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Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmanagarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

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Assistant professor of Law

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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.

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EFFICACY OF MEDIATION IN BUSINESS
CRISIS MANAGEMENT:
LESSONS FROM AROUND THE WORLD

Authored By-Divyanshu Bhardwaj

Table of Contents

INTRODUCTION

ADVANTAGES OF COMMERCIAL MEDIATION

LESSONS FROM AROUND THE WORLD

The United States of America

European Union

Australia

SINGAPORE CONVENTION LEADING THE WAY FORWARD

CONCLUSION

Introduction

In the business world, economic collapse owing to lockdowns has been a common phenomenon in most countries across the world. It has resulted in an unprecedented number of lawsuits, many of which revolve around contractual concerns and, indeed, a special legal principle known as force majeure in the event of a pandemic. These issues will probably linger in the judicial system for years, remain unsolved, and finally, when disposed of will leave behind a massive body of case laws on the subject where none existed before. The question thus arises, is there an alternative that can prevent this. One would be prompt to answer that the disputes can be arbitrated. However, arbitration itself is facing the parallel issue of delays due to prolonged litigation involved in the execution of awards.

In the course of business, companies do not see the benefit of spending years litigating on force majeure issues in clogged and overburdened courts, when it is possible for them to change course, particularly in the emerging digital economy, and go straight to the heart of their respective interests. Resultantly, most stakeholders have resorted to adopting easier mechanisms to resolve the crisis and move on to put their entire focus on making profits. Amidst this crisis, mediation comes as a messiah and offers a simple technique to suit the business time rhythms rather than the courts. In the face of a crisis, the mindset of parties has shifted and the tendency to sit on the dispute together, discuss, negotiate, and even compromise to some level to end the scuffle. Contractual disputes revolve around the breach of obligations on either or both parties. It is very likely that most corporations have not been able to keep up with their commitments in the middle of the present health crisis. Mediation is the best way to encourage consensual settlement, and a breaching party that pays damages through consensual dispute resolution should ideally not be put in a worse position when the opposite party has also been under the radar of breaches.

Advantages Of Commercial Mediation

One cannot neglect the advantages of Commercial Mediation while assessing its effectiveness in resolving corporate crises. Lockdowns were imposed in the majority of countries as a result of Covid-19, causing huge business setbacks all across the world. Furthermore, most traditional systems of dispute resolution have become less accessible, yet mediation has proven to be a viable and appealing alternative. As more and more aspects of life and business move online, it makes sense to seek dispute resolution online as well. The comparative advantage of

mediation, which is fundamentally a flexible and adaptable technique, is found here. It is easier for this conflict resolution process, in which parties retain decision-making power, to go online with the cooperation of the parties than it is for courts. Mediation has the advantage of being able to be performed in whatever manner the parties like, including through live screen or telephone conference.

In such an uncertain and unprecedented era, mediation has provided clarity to the parties concerning the fate of their disputes.¹ The procedure's efficiency is valuable in itself, especially as it is impossible to predict the length of the case's prospective litigation due to lockdowns, backlogs, and other factors. With so many disputed legal issues currently arising as a result of the pandemic's disruptions, the resolution of which is unpredictable, it is sometimes more desirable to focus on economic interests and partnerships in business conflicts coming forward. As a result, another benefit of mediation is that it enables innovative solutions to emerge, as well as the consideration and prioritization of economic interests. Finally, mediation is a more relaxing, adaptable, and supporting technique. This could be done in a secure and comfortable environment for clients, with flexible scheduling and cost savings. Even when the courts open, the prospect of having to travel and attend hearings, fearing a second wave, or, on the other hand, wondering whether further hearings would be postponed, and when the dispute will truly be settled, is frightening in and of itself.

Lessons From Around The World

A business group based in Odisha, India, supplying medical equipment's, realized that one of its customers, a newly opened hospital, owed crores of rupees. There was neither proper paperwork nor witnesses to back up the several sale transactions. The sellers were small-business owners having a long-term history of doing business well with the hospital. When the case went to mediation, the mediator assisted the suppliers in realizing that foregoing the outstanding debts or going to court to confront the hospital owners would be comparable to betraying their long-term faith in the hospital. It would be counterproductive to the hospital's new beginning as well. Finally, the new hospital paid a proportion of the dues, and arriving at an understanding, both parties agreed to a profitable supply contract with a smoother reconciliation mechanism moving forward. In addition, the hospital provided stall facilities on campus without any charges for the coming four years in order to uphold and reaffirm the suppliers' gesture of goodwill. As a result, mediation was more productive than arbitration in

¹ *The Impact and Lessons of the Covid -19 Crisis*, International Mediation Institute (Oct. 19, 2021, 6:19 am), <https://imimediation.org/>.

reaching a settlement. Even though mediation is a long-standing practice inside the rural administrative structure, it is not yet the most often used method for resolving civil disputes.² Now, let us discuss how mediation has been the go-to-go mechanism in some other countries.

The United States of America

According to the American Arbitration Association, more than 85 percent of all mediation cases resulted in a settlement. As per a 2003 report by AAA, a stream of evidence has consistently indicated that the rapid, fairly priced, and readily available alternative to the judicial process that ADR offers has enormous corporate value.³

Various multinational corporations, like The Coca-Cola Company, Bell South Corporation, Bank of America Corp., General Mills Inc., and others, have established Conflict Management Programs that use mediation rather than litigation. According to the report of a Cornell University-sponsored poll of 1,000 U.S. firms, 19% of survey respondents said they used mediation regularly, 30% said they used it seldom, and 43% said they used it occasionally.

European Union

The EU's involvement in the Singapore Convention would allow European businesses to take advantage of mediation by making Mediated Settlement Agreements (MSAs) for international commercial disputes easier to enforce.⁴ Mediation's flexible and less expensive nature has long been embraced by sophisticated European business executives, who know that it is well suited to enterprises of various sizes and spending capacities. Mediation's core idea of resolving conflicts in a non-adversarial manner aid in maintaining goodwill between parties.

Australia

According to the Australian Bureau of Statistics (ABS), the COVID-19 study is expected to have the following negative business impacts:

- Over the next two months, seven out of ten businesses expect reduced cash flow (72%) and decreased demand for goods and services (69%).
- Two-thirds of businesses reported lower demand for goods and services (64 %), as well as lower cash flow or turnover (66 %).

As per the study, Mediation would be proved way more effective in resolving the business crisis as it provides rapid and cost-effective resolutions, can even be negotiated without the

² Vijayalakshmi Sridhar, *Mediation on the Table* (2021) (Oct. 19, 2021, 19: 18 pm), <https://www.businesstoday.in/magazine/management/story/mediation-on-the-table-294656-2021-04-29>

³ Ronan Feehily, *Commercial Mediation Agreements and Enforcement in America*, 48 *The Comparative and International Law Journal of America*, 298, 305–51 (2016).

⁴ Chloe Lee, *What's Next for International Mediation in Europe?* International Mediation Institute (Oct. 18, 2021, 19: 18 pm), <https://imimmediation.org/2021/02/01/whats-next-for-international-mediation-in-europe/>.

help of a third party or with the help of a neutral third-party mediator who can help them reach an agreement and above all, there are fewer constraints on the options open to parties.⁵

Singapore Convention Leading The Way Forward

The United Nations adopted a Convention on International Settlement Agreements Resulting from Mediation which is most commonly known as the “Singapore Convention” on 20th December 2018⁶, to recognize and enforce the settlement agreements arrived at via mediation and to expand their use. Along with 45 other states, Turkey signed the Singapore Convention on the very day it was kept forward for signature i.e., 7th August 2019. Until today, fifty-five states have signed the Convention.⁷ Along with Turkey, Australia, Ecuador, Honduras, the Philippines, Samoa, Saudi Arabia, and Singapore have already ratified the convention.

The Convention intends to create a structure of international settlement agreements reached through mediation, allowing for the development of amicable international economic relations. The convention has given an efficient system for the execution of such agreements through its elaborate 16 articles. As per Article 1, the convention concentrates on agreements aimed at resolving a commercial dispute between two parties who are both incorporated and operating in different states. Also, conflicts can be resolved through mediation agreements, when the participants' places of business are not in the same state as the state in which an essential part of the settlement agreement's commitments is serviced or the state that is most closely linked with the agreement's subject matter.⁸

The Singapore Convention has an important role in global economic relations as with the help of its provisions, the commercial international mediation settlement agreements can be enforced in member states without necessitating a full court proceeding. This will save both the time and money of the parties, provided that enforcing the agreement should not be against the public policy of that country and that the laws of that country should allow settlement by the mediation of the subject matter of that particular dispute, as specified under Article 5. According to Article 3 of the convention, member states need not change their procedural rules to mediation settlement agreements, rather, they just need to put those rules in line with the provisions of this convention.

⁵ Australian Bureau of Statistics, <https://www.abs.gov.au/statistics/economy/business-indicators/business-conditions-and-sentiments/jul-2020> (last visited Oct 19, 2021).

⁶ United Nations Convention on International Settlement Agreements, <https://uncitral.un.org/> (last visited Oct. 17, 2021).

⁷ Singapore Convention on Mediation, <https://www.singaporeconvention.org/> (last visited Oct. 18, 2021).

⁸ William Herbert, *International Commercial Mediation*, 45 THE INTERNATIONAL LAWYER, 98, 111–23 (2011).

States and economic cooperation organisations can sign, ratify, and join the treaty. When a country ratifies the Convention, it is considered to have backed UNCITRAL's (United Nations Commission on International Trade Law) aim of removing legal barriers to international trade. As more and more states become party to the Singapore Convention, it will ensure that mediation is more frequently preferred for the settlement of international commercial disputes due to its fast and flexible process.

There are some notable characteristics of the Convention on Mediation which has been enumerated below:⁹

- Either side to a settlement agreement can seek direct implementation of the agreement in the domestic courts of a Member State wherever assets are located, and even use such settlement agreement to show that the matter has already been resolved by judicial means.
- Enforcement will take place following the enforcing State's rules of procedure.
- When trying to obtain enforcement of a settlement agreement, the party depending on it has to exhibit that it was attained through mediation. It can be done by either displaying (a) the signature of the mediator on the concluding agreement, (b) a signed document by the mediator denoting that the process of mediation occurred, (c) an authentication from the organisation that conducted the mediation, or (d) some other evidence appropriate to the relevant enforcing authority.

The convention will apply to all settlement agreements that involves member States as well as their agencies unless the state has expressly declared the non-application of the convention. In summary, the Mediation Convention makes things simpler to implement settlement agreements made through mediation, and after it enters into force in a significant number of jurisdictions, it will increase enforcement options by giving easy access to courts wherever important assets or enterprises are located. As a result, it adds to the international dispute resolution toolkit for cross-border trade a valuable instrument.¹⁰

⁹ *Mediation of Investor-State Conflicts*, 127 HARVARD LAW REVIEW, 2543–64 (2014).

¹⁰ W.T Coombs, *Global Crisis Management—Current Research and Future Direction*, 4 Journal of International Management 432-437 (2018).

Conclusion

Mediation is a cost-effective and time-saving method of dispute resolution which encourages parties to reach a mutual agreement. It is becoming more popular in commercial disputes especially as without risking their business relationship, parties can resolve the disputes cordially in front of the mediator while maintaining confidentiality between the mediator and the two parties.

Mediation must almost always be the first step in settling a conflict without a doubt. Mediation is a rapid and cost-effective procedure whereas arbitration or litigation involves longer, more emotionally, and costly taxing. Most significantly, mediation allows the parties to reach a mutually agreed settlement under terms and conditions established by the parties in a conflict. The arbitration tribunal or court shall, however, decide on the issue, and the parties have a legal duty to abide by that decision when a case is arbitrated or litigated.

The Singapore Convention intends to increase the use of mediation in international trade by making settlement agreements more effective. Mediation has been proven to be the most effective and greatest strategy for resolving business crises in several countries due to its multiple benefits. As India is also a signatory to the convention, we can expect improvement in the corporate performance of the country. Disputes are bound to occur; they cannot be put at bay. However, simpler resolution can increase the ease of doing business.

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