LL.B. VI Term

LB-602: Alternative Dispute Resolution

Reading Materials Prepared by

Usha Tandon
Sunanda Bharti
Ashish Kumar
Neelam Tyagi

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LB-602 – Alternative Dispute Resolution

Guidelines for Teaching

Teachers are advised to follow a structured rhythm while teaching the ADR course to ensure a logical progression in the students' understanding. The course must begin with negotiation, followed by mediation, arbitration, and finally Lok Adalat.

Negotiation serves as the foundation for all other ADR mechanisms, as its principles are integral to mediation, arbitration, and even Lok Adalat proceedings. By teaching negotiation first, students will develop a strong grasp of the skills and concepts that are common threads running through the entire ADR framework. This sequence must be adhered to for consistency and effective learning outcomes.

Objectives of the Course

With the introduction of Section 89, CPC and various amendments in the Arbitration and Conciliation Act 1996, alternative dispute resolution methods have been given a primary role in reducing arrears and promoting fast and affordable settlement of disputes. This course has two primary objectives. First is to provide the students with the theoretical understanding of the concepts and the legal provisions relating to ADR. Secondly, the course is geared to train the students in the practical skills required to effectively participate in the ADR processes. It is desirable that the course is delivered by a team of trained teachers for individualised learning and supervision.

The teaching methods to be employed by teachers include lectures, use of multi-media, simulation exercises, role plays, field visits, viva type one on one interaction, feedback and other CLE methods of teaching and learning. The course focuses on instilling the following practical skills among the students: Communication including verbal, non-verbal, body language and para-linguistic; Case and Dispute Analyses and Strategy; Distinguishing interests from rights; Persuasion; Skills of mediators; Drawing agreements; Negotiation skills; Ethical dilemmas.

Learning Outcomes: At the end of the Semester, the students will be able to

- Describe, analyse and apply the substantive rules of ADR
- Choose appropriate ADR
- Improve upon the communication potential
- Draw settlement agreements
- Choose appropriate negotiation strategy
- Understand through simulation and Role Play, the Mediator’s skills
- Solve the ethical dilemmas
- To develop fundamental skills necessary for effective dispute resolution.

Required Readings for Overall Course: (Material which has not been supplied but is nonetheless important for the course, and should be read)

1. Mediation Act 2023
2. The Arbitration and Conciliation Act 1996 as per latest amendment/s (for an overview)
3. Section 89, Code of Civil Procedure
4. Legal Services Authorities Act, 1987
5. C. Markanda, Law Relating to Arbitration and Conciliation, pp.1-8, (8th Edn. 2013) LexisNexis
6. 222nd Report of the Law Commission of India on Need for Justice-dispensation through ADR, etc. (2009)
7. Justice Manju Goel, 'Successful Mediation in Matrimonial Disputes' available at http://www.delhimediationcentre.gov.in/articles.htm

Suggested Readings for Overall Course: (Material which has not been supplied but will improve overall understanding of the course)

1. 'Mediation Manual, Mediation and Conciliation Project Committee, Supreme Court of India, Delhi <https://mcpc.nic.in/pdfs/20072021_05.pdf>

2. Thomas P Valenti and Tanima Tandon, Mediation in India-Practical Tips and Techniques, in Shashank Garg (ed.) Alternative Dispute Resolution, The Indian Perspective 187-248 (OUP 2018).

4. *Dayawati v. Yogesh Kumar Gosain,* 243 (2017) Delhi Law Times 117 (DB), Full text available at:http://lobis.nic.in/ddir/dhc/GMI/judgement/17-10-2017/GMI17102017CRLRF12016.pdf

5. Vikramajit Sen and Satyajit Gupta, The Concept of Seat in International Arbitration-Developments in India, in Shashank Garg (ed.) Alternative Dispute Resolution, The Indian Perspective 187-248 (OUP 2018).

6. Sheila Ahuja, International Arbitration with an Indian Connection, in Shashank Garg (ed.) Alternative Dispute Resolution, The Indian Perspective 249-388 (OUP 2018).

7. Tameem Zainulbhai, Justice for All: Improving the Lok Adalat System in India, 35(1) Fordham International Law Journal (2016) pp. 248-278. Full text available at: https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2422&context=ilj

MODULES A to F--

A) Introduction to Alternate Dispute Resolution: Differences between Litigation, Arbitration, Conciliation, Mediation and Negotiation, Online Dispute Resolution

Supplied Readings:

1. Need for Alternatives to the Formal Legal System (Special Address by Muralidhar S. in International Conference on ADR, Conciliation. Mediation and Case Management Organised by the Law Commission of India at New Delhi on May 3-4, 2003). 1

2. 'Comparison of Adjudication with ADR', Mediation Training Module of India, Chapter 4 (2011) SC of India. 8

3. Supreme Court of India, *Mediation Manual of India*, 'Development of Mediation in India' (Chapter I, 1-11) 11

4. *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. P. Ltd.* (2010) 8 SCC24.. .19

5. NITI Aayog, 'Designing the Future of Dispute Resolution: The ODR Policy Plan for India' (October 2021) 7-9 .... .35

6. Iram Majid, 'Online Dispute Resolution Today and Tomorrow' in Mediation: Theory to Practice (excerpts from Chapter 13, 361–398)...................................... ...38

B) Communication – Introduction, verbal, non-verbal communication, para linguistics

Supplied Readings:

1. Creating Effective Communication in Your Life by Randy Fujishin, Creating Communications: Exploring and Expanding your Fundamental Communication Skills, 2nd Edn., Rownman Littlefield Publishers. 2009, pp 1-17). 55

Suggested Readings:

1. Iram Majid, 'Effectual Communication: Stepping Stone of Success for Mediation' in Mediation: Theory to Practice (Chapter 10, 244–293).

Simulation Exercises/Class Energisers –at least 2

C) Negotiation- Introduction, Style and Strategies

Supplied Readings:

1. **Negotiation** 64
   Exercise: The negotiating style profile
   Predominant Negotiation Styles
   Development of conflict
   Negotiating techniques/Strategies
   Eight critical mistakes
   Being assertive in negotiation

Exercise Questionnaire: opinions and attitudes

Negotiation: the art of negotiating

2. **The Seven Elements of Negotiation** ………………………………………….. 87

Suggested Readings:

Fisher, R., Ury, W., & Patton, B. *Getting to Yes: Negotiating Agreement Without Giving In* (Chapters 1-2)

Simulation Exercises –at least 2

D) Mediation: Difference between mediation/ conciliation and other ADRs, Mediator's Skills and Roles, Stages of Mediation in detail, Strategies and Techniques, Role of Silence/Apology, Handling Emotions/Impasse, Drafting Mediation Settlement Agreement, Ethical Dilemmas in Mediation, Communication in Mediation, Criminal Law and Mediation, Overview of the changes that would result once the Mediation Act, 2023 comes into force fully.

Supplied Readings:

1. Supreme Court of India, *Mediation Manual of India*, 'Concept of Mediation' (Chapter III, 16–19)……………………………………………………………….89
2. Supreme Court of India, *Mediation Manual of India*, 'The Process of Mediation' (Chapter V, 24). ……………………………………………………………..93
3. Supreme Court of India, *Mediation Manual of India*, 'Stages of Mediation' (Chapter VI, 25–35)……………………………………………………………….94
4. Supreme Court of India, *Mediation Manual of India*, 'Role of Mediators' (Chapter VII, 36–41)……………………………………………………………….105
5. *Dayawati* v. *Yogesh Kumar Gosain,* 243 (2017) Delhi Law Times 117 (DB) ……………………………………………………………………………………..111
6. United Nations Convention on International Settlement Agreements Resulting from Mediation, 2018 (Singapore Convention on Mediation)……………………………………………………………………….119

Suggested Readings:

1. Shriram Panchu**,** Mediation Practice Law - The Path to Successful Dispute Resolution Pages 90-111, 2nd Edition, LexisNexis 2015. (on the 'How to' of conducting Mediation and essentials of a mediation settlement agreement)

Simulation Exercises –at least 2

E) Arbitration

NOTE: The Arbitration Module is just for conceptual introduction/understanding of the process of Arbitration, drafting of arbitration clause, getting to know the recent changes in the Indian Arbitration Act, 1996 and knowing the differentiation of Arbitration with other form of ADR.

(a) Overview of A & C Act, 1996

(b) Overview of International Rules

(c) Drafting Arbitration Clause

Supplied Readings:

1. Aman Hingorani, "Alternative Dispute Resolution, including Arbitration, Mediation and Conciliation", All India Bar Examination Preparatory Materials 124

2. Duties of Arbitrator by P.C. Markanda, Naresh Markanda & Rajesh Markanda, Advocates, Supreme Court of India. 128

3. 2015 Amendment to the Arbitration and Conciliation Act, 1996. 154

4. 2019 Amendment to the Arbitration and Conciliation Act, 1996. 158

5. Excerpts from Drafting Dispute Resolution Clauses A Practical Guide, American Arbitration Association. 164

Suggested Readings:

1. Redfern, A., & Hunter, *M*. Law and Practice of International Commercial Arbitration.

Simulation Exercise on Drafting Arbitration Clause (at least one practice)

F) Visit to Delhi Mediation Centre/ Lok Adalat/ Arbitration Centre.

Discussion on Legal Services Authorities Act, 1987

The students shall have to prepare the reports according to the experience gained during field visit-whether it is to Mediation Centre/ Lok Adalat/ Arbitration Centre.

EXAMINATION

As per established policy, there is no supplementary exam for the internal assessment component of this course.

End-semester written examination--- 50 marks (2 Hours)

Oral/practical exercises- 50 marks

• Mediation (10 marks)	• Attendance 96 – 100%=10 marks 91 – 95% = 8 marks 86 - 90% = 6 marks 81- 85% = 4 marks 76 – 80 % = 2 marks 70%-75%= 1 mark
• Negotiation (10 marks)	
• Arbitration (10 marks)	
• Field Visit Report (10 marks)	

Need for Alternatives to the Formal Legal System

[Special Address by Dr. S.Muralidhar, Part-time Member, Law Commission of India in an International Conference on ADR, Conciliation, Mediation and Case Management Organised By the Law Commission of India at New Delhi on May 3-4, 2003.]

The need for alternatives to the formal legal system has engaged the attention of the legal fraternity, comprising judges, lawyers and law researchers for several decades now. This has for long been seen as integral to the process of judicial reform and as signifying the `access-to justice' approach. In their monumental comparative work on civil justice systems, Mario Cappelletti and Bryant Garth point out that the emergence of the right of access to justice as "the most basic human right" was in recognition of the fact that possession of rights without effective mechanisms for their vindication would be meaningless.[1] It was not enough that the state proclaimed a *formal* right of equal access to justice. The state was required to guarantee, by affirmative action, *effective* access to justice. Beginning about 1965, in the U.S.A, the U.K. and certain European countries, there were three practical approaches to the notion of access to justice. The 'first wave' in this new movement was legal aid*;* the second concerned the reforms aimed at providing legal representation for 'diffuse' interests, especially in the areas of consumer and environmental protection; and the third, "the `access–to–justice approach,' which includes, but goes much beyond, the earlier approaches, thus representing an attempt to attack access barriers in a more articulate and comprehensive manner."[2] The last mentioned approach "encourages the exploration of a wide variety of reforms, including changes in the structure of courts or the creation of new courts, the use of lay persons and paraprofessionals both on the bench and in the bar, modifications in the substantive law designed to avoid disputes or to facilitate their resolution, and the use of private and informal dispute resolution mechanisms. This approach, in short, is not afraid of comprehensive, radical innovations, which go beyond the sphere of legal representation."[3]

In India too the need to evolve alternative mechanisms simultaneous with the revival and strengthening of traditional systems of dispute resolution have been reiterated in reports of expert bodies. Reference in this context may be made to the Report of the Committee on Legal Aid constituted by the State of Gujarat in 1971 and chaired by Justice P.N. Bhagwati (as he then was) which *inter alia* recommended

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[1] M. Cappelletti and B. Garth, "Access to Justice - the worldwide movement to make rights effective: a general report" in M. Cappelletti and B. Garth (eds.), Access to Justice–A World Survey, Volume I, Sijthoff & Noordhoff – Alphanaanderijan (1978), 5 at 8-9. This shift occurred, according to the authors, simultaneous with the emergence in the twentieth century of the "welfare state".

[2] *Id.* at 21. The authors explain (at 49): "We call it the `access-to-justice' approach because of its overall scope; its method is not to abandon the techniques of the first two waves of reform, but rather to treat those reforms as but several of a number of possibilities for improving access."

[3] *Id.* at 52

adaptation of the `neighbourhood law network' then in vogue in the U.S.A; the *Report of the Expert Committee on Legal Aid: Processual Justice to the People,* Government of India, Ministry of Law, Justice and Company Affairs (1973) (*1973 Report*) which was authored primarily by its Chairman Justice V.R.Krishna Iyer (as he then was) which while urging ADR (*lok nyayalayas*) in identified groups of cases exhorted the preservation and strengthening of gram nyayalayas; and the Report of two-member Committee of Justices Bhagwati and Krishna Iyer appointed to examine the existing legal aid schemes and suggest a framework of a legal services programme that would help achieve social objectives [*Report on National Juridicare Equal Justice – Social Justice,* Ministry of Law, Justice and Company Affairs (1977) (*1977 Report*)]. The last mentioned report formulated a draft legislation institutionalising the delivery of legal services and identifying ADR, conciliation and mediation as a key activity of the legal services committees. Each of these reports saw the process of improving access to justice through legal aid mechanisms and ADR as a part of the systemic reform of the institution of the judiciary coupled with substantive reforms of laws and processes. The present have of legal reforms have only partly acknowledged and internalised the recommendations in these reports. Still, the implementation of the reforms pose other kinds of challenges. The attempt through the introduction of S.89 of the Code of Civil Procedure 1908 (CPC) is perhaps a major step in meeting this challenge.

The reasons for the need for a transformation are not much in dispute. The inability of the formal legal system to cope with the insurmountable challenge of arrears argues itself.

The Parliamentary Standing Committee on Home Affairs found that as of 2001, there were in 21 High Courts in the country, 35.4 lakh cases pending.[4] Of the 618 posts of High Court judges there were 156 vacancies as on January 1, 2000.[5] The position in the subordinate courts was even more alarming. There was a backlog of over 2 crore (20 million) cases for as long as 25 to 30 years.[6] Of these, there were over 1.32 crore (13.2 million) criminal cases and around 70 lakhs (7 million) civil cases.[7] The total

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[4] J. Venkatesan, "Panel concern over backlog in courts", *The Hindu*, New Delhi, March 10, 2002, 12: "The Committee was particularly disturbed by the fact that cases were pending for over 50, 40 and 30 years in the High Courts of Madhya Pradesh, Patna, Rajasthan and Calcutta. And more than 5 lakh cases were pending for over 10 years – 2 lakhs in Allahabad, 1,46,476 in Calcutta 28,404 in Bombay and 5,050 in Madras."

[5] Indian Law Institute, Judicial System and Reforms in Asian Countries: The Case of India, Institute of Developing Economies, Japan External Trade Organisation (IDE-JETRO), (March 2001) 39.

[6] *Ibid.*

[7] *Id.* at 35.

number of subordinate judges[8]in all the states and union territories in the country, as of September 1999 was 12,177.[9]

Despite this severe strain on resources, the performance of the subordinate judiciary has been remarkable. A joint study by the Indian Law Institute and the Institute of Developing Economies, Japan in March 2001, revealed that in a single year (1998) the number of cases disposed of by the district and subordinate courts was 1.36 crores (13.6 million).[10] At the end of every year, however, the pendency of cases remains at the figure of around 20 million, which means the subordinate judiciary is running hard to remain at the same place.[11]

In its 120th Report in 1988, the Law Commission of India had recommended that "the state should immediately increase the ratio from 10.5 judges per million of Indian

population to at least 50 judges per million within the period of next five years."[12] In 2001, the ratio remains at 12 or 13 judges per million population.[13] While it is debateable whether this relating of the number of judges should be to the population as a whole or to the number of cases in the various courts, there is no gainsaying that judicial officers are not paid very well and work in deplorable conditions where basic infrastructure is unsatisfactory or inadequate.[14]

All of the above should in fact persuade prospective and present litigants, as well as those engaging with the formal legal system as judges and lawyers, to reservedly embrace the notion of ADR, conciliation and mediation. However, it does appear there are many more factors that ail the formal legal system which, if not adequately

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[8] *Id.* at 6: This would include district and sessions judges, additional district and sessions judges, subordinate/assistant sessions judges, chief judicial magistrates, metropolitan magistrates and judicial magistrates.

[9] *First National Judicial Pay Commission Report* (1999) 1229. The judge strength rose from 9232 in 1985 to 12771 in September 1995.

[10] Indian Law Institute, Judicial System and Reforms in Asian Countries: The Case of India, Institute of Developing Economies, Japan External Trade Organisation (IDE-JETRO), (March 2001) 37.

[11]The same study (*id.* at 36) points out that at the end of 1998, there were 1.93 crore cases (19.3 million) which were pending in the subordinate courts for less than ten years.

[12] *120th Report of the Law Commission of India on Manpower Planning in the Judiciary: A Blueprint*¸ Ministry of Law, Justice and Company Affairs, Government of India (1987), 3.

[13] Recently, the Chief Justice of India said: "The reason why we do not have more judges across the board is because the States are simply not willing to provide the finances that are required…The expenditure on the judiciary in terms of the GNP is only 0.2 per cent; and, of this, half is recovered by the states through court fees and fines. Given the attitude of the states, is it any wonder that the jails of our country are filled to the brim, largely with undertrials.?": "Speech by Hon'ble Mr.S.P.Bharucha, Chief Justice of India on 26th November 2001 (Law Day) at the Supreme Court" (2001) 8 SCALE J-13 at J-14.

[14] This led to a public interest litigation by the All India Judges Association in the Supreme Court claiming better conditions of work as well as an increased and uniform pay structure. See orders in *All India Judges Association v. Union of India* (1992) 1 SCC 119; (1993) 4 SCC 288; (2000) 1 SCALE 136 and (2002) 3 SCALE 291.

addressed in the proposed alternative system, may hinder the move for transformation. This assumes particular significance in the context of suggestions that the ADR, mediation or conciliation processes should be court-annexed and institutionalised. I propose to highlight here a few of these factors.

`Hidden' and other costs

One disincentive for a person to engage with the legal system is the problem of uncompensated costs that have to be incurred. Apart from court fees, cost of legal representation, obtaining certified copies and the like, the system fails to acknowledge, and therefore compensate, bribes paid to the court staff,[15] the extra `fees' to the legal aid lawyer,[16] the cost of transport to the court, the bribes paid (in criminal cases) to the policemen for obtaining documents, copies of depositions and the like or to prison officials for small favours.[17] In some instances, even legal aid beneficiaries may not get services for `free' after all.[18] It is important to acknowledge the existence of a general distrust of the legal system including it processes and institutions which are mystifying, alienating and intimidating; distaste of lawyers and courts as they seem imposing and authoritarian; seeing the whole legal process as of nuisance value resulting in irreversible consequences, an uninvited `trouble' that has to be got rid of. Unless frontally addressed, a court annexed or an institutionalised ADR, mediation or conciliation system may soon be undermined by the same problems that afflict the formal legal system. The attraction of the alternative system would then lie in the promise of not only reduced costs and uncertainties but importantly a liberation from the stranglehold of the `court annexed bureaucracy'.

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[15] For a study pointing to corruption prevalent in the district and subordinate courts in Delhi see, V.N.Rajan and M.Z.Khan, Delay in Disposal of Criminal Cases in the Sessions and Lower Courts in Delhi, Institute of Criminology and Forensic Science, (1982). The authors point out (at 42) "It was seen that those who greased the palm of the readers and peons were able to get adjournments readily while others waited outside the court helplessly. To those who were unwilling to part with money, these court officials were not prepared even to tell whether the presiding officer would come and the cases would be heard or not."

[16] Siraj Sait, "Save the legal aid movement", *The Hindu*, June 29, 1997, V: "What is galling is that many sleazy lawyers who get legal aid cases tell the poor victims that if they want result they must pay them extra over what the Tamil Nadu Legal Aid Board pays them."

[17] Chadha, The Indian Jail: A Contemporary Document, Vikas Publishing Pvt. Ltd., 31 where she talks of the system of a `setting' for various tasks involving the prisoner having to depend on the jail official in Tihar Jail in Delhi: "A minimum `setting' even for the official to *consider* the request is Rs.500."(emphasis in original) William Chambliss, "Epilogue- Notes on Law, Justice and Society", in William Chambliss (ed.), Crime and the Legal Process, McGraw Hill Book Co. (1969) points out (at 421): "When a police force or an entire legal system is found to be engaged in a symbiotic relationship with professional criminals, the cause of this unfortunate circumstance is seen as residing in the inherent corruptibility of the individuals involved."

[18] An empirical study of the working of legal aid schemes in Punjab showed that beneficiaries of legal aid complained that "they were provided only the services of a counsel and nothing beyond" and that they "had to spend amounts varying between Rs.100 to 900 for their cases in lower courts": Sujan Singh, Legal Aid: Human right to Equality, Deep and Deep, (1998), 272.

The Law and Poverty Dimension

There is an imperative need to acknowledge that those who are economically and socially disadvantaged see the entire legal system as irrelevant to them as a tool of empowerment and survival. The economically disadvantaged litigant is, notwithstanding the present concerted moves to reach legal aid through a geographically wide network of legal aid institutions,[19] unable to effectively access the system as they encounter barriers in the form of expenses, lawyers and delays. The formal system, as presently ordered, tends to operate to the greater disadvantage of this class of society which then looks to devising ways of avoiding it rather than engaging with it. Without fundamental systemic changes, any alternative system, however promising the results may seem, is bound to be viewed with suspicion. The participatory nature of an ADR mechanism, which offers a level playing field that encourages a just result and where the control of the result is in the hands of the parties, and not the lawyers or the judges, would act as a definite incentive to get parties to embrace it.

The Parallel System

The noted economist Hernando de Soto, in a path-breaking study of encroachments in Lima in Peru, points out that although the parallel system began as a by-product of the formal system, it has for long been the only system with which the police, the lawyers, the judiciary and the litigant are prepared to readily engage.[20] A similar systematic study in several areas of disputes in India might well reveal the same position. For many a litigant, the engagement with the parallel system is not a matter of choice. For the others it becomes a source of additional means of livelihood. On the other hand, the formal legal system also appears to be in the stranglehold of those for whom the economic stakes in working the system to suit their ends is too high to permit any meaningful change that can threaten their source of living. The attitude towards maintaining the status quo therefore gets firmly entrenched. The resultant cynicism that has set into the system, coupled with a skepticism of all reform requires to be rooted out gradually but firmly if the reform agenda has to be implemented progressively. This would require building in deterrent disincentives for engaging with the parallel system that presently poses a serious threat to the legitimacy of the formal system. This may have to be coupled with an audit of the formal system, both financial and social, to pinpoint those areas that require immediate attention and correction. Since the legitimacy of the ADR mechanism is premised on parties consenting to the process, the costs of engaging with either the parallel system or benefiting from the ills

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[19] The Legal Services Authorities Act 1987 mandates the setting up o legal aid committees at the state, district and taluka levels. These are apart from committees annexed to each of the High Courts and the Supreme Court.

[20] Hernando de Soto, The Other Path, Harper & Row (1989). This seminal work could form a model for initiating a study of the working of the criminal justice system. This might reveal the actual costs involved in several stages of the system.

of the formal system have to be raised considerably high to drive the parties to consent to the ADR processes.

From an economic point of view, it should be possible to argue that those litigants who as a class or group burden the court system the most should either bear the proportionate `carrying' costs of the litigation load or mandatorily be driven to an ADR process. For instance, if the government is the major litigant in the courts, it should not be open for the government to both avoid the costs of the litigation it generates and also resist attempts at being driven to ADR processes. On the other hand it might well take the lead in offering to participate in such processes in all prospective and current litigation which involves the government as a party.

Audit of Lok Adalat Mechanisms

It is a fact that a large number of civil disputes pending in the courts, and to a small extent petty criminal matters, have been `disposed of' through the *lok adalats* that are a permanent `embedded' feature of the functioning of legal services authorities. While one point of view sees this as a success, another questions whether the *lok adalat* as presently institutionalised is really a tool of `case management' which essentially addresses the problems of an over-burdened judiciary and not so much as an instrument of justice delivery for the litigant. If the `success' of the *lok adalat* stems from negative reasons attributable to the failures of the formal legal system, the utility of this mechanism may also be short-lived. In other words if the incentive for litigants to accept *lok adalat* decisions is that if they didn't they would be faced with the prospect of further delays, uncertainties and costs, it constitutes a confirmation for them that the formal legal system is unable to provide an acceptable quality of legal services or justice. This in turn would not augur well for the legitimacy of the system in the long run. What this then means is that there has to be a gradual but conscious effort to offering positive reasons, and not negative ones, for litigants to be willing consumers of the ADR processes. An audit of the existing ADR mechanisms from the point of view of `customer satisfaction' would help shape the programmes for the future in order to maximise the `success'.

An ADR system that is both transparent and accountable is in the circumstances imperative in order to make the crucial difference to those presently engaged in the formal legal system which is largely perceived as lacking in this area. As has been pointed out by several speakers, a successful implementation of ADR processes will have to be preceded by an identification of categories of cases or specific dispute areas that are most amenable to their introduction.

Despite the challenges that face the ADR processes today, the benefits in the long run that they are capable of generating appear to outweigh the factors that may in the short run deter their enforcement. We have listened to many positive experiences of ADR in the past two days and this should encourage us to move forward with the reform process. The diverse nature of the country's population defies any uniform approach or set pattern and this is perhaps the biggest strength of the ADR mechanisms. Their flexibility and informality, the scope they offer for innovation and

creativity, hold out the promise of a great degree of acceptability lending them the required legitimacy. Their utility as a case management tool cannot be overemphasised. ADR processes provide the bypasses to handle large chunks of disputes thus leaving the formal legal system to handle the more complex litigation. Even while they do not offer to be a panacea for all the ills of the formal legal system, ADR processes offer the best hope yet of complementing and helping to fortify the formal legal system.

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Comparison Between Judicial Process and Various ADR Processes

[Material Extracted from Chapter IV, *Mediation Training Manual of India*, designed by Mediation and Conciliation Project Committee, Supreme Court of India]

JUDICIAL PROCESS	ARBITRATION	MEDIATION
Judicial process is an adjudicatory process where a third party (judge/ Other authority) decides the outcome.	Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties.	Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement.
Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes.	Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration & Conciliation Act, 1996.	Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility.
The decision is binding on the parties.	The award in an arbitration is binding on the parties.	A binding settlement is reached only if parties arrive at a mutually acceptable agreement.
Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties.	Adversarial in nature as focus is on determination of rights and liabilities of parties.	Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities.
Personal appearance or active participation of parties is not always required.	Personal appearance or active participation of parties is not always required.	Personal appearance and active participation of the parties are required.
A formal proceeding held in public and follows strict procedural stages.	A formal proceeding held in private following strict procedural stages.	A non-judicial and informal proceeding held in private with flexible procedural stages.
Decision is appealable.	Award is subject to challenge on specified grounds.	Decree/Order in terms of the settlement is final and is not appealable.
No opportunity for parties to communicate directly with each other.	No opportunity for parties to communicate directly with each other.	Optimal opportunity for parties to communicate directly with each other in the presence of the mediator.
Involves payment of court fees.	Does not involve payment of court fees.	In case of settlement, in a court annexed mediation the court fee already paid is refundable as per the Rules.

MEDIATION	CONCILIATION	LOK-ADALAT
Mediation is a non-adjudicatory process.	Conciliation is a non-adjudicatory process.	Lok Adalat is non-adjudicatory if it is established under Section 19 of the Legal Services Authorities Act, 1987. Lok Adalat is conciliatory and adjudicatory if it is established under Section 22B of the Legal Services Authorities Act, 1987.
Voluntary process.	Voluntary process.	Voluntary process.
Mediator is a neutral third party.	Conciliator is a neutral third party.	Presiding officer is a neutral third party.
Service of lawyer is available.	Service of lawyer is available.	Service of lawyer is available.
Mediation is party centred negotiation.	Conciliation is party centred negotiation.	In Lok Adalat, the scope of negotiation is limited.
The function of the Mediator is mainly facilitative.	The function of the conciliator is more active than the facilitative function of the mediator.	The function of the Presiding Officer is persuasive.
The consent of the parties is not mandatory for referring a case to mediation.	The consent of the parties is mandatory for referring a case to conciliation.	The consent of the parties is not mandatory for referring a case to Lok Adalat.
The referral court applies the principles of Order XXIII Rule 3, CPC for passing decree/order in terms of the agreement.	In conciliation, the agreement is enforceable as it is a decree of the court as per Section 74 of the Arbitration and Conciliation Act, 1996.	The award of Lok Adalat is deemed to be a decree of the Civil Court and is executable as per Section 21 of the Legal Services Authorities Act, 1987.
Not appealable.	Decree/order not appealable.	Award not appealable.
The focus in mediation is on the present and the future.	The focus in conciliation is on the present and the future.	The focus in Lok Adalat is on the past and the present.
Mediation is a structured process having different stages.	Conciliation also is a structured process having different stages.	The process of Lok Adalat involves only discussion and persuasion.
In mediation, parties are actively and directly involved.	In conciliation, parties are actively and directly involved.	In Lok Adalat, parties are not actively and directly involved so much.
Confidentiality is the essence of mediation.	Confidentiality is the essence of conciliation.	Confidentiality is not observed in Lok Adalat.

A Role Play to Demonstrate the Differences Between Adjudication and Mediation

"*The Family Portrait*"

FACTS: Their father died recently, leaving the family property to the two sons. Their mother died earlier, so both parties are the sole surviving heirs. Their father's will is clear regarding the family home and his other personal property - everything has been divided fifty-fifty. However, the will mentions that the family portrait, an original painting by a famous Indian Painter, of their parents and grandparents, and which is a cherished family possession is to go to the father's "favourite child". The will does not name his favourite child. The two brothers cannot agree on who the father's favourite child is.

Exercise: Resolve the dispute using (i) arbitration (adjudication) and (ii) mediation.

Exercise (i) Arbitration (Adjudication)

° The arbitrator has to first decide upon what the "issue" in dispute is : Which child fits the definition of the "favourite child"?
° Each party (child) presents reasons to the arbitrator as to why they believe that they were the favourite child.
° The arbitrator evaluates the evidence and decides who fits in the definition of "favourite child"
- the painting is awarded to that child.
° No compromise is permitted. The arbitrator must make a decision as to who is right and who is wrong depending on (i) the meaning of "favourite child" and (ii) an appraisal and comparison of each party's evidence as to why they were the "favourite child".

Exercise (ii) Mediation
Here, the mediator facilitates the negotiation of the same issue. The parties will try and work out a solution between themselves, rather than relinquishing control over the resolution of the dispute to an arbitrator or any other neutral. The parties are free to choose creative compromises - there is no right and wrong, and consequently, there need not be only one winner.
Mediator is to demonstrate

- Identifying need
- Creating options
- Controlling process
- Restoring relationship

Development of ADR / Mediation in India

[Material Extracted from Chapter I, Mediation Training Manual of India, designed by Mediation and Conciliation Project Committee, Supreme Court of India]

INTRODUCTION

Though documentation is scant, it is believed that nearly every community, country, and culture has a lengthy history of using various methods of informal dispute resolution. Many of these ancient methods shared procedural features with the process that has coalesced in the form of contemporary mediation. In India, as in other countries, the origin of mediation is obscured by the lack of a clear historical record. In addition, there is a lack of official records of indigenous processes of dispute resolution due to colonization in India over the past 250 years. There is scattered information, set forth below, that can be gathered by tracing mediation in a very elementary form back to ancient times in the post-Vedic period in India. Tribal communities practiced diverse kinds of dispute resolution techniques for centuries in different parts of the world, including India. In China government- sponsored mediation has been used on a widespread basis to resolve disputes based on aged societal principles of peaceful co-existence. Native Americans are known to have adopted their own dispute resolution procedures long before the American settlement.

HISTORICAL PERSPECTIVE

As recorded in Mulla's Hindu Law, ancient India began its search for laws since Vedic times approximately 4000 to 1000 years B.C. and it is possible that some of the Vedic hymns were composed at a period earlier than 4000 B.C. The early Aryans were very vigorous and unsophisticated people full of joy for life and had behind them ages of civilized existence and thought. They primarily invoked the unwritten law of divine wisdom, reason and prudence, which according to them governed heaven and earth. This was one of the first originating philosophies of mediation - Wisdom, Reason and Prudence, which originating philosophy is even now practiced in western countries.

The scarcely available ancient Indian literature reflects the cultural co-existence of people for many centuries. This reality necessitated many of the collaborative dispute resolution methods adopted in the modern mediation process. Towards the end of the Vedic epoch, philosophical and legal debates were carried on for the purpose of eliciting truth, in assemblies and parishads, which are now described as conferences. India has one of the oldest cultural histories of over 5000 years and a recent history of about 1000 years during which it was invaded by the Iranian plateau, Central Asia, Arabia, Afghanistan and the West Indian culture has absorbed the changes and influences of these aggressions to produce remarkable racial and cultural synthesis. The 29 Indian States have different and varying social and culture traditions, customs and religions. The era of Dharma Shashtras [code of conduct] followed the Vedic epoch, during which period scholastic jurists developed the philosophy of basic laws. Their learned discourses recognized existing usages and customs of different communities, which included resolution of disputes by non-adversarial indigenous methods. One example is the tribunal propounded and set up by a brilliant scholar Yagnavalkya, known as KULA, which dealt with the disputes between members of the family, community, tribes, castes or races. Another tribunal known as SHRENI, a corporation of artisans following the same business,

dealt with their internal disputes. PUGA was a similar association of traders in any branch of commerce. During the days of Yagnavalkya there was an unprecedented growth and progress of trade, industry and commerce and the Indian merchants are said to have sailed the seven seas, sowing the seeds of International Commerce. Another scholar Parashar opined that certain questions should be determined by the decisions of a parishad or association or an assembly of the learned. These associations were invested with the power to decide cases based on principles of justice, equity and good conscience. These different mechanisms of dispute resolution were given considerable autonomy in matters of local and village administration and in matters solely affecting traders' guilds, bankers and artisans. The modern legislative theory of arbitrage by domestic forums for deciding cases of members of commercial bodies and associations of merchants finds its origin in ancient customary law in India. Cases were decided according to the usages and customs as were approved by the conscience of the virtuous and followed by the people in general. The parishad recognized the modern concept of participatory methods of dispute resolution with a strong element of voluntariness, which another founding principle of modern mediation. Buddhism propounded mediation as the wisest method of resolving problems. Buddha said, "Meditation brings wisdom; lack of mediation leaves ignorance. Know well what leads you forward and what holds you back; choose that which leads to wisdom". This Buddhist aphorism reflects acceptance of the principle that mediation focuses on the future instead of dwelling in the past. Ancient Indian Jurist Patanjali said, "Progress comes swiftly in mediation for those who try hardest, instead of deciding who was right and who was wrong". It is a recorded fact that complicated cases were resolved not in the King's courts but by King's mediator. Even during the Mughal rule, Emperor Akbar depended upon his mediator minister Birbal. The most famous case was when two women claimed motherhood of a child, the Mediator suggested cutting the child into two and dividing its body and giving one-half to each woman. The real mother gave up her claim to save the child's life whereas the fake mother agreed to the division. The child was then given to the real mother. Though this was not a fully-developed example of modern mediation, it is an example of interest-based negotiation where the neutral third party seeks to identify the underlying needs and concerns of the parties. It is widely accepted that a village panchayat, meaning five wise men, used to be recognized and accepted as a conciliatory and / or decision- making body. Like many of the ancient dispute resolution methods, the panchayat shared some of the characteristics of mediation and some of the characteristics of arbitration.

As societies grew in size and complexity, informal decision-making processes became more structured and they gradually took the shape of a formal justice delivery system. In fact, societies could not grow larger in size and complexity without first evolving a system of resolving disputes that could keep the peace and harmony in the society and keep trade and commerce growing efficiently.

Mediation in the United States has developed in several distinct directions. Community mediation emerged in the 1960's in response to racial tensions and integration issues. Neighbourhood Justice Centers were established to address those issues. Later, community mediation expanded in application to neighbourhood disputes, family disputes, and other disputes where the issues were predominantly interpersonal. This view held that mediation should be community-based and independent of the legal system, opining that

mediation could deliver a high rate of satisfying settlement results if it were separate from the legal bureaucracy. In the 1980's, private mediation caught on when insurance companies realized the cost benefits of resolving insurance claims informally and expeditiously. Private mediation took hold in a variety of ways, including the emergence of private/independent mediators, non-profit mediation programs and agencies, and for-profit mediation providers. Private mediation was applied to pre-litigation disputes, litigated disputes, and, more recently, commercial and international disputes. Court-annexed mediation, which was the subject of experimental usage in the 1970's and 1980's, began to expand significantly in the 1990's. This school of thought concluded that mediation should be an extension of the legal system, even seeing mediation as an effective means of narrowing issues for litigation in courts. Currently, court-annexed mediation is offered by most courts at the trial and appellate levels. All three forms of mediation, community mediation, private mediation, and court-annexed mediation continue to co-exist, thrive, and to meet the needs of disputing parties in the United States.

A turning point in the use of alternative dispute resolution in the United States occurred in 1976, at a nationwide conference of lawyers, jurists, and educators called the Pound Conference. The conference was convened to address the urgent problems of over-crowding in the jails, lengthy delays in the courts, and the lack of access to justice due to the prohibitive costs of litigation. The need for alternatives to litigation generated in the new concept of a "Multi-door Court-house," and reinforced the importance of "Neighbourhood Justice Centers". The Multi-door Court-house concept, originated by Harvard professor Frank Sander, envisioned a scenario in which an aggrieved party could simply go to a kiosk at the entrance of a courthouse where a facilitative attendant would direct the disputant to one of the doors providing alternative or traditional dispute resolution processes. Prof. Sander described it as fitting the forum to the fuss. In this manner, the legal system could help the litigants achieve the most satisfactory result, in effect placing responsibility for providing alternative processes, including mediation, in the hands of the judicial system. The idea of a neutral assisting the disputants in arriving at their own solution instead of imposing his solution was introduced. Professors Ury, Brett and Goldberg opined that reconciling interests was less costly and probing for deep-seated concerns, devising creative solutions and making trade-offs was more satisfying to the disputants than the adjudicatory process.

MEDIATION IN INDIA

Mediation, Conciliation and Arbitration, in their earlier forms are historically more ancient than the present day Anglo-Saxon adversarial system of law. Various forms of mediation and arbitration gained a great popularity amongst businessmen during pre-British Rule in India. The Mahajans were respected, impartial and prudent businessmen who used to resolve the disputes between merchants through mediation. They were readily available at business centres to mediate the disputes between the members of a business association. The rule in the constitution of the Association made a provision to dismember a merchant if he resorted to court before referring the case to mediation. This was a unifying business sanction. This informal procedure in vogue in Gujarat, the western province of India, was a combination of Mediation and Arbitration, now known in the western world, as Med-Arb. This type of mediation had no legal sanction in spite of its wide common acceptance in the business world. The

East India Company from England gained control over the divided Indian Rulers and developed its apparent commercial motives into political aggression. By 1753 India was converted into a British Colony and the British style courts were established in India by 1775. The British ignored local indigenous adjudication procedures and modeled the process in the courts on that of British law courts of the period. However, there was a conflict between British values, which required a clear-cut decision, and Indian values, which encouraged the parties to work out their differences through some form of compromise.

The British system of justice gradually became the primary justice delivery system in India during the British regime of about 250 years. Even in England it was formed during a feudal era when an agrarian economy was dominant. While India remained a colony, the system thrived, prospered and deepened its roots as the prestigious and only justice symbol. Indigenous local customs and community-based mediation and conciliation procedures successfully adopted by business associations in western India were held to be discriminatory, depriving the litigants of their right to go to courts.

The British Courts gradually came to be recognized for its integrity and gained peoples' confidence. Even after India's independence in 1947, the Indian Judiciary has been proclaimed world over as the pride of the nation.

Until commerce, trade and industry started expanding dramatically in the 21st century, the British system delivered justice quicker, while maintaining respect and dignity. Independence brought with it the Constitution, awareness for fundamental and individual rights, governmental participation in growth of the nation's business, commerce and industry, establishment of the Parliament and State legislatures, government corporations, financial institutions, fast growing international commerce and public sector participation in business. The Government became a major litigant. Tremendous employment opportunities were created. An explosion in litigation resulted from multiparty complex civil litigation, expansion of business opportunities beyond local limits, increase in population, numerous new enactments creating new rights and new remedies and increasing popular reliance on the only judicial forum of the courts. The inadequate infrastructure facilities to meet with the challenge exposed the inability of the system to handle the sheer volume of caseloads efficiently and effectively. Instead of waiting in queues for years and passing on litigation by inheritance, people are often inclined either to avoid litigation or to start resorting to extra-judicial remedies.

Almost all the democratic countries of the world have faced similar problems with court congestion and access to justice. The United States was the first to introduce drastic law reforms about 30 years back and Australia followed suit. The United Kingdom has also adopted alternative dispute resolution as part of its legal system. The European Union also endorses mediation for the resolution of commercial disputes between member states.

LEGAL RECOGNITION OF MEDIATION IN INDIA

The concept of mediation received legislative recognition in India for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are "charged with the duty of mediating in and promoting the settlement of Industrial disputes."

Detailed procedures were prescribed for conciliation proceedings under the Act.

Arbitration, as a dispute resolution process was recognized as early as 1879 and also found a place in the Civil Procedure Code of 1908. When the Arbitration Act was enacted in 1940 the provision for arbitration originally contained in Section 89 of the Civil Procedure Code was repealed. The Indian Legislature made headway by enacting The Legal Services Authorities Act, 1987 by constituting the National Legal Services Authority as a Central Authority with the Chief Justice of India as its Patron-in-Chief. The Central Authority has been vested with duties to perform, inter alia, the following functions: -

- To encourage the settlement of disputes by way of negotiations, arbitration and conciliation.
- To lay down policies and principles for making legal services available in the conduct of any case before the court, any authority or tribunal.
- To frame most effective and economical schemes for the purpose.
- To utilize funds at its disposal and allocate them to the State and District Authorities appointed under the Act.
- To undertake research in the field of legal services.
- To recommend to the Government grant-in-aid for specific schemes to voluntary institutions for implementation of legal services schemes.
- To develop legal training and educational programmes with the Bar Councils and establish legal services clinics in universities, Law Colleges and other institutions.
- To act in co-ordination with governmental and non-governmental agencies engaged in the work of promoting legal services.

The Indian parliament enacted the Arbitration and Conciliation Act in 1996, making elaborate provisions for conciliation of disputes arising out of legal relationship, whether contractual or not, and to all proceedings relating thereto. The Act provided for the commencement of conciliation proceedings, appointment of conciliators and assistance of suitable institution for the purpose of recommending the names of the conciliators or even appointment of the conciliators by such institution, submission of statements to the conciliator and the role of conciliator in assisting the parties in negotiating settlement of disputes between the parties.

In 1999, the Indian Parliament passed the CPC Amendment Act of 1999 inserting Sec.89 in the Code of Civil Procedure 1908, providing for reference of cases pending in the Courts to ADR which included mediation. The Amendment was brought into force with effect from 1st July, 2002.

Since the inception of the economic liberalization policies in India and the acceptance of law reforms the world over, the legal opinion leaders have concluded that mediation should be a critical part of the solution to the profound problem of arrears of cases in the civil courts. In 1995-96 the Supreme Court of India under the leadership of the then Chief Justice, Mr. A. M.

Ahmadi, undertook an Indo-U.S. joint study for finding solutions to the problem of delays in the Indian Civil Justice System and every High Court was asked to appoint a study team which worked with the delegates of The Institute for Study and Development of Legal Systems [ISDLS], a San Francisco based institution. After gathering information from every State, a central study team analyzed the information gathered and made some further concrete suggestions and presented a proposal for introducing amendments relating to case management to the Civil Procedure Code with special reference to the Indian scenario.

EVOLUTION OF MEDIATION IN INDIA

The first elaborate training for mediators was conducted in Ahmedabad in the year 2000 by American trainers sent by Institute for the Study and Development of Legal Systems (ISDLS). It was followed by a few repeated advance training workshops conducted by Institute for Arbitration Mediation Legal Education and Development (AMLEAD) a Public Charitable Trust settled by two senior lawyers of Ahmedabad. On 27th July 2002, the Chief Justice of India, formally inaugurated the Ahmedabad Mediation Centre, reportedly the first lawyer-managed mediation centre in India. The Chief Justice of India called a meeting of the Chief Justices of all the High Courts of the Indian States in November, 2002 at New Delhi to impress upon them the importance of mediation and the need to implement Sec. 89 of Civil Procedure Code. Institute for Arbitration Mediation Legal Education and Development (AMLEAD) and the Gujarat Law Society introduced, in January 2003, a thirty-two hours Certificate Course for "Intensive training in Theory and Practice of Mediation". The U.S. Educational Foundation in India (USEFI) organized training workshops at Jodhpur, Hyderabad and Bombay in June 2003. The Chennai Mediation Centre was inaugurated on 9th April, 2005 and it started functioning in the premises of the Madras High Court. This became the first Court-Annexed Mediation centre in India. The Delhi Judicial Academy organized a series of mediation training workshops and opened a mediation centre in the Academy's campus appointing its Deputy Director as the mediator. Delhi High Court Mediation and Conciliation Centre has been regularly organizing mediation awareness workshops and Advanced Mediation Training workshops.

The Mediation and Conciliation Project Committee (MCPC) was constituted by the then Chief Justice of India Hon'ble Mr. Justice R.C. Lahoti by order dt. 9th April, 2005. Hon'ble Mr. Justice N. Santosh Hegde was its first Chairman. It consisted of other judges of the Supreme Court and High Court, Senior Advocates and Member Secretary of NALSA. The Committee in its meeting held on 11th July, 2005 decided to initiate a pilot project of judicial mediation in Tis Hazari Courts. The success of it led to the setting up of a mediation centre at Karkardooma in 2006, and another in Rohini in 2009. Four regional Conferences were held by the MCPC in 2008 at Banglore, Ranchi, Indore and Chandigarh.

MCPC has been taking the lead in evolving policy matters relating to the mediation. The committee has decided that 40 hours training and 10 actual mediation was essential for a mediator. The committee was sanctioned a grant-in-aid by the department of Legal Affairs for undertaking mediation training programme, referral judges training programme, awareness programme and training of trainers programme. With the above grant-in-aid, the committee has conducted till March, 2010, 52 awareness programmes/ referral judges training programmes and 52

Mediation training programmes in various parts of country. About 869 persons have undergone 40 hours training. The committee is in the process of finalizing a National Mediation Programme. Efforts are also made to institutionalize its functions and to convert it as the apex body of all the training programmes in the country.

The Supreme Court of India upheld the constitutional validity of the new law reforms in the case filed by Salem Bar Association and appointed a committee chaired by Justice Mr. Jagannadha Rao, the chairman of the Law Commission of India, to suggest and frame rules for ironing out the creases, if any, in the new law and for implementation of mediation procedures in civil courts. The Law Commission prepared consultation papers on Mediation and Case Management and framed and circulated model Rules. The Supreme Court approved the model rules and directed every High Court to frame them. The Law Commission of India organized an International conference on Case Management, Conciliation and Mediation at New Delhi on 3rd and 4th May 2003, which was a great success. Delhi District Courts invited ISDLS to train their Judges as mediators and help in establishing court annexed mediation centre. Delhi High Court started its own lawyers managed mediation and conciliation centre. Karnataka High Court also started a court-annexed mediation and conciliation centre and trained their mediators with the help of ISDLS. Now court-annexed mediation centres have been started in trial courts at Allahabad, Lucknow, Chandigarh, Ahmedabad, Rajkot, Jamnagar, Surat and many more Districts in India.

Mandatory mediation through courts has now a legal sanction. Court-Annexed Mediation and Conciliation Centres are now established at several courts in India and the courts have started referring cases to such centres. In Court-Annexed Mediation the mediation services are provided by the court as a part and parcel of the same judicial system as against Court-Referred Mediation, wherein the court merely refers the matter to a mediator. One feature of court-annexed mediation is that the judges, lawyers and litigants become participants therein, thereby giving them a feeling that negotiated settlement is achieved by all the three actors in the justice delivery system. When a judge refers a case to the court-annexed mediation service, keeping overall supervision on the process, no one feels that the system abandons the case. The Judge refers the case to a mediator within the system. The same lawyers who appear in a case retain their briefs and continue to represent their clients before the mediators within the same set-up. The litigants are given an opportunity to play their own participatory role in the resolution of disputes. This also creates public acceptance for the process as the same time-tested court system, which has acquired public confidence because of integrity and impartiality, retains its control and provides an additional service. In court-annexed mediation, the court is the central institution for resolution of disputes. Where ADR procedures are overseen by the court, at least in those cases which are referred through courts, the effort of dispensing justice can become well-coordinated.

ADR services, under the control, guidance and supervision of the court would have more authenticity and smooth acceptance. It would ensure the feeling that mediation is complementary and not competitive with the court system. The system will get a positive and willing support from the judges who will accept mediators as an integral part of the system. If reference to mediation is made by the judge to the court annexed mediation services, the mediation process will become more expeditious and harmonized. It will also facilitate the

movement of the case between the court and the mediator faster and purposeful. Again, it will facilitate reference of some issues to mediation leaving others for trial in appropriate cases. Court annexed mediation will give a feeling that court's own interest in reducing its caseload to manageable level is furthered by mediation and therefore reference to mediation will be a willing reference. Court annexed mediation will thus provide an additional tool by the same system providing continuity to the process, and above all, the court will remain a central institution for the system. This will also establish a public-private partnership between the court and the community. A popular feeling that the court works hand-in-hand with mediation facility will produce satisfactory and faster settlements.

* * * * *

Legal Framework

Civil Procedure Mediation Rules formulated by *Supreme Court in Salem Advocate Bar Association v Union of India* : (2005) 6 SCC 344.

Rule 11: Procedure of Mediation

(iv) Each party shall, ten days before a session, provide to the mediator a brief memorandum setting forth the issues, which according to it, need to be resolved, and its position in respect to those issues and all information reasonably required for the mediator to understand the issue; such memoranda shall also be mutually exchanged between the parties.

(v) Each party shall furnish to the mediator, copies of the pleadings or documents or such other information as may be required by him in connection with the issues to be resolved…

(vi) Each party shall furnish to the mediator such information as may be required by him in connection with the issues to be resolved.

Arbitration and Conciliation Act 1996

Section 65: Submission of statements to conciliator.

(1) The conciliator, upon his appointment, may request each party to submit to him a brief written statement of his position and the facts and grounds in support thereof, supplement by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

(2) The Conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

(3) At any stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information as he deems appropriate.

Afcons Infrastructure Ltd. v. *Cherian Varkey Construction Company Pvt. Ltd.*

(2010) 8 SCC 24

(Process of referral to different modes of ADR under Section 89 of CPC, 1908)

R.V.RAVEENDRAN, J. Leave granted. The general scope of Section 89 of the Code of Civil Procedure (`Code' for short) and the question whether the said section empowers the court to refer the parties to a suit to arbitration without the consent of both parties, arise for consideration in this appeal.

2. The second respondent (Cochin Port Trust) entrusted the work of construction of certain bridges and roads to the appellants under an agreement dated 20.4.2001. The appellants sub-contracted a part of the said work to the first respondent under an agreement dated 1.8.2001. It is not in dispute that the agreement between the appellants and the first respondent did not contain any provision for reference of the disputes to arbitration.

3. The first respondent filed a suit against the appellants for recovery of Rs.210,70,881 from the appellants and their assets and/or the amounts due to the appellants from the employer, with interest at 18% per annum. In the said suit an order of attachment was made on 15.9.2004 in regard to a sum of Rs.2.25 crores. Thereafter in March 2005, the first respondent filed an application under section 89 of the Code before the trial court praying that the court may formulate the terms of settlement and refer the matter to arbitration. The appellants filed a counter dated 24.10.2005 to the application submitting that they were not agreeable for referring the matter to arbitration or any of the other ADR processes under section 89 of the Code. In the meanwhile, the High Court of Kerala by order dated 8.9.2005, allowed the appeal filed by the appellants against the order of attachment and raised the attachment granted by the trial court subject to certain conditions. While doing so, the High Court also directed the trial court to consider and dispose of the application filed by the first respondent under section 89 of the Code.

4. The trial court heard the said application under section 89. It recorded the fact that first respondent (plaintiff) was agreeable for arbitration and appellants (defendants 1 and 2) were not agreeable for arbitration. The trial court allowed the said application under section 89 by a reasoned order dated 26.10.2005 and held that as the claim of the plaintiff in the suit related to a work contract, it was appropriate that the dispute should be settled by arbitration. It formulated sixteen issues and referred the matter to arbitration. The appellants filed a revision against the order of the trial court. The High Court by the impugned order dated 11.10.2006 dismissed the revision petition holding that the apparent tenor of section 89 of the Code permitted the court, in appropriate cases, to refer even unwilling parties to arbitration. The High Court also held that the concept of pre existing arbitration agreement which was necessary for reference to arbitration under the provisions of the Arbitration & Conciliation Act, 1996 (`AC Act' for short) was inapplicable to references under section 89 of the Code, having regard to the decision in Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya & Anr. [2003 (5) SCC 531]. The said order is challenged in this appeal.

5. On the contentions urged, two questions arise for consideration :

- What is the procedure to be followed by a court in implementing section 89 and Order 10 Rule 1A of the Code?

- Whether consent of all parties to the suit is necessary for reference to arbitration under section 89 of the Code?

6. To find answers to the said questions, we have to analyse the object, purpose, scope and tenor of the said provisions. The said provisions are extracted below :

"89. 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 observations 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 has been referred –

a. for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 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,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 (39 of 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."

Other relevant provisions under CPC may be extracted as follows:

Order 10 Rule 1A. Direction of the Court to opt for any one mode of alternative dispute resolution.--After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.

Order 10 Rule 1B. Appearance before the conciliatory forum or authority.--Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

Order 10 Rule 1C. Appearance before the Court consequent to the failure of efforts of conciliation.--Where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it."

7. If section 89 is to be read and required to be implemented in its literal sense, it will be a Trial Judge's nightmare. It puts the cart before the horse and lays down an impractical, if not impossible, procedure in sub-section (1). It has mixed up the definitions in sub-section (2). In spite of these defects, the object behind section 89 is laudable and sound. Resort to alternative disputes resolution (for short `ADR') processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the courts. As ADR processes were not being resorted to with the desired frequency, Parliament thought it fit to introduce Section 89 and Rules 1-A to 1-C in Order X in the Code, to ensure that ADR process was resorted to before the commencement of trial in suits. In view of its laudable object, the validity of section 89, with all its imperfections, was upheld in Salem Advocate Bar Association v. Union of India reported in [2003 (1) SCC 49 - for short, Salem Bar - (I)] but referred to a Committee, as it was hoped that section 89 could be implemented by ironing the creases. In Salem Advocate Bar Association v. Union of India [2005 (6) SCC 344 - for short, Salem Bar-(II)], this Court applied the principle of purposive construction in an attempt to make it workable.

What is wrong with section 89 of the Code?

8. The first anomaly is the mixing up of the definitions of `mediation' and `judicial settlement' under clauses (c) and (d) of sub-section (2) of section 89 of the Code. Clause (c) says that for "judicial settlement", the court shall refer the same to a suitable institution or person who shall be deemed to be a Lok Adalat. Clause (d) provides that where the reference is to "mediation", the court shall effect a compromise between the parties by following such procedure as may be prescribed. It makes no sense to call a compromise effected by a court, as "mediation", as is done in clause (d). Nor does it make any sense to describe a reference made by a court to a suitable institution or person for arriving at a settlement as "judicial settlement", as is done in clause (c). "Judicial settlement" is a term in vogue in USA referring to a settlement of a civil case with the help of a judge who is not assigned to adjudicate upon the dispute. "Mediation" is also a well known term and it refers to a method of non-binding dispute resolution with the assistance of a neutral third party who tries to help the disputing parties to arrive at a negotiated settlement. It is also synonym of the term `conciliation'. (See : Black's Law Dictionary, 7th Edition, Pages 1377 and 996). When words are universally understood in a particular sense, and assigned a particular meaning in common parlance, the definitions of those words in section 89 with interchanged meanings has led to confusion, complications and difficulties in implementation. The mix-up of definitions of the terms "judicial settlement" and "mediation" in Section 89 is apparently due to a clerical or typographical error in drafting, resulting in the two words being interchanged in clauses (c) and (d) of Section 89(2). If the word "mediation" in clause (d) and the words "judicial settlement" in clause (c) are interchanged, we find that the said clauses make perfect sense.

9. The second anomaly is that sub-section (1) of section 89 imports the final stage of conciliation referred to in section 73(1) of the AC Act into the pre-ADR reference stage under section 89 of the Code. Sub-section (1) of section 89 requires the court to formulate the terms of settlement and give them to the parties for their observation and then reformulate the terms of a possible settlement and then refer the same for any one of the ADR processes. If sub-section (1) of Section 89 is to be literally followed, every Trial Judge before framing issues, is required to ascertain whether there exists any elements of settlement which may be acceptable to the parties, formulate the terms of settlement, give them to parties for observations and then reformulate the terms of a possible settlement before referring it to arbitration, conciliation, judicial settlement, Lok Adalat or mediation. There is nothing that is left to be done by the alternative dispute resolution forum. If all these have to be done by the trial court before referring the parties to alternative dispute resolution processes, the court itself may as well proceed to record the settlement as nothing more is required to be done, as a Judge cannot do these unless he acts as a conciliator or mediator and holds detailed discussions and negotiations running into hours.

10. Section 73 of AC Act shows that formulation and reformulation of terms of settlement is a process carried out at the final stage of a conciliation process, when the settlement is being arrived at. What is required to be done at the final stage of conciliation by a conciliator is borrowed lock, stock and barrel into section 89 and the court is wrongly required to formulate the terms of settlement and reformulate them at a stage prior to reference to an ADR process. This becomes evident by a comparison of the wording of the two provisions.

Section 73(1) of A&C Act, 1996: When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

Section 89 (1) CPC: (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 observations of the parties, the Court may re-formulate 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.

Formulation and re-formulation of terms of settlement by the court is therefore wholly out of place at the stage of pre ADR reference. It is not possible for courts to perform these acts at a preliminary hearing to decide whether a case should be referred to an ADR process and, if so, which ADR process.

11. If the reference is to be made to arbitration, the terms of settlement formulated by the court will be of no use, as what is referred to arbitration is the dispute and not the terms of settlement; and the Arbitrator will adjudicate upon the dispute and give his decision by way of award. If the reference is to conciliation/mediation/Lok Adalat, then drawing up the terms of the settlement or reformulating them is the job of the conciliator or the mediator or the Lok

Adalat, after going through the entire process of conciliation/ mediation. Thus, the terms of settlement drawn up by the court will be totally useless in any subsequent ADR process. Why then the courts should be burdened with the onerous and virtually impossible, but redundant, task of formulating terms of settlement at pre-reference stage?

12. It will not be possible for a court to formulate the terms of the settlement, unless the judge discusses the matter in detail with both parties. The court formulating the terms of settlement merely on the basis of pleadings is neither feasible nor possible. The requirement that the court should formulate the terms of settlement is therefore a great hindrance to courts in implementing section 89 of the Code. This Court therefore diluted this anomaly in Salem Bar (II) by equating "terms of settlement" to a "summary of disputes" meaning thereby that the court is only required to formulate a `summary of disputes' and not 'terms of settlement'. How should section 89 be interpreted?

13. The principles of statutory interpretation are well settled. Where the words of the statute are clear and unambiguous, the provision should be given its plain and normal meaning, without adding or rejecting any words. Departure from the literal rule, by making structural changes or substituting words in a clear statutory provision, under the guise of interpretation will pose a great risk as the changes may not be what the Legislature intended or desired. Legislative wisdom cannot be replaced by the Judge's views. As observed by this Court in somewhat different context : "When a procedure is prescribed by the Legislature, it is not for the court to substitute a different one according to its notion of justice. When the Legislature has spoken, the Judges cannot afford to be wiser." (See : *Shri Mandir Sita Ramji* v. *Lt. Governor of Delhi* - (1975) 4 SCC 298). There is however an exception to this general rule. Where the words used in the statutory provision are vague and ambiguous or where the plain and normal meaning of its words or grammatical construction thereof would lead to confusion, absurdity, repugnancy with other provisions, the courts may, instead of adopting the plain and grammatical construction, use the interpretative tools to set right the situation, by adding or omitting or substituting the words in the Statute. When faced with an apparently defective provision in a statute, courts prefer to assume that the draftsman had committed a mistake rather than concluding that the Legislature has deliberately introduced an absurd or irrational statutory provision. Departure from the literal rule of plain and straight reading can however be only in exceptional cases, where the anomalies make the literal compliance of a provision impossible, or absurd or so impractical as to defeat the very object of the provision. We may also mention purposive interpretation to avoid absurdity and irrationality is more readily and easily employed in relation to procedural provisions than with reference to substantive provisions.

13 (6) Justice G.P. Singh extracts four conditions that should be present to justify departure from the plain words of the Statute, in his treatise "Principles of Statutory Interpretation" (12th Edn. - 2010, Lexis Nexis - page 144) from the decision of the House of Lords in *Stock* v. *Frank Jones (Tipton) Ltd.*, [1978 (1) All ER 948] :

"......a court would only be justified in departing from the plain words of the statute when it is satisfied that (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly and could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the

anomaly can be obviated without detriment to such a legislative objective; and (4) the language of the statute is susceptible of the modification required to obviate the anomaly."

14. All the aforesaid four conditions justifying departure from the literal rule, exist with reference to section 89 of the Code. Therefore, in *Salem Bar*-II, by judicial interpretation the entire process of formulating the terms of settlement, giving them to the parties for their observation and reformulating the terms of possible settlement after receiving the observations, contained in sub-section (1) of section 89, is excluded or done away with by stating that the said provision merely requires formulating a summary of disputes. Further, this Court in Salem Bar-II, adopted the following definition of `mediation' suggested in the model mediation rules, in spite of a different definition in section 89(2)(d) :

"Settlement by `mediation' means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties' own responsibility for making decisions which affect them."

All over the country the courts have been referring cases under section 89 to mediation by assuming and understanding `mediation' to mean a dispute resolution process by negotiated settlement with the assistance of a neutral third party. Judicial settlement is understood as referring to a compromise entered by the parties with the assistance of the court adjudicating the matter, or another Judge to whom the court had referred the dispute.

15. Section 89 has to be read with Rule 1-A of Order 10 which requires the court to direct the parties to opt for any of the five modes of alternative dispute resolution processes and on their option refer the matter. The said rule does not require the court to either formulate the terms of settlement or make available such terms of settlement to the parties to reformulate the terms of possible settlement after receiving the observations of the parties. Therefore the only practical way of reading Section 89 and Order 10, Rule 1-A is that after the pleadings are complete and after seeking admission/denials wherever required, and before framing issues, the court will have recourse to section 89 of the Code. Such recourse requires the court to consider and record the nature of the dispute, inform the parties about the five options available and take note of their preferences and then refer them to one of the alternative dispute resolution processes.

16. In view of the foregoing, it has to be concluded that proper interpretation of section 89 of the Code requires two changes from a plain and literal reading of the section. Firstly, it is not necessary for the court, before referring the parties to an ADR process to formulate or re-formulate the terms of a possible settlement. It is sufficient if the court merely describes the nature of dispute (in a sentence or two) and makes the reference. Secondly, the definitions of `judicial settlement' and `mediation' in clauses (c) and (d) of section 89(2) shall have to be interchanged to correct the draftsman's error. Clauses (c) and (d) of section 89(2) of the Code will read as under when the two terms are interchanged:

(c) for "mediation", 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 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for "judicial settlement", the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed. The above changes made by interpretative process shall remain in force till the legislature corrects the mistakes, so that section 89 is not rendered meaningless and infructuous.

Whether the reference to ADR Process is mandatory?

17. Section 89 starts with the words "where it appears to the court that there exist elements of a settlement". This clearly shows that cases which are not suited for ADR process should not be referred under section 89 of the Code. The court has to form an opinion that a case is one that is capable of being referred to and settled through ADR process. Having regard to the tenor of the provisions of Rule 1A of Order 10 of the Code, the civil court should invariably refer cases to ADR process. Only in certain recognized excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR process, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under section 89 of the Code. Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process under section 89 of the Code, is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other case reference to ADR process is a must.

18. The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:

(i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).

(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.

(v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.

(vi) Cases involving prosecution for criminal offences.

19. All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes :

(i) All cases relating to trade, commerce and contracts, including - disputes arising out of contracts (including all money claims);

- disputes relating to specific performance;
- disputes between suppliers and customers;
- disputes between bankers and customers;
- disputes between developers/builders and customers;
- disputes between landlords and tenants/licensor and licensees;
- disputes between insurer and insured;

(ii) All cases arising from strained or soured relationships, including

- disputes relating to matrimonial causes, maintenance, custody of children;
- disputes relating to partition/division among family members/co-parceners/co-owners; and
- disputes relating to partnership among partners.

(iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);
- disputes between employers and employees;
- disputes among members of societies/associations/Apartment owners Associations;

(iv) All cases relating to tortious liability including

- claims for compensation in motor accidents/other accidents; and
- All consumer disputes including
- disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or `product popularity.

The above enumeration of `suitable' and `unsuitable' categorization of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/Tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

How to decide the appropriate ADR process under section 89?

20. Section 89 refers to five types of ADR procedures, made up of one adjudicatory process (arbitration) and four negotiatory (non adjudicatory) processes - conciliation, mediation, judicial settlement and Lok Adalat settlement. The object of section 89 of the Code is that settlement should be attempted by adopting an appropriate ADR process before the case proceeds to trial. Neither section 89 nor Rule 1A of Order 10 of the Code is intended to supersede or modify the provisions of the Arbitration and Conciliation Act, 1996 or the Legal Services Authorities Act, 1987. On the other hand, section 89 of the Code makes it clear that

two of the ADR processes - Arbitration and Conciliation, will be governed by the provisions of the AC Act and two other ADR Processes - Lok Adalat Settlement and Mediation (See : amended definition in para 18 above), will be governed by the Legal Services Authorities Act. As for the last of the ADR processes - judicial settlement (See : amended definition in para 18 above), section 89 makes it clear that it is not governed by any enactment and the court will follow such procedure as may be prescribed (by appropriate rules).

21. Rule 1A of Order 10 requires the court to give the option to the parties, to choose any of the ADR processes. This does not mean an individual option, but a joint option or consensus about the choice of the ADR process. On the other hand, section 89 vests the choice of reference to the court. There is of course no inconsistency. Section 89 of the Code gives the jurisdiction to refer to ADR process and Rules 1A to IC of Order 10 lay down the manner in which the said jurisdiction is to be exercised. The scheme is that the court explains the choices available regarding ADR process to the parties, permits them to opt for a process by consensus, and if there is no consensus, proceeds to choose the process.

22. Let us next consider which of the ADR processes require mutual consent of the parties and which of them do not require the consent of parties.

Arbitration

23. Arbitration is an adjudicatory dispute resolution process by a private forum, governed by the provisions of the AC Act. The said Act makes it clear that there can be reference to arbitration only if there is an `arbitration agreement' between the parties. If there was a pre-existing arbitration agreement between the parties, in all probability, even before the suit reaches the stage governed by Order 10 of the Code, the matter would have stood referred to arbitration either by invoking section 8 or section 11 of the AC Act, and there would be no need to have recourse to arbitration under section 89 of the Code. Section 89 therefore pre-supposes that there is no pre-existing arbitration agreement. Even if there was no pre-existing arbitration agreement, the parties to the suit can agree for arbitration when the choice of ADR processes is offered to them by the court under section 89 of the Code. Such agreement can be by means of a joint memo or joint application or a joint affidavit before the court, or by record of the agreement by the court in the ordersheet signed by the parties. Once there is such an agreement in writing signed by parties, the matter can be referred to arbitration under section 89 of the Code; and on such reference, the provisions of AC Act will apply to the arbitration, and as noticed in Salem Bar-I, the case will go outside the stream of the court permanently and will not come back to the court.

24. If there is no agreement between the parties for reference to arbitration, the court cannot refer the matter to arbitration under section 89 of the Code. This is evident from the provisions of AC Act. A court has no power, authority or jurisdiction to refer unwilling parties to arbitration, if there is no arbitration agreement. This Court has consistently held that though section 89 of the Code mandates reference to ADR processes, reference to arbitration under section 89 of the Code could only be with the consent of both sides and not otherwise.

24.1) In *Salem Bar* (I) [*Salem Advocate Bar Association* v. *Union of India*, (2003) 1 SCC 49], this Court held :

"It is quite obvious that the reason why Section 89 has been inserted is to try and see that all the cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the law's delays and the limited number of Judges which are available, it has now become imperative that resort should be had to alternative dispute resolution mechanism with a view to bring to an end litigation between the parties at an early date. The alternative dispute resolution (ADR) mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial."

In *Salem Bar* - (II) [*Salem Advocate Bar Association* v. *Union of India*, (2005) 6 SCC 344], this Court held :

"Some doubt as to a possible conflict has been expressed in view of used of the word "may" in Section 89 when it stipulates that "the court may reformulate the terms of a possible settlement and refer the same for" and use of the word "shall" in Order 10 Rule 1-A when it states that "the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of Section 89".

The intention of the legislature behind enacting Section 89 is that where it appears to the court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the section and if the parties do not agree, the court shall refer them to one or the other of the said modes. Section 89 uses both the words "shall" and "may" whereas Order 10 Rule 1-A uses the word "shall" but on harmonious reading of these provisions it becomes clear that the use of the word "may" in Section 89 only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of ADR methods. There is no conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarized in the terms of settlement formulated or reformulated in terms of Section 89.

One of the modes to which the dispute can be referred is "arbitration". Section 89(2) provides that where a dispute has been referred 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 the 1996 Act. Section 8 of the 1996 Act deals with the power to refer parties to arbitration where there is arbitration agreement. As held in *P. Anand Gajapathi Raju* v. *P.V.G. Raju* [2000 (4) SCC 539] the 1996 Act governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in Section 89 of the Code where the court asks the parties to choose one or other ADRs including arbitration and the parties choose arbitration as their option. Of course, the parties have to agree for arbitration."

The position was reiterated by this Court in *Jagdish Chander* v. *Ramesh Chander* [2007 (5) SCC 719] thus :

"It should not also be overlooked that even though Section 89 mandates courts to refer pending suits to any of the several alternative dispute resolution processes mentioned therein, there cannot be a reference to arbitration even under Section 89 CPC, unless there is a mutual consent of all parties, for such reference."

Therefore, where there is no pre-existing arbitration agreement between the parties, the consent of all the parties to the suit will be necessary, for referring the subject matter of the suit to arbitration under section 89 of the Code.

Conciliation

25. Conciliation is a non-adjudicatory ADR process, which is also governed by the provisions of AC Act. There can be a valid reference to conciliation only if both parties to the dispute agree to have negotiations with the help of a third party or third parties either by an agreement or by the process of invitation and acceptance provided in section 62 of AC Act followed by appointment of conciliator/s as provided in section 64 of AC Act. If both parties do not agree for conciliation, there can be no `conciliation'. As a consequence, as in the case of arbitration, the court cannot refer the parties to conciliation under section 89, in the absence of consent by all parties. As contrasted from arbitration, when a matter is referred to conciliation, the matter does not go out of the stream of court process permanently. If there is no settlement, the matter is returned to the court for framing issues and proceeding with the trial. The other three ADR Processes

26. If the parties are not agreeable for either arbitration or conciliation, both of which require consent of all parties, the court has to consider which of the other three ADR processes (Lok Adalat, Mediation and Judicial Settlement) which do not require the consent of parties for reference, is suitable and appropriate and refer the parties to such ADR process. If mediation process is not available (for want of a mediation centre or qualified mediators), necessarily the court will have to choose between reference to Lok Adalat or judicial settlement. If facility of mediation is available, then the choice becomes wider. It the suit is complicated or lengthy, mediation will be the recognized choice. If the suit is not complicated and the disputes are easily sortable or could be settled by applying clear cut legal principles, Lok Adalat will be the preferred choice. If the court feels that a suggestion or guidance by a Judge would be appropriate, it can refer it to another Judge for dispute resolution. The court has used its discretion in choosing the ADR process judiciously, keeping in view the nature of disputes, interests of parties and expedition in dispute resolution.

Whether the settlement in an ADR process is binding in itself ?

27. When the court refers the matter to arbitration under Section 89 of the Act, as already noticed, the case goes out of the stream of the court and becomes an independent proceeding before the arbitral tribunal. Arbitration being an adjudicatory process, it always ends in a decision. There is also no question of failure of ADR process or the matter being returned to the court with a failure report. The award of the arbitrators is binding on the parties and is executable/enforceable as if a decree of a court, having regard to Section 36 of the AC Act. If any settlement is reached in the arbitration proceedings, then the award passed by the Arbitral

Tribunal on such settlement, will also be binding and executable/enforceable as if a decree of a court, under Section 30 of the AC Act.

28. The other four ADR processes are non-adjudicatory and the case does not go out of the stream of the court when a reference is made to such a non- adjudicatory ADR forum. The court retains its control and jurisdiction over the case, even when the matter is before the ADR forum. When a matter is settled through conciliation, the Settlement Agreement is enforceable as if it is a decree of the court having regard to Section 74 read with Section 30 of the AC Act. Similarly, when a settlement takes place before the Lok Adalat, the Lok Adalat award is also deemed to be a decree of the civil court and executable as such under Section 21 of the Legal Services Authorities Act, 1987. Though the settlement agreement in a conciliation or a settlement award of a Lok Adalat may not require the seal of approval of the court for its enforcement when they are made in a direct reference by parties without the intervention of court, the position will be different if they are made on a reference by a court in a pending suit/proceedings. As the court continues to retain control and jurisdiction over the cases which it refers to conciliations, or Lok Adalats, the settlement agreement in conciliation or the Lok Adalat award will have to be placed before the court for recording it and disposal in its terms. Where the reference is to a neutral third party (`mediation' as defined above) on a court reference, though it will be deemed to be reference to Lok Adalat, as court retains its control and jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal. Where the matter is referred to another Judge and settlement is arrived at before him, such settlement agreement will also have to be placed before the court which referred the matter and that court will make a decree in terms of it. Whenever such settlements reached before non-adjudicatory ADR Fora are placed before the court, the court should apply the principles of Order 23 Rule 3 of the Code and make a decree/order in terms of the settlement, in regard to the subject matter of the suit/proceeding. In regard to matters/disputes which are not the subject matter of the suit/proceedings, the court will have to direct that the settlement shall be governed by Section 74 of AC Act (in respect of conciliation settlements) or Section 21 of the Legal Services Authorities Act, 1987 (in respect of settlements by a Lok Adalat or a Mediator). Only then such settlements will be effective.

Summation

29. Having regard to the provisions of Section 89 and Rule 1-A of Order 10, the stage at which the court should explore whether the matter should be referred to ADR processes, is after the pleadings are complete, and before framing the issues, when the matter is taken up for preliminary hearing for examination of parties under Order 10 of the Code. However, if for any reason, the court had missed the opportunity to consider and refer the matter to ADR processes under Section 89 before framing issues, nothing prevents the court from resorting to Section 89 even after framing issues. But once evidence is commenced, the court will be reluctant to refer the matter to the ADR processes lest it becomes a tool for protracting the trial.

30. Though in civil suits, the appropriate stage for considering reference to ADR processes is after the completion of pleadings, in family disputes or matrimonial cases, the position can be slightly different. In those cases, the relationship becomes hostile on account

of the various allegations in the petition against the spouse. The hostility will be further aggravated by the counter-allegations made by the respondent in his or her written statement or objections. Therefore, as far as Family Courts are concerned, the ideal stage for mediation will be immediately after service of respondent and before the respondent files objections/written statements. Be that as it may.

31. We may summarize the procedure to be adopted by a court under section 89 of the Code as under :

(a) When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties.

(b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.

(c) In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

(d) The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.

(e) If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeble for reference to conciliation which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with section 64 of the AC Act.

(f) If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three other ADR processes : (i) Lok Adalat; (ii) mediation by a neutral third party facilitator or mediator; and (iii) a judicial settlement, where a Judge assists the parties to arrive at a settlement.

(g) If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation. Where the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.

(h) If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.

(i) If the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by Section 74 of the AC Act (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). This will be necessary as many settlement agreements deal with not only the disputes which are the subject matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject matter of the suit.

(j) If any term of the settlement is ex facie illegal or unforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability.

32. The Court should also bear in mind the following consequential aspects, while giving effect to Section 89 of the Code :

(i) If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order sheet.

(ii) If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. There is no need for an elaborate order for making the reference.

(iii) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.

(iv) If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for Judicial Settlement to another Judge.

(v) If the court refers the matter to an ADR process (other than Arbitration), it should keep track of the matter by fixing a hearing date for the ADR Report. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternative forum, the nature of case etc.). Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings.

(vi) Normally the court should not send the original record of the case when referring the matter for an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary.

33. The procedure and consequential aspects referred to in the earlier two paragraphs are intended to be general guidelines subject to such changes as the concerned court may deem fit with reference to the special circumstances of a case. We have referred to the procedure and process rather elaborately as we find that section 89 has been a non-starter with many courts. Though the process under Section 89 appears to be lengthy and complicated, in practice the process is simple: know the dispute; exclude `unfit' cases; ascertain consent for arbitration or conciliation; if there is no consent, select Lok Adalat for simple cases and mediation for all other cases, reserving reference to a Judge assisted settlement only in exceptional or special cases. Conclusion

34. Coming back to this case, we may refer to the decision in Sukanya Holdings relied upon by the respondents, to contend that for a reference to arbitration under section 89 of the Code, consent of parties is not required. The High Court assumed that Sukanya Holdings has held that section 89 enables the civil court to refer a case to arbitration even in the absence of an arbitration agreement. Sukanya Holdings does not lay down any such proposition. In that decision, this Court was considering the question as to whether an application under section 8 of the AC Act could be maintained even where a part of the subject matter of the suit was not covered by an arbitration agreement. The only observations in the decision relating to Section 89 are as under:

"Reliance was placed on Section 89 CPC in support of the argument that the matter should have been referred to arbitration. In our view, Section 89 CPC cannot be resorted to for interpreting Section 8 of the Act as it stands on a different footing and it would be applicable even in cases where there is no arbitration agreement for referring the dispute for arbitration. Further, for that purpose, the court has to apply its mind to the condition contemplated under Section 89 CPC and even if application under Section 8 of the Act is rejected, the court is required to follow the procedure prescribed under the said section."

The observations only mean that even when there is no existing arbitration agreement enabling filing of an application under section 8 of the Act, there can be a reference under section 89 to arbitration if parties agree to arbitration. The observations in Sukanya Holdings do not assist the first respondent as they were made in the context of considering a question as to whether section 89 of the Code could be invoked for seeking a reference under section 8 of the AC Act in a suit, where only a part of the subject- matter of the suit was covered by arbitration agreement and other parts were not covered by arbitration agreement. The first respondent next contended that the effect of the decision in Sukanya Holdings is that "section 89 of CPC would be applicable even in cases where there is no arbitration agreement for referring the dispute to arbitration." There can be no dispute in regard to the said proposition as Section 89 deals, not only with arbitration but also four other modes of non-adjudicatory resolution processes and existence of an arbitration agreement is not a condition precedent for exercising power under Section 89 of the Code in regard to the said four ADR processes.

35. In the light of the above discussion, we answer the questions as follows :

(i) The trial court did not adopt the proper procedure while enforcing Section 89 of the Code. Failure to invoke Section 89 *suo moto* after completion of pleadings and considering it only after an application under Section 89 was filed, is erroneous.

(ii) A civil court exercising power under Section 89 of the Code cannot refer a suit to arbitration unless all the parties to the suit agree for such reference.

36. Consequently, this appeal is allowed and the order of the trial court referring the matter to arbitration and the order of the High Court affirming the said reference are set aside. The Trial Court will now consider and decide upon a non-adjudicatory ADR process.

* * * * *

B. UNDERSTANDING ODR

The concept of ODR is still evolving. At a preliminary level, ODR refers to the **usage of ICT tools** to enable parties to resolve their disputes. This includes using simple to complicated communication technologies such as audio-visual tools ranging from telephones to smart phones to LED screens, spread sheets, e-mail and messaging applications, with the crux of it being to enable dispute resolution without physical congregation of the parties.

From instances seen around the world, in its first phase, ODR shares its fundamentals with ADR mechanisms such as negotiation, mediation and arbitration.[15] To this extent, most of the early ODR efforts have **mirrored ADR processes** through aggregated use of simple ICT tools.[16]

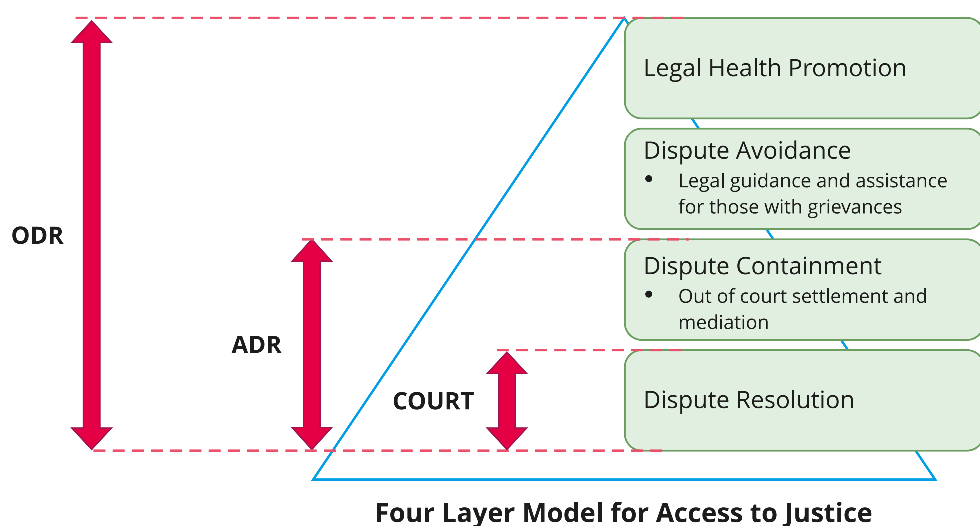
ODR however is not to be understood to mean just e-ADR. At a more advanced stage, ODR can work as the fourth party through the use of algorithmic assistance tools that help parties find resolutions. Such technology can take the form of **intelligent decision support systems**, smart negotiation tools, automated resolution, and machine learning. Eventually, ODR can also offer multi-door dispute resolution through tailored processes for specific parties and their dispute.[17] With the help of technology tools, these **tailored processes can be designed** to achieve an ideal dispute resolution for all the disputants. A few of these advanced ODR systems, already underway in some jurisdictions, are described in Chapter III of the report.

Even the manner in which ODR can impact the dispute resolution ecosystem is expansive. It can function as more than merely a method to 'resolve disputes'. Instead, ODR can provide a comprehensive system for access to justice, as articulated by Professor Richard Susskind. It can do so by encompassing the following stages in the life cycle of a dispute: [18]

1. **Legal Health Promotion:** ODR can play an important role in promoting legal health by making people aware about the law, their rights and duties, and the remedies available with them. For instance, in the European Union, it is mandatory for merchants to inform the consumers of the option to avail ODR. Similarly, tools can be developed where parties can feed in questions and get answers on the rights and protections. Thus overall, ODR can help in moving towards a more **'rule of law' based society**.
2. **Dispute Avoidance:** Data driven development of ODR tools can provide citizens information to make informed choices based on the strength and weaknesses of the position of law. For example, the study of thousands of credit disputes can help parties identify, even before a dispute has arisen, the stages at which the disputes are likely to occur, thereby providing them an opportunity to pre-emptively address any likely challenges. Additionally, ODR can also help parties identify the likely outcome of the case if the rights are agitated in that situation.

Thus, ODR can help people recognise and avoid legal obstacles and thereby, disputes.

3. **Dispute Containment:** At a primary level, ODR can enable informal and pragmatic containment of dispute before it enters court systems.[19] ADR processes such as **mediation and arbitration** already provide an avenue where disputes can be resolved before they reach the courts. In this light, ODR, in effect, can add a digital layer to ADR and make it more efficient. For instance, mandatory pre-litigation ODR cases involving e-commerce claims, small cause claims and cheque-bouncing issues can be resolved before they reach the courts system. This is extremely critical for Indian judiciary, which has a burgeoning case-load.



Four Layer Model for Access to Justice

Even though ODR has evolved over the years as explained in the next section on its origins, a few undisputable features of ODR which have also lent themselves to circumscribing this Committee's mandate are listed below:

1. A mandatory component of ODR is the use of ICT tools. To this end, a certain threshold in terms of integration of ICT needs to be met for a dispute resolution process to be categorised under ODR. For instance, mere scheduling of hearing dates through email or exchange of documents online would not classify as ODR. If substantial communication (verbal and non-verbal) between parties or the parties and the neutrals occur through an **aggregated use of ICT tools** or over an ODR Platform, it would fall within the ambit of ODR.[20]

2. ODR is **distinct from virtual courts**. The use of ICT tools within the judiciary is covered under the term 'virtual courts' or 'online courts'.[21] On the other hand, ODR is the use of ICT tools outside the court system. That said, cases could be referred to ODR during the various stages of a life cycle of a case. ODR can be used prior to a case being filed into court (e.g. pre-litigation mediation) or referred to ODR after a case is filed in court (e.g. reference under Section 89 of the Code of Civil Procedure,

1908), or even after a case is resolved in a court and considered closed (e.g. for modifying divorce orders post-separation).

3. ODR is **not a completely new mode of dispute resolution**. For many variants of ODR, such as e-arbitration and e-mediation, the prescribed processes used during resolution, are informed by the traditional processes, which ODR is intending to elevate with technology. Thus, pre-existing formal ways of dispute resolution outside the court system can be considered to be ODR if they satisfy the requirements mentioned under point one above. That said, there are indeed other variants of ODR, which are new and continue to evolve, especially in the realm of AI/ML driven ODR.

C. ORIGINS OF ODR

Before describing the challenges with the status quo, it is important to understand the origins of ODR, identify the pattern and pace of its development, and the challenges that have already been overcome.

The origins of ODR can be traced to the **evolution of the internet in the 1990s**, which increased online transactions, and thereby disputes related to such transactions. Broadly, ODR's development across the world can be divided into three phases, with each phase benefiting from the subsequent innovations in ICT.

1. First Phase: eBay's experiment leads the way

The first initiatives on ODR projects were launched in 1996 in the University of Massachusetts and the University of Maryland.[22] In the late 1990s, with the expansion of the internet and the evolution of e-commerce, **a robust system** was required to address the disputes originating from commercial activities over the internet.[23] ODR offered a solution to this problem.

Around the same time, ODR was pioneered in a few early e-commerce entities. In 1999, **eBay started a pilot project** to provide online mediation facilities for disputes arising between buyers and sellers on its platform.[24] The pilot project handled **two hundred disputes in a two-week period**, by far the largest number of disputes ever handled online. It prompted eBay to include dispute resolution as an option for buyers and sellers in the event a transaction was unsuccessful. Initially, eBay's dispute resolution process was contracted out to an internet start-up, **SquareTrade**, and several years later was taken over by eBay.[25] The number of disputes handled by eBay grew steadily over the next decade and by 2010 eBay was handling over 60 million disputes per year through its ODR Platform.[26]

2. Second Phase: Growth of ODR start-ups

The success of this model, and the rapid growth of the internet kick-started the evolution of ODR, leading to the boom of ODR Platforms. [27] There were up to **21 new ODR programs that were launched in the year 1999** from only 9 in the previous year.[28] By 2004, the number had reached 115.[29] Even the Internet

CHAPTER 13

ONLINE DISPUTE RESOLUTION: TODAY AND TOMORROW

The pessimist sees difficulty in every opportunity. The optimist sees opportunity in every difficulty.

– Winston Churchill

I. THE CONCEPT OF ONLINE DISPUTE RESOLUTION

Let us take this opportunity to examine an interesting proposition discussed in the previous chapters: conflict is not necessarily negative. While there is some truth in the fact that conflict is associated with aggression, harm, and damage, it is also an unmistakable sign of our acknowledgement of each other's presence in our lives. This supports the idea that in every human relationship, fights are seen as 'healthy' since they indicate a struggle to hear and be heard, whereas a frigid period of silence indicates absolute indifference and non-cooperation.

With the coronavirus pandemic, people have increasingly adapted to life in their bubbles. Our fear of the disease makes these bubbles hostile to human proximity, creating social distance. Without the need to acknowledge pent-up conflicts and resolve them to move relationships forward, the human society is reaching a state of complete enervation.

Online dispute resolution (ODR) is a major milestone for alternative dispute resolution (ADR) in a pandemic-ridden world, primarily because it represents a human adaptation to an inconceivable challenge. It revitalizes society by being a facilitator of compromise and conversations since it is easily accessible. This encourages people to approach these platforms and express themselves. Further, since they can engage with the other party from places where they feel most at ease, it aids dispute resolution by converting social distance into a strength, rather than a weakness. It is an alternate to the alternative for traditional litigation.

ODR can be distinguished from the more traditional procedures of ADR. Here, technology takes part as a 'fourth party'.[1] It can be referred to as a method of finding

1. Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Wiley, 2001), p. 93; Arno R. Lodder and Ernest Thiessen, *The Role of Artificial Intelligence in Online Dispute Resolution* (ResearchGate, 2003).

an amicable solution to a dispute between the parties with the assistance of technology, where any of the party or the mediator cannot be physically present and so they are connected through technological means. It is particularly important to note that the communication medium used for mediation plays a vital role in the whole mediation process and can influence the negotiations themselves. The rapid increase and reliance on the information technology of the world is pervasively increasing every second and demands that all adapt to it. Mediation is no exception. Electronic commerce and the Internet offer unprecedented opportunities.[2] Professor Susskind thinks that ODR will "liberate a latent market, people and organization, who have not felt able to take action in the past,"[3] and "will become the dominant way to resolve all bar the most complex and high-value disputes."[4] The Civil Justice Council (CJC) of the United Kingdom appointed an ODR Advisory Group under the chairmanship of Professor Susskind in 2014. This is a definite indication of how ODR has started to gain importance. The ODR mechanism is also used as an alternative solution to resolve cross-border disputes.

II. ONLINE DISPUTE RESOLUTION MECHANISM AS AN ALTERNATIVE SOLUTION TO RESOLVE CROSS-BORDER DISPUTES

ODR widens the horizon of dispute resolution mechanisms and tends to resolve issues that were never envisaged and especially serves as an alternate mechanism to resolve cross-border disputes. It has proved time and again to be one of the most efficient, coherent, and efficacious mechanisms to resolve issues. ODR resolves one of the major issues of jurisdiction in cross-border disputes. It offers the most efficient alternative to resolve the dispute by being swift and cost-efficient. Online mediation has gained more fame than online arbitration. One of the reasons researchers chose online mediation over online arbitration was the fact that online arbitration projects have had great difficulty in obtaining cases because potential respondents do not wish to consent to the decision-making authority of an arbitrator.[5] Melissa Conley Tyler reported that mediation was the most common individual service offered by ODR service providers in 2005. There are several online mediation initiatives as well, such as the Online

2. Marc Wilikens, Arnold Vahrenwald, and Philip Morris, *Out-of-Court Dispute Settlement Systems for e-Commerce: Report of an Exploratory Study* (Joint Research Centre, 2000), p. 2.
3. Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford: Oxford University Press, 2008).
4. Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Great Britain: Clay's Ltd, St Ives Plc., 2003).
5. E. Katsh, J. Rifkin, and A. Gaitenby, "E-Commerce, E-Disputes and E-Dispute Resolution: In the Shadow of 'eBay Law,'" *Ohio State Journal of Dispute Resolution*, 15, no. 3 (2000): 705–734.

Ombudsman Project, the Maryland Family Mediation Project, the Cyber Tribunal Project at the University of Montreal, School of Law, Square Trade, and the like.

Recently, the Dutch minister of the Justice Department Korthals has stated that he sees possibilities for a cross-border Consumer Complaint Board for e-commerce disputes between the Netherlands and Germany.[6] In Europe, initiatives towards ODR were launched including the Dutch e-Mediation initiative and the British e-Mediator to promote online mediation.

Some ODR service providers like Juripax and the Mediation Room open themselves to the world and work as global practitioners, not limiting themselves to any one region and being an effective ODR tool to use for mediation in cross-border disputes. The Directive on Consumer Alternative Dispute Resolution defines a cross-border dispute as a "contractual dispute arising from the sale of goods or provision of services, in case the consumer, when ordering such goods or services, is domiciled in a member-state other than that of the trader."[7] Cross-border disputes are referred to in the case when the mediation, judicial, or arbitrary proceedings are engaged in a member-state other than the one where the parties are domiciled in.[8]

Cross-border disputes are, however, highly complicated and involve various complex elements due to the difference in jurisdictions. It is important for the mediator as well as for the parties to be aware of the laws and customs of both nations. It is vital to consider that the settlement reached is not in contradiction with any legislative laws or customs of any nation or in contradiction with international legislation. In disputes related to cross-border, where the proceedings are conducted online, it becomes more important for the moderator to be equipped with certain skill sets and be aware of the laws and customs of both countries so that he can facilitate to resolve the issue in an unbiased and competent manner.

It is also vital for the mediator to adopt national codes of conduct for the mediator if they are present in any of the countries the disputing parties reside in. Cross-border dispute resolution is a structured and voluntary process where disputes that arise between two parties residing in different nations are tried to be resolved. It is also of great importance that the settlement agreement in such cases be drawn in language/s that is understood by both the parties so that future disputes arising related to the settlement agreement can be resolved. The ODR mechanism makes this process of mediation more facile, accessible, time saving, and lucrative. Cross-border dispute resolution

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6. *De automatiseringsgids* 16 juni 2000, p. 1; Esther van den Heuvel, *Online Dispute Resolution as a Solution to Cross-Border e-Disputes: An Introduction to ODR* (1997).
7. Directive of the European Parliament and of the Council 2009/22/EC (European Union, 2009).
8. *Ibid.*

involves an extremely high level of complexity since there are two nations' legislations involved in the same case and the matter lies in two different nations' jurisdiction. Now that we have already studied the different types of mediation, it is clear that all countries have their preferences and that different techniques are used in different countries. A new challenge of choosing the kind of mediation for the proceedings is also put forward in this type of mediation, that is, parties have to choose the type of mediation they want to get involved in.

Online mediation in cross-border disputes not only offers many benefits but also faces many obstacles. One of the main obstacles is that a large group is not equipped or is still in the process of adapting to the Internet and/or other technological advancements. ODR tends to just add up to their difficulties. For ODR to be a successful mechanism in resolving cross-border disputes, everyone must be equipped with technology.

Another obstacle is the unfamiliarity of ODR amongst people. The mediation process is unfamiliar to most people and as it is a voluntary process, it is not likely that many people will volunteer to take part in a process they do not know and/or do not understand.[9] For this mechanism to be successful, people must be made aware of mediation. Yet another obstacle is the combination of two relatively new phenomena which will in all likelihood be met with resistance from different sides. Therefore, it is essential to create trust in ODR[10] and the process of mediation so that people are drawn to resolve cross-border disputes using mediation via the ODR mechanism. In the United States, there are seals from 'Online Mediators' and 'Squaretrade' and 'BBBOnline' and various others. It is especially important when introducing seals like these to make sure that companies do not use these seals as a mere marketing mechanism but also follow the rules.[11] The BBBOnLine Reliability Program, for instance, will immediately take away the seal if a company does not comply with the outcome of a BBBOnLine procedure.[12] More such steps need to be followed so that people can be assured of safety, privacy, and compliance by the parties to the terms of the settlement agreement to resolve cross-border disputes using mediation in ODR mechanism.

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9. C. Hart, *Online Dispute Resolution and Avoidance in Electronic Commerce*, Uniform Law Conference of Canada, 8 August 1999.
10. Esther van den Heuvel, *Online Dispute Resolution as a Solution to Cross-Border e-Disputes: An Introduction to ODR* (1997).
11. S. van der Hof, *De internationale on-line consumentenovereenkomst*, an article written for the spring meeting of the Netherlands Association for Information Technology and Law, 11 May 2000, p. 11.
12. C.I. Underhill, S.J. Cole, and A. Cohen, *CBBB and BBBOnLine, Alternative Dispute Resolution for Consumer Transactions in the Borderless Society* (Arlington, VA, 21 March 2000), p. 12.

III. A METHODICAL BREAKDOWN OF ONLINE DISPUTE RESOLUTION: ADVANTAGES AND DISADVANTAGES

Taking the contemporary situation of COVID-19 and the legal recognition of arbitration agreements through electronic means[13] into consideration, an active action for dispute resolution is called for because as individual businesses have either shut down or restarted with losses, they may have inevitably failed to fulfil their legal obligations. Although we observe that the courts in India have undertaken virtual hearings, in consideration of the backlog of cases, speedy disposal still proves to be a conundrum. In such a scenario, ODR is a viable alternative given its advantages over traditional courts of law and ADR. Although the possibilities of ODR are endless in light of its advantages and development campaigns at various governmental levels, ODR has its fair share of disadvantages. Therefore, we shall attempt to address both ends of the spectrum by considering India and other developing countries for illustration purposes alone.

A. *Advantages of ODR over Traditional Courts and ADR*

1. Resolution of the Economic Burden

At the outset, we observe that there exists a benefit of cost savings. In traditional litigation, the costs incurred for travelling long distances, court fees, attorney fees, and costs alike are abysmal.[14] Further, the long pendency of the litigation cases leads to a perpetual incurring of such costs and expenditure. Traditional litigation might often be unnecessary in multiple cases such as in those matters where both the parties have already determined their liabilities, and the dispute is only concerned with the monetary settlement. In such a situation, ODR proves to be a massive cost-saver.[15]

Apart from the reduced costs, we also observe flexibility in terms of traveling. The parties and the neutral do not have to traverse prolonged distances. Further, the documents do not have to be posted to either of the parties' locations. The need for a common physical facility also lapses. All the aforementioned are compensated efficiently and effectively through the virtual mode wherein the parties choose to communicate via a common ODR platform. This common online platform may specifically be designed for ODR. The documents and messages are also transmitted through this common online platform. The neutral's time is also significantly saved because they can hold caucuses with either party or with both the parties without leading to a disruption

13. Arbitration and Conciliation (Amendment) Act, 2015, Section 3, Acts of Parliament, 2015 (India).
14. Llewellyn Joseph Gibbons, Robin M. Kennedy, and Jon Michael Gibbs, "Frontiers of Law: The Internet and Cyberspace: Cyber-Mediation Communications Medium Massaging the Message," *New Mexico Law Review*, 32 (2002).
15. Lan Q. Hang, "Online Dispute Resolution Systems: The Future of Cyberspace Law," *Santa Clara Law Review*, 41, no. 3 (2001).

in communication. Further, the "*idle time*" of the parties is also substantially reduced as compared to traditional ADR, since the individual parties do not have to separately wait for the next stage of ADR.[16]

2. Speedy and Convenient Dispute Resolution Mechanism with Data Storage

The pendency of cases in India is exorbitant due to administrative complexities, excessive vacancies and adjournments, and complex processes. Though ADR seemed to be a reasonable option, it was faced with similar difficulties and led to the need for ODR. In such a scenario, ODR is capable of quick dispute resolution through synchronization of mutual efforts, dialogue, and schedules through asynchronous communication that allows parties to submit their arguments intermittently.[17] Further, the conundrum of data storage is also resolved because the soft copy of the documents can be stored in the servers of the respective ODR platforms without needing to delete the same.[18] In finality, the existent burden on the traditional courts of law is also significantly reduced.

3. Positive Environmental Impact

The Indian courts use approximately 11 billion sheets of paper. The 'green cost' to this is approximately 1.3 million trees and 109 billion litres of water per annum.[19] As problematic as this sounds, the same is resolved through ODR because the need for paper in ODR is eliminated wherein the parties and the neutral communicate through electronic means.

4. Elimination of Inherent and Subconscious Bias

Studies have shown that there is an implicit bias and anxiousness on the part of the neutral while resolving disputes between members from different communities and backgrounds.[20] Thus, ODR helps to resolve the same wherein certain ODR platforms, which

16. Joseph W. Goodman, "The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites," *Duke Law and Technology Review*, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr (last accessed on 05 April 2021).
17. The NITI Aayog Expert Committee on ODR, *Designing the Future of Dispute Resolution: The ODR Policy Plan for India*, NITI AAYOG (October 2020), https://niti.gov.in/sites/default/files/2020-10/Draft-ODR-Report-NITI-Aayog-Committee.pdf (last accessed on 05 April 2021).
18. Moghe, "Online Dispute Resolution Mechanism: Prospects and Challenges in India," *Legal Service India*, http://www.legalserviceindia.com/legal/article-839-online-dispute-resolution-mechanism-prospects-and-challenges-in-india.html.
19. Bhaven Shah, "Online Dispute Resolution: A Possible Cure to the Virus Plaguing the Justice Delivery System?" *Bar & Bench* (22 March 2020), https://www.barandbench.com/columns/online-dispute-resolution-a-possible-cure-to-the-virus-plaguing-the-justice-delivery-system.
20. Carol Izumi, "Implicit Bias and Prejudice in Mediation," *SMU Law Review* (2017), https://scholar.smu.edu/cgi/viewcontent.cgi?article=4696&context=smulr.

are based solely on texts and emails, eliminates the need for audio and visual. This elimination, in turn, subtracts the identity of the parties and aids the neutral to better resolve the dispute without needing to know the backgrounds of the parties.[21] Indian cases of ***Shakti Bhog Foods Ltd. v. Kola Shipping Ltd.***[22] and ***Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.***[23] are valid examples of the implementation of ODR as the parties in the aforementioned cases decided on arbitration as a mode through the exchange of emails.

The need for expeditious disposal of cases through technology was also recognized in ***Meters and Instruments Private Limited and Ors. v. Kanchan Mehta***[24] wherein the Supreme Court of India held that

> [U]se of modern technology needs to be considered not only for paperless courts but also to reduce overcrowding of courts. There appears to be a need to consider categories of cases which can be partly or entirely concluded "online" without the physical presence of the parties by simplifying procedures where seriously disputed questions are not required to be adjudicated.

Further, in the case of ***Grid Corporation of Orissa Ltd. v. AES Corporation***,[25] the Supreme Court of India explicitly held that

> [W]hen an effective consultation can be achieved by resort to electronic media and remote conferencing it is not necessary that the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or the ruling contract between the parties.

Thus, the benefits derived from ODR lead to a proper enhancement of our legal health wherein the individuals are aware of their rights and remedies. Further, due to the existence of ODR, their confidence in the legal resolution process also increases. Therefore, due to these aforementioned benefits, we can conclude that ODR increases access to justice as gradually more people choose ODR over other traditional methods for dispute resolution.[26]

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21. *Supra* note 5.
22. *Shakti Bhog Foods Ltd. v. Kola Shipping Ltd.*, A.I.R. 2009 S.C. 12 (India).
23. *Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.*, 2010 3 S.C.C. 1 (India).
24. *Meters and Instruments Private Limited and Ors. v. Kanchan Mehta*, A.I.R. 2017 S.C. 4594 (India)*.
25. *Grid Corporation of Orissa Ltd. v. AES Corporation* (2002) 7 S.C.C. 736 (India).
26. Online Dispute Resolution Advisory Group, "Online Dispute Resolution for Low Value Civil Claims," *Courts and Tribunal Judiciary* (2015), https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf.

5. Flexibility in the Selection of Language of Communication

As we have now established that there exists an inherent subconscious bias by the neutral, there also arises the need for us to comprehend the existence of cultural and language barriers which intrinsically renders it difficult for the parties to communicate effectively and efficiently. In cases of international ODR, it may be possible that both parties possess differences in the language of communication. In such a scenario, the need for translation arises. In Latin America, we observe that ODR may happen either in Spanish or Portuguese.[27] Similarly, given the advanced and customized, verified ODR platforms such as Peacegate,[28] Juripax,[29] the Mediation Room,[30] Square Trade, and Mordia, the need for a translation software arises which not only translates a person's text into understandable speech but also translates the documents and messages.

B. *Disadvantages of ODR over Traditional Courts and ADR*

1. Challenges in the Technological Structure Concerning the Digital and Gender Divide

Digital literacy is essential for the smooth functioning of ODR. However, in India, there exists a massive digital literacy gap concerning age, ethnicity of a person, and their geographical placement. Thus, there is a need to address the digital divide to ensure equal access to justice to people rather than restricting it to non-rural areas alone.[31] Further, one of the most aggravating conundrums is the lack of adequate technological infrastructure to undertake ODR. ODR requires a computer and/or smartphones and medium- to high-speed Internet connectivity to ensure a hassle-free experience. However, because of the scarce distribution and access to these resources, there exists a perpetual challenge.[32] In finality, it was observed that only one-third of Indian women have access to Internet facilities.[33] This situation is far worse in rural areas which have only 28 per cent of users with access to Internet facilities.[34]

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27. Shekhar Kumar, "Virtual Venues: Improving Online Dispute Resolution as an Alternative to Cost Intensive Litigation," *John Marshall Journal of Computer and Information Technology and Privacy Law*, 27, no. 1 (2009): 81, 82–93.
28. *Peacegate*, https://peacegate.in/#/guest-user-home.
29. *Juripax: Technology for Early Dispute Resolution*, http://www.juripax. com/EN/home.
30. *The Mediation Room*, http://www.themediationroom.com.
31. Charlotte Austin, *Online Dispute Resolution – An Introduction to Online Dispute Resolution (ODR), and Its Benefits and Drawbacks*, Ministry of Business, Innovation & Employment (2017).
32. *Supra* note 4.
33. IAMAI, *India Internet 2019* (2019), https://cms.iamai.in/Content/ResearchPapers/d3654bcc-002f-4fc7-ab39-e1fbeb00005d.pdf (last accessed on 05 April 2021).
34. *Supra* note 5, at 66.

Thus, it leads to the birth of a gender divide in ODR which mandates an immediate resolution. In such a scenario, effective deployment and implementation of government schemes are of importance wherein the government must adopt a sensitive and accountable approach. A quintessential example of such an active advocate scheme is the National Broadband Mission wherein the Indian Government aims to provide broadband access to all the villages by 2022.[35]

2. Social Perceptional Challenge of ODR

It is socially difficult to introduce ODR in countries that heavily depend on traditional mechanisms such as courts of law. This is further aggravated since resorting to the ADR mechanism is only in its nascent stage, which makes the road to ODR much more arduous.[36] This difficulty is worsened because of the lack of awareness regarding ADR and ODR, due to them being in their initial stages of development, which leads to the development of the corollary: a lack of awareness.[37] This awareness problem persists because of the lack of familiarity with the new modes of dispute resolution as people have made themselves comfortable in the traditional modes of dispute resolution in the current social strata, that is, courts of law.[38] Therefore, the most appropriate way to deal with the same is to not resort to arm-chair bureaucracy but active-field bureaucracy.

3. Functional Conundrums

Firstly, there persists a problem of data privacy and confidentiality. These problems are in terms of impersonation of online data coupled with the breach of privacy of the parties' data through the exchange of their documents and other materials during such ODR process, and through the tampering of digital evidence such as awards and agreements delivered digitally.[39] Secondly, with the implementation of ODR, there will be an exponential rise in demand for neutrals that are comfortable and well versed with the ODR technology.[40] However, this may prove counter-productive due to the persistent digital divide. It is also a challenge to handle dispute resolution remotely as the neutral is mandated to adhere to certain etiquettes, both professional and personal, to

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35. DD News, *Govt. Launches National Broadband Mission, Aims to Provide Broadband for All*, DD News (18 December 2019), http://ddnews.gov.in/node/39578#:~:text=The%20government%20yesterday%20launched%20the,to%20all%20villages%20by%202022.
36. *Supra* note 5, at 67.
37. *Ibid.*
38. *Ibid.*
39. *Supra* note 12.
40. Graham Ross, *Challenges and Opportunities in Implementing ODR*, Proceedings of the UNECE Forum on ODR (2003), https://www.mediate.com/Integrating/docs/ross.pdf.

ensure an effective and efficient ODR. These etiquettes may range from setting the right background to resorting to a properly verified and authorized platform for ODR that adheres to the data protection standards and ensures the safety and confidentiality of the data. In other words, a striking need for training neutrals in modern technology is existent in our social construct wherein the feeling of isolation from technology should be dwindling rather than magnifying.

4. Uncertainty Regarding the End Product of ODR

Court-initiated mediation proceedings are enforceable under S. 21 of the Legal Services Authorities Act, 1987, in India.[41] However, there exists a grey area regarding the enforceability of such proceedings that are not initiated by the court because the latter type of proceedings can be enforced only as an agreement between the parties and any breach shall result in the formal court process.[42] In finality, the Arbitration and Conciliation Act of 1996 in India allows for the enforcement of arbitral awards in the same manner as that of court decrees.[43] The reason why this is problematic is that the enforcement and execution of such awards, through traditional courts of law, leads to a further delay and acts counter-productive to the core objectives of ODR.

Although the scenario of ODR in India and other similar developing countries looks promising, it is far from materialization given that the disadvantages of ODR far outweigh its advantages. Positive governmental effort and support towards familiarization and vocational training in advanced technology is the need of the hour. In conclusion, sensitization of people about the ADR mechanism is essential to bridge the gap between the planning and the execution levels.

IV. ANALYSIS OF SURVEY CONDUCTED IN RESPECT OF ODR

We conducted a survey on ODR mechanisms, and post analysing all the aspects, the following charts were drawn from the responses as shown below. The participants to the survey were mediators and parties who had been engaged in the mediation process. They also represent a large diversity of cultural, economic, and social backgrounds.

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41. *Afcons Infrastructure Ltd. & Another v. Cherian Varkey Construction Company Pvt Ltd & Others*, (2010) 8 S.C.C. 24 (India).
42. *Supra* note 5, at 69.
43. Arbitration and Conciliation Act, 1996, s. 36, Acts of Parliament, 1996 (India).

it would be really difficult to judge a person's body language at a video conference. The visual availability of the person due to constraints such as the camera coverage and the screen size may act as a barrier to provide a full view of the person and may hide their nervousness or frustration which they may generally convey through their actions or expressions.

VI. CHALLENGES TO EFFECTIVE COMMUNICATION IN ONLINE MEDIATION SESSIONS

The primary challenge to any ODR session is not having a sincere platform dedicated to ODR. Often, most mediators neglect the importance of the right platform that assists the process and guides both the parties and the mediators in the right direction. It has been widely observed that we as mediators try doing our clerical works while neglecting a few basic steps of the initiation and jeopardizing the process in the long run. The second major issue could be connectivity. Even for a country like India that has one of the largest Internet user-base in 2020 of approximately 700 million active Internet users, having good Internet connectivity is still a challenge for many. It, therefore, compromises the modes of communication during an online mediation session. Further, the other barriers to effective communication, if a stable network has not been maintained, could be the language barrier, communication barrier, technological unsoundness, difficulties in adjusting to an online platform from a physical form, inactive listening, unwillingness to participate, impossibility to read a person's body language, and lastly, barriers to creating a rapport. A person's physical presence has ways to create a warmer and more hospitable atmosphere, whereas online meetings may lack the human touch required for such acts. A simple handshake can sometimes comfort a person and a smile can win their trust. Such factors could be missing in an online session due to the absence of a physical presence.

Language and communication barriers in online mediation could be a problem. We live in a world with around 7,000 recognized spoken languages, and in a country like India where we have 22 recognized national regional languages, it is surely impossible to set one common ground language for even the mediators. This could work out only if both parties are comfortable with one common language of their preference, for example, English or Hindi. In physical meetings we often see clients being accompanied by professional translators, which could be a difficult task in an online session considering the confidentiality of the session. Further, not every client or party to a dispute is technology-friendly and may face problems handling laptops and video-calling applications and platforms. This could cause trouble and take more time whilst adjusting and learning to use the platform and may disrupt communication. Online platforms

may have video calling features but even then, it is hard to ensure whether the other person is listening or not. People often turn off their videos due to bad connectivity and then it is impossible to ascertain their presence and focus. When dealing with disputes of high emotional gravity, the parties to the dispute may also get vocal and may disconnect out of frustration. They may then not respond and be unwilling to participate out of stress or frustration and there would be no other way to communicate to them until they are willing to reach out to the mediator or the counsel assisting them through the session. In a mediation proceeding, it is very challenging to predict when and how things can go south and to what extent. Under such circumstances, the mediators have to control the session and indulge the parties in productive discussions, trying to avoid any conflict between the parties, and sometimes even console any of the clients who are overwhelmed by the discussions of the session. Such situations are difficult to be handled in an online scenario. Lastly, since the frame of online mediation sessions is restricted to the camera's wide-angle coverage and the size of the screen you may be using the platform from, it makes it challenging to read the body language of the person speaking. At times, the participant (client) may have improper lighting in the room and so his facial expressions may not be visible.

These issues may create difficulty in creating a rapport that may comfort the parties to open up about their problems and trust in the process that may provide them with an amicable solution and grant their interests. Mediation is a client-driven process because, at the end of the day, it is parties who have to live with the outcome of the mediation session: they have the power to make their own choices and make their own decisions. They are at their liberty to share and have absolute freedom to accept or refuse or review any offers tabled during the session. It is, therefore, important for both the mediator and the counsels that the session maintains the clarity of ideas and communication, which will be directly reflected in the offers made by the parties and this is where the main aim of effective communication comes into play.

Personal Anecdote

I truly speak from experience when I say it is quite difficult to conduct mediations using an online platform if such platform is not provided by the institution or in the situation where it is given but not well equipped. However, an additional difficulty arises in case of time restraints placed by the institution. For example, court-annexed mediations have a one-hour time limit which has a direct impact on creating a rapport with the parties. A possible solution would be to conduct one-on-one sessions with each party but that becomes time consuming and defeats the purpose. Another issue I recently faced was the technological inadaptability of elderly citizens who sometimes do not

even know how to unmute themselves. These are practical difficulties I have encountered and the next part deals with tips that I have learned over the course of time and experience to overcome these.

VII. MEASURES TO ENSURE EFFECTIVE COMMUNICATION IN ODR

As initially highlighted in the challenges, the primary challenge we face in an ODR (mediation) is the absence of an ODR-dedicated platform. What most mediators or ADR Institutions fail to acknowledge is the importance of an absolute ODR-dedicated platform that would not just lessen the burden on the part of the participants of the session, but also ensure that the process and procedure have been rightly followed. For example, the Indian Institute of Arbitration and Mediation has an ODR-dedicated platform known as *PeaceGate APP*, which is accessible on all electronic communication devices such Android or IOS-based phones, laptops, tablets, and the like. This app is an ADR ERP that assists parties to book a room for an ADR session on an online platform, which is created within the app itself. It first invites the parties to a negotiation session, and if the parties are not satisfied, gives them an option to move to online mediation, appointing a mediator from its interface as well, and finally, if the parties still feel they need to move a step further, it gives them a chance to move to arbitration and allows the parties to choose the arbitrator of their choice. This platform also has a virtual guide to assist you and ease the process, analyse your dispute, and identify the best mode for resolution. Such assistance is a part of communication as well and thus creates trust with the parties when they realize the ease and assistance they have been provided while trying to settle their dispute. Further, there are a few technical challenges that must be ensured to be well and in proper working condition in advance or well before the session, such as the following.

A. *Maintaining Proper Internet Connectivity and Other Logistics to Be Used in the Session*

Every participant to the mediation session, be it the clients, their counsels, or the mediators must ensure proper Internet connectivity as a primary requirement for a productive and effective ODR session (online mediation session). They must also ensure they have all other logistics required for the session (such as webcams, microphones, any external headphones, or speakerphones that may be used for the convenience of the session) to be in working condition before the session. Any disruption caused due to either bad connectivity or failure of any device would immediately disrupt the session and may even break the flow of the session compromising the communication and wasting time. The parties shall be advised to use any technical assistance if required, in

case they may not be technology-friendly and find it difficult to operate the functions of the platform used for the session.

B. *Ensuring No Background Disruptions, Proper Lighting in the Room, and Proper Camera and Mic Adjustment*

The participants are further requested to ensure that there are no disruptions or background noise in the room they may sit in while the session is in progress. The room shall have proper lighting and the camera should be adjusted in a way that the facial expression may be visible for the participant since, at times, the expressions (especially the eyes) do the talking. The microphone shall be adjusted in such a way that their voice is audible, but they are not breathing into the mic. Once these adjustments are made as per the soothing conditions, the session will be ready to begin without any interruptions.

Once the session is good to go, it is now the responsibility of the participants to not let the physical barriers and other constraints come in the way of a productive session to find an amicable solution. Therefore, for the convenience of the reader, we will divide the tips of communication based on the relationships involved in the session. They are as follows:

1. Role of Mediator (or Any Neutral Third Party) in a Mediation Session (ODR Session)

The role of a mediator is always crucial in ODR and ADR as they are responsible for maintaining and facilitating the communication and to bridge over any barriers in the way of finding an amicable solution. The mediator would therefore have to ensure to create a comfortable atmosphere by greeting positively with a smile and asking some general questions such as "How are you doing today?" "How can we assist the two parties today?" During a physical meet, mediators often comfort the parties by polite greetings, offering tea and coffee to ease the nervousness of the client and often observe the body language such as expressions, hand gestures, signs of sweating, or heavy breathing to sense the mood with which the client has entered the room. However, online mediation may not allow the mediator to have such access to analyse these things about the party to the dispute. Hence, they may sense the tone of the parties, and the expressions, if possible. They may ask questions that give the parties confidence and encourage them to open up, such as, "I understand we are connected online and so you may not feel as comfortable with this session, but since we are bound to have an online session, I hope that the arrangements are to your suiting?" and a few comforting remarks such as "We hope to be of the best possible assistance to you", "Please feel free to interact with us by using just our first names," and the like. Such

statements and remarks may help in easing the tension in the room and comfort the parties into opening up to the mediator. The mediator may also share their experience and qualifications that may build trust upon their capabilities. The usual offline mediation sessions take place in offices or chambers of the mediators and so, they have their degrees and certificates on display for the parties to refer to. In an online mediation, such details could be shared verbally.

2. Maintaining the Mediator–Party Interactions and Flow of the Session

Further while facilitating the conversation, the mediator may have to be more attentive in an online mode than in a physical one. It is easier to get distracted while conducting a session online, which may break the flow of the session. The mediator must ensure that there is no language barrier between either the parties or the party and the mediator. In addition to it, there must be no communication gap between the participants as well. If at any point a participant may get disconnected, the mediator may pause the session if possible. If the discussion has progressed any further from the point of disconnection, the mediator must brief the participant with the events he/she missed, and hence, the mediators would have to be active listeners. They may nod once in a while and clarify for the parties if and when required to stay aligned to the sense they wish to convey through their words. The mediators have the right to call a caucus which is used for one-to-one interaction with the teams and is a crucial element of the session that helps in understanding the stance of the party and to resolve any deadlock reached during the session. Since this is an online session it could be difficult for one party to leave the room by simply walking out, and so some video calling applications provide the features of breakout rooms where one party could be shifted while caucusing with the other. The mediator should take the prime duty to ensure and maintain effective communication by rephrasing the conversation to a simpler sense and refraining from passing any suggestions or judgments. Lastly, the flow of the session must remain uninterrupted for productive communication and so, the mediator must try and ensure that the session remains free from disruptions as much as possible. A mediator must be patient and incorporate the skills of effective communication that they may use during offline sessions into modified online versions to be the mindful and upgraded version of themselves with the changing times and future requirements. If the mediator can overcome the challenges of online mediation, the session could result in more productive results than any offline ADR session. At the end of a session, if it successfully resolves the issue, the mediator may thank the parties and ensure them that the post-session formalities will be taken care of by them with the cooperation of their respective counsels in the least time possible. Further, highlight the key moments of the session and summarize the events of it to the parties to ensure them that the mediator has been an active part of the session and so have been the parties and it is not the mediator or

the counsels who have resolved the issue but the clients themselves. However, if the mediation does not work out, the mediator must ensure that the parties do not lose trust in the process. Parties should either give it another chance or opt for another ODR session such as arbitration or conciliation.

3. Maintaining Communication on the Part of the Parties

After ensuring the above-mentioned measures, the parties in the session have a few duties and roles to ensure a productive session through effective communication. The interests of parties are either based on rapport and mutual respect or monetary losses and/or compensations. These sessions can only work well once the parties are willing to resolve the issue and share their problems and interests. Similarly, when the other person is given the chance to share their problems and interests, they should actively listen. The parties must acknowledge the fact that they both wish for the issue to be solved in the best way possible and it is for this sole purpose they are in the session. Just as the mediators, the parties may also respectfully clarify with the other to stay on the same page. The counsels for both the parties should be open to clarify any doubts of the other party or the mediators about any comment made or any proposal/offer that has been tabled by their clients. On various online platforms, it often happens that when two people start to speak at the same time trying to interrupt the other, their voices clash and get reduced to the point that they almost become inaudible. Therefore, for most ODR, it must be ensured that one party may not interrupt the other as they both would not be audible. Hence, to be able to hear and be heard, all parties must take turns to speak and wait for their chance patiently. In a physical scenario, people usually raise their voices higher to be heard over the other, but that may not help in an online mediation session. Lastly, the clients and their counsels may not create any unnecessary disruptions or barriers and must respect the mediator and cooperate with them and the other party at all times, since a mediation session is focused on creating a win-win situation. The parties must ensure that they do not disconnect by choice even if the session may not work as per their expectation. They may try to talk to the mediator alone in the absence of the other party if they feel that the joint conversation may not be helping the session. In such a situation, the mediator may help them in any way they may find possible. The clients must also recognize that an online mediation session may make it difficult for kind gestures towards the other party, such as warm hugs and handshakes, or in the Indian context, taking blessings by touching one's feet, but they may use the power of words to compensate for the physical distance that may act as a barrier to such acts.

Through effective communication, a lot of life's problems can be solved. We understand that adjusting to the online platforms and new technological advancements could

be a bit challenging, but the changing times require upgradation in lifestyle as well. Incorporating new ways and techniques into your old-school tricks of communication could yield better results. For example, instead of using the blackboards and chalks, we have shifted to using presentations and active video learning processes for better understanding. Similarly, ODR may provide better options to explain the technicalities of the issue at hand. Sharing files and documents over mails has made life easier. You may read the documents and refer to them at any point of time on your mobile device or laptops, which may help in reaching out to more participants at one go ensuring communicating with a mass, rather than an individual at a time. Further, these sessions provide better technical support to ensure the clarity of the session, such as recording the session with high-definition audio and video, to refer to it at any point if required. Communication is not a street or road as most phrases may portray, but communication is a whole city that has various roads, streets, and pathways. The distance you have to travel could be tricky, as it may have a lot of turns and roadblocks, or you may just use a simpler road that goes straight to your destination while not having any roadblocks. The latter is what effective communication aims to do. It ensures that you reach your destination with the person you wish to convey your ideas to, in the simplest and most comprehensible sense. The processes of ADR and ODR are always client-oriented, and so it is equally important for both the parties to be as involved as the mediator or any third neutral party, who is a professional in the field or is well aware of the intricacies of the process. The present situation of the global pandemic has revolutionized the mechanisms of dispute resolution, be it the formal methods of litigation or ADR mechanisms. The shift is prominent and will serve as the base for future dispute settlement techniques and laws.

VIII. ARTIFICIAL INTELLIGENCE AND MEDIATION

When we talk about Moore's law, we understand that it essentially argues the doubling capacity of the processor chips. In the current paradigm, we observe the same coming true with the rise of artificial intelligence (AI). The entire rationale behind AI is to create a framework that is capable of reducing the redundancy of human tasks by replacing them with advanced technology. AI is, thus, essentially a mechanism that is capable of performing human tasks, with human calibre, skills, knowledge, and emotions. Except for emotions, all the other factors are highly progressed, effective, and efficient as compared to that of human beings. The conundrum arises for emotions and the same shall be dealt with in the latter half of this part. The high efficiency and effectiveness of AI, when combined with the mediation process, open avenues of different stature. Therefore, we essentially attempt to address the role and capability of AI in the contemporary mediation scenario.

Creating Effective Communication in Your Life

*Randy Fujishin**

(*Creating Communications: Exploring and Expanding your Fundamental Communication Skills, 2nd Edn., Rownman Littlefield Publishers. 2009, pp 1-17)

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THE PROCESS OF COMMUNICATION

Let's begin with an examination of communication itself, for it is communication that enables us to experience our lives and share experiences with others. The late-night talks, the laughter, the gentle touches, the tears, the encouragement, and the thousands upon thousands of other communication acts all combine to create what you experience as life. Our communication with others is not a little thing. It is life itself. The importance of communication cannot be overstated. It is often suggested that "Once a human being has arrived on this earth, communication is the single most important factor determining what kinds of relationships he makes and what happens to him in the world." In other terms, it is stated that "How he manages his survival, how he develops intimacy, and how he makes sense of his world are largely dependent upon his communication skills."

So, what exactly is communication? Let's define communication in a way that emphasizes your creative involvement in the communication process. Communication is the process whereby we create and exchange messages.

A Process

Any activity can be viewed as a thing or a process. A thing is static, time bound, and unchanging. A process is moving, continually changing, with no beginning or end. In our definition, communication is a process—something that is continually changing. Individual words, sentences, and gestures have no meaning in isolation. They make sense only when viewed as parts of an ongoing, dynamic process.

To fully understand the process of communication, we must notice how what we say and do influences and affects what the other person says and does. We must pay attention to the changes we experience and how these changes influence and affect our perception, interpretation, and interactions with others, from moment to moment, year to year, and decade to decade.

Similarly, we also need to be sensitive to the ongoing changes in those we communicate with because they are changing too. Communication is alive, and to fully appreciate it requires that we view it as a dynamic, fluid, and continually changing process.

Creating Messages

Language in any culture contains thousands if not hundreds of thousands of words to select from and arrange in endless combinations to form the basic structures of verbal communication. There are even more subtle and not-so-subtle nonverbal (or nonlanguage) communication behaviours that can be added to the mix.

It is our ability to create messages from the verbal and nonverbal dimensions of communication that truly distinguishes us from all other forms of life. Our ability to create communication not only is the most significant way humans differ from animals and plants, but it also may be one of the deepest and strongest drives within us—to express and share who we are. What more powerful and significant way to express who and what we are than by communicating our thoughts and feelings with others?

Exchanging Messages

After selecting the words, sentences, and nonverbal cues to form the thought or feeling we are attempting to communicate, we send the message to the recipient, who processes the message and gives a response in the form of feedback. The recipient's role in the communication process is also a creative process, because what he or she selectively perceives and interprets from the original message will determine the meaning of the message for him or her. The message recipient then creates a response from all the words and nonverbal behaviours available. Receiving and creating a response is just as important as creating and sending the original message.

VERBAL AND NONVERBAL COMMUNICATION

The communication process has two forms—verbal and nonverbal. Both forms usually operate together in the majority of messages you send and receive.

Verbal communication is all spoken and written communication. A mother whispering reassuring words to a child, a speaker addressing an audience of five thousand, or a sunbather reading a book on the beach is utilizing verbal communication.

Nonverbal communication is all communication that is not spoken or writ-ten. It is your body type, voice, facial expressions, gestures, movement, clothing, and touch. It is your use of distance, use of time, and the environment you create. It is your laughter, your tears, your gentle touch, your relaxed breathing, the car you drive, and the colour of your pen. All these things and countless others make up your nonverbal communication.

Verbal communication and nonverbal communication enable you and me to communicate. They provide all that is necessary for the process of connecting, and it is our privilege to use them creatively, effectively, and meaningfully.

COMPONENTS OF COMMUNICATION

Even though the following seven components of communication operate almost instantaneously, we will examine them separately to more clearly understand their specific

function. The seven components are source, message, receiver, encoding, channel, decoding, and context.

Source: The source is the originator of the message. It is the person or persons who want to communicate a message to another person or a group of people. The source of a message can be an individual speaker addressing a group, a child asking for candy, a couple sending out invitations to a family reunion, or a person writing a letter.

Message: The message is the idea, thought, or feeling that the source wants to communicate. This message is encoded or converted into verbal and nonverbal symbols that will most likely be understood by the receiver.

Receiver: The receiver is the recipient of the message. The receiver can be an individual or a group of people. Once the receiver hears the words and receives the nonverbal cues from the sender, she must interpret or decode them if communication is to occur.

Encoding: Once the source has decided on a message to communicate, he must encode or convert that idea, thought, or feeling into verbal and nonverbal symbols that will be most effectively understood by the receiver. This encoding process can be extremely creative because there are unlimited ways for the source to convert the idea or feeling into words and behaviours.

Consider a simple message such as “I want to see you again.” The source can simply say, “I want to see you again,” and smile as he says the words. He can also say, “Let’s get together again,” and cast a humorous glance, or he can murmur, “I need to see you again,” with direct eye contact and outstretched arms. He could simply scribble a note on a napkin saying, “We need an encore,” and place it gently in front of the other person. There are countless ways to encode this simple message and each one would be received and interpreted by the recipient in a slightly different way.

The important thing to remember is that you can open yourself up to the end-less possibilities of selecting, arranging, and delivering messages you want to communicate. Your willingness to put greater creativity into the encoding process will enhance and deepen your communication with others.

Channel: A **channel** is the medium by which the message is communicated. The source can utilize the channels of sight, sound, touch, smell, and taste. For instance, if you want to communicate affection for another person, you can utilize a variety of channels or combination of channels. You can say, “I like you” (sound). You can give a hug (touch). You can wink an eye (sight). You can send cookies that you baked (taste). Or you can deliver a dozen roses (smell). You can creatively select the channels of communication to productively communicate your message.

Decoding: Decoding is the process of making sense out of the message received. The receiver must decipher the language and behaviours sent by the source so they will have meaning. After the receiver decodes the message, the receiver (now the source) can encode a return message and send it back to the other person.

Context: All communication occurs within a certain context. The context is made up of the physical surroundings, the occasion in which the communication occurs, the time, the number of people present, noise level, and many other variables that can influence and affect the encoding and decoding of messages. The context plays an important role in the communication process.

As you consider the effects that the context can have on communication, you might want to put your creativity to good use. Think of ways you can create a serene, healthy, and productive communication environment. Simple things like choosing a time when you both have an opportunity to meet. Making the actual physical surroundings clean, uncluttered, and peaceful. Maybe straightening up the house, buying some flowers to cheer the place up, and even putting on some soothing background music. Perhaps a drive in the country or a walk in a park will create a more relaxed context in which you can communicate more effectively. Whatever you do, remember that you can have some influence over the context in which communication occurs within your life.

PERCEPTION

To more fully understand communication, we must recognize the importance of perception. **Perception** is the process by which we assign meaning to a stimulus. Or put another way, perception is giving meaning to the things we see and experience.

Selection

The process of perception involves our five senses. We see, hear, touch, smell, and taste. From these five senses we take in the stimuli of the world. It's from these five senses that we receive information to make sense of our lives. Because we are exposed to much more stimuli than we could ever manage, the first step in perception is to select which stimuli to attend to. In other words, we don't attend to every stimulus that is present at any given moment.

Even in the location where you're reading this book, if you were to count each stimulus in your field of vision, the number would be in the thousands, perhaps the tens of thousands. To pay attention to each stimulus at the same moment would be impossible. So you have to decide—do you select the words in this sentence or gaze at your left foot? Each selection changes your focus of vision. You can't select all the things, so you must select a few.

Interpretation

Once we have selected our perceptions, the second step is to interpret them in a

way that makes sense to us. Interpretation is the act of assigning meaning to a

stimulus. It plays a role in every communication act we encounter. Is a friend's humorous remark intended to express fondness or irritation? Does your supervisor's request for an

immediate meeting with you communicate trouble or a pay raise? When an acquaintance says, "Let's do lunch," is the invitation serious or not? Almost every communication act we encounter involves some level of interpretation on our part. Let's examine some factors that influence our perception.

Physical factors.

The most obvious factors that influence our interpretation are physical. What is the condition of our five senses? Can we see accurately or do we need glasses? Can we hear sufficiently or is our hearing diminished by age? Can we smell and taste sharply or are allergies causing difficulties? Can you touch and feel with adequate sensitivity or do clothing and gloves make it hard?

The time of day affects how we physically process the sensory input. Are you more awake in the morning or late at night? Some people are most alert and attentive in the morning, while others come alive late at night.

Your general state of health can influence interpretation. When you are ill, hungry, or depressed, you see and experience a very different world than when you are healthy, well fed, and cheerful.

Age also can affect your interpretation. Older people view the world and events with a great deal more experience than do younger people. By simply having lived longer, older people have generally been through more of life's developmental stages—early adulthood, parenthood, grandparenthood, retirement. Younger people, on the other hand, usually have much more physical energy and time to play, explore, and investigate the world around them. With fewer life experiences, younger people interpret life differently.

Other physical factors are fatigue, hunger, stress, monthly biological cycles, diet, and exercise. Our bodies play an important role in our interpretation of the world.

Psychological factors. The second category of factors that influence interpretation is psychological or mental. For example, education and knowledge affect how we see the world around us. An individual who never went beyond the seventh grade sees a much different world than an individual who has completed law school. A trained botanist sees a forest far differently than does a first-grader.

Past experiences also affect how we interpret perceptions. Someone who grew up happily on a farm may view rural environments very differently than some-one who grew up in New York City. A victim of robbery may be more fearful of a darkened street than someone who has never experienced a crime. An individual who grew up in a loving, stable family may have a more positive view of raising children than a person who grew up in a cold, unstable family.

Assumptions about people and the world in general influence interpretations also. A belief that people are basically good and honest, or basically untrustworthy and self-serving, will affect how we view the actions of others.

Finally, moods will influence how we interpret the things we see and experience. When we are feeling successful and competent, we see a very different world than when we are feeling sad, lonely, and depressed.

Cultural factors. A person's cultural background can affect and influence his or her interpretation of the world. Chapter 5 is devoted to intercultural communication and the role culture plays in how we communicate with those who are different from us. For now, we'll just briefly mention some cultural factors that influence perception.

Every culture has its own worldview, language, customs, rituals, artefacts, traditions, and habits. These factors not only affect how people perceive and interact with one another within a given culture, but also, they influence how they interact with people of different cultures. Culture can shape and determine how an individual sees the world. Americans interpret direct eye contact as a sign of confidence, honesty, and politeness, whereas Japanese interpret the same direct eye contact as rude and confrontational. People from Middle Eastern countries often converse within a few inches of each other's face, whereas Americans would find such closeness violation of personal space. For Americans, the "okay" sign made with the thumb and the forefinger is a sign that everything is fine, but in many cultures, it is an obscene gesture.

Position in space. The final factor that influences perception is position in space. Where we are determines how we see things. For instance, if you sit at the back of a classroom, you will perceive a very different environment than if you sit in the front row, right under the nose of the lecturer. The same holds true for adult interaction with children. You will perceive children differently if you kneel down to their eye level rather than stand over them. You even pay higher prices for better viewing positions. Think of the last concert, sporting event, or resort you attended or visited. The closer seats or the rooms with a view generally cost more.

Perception Checking

Because so many factors influence perception, what can we do to create more effective communication? Perception checking is a method for inviting feedback on our interpretations. Perception checking involves three steps:

1. An observation of a particular behaviour.
2. Two possible interpretations of that behaviour.
3. A request for clarification about how to interpret that behaviour.

Many times people observe and interpret the behaviour, and that's the end of it. Often their interpretations can be easily and readily corrected with a simple perception check. Here are two examples of how perception checking works:

> "I noticed you haven't been in class for the past two weeks. (observed behaviour) I wasn't sure whether you've been sick (first interpretation) or were dropping the class. (second interpretation) What's up?" (request for clarification)

> "You walked right past me without saying hello. (observed behaviour) It makes me curious if you're mad at me (first interpretation) or just in a hurry. (second interpretation) How are you feeling?" (request for clarification)

Often, perception checking is more to the point. You may not want to use all three steps:

> "I see you rolling your eyes at me. (observed behaviour) What's the matter?" (invitation for clarification)

> "Are you certain you want to go to the movies? (request for clarification) You don't act like you're too enthusiastic." (observed behaviour)

Perception checking can be a simple technique for clarifying communication behaviour in a way that is not threatening or confrontational. It simply asks for clarification.

PRINCIPLES OF COMMUNICATION

The portion has been edited to suit the requirements of the course. LB-602

Certain generally accepted truths or principles of communication are important to consider when communicating with others. These principles hold true for all people in every culture. By understanding these principles, you will experience greater communication effectiveness.

Communication Is Constant

You cannot *not* communicate. In other words, you are always communicating. Too often we think that if we are not talking, we are not communicating. You may not be communicating verbally, but your nonverbal communication is constantly displaying signs and cues that reflect what you are thinking and feeling internally. Your posture, gestures, facial expressions, clothing, use of time, and even the car you drive are just a few of the nonverbal messages that others perceive and interpret.

Even when you are speaking, your tone of voice, rate of speech, pitch, volume, pauses or lack of pauses, and vocal fillers such as "ah" and "um" are some of the nonverbal behaviours that can convey what you're thinking and feeling beneath the level of language. You're always communicating.

Communication Is Irreversible

"Forget I said that." "I'm sorry I did that. Let's pretend it never happened." We have all issued statements like these in an attempt to erase or diminish the impact of an angry word or action. Even though the other person agreed to forget or dis-miss the statement or behaviour, the memory of a careless word or deed can last a lifetime. I'm sure you can recall a stinging criticism or hurtful act you experienced during childhood. The memory of the criticism or act can linger and haunt you many years later. Likewise, uplifting, positive, and healing words and deeds can also be carried in the hearts and minds of others forever.

Your every word and deed can leave an indelible imprint on the minds and hearts of others. Be conscious of your choices as you create messages to others.

Communication Is Creative

The last principle of communication is that it is creative. This creativity is much broader than the creativity associated with art, music, and poetry. It is the creativity expressed in your daily communication, in the unique and special ways you communicate: When you choose to be silent. The way you listen. The

times you choose to speak. The words you select from your vocabulary palette and the sentences you create. The combinations of facial expressions, gestures, movements, and postures you choose to express your thoughts and feelings. The letters you send. The telephone calls you make. The clothes you wear. The car you drive. The room you decorate. The home you live in. These are just some of the ways you create communication in your life.

Your communication and the impact it has on others does not just happen. You make it happen. You decide whether or not to return a phone call. You decide whether or not to respond to a lunch invitation. You decide whether to respond in kindness or in anger to a criticism levelled your way. You create by choosing one behaviour and not another. You are always creating something in your communication life.

Do You Enlarge or Diminish Others?

I believe that we enlarge or diminish others with our communication. We heal or hurt others with our words. People go away from our interactions feeling a little better or a little worse than before.

You are free to create the words and behaviours that will ultimately enlarge or diminish the recipient of your message. No one is writing your script or coaching your movements and gestures. You are ultimately the scriptwriter, the dialogue coach, the director, and the speaker who will deliver the lines. You are given a great deal of creative latitude for how you create your messages during your life. What will you create? Will you enlarge or diminish others with your communication?

Inside you there is an artist you might not know just yet. But relax, continue reading, and gently welcome the artist within you. The highest art you will ever create lies ahead—the art of communication.

Exercises below are intended to help you explore and experiment with new ways of communicating in a variety of settings and to expand your thoughts about who you are and the communication possibilities available to you.

Exploring Creative Tasks

1. Listen for thirty seconds or more without verbally interrupting a friend during a conversation. What changes did that create? What was your friend's response? How did you feel not interrupting as much?
2. Use perception checking in situations when another person's communication or behaviour is confusing, ambiguous, or unclear. What were the results of your perception check? What changes did it create in the conversation?
3. List ten positive characteristics or traits a friend possesses. Share the list with your friend. In your opinion, was the experience enlarging or diminishing for your friend? What makes you think so? Has this conversation changed your relationship?
4. Keep a daily journal of specific instances when you were consciously aware of attempting to create more positive messages to others. What does it feel like to keep this journal? What are you learning about yourself? About others?

Expanding your creative thinking

1. What are some of your current creative activities or hobbies? What art forms or creative activities would you like to do in the future? What benefits do you think you would derive from them? When would you like to begin these artful activities?
2. In what specific ways could you be more positive and enlarging in your communication with loved ones and friends? With co-workers and casual acquaintances? How do you think more positive communication behaviours would change your relationships with these people?
3. What factors influence your perception and communication during a given day? When are you the most alert, positive, and energetic? Are there any specific ways you modify or improve your "view" of others? What are they? Can you think of any other ways to "see" the best in others?
4. List five specific changes that you could undertake that would make you more self-accepting, calm, and loving. Tape this list to your bedroom mirror or your car dashboard to remind yourself of your goals.

NEGOTIATION- INTRODUCTION, STYLE AND STRATEGIES

(a) Negotiation
(b) Exercise: The negotiating style profile
(c) Definitions of negotiation
(d) Development of conflict
(e) Negotiating techniques
(f) Eight critical mistakes
(g) Being assertive in negotiation
(h) Exercise: Questionnaire: opinions and attitudes
(i) Negotiation: the art of negotiating

NEGOTIATION- INTRODUCTION, STYLE AND STRATEGIES

NEGOTIATION

I. In the space below, write what the word "negotiation" means to you.

____

____

____

____

Negotiation - Whenever we attempt to influence another person through an exchange of ideas, or something of material value, we are negotiating. Negotiation is the process we use to satisfy our needs when some else controls what we want.

(EXERCISE)
THE NEGOTIATING STYLE PROFILE

The following instrument is designed to help you gain a deeper understanding of your negotiating style. There is no right or wrong answers. The data provided by this instrument will only be valid if you respond candidly to each of the statements.

Directions: There are 30 statements in this instrument. Please respond to each statement by circling the number corresponding to the response that most accurately reflects the extent to which the statement is descriptive of your thinking.

Strongly disagree	**1**
Disagree	**2**
Slightly disagree	**3**
Neither agree or disagree	**4**
Slightly agree	**5**
Agree	**6**
Strongly agree	**7**

Example:

I often feel I lack the power to produce a successful outcome.	SD D SD ? SA A SA 1 2 3 4 5 6 7

Directions: For each statement, circle the number that most accurately reflects the extent to which that statement is descriptive of you or your thinking. Remember to be called in your responses.

Strongly disagree	**1**
Disagree	**2**
Slightly disagree	**3**
Neither agree or disagree	**4**
Slightly agree	**5**
Agree	**6**
Strongly agree	**7**

Please turn the page and complete the instrument

		SD	**D**	**SD**	**?**	**SA**	**A**	**SA**
1.	When I negotiate, my interest must prevail.	1	2	3	4	5	6	7
2.	I try to identify common interests to use as a basis for satisfying both parties needs.	1	2	3	4	5	6	7
3.	I put aside unpleasant confrontations in favour of a friendly approach.	1	2	3	4	5	6	7
4.	Negotiators are adversaries.	1	2	3	4	5	6	7
5.	I am unable and week to take care of myself.	1	2	3	4	5	6	7
6.	I often feel I lack the power to produce a successful outcome.	1	2	3	4	5	6	7
7.	I enjoy the reputation of tough battler.	1	2	3	4	5	6	7
8.	Negotiation may be said to be effective when both Parties get their needs satisfied.	1	2	3	4	5	6	7
9.	Half a loaf is better than none.	1	2	3	4	5	6	7
10.	Negotiation is a contest of wills.	1	2	3	4	5	6	7
11.	You have to make concessions to the other party to build the relationship.	1	2	3	4	5	6	7
12.	I acknowledge that my co. has made a mistake.	1	2	3	4	5	6	7
13.	You should do unto others before they do it to you.	1	2	3	4	5	6	7
14.	Affable relationships produce the best results.	1	2	3	4	5	6	7
15.	Compromise is the essence of effective negotiation.	1	2	3	4	5	6	7
16.	An effective negotiator employs threats, bluffs, surprises.	1	2	3	4	5	6	7
17.	I keep a low profile during a negotiating discussion.	1	2	3	4	5	6	7
18.	Split the difference is my motto.	1	2	3	4	5	6	7
19.	I am unable to stand up for my rights	1	2	3	4	5	6	7
20.	A soft word can win a hard heart.	1	2	3	4	5	6	7
21.	Though the outcome is not fair to me, it will maintain relationship	1	2	3	4	5	6	7

22.	When negotiating, I attempt to work through our differences.	1 2 3 4 5 6 7
23.	I search for a solution the other party will accept.	1 2 3 4 5 6 7
24.	My approach is always to meet the other party halfway	1 2 3 4 5 6 7
25.	The most successful negotiation makes everyone a winner.	1 2 3 4 5 6 7
26.	I often let others take responsibility for solving the problem.	1 2 3 4 5 6 7
27.	When I negotiate, I put a lot of effort into looking for trade-offs so each party gets something out of the deal.	1 2 3 4 5 6 7
28.	You choose; any thing is fine with me	1 2 3 4 5 6 7
29.	I put aside decisions until conflicts have quieted down.	1 2 3 4 5 6 7
30.	In a successful negotiation everyone gives something but everyone also gains something.	1 2 3 4 5 6 7

Please do not turn the page until you have completed your responses.

Part I: Securing Key

Directions: The 30 statements in the instrument have been set up in five columns in the chart below. Transfer the number corresponding to your answer to each statement to the appropriate space in the chart. Then add up the total number of points in each columns and enter the total in the space provided

Question Number

	1_	3_	9_	2_	5_
	4_	11_	1 5_	8 _	6_
	7_	12_	18_	14_	17_
	10_	20_	24_	22_	19_
	13_	21_	27_	25_	26_
	16_	23_	30_	29_	28_
Total	a_____	b_____	c_____	d_____	e_____
	Defeat	**Accommodate**	**Compromise**	**Collaborate**	**Withdraw**

Part II: Negotiating Profile

Directions: In each of the style columns, circle the number representing the total points given for that style in Part 1. Then connect the circled numbers to produce a plot line.

Defeat	**Accommodate**	**Compromise**	**Collaborate**	**Withdraw**
38	38	38	38	38
36	36	36	36	36
34	34	34	34	34
32	32	32	32	32
30	30	30	30	30
28	28	28	28	28
26	26	26	26	26
24	24	24	24	24

20	20	20	20	20
18	18	18	18	18
16	16	16	16	16
14	14	14	14	14
12	12	12	12	12
10	10	10	10	10
8	8	8	8	8
6	6	6	6	6
4	4	4	4	4
2	2	2	2	2
0	0	0	0	0

Part III Interpretation

The style with the highest number represents your preferred negotiating style. If two or more styles have the same total, you probably use both styles and use them equally or alternatively. Perhaps you use one as a primary or "first approach" style and switch to the second style as a back-up.

The profile indicates the relative strength of our subscription to a particular style, as you perceive it. To the extent that your responses were honest, the data will be representative of our general philosophy of negotiating if, in fact, this philosophy is acted on, then the data represents your negotiating behaviour style.

All styles have usefulness in selected situations. However, the most satisfying and rewarding negotiations in the long term are achieved by consistent use of a Collaborative style. This approach produces a win/ win outcome for both parties.

PREDOMINANT NEGOTIATION STYLES

Defeat – This pattern is characterized by win-lose competition, pressure, intimidation, adversarial relationships and the negotiator attempting to get as much possible for him/ herself. Defeat the other party at any cost.

Collaborative – This pattern is characterised by searching for common interests with the other party, problem solving behaviour, recognising that both parties must get their needs satisfied for the outcome to be entirely successful. Collaborative behaviour and synergistic solutions result. Working to build a win-win outcome is the main purpose of the negotiator.

Accommodate – This pattern is characterised by efforts to promote harmony, avoidance of substantive differences, yielding to pressure to preserve the relationship, placing interpersonal relationships above the fairness of the outcome. Accommodate the other party's needs becomes the negotiator's style.

Withdraw – This pattern is characterised by feelings powerlessness, indifference to the bargaining result, resignation, surrender, taking whatever the other party is willing to concede. Withdraw and remove oneself becomes the behaviour of the negotiator.

Compromise – This pattern is characterised by compromise, meeting the other party half way, looking for trade-offs, spitting the difference and half-way measures. Conflict reduction is valued over synergistic problem solving. Finding an acceptable agreement is the objective of this style.

Discussion Questions

The value of your results from your negotiating profile will be greatly enhanced through discussion of the following questions with others in your training groups:

1. Do you think that your scores for the five negotiation styles actually represents your usual behavior when faced with negotiation situations at work? Why or why not?
2. What could you do specifically to increase your negotiating effectiveness?

Negotiation – Some Practical Definitions

Following are some accepted definitions of negotiation:

1. Whenever we attempt to influence another person through an exchange of ideas, or something of material value, we are negotiating. **Negotiation is the process we use to satisfy our needs when someone else controls what we want**. Every wish we would like to fulfill, every need we feel compelled to satisfy, are potential situations for negotiation. Other terms are often applied to this process such as: bargaining, haggling, bickering, mediating or bartering.
2. Negotiation between companies, groups or individuals normally occurs **because one has something the other wants and is willing to bargain to get it.**
3. Most of us are constantly involved in negotiations to one degree or another. Examples include: When people meet to draw up contracts, buy or sell anything; resolve differences; make mutual decisions; or agree on work plans. Even deciding where to have lunch makes use of the negotiation process.

DEVELOPMENT OF CONFLICT

Whatever the type, whomsoever the conflict affects, it always arises cut of a four stage process as follows.

Frustration

Conflict situations originate where an individual or group feels frustrated or about to be frustrated in pursuit of important goals. The cause can be:

- Performance goals;
- Promotion;
- Pay rises;
- Power;
- Scarce economic resources;

- Rules;
- Values;
- In short, anything the individual or group cares about.

Thus, failing to achieve a target or goal may cause the start of the conflict cycle. At the second state, parties to the potential conflict attempt'

- To understand the nature of the problem;
- What they themselves want as a resolution;
- The various strategies they may employ to achieve that resolution.

This is the stage where conflict most often be turned to good use or avoided if careful negotiation are employed. It is the moment of self or behaviour analysis. Effective analysis will determine the right behaviour pattern for the future to correct the frustration felt as a result of goal failure. False analysis will lead to behaviour that is doomed to increase the frustration.

Behaviour

As a result of the conceptualisation process, parties to the conflict attempt to implement their resolution by behaving in the pattern they have selected as most likely to achieve the desired result.

Instant conceptualisation, when the party to the conflict is still feeling frustrated, usually leads to worse behavioral patterns and further conflict.

Outcome

If the outcome results in one party feeling dissatisfied, the seeds will be sown for further conflict. Whatever the result, the outcome will be part of the patterning and conditioning that set the possible patterns of behaviour in future conflict.

Conflict can become an ever-decreasing; circle; the frustration leads to instant and false conceptualisation, which in its turn causes further wrong behaviour, the outcome of which is further frustration and even more false conceptualisatlion. The only way out of such a situation is to break the conflict at the conceptualisation stage.

How we respond to conflicts/Handling conflict

It is only at the conceptualisation stage of conflict development that the most effective solutions can be found, so part of handing conflict must be watching for the process of conflict development to begin. Once the pattern of the developing conflict has been established, help or self-help can be administered. Beware or starting too early and catching the remaining frustration, which can easily turn to anger. Trying to solve a conflict with an angry person is almost impossible and can result in the permanent rejection of the most sound and sensible idea.

Competing

Competing is handling conflict head on. It is standing firm and rejecting the views and beliefs of the other party or standing between the warring factions and demanding that the war cease.
Use it where:

- A quick decision is vital;

- Unpopular ideas on important issues must be implemented;
- Issues are vital to the organisation and you know you are right;
- Opponents take advantage of non-competitive behaviour.

Collaborating

Collaborating is less than the art of total compromise. It will in allprobability be the chosen method for dealing with cognitive conflict to ensure that no one good idea is needlessly sacrificed to the solution of conflict. To collaborate, take the ideas that come from both parties to the conflict and try to find a way of developing them all, without detracting from the overall goal. Use it where:

- both sets of concerns are too important to be compromised;
- your objective is to learn;
- your wish to merge insights from different people;
- you need commitment;
- you need a dispel feelings that have interfered with a relationship.

Compromising

Compromise is the art of win-win negotiation. Both parties to the conflict should feel that they have won but neither should feel any sense of loss. You will achieve it by using negotiation tactics as described in Chapter 13. Use it where:

- goals are important but not worth the disruption of mere assertive behaviour;
- opponents with equal power are committed to mutually exclusive goals;
- you wish to achieve temporary settlements to complex issues;
- time pressure is great;
- you need a back-up to failed collaboration or competition.

Avoiding

Avoiding means deciding not to get involved in the conflict and asking that it be shelved elsewhere. Use it where:

- the issue is trivial;
- more important issues are pressing;
- there is no chance of satisfying your concerns;
- the potential disruption outweighs the benefits of resolution;
- people need to cool down;
- gathering information might help;
- others can resolve the conflict more effectively;
- issues seem intangible.

Accommodation

Accommodating is the art of accepting the situation and agreeing to back down in conflict. Use it where:

- you are wrong;
- issues are more important to others than yourself;
- you can build social credits for future issues;
- you need to minimise loss, as you are outmatched and losing harmony and stability are especially important;

- subordinates need to learn by mistakes made.

Conflicts can be constructive
Don't forget that conflict can be constructive. Without conflict an organisation cannot grow and develop. Conflict is an essential part of change and creativity. Use it for:

- problem solving;
- engendering new ideas;
- personality development;
- training and educating;
- role playing to establish potential problem areas.

Conflict and anxiety
As a result of conflict, individuals often experience considerableanxietybut can find no easy way to reduce it. This is particularly the case where a solution to the conflict seems unobtainable or long term. As a result, the suffering individuals apply defence mechanisms. Three group types of defence mechanism may be employed:

Aggressive defence mechanisms

- Fixation won't budge from a point of view;
- Displacement - redirecting pent up emotions towards hate objects or individuals.
- Negativism-active or passive resistance, no cooperation.

Compromise defence mechanisms

- Compensation- individual works harder to make up for feeling inadequate.
- *Identification*- individual enhances self-esteem by copying the behaviour of someone he admires.
- *Projection*-individual pretends that his own undesirable traits are in fact attributable to others.
- *Rationalisation*- individual justifies behaviour and beliefs by providing explanations for them.
- *Reaction formation*- urges not acceptable to consciousness are repressed and the opposite attitudes displayed in their place by the individual.

Withdrawal defence mechanisms

- *Conversion* – emotional conflicts are expressed in muscular, sensory or bodily symptoms of disability, malfunctioning or pain.
- *Fantasy* – day-dreaming provides an escape from reality.
- *Regression* – individual returns to an earlier and less mature level of adjustment in the face of frustration .
- *Repression* – impulses, experiences and feelings that are psychologically disturbing, because they arouse a sense of guilt or anxiety, are completely excluded from consciousness.
- *Resignation* – apathy and boredom - switching off.
- *Withdrawal of flight* – leaving the area of frustration either physically or mentally.

The anxiety feelings caused by conflict show in the conceptualisation and the eventual behaviour outcome. Part of the resolution of conflict must be the treatment of the anxiety based reactions. This is particularly important when trying to resolve one's own conflicts.

Awareness of the normal reaction to anxiety should help to select the right approach at conceptualization.

NEGOTIATING TECHNIQUES/STRATEGIES

SALAMI:

Salami is a technique used to achieve an objective a little bit at a time rather than in one giant step. This strategy is said to have been named by Matyas Rakosis, General Secretary of the Hungarian Communist Party who explained it this way:

"When you want to get hold of a salami which your opponents are strenuously defending, you must not grab at it. You must start by carving yourself a very thin slice. The owner of the salami will hardly notice it, or at least he will not mind very much. The next day you will carve another slice, then still another. And so, little by little, the salami will pass into your possession.

You want to buy 5 acres of land from an elderly gentleman, who for sentimental reasons does not want to sell more than 1 acre now. You are in no hurry to acquire all 5. How would you approach the old gentleman?

Check Your Response with the One on the Next Page

From no to yes

1. Listen Actively

Show them you understand

- they feel strongly
- what they feel strongly about
- why they feel strongly about it

2. Win yourself a hearing

Explain your own feelings (backed up by fact)

- refer back to their points
- make your points firmly but stay friendly

3. Working to a joint solution

- seek their ideas
- build on their ideas (don't knock them down)
- offer your ideas (don't try to impose them)
- construct the solution from everyone's needs

APPLYING THE SALAMI STRATEGY

Offer to buy one acre now with an option to buy the other four, one acre at a time, over the next four years.

FAIT ACCOMPLI:

Residents of a community called Hillview woke up one morning to discover a local developer removing the top of a peak, which was an appealing part of their view. The developer did not have a legally required permit, but once removed the hill top could not be restored. The strategy he used is called Fait Accompli. He took action to accomplish his objective risking acceptance because he did not wish to spend the necessary time, effort or expense to follow the established guidelines. In effect the developer said, "I did what I wanted to, so now what are you going to do?". This can be risky. Those who employ it must understand and accept the consequences if the strategy fails. For example, the same developer later put up a fence in violation of local ordinances. This time the citizens protested and he was required to tear down the fence and move it to a legal boundary at considerable expense.

Some examples of Fait Accompli are given below. Please indicate how you would respond to them.

FAIT ACCOMPLI	RESPONSE
A contract was sent to you containing a provision you did not agree to and find unacceptable.	
You took your old vehicle to a garage to obtain a cost estimate on repairs. When you returned you found they already repaired it and presented you with a bill for $750.00	

POSSIBLE RESPONSES TO FAIT ACCOMPLI

1. Use Fait Accompli yourself. Delete the unacceptable clauses from the contract and send it back.
2. Several options including the following are possible:
    - Refuse payment.
    - Appeal to higher authority. Take it to the owner.
    - File, or threaten to file a lawsuit. If local laws or ordinances have been violated, appeal to enforcing agencies for assistance.
    - Tell others what happened to you. Document your case and let the public and others know of the unethical practices.

STANDARD PRACTICE:

"Standard Practice" is a strategy used to convince others to do or not to do something because of so called "standard practices". It often work very well because it infers it is the best way to do whatever needs to be done, and is probably a safe approach. Standard contracts are an example of this strategy. The party suggesting a standard contract assumes no one would want to change it, because it reflects what others routinely agree to under the circumstances. Often the other party will accept this fact of life, however, those who wish to test it can have good results.

A plumber who was contracted to install plumbing in a new home told his customer the payment terms were 30% when he started the job, 60% when it was half completed and 100% on completion. When the customer refused to accept the agreement, the contractor said the terms were industry standards and showed him the standard contract to prove it. The customer refused to sign. Finally, the contractor agreed to 30% at the start, 30% at the half-way point and 40% upon completion. This assured the customer that the plumbing would be finished before the contractor could take his profit, but provided adequate funds for the plumber to carry out the project.

DEADLINES:

Time is critical to people and organisations. Consequently deadlines can be an effective negotiation strategy. All too often we are aware of time pressures upon ourselves. But assume the other party has plenty of time. A better assumption would be that if we have deadlines, the other party probably has them too. The more we learn about the other party's deadlines the better we can plan our strategies. When others attempt to force us to their deadlines, we should not hesitate to test them. Most sales in retail stores that "start" on Tuesday and "end" on Friday, can be negotiated so that a buyer can take advantage of them on a Monday or Saturday as well. Most hotels will extend their check out time beyond 12 noon if you are willing to negotiate for a later time. Proposals requested by the 1st of the month arc often just as acceptable on the 2nd. Deadlines are usually as demanding as we are willing to think they are. The more we know about the person or organisation that set them, the better we can evaluate what they really mean.

Before entering a negotiation, ask yourself these questions:

1. What actual deadlines and time constraints am I under? Are these self imposed or controlled by someone else?
2. Are these deadlines realistic? Can I change them?
3. What deadlines might be controlling the other side? Can I usc these to my advantage?

Here is a dialogue between Dick Thomas a purchasing agent and Rick Forest, an office equipment sales manager.

Mr. Thomas: The supersonic typewriters you are suggesting will meet our requirements. Can you provide 3 by next Monday for $4,500?

Mr. Forest : I am not sure we can. Because you also want the output energizer that puts the price for 3 over $5,000

Mr. Thomas: That's more than our budget allows for this purchase.

Mr. Forest : Well, I am sorry about that. To meet your price, I would have to talk to my District Manager and he is hard to reach.

What might Mr. Thomas say to get Mr. Forest to agree to supply the typewriters for $4,500, or at least to make some price concession with minimum delay?

When you have completed your response, compare it with the possibilities suggested on the next page.

Possible Response by Mr. Thomas

Well I'm sorry we can't make a deal. I have an appointment this afternoon with High Speed and Quickline. Both have indicated they can provide comparable equipment at a cost within our budget. The department head who wants these machines is leaving tomorrow for 2 weeks vacation. He will make his choice before he leaves today.

FEINTING:

Feinting gives the impression one thing is desired when the primary objective is really something else. An employee, for example, may negotiate with the boss for a promotion when the real objective is a good increase in salary. If the promotion is forthcoming so is the raise. If the promotion is not possible, a nice raise may be the consolation prize. Politicians use a variation of this strategy to test receptivity by the public to something they plan to do. Their planned action is "leaked" by a "reliable source" to test acceptability before final decision is made. The public's response is then evaluated. If there is little opposition it is probably safe to proceed. If there is an adverse reaction, another approach can be explored.

APPARENT WITHDRAWAL:

Apparent withdrawal may include some deception as well as deferring and feinting. It attempts to make the other negotiator believe you have withdrawn from consideration of an issue when you really have not. Its purpose may be to ultimately get a concession or change in position. For example, the prospective buyer of a painting finds the seller unwilling to meet the price the buyer is prepared to pay. The buyer might say, "I'm sorry but can't meet your price. You know my price so unless there is some movement on your part we can't do business." The buyer then leaves. If the buyer has made a realistic offer, the seller may decide to make a concession. If not, the buyer can always go back with a slightly higher offer. In the meantime, of course, the buyer can consider other options.

GOOD GUY/BAD GUY:

The good guy/bad guy ploy is an internationally used strategy. One member of anegotiating team takes a hard line approach while another member is friendly and easy to deal with. When the bad guy steps out for a few minutes, the good guy offers a deal that under the circumstances may seem too good to refuse. There are many versions of "bad guys". They may be lawyers, spouses, personnel representatives, accountants, tax experts, sales managers, or economists.

One danger in using this strategy is that it will be recognised for what it is. Here are some ways to deal with it if you feel it is being used on you.

- Walk out.
- Use your own bad guy.
- Tell them to drop the act and get down to business.

LIMITED AUTHORITY:

Limited authority is an attempt to force acceptance of a position by claiming anything else would require higher approval. Individuals who claim to have limited authority arc difficult to negotiate with, because the reason they use to not meet your demands is due to someone else, or some policy or practice over which they have no control. A salesperson who cannot give more than a 5% cash discount; influence the delivery date; or accept a trade will not make concessions in those areas. Some negotiators will concede under these circumstances, while others will insist their offer be taken wherever necessary for approval or rejection. There is some risk this will terminate the negotiation, but it does give the other party a chance to gracefully re-evaluate their position.

Can You Recognise and Define the following?

	YES	NO
SALAMI	__	__
FAIT ACCOMPLI	__	__
STANDARD PRACTICE	__	__
DEADLINES	__	__
FEINTING	__	__
APPARENT WITHDRAWAL	__	__
GOOD GUY/BAD GUY	__	__
LIMITED AUTHORITY	__	__

NEGOTIATION: EIGHT CRITICAL MISTAKES

Tick those you intend to avoid:

- **Inadequate Preparation**

Preparation provides a good picture of your options and allows for planned flexibility at the crunch points.

- **Ignoring the give/get principle**

Each party needs to conclude the negotiation fecl.ing something has been gained.

- **Use of intimidating behaviour**

Research shows the tougher the tactics, the tougher the resistance. Persuasiveness not dominance makes for a more effective outcome.

- **Impatience**

Give ideas and proposals time to work. Don’t rush things, patience pays.

- **Loss of temper**

Strong negative emotions are a deterrent to developing a cooperative environment, and creating solutions.

- **Talking too much and listening too little**

"If you love to listen, you will gain knowledge, and if you incline your ear, you will become wise."

- **Arguing instead of influencing**

Your position can be best explained by education, not stubbornness.

- **Ignoring conflict**

Conflict is the substance of negotiation. Learn to accept and resolve it, not avoid it.

BEING ASSERTIVE IN NEGOTIATION

What is assertiveness?

Your definition:

What it is?

Assertiveness based on a philosophy of personal responsibility and an awareness of the rights of other people. Being Assertive means be honest with yourself and others. It means having the ability to say directly what it is you want, you need or you feel, but not at the expense of other people.

It means having confidence in yourself and being positive, while at the same time understanding other people's points of view. It means being able to behave in a rational and adult way. Being assertive means being able to negotiate and reach at workable compromises. Above all, being assertive means having self-respect and respect for other people.

Basically – **I AM OK – YOU ARE OK**

HONESTY

CONFIDENCE

I'M OK – YOU'RE OK

Assertive Body Language

- Use eye to eye contact (sometimes culturally inappropriate)
- Hold your body proud but not overbearing.
- I may be appropriate to balance your stance – et. Sit if the other person is sitting, stand if they're standing.
- If you feel "frozen" and don't know what to do, it may help to walk around, move your body.

	ASSERTIVE	AGGRESSIVE	PASSIVE
Posture	Upright/ Straight	Leaning Forward	Shrinking
Head	Firm not Rigid	Chin Jutting Out	Head Down
Eyes	Direct not starting. Good and regular eye	Strongly focused starting often piercing or glaring	Glancing away. Little eye contact.

	contact	eye.	
Face	Expression fits the words	Set/ Firm	Smiling even when upset.
Voice	Well modulated to fit content	Loud/ Emphatic	Hesitant/ Soft, trailing off at ends of words/sentences
Arms Hands	Relaxed/ Moving easily	Controlled Extreme/ Sharp gestures/ Fingers pointing, Jabbing	Aimless/ Still
Movement Walking	Measured pace suitable to action	Slow and heavy or fast deliberate, hard	Slow and hesitant or fast and jerky

Becoming Assertive-Work out Your Bottomline

- Set a goal - know which things are not negotiable and be clear about them.
- Stay firm- don't let yourself be distracted or "hooked in" by manipulation, anger, tears, etc.
- Be aware of someone else's feelings and be clear that is how they feel, not a signal that you are wrong.
- Sometimes it may be most important to make your statement.

Be prepared to let both of you come out winners if that is possible

- Look for compromise where possible (sometimes it is not).
- Winner-Winner is usually better for all than Winner-Loser or Loser-Winner.

MAKE DECISION AND CHOICES ABOUT WHATS HAPPENING

- Look at the process
- You can choose to initiate, maintain or terminate the conversation.

Be Persistent - Broken Record

- Repeat yourself if you need to - if the message doesn't get through the first time or if you are being manipulated.

Children are experts in the use of the Broken Record technique and use it very effectively. It is useful to help make sure that you are listened to and that your message is received. Sometimes when people are actively involved in their own concern or needs they pay little attention to what you have to say or to your situation. Broken Record makes sure that your message does get through without nagging, or whining.

With the Broken Record technique it is important to keep on repeating the message until it can no longer be ignored or dismissed. It is also important to use some of the same words over and over again in different sentences. This reinforces the main part of your message and prevents others raising red herrings or diverting you from your central message.

Example

To insistent customer –

'*We won't be able to complete by the 15th*. I understand it causes you problems, but the hard facts are *it won't be possible to complete all the work by the fifteenth.* However, we can

promise to finish key areas if you tell us your needs, and we will reschedule the rest. What *we can't do is complete everything by the 15th.'*

Your Examples

____

____

____

____

____

____

(EXERCISE)
QUESTIONAIRE: OPINIONS AND ATTITUDES

Read through the sentences below, and then put a circle around the number which most closely coincides with your opinion. Before, starting look at the key.

Key
1. I agree entirely
2. I agree on the whole
3. I can't make up my mind
4. I disagree on the whole
5. I disagree entirely

Statement	Rating
There is no life after death.	1 2 3 4 5
Wars never solve anything.	1 2 3 4 5
We should try to cure criminals, not punish them.	1 2 3 4 5
People suffering from incurable diseases should be painlessly put to death if they request it.	1 2 3 4 5
Men and women can never be equal.	1 2 3 4 5
It is wrong to pay people so much money for playing sport.	1 2 3 4 5
People should wait until they are at least 24 before getting married.	1 2 3 4 5
People were a lot happier 'in the old days'	1 2 3 4 5
There is too much fuss made about nuclear power these days.	1 2 3 4 5
Divorce is wrong.	1 2 3 4 5
Most people keep pets because they are lonely or have difficulty in making relationships with other people.	1 2 3 4 5
The United Nations is a waste of time and money	1 2 3 4 5

When you have finished, discuss your answers with another participant, remember to give reasons for your opinion and even to argue with your partner if you disagree with him or her.

NEGOTIATION: THE ART OF NEGOTIATING

Negotiation is the use of knowledge, time and power to influence the behaviour of other people so that you can achieve your goals. The steps are as follows:

- *Define needs*: what do you and the parties you represent need to get from this negotiation?
- *Check resources*: What resources do you have to help you with the negotiation? Who can you use? What are the facts?
- *Know limitations*: At what stage will you have to hand a negotiation over to someone else? How far is your side prepared to go in conceding to the other side?
- *Understand options*: List the possible options that could come out of the negotiation. How many of them are possible for your side to accept?
- *Formulate goals*: Decide what you hope to achieve and the elements of the goal that cannot be compromised.
- *Prepare for the encounter*: Prepare both mentally and physically.

Preparation

For the other party

- *Recognise the need*: What does he went from the negotiation?
- *Understand and define that need*: How strongly are those needs likely to be felt?
- *Check alternatives*: What possible alternatives are there? Will he have thought of them All?
- *Understand the options*: Realise the areas where your opponent cannot afford to compromise? And the options that can remain open for him.
- *Know the power of choice*: Understand that he is able to choose.

For yourself

- *Recognise your own need*: What do you hope to prove by this negotiation?
- *Check alternative resources*: Are there alternatives that you have rejected because of your assumptions or attitude?
- *Define options*: Write down your options; keep them all open.
- *Set goals*: Write down your goal and stick to it.
- *Set limits to goals*: How far they can be compromised? Make a careful list of areas that can be compromised.
- *Consider the effect of the passage of time*: Remember, what was important yesterday may change in the light of the negotiation.
- *Consider the time pressures:* Set time criteria.
- *Set cost limits*: What are the costs that are acceptable? Do not go above them.
- *Establish gain to be achieved*: Write down what are the anticipated achievements are to be.

Confrontation or collaboration?

The opposite parties in a negotiation are counterparts. Some negotiators think of their counterparts as the enemy. To negotiate, the two parties will have to come together, therefore life is much easier if you think of your counterpart as a friend: *attitude determines outcome.*

Negative Orientation: The enemy

- Opposition
- Opposition leads to suspicion

- Suspicion leads to aggression
- Aggression leads to deadlock

The confrontational mindset:
Counterpart = adversary
Difference = conflict
Resources = weapons

Positive orientation: *The friend*

- Opposition
- Opposition leads to cooperation
- Cooperation leads to partnership
- Partnership leads to settlement

The collaborative mindset
Counterpart = partner \
Difference = opportunities
Resources = incentives to co-operate

How to conduct collaborative negotiation:

The collaborative negotiator must show the following character traits if he has to succeed:

- Interest in the needs of the counterpart.
- Understanding of the counterpart's needs.
- Willingness to co-operate end compromise.
- Mind focused on settlement not obstacles.
- Mutual gain = win-win.

As a collaborative negotiator, you will achieve the following gains:

- Difference leads to opportunities.
- Co-operation leads to trust.
- Preparation leads to understanding.
- Counterpart becomes partner.
- Mutual problem solving brings settlement.

The stages of collaborative negotiation are:

- Analyse the needs of the counterpart.
- Demonstrate the desire for cooperation.
- Emphasise mutual interest.
- Demonstrate understanding of counterpart's needs.
- Understand the relationship between counterpart's needs and own resources and goals.

Power in negotiation

- Bargaining power is measured relative to that of the counterpart.
- Bargaining power is determined by external economic and political factors.
- It is preferable to negotiate from a powerful position.
- The balance of power in a negotiation is determined by the urgency of each side's needs and assets.

The power of persuasion

- Persuasion gives the negotiator power.

- Persuasion is a personal form of power.
- Persuasion can be learned and improved.
- Persuasion depends on selling ability.
- Persuasion depends on positive tone.
- Persuasion plays both to economic reasoning and to personal factors.

Assessing the balance of power

- How badly do you need what the counterpart has?
- How soon must your needs be fulfilled?
- What are the consequences should your negotiation break down?
- How badly does the counterpart need what you bring to the table?
- What are your counterpart's time restraints?
- Are there alternatives to dealing with this counterpart?
- Who is in the position of most immediate and greatest need?
- Who has the superior position with respect to resources?

How to win

Set sensible expectations

- Set high goals.
- Use realistic assumptions.
- Decide areas open for significant compromise.
- Decide areas not open for compromise.
- Be clear about what you hope to achieve.

Use the right level you hope to achieve.

- Know your limits.
- Find out the counterpart's limits.
- Don't let someone with limited authority wear you down.
- Try to bypass negotiators with limited authority.
- Share responsibility with those on whose behalf you negotiate.

Go for win-win

- Win-win brings together different needs and creates opportunities for mutual gain.
- Win-lose make enemies who fight harder next time.
- Focus on the goal.
- Confine disagreement to ideas.
- Avoid personal issues.

Use time with care

- Haste makes waste; the best negotiations take time.
- Be prepared; negotiate before the crisis.
- Over a barrel; urgency may force concessions.
- Sleep on it; avoid marathon sessions.

Use questions

- Ask them even if you know the answers.
- Ask for help.
- Listen.
- Question what is negotiable; don't be thrown by 'company policy'.

Personalise the negotiation

- Form bonds of respect and trust.
- Remember people as well as things are involved.
- Make personal contact, relax, and smile.
- Make it matter; show your concern.
- Relate to the organisation.

Use time

- Allow time for frequent recesses.
- Move the bargaining at a deliberate pace.
- Use recesses to calm down or research further.
- Maintain self-control at all times.

Watch for unspoken needs

- Remember your counterpart may have a hidden agenda.
- Watch the body language.
- Stay awake.
- Meet your counterpart's needs.
- Remember personal and social needs can often be met at minimum expense.

Finally:

- Aim to control the situation.
- Believe in yourself.
- Keep written records for the future.

Trouble -shooting

The likely needs or wants of your counterpart

- To feel good about himself.
- To avoid further trouble and risk.
- To be recognised as a man of good judgement.
- Knowledge.
- An easy life.
- To be listened to.
- To keep his job.
- Promotion.
- To save time.
- To be liked.
- Power.

How to break an impasse

Sometimes you his situation when nothing seem possible. No one is willing to give way. The only way out is changing.

Change:

- The shape of the package;
- A member of the team;
- The Time limits on the part of negotiation;
- The risk mix;
- The time scale of per performance;
- The bargaining emphasis;

  - The type of contract;
  - The base for a percentage.
- Call a mediator.
- Arrange summit meeting.
- Add options.
- Setup a joint study committee.
- Tell a joke.

How to make concessions

- Leave you self room to negotiate.
- Encourage the counterpart to open up first.
- Let the counterpart make the first concession.
- Make him work for his gains.
- Conserve Concessions.
- Don’t give tit-for-tat concessions.
- A promise is a concession at a discount rate.
- Don’t be afraid to say ‘no’.
- Keep track of your concessions.
- Retreat from a concession if you have made a mistake.
- Don’t give in too much too quickly.

Difficult counterparts

The majority of counterparts are polite and friendly and easy to deal with; it is only the occasional one that is difficult. Sometimes he has justification, while at other times he is someone who seems to enjoy being difficult.

To deal with the difficult, you need to hold on to the following - facts:

- People demonstrate their frustration in many ways; most of the difficult behaviour you hear is a direct result of frustration. They are all nice people underneath.
- Anxiety can have a strange effect on personality.
- Whatever the person says, it is not a personal insult or intended as such. Do not take personal offence.
- One temper lost is bad enough, to lose yours as well is will not improve matters.
- Only the facts matter at the end of the day; hold out for the facts.
- Taking a deep breath before you speak or react, gives you time to think. Thinking before you speak or react saves a lot of talking time later.

Complainers

Complaints fall into two categories: the just and unjust. Until you know the facts, you will not know which sort of complaint you are dealing with.

The technique

- Take a deep breath.
- Keep your voice up and friendly.
- Listen to what is being said and take notes.
- Do not interrupt; let the speaker get it all off his chest.

- Check the validity of complaints about the past.
- Sympathise without being disloyal.
- If the company is at fault, apologise.
- Never give excuse, it always seems lame.
- If you promise to do something, do it.

Never say:

- I'm not the person to talk to about… (Even if it is true, it won't solve any problems.)
- It's not my fault. (It probably isn't, but just saying so won't help anyone.)
- I didn't handle this. (See above.)
- We are having lots of problems with… (It doesn't help your caller, but it does harm the organisation.)

Never:

- interrupt the complainer, he will only start all over again;
- automatically accept responsibility or liability, as that may not be the case.
- jump to conclusions before gathering all the facts.
- talk down to your complainer, or accuse him of misuse – it may be be true, but it will not smooth ruffled feathers;
- lose your temper;
- appeal for sympathy by trying to Justify your position – It will sound like a lame exercise.

Aggression

Aggression is a symptom of both anxiety and frustration. It is the by-product of someone who has failed at a talk or feels insecure. Do not confuse it with assertion.

The technique

- Take a deep breath.
- Speak calmly and evenly on a middle pitch.
- Keep your temper.
- Do not respond with aggression.
- Ask for the facts and check your understanding of them.
- Say something like 'I'm sorry this is causing you a problem, but I can only help if you let me' (empathetic assertion).
- Encourage your counterpart to talk out his feelings of aggression. (The longer he goes on talking, the less aggressive he will become.)
- Be assertive and point out politely the consequences of continued aggressive reactions.
- If you cannot calm your counterpart, arrange a break.

Vagueness

Negotiating with a vague counterpart is very difficult. He will go on for a long time and say very little. You must be patient at all times and try to steer him back to the point.

The technique

- Maintain your patience.
- Write down all the facts as you hear them.
- Use the facts to guide your counterpart back to the point from time to time.
- Keep a smile in your voice.
- Be businesslike.
- Don’t allow yourself to be dragged down red herring-strewn by ways.
- Keep to the point yourself.
- Keep your temper.
- Don’t be abrupt.
- Summarise regularly.

Unfriendly

Some individuals are not particularly fond of people in general. They are not likely to be very friendly when negotiating. Other people confuse being businesslike with unfriendliness. An apparent unfriendly attitude may be a symptom of anxiety or frustration. Either way, do not take it personally; it is not intended personally.

The technique

- Smile as you speak.
- Take nothing personally.
- Keep your voice up and pleasant.
- Deal with the points as quickly as possible.
- Don’t makes personal remarks.
- Get the facts and stick to them.
- Once the negotiation is over and the matter dealt with, forget your counterpart.

The Seven Elements of Negotiation

1. **ALTERNATIVES.** These are the walk away alternatives which each party has if agreement is not reached. These are things that one party or another can do by self-help, without requiring the agreement of the other. In general, neither party should agree to something that is worse for that party than its "BATNA" – its Best Alternative Agreement.

2. **INTERESTS**. This is the word we use for what it is that somebody wants. Underlying the positions of the parties are their needs, their concern, their desires, their hopes and their fears. Other things being equal, an agreement is better to the extent that it meets the interests of the parties.

3. **OPTIONS.** We use this word to identify the full range of possibilities on which the parties might conceivably reach agreement. We refer to options "on the table" or which might be put on the table. "We might decide that you get the orange, that I get it, that we cut it in half, or we might decide that I can have the peel for baking and that you can have the fruit to eat. They are all options. We have not yet decided." Generally speaking, an agreement is better if it is the best of many options:- if it could not be better for one party without being worse for another.

4. **LEGITIMACY.** Other things being equal, an agreement is better to the extent that each party considers it to be fair as measured by some external benchmark; some criterion or principle beyond the simple will of either party. Such external standards of fairness include international law, precedent, practice, or some principle such as reciprocity and most-favoured- nation treatment.

5. **RELATIONSHIP.** A negotiation has produced a better outcome to the extent that the parties have improved their ability to work together rather than damaged it. Most important negotiations are with people or institutions with whom we have negotiated before and will be negotiating again. Whatever else a relationship may involve, one crucial aspect is an ability to deal well with differences. One dimension of the quality of a negotiated outcome is the quality of the resulting working relationship: Are the parties better or worse able to deal with future differences? (Each element represents something desirable in a good outcome. There are likely to be trade-offs among them. Doing better on one may mean doing worse on another.)

6. **COMMUNICATION.** Other things being equal, an outcome will be better if it is reached efficiently without waste of time or effort. Efficient negotiation requires effective two-way communication.

7. **COMMITMENTS.** Commitments are oral or written statements about what a party will or won't do. They may be made during the course of a negotiation or may be embodied in an agreement reached at the end of the negotiation. In general, an agreement will be better to the extent that the promises made have been well planned and well-crafted so that they will be practical, durable,, easily understood by those who are to carry them out, and verifiable if that is important.

The 7 Elements as a Checklist for Preparation

Alternatives
- ✓ What's our BATNA? What's theirs?
- ✓ Can we improve ours? Worsen theirs?

Interests
- ✓ What are ours? What are theirs?
- ✓ Are there other parties to consider?
- ✓ Which interests are shared, which are just different, and which conflict?

Options
- ✓ What are some possible agreements that might creatively satisfy both our interests?

Criteria (Legitimacy)
- ✓ What standards might international law suggests?
- ✓ What "ought" to govern an agreement?
- ✓ How can they justify the outcome to their constituents?

Commitments
- ✓ What is our authority? Theirs?
- ✓ What kind of commitment do we want at each stage of the negotiation process?
- ✓ Process agreement?
- ✓ Framework? Tentative? Final?
- ✓ What might a framework for an agreement look like?

Relationship
- ✓ What kind would we like to have?
- ✓ How can we improve the relationship without conceding on the substance?

Communication
- ✓ What information do we want to listen for?
- ✓ How can we show them they have been heard?
- ✓ What messages do we want left in their heads?
- ✓ What is our process strategy? What might we say to start off?

Chapter-III
Concept of Mediation

1. Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. In mediation, the parties retain the right to decide for themselves whether to settle a dispute and the terms of any settlement. Even though the mediator facilitates their communications and negotiations, the parties always retain control over the outcome of the dispute.

1.1 Mediation is voluntary. The parties retain the right to decide for themselves whether to settle a dispute and the terms of settlement of the dispute. Even if the court has referred the case for the mediation or if mediation is required under a contract or a statute, the decision to settle and the terms of settlement always rest with the parties. This right of self-determination is an essential element of the mediation process. It results in a settlement created by the parties themselves and is therefore acceptable to them. The parties have ultimate control over the outcome of mediation. Any party may withdraw from the mediation proceedings at any stage before its termination and without assigning any reason.

1.2 Mediation is a party-centred negotiation process. The parties, and not the neutral mediator are the focal point of the mediation process. Mediation encourages the active and direct participation of the parties in the resolution of their dispute. Though the mediator, advocates, and other participants also have active roles in mediation, the parties play the key role in the mediation process. They are actively encouraged to explain the factual background of the dispute, identify issues and underlying interests, generate options for agreement and make a final decision regarding settlement.

1.3 Though the mediation process is informal, which means that it is not governed by the rules of evidence and formal rules of procedure it is not an extemporaneous or casual process . The mediation process itself is structured and formalized, with clearly identifiable stages. However, there is a degree of flexibility in following these stages.

1.4 Mediation in essence is an assisted negotiation process. Mediation addresses both the factual/legal issues and the underlying causes of a dispute. Thus, mediation is broadly focused on the facts, law, and underlying interests of the parties, such as personal, business/commercial, family, social and community interests. The goal of mediation is to find a mutually acceptable solution that adequately and legitimately satisfies the needs, desires and interests of the parties.

1.5 Mediation provides an efficient, effective, speedy, convenient and less expensive process to resolve a dispute with dignity, mutual respect and civility.

1.6 Mediation is conducted by a neutral third party- the mediator. The mediator remains impartial, independent, detached and objective throughout the mediation process. In mediation, the mediator assists the parties in resolving their dispute. The mediator is a guide who helps the parties to find their own solution to the dispute. The mediator's personal preferences or perceptions do not have any bearing on the dispute resolution process.

1.7 In Mediation the mediator works together with parties to facilitate the dispute resolution process and does not adjudicate a dispute by imposing a decision upon the parties. A mediator's role is both facilitative and evaluative. A mediator *facilitates* when he manages the interaction between the parties, encourages and promotes communication between them and manages interruptions and outbursts by them and motivates them to arrive at an amicable settlement. A mediator *evaluates* when he assists each party to analyze the merits of a claim/defence, and to assess the possible outcome at trial.

1.8 The mediator employs certain specialized communication skills and negotiation techniques to facilitate a productive interaction between the parties so that they are able to overcome negotiation impasses and find mutually acceptable solutions.

1.9 Mediation is a private process, which is not open to the public. Mediation is also **confidential** in nature, which means that statements made during mediation cannot be disclosed in civil proceedings or elsewhere without the written consent of all parties. Any statement made or information furnished by either of the parties, and any document produced or prepared for / during mediation is inadmissible and non-discoverable in any proceeding. Any concession or admission made during mediation cannot be used in any proceeding. Further, any information given by a party to the mediator during mediation process, is not disclosed to the other party, unless specifically permitted by the first party. No record of what transpired during mediation is prepared.

1.10 Any settlement reached in a case that is referred for mediation during the course of litigation is required to be reduced to writing, signed by the concerned parties and filed in Court for the passing of an appropriate order. A settlement reached at a pre-litigation stage is a contract, which is binding and enforceable between the parties.

1.11 In the event of failure to settle the dispute, the report of the mediator does not mention the reason for the failure. The report will only say "not settled".

1.12 The mediator cannot be called upon to testify in any proceeding or to disclose to the court as to what transpired during the mediation.

1.13 Parties to the mediation proceedings are free to agree for an amicable settlement, even ignoring their legal entitlement or liabilities.

1.14 Mediation in a particular case, need not be confined to the dispute referred, but can go beyond and proceed to resolve all other connected or related disputes also.

Types of Mediation

1. **COURT- REFERRED MEDIATION-** It applies to cases pending in Court and which the Court would refer for mediation under Sec. 89 of the Code of Civil Procedure, 1908.

2. **PRIVATE MEDIATION -** In private mediation, qualified mediators offer their services on a private, fee-for-service basis to the Court, to members of the public, to members of the commercial sector and also to the governmental sector to resolve disputes through mediation. Private mediation can be used in connection with disputes pending in Court and pre-litigation disputes.

Advantages of Mediation

1. The parties have **CONTROL** over the mediation in terms of 1) its *scope* (i.e., the terms of reference or issues can be limited or expanded during the course of the proceedings) and 2) its *outcome* (i.e., the right to decide whether to settle or not and the terms of settlement.)

1.1. Mediation is **PARTICIPATIVE.** Parties get an opportunity to present their case in their own words and to directly participate in the negotiation.

1.2. The process is **VOLUNTARY** and any party can opt out of it at any stage if he feels that it is not helping him. The self-determining nature of mediation ensures compliance with the settlement reached.

1.3. The procedure is **SPEEDY, EFFICIENT** and **ECONOMICAL.**

1.4. The procedure is **SIMPLE** and **FLEXIBLE.** It can be modified to suit the demands of each case. Flexible scheduling allows parties to carry on with their day-to-day activities.

1.5. The process is conducted in an **INFORMAL, CORDIAL** and **CONDUCIVE** environment.

1.6. Mediation is a **FAIR PROCESS.** The mediator is impartial, neutral and independent. The mediator ensures that pre-existing unequal relationships, if any, between the parties, do not affect the negotiation.

1.7. The process is **CONFIDENTIAL.**

1.8. The process facilitates better and effective **COMMUNICATION** between the parties which is crucial for a creative and meaningful negotiation.

1.9. Mediation helps to maintain/ improve/ restore relationships between the parties.

1.10. Mediation always takes into account the **LONG TERM AND UNDERLYING INTERESTS OF THE PARTIES** at each stage of the dispute resolution process - in examining alternatives, in generating and evaluating options and finally, in settling the dispute with focus on the present and the future and not on the past. This provides an opportunity to the parties to comprehensively resolve all their differences.

1.11. In mediation the focus is on resolving the dispute in a **MUTUALLY BENEFICIAL SETTLEMENT.**

1.12. A mediation settlement often leads to the **SETTLING OF RELATED/CONNECTED CASES** between the parties.

1.13. Mediation allows **CREATIVITY** in dispute resolution. Parties can accept creative and non conventional remedies which satisfy their underlying and long term interests, even ignoring their legal entitlements or liabilities.

1.14. When the parties themselves sign the terms of settlement, satisfying their underlying needs and interests, there will be compliance.

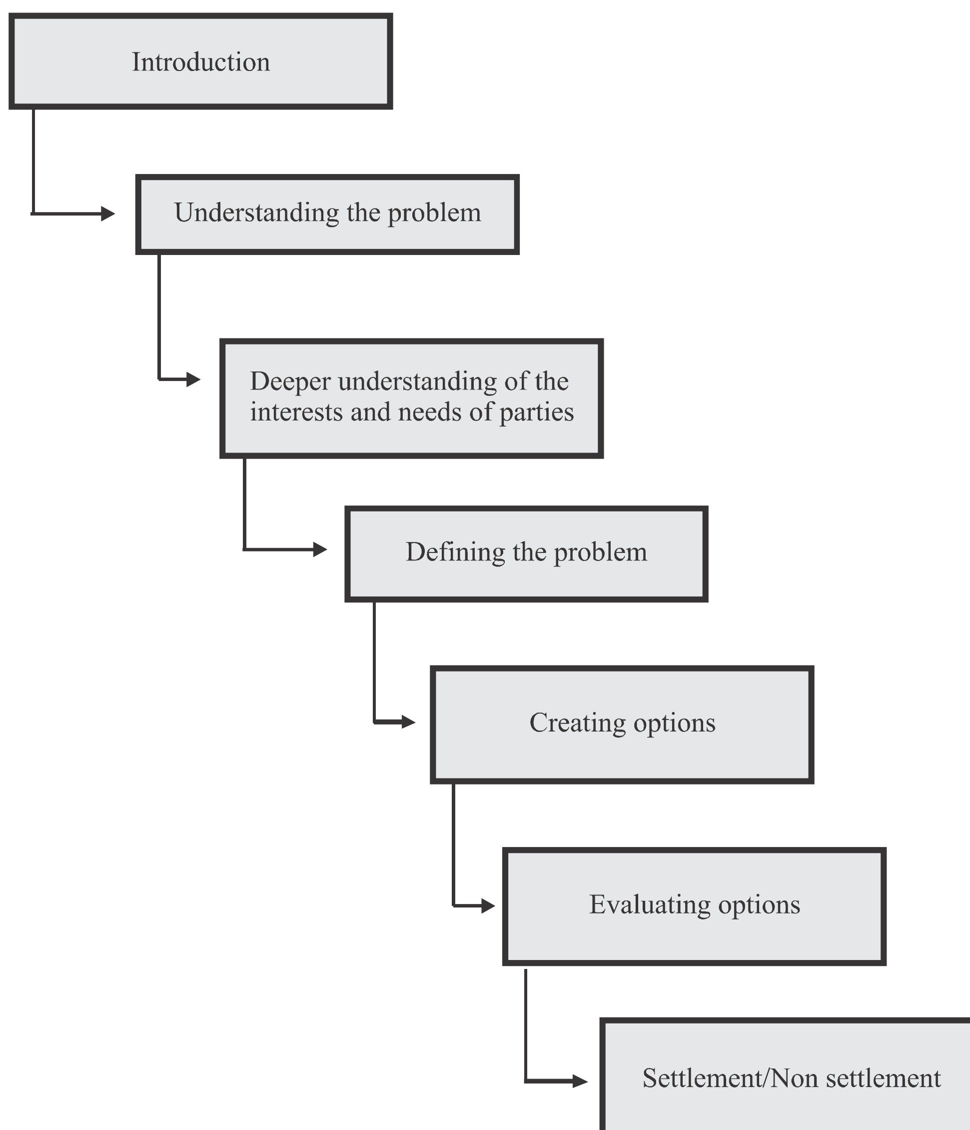
1.15. Mediation **PROMOTES FINALITY.** The disputes are put to rest fully and finally, as there is no scope for any appeal or revision and further litigation.

1.16. **REFUND OF COURT FEES** is permitted as per rules in the case of settlement in a court referred mediation.

CHAPTER-V

THE PROCESS OF MEDIATION

Mediation is a dynamic process in which the mediator assists the parties to negotiate a settlement for resolving their dispute. In doing so, the mediator uses the four functional stages of mediation, namely, (i) Introduction and Opening Statement (ii) Joint Session (iii) Separate Session and (iv) Closing. These functional stages are used in an informal and flexible manner so that the mediation process gains momentum, following a specific and predictable course as illustrated below.



Each of the above phases reflects an essential pre-requisite in the dynamics of the mediation process which must be accomplished before moving to the next phase.

CHAPTER-VI

STAGES OF MEDIATION

The functional stages of the mediation process are:

1) Introduction and Opening Statement
2) Joint Session
3) Separate Session(s)
4) Closing

STAGE 1: INTRODUCTION AND OPENING STATEMENT

Objectives

- Establish neutrality
- Create an awareness and understanding of the process
- Develop rapport with the parties
- Gain confidence and trust of the parties
- Establish an environment that is conducive to constructive negotiations
- Motivate the parties for an amicable settlement of the dispute
- Establish control over the process

Seating Arrangement in the Mediation Room

At the commencement of the mediation process, the mediator shall ensure that the parties and/or their counsel are present.

There is no specific or prescribed seating arrangement. However, it is important that the seating arrangement takes care of the following:

- The mediator can have eye-contact with all the parties and he can facilitate effective communication between the parties.
- Each of the parties and his counsel are seated together.
- All persons present feel at ease, safe and comfortable.

Introduction

- To begin with, the mediator introduces himself by giving information such as his name, areas of specialization if any, and number of years of professional experience.
- Then he furnishes information about his appointment as mediator, the assignment of the case to him for mediation and his experience if any in successfully mediating similar cases in the past.
- Then the mediator declares that he has no connection with either of the parties and he has no interest in the dispute.
- He also expresses hope that the dispute would be amicably resolved. This will create confidence in the parties about the mediator's competence and impartiality.
- Thereafter, the mediator requests each party to introduce himself. He may elicit more information about the parties' and may freely interact with them to put them at ease.
- The mediator will then request the counsel to introduce themselves.
- The mediator will then confirm that the necessary parties are present with authority to negotiate and make settlement decisions
- The mediator will discuss with the parties and their counsel any time constraints or scheduling issues
- If any junior counsel is present, the mediator will elicit information about the senior advocate he is working for and ensure that he is authorized to represent the client.

The Mediator's Opening Statement

The opening statement is an important phase of the mediation process. The mediator explains in a language and manner understood by the parties and their counsel, the following:

- Concept and process of mediation
- Stages of mediation
- Role of the mediator
- Role of advocates
- Role of parties
- Advantages of mediation
- Ground rules of mediation

The mediator shall highlight the following important aspects of mediation:

- Voluntary
- Self-determinative
- Non-adjudicatory
- Confidential
- Good-faith participation
- Time-bound
- Informal and flexible
- Direct and active participation of parties
- Party-centred
- Neutrality and impartiality of mediator
- Finality
- Possibility of settling related disputes
- Need and relevance of separate sessions

The mediator shall explain the following ground rules of mediation:

- Ordinarily, the parties/counsel may address only the mediator
- While one person is speaking, others may refrain from interrupting
- Language used may always be polite and respectful
- Mutual respect and respect for the process may be maintained
- Mobile phones may be switched off
- Adequate opportunity may be given to all parties to present their views

Finally, the mediator shall confirm that the parties have understood the mediation process and the ground rules and shall give them an opportunity to get their doubts if any, clarified.

Stage 2: Joint Session

Objectives

- Gather information
- Provide opportunity to the parties to hear the perspectives of the other parties
- Understand perspectives, relationships and feelings
- Understand facts and the issues
- Understand obstacles and possibilities
- Ensure that each participant feels heard

Procedure

- The mediator should invite parties to narrate their case, explain perspectives, vent emotions and express feelings without interruption or challenge. First, the plaintiff/petitioner should be permitted to explain or state his/her case/claim in his/her own words. Second, counsel would thereafter present the case and state the legal issues involved in the case. Third, defendant/ respondent would thereafter explain his/her case/claim in his/ her own words. Fourth, counsel for defendant/respondent would present the case and state the legal issues involved in the case.
- The mediator should encourage and promote communication, and effectively manage interruptions and outbursts by parties.
- The mediator may ask questions to elicit additional information when he finds that facts of the case and perspectives have not been clearly identified and understood by all present.
- The mediator would then summarize the facts, as understood by him, to each of the parties to demonstrate that the mediator has understood the case of both parties by having actively listened to them.
- Parties may respond to points/positions conveyed by other parties and may, with permission, ask brief questions to the other parties.
- The mediator shall identify the areas of agreement and disagreement between the parties and the issues to be resolved.
- The mediator should be in control of the proceedings and must ensure that parties do not 'take over' the session by aggressive behaviour, interruptions or any other similar conduct.
- During or on completion of the joint session, the mediator may separately meet each party with his counsel, usually starting with the plaintiff/petitioner. The timing of holding the separate

session may be decided by the mediator at his discretion having regard to the productivity of the on-going joint session, silence of the parties, loss of control, parties becoming repetitive or request by any of the parties. There can be several separate sessions. The mediator could revert back to a joint session at any stage of the process if he feels the need to do so.

Stage 3: Separate Session

Objectives

- Understand the dispute at a deeper level
- Provide a forum for parties to further vent their emotions
- Provide a forum for parties to disclose confidential information which they do not wish to share with other parties
- Understand the underlying interests of the parties
- Help parties to realistically understand the case
- Shift parties to a solution-finding mood
- Encourage parties to generate options and find terms that are mutually acceptable

Procedure

(i) RE - AFFIRMING CONFIDENTIALITY

During the separate session each of the parties and his counsel would talk to the mediator in confidence. The mediator should begin by re-affirming the confidential nature of the process.

(ii) GATHERING FURTHER INFORMATION

The separate session provides an opportunity for the mediator to gather more specific information and to follow-up the issues which were raised by the parties during the joint session. In this stage of the process:-

- Parties vent personal feelings of pain, hurt, anger etc.,
- The mediator identifies emotional factors and acknowledges them;
- The mediator explores sensitive and embarrassing issues;
- The mediator distinguishes between positions taken by parties and the interests they seek to protect;
- The mediator identifies why these positions are being taken (need, concern, what the parties

hope to achieve);

- The mediator identifies areas of dispute between parties and what they have previously agreed upon;
- Common interests are identified;
- The mediator identifies each party's differential priorities on the different aspects of the dispute (priorities and goals) and the possibility of any trade off is ascertained.
- The mediator formulates issues for resolution.

(iii) REALITY - TESTING

After gathering information and allowing the parties to vent their emotions, the mediator makes a judgment whether it is necessary to challenge or test the conclusions and perceptions of the parties and to open their minds to different perspectives. The mediator can then, in order to move the process forward, engage in REALITY-TESTING. Reality-testing may involve any or all of the following:

(a) A detailed examination of specific elements of a claim, defense, or a perspective;

(b) An identification of the factual and legal basis for a claim, defense, or perspective or issues of proof thereof;

(c) Consideration of the positions, expectations and assessments of the parties in the context of the possible outcome of litigation;

(d) Examination of the monetary and non-monetary costs of litigation and continued conflict;

(e) Assessment of witness appearance and credibility of parties;

(f) Inquiry into the chances of winning/losing at trial; and

(g) Consequences of failure to reach an agreement.

Techniques of Reality-Testing

Reality-Testing is often done in the separate session by:

1. Asking effective questions,
2. Discussing the strengths and weaknesses of the respective cases of the parties, without breach of confidentiality, and/or
3. Considering the consequences of any failure to reach an agreement (BATNA/WATNA / MLATNA analysis).

(I) ASKING EFFECTIVE QUESTIONS

Mediator may ask parties questions that can gather information, clarify facts or alter perceptions of the parties with regard to their understanding and assessment of the case and their expectations.

Examples of effective questions:

- **OPEN-ENDED QUESTIONS** like 'Tell me more about the circumstances leading up to the signing of the contract'. 'Help me understand your relationship with the other party at the time you entered the business'. 'What were your reasons for including that term in the contract?'
- **CLOSED QUESTIONS,** which are specific, concrete and which bring out specific information. For example, 'it is my understanding that the other driver was going at 60 kilometers per hour at the time of the accident, is that right?' 'On which date the contract was signed?' 'Who are the contractors who built this building?'
- **QUESTIONS THAT BRING OUT FACTS:** 'Tell me about the background of this matter'. 'What happened next?'
- **QUESTIONS THAT BRING OUT POSITIONS:** 'What are your legal claims?' 'What are the damages?' 'What are their defenses?'
- **QUESTIONS THAT BRING OUT INTERESTS:** 'What are your concerns under the circumstances?' 'What really matters to you?' 'From a business / personal / family perspective, what is most important to you?' 'Why do you want divorce?' 'What is this case really about?' 'What do you hope to accomplish?' 'What is really driving this case?'

(II) DISCUSSING THE STRENGTHS AND WEAKNESSES OF THE RESPECTIVE CASES OF THE PARTIES

The mediator may ask the parties or counsel for their views about the strengths and weaknesses of their case and the other side's case. The mediator may ask questions such as, 'How do you think your conduct will be viewed by a Judge?' or 'Is it possible that a judge may see the situation differently?' or 'I understand the strengths of your case, what do you think are the weak points in terms of evidence?' or 'How much time will this case take to get a final decision in court?' Or 'How much money will it take in legal fees and expenses in court?

(III) CONSIDERING THE CONSEQUENCES OF ANY FAILURE TO REACH AN AGREEMENT (BATNA/WATNA /MLATNA ANALYSIS).

BATNA Õ Best Alternative to Negotiated Agreement
WATNA Õ Worst Alternative to Negotiated Agreement
MLATNA Õ Most Likely Alternative to Negotiated Agreement

One technique of reality-testing used in the process of negotiation is to consider the different alternatives to a negotiated settlement. In the context of mediation, the alternatives are 'the best', 'the worst' and 'the most' likely outcome if a dispute is not resolved through negotiation in mediation. As part of reality-testing, it may be helpful to the parties to examine their alternatives outside mediation (specifically litigation) so as to compare them with the options available in mediation. It is also helpful for the mediator to discuss the consequences of failing to reach an agreement e.g., the effect on the relationship of the parties, the effect on the business of the parties etc.

While the parties often wish to focus on best outcomes in litigation, it is important to consider and discuss the worst and the most likely outcomes also. The mediator solicits the viewpoints of the advocate/party about the possible outcome in litigation. It is productive for the mediator to work with the parties and their advocates to come to a proper understanding of the best, the worst and the most likely outcome of the dispute in litigation as that would help the parties to recognize reality and thereby formulate realistic and workable proposals.

If the parties are reaching an interest-based resolution with relative ease, a BATNA/WATNA/ MLATNA analysis need not be resorted to. However if parties are in difficulty at negotiation and the mediator anticipates hard bargaining or adamant stands, BATNA/ WATNA/ MLATNA analysis may be introduced.

By using the above techniques, the mediator assists the parties to understand the reality of their case, give up their rigid positions, identify their genuine interests and needs, and shift their focus to problem-solving. The parties are then encouraged to explore several creative options for settlement.

(iv) BRAIN STORMING

Brain Storming is a technique used to generate options for agreement.

There are 2 stages to the brain storming process:

1. Creating options
2. Evaluating options

1. **Creating options:-** Parties are encouraged to freely create possible options for agreement. Options that appear to be unworkable and impractical are also included. The mediator reserves judgment on any option that is generated and this allows the parties to break free from a fixed mind set. It encourages creativity in the parties. Mediator refrains from evaluating each option and instead attempts to develop as many ideas for settlement as possible. All ideas are written down so that they can be systematically examined later.

2. **Evaluating options:-** After inventing options the next stage is to evaluate each of the options generated. The objective in this stage is not to criticize any idea but to understand what the parties find acceptable and not acceptable about each option. In this process of examining each option with the parties, more information about the underlying interests of the parties is obtained. This information further helps to find terms that are mutually acceptable to both parties.

   Brainstorming requires lateral thinking more than linear thinking.

   Lateral thinking: Lateral thinking is creative, innovative and intuitive. It is non-linear and non-traditional. Mediators use lateral thinking to generate options for agreement.

   Linear thinking: Linear thinking is logical, traditional, rational and fact based. Mediators use linear thinking to analyse facts, to do reality testing and to understand the position of parties.

(v) SUB- SESSIONS

The separate session is normally held with all the members of one side to the dispute, including their advocates and other members who come with the party. However, it is open to the mediator to meet them individually or in groups by holding sub- sessions with only the advocate (s) or the party or any member(s) of the party.

- Mediator may also hold sub-session(s) only with the advocates of both sides, with the consent of parties. During such sub-session, the advocates can be more open and forthcoming regarding the positions and expectations of the parties.
- If there is a divergence of interest among the parties on the same side, it may be advantageous for the mediator to hold sub- session(s) with parties having common interest, to facilitate negotiations. This type of sub-session may facilitate the identification of interests and also prevent the possibility of the parties with divergent interests, joining together to resist the settlement.

(vi) EXCHANGE OF OFFERS

The mediator carries the options/offers generated by the parties from one side to the other. The parties negotiate through the mediator for a mutually acceptable settlement. However, if negotiations fail and settlement cannot be reached the case is sent back to the referral Court.

Stage 4: Closing

(A) Where there is a settlement

- Once the parties have agreed upon the terms of settlement, the parties and their advocates re-assemble and the mediator ensures that the following steps are taken:

  1. Mediator orally confirms the terms of settlement;
  2. Such terms of settlement are reduced to writing;
  3. The agreement is signed by all parties to the agreement and the counsel if any representing the parties;
  4. Mediator also may affix his signature on the signed agreement, certifying that the agreement was signed in his/her presence;
  5. A copy of the signed agreement is furnished to the parties;
  6. The original signed agreement sent to the referral Court for passing appropriate order in accordance with the agreement;
  7. As far as practicable the parties agree upon a date for appearance in court and such date is intimated to the court by the mediator;
  8. The mediator thanks the parties for their participation in the mediation and, congratulates all parties for reaching a settlement.

- **THE WRITTEN AGREEMENT SHOULD:**

  3 clearly specify all material terms agreed to;

  3 be drafted in plain, precise and unambiguous language;

  3 be concise;

  3 use active voice, as far as possible. Should state clearly WHO WILL DO, WHAT, WHEN, WHERE and HOW (passive voice does not clearly identify who has an obligation to perform a task pursuant to the agreement);

  3 use language and expression which ensure that neither of the parties feels that he or she has 'lost';

  3 ensure that the terms of the agreement are executable in accordance with law;

  3 be complete in its recitation of the terms;

3 avoid legal jargon, as far as possible use the words and expressions used by the parties;

3 as far as possible state in positive language what each parties agrees to do;

3 as far as possible, avoid ambiguous words like reasonable, soon, co-operative, frequent etc;

(B) Where there is no settlement

- If a settlement between the parties could not be reached, the case would be returned to the referral Court merely reporting **"not settled".** The report will not assign any reason for non settlement or fix responsibility on any one for the non-settlement. The statements made during the mediation will remain confidential and should not be disclosed by any party or advocate or mediator to the Court or to anybody else.
- The mediator should, in a closing statement, thank the parties and their counsel for their participation and efforts for settlement.

CHAPTER-VII

ROLE OF MEDIATORS

Mediation is a process in which an impartial and neutral third person, the mediator, facilitates the resolution of a dispute without suggesting what should be the solution. It is an informal and non-adversarial process intended to help disputing parties to reach a mutually acceptable solution. The role of the mediator is to remove obstacles in communication, assist in the identification of issues and the exploration of options and facilitate mutually acceptable agreements to resolve the dispute. However, the ultimate decision rests solely with the parties. A mediator cannot force or compel a party to make a particular decision or in any other way impair or interfere with the party's right of self-determination.

(A) FUNCTIONS OF A MEDIATOR

The functions of a mediator are to -:

(i) facilitate the process of mediation; and

(ii) assist the parties to evaluate the case to arrive at a settlement

(i) FACILITATIVE ROLE

A mediator facilitates the process of mediation by-

- creating a conducive environment for the mediation process.
- explaining the process and its ground rules.
- facilitating communication between the parties using the various communication techniques.
- identifying the obstacles to communication between the parties and removing them.
- gathering information about the dispute.
- identifying the underlying interests.
- maintaining control over the process and guiding focused discussion.
- managing the interaction between parties.
- assisting the parties to generate options.
- motivating the parties to agree on mutually acceptable settlement.

- assisting parties to reduce the agreement into writing.

(ii) EVALUATIVE ROLE

A mediator performs an evaluative role by-

- helping and guiding the parties to evaluate their case through reality - testing.
- assisting the parties to evaluate the options for settlement.

(B) MEDIATOR AS DISTINGUISHED FROM CONCILIATOR AND ADJUDICATOR

(i) Mediator and Conciliator

The facilitative and evaluative roles of the mediator have been already explained. The evaluative role of mediator is limited to the function of helping and guiding the parties to evaluate their case through reality testing and assisting the parties to evaluate the options for settlement. But in the process of a conciliation, the conciliator himself can evaluate the cases of the parties and the options for settlement for the purpose of suggesting the terms of settlement.

The role of a mediator is not to give judgment on the merits of the case or to give advice to the parties or to suggest solutions to the parties.

(ii) Mediator and Adjudicator

A mediator is not an adjudicator. Adjudicators like judges, arbitrators and presiding officers of tribunals make the decision on the basis of pleadings and evidence. The adjudicator follows the formal and strict rules of substantive and procedural laws. The decision of the adjudicator is binding on the parties subject to appeal or revision. In adjudication, the decision is taken by the adjudicator alone and the parties have no role in it.

In mediation the mediator is only a facilitator and he does not suggest or make any decision. The decision is taken by the parties themselves. The settlement agreement reached in mediation is binding on the parties. In court referred mediation there cannot be any appeal, or revision against the decree passed on the basis of such settlement agreement. In private mediation, the parties can agree to treat such settlement agreement as a conciliation agreement which then will be governed by the provisions of the Arbitration and Conciliation Act, 1996.

(C) QUALITIES OF A MEDIATOR

It is necessary that a mediator must possess certain basic qualities which include:

i. complete, genuine and unconditional faith in the process of mediation and its efficacy.

ii. ability and commitment to strive for excellence in the art of mediation by constantly updating skills and knowledge.

iii. sensitivity, alertness and ability to perceive, appreciate and respect the needs, interests, aspirations, emotions, sentiments, frame of mind and mindset of the parties to mediation.

iv. highest standards of honesty and integrity in conduct and behavior.

v. neutrality, objectivity and non-judgmental.

vi. ability to be an attentive, active and patient listener.

vii. a calm, pleasant and cheerful disposition.

viii. patience, persistence and perseverance.

ix. good communication skills.

x. open mindedness and flexibility.

xi. empathy.

xii. creativity.

(D) QUALIFICATIONS OF MEDIATORS

The Supreme Court of India in **Salem Advocate Bar Association** V **Union of India,** (2005) 6 SCC 344 approved the Model Civil Procedure Mediation Rules prepared by the Committee headed by Hon'ble Mr. Justice M.J.Rao, the then Chairman, Law Commission of India. These Rules have already been adopted by most of the High Courts with modifications according to the requirements of the State concerned. As per the Model Rules the following persons are qualified and eligible for being enlisted in the panel of mediators:--

(a) (i) Retired Judges of the Supreme Court of India;

(ii) Retired Judges of the High Court;

(iii) Retired District and Sessions Judges or retired Judges of the City Civil Court or Courts of equivalent status;

(b) Legal practitioners with at least fifteen years standing at the Bar at the level of the Supreme Court or the High Court or the District Courts of equivalent status;

(c) Experts or other professionals with at least fifteen years standing; or retired senior bureaucrats or retired senior executives;

(d) Institutions which are themselves experts in mediation and have been recognized as such by the High Court, provided the names of its members are approved by the High Court initially or whenever there is change in membership.

(E) ETHICS AND CODE OF CONDUCT FOR MEDIATORS

1. Avoid conflict of interest

A mediator must avoid mediating in cases where they have direct personal, professional or financial interest in the outcome of the dispute. If the mediator has any indirect interest (e.g. he works in a firm with someone who has an interest in the outcome or he is related to someone who has such an interest) he is bound to disclose to the parties such indirect interest at the earliest opportunity and he shall not mediate in the case unless the parties specifically agree to accept him as mediator despite such indirect interest.

Where the mediator is an advocate, he shall not appear for any of the parties in respect of the dispute which he had mediated.

A mediator should not establish or seek to establish a professional relationship with any of the parties to the dispute until the expiry of a reasonable period after the conclusion of the mediation proceedings.

2. Awareness about competence and professional role boundaries

Mediators have a duty to know the limits of their competence and ability in order to avoid taking on assignments which they are not equipped to handle and to communicate candidly with the parties about their background and experience.

Mediators must avoid providing other types of professional service to the parties to mediation, even if they are licensed to provide it. Even though, they may be competent to provide such services, they will be compromising their effectiveness as mediators when they wear two hats.

3. Practice Neutrality

Mediators have a duty to remain neutral throughout the mediation i.e. from beginning to end. Their words, manner, attitude, body language and process management must reflect an impartial and even handed approach.

4. Ensure Voluntariness

The mediators must respect the voluntary nature of mediation and must recognize the right of the parties to withdraw from the mediation at any stage.

5. Maintain Confidentiality

Mediation being confidential in nature, a mediator shall be faithful to the relationship of trust and confidentiality imposed on him as a mediator. The mediator should not disclose any matter which a party requires to be kept confidential unless ;

a. the mediator is specifically given permission to do so by the party concerned; or

b. the mediator is required by law to do so.

6. Do no harm

Mediators should avoid conducting the mediation process in a manner that may harm the participants or worsen the dispute. Some people suffer from emotional disturbances that make mediation potentially damaging psychologically. Some people come to mediation at a stage when they are not ready to be there. Some people are willing and able to participate, but the mediator handles the process in a way that inflames the parties' antagonism towards each other rather than resolving. In such situations, the mediator must modify the process (e.g. meet the parties separately or meet the counsel only) and if necessary withdraw from mediation when it becomes apparent that mediation, even as modified, is inappropriate or harmful.

7. Promote Self-determination

Supporting and encouraging the parties in mediation to make their own decisions (both individually and collectively) about the resolution of the dispute rather than imposing the ideas of the mediator or others, is fundamental to the mediation process. Mediator should ensure that there is no domination by any party or person preventing a party from making his/her own decision.

8. Facilitate Informed Consent

Settlement of dispute must be based on informed consent. Although, the mediator may not be the source of information for the parties, mediator should try to ensure that the parties have enough information and data to assess their options of settlement and the alternatives to settlement. If the parties lack such information and data, the mediator may suggest to them how they might obtain it.

9. Discharge Duties to third parties

Just as the mediator should do no harm to the parties, he should also consider whether a proposed settlement may harm others who are not participating in the mediation. This is more important when the third parties likely to be affected by a mediated settlement are children or other vulnerable people, such as the elderly or the infirm. Since third parties are not directly involved in the process, the mediator has a duty to ask the parties for information about the likely impact of the settlement on others and encourage the parties to consider the interest of such third parties also.

10. Commitment to Honesty and Integrity

For a mediator, honesty means, among other things, full and fair disclosure of :

a. his qualifications and prior experience;

b. direct or indirect interest if any, in the outcome of the dispute;

c. any fees that the parties will be charged for the mediation; and

d. any other aspect of the mediation which may affect the party's willingness to participate in the process.

Honesty also means telling the truth when meeting the parties separately, e.g. if party 'A' confidentially discloses his minimum expectation and party 'B' asks the mediator whether he knows the opponent's minimum expectation, saying 'No' would be dishonest. Instead, the mediator could say that he has discussed many things with party 'A' on a confidential basis and, therefore, he is at liberty to respond to the question, just as he would be precluded from disclosing to party 'A' certain things what was told by party 'B'. When mediating separately and confidentially with the parties in a series of private sessions, the mediator is in a unique and privileged position. He must not abuse the trust the parties placed in him, even if he believes that bending the truth will further the cause of settlement.

Apart from the fee/remuneration/honorarium, if any, prescribed under the rules, the mediator shall not seek or receive any amount or gift from the parties to the mediation either before or after the conclusion of the mediation process.

Where the mediator is a judicial officer he shall not mediate any dispute involved in or connected with a case pending in his Court.

Legality of Referral of Criminal Compoundable Cases to Mediation (para 59-62)

Dayawati v. Yogesh Kumar Gosain

243 (2017) Delhi Law Times 117 (DB), decided on October 17, 2017

GITA MITTAL, ACTING CHIEF JUSTICE

1. The legal permissibility of referring a complaint cases under Section 138 of the NI Act for amicable settlement through mediation; procedure to be followed upon settlement and the legal implications of breach of the mediation settlement is the subject matter of this judgment.

2. The brief Facts:

Before dealing with the questions raised before us, it is necessary to briefly note some essential facts of the case. The appellant Smt. Dayawati ("*complainant*" hereafter) filed a complaint under Section 138 of the NI Act, complaining that the respondent Shri Yogesh Kumar Gosain herein *("respondent"* hereafter) had a liability of Rs.55,99,600/- towards her as on 7th April, 2013 as recorded in a regular ledger account for supply of fire-fighting goods and equipment to the respondent on different dates and different quantities. In part discharge of this liability, the respondent was stated to have issued two account payee cheques in favour of the complainants of Rs.11,00,000/- (Cheque No.365406/- dated 1st December, 2014) and Rs.16,00,000/- (Cheque No.563707 dated 28th November, 2014). Unfortunately, these two cheques were dishonoured by the respondent's bank on presentation on account of "*insufficiency of funds*".

7. As a result, the complainant was compelled to serve a legal notice of demand on the respondent which, when went unheeded, led to the filing of two complaint cases under Section 138 of the NI Act before the Patiala House Courts, New Delhi being CC Nos.89/1/15 and 266/1/15. In these proceedings, both parties had expressed the intention to amicably settle their disputes. Consequently, by a common order dated 1st April, 2015 recorded in both the complaint cases, the matter was referred for mediation to the Delhi High Court Mediation and Conciliation Centre.

8. We extract hereunder the operative part of the order dated 1st April, 2015 which reads as follows :

> *"... Ld. Counsel for accused submits that accused is willing to explore the possibilities of compromise. Ld. Counsel for complainant is also interested (sic) in compromise talk. Let the matter be referred to Mediation Cell, High Court Delhi, Delhi. Parties are directed to appear before the Mediation Cell, Hon'ble High Court, Delhi on 15.04.2015 at 2:30 p.m."*

9. It appears that after negotiations at the Delhi High Court Mediation and Conciliation Centre, the parties settled their disputes under a common settlement agreement dated 14th May, 2015 under which the accused agreed to pay a total sum of Rs.55,54,600/- to the complainant as full and final settlement amount in installments with regard to which a mutually agreed payment schedule was drawn up. It was undertaken that the complainant would withdraw the complaint cases after receipt of the entire amount. In the agreement drawn up, the parties agreed to comply with the terms of the settlement which was signed by both the parties along with their respective counsels.

10. This settlement agreement was placed before the court on 1st June, 2015 when the following order was recorded:

> *"File received back from the Mediation Centre with report of settlement. Settlement agreement dated 14.05.2015 gone through. At joint request, put up for compliance of abovesaid settlement agreement and for making of first installment on 30.06.2015"*

11. Unfortunately, the accused/respondent herein failed to comply with the terms of the settlement. Though vested with the obligation thereunder to pay a sum of Rs.11,00,000/- as the first installment on 25th June, 2015, he paid only a sum of Rs.5,00,000/- to the complainant through RTGS without giving any justification. On the 30th June of 2015, the Metropolitan Magistrate consequently recorded thus:

> *"... Ld. Counsel for complainant submits that the accused has not made the payment of first installment in terms of mediation settlement dated 14.05.2015. Ld. Counsel for complainant further submits that accused was to pay first installment of* Rs.*11,00,000/- on or before the 25.06.2015 however he has paid only* Rs.*5,00,000/- through RTGS. No reasonable explanation for the non-payment of full amount of first installment is given by the accused. Further, no assurance is given by the accused for making of the due installments within the stipulated time.*

Considering the facts of the case and submissions on behalf of both the parties, it is apparent that the accused is not willing to comply with the terms and conditions of the mediation settlement. Hence, mediation settlement failed.

Let the matter be proceeded on merit, put up on 14.08.2015"

12. Thereafter, two more opportunities were given by the Metropolitan Magistrate on 14th August, 2015 and 21st August, 2015 to the accused to comply with the settlement. Finally, in view of the continued non-compliance, the matter was listed for framing of notice on 28th September, 2015 and trial on merits.

13. In the meantime, the Negotiable Instruments (Amendment) Ordinance, 2015, received the assent of the President of India on the 26th of December, 2016. On account of promulgation of the ordinance, Section 142 of the Negotiable Instruments Act, 1881 stood amended with regard to jurisdiction of offences under Section 138 of the enactment and therefore these cases stood transferred from Patiala House Courts to Tis Hazari Courts at which stage the matter came to be placed before the ld. referral judge.

14. At this stage, an application dated 16th November, 2015 was filed by the complainant seeking enforcement of the settlement agreement dated 14th May, 2015 placing reliance on the judicial precedents reported at ***2013 SCC OnLine Del 124 Hardeep Bajaj v. ICICI; 2015 SCC OnLine Del 7309 Manoj Chandak v. M/s Tour Lovers Tourism (India) Pvt Ltd and 2015 SCC OnLine Del 9334 M/s Arun International v. State of Delhi.*** The complainant urged that the settlement agreement was arrived at after long negotiations and meetings; that it was never repudiated by the accused nor challenged on grounds of it being vitiated for lack of free consent or any other ground and lastly, that the accused having paid part of the first agreed installment, has also acted upon the mediation settlement and cannot be allowed to wriggle free of his obligation under the same.

15. The respondent, on the other hand, argued that the settlement agreement was not binding contending primarily, for the first time, that the settlement amount was exorbitant and onerous pointing out that the complaints were filed with regard to two cheques which were for a cumulative amount of Rs.27,00,000/- while the settlement amount was of Rs.55,54,600/- and this by itself was evidence that the agreement was unfair, arbitrary and not binding on the accused. It was further urged that on receipt of the case from the mediation cell, the statement of the parties ought to have been recorded before the court whereby the parties would have adopted the mediation settlement agreement so that the same bore the *imprimatur* of the court. As per the respondent, absence of such statement in the case denuded the settlement agreement of its binding nature and efficacy.

16. The ld. Metropolitan Magistrate was of the view that these questions had arisen, not just in this case, but a plethora of other cases as well. Consequently, the order dated 13th of January 2016 was passed making the aforestated reference under Section 395 of the Cr.P.C. to this court. At the same time, so far as the complaints under Section 138 of the NI Act are concerned, the ld. MM additionally directed thus:

> *"In view of the question of law that has arose in the present case, the decision on which is necessary for further proceedings and a proper adjudication of the present case – a reference has been made u/s 395 of the CrPC for consideration and guidance of the Hon'ble High Court of Delhi.*
>
> *The office attached to this court is directed to send this Reference Order to the Ld. Registrar General, Hon'ble High Court of Delhi in appropriate manner and through proper channel.*
>
> *List the matter now on 06.06.2016 awaiting the outcome of the reference and clarity on the legal issue."*

VIII. Dispute resolution encouraged in several cases by the Supreme Court in non-compoundable cases as well

59. We note that there have been several instances when the Supreme Court has approved exercise of inherent powers under Section 482 of the Cr.P.C. by the High Court for quashing criminal cases on account of compromise/settlement even though they are not included in the list of compoundable cases under Section 320 of the Cr.P.C. ***In (2012) 10 SCC 303, Gian Singh v. State of Punjab,*** it was held that this was in exercise of statutory power of the High Court under Section 482 of the Cr.P.C. The relevant extract of the judgment is reproduced as under:

> "*61. ... But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing*

> *the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."*

60. In a recent pronouncement dated 4th October, 2017, reported at ***2017 SCC OnLine SC 1189 Parabatbhai Aahir @ Parbatbhai Bhimsinhabhai Karmur and Ors v. State of Gujarat and Anr*** a three-Judge bench of the Supreme Court speaking through D.Y. Chandrachud, J. cited with approval, inter alia, the judgment in ***Gian Singh*** reiterating that in exercise of its inherent jurisdiction under Section 482 of the Cr.P.C, the High Court is empowered to quash FIRs/Criminal Proceedings emanating from non-compoundable offences if the ends of justice and the facts of the case, so warrant. While, so approving the Supreme Court, laid down the exposition of the law in the form of exhaustive guidelines which are extracted thus:

> *'(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;*
>
> *(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is noncompoundable.*
>
> *(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;*
>
> *(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;*

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.'

61. The judicial precedent in **(2013) 5 SCC 226, K. Srinivas Rao v. D.A. Deepa** is in the context of a complaint filed by the respondent wife under Section 498A of the Indian Penal Code, against the appellant husband and his family members, the offence under Section 498A of the IPC being non-compoundable. Noting that mediation, as a method of alternative dispute redressal had got legal recognition, observations regarding settlements of matrimonial disputes were made in paras 39 and 46 by the Supreme Court to the courts dealing with matrimonial matters which read thus :

> *"39. Quite often, the cause of the misunderstanding in a matrimonial dispute is trivial and can be sorted out. Mediation as a method of alternative dispute resolution has got legal recognition now. We have referred several matrimonial disputes to mediation centres. Our experience shows that about 10% to 15% of matrimonial disputes get settled in this Court through various mediation centres. We, therefore, feel that at the earliest stage i.e. when the dispute is taken up by the Family Court or by the court of first instance for hearing, it must be referred to mediation centres……*
>
> xxx xxx xxx
>
> *44. We, therefore, feel that though offence punishable under Section 498-A IPC is not compoundable, in appropriate cases if the parties are willing and if it appears to the criminal court that there exist elements of settlement, it should direct the parties to explore the possibility of settlement through mediation. This is, obviously, not to dilute the rigour, efficacy and purport of Section 498-A IPC, but to locate cases where the matrimonial dispute can be nipped in bud in an equitable manner. The Judges, with their expertise, must ensure that this exercise does not lead to the erring spouse using mediation process to get out of clutches of the law. During mediation, the parties can either decide to part company on mutually agreed terms or they may decide to patch up and stay together. In either case for the settlement to come through, the complaint will have to be quashed. In that event, they can approach the High Court and get the complaint quashed. If, however, they choose not to settle, they can proceed with the complaint. In this exercise, there is no loss to anyone. If there is settlement, the parties will be saved from the trials and tribulations of a criminal case and that will reduce the burden on the courts which will be in the larger public interest. Obviously, the High Court will quash the complaint only if after considering all circumstances it finds the settlement to be equitable and*

genuine. Such a course, in our opinion, will be beneficial to those who genuinely want to accord a quietus to their matrimonial disputes.

xxx xxx xxx

46. We, therefore, issue directions, which the courts dealing with the matrimonial matters shall follow.

Xxx xxx xxx

46.2. The criminal courts dealing with the complaint under Section 498-A IPC should, at any stage and particularly, before they take up the complaint for hearing, refer the parties to mediation centre if they feel that there exist elements of settlement and both the parties are willing. However, they should take care to see that in this exercise, rigour, purport and efficacy of Section 498-A IPC is not diluted. Needless to say that the discretion to grant or not to grant bail is not in any way curtailed by this direction. It will be for the court concerned to work out the modalities taking into consideration the facts of each case.

46.3. All mediation centres shall set up pre-litigation desks/clinics; give them wide publicity and make efforts to settle matrimonial disputes at pre-litigation stage."

62. Therefore, the Supreme Court has recognized the permissibility of the High Court's quashing the criminal prosecutions in exercise of their inherent jurisdiction under Section 482 of the Cr.P.C. on a consideration of the subject matter of the cases. The Supreme Court has accepted compromises in non-compoundable offences upon evaluation of the genuineness, fairness, equity and interests of justice in continuing with the criminal proceedings relating to noncompoundable offences, after settlement of the entire dispute especially in offences arising from *"commercial, financial, civil, partnership*" or such like transactions or relating to matrimonial or family disputes which are private in nature.

United Nations Convention on International Settlement Agreements Resulting from Mediation, 2018 (SingaporeConvention on Mediation)

Preamble

The Parties to this Convention,

Recognizing the value for international trade of mediation as amethod for settling commercial disputes in which the parties in disputerequest a third person or persons to assist them in their attempt tosettle the dispute amicably,

Noting that mediation is increasingly used in international anddomestic commercial practice as an alternative to litigation,

Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to thetermination of a commercial relationship, facilitating the administrationof international transactions by commercial parties and producingsavings in the administration of justice by States,

Convinced that the establishment of a framework for internationalsettlement agreements resulting from mediation that is acceptableto States with different legal, social and economic systems wouldcontribute to the development of harmonious international economic
relations,

Have agreed as follows:

Article 1. Scope of application

1. This Convention applies to an agreement resulting frommediation and concluded in writing by parties to resolve a commercialdispute ("settlement agreement") which, at the time of its conclusion,is international in that:

(a) At least two parties to the settlement agreement have theirplaces of business in different States; or

(b) The State in which the parties to the settlement agreementhave their places of business is different from either:

(i) The State in which a substantial part of the obligationsunder the settlement agreement is performed; or

(ii) The State with which the subject matter of thesettlement agreement is most closely connected.

2. This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactionsengaged in by one of the parties (a consumer) for personal, familyor household purposes;

(b) Relating to family, inheritance or employment law.

3. This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded inthe course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State ofthat court;

(b) Settlement agreements that have been recorded and areenforceable as an arbitral award.

Article 2. Definitions

1. For the purposes of article 1, paragraph 1:
(a) If a party has more than one place of business, the relevantplace of business is that which has the closest relationship to thedispute resolved by the settlement agreement, having regard to thecircumstances known to, or contemplated by, the parties at the timeof the conclusion of the settlement agreement;
(b) If a party does not have a place of business, reference isto be made to the party's habitual residence.

2. A settlement agreement is "in writing" if its content is recordedin any form. The requirement that a settlement agreement be inwriting is met by an electronic communication if the informationcontained therein is accessible so as to be useable for subsequentreference.

3. "Mediation" means a process, irrespective of the expressionused or the basis upon which the process is carried out, wherebyparties attempt to reach an amicable settlement of their disputewith the assistance of a third person or persons ("the mediator")lacking the authority to impose a solution upon the parties to thedispute.

Article 3. General principles

1. Each Party to the Convention shall enforce a settlementagreement in accordance with its rules of procedure and under theconditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims wasalready resolved by a settlement agreement, a Party to the Conventionshall allow the party to invoke the settlement agreement in accordancewith its rules of procedure and under the conditions laid down inthis Convention, in order to prove that the matter has already beenresolved.

Article 4. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Conventionshall supply to the competent authority of the Party to the Conventionwhere relief is sought:
(a) The settlement agreement signed by the parties;
(b) Evidence that the settlement agreement resulted frommediation, such as:
(i) The mediator's signature on the settlement agreement;
(ii) A document signed by the mediator indicating thatthe mediation was carried out;
(iii) An attestation by the institution that administeredthe mediation; or
(iv) In the absence of (i), (ii) or (iii), any other evidenceacceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed bythe parties or, where applicable, the mediator is met in relation to anelectronic communication if:
(a) A method is used to identify the parties or the mediatorand to indicate the parties' or mediator's intention in respect of theinformation contained in the electronic communication; and

(b) The method used is either:
(i) As reliable as appropriate for the purpose for whichthe electronic communication was generated or
communicated, in the light of all the circumstances,including any relevant agreement; or
(ii) Proven in fact to have fulfilled the functionsdescribed in subparagraph (a) above, by itself ortogether with further evidence.

3. If the settlement agreement is not in an official language of theParty to the Convention where relief is sought, the competentauthority may request a translation thereof into such language.

4. The competent authority may require any necessary documentin order to verify that the requirements of the Convention have beencomplied with.

5. When considering the request for relief, the competent authorityshall act expeditiously.

Article 5. Grounds for refusing to grant relief
1. The competent authority of the Party to the Convention whererelief is sought under article 4 may refuse to grant relief at the requestof the party against whom the relief is sought only if that partyfurnishes to the competent authority proof that:
(a) A party to the settlement agreement was under someincapacity;
(b) The settlement agreement sought to be relied upon:
(i) Is null and void, inoperative or incapable of beingperformed under the law to which the parties havevalidly subjected it or, failing any indication thereon,under the law deemed applicable by the competent
authority of the Party to the Convention whererelief is sought under article 4;
(ii) Is not binding, or is not final, according to its terms;or
(iii) Has been subsequently modified;
(c) The obligations in the settlement agreement:
(i) Have been performed; or
(ii) Are not clear or comprehensible;
(d) Granting relief would be contrary to the terms of thesettlement agreement;
(e) There was a serious breach by the mediator of standardsapplicable to the mediator or the mediation without which breachthat party would not have entered into the settlement agreement; or
(f) There was a failure by the mediator to disclose to theparties circumstances that raise justifiabledoubts as to the mediator'simpartiality or independence and such failure to disclose had amaterial impact or undue influence on a party without which failurethat party would not have entered into the settlement agreement.

2. The competent authority of the Party to the Convention whererelief is sought under article 4 may also refuse to grant relief if it findsthat:
(a) Granting relief would be contrary to the public policy ofthat Party; or

(b) The subject matter of the dispute is not capable ofsettlement by mediation under the law of that Party.

Article 6. Parallel applications or claims
If an application or a claim relating to a settlement agreement hasbeen made to a court, an arbitral tribunal or any other competentauthority which may affect the relief being sought under article 4,the competent authority of the Party to the Convention where suchrelief is sought may, if it considers it proper, adjourn the decision andmay also, on the request of a party, order the other party to givesuitable security.

Article 7. Other laws or treaties
This Convention shall not deprive any interested party of any rightit may have to avail itself of a settlement agreement in the mannerand to the extent allowed by the law or the treaties of the Party to
the Convention where such settlement agreement is sought to berelied upon.

Article 8. Reservations
1. A Party to the Convention may declare that:
(a) It shall not apply this Convention to settlement agreementsto which it is a party, or to which anygovernmental agencies or anyperson acting on behalf of a governmental agency is a party, to theextent specified in the declaration;
(b) It shall apply this Convention only to the extent that theparties to the settlement agreement have agreed to the application ofthe Convention.

2. No reservations are permitted except those expressly authorizedin this article.

3. Reservations may be made by a Party to the Convention at anytime. Reservations made at the time of signature shall be subject toconfirmation upon ratification, acceptance or approval. Suchreservations shall take effect simultaneously with the entry into forceof this Convention in respect of the Party to the Conventionconcerned. Reservations made at the time of ratification, acceptanceor approval of this Convention or accession thereto, or at the timeof making a declaration under article 13 shall take effect simultaneouslywith the entry into force of this Convention in respect of the Partyto the Convention concerned. Reservations deposited after the entryinto force of the Convention for that Party to the Convention shalltake effect six months after the date of the deposit.

4. Reservations and their confirmations shall be deposited withthe depositary.

5. Any Party to the Convention that makes a reservation underthis Convention may withdraw it at any time. Such withdrawals areto be deposited with the depositary, and shall take effect six months
after deposit.

Article 9. Effect on settlement agreements
The Convention and any reservation or withdrawal thereof shallapply only to settlement agreements concluded after the date whenthe Convention, reservation or withdrawal thereof enters into forcefor the Party to the Convention concerned.

Article 10. Depositary
The Secretary-General of the United Nations is hereby designated as
the depositary of this Convention.

Article 11. Signature, ratification, acceptance, approval,accession
1. This Convention is open for signature by all States in Singapore,on 7 August 2019, and thereafter at United Nations Headquarters inNew York.
2. This Convention is subject to ratification, acceptance or approvalby the signatories.
3. This Convention is open for accession by all States that are notsignatories as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval or accessionare to be deposited with the depositary.

Alternative Dispute Resolution, including Arbitration, Mediation and Conciliation

All India Bar Examination Preparatory Materials

By Dr. Aman Hingorani

Introduction

Article 39A of the Constitution directs the State to secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and in particular, to 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.

The Supreme Court has recognized the "right to speedy trial" as being implicit in Article 21 of the Constitution. (*Hussainara Khatoon v State of Bihar*, AIR 1979 SC 1360).

To give effect to the said mandate, Parliament has recognized various alternative dispute resolution (**ADR**) mechanisms like arbitration, conciliation, mediation and Lok Adalats to strengthen the judicial system.

Section 89 of the Code of Civil Procedure, 1908 (**the Code**) expressly provides for settlement of disputes through ADR.

Section 89 (1) of the Code provides that 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 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 Adalat or mediation.

Section 89 (2) of the Code provides that where a dispute has been so referred

- for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (**the 1996 Act**) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.
- to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of Section 20 (1) of the Legal Services Authorities Act 1987 (**the 1987 Act**) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat.
- 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 other provisions of the 1987 Act shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act.
- for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

Order X Rule 1 A of the Code further provides that after recording the admissions and denial, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as may be opted by the parties. Order X Rule 1B of the Code provides for the fixing of the date of appearance before the conciliatory forum or authority, while Order X Rule 1C contemplates the referral of the matter back to the Court consequent to the failure of efforts of conciliation.

The Code contemplates recourse to ADR in several other circumstances. Order XXXII-A, which pertains to suits relating to matters concerning the family, imposes a duty on the Court to assist the parties, where it is possible to do so consistently with the nature and circumstances of the case, in arriving at a settlement in respect of their dispute and empowers it to secure the assistance of a welfare expert for such purpose. Similarly, Order XXVII Rule 5 (B) mandates that in every suit or proceeding to which the Government, or a public officer acting in his official capacity, is a party, it shall be the duty of the Court to make, in the first instance, every endeavour, where it is possible to do so consistently with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject matter of the suit.

Model Civil Procedure Alternative Dispute Resolution Rules

The 1996 Act and the 1987 Act do not contemplate a situation where the Court asks the parties to choose one of the ADR mechanism, namely, arbitration, conciliation or through Lok Adalat. These Acts, thus, are applicable only from the stage after reference is made under Section 89 of the Code. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

In view of right to speedy trial being implicit in Article 21 of the Constitution and in order to provide fair, speedy and inexpensive justice to the litigating public, the Supreme Court has recommended the High Courts to adopt, with or without modification, the model Civil Procedure Alternative Dispute Resolution and Mediation Rules framed by the Law Commission of India. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353)

The model Alternative Dispute Resolution Rules framed by the Law Commission lay down the procedure for directing parties to opt for alternative modes of settlement. The Court is mandated to give guidance as it deems fit to the parties, by drawing their attention to the relevant factors which the parties will have to take into account, before exercising their option as to the particular mode of settlement. The Rules provide for the procedure for reference by the Court to the different modes of settlement, as also the procedure for the referral back to the Court and appearance before the Court upon failure to settle disputes by ADR mechanisms. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

It is permissible for the High Courts to frame rules under Part X of the Code covering the manner in which the option to one of the ADRs can be made. The rules so framed by the High Courts are to supplement the rules framed under the Family Court Act, 1984. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

Arbitration

Arbitration is an adjudicatory process in which the parties present their disputes to a neutral third party (arbitrator) for a decision. While the arbitrator has greater flexibility than a Judge in terms of procedure and rules of evidence, the arbitration process is akin to the litigation process.

A valid arbitration must be preceded by an arbitration agreement which should be valid as per the Indian Contract Act, 1872. The parties to an agreement must have the capacity to enter into a contract in terms of Sections 11 and 12 of the said Act.

Apart from statutory requirement of a written agreement, existing or future disputes and an intention to refer them to arbitration (Section 7, 1996 Act), other attributes which must be present for an agreement to be considered an arbitration agreement are

- the arbitration agreement must contemplate that the decision of the arbitral tribunal will be binding on the parties to the agreement.

- the jurisdiction of the arbitral tribunal to decide the rights of the parties must derive either from the consent of the parties or from an order of the Court or from the statute, the terms of which make it clear that the process is to be arbitration.
- the agreement must contemplate that substantive rights of the parties will be determined by the arbitral tribunal.
- the arbitral tribunal must determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides.
- the agreement of the parties to refer their disputes to the decision of the arbitral tribunal must be intended to be enforceable in law.
- the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when the reference is made to the tribunal.
- the agreement should contemplate that the tribunal will receive evidence from both sides and hear their contentions or atleast give the parties an opportunity to put them forward.

(K. K. Modi v K. N. Modi, AIR 1998 SC 1297, *Bharat Bhushan Bansal v U.P. Small Industries Corporation*, AIR 1999 SC 899, *U.P Rajkiya Nirgam Ltd. V Indure (P) Ltd*., AIR 1996 SC 1373).

It is possible to spell out an arbitration agreement in a contract by correspondence with the Government. (*P.B. Ray v Union of India*, AIR 1973 SC 908). But even such contract by correspondence with the Government has to be entered into by the officer duly authorized to enter into contract on behalf of the Government under Article 299 of the Constitution. A contract by a person not so authorized is void. *(State of Punjab v Om Prakash,* AIR 1988 SC 2149).

Arbitration and Expert Determination

Expert determination is the referral of a dispute to an independent third party to use his expertise to resolve the dispute. Such determination is helpful for determining valuation, intellectual property or accounting disputes. The expert is not required to give reasons for his determination. However, the determination of an expert is not enforceable like an arbitral award. Nor it can be challenged in a court of law.

To hold that an agreement contemplates arbitration and not expert determination, the Courts have laid emphasis on

- existence of a “formulated dispute” as against an intention to avoid future disputes.
- the tribunal or forum so chosen is intended to act judicially after taking into account relevant evidence before it and the submission made by the parties before it.
- the decision is intended to bind the parties.

(K. K. Modi v K. N. Modi, AIR 1998 SC 1297).

Nomenclature used by the parties may not be conclusive. One has to examine the true intent and purpose of agreement. The terminology “arbitrator” or “arbitration” is persuasive but not always conclusive.

Illustration : Two groups of a family arrived at a MoU for resolving the disputes and differences amongst them. The relevant clause of this memorandum purported to prevent any further disputes between the two groups, in connection with division of assets in agreed

proportions, after their valuation by a named body and under a scheme of division by another named body. It further intended to clear any other difficulties which may arise in implementation of the agreement by leaving it to the decision of the Chairman of the Financial Corporation, who was entitled to nominate another person for deciding another question. The clause did not contemplate any judicial determination or recording of evidence. It was held to be a case of expert determination and not arbitration, even though the parties in correspondence used the word 'arbitration'. (*K. K. Modi v K. N. Modi,* AIR 1998 SC 1297).

Institutional Arbitration

The contract between the parties often contains an arbitration clause which designates an institution to administer and conduct the arbitration process under pre-established set of rules. Examples of such institutions are the Court of Arbitration of International Chambers of Commerce, London Court of International Arbitration and American Arbitration Association. Should the administrative costs of the institution, which may be substantial, be not a factor, the institutional approach is generally preferred. The advantages of institutional arbitration to those who can afford it are

- availability of pre-established and well tried rules and procedures which assure that arbitration will get off the ground.
- availability of administrative and technical assistance.
- availability of a list of qualified and experienced arbitrators.
- appointment of arbitrators by the institution should the parties request it.
- physical facilities and support services for arbitrations.
- assistance in encouraging reluctant parties to proceed with arbitration and
- final review and perspective of a valid award ensuring easier recognition and enforcement.
- operational benefits of the parties rarely disputing proper notice.
- availability of panel of arbitrators to fall back on if appointment is challenged or the arbitrator resigns or is replaced.
- The primary disadvantages of institutional arbitration are that it is slow and rigid.
- administrative fees for services and use of facilities may be high in disputes over large amounts, especially where fees are related to the amount in dispute. For lesser amounts in dispute, institutional fees may be greater than the amount in controversy.
- the institution's bureaucracy may lead to added costs and delays.

Ad-hoc Arbitration

Ad hoc arbitration is a proceeding constructed by the parties themselves (and not a stranger or institution) with rules created solely for that specific case. The parties make their own arrangement with respect to all aspects of the arbitration, including the law which will be applied, the rules under which the arbitration will be carried out, the method for the selection of the arbitrator, the place where arbitration will be held, the language, and finally and most importantly, the scope and issues to be resolved by means of arbitration.

If the parties approach the arbitration in a spirit of cooperation, ad hoc proceedings can be more flexible, suitable, cost effective and faster than an institutional arbitration proceeding.

However, the disadvantages of ad hoc arbitration are

- there is high party control which entails the need of party cooperation right upto the end since there are no pre established set of rules.
- the parties run risk of drafting inoperative arbitral clauses. Clauses are often drafted in great detail and which are rarely workable and are susceptible to different interpretations, leading to litigation.
- the arbitral award itself may be rendered unenforceable if wrong procedure is prescribed and followed
- it suffers from lack administrative supervision to schedule hearings, fees, engagement of translators etc. It is also attendant with lack of facilities and infrastructure.

Ad hoc arbitration need not be entirely divorced from institutional arbitration. Parties can choose choosing applicability of rules of an institution to conduct arbitration without giving function to institution. Conversely, the parties can designate an institution to administer the arbitration proceeding but excluding applicability of part of its rules. The parties can simply require an institution to only appoint the arbitrator for them. While parties in ad hoc arbitration adopt own set of rules, it is always open to them to adopt the rules of an arbitral institution adapted to their case or of Model Law of UNCITRAL.

Statutory Arbitration

There are a large number of Central and State Acts, which specifically provide for arbitration in respect of disputes arising on matters covered by those enactments. Instances of such enactments are the Electricity Act, 1910 and Electricity (Supply) Act, 1948. In view of the position that such an arbitration would also governed by the 1996 Act, the provision for statutory arbitration is deemed to be arbitration agreement (*Grid Corporation of Orissa v Indian Change Chrome Ltd.*, AIR 1998 Ori 101).

Fast Track Arbitration/Documents only Arbitration

Should the parties agree that no oral hearings shall be held, the arbitral tribunal could fast track the arbitration process by making the award only on the basis of documents.

Arbitration under the 1996 Act

The 1996 Act repeals the earlier law on arbitration contained in the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961.

The 1996 Act seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the UNCITRAL Model Law and Rules. However, the said Model Law and Rules do not become part of the Act so as to become an aid to construe the provisions of the Act. (*Union of India v East Coast Boat Builders and Engineers Ltd.*, AIR 1999 Del 44).

The 1996 Act is a long leap in the direction of ADR. The decided cases under the Arbitration Act, 1940 have to be applied with caution for determining the issues arising for decision under the

1996 Act (*Firm Ashok Traders v Gurumukh Das Saluja*, (2004) 3 SCC 155.) Interpretation of the provisions of the 1996 Act should be independent and without reference to the principles underlying the Arbitration Act, 1940 (*Sundaram Finance Ltd v NEPC India Ltd*, AIR 1999 SC 565).

Under the Arbitration Act, 1940, there was a procedure for filing and making an award a rule of Court i.e. a decree, after the making of the award and prior to its execution. Since the object of the 1996 Act is to provide speedy and alternative solution to the dispute, the said procedure is eliminated in the 1996 Act. Even for enforcement of a foreign award, there is no need to take separate proceedings, one for deciding the enforceability of the award to make it a rule of the Court or decree and the other to take up execution thereafter. The Court enforcing the foreign award can deal with the entire matter in one proceeding. (*Fuerst Day Lawson Ltd. v Jindal Exports Ltd.*, AIR 2001 SC 2293).

Commencement of 1996 Act

Though the 1996 Act received the Presidential assent on 16 August 1996, but it, being a continuation of the Arbitration and Conciliation Ordinance, is deemed to have been effective from 25 January 1996 i.e. the date when the first Ordinance was brought in force. (*Fuerst Day Lawson Ltd. v Jindal Exports Ltd.*, AIR 2001 SC 2293). Therefore, the provisions of the Arbitration Act, 1940, will continue to apply to the arbitral proceedings commenced before 25 January 1996. (*Shetty's Construction Co. (P) Ltd. v Konkan Railway Construction,* (1998) 5 SCC 599).

Section 85 (2) (a) of the 1996 Act further provides that notwithstanding the repeal of the Arbitration Act, 1940, its provisions shall continue to apply in relation to arbitration proceedings which commenced prior to the coming into force of the 1996 Act on 25 January 1996, unless otherwise agreed by the parties. Section 21 gives the parties an option to fix another date for commencement of the arbitral proceedings. Therefore, if the parties to the arbitration had agreed that the arbitral proceedings should commence from a day post 25 January 1996, the provisions of the 1996 Act will apply.

In cases where arbitral proceedings had commenced before coming into force of the 1996 Act and are pending before the arbitrator, it is open to the parties to agree that the 1996 Act will be applicable to such arbitral proceedings. (*Thyssen Stahlunion Gmbh v Steel Authority of India,* (1999) SCC 334).

Domestic Arbitration

The expression "domestic arbitration" has not been defined in the 1996 Act. An arbitration held in India, the outcome of which is a domestic award under Part I of this Act, is a domestic arbitration (Sections 2(2) and 2(7)). Therefore, a domestic arbitration is one which takes place in India, wherein parties are Indians and the dispute is decided in accordance with substantive law of India (Section 28(1) (a)).

Part I of the 1996 Act

Part I restates the law and practice of arbitration in India, running chronologically through each stage of arbitration, from the arbitration agreement, the appointment of the arbitral tribunal, the conduct of the arbitration, the award to the recognition and enforcement of awards.

Once the parties have agreed to refer a dispute to arbitration, neither of them can unilaterally withdraw from the arbitral process. The arbitral tribunal shall make an award which shall be final and binding on the parties and persons claiming under them respectively (Section 35), and such

award unless set aside by a court of competent jurisdiction (Section 34), shall be enforceable under the Code, in the same manner as if it were a decree of the Court (Section 36).

Limited judicial intervention

Under the 1996 Act, there is no provision for reference to arbitration by intervention of the Court. Section 5 of the 1996 Act provides for limited role of judiciary in the matters of arbitration, which is in consonance with the object of the Act to encourage expeditious and less expensive resolution of disputes with minimum interference of the Court (*P. Anand Gajapathi Raj v P.V.G. Raju*, AIR 2000 SC 1886).

Arbitration Agreement

The existence of arbitration agreement is a condition precedent for the exercise of power to appoint an arbitrator under Section 11 of the 1996 Act. The issue of existence and validity of the "arbitration agreement" is altogether different from the substantive contract in which it is embedded. The arbitration agreement survives annulment of the main contract since it is seperable from the other clauses of the contract. The arbitration clause constitutes an agreement by itself. *(Firm Ashok Traders v Gurumukh Das Saluja,* (2004) 3 SCC 155).

In cases where there is an arbitration clause, it is obligatory for the Court under the 1996 Act to refer the parties to arbitration in terms of their arbitration agreement (Section 8). However, the Act does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated by Section 8 of the Act.

Similarly, the Court is to refer the parties to arbitration under Section 8 of the 1996 Act only in respect to "a matter which is the subject matter of an arbitration agreement". Where a suit is commenced "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words "a matter" indicates that the entire subject matter of the suit should be subject to arbitration agreement. (*Sukanya Holdings Pvt. Ltd. V Jayesh H. Pandya*, (2003) 5 SCC 531).

Section 8 of the 1996 Act is attracted to only arbitrable disputes, which the arbitrator is competent or empowered to decide.

Illustration : The parties agreed to refer the question of winding up a company to arbitration. However, the power to order winding up of a company is conferred upon the company court by the Companies Act. As the arbitrator has no jurisdiction to wind up a company, the Court cannot make such a reference under Section 8. (*Haryana Telecom Ltd. v Sterlite Industries (India) Ltd*., AIR 1999 SC 2354).

Illustration : The parties agreed to refer the question as to whether probate should be granted or not to arbitration. Since the judgement in the probate suit under the Indian Succession Act is a judgement *in rem*, such question cannot be referred to arbitration (*Chiranjilal Shrilal Goenka v Jasjit Singh*, (1993) 2 SCC 507).

The application under Section 8 of the 1996 Act can be filed in the same suit or as an independent application before the same Court.

Ordinarily the application under Section 8 of the 1996 Act has to be filed before filing of written statement in the concerned suit. But when the defendant even after filing the written statement applies for reference to arbitration and the plaintiff raises no objection, the Court can refer the dispute to arbitration. The arbitration agreement need not be in existence before the action is brought in Court, but can be brought into existence while the action is pending. Once the matter

is referred to arbitration, proceedings in civil suit stands disposed of. The Court to which the party shall have recourse to challenge the award would be the Court as defined in Section 2 (e) of the Act, and not the Court to which an application under Section 8 is made. (*P. Anand Gajapathi Raju v P.V.G Raju* AIR 2000 SC 1886).

Where during the pendency of the proceedings before the Court, the parties enter into an agreement to proceed for arbitration, they would have to proceed in accordance with the provisions of the 1996 Act.

Illustration : The High Court, in exercise of its writ jurisdiction, has no power to refer the matter to an arbitrator and to pass a decree thereon on the award being submitted before it. (*T.N Electricity Board v Sumathi,* AIR 2000 SC 1603).

Interim measures by the Court

The Court is empowered by Section 9 of the 1996 Act to pass interim orders even before the commencement of the arbitration proceedings. Such interim orders can precede the issuance of notice invoking the arbitration clause. (*Sundaram Finance Ltd v NEPC India Ltd*, AIR 1999 SC 565). The Court under Section 9 merely formulates interim measures so as to protect the right under adjudication before the arbitral tribunal from being frustrated. (*Firm Ashok Traders v Gurumukh Das Saluja*, (2004) 3 SCC 155).

If an application under Section 9 of the 1996 Act for interim relief is made in the Court before issuing a notice under section 21 of the Act, the Court will first have to be satisfied that there is a valid arbitration agreement and that the applicant intends to take the dispute to arbitration. Once it is so satisfied, the Court will have jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances of the case warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings the Court, while exercising the jurisdiction under section 9, can pass a conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing arbitral proceedings. (*Sundaram Finance Ltd v NEPC India Ltd*, AIR 1999 SC 565).

Once the matter reaches arbitration, the High Court would not interfere with the orders passed by the arbitrator or the arbitral tribunal during the course of arbitration proceedings. The parties are permitted to approach the Court only under Section 37 or through Section 34 of the 1996 Act. *(SBP and Co. v Patel Engineering Ltd.,* 2005 (3) Arb LR 285 (SC)).

Composition of Arbitral Tribunal

The arbitral tribunal has been defined by Section 2 (d) of the 1996 Act to mean a sole arbitrator or a panel of arbitrators appointed in accordance with the provisions of Sections 10 and 11 of the Act. The number of arbitrators should not be an even number.

An arbitrator must be independent and impartial. A prospective arbitrator should disclose in writing to the parties any circumstances likely to give rise to justifiable doubts as to his independence or impartiality (Section 12(1), 1996 Act). The 1996 Act prescribes the procedure for challenging the arbitrator, terminating his mandate, and his replacement by a new arbitrator (Sections 13 to 15).

Arbitration under the 1996 Act is a matter of consent and the parties are generally free to structure their agreement as they see fit. The parties have been given maximum freedom not only to choose their arbitrators, but also to determine the number of arbitrators constituting the arbitral tribunal.

There is no right to challenge an award if the composition of the arbitration tribunal or arbitration procedure is in accordance with the agreement of the parties even though such composition or procedure is contrary to Part I of the 1996 Act. Again, the award cannot be challenged if such composition or procedure is contrary to the agreement between the parties but in accordance with the provisions of the 1996 Act. If there is no agreement between the parties about such composition of the arbitral tribunal or arbitration procedure, the award can be challenged on the ground that the composition or procedure was contrary to the provisions of the Act. *(Narayan Prasad Lohia v Nikunj Kumar Lohia,* (2002) 3 SCC 572*).*

Where the agreement between the parties provides for appointment of two arbitrators, that by itself does not render the agreement as being invalid. Both the arbitrators so appointed should appoint a third arbitrator to act as the presiding officer (Section 11 (3), 1996 Act). Where the parties have participated without objection in an arbitration by an arbitral tribunal comprising two or even number of arbitrators, it is not open to a party to challenge a common award by such tribunal on the ground that the number of arbitrators should not have been even. The parties are deemed to have waived such right under Section 4 of the 1996 Act. *(Narayan Prasad Lohia v Nikunj Kumar Lohia,* (2002) 3 SCC 572*).*

The determination of the number of arbitrators and appointment of arbitrators are two different and independent functions. The number of arbitrators, in the first instance is determined by the parties, and in default, the arbitral tribunal shall consist of a sole arbitrator. However, the appointment of an arbitrator should be in accordance with the agreement of the parties, or in default, in accordance with the mechanism provided under Section 11 of the 1996 Act.

The power of the Chief Justice under Section 11 of the 1996 Act to appoint the arbitral tribunal is a judicial power. Since adjudication is involved in constituting an arbitral tribunal, it is a judicial order. The Chief Justice or the person designated by him is bound to decide

- whether he has jurisdiction.
- whether there is an arbitration agreement.
- whether the applicant is a party to the arbitration agreement.
- whether the conditions for exercise of power have been fulfilled.
- if the arbitrator is to be appointed, the fitness of the person to be appointed.

(SBP and Co. v Patel Engineering Ltd., 2005 (3) Arb LR 285 (SC)).

The process, being adjudicatory in nature, restricts the power of the Chief Justice to designate, by excluding non judicial institution or non judicial authority from performing such function. The Chief Justice of India can, therefore, delegate such power only to another Judge of the Supreme Court, while the Chief Justice of a High Court can delegate such power only to another Judge of the High Court. It is impermissible to delegate such power to the District Judge. *(SBP and Co. v Patel Engineering Ltd,* 2005 (3) Arb LR 285 (SC)).

Notice must be issued to the non applicant to given him an opportunity to be heard before appointing an arbitrator under Section 11 of the 1996 Act. *(SBP and Co. v Patel Engineering Ltd,* 2005 (3) Arb LR 285 (SC)).

No appeal lies against the decision of the Chief Justice of India or his designate while entertaining an application under Section 11 (6) of the 1996 Act, and such decision is final. However, it is open to a party to challenge the decision of the Chief Justice of a High Court or his designate by way of Article 136 of the Constitution. *(SBP and Co. v Patel Engineering Ltd.,* 2005 (3) Arb LR 285 (SC)).

Where an application for appointment of arbitrator is made under Section 11(2) of the 1996 Act in an international commercial arbitration and the opposite party takes the plea that there was no mandatory provision for referring the dispute to arbitration, the Chief Justice of India has the power to decide whether the agreement postulates resolution of dispute by arbitration. If the agreement uses the word 'may' and gives liberty to the party either to file a suit or to go for arbitration at its choice, the Supreme Court should not exercise jurisdiction to appoint an arbitrator under Section 11 (12) of the Act (*Wellington Associates Ltd. v Kirit Mehta*, AIR 2000 SC 1379). Where the arbitrator is to be appointed, the Supreme Court can use its discretion in making an appointment after considering the convenience of the parties. (*Dolphin International Ltd. v Ronark Enterprises Inc.*, (1998) 5 SCC 724).

Jurisdiction of Arbitral Tribunal

The arbitral tribunal is invested with the power to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of the arbitration agreement. For that purpose, the arbitration clause shall be treated as an agreement independent of the other terms of the agreement even though it is part of the said agreement. So, it is clear that even if the arbitral tribunal decides that the agreement is null and void, it shall not entail *ipso jure* the invalidity of the arbitration clause. (*Olympus Superstructures (P) Ltd. v Meena Vijay Khetan*, AIR 1999 SC 2102).

Objections to jurisdiction of the arbitral tribunal must be raised before the arbitral tribunal. If the arbitral tribunal accepts the plea of want of jurisdiction, it will not proceed further with the arbitration on merits and the arbitral proceedings shall be terminated under Section 32 (2) (c) of the 1996 Act. Such decision, however is appealable (Section 37 (2) (a)). In case the tribunal rejects the plea of jurisdiction, it will continue with the arbitral proceedings and make an arbitral award, which can be challenged by the aggrieved party under Section 34 (2) of the 1996 Act. The Court has no power to adjudicate upon the question of the want of jurisdiction of an arbitral tribunal.

Section 16 of the 1996 Act, however, does not take away the power of Chief Justice in a proceeding under Section 11 to decide as to whether there is a valid arbitration agreement or not, before deciding whether the dispute should be referred to the arbitrator for arbitration. (*Wellington Associates Ltd. v Kirit Mehta*, AIR 2000 SC1379).

The arbitral tribunal, during the arbitral proceedings, can order interim measure for the protection of the subject matter of the dispute and also provides for appropriate security in respect of such a measure under Section 17 of the 1996 Act. Such an order for interim measures is appealable under Section 37 (2) of the Act.

The power of interim measure conferred on the arbitral tribunal under Section 17 of the 1996 Act is a limited one. The tribunal is not a Court of law and its orders are not judicial orders. The tribunal cannot issue any direction which would go beyond the reference or the arbitration agreement. The interim order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. No power has been conferred on the arbitral tribunal under this section to enforce its order nor does it provide for judicial enforcement thereof. *(M.D Army Welfare Housing Organization v Sumangal Services (P) Ltd.,* AIR 2004 SC 1344*).*

Conduct of Arbitral Proceedings

Sections 18 to 27 of the 1996 Act lay down various rules dealing with arbitral procedure. Section 19 establishes procedural autonomy by recognizing parties' freedom to lay down the rules of procedure, subject to the fundamental requirements of Section 18 of equal treatment of parties. Section 20 gives right to the parties to agree on the place of arbitration.

The arbitral tribunal is not bound by the procedure set out by Code. It is for the parties to agree on a procedure and if the parties are silent, then the arbitrator has to prescribe the procedure. However, the procedure so prescribed should be in consonance with the principles of natural justice. The doctrine of natural justice pervades the procedural law of arbitration as its observance is the pragmatic requirement of fair play in action.

Arbitral award

The award-making process necessarily minimizes the derogable provisions of the 1996 Act and is mainly concerned with the role of the arbitrator in connection with making of the award (Sections 28 to 33). Section 28 pertains to the determination of the rules applicable to the substance of the disputes. Section 29 provides the decision-making procedure within the tribunal. Section 30 relates to settlement of a dispute by the parties themselves and states that with the agreement of the parties, the arbitration tribunal may use mediation, conciliation and other procedures at any time during the arbitral proceedings to encourage settlement. Section 31 refers to the form and contents of arbitral award. Unlike the 1940 Act, the arbitral award has to state reasons upon which it is based unless the parties have agreed that no reasons are to be given or the award is an arbitral award on agreed terms under Section 30. Section 32 pertains to the determination of the arbitral proceedings, while Section 33 relates to the corrections and interpretation of an award as also to making of additional awards.

Recourse against arbitral award

Section 34 of the 1996 Act provides for recourse against the arbitral award. The limited grounds for setting aside an arbitral award are

- incapacity of party.
- invalidity of agreement.
- absence of proper notice to the party.
- award beyond scope of reference.
- illegality in the composition of arbitral tribunal or in arbitral procedure.
- dispute being non arbitrable.
- award being In conflict with public policy.

Section 34 of 1996 Act is based on Article 34 of the UNCITRAL Model law. The scope for setting aside the award under the 1996 Act is far less than that under Sections 30 or 33 of the Arbitration Act, 1940. (*Olympus Superstructures (P) Ltd. v Meena Vijay Khetan*, AIR 1999 SC 2102).

The arbitrator is the final arbiter of a dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusions or has failed to appreciate the facts. (*Sudershan Trading Co. v Government of Kerala*, AIR 1989 SC 890).

The arbitrator is the sole judge of the quality and quantity of evidence and it will not be for the Court to re-appreciate the evidence before the arbitrator, even if there is a possibility that on the same evidence, the Court may arrive at a different conclusion than the one arrived at by the arbitrator (*M.C.D. v Jagan Nath Ashok Kumar*, (1987) 4 SCC 497). Similarly, if a question of law is referred to the arbitrator and he gives a conclusion, it is not open to challenge the award on the ground than an alternative view of the law is possible (*Alopi Parshad & Sons Ltd v Union of India*, (1960) 2 SCR 793).

The power of the arbitral tribunal to make an award is different from its power to issue procedural orders and directions in the course of the arbitration proceedings. Such orders and directions are not awards and hence are not open to challenge under Section 34 of the 1996 Act, though they may provide basis for setting aside or remission of the award. For instance, questions concerning the jurisdiction of the arbitral tribunal or the choice of the applicable substantive law are determinable by arbitral process resulting in an award. On the other hand, questions relating to the admissibility of evidence or the extent of discovery are procedural in nature and are determinable by making an order or giving a direction and not by an award.

In view of the principles of acquiescence and estoppel, it is not permissible for a party to challenge an arbitration clause after participating in arbitration proceeding.

Illustration: Where a party consented to arbitration by the arbitral tribunal as per the arbitration clause and participated in the arbitral proceedings, it cannot later take the plea that there was no arbitration clause (*Krishna Bhagya Jala Nigam Ltd. V G Hari's Chandra Reddy*, (2007) 2 SCC 720).

However, the principle of acquiescence is inapplicable where the arbitrator unilaterally enlarges his power to arbitrate and assumes jurisdiction on matters not before him.

Illustration : The parties, by express agreement, referred to arbitration only the claims for refund of the hire charges. The arbitrator, upon entering into the reference, enlarged its scope. Since the arbitrator continued to adjudicate on such enlarged dispute, despite objections, the parties were left with no option, but to participate in the proceedings. Such participation did not amount to acquiescence. Once appointed, the arbitrator has the duty to adjudicate only the matter brought before it by the parties. The award is liable to be set aside as the arbitrator had misdirected himself and committed legal misconduct. (*Union of India v M/s G. S. Atwal*, AIR 1996 SC 2965).

The Court to which the party shall have recourse to challenge the award would be the Court as defined in Section 2(1)(e) of the 1996 Act and not the Court to which an application under Section 8 of the Act was made *(P. Anand Gajapathi Raju v P.V.G Raju*, AIR 2000 SC 1886)

Finality and enforcement of awards

Section 35 of the 1996 Act provides that subject to the provisions of Part I of the Act, an arbitral award shall become final and binding on the parties claiming under them respectively. The word 'final" with respect to an award, as used in this section, is not to be confused with the expression 'final award'. The word 'final' means that unless and until there is a successful challenge to the award, it is conclusive as to the issues with which it deals as between the parties to the reference and persons claiming under them. The award can, therefore, be enforced, even if there are other issues outstanding in the reference.

Section 36 of the 1996 Act renders an arbitral award enforceable in the same manner as if it were a decree, if no challenge is preferred against it within the time prescribed for making a challenge or, when upon a challenge being preferred, it has been dismissed. However, the fact that an arbitral award is enforceable as if it were a decree does not make the arbitral proceedings a suit.

The arbitral award becomes immediately enforceable without any further act of the Court once the time expires for challenging the award under Section 34 of the 1996 Act. If there were residential doubts on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favor of curtailment of the Court's powers by the exclusion of the operation of Section 5 of the Limitation Act *(Union of India v Popular Constructions,* (2001) 8 SCC 470*)*

When the arbitration proceedings commenced before the 1996 Act came into force but award was made after the 1996 Act came into force, the award would be enforced under the provisions of Arbitration Act, 1940. (*Thyssen Stahlunion Gmbh v Steel Authority of India,* (1999) SCC 334).

International Commercial Arbitration and Foreign Awards

An "international commercial arbitration" has been defined in Section 2(f) of the 1996 Act to mean an arbitration relating to disputes arising out of legal relationships considered commercial under the law in force in India and where atleast one of the parties is

- a foreign national or an individual habitually resident outside India
- a body corporate incorporated outside India
- a company or association of individuals whose central management and control is exercised by a country other than India
- the Government of a foreign country

The law applicable may be Indian law or foreign law depending upon the contract (Section 2(1)(f) and Section 28(1)(b)).

Part I of the 1996 Act is to also apply to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied, exclude it or any of its provisions. The definition of international commercial arbitration in Section 2(1)(f) of the 1996 Act makes no distinction between international commercial arbitration held in India or outside India. Part II of the 1996 Act only applies to arbitrations which takes place in a convention country. An international commercial arbitration may, however, be held in a non-convention country. The 1996 Act nowhere provides that the provisions of Part I are not to apply to international commercial arbitrations which take place in a non-convention country. The very object of the Act is to establish a uniform legal framework for the fair and efficient settlement of disputes arising in international commercial arbitrations. (*Bhatia International v Bulk Tradings,* AIR 2002 SC1432).

Illustration **:** Even if in terms of the arbitration agreement, the arbitration proceedings between two foreign parties were being held under I.C.C Rules outside India, yet a party to the arbitration proceedings may seek an interim injunction under Section 9 of the Act against Oil and Natural Gas Commission, a Government Company, for restraining it making any payment to the opposite party till the arbitration proceedings pending between the parties is not concluded. Such injunction in respect of the properties within territory of India is maintainable. However, if the injunction is sought for properties outside the country, then such an application under Section 9 is not maintainable in Indian Court. *(Olex Focas Pty. Ltd. V Skodoecport Co. Ltd.,* AIR 2000 Del. 161).

Part II of the 1996 Act pertains to the enforcement of certain foreign awards and consists of two chapters. Chapter I relates with New York Convention Awards which are supplemented by the First Schedule to the 1996 Act. Chapter II refers with Geneva Convention Awards which is to be read with the Second and the Third Schedule of the Act.

The expression "foreign award" which means an arbitral award on differences between persons arising out of legal relationship considered as commercial under the law in India. An award is 'foreign' not merely because it is made on the territory of a foreign state but because it is made in such a territory on an arbitration agreement not governed by the law of India. (*NTPC v Singer Company*, AIR 1993 SC 998).

A foreign award given after the 1996 Act came into force can be enforced only under Part II of 1996 Act, there being no vested right to have the same enforced under the Foreign Awards

(Recognition and Enforcement) Act, 1961. It is relevant that arbitral proceedings had commenced in the foreign jurisdiction before the commencement of the 1996 Act. (*Thyssen Stahlunion Gmbh v Steel Authority of India,* (1999) SCC 334).

Mediation

Mediation is a voluntary, disputant-centred, non binding, confidential and structured process controlled by a neutral and credible third party who uses special communication, negotiation and social skills to facilitate a binding negotiated settlement by the disputants themselves. The result of the mediation agreement is a settlement agreement, and not a decision.

The focus in mediation is on the future with the emphasis of building relationships, rather than fixing the blame for what has happened in the past. The purpose of mediation is not to judge guilt or innocence but to promote understanding, focus the parties on their interests, and encourage them to reach their own agreement. The ground rules of mediation include

- neutrality : the mediator should be neutral having no interest with the dispute or either party.
- self determination : mediation is based on the principle of the parties' self-determination, which means each party makes free and informed choices. The mediator is, therefore, responsible in the conduct of the process while the parties control the outcome.
- confidentiality : it is of the essence of successful mediation that parties should be able to reveal all relevant matters without an apprehension that the disclosure may subsequently be used against them as well. Were the position otherwise, unscrupulous parties could use and abuse the mediation process by treating it as a gigantic, penalty free discovery process. The mediator must state to the parties
- that he and the parties shall keep confidential all matters relating to the mediation proceedings, and that confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for the purposes of its implementation and enforcement.
- that unless otherwise agreed by the parties, it would be legally impermissible for him to act as an arbitrator or a witness in any arbitral or judicial proceeding in respect of the dispute that is the subject of mediation proceedings and that the parties are not allowed to introduce such evidence – neither on facts (like the willingness of one party to accept certain proposals) nor on views, suggestions, admissions or proposals made during the mediation.
- that the only behavior that might be reported is the information about whether parties appeared at a scheduled mediation and whether or not they reached a solution.
- fair process : the process is just as important as the outcome. It is crucial that parties feel they are being treated fairly and their concerns are being heard.
- voluntary process : mediation is possible only with consent of parties, who get bound once they sign the settlement arrived at during mediation.

Pre-mediation preparation

The mediator often asks for a pre-mediation summary from the parties to familiarize himself with the dispute. The participants during mediation need not necessarily be only the actual disputants but all parties that could facilitate or block a settlement.

In preparing the case, it will be useful for the mediator and/or the parties to analyze the dispute. In doing so, the mediator must be conversant with the applicable law and practice, the perspective of both sides on the facts and the issues that are of most concern to either party.

Demeanor of the mediator

The mediator should try to establish his neutrality and control over the process by maintaining neutral body language; using neutral, plain and simple words; using words of mutuality that apply to all parties; having appropriate eye contact; using calm, moderate, business like and deliberative tone and having a attentive posture. Importance must be given to seating arrangement so as to ensure closeness, eye contact and audibility.

Opening Statement

The mediation commences with the opening statement by the mediator, which must be simple and in a language/ style adapted to the background of parties. In the opening statement, the mediator

- introduces himself, his standing, training and successful experience as a mediator.
- expresses his hope to bring about a settlement in the present case.
- asks the parties to introduce themselves.
- asks parties which language they would prefer to be addressed in and how they would they like to be addressed.
- welcomes their lawyer.
- enquires about previous experience of parties and counsel in any mediation process.
- declares impartiality and neutrality, and describes the role of the mediator.
- addresses confidentiality and neutrality by using appropriate eye contact, words and body language.
- emphasizes on the non adversarial aspect of the process like the absence of recording of evidence pr pronouncement of judgment or award or order.
- emphasizes the voluntary nature of process.
- informs that he can go beyond the pleadings and may cover other disputes.
- states the mediation process (i.e. gives a road map) and the possibility of having private sessions.
- explains procedure where there is settlement or no settlement.
- informs that Court fee is refunded on settlement.

The mediator manages any outbursts, handles administrative matters such as breaks or order of presentation, determines whether the parties are clear about what to do, gets confirmation that the parties want mediation and invites both parties to state their perspective. Either side can speak first, both having been given an assurance of equal opportunity.

Stages and sessions of Mediation

Introduction is followed by

- problem understanding stage.
- needs and interests understanding stage.
- problem defining stage.
- issues identification stage.
- options identification stage.
- options evaluation stage.

These stages could be in joint session or private session (caucus)

In a joint session

- parties and respective counsels are present.
- parties are advised not to say anything that will upset the other parties and that any such information can be stated in private session.
- parties/counsels are allowed to speak without interruption.
- normally the party is asked to speak first, with the counsel supplementing with legal issues.
- any friend or relative of the parties are heard too.
- the mediator summarizes after hearing each party/counsel as to what he has understood.
- parties/counsels may add on any information.
- the mediator should accede to the request of parties who would like to talk.
- the mediator may seek clarifications.
- after hearing one side, the mediator listens to the other side.
- no interruptions are allowed as the decorum and dignity is be maintained.

Where a party requests for a private caucus, the mediator should conclude the joint session before meeting in private. The private session with one party should be followed with private session with other party. The mediator should explain beforehand that a private session may take more time with one party.

The mediator should use private session

- to share private matters and information that cannot be discussed in joint sessions.
- to regain control when a party is getting out of hand.
- when the parties are near a deadlock or impasse.
- to allow the parties to vent their emotions in a productive manner.

- to expose unrealistic expectations.
- to shift from discussion to problem solving.
- to evoke options for settlement.
- to communicate offers and counter-offers.

The mediator should avoid private session

- when a party can be directly persuaded.
- a party can communicate a compelling position.

Mediation Techniques

Mediation is all about transforming conflicts. The mediator must take the sting out of the hostility between the parties. The mediator could use the technique of neutral reframing to rephrase an offensive or inflammatory statement of a party in an inoffensive manner by focusing on the positive need in that statement

Illustration :. Party : He is so dominating that he never talks to me, forcing me to keep everything bottled up.

Mediator : You would like to be heard

The mediator has thus not only converted the negative statement into a positive one, he has exposed the other party to the positive need (of being heard) underlying the statement. Other mediation techniques listed by commentators are

- summarizing : the mediator restates the essence of the statement of the party briefly, accurately and completely.
- acknowledgement : the mediator reflects back the statement of a party in a manner that recognizes that party's perspective.
- re-directing : the mediator shifts the focus of a party from one subject to another in order to focus on details or respond to a highly volatile statement by a party.
- deferring : the mediator postpones a response to a question by a party in order to follow an agenda or gather additional information or defuse a hostile situation.
- setting an agenda : the mediator establishes the order in which the issues, positions or claims are to be addressed.
- handling reactive devaluation : the mediator takes ownership of an information or statement of a party in order to pre-empt the other party from reacting negatively to such information or statement solely based on the source of the information.

The mediator should endeavor to shift from positions to interests by

- talking to the parties to uncover their long term interests, and in the process, discover interests common to the parties.
- using open questions to elicit more facts.

- inviting options again from the parties for settlement.
- putting all settlement options, no matter how ostensibly insignificant, on the table.
- examining each options one by one as any given option might just appeal to a party on deeper analysis.
- do reality check by comparing a pending offer with
- the best result a party can get in litigation (BATNA or best alternative to a negotiated agreement).
- the worst result a party can get in litigation (WATNA or worst alternative to a negotiated agreement).
- the most likely result a party can get in litigation (MLATNA or most likely alternative to a negotiated agreement).

Handling emotions

The mediator should be familiar with his own reaction when faced with emotions. Strategies to handle emotions include

- accepting some venting, though preferably in a private session.
- utilizing active listening to verify the sincerity of the emotions.
- identifying the source or reason for the emotion and addressing the cause, not the behavior .
- insisting that order be maintained.
- moving to an easier issue on the agenda.
- dealing with one issue at a time.
- inviting parties to disclose the emotional impact of the situation or express their feelings to one another.
- simply suggesting a recess.

Role of silence in mediation

Use of silence in mediation cannot be overemphasized. A mediator is required to understand the relevance of the pauses and silence of the parties during mediation. Sometimes an important piece of information is revealed after a period of silence.

Silence can be helpful to the speaker because it:

- allows the speaker to dictate the pace of the conversation.
- gives time for thinking before speaking.
- enables the speaker to choose whether or not to go on.
- Silence can be useful to the listener because

- demonstrates interest, respect and patience.
- gives an opportunity to observe the speaker and pick up non-verbal clues.

Use of Apology and Saving Face approach in mediation

Apology is to acknowledge and express regret for a fault without defense. The emphasis is on that the act done cannot be undone but it should not go unnoticed. Fear of losing face is also a powerful emotion to make parties stick to their positions or continue with litigation. The mediator should explore settlement options that give honorable "exit".

Handling Impasse

The mediator could

- shift gears between private and joint sessions get the parties to do a reality check on how "foolproof" their case actually is.
- Have a private session with the counsel if he has given legally untenable advise to his client who is falsely assured that he is bound to win in litigation.
- warn the participants/ bring the parties together to acknowledge the situation.
- solicit any last ditch efforts.
- change atmosphere/use humor to relax atmosphere.
- revisit issues, or areas of agreement.
- proceed with preferably an easier issue.
- ask parties about cause of an impasse.
- ask parties to suggest options to overcome the deadlock.
- praise work and accomplishments of parties.
- try role-reversal.
- propose hypothetical solutions .
- suggest (or threaten) ending the mediation.
- suggest third party/ expert intervention.
- allow emotions to emerge.
- take a break.

Settlement agreement

The settlement agreement must be reduced in writing. It must

- comprise the statement about parties' future relationship.
- describe responsibility of each party in implementing the settlement.
- be clear, concise, complete, concrete, realistic and workable.
- be balanced and should reflect each party is gaining something.
- be positive, without any blame assessment.

- contain non-judgmental language.

The settlement agreement can be drafted by the parties but it is preferable if it is drafted by the mediator. If mediator drafting the agreement, the mediator should orally recite the terms of the settlement, clarify the terms and confirm the terms before putting it down.

While drafting an agreement, the mediator should be specific and must avoid ambiguous words such as "reasonable", "soon", "frequent", "co-operative" or "practicable". He should state clearly "who" will do "what", "when", "where", "how", "how much" and for "how long".

The mediator should avoid legal jargon and use plain language, preferably the language of the parties. The parties to the agreement should sign each page, while the counsel should attest the signature of their client by signing on the last page. Once the settlement agreement is signed by the parties, the mediator should sign the agreement and furnish a copy of the same to each party.

Ending mediation

The mediator should pay special attention on a proper ending to the mediation process, which is the outcome of the efforts of the parties. If parties do not come to terms, the mediator should congratulate them for the progress made, with hope for settlement in future. There is no such thing as failed mediation. If parties come to terms, the mediator should congratulate parties. Mediation ends on the date of the settlement agreement.

Model Civil Procedure Mediation Rules 2003

While there is no comprehensive statute governing mediation in India, the Supreme Court has recommended the High Courts to adopt, with or without modification, the model Civil Procedure Mediation Rules framed by the Law Commission of India. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

The Rules provide for the procedure for appointment of a mediator, the qualifications of the mediator and procedure for mediation. Rule 12 provides that the mediator is not bound by the Evidence Act 1872 and the Code, but shall be guided by principles of fairness and justice, having regard to the rights and obligations of the parties, usages of trade, if any, and the nature of the dispute, Rule 16 describes the role of mediator and states that the mediator shall attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute, emphasizing that it is the responsibility of the parties to take decision which affect them; he shall not impose any terms of settlement on the parties.

Rule 17 emphasises that the parties alone responsible for taking decision and that the mediator will not and cannot impose any settlement or give any warranty that the mediation will result in a settlement. The Rules have strict provisions with regard to the confidentiality of the mediation process. While Rule 11 enables the mediator to meet or communicate with each of the parties separately, Rule 20 restrains the mediator from disclosing to the other party any information given to him by a party subject to a specific condition that it be kept confidential, and mandates the mediator and the parties to maintain full confidentiality in respect of the mediation process. The Rule 20 further requires the parties not to rely on or introduce the said information in any other proceedings as to

- views or admissions expressed by a party in the course of the mediation proceedings
- confidential documents, notes, drafts or information obtained during mediation
- proposals made or views expressed by the mediator

- the fact that a party had or had not indicated his willingness to accept a proposal for settlement.

Rule 21 limits the communication between the mediator and the Court to informing the Court about the failure of a party to attend and, with the consent of the parties, his assessment that the case is not suited for settlement through mediation or that the parties have settled their disputes.

Rule 24 provides for the reduction of the agreement between the parties into a written settlement agreement duly signed by the parties. The settlement agreement is to be forwarded to the Court by the mediator with a covering letter. The Court would pass the decree in terms of the settlement under Rule 25. Should the settlement dispose of only certain issues in the suit which are severable from the other issues, the Court may pass decree straightaway in accordance with the settlement on those issues without waiting for a decision of the Court on the other issues which are not settled. If the issues are not severable, the Court shall wait for the decision of the Court on the other issues which are not settled.

Rule 27 lays down ethical standards of a mediator, stating that he should

- follow and observe the Rules strictly and diligently.
- not carry on any activity or conduct which could reasonably be considered as conduct unbecoming of a mediator.
- uphold the integrity and fairness of the mediation process.
- ensure that the parties involved in the mediation and fairly informed and have an adequate understanding of the procedural aspects of the process.
- satisfy himself that he is qualified to undertake and complete the mediation in a professional manner.
- disclose any interest or relationship likely to affect impartiality or which might seek an appearance of partiality or bias.
- avoid, while communicating with the parties, any impropriety or appearance of impropriety.
- be faithful to the relationship of trust and confidentiality imposed in the office of mediator.
- conduct all proceedings related to the resolutions of a dispute, in accordance with the applicable law.
- recognize that the mediation is based on principles of self-determination by the parties and that the mediation process relies upon the ability of parties to reach a voluntary agreement.
- maintain the reasonable expectations of the parties as to confidentiality, refrain from promises or guarantees of results.

Conciliation

Conciliation is a term often used interchangeably with mediation. Some commentators view conciliation as a pro-active form of mediation, where the neutral third party takes a more active

role in exploring and making suggestions to the disputants how to resolve their disputes (*Salem Advocates Bar Association v Union of India,* AIR 2005 SC 3353).

The manner of conducting conciliation, the ground rules and ethical standards are similar to that of mediation.

The 1996 Act is the first comprehensive statute on conciliation in India. Part III of the 1996 Act adopts, with minor contextual various, the UNICITRAL Conciliation Rules, 1980.

The 1996 Act provides the procedure for commencement of conciliation proceedings through invitation of one of the disputants (Section 62) and the submission of statements to conciliator describing the general nature of the dispute and the points at issue (Section 65). The conciliator is not bound by the Code or the Indian Evidence Act, 1872 (Section 66).

Role of Conciliator

Section 67 of the 1996 Act describes the role of conciliator as under

- the conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.
- the conciliator shall be guided by principles of objectivity, fairness and justice giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.
- the conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.
- the conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons thereof.

Confidentiality is integral to the conciliation process. While Section 69 of the 1996 Act enables the conciliator to meet or communicate with each of the parties separately, Section 70 restrains the conciliator from disclosing to the other party any information given to him by a party subject to a specific condition that it be kept confidential. Section 75 mandates that notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

Unless otherwise agreed by the parties, the conciliator is barred by the 1996 Act from acting as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings as also from being presented by the parties as a witness in any arbitral or judicial proceedings (Section 80).

Section 81 of the 1996 Act provides that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings

- views expressed or suggestions made by the other party in respect of a possible settlement of the dispute.
- admissions made by the other party in the course of the conciliation proceedings.
- proposals made by the conciliator.
- the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

Section 73 of 1996 Act mandates that the settlement agreement signed by the parties shall be final and binding on the parties and persons claiming under them respectively, which is to be authenticated by the conciliator. Section 74 confers the settlement agreement to have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30 i.e. the status of a decree of a Court.

A successful conciliation proceeding comes to an end only when the settlement agreement signed by the parties comes into existence. It is such agreement which has the status and effect of legal sanctity of an arbitral award under section 74 of the 1996 Act. (*Haresh Dayaram Thakur v State of Maharashtra,* AIR 2000 SC 2281)

Conciliation under other statutes

Several statutes contain provisions for settlement of disputes by conciliation, like the Industrial Disputes Act, 1947, the Hindu Marriage Act, 1948, the Family Courts Act, 1984 and the Gram Nyayalayas Act 2008. Section 20 of the 1987 deals with cognizance of cases by Lok Adalats and mandates that every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity, fair play and other legal principles. The 1987 Act also provides for pre-litigation conciliation and settlement and lays down the procedure for reference of the matter to conciliation before the Permanent Lok Adalat which is to assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner.

DUTIES OF ARBITRATOR

By

P.C. Markanda, Naresh Markanda & Rajesh Markanda, Advocates, Supreme Court of India

(Source: http://www.markandalaw.com/wp-content/themes/twentysixteen/pdf/Impartiality-of Arbitrator.pdf)

Duty to act fairly

Duty to act fairly is the first and foremost function of an arbitrator. He must act in a fair and reasonable manner to both the parties and in the arbitration hearings he must not show or exhibit favour towards one party more than towards the other and must refrain from doing for one party which he cannot do for the other. Showing undue favours to one party at the cost of the other in matters handled by him would be looked upon with suspicion by the Courts. It was in this context that Donaldson J. in the Myron, (1969)1 Lloyd's Rep. 411 (at page 415) observed that "Mr.___ had, indeed, been the arbitrator appointed by them on several occasions and was described before me as their first choice arbitrator, language more usually heard in the context of Smithfield or Covent Garden market produce than of a well-known arbitrator, but the meaning is clear enough."

The position of the arbitration is like that of Creaser's wife who should be above all suspicion. The Courts have continually held that rules of natural justice must be followed by the arbitrators including the principles incorporated in the maxim *audi alterem partem*. Ignorance of the rules of natural justice cannot be defended on the plea that the evidence was inconsequential or had not affected the mind of the arbitrator or was of a trifling nature.

Adherence to the principles of natural justice

An arbitrator must act in accordance with the principles of natural justice. It is now well settled that an arbitrator is not bound by the technical and strict rules of evidence which are founded on fundamental principles of justice and public policy. However, in proceedings of arbitration, there must be adherence to justice, equity, law and fair play in action. The proceedings must adhere to the principles of natural justice and must be in consonance with practice and procedure which will lead to proper resolution of dispute.

The rule of natural justice requires that parties should be given an opportunity to be heard by the arbitrators, which means whatever material they want to place before the arbitrators should be allowed to be placed. *Oil & Natural Gas Commission Ltd.* v. *New India Civil Erectors Pvt. Ltd.*, 1996 (Suppl) Arb LR 426 (DB—Bom).

Where the arbitrator refuses to consider the contentions of the contractor and refuses permission to produce evidence, inasmuch as directions were not given to the government to produce the record which had been withheld on the ground of privilege, without even

indirectly or incidentally mentioning the nature and volume of the record held privileged, it was held that these lacunas are the violations of the principle of natural justice and denial of opportunity to the contractor to press and prove his case. *President of India* v. *Kesar Singh*, AIR 1966 J&K 113: 1966 Kash LJ 287.

In Mustill and Boyd"s Law and Practice of Commercial Arbitration in England, 1982 Ed., p. 261, the following cardinal rules have been suggested for being followed by the arbitral tribunal in order to ensure fairness in conducting arbitration between the litigant parties:

1) Each party must have a full opportunity to present his own case to the tribunal.
2) Each party must be aware of his opponent's case, and must be given a full opportunity to test and rebut it.
3) The parties must be treated alike. Each must have the same opportunity to put forward his own case, and to test that of the opponent.

The above principles (Sr. Nos. 1 and 3) are in consonance with Section 18 of the Act and the principle stated at Sr. No. 2 conforms to Section 23(1) of the Act. The principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary.

Hearing in absence of one party

An arbitrator would be guilty of misconduct if he is charged with any information having been obtained from one side which was not disclosed to the other. Such an information may be oral or in writing. It is with this aspect in mind that the Legislature provided in Section 24(3) of the Act that "All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties".

When the arbitrator accepts documents from one party in the absence of the other party, the arbitrator would be guilty of misconducting the proceedings because no arbitrator can accept document from one party at the back of the other. *Padam Chand Jain* v. *Hukam Chand Jain*, AIR 1999 Del 61.

During the conduct of a reference the arbitrator required the attendance of a witness whom neither side proposed to call. After this witness had given evidence the proceedings terminated, and the arbitrator said that he required nothing further from either of the parties. Subsequently, however, the plaintiff found the arbitrator closeted with the witness and a special pleader who was acting for the defendants, the three persons being engaged in considering the papers and plans connected with the arbitration. The arbitrator explained that the witness was explaining to him information in connection with the case, by which, however, his opinion would not be biased. Held that, as there had been an opportunity for the mind of the arbitrator to have been biased by information given on behalf of one side without

the other having had an opportunity of meeting it, the award eventually made by the arbitrator must be set aside [(1844) 14 L.J.Q.B. 17]

Failure to consider vital documents

The well-settled rule of law is that an arbitrator misconducts the proceedings if he ignores very material documents to arrive at a just decision to resolve the controversy. Even if the department did not produce those documents before the arbitrator, it was incumbent upon him to get hold of all the relevant documents for arriving at a just decision. In *K.P. Poulose* vs *State of Kerala*, AIR 1975 SC 1259, it had been held by the Hon'ble Supreme Court as under:

"Misconduct under Section 30(a) has not a connotation of moral lapse. It comprises legal misconduct which is complete if the Arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision.

In the instant case, the Arbitrator has misconducted the proceedings by ignoring the two very material documents to arrive at a just decision to resolve the controversy between the Department and the contractor. Even if Department did not produce those documents before the Arbitrator, it was incumbent upon him to get hold of all the relevant documents including the two documents in question for the purpose of a just decision. Further, he arrived at an inconsistent conclusion even on his own finding. The award suffered from a manifest error apparent ex facie."

The making of an award without the basic documents, namely, the arbitration agreement before the arbitrators at the time of application of mind, i.e. at the time of considering the rival contentions of the parties is not permissible. The arbitrator has to insist on the production of the agreement, even if not presented by the parties, as without such agreement being on record, the respective contentions of the parties cannot be adjudicated upon. *Hooghly River Bridge, Commissioner* v. *Bhagirathi Bridge Construction Co. Ltd.*, AIR 1995 Cal 274.

Arbitrator must act within submission

The aim of arbitration is to settle all disputes between the parties and to avoid further litigation. Hence, where the contractor claimed amounts for work done after arbitration proceedings had begun and the claim statement filed with the arbitrator also included this claim, the arbitrator had jurisdiction to make an award on the said claim also. *Shyama Charan Agarwala & Sons* v. *Union of India*, (2002) 6 SCC 201.

In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimants could raise a particular dispute or claim before the arbitrator. If the answer is in affirmative, then it is clear that arbitrator would have the jurisdiction to deal with such a claim. On the other hand, if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a

dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim, then any decision given by the arbitrator in respect thereof would clearly be in excess of jurisdiction. In order to find whether the arbitrator has acted in excess of jurisdiction the court may have to look into some documents including the contract as well as the reference of the dispute made to the arbitrators limited for the purpose of seeing whether the arbitrator has the jurisdiction to decide the claim made. *Himachal Pradesh State Electricity Board* v. *R.J. Shah*, (1999)4 SCC 214; *Rajasthan State Mines & Minerals Ltd.* v. *Eastern Engg. Enterprises*, 1999(3) RAJ 326 (SC).

An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialized branch of the law of agency (Mustill and Boyd's Commercial Arbitration, 2nd Ed., p.641). He commits misconduct if by his award he decides matters excluded by the agreement (Halsbury Laws of England, Vol. II, 4th Ed., para 622). As an arbitrator derives his jurisdiction only from the agreement for his appointment, it is never open to him to reject any part of that agreement, or to disregard any limitation placed on his authority. A deliberate departure from contract amounts to not only manifest disregard of his authority or misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award, *Shyama Charan Agarwala & Sons* v. *Union of India*, (2002)6 SCC 201.

It is an integral part of the duties of the arbitrator to adhere to the conditions of the contract agreed to between the parties and must always be within the terms of reference in accordance with which the parties desire him to make and publish the award. Thus, it is mandatory and obligatory on his part to act strictly in accordance with the law laid down by the Courts and not to act whimsically and arbitrarily and in the manner which he thinks is just and reasonable.

Where in a works contract a contractor demands extra costs due to price escalation, which had been barred specifically under the terms of the agreement, the award of such extra costs by the arbitrator was held to be bad in law on the ground that the arbitrator acted in excess of the jurisdiction conferred on him. *Continental Construction Co. Ltd.* vs *State of Madhya Pradesh*, AIR 1988 SC 1166)

An arbitrator derives authority from the reference made to him either by the parties or by a person named in the agreement having the authority to appoint the arbitrator, as authorized by the parties in the agreement itself. The arbitrator is not permitted in law to enlarge the scope of reference. Any decision or award on an item(s) which is beyond the scope of reference shall not have the sanction of law. If the award on an item not referred for adjudication in arbitration had been decided by the arbitrator and is not severable from the rest of the award, then the whole of the award shall be set aside by the Court. In *Jivrajbhai Ujamshi Sheth and others* vs *Chintamanrao Balaji and others*, AIR 1965 SC 214, the Hon'ble Supreme Court laid down the law as under:

"If the parties set limits to action by the arbitrator, then the arbitrator has to follow the limits set for him, and the Court can find that he has exceeded his jurisdiction on proof of such action. The assumption of jurisdiction not possessed by the arbitrator renders the award, to the extent to which it is beyond the arbitrator's jurisdiction, invalid. And if it is not possible to severe such invalid part from the other party of the award, the award must fail in its entirety."

Arbitrator to decide on his skill and knowledge

Lord Goddard, CJ in *Mediterranean & Eastern Export Co. Ltd.* vs *Fortress Fabrics Ltd.*, [1948]2 All ER 186, held as under:

"A man in the trade who is selected for his experience would be likely to know and indeed be expected to know the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. .... It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my opinion more especially in commercial arbitrations, to endeavour to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them......".

Arbitrator cannot delegate his functions

In Russell on Arbitration, 20th Ed., page 228, it has been stated as under:

"One who has an authority to do an act for another must execute it himself, and cannot transfer it to another; for this, being a trust and confidence reposed in the party, cannot be assigned to a stranger, whose ability and integrity were not so well thought of by him for whom the act was to be done".

"Arbitrators cannot refer their arbitrements to others, nor to an umpire; if the submission be not so; neither can they make their arbitrement in the names of themselves and of a third person to whom no submission was made; nor alter it after it is once made."

Power to proceed *ex-parte*

An arbitrator ought not to proceed *ex parte* against a party if he has not appeared at one of the sittings. The arbitrator should give another notice fixing date, time and venue and intimate that he would proceed with the matter *ex parte* if either party fails to attend. Even after notice if the defaulting party does not attend, the arbitrator may proceed in his absence. *Hemkunt Builders P. Ltd.* v. *Panjabi University, Patiala*, 1993(1) Arb LR 348.

As per terms of the arbitration agreement, both the parties were required to nominate their respective arbitrators. Delay occurred on the part of one party to nominate its arbitrator. Thereupon, the nominee-arbitrator of the other party started conducting arbitration proceedings *ex parte* in a tearing haste without waiting for other party. He not only proceeded *ex parte* on same date but also recorded statement of witness and heard arguments. It was held

that the procedure adopted by the arbitrator was in violation of the principles of natural justice and the award rendered by him was set aside, *Shri Ram Ram Niranjan* v. *Union of India*, AIR 2001 Del 424

Russell on Arbitration, 20th Ed., p. 263 states:

"In general, an arbitrator is not justified in proceeding *ex parte* without giving the party absenting himself due notice. It is advisable to give the notice in writing to each of the parties or their solicitors. It should express the arbitrator's intention clearly, otherwise the award may be set aside.

"If a party says: "I will not attend, because you (the arbitrator) are receiving illegal evidence, and no award which you can make will be good, the arbitrator may go on with the reference in his absence; and it seems that it is not necessary in such a case to give the recusant any notice of the subsequent meetings. But, though it may not always be necessary, it is certainly advisable that notice of every meeting should be given to the party who absents himself, so that he may have the opportunity of changing his mind, and of being present if he pleases."

If the arbitrator did not allow adjournment of just one day, as the counsel of the party was busy in another arbitration proceedings and proceeded to pass an *ex parte* award, without giving notice of his intention to do so, the award would be invalid. *Executive Engineer, Prachi Division* v. *Gangaram Chhapolia*, AIR 1983 NOC 205 (Ori).

Failure to act without unreasonable delay

Section 14(1)(a) of the Act provides that the mandate of an arbitrator shall terminate if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay. Thus, where the named arbitrator does not act for three months despite repeated reminders, it can be clearly said that the mandate of the named arbitrator shall be deemed to have been terminated as he failed to act without undue delay as contemplated under section 14(1)(a) and the court gets the power to appoint a new arbitrator under section 11(5). *Deepa Galvanising Engg. Industries Pvt. Ltd.* v. *Govt. of India*, 1998(1) ICC 410 (AP).

Where the parties stipulated by consent that if the arbitrator does not complete the arbitral proceedings on or before a particular date his mandate shall stand terminated, then the mandate automatically terminates on the expiry of that date. Consent order is nothing but an agreement between the parties with super imposed seal of the court. *Kifayatullah Haji Gulam Rasool* v. *Bilkish Ismail Mehsania*, AIR 2000 Bom 424.

What is reasonable dispatch depends upon the type of arbitration and the size and complexity of the dispute. The question of reasonableness should be determined by reference to the nature of arbitration and the interests of the parties and not individual circumstances of the arbitrator. Thus, if the arbitrators were delayed in proceeding by illness or unexpected absence abroad, they would be open to removal, even though they had not personally flawed. Conversely, fault is not sufficient to amount to a failure to use all reasonable dispatch: an

arbitrator may be incompetent or guilty of misconduct and yet not be guilty of such delay. (Mustil & Boyd's Commercial Arbitration, p. 474).

In this regard, Karnataka High Court in *Rudramani Devaru v. Shrimad Maharaj Niranjan Jagadguru*, AIR 2005 Kant 313 summarized the principles to be followed by an arbitral tribunal as under:

"The minimum requirements of a proper hearing should include: (i) each party must have notice that the hearing is to take place and of the date, time and place of holding such hearing; (ii) each party must have a reasonable opportunity to be present at the hearing along with his witnesses and legal advisers, if any, if allowed; (iii) each party must have an opportunity to be present throughout the hearing; (iv) each party must have a reasonable opportunity to present statements, documents, evidence and arguments in support of his own case; (v) each party must be supplied with the statements, documents and evidence adduced by the other side; (vi) each party must have a reasonable opportunity to cross-examine his opponent's witnesses and reply to the arguments advanced in support of his opponent's case. It is expected of an arbitral tribunal that it should ensure that the date of the hearing is not so close that the case cannot be properly prepared. Equally, an arbitral tribunal, while fixing the date of hearing, should try to accommodate any party who is placed in difficulty by his absence due to unavoidable circumstances such as illness or compelling engagements of himself elsewhere etc. Each party is also entitled to know any statements, documents, evidence or information collected by the arbitral tribunal itself which are adverse to his interest, if they are not contested. The arbitral tribunal is neither to hear evidence nor arguments of one party in the absence of the other party, unless despite opportunity, the other party chooses to remain absent. So also, the arbitral tribunal is not to hear evidence in the absence of both the parties unless both the parties choose to remain absent despite proper notice. Each party to arbitration reference is entitled to advance notice of any hearing and of any meeting of the arbitral tribunal as provided under S.24 of the Act".

2015 Amendment to the Arbitration and Conciliation Act, 1996

By Argus Partners

Introduction

The Arbitration and Conciliation Act, 1996 ("Act") has been amended by the Arbitration and Conciliation (Amendment) Ordinance, 2015 ("Ordinance"), promulgated by the President of India on October 23, 2015.

The Ordinance has introduced significant changes to the Act and seeks to address some of the issues, such as delays and high costs, which have been affecting arbitrations in India.

The Ordinance is an attempt to make arbitration a preferred mode for settlement of commercial disputes and to make India a hub of international commercial arbitration. With the amendments, arbitrations in India are sought to be made more user-friendly and cost effective. The major changes brought about by the Ordinance are summarized in this update.

Interim Measures

The Ordinance introduces a paradigm shift in the mode and method of grant of interim measures in an arbitration proceeding.

Recent judicial decisions (*Bharat Aluminum Co v. Kaiser Aluminum Technical Services,* Supreme Court (2012) 9 SCC 552) had held that Part I of the Act (which, inter alia, includes provisions on seeking interim reliefs before a Court in India) would not apply to foreign seated arbitrations. The Ordinance has inserted a proviso to section 2 of the Act, whereby, sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of Section 37 (all falling in Part I of the Act) have been made applicable to international commercial arbitrations, even if the place of arbitration is outside India. As a result a party to an arbitration proceeding will be able to approach Courts in India for interim reliefs before the commencement of an arbitration proceeding, even if the seat of such arbitration is not in India.

Importantly, under the newly inserted section 9(3), a Court cannot, as a matter of course, entertain an application for interim measure once an arbitral tribunal has been constituted, unless the Court finds that circumstances exist which may not render the remedy available under section 17 of the Act, i.e. approaching the arbitral tribunal for interim measures, efficacious. The intention of the Legislature is to limit the involvement of Courts in an arbitration proceeding thereby making such proceedings swift and effective.

Another important change introduced by the Ordinance is the power of an arbitral tribunal to grant interim reliefs. Though the original section 17 of the Act afforded an arbitral tribunal the power to grant interim measures, it definitely did lack the saber- tooth. In this regard the Supreme Court of India had held that though section 17 of the Act gave an arbitral tribunal the power to pass interim orders, but the same could not be enforced as an order of a Court (*M/s. Sundaram Finance v. M/s. NEPC India Ltd.*, AIR 1999 SC 565,

and *M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.,* AIR 2004 SC 1344). The Ordinance has substituted section 17 by a new section which ensures that an order passed by an arbitral tribunal under section 17 will now be deemed to be an order of the Court and shall be enforceable under the Code of Civil Procedure, 1908. Moreover, as discussed above, once the arbitral tribunal is constituted, all applications seeking interim measures would now be directed to it and not the Court.

Strict Timelines

The Ordinance brings about some strict timelines in completion of arbitration proceedings. Proceedings before Courts have also been made time-bound.

Commencing arbitration proceedings after obtaining an interim order from a Court

In order to discourage litigants who obtain an interim order under section 9 of the Act, but do not commence arbitration proceedings, a timeline of 90 (ninety) days to commence arbitration proceedings after obtaining an order under section 9 of the Act has been introduced.

Application to set aside an arbitral award

An application to set aside an arbitral award under Section 34 of the Act has to be disposed of by the Court within a period of 1 (one) year from its filing.

Application for appointment of an arbitrator

The Ordinance provides that the Chief Justice of the High Court or the Chief Justice of the Supreme Court of India, in an application for appointment of an arbitrator, can only confine themselves to ascertaining that a valid arbitration agreement exists. Such application is required to be disposed of within a period of 60 (sixty) days.

Completion of arbitration proceedings

As far as arbitration proceedings are concerned, newly introduced section 29A of the Act mandates completion of arbitration proceedings within a period of 12 (twelve) months of entering into a reference. Amended section 12 of the Act now requires an arbitrator to make a specific disclosure if there are circumstances which would affect his ability to complete the arbitration proceeding within the period of 12 (twelve) months.

Further, amended section 24 of the Act now empowers the arbitrator to impose exemplary costs on a party that seeks an adjournment before the arbitral tribunal without citing sufficient cause.

The parties to an arbitration may, however, by consent, extend the period for making an arbitration award for a further period not exceeding 6 (six) months. In case of expiry of the extended period, the mandate of the arbitral tribunal will stand terminated, unless a Court grants a further extension of the period, upon an application of the parties to the arbitration proceeding. When the Court grants an extension of time as above, it may substitute some or all of the arbitrators.

Fast Track Arbitrations

The Ordinance introduces a fast track arbitration proceeding.

Newly introduced section 29B of the Act provides for an option whereby the parties to an arbitration agreement may mutually decide to appoint a sole arbitrator who decides the dispute on the basis of written pleadings, documents and submissions. Oral hearing and technical formalities may be dispensed with for the sake of an expeditious disposal. An award has to be rendered within a period of 6 (six) months of entering into a reference.

Challenging an Award

Public Policy

Section 34 of the Act provides that an arbitral award may be set aside if it is contrary to 'public policy'.

The Supreme Court of India in ONGC v. Saw Pipes (2003) had expanded the test of 'public policy' to mean an award that violates the statutory provisions of Indian law or even the terms of the contract in some cases. Such an award would be considered as 'patently illegal' and therefore in violation of public policy. This interpretation practically afforded the losing party an opportunity to re-agitate the merits of the case. Though in a very recent judgment, the Supreme Court noted that while the merits of an arbitral award can be scrutinized when a challenge is made on grounds that an arbitral award has violated 'public policy, there were limitations as to the extent to which, such a re-evaluation can be conducted.

The Ordinance, however, clarifies that an award will be in conflict with the public policy of India, only in certain circumstances, such as if the award is induced or affected by fraud or corruption, or is in contravention with the fundamental policy of Indian law, or is in conflict with the most basic notions of morality or justice. Further, the Ordinance provides that a determination of whether there is a contravention with the fundamental policy of Indian law cannot entail a review of the merits of the dispute. This amendment seeks to limit the re-appreciation of the merits of the dispute at the stage of challenge to the award before the Court.

Hence, the Legislature has fundamentally reduced the scope of the inquiry by the judiciary into the question of violation of 'public policy'.

Patent illegality

Another amendment brought about by the Ordinance is that an arbitral award can be set aside by a Court if the award is vitiated by patent illegality appearing on the face of the award.

However, an award cannot be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence.

Stay on enforcement of an award

The Ordinance provides that the mere filing of an application challenging an arbitration award would not automatically stay the execution of the award. The execution of an award will only be stayed when the Court passes any specific order of stay on an application by a party to the proceeding.

Ensuring Impartiality of an Arbitrator

The Ordinance gives foremost importance to the impartiality of an arbitrator. Original Section 12 of the Act necessitated an arbitrator to disclose in writing circumstances likely to give rise to justifiable doubts as to his independence or impartiality. The Ordinance specifies in elaborate detail the circumstances which may lead to such justifiable doubts. The newly inserted fifth schedule of the Act lists 34 (thirty four) such grounds which shall act as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. It is now important to see how proximate the arbitrator is to a party to the proceeding and/or the party's lawyer.

Arbitration Fees

In a very significant step, the Ordinance provides a cap on the fees to be paid to an arbitrator, barring international commercial arbitrations and institutional arbitrations. The amendment to Section 11 of the Act empowers the concerned High Court to frame rules to determine the fees of the Arbitral Tribunal and the mode of such payment. The rates specified in the newly inserted fourth schedule have to be considered.

The Definition of 'Court'

Original Section 2(e) of the Act provided a single definition of "Court", which meant a District Court, or the High Court exercising its ordinary original civil jurisdiction, as the case may be. The Ordinance, however, bifurcates the definition and clearly specifies that unlike other arbitrations, in case of international commercial arbitrations, only a High Court exercising its ordinary original civil jurisdiction will qualify as a "Court".

The 2019 Arbitration Amendment Act and the Changes It Ushers In - A Primer

By
Dr. Amit George
Source: https://barandbench.com/npac-arbitration-review-2019-arbitration-amendment-act/
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Having received presidential assent on August 9, 2019, the Arbitration and Conciliation (Amendment) Act, 2019 ('2019 Amendment') has formally been published in the Official Gazette. The key features of the Amendment are dealt with below:

Modified timeline for completion of proceedings
The 2019 Amendment relaxes the stringent time-period for completion of arbitration proceedings as prescribed by the 2015 Amendment to a certain extent.
The 2019 Amendment frees international commercial arbitrations from a pre-determined time-period, albeit retaining a 'pious-hope' provision for completion thereof within a period of 12 months from the date of completion of pleadings. In the case of a domestic arbitration, the time-period of 12 months (extendable of course by another 6 months subject to consent by the parties, and thereafter by the Court) for the conclusion of the proceedings is now to be reckoned from the date of completion of pleadings instead of from the date of constitution of the arbitral tribunal.

In order to ensure that this phase of completion of pleadings does not become a runaway-horse, there is a period of six months which has been prescribed for the filing of the Statement of Claim and Defence. It is, however, unclear as to what are the consequences of a breach of the six-month period by the parties.

Mandate of the Arbitrator(s) to continue pending an application for extension of time
The 2019 Amendment specifies that when the parties have approached the Court concerned with an application under Section 29A for extension of time for completion of the arbitration proceedings, then the mandate of the arbitrator(s) shall continue till the disposal of the said application.
This ensures the continuation of the arbitration proceedings for the period when the said application is pending before the Court, which period prior to this amendment could not be put to any beneficial use inasmuch as an arbitrator(s) with a lapsed mandate could revive the proceedings only once the Court would allow an application filed under Section 29A.

Yet further, it has also been provided in the 2019 Amendment that if a Court deems it fit to effect a reduction in the fees of the arbitrator(s) while considering such an application, it shall

do so only after giving the arbitrator(s) concerned an opportunity of being heard in the matter.

Confidentiality of Arbitration Proceedings

The 2019 Amendment explicitly incorporates a requirement for the arbitrator(s), the arbitral institution concerned and the parties themselves to maintain the confidentiality of all arbitration proceedings, except where disclosure of the award is necessary for the purpose of its implementation and enforcement.

Manner of demonstrating circumstance(s) that would justify interference with an award in a petition under Section 34

An interesting modification brought about by the 2019 Amendment is in relation to the manner of 'proving' the pre-requisites for interference with an award under Section 34. Whereas the provision in the 1996 Act required a party to 'furnish proof' of the existence of circumstances that would justify interference with an award, the 2019 Amendment clarifies that the said circumstances have to be established on the basis of the record of the arbitral tribunal. This not only removes the otherwise ambiguous phrase 'furnish proof', yet further, it seems to expressly clarify that the demonstration has to be made by the party concerned on the basis of the record of the arbitral tribunal alone, thereby expressly barring reference to material which was not placed before the arbitral tribunal.

Excision of Power of Arbitrators to make orders under Section 17 in the Post-Award stage

The 2015 Amendment had permitted the parties to obtain interim measures from an arbitral tribunal under Section 17 of the 1996 Act during the pendency of the arbitration proceedings or at any time after the making of the award, but before it was enforced in accordance with Section 36.

This period for which the arbitral tribunal can order interim relief has now been reduced in the 2019 Amendment, by the removal of the said power after the making of the arbitral award. This, therefore, means that after the making of an award and before its enforcement, it is the concerned Court only which can be approached for interim measures under Section 9 of the 1996 Act. This ties in with the general prescription that the arbitral tribunal is by and large functus-officio after the passing of the award except for certain limited functions such as those mentioned in Section 33 of the 1996 Act.

Protection for Arbitrators

The 2019 Amendment also puts in place an express safety-net for arbitrators and clarifies that no suit or other legal proceedings shall lie against an arbitrator(s) for anything done in good faith or intended to be done under the 1996 Act.

Prima Facie finding enough for refusal to refer parties to Arbitration under Section 45

The 2019 Amendment has sought to bring about textual equivalence between Section 45 and Section 8 of the 1996 Act as regards the nature of the determination required to be made by a Court. Section 45 which required the Court to come to a definitive finding that a matter was not capable of settlement through arbitration, has now been amended to reflect, pari-materia with Section 8(1), that a Court may refuse a reference to arbitration under Section 45 upon arriving at a prima-facie finding that the arbitration agreement was null and void, inoperative or incapable of being performed.

Formal recognition of Arbitral Institutions and delegation of crucial functions

The 2019 Amendment brings to practical fruition the normative push initiated by the 2015 Amendment towards setting up and establishing arbitral institutions in the country. To this end, the 2019 Amendment specifically empowers the Supreme Court and the High Courts to designate arbitral institutions for performing crucial functions, including appointment of arbitrators.

This is a significant step inasmuch as appointment of arbitrators under Section 11 has consistently been regarded as a judicial function in terms of the judgment of the Supreme Court in *SBP & Co.* v. *Patel Engineering Ltd.* [(2005) 8 SCC 618], though there was a dilution of this principle in the 2015 Amendment inasmuch as it provided, under Section 11(6)(B), that delegation of the powers of appointment of an arbitrator by the Court concerned to an arbitral institution shall not amount to a delegation of judicial power.

This function has now by the 2019 Amendment been expressly permitted to be delegated to an institution to be so designated by the Court concerned. The applications for appointment which were hitherto to be filed before the Supreme Court, in the case of an international commercial arbitration, and the High Court, in the case of a domestic arbitration, are now to be filed before the institution, if any, designated by the Supreme Court and the High Court respectively.

An arbitral institution when so approached is required to dispose of the application within a period of 30 days from the date of service of notice on the opposite party, though the practicality or mandatory enforceability of this provision is uncertain. Yet further, if the High Court concerned is unable to designate an arbitral institution for lack of availability, then the High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator(s) would be deemed to be an arbitral institution.

While there can be a lot of debate about the efficacy of delegating such a function to an arbitral institution, on an ancillary note, it is definitely another indicator of the rapidly denigrating position of the Supreme Court as a Constitutional Court, and its evolution into a predominantly appellate forum.

The present position is that orders passed by the High Courts in exercise of jurisdiction under Section 11 are, due to the lack of an appellate provision in the 1996 Act, directly assailed before the Supreme Court in exercise of jurisdiction under Article 136 of the Constitution of India. Now, with the delegation of the power of appointment of arbitrators under Section 11 being delegated to arbitral institutions, the Supreme Court of India will directly hear challenges, under Article 136, against orders passed by designated arbitral institutions. This distinction or affliction, depending on the perspective, is seemingly unique to the Indian Supreme Court amongst apex judicial forums in countries across the world.

Applicability of the Fee Provisions enshrined in the Fourth Schedule

The 2019 Amendment postulates, through some very convoluted language, that in the absence of a designated arbitral institution, the High Court is required to maintain a panel of arbitrators and if a party were to appoint an arbitrator from such a panel then the fee as stipulated in the Fourth Schedule shall be applicable to the arbitrator so appointed.

Yet further, any reference to an arbitrator from this panel is to be deemed to be a reference to an arbitral institution. Even in the case of a designated arbitral institution, unless in the case of an international commercial arbitration or in the case where the parties have agreed for determination of fees as per the rules of an arbitral institution, then the fee as stipulated in the Fourth Schedule shall be applicable to the arbitrator so appointed by the arbitral institution concerned.

Establishment of the Arbitration Council of India

Tied in with the introduction of arbitral institutions is the creation of the Arbitration Council of India which, in terms of the provisions of the 2019 Amendment, has been modelled as a premier arbitration regulator/overseer performing various functions for promoting, reforming and advancing the practice of arbitration in the country. In the furtherance of this goal, the Arbitration Council of India has been given powers inter-alia for grading arbitral institutions, recognizing professional institutes providing accreditation of arbitrators, maintaining a repository of arbitral awards made in India etc.

The constitution of the Arbitration Council of India as comprising of the Chairperson, a Chief Executive Officer and various members has also been laid down in perfunctory detail. For greater clarity on the exact scope of the powers and functions of the Arbitration Council of India, and its internal constitution, one would have to await the introduction of the relevant

regulations in this regard which the Central Government has been empowered to frame and prescribe.

Express Qualifications to be accredited as an Arbitrator

Unlike the 1996 Act or the 2015 Amendment, wherein there were no specific qualifications prescribed for being appointed as an arbitrator, aside from the general requirements of independence and impartiality, the 2019 Amendment has introduced the Eighth Schedule which specifically provides that only a certain specific class of persons holding certain qualifications would be eligible to be accredited as an arbitrator including advocates, chartered accountants, cost accountants and company secretaries [all with 10 years of experience] or officers of the Indian legal service, or officers with a law degree or an engineering degree [both in the government and in the private sector with 10 years of experience], officers having senior level experience of administration [both in the government and in the private sector with 10 years of experience], or a person having educational qualification at the degree level with 10 years of experience in a technical or scientific stream in the fields of telecom, information technology, intellectual property rights or other specialized areas [both in the government and in the private sector].

The ability to be an arbitrator is therefore expressly tied-in with qualification and experience. There are a few more vague general norms applicable to arbitrators, which primarily deal with their impartiality and independence and their legal and practical competence to be able to render a reasoned award and their understanding of the applicable law and best practices.

Significantly, any person having been convicted of any offence involving moral turpitude or an economic offence would fall afoul of these norms. However, both these qualifications and norms, are introduced by the 2019 Amendment in relation to Section 43J which pertains to accreditation of arbitrators by the Arbitration Council of India. There does not seem to be any express reference to the incorporation of these parameters in the existing Fifth Schedule or the Seventh Schedule, meaning thereby that for the moment there is no proscription against persons not falling within the parameters as specified in the Eighth Schedule being appointed as arbitrators.

Non-Retrospective

The retrospective nature of the far-ranging 2015 Amendment inasmuch as it related to Court proceedings has been conclusively determined by the Supreme Court in the judgment in *Board of Control for Cricket in India* v. *Kochi Cricket (P.) Ltd.* [(2018) 6 SCC 287] in the context of Section 36 of the 1996 Act, and in *Ssangyong Engineering and Construction Co.*

Ltd. v. *National Highways Authority of India* [2019 (3) Arb. LR 152 (SC)] in the context of Section 34 of the 1996 Act.

In Kochi Cricket (supra), the Supreme Court had gone so far as to express its displeasure with the then pending proposal to render the 2015 Amendment prospective in nature. The Supreme Court had urged a re-think in this regard. However, Parliament has specifically disregarded the advice of the Supreme Court, and through the 2019 Amendment expressly made the 2015 Amendment prospective in nature i.e. the provisions of the 2015 Amendment would only apply to cases where the arbitration was invoked post October 23, 2015. The all-encompassing language makes the applicability of the 2019 Amendment prospective not only to arbitration proceedings themselves but also related court proceedings.

The immediate fallout of this, inter-alia, would that be a large number of execution petitions which, inspired by the decision in Kochi Cricket (supra), had come to be filed in relation to awards which arose from arbitrations which were invoked prior to October 23, 2015 and in which Section 34 award-challenge petitions are pending, would now, unless the same have already been disposed of, be rendered non-maintainable inasmuch as Section 36 of the un-amended 1996 Act provides for automatic stay of awards upon the filing of a Section 34 award-challenge petition.

However, the 2019 Amendment does not itself contain an express provision about the retrospectivity or otherwise of the changes it introduces to the 1996 Act. Whereas such an omission arguably veers to a presumption of prospectively, this issue is nonetheless likely to lead to future litigation on this aspect in the absence of an express provision.

Excerpts from Drafting Dispute Resolution Clauses

American Arbitration Association

Drafting clear, unambiguous clauses contributes to the efficiency of the ADR process. For example, arbitration agreements require a clear intent to arbitrate. It is not enough to state that "disputes arising under the agreement shall be settled by arbitration." While that language indicates the parties' intention to arbitrate and may authorize a court to enforce the clause, it leaves many issues unresolved. Issues such as when, where, how and before whom a dispute will be arbitrated are subject to disagreement once a controversy has arisen, with no way to resolve them except to go to court. Some of the more important elements a practitioner should keep in mind when drafting, adopting or recommending a dispute resolution clause follow.

- The clause might cover all disputes that may arise, or only certain types.
- It could specify only arbitration – which yields a binding decision – or also provide an opportunity for non-binding negotiation or mediation.
- The arbitration clause should be signed by as many potential parties to a future dispute as possible.
- To be fully effective, "entry of judgment" language in domestic cases is important.
- It is normally a good idea to state whether a panel of one or three arbitrator(s) is to be selected, and to include the place where the arbitration will occur.
- If the contract includes a general choice of law clause, it may govern the arbitration proceeding. The consequences should be considered....
- The parties are free to customize and refine the basic arbitration procedures to meet their particular needs. If the parties agree on a procedure that conflicts with otherwise applicable AAA rules, the AAA will almost always respect the wishes of the parties....
- The parties can provide for arbitration of future disputes by inserting the following clause into their contracts (the language in the brackets suggests possible alternatives or additions).

- Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

- We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial [or other] Arbitration Rules the following controversy: [describe briefly]. We further agree that a judgment of any court having jurisdiction may be entered upon the award.

The standard clause is often the best to include in a contract. It makes clear that all disputes are arbitrable. Thus, it minimizes dilatory court actions to avoid the arbitration process. It is self-enforcing. Arbitration can continue despite an objection from a party, unless the proceedings are stayed by court order or by agreement of the parties. It provides a

complete set of rules and procedures. This eliminates the need to spell out dozens of procedural matters in the parties' agreement. It provides for the selection of a specialized, impartial panel. Arbitrators are selected by the parties from a screened and trained pool of available experts.

The parties should consider adding a requirement regarding the number of arbitrators appointed to the dispute and designating the place and language of the arbitration.....For strategic or long-term commercial international contracts, the parties may wish to provide a "step" dispute resolution process encouraging negotiated solutions, or mediation in advance of arbitration or litigation. A model step clause and mediation clause follow.

"*In the event of any controversy or claim arising out of or relating to this contract, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a solution satisfactory to both parties. If they do not reach settlement within a period of 60 days, then either party may, by notice to the other party and the International Centre for Dispute Resolution, demand mediation under the International Mediation Procedures of the International Centre for Dispute Resolution. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution.*"

Usually, the effective management of time and expense in arbitration is best left in the hands of experienced case managers and arbitrators. Occasionally, however, parties wish to ensure that matters are resolved in a minimum of time and without recourse to the expense and time necessitated by common law methods of pre-hearing information exchange. The clauses that follow limit the time frame of arbitration (clauses presented in the alternative) and the amount of pre-hearing information exchange available to the parties. One word of caution: once entered into, these clauses will limit the arbitrator's authority to mold the process to the specific dictates of the case.

Other Provisions That Might be Considered

A. Specifying a Method of Selection and the Number of Arbitrators

The parties may agree to have one arbitrator or three (which significantly increases the cost).

The arbitration clause can also specify by name the individual whom the parties want as their arbitrator. However, the potential unavailability of the named individual in the future may pose a risk. All of these issues and others can be dealt with in the arbitration clause. Some illustrative provisions follow.

- ➢ The arbitrator selected by the claimant and the arbitrator selected by respondent shall, within 10 days of their appointment, select a third neutral arbitrator. In the event that they are unable to do so, the parties or their attorneys may request the American Arbitration Association to appoint the third neutral arbitrator. Prior to the commencement of hearings, each of the arbitrators appointed shall provide an oath or undertaking of impartiality.

- Within 14 days after the commencement of arbitration, each party shall select one person to act as arbitrator and the two selected shall select a third arbitrator within 10 days of their appointment. [The party-selected arbitrators will serve in a non-neutral capacity.] If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association.

- In the event that arbitration is necessary, [name of specific arbitrator] shall act as the arbitrator.

When providing for direct appointment of the arbitrator(s) by the parties, it is best to specify a time frame within which it must be accomplished. Also, in many jurisdictions, the law permits the court to appoint arbitrators where privately-agreed means fail. Such a result may be time consuming, costly, and unpredictable. Parties who seek to establish an ad-hoc method of arbitrator appointment might be well advised to provide a fallback, such as, should the particular procedure fail for any reason, "arbitrators shall be appointed as provided in the AAA Commercial Arbitration Rules."

B. Arbitrator Qualifications

The parties may wish that one or more of the arbitrators be a lawyer or an accountant or an expert in computer technology, etc. In some instances, it makes more sense to specify that one of three arbitrators be an accountant, for example, than to turn the entire proceeding over to three accountants. Sample clauses providing for specific qualifications of arbitrators are set forth below.

- The arbitrator shall be a certified public accountant.
- The arbitrator shall be a practicing attorney [or a retired judge] of the [[specify]] [Court].
- The arbitration proceedings shall be conducted before a panel of three neutral arbitrators, all of whom shall be members of the bar of the state of [specify], actively engaged in the practice of law for at least 10 years.
- The panel of three arbitrators shall consist of one contractor, one architect, and one construction attorney.
- The arbitrators will be selected from a panel of persons having experience with and knowledge of electronic computers and the computer business, and at least one of the arbitrators selected will be an attorney.
- In the event that any party's claim exceeds $1 million, exclusive of interest and attorneys' fees, the dispute shall be heard and determined by three arbitrators.

  Parties might wish to specify that the arbitrator should or should not be a national or citizen of a particular country. The following examples can be added to the arbitration clause to deal with this concern.

- The arbitrator shall be a national of [country].

- The arbitrator shall not be a national of either [country A] or [country B].
- The arbitrator shall not be of the nationality of either of the parties.

C. Locale Provisions

Parties might want to add language specifying the place of the arbitration. The choice of the proper place to arbitrate is most important because the place of arbitration implies generally a choice of the applicable procedural law, which in turn affects questions of arbitrability, procedure, court intervention and enforcement. In specifying a locale, parties should consider (1) the convenience of the location (e.g., availability of witnesses, local counsel, transportation, hotels, meeting facilities, court reporters, etc.); (2) the available pool of qualified arbitrators within the geographical area; and (3) the applicable procedural and substantive law. Of particular importance in international cases is the applicability of a convention providing for recognition and enforcement of arbitral agreements and awards and the arbitration regime at the chosen site. An example of locale provisions that might appear in an arbitration clause follows.

- The place of arbitration shall be [city], [state], or [country].

D. Language

In matters involving multilingual parties, the arbitration agreement often specifies the language in which the arbitration will be conducted. Examples of such language follow.

- The language(s) of the arbitration shall be [specify].
- The arbitration shall be conducted in the language in which the contract was written.

Such arbitration clauses could also deal with selection and cost allocation of an interpreter.

E. Governing Law

It is common for parties to specify the law that will govern the contract and/or the arbitration proceedings. Some examples follow.

- This agreement shall be governed by and interpreted in accordance with the laws of the State of [specify]. The parties acknowledge that this agreement evidences a transaction involving interstate commerce. The United States Arbitration Act shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration clause in this agreement.
- Disputes under this clause shall be resolved by arbitration in accordance with Title 9 of the US Code (United States Arbitration Act) and the Commercial Arbitration Rules of the American Arbitration Association.
- This contract shall be governed by the laws of the state of [specify].

F. Conditions Precedent to Arbitration

Under an agreement of the parties, satisfaction of specified conditions may be required before a dispute is ready for arbitration. Examples of such conditions precedent include written notification of claims within a fixed period of time and exhaustion of other contractually established procedures, such as submission of claims to an architect or engineer. These kinds of provisions may, however, be a source of delay and may require linkage with a statute of limitations waiver (see below). An example of a "condition precedent" clause follows.

> ➢ If a dispute arises from or relates to this contract, the parties agree that upon request of either party they will seek the advice of [a mutually selected engineer] and try in good faith to settle the dispute within 30 days of that request, following which either party may submit the matter to mediation under the Commercial Mediation Procedures of the American Arbitration Association. If the matter is not resolved within 60 days after initiation of mediation, either party may demand arbitration administered by the American Arbitration Association under its [applicable] rules.

G. Preliminary Relief

If the parties foresee the possibility of needing emergency relief akin to a temporary restraining order, they might specify an arbitrator by name for that purpose in their arbitration clause or authorize the AAA to name a preliminary relief arbitrator to ensure an arbitrator is in place in sufficient time to address appropriate issues. Specific clauses providing for preliminary relief are set forth below.

> ➢ Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the establishment of the arbitral tribunal (or pending the arbitral tribunal's determination of the merits of the controversy).
>
> Pending the outcome of the arbitration, parties may agree to hold in escrow money, a letter of credit, goods, or the subject matter of the arbitration. A sample of a clause providing for such escrow follows.
>
> ➢ ESCROW 1 : Pending the outcome of the arbitration [name of party] shall place in escrow with [law firm, institution, or AAA] as the escrow agent, [the sum of ____________________, a letter of credit, goods, or the subject matter in dispute]. The escrow agent shall be entitled to release the [funds, letter of credit, goods, or subject matter in dispute] as directed by the arbitrator(s) in the award, unless the parties agree otherwise in writing.

H. Consolidation

Where there are multiple parties with disputes arising from the same transaction, complications can often be reduced by the consolidation of all disputes. Since arbitration is a process based on voluntary contractual participation, parties may not be required to arbitrate a dispute without their consent. However, parties can provide for the consolidation of two or more separate arbitrations into a single proceeding or permit the joinder of a third party into

an arbitration. In a construction dispute, consolidated proceedings may eliminate the need for duplicative presentations of claims and avoid the possibility of conflicting rulings from different panels of arbitrators. However, consolidating claims might be a source of delay and expense. An example of language that can be included in an arbitration clause follows.

> ➢ The owner, the contractor, and all subcontractors, specialty contractors, material suppliers, engineers, designers, architects, construction lenders, bonding companies, and other parties concerned with the construction of the structure are bound, each to each other, by this arbitration clause, provided that they have signed this contract or a contract that incorporates this contract by reference or signed any other agreement to be bound by this arbitration clause. Each such party agrees that it may be joined as an additional party to an arbitration involving other parties under any such agreement. If more than one arbitration is begun under any such agreement and any party contends that two or more arbitrations are substantially related and that the issues should be heard in one proceeding, the arbitrator(s) selected in the first-filed of such proceedings shall determine whether, in the interests of justice and efficiency, the proceedings should be consolidated before that (those) arbitrator(s).

I. Document Discovery

Under the AAA rules, arbitrators are authorized to direct a prehearing exchange of documents. The parties typically discuss such an exchange and seek to agree on its scope. In most (but not all) instances, arbitrators will order prompt production of limited numbers of documents which are directly relevant to the issues involved. In some instances, parties might want to ensure that such production will in fact occur and thus provide for it in their arbitration clause. In doing so, however, they should be mindful of what scope of document production they desire. This may be difficult to decide at the outset. If the parties address discovery in the clause, they might include time limitations as to when all discovery should be completed and might specify that the arbitrator shall resolve outstanding discovery issues. Sample language is set forth below.

> ➢ Consistent with the expedited nature of arbitration, each party will, upon the written request of the other party, promptly provide the other with copies of documents [relevant to the issues raised by any claim or counterclaim] [on which the producing party may rely in support of or in opposition to any claim or defense]. Any dispute regarding discovery, or the relevance or scope thereof, shall be determined by the [arbitrator(s)] [chair of the arbitration panel], which determination shall be conclusive. All discovery shall be completed within [45] [60] days following the appointment of the arbitrator(s).

J. Depositions

Generally, arbitrators prefer to hear and be able to question witnesses at a hearing rather than rely on deposition testimony. However, parties are free to provide in their arbitration

clause for a tailored discovery program, preferably to be managed by the arbitrator. This might occur, for example, if the parties anticipate the need for distant witnesses who would not be able to testify except through depositions or, in the alternative, by the arbitrator holding a hearing where the witness is located and subject to subpoena. In most cases where parties provide for depositions, they do so in very limited fashion, i.e., they might specify a 30-day deposition period, with each side permitted three depositions, none of which would last more than three hours. All objections would be reserved for the arbitration hearing and would not even be noted at the deposition except for objections based on privilege or extreme confidentiality. Sample language providing for such depositions is set forth below.

> ➢ At the request of a party, the arbitrator(s) shall have the discretion to order examination by deposition of witnesses to the extent the arbitrator deems such additional discovery relevant and appropriate. Depositions shall be limited to a maximum of [three] [insert number] per party and shall be held within 30 days of the making of a request. Additional depositions may be scheduled only with the permission of the [arbitrator(s)] [chair of the arbitration panel], and for good cause shown. Each deposition shall be limited to a maximum of [three hours] [six hours] [one day's] duration. All objections are reserved for the arbitration hearing except for objections based on privilege and proprietary or confidential information.

K. Duration of Arbitration Proceeding

Parties sometimes underscore their wish for an expedited result by providing in the arbitration clause, for example, that there will be an award within a specified number of months of the notice of intention to arbitrate and that the arbitrator(s) must agree to the time constraints before accepting appointment. Before adopting such language, however, the parties should consider whether the deadline is realistic and what would happen if the deadline were not met under circumstances where the parties had not mutually agreed to extend it (e.g., whether the award would be enforceable). It thus may be helpful to allow the arbitrator to extend time limits in appropriate circumstances. Sample language is set forth below.

> ➢ The award shall be made within nine months of the filing of the notice of intention to arbitrate (demand), and the arbitrator(s) shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by agreement of the parties or by the arbitrator(s) if necessary.

L. Remedies

Under a broad arbitration clause and most AAA rules, the arbitrator may grant "any remedy or relief that the arbitrator deems just and equitable" within the scope of the parties' agreement. Sometimes parties want to include or exclude certain specific remedies. Examples of clauses dealing with remedies follow.

- The arbitrators will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute.
- In no event shall an award in an arbitration initiated under this clause exceed $________.
- In no event shall an award in an arbitration initiated under this clause exceed $________ for any claimant
- The arbitrator(s) shall not award consequential damages in any arbitration initiated under this section.
- Any award in an arbitration initiated under this clause shall be limited to monetary damages and shall include no injunction or direction to any party other than the direction to pay a monetary amount.
- If the arbitrator(s) find liability in any arbitration initiated under this clause, they shall award liquidated damages in the amount of $________.
- Any monetary award in an arbitration initiated under this clause shall include pre-award interest at the rate of ____% from the time of the act or acts giving rise to the award.

M. "Baseball" Arbitration

"Baseball" arbitration is a methodology used in many different contexts and is particularly effective when parties have a long-term relationship.

• The procedure involves each party submitting a number to the arbitrator(s) and serving the number on his or her adversary on the understanding that, following a hearing, the arbitrator(s) will pick one of the submitted numbers, nothing else.

A key aspect of this approach is that there is incentive for a party to submit a highly reasonable number, since this increases the likelihood that the arbitrator(s) will select that number. In some instances, the process of submitting the numbers moves the parties so close together that the dispute is settled without a hearing. Sample language providing for "baseball" arbitration is set forth below.

- Each party shall submit to the arbitrator and exchange with each other in advance of the hearing their last, best offers. The arbitrator shall be limited to awarding only one or the other of the two figures submitted.

N. Arbitration within Monetary Limits

Parties are often able to negotiate to a point but are then unable to close the remaining gap between their respective positions. By setting up an arbitration that must result in an award within the gap that remains between the parties, the parties are able to eliminate extreme risk, while gaining the benefit of the extent to which their negotiations were successful. There are two commonly-used approaches. The first involves informing the arbitrator(s) that the award should be somewhere within a specified monetary range. Sample contract language providing for this methodology is set forth below.

> ➢ Any award of the arbitrator in favor of [specify party] and against [specify party] shall be at least [specify a dollar amount] but shall not exceed [specify a dollar amount]. [Specify a party] expressly waives any claim in excess of [specify a dollar amount] and agrees that its recovery shall not exceed that amount. Any such award shall be in satisfaction of all claims by [specify a party] against [specify a party].

A second approach is for the parties to agree but not tell the arbitrator(s) that the amount of recovery will, for example, be somewhere between $500 and $1,000. If the award is less than $500, then it is raised to $500 pursuant to the agreement; if the award is more than $1,000, then it is lowered to $1,000 pursuant to the agreement; if the award is within the $500-1,000 range, then the amount awarded by the arbitrator(s) is unchanged. Sample contract language providing for this methodology is set forth below.

> ➢ In the event that the arbitrator denies the claim or awards an amount less than the minimum amount of [specify], then this minimum amount shall be paid to the claimant. Should the arbitrator's award exceed the maximum amount of [specify], then only this maximum amount shall be paid to the claimant. It is further understood between the parties that, if the arbitrator awards an amount between the minimum and the maximum stipulated range, then the exact awarded amount will be paid to the claimant. The parties further agree that this agreement is private between them and will not be disclosed to the arbitrator.

O. Assessment of Attorneys' Fees

The AAA rules generally provide that the administrative fees be borne as incurred and that the arbitrators' compensation be allocated equally between the parties and, except for international rules, are silent concerning attorneys' fees; but this can be modified by agreement of the parties. Fees and expenses of the arbitration, including attorneys' fees, can be dealt with in the arbitration clause. Defining the term 'prevailing party' within the contract is recommended to avoid misunderstanding. Some typical language dealing with fees and expenses follows.

> ➢ The prevailing party shall be entitled to an award of reasonable attorney fees.

> ➢ The arbitrators shall award to the prevailing party, if any, as determined by the arbitrators, all of its costs and fees. "Costs and fees" mean all reasonable pre-award expenses of the arbitration, including the arbitrators' fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorneys' fees.

> ➢ Each party shall bear its own costs and expenses and an equal share of the arbitrators' and administrative fees of arbitration.

> ➢ The arbitrators may determine how the costs and expenses of the arbitration shall be allocated between the parties, but they shall not award attorneys' fees.

P. Reasoned Opinion Accompanying the Award

In domestic commercial cases, arbitrators usually will write a reasoned opinion explaining their award if such an opinion is requested by all parties. While some take the position that reasoned opinions detract from finality if they facilitate post-arbitration resort to the courts, parties sometimes desire such opinions, particularly in large, complex cases or as already provided by most applicable rules in international disputes. If the parties want such an opinion, they can include language such as the following in their arbitration clause.

- The award of the arbitrators shall be accompanied by a reasoned opinion.
- The award shall be in writing, shall be signed by a majority of the arbitrators, and shall include a statement setting forth the reasons for the disposition of any claim.
- The award shall include findings of fact [and conclusions of law].
- The award shall include a breakdown as to specific claims.

Q. Confidentiality

While the AAA and arbitrators adhere to certain standards concerning the privacy or confidentiality of the hearings (see the AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon VI), parties might also wish to impose limits on themselves as to how much information regarding the dispute may be disclosed outside the hearing. The following language might help serve this purpose.

- Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

The preceding language could also be modified to restrict only disclosure of certain information (e.g., trade secrets).

R. Appeal

The basic objective of arbitration is a fair, fast and expert result, achieved economically. Consistent with this goal, an arbitration award traditionally will be set aside only in egregious circumstances such as demonstrable bias of an arbitrator. Sometimes, however, the parties desire a more comprehensive appeal, most often in the setting of legally complex cases. Some sample clauses incorporating appeal provision are

- "Notwithstanding any language to the contrary in the contract documents, the parties hereby agree: that the Underlying Award may be appealed pursuant to the AAA's Optional Appellate Arbitration Rules ("Appellate Rules"); that the Underlying Award rendered by the arbitrator(s) shall, at a minimum, be a reasoned award; and that the Underlying Award shall not be considered final until after the time for filing the notice of appeal pursuant to the Appellate Rules has expired. Appeals must be initiated within thirty (30) days of receipt of an Underlying Award, as defined by Rule A-3 of the Appellate Rules, by filing a

> Notice of Appeal with any AAA office. Following the appeal process the decision rendered by the appeal tribunal may be entered in any court having jurisdiction thereof...”

S. Mediation-Arbitration

A clause may provide first for mediation under the AAA’s mediation procedures. If the mediation is unsuccessful, the mediator could be authorized to resolve the dispute under the AAA’s arbitration rules. This process is sometimes referred to as “Med-Arb.” Except in unusual circumstances, a procedure whereby the same individual who has been serving as a mediator becomes an arbitrator when the mediation fails is not recommended, because it could inhibit the candor which should characterize the mediation process and/or it could convey evidence, legal points or settlement positions ex parte, improperly influencing the arbitrator. Sample:

If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration. Any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If all parties to the dispute agree, a mediator involved in the parties’ mediation may be asked to serve as the arbitrator.