ADR AND INDIA: AN OVERVIEW

Alternative Dispute Resolution was conceived of as a dispute resolution mechanism outside the courts of law established by the Sovereign or the State. In this sense, it included arbitration, as also conciliation, mediation and all other forms of dispute resolution outside the courts of law, which would all fall within the ambit of ADR. However, with passage of time, the phrase "Arbitration and ADR" came in vogue, which implied that arbitration was distinct from other ADR forms. In arbitration, there is a final and binding award, whether the parties consent to it or not, but in other forms of ADR (which came to be more commonly associated with phrase "ADR") there would be no finality except with the consent of the parties. The protagonists of ADR in this sense claimed that, whereas in arbitration one party may win and the other(s) may lose – may be both may lose-as in a court case, in ADR it is a "win-win" situation because the parties would agree to a disposal of the matter on terms comfortable to each of them;

In ADR, in this sense, it is not the "dispute" or "difference" between the parties that is addressed, but the mindset of the parties, so that with gradual change in the mindset eventually both sides come to a meeting point. The most practiced forms of ADR, in this sense, are "conciliation" and "mediation". In western countries, neutral evaluation is also frequently resorted to but in India this or other forms of ADR have not yet come in vogue. Conciliation and mediation are often used as interchangeable terms although there is a subtle difference between the two. In both the forms, the conciliator or mediator (often known as "neutral") endeavours to bring both sides closer to each other, but in one he plays a more proactive role whereas in the other his role is only to enable the parties to come closer to each other and for that purpose, at times, the word "facilitator" is used instead of the word "neutral";

DM Popat

In India, ADR has an important place because of historical reasons. If one bears in mind our heritage, tradition and culture, one fails to understand as to why arbitration and other ADR methods should not succeed admirably in India. To think of challenging the Panchas' decision was considered a sacrilege and to suspect or to even think of the Panchas being partial was like blasphemy. With this background, it should not be difficult to identify the areas, which are obstacles in our goal to once again reach the ideals of ADR.

ADR in global perspective

The international business community realized that court cases were not only time-consuming but also very expensive. Businessmen always want to make best use of their time, money and energy, with the result that arbitration was preferred to court litigation. Besides, in arbitration, the parties to the dispute usually got a person of their choice to decide the matter and thereby the parties avoided decision-making at the hands of a judge, who may not be conversant with the subject mat-

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ter of the dispute. However, in course of time, even arbitration proceedings became protracted, with the result that the man of commerce internationally resorted to other forms of ADR, viz. conciliation, mediation or neutral evaluation. Throughout the world, efforts are being made to bring about dispute resolution in as informal a manner as possible speedily and with least expense. In certain areas even such ADR was avoided. For example, in insurance, a good part of the risk is passed on to the reinsurer. In some cases, whether the insurer of one insured had to bear the loss or the insurer of the other insured made little difference because both risks were largely covered the same reinsurer. This brought about the concept of *knock-for-knock*, which one finds in vogue even in India – at least in car insurance where it is not the insurer of the insured whose driver is negligent who bears the loss but the loss is borne where it falls.

Emerging trends in preventing court litigation

At the beginning of the British regime, when the courts were established, there were few cases and the concepts like "courts delays" were unknown but by the time the British left us there were arrears in courts which resulted in elongation of the lifespan of any matter in court. Further, with our achieving independence, our legislators kept on passing laws, at times, in a language that was neither simple nor clear, which brought about a spate of litigation contributing to congestion of courts. In 2-3 decades, a stage was reached when everyone started apprehending that our judicial system would collapse because of the arrears and unduly long time taken for disposal of any matter. With high rates of interest, the non-claimant always had a vested interest in delaying the disposal of court cases because the rate of interest to be awarded by the courts in normal circumstances was only 6% simple interest per annum whereas trade and industry had to borrow at two to three times that rate of interest and that too on quarterly compounded basis. Recent amendments in the Code of Civil Procedure, 1908 ("CPC" for short) and provisions for pushing commercial matters to arbitration or other forms of ADR coupled with formation of tribunals for handling specific types of cases has resulted in arresting further elongation of time for disposal of court cases but it will take a few years before the full impact of these changes is known.

Drawbacks and suggested amendments in Arbitration and Conciliation Act, 1996

(i) Arbitration, as practised in India, instead of shortening the lifespan of the dispute resolution, became one more "inning" in the game. Not only that, the arbitrator and the parties' lawyers treated arbitration as "extra time" or overtime work to be done after attending to court matters. The result was that the normal session of an arbitration hearing was always for a short duration and a part of the time, at the beginning, was taken for recapitulating what had happened till that point of time and at the end for fixing the next date of hearing. Absence of a full-fledged Arbitration Bar effectively prevented arbitrations being heard continuously on day-to-day basis over the normal working hours, viz. 4-5 hours every day. This resulted in elongation of the period for disposal. Besides, most of the arbitrations were ad hoc as there were no Arbitration Institutions. With the establishment of such Institutions (for example the Indian Council of Arbitration which was established in 1965), institutional arbitrations made a beginning but it was difficult to bring about any effective change in the culture and mindset of the arbitrators or the lawyers appearing before them. Besides, with long delays in court matters, and consequent vested interest in the non-claimant to delay matters for as long as possible, pending the arbitration, the matter was often taken to the court for taking arbitration off the track on technical grounds. In many cases, the court gave an interim injunction restraining the arbitrators from continuing with the arbitration and took a long time to dispose of the matter finally. Even when applications objecting to the continuation of arbitration on the ground of there being no jurisdiction were dismissed, appeals from such orders of dismissal resulted in further delay. Several technical objections were being taken by the lawyers, which eventually led the Supreme Court of India to observe in *Guru Nanak's* case on 29th September, 1981, as under:

***"Interminable, time-consuming, complex and expensive Court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to arbitration Act, 1940 ('Act' for short). However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has, by the decisions of the Courts been clothed with 'legalese' of unforeseeable complexity".* (See Guru Nanak Foundation v. M/s. Rattan Singh & Sons, A.I.R. 1981 S.C. 2075 at 2076);**

(ii) With the apprehension of courts collapsing under pressure of work, and India's decision to liberalise, it became absolutely necessary to amend or replace its Arbitration Law so as to qualify India to sit in the global village. This led to a meeting of the Prime Minister of India and the Chief Ministers of all the States, on 8th December, 1993, where a Working Group was constituted to suggest a new Arbitration Law for India. The result of that Working Group's efforts was the Bill which eventually became The Arbitration and Conciliation Act, 1996, which was on the UNCITRAL (United Nations Commission on International Trade Law) Model and was widely acclaimed the world over as being an ideal piece of legislation. However, due to absence of Arbitral Institutions and the bulk of arbitrations being ad hoc, even the provisions of the new Act did not show any immediate results because the mindset of the arbitrators and lawyers continued as before;

(iii) In the Indian Arbitration Act, 1940, there was a provision for time period, viz. four months, for giving the award. Experience showed that this period of four months was illusory because in almost every case extension was given and the very act of getting such extension became time-consuming and expensive. The Working Group therefore suggested the deletion of time-frame for giving award but considered it to be a matter of culture and suggested effective steps to be taken in that direction. However, since most of the arbitration matters were ad hoc there was little possibility of any substantial change in handling arbitrations, particularly because the arbitrators, many of whom were retired judges, continued to oblige the parties and their lawyers by giving adjournments under an erroneous apprehension that if they did not do so they would not get new arbitration cases. For this purpose, it is suggested that institutional arbitrations should be encouraged and a full-fledged Arbitration Bar should come into existence so that arbitration proceedings can be heard on day-to-day basis with at least 4-5 hours working on every day.

(iv) Apart from this, the judiciary's approach to the 1996 Act is not consistent. To illustrate, in *Sundaram Finance Ltd. v. NEPC India Ltd.* (reported in AIR 1999 SC 565) the Supreme Court said:

"The 1996 Act is very different from the Arbitration Act, 1940. The provisions of this Act have, therefore, to be interpreted and construed independently and in fact reference to 1940 Act may actually lead to misconstruction. In other words the provisions of 1996 Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act."

Unfortunately, later on, even the Apex Court forgot this replacement of statute and its avowed objects, with the result that the judicial mindset continued to remain as it was under the Arbitration Act, 1940;

(v) It is trite to say that once the parties have removed the ***lis*** (dispute) from the courts of law and agreed that the same would be decided by arbitration and that such decision would be final and binding, it was for the courts to compel the parties to adhere to their agreement and to interfere with the award not to "do justice" between the parties but only for the purpose of ensuring that such private administration of justice did not contravene the basic ethos of the society, viz. "public policy" so that transactions like money laundering, drug trafficking, flesh trading and the like are not able to get the support of such private dis-

posal of justice. Instead, the courts (or at least some of them in some cases) forgot this aspect of the matter and, obsessed by the mindset which was prevalent under the Arbitration Act, 1940, looked at the matter as if it was the courts' bounden duty to ensure that "justice is done" according to the courts assessment and inclination. This is an entirely erroneous approach. The matter would be clear if one looks at it as a game of cricket. Earlier, we were playing five days' cricket match with two innings but then we evolved a single day, limited (normally 50) overs match. Supposing in such a match, on a given occasion, a batsman is wrongly given out by the umpire, then neither the batsman nor, for that matter, the entire cricket community can bring about a reversal of the decision on the ground that injustice was done to the batsman and that he will not get another chance to bat because it is only a single day, single inning match. Consider what would be the chaotic effect if reversal on such a ground were permitted. The only course is that while even a wrong decision is acquiesced into, such umpire is not again appointed as an umpire. Applying the same analogy, an arbitrator's (apparently) wrong decision should be accepted and the injustice between the parties should be tolerated and acquiesced into but such person may not be appointed as an arbitrator thereafter and since this is the function of the parties, the parties would obviously, in their own interest, follow the course of avoiding such an arbitrator. This approach is not only logically concomitant with accepting arbitration as an effective justice delivery system as an alternative to the judicial process by the courts but is the very essence of arbitration and if this essential principle is overlooked, arbitration, as also the other ADR methods, can never be successful. Even modern international commercial trend not only recognizes this but also practices it in the long-term interest of the international business community. The choice is between having protracted delays and heavy expenses for resolving each and every dispute and difference on the one hand or some members of the commercial community having (perhaps) to suffer wrong decisions on the other. It is in the long term interest of the business community as a whole that in such individual cases the decisions appearing to be wrong are suffered instead of making the entire system of effective alternative dispute resolution method lose its very purpose and reaching a level requiring its rejection. Prudence demands that one should not throw away the baby with the bath water;

Undoubtedly, today it is only the Bombay High Court, which has taken the lead in implementing the spirit of Section 89 of the CPC, which provides for several modes for resolution of disputes. But very soon other courts too will follow.

(vi) It is in the interest of the society, community and business that counter-productive dispute resolution process, or for that matter, any process, which does not ensure "value for money" in terms of time, money and energy, is to be avoided, even at the possible cost of suffering some wrong decisions in individual cases. Once this aspect is clearly perceived and understood, it will not be difficult to put arbitration and other ADR methods on the ideal pedestal to which they belong;

(vii) The Supreme Court, despite having recognized this sea change in the law, in *ONGC v. Saw Pipes* (reported in (2003) 5 SCC 705) read the phrase "public policy of India" in a manner which upset the apple cart. There has been serious criticism of this judgment as it is putting the clock back. However, the Supreme Court itself is reconsidering this view and in the meantime an amendment has been proposed whereby the rigorous impact of this judgment would stand largely undone.

Commercial arbitration in India

Before the advent of the British, while at the village level "Panchas" would dispose of a matter as soon as any difference or dispute arose, at the level of towns and cities, the trade bodies effectively dealt with the disputes and differences arising between men of commerce. However, with the growth of trade and commerce, and there being many occasions when all the parties were not from the same locality, disposal of differences and disputes in an informal way became impossible and formal commercial arbitration came into vogue in India. Even today, in Commodity Exchanges, disputes are resolved almost within hours and in some Exchanges, like for example the Cotton Exchange of Mumbai, even appeals are disposed of in 2-3 days. This is so because the matters are

decided by men of commerce having rich experience in the trade and its different aspects and enjoying a reputation for their long standing in the business. It is often said that arbitration is as successful as the arbitrator. Since the arbitrators in Commodity Exchanges are men having a quick grip on the subject, the disposal of arbitrations in such Exchanges are quick and inexpensive - with almost no likelihood of challenge in court. In matters not so simple as disputes and differences between the members of a Commodity Exchange, well-experienced arbitrators, even today, bring about a quick result in an inexpensive manner but it is the need of the day to have trained arbitrators because with the court matters being pushed to arbitration there is bound to be a greater demand for good arbitrators available at reasonable fees.

Emerging trends in online ADR/ODR

As of date, there have been several Internet service providers who have provided platforms for Online resolution of disputes by parties, which they can pursue irrespective of their geographical locations. Quite a few of these have closed down, may be due to their's being a bad business model or probably due to their system/platform not living up to the expectations of the end user. But this certainly does not reflect on the popularity or utility of the concept of ODR (On line Dispute Resolution), in some places also referred to as "eADR" (electronic Alternative Dispute Resolution). This is evident from the fact that the number of service providers has increased this year to over a hundred.

The benefits of ODR are manifold. Being accessible online, the dispute resolution platform can be availed of sitting in one's own office or residence or even while being on the move. Hence, one of the first requirements for marketability of any product or service (especially a new one), that of CONVENIENCE, is met. AFFORDABILITY to the end user is clear from the fact that it avoids unnecessary expense of time and money on travel to, and hiring of, venues for the meetings. Initially it may appear, and it would be true especially in the Indian context (where the neutrals are often not computer-savvy), that the CHOICE factor is not well addressed. However, this is a passing phase. Already we have lawyers, chartered accountants and others in Mumbai, who, as part of their training to become conciliators/mediators, are getting hands on experience in ODR. In addition, the process, being conducted online, affords the parties an opportunity to appoint neutrals from anywhere in the world. This widens their CHOICE rather than restrict it;

Though not widely heard today, even in most metropolitan cities in India, ODR is an idea whose time has come. But we must understand that it cannot be implemented unless we first popularize the different modes of ADR, as also remove the stigmas that arbitration (especially 'ad hoc' arbitration) is gathering. But the night is not too long. Already the Bombay High Court has taken initiatives in that direction. It has not only initiated training programmes for lawyers and judges

INTELLECTUAL PROPERTY RIGHTS AND ARBITRATION

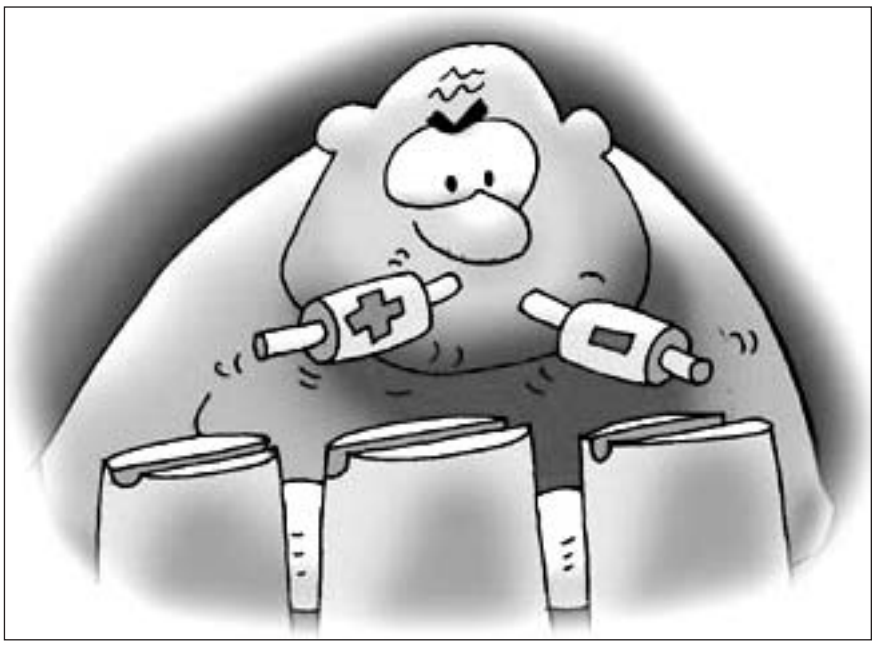
As part of the process of specialization, since it is difficult to get judges experienced in Intellectual Property (IP) rights or matters relating thereto, arbitration has to be a preferred course for dispute resolution because the parties can choose an arbitrator knowledgeable and experienced in the field. However, development in this direction is at an early stage, which does not provide adequate data for any realistic assessment of arbitration in intellectual property related matters. It must be borne in mind that several intellectual property related matters arise between parties who do not have an agreement inter se. In all such matters, only Courts can push the matters to Arbitration. It is too early to assess Courts behavioral pattern on this count because amendments in the CPC are recent.

in several parts of Maharashtra and has even started an ADR course jointly with the Mumbai University (the first batch of which is nearing completion but it is also chalking out plans for implementing mediation, conciliation and arbitration at several courts in Maharashtra. The Bombay High Court itself has separate Panels of Arbitrators and Mediators whose fees are stipulated at very nominal rates;

With India having its own unique place in information & technology and the younger generation being computer-savvy, ODR has already started. Several Arbitration Institutions have framed Rules in this behalf and video-conferencing has been accepted as a workable solution for minimizing the cost. Here again, it is somewhat premature to make any realistic assessment. One can only say with confidence that the use of technology in arbitration and ADR has already made a good start and the trend is that in the near future, it would be utilized to expedite arbitration and other ADR methods as also to minimize the cost.

Management of integrated securitization of IP assets on ADR/ODR

While on the subject of use of information & technology in arbitration and other ADR methods, it would be worthwhile to note that arbitration and ADR can play a meaningful role in several new avenues, including integrated securitization of all types of assets (including but not restricted to intellectual property assets) and the management of such integrated securitization. However, this being a specialized subject, it could be well dealt with independently.



ADR in the new millennium – Indian Context

The most effective initiatives for implementing ADR have probably been found to be in the State of California, USA. There, several modes of ADR have been implemented, some of which are non-binding and some being of binding nature, judicial arbitration, private arbitration, settlement conference (before the Judge assigned to the case), early neutral evaluation, mediation and conciliation. Though some of these concepts are today alien in the Indian context, one will very soon find several of them being implemented in varying forms and degrees in the courts in India.

In partnership suits or even in mortgage suits, accounts are to be taken and the matters are referred by the Court to the Commissioner for taking accounts, who is, on several occasions, incapable of grappling with the issue. There is no reason why the courts should not directly refer such matters to professional Chartered Accountants.

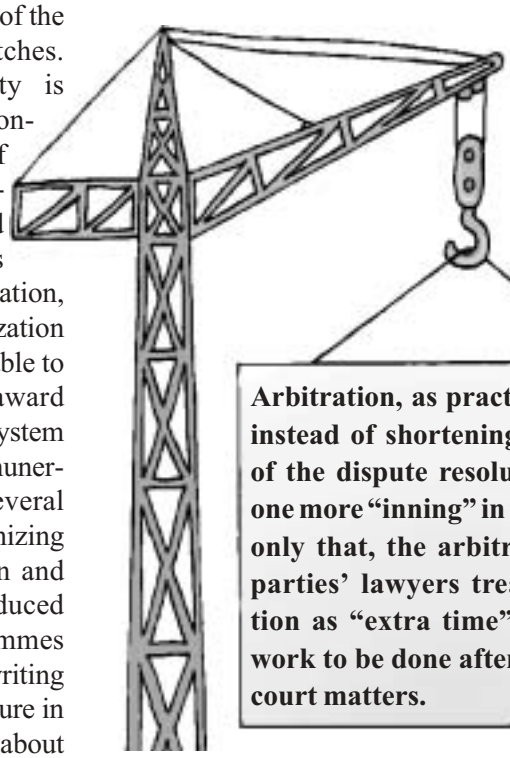
Those who have implemented them in several other countries have already realized the benefits of these available alternatives and India too shall realize their potentials and benefit from making these available to the litigating masses.

Along with popularization of ADR, which has gained statutory recognition by the introduction of the new Section 89 of the CPC and the introduction of the new Information Technology Act, 2000, the passage for implementation of ODR too has been smoothened. The latter statute extends recognition to generation and storage of electronic data as also gives recognition to electronic communication. This is a real shot in the arm for implementation of ODR.

In the days of "time being money", even in games like cricket, we have drifted towards one day,

limited overs matches instead of the five days, two inning matches. India's business community is becoming more and more conscious of minimizing use of time, money and energy in dispute resolution processes and therefore, while arbitration is being preferred to court litigation, there is also a growing realization that in the long run it is advisable to perhaps suffer an adverse award rather than render the entire system of arbitration and ADR unremunerative. Law Colleges and several other Institutions have, recognizing the importance of arbitration and other ADR methods, introduced courses and training programmes and one can clearly see the writing on the wall that in the near future in India ADR methods will bring about amicable settlement between the disputants thereby saving a lot of time, money and energy for the business community as also for the professionals from legal, accounting and other disciplines so that they can concentrate more on constructive work. In this background, conciliation and mediation has a very bright prospect in India and it will be advisable for all professionals, including members of professions like law and accountancy, to get formal training as conciliators/mediators.

As even non-metropolitan areas in India are carrying out experiments (for details see P.C. Rao and William Sheffield's book: ALTERNATIVE DISPUTE RESOLUTION) in arbitration and other ADR methods, one is not only optimistic but realistic in taking the view that arbitration and other ADR methods are bound to get more and more popular and the persons trained at an early date as an arbitrator, conciliator or mediator will definitely have adequate returns with the satisfaction of having Gandhian satisfaction. The father of the nation, Mahatma Gandhiji, as a lawyer, had said, *"I realize that the true function of a Lawyer was to unite parties... A large part of my time during the twenty years of my practice as a Lawyer was occupied in bringing about private compromise of hundreds of cases. I lost nothing thereby - not even money, certainly not my soul"*. It will be found that by the end of this decade the arrears pending in courts that implement ADR have reduced to virtually half. Undoubtedly, today it is only the Bombay High Court, which has taken the lead in implementing the spirit of Section 89 of the CPC. But very soon other courts too will follow.



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Mediation in India

Mediation is one of the several modes afforded by Section 89 of the CPC for resolution of disputes. Going by the strict terms of the provisions of the CPC, viz. Order X Rule 1A, the courts have the power to refer the parties to one of the modes of dispute resolution listed in Section 89, only at the time of the first hearing of the proceedings. This will have a telling effect in a negative way for the simple reason that the first hearing usually takes place after the parties have filed all their pleadings, documents and probably even completed discovery and inspection. By this time, not only has a long time elapsed but the parties too have probably hardened their position in the course of pleadings and documentary evidence in an adversarial manner. For mediation to succeed, it is in fact very essential that it be used as an early intervention tool. Unfortunately, the draftsmen of the new provision in the CPC have not seriously thought this of. It is hence, firstly, necessary to re-position the provisions contained in Order X, Rules 1A, 1B and 1C in a manner that the courts are empowered to refer the matters to mediation as soon as the same are filed;

Another aspect that requires attention is that although the ADR provisions have been introduced in Section 89 of CPC, one finds practical difficulty in implementing these provisions. One should understand and keep in mind the dynamics of potent modes of ADR like mediation and conciliation. Although there is subtle difference between the two, there is no difference in the

process undertaken/deployed for implementation. However, clubbing of mediation and conciliation with arbitration and judicial settlement, which are more in the nature of being modes of dispute adjudication rather than dispute resolution is not appropriate, does indicate some lack of clarity. It appears that in an uncharted area the legislators have simply lifted the provisions of Section 73 of the Arbitration and Conciliation Act, 1996, replaced the word 'conciliator' therein by the word 'court' and, after making some cosmetic changes, positioned them as an omnibus provision for all modes of ADR listed in Section 89 of CPC.

The difficulty created thereby is that the courts are required to formulate the terms of settlement before referring the dispute for resolution to any neutral by any specified mode of ADR, including mediation and conciliation, which two modes are meant to address not only the issues raised by the parties in their pleadings but also their respective underlying interests and concerns. I may remind the readers that the conciliator reaches the stage envisaged in Section 73 of the 1996 Act after going through the whole process of understanding the underlying interests and concerns of the parties and after sitting with them, jointly and/or separately, for explaining the possible terms of settlement. Surely, the courts cannot be expected to do all that. What's more, the elementary question that arises on reading Section 89 is this that if the parties have agreed on the terms of a possible settlement, why should the court not make the additional effort of finalizing those terms itself instead of directing parties to some of the other ADR track for arriving at those very terms of settlement formulated by the court. A revamping of Section 89 is hence necessary.

Role of CAs

There is no reason why such aspects of dispute resolution processes, which can best be handled by Chartered Accountants, are not pushed in their lap. For example, in partnership suits or even in mortgage suits, accounts are to be taken and the matter is referred by the Court to the Commissioner for taking accounts, who is, on several occasions, incapable of grappling with the matter. There is no reason why the courts should not directly refer such matters to professional Chartered Accountants who can, with their knowledge and experience, bring about an early resolution of the differences with minimum expense. The other area where a professional or a Chartered Accountant should look into is privatization or winding up of companies. Winding up, in the traditional method as we have practiced till now, has made it clear that winding up proceedings act like "bhasmasur" – a demon who would reduce everything he touches to ashes.

To cure this, we had, for the last two decades, a law known in common parlance as SICA, i.e. The Sick Industrial Companies (Special Provisions) Act, 1985, but the experience of working of that law has made it clear to us that we must have some alternative methods for handling such cases in its operational aspects rather than letting them remain with judicial or quasi-judicial methods.

There are more than a hundred Internet service providers, who provide platforms for online resolution of disputes by parties, irrespective of their geographical locations.

Although the concept of Company Law Tribunal or specialized agency is correct in principle, the subject matter of winding-up is not ideally suited for judicial or quasi-judicial bodies but it demands handling by qualified and experienced persons without the technicalities of judicial or quasi-judicial proceedings. That is why the concept of privatization of liquidation proceedings was thought of in our country and more so because it is being practiced in some countries. Chartered Accountants, as also the business community, should urge the Government to try this method, to begin with, in some cases so that the services of professional Chartered Accountants are best utilized to solve the problems in areas which have otherwise eluded any effective handling by judicial and quasi-judicial proceedings. A professional Chartered Accountant, because of his training and experience, would, without being caught in the cobweb of technicalities of proceedings, be able to bring about an effective disposal so that the very essence of liquidation would be retained and total destruction of all the assets of the Company in liquidation, as is now being done by *bhasmasur*, is avoided. ■