas, and several other categories of petty civil and criminal cases, which form a substantial percentage of pending litigation, can be better and more satisfactorily resolved by the processes of mediation or conciliation through intervention of public spirited, respected and senior citizens.

3. Arbitration

Arbitration is adjudication over disputes between parties by a neutral person who has been agreed upon by the parties to be the arbiter and decide upon the matter. The parties are permitted to agree upon the procedure to be followed for such arbitration. In India, the law governing arbitration is the Arbitration and Conciliation Act, 1996 based upon the UNCITRAL Model Law on Arbitration of the year 1985.

In the past, statutory provisions on arbitration were contained in three different enactments, viz., the Arbitration Act, 1940, the Arbitration (Protocol and Convention)

²⁵ As has been stated in the previous chapter, despite the working of ADR techniques supplementing the functions of ordinary courts, the data collected indicate huge number of pending cases resulting in the case load and arrears.

Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. The Arbitration Act, 1940 laid down the framework within which domestic arbitration was conducted in India, while the other two Acts dealt with foreign awards. The Arbitration and Conciliation Act 1996 has repealed the Arbitration Act, 1940 and also the Acts of 1937 and 1961, consolidated and amended the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and also defined the law relating to conciliation. The Arbitration Act of 1996 contains mainly three parts. Part I deals with domestic arbitrations, Part II deals with international commercial arbitrations and Part III deals with provisions as to conciliation. The Act does not define arbitration as such. It merely says that arbitration means any arbitration whether or not administered by a permanent arbitral institution²⁶. This means that arbitration may be *ad hoc*²⁷ or *institutional*.

Institutional arbitration is arbitration conducted under the rules laid down by an established arbitration organization²⁸. Such rules are meant to supplement provisions of Arbitration Act in matters of procedure and other details the Act permit. They may provide for domestic arbitration or international arbitration or for both, and the disputes dealt with may be general or specific in character. In order to facilitate the conduct of the arbitral proceedings, it is provided that the parties or the arbitral tribunal, with the consent of the parties may arrange for administrative assistance by a suitable institution²⁹ and expressly facilitates the adoption of institutional rules³⁰.

Other kinds of arbitration are *specialized arbitration statutory arbitration*, *Compulsory arbitration by Government* and *permanent Machinery of arbitrators*³¹.

²⁶ Section 2(a) of the Arbitration and Conciliation Act, 1996.

²⁷ An *ad hoc* arbitration is arbitration agreed to and arranged by the parties themselves without recourse to any institution. The proceedings are conducted and the procedures are adopted by the arbitrators as per the agreement or, with the concurrence of the parties. It can be a domestic²⁷, international²⁷ or foreign arbitration²⁷. In case of disagreement on the appointment of an arbitrator under *ad hoc* arbitration cases, Section 11 Of the Arbitration and Conciliation Act' 1996 empowers the Chief Justice of High Court or Chief Justice of India, as the case may be, to appoint the arbitrators. The Chief Justice is also empowered to designate any person or institution to take the necessary steps for the appointment of arbitrators. A scheme made by the Chief justice may designate a person by name or ex-officio or an institution, which is specializing in the field of arbitration. The new provision has really given recognition to the role of arbitral institutions in India.

²⁸ For example, International Centre for Alternate Dispute Resolution (ICADR), New Delhi.

²⁹ Section 6 of the Arbitration and Conciliation Act, 1996

³⁰ Section 2(8) *ibid*.

³¹ *Specialised arbitration* is arbitration conducted under the auspices of arbitral institutions, which have framed special rules to meet the specific requirements for the conduct of the arbitration in respect of

4. Arbitration and Conciliation Act, 1996: A new era

The highly technical and formal procedures of courts have in fact stimulated the need for the less formal and speedy dispute resolution mechanisms. The Arbitration Act, 1940, that had been enacted for the effective and speedy resolution of disputes had become outdated. Its ineffectiveness was emphasized by the Supreme Court of India in *Gurunanak Foundation v. Rattan Singh and Sons*.³² In the context of liberalization of the economy and globalisation of world markets, the Government of India realized that for the effective implementation of economic reforms in India, it was necessary to introduce reforms in the business laws. As part of such an effort, changes were also made in the arbitration law in India. The Arbitration and Conciliation Act, 1996, has been enacted in close similarity with the UNCITRAL Model Law on Arbitration with the objective that, disputes arising in international commercial relations shall be settled in a fair, efficient and expeditious manner³³. This could be regarded as one reason why the settlement of international disputes through arbitration has got a tremendous impact in these recent years. There is also an opposite view stating that the unification in the arbitration laws has brought about certain practical difficulties in arbitration due to the changing dimensions of global

disputes of particular types including disputes as to commodities, maritime, construction, specific areas of technology etc.

Statutory arbitrations are arbitrations conducted in accordance with the provisions of certain special Acts, which specifically provide for arbitration in respect of disputes arising from matters covered by those Acts. The provisions of 1996 Act generally apply to those arbitrations unless they are inconsistent with the particular provision of those Acts, in which case the provisions of those Acts are applicable.

Government contracts generally provide for *compulsory arbitration* in respect of disputes arising there under and usually the arbitrators appointed to decide such disputes are senior government officers. A standing committee consisting of senior officers is constituted to ensure no litigation involving such dispute is taken up in a court or tribunal without the matter having been first examined by the said committee and the committee's clearance for litigation has to be obtained. This procedure has helped in the settlement of a large number of disputes in an amicable manner, which would have otherwise ended up in litigation.

Permanent machinery of arbitrators has been set up in Department of Public Enterprises for resolving commercial disputes except taxation between Public Sector Enterprises inter-se as well as between a public sector enterprise and a Central Government Department or Ministry.

³² (1981) 4 SCC 634. The Court observed as follows, “*Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternate forum, less formal, more effective and speedy for resolution of disputes avoiding procedural delays and this led them to Arbitration Act, 1940. However, the way in which the proceedings under the Act were conducted and without an exception challenged in the court had made lawyers laugh and legal philosophers weep*”.

³³ *Konkan Railway Corporation Ltd. v. Mehul Construction Ltd.*, (2000) 7 SCC 201.

trade³⁴. Here is an attempt made to analyze these issues with the help of doctrinal study.

As has been stated earlier, the 1996 Act tried to reduce the judicial intervention in the arbitration process. Speedy settlement of disputes itself means the absence of long and delaying technicalities of ordinary courts. In the present constitutional set up judiciary plays a vital role in the enforcement of individual rights. The right to go for judicial review is an accepted fundamental right and each party to the dispute has got the freedom to exercise it. The scope and extent of that freedom is an important issue in the context of alternate dispute resolution mechanisms. Although there is a role for the judiciary in arbitration proceedings³⁵, it is an accepted fact that over-interference on the part of the judiciary would definitely result in the delay of arbitration process, causing much worry to the disputants. Our experience with arbitration in the context of judicial process had once made the Law Commission of India to propose certain amendments to the arbitration law in India. But the recommendations are yet to see the light of the day³⁶.

5. The Arbitration and Conciliation Act, 1996: Major policy issues involved

The Indian Arbitration and Conciliation Act, 1996 has consolidated the provisions relating to domestic as well as international arbitration in to one single document³⁷. The Act contemplates both *ad hoc* and institutional arbitration that may be accomplished by an agreement between the parties or in accordance with the provisions of the Act. But in practice, it has been proved that since the applicable fields have not been properly demarcated under the provisions of the Act, there are a few grey areas in the Act, which would have definitely invited the attention of the policy makers. While examining the various factors affecting smooth functioning of the Act³⁸, it can be seen that the jurisdiction of the arbitral tribunal is an important

³⁴ Janak Dwarkadas, "A Call for institutionalised arbitration in India: A step towards certainty, efficiency and accountability", (2006) 3 SCC (jour) 1.

³⁵ See ss. 9 and 11 of the Arbitration and Conciliation Act, 1996 dealing with interim orders by the court and appointment of arbitrators respectively..

³⁶ The 16th Law Commission of India in its 176th Report on Arbitration (2002). The Arbitration and Conciliation Bill, 2003 placed before the Rajyasabha was withdrawn on 12th May, 2008.

³⁷ Part I of the Act deals with domestic arbitrations whereas Part II deals with international arbitrations.

³⁸ The Arbitration and Conciliation Act, 1996. Herein after referred to as the Act.

element determining the validity of an arbitral award passed thereunder³⁹. Generally speaking, the irregular mode of appointment of arbitrators, their lack of jurisdiction and the element of bias or misconduct on their part can become solid grounds for challenging awards⁴⁰. Likewise, the principles of natural justice are the cardinal principles on which the entire arbitration process rests. For this reason, procedural irregularities in the conduct of arbitration and their effect on the validity of final award are also equally important. An arbitral award should be made fulfilling the requirement of fairness. Similarly issues of legality and fairness are also important elements in testing the validity of an award may it be domestic or international.⁴¹ Arbitral awards not falling within the parameters set forth by the Act are easily vulnerable to challenge under the provisions of the Arbitration and Conciliation Act, 1996⁴². In order to have a holistic approach towards these main issues, a detailed analysis of each one of them is imperative.

5.1. Appointments and qualification of arbitrators

The appointment of arbitrators is a major step in the arbitration proceedings. So great caution is required to be exercised by the parties during the selection of arbitrators. The parties are given the freedom to select the arbitrators of their own choice⁴³. If the parties fail to do so, the judiciary is given the freedom to choose arbitrators. The Chief Justice or any person or institution designated by him shall make the appointment upon request of a party.⁴⁴ Again if the parties fail to comply with the agreement under s. 11(2) as to the appointment of a sole arbitrator, within 30 days from the request by the other party, the Chief Justice or a person or institution designated by him can appoint a sole arbitrator upon the request by that party⁴⁵. In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than that of the parties⁴⁶. There was a legislative move to replace the words, ‘Chief Justice of India’ and the words, ‘Chief

³⁹ Section 16 of the Act deals with the jurisdiction of the Act to rule on its own jurisdiction.

⁴⁰ Sections 10, 11 and 12 of the Arbitration and Conciliation Act, 1996.

⁴¹ Dhyan Chinnappa, “Enforcement of Arbitral Awards”, (2002) 8 SCC (Jour) 39.

⁴² *Id.*, ss. 34 and 45.

⁴³ *Id.*, s. 11(1)

⁴⁴ *Id.*, s. 11(4)

⁴⁵ *Id.*, s. 11(5)

⁴⁶ *Id.*, s. 11(9)

Justice’ by the words, ‘Supreme Court’ and ‘High Court’ respectively⁴⁷. This would have had the effect of converting the process of appointment of arbitrators from being an administrative act to a judicial one. There is also an argument that it would have further made the arbitration law in India in absolute conformity with the UNCITRAL Model Law as the latter empowers the court to make appointment of arbitrators⁴⁸. Critics’ felt that such duplication is unwarranted and variations from the international rules should be maintained wherever required⁴⁹.

5.1.2. Judicial interpretation

The law provides that the parties are free to determine the number of arbitrators, provided that such number shall not be even number⁵⁰. If there are two arbitrators appointed by each of the parties, then the appointed arbitrators are free to appoint a third arbitrator, who shall act as the presiding arbitrator⁵¹. The parties can agree as to the nationality of an arbitrator in their agreement, a person of any nationality can be appointed as an arbitrator.

In *Grid Corporation of Orissa Ltd. v. AES Corp*⁵² the issue was regarding the nationality of the presiding arbitrator. Here, the Supreme Court held that, in international commercial arbitration, the presiding arbitrator might be of a nationality other than of the parties. Again the court explained the principal factors behind the appointment of the presiding arbitrator. It was held that the requirement of law is satisfied, (1) if it is actually made, (2) if it is made in consultation between the two

⁴⁷ Supra n. 34.

⁴⁸ Art. 7(2)(b) & 11 of UNCITRAL Model Law on Arbitration (1985)

⁴⁹ Jaya V S. “Competency and Jurisdiction of Arbitral Tribunals: Some Issues”, XXVI DLR (2004). The author further says that, there are a couple of departures from the UNCITRAL Model Law, designed to keep out court intervention. Thus, for instance, Section 8 of the Act departs from the Model Law in as much as it does not permit a court to entertain an objection to the effect that the arbitration agreement is “null and void, inoperative or incapable of being performed”. Section 16 (corresponding Article 16 of the Model Law) provides that the arbitral tribunal may rule on its own jurisdiction including with respect to the existence or validity of the arbitration agreement. The Model Law goes on to contemplate recourse to a court from a decision of the tribunal rejecting a challenge to its jurisdiction. The Indian law does not do so and provides where the arbitral tribunal rejects a challenge to its jurisdiction, it shall continue with the arbitral proceedings and render the award. (An award can of course be challenged on the ground that the arbitrators have exceeded their jurisdiction.)

⁵⁰ Section 10(1) of the Arbitration and Conciliation Act, 1996.

⁵¹ *Id.*, at s. 11(3).

⁵² (2002) 7 SCC 736.

original arbitrators and (3) if the Information as to appointment is communicated by both or either of the parties.

When an application is made for the appointment of an arbitrator, the court may decide whether the particular clause is an arbitration agreement or not. The Supreme Court in *Wellington Associates v. Kirti Mehta*⁵³, said that, Sec. 16 of the Act did not exclude the jurisdiction of the nominee of the Chief Justice of India to decide the question as to the existence of a valid arbitration agreement⁵⁴. Thus, under Sec. 11 of the Act, it is permissible to decide a question as to the existence or otherwise of the arbitration agreement. This trend was not uniformly found in the subsequent cases as there were cases holding a contrary view also. In *Konkan Railway Corporation v. Rani Construction Pvt. Ltd.*⁵⁵, the Apex Court categorically stated that the power exercised by the Chief Justice in the appointment of arbitrators is an administrative power and not a judicial power. The Court further clarified that the major role of the court at the stage of appointment must be to facilitate the arbitration by helping the parties to select arbitrators and not to decide on the merits of the case or the validity of the arbitration agreement. This view was reiterated in *Food Corporation of India v. Indian Council of Arbitration*,⁵⁶ wherein the court held that legislative intent underlying the Act is to minimize the supervisory role of the courts in the arbitral process and quick nomination or appointment of arbitrator, leaving all contentious issues to be decided by him.

Coming to the present position, the Supreme Court apparently acceded to its earlier view taken in the case of *Wellington Associates*⁵⁷ by the recent decision in *S.B.P. & Co. v. Patel Engineering Ltd.*,⁵⁸ by holding that the nature of power exercised by the Chief Justice in the appointment of arbitrators is of judicial in character and not of administrative nature while overruling the earlier decision in the *Konkan Railway* case. The present decision has invoked many far-reaching consequences as it has increased the scope of judicial interference with the arbitral

⁵³ AIR 2000 SC 1379.

⁵⁴ The Arbitration and Conciliation act, 1996, s. 16 reads, "the arbitral tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of an arbitration agreement.

⁵⁵ (2002)2 SCC 388

⁵⁶ (2003) 6 SCC 564.

⁵⁷ *Supra* n 30.

⁵⁸ (2005) 8 SCC 618

proceedings. The current position is unfortunately going against the very objective of minimum judicial interference in the arbitration law as it has opened up a new route for the disputants to the courts by way of an appeal⁵⁹. The law laid down in the *Konkan Railway* case is perhaps preferable to the latest decision in *S.B.P. & Co*⁶⁰.

5.1.3. Summary of the judgment in *S.B.P. & Co. v. Patel Engineering Ltd.*⁶¹

In this case, a constitutional bench of the Supreme Court consisting of seven judges considered the legal issue as to the nature of power exercised by the Chief Justice of India or Chief Justices of the high courts under sections 11(9) and 11 (6) respectively. The findings of the Court were as follows:

- i. The power exercised by the Chief Justice of the High Court or the Chief Justice of India under section 11(6) of the Act is not an administrative power. It is a judicial power.
- ii. The power under section 11(6) of the Act, in its entirety, could be delegated, by the Chief justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court.
- iii. In case of designation of a judge of the High Court or of the Supreme Court, the power that is exercised by the designated judge would be that of the Chief Justice as conferred by the statute.

⁵⁹ Once the process of appointment of arbitrators by the Chief Justice is said to be of judicial nature and not of administrative character, it is amenable to judicial review under Article 136 of the Constitution of India.

⁶⁰ Indeed the Supreme Court went a step further holding that the Chief Justice would have jurisdiction to determine whether there is in existence a valid arbitration agreement. The court held: "It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage...He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration." The decision makes a significant inroad into Section 16 of the Act which provides that all contentious issues, relating to the jurisdiction of the tribunal, including with respect to the existence or validity of the arbitration agreement shall be decided by the arbitral tribunal (corresponding to Article 16 of the Model Law)".

⁶¹ *Supra* n. 28.

- iv. The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice of the judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the Judge Designate.
- v. Designation of a district judge as the authority under section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.
- vi. Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court only in terms of section 37 of the Act or in terms of section 34 of the Act.
- vii. Since an order passed by the Chief Justice of the High Court or by the Designated Judge of that court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court.
- viii. There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under section 11(6) of the Act.
- ix. In a case where the parties have constituted an arbitral tribunal without having recourse to section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by section 16 of the Act.

- x. Since all were guided by the decision of this court in *Konkan Railway corporation Ltd. v. Rani Construction P. Ltd.* [2000] 8 SCC 159 and orders under section 11(6) of the Act have been made based on the position adopted in that decision, it was clarified that appointments of arbitrators or arbitral tribunals thus far made, are to be treated as valid, all objections being left to be decided under section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under section 11(6) of the Act.
- xi. Where District Judges had been designated by the Chief Justice of the High Court under section 11(6) of the Act, the appointment orders thus so far made by them will be treated as valid; but applications, if any, pending before them as on the date of judgment will stand transferred, to be dealt with by the Chief of the concerned High Court or a judge of that court designated by the Chief Justice.
- xii. The decision in *Konkan Railway Corporation Ltd. v. Rani Construction P.Ltd.*⁶² is overruled.

5.1.4. Implications of the decision in *S.B.P. & Co. v. Patel Engineering Ltd.*⁶³

The decision entails the following consequences like,

- i. If the order of appointment of arbitrators is made judicial order, it is possible to challenge that order by way of an appeal under Article 136. This will definitely prolong the proceedings at the initial stage of appointment itself.
- ii. Going in appeal against the order of the Chief Justice of the High Court may not sound realistic. The lawyers and parties might fear that the judge may be prejudiced against them in subsequent cases on account of such a challenge.
- iii. The decision has enhanced the scope of judicial intervention in the arbitral process by holding that the court while entertaining an application under

⁶² [2000] 8 SCC 159

⁶³ *Supra* n. 28.

section 8 or 11 of the Act can go into the contentious issues apart from deciding the preliminary issues⁶⁴.

- iv. Consequently, the power of an arbitral tribunal to rule on its own jurisdiction under section 16 of the Act by deciding issues such as, validity of the arbitration agreement, arbitrability of the disputes, competency of the parties *etc.* has been considerably reduced. As a result of the decision, the referring court has also got the power to decide such issues.
- v. The judgment categorically states that the order of appointment under section 11 could only be that of the Chief Justice or any other judge nominated by him, but they may seek opinion of an institution regarding matters of appointment. Here exists confusion regarding the role of an *institution or person* as mentioned in the Act. As per section 11(7) of the Arbitration and Conciliation Act, 1996, a decision on matter entrusted by sub-sections (4), (5) and (6) to the Chief Justice or the person or institution designated by him is final. In the light of the impugned judgment, it is not very clear that whether the order passed by such a person or an institution would also assume the character of a judicial order whereas the person or an institution need not necessarily be a judicial authority.
- vi. As a whole, the decision has the effect of undermining the best objectives of the Act such as speedy and efficacious resolution of disputes, minimal judicial intervention, ensuring party autonomy *etc.*
- vii. Designation of a district judge as the authority under section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act. This may cause difficulties for those parties who live in remote areas or far away from the place where the High Court is situated since they may not have easy an access to the High Court always.

⁶⁴ Section 8 of the Act talks about the power of the court to refer the parties to arbitration on an application made by the parties in the light of a existing arbitration agreement between them.

5.1.5. Accountability of arbitrators

The validity of an arbitration agreement determines the jurisdiction of an arbitral tribunal. What the law requires is that there should be an arbitration agreement between the parties to refer the differences or disputes to arbitration⁶⁵. When there exists an agreement between the parties to refer the disputes to arbitration and afterwards a dispute arises, the very next step is the appointment of arbitrators as discussed earlier. Now the issue is whether the appointed arbitrators suffer from any kind of disqualification such as bias or lack of qualifications. A person to be appointed as an arbitrator or who has been so appointed is obliged to disclose in writing any circumstances that are likely to give rise to justifiable doubts as to his independence and impartiality⁶⁶. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or if he does not possess qualifications agreed to by the parties. This means that a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only by reason of which he becomes aware after the appointment has been made. Thus it becomes clear that an arbitrator must possess integrity and the requisite qualification. He should not act with a mind leading to predisposition towards an issue. He is likely to suffer from bias when his competence, qualification, impartiality or independence is challenged.

5.1.6. Issues identified and recommendations with respect to appointments and qualification of arbitrators

Appointment of arbitrators has become a vital issue in the arbitration process. To ensure minimum judicial intervention at the initial stage of appointment of arbitrators, changes in law and policy are required. To avoid inconsistencies in the appointment procedure of arbitrators, it is suggested that suitable arbitral institutions may be empowered to take the lead in this respect⁶⁷. The Court may direct only these accredited institutions to help the parties with the selection of arbitrators of their choice from the panel. This would in a way regulate the unsupervised and

⁶⁵ Section 7 of the Arbitration and Conciliation Act, 1996 reads thus, “An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not.”

⁶⁶ Section 12 of the Arbitration and Conciliation Act, 1996.

⁶⁷ These institutions may get themselves registered with the Government.

unaccountable arbitrations taking place in the country. This calls for an amendment in the existing position of law.

When there is a clear proof of bias or misconduct on the part of the arbitrators the courts are given the power to set aside an arbitral award⁶⁸. In such a case, the parties have to wait till the entire arbitration proceedings are over. This would generally result in waste of both money and time⁶⁹. This difficulty can be avoided by appointing persons who are known for their integrity and impartiality as arbitrators. Keeping in mind the interest of the business community and the public policy, it is desirable that a proper institutionalized mechanism is set up to ensure accountability of arbitrators and transparency in the arbitration process. In the case of institutional arbitration, after the appointment is made, the institution would keep monitoring the proceedings to ascertain the performance of arbitrators. Generally Rules of these institutions provide for a fee structure that is not based on the number of sittings these arbitrators hold, but fixed for each arbitration. This would definitely resolve the existing problem of arbitrators unnecessarily holding additional sittings and claiming their fee on the basis of such number of sittings they hold.

Any kind of misconduct or malafide acts from the arbitrators will definitely vitiate the arbitral award. It is therefore, necessary that there should be an internationally accepted code of conduct for the arbitrators to be observed in resolving the disputes. It is often mentioned that there is overburdening of retired, eminent persons with several arbitration cases at a time. Here, the remedy is that no person should be appointed as an arbitrator, until he has finished the case in his hand. There should also be a reasonable time limit for the completion of arbitration cases. One way of addressing this issue would be to have full-time arbitrators. One may even go as far as to recommend that those arbitrators cannot practise or engage in any other profession simultaneously. This will provide a check on prolonged arbitral process.

⁶⁸ *Infra* n. 65.

⁶⁹ To have a detailed explanation the meaning of the term, jurisdiction under the Act, the decision in *National Thermal Power Corporation v. Siemens Aktiengesellschaft*, (2007) 4 SCC 451 may be referred to.

5.2. Procedural justice to parties and legality of arbitral awards

Aspect of procedural justice is often used as justification for judicial interference⁷⁰. According to the Supreme Court, like judges in an ordinary court, the arbitrators are also bound by these rules⁷¹. An arbitral award can be challenged successfully, if it is proved that, there is violation of the principles of natural justice by not giving a notice, or not allowing the other party to present his version of the dispute⁷². The term ‘natural justice’ is a vague term. It’s meaning differs from case to case⁷³. The different contours of the concept are determined by the judiciary itself⁷⁴.

5.2.1. Rules of procedure

The Arbitration and Conciliation Act, 1996 provides for the determination of rules of procedure for conduct of arbitral proceedings⁷⁵. The Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872, does not bind the arbitral tribunal.⁷⁶ The parties are given the freedom to agree on the procedure to be followed by the arbitral tribunal.⁷⁷ Failing agreement by the parties, the arbitral tribunal may conduct the arbitration in such a manner, as it considers appropriate.⁷⁸ The power thus conferred

⁷⁰ In *Food Corporation of India v. Indian Council of Arbitration*, (2003) 6 SCC 564, the court held that legislative intent underlying the Act is to minimize the supervisory role of the courts in the arbitral process and quick nomination or appointment of arbitrator, leaving all contentious issues to be decided by him. The institution opted by the parties shall nominate the arbitrator as sought for by them giving due importance to the procedural rights of the parties.

⁷¹ *Ibid.*

⁷² *Jaya V S, “Procedural Justice for Parties to Arbitration: Reflections and Perspectives on Indian Arbitration Law”, XXIX DLR (2007)*

⁷³ Lack of fair hearing, not giving proper notice to either parties, lack of fair consideration of relevant documents are some of the instances of violation of natural justice.

⁷⁴ In *Maula Bux v. State of West Bengal*, AIR 1990 Cal. 318, at p. 334, the Court explained the important rules of natural justice. They include the following: -

- i. To act fairly, in good faith, without bias, and in a judicial temper.
- ii. To give each party the opportunity of adequately stating his case and correcting or contradicting any relevant statement to his case and not to hear one side behind the back of the other.
- iii. A man must not be a judge in his own case, so that a judge must declare any interest he has in the subject matter of the dispute before him.
- iv. A man must have a notice of what he is accused.
- v. Relevant documents, which are looked at by the tribunal, should be disclosed to the parties interested.

Later these elements were incorporated in the Arbitration and Conciliation Act, 1996 by way of Ss.18, 12 and 24 Arbitration and Conciliation Act, 1996.

⁷⁵ Section 19 of the Arbitration and Conciliation Act, 1996.

⁷⁶ *Id.*, at s. 19 (1).

⁷⁷ *Id.* s. 19 (2).

⁷⁸ *Id.* s. 19 (3).

on the tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.⁷⁹ This power may subsequently give rise to judicial review also. Across different countries, the courts have different approaches to procedural justice to parties to arbitration⁸⁰. This may cause difficulties for the foreign parties coming to India to settle their disputes.

In *Sudarshan Trading Co. v. State of Kerala*,⁸¹ the Supreme Court has opined that arbitral tribunal will have the power to adopt its own rules for evaluating evidence. It is the sole judge of quality and quantity of evidence. The court has no jurisdiction to substitute its own evaluation of the conclusion of law or fact. Courts in other countries have taken another view in this regard.⁸² To give reasons that are inadequate, to act on no evidence or on evidence that ought to have been rejected, and not taking into consideration evidence which ought to have been considered, are viewed as an error of law.

5.2.2. Party autonomy

The autonomy of parties to determine the rule of procedure is given special importance by the law. It allows the parties to select the rules, according to their specific wishes and needs. It provides flexibility for solving any procedural question, not regulated by the agreement or the Act. It enables resolution of any procedural difficulty, if any experienced during the course of the proceedings. In *National Thermal Power Corpn. v. Singer Co.*,⁸³ the court upheld the principle of party autonomy in international business as the guiding principle of the self-regulating mechanism envisaged by arbitration rules of major institutions like ICC.

5.2.3. Venue and language of arbitration

The parties may agree or the arbitral tribunal will decide the place of arbitration and the period of time within which the claims and defences to be filed by

⁷⁹ *Id.* s. 19 (4).

⁸⁰ See for example, *R v. Agricultural Land Tribunal Ex. P. Bracy*, (1960) 1 All ER 518.

⁸¹ AIR 1989 SC 890.

⁸² *Id.*, at *R v. Agricultural Land Tribunal Ex. P. Bracy*, (1960) 1 All ER 518.

⁸³ (1992) 3 SCC 551.

the parties.⁸⁴ This has brought about inconsistent practices among arbitrators and parties performing under the same set of Rules of arbitration. The arbitral proceedings including hearing and meetings are expected to be held at the place determined by the parties.⁸⁵ Failing agreement, the arbitral tribunal is empowered to decide the matter. For consultation amongst its members, for hearing witnesses, experts or parties, or for inspection of documents, goods or other property, the arbitral tribunal may meet at any place it considers appropriate, unless otherwise agreed by the parties.⁸⁶ In determining the place, the tribunal should take into consideration the circumstances of the case including the convenience of the parties.⁸⁷ However, the arbitral tribunal has the discretion to meet at any place it consider appropriate to enable arbitral proceedings being carried out in a manner most efficient and economical. The legal relevance of the place of arbitration is that it determines the international character of arbitration.⁸⁸ It is also a connecting factor for the 'territorial' applicability of the law and becomes the place of origin of the award. Apart from this, the place of arbitration has got some factual relevance too. The place should be convenient for the parties and the arbitrators. It should be selected taking into account the availability and the cost of support services needed and the location of the subject matter in dispute. If the arbitrator decides the place of arbitration, without looking into the relevant factors, the parties can approach the court for setting aside the award on the ground of substantial procedural irregularity. As against the usual court procedure, the arbitration does not contain the limitation as to selection of forum.⁸⁹

With regard to the language of the arbitral proceedings also the Act gives freedom to the parties to agree upon the language to be used⁹⁰. If they fail, the arbitral tribunal determines the language. Translation of documentary evidence in that language may be ordered to accompany the evidence. Bearing in mind the needs of the proceedings and economy, the arbitral tribunal may consider which of them should be accompanied by a translation into the language of the proceedings and may order accordingly. The arbitral tribunal can also determine the possible need for the

⁸⁴ *Id.* ss. 20 (1) and 22 (1).

⁸⁵ *Id.* S. 23 (1).

⁸⁶ *Id.* S. 20 (3).

⁸⁷ *Id.* S. 20 (2).

⁸⁸ *Bhatia International v. Bulk Trading S. A.*, (2002) 4 SCC 105; See also, *Shreejee Traco (I) (P) Ltd. v. Paperline Internatioanl Inc.*, (2003) 9 SCC 79.

⁸⁹ Krishna Sarma. "Trans-national Commercial Arbitration in India," (2000) 4 COMPLJ 11 (Jour.).

⁹⁰ S. 22 of the Arbitration and Conciliation Act, 1996.

interpretation of the oral presentations. The arbitral tribunal must allow the parties to submit their claim and counter claim at the earliest opportunity.⁹¹ If there exists circumstances, which requires the parties to give an oral hearing, then the arbitral tribunal must provide it. Non-compliance with such procedures will vitiate the award.

5.2.4. Issues identified and recommendations with respect to procedural justice to parties

The Arbitration and Conciliation Act, 1996, as it is modeled on the UNCITRAL Model Law has become a statute of international business standards in dealing with arbitration cases. In the era of fast growing industrialization and international commercial trade, there is an imminent need for settlement of disputes at an early date. Over- judicialisation of such disputes in traditional court divides the parties into two enemy camps. Redressal of disputes does not require confrontation, but it requires collaboration, co-operation and mutual trust that are available in arbitration proceeding than in the ordinary courts. The arbitrator, while acting as an impartial judge, has to adhere to certain basic principles such as *audi alteram partem* and independence and impartiality. Any deviance from the normally expected standards may vitiate the entire arbitration process.

The setting aside of an arbitral award on the ground of minor procedural irregularities may destroy the objective behind ADR mechanisms. Hence, to satisfy the minimum requirement of procedural fairness it is imperative that the Indian arbitration law is amended to include specific provisions as to maximum time limit for hearing the parties, examination of the documents and passing the final award, with total period not exceeding six months. These suggestions, if implemented would certainly make India an important venue for international arbitration, as it would really help preventing arbitrators from unnecessarily delaying the process.

⁹¹ Per Cotton L.J. in *Philipps v. Philipps*, (1978) 4 QB 127.

5.3. Validity of an arbitral award

The validity of an arbitral award depends on many factors. The interpretation of law governing arbitration, especially international arbitration assumes great importance in determining the validity of an arbitral award. Often the arbitrators find it very difficult to come up with an interpretation of law in accordance with the intention of the parties. A common standard cannot be adopted in all cases because that may go against the interest of parties. So the element of fairness depends on the facts and circumstances of each and every case⁹². The Act provides for limited grounds on which an application for setting aside an arbitral award can be made⁹³. Legal validity of an arbitral award mainly depends on the propriety of the substantive

⁹² In *K.K. Modi v. K.N. Modi*, (1998) 3 SCC 573, the Supreme Court reiterated that the arbitral tribunal will have to determine the rights of the parties in an impartial and judicious manner, because the tribunal owes an equal obligation of fairness towards both sides. See also, *McDermott International Inc v. Burn Standard Co. Ltd*, (2006) 11 SCC 181.

⁹³ Section 34 of the Act deals with recourse against arbitral awards. It reads as follows:

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with subsection (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) The party making the application furnishes proof that—

- (i) a party was under some incapacity; or
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
- (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iv) the arbitral 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, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
- (ii) the arbitral award is in conflict with the public policy of India.

Explanation : Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced/ or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral Tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral Tribunal will eliminate the grounds for setting aside the arbitral award.

law applied to the arbitration, venue chosen for conducting arbitration proceedings, interpretation of contract between parties etc⁹⁴.

5.3.1. Choice of law in arbitration

The Indian Arbitration and Conciliation Act, 1996, lays down the rules applicable to the substance of a dispute.⁹⁵ The enforceability of the award in the national courts also depends on the proper application of the substantive law. As far as India is concerned, in domestic arbitrations, the substantive law shall be law in force in India.⁹⁶ In international arbitrations, the parties themselves can choose the applicable law to the substance of the dispute.⁹⁷ Usually the law here means the substantive law of the country specified by the parties.⁹⁸ If the parties fail to designate the applicable law the arbitral tribunal can choose the same.⁹⁹ The Act also ensures justice and fairness in making the choice of law.¹⁰⁰ The terms of the contract and usages of the trade applicable to the transaction are also given priority in all these cases to ensure that the applicable law is free from any infirmities.¹⁰¹

A study of these provision shows that, the party's freedom to choose a particular law for deciding the dispute is restricted in domestic arbitrations. But in international arbitrations, they have been given the freedom to choose the substantive

⁹⁴ The arbitrator is required to make an award in accordance with the law. (*Thawandas Pherumal v. Union of India*, A.I.R. 1955 S.C. 468). In the absence of reasons stated in the award, it is not possible to find out whether an award has been passed in accordance with law. The reasons stated should be paper and adequate. To give reasons which are inadequate is an error of law.(*R. v. Agricultural Land tribunal exp. Bracy*, [1960] 1 All ER 518). At the same time it is to be noted that the arbitral tribunal is not required to give a detailed judgment. (*Indian Oil Corporation v. Indian Carbon Ltd.*, A.I.R. 1988 S.C.1340)

⁹⁵ Section 28 of the Arbitration and Conciliation Act, 1996..

⁹⁶ *Id.*, at s.28 (1) (a). It reads, "Where the place of arbitration other than an international commercial arbitration, is in India, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India".

⁹⁷ *Id.*, at s.28 (1) (b) (i). It reads, "In international commercial arbitration, the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute".

⁹⁸ *Id.*, at 28(1)(b)(ii). It reads, "Any designation by the parties or the legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of law rules".

⁹⁹ *Id.*, at s.28(1)(b)(iii). It reads, "Failing any designation under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute".

¹⁰⁰ *Id.*,at s.28(2). It reads, "The arbitral tribunal shall decide *ex acquo et bono as amiable composituier* only if the parties have expressly authorized to do".

¹⁰¹ *Id.*, at s. 29(3). It reads, "In all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of trade applicable to such transaction".

law of any country for deciding their dispute. Thus, the scope for challenge against the validity of an award is more with respect to international arbitration as compared to domestic arbitration.

5.3.2. Parties' autonomy in choosing applicable law

International Arbitration in the Indian context involves numerous difficulties, one of the most troublesome of which is the substantive law to be applied in a given dispute. The parties may specify the substantive law of the arbitration in their original agreement. "In general, parties to an agreement containing an arbitration clause have virtually autonomy in selecting the substantive governing law. Almost any choice of substantive law by the parties is enforceable, so long as the arbitral award itself is enforceable."¹⁰² Once the parties agree as to the law that is to be applied in deciding the dispute, the arbitral tribunal is bound to adhere to it and to give a proper interpretation of that law. Here the issue is that the Indian Arbitrators may not necessarily be conversant with foreign law and practice. This will pose great difficulty in the smooth conducting of the arbitration. In arbitrations other than the international commercial arbitration, neither the arbitral tribunal nor the parties have a choice to decide the substantive law applicable for resolving the dispute.¹⁰³ In all such cases, the dispute has to be resolved in accordance with the Indian law for the time being in force, as applicable to the subject matter of the dispute. In international commercial arbitration where the arbitration proceedings are conducted at any place situated in India, the arbitral tribunal shall first ascertain as to whether the parties have by agreement designated the rules of law of any particular country for being applied to the substance of the dispute. Where the parties have chosen to designate the law or legal system of a particular country to be applied by the arbitral tribunal, that law binds it.

Generally it is seen that the parties do agree with a substantive law of a particular country as the law to be followed in resolving the dispute. Often a question may arise whether the express mentioning of a particular law made by the parties is in accordance with the general principles of trade. The question of choice of law has

¹⁰² Notes,; "General Principles of Law in International Commercial Arbitration". 101. Harv.L.Rev.1817(1988).

¹⁰³ Section 28 of the Arbitration and Conciliation Act, 1996.

become a serious problem affecting the relevancy of international commercial arbitration¹⁰⁴ and thereby reducing its importance in the field of international trade. Here it is important that the arbitrators have to be well equipped with the necessary mindset and skills to deal with such issues in an efficacious manner.

5.3.3. Parties specifying or not specifying a national law

Parties specifying or not specifying a national law may lead to disputes of different types. When the parties clearly designate the substantive law of a particular jurisdiction, there is little room for the application of the general principles of law. In such a situation, the arbitral tribunal also cannot move away from what is intended by the parties. In many of the standard form contracts, the parties expressly provide the law, which is to govern contractual rights and obligations. For example, in a case where an Indian public sector undertaking had entered into a contract with a foreign company and the parties to the contract had expressly stated that the laws applicable to the contract would be the laws in force in India and that the courts of Delhi would have exclusive jurisdiction in all matters arising under the contract; definitely the contract would in all respects be construed and governed according to Indian law. The Supreme Court also has taken the same view in *National Thermal Power Corporation v. Singer Co.*¹⁰⁵

The parties may supplement their choice of a national law with reference to some other rules such as general principles of law or law merchant or the law of international trade. Here also the arbitrators have to exercise their discretion to find out the applicable law, which would match with the intention of the parties. Sometimes the agreement may be silent as to the substantive law to be applied in the particular case. In many cases the parties simply are unable to agree on a particular national or non-national law. Arbitrators in such situations have more discretion than in any other case, as they may apply any substantive law that their arbitral rules and other procedural provisions allow.

¹⁰⁴ Dr.K.I.Vibhute, "International Commercial Arbitration: Some Reflections on its Problems and Perspectives", (1995) 1 S.C.C 7(Jour.).

¹⁰⁵ A.I.R. 1993 S.C. 998.

The parties usually agree on the terms of reference to arbitration and even the procedure to be followed by the arbitral tribunals in an international arbitration. But they may keep silence as to the law to be applied in settling the disputes. In the absence of choice of any substantive law by the parties, the arbitrator in some cases may apply the conflict of laws rules they view most appropriate to the particular case. The choice of law can become an important point of issue under four circumstances namely, (1) in the case of the interpretation of an arbitration agreement, (2) in an individual reference to arbitration and the mode of its application, (3) in the arbitral procedure and the law governing it and (4) selecting the law applicable for deciding the dispute.

Sometimes, the validity of interpretation of an arbitration agreement itself may be an issue. The submission may take the form of a separate agreement entered into by parties after a dispute has arisen. It is now established that an arbitration agreement is a separate contract distinct from the substantive agreement in which it is usually imbedded.¹⁰⁶ If there is an express designation of the governing law in the arbitration agreement generally that will be determinative. In the absence of an express choice, the proper law will be inferred from the terms and nature of the agreement and the circumstances of the case. Generally the law applicable to the substantive contract will govern the arbitration agreement also. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹⁰⁷ provides that the validity of an arbitration agreement is to be referred to, “the law to which the parties have subjected it or, failing any indication there on the law of the country where the award is made.”¹⁰⁸

5.3.4. Issues identified and recommendations with respect to legality of arbitral awards

In an international arbitration, many legal issues on the validity of its award may arise, as it contains laws of different countries. In an international arbitration where the place of arbitration is situated in India, the problems arising out of

¹⁰⁶ Section 16 (a) says that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

¹⁰⁷ The New York Convention, 1958.

¹⁰⁸ Article VI (a).

arbitration may call for the application of any one or more of the following laws.¹⁰⁹ (1) Proper law of contract¹¹⁰, (2) proper law of arbitral agreement¹¹¹ and (3) law governing the conduct of arbitration¹¹².

The arbitrator may also apply a fully non-national standard such as law merchant, standard usages or general principles of law.¹¹³ Here also the problem may come, as there are no clearly defined general principles of law or custom or usage in international trade. Here lies the need for developing a coherent set of principles based on published arbitral awards. For that it is necessary to examine the interference made by the courts in ascertaining the legality of such arbitral awards. A comprehensive code of principles enunciated by the courts regarding the principles determining the validity and fairness of an arbitral award may be useful in this regard.

Once a dispute has arisen and a party gives notice of arbitration, thereby putting into effect the arbitration agreement, a new set of contractual relationship comes into being, requiring the parties to arbitrate that particular dispute. Under this situation, the arbitration agreement and the individual reference stand on different footing and the illegality of one will not affect the other. Hence the proper law of contract or the system of law with which the contract has a close connection may be taken into account in deciding the legality of the arbitration agreement or individual reference.

The law governing the arbitral procedure will usually be the law of the place where the arbitration is held. Sometimes, it may be necessary to determine the

¹⁰⁹ J.H.C. Morris et.al., *Dicey's Conflict of Laws*, Stevens and Sons Ltd., London (7th edn.-1958). Pp.797-802.

¹¹⁰ Proper law of contract is the law governing the contract that creates the substantive rights of the parties, in respect of which the dispute has arisen. This is the system of law by which the parties intended the contract to be governed, or where the intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection.

¹¹¹ Generally, the arbitration agreement is governed by its proper law. At the same time the arbitration is to be conducted according to its procedural law. As regards the governing law of arbitration Dicey, states, "Its proper law governs the validity, effect and interpretation of an arbitration agreement. The parties have the freedom to agree on the law governing the arbitration proceedings. In the absence of an agreement, the law of the country in which the arbitration is held is the governing law.

¹¹² This is generally known as the 'curial law' of arbitration. If the parties expressly make the choice of curial law, then the arbitration proceedings will be conducted in accordance with that law. If the parties have not made any choice, then the arbitration proceedings will be conducted according to the law of the place or seat of arbitration.

¹¹³ *Ibid.*

arbitral procedure law prior to the commencement of the arbitration proceedings themselves. If the agreement does not specify the site of the arbitration, the problem can arise. In such cases, the court may come up with the proposition that the proper law of the agreement would apply.¹¹⁴ In the absence of an express choice, the proper law is the legal system to which the contract is most closely connected.¹¹⁵ Under the UNCITRAL Model Law, there are express provisions in this regard.¹¹⁶

Another important issue is regarding the interpretation given by the courts regarding the applicability of provisions under Part I of the Act to international arbitrations¹¹⁷. The Supreme Court has interpreted the 1996 Act to the effect that even international arbitrations taking place in India, the same would be treated as a domestic arbitration and in such cases Part I of the Act would apply¹¹⁸. This would invariably curtail certain benefits attached with a foreign award under the New York convention like awarding cost for successful party in case of any frivolous challenge against enforcement of the award. In the light of the recent judicial interpretations on the applicability of Part I to foreign awards¹¹⁹, it is recommended that a legislative amendment providing for cost to the affected party may be introduced in the Arbitration and Conciliation Act, 1996.

5.4. Finality and enforcement of arbitral awards

Under the present law, there is a presumption of finality of an award. In domestic arbitration, the awards are enforceable as decrees of the court due to this presumption of finality. But this is not the case with international or foreign awards. In an international arbitration issues relating to different national laws will come into play. As a result, during the enforcement process, it has to get through a number of

¹¹⁴ See also, *International Tank & Pipe S.A.K. v. Kuwait Aviation Fueling Co.K.S.G.*, [1955] Q.B.224.

¹¹⁵ *Bonython v. Common wealth*, [1951] AC 210 at 219.

¹¹⁶ UNCITRAL Model Law, Art 28(1). It reads, "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 the 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".

¹¹⁷ See, *Bhatia International v. Bulk Trading S. A.*, (2002) 4 SCC 105.

¹¹⁸ *Ibid.*

¹¹⁹ *Venture global Engineering v. Satyam computers Services*, 2008(1) SCALE 214.

hurdles¹²⁰. The law specifically says about certain conditions under which, the court can intervene in the enforcement process of an arbitral award. Although there is uniformity in the conditions for enforcement at the international level, the interest of individual nations outweighs such uniformity.

5.4.1. Conditions for enforcement of arbitral awards

The UNCITRAL Model Law, which is adopted in India, makes the enforcement of foreign awards easier. It states, “an arbitral award irrespective of the country in which it was made shall be recognized as binding upon an application in writing to the competent court and shall be enforced subject to the provisions of this articles and of article 36”.¹²¹ Likewise the case of other arbitral Institutions also¹²². The aim of the 1996 Act is to minimize the scope and extent of judicial intervention in arbitration matters¹²³. The court has adhered to this principle in interpreting the contract and the arbitration clause in it as seen in a number of cases¹²⁴. Yet in a number of other cases the court has taken a contrary view. For example, in *Bhatia International v. Bulk Trading S. A*¹²⁵, the court refused to accept the contention that an award made in a non-convention country¹²⁶ could not be enforced in India and observed that a party could not be left completely remediless in such situations. It was further held that the provisions of Part I of the Arbitration and Conciliation Act, 1996 would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and

¹²⁰ Garry B Born, “*International Commercial Arbitration*”, Transnational Publishers and Kluwer Law International (New York)(2nd Edition – 2001)

¹²¹ The UNCITRAL Model Law, Arts. 35 and 36.

¹²² Rules of the International Chamber of Commerce require the scrutiny of the award by the court¹²² as a condition for the enforceability of the award. When this is done, the award becomes binding on the parties. The American Arbitration Association rules do not contain any specific provision regarding enforcement of arbitral awards. The award passed by the tribunal is treated as final and binding on the parties. Rules of the London Court of International Arbitration makes all awards made under in final and binding on the parties. Its rules say that, the decisions of the LCIA court with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal.

¹²³ Section 5 of the Arbitration and Conciliation Act reads thus, “Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this Part.

¹²⁴ In *Sudarshan Trading Co. v. Government of Kerala*, (1989) 2 SCC 38, it has been ruled that “by purporting to construe the contract the court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction”. The same view has been followed in a number of other subsequent cases also like, *HP State Electricity Board v. R. J. Shah & Co.* (1999) 4 SCC 214 and *Pure Helium Ltd. v. ONGC*, (2003) 8 SCC 593.

¹²⁵ (2002) 4 SCC 105.

¹²⁶ A non-convention country means a country that is not a party to the New York Convention of 1958.

parties are free to deviate only to the extent permitted by the derogable provisions of Part I of the Act. Though the decision seems to be practically good, still there is no consistency among the various high courts as evident in a number of conflicting judgments. In a recent decision, a two-judge bench of the Supreme Court reiterating the decision in *Bhatia International* held that an award made in England through an arbitral process conducted by the London Court of International Arbitration, though a foreign award, Part I would be applicable to such an award. Hence the courts in India would have jurisdiction both under section 9 and section 34 of the Act and entertain a challenge to its validity¹²⁷.

5.4.2. Grounds for non-enforcement of arbitral awards

It is generally presumed that arbitral awards are binding and become final on the persons between whom it is made.¹²⁸ However, there are a few specific grounds on which the enforcement of the arbitral awards may be refused.¹²⁹ They are the following.

Incapacity of parties and invalidity of arbitration agreement

Incapacity of the parties is a valid ground for refusal of enforcement of arbitral awards. Generally the incapacity of the parties is to be determined in accordance with the law applicable to the parties or in the absence of any indication thereof, according to the law of the place of arbitration. Same is the case with the law to be applied for determination of the validity of the arbitration agreement¹³⁰.

¹²⁷ *Venture Global Engineering v. Satyam Computers Services*, 2008 (1) SCALE 214.

¹²⁸ S. 46 of the Arbitration and Conciliation Act 1996.

¹²⁹ S. 48(2) of the Arbitration and Conciliation Act 1996.

¹³⁰ The law provides that the arbitration agreement referring disputes to arbitration shall include only those disputes that are capable of being settled through arbitration. What is arbitral is the dispute between the persons arising out of legal relationship whether contractual or not, considered as commercial in accordance with the law in force in India in pursuance of an agreement. If the court is satisfied that the dispute is not capable of settlement by arbitration, enforcement can be refused. An arbitrator can arbitrate only an arbitrable dispute. What is arbitrable is a matter, which the disputants may settle by arbitration agreement. For example, non-payment of a debt, which is acknowledged and admitted, cannot be submitted to arbitration. It is the case with matrimonial disputes. But now a days even matrimonial disputes are being referred to arbitration. Matters, which fall within the jurisdiction of the specified statutory tribunals, are determined only by them and are outside the purview of arbitration. Income-tax disputes, other tax disputes and industrial disputes cannot be a subject matter for arbitration. So also, disputes relating to title to immovable properties in a foreign country is not arbitrable. But what is seen today is that the scope of resolution of disputes through arbitration is widening day by day.

The Supreme Court in *Svenka Handles Banker v. Indian Charge Chrome Ltd.*¹³¹ held that the right to foreign arbitration is an indefeasible right of the parties in which the court does not have any discretion. For getting a reference for arbitration, the parties have to put their material before the court and the court has to record its finding as to the capacity of the parties thereon.¹³² If the agreement is such that it is not capable of being performed, the court may not refer the parties to arbitration. Incapacity does not mean impossibility. It implies that performance is impracticable from a reasonable man's point of view.

Incapacity of the parties to perform an agreement may happen when the contract is frustrated. Frustration occurs whenever law recognizes that without default of either party a contractual obligation has become incapable of being performed, because the circumstances in which the performance is called for would render it a thing radically different from which was undertaken by the contract. This doctrine does not apply to self-induced frustration. It is applicable when the impossibility is caused by external circumstances beyond the contemplation of the parties¹³³.

Improper composition of arbitral tribunal or violation of the principles of natural justice by the arbitrator

Enforcement of an arbitral tribunal can be opposed on the ground that the composition of the arbitral tribunal was not in accordance with the agreement or with the law of the county where the arbitration took place. Generally the law which would apply to the filling of award, its enforcement and its setting aside would be the law governing the agreement to arbitrate and the performance of the agreement.¹³⁴

Similarly, an arbitrator is guilty of misconduct if he acts in apparent violation of the rules of natural justice to the detriment of either party. Lack of opportunity or notice may be a ground for refusal of enforcement. The person alleging must establish that he did not have 'proper notice' which was adequate or of sufficient for preparing

¹³¹ (1994)2 S.C.C. 155.

¹³² *Renu Sagar Power Co. Ltd. v. General Electric Co. Ltd.*, AIR 1985 SC 1156.

¹³³ S.A. Tiewul, "The Enforcement of Arbitration Agreements and Awards", Vol.2, The University of Ghana law Journal, 162 (1974).

¹³⁴ For more details refer to the discussion under the head *validity of an arbitral award* at pp.34-40

his case. The court will not enforce an award when there is misconduct on the part of the arbitrator relating to the award. A detailed analysis of the provisions under the Act has already been done previously in this chapter¹³⁵

Award not becoming final

Enforcement of a foreign award may be refused, on the request of the party if he proves that the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which or under the law of which county, that award was made. The parties anticipate maximum expertise and expediency on the part of the arbitrators while deciding a dispute. If it is not reflected in the award, then the court can exercise its power of judicial scrutiny during the process of enforcement. If a party has made an appeal regarding the competence of the arbitrator or any defect in the arbitration procedure, before the prescribed authority of the country where the award is made, or the time for making such an objection or appeal has not expired, the award cannot be enforced. It would be binding if such objection has been rejected or such time has expired.¹³⁶ This matter was further discussed in *Harendra H. Metha v. Mukesh H. Mehta*.¹³⁷ The Court identified the following ingredients,

1. The award should be made on an arbitration agreement governed by the New York Convention or the Geneva Convention and not by the Indian Law
2. The agreement involved must be an agreement considered as commercial under the law in force in India.
3. The award must be made outside India.

However in another case, the Supreme Court has observed that, an award on the arbitration agreement governed by law of India, although the dispute was with a foreigner and the arbitration was held and made in a foreign country was not a foreign award.¹³⁸

¹³⁵ For more details refer to the discussion under the head *procedural justice for parties to arbitration* at pp30-33.

¹³⁶ *Tans Ocean Shipping Co. Ltd. v. Black Sea Shipping Co. Ltd.* (1999) 96 Com. Cas. 367 (SC).

¹³⁷ (1999) 97 Com. Cas. 265 (SC).

¹³⁸ *National Thermal Power Corporation v. Singer Co.*, AIR 1993 SC 998.

5.4.3. Award in conflict with public policy

One of the major grounds for setting aside an award is issue relating to public policy which may not be the same in India and in other countries.” The Act does not define “public policy” and therefore it has been ruled by the courts that what would constitute public policy is a matter dependent upon the nature of the transaction and the statute¹³⁹. The interpretation given by the courts to the term public policy has been generally criticized as leading to excessive judicial interference with arbitration process and awards¹⁴⁰. It is true to certain extent that the Court’s intervention has also not been able to do much in resolving the issue effectively.¹⁴¹ There are instances wherein the court has appreciated the fact that the 1996 Act makes provision for the supervisory role of the courts and for the review of the arbitral awards only to ensure fairness. This has been further explained by the Supreme Court in *MacDermott International INC v. Burn Standard CO LTD*¹⁴², that the supervisory role is to be kept at a minimum level and interference is envisaged only in case of fraud, bias, violation of natural justice etc. Interference on ground of patent illegality is permissible only if the same goes to the root of the matter, and a public policy violation should be so unfair and unreasonable as to shock the conscience of the court. The issue as to public policy is still being treated as a controversial one.¹⁴³ To resolve the problem, it is suggested that a better understanding of the law and practice relating to transnational public policy issues may be desirable for both the arbitrators and judges.

¹³⁹ *Ibid.*

¹⁴⁰ *ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705.

¹⁴¹ *Renusagar Power Co. Ltd v. General Electric Co.*, (1994) Supp. 1 SCC 644. See also, *ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705.

¹⁴² (2006) 11 SCC 181.

¹⁴³ The items permitted in *Renusagar* are restricted to-

- i. Fundamental policy of India
- ii. Interest of India
- iii. Justice and morality.

Whereas in *ONGC* case, one more ground was introduced along with the above three, i.e., *if the award is patently illegal* it can be set aside on the ground of violation of public policy within the meaning of section 34(2)(b)(ii) of the Arbitration and Conciliation act, 1996. Critics view it as a bad decision on the ground that the same law would be applied in an international arbitration also. In the light of the fact that in *ONGC* case, both the parties were Indians and arbitrated the matter in India, it is felt that the fear is misplaced. See also, *Hindustan Zinc Ltd. v. Friends Coal Carbonisation*, (2006) 4 SCC 445. As per this decision, the award must be in accordance with the agreement of the parties and the agreement of the parties must lie within the parameters prescribed by the non-derogable provisions of Part I of the Act. This seems to be contrary to the earlier decision in *Narayan Pasad Lohia v. Nikunju Kumar Lohia*, (2002) 3 SCC 572, wherein it was held that if the award passed in accordance with the agreement of the parties, it may not be set aside by the court.

5.4.4. Issues identified and recommendations with respect to finality and enforcement of arbitral awards

Parties choose arbitration, though not very cost effective always, to avoid contentious litigation in courts¹⁴⁴. The scheme of the Act of 1996 clearly demonstrates that the Act is intended to provide for greater autonomy in the arbitral process and limits judicial intervention to a narrow circumference than the position obtained under the previous legal regime¹⁴⁵. India's experience with arbitration for last so many years has proved the fact that what the present system requires is a supportive role of the court rather than a supervisory role.¹⁴⁶ Whether the courts have reminded themselves of this note of caution while dealing with the arbitral process and particularly, the arbitral awards is a question that probably cannot be satisfactorily answered in the affirmative¹⁴⁷. The recent decisions of the Supreme Court also add to this point¹⁴⁸. The provisions dealing with domestic arbitration and international arbitration though intended to be operative in different fields, there exist certain practical difficulties due to the overlapping nature of certain provisions in the two parts. For example, section 9 of the Act dealing with the power of the court to pass interim orders during the pendency of the arbitration matter has invited the attention of jurists and lawyers after the controversial decisions in *Bhatia international*¹⁴⁹ and *Global Engineering*¹⁵⁰ cases. The view taken by the court in these cases is that even for international arbitrations held in India, Part I of the Act dealing with domestic arbitration would apply¹⁵¹. This has in fact opened a floodgate for judicial intervention in the arbitral process. Hence, it is suggested that there may be a change in the present Act so that inconsistencies and overlapping provisions can be rectified. Ambiguities in legislation would invariably slow down the processes envisaged under it. Same is the case with the

¹⁴⁴ Sanjay P Gogia, "Need for a new International Court for Enforcement of International Commercial Arbitral Awards" Indian Journal of International Law, p. 78

¹⁴⁵ D.K.Bebber, "The Arbitration Law in India", Chartered Secretary, December (1996)

¹⁴⁶ See for example, *Ardy International (P) Ltd. v. Inspiration Clothes and U*, (2006) 1 SCC 417. It was held by the Supreme Court that an application under the Civil Procedure Code, 1908 can be considered as an application under section 8 of the Arbitration and Conciliation act, 1996, even if the civil suit was found to be not maintainable due to the existence of an arbitration agreement entered in to by the parties.

¹⁴⁷ A. K. Ganguli, "Emerging trends in the enforcement of arbitration awards", 50 JILI (2008), p. 57

¹⁴⁸ *S B P & Co.v.Patel Engineering & Anr*, (2005) 8 SCC 618.

¹⁴⁹ *Supra* n. 114.

¹⁵⁰ *Supra* n. 116.

¹⁵¹ The result is that even against a foreign award, provisions under section 34 of the Act may be invoked in India by a foreign party. This is absolutely against the very scheme of the Act.

vague provisions under the Arbitration and Conciliation Act, 1996 also. If these defects go uncorrected, the common fear of arbitrators ruining the finances and commerce of the parties may also become a reality.¹⁵² Therefore it is suggested that there is an urgent need to introduce a few changes in the Act as mentioned hereunder. The presence of an institution to keep vigilance over arbitration process assumes importance here, as that would ensure a minimum level of accountability and fairness in arbitration in accordance with the legislative mandate. Thus, it is clear that when arbitration is conducted in accordance with the established principles of justice and in compliance with the well-drafted rules of an institution there are fewer chances of parties complaining about lack of fairness in the arbitral process. This can definitely help the parties in avoiding the delay by getting the problems connected with enforcement to be remedied at the earliest.

Under the present law, the parties even after getting the arbitral award passed without any delay have to wait for a long time, if the opposite parties raise a claim as to its non-enforcement. It is often seen that the unsuccessful party challenging the awards resulting in undue hardship for the winning party. To remedy this defect, it is possible that a provision may be made to the effect that the challenging party has to deposit certain amount of sum as a security against the stay proceedings¹⁵³. The court may also be empowered to pass appropriate orders against parties filing frivolous and vexatious complaints. A summary way of proceedings may be introduced in the Arbitration Act to enable the court to deal with such applications as in the case of special statutory tribunals.¹⁵⁴

6. The incentive structure for various stakeholders in arbitration

“Arbitrate and don’t litigate” shall be the principle in mind while going for an alternate dispute resolution mechanism to resolve disputes. On the one hand there are horror stories of arbitrations being delayed for years by the parties fighting through

¹⁵² Jaya V.S, “ Finality and Enforcement of Foreign Arbitral Awards: Reflections on Indian Law”, *Asia Law Review* Vol. 2, (2007).

¹⁵³ A provision similar to summary proceedings in the quasi judicial tribunals providing for pre-deposit of certain percentage disputed amount may be introduced in the Arbitration and Conciliation Act, 1996 also. That means a provision for pre-deposit of certain percentage of the total award as a security against stay in the enforcement proceedings.

¹⁵⁴ For example, CESTAT constituted under the Central Excise Act, 1944 and Customs Act, 1962.

the courts in an attempt to delay an inevitable result. On the other hand it is quite natural that the parties may want minimum judicial interference on certain occasions to allow a smooth process. Lawyers and businessmen are frequently criticized for utilizing judicial interference in arbitration process¹⁵⁵.

From the point of view of parties to arbitration it can be seen that most of the areas, where there is an unnecessary delay in the arbitration process, have a close connection with the conduct of arbitrators. Any kind of misconduct or malafide acts from the arbitrators will definitely vitiate the arbitral award. It is therefore, necessary that there should be an internationally accepted code of conduct for the arbitrators to be observed in resolving the disputes. On the basis of that, the court can decide the fairness in the award made. The arbitrators should adhere to those standards, which are expected out of them. The arbitrators should act as officers discharging the public function of dispensation of justice¹⁵⁶. It is the case with lawyers too. A feeling of responsibility should be there in the minds of lawyers. Unnecessary adjournments and enormous sittings of arbitration should be curtailed. Both the arbitrators and the lawyers are paid normally on the basis of number of sittings they hold and appearances they make. A provision may be made in the Act providing for a fixed fee for arbitrators. They should not be paid on the basis of number of sittings as it may provide an incentive for them to have additional sittings, which will further delay the process. So a fixed fee for arbitrators will certainly help improvement in the system.

From the arbitrators' point of view it is felt that lack of proper infrastructure and training offered to arbitrators are frequently cited as the reasons for weakening of the system¹⁵⁷. Lack of accountability on the part of *ad hoc* arbitrators also contributes to this cause. A separate Bar for full-time arbitrators who have been trained by the accredited national arbitral institution may be useful in this regard. Taking in to consideration the socio-economic conditions peculiar to India, it is strongly felt that progress could be perhaps achieved in making the institutional arbitration more popular, effective and cheaper by setting up high quality arbitral institutions of

¹⁵⁵ For details, refer to chapter 4 dealing with an empirical study of status of arbitration in India.

¹⁵⁶ Jaya V S., "*Legality and Fairness of Arbitral Awards*", AALCO Quarterly Bulletin, No. 3, p. 278(2006)

¹⁵⁷ Based on the discussions took place in the judges consultation meet held on 12-04-08 at the Indian Law Institute, New Delhi.

international standard in India¹⁵⁸. These arbitral institutions shall be given the power to appoint arbitrators, as they are well versed in the matter of arbitration both domestic and international. This will definitely help the trading industries also. These institutions should improve upon their rules to make it in conformity with the international standards. These institutions may work out the modalities for developing a proper enforcement mechanism, which is more in the nature of self-regulatory¹⁵⁹. This may also enhance the uniformity in arbitration laws at the international level. This would definitely help the business community in achieving the objectives of Indian arbitration law and the promotion of international trade.

7. Scope and nature of dispute settlement through different methods of ADR

Under this head the various types of cases, which can be effectively handled through Conciliation, mediation and other forms of ADR are studied. The study aims at enhancing the scope and nature of known methods of ADR and also to explore the possibility of tailoring new ADR techniques to novel types of disputes.

7.1. Conciliation

The proceedings relating to conciliation are dealt under sections 61 to 81 of Arbitration and Conciliation Act, 1996. This Act is aimed at permitting mediation conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes. This Act also provides that a settlement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal. Conciliation shall apply to disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto¹⁶⁰.

Unlike an arbitrator, a conciliator does not give a decision but his main function is to induce the parties themselves to come to settlement. An arbitrator is expected to give a hearing to the parties, but a conciliator does not engage in any

¹⁵⁸ *Ibid.*

¹⁵⁹ The arbitration rules of the three major arbitral institutions in the world, viz., ICC (Paris), LCIA (London) and AAA (New York) contain very strict provisions to maintain internal discipline between parties and the arbitrators.

¹⁶⁰ Section 61 of the Arbitration and Conciliation Act, 1996.

formal hearing, though he may informally consult the parties separately or together. The arbitrator is vested with the power of final decision and in that sense it is his contribution that becomes binding. In contrast, a conciliator has to induce the parties to come to a settlement by agreement. A party initiating conciliation can send to the other party a written invitation to conciliation¹⁶¹. Conciliation commences when the other party accepts in writing this invitation. If it does not accept it, then there will be no conciliation¹⁶². If the settlement is product of conciliation, with all the formalities of reducing it into writing and authenticated by the conciliator, on a stamped paper, it will be an award and thus a decree, which could be executed immediately¹⁶³. Non-compliance would lead the party affected to file execution petition straight.

7.2. Matrimonial disputes

In any matrimonial suit, before proceeding to grant any relief, it shall be the duty of the court in the first instance, if it is possible to do so consistently with the nature and circumstances of the case, to make every endeavour to bring about reconciliation between the parties¹⁶⁴. However, the reconciliation cannot be applied in any proceedings wherein relief is sought on any of the grounds specified in Clause II to VII of sub-section (1) of Section 13 of the Hindu Marriage Act, 1955. For the purpose of aiding the court in bringing about such reconciliation the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period of not exceeding 15 days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions, to report to the court as to whether reconciliation can be and has been effected and the court shall in disposing of the proceedings have due regard to the report. The Preamble of the Family Courts

¹⁶¹ *Id.*, at s. 62.

¹⁶² *Ibid.*

¹⁶³ *Id.*, at s. 73 and 74.

¹⁶⁴ Section.23 (2) of the Hindu Marriage Act, 1955 reads thus: "In any proceeding under this Act, whether defended or not, if the court is satisfied that before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about reconciliation between the parties".

Act, 1984 itself contains the obligations on the Family Court to endeavour to effect a reconciliation or settlement between the parties to the family disputes¹⁶⁵.

7.3. Intellectual property rights disputes

Disputes on intellectual property rights generally assume international character because of the involvement of different legal systems. As far as India is concerned, the arbitrability of domestic intellectual property claims is not very well settled. The specific legislation dealing with intellectual property rights do not contain any provision for arbitration¹⁶⁶. These legislation are also silent as to the enforceability of arbitral awards involving the findings of validity of a claim over an intellectual property or the right against its infringement. There are no reported decisions of Indian courts regarding the arbitrability of intellectual property disputes. At the international level, many countries have already explored the possibility of introducing an alternate dispute resolution mechanism like arbitration in settling the IPR issues. The disputes relating to infringement, licensing as well as validity of an IPR claim can be arbitrated in US.¹⁶⁷ Similarly it is possible in Germany and U.K.

Looking at the complexity and technicality of the IPR disputes it is suggested that the arbitral institutions with their own panel of experts in IPR Laws would be a better option to take the lead¹⁶⁸. Such institutions should provide congenial environment, infrastructure, special assistance etc. for the smooth conduct of the arbitral proceedings. Generally, the know-how contracts dealing with the transfer of the right to exploit the intellectual or industrial secrets of inventions play a decisive role and sometimes even more important than the underlying patent. It is therefore natural that in disputes where there is a necessity of preserving secrecy, parties will

¹⁶⁵ The proceedings of the court at the initial stage will be informal. Section 9 of the Act envisages the method to be adopted for a settlement. The role of family court's judge is very important here. He is expected to give an impression to the parties that he is their well wisher and his endeavour is to settle the dispute amicably. The Judge of a family court shall assist and persuade the parties to come to a settlement rather than sit at their loggerheads. In this connection he may take the help of experts and counsellors.

¹⁶⁶ For example, legislation like, Patent Act, 1970 or the Copyright Act, 1957 does not contain any specific provisions for arbitration of disputes arising out of it.

¹⁶⁷ In *Rhone-Poulenc Specialties Chimiques v. SCM Corp.*, 769 F.2d. 1569 (Fed. Cir. 1985). Also, *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F. 2d 1191 (7th Circuit 1987) and *Necchi Sewing Machine Sales Corp. v. Necchi S.p.A.* 369 F.2d 579 (2d Circuit 1966), *Givenchy S.A. v. William Stuart Industries (Far East) Ltd.*, (1986) WL 3358.

¹⁶⁸ Well-known Patent Agents may be appointed as arbitrators in resolving disputes relating to IPR

always want to have a dispute resolved by arbitration and not by the court. The reason being that in the courts where a larger group of persons dealing with the secret, the risk of disclosing the secrets increases considerably and more importantly court proceedings are open to the public. Thus they are accessible to everybody, including the competitors. This can be avoided in arbitration or like ADR proceedings for the reason that they are private forums chosen by parties and maintain utmost confidentiality throughout the proceedings¹⁶⁹. It would be more appropriate if separate provisions suggesting the use of ADR mechanisms in resolving the disputes were made within the legislation dealing with IPR. Furthermore, the courts must suggest the parties to opt for the various ADR mechanisms available for bringing their IP disputes for resolution.¹⁷⁰

7.4. Section 89 of Civil Procedure Code, 1908

The *Civil Procedure Code 1908* was also amended in the year 2002 by reintroducing section 89. A recent judgment of the Supreme Court has added more meaning to it.¹⁷¹ This Section provides for judicial settlement of disputes through arbitration, conciliation or court- annexed mediation¹⁷². Though the legal community

¹⁶⁹ H Stumpf, "Arbitration and Contracts Concerned with Scientific, Technical and Research work including agreements on the use of inventions, know-how, etc." A Report presented to the Fourth International Arbitration Congress at Moscow in October 1972.

¹⁷⁰ Courts have the power to refer the disputes to ADR techniques under the provisions of S. 89 of Civil Procedure Code 1908.

¹⁷¹ *Salem Bar Association v. Union of India*, (2005) 6 SCC 344.

¹⁷² Section 89 of CPC reads thus: "Where it appears to the court that there exists elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for-

Arbitration

Conciliation

Judicial settlement including settlement through Lok Adalats

Mediation.

2) Where a dispute had been referred-

- (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.
- (b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;
- (c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

at large welcomed the reintroduction of section 89 in to the code of civil procedure, it is also not free from criticisms. At a national consultation meet of district and sessions judges from all across the country arranged in New Delhi to solicit their views regarding the merits and demerits of the section 89 of CPC, following factors were identified as the reasons for its failure. The consultation really helped in coming up with meaningful suggestions for improving the system¹⁷³.

7.4.1. Issues identified and recommendations with respect to section 89 of CPC

Lack of proper and effective training to be offered to judicial officers in ADR techniques and lack of necessary infrastructure for mediators and mediation centres are the major hurdles in the path of implementation of section 89 CPC. Training of judges has to be properly institutionalized in order to achieve desired results. At the same time, lack of interest and cooperation among lawyers towards settlement of disputes through ADR mechanisms is another difficulty in the enforcement of section 89 CPC. Over burdening of Judicial Officers with routine court work gives very little time for them to give proper attention to resolution of disputes using ADR techniques. Lack of awareness among public and lawyers towards various modes of ADR also leads to prolonging of proceedings by the parties. Non-Cooperation from insurance companies and other similar departments, both governmental as well as of public sector undertakings is also cited as one of the reasons for non-implementation. Reluctance on the part of judges to refer the matter to ADR modes and non-appearance of one or both the parties also cause undue delay. On account of their personal reasons like fee/commission and other vested interests, quite often the lawyers tend to delay the proceedings.

It is very difficult for the judge to convince a litigant without the support of lawyers. At present ADR techniques are useful in matrimonial and motor accident cases. Section 89 of the *Code of Civil Procedure, 1908* may be made applicable before the institution of suit through a panel of lawyers. The provision may be made compulsory for all civil cases and in such cases party should be directed to take

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

¹⁷³ National consultation meet of District and Sessions judges from all across the country organised under the auspices of Indian Law Institute, New Delhi from 12th –13th April, 2008.

recourse to Section 89 CPC. Family disputes and small-scale commercial disputes are generally settled by ADR in a short period. More incentives for cases settled under Section 89 and disposal shall be credited to judges' norms. Mediation may be made compulsory and specific rules for Section 89 CPC should be framed. Mediation centres shall be set up at district and High Court levels under the supervision and support of respective high courts. Mediation Rules shall be framed by the high courts ensuring full compliance with directions of the Supreme Court in *Salem Bar Association* case¹⁷⁴. Trial court may be given more authority to compel the parties for a possible settlement, as at present it is not a condition precedent to follow section 89 CPC. Parties should be made to give reasons in writing on affidavit if they do not agree with a proposed resolution formulated by the court.

There is no time frame for completion of ADR proceedings. It is desirable that the law may be changed to introduce a limited timeframe for the completion of the proceedings. The stage at which a matter can be referred to ADR techniques shall be specifically included under the section. The parties to the disputes shall be allowed to exercise their wisdom and discretion in choosing the appropriate mode of settlement. The changes may include the provision as to conducting arbitration, mediation or conciliation through recognized institutions accredited with the government¹⁷⁵. The court may refer the case to these well-established institutions for an easy judicial settlement with help of trained mediators or conciliators in their panel. This would definitely result in enhancing the scope of ADR proceedings under section 89 of CPC.

7.5. Mediation

In general terms, mediation is the negotiation facilitated by a third party. It is a private, voluntary, informal non-binding and cost effective process, which provides an environment for constructive communication. The core value in mediation is that the process provides the parties with an opportunity to negotiate, converse and explore options aided by a neutral third party, the mediator, to exhaustively determine if a

¹⁷⁴ *Salem Bar Association v. Union of India*, (2005) 6 SCC 344. A few states are yet to take steps for setting up of mediation centres or Rules thereunder.

¹⁷⁵ These accredited institutions that are registered with the government may only be directed by the court to take up matters coming under section 89. The parties may choose the procedure to be followed according to their convenience. Under the strict rules of the institution, the parties may resolve their disputes in a more efficacious and speedy manner.

settlement is possible. As a whole in mediation, the disputes are getting dissolved rather than getting resolved.

It was also opined in the consultation meet that ADR through mediation is moving very satisfactorily and successful. It not only resolves the particular dispute referred to mediation but also the present as well as future disputes. It focuses on past and future relations between the parties¹⁷⁶. Parties feel free to reveal facts to neutral mediators as the entire process maintains confidentiality. There is no rigid framework of rules for mediation. It is a very flexible process. A person who is acceptable to both the parties would serve as mediator. It is important to decide on the cost of the mediation at the beginning itself. The Mediator should indicate the possible cost and obtain the consent of parties to share the cost equally. If not, the cost of mediation would become an issue of conflict to be mediated between the mediator and the party. Though not much accredited, negotiation can also be termed as a kind of mediation for certain reasons¹⁷⁷.

7.5.1. Incentive structure for various stakeholders in mediation

Mediation has now become a frequently used method of ADR for the reason that it gives number of incentives to both the parties and mediators. From the point of view of parties to court-annexed mediation under section 89 CPC, it is always cost effective as compared to court litigation. It is generally offered free of cost to promote out of court settlements. In non-court annexed mediation, although the parties have to pay certain sum as mediator's fee, it may be nominal as compared to their business and other personal interests salvaged through the process of mediation. Moreover, the common fact that in mediation, the disputes are getting dissolved and not resolved provides an incentive to parties to settle their disputes in a harmonious way as compared to contentious litigation in the courts. In mediation, since the mediator persuades the parties to settle their differences in an amicable and acceptable manner,

¹⁷⁶ For more details, please refer to Chapter 3 based on an empirical study on mediation practice in the three cities of Delhi, Bombay and Bangalore.

¹⁷⁷ Negotiation is a communication process. It is voluntary and non-binding. It has control over procedure and outcome since there is wide range of possible solutions. Aims at maximum joint gains, which is quick, inexpensive, private and less complicated. Negotiation is possible where parties must cooperate to meet these goals. Parties can influence each other to act in ways that provide mutual benefit or avoidance of harm.

there is no question of one party winning the case or the other party losing it. This would further help in maintaining a cordial relationship between the parties even after the dispute is settled.

From the point of view of mediators, there are certain factors that encourage them to take up the task of mediation. An empirical analysis of the status of court-annexed mediation in Delhi and Bangalore has revealed the fact that generally, sitting or retired judicial officers and lawyers act as mediators. The success story of mediation establishes the fact that the mediators are skilled and competent in effecting a fruitful settlement of the disputes. This would definitely help building up their reputation as persons possessing high integrity and impartiality. Also, in court-annexed mediation, the mediators are paid a certain sum as fee apart from the regular income they have. In non-court annexed mediation or general mediation, the parties agree upon the fee to be paid to the mediators or if it is an institutional mediation, the monitoring institution will pay the mediators as per the fee fixed by the Rules of that particular institution. The institution must take active steps in promoting mediation and offering training to the mediators. These systematized efforts give the mediators an incentive to finish cases at the earliest without any delay.

7.6. Lok Adalats

Lok Adalat (people's courts), established by the government settles dispute through conciliation and compromise. Matters pending or at pre-trial stage, provided a reference is made to it by a court or by the authority concerned or committee, when the dispute is at a pre-trial stage and not before a Court of Law it can be referred to *Lok Adalat*¹⁷⁸. Parliament enacted the *Legal Services Authorities Act 1987*, and one of the aims for the enactment of this Act was to organize Lok Adalat to secure that the operation of legal system promotes justice on the basis of an equal opportunity. The Act gives statutory recognition to the resolution of disputes by compromise and settlement by the Lok Adalats¹⁷⁹. The concept has been gathered from system of *Panchayat*, which has roots in the history and culture of this Country. The provisions

¹⁷⁸ Here comes the significance of *Lok Adalat*, which has showed its significance by settling huge number of Third Party claims referred by Motor Accident Claim Tribunal (MACT). Except matters relating to offences, which are not compoundable, a *Lok Adalat* has jurisdiction to deal with all matters.

¹⁷⁹ For more details on the types of cases settled in *Lok Adalats*, please refer to Chapter 5 dealing with an empirical study of the working of *Lok Adalats* in the three cities of Delhi, Mumbai and Bangalore.

of the Act based on the notion of decentralization of justice are meant to supplement the Court system. They will go a long way in resolving the disputes at almost no cost to the litigants and with minimum delay. At the same time, the Act is not meant to replace and supplants the Court system. The Legal Services Authorities Act, 1987 (as amended vide Act No. 37 of 2002) provides for setting up of a “Permanent Lok Adalat” which can be approached by any party to a dispute involving “public utility services” which have been defined in the Act¹⁸⁰ (as amended) to include transport services for the carriage of passengers or goods by air, road or water; postal, telegraph or telephone services; insurance service, as also services in hospital or dispensary, supply of power, light or water to the public, besides systems of public conservancy or sanitation¹⁸¹.

7.6.1. Incentive structure for various stakeholders in Lok Adalats

The empirical data collected show that the success rate of *Lok Adalats* in the country is remarkably high.¹⁸² While examining the incentive structures for various stakeholders in *Lok Adalats*, it can be seen that the litigants are more aware about the advantages of such an ADR mechanism than any other form. Since the entire process is totally free of cost, it gives an incentive to the poor to settle their disputes in *Lok Adalats*. The rural inhabitants also get the benefit in view of the fact that these *Adalats* are regularly conducted in different parts of the states including rural areas under the supervision of *Taluka*, District and State Legal Service Authorities. In some states, the poor litigants coming to Lok Adalats are even provided with refreshments and other amenities.

From the point of view of presiding officers of Lok Adalats, for the effective functioning of the system, goodwill and co-operation among the lawyers, parties and

¹⁸⁰ Section 22A of the Legal Services Authorities Act, 1987.

¹⁸¹ Any civil dispute with a public utility service and where the value of the property in dispute does not exceed Rupees ten lakhs; or any criminal dispute which does not involve an offence not compoundable under any law, can be taken up in the “Permanent Lok Adalat”. An important feature of this amendment is that after an application is made to the Permanent Lok Adalat, no party to that application can invoke jurisdiction of any court in the same dispute. Such disputes involving public utility services shall be attempted to be settled by the Permanent Lok Adalat by way of conciliation and failing that, on merit, and in doing so the Permanent Lok Adalat shall be guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice without being bound by the Code of Civil Procedure and the Indian Evidence Act.

¹⁸² *Infra* chapter 5.

the judges are very important. The co-ordination among the various stakeholders has been the main driving force behind the success of *Lok Adalats*. The prompt result gives the officers an incentive to conduct more and more *Adalats* of like nature. These officers are also paid certain sum as fee. In the light of the present day developments in the digital technology, it is recommended that a well equipped judiciary with necessary infrastructure facilities and adequate training offered to these officers are highly desirable.

7.7. Plea bargaining

A new chapter¹⁸³ on plea-bargaining has been introduced by the Criminal Law (Amendment) Act, 2005 that makes it applicable to offences for which punishment is up to a period of seven years. Plea-bargaining can be defined as pre-trial negotiations between the accused and the prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecution. The object of plea-bargaining is to reduce the risk of undesirable orders for either side. One major reason for introducing plea-bargaining to our system is that most of the criminal courts are overburdened and unable to dispose off the cases on merits¹⁸⁴. Apart from regular courts, presently this technique is being practised in *Lok Adalats* also¹⁸⁵.

7.8. Tribunal system in India

Two decades after the commencement of the Constitution of India, it was realized that the existing court system was insufficient to cater to the needs of the people and to deal with all types of disputes. The constitution was accordingly amended and Article 323-B was added to authorize the legislature to establish tribunal, commissions, district boards etc for the adjudication or trial of any disputes, complaints or offences with respect to any matters¹⁸⁶. The survey of the existing legal frame work of alternate dispute resolution mechanisms would not be complete without mentioning the offices of Conciliation officer, Board of Conciliation,

¹⁸³ Chapter XXIA of the code of Criminal Procedure, 1973.

¹⁸⁴ To reduce the delay in disposing criminal cases, the 154th Report of the Law Commission first recommended the introduction of plea- bargaining as an alternative method to deal with huge arrears of criminal cases.

¹⁸⁵ Refer to tables 14 and 15 in Chapter 5 dealing with *Lok Adalats* for more details as to cases settled through the technique of plea-bargaining.

¹⁸⁶ 42nd Amendment to the Constitution of India (1976)

Voluntary arbitrator, Labour Court, Industrial Tribunal and National Tribunal for resolving labour disputes¹⁸⁷.

7.9. Consumer Disputes Redressal Agencies

The Consumer Protection Act, 1986 provides for establishment of Central Consumer protection Councils and the State Consumer Protection Councils for the purpose of spreading consumer awareness. Central Council is headed by the Minister in Charge of the Consumer affairs in the central Government and in the State; it is the Minister in charge of the Consumer affairs in the state who heads the state council. There are consumer councils at the district level also. The main object of these Councils is to protect and promote the rights of consumers such as the right to safety, the right to information, to right to choose, the right to be heard, the right to seek refusal and the right to consumer education¹⁸⁸. In order to ensure the better protection of the interests of consumers and the speedy settlement of grievances the Act provides for the establishment of Consumer Disputes Redressal Commissions at the central as well as state levels and Consumer Disputes Redressal Forums at the district level also.¹⁸⁹

7.10. Ombudsman

The institution of ombudsman is slowly gaining momentum in India. Keeping in view the time constraints, the economy and the resources involved in regular courts some of the institutions have preferred to have an ombudsman for settlement of disputes arising against their institution. Grievance Redressal Committee and *Lok Ayukta* have been constituted accordingly¹⁹⁰. With an objective of protecting the taxpayer's rights and reducing his burden, the government has announced the setting up of a Tax Ombudsman and notified the 2006 Scheme¹⁹¹. Similar schemes are present for redressal of customers' grievances under banking, insurance,

¹⁸⁷ See the provisions under the Industrial Disputes Act, 1947.

¹⁸⁸ Section 6 and 8 of the Consumer Protection Act, 1996.

¹⁸⁹ *Id.*, at Sections 4, 7 and 8A.

¹⁹⁰ *Lok Ayukta* have been constituted in various states under state legislation passed by the respective State Governments.

¹⁹¹ The current tax system provides for appeals right up to the Supreme Court, while the offices of the Authority for Advance Ruling and the Settlement Commission are there to minimise litigation.

securities¹⁹² and electricity laws.¹⁹³ The success story of ombudsmen in banking and insurance services has been the driving force for this development¹⁹⁴. The Reserve Bank of India announced the revised Banking Ombudsman Scheme with enlarged scope to include customer complaints on certain new areas, such as, credit card complaints, deficiencies in providing the promised services even by banks' sales agents, levying service charges without prior notice to the customer and non adherence to the fair practices code as adopted by individual banks. Applicable to all commercial banks, regional rural banks and scheduled primary cooperative banks having business in India, the revised scheme came into effect from January 1, 2006.

7.11. Fast track arbitration

A novel experiment aimed at clearing the massive backlog in court cases has begun in the country with the setting up of fast track courts in various states. These courts are expected to serve as model courts for speedy disposal of cases pending for a long time. This includes both civil and criminal cases. The scheme envisages the appointment of *ad-hoc* judges from amongst the retired judges, additional sessions judges or judges promoted on *ad-hoc* basis and posted in these courts or from among members of the bar. The states that are lagging behind their targets are being persuaded by the Centre to speed up the work.

Similarly with India's economic growth on the fast track, the need for a fast track arbitration process has never been felt more¹⁹⁵. Under fast track arbitration, the arbitrators have to decide the matter within the time frame on written submission

¹⁹² For example, BIFR, DRT (Debts Recovery Tribunal), OTS (one-time settlement) and CDR (corporate debt restructuring) Schemes.

¹⁹³ See for example, the High Court of Madras in W.P No. 6199 / 2007 in the matter of *Superintending Engineer Dharmapuri Electricity Distribution Circle v. Meenakshi Udyog India Pvt. Ltd and Tamil Nadu Electricity Ombudsman*, held that the Ombudsman has jurisdiction to don the role of an arbitrator once mediation fails and there is no embargo on adjudicatory functions. Tamil Nadu Electricity Board's contention that the Ombudsman is only a mediator and not an adjudicator has been rejected. The Regulations of the Tamil Nadu Electricity Regulatory Commission conferring upon the Ombudsman the dual roles of mediator as well as arbitrator have been upheld. The appellate power which is vested with the Ombudsman to hear the appeals against the orders of the Consumer Grievance Redressal Forums has also been upheld by the High Court.

¹⁹⁴ The banking and insurance ombudsman function under the Banking Regulation Act, 1949 and Insurance Act, 1938, respectively. The institution of Insurance Ombudsman was created by the Government of India vide its notification dated 11th November 1998 to handle complaints of aggrieved insured persons. Claimants who could not get their complaints redressed by insurers may get in touch with the Ombudsman relevant to their states.

¹⁹⁵ S. Venugopalan, "Fast Track Arbitration"(2004) 10 CLA-BL supp (Mag.) 37.

without oral hearings¹⁹⁶. This will inspire confidence in the foreign investors who want to dispose of the matter in a minimum timeframe to reduce the number of hearings and ultimate reduction of substantial cost, which is the very objective of arbitration.¹⁹⁷

8. Conclusion

The doctrinal analysis indicates that ADR methods have the potential to reduce the arrears of courts. At the same time, the empirical data collected during the study show that despite all efforts, there exists a huge disparity between the number of cases being disposed off in a year and the number of cases pending in the courts. Reasons are manifold. They are being analyzed. Remedial measures are also being explored since the potential of ADR in minimizing caseload depends a lot on how imaginatively it is employed in a system.

In the process of administration of justice, the ADR methods could be better utilized with the help of a supportive judiciary. It is desired that both the systems should work complementary to each other. This invariably calls for attention of judicial officers towards systematic use of ADR techniques. Resolution of disputes is an essential characteristic for societal peace, amity, comity and harmony and access to justice to poor. Indian socio-economic conditions warrant highly motivated and sensitized legal service programmes as large population of consumers of justice are either poor or ignorant or illiterate or backward, and, as such, at a disadvantageous position. The State, therefore, has a duty to see that the operation of legal system promotes justice on the basis of equal opportunity. Alternative dispute resolution if properly institutionalized, as an adjunct to judiciary would prove to be a vital tool for easy and early settlement of disputes.

A summary of the recommendations made are given below:

¹⁹⁶ The ICADR has been following the technique of fast track arbitration and is proved to be successful also. This special feature of the rules of arbitration of the ICADR i.e., the fast track arbitration under which parties may request the arbitral tribunal before the commencement of the arbitration proceedings to settle disputes within a fixed time frame of 3-6 months or any other time frame agreed by the parties.

¹⁹⁷ 176th Report of the Law commission contained provisions for introducing fast track arbitration though not implemented.

- i. Institutional arbitration shall be promoted in India to make India an important venue of both domestic and international arbitration.
- ii. A national institution shall be developed to promote ADR system in India. This Institution shall impart training to arbitrators/mediators and to provide necessary infrastructure facilities in the conduct of arbitration/mediation.
- iii. *Ad hoc* arbitration in India may be regulated to ensure accountability of arbitrators enabling progress in the present system of arbitration in India.
- iv. The Arbitration and Conciliation Act, 1996, may be amended to include the following provisions;
 - a. Time limit for conducting an arbitration matter.
 - b. The power may also be delegated to District Judges in the appointment of arbitrators under section 11 of the Act.
 - c. Separate Bar of full time arbitrators/mediators.
 - d. Compulsory registration of such arbitrators/mediators with the Government.
 - e. An internationally accepted *code of conduct* for arbitrators to ensure their accountability.
 - f. Arbitrator's fee shall be fixed.
 - g. Grounds for setting aside of arbitral awards under section 34 shall be further limited by pecuniary limits.
 - h. Cost to the affected party in case of a frivolous challenge against the enforcement of an arbitral award.
 - i. Provision shall be made to regulate *ad hoc* arbitrations in India.
 - j. Provisions for a strong enforcement mechanism that may be self-regulatory.
- v. The Code of Civil Procedure may be amended to include the following provisions in section 89;
 - a. Limited time frame shall be fixed for settlement of disputes outside the court.
 - b. The phrase '*Suitable institution or person*' mentioned in section 89(2)(c) to effect a *judicial settlement* may include Government accredited ADR institutions including mediation centres in each state.

- c. The phrase in section 89 (2) (d) '*court shall effect a compromise*' shall be amended to include suitable mediation institutions to take a leading role in the settlement of disputes under section 89 CPC.
- d. The stage at which a case may be referred to ADR shall be specifically mentioned under the section. There shall be an amendment by stating, *wherever it may be acceptable to the parties or can be explored by the parties* instead of stating *where it appears to the court*.
- vi. Institutional arbitration and mediation shall be promoted in cases of settlement outside the court.
- vii. Only accredited Institutions registered with the Government may be entrusted with the task of appointment of arbitrators, mediators etc.
- viii. Keeping the objective of the Act in mind, the scope of judicial interference in arbitration should be minimal. The consequential changes in the law and policy including judicial approach are anticipated.

Thus, the doctrinal analysis of the law and policy with respect to resolution of commercial as well as non- commercial disputes establishes the fact that there is an imminent need to introduce changes into the existing legal framework. In the light these observations, the following three chapters will be analyzing the data collected through the empirical study to build up a strong case for effecting the aforesaid changes in the law and policy.

Chapter 3

Dispute resolution through mediation: Empirical analysis of its effectiveness in Delhi, Bangalore and Mumbai

1. Introduction

MEDIATION THOUGH not a new concept in India,¹⁹⁸ its importance as a dispute resolution mechanism was never felt until the introduction of s. 89 CPC¹⁹⁹ and the establishment of institutionalized mediation centres in some of the cities.²⁰⁰ Generally in India it is done on an *ad hoc* basis at pre-litigation stage or during the pendency as referred by the courts under s. 89 CPC. The merit of mediation is that when a dispute is resolved, generally all the connected disputes are also usually settled. Another advantage is that if it were a judgment from a court, generally the judgment debtor would go for an appeal. In mediation this chance is minimal, since

¹⁹⁸ For example there are many communities in India who settle the disputes within the community themselves. The neutrals in such community dispute resolution would be one or more people who commands acceptance from majority of the community. These communities are generally caste based, occupation based, or confined to a particular geographical area. It can be criticised that these processes are not exactly mediation because of the social sanctions for non-enforcement of the decisions. An example is the dispute resolution among the *Marvadi* community in Mumbai. Another interesting example could be the '*Auto Rickshaw Courts*' in Kannur district of Kerala State. They settle disputes arising among themselves or between the public and auto drivers regarding the fare and other related matters. If the disputes are not settled at this stage, then they are referred to the normal litigation.

¹⁹⁹ Section 89 of the Code of Civil Procedure, 1908 says "Settlement of disputes outside the Court. (1) Where it appears to the court that there exist elements of a settlement, which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for-

- (a) Arbitration;
 - (b) Conciliation
 - (c) Judicial settlement including settlement through Lok Adalat; or
 - (d) Mediation.
- (2) Where a dispute had been referred-
- (a) For arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.
 - (b) To Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;
 - (c) For judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;
 - (d) For mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

²⁰⁰ In India the first of its kind was started in Tamil Nadu on 9th April 2005. It is also set up in Delhi and Bangalore.

the disputants themselves arrive at the settlement. The mediator's role is limited to the extent of facilitating the parties with an easy resolution of their disputes. It is also important that in mediation the parties do not act as adversaries and hence the relationship is well maintained.

This chapter focuses on the effectiveness of mediation as a dispute resolution method in the three cities, namely Delhi, Bangalore and Mumbai.²⁰¹

2. Case study and analysis of mediation in Delhi

In Delhi there are three instances of dispute resolution through institutionalized mediation. They are (a) Delhi High Court Mediation and Conciliation Centre; (b) dispute resolution through mediation by the Delhi High Court Legal Services Committee; and (c) Court-Annexed Mediation Centres at *Kar Kar Dooma* and *Tis Hazari* Courts.

2.1. Delhi High Court Mediation and Conciliation Centre

The Delhi High Court Mediation and Conciliation Centre started functioning in the year 2006 with two important objectives. First one was to encourage amicable resolution of disputes through mediation and conciliation. The second one was to train lawyers as mediators in the most competent and efficient manner. In an attempt to fulfill these objectives, so far 108 lawyers, including 10 Senior Advocates and 50 other lawyers with more than 15 years of experience in the Bar, have been trained as mediators. Among this 32 lawyers have also received advance training in mediation.

The Delhi High Court Mediation and Conciliation Centre, known as *Samadhan*,²⁰² have successfully settled 135 disputes out of 730 disputes that were referred to this Centre by the Delhi High Court during 2006 - 2007. The nature of cases that were mediated at this Centre included commercial disputes, partnership disputes, property disputes, criminal cases under section 498-A IPC, matrimonial disputes, industrial and labour disputes and disputes involving government bodies.

²⁰¹ Mediation experiences in these three cities are analysed using statistical data collected directly from these centres or from published official documents.

²⁰² Means 'peace' in Sanskrit language.

The cases to this Centre are either referred by the various courts in Delhi or are taken up on request by the parties at pre-litigation stage. The costs of mediation are either free or shared by the parties to the dispute.

2.2. Delhi High Court Legal Services Committee

The Delhi High Court Legal Services Committee is set up under section 8A of the Legal Services Authorities Act, 1987, by the Delhi Legal Services Authority with the primary objective of providing legal aid to the masses. Apart from free legal aid to the needy, it also conducts mediation and *Lok Adalats*. In the year 2003 this committee settled 21 disputes through mediation, whereas the settlement rate had gone up to 956 in 2004 and 169 in 2005. In the year 2006 2369 cases were referred to this Committee, which included 1925 pre-litigation matters and 444 disputes pending in different courts. Out of this 232 pre-litigation matters and 63 pending cases were settled amicably.

2.3. Court annexed mediation centres at *Tis Hazari* and *Kar Kar Dooma*²⁰³

In Delhi the Committee headed by the Chairman of the Law Commission of India, framed Alternative Dispute Resolution and Mediation Rules. The Delhi High Court on 11.08.2005 approved this Rule.²⁰⁴ Thereafter fifty-five cases were referred to by the courts for mediation at *Tis Hazari* Courts, between 16.08.2005 and 02.09.2005, of which 15 cases were settled by 02.09.2005. The settled cases included recovery suits, tenancy disputes, guardianship and custody issues, matrimonial disputes,

²⁰³ For giving effect to s. 89 of the Code of Civil Procedure, 1908, the then Chief Justice of India, Mr. Justice R.C. Lahoti appointed a Mediation and Conciliation Project Committee on 09.04.2005 to provide centralized direction and support for mediation efforts in India. After due deliberations, the MCPC started a pilot project in the district courts in Delhi. The Pilot Project was launched in August 2005 under the auspices of the National Legal Services Authority with trainers provided free of charge by the Institute for the Study and Development of Legal Systems in California, USA. It was agreed that ISDLS would bring specialist mediators/trainers to train judicial officers in the art and technique of mediation and these trained judicial officers would then mediate pending disputes at the Mediation Centre by other judicial officers. To develop and implement this project, the MCPC formed a sub-committee, which would be the oversight system. The sub-committee consisting of Honourable Mr. Justice S.B. Sinha, Judge, The Supreme Court of India, Honourable Mr. Justice Madan B. Lokur, Judge, Delhi High Court and Mr. Raju Ramachandran, Senior Advocate. [For more information, see *Annual Report of Delhi Mediation Centre*, at p. 11 (2005-2006).] Incidentally, the decision in *Salem Advocate Bar Association v. Union of India* (2005) 6 SCC 344 came to be pronounced by the Supreme Court on 02.08.2005, on the same date as the launching of the Pilot Mediation Programme at the *Tis Hazari* Courts.

²⁰⁴ Vide notification No. 171/Rules /DHC dated 11.08.2005 published in the Delhi Gazette Extra Ordinary Part IV No. 120 (NCTD. No. 427) dated 11.08.2005.

partition suits, motor accident claim cases and cases under the Negotiable Instruments Act, 1881. Encouraged by this the Hindustan Times²⁰⁵ published a report titled as 'Faster verdicts via Mediation Cell' s the excerpt of which is given below.

Complainant Sumair Singh is a happy man. He had almost given up on his recovery case against a bank, thanks to the long Court proceedings that went on and on with little progress. It was then that he decided to put up his plea before the Mediation Cell. Action was prompt; the case reached an agreement in one day.

Judicial mediation on a regular basis commenced with effect from 13.09.2005 in the *Tis Hazari* Courts, Delhi.

2.3.1. Setting up Mediation Centres at *Tis Hazari* and *Kar Kar Dooma*

Encouraged by this mediation centres were established at *Tis Hazari* courts on 24.10.2005 and *Kar Kar Dooma* courts on 02.12.2005.²⁰⁶ Thereafter the cases that were referred to these mediation centres were increased and this in turn resulted in the increase of mediation days per mediator from one day per week to 6 days per week.

2.3.2. Statistical analysis of mediation in Delhi

The study found that one of the most significant aspects of judicial mediation at the Mediation Centres at Delhi is that the service is provided free of cost to the litigants. On the conclusion of a successful mediation, followed by a decree, the plaintiff is entitled to a refund of court fees. At the same time if the parties settled the disputes themselves without their case being referred to the mediation centres, their court fee will not be returned.²⁰⁷ This situation requires change with due regard to the objectives of mediation.

²⁰⁵ *The Hindustan Times*, New Delhi dated 30.08.2005.

²⁰⁶ Mediation Centre at *Tis Hazari* Courts was inaugurated on 24.10.2005 by the Honourable Mr. Justice Y.K. Sabharwal, then Judge, Supreme Court of India and also the then Executive Chairman of the NALSA and former Chief Justice of India. Judicial mediation also commenced at the *Kar Kar Dooma* courts from 02.12.2005, and was formally inaugurated on 05.05.2006 by the Honourable Mr. Justice S.B. Sinha, Judge, Supreme Court of India.

²⁰⁷ As opined by the Registrar General of the High Court of Delhi while consulted by the researchers.

Table 9
Data from *Tis Hazari* Mediation Centre (during 2005-2008)²⁰⁸

Total number of cases referred for mediation from 22/08/2005 to 21/04/2008	5457
Cases not fit for mediation	840 (15.39%)
Cases fit for mediation	4617
Cases pending for mediation	163
Cases settled	2907(65.27%)
Cases not settled	1547(34.73%)
Connected cases settled	1217
Average time spent per case	135 minutes

Table 10
Data from *Kar Kar Dooma* Mediation Centre (During 2005-2008)²⁰⁹

Total number of cases referred for mediation from 22/08/2005 to 21/04/2008	1849
Cases not fit for mediation	216 (11.68%)
Cases fit for mediation	1633
Cases pending for mediation	8
Cases settled	1287 (79. 20%)
Cases not settled	338 (20.80%)
Connected cases settled	407
Average time spent per case	105 minutes

²⁰⁸ Prepared on the basis of data received from *Tis Hazari* Mediation Centre by the Delhi Research Team as on 21.04.2008.

²⁰⁹ Prepared on the basis of data received from *Kar Kar Dooma* Mediation Centre by the Delhi Research Team.

Table 11
Types of cases referred to *Tis Hazari* Mediation Centre²¹⁰

Sr. No.	Type	Total cases Referred (Excluding connected cases)	Not Settled	Not Fit	Settled	Connected	Pending	Success rate in %
1	125 Cr. P. C ²¹¹	303	116	36	143	100	8	55.21%
2	138 N. I. Act ²¹²	537	65	49	394	131	29	85.84
3	Other Criminal Cases	167	65	13	74	42	15	53.24
4	Custody/Guardianship	138	62	19	50	54	7	44.64
5	Injunction/possessions/damages	1639	566	264	741	216	68	56.69
6	Labour Disputes	3	1	0	2	0	0	66.67
7	MACT	193	23	46	122	10	2	84.14
8	Matrimonial	1164	495	129	491	426	49	49.80
9	Other Civil Suits	540	168	103	242	64	27	59.02
10	Partition	253	109	53	84	14	7	43.52
11	Probate	38	19	4	14	10	1	42.42
12	Recovery	1469	256	170	968	239	75	79.08
13	Rent Act	56	20	7	26	3	3	56.52
	Total	6500	1965	893	3351	1309	291	

²¹⁰ *Supra* n. 205.

²¹¹ Section 125 of the Code of Criminal Procedure, 1973 says “Order for maintenance of wives, children and parents: (1) If any person leaving sufficient means neglects or refuses to maintain-

- (a) His wife, unable to maintain herself, or
- (b) His legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
- (c) His legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
- (d) His father or mother, unable to maintain himself or herself,

A Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct”

²¹²Section 138 of the Negotiable Instruments Act, 1881 says “Dishonor of cheque for insufficiency, etc., of funds in the accounts: - Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honor the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to two year or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless- (a) The cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. (b) The payee or the holder induce course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer, of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and (c) The drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.”

Table 12
Types of cases referred to *Kar Kar Dooma Mediation Centre*²¹³

Sr. No.	Type	Total cases referred (Excluding connected cases)	Not Settled	Not Fit	Settled	Connected	Pending	Success rate in %
1	125 Cr. P. C	138	35	10	90	51	3	72.00
2	138 N. I. Act	775	58	33	669	171	15	92.02
3	498A ²¹⁴ /406 ²¹⁵ IPC	8	2	1	5	0	0	71.43
4	Criminal Others	7	4	0	3	0	0	42.86
5	Custody/Guardianship	3	1	0	2	1	0	66.67
6	Injunction/Possession/Damages	416	102	43	256	43	15	71.51
7	Labour	1061	196	122	735	37	11	78.95
8	MACT ²¹⁶	125	13	10	100	37	2	88.50
9	Matrimonial	323	104	34	181	161	4	63.51
10	Other Civil Suits	53	17	6	27	20	3	61.36
11	Partition	9	2	3	4	0	0	66.67
12	Probate	1	0	0	1	1	0	100
13	Recovery	305	35	18	246	38	6	87.54
14	Rent Act	71	26	9	34	14	2	56.67
15	Others	1	1	0	10	0	0	90.91
	Total	3309	596	289	2363	574	61	

It is interesting to note that the Supreme Court of India and the Delhi High Court have also referred cases to these Mediation Centres. The table below shows the details of such cases.

²¹³ *Supra* n. 206.

²¹⁴ Section. 498A of the Indian Penal Code, 1860 says “Husband or relative of husband of a woman subjecting her to cruelty: - Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation-For the purpose of this section, "cruelty" means- (a) Any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical) of the woman; or (b) Harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her meet such demand.”

²¹⁵ Section 406 of the Indian Penal Code, 1860 says “Punishment for criminal breach of trust: - Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”

²¹⁶ Motor Accidents Claims Tribunal.

Table 13
Cases referred from Supreme Court and Delhi High Court to Delhi Mediation Centres²¹⁷

	Total cases referred	Not Settled	Not Fit	Settled	Connected	Pending	Success rate in %
<i>Tis Hazari</i> Mediation Centre	179	84	20	71	137	4	46.81
<i>Kar Kar Dooma</i> Mediation Centre	55	21	15	18	44	1	46.15

From the available data, it is not clear as to whether commercial disputes are resolved at these centres. In an effort to know the details, the mediators at these Centres said that commercial disputes of high value are not being referred to these Centres.

2.3.3. Merits of Mediation Centres in Delhi

The following are the merits of mediation centres when compared to other dispute resolution mechanisms in Delhi.²¹⁸

1. Underlying interests, root causes of the dispute between the litigants are being addressed rationally, patiently and neutrally.
2. Subtly overcoming the unstated desires involved in litigation, through preservation of harmonious relations, be they commercial or human, between partners, traders, brothers, sisters, spouses, neighbors.
3. The reality of a trial attendant with its technicalities, delays, and its cost are mentally assimilated.
4. The positive/post-mediation attitude of parties towards each other.

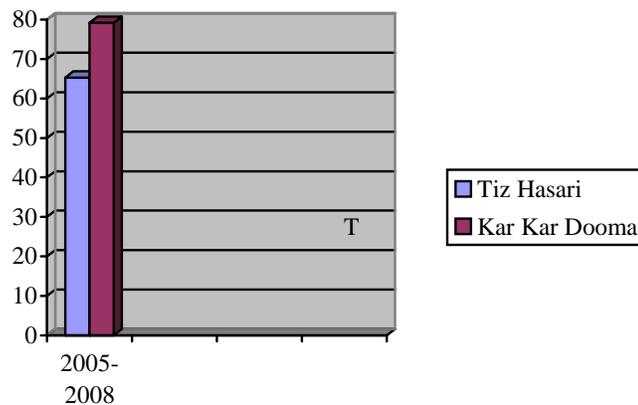
2.3.4. Comparison of the success rates in *Tis Hasari* and *Kar Kar Dooma* Centres

The following graph compares Mediation Centres at *Tis Hasari* and *Kar Kar Dooma* during the period 2005-08.

²¹⁷ *Supra* n. 206.

²¹⁸ As opined by the officers and mediators at Delhi Mediation Centres.

Graph 18
Success Rates of Mediation in *Tis Hazari* and *Kar Kar Dooma*



Scope for further study

Kar Kar Dooma Mediation Centre shows a higher success rate than the *Tis Hazari* Mediation Centre. This can be due to various reasons like (a) There is an urban-rural difference in the places where these courts are situated. *Kar Kar Dooma* Mediation Centre is situated in countryside as compared to *Tis Hazari* Mediation Centre, which is an urban area. (b) The success rate may also depend upon the support given by the officers in charge of these Centres. These differences are there despite the fact that both the centres are within the same city and under the same administrative supervision.

A detailed comparative study may be done between these two Centres to identify and address these issues effectively. Such a study, if done, would not only help rectifying the existing defects, but would also benefit other mediation centres in resolving disputes more efficiently in future.

2.3.5. Success rates of mediation: Does it depend on the referral stage?

Another interesting fact that came into light, as a part of this study was that the courts have referred disputes to these mediation centres throughout the litigation

process at different stages. The success rate of mediation also depends on the stage at which the disputes are referred to mediation by the courts. The following tables show the success rate and the time taken at different stages of reference.

Table 14
Settlement rates per referral stage at *Tis Hazari* (period 22.08.2005 to 31.07.2007)²¹⁹

Stage	Referred cases	Settled	Not settled	Success rate (%)	Average minutes
Completion of pleadings	391	277	114	71.00	93
Up to the framing of issues	263	167	96	63	100
After framing of issues	110	61	49	55	98
Evidence	844	524	320	62	97
Arguments	1378	746	632	54	113
Total	2986	1775	1211	59%	104

Table 15
Settlement rates per referral stage at *Kar Kar Dooma* (during 1.12.2005 to 31.07.2007)²²⁰

Stage	Referred cases	Settled	Not settled	Success rate (%)	Average minutes
Completion of pleadings	475	411	64	87	63
Up to the framing of issues	138	107	61	78	74
After framing of issues	65	54	11	83	85
Evidence	709	553	156	78	62
Arguments	307	228	79	74	78
Total	1694	1353	341	80	67

An analysis of the above data reveals that the success rate and the time taken for disposal generally depend on the stage at which the dispute is referred for mediation. If it is immediately after the completion of pleadings but before the issues are framed, the success rate is high and average time taken is less in both the centres in Delhi. Conversely the success rate is less and generally more time is taken when it is after the arguments. The only conclusion that could be derived from this analysis is that the success rate of dispute resolution through the mediation centres generally

²¹⁹ *Supra* n. 205.

²²⁰ *Supra* n. 206.

depends on the stage at which the dispute is referred. The reasons for this phenomenon could be found out only after a detailed study. A hypothesis that could be derived from this observable fact is that when the litigation advances stage by stage through the existing courts in India, the processes and technicalities makes the dispute more complicated than what it was at the time of institution of the suit. It could also be presumed that it affects the relationship between the parties negatively, making it worse. Testing of this hypothesis is beyond the scope of this study.

Scope for further study

The hypotheses stated above could be proved or disproved on the basis of a detailed study.

2.4. Institutions imparting training in mediation in Delhi

In a study conducted in various governmental, semi governmental, non-governmental organizations and various business houses, it was revealed that only few institutions impart training in mediation in Delhi. The list includes the Indian Law Institute,²²¹ ICADR,²²² Delhi High Court Mediation and Conciliation Centre²²³ and Delhi Judicial Academy.²²⁴ Among these institutions, the Delhi Judicial Academy imparts training only for judicial officers. However, the total number of mediators trained, the number of persons takes up the career/service of mediation, the utility of the training at these centres with respect to their career/service *etc.* are unknown.

3. Case study and analysis of mediation in Bangalore

The Bangalore Mediation Centre was started under the leadership of Chief Justice of Karnataka High Court. Similar to Delhi, this project was also as per the design of ISDLS. But when compared to Delhi, where the judicial officers, act as mediators, the Bangalore Mediation Centre runs with the help of advocate mediators under a few judicial mediators acting as co-ordinators and administrative heads. It is

²²¹ <http://www.ilidelhi.org>

²²² <http://www.icadr.org>

²²³ <http://dhcmc.org>

²²⁴ <http://judicialacademy.nic.in>

stipulated that the advocate mediators should have a minimum of 15 years of experience. It is also mandatory that they undergo a 40-hour training programme before acting as mediators. The mediation programme and its performance are supervised by the Judges of Karnataka High Court. In the first three months of its inception, 55 mediators were trained who have successfully mediated over 200 disputes in recovery, tenancy disputes, specific performance, partition, and injunction suits. The table below shows the details.

Table 16
Bangalore Mediation Centre (During the period between 01/01/2007 and 18/01/2008)²²⁵

Details		Figures	%
Cases referred	Number of cases pending at the beginning of the period	0	0
	Number of cases referred during the period	2906	
Cases not mediated	Case was not fit for Mediation	44	2 %
	One or more parties did not appear for a follow-up mediation	117	4 %
	One or more necessary parties never appeared	191	7 %
	One or more parties appeared but refused to participate in mediation	49	2 %
	Others	58	2 %
Cases mediated	Cases Mediated	1621	56%
	Cases Settled	887	55%
	Connected cases settled	97	
	Total cases settled through mediation	984	
	Cases not settled	734	45%

Table 17
Average time taken for Mediation at Bangalore Mediation Centre²²⁶

Details	
Total number of mediators	72
Number of mediator hours	3553 Hours
Average time spent per case	131 Minutes
Average number of sessions per case	1.81

²²⁵ Prepared by the Bangalore Research Team on the basis of data received from Bangalore Mediation Centre

²²⁶ *Ibid.*

3.1. Analysis of data from Bangalore

Even though an evaluation of performance at this stage *i.e.* one year after the institution of mediation centre at Bangalore would be premature, a brief analysis is done below which depicts the trends. In Bangalore out of the 2906 cases that were referred by the courts only 56% *i.e.* 1621 cases were actually mediated. The rest of the cases were not mediated because of one or the other reasons. Out of these 1621 cases 887 disputes and another 99 connected cases were also settled making the total figure to 984. The average time taken for the settlement of these disputes is 131 minutes.

If the performance of Bangalore Mediation centre is compared to its counterparts in Delhi, the latter has a higher success rate. This difference in Bangalore Mediation Centre and Delhi Mediation Centres could be because of the fact that in Delhi judicial officers act as mediators whereas in Bangalore advocates act as mediators. Mediation by judicial officers seems to be more acceptable by the public.

Scope for further study

The reasons behind the higher success rate of Delhi Mediation Centres when compared to Bangalore could be studied. It may be of interest to examine as to whether mediation by judicial officers or that by the advocates is more successful in India.

3.2. Institutions imparting training at Bangalore

In a study conducted in 26 governmental, semi governmental, non-governmental organizations and various business houses,²²⁷ admittedly only 4 were running training programmes in mediation. They were Karnataka Judicial Academy,

²²⁷ Bangalore Mediation Centre, Karnataka Judicial Academy, Department of Police, Department of Commercial Taxes, Advocates Association, Bangalore Mahanagar Taluka, Karnataka State Legal Service Authority, BMTC, Water Resources Department, Department of Health, Federation of Karnataka Chambers and Commerce & Industry, Karnataka Power Corporation, Premanjali Educational Trust, Makkala Sahaya Vani, Karnataka State Women's Development Corporation, SKIP-Skills for Progress, Sheshadripuram Law College, National Law School of India University, Bangalore Institute of Legal studies. S Ramaiah College, Arunodaya Institute of Legal studies, ICONIUM Consulting Group, Denso Kirloskar, Wipro Technology and L& T

Federation of Karnataka Chambers and Commerce,²²⁸ National Law School of India University²²⁹ and Bangalore Mediation Centre.²³⁰ There are also other law colleges who impart general awareness of ADR as a part of curriculum, but as such they conduct no training programmes. Out of these four samples, two were conducting training programmes that were open for public.²³¹ The other two, *i.e.* Karnataka Judicial academy and Bangalore Mediation centre were conducting in-house training programmes. Among these samples, the Federation of Karnataka Chamber of Commerce has is associated with Indian Council of Arbitration, New Delhi²³² for imparting training. It was pointed out by the persons in charge of the mediation training, that the greatest challenge for conducting any such training programme is the lack of qualified and skilled trainers.

4. Mediation programmes in Mumbai

At Mumbai as of now there is no institutionalized mediation centres apart from *ad hoc* mediation. But since there are no statistical data regarding *ad hoc* mediation an analysis of the effectiveness of this mechanism would not be successful.

4.1. Section 89 CPC and mediation panel in Mumbai

After the re-introduction of section 89 in to the CPC, the Mumbai High court constituted panels of mediators²³³ comprising of former judges and advocates to effectively use section 89 CPC.²³⁴ In *Salem Bar Association v. Union of India*,²³⁵ the apex court also reiterated the need for implementing the provisions of s. 89 CPC.²³⁶ Accordingly the Bombay High Court also created the Rules for collection of fees by these mediators. As per Clause 3 of this Circular the conciliators and mediators may not charge any fee for the first four hours. Thereafter a maximum fee of Rs 500/- could be charged for a sitting of two hours per day.

²²⁸ <http://www.fkcci.org>

²²⁹ <http://www.nls.ac.in>

²³⁰ <http://www.nyayadegula.kar.nic.in>

²³¹ Federation of Karnataka Chambers and Commerce and National Law School of India University.

²³² <http://www.ficci.com/icanet>

²³³ Also arbitrators

²³⁴ Wide Circular Number P 1615/2003

²³⁵ (2005) 6 SCC 344.

²³⁶ So far very few states have complied with requirement of setting up mediation centres under the supervision of their respective high courts.

4.2. Training programmes in mediation and conciliation

After s. 89 was incorporated in the Code of Civil Procedure in the year 2002²³⁷ training programmes were conducted for 260 advocates and Judges on 13th and 14th of March 2004 and 1st and 2nd May 2004. The main purposes of these training programmes were to use the ADR mechanisms under section 89 CPC in an efficacious manner, though the effectiveness of these training programmes has not been tested so far.

5. Conclusion

The Study reveals that, mediation, as a dispute resolution technique in the two metropolitan cities of Delhi and Bangalore is in its infancy. Success is definitely evident at these mediation centres, though not strong enough to bring down the huge backlog of cases pending in different courts. It could prove to be very effective in wiping out arrears if some changes are effected. Defects like, lack of public awareness, absence of quality training programmes, lack of supporting academic research and more importantly lack of efficient leadership should be immediately addressed so that the initial success rate is maintained if not enhanced. It is also necessary that similar initiatives be taken up all across the country including Mumbai. There has to be a co-ordinated effort based upon a forward-looking policy.

Another assumption that could be made on the basis of rating the initial success of mediation centres at Delhi and Bangalore is that the success of mediation greatly depends on institutionalizing it.²³⁸ When the efforts of mediation are made on *ad hoc* basis, there is a danger that its importance gets unnoticed due to the lack of effective supervision and documentation. A mediation institution could be established in the country, with larger objectives and scope so that the alternative methods of mediation are made more effective in resolving disputes of all kinds.

²³⁷ Civil Procedure Code (Amendment) Act, 2002.

²³⁸ In Delhi and Bangalore as compared to Mumbai, dispute resolution through mediation can be said to be a success. This is mainly due to the establishment of institutionalised mediation centres in Delhi and Bangalore.

Chapter 4

Dispute resolution through *ad hoc* and institutional arbitration: An analysis of their effectiveness

1. Introduction

THIS CHAPTER attempts to analyze the effectiveness of arbitration as a dispute resolution mechanism in Delhi, Bangalore and Mumbai with the help of empirical data collected. It also attempts to compare *ad hoc* arbitration with that of *institutional* arbitration to analyze their effectiveness in resolving disputes. Generally *ad hoc* arbitrations take place on the basis of an arbitration clause in the agreement without approaching the court.²³⁹ This type of arbitration is characterized by the element of confidentiality involved in it. The most challenging aspect of this type of arbitration is that the collection of data is very difficult as there are generally speaking no records at all showing the number of arbitrators practising in India and arbitrations held by them. However, for studying the effectiveness of this mode of arbitration, various methods were adopted by the research team, including data collection through informal consultation with the practicing arbitrators.

For the purpose of making a comparative analysis of the effectiveness of *ad hoc* arbitration with that of *institutional* arbitration in resolving disputes between the parties, separate interviews were conducted among thirty experts through open-ended oral questions.²⁴⁰ The different institutions imparting training programmes in arbitration were also identified. Information was also collected to understand the status of public awareness about arbitration. The chapter concludes by stating the possible role that an arbitration institution could play for improving the effectiveness of arbitration as a dispute resolution mechanism.

²³⁹ Generally the parties appoint arbitrators of their choice unless there is a disagreement between the parties as to the existence of an arbitration agreement.

²⁴⁰ See Annexure 8.

2. *Ad hoc* arbitration: an analysis of its effectiveness in Delhi, Bangalore and Mumbai

Ad hoc arbitration in India is a sector where the success mainly depends on the co-operation between the parties. It is characterized by its confidential nature, making it a good option of settling disputes of both commercial and non-commercial nature. These arbitrations are supposed to be flexible in terms of cost and time. But in reality there is a volley of questions to be examined. Are the disputes being settled as per the convenience of the parties? Could the parties settle their dispute as intended by them in terms of time and money? How effective are these arbitrations in the administration of justice and in reducing the backlog of cases in the courts? Here is an attempt to answer these questions.

The research team used the following methods to find answers for these questions. (a) Feed back from arbitration experts coming from different background were taken. In each city the research team talked to minimum twenty-five experts to find out the time, fee and other details of arbitration proceedings. (b) Interviews were conducted by circulating open-ended questionnaires among practitioners of law. Interviews were also done personally, over phone, through email and in whatsoever manner possible. (c) The third method was through organizing conferences and consultation meets. As a part of this study three Roundtable Conferences were held, two at regional levels in Mumbai and Bangalore and a National Round Table Conference in Delhi. (d) Consultation with the Judges was another mode of collection of information used by the research team. A Judges Consultation was organized in Delhi which was attended by 51 District and Sessions Judges from all over India.

2.1. Informal consultation

By and large the respondents were hesitant to react to the questions asked to them. Most of them were very cautious in giving answers particularly when asked about the fee, which they are charging from the parties. In the informal consultation²⁴¹ the respondents who were practicing arbitrators said that the maximum fee, which

²⁴¹ Put together 82 respondents were consulted. The respondents included arbitrators, lawyers and others from the three cities. Most of them were not revealed about the study. Researchers who are either lawyers, or post graduate students or research students of law discussed the issues with the respondents in an informal way.

they are charging, is two lakhs for the entire proceeding, and the proceeding would approximately take six months to one year. At the same time respondents who were from industry said that the average fee taken by arbitrators is highly exorbitant and it ranges from Rs. 1 lac to 3 lacs per sitting.²⁴² They also stated that it also depends on the number of sittings and the place of arbitration. Few of them were very critical of the current status of arbitration in India.

1. A senior legal officer of a multinational corporation in India said that nowadays his company do not opt arbitration or any such mode of dispute resolution in India. According to him ADR lacks efficiency. He also mentioned that almost all the arbitration awards in which his company was involved were challenged in the court of law. He stressed that, for his company time is money, and because of this nowadays his company directly talks to the disputing party and settle the matter without involving any arbitrators. In the month of February 2008, he had settled a matter that involved many cores of rupees in just fifteen days. When specifically asked about institutional arbitrations he opined that arbitration institutions are, practically, another wing of the present court system. These institutions lack cost efficiency and transparency.
2. Another set of respondents attributed the problems in arbitration to some of the retired judges acting as arbitrators. It was pointed out that they have the habit of adjourning the matter even if the situation does not demand that. An example given by one of the respondent is as follows. In a matter in which a retired judge was the arbitrator, conducted the proceedings, but no award was given for six months. After six months the arbitrator required the parties to start the arbitration proceedings afresh since he had forgotten the details of the matter by then. In another case the arbitrator used to adjourn the matter just after a cup of tea and not conducting any proceedings but charged the entire fee.
3. It was also pointed out that, very often the arbitrators lack ethical behavior and look at each dispute as a source of generating maximum income. It was suggested that since there is no code of conduct, the instances of misconduct and bias are many.

²⁴² ICADR, an institution having maximum number of trained arbitrators on its panel charge a maximum fee of rupees one lakh for arbitration proceeding.

4. It was also pointed out that *ad hoc* arbitrators always look for arbitration involving huge money and no one is interested in conducting arbitral proceedings involving comparatively smaller claims.

It was generally pointed out that the present *ad hoc* arbitration system in India lacks efficiency and needs total revamping. It was also suggested that an Institution specialized in ADR may be developed to make changes in the present system.

2.2. Analysis of questionnaire circulated in the three cities

A questionnaire with open-ended questions was circulated among lawyers and arbitrators in the three cities.²⁴³ A total number of five hundred respondents answered the questions. Out of these 500 respondents 25% have arbitration experience. Generally, there was a fear element in the minds of lawyers about ADR. Most of the respondents feared that ADR would minimize the number of case filings in India and would consequentially end up in losing jobs for them. Twenty Five percent of the respondents pointed out the following deficiencies in the arbitration system in India.

1. The Arbitration and Conciliation Act, 1996 is not effective and needs changes. (But none of these respondents could give any concrete suggestions for improving the Arbitration and Conciliation Act, 1996.)
2. These arbitrators also complained that some times the parties do not cooperate with each other and also with the arbitrators. They said that the parties always look forward to adjourn the matter as many times as possible.

2.3. Analysis of roundtable conferences

When compared to questionnaire method which was focused only on lawyers and arbitrators, the roundtable conferences were attended by a mixed group comprising practicing lawyers, arbitrators, judges, academia, litigant and non-litigant public, students *etc.* The suggestions that were made in these conferences are analysed in the light of other supporting data below.

²⁴³ See Annexure 8.

2.3.1. *Ad hoc* arbitration in India is not cost effective

In the roundtable conferences that took place at Bangalore and Mumbai it was generally the opinion that *ad hoc* arbitration in India is not very cost effective. The conferences suggested that the cost of going for normal court litigation is much cheaper when compared to *ad hoc* arbitration. So generally the opinion was that *ad hoc* arbitration in India is not a good option nowadays. Indeed, the representatives of industry expressed the view that if the delay were avoided they would prefer *ad hoc* arbitration to litigation. The tables given below show the fee and other expenses in *ad hoc* arbitration.

Table 18
Fee in *ad hoc* arbitration (not data based) (Exclusive of other expenses)

Approximate minimum fee in <i>ad hoc</i> arbitration	1 lac per sitting
Approximate maximum fee in <i>ad hoc</i> arbitration	3 lac per sitting

Presuming that an *ad hoc* arbitration would have minimum four sittings in a year, for a matter that takes two years, the fee for one arbitrator alone would cost 8 to 24 lacs for a single arbitration.

Similarly the table below shows the fee structure of Institutional arbitration taking ICADR, as an example. The table shows the fee structure for domestic commercial arbitration and conciliation.

Table 19
Administrative fee for domestic commercial arbitration/conciliation²⁴⁴

	Amount in dispute (in Rupees)	Amount of fee (in rupees)
1	Where the total amount involved in the dispute does not exceed 5, 00, 000/-	Rs 5,000/-
2	Where the total amount involved in the dispute exceeds 5, 00, 000 but does not exceed 10,00,000/-	Rs 5,000/- plus 1% of the amount by which the total amount in dispute exceeds 5,00,000/-
3	Where the total amount involved in the dispute exceeds 10,00,000/- but does not exceed 25,00,000/-	Rs 10,000/- plus 0.5% of the amount by which the total amount in dispute exceeds 10,00,000/-

²⁴⁴ Appendix B of Brochure of ICADR at p. 11.

4	Where the total amount involved in the dispute exceeds 25,00,000/- but does not exceed 50,00,000/-	Rs 17,500 plus 0.25 % of the amount by which the total amount in dispute exceeds 25, 00,000/-
5	Where the total amount involved in the dispute exceeds 50,00, 000/-	23, 750/- plus 0.125 % of the amount by which the total amount in dispute exceeds 50,00,000 subject to a maximum of 35, 000/-

Table 20
Arbitrators/ conciliators fee in domestic arbitration and conciliation²⁴⁵

	Amount in dispute (in rupees)	Amount of fee for one arbitrator/conciliator
1	Where the total amount in dispute does not exceed 5,00,000/-	Rs 10,000/-
2	Where the total amount in dispute exceeds 5,00,000 but does not exceed 10,00,000	Rs 10,000/- plus 1% of the amount by which the total amount in dispute exceed 5,00,000/-
3	Where the total amount in dispute exceeds 10,00,000 but does not exceed 25,00,000/-	Rs 15,000/-plus 0.5 percent of the amount by which the total amount in dispute exceeds 10,00,000/-
4	Where the total amount in dispute exceeds 25,00,000/- but does not exceed 50,00,000/-	Rs 22, 500 plus 0.25 % of the amount by which the total amount in dispute exceeds 25,00,000/-
5	Where the total amount in dispute exceeds 50,00,000/-	Rs 28,750 plus 0.125 % of the amount by which the total amount in dispute exceeds 50,00,000 subject to a maximum of 1,00,000 in case of arbitration and 35,000 in case of conciliation

In addition to this, Rs. 2000/- is collected for one day or part thereof for the arbitration hall. There is a non-refundable fee of Rs 5000/- if ICADR is acting only as an appointing authority.

²⁴⁵ Appendix B of Brochure of ICADR at p.12.

From an analysis of the tables above it could be gleaned that the maximum fee that is payable to ICADR is less than the fee in an *ad hoc* arbitration. The following table shows the maximum fee that is payable to ICADR.

Table 21
Maximum Fee Payable to ICADR

	Details	Amount in rupees
1	Maximum fee in arbitration (upper limit)	Rs 1,00,000/-
2	Maximum administrative charges (upper limit)	Rs 35,000/-
3	Charges for arbitration hall	Rs 2,000/- per day
	Presuming that there would be 4 sittings in year for two years	Rs 16, 000/- (8 x 2,000/)
	Total	Rs, 1, 51, 000/-

Analysis 1

The cost of *ad hoc* arbitration is much higher than that of institutional arbitration

2.3.2. Code of conduct and professional ethics for arbitrators

The discussions suggested that at present there is no code of conduct or rules of professional ethics to regulate the conduct of arbitrators. This needs to be resolved. When compared to *ad hoc* arbitrations, some of the arbitral institutions²⁴⁶ have more control over the arbitrators who are in their panel. These institutions may also see that detailed rules of conduct and professional ethics are drafted and strictly enforced.

Analysis 2

ICADR and other similar centres of Institutional arbitration should have separate Rules of Conduct and their effectiveness should be supervised by these institutions

²⁴⁶ See for example ICA has evolved a Code of Conduct for arbitrators on its panel. As per this Code of Conduct an arbitrator has to make a Declaration of acceptance of the responsibility and statement of independence. But ICADR does not have a separate Code of Conduct for arbitrators on its panel.

2.3.3. Arbitration always brings in delays

In both the conferences the opinion expressed was that generally arbitration also brings in delay like litigation in the courts. It was also suggested that the element of delay is also the main problem in Institutional arbitration. In *ad hoc* arbitration it normally takes six months to three years to get an award. The same is the case with institutional arbitration also. The table given below shows the average time taken by *ad hoc* arbitration in resolving disputes prepared by taking 50 arbitration matters randomly.

Table 22
Year wise disposal of *ad hoc* arbitration

Time taken for disposal	Percentage of cases disposed
Less than 1 Year	0
1 Year to 2 Years	15
2 Years to 3 Years	60
3 Years to 4 Years	15
More than 4 Years	10

In *ad hoc* arbitration it was also observed that either of the parties challenges the award and it further causes delay. The table below shows the number of arbitration awards that are challenged in Mumbai for the last four years.

Table 23
Number of arbitration awards challenged

Year	Number of Cases referred under section 89 CPC	Number of Awards passed	Number of Awards Challenged
2008	117	35	12
2007	245	93	31
2006	271	91	17
2005	232	89	18

In the total number of awards 30% to 35% of the awards are challenged on any of the following grounds

1. The award was improperly procured.
2. Misconduct on the part of Arbitrator.
3. Award was made after the proceedings became invalid.
4. Award was otherwise invalid.

This further proves the fact that in an *ad hoc* arbitration, the matter could be delayed for many years.²⁴⁷

Looking at the delay in institutional arbitration, (taking ICADR as an example) the following table illustrates the time taken in arbitration.

Table 24
Time taken by ICADR in arbitration

Total number of ICADR arbitrations analysed	18
Minimum duration	3 months
Maximum duration	5 years 7 months
Average duration	23 months

From the table it could be seen that the delay factor is common to both *ad hoc* and Institutional arbitration.

Analysis 3

The delay factor is common to both *ad hoc* arbitration and institutional arbitration. There has to be a fixed time frame for conducting of both *ad hoc* and institutional arbitration.

3. *Ad hoc* arbitration and Institutional arbitration: A comparative evaluation of their effectiveness

Arbitration is built on the foundations of the principles of party autonomy. The parties enjoy the benefit of freedom in referring their dispute to any jurisdiction, anywhere in the world. The principle of party autonomy generally gives the parties the choice between institutional arbitration and *ad hoc* arbitration. Choosing between these two systems of arbitration is to be taken after a comprehensive comparison between them.

²⁴⁷ During the study it was found that even some of the PSU's are in the habit of dragging the arbitration proceedings, apprehending that they may not get a favourable award by the tribunal. It is a general trend that the weaker party tends to delay the proceedings to escape from an unfavourable award.

This part of the study, which attempts at a comparative analysis of these two types of arbitration, uses the data and information collected from experts in the field at various levels and places. They were consulted through direct interviews, online interaction using emails, chat and online conferences. Attempt is also made to supplement the information so gathered using information from books and articles.

Sampling was the most difficult part of this study. The researchers found difficulty in fixing the criteria for finalizing the samples. First problem was that there is no single register or document where names of the entire arbitrators are registered. The two exceptions are the panel of arbitrators at ICADR and ICA²⁴⁸ where there is an entry of more than 2000 arbitrators. The samples were selected from these lists and also from those who are practicing independently as arbitrators. By randomly selecting arbitrators attached to these institutions and also those arbitrators who are independently practicing arbitration, the research team intended to extract opinions that reflect on both institutional as well as *ad hoc* arbitration. Samples were also selected from corporate and business houses and academia having sufficient exposure to arbitration. The questions²⁴⁹ that were asked in these samples were open ended, and the answers to them by the experts require careful analysis.

3.1. *Ad hoc* arbitration

Usually in an *ad hoc* arbitration the parties to the dispute make their own arrangements for the arbitration proceedings. They themselves do selection of arbitrators, designation of rules, applicable law, procedures and administrative support. *Ad hoc* arbitration is a good method of dispute resolution if the parties approach arbitration with a spirit of cooperation. This may also possibly make the arbitration more flexible, cheaper and faster than its institutional counterpart.

Hope H. Camp Jr., says that an *ad hoc* arbitration “in its purest sense is a complete agreement between the parties with respect to all aspects of the arbitration, including the law which will be applied, the rules under which the arbitration will be

²⁴⁸ The Indian Council of Arbitration is the first arbitration institution in India established in 1965. ICA in the year 2007 alone received 61 new arbitration matters, out of which 58 were under commercial rules of arbitration and 3 were under maritime arbitration rules. Among this 61 matters 10 were international arbitrations. In the year 2007, ICA settled 63 matters through arbitration. At the end of the year 2007 ICA has 531 matters pending before it.

²⁴⁹ Refer to Annexure 8

carried out, the method for the selection of the arbitrator, the place where the arbitration will be held, the language, and finally, and most importantly, the scope and issues to be resolved by means of arbitration.”²⁵⁰ Another scholar putting it in common language dubbed *ad hoc* arbitration as “you pick one, I’ll pick one; those two will pick a third, and whatever the three decide is binding upon us.”²⁵¹ In other words in *ad hoc* arbitration the parties are “on their own” for all the aspects of the case, they must solve the problem of appointing the arbitrators, addressing issues like “objections, compensation, hearing arrangements and award procurement.”²⁵²

3.1.1. General overview of *ad hoc* arbitration on the basis of the empirical study

Summarizing the general views on *ad hoc* arbitration by various experts its greatest drawback is that it usually does not have a set of pre-established rules that are applicable. The parties’ can either create and adopt their own set of rules or may also adopt some pre-existing set of rules elaborated by an arbitral institution or by an international organization, such as UNCITRAL. This flexibility is definitely a positive aspect of *ad hoc* arbitration, but can bring along with it certain potential complications as well.

Another problem that came up during the course of research was that it is at present ‘over legalized’ by adhering to procedural technicalities. Some of them stated that even though it is over lawyered the quality of these arbitrators has drastically come down. These arbitrators do not have sufficient qualification, training and know-how in arbitration. There was also a view that very few people with non-law background turned out to be arbitrators, particularly with engineering qualification. The fact that majority of the arbitrators in India with law background brings along with them over emphasis on the procedural law which slow down the entire dispute resolution process. It was also pointed out that some of arbitrators do not have sufficient knowledge and expertise in arbitration.

²⁵⁰ Hope H. Camp Jr. “Binding Arbitration: A Preferred Alternative for Resolving Commercial Disputes Between Mexican and U.S.” *Businessmen Saint Mary’s Law Journal* 1991.

²⁵¹Garry Arkin, “New Opportunities for Arbitration in East/West Trade Transnational Lawyer” *Practitioner’s Perspective* 1990.

²⁵² William K. Slate, “International Arbitration: Do Institutions Make a Difference, Business Law Symposium Commercial Arbitration: A discussion of recent developments and trends” *Wake Forest Law Review* 1996.

The empirical study also reveals that one of the greatest drawbacks of the *ad hoc* arbitration in India is the fact that, retired judges who come as arbitrators bring with them their tendency of emphasizing on complying with the procedural formalities and strict adherence to law of evidence. Some of the experts, on the specific condition of keeping their identity anonymous, opined that the habit of adjourning the cases for maximum number of times is usually done by the retired judges acting as arbitrators when compared to other arbitrators.

3.2. Institutional arbitration

Institutional arbitration is one in which a specialized institution administers the arbitral process as provided by the rules of that institution. Once the matter is taken up by these institutions the dispute will be arbitrated by trained and qualified arbitrators who are in the panel of that institution. The institution shall supervise and administer the whole process for which they would collect a stipulated fee. The famous arbitral institutions in the world are the London Court of International Arbitration, The International Court of Arbitration *etc.* The advantages of institutional arbitration are (a) availability of pre-established rules and procedures, (b) administrative assistance from institutions (c) Panel of well-trained arbitrators (d) physical facilities and support services *etc.*

3.2.1. General overview of institutional arbitration on the basis of empirical study

Interestingly most of the arbitrators who are not in the panels of any arbitration institution criticized institutional arbitration. It was argued that the administrative and supervisory roles of arbitral institutions would violate the principle of party autonomy. This would result in bureaucratic delay and finally the demarcating line between the ordinary courts and these institutions would be blurred.

It was pointed out by a few that compared to *ad hoc* arbitration; institutional arbitration ensures more transparency and accountability in the arbitral process. In an institutional arbitration, the arbitrators are appointed from its panel of arbitrators, the

institution can keep a constant watch of the entire proceedings.²⁵³ They were of the opinion that institutional arbitration would be a better option if the institution rules were made more transparent.

3.3. Comparison between *ad hoc* and Institutional Arbitration on the basis of the empirical study

This part of the study was conducted with an aim analyzing as to what do the various stakeholders of ADR in India feel about institutional and *ad hoc* arbitration.²⁵⁴ For this purpose data was collected from the following categories of people through various modes, like direct interview by the researchers, online communications and interactions like chat, email and conferences, telephonic interviews *etc.* Samples are selected from the following classes of people.

1. Ten individuals representing industry and business houses, who included company secretaries, legal officers and legal advisors of corporate houses.²⁵⁵ Their suggestions and opinions were collected because they are the people, who consider 'time as money'. It is the disputes between these people that are usually subject to arbitration. Care was also taken to see that representatives from big, medium and small business houses were interviewed.
2. Ten others consisted of persons practising as arbitrators either independently or under the panel of an arbitral institution.²⁵⁶ This set of samples included retired judges, lawyers, arbitrators *etc.* The experience of these people varies from few months to many years. When compared to the other two categories of samples this category is expected to have diverse opinions.
3. Ten individuals from the academia²⁵⁷ having done research and teaching in ADR systems. They were teaching the graduate and postgraduate students of law in various universities and law colleges.

²⁵³ Arbitral institutions in India like, ICADR, ICA *etc* provide the clients with the infrastructure facilities like, venue, technical support and administrative assistance.

²⁵⁴ "The difference between an ad hoc arbitration and an institutional arbitration is like the difference between a tailor-made suit and one that is bought 'off the peg'" a observed by the authors, Alan Redfern and Martin Hunter in *Law and Practice of International Commercial Arbitration* Sweet & Maxwell (2003) at 47.

²⁵⁵ Hereinafter referred to as Class A

²⁵⁶ Hereinafter referred to as Class B

²⁵⁷ Hereinafter referred to as Class C

The main purpose of these distributed samples, *i.e.* the samples from different areas of specialisation, is that their answers, put together should reflect the expertise in those areas. On the basis of the answers to questionnaires, the following analysis has been done.

3.3.1 Cost efficiency

An important question that came up during the course of interview was the mode of calculating the cost. Can the cost be calculated simply on the basis of money actually spent on arbitration proceedings as fees and other expenditure or does it include the benefits, monetary as well as others including time, maintenance of relationship *etc.*, that could not have been saved if the dispute were directed to be settled in a court litigation. It was opined that several factors influence the determination of costs. It was observed that the key for cost efficiency lies not just in the amount that is paid as fee, but also in the proper management of the proceedings and the assistance of competent, experienced counsels and arbitrators. Generally the opinion among the experts is that cost efficiency of arbitration has to be calculated after taking into consideration all the relevant factors and not just the actual money that is spent. But some of the experts in Class B took a contrary view (or might be they were biased) when it came for finding out the cost efficiency in *ad hoc* arbitration and institutional arbitration.

Ad hoc arbitration presupposes cooperation among the parties for its success. But if a difference of opinion arises among the parties, this presupposition of cooperation would collapse and this could increase the costs by stretching it to courts on various reasons. The important point here is that if there is cooperation among the parties from the drafting of arbitration agreement/clause to the enforcement of award, an *ad hoc* arbitration could be made cost efficient. At the same time no legal system can presume absolute cooperation among parties to dispute. After all it is the lack of cooperation that leads to the dispute. Parties also tend to overlook the fact that within the expenses of arbitration, administrative costs of an institution are always considerably less than the fee of counsels and those of the arbitrators, which represent the utmost part of the costs and which must be paid anyway. Therefore, an *ad hoc* arbitration, constructed and conducted by the parties themselves, instead of saving cost may involve expenses more than what the parties envisaged. At the same time,

even though an institutionally administered arbitration seems to be more expensive in the first instance, but looking at from a perspective of cost efficiency as mentioned above it may not be so. The following table shows the picture about the opinions that were raised by the experts in the interview.

Table 25
Costs in arbitration

Opinions	Class A	Class B	Class C
<i>Ad hoc</i> arbitration is cost efficient	20% (2/10)	60% (6/10)	0%
Institutional arbitration is cost efficient	60% (6/10)	20% (2/10)	10% (1/10)
Cost efficiency depends on many variables and a general opinion cannot be drawn	20% (2/10)	20% (2/10)	90% (9/10)

As to which type of arbitration is more cost efficient, majority of the experts in Class A opined that if all things were in proper order, an institutional arbitration would be the better option. But majority of the experts from Class B were of the view that *ad hoc* arbitration would be the better choice because of its flexible nature. The experts in Class C took a balanced view that the cost efficiency depends on many variables, like, the actual time taken, in minimizing the chances of challenging arbitral award in the courts *etc.* The arbitrators should take positive steps in building a cordial relationship among the parties. It was suggested that the following changes could improve dispute resolution through arbitration.

- a. The arbitrators may be trained in not only dealing with the technical questions in arbitration but also in maintaining a cordial relationship among the parties.
- b. The arbitral institutions may not only focus on large disputes involving many crores of rupees but also concentrate on resolving small disputes. Nowadays the numbers of smaller disputes that go for institutional arbitration are very few.
- c. The arbitral institutions need to be more professional and transparent. For example, as pointed out by an expert, rules of most of the arbitral institutions are drafted either in one or two languages. This may create a problem for the parties from foreign countries speaking other languages. India should also take an active step in establishing an arbitral institution with its rules well drafted in different languages on the lines of rules of international arbitral institutions

- d. It was also suggested that these institutions could benefit from the modern techniques of communication like video conferencing and online transmission of documents signed digitally.

3.3.2. Supervision and administrative nature

Arbitration institutions may have supervisory and administrative control as per the rules laid down by it. Some of them supervise the appointment of the arbitrators²⁵⁸ whereas some exercise control extending usually to the entire proceeding, ensuring a smooth running of arbitration. Some institutions also exercise supervision of the awards rendered in arbitration conducted by them.²⁵⁹ But at the same time all these supervisory activities are criticized as creating rigidity in the proceedings and over regulating arbitration. Some of the experts pointed out that administrative control from an experienced institution may be reflected on the quality of the proceeding also. The table below gives an analysis of the answers and suggestions.

Table 26
Supervision and administrative nature in arbitration

Opinions	Class A	Class B	Class C
Institutional arbitration holds more supervisory and administrative powers when compared to ad hoc arbitration	80%(8/10)	80%(8/10)	90%(9/10)
Supervisory and administrative powers are good for arbitration if it improves quality and speed	80%(08/10)	80% (8/10)	90%(09/10)
But in practice Supervisory and administrative powers are creating more rigidity and are against the principles of party autonomy.	-----	60%(06/10)	-----
Do not have opinion/Silent	20% (02/10)	20% (02/10)	10% (01/10)

Almost all the classes of people are unanimous on the point that institutional arbitration holds more supervisory and administrative powers. They are almost equal opinion on the point that these supervisory and administrative powers are good if they bring efficiency in resolving disputes. But majority of Class B said that in practice these supervisory role of institutions create more rigidity in the dispute resolution

²⁵⁸ Therefore the parties will have the confidence that the selected arbitrators are indeed neutral, independent and professionally suitable for deciding the factual situation of that particular case.

²⁵⁹ A well-known example is the ICC, which provides for a preliminary approval by the Secretariat of the Court for every award before it is rendered.

process. Some of them also said that the administrative roles of the courts are against the principles of party autonomy.

3.3.3. Flexibility

It is the greatest merit of *ad hoc* arbitration that the proceedings are more flexible. The parties can shape their dispute resolution process in any mode as they wish. Some of the experts emphatically stated that this flexibility alone would not bring efficiency in arbitration. These experts favored waving some of the freedoms of party autonomy, for attaining more positive result in the arbitration. In arbitration they said flexibility and efficiency could go together only if there is cooperation among the parties. But this cooperation is lost when the disputes become complex and long pending.

Table 27
Flexibility in arbitration process

Opinions	Class A	Class B	Class C
<i>Ad hoc</i> arbitration is more flexible when compared to Institutional arbitration	100% (10/10)	100% (10/10)	100% (10/10)
The right to be flexible can be waived in lieu of efficiency in dispute resolution.	100% (10/10)	90% (09/10)	100% (10/10)

The experts while answering the questions generally admitted that *ad hoc* arbitration is more flexible when compared to institutional arbitration. One of the respondents in Class B said that the flexibility could not be waived for any reasons because it is one of the foundation on which the whole philosophy of arbitration is based. Here there is an apparent contradiction in the opinions of the experts in class B in answering the second question. They say that since speedy justice is an important purpose of arbitration the parties can waive their right to be flexible. The opinion of one of the experts in Class B who answered the second question²⁶⁰ is also noteworthy. He says that the principle of party autonomy is the foundational principle of ADR, which makes it different from litigation. He says that this principle should be kept supreme; otherwise in the long term these institutions would become replica of the present court system.

²⁶⁰ Garry Arkin, "New Opportunities for arbitration in East/West Trade Transnational Lawyer" Practitioners Perspective 1990.

3.3.4. Time²⁶¹

Here the pertinent question is whether delay is an “inevitable evil” as in the case of present court system. If there is delay is it not against the basic objectives of ADR? Answering this question the experts were of the unanimous opinion that delay is not an inevitable evil and has to be avoided otherwise the basic purposes of ADR itself is violated. It was pointed out that delay is the greatest problem in institutional arbitration. They had given the following reasons for the delay in arbitration proceedings

- 1) The parties are using the delaying tactics on various grounds.
- 2) Frequency of adjournments, granted by the arbitrator.

Another opinion that came up in the interview was that in *ad hoc* arbitration, time is flexible. If the parties cooperate and if arbitrator does not go for unwanted adjournments, the experts said that an *ad hoc* arbitration could be finished off in a short duration than that of institutional arbitration. In institutional arbitration delay is considered to be one of the greatest disadvantage. The experts suggest that the procedural formalities required by the institution may delay arbitration proceedings.

4. Arbitration Training: An empirical analysis of its effectiveness in Delhi, Bangalore and Mumbai

The number of institutions imparting practical training in arbitration techniques are very few in all the cities. This is irrespective of the fact that the law colleges in these cities impart theoretical knowledge in arbitration as part of the curriculum in the LL.B course. However, it is opinioned that the quality teaching of arbitration is not good. Other than the law colleges there are four institutions in Delhi,²⁶² two in Bangalore²⁶³ and none in Mumbai that imparts full training in arbitration.

²⁶¹ Here the data from the city consultations at Bombay, Bangalore and Judges Consultation Meet are also used. Because of this reason tabular analysis is not done.

²⁶² The ICADR, ICA, ILI and Delhi Judicial Academy.

²⁶³ Bangalore Judicial Academy and Regional Centre of ICADR in Bangalore

It was also suggested that arbitration should be compulsory part of LL.B. curriculum. It may serve the professionals to be well trained in arbitration skills. It was also suggested that there should be compulsory apprenticeship on dispute resolution.

5. Public awareness about arbitration: The current status

It is surprising to note that the status of public awareness about arbitration is in a very bad state as there are many who have not even heard about the term once. Still a few of them could explain as to what actually it is all about. But it was also expressed by them that they have never resorted to arbitration techniques in settling their disputes, if any, with others.

At the Regional Roundtable Conferences one of the most noticeable opinions expressed at this question was regarding imparting of knowledge of dispute resolution from the school level onwards. The formal education could be made a venue for imparting the culture of dispute resolution. The benefit of such a culture of peaceful dispute resolution is in fact two fold. The culture of dispute resolution would create an environment conducive to settle their disputes. Secondly this would also help them to arbitrate disputes of others in a better way.

6. Conclusion

Ad hoc arbitration in India has failed to achieve its objectives as it is haunted by the problems of conventional litigation, like delay, over emphasis of procedural law and frequent adjournments. It is also affected by huge fee charged by arbitrators, lack of their accountability and commitment, absence of rules of conduct and standards of professional ethics. These factors have invited the attention of stakeholders in building up a strong institutional arbitration promoting their interests. As has been proved in the present study, in the absence of a well-organized institutional set up, the practice of arbitration would not bring about the desired results. As examined in other chapters,²⁶⁴ other modes of ADR *viz.* mediation and Lok Adalats *etc.* have been to a great extent successful in resolving disputes because of

²⁶⁴ Refer to chapters 3 and 5.

their institutional set up. In the light of the fact that there is a scope for enhancing the ambit of disputes that can be the subject of arbitration,²⁶⁵ setting up of a strong institutional mechanism would definitely help transforming India in to an international centre of arbitration.

7. Suggestions

In the course of interview some of the arbitrators opined that India could benefit in dispute resolution in this era of globalisation and information technology. They said that India has many factors that could be positively used for transforming the global dispute resolution mechanisms in its favor. Some of these factors are

- i. There are many qualified lawyers and other professional who could be trained as arbitrators. As most of them could speak English, communication would also not be a problem.
- ii. The cost of dispute resolution would be the lowest in India. To maintain this edge of low cost, India should aim at resolving maximum number of disputes in an effective way at a minimum cost (including administrative charges and arbitrators fee).
- iii. India may bring up professional arbitration institutions that fulfill the needs of all the sectors of trade. There should be institutions and trained arbitrators who can cater to the needs of different trades like Softwares, IPR, Shipping, construction, biotechnology *etc.*
- iv. There may be more transparency and professionalism among the institutions doing arbitration.
- v. There may be an amendment to the existing law with the effect of managing *ad hoc* arbitration effectively.
- vi. The Government may take steps in establishing and maintaining a national registry of qualified arbitrators.
- vii. India may equally focus on domestic dispute resolution through institutional and *ad hoc* mechanisms as well as disputes between big corporations. But to take advantage, positive steps has to be taken in making the rules clearer, transparent and result oriented.

²⁶⁵ *Supra* Chapter 2.

Chapter 5

Dispute Resolution through other forms of ADR: An empirical analysis

1. Introduction

MEDIATION AND ARBITRATION as methods of dispute resolution have been already analysed in the light of empirical data in this Report.²⁶⁶ There are various other forms of ADR, like *Lok Adalats*, Conciliation, Negotiation, Tribunals and Special courts such as Consumer forums at different levels. The list also includes fast track courts and plea-bargaining among so many other known types of ADR. This part focuses on *Lok Adalats* or ‘people’s court’, which are in practice all over the country and are an inseparable part of the administration of justice in India²⁶⁷ based on the data collected from Delhi, Mumbai and Bangalore.

2. Lok Adalats

The constitutional mandate of ‘access to justice’ as provided in Article 39A²⁶⁸ has been fulfilled to a great extent with the coming into effect of the Legal Services Authorities Act, 1987²⁶⁹ which provides for the establishment of *Lok Adalats*,²⁷⁰ It is a

²⁶⁶ *Supra* Chapters 3 and 4, respectively.

²⁶⁷ Since the collections of data in all these fields are difficult, analysis is done only on Lok Adalats this chapter. The reasons that made the collection of data difficult are

1. The time constraint of this study
2. The non availability of data/non recording of data in a proper manner
3. Non-cooperation of the staff of various Courts/authorities/tribunals.

²⁶⁸ Article 39A of The Constitution of India says, “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 for securing justice are not denied to any citizen by reason of economic or other disabilities.”

²⁶⁹ The legal Services Authorities Act, 1987 underwent amendment in 1994 and 2002. The Legal Services Authorities (Amendment) Act, 2002 deals with the provisions to establish Permanent *Lok Adalats* at such places and for exercising such jurisdiction in respect of one or more utility services: the award of Permanent *Lok Adalats* would be final and binding on all the parties concerned. Section 80 of the CPC provides for giving 60 days mandatory notice in case of suits by or against the Governments with a view to see that the disputes between the government and the citizens are amicably settled. As per the recommendations of the Malimath Committee, Section 89 was inserted in to the Code of Civil Procedure by section 7 of the Code of Civil Procedure (Amendment) Act. This was challenged in the Supreme Court in Salem Advocates Bar Association v. Union of India (2003). This case opened up, clarified and legitimised a new era in civil law adjudication by providing access to justice through ADR mechanism. The Supreme Court upheld the amendment.

²⁷⁰

flexible institution developed for social justice, founding its basis on the principles of participatory justice. This as a system parallel to the ordinary courts of the land, works at all levels *i.e.* at district courts and courts subordinate to it, high courts and the Supreme Court. The positive aspect of this mechanism could be seen in the recent *Lok Adalat* conducted by the Supreme Court of India, where the sitting judges including the Chief Justice of India, came down from the bench to interact with the parties directly. Twenty-five cases arising out of appeals relating to motor accident claims, matrimonial and labour disputes were settled in this *Lok Adalat*, where importantly media were allowed to enter into open courts for the first time.²⁷¹ To evaluate the success of this system as a mode of administration of justice, the facts and figures need to be analysed.

The following table shows the total number of Lok Adalats held through out India during the period 2004 - 2007.

Table 28
Number of *Lok Adalat* held through out India from 2004-2007²⁷²

Years	2004	2005	2006	2007
Total Lok Adalats held	442857	498154	555226	622461

Analysis 1

In the figure given above a constant and steady increase in each year in the number of *Lok Adalats* held could be seen. This establishes the fact that dispute resolution through *Lok Adalats* is picking up, generally, in India.

Based on this analysis the following questions may come up. (a) Whether this increase in the number of *Lok Adalats* is reflected in the total number of disputes that are settled through these *Lok Adalats*? (b) Among the traditional courts and Lok

²⁷¹ See <http://www.hindu.com/2008/05/04/stories/2008050452400100.htm>. Last visited on 10/05/2008

²⁷² Consolidated by the Delhi Research Team on the basis of data received from National Legal Services Authority.

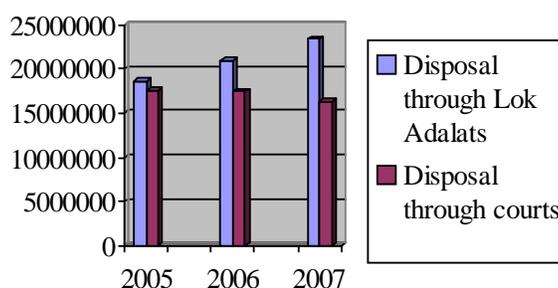
Adalats, which one disposes more number of cases? The following statistical information from the period 2004 – 2007 gives the details.

Table 29
Number of cases settled through *Lok Adalat* through out India from 2004 to 2007²⁷³

A				
Years	2004	2005	2006	2007
Cases settled in <i>Lok Adalats</i>	1,74,13,717	1,86,95,934	2,10,30,623	2,34,12,194
Total Cases settled in India		1,76,48,152	1,74,51,381	1,63,65,096
B				
Civil cases settled in high courts		9,34,987	9,70,304	9,60,793
Criminal cases settled in high courts		4,03,258	4,70,050	4,90,403
Total in high courts		13,38,245	14,40,354	14,51,196
Civil cases settled in subordinate courts		38,66,926	40,20,941	37,59,378
Criminal cases settled in subordinate courts		1,24,42,981	1,19,90,086	1,11,54,522
Total in subordinate courts		1,63,09,907	1,60,11,027	1,49,13,900

The above table is also represented as a graph for an easy understanding of the pattern of change.

Graph 19
Graphical representation of a comparative analysis of number of cases settled through *Lok Adalats* and courts in India from 2004 to 2007



From the above table and graph, following observations can be made:

- (a) There is a steady increase in the number of cases settled through *Lok Adalats* from 2005 to 2007.

²⁷³ *Ibid*

- (b) The number of cases settled through ordinary courts in India is lesser than the number of cases settled through *Lok Adalats*.
- (c) A recession is seen in the number of cases settled through ordinary courts in India.

Analysis 2

In general, the system of dispute resolution through *Lok Adalats* is contributing positively to the justice administration in the country. Based upon this data it could be said that *Lok Adalat* as a system of dispute resolution is a success in India and is helpful in reducing the backlog of cases that are pending before various forums.

Since this study is regarding the effectiveness of ADR in the three cities, namely Mumbai, Delhi and Bangalore, a thorough analysis of the statistical information from these three cities is required. The questions that are attempted to be answered in the further discussion are mainly two.

Question No 1

Whether Analysis 1 and 2, which are general statements about the success of *Lok Adalats* in India, is applicable to these cities as well?

Question No.2

Is there any difference in the attitude and support towards *Lok Adalats* as a dispute resolution mechanism among the authorities (State Legal Service Authority and others) in these three different cities?

2.1. Overview of *Lok Adalats* held in the three selected states of Delhi, Maharashtra and Karnataka

State Legal Services Authorities are established under the Legal Services Authorities Act, 1987 for providing legal aid and for spreading legal awareness. The State Legal Services Authority holds *Lok Adalat* in the court premises and has permanent *Lok Adalats* in various Public Utility Services. The following table shows the number of *Lok Adalats* held during the period 2004 - 2007 in these three places.

Table 30
Number of *Lok Adalats* held from 2004 to 2007²⁷⁴

Years	2004	2005	2006	2007
Karnataka	9358	12883	16946	20482
Maharashtra	10906	13535	16489	19249
Delhi	2601	3204	3898	5473

Graph 20
Number of *Lok Adalats* held from 2004 to 2007

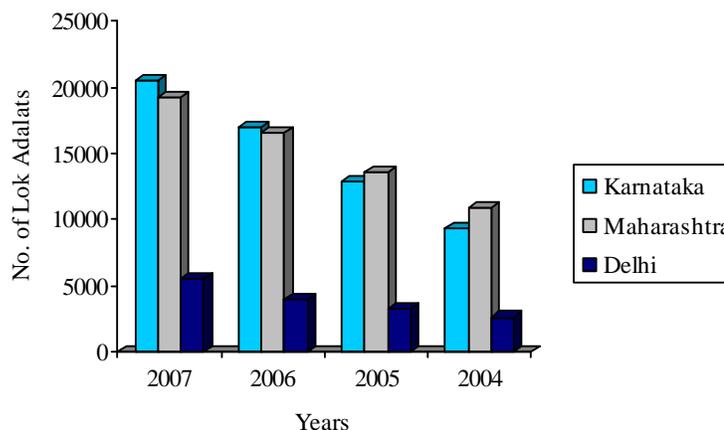


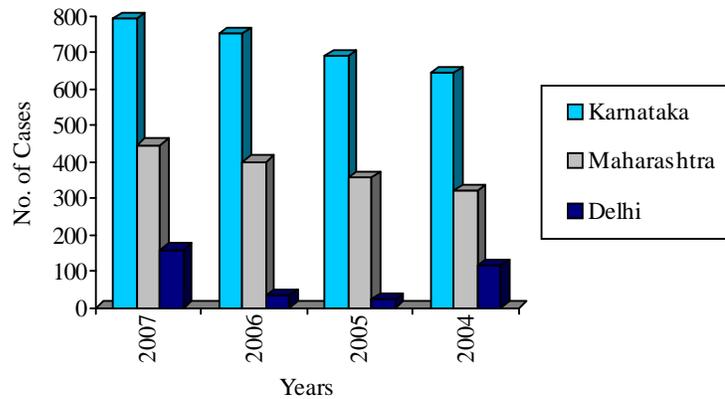
Table 31
Number of disputes settled through *Lok Adalats* from 2004 to 2007²⁷⁵

	2004	2005	2006	2007
Karnataka	644572	689891	752966	794046
Maharashtra	319819	356112	400346	446272
Delhi	113025	22909	31910	157972

²⁷⁴ *Ibid*

²⁷⁵ *Ibid.*

Graph 21
Number of disputes settled through Lok Adalats from 2004 to 2007



The above given data give a general impression that the authorities in Karnataka and Maharashtra held more numbers of *Lok Adalats* when compared to Delhi. In the first two years Maharashtra held more number of *Lok Adalats*, but later, in the years 2006 and 2007, Karnataka had more numbers. But the important thing here is that throughout these years Karnataka settled the maximum number of cases followed by Maharashtra. Even though in Delhi the number of *Lok Adalats* increased to 1,57,972 in the year 2007, the number of cases that were settled in these years illustrates a pattern that is not uniform. The number of disputes settled saw a recession during the years 2005 and 2006.

2.2. Case study and analysis of Lok Adalats in Mumbai

The Maharashtra State Legal Service Authority has taken great lead in settlement of disputes by organizing *Lok Adalats* at State, District and Taluka levels and also by providing legal aid to the weaker and poorer sections of the society.

Table 32
Nature and number of cases settled in Lok Adalat in Mumbai²⁷⁶

Year	Nature and Number of Cases settled in Lok Adalat in Mumbai						
	MACT	Civil	Criminal	Pre-Litigation	Industrial	Labour	Total
2000 to 2001	203	310	738	1	64	21	1337
2001 to 2002	142	132	618	9	73	68	1042
2002 to 2003	126	158	418	3	23	23	730
2003 to 2004	51	120	563	--	--	--	734
2004 up to Feb, 2005	34	106	785	--	--	--	925

²⁷⁶ *Ibid.*

The table above shows the number of *Lok Adalats* held by the Maharashtra State Legal Services Authority during 2000 to 2005. This data is disaggregated in to different headings. Due to time constraints, the Mumbai Research Team reported that they could not collect disaggregated data after 2005. But the table below shows the details of total number of *Lok Adalats* held up to the year 2008.

Table 33

Total number of *Lok Adalats* held and total number of settled disputes in Mumbai²⁷⁷

Year	Total Lok Adalats	Settled cases	No. of Beneficiaries
2005-2006	2668	42134	107311
2006-2007	2918	43310	96515
2007-2008	2450	45110	90940

These two tables show that even though the number of *Lok Adalats* in Mumbai came down during 2002 to 2005, from the year 2005-06 onwards it was again strengthened.

In Mumbai, *Lok Adalats* are also organised by agencies other than the Maharashtra State Legal Services Authority. For example the table below shows the number of Lok Adalats held by the Motor Accident Claims Tribunals during 2005-2007.

Table 34

Motor Accident Claims Lok Adalats in Mumbai²⁷⁸

Date	Number of Cases referred	Number of Cases Disposed
22.01.05 -17.12.05	3999	865
14.01.06-01.12.06	1974	399
10.02.07-27.10.07	1667	390

Analysis of data from Mumbai

From the analysis of these tables, it is evident that the settlement through *Lok Adalats* has seen a recession particularly during the year 2002 to 2005. This recession is again seen from 2007-2008 onwards where the total number of

²⁷⁷ Consolidated by the Mumbai Research Team on the basis of data from Maharashtra State Legal Services Authority

²⁷⁸ Consolidated by the Mumbai Research Team on the basis of data from Motor Accident Claims Tribunal, 9, Hazarimal Somani Marg, Mumbai.

Lok Adalats held decreased from 2918 to 2450. This is in spite of the fact that the number of cases settled, has increased from 42134 during 2005-2006 to 45110 during 2007-2008. There is an increase of 2976 settled cases during this period. Except this development, which could be stated as negligible, taking into account the total number of pending cases in Mumbai, the data reveals that there is a recession.

Answer to Question 1: From the data given above the only conclusion that could be derived is that, Lok Adalat as a system of dispute resolution has been effective in Mumbai.

2.3. Case study and analysis of *Lok Adalats* in Delhi

Similar to Mumbai, the Delhi Legal Service Authority initiated many *Lok Adalats* in Delhi, the details of which are analyzed in the following paragraphs.

2.3.1. Permanent *Lok Adalats*

Delhi Legal Services Authority has taken a lead and has set-up permanent and continuous *Lok Adalat* in government departments and other public utility services in Delhi.²⁷⁹ The Authority has also set up 9 other permanent *Lok Adalats* in B.S.E.S, NDPL, MTNL, Municipal Corporation of Delhi, Delhi Development Authority and New Delhi Municipal Council. The Authority gives advertisements in leading daily newspapers regularly with regard to the holding of *Lok Adalat* requesting the general public for filing their pending cases as well as pre-litigative matters for settlement in these permanent and continuous *Lok Adalats*.

2.3.2. *Lok Adalat* for Family/Matrimonial Disputes

Delhi Legal Services Authority organizes special *Lok Adalat* to deal with matrimonial and family disputes. It has been the priority of this Authority, to settle the disputes between the parties particularly in matrimonial and family matters at pre-

²⁷⁹ *Supra* n. 177 and 178.

litigative stage itself. Considering the huge backlog of the cases in the courts, the endeavor of the Authority is to minimize the litigation so as to lessen the burden of the courts and also to save the time and money of the parties involved.

Table 35
Number of Lok Adalats in matrimonial Disputes²⁸⁰

Years	April 2007-Dec 2007		Jan 2008- March 2008	
Matrimonial Cases	Cases taken up	Cases disposed	Cases taken up	Cases disposed
	21	17	04	04

2.3.3. Lok Adalats for Motor Accident Claims matters

The MACT *Lok Adalats* are organized in all court complexes from time to time and cases of all the insurance companies are taken up in these *Lok Adalats*. A large number of accident claims are settled through *Lok Adalats*.

Table 36
Lok Adalats for Motor Accident Claims matters²⁸¹

Years	April 2007-Dec 2007		Jan 2008- March 2008	
MACT Cases	Cases taken up	Cases disposed	Cases taken up	Cases disposed
	381	141	208	120

2.3.4. Lok Adalats for cases under s.138 of Negotiable Instruments Act, 1881 and other compoundable offences

Lok Adalats are organized to dispose of cases under s.138 of Negotiable Instrument Act, 1881 and other compoundable criminal cases.

Table 37
Lok Adalats for cases under s.138 of Negotiable Instruments Act, 1881 and other compoundable offences²⁸²

Years	April 2007-Dec 2007		Jan 2008- March 2008	
Criminal cases which are compoundable & under Section 138 N.I. Act.	Cases taken up	Cases disposed	Cases taken up	Cases disposed
	68,016	33,125	22944	12, 105

²⁸⁰ Consolidated by the Delhi Research Team on the basis of data collected from Delhi Legal services Authority.

²⁸¹ *Ibid*

²⁸² *Ibid.*

2.3.5. Daily Lok Adalats by Delhi Legal Services Authority

Delhi Legal Services Authority has commenced daily *Lok Adalats* for the settlement of cases under s. 138 of Negotiable Instrument Act, 1881 compoundable offences under Cr.P.C, MACT cases and matrimonial disputes. Presently the statistics are not available for this type of *Lok Adalats*.

2.3.6. Sunday Lok Adalats

Sunday *Lok Adalats* is a new initiative by the Delhi Legal Service Authority for the disposal of cases under s. 138 of Negotiable Instruments Act, 1881 and other compoundable offences.

2.3.7. Mega Traffic Lok Adalats

Mega Traffic *Lok Adalats* were started as per directions of Arrears Committee of Supreme Court of India. Since its inception three Mega Traffic *Lok Adalats* are held so far. The main purpose was to reduce the huge pendency of Traffic Challan Cases as well as to create awareness among public about the Traffic Rules. In this new form of Adalats the settlement rate is almost 100%.

Table 38
Cases disposed of in Mega Traffic Lok Adalat²⁸³

Year	2007	
	Cases taken up	Cases disposed
Mega Traffic Lok Adalat	80,080	80,053

2.3.8. Special Adalats on Plea Bargaining

After the insertion of plea-bargaining in the Cr.P.C, Delhi Legal Services Authority held special *Adalats* on plea-bargaining in the year 2007. The following table gives the details.

Table 39
Plea Bargaining²⁸⁴

	No. of cases taken up	No. of cases disposed
Special Adalats on Plea Bargaining	722	544

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

2.3.9. Lok Adalat for the settlement of cognizable and compoundable cases at pre-litigation stage

In the year 2007 the Delhi Legal Services Authority also commenced *Lok Adalats* for the settlement of cognizable and compoundable offences at pre-litigation stage itself. As indicated in the table below out of 457 cases, 170 cases are settled.

Table 40
Cognizable Offences²⁸⁵

	No. of cases taken up	No. of cases settled
Settlement of compoundable cognizable offences at pre-litigation stage	457	170

2.3.10. Lok Adalat for bank recovery cases at pre-litigation stage

The Delhi Legal Services Authority also organizes *Lok Adalat* for the settlement of cases relating to banking disputes on every Sunday at pre litigation stage. It provides an opportunity to the borrower to settle his/her liability with the bank by negotiation, and thereby save time, energy and money. The potential litigation is settled at its inception. The rate of disposal in bank recovery cases is around 67%, which is much higher than the courts.

Table 41
Bank recovery Cases²⁸⁶

Years	April 2007-Dec 2007		Jan 2008- March 2008	
Bank Recovery Cases	Cases taken up	Cases disposed	Cases taken up	Cases disposed
	3038	2017	1765	1349

Table 42
Number of cases resolved through Lok Adalat in Delhi from 2004-2007²⁸⁷

	2004	2005	2006	2007
Cases resolved by Lok Adalat in Delhi	113025	22909	31910	157972

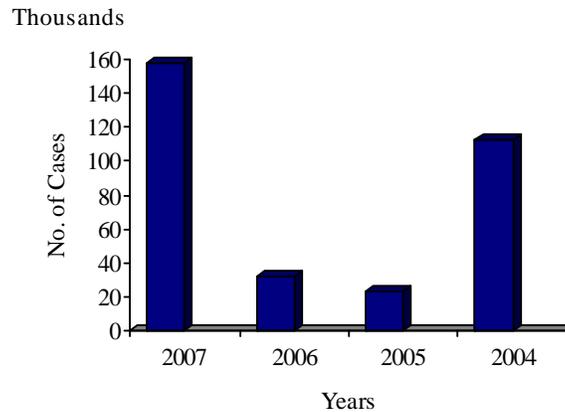
²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid*

Graph 22

Number of cases resolved through *Lok Adalat* in Delhi from 2004-2007



Analysis of Data from Delhi

Even though there was a recession in the number of disputes that are resolved through *Lok Adalats* from 2004 to 2006, the year 2007 has seen a remarkable increase in terms of number of cases settled. The reasons for the recession in the year 2004-2006 and the change that took place in the year 2007 are not analysed in this study.

Answer to Question 1: *Lok Adalat* as a system of dispute resolution is successful in Delhi and Analysis 1 and 2 are equally applicable. This may be due to the support and vision of the Delhi Legal Services Authority.

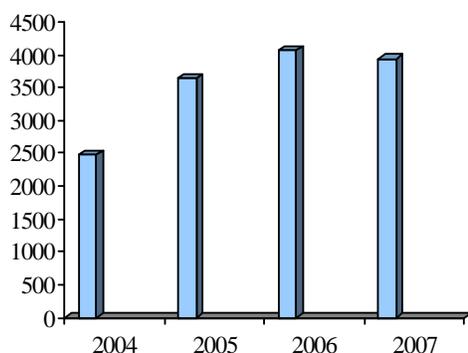
2.4. Case study and analysis of *Lok Adalats* in Bangalore

Like Delhi and Mumbai the *Lok Adalats* are conducted in Bangalore for speedy disposal of disputes and thereby taking justice to the masses. The following tables and graphs give the statistical figures signifying the trend in Bangalore.

Table 43
Number of *Lok Adalats* organized in Bangalore²⁸⁸

Years	2004	2005	2006	2007
	2,484	3,641	4,063	3,940

Graph 23
Number of *Lok Adalats* organized in Bangalore from 2004 to 2007



The above table and graph show that there was a steady increase in the number of *Lok Adalats* held during the period starting from 2004 to 2006. The number of *Lok Adalats* held, increased from 2484 in the year 2004 to 4,063 in the year 2006. But in the year 2007 the number went down marginally.

Table 44
Total number of cases settled through *Lok Adalats* in Bangalore²⁸⁹

Years	2004	2005	2006	2007
	39,087	44,605	62,387	39,892

Table 45
Nature of cases settled through *Lok Adalats* in Bangalore²⁹⁰

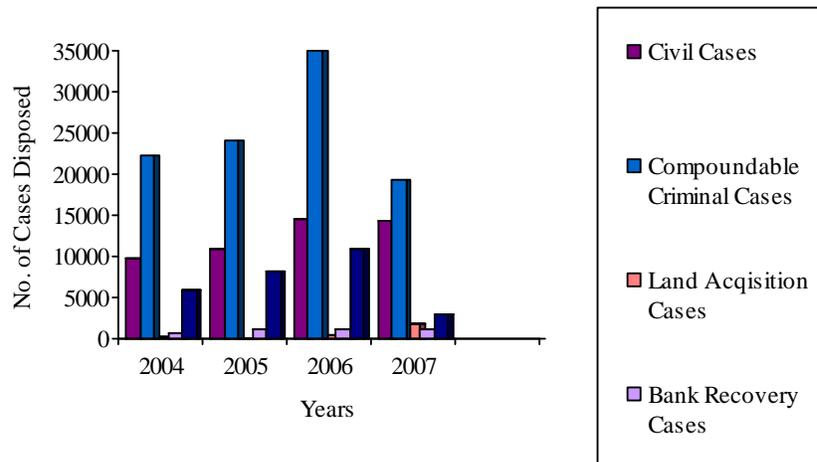
Type of cases	Civil	Compoundable Criminal	Land Acquisition	Bank Recovery	MACT	Total
Years						
2004	9,851	22,153	236	835	6,012	39,087
2005	10,986	24,091	127	1,222	8,179	44,605
2006	14,643	34,887	626	1,259	10,972	62,387
2007	14,302	19,235	2,020	1,288	3,047	39,892

²⁸⁸ Consolidated by the Bangalore Research Team on the basis of data from Karnataka State Legal Services Authority.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

Graph 24
Cases settled through *Lok Adalats* in Bangalore



Regarding the number of disputes settled through *Lok Adalats*, a steady progress during the period starting from 2004 to 2007 is visible. This trend could be seen in the number of cases settled through *Lok Adalats* in civil cases, compoundable criminal cases, Land acquisition cases, bank recovery cases and motor vehicle cases. This progression turned to a recession in the year 2007 except in land acquisition cases and bank recovery cases. Taking the total number of cases into account, there is a reduction of 22,495 cases from 2006 to 2007.

Analysis of Data from Bangalore

There has been a constant progression in the number of *Lok Adalats* held and the disputes settled in Bangalore from the year 2004 to 2006. But numbers went down in the year 2007.

Answer for Question 1: In spite of this inconsistency it could be seen that *Lok Adalat* as a dispute resolution mechanism has been fruitful in Bangalore and it helps in reducing the number of cases that are pending in various forums.

Answer to question 2

From the analysis of the data from Delhi, Mumbai and Bangalore it could be seen that in all these cities there are fluctuations and inconsistencies in the functioning of *Lok Adalat* as a system of dispute resolution.

Scope for further study

There could be a further study based on empirical and statistical data, to find out the reasons for the success, failure and inconsistency in the functioning of *Lok Adalats* in these cities.

2.5. Public Awareness about *Lok Adalat* as a dispute resolution mechanism in Delhi, Mumbai and Bangalore

The study conducted in these cities through closed questionnaires²⁹¹ among a mixed group of the public, selected on random basis reveals that even though most of them have heard about *Lok Adalats*,²⁹² they do not know about its benefits. Most of them think that it is part of the court system. In Delhi there is a difference, mainly because of the three Mega Traffic Lok Adalats, which were organized recently. Many of them have either benefited out of these mega traffic adalats or have seen the advertisements.

3. Conclusion

In the study it is found that there is a steady increase in the disposal and settlement of cases through *Lok Adalats*. In fact data shows that more number of cases were disposed in *Lok Adalats* during 2005-2007 when compared to all the courts in

²⁹¹ Annexure 3

²⁹² 53% in Banagalore, 55% in Mumbai and around 60% in Delhi.

India ranging from high courts to the lowest in the hierarchy. As a matter of fact, people go to *Lok Adalats* because they have no hope for settlement of disputes in the ordinary courts. The increasing number in the *Lok Adalats* and participation of judges, lawyers and most importantly the litigants show the popularity and public faith in the system. The importance of *Lok Adalats* has to be understood in the light of increasing backlog of cases in India.²⁹³ Though *Lok Adalat* is held under the direct leadership of judiciary by sparing their extra time, the success is undoubtedly remarkable in affording speedy justice. This establishes the fact that for the effective functioning of ADR mechanisms, support and co-operation from the judiciary is very essential.

Lok Adalats are often criticized on the ground that they try to determine the disputes instead of settling the disputes.²⁹⁴ It is also criticized that *Lok Adalats* as justice delivery mechanism might be rendering justice to the masses, but very often fails to render justice to individuals whose cases are settled in these forums. The litigants are sometimes compelled to settle their cases for peanuts.²⁹⁵ But these criticisms seem to be misplaced. Active support of the judiciary makes the system justice oriented and therefore more acceptable to the community.

Lok Adalats as a system of administration of justice has proven to be efficient only after they were institutionalized under the Legal Services Authorities Act. Revamping of coordinated institutional supervision would hopefully make the system more effective.

²⁹³ For more details refer to chapter I.

²⁹⁴ Honourable Mr. Justice S. B. Sinha, Judge, The Supreme Court of India; Honourable Mr. Justice Madan B. Lokur, Judge, High Court of Delhi; Honourable Dr. Justice S. Muralidhar, Judge, High court of Delhi expressed this opinion at the National Roundtable Conference.

²⁹⁵ Honourable Dr. Justice S. Muralidhar, Judge, High Court of Delhi at the National Roundtable Conference.

Chapter 6

Conclusion and Recommendations

1. Introduction

THIS STUDY reveals that, among the ADR mechanisms *ad hoc* arbitration has not been a success. At the same time, other methods such as mediation and *Lok Adalats* are developing on the right track and are achieving their objectives to a great extent, after they were institutionalized.²⁹⁶ It is also seen that various statutory interventions made with the objective of laying down legal framework for ADR in India, have had no impact in resolving disputes amicably. It is also found that alternative dispute resolution mechanisms, if properly manned could become very effective in resolving disputes of any kind, ranging from commercial to family disputes or from traffic offences to intellectual property disputes.

Towards the end making ADR more effective in India, it is proposed that a national policy of ADR may be formulated giving a broad framework of modes of dispute resolution through alternative means with the objective of effective settlement of disputes of both domestic as well as international character. This would also help us to develop a dispute resolution culture conducive to the acceptance and development of the philosophy underlying ADR.

2. Recommendations

The success of mediation centres and *Lok Adalats* signals that there is need for setting up institutional ADR mechanism in India. Establishment of institution/s with sufficient statutory backup, supplemented by the generation of a dispute resolution culture among the masses, India could be made the hub of institutional dispute resolution in the world. To achieve the same concrete and active steps may be taken at the following levels.

²⁹⁶ Disposal of a few hundred cases through these institutions will not solve the problem of huge backlog of cases in India.

Recommendation 1: Policy making and legislative intervention

1. **Legislative/policy initiative by the Government** in the form of amendments/new legislation *etc.*²⁹⁷
2. **Judicial consensus:** In the light of the aim and objectives of ADR, the judiciary should arrive at a consensus on the circumstances under which a judicial intervention is required.

Recommendation 2: More empirical, doctrinal and comparative research

- 1 **Research on ADR:** More empirical and comparative doctrinal research²⁹⁸ may be taken up by various stakeholders. This would help formulation of strategies and policies at national as well as at regional levels.²⁹⁹

²⁹⁷ Amendments shall be made in the Arbitration and Conciliation Act, 1996 and Section 89, CPC. Another specific statute with the objective of developing mediation as a successful dispute resolution technique may also be enacted. The Arbitration and Conciliation Act, 1996, may be amended to include the following provisions;

1. Time limit for conducting an arbitration matter.
2. The power may also be delegated to District Judges in the appointment of arbitrators under section 11 of the Act.
3. Separate Bar of full time arbitrators/mediators.
4. Compulsory registration of such arbitrators/mediators with the Government.
5. An internationally accepted *code of conduct* for arbitrators to ensure their accountability.
6. Arbitrator's fee shall be fixed.
7. Grounds for setting aside of arbitral awards under section 34 shall be further limited by pecuniary limits.
8. Cost to the affected party in case the opposite party the enforcement of an arbitral award.
9. Provision shall be made to regulate *ad hoc* arbitrations in India.
10. Provisions for a strong enforcement mechanism that may be self-regulatory.

The Code of Civil Procedure may be amended to include the following provisions in section 89;

1. Limited time frame shall be fixed for settlement of disputes outside the court.
2. *Suitable institution or person* mentioned in section 89(2)(c) to effect a *judicial settlement* may include Government accredited ADR institutions including mediation centres in each state.
3. The phrase in section 89 (2) (d) *court shall effect a compromise* shall be amended to include suitable mediation institutions to take a leading role in the settlement of disputes under section 89 CPC.
4. The stage at which a case may be referred to ADR shall be specifically mentioned under the section.
5. There shall be an amendment by stating, *wherever it may be acceptable to the parties or can be explored by the parties* instead of stating *where it appears to the court*.

²⁹⁸ Some of these areas are pointed in this study in a separate table under the heading "scope for further study" in chapter 1 to 5.

²⁹⁹ Sometimes the national strategy may not suit in a particular region. For example the general nature of cases that comes from urban and rural areas may not be the same, which might require separate strategies.

- 2 **Collection and tabulation of statistical data regarding ADR and courts:**
Various stakeholders shall also be taken for properly recording and tabulating data regarding various modes of dispute resolution in India.³⁰⁰

Recommendation 3: Building infrastructure/ creation of a pool of professionals etc.

1. **Establishment of a separate Bar/Registry for mediators/arbitrators:** A separate Bar/Registry may be formed for mediators and arbitrators in the model of the Bar Council of India and Bar Associations for lawyers.

2. **Standards of conduct and rules of professional ethics:** The most important challenge pointed out by the sample groups during the empirical study is the lack of accountability of the arbitrators and transparency in the arbitration process.³⁰¹ Framing of an internationally accepted code of conduct for arbitrators and others would be really of great help in ensuring quality.³⁰² In India so far we have not been able to set up a separate panel of trained arbitrators or mediators. A separate panel of experts so constituted may be helpful in cultivating a good ADR culture in India.

3. **Decentralized body of practitioners:** Instead of building ADR infrastructure and pool of trained professionals with expertise in the major cities, efforts may be made to develop them throughout India.

4. **Establishment of Institutional ADRs in India:** It is seen that in India institutional mechanisms of ADR, work more effectively than ADR on *ad hoc* basis. So institutions may be developed with supervisory roles that could also coordinate the efforts of streamlining ADRs in India.

³⁰⁰ One of the greatest challenges for the completion of this study was non-availability of data since they were either not properly recorded or monitored. The benefit of such a data bank is that the trends could be easily studied, so that streamlining could also be done in a comparatively easier manner.

³⁰¹ For details, refer to chapter 4.

³⁰² *Supra* chapter 2. This would definitely encourage more and more parties coming for settling their trade disputes and it can act as the venue for even foreign arbitrations that may be encouraged to take place in India.

5. **Publication of information in various languages:** It is also important that all documents and information are published in all the major Indian and foreign languages by the various stakeholders and take a proactive step in reaching different parts of the globe through print media as well as through its web site.

6. **Working arrangements with international organizations:** The aforesaid institution and other stakeholders could have working arrangement with similar organizations in other countries/international agencies dealing with ADR so that in future ADR may develop as an effective method of dispute resolution.

7. **Use of Information Technology:** The modern avenues of information technology shall be made use of in the following manner:
 - **Developing a separate digital network:** Dispute resolution need not be done always in a face-to-face interaction across the table. A dispute could be resolved if there is an effective communication between the parties as well as between the parties and the arbitrators or mediators. It is also necessary that the authenticity of the communication is legally verifiable. In fact the judiciary in India³⁰³ has recognized taking evidence through videoconferencing. A strong and confidential web based network may be developed, secured by cryptographic algorithms.³⁰⁴

 - **Official website:** Nowadays an official website is not a window to the organization to which it belongs but it is the main door. The important factor is that this door could be opened from any where in the world by

³⁰³ See the judgements of the Supreme Court of India in *State of Maharashtra v. Dr. Praful B. Desai* (AIR 2003 SC 2053) and the High Court of Andhra Pradesh in *Bodala Murali Krishana v. Smt. Bodala Prathima* (AIR 2007 A.P)

³⁰⁴ Once such a network is developed, the distance and place becomes absolutely irrelevant for the purpose of dispute resolution. The parties and the arbitrator need to have a system with a strong audio and video recording devices connected to the Internet. A separate online account can be created with separate username and password for parties and arbitrators. Once they access the online content of their dispute it could be downloaded, or printed in the normal way. Parties and arbitrators could also transmit documents that are electronically signed. The benefit of such a network is that the cost of dispute resolution could be reduced to a great extent. It may also help speedy disposal.

any one. The various stakeholders shall design their websites, with all the details and information in various Indian and foreign languages.

- **Online Dispute Resolution techniques:** Efforts shall be made to develop secure online platforms for resolving disputes of all nature but commercial disputes in particular.³⁰⁵

Recommendation 4: Creation of dispute resolution culture in India

1. Development of a dispute resolution culture from school level onwards:

Efforts may be made for the development of a dispute resolution culture from school level onwards. The need and methods for peaceful resolution of dispute may be made a part of the formal education curriculum.

2. Promote public awareness with the help of voluntary organizations, educational institutions and others:

More seminars, workshops, conferences, training programmes,³⁰⁶ refresher programmes, publications, *etc.* may be organized so that a dispute resolution culture is generated in the country from grass root to policy making level.

3. Community mediation:

The benefits of community mediation are that they resolve disputes in an informal and amicable way without affecting the relationship between the parties.³⁰⁷ Most of these community mediation mechanisms have very strong social sanctions against the violation of their rules.³⁰⁸ Hence, community mediation, which peacefully resolves disputes, may be encouraged.

³⁰⁵ Online Dispute Resolution techniques can be more effectively used in resolving commercial disputes than other kinds of disputes. There are limitations in using online platforms of dispute resolution for criminal cases, disputes involving immovable property etc.

³⁰⁶ With strong curriculum drafted with the objectives in mind.

³⁰⁷ For example, the *Auto Rickshaw courts* prevalent at Kannur District in Kerala. Under this system the passengers can take their complaints against the auto drivers to the informal courts established by the *Auto Drivers Coordination Committee*. If complaints are found to be genuine, the court punishes the errant driver. The court is an offshoot of the set up to protect the interest of the passengers as well as the auto drivers. The committee consisting of trade unions affiliated to both the ruling and opposition parties had been engaged in settling the disputes between the drivers and passengers for the last two years. The 'Auto Court' has no judicial powers. Yet, the auto drivers as well as the passengers accept its verdicts. The result is that there is a steep fall in the number of complaints involving auto rickshaws, except those concerning accidents.

³⁰⁸ In Africa, community mediation is quiet frequently resorted to by the litigants. The system of dispute resolution is not altogether a concept new to our business world. The study in Mumbai has

Recommendation 5: Addressing the root causes for court delay and case backlog

1. This study shows that ADR has great potential to reduce court delay and case backlog in India. It also indicates that ADR has certain limitations in this regard. Given the dimensions of the challenge of court delays and case backlog in India, it is therefore crucial to address their root causes, *e.g.* inefficient case management, lack of inadequate information technology systems, inadequate filters for influx of certain types of cases, inadequate enforcement capacity, inadequate human resources *etc.* These root causes will have to be identified and analyzed by continuous studies.

Recommendation 6: Keeping pace with the challenges

1. **Efforts to be continued:** Continuous efforts are to be made for further progress even after achieving results at all these levels.

The present study on the status and effectiveness of ADR in India undoubtedly signifies that the success of any ADR mechanism would indeed depend upon the strength and support of its institutional set up.³⁰⁹ The small-scale efforts to introduce institutionalized ADRs like *court-annexed mediation*, may not achieve the desired goal in the long run. Only concrete, well-planned and continuous efforts at different levels would help India in achieving its mission. Active support and encouragement of the judiciary is essential to help us develop a culture conducive to the growth of well-respected and well-recognized ADR.

found that there is a well-established system of traditional dispute resolution existing among the business community in Mumbai. For example, the powerful *Marwari* community has their own mechanism set-up to decide and resolve the dispute among its members arising out of their business transactions. Similarly, the businessmen belonging to *Sindhi* and *Parsi* communities have evolved a similar system over the years. The *Bori* community very systematically resolves their disputes through their respective *Jammat Khanna*. The decisions of such traditional neutrals have better enforceability as it is backed by social sanctions. The only difficulty with the system is that it applies only among the members of the particular community. Moreover, the decisions are often based on logic and wisdom rather than on facts or law. Similarly the study in Bangalore also found such community dispute resolution mechanisms especially among the business communities.

³⁰⁹ As has been discussed in the respective chapters on mediation, arbitration and *Lok Adalats*.

ANNEXURES

ANNEXURE - 1

GUIDELINES FOR THE RESEARCHERS

The Researchers working on this project in Bangalore, Mumbai and Delhi are required to follow the guidelines given below.

A. ROLE OF THE RESEARCH SUPERVISOR AND RESEARCHERS

1. The Researchers are required to collect data with a sound understanding about the purpose and goals of the ADR Project.
2. Data collected by the researchers must be authentic.
3. It shall be the duty of the Research Supervisor to cross check and verify the authenticity of the data so collected.

B. THE GENERAL FRAME WORK

The researchers are required to collect data for studying the following: -

- a. Impact of ADR mechanisms on reduction of cases in the Courts (Explanation given in Rule C)
- b. Use of ADR as a mode of dispute settlement mechanism. (Explanation given in Rule D)
- c. Formal Training and Public awareness of ADR (Explanation given in Rule E)
- d. Enforcement of awards (Explanation given in Rule F)
- e. Suggestions to improve the ADR techniques in India (Explanation given in Rule G)

C. IMPACT OF ADR MECHANISMS ON REDUCTION OF CASES IN THE COURTS

Researchers are required to collect data in the following line.

1. Cases of Munsiff/Civil courts, sub courts, district courts and the High Court, including Consumer Redressal forums, State Consumer Commissions, Motor Accident Claims Tribunals, Labour & Industrial Courts and Family Courts.

2. Total number of cases filed in a year in each of these courts from 1996 to 2007. This has to be made under different headings like matrimonial matters, property matters, money matters, defamation suit, motor accident matters, Intellectual Property matters, Labour Disputes, consumer disputes and others.
3. Number of cases falling in each category and disposed off in a year in each court as per clause 2.
4. Time taken to dispose off each case. (This shall be noted down under five different heads on the basis of disposal)
 - A. One year to Two years
 - B. Two years to Three years
 - C. Three years to Five Years
 - D. Five Years to Ten Years
 - E. More than Ten Years
5. Details of cases that have been referred to by the courts in each year for various ADR mechanisms like
 - (a) Negotiation
 - (b) Mediation.
 - (c) Lok Adalats
 - (d) Judicial Settlement
6. The details of cases that have been referred to by the sub courts, district courts and high court to arbitration in each year after the year 1996.
7. The number of arbitrators appointed by sub courts, district courts and high courts in each year after the year 1996.
8. The number of arbitral awards enforced by sub courts, district courts and high court in each year after 1996.
9. As per the above guidelines data shall be collected as per the Proforma given in Annexure 2.

(Note: While collecting data through questionnaire, doubts of people shall be clarified by the researcher.)

D. USE OF ADR AS A MODE OF DISPUTE SETTLEMENT MECHANISM.

1. Number of Lok Adalats, Nyaya Panchayats, held in each year for the last 10 years as per annual data (photocopies of the records may be given)
2. The type and number of disputes currently being handled through arbitration/ mediation/ Lok Adalats/ other ADR methods (Nyaya Panchayats, Nyayalayas, village head man, religious head etc.) without intervention of the court.
3. Time taken for their disposal.

E. FORMAL TRAINING AND PUBLIC AWARENESS OF ADR.

A. The Research Institution shall examine the different public awareness measures by the various government, private and educational institutions, departments and organizations. An empirical study using the questionnaire method shall also be conducted.

1. Different initiatives of formal ADR training. The researcher shall find out the different institutions imparting training in ADR.
 - i. The nature of training,
 - ii. Its Duration, and the skills/ techniques imparted.
 - iii. The Degree/ Diploma awarded,
 - iv. Number of people actually practicing as arbitrators /mediators/ conciliators after the training.
2. The number of law firms (the opinion of senior arbitrator may be taken into account) and independent lawyers specializing in arbitration. Information shall be collected as to whether these firms or lawyers are engaged in any other area of legal practice or not.
 - i. Whether these firms or lawyers are exclusively practicing arbitration? Do they practice in other areas also? If yes what are those areas?
 - ii. The number of mediation matters taken up by them in a year
 - iii. The number of conciliation matters taken up by them in a year
 - iv. The number of arbitration matters taken up by them in a year.
 - v. Average time taken for passing the award/order.
 - vi. Number of arbitration/mediation/conciliation proceedings, which took more than one year and state reasons for such delay.
 - vii. The suggestions and recommendations of these arbitrators/ conciliators/ mediators to improve the working of the present system.

3. The awareness among the public about different ADR techniques as a mode of settling disputes. (A questionnaire shall be prepared to conduct a survey of public awareness).

F. ENFORCEMENT OF AWARDS

1. The number of foreign awards coming before the court in an year.
 - a. Grounds for opposing enforcement.
 - b. Time taken by the court.
2. The number of domestic awards coming before the court in an year.
 - a. Grounds for opposing execution.
 - B. Time taken by the executing court.

G. SUGGESTIONS TO IMPROVE THE ADR TECHNIQUES IN INDIA.

(Experts to be interviewed)

1. The steps necessary to improve quick disposal of cases and attract more cases for settlement through ADR.
2. The shortcomings of the Arbitration and Conciliation Act, 1996 and the steps necessary to improve it.
3. Shortcomings and the review of the implementation of Section 89 of the Code of Civil Procedure, 1908.
4. The merits and demerits of *ad-hoc* arbitration.
5. The merits and demerits of institutional arbitration.

H. GUIDELINES FOR KEEPING THE DECORUM OF THE COURTS AND TRIBUNALS.

1. The Researcher shall strictly follow court rules, both inside and outside the court hall.
2. The researcher before entering any room or access any records must get permission from the authority/officer concerned.
3. The researcher should not, in any case, enter into any argument, with any one, or use any undesirable means while working for this project.
4. If the researchers face any difficulty regarding the work assigned to them under this project they are required to report it to the project supervisor.

ANNEXURE - 2
Proforma for the collection of data as per Guideline C
 (Data to be collected from the case records)
 (Sufficient explanation is to be given for each question)

S.No	Case Type	Case No:	Filing Date	Court/Tribunal	Name of parties:	Relevant Law/Act & sections	Date of Disposal		
Claim of parties/remedy under the law (in the case)									
Number of years taken for Disposal of the case (Please Tick the relevant column)									
1 to 2		2 to 3		3 to 5		5 to 10		More than 10	
<ol style="list-style-type: none"> 1. The reasons for delay (if any) 2. Whether the case was referred to any ADR mechanism? If yes give details. (Including the time taken for disposal) 3. Whether the case was referred (specifically) to Lok Adalats? If yes give details (including the time taken for disposal) 4. What was the remedy given through this ADR mechanism? 5. Remarks by the Researcher 									
Name & Signature of the Research Supervisor with date					Name & Signature of the Researcher with date				

ANNEXURE - 3

Questionnaire for studying about public awareness of ADR

(To be distributed among the samples identified from the general public)

[As per Rule E(3)] of Annexure 1

Name :
Address :
Age :
Sex :

Qualification (Tick the relevant column)

PhD	Post Graduation	Graduation	+2	Tenth pass	Up to tenth	No formal education

	Yes	No
1. Were/Are you a party to any civil litigation?		
2. How many years it took for the final disposal? (Write number of years).....		
3. How much money was spent by you for the case?.....		
4. Are you satisfied with the time taken?.....		
5. In your opinion, who is responsible for the delay in your case [(1) Your Lawyer/ (2) Opposite party's lawyer/ (3) Opposite Party/(4) Judge/ (5) Witnesses (6) The system]...		
6. Did you instruct your lawyer to get a speedy remedy?.....		
7. Do you know about Lok Adalats or any means of resolving disputes outside the court .		
8. Did your lawyer tell you about various methods like Arbitration, Mediation, Conciliation, Judicial Settlement or Lok Adalats through which case could be resolved without any delay? ...		
9. Did the Judge tell you about various methods like Arbitration, Mediation, Conciliation, Judicial Settlement or Lok Adalats through which case could be resolved without any delay?.....		
10. Did you try for an out of court settlement?		
11. Have you heard about Consumer Courts?		
12. If yes, do you feel that they are speedier than ordinary civil courts?		
13. Have you heard about Nyaya Panchayat / Village Panchayat / or any other methods?.....		
14. Do you think that they were better than the modern court system?		
15. Have you heard about arbitration/mediation/conciliation/Lok Adalats.....		
16. What do you think an arbitration/mediation/conciliation/Lok Adalat is? (Write Yes or No)		
These methods are for speedy disposal of cases		These methods do not have the sanctity of law
These methods are more expensive than filing cases in the courts		There is no difference between court case and these methods
17. Do you think that civil disputes can be more effectively settled outside the court through Lok Adalats or any other modes of dispute resolution?		
18. Any other remarks		

Remarks by the Researcher

Name & Signature of the Research supervisor with date. Name &Signature of the Researcher with date

ANNEXURE - 4

Proforma for the collection of data regarding ADR training

(To be distributed among the various organizations/educational institutions/Government departments/Departmental training centers/NGOs/ others who conduct various training programmes)

(As per Rule E(A) of Annexure 1

1. Name and address of the Institution

2. Type and nature of training? (Including conferences, seminar, workshops and others)

3. Duration of the training (Including conferences, seminar, workshops and others)

4. The Degree/Diploma awarded. (If any awarded) (Attach copies of Syllabus)

5. Is there any tie up with other institutions, in India or abroad, for running this programme?

6. Is it departmental or in-house training?

7. Is it open for public?

8. If, in-house training, what is the nature of training?

9. If, in-house training, who are the trainees and trainers?

10. Number of trainees/students who practice arbitration after completion? (Give data only if available)

11. What are the main challenges faced in imparting the training?

Remarks by the Researcher

Name & Signature of the Research Supervisor with date

Name & Signature of the Researcher with date

ANNEXURE - 5

Proforma for the collection of data regarding enforcement of arbitral awards

(From the records)

[As per Rule F of Annexure 1]

1. What is the nature of award (Foreign or domestic)
2. Names of Parties?
3. Place, State and Country from where it comes
4. What is the award?
5. Grounds for opposing the award
6. Whether this case was remitted back to the arbitrator by the court?
7. Time taken by the executing court
8. If there is a delay- the reasons for it
9. Remarks by the Researcher

Name & Signature of the Research Supervisor with date

Name & Signature of the Researcher with date

ANNEXURE - 6

The Indian Law Institute

(Deemed University)
Bhagwandas Road
New Delhi-110001

ADR Status/Effectiveness Study

Questionnaire for the collection of data from Experts

(Attach additional sheets if required)

(Questionnaire in two pages)

1. Present Position and/or Positions held:

2. Main areas of ADR techniques followed by you (Please Tick)

Mediation	Arbitration	Conciliation	Negotiation	Lok Adalats

3. Number of years of experience:

4. Number of ADR proceedings taken up (year wise)

Mediation	Arbitration	Conciliation	Negotiation	Lok Adalats

5. Average time taken for disposal of these matters

Mediation	Arbitration	Conciliation	Negotiation	Lok Adalats

6. If there is delay in these proceedings, reasons for such delay (your opinion):

7. How far the various purposes of ADR, are fulfilled at the practical level? (Your Opinion):

8. Shortcomings of Arbitration and Conciliation Act, 1996(your opinion):

9. Steps to be taken for improving Arbitration and Conciliation Act, 1996(your opinion):

10. Shortcomings of section 89 of the Civil Procedure Code, 1908(your opinion):

11. What are the necessary amendments through which these shortcomings can be rectified with respect to section 89 CPC?

12. Suggestions to improve the ADR techniques in India (your suggestions):

13. Any other suggestions for improving the different techniques of ADR in India:

ANNEXURE - 7

Questionnaire for the Collection of Data

(To be distributed among lawyers, arbitrators, mediators and conciliators)
Under Rule E (2) of Annexure 1

1. Name and address of the Law firm/ Lawyer
2. Name of the senior arbitrator
3. Number of years practice
4. Main areas of practice
5. Whether practising ADR?
6. Since when practising ADR?
7. Type of ADR practising
 1. Mediation:
 2. Arbitration:
 3. Lok Adalats:
 4. Nyaya Panchayat:
 5. Conciliation:
 6. Negotiation
8. Number of arbitration proceedings taken up (year wise)
9. Average time taken for disposal of matters in arbitration
10. Reasons for delay in arbitration proceedings
11. Role required to be played by ADR
12. Shortcomings of Arbitration and Conciliation Act, 1996:
13. Steps to be taken for improving Arbitration and Conciliation Act, 1996:
14. Shortcoming of section 89 of the Civil Procedure Code, 1908
15. Suggestions to improve the ADR techniques in India
16. Any other remarks.

Name & Signature of the Researcher with date

Name & Signature of the research supervisor with date

ANNEXURE - 8

THE INDIAN LAW INSTITUTE

(Deemed University)
Bhagwandas Road
New Delhi-110001

ADR Status/Effectiveness Study

Questionnaire for the Collection of Data on the comparative analysis of Ad Hoc and Institutional Arbitration

1. Background of the expert
2. If you are asked to choose amongst ad hoc and institutional arbitration, which one would be preferred by you in each of the following (Please give reasons)
 - a. Costs
 - b. Supervision and administration
 - c. Flexibility and security
 - d. Time
 - e. Efficiency
3. Which is most efficient form of arbitration in terms of current rapid industrialization and economic growth in India?
4. Which is best Institution conducting institutional arbitration that could be taken as a model in India?

ANNEXURE - 9

National Consultation with the District and Sessions Judges

April 12-13, 2008

Introduction

THE INDIAN Law Institute as part of the study consulted 51 district and Sessions judges deputed by the 19 high courts from all across the country on 12-13th April, 2008. Out of this 35 judges responded to ILI Research Team postings and answered the questionnaire made for that purpose. On the first day, the consultation took views of the working of s. 89 of *Code of Civil Procedure, 1908* and the deficiencies in the working of the system and suggestions for its improvement were taken. On the second day the forum again met and discussed the issues relating to *Arbitration and Conciliation Act 1996*. Their opinions were sought and suggestions were noted down. The following is a brief analysis of the deliberations took place and suggestions emerged during the consultation.

Years of experience

The sample group comprised of persons with experience ranging from 5 to 34 years in the respective State judicial services.

Main Areas of ADR techniques followed

Nearly 50 percent of the Judges were of the opinion that ADR techniques are mainly followed in the form of *Lok Adalats*. On the other hand, around 30 percent were of the opinion that mediation is a mostly used technique of ADR. Moreover, 10 to 20 percentage of the judges were of the opinion that conciliation and arbitration are effectively used respectively in settling the disputes of particular nature. Clearly, the *Lok Adalat* is the most prevalent mode of ADR, which is being practiced in India.

Time taken for disposal of ADR proceedings

During deliberations it was found that in mediation the average time taken for disposal varies from one hour to 3 months. In conciliation, the average time taken for disposal ranges from 1 hour to 3 weeks. In *Lok Adalats* the period of disposal ranges from 20 minutes to 6 weeks. However, surprisingly, none of the judges responded to the average time being taken in disposal of a matter referred to arbitration.

Reasons for delay in proceedings under ADR Scheme

From the data collected and the opinions collected, the following reasons were found out for the delay in the proceedings under Section 89 of *Code of Civil Procedure, 1908*:

1. Excess application of the provisions of *Code of Civil Procedure, 1908* in arbitration proceedings. It invariably delays the arbitral proceedings.
2. Lack of interest and cooperation among lawyers towards settlement of disputes through ADR mechanisms.
3. Over burdening of Judicial Officers with routine court work. Clearly, it gives very little time to them to give proper attention to resolution of disputes using ADR techniques.
4. Lack of proper and effective training offered to the judicial officers in ADR techniques. Training of judges has to be properly institutionalized in order to achieve desired results.
5. Lack of awareness among public and lawyers towards various modes of ADR.
6. Prolonging of proceedings by the parties due to various reasons.
7. Non – Cooperation from insurance companies and other similar departments, both governmental as well as public sector undertakings.
8. Reluctance on the part of judges to give enough attention towards settlement of disputes using ADR.
9. Non-willingness on the part of lawyers and parties to compromise.
10. Non- appearance of one or both the parties / advocates and lawyers demanding adjournments thereby unnecessarily delay.
11. Irregularity or lack of punctuality among lawyers.

12. Lack of necessary infrastructure for mediators and mediation centers.
13. Lack of will of lawyers to resolve the matter using ADR mechanism.
14. Causing delay on account of their personal reasons like fee/commission and other vested interests.

Certain factors emerged during the Consultation

1. It is very difficult for the judge to convince a litigant without the support of lawyers.
2. At present ADR techniques are useful in matrimonial and motor accident cases.
3. Section 89 of the *Code of Civil Procedure, 1908* should be applied before the institution of suit through a panel of lawyers.
4. Section 89 CPC should be made compulsory for all civil cases and party should be directed to take recourse to Section 89 CPC.
5. Family disputes and small-scale commercial disputes are generally settled by ADR in Short period.
6. Non-inclination among judges to refer to section 89 CPC
7. Non-Cooperation from advocates and litigants.
8. More incentives for cases settled under Section 89 and disposal shall be credited to judges' norms.
9. Parties should be made to give reasons in writing on affidavit if they do not agree with a proposed resolution formulated by the court.
10. There is no time frame for completion of ADR proceedings.
11. Parties feel free to reveal facts to neutral mediators as the entire process maintains confidentiality. However, it is more successful in court-annexed mediation.

Outcome on Arbitration

The same group was consulted on the aspects of resolution of disputes through Arbitration also. Their responses as to different facets of arbitration proceeding were as per the following:

1. The district judiciary lacks adequate infrastructure to apply the provisions of Arbitration Act and its application should be made compulsory before initiation of civil cases.

2. Creation of a separate and independent forum with an inbuilt enforcement mechanism shall be established.
3. Non- availability of trained persons to act as Arbitrators.
4. An award is liable to be challenged in a court of law. The process is costly, highly technical and time-consuming.
5. There are certain inherent defects in the method of appointing the arbitrator.
6. There is an inherent delay in both making as well as executing the award.
7. The power to appoint arbitrators may be delegated to the district judges also.
8. Arbitral awards should be made binding on the parties once it is made.
9. Sections 9 and 31 of the Arbitration and Conciliation Act are too technical in nature inviting undue participation of the Lawyers.
10. Arbitrator normally charges huge fees.
11. There are no specific parameters for fixation of Arbitrators fees, Appointment of arbitrators, Adjournments etc.
12. Court's power to check the arbitrariness of the arbitrator is limited.
13. Arbitrator should be asked to support awards with reasons and courts should be empowered to examine the correctness of such reasons.
14. Section 9 of the Act should be scrapped. Court which deals with section 11 may grant interim relief.
15. Under Section 34 of the Act, grounds for challenge should be circumscribed by pecuniary limits and no challenge if the subject matter is less than 5 lacs.
16. No time frame prescribed for settlement/ or passing of award.
17. At times arbitration is proved to be expensive than litigation.
18. Even the rules prescribed by the arbitral bodies are not followed by the arbitrators or by parties.
19. No specific provision as to restrict adjournments.
20. No provision to check frivolous or avoidable arbitration.

Steps to be taken for improving Arbitration and Conciliation under the Act of 1996

These are the suggestions given for the improvement of the present working of the system.

1. Provisions for cost on losing party.

2. Provision for cost on adjournments.
3. Time frame should be fixed by provisions.
4. There should be provisions for checking the fee of arbitrators. Certificates to be issued by the arbitrators about the fee charged and to be submitted to arbitration authorities or courts referring the matter to the arbitration.

Shortcomings of Section 89 of CPC

Certain shortcomings which were also pointed out are as followings:

1. Since the outcome of mediation is variable, wide and broad, resolution of the dispute cannot be confined to the issues on which the case is referred.
2. It is not possible for the referring judge to formulate the terms of settlement and give those to the parties for their observations. This part of section 89 is not practical and has not been observed or followed by the judges. This requires suitable amendments.
3. The term judicial settlement is not explained or defined under section 89 CPC. It is not clear as to what could be a suitable institution or person as mentioned in section 89 (2) (c). Whether mediation centers could be such an institution needs to be examined.
4. Section 89 (d) needs suitable amendment in place of “*court shall effect a compromise.*”
5. The stage at which a case may be referred to ADR is not clear in terms of Section 89.
6. It can be stated that “*wherever it appears to court at any stage of the case.*” It can be amended by stating, “*which may be acceptable to parties or can be explored by the parties.*”
7. In fact mediation and conciliation are synonymous and inter-changeable. By referring to conciliation under the section separately, it implies conciliation as provided in Part 3 of Arbitration and Conciliation Act, 1996. It requires clarification by necessary amendments.

Suggestions to improve ADR techniques in India

1. After the case is settled in mediation it is sent back to the referring court for passing appropriate orders or judgments or decree in terms of the settlement. In some of the

cases the party backs out of a settlement or even does not appear in the court. In any case, there is an unavoidable delay between settlements and appearance in the court. To avoid this and for more convenience of all and better administration of justice. One *Lok Adalat* judge may be made available in the mediation centers to pass appropriate orders or judgments or decree in terms of the settlement immediately after the matter is settled by the parties before the mediator.

2. Vast publicity is required to inform the public about the utilities of ADR or mediation and the existing mediation facilities. Lack of public awareness is a serious problem.
3. Financial institutions, banks public service undertakings, public utility services like BSES, NDPL, have tax matters, compensation cases and litigation against government authorities etc. These can be taken care of at the pr-litigation stage. Modalities are to be worked out in this direction.
4. Adequate training in ADR particularly in mediation is essential
5. Creation of a forum of lawyers with incentives.
6. Spread the message of ADR from the School level onwards
7. Strict rules to limit the cost.
8. Pre-litigation, Mediation and Conciliation should be made within the jurisdiction of Lok Adalats
9. Pre-litigation, Mediation and Conciliation should also be extended to all cases other than those pertaining only to public utility services.
10. Mediation and Conciliation should be opened at *Taluka* and *Block* levels.
11. Whole- time secretary should be appointed to the district Legal-services authority to assist in proper administration of cases.

ANNEXURE - 10

The Indian Law Institute

(Deemed University)
Bhagwandas Road
New Delhi-110001

ADR Effectiveness Study

Report on National Roundtable Conference

Date 13th May 2008.

THE CONFERENCE was chaired by honourable Mr. Justice S.B. Sinha, Judge, The Supreme Court of India. Other dignitaries on the dais were Honourable Mr. Justice Madan.B.Lokur, Judge, High Court of Delhi; Honourable Dr. Justice S. Murlidhar and Prof. K.N.Chandrasekharan Pillai, Director, ILI. The dignitaries who were present in the audience were Mr. Pravin S. Parekh, Senior Advocate, Supreme Court of India, Mr.B.S Saluja, Secretary General of ICADR; Mr Suman Jyoti Khaitan, Advocate; Mr. A.K. Ganguli, Senior Advocate, Supreme Court of India; Mr.S.K. Dholakia, Senior Advocate, The Supreme Court of India, Mr. R. S. Seth, Secretary, National Legal Services Authority; Dr. Francis Julian, Lawyer and Arbitrator, Dr. M.P. Raju, Lawyer and Arbitrator; Dr. V. Sudesh, Associate Professor, University Law College, Bangalore University, Mr. Sunil Sastry, Advocate and Arbitrator, Bangalore; Mr. Sanjay Diwakar, Arbitrator and Advocate, Delhi; Dr. Anil Varieth, Mumbai and others.

After the intervention by the Chair; Mr. Vishnu Konoorayar, Assistant Research Professor and Project Coordinator, presented the results of the study inviting suggestions from the experts present there.

The general view was that among other mechanisms of ADR mediation to a large extent is the most effective mode but as far as India is concerned there is still a long way to

go. Herein specific suggestions were made by various speakers. It was pointed out by Justice S.B.Sinha that to fulfill the need of Mediation in Delhi itself. There is a requirement of 3000 trained mediators. He pointed out difficulty as to the lack of training, and the need for professionalised & specialized mediation practice by the lawyers. He suggested the need for minimum 40 hrs training for all the judges or lawyers catering for mediation.

Points made by Honourable Mr. Justice S. B. Sinha were

- For 3000 mediators there must be 50 to 100 trainers
- Need for continuous refresher courses for the mediators
- Special aptitude needs to be identified among the mediators through training.
- There could be more regulated and supervised mediation.
- As such pre - litigation mediation is not reducing the pendency. It only brings down the influx.
- Smaller areas like Districts and *Talukas* are to be targeted.
- Trainers need to develop there own training mechanisms.
- The definition of *Lok Adalat* is not clear. There is conflict between mass justice and individual justice. In *Lok Adalat* sometimes the decision is forced one rather than a mutual compromise by the parties.

Honourable Mr. Justice Madan B. Lokurs's broad view was that mediation is the most successful and cost effective mode of ADR, but there is a need for more efforts to be made. More focus to be brought in and an extensive training programme to be put into place.

Points made by Honourable Mr. Justice Madan B. Lokur were:

- Targets need to be revised.
- Indigenous training mechanisms needs to devised
- Trainers and trained mediators need to make a commitment to go to districts and rural areas for 3 to 4 weeks to impart training and set up the centers for mediation.
- In this regard Judicial Officers are willing but then the question is can we dispense with their services, and even if that is done, it will take years to take in to effect.

- Cost effective in comparison with *Lok Adalats*. The definition of *Lok Adalat* is also not consistent through out different states and a better statistical analysis in terms of definition is required.
- There is a need to look into what kind of cases can be settled through *lok adalats* as setting up of Mega Lok Adatlat for traffic challans helped in lowering the pendency before the courts and he suggested that such cases should not be included as they makes the pendency count faulty.
- On an average 400 cases are being disposed of by mediation per month and the graph is going up making mediation more favorable mode of settlement.
- This is cost effective. Judges don't charge fee and lawyers are paid by the State, whereas in the *lok adalats* on an average they are only able to dispose off 10 cases incurring a cost of about 500 to 600 *per case* which includes the judges charge as well as the tea and lunch served to them.
- Mediation by High Court Legal Services Authority and Delhi Legal Services Authority needs to be encouraged.

Honourable Dr Justice S. Murlidhar observed that in a break down system there is a need for judicial case settlement. Also from the point of view of the litigants mediation may be working well for others but still it being a compromise for them as the only relief for them being the termination of litigation but that has come to them after spending 5, 7 or 10 years in the court. He pointed out that in *Lok Adalats* many often there is a conflict between mass justice and individual justice. He said that the *Lok Adalats* very often compels the parties to settle the matter for peanuts. These criticisms were generally accepted by everyone in the conference to be true.

Justice Dr. Muralidhar also observed that the highest pendency being that of 138 matters the referral for the mediation for the same must be the highest but the data provided does not reflect the same. He raised the following question that should be answered. He also made few suggestions.

1. Are we subsidizing the system as the judges are either working during the judicial time or despite the case load burden.
2. Who are the users of the system?
3. Breakdown between the pendency being created by the Government and the private cases.
4. Need for analysis of mass pendency before tribunals and a distinction to be made between mass justice and individual justice.
5. Multi courthouse system may be introduced for litigants to choose between mediation, conciliation or litigation in case of Section 138 of Negotiable Instruments Act 1881 matters and also there should be one date and no adjournments.

Mr. A.K. Ganguli, suggested the setting up of professionalised Bar for arbitrators.

Mr. Suman Jyoti Khaitan advocated the need for a better infrastructure, the need to equip the system with digital technology and in the sphere of Arbitration he emphasized the need for powerful and well-equipped secretariat.

Honourable Mr. Justice S.B Sinha suggested for public awareness and implementation programme be undertaken for these ADR mechanisms. He also suggested preparing a vision document for ODR.

Dr. M. P. Raju suggested for a National Registry of Arbitrators.

The meeting concluded with a vote of thanks proposed by Mr. Dalip Kumar, Registrar, Indian Law Institute.

ANNEXURE - 11

Report of the Roundtable Conference

24 April 2008

Organized by the P. G. Dept of Law, University Law College, Bangalore University.

Venue: Hotel Atria International, Bangalore.

Time: 11.00. A.M.

Minutes of the Conference:

- Dr. V. Sudesh, Project Co-ordinator & the Master of Ceremonies invited the Delegates to the Roundtable Conference comprising Hon'ble Mr. Justice V. Gopala Gowda, Judge, High Court of Karnataka, Hon'ble Mr. Justice Jawed Rahim, Judge, High Court of Karnataka, and Hon'ble Mr. Justice Chinnappa, and Mr. Justice Mohd Anwar Former Judges of the High Court of Karnataka. Other dignitaries attended the conference were Sri. Keshavanarayan, Director, Bangalore Mediation Centre, Bangalore; Sri. Ravindra, Dist Judge, Bangalore, Prof. Dr. Subramanya T.R., Dean, Faculty of Law, Bangalore University, Bangalore and Prof. Dr. K.M.H. Rayappa, Principal, University Law College, Bangalore along with other 53 delegates including Advocate/s, Arbitrators, Approved Mediators from High Court of Karnataka, Academicians, Researcher Scholars, Corporate Legal Practitioners / Advisors and Students.

Prof. Dr. T.R. Subramanya welcomed the distinguished august gathering to the Roundtable Conference and introduced the esteemed delegates and Prof. Dr. K.M. H. Rayappa threw light upon the purpose of the Conference.

The Chairman of the Roundtable Hon'ble Mr. Justice V. Gopala Gowda declared the Roundtable Conference open and in his key address enlightened that:

1. The subject matter is a pertinent topic for discussion in the light of the amendment to

Section 89 of the Civil Procedure Code, 1908.

2. Arbitration is not new phenomenon. It exists in the pre-constitutional legislation such as the I.D.Act, 1947, wherein arbitration and conciliation are recognized methods for resolving industrial disputes.
3. The Arbitration & Conciliation Act, 1996 is a comprehensive legislation providing scope for speedier settlement of disputes between parties.
4. There is a need for the judges, lawyers and the public to use ADR mechanisms and get involved in it to avoid hijacking of the system by anti-social elements.

Hon'ble Mr. Justice Jawed Rahim opined that:

1. Section 15³¹⁰ of the Act, is against the very purpose of ADRs and also the arbitral proceedings gets vitiated through Section 16 (3) of the Act, thus the object of ADRs is lost.
2. There is a need for training of arbitrators
3. Finality of the award should be deliberated by Law.

Hon'ble Mr. Justice Mr. Chinappa stressed

1. The importance for implementing ADRs in order to arrest delay in litigation
2. Parties to arbitration should seek to invoke Section 34 of the Act, only if the Arbitrator is prejudiced or has not considered all the important matters and not otherwise.

Hon'ble Mr. Justice Mohd Anwar, affirmed that

1. Due importance should be given to the arbitration clause in the contract/agreement.
2. Principles of Natural Justice, plays a pivotal role in a Arbitration proceeding.
3. There is a need for the proactive role of an Arbitrator.
4. There should be no scope for exparte Award.
5. To bring sanctity to arbitration only judicial officers should be appointed as arbitrators for the fact that they are experienced in delivering justice on pure judicial

³¹⁰ Termination of mandate and substitution of arbitrator.

matters.

Mr. Keshav Narayan, the Director of the Bangalore Mediation Centre enlightened the delegates about the advantages of the mediation as one of the methods of ADR. He highlighted the success of the Bangalore Mediation Center in settling cases through mediation. Further he also stressed on the importance of spreading awareness of the advantages of mediation as an effective ADR system.

Mr. Ravindra, Judge, brought to the forum some important viewpoints:

1. The place of Arbitration is usually not where the dispute arises and thereby the parties may not be able to attend the proceeding. Therefore, Section 20 of the Act should be modified accordingly.
2. He canvassed that Section 34 of the Act provides for an application to set aside an Arbitral Award within three months but this should not be the case. It should be according to Section 5 of the Limitation Act, 1963.

Sri. Abhinav Ramanand, Arbitrator and Advocate, opined that:

1. There is a need for fixing a time frame within which the Civil Court should decided issues arising out of Arbitration.
2. Need for a separate Court for the aforesaid purpose
3. Need for settlement of a matter either partly or wholly, even in the absence of the Counsel for the either parties
4. Need for uniform rules to be framed by each and every High Court for the effective use of ADR's.

M. Sunil Sastry, Arbitrator and Advocate, suggested that:

1. A time parameter along with a need for sharing the Arbitrator Fee uniformly by both the parties should be inserted by needful amendment.
2. Training should be given as per or on the lines of course/ program for Arbitrator and etc., as employed in U.S.A and U.K
3. Further need for technical Arbitrator to know legal procedure failing which, for want

of proper procedure, the entire proceeding may be set- aside.

Apart from these suggestions, the following general suggestions were made by most of the members of the panel as under:

1. The general reasons deterring, persons for opting to ADRs are:
 - a. The lack of sanctity of the proceedings.
 - b. The leniency of the Arbitrators.
 - c. Cost factors.
 - d. Apprehension of Advocate/s and parties.
 - e. Lack of information about ADR, until a party becomes a full-fledged litigant.

After perusing the opinion of the Delegates, the following valuable suggestions are opined:

1. Need for a pre litigation scope for ADR.
2. Need to create awareness amongst the Public and litigants.
3. Need for amendment of the Arbitration and Conciliation Act, 1996.
4. Scope for Training of Arbitrators.
5. Need for co-operation from the Lawyers and parties to litigation to opt for ADR.
6. Need for lesser procedure in ADR.
7. Proactive stand of Litigants, Advocate, Courts.
8. Need for proper channelization of ADR.
9. Accountability of Arbitrator.
10. Cost friendly and Effective.
11. Need for exhausting ADR within a stipulated time parameter.
12. User Friendly.
13. Sanctity of the proceedings should be the same if not more than that of the Courts.
14. There should be a statutory fixation of the Arbitrators' fees and not to leave it to the discretion of the parties to the dispute.

The Roundtable Table concluded with word of thanks by the project co-coordinator to all the delegates

ANNEXURE - 12

Report of the Roundtable Conference

Held on 9/05/2008 At Mumbai

A Roundtable Conference was held on 09/05/2008 in the seminar hall YMCA, Colaba, Mumbai, at 10:30 am. The theme of the conference was alternative disputes resolution - the trends and challenges.

Honorable Dr. Justice D. Y. Chandrachud, Judge Bombay High Court delivered the keynote address. The address of his Lordship was very much informative and encouraging. Addressing the issue from the judge's point of view, he shared a few live examples, which he came across as a sitting judge. He also emphasized on the need for institutional arbitration, for settling huge volume of cases pending in different courts. He recalled the role played by the Bombay high court in the area of ADR. He has also brought on light the exemplary work done by the Maharashtra state legal service authority by way of *lok Adalats*.

Dr. Suresh Mane, Head, Department of Law, and University of Mumbai who presided over the workshop also agreed for the need of institutional arbitration and caution against the unhealthy practices followed in the field of arbitration. According to him the ADR mechanism must be made accessible to the common people and then only it would serve a meaningful purpose. He said that any mechanism of ADR should not be designed only to suit the needs of the multinationals.

Dr. Anil G. Variath, the Faculty in Charge, Law School, SNDT Women's University, Mumbai, who is also the advisor to the project undertaken in Mumbai, spoke in respect of the fact that ADR mechanism other than Lok Adalat are not properly utilized in Mumbai. The Arbitration now, in the absence of institutional Arbitration has become a costly and time-consuming affair.

Ms. Ruchita Salvi, one of the participants in the survey shared the experiences. She said that the court staffs were not co-operative in many courts and many of them didn't know about ADR other than *Lok Adalat*. The most striking fact was that ADR centers were opened in Family Courts and City Civil Court, but were closed down in two to three months.

Dr. Dalip Kumar, Registrar Indian Law Institute and Dr. Sivakumar, Research Professor Indian Law Institute also attended the conference. Both of them explained about the research project undertaken by the Institute and also gave a general idea about the Scheme of Alternative Disputes Resolutions. After the explanation the forum was opened for Public discussion. There was very good participation from the public. The participants were from different walks of life like Judicial Officers, Lawyers, Banking and Insurances Professionals, Law Students, Journalists etc. Many of them actively participated in the open discussion.

Adv. Lovely said there are a few individual lawyers who resort to mediation in Family Court, but there was no mediation centers. Mr. T.M Rajan, Zonal Manager. LIC of India urged that the Arbitration must be made compulsory for all sort of insurance cases. Mr. Andrew Joseph, Dy. Legal Advisor to RBI, suggested the same in banking sector. Mr. T.G. Sundaram Iyer, called for ADR methods in securities and investment sector. Ms. Dhina Vaidya suggested that rules of arbitration should be framed so as to avoid the delay in passing awards.

To sum up the discussion, it can be said that broadly the following points were highlighted by the participants in respect of the conference theme.

1. There is a need for strengthening the Alternate Dispute Resolution Mechanism.
2. The present system of ADR is not serving the real purpose on account of the following reasons: -
 - a. There is lack of awareness among the public at large about ADR mechanism.
 - b. The present system of ADR, especially the Arbitration is highly expensive and time consuming and hence the common litigants cannot resort to the same.

- c. Lack of transparency in Arbitration proceedings and there are no uniform rules of practice.
 - d. In the absence of uniform practice and established norms, the technicalities of C.P.C and other court procedure may also come in the way of Arbitration.
 - e. By and large, the present system of Arbitration has failed to gain public confidence.
3. In the above circumstances, there is an urgent need for setting up Institutional Arbitration in Mumbai.
 4. The Institutional Arbitration will help to bring out uniform practice in Arbitration and would also gain public confidence.
 5. The present system of Ombudsman in Banking and Insurance Industry is to be given statutory recognition.
 6. The Insurance Companies and Banking Companies in Public Sector must be instructed by Government of India to include Arbitration Clause in their Loan documents and policy documents.
 7. The present system of ADR is mostly centered on *Lok Adalat* and *Ad-hoc* Arbitration.
 8. There is lack of enthusiasm and awareness among the Court staff.
 9. There is lack of trained Arbitrators.
 10. The fees schedule of the Arbitrators is exorbitant.
 11. As the fees of the Arbitrator is usually borne by the party at whose instance the Arbitrator is appointed, the awards are often challenged on the grounds of bias.
 12. Lack of uniformity in the fees structure adversely affects the impartiality of the Arbitrator.

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