

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume II Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

EDITORIAL TEAM

EDITORS

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted IMoot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

THE UPRISE OF MEDIATION ADMIST **PANDEMICS**

AUTHORED BY - KUMARI MONIKA

INTRODUCTION

Mediation, a procedure in which there should have at least two parties must not be in the parallel or same decision, try to come up on a mutual ground of agreement with the help of mediators¹. Pandemic has kept forward challenges that could never be predicted by anyone. There have been restrictions on traveling, gatherings etc. due to the posed lockdown every individual was restricted to their homes. In such situation's reaching court was another task and the courts were also shut down. But justice found its way and virtual hearings were organised. The mediation was also done virtually. After successful e-mediation, it has also been observed that it could actually be the future of mediation. Mediation is also seen as a new member in the field of seeking justice since it only came a few decades ago in India and few more years back worldwide. But now it is said to be the first step to the dispute resolution process. There will always be a problem of meeting a person because mediation requires interpersonal relationships but e-mediation gives a cost and time friendly mediation which is better for all the parties opting for mediation².

1. DEFINITIONS

MEDIATION

Mediation is "the process of talking to two separate people or groups involved in a disagreement to try to help them to agree or find a solution to their problems."³

Mediation is also defined as, "A method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties to reach a mutually agreeable solution."⁴

According to Joseph Grynbaum, "a pound of arbitration is worth an ounce of mediation and a ton of litigation."

¹ Cambridge Law Dictionary, available at: <https://dictionary.cambridge.org/dictionary/english/mediation>

² Pinsent Masons, <https://www.pinsentmasons.com/out-law/analysis/remote-mediation-post-pandemic> (last visited September 15th, 2021)

³ *supra* note 1.

⁴ Black's Law Dictionary Eighth Edition, First South Asian Edition 2015

Abraham Lincoln advised, "Discourage litigation. Talk with your neighbours whenever you can. The lawyer who becomes a peacemaker is more likely to be a good person. There will still be enough work to do."

2. CONCEPT OF MEDIATION

There are many reasons why mediation is a better alternative to traditional litigation to resolve the dispute. There are some of the stages involved in the stated process which starts as an Introduction or the Opening Statement in which the parties and counsellors are being introduced with each other. Further, the Joint Session stage is involved where the both parties agree to have a joint session with a pre-decided venue and date. Then, it involves a stage of caucus or Separate Session in which a session precludes individual parties and mediators ask for their rights. The concluding stage involves Closing in which the mediator gives options to both of the parties and recommends the solution to resolve the dispute.⁵

The main aim of involving the stages in the process to show that the mediator has been neutral to the parties, to create the awareness among the parties of how the procedure works or why it is better to choose instead of traditional litigation in the Courts and with this the parties trust the process and the mediator can settle the dispute amicably. It is inferred that after the process the parties are motivated well enough to settle the disputes within themselves and in further time too to deal with negotiations earlier than in Indian Courts.

COVID-19 may prove to be an important circumstance in which it has been seen the change in legal fraternity by the judges, parties, lawyers, counsellors etc. for accepting the proceedings virtually and by this, the process of resolving dispute online with consent has been taken to a higher level than it used to be in earlier times. Probably this change has been acting like this covid-19 cloud has also a silver lining with respect to online resolving disputes. Mediation over the Internet will have the advantage to the mediator and the parties involved to have their dispute mediated just by clicking on their screens though they can be miles apart from each other. Party and lawyer perspectives can be expressed through guided discussion. Separate meetings can be scheduled when the mediator moves the other party's lawyer and other party to another virtual conference room.

⁵ Geetanjali Sethi, India: Mediation: Current jurisprudence and the path way ahead, Mondaq, (June 24, 2020) https://www.mondaq.com/india/arbitration-dispute-resolution/957898/mediation-current-jurisprudence-and-the-path-ahead#_ftn3 (last visited September 13, 2021)

In addition to being convenient and cost-effective, online mediation is an efficient and time-saving method. Costs are not borne by the parties, since the travel fare is not involved in the process and as far as the offline similar mediation resolution is concerned, the parties don't have to be in the queue to wait for their turn. It is possible to accomplish a great deal through this medium. Face-to-face meetings provide the people with immediacy, directness, and complete connection that cannot be replicated in this process. It may also be the case that in an online process an intermediary world of the Internet and Wi-Fi creates a sense of security when we are creating a grainy barrier between the screens.⁶

It has also been evidently seen that confronting Face-to-face can increase the conflict in cases since the emotions are high. Those situations arise frequently in matrimonial disputes, and in family business disputes when frayed tempers and emotions inflict harm on logical decisions. When we adopt this mode, we would dismantle difficulties of distance between parties in the event parties are situated in different countries. People from different places can easily communicate on one platform as the new rash of webinars demonstrates.

While online mediation offers a few advantages, it also carries some cautions. The possibility of hearings being recorded could threaten confidentiality, so service providers need to take precautions, and breachers will be penalized if they do not abide by the rules. The Internet services need to optimize their quality for clear screen displays and uninterrupted feeds to minimise technical glitches. Most importantly, it is the fear that communication done online would exclude the people who can't afford the accessibility of the internet or doesn't know how to operate it or doesn't have any sort of guidance. The denial of justice will result from such exclusion. Therefore, it is suggested that there should have been assistance to the weaker parties and permitted to claim the online mediation option if the State and its courts should encourage the whole and allow them.

THE PRESENT GLOBAL SCENARIO & ITS IMPACT ON MEDIATION

INTERNATIONAL CONTEXT

There are currently four complementary arenas that are interconnected with each other: the

⁶ Sriram Panchu, "Mediation in the age of COVID-19", The Hindu (September 13, 2021; 03:02 PM) <https://www.thehindu.com/opinion/lead/mediation-in-the-age-of-covid-19/article31863358.ece>

foremost is diplomacy of state; the second being where the individuals and institutions cooperate with the government without having any official status or any authority; third which involves public dialogue in which there would be unofficially appointed actors who engages the influential public to get them explained the conflict's nature and hence, to take an initiative and the last includes the civil society which has the objective to promote peace without being violent. For the peace process to be successfully pursued, it must take place in all these spheres (through a comprehensive strategy) and create bridges between them all.⁷

It has been evident that the interconnected institutionalized mediation strategy has worked well in Gambia. In recent years, Africa has seen secessionist tendencies and state separations. In almost all secessionist movements, power and jurisdiction is negotiated with the host state on behalf of their political organizations.⁸

HOW PRESENT SCENARIO IMPACT

MEDIATIO⁹

It is expected that numerous disagreements over the interpretation of force majeure clauses, material adverse effect clauses, and termination clauses will arise considering the virus outbreak. When there has been absence of clauses or they have been drafted inadequately, it would not be a good idea to approach the Court of Law to have the justice.

Some High Courts of India, such as the Bombay High Court, Delhi High Court, Kerala High Court, and many of the international organizations which have already established mediation rules, such as Singapore International Arbitration Centre, London Court of International Arbitration, and International Chamber of Commerce. Parties can use these extensive and comprehensive rules to handle all aspects of mediation, including the procedural aspects. As an alternative, ad hoc arbitration can also be arranged between the parties, which allows them to have a discretion to finalize the procedure which is to be followed during the process.

The Singapore International Mediation Centre (SIAC) has created SIMC COVID-19

⁷ José Pascal da Rocha, "The Changing Nature of International Mediation", Wiley Online Library, (September 13, 2021; 03:20 PM) <https://onlinelibrary.wiley.com/doi/full/10.1111/1758-5899.12683>

⁸ Id.

⁹ Ankoosh Mehta, Durga Agarwal and Maitrayi Jain, "Mediation: The Future of Dispute Resolution", SCC online (September 13, 2021 ; 03:30 PM) <https://www.sconline.com/blog/post/2020/06/25/mediation-the-future-of-dispute-resolution/>

Protocol¹⁰ in response to the advantages and the future prospectus of mediation by providing businesses with a quick, simple dispute resolution tool through fully expedited mediation. With the help of the EU and the UNDP, Georgian International Arbitration Center launched a similar project which allows the parties to refer their disputes for either facilitation or mediation¹¹. Mediation methods are being adopted by various organizations to resolve disputes during and after the pandemic, demonstrating the readiness of these organizations to accept this as a viable solution to disputes.

THE UPRISE OF MEDIATION AMIDST PANDEMIC

Increasing demand of virtual ADR

ADR¹² is an alternative to litigation but pandemic has given it another value. It is not only an alternative now but a preferred source of seeking justice. Virtual mediation has given it a new picture. It is not only cost effective but it is way easier for the mediator and the attorneys and the parties as well. If there is some private conversation to happen the mediator can easily put one party and their attorney to a different virtual room in just one click. It is also easy for the parties as they can be present from miles away. This is reducing the costs and saving time of every individual involved. The parties do not have to wait long hours or travel for miles or go through multiple adjournments. They can avoid multiple visits to the mediation centre and the results are achieved faster than ever¹³. Although there are problems since not all the parties or attorneys are technologically smart. There have been issues of network, availability of resources, immediacy and directness will always be missing. Although there are multiple cases in ADR where parties run high on emotions and the conflicts arise which leads to delay and that can be prevented with virtual mediation. A well organised mediation can also bring an end to a long standing dispute.

Initially, parties reverted to the conventional mediation day schedule, but only on an online platform or platforms. This usually entailed the mediator 'shutting ling' between the parties

¹⁰ Kluwer Mediation Blog, (May 21, 2020) http://mediationblog.kluwerarbitration.com/2020/05/21/international-mediation-and-covid-19-the-new-normal/?doing_wp_cron=1591162205.3996729850769042968750 (last visited September 13, 2021; 03:30 PM)

¹¹ GIAC and Resolve are joining Forces to launch Covid-19 Business Support initiative, GEORGIAN INTERNATIONAL ARBITRATION CENTRE IS, (May 23, 2020) <https://giac.ge/giac-and-resolve-are-joining-forces-to-launch-covid19-business-support-initiative/> (last visited September 13, 2021; 03:30 PM)

¹² Alternative Dispute Resolution

¹³ supra note 6.

in their own virtual breakout conference rooms until a resolution was achieved, or not. Remote mediations, on the other hand, have progressed significantly in the last year and continue to do so.

Indian Judiciary's stand

India is a country with over 45 million pending cases. The number has only increased during the pandemic. Even before the pandemic the Supreme Court was encouraged to pave its way on pre-litigation process i.e., mediation process to resolve the dispute without being entered into court or its proceedings.

The Apex Court of India has laid emphasis on why the mediation has been important specifically in the field of commercial deals held in the case of Afcons Infrastructure Case¹⁴, and stated that, "this type of Alternative Dispute Resolution (ADR) is ideal for parties faced with complex issues that they are willing to resolve through negotiations."

Many litigators have been very sceptical about mediation since there were informal mediation sessions that were unsuccessful. A litigant walk in the court with a mindset of a win or a loss therefore, mediation was not a process that was suitable to most¹⁵.

The pandemic came with an opportunity and as a game changer for ADR. With the increasing number of cases and restrictions it came up as the most efficient approach.

In the India-Singapore mediation summit, CJI being the keynote speaker, compared mediation with Mahabharat and stated that in India, the process of mediation is not new, instead it has its deep roots in history. It has always been a part of the country's culture. From Mahabharat to the times of monarchy and till today. Earlier as well, there had always been a mediator to solve the disputes between the parties. During Mahabharat, Lord Krishna had acted as a mediator.

CJI Ramana also stated, that mediation can actually reduce the pendency, save resources and also give litigants more control over their dispute resolution process.

¹⁴ Afcons infrastructure and Ors. v. Cherian Verkey Construction and Ors, 2010 (8) SCC 24.

¹⁵ Eshwar Agarwal et.al., THEWEEK, (July 09, 2020, 21:44 IST) <https://www.theweek.in/news/india/2020/07/09/opinion--we-need-alternative-dispute-resolution-mechanisms-in-in.html> (last visited September, 15th 2021)

It has been observed that the luxurious parties try to frustrate the judicial system and contribute to the delay of the judgment which is another thing that can be prevented.

The pandemic has caused a huge disruption to the economy and industries worldwide, therefore, the development of ADR is evident. There is a risk of neutrality of the mediator, there can be moral dilemmas that a mediator can face.

Amitabh Kant¹⁶, stated that, “The policy action plan for Online Dispute Resolution (ODR) will be a rapidly growing system for delivering efficient and cheap justice, particularly in small and medium-value matters.”¹⁷

Mediation in other countries

ADR was introduced way back in other countries as compared to India. The USA, Europe, and other Asian countries became familiar with it before India. There has been significant growth since then. Singapore being another nation where mediation came a few decades ago has even introduced a summit which is signed by 34 nations. India and Singapore being the first nations to do so.

If we compare to the USA, Indian advocates are more conservative when it comes to mediation. They see mediation as something that is depriving them of income and puts their clients at risk of losing. The same was the case when mediation was newly introduced in the USA.

However, in Europe and Asia mediation has a firm hand since many MNCs also take the approach of mediation being a less expensive and less time-consuming process¹⁸.

Even in India, mediation is now coming as an awareness since pandemic and the litigants are becoming more familiar with it. Pandemic has proven to be a gamechanger for mediation. Like every other country India is facing its initial dilemma with a new form of justice but

¹⁶ Chairman of Niti Aayog.

¹⁷ Amisha Mathur, IndiaToday, (July 18, 2021 at 02:39 IST) <https://www.indiatoday.in/india/story/amicable-dispute-settlement-is-part-of-indian-cultural-ethos-says-cji-nv-ramana-1829436-2021-07-18> (last visited September 15th, 2021)

¹⁸ World law alliance, <https://worldlawalliance.com/mediation-in-india-as-compared-to-mediation-in-united-states-of-america/> (last visited September, 15th 2021)

with time it is now coming to the realisation that mediation could actually be the future of the nation for easy and fast dispute resolution. As India has a lot of pending cases and mediation might only help the nation reduce the number.

Conclusion

India is a developing nation, since independence it has come a long way even in the field of judiciary. There have been several changes all along. ADR is still a newly introduced phenomenon in the nation. Although the pandemic has been evidently seen to play a vital role in developing awareness and growth of mediation. It can be stated that there has been a flipping of the process of dispute resolution due to the pandemic. Nobody could think the pandemic may after all have a silver lining.

Mediation has come very far and still has a long way to go. The litigants can become more aware of the benefits and the approach. It is also becoming a more attractive approach since it is very convenient for the people who live in different countries they can easily be reached virtually and do not have to travel again and again.

It does require a better implementation of protocols and regulations. But it is not an impossible approach.

The current pandemic has changed the way people think and interact; the dispute resolution has a new face to it rather a developed face¹⁹.

There are many myths about mediation due to which the litigants do not favour it but the apprehensions may soon fade once it is realised that mediation is meant to supplement (not replace) the judicial process, that it is extremely adaptable to diverse situations, and that competence in India is already increasing at a rapid pace.

¹⁹ Riya Dani, VIA, Mediation & Arbitration Centre, (August, 2021) <https://viamediationcentre.org/readnews/NDMz/COVID-19-and-Alternative-Dispute-Resolution> (last visited September, 15th 2021)