
A CRITICAL ANALYSIS OF FACILITATIVE MEDIATION AS A METHOD OF MEDIATION

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CHAPTER 1: INTRODUCTION

“In a mediation procedure, a neutral intermediary, the mediator, helps the parties to reach a mutually satisfactory settlement of their dispute. Any settlement is recorded in an enforceable contract.”

WORLD INTELLECTUAL PROPERTY ORGANIZATION¹

1.1 PRELUDE

“Mediation is a process of conflict resolution wherein a neutral party and two conflicting parties try to amicably solve their matter. The neutral party is a mediator and its function is to settle the differences between the parties that are in conflict.”

To understand the essence of Mediation one has to look back on the evolution and the early development of Mediation that is being practised in the courtrooms today.

1.1.1. GLOBAL EVOLUTION OF MEDIATION

The effectiveness of a mediator also depends upon the readiness of parties to reach a common ground, making his job more of a listener and the mediator has the commitment to resolve a dispute. They have to dig deep and remove any obstacle before the parties and discuss the matter without any confrontations. Mediation has been a part of human and has evolved as has civilization.

Mediation in **United States** can be traced back to labour and social unrest in the early 20th century and since dockets usually got filled, the government started using courtrooms to resolve conflicts in 1970. Due to its popularity, scholars and researchers were of the opinion that it was an easy way to resolve conflict.²

Mediation in **Israel**, King Solomon stood as a mediator between two women. The dispute is probably the most famous child custody battle in history. Two women started fight over a child's rightful motherhood. The King took the matter into his

¹ World Intellectual Property Organization, <https://www.wipo.int/amc/en/mediation/what-mediation.html>, (last visited on May 20, 2022).

² Mediate.com everything mediation, <https://www.mediate.com/the-history-of-mediation-and-why-it-is-still-in-use-today/>, (last visited on May 3, 2022).

own hand and offered a way that would favour both the women equally. This approach to conflict makes a mediator highly important in cases that get settled out of court. Even centuries later, the mediators are adapting this technique to settle civil disagreements between local citizens and foreign people. Later on special Community mediation centres were established to resolve the disputes with Palestine after declaration of Statehood in Israel in 1948. These conflict resolution centres played an important role in easing political tensions between both countries.³

Mediation in the **Middle East**, scholars are of the opinion that mediation dates back to Sumerian society and Sumer who was an ancient Mesopotamian civilization that existed around 4500-1900 B.C, the present Middle East. During that period, the Mash Kim put a lot of burden on the merits of the case before they appeared before the court. The Mash Kim emphasized that quarrelling parties should resolve their disagreements on their own to save relations and the role played by them is similar to the present day mediator.⁴ Furthermore, the Sharia's Law supports the role of a mediator and the thumb rule is that mediator must be unprejudiced and have no stake in the dispute. The matter should be resolved by suggesting ideas and offering solutions in front of parties. The decision rests in the hand of party and not the mediator. Even Prophet Muhammad's in early phases of life was appointed as mediator by tribes warring over the Ka'ba reconstruction. The Prophet resolved the matter by suggesting a solution that accommodated both the parties' interests.

Mediation in **China**, Confucius was a philosopher who believed that respect for one another trumped the superiority of law and its associated conflicts. During his reign (from 551 B.C. to 479 B.C.), some scholars believe that China fully supported mediation. The philosopher advised that ethical reconciliation is the best solution to but Confucius insisted that the disagreeing parties should consent to it. The mediators used to meet with both parties separately and then talk to them. To ensure fairness the mediator used to talk to people with greater knowledge of the dispute to safe guard the integrity of reconciliation. Due to his

³ Mediate.com everything mediation, *supra* note 2, at 1.

⁴*Id.* at 3.

influence on Chinese culture, mediation became the leading way to settle disputes in China for thousands of years.⁵

1.1.2. EVOLUTION OF MEDIATION IN INDIA

Mediation is an old concept. Before the British Era, India had a system called the Panchayat system, wherein village elders assisted in resolving community/village level disputes. Such traditional mediation techniques are still utilized even today in villages. In addition to it during pre-British India, mediation was popular among businessmen. The respected businessmen called as Mahajans were promoted by business association members to solve disputes using an informal procedure, which was a combination of mediation and arbitration. Also there is a dispute resolution method i.e. used by some village in India namely the use of panchas, or where wise persons resolve the day to day tribal disputes. Wherein, conflicting members of a tribe meet with a panch of the panchayat to present their problems and to arrive at a settlement, if the panch fails to resolve, then the dispute is presented before the public forum attended by all members of the tribe. After considering claims, defences, and interests, the panchayat attempts to settle the dispute. If parties do not come to a settlement, the panchayat gives a decision that is binding upon the parties. The decision is made in accordance with the tribal law and the interests of the tribe in maintaining harmony and prosperity. The proceedings are oral and no record is preserved of the outcome. Even though they lack legal authority, such mediation processes were regularly used and commonly accepted by Indian's at village level. Mediation is somewhat similar to the ancient dispute resolution processes. In mediation the parties are encouraged to participate directly. Its wide framework of discussion consists both the applicable law and the fundamental interests of the parties. The mediator, who is an expert in dispute resolution, has a control over the whole process, just like a panch serving the role of a peacemaker. The difference lies as in ancient methods if mediation failed, the same person had the authority to render a binding decision.⁶

⁵Mediate.com everything mediation, *supra* Note 3, at 3.

⁶46 VUWLR, Thomas J Stipanowich, The International Evolution of Mediation: A Call for Dialogue and Deliberation 252 (2015).

After inception British adversarial system in India, arbitration was the legalized ADR method and is still one of the most used and accepted method of ADR. Mediation is a new concept and has just begun to become familiar to the legal fraternity, normally matters are referred to mediation in traditional community settings and where it is court-directed or made compulsory by statute i.e. in the case of intra-governmental disputes between government agencies, in labour disputes and in public utility services disputes. On comparing with US, the Indian system has started to just accept the process whereas American lawyers and judges have warmly embraced mediation as a primary tool for resolving conflicts in court and out of court⁷. Mediation in India has number of features that are different from the recognized judicial systems of Europe that have a global influence on the manner in which legal conflicts are resolved. Mediation both builds and diversifies the capability for resolving conflicts in society. European- style courts are state authorized institutions that conduct public-formal proceedings, that assume the parties are literate and shapes the party in a conflictual, legal position-based, dwelling on the fact finding processes that result in win-lose remedies, backed by sanction. On the other hand, mediation and other ADR techniques, except for arbitration are private, informal, oral, more collaborative, facilitative, future-looking, interest-based processes that bring parties to a win-win solution that is based to save the relation between parties. Based on these features in many non-European countries, mediation is similar to traditional forms of dispute resolution that are being followed for a very long time. Legal scholars are now trying to revive or extend the traditional forms of dispute resolution and integrate them into the formal litigation system. Lok Adalat, has received quite attention since its re-introduction in the 1980s. Basically it is an ancient method for dispute resolution used by tribal people. The Legal Services Authority Act (1987) promoted the resurgence of lok adalat to provide in order to provide speedy and affordable justice. Lok adalat can be compared to settlement conferences they are conducted in the United States, except that the presiding officer in lok adalat are senior members of the Bar. Lok adalat "judges" preside in panels to solve a number of cases referred to Lok Adalat on a single day and are usually heard in open court (in the presence of other parties and attorneys).

⁷Anil Xavier, Mediation: Its Origin & Growth in India, Vol. 27 Hamline Journal of Public Law & Policy 1, 5 (2006), https://www.arbitrationindia.com/pdf/mediation_india.pdf

Customarily, lok adalat judges are highly evaluative from the outset of each hearing. Represented parties do not play an active role in presenting or negotiating their dispute. Instead, attorneys advocate on their behalf. Importantly, litigants may participate in lok adalat without paying a fee, thereby making it accessible to parties with limited financial resources. Historically, lok adalat has been used primarily in personal injury cases and other injury claims involving insurance companies. Parties have the right to decide whether to submit their dispute to lok adalat. Because lok adalat has resulted in the disposition of a measurable number of disputes and is considered to be an effective and affordable alternative to trial, it will continue to be an important dispute resolution tool.

The development of mediation in India holds enormous promise. As the neutral communication skills and useful bargaining strategies of negotiation strengthen the capacity to bring justice to the society. Despite these techniques some obstacles block the path to mediation in India. One of them being limited access. The enactment of the Arbitration & Conciliation Act, 1996, conciliation was given statutory recognition but its awareness was limited. The term “conciliation” is synonymous and sometimes used interchangeably with “mediation” in most countries, was differentiated in the statute. The concept was given recognition only in 1996 and by the 1999 amendment of the Civil Procedure Code (CPC) by inserting Section 89. The statutory language of the Arbitration and Conciliation Act, 1996 and of Section 89 of the Civil Procedure Code, shows the difference between "conciliation" and “mediation”. Mediation and conciliation is the process wherein a third party assist the disputants by resolving disputes by mutual agreement. But a conciliator is a pro-active and interventionist, because of his statutory power under the Code along with power to formulate and reformulate the terms of the settlement agreement. The definition of "conciliator" in the statute is consistent with Rules for Conciliation promulgated by the United Nations Commission on International Trade Law (UNCITRAL).⁸

The Supreme Court of India started an Indo-US exchange of information between high-ranking members of the judiciary from respective countries. The former

⁸Thomas J Stipanowich, The International Evolution of Mediation: A Call for Dialogue and Deliberation, *supra* Note 6, at 3.

Indian Supreme Court Chief Justice A.M. Ahmadi met with US Supreme Court Justices Ruth Bader Ginsburg, Antonin Scalia and the then Chief Judge J. Clifford Wallace, of the 9th US Circuit Court of Appeals. In 1996, under the instructions of Justice Ahmadi a national study team was formed to examine case management and dispute resolution as a joint project with the US. The study group suggested procedural reforms and new procedural provisions were enacted in 2002, providing for mandatory case reference to alternative dispute resolution, including mediation. Even after enactment of Arbitration & Conciliation Act, 1996, no effort was taken by the legal fraternity to exploit the provisions and encourage the litigants. The incorporation of Section 89 was not accepted by a group of lawyers and was challenged and led to many problems due to which a Committee headed by former Judge of the Supreme Court and Chairman of the Law Commission of India, Justice M. Jagannadha Rao, was constituted. Later on the report was submitted and the Hon'ble Supreme Court of India pronounced a landmark decision "***Salem Advocate Bar Association, Tamil Nadu v. Union of India***"⁹, where reference under Section 89 was held mandatory. This judgment turned out to be the real turning point for the development of mediation in India and was carefully emphasized in order to gain the trust of litigants.

In the US, lawyers, the locals, state bar associations, American Bar Association, the Federal Bar Association, judges were actively participating in promotion and utilization of mediation. The American legal fraternity realized the truth that the legal system was overloaded and is about to collapse and understood that cases can be handled efficiently through mediation and other ADR procedures. In 1980s, lawyers and State Bar Associations had professionalized mediation, by establishing mediator training standards, through training of lawyers in mediation and by prescribing ethical standards for lawyers when acting as. That led to mediations being led by trained lawyer and making it an important part of their law practice. By actively taking part in the whole mediation process, the lawyers of US have rather than losing their livelihood have transformed it into an effective

⁹Writ Petition (Civil) No. 496 of 2002.

source of practice and income and they quickly realized that mediation was just another tool in their lawyer tool bag.¹⁰

In India, while judges have been quick to accept the importance of mediation and have realized its value to reduce case backlogs and delays, Indian lawyers have not embrace it yet. Also, understandably, Indian lawyers view mediation as potentially depriving them of income by settling cases prematurely and thereby obviating legal fees that would otherwise be earned. Private litigants, too, think about mediation as an alternative to the court system. But fearful of exploitation, distrustful of private proceedings, comforted by the familiarity of the court system, insecure about making decisions about their own interests, or interested in vexatious litigation or in delaying the case for economic reasons, litigants prefer the lawyer-dominated old style evaluative judicial process. They are quite wrong in thinking so for a variety of reasons: -

- **First**, mediation will not diminish the preferences of such litigants and shall not finish off their right to trial.
- **Second**, effective mediators will gain their trust over time.
- **Third**, the parties can at any stage re-evaluate their legal claims and refer the matter back to court.

The litigants can save their relations with family members, community, or organization, if they will put their trust in the neutral third party, and where mediation shall be governed under a strong evaluative process and it has a high satisfaction rate.

The main reason behind the growth of mediation in Europe and Asia is because of the multi-national corporations ("MNC's") as they seek quicker, cheaper and less troublesome means for settling internal employer, management and shareholder disputes and external commercial disputes with trade and distribution partners around the world.

¹⁰ Mediation: Its Origin & Growth in India, *supra* Note 7, at 4.

At the first annual European Business Mediation Congress held between October 21st to October 23rd in 2004 by CPR Institute of Dispute Resolution, about 140 attendees to a Survey on European Business Mediation indicating that 60% viewed MNC's as necessarily leading the charge in globalization of mediation, while, 25% viewed lawyers as the leaders, and only 7% viewed courts as the leaders in mediation on the international commercial scene. Thus making MNCs as one of the major role players in the development and acceptance of mediation.¹¹

1.2 OVERVIEW OF THE WORK

The scope of this study is narrow and is limited to the framework of mediation in our country while making a comparative analysis of legal framework followed in USA, UK and Canada. This study also tries to cover the hidden side of Mediation i.e. the negative influence over the mind of people as to how people have started to commit crimes without even thinking about gravity of the offence committed by them. The main reason behind this being the matters that are being resolved through Mediation because the legal machinery was unable to take give justice to the aggrieved/victim/complainant. To understand the criticism or the side of mediation i.e. present but we have neglected to accept its presence due to some personal bias hidden behind it. To understand this phenomenon, we shall look in to our past to study the evolution of this term and what led to its present form. The paper shall also try to explain the term mediation in light of international forums and treaties along with its principles, modes and methods. The paper is also aimed to define the negative role played by our judicial system. The study shall be limited to the conditions prevailing in our country while taking certain example from other countries to give opinion for changes that can be made by our legislature.

1.3 RESEARCH METHOD

1.3.1 STATEMENT OF RESEARCH PROBLEM

The ongoing development and evolution of mediation is considered a positive step towards justice and speedy trial but in the midst of them there are some people who have rather started to misuse the process and by taking its undue advantage have tried to make a mockery of justice. The problem shall cover how bride and groom both are misusing the present mediation process to gain undue advantage

¹¹Mediation: Its Origin & Growth in India, *supra* Note 10, at 7.

of the other even so they are wrong and it's apparent on the face of it. It shall also cover how court sanctioned processes like pre-litigation mediation, LokAdalat are being misused by people and lawyers.

1.3.2 HYPOTHESIS

Mediation can be used as an effective tool to pave a road towards justice while keeping in mind the rights and interests of both the parties.

1.3.3 RESEARCH OBJECTIVE OF STUDY

The researcher in this dissertation tries to study the legal issues and difficulties faced by the litigants in mediation. Following are the objectives of the research:

1. To explore the role of mediation in legal dispute resolution;
2. To make a comparative analysis between laws India and some other countries
3. To find out efficiency and deficiency in the process of mediation;
4. To analyse the procedure of court annexed mediation;
5. To study the behaviour and ethics of the mediators and the litigants;
6. To test the impact of established theories of mediation.

1.3.4 RESEARCH METHODOLOGY

In order to approach the prescribed objectives of study. Comparative and doctrinal model of research methodology is done, intensive literature review on the subject was applied and the issues under study is examined in a systematic manner. Various textbooks and legal journals along with the judgments of last three decades of High Court and Supreme Court are referred. E-resources will majorly contribute in writing of this dissertation for getting the most relevant and latest information on the relevant websites which helped the researcher to explore the subject through various dimensions.

Method of Citation

The researcher has followed a uniform mode of citation as per the Blue Book Mode of Citation, throughout the dissertation.

Method of Writing

The method of writing adopted is descriptive and analytical.

1.4 LITERATURE REVIEW

1. Paper by **Anil Xavier, Mediation: Its Origin & Growth in India, Vol. 27 Hamline Journal of Public Law & Policy 1, 5 (2006)** has discussed the origin of mediation as the process of mediation, is not something new in India. Before the British rule, the Panchayati system was prevalent in the country in which the village elders resolve the disputes. In business community, the Mahajans played the role of mediators to resolve the conflicts between them. Some tribal's had their own Panches who used to resolve the disputes according to their tribal laws. It was rightly observed by the author that in the process of mediation, the parties participate directly. Discussions held as per law and the respective interests of the parties. He compared the mediation system of United States with the mediation system prevalent in India and observed that Indian legal fraternity welcomed the process of mediation more warmly than the other nations. But undoubtedly, Indian system is almost thirty years behind the Americans as India is still discussing about its structure and working. In the later part of the introduction of the paper, he gave the statutory provisions behind mediation and conciliation as arbitration and conciliation Act, Section 89 of civil procedure code. In the operative part of the paper, under the heading of the courts, the author provides a very useful information that in 1994- 95, the then C.J A.M. Ahmadi formed a national study team to examine case management and dispute resolution as a part of joint project with the United States. The Indo-US study group suggested procedural reforms, including legislative changes that authorized the use of mediation.
2. **Mediation in the U.S. legal System by Edwar P. Davis, Jr.** is divided in six parts. i.e. Introduction, what is mediation?, the benefits of mediation, what makes a good mediator, types of mediation and the conclusion. The article clearly speaks that the system of mediation in United States is not very much different from the process of mediation prevalent in India. The article eminently observed the process of mediation which says that the willingness of the parties and the skill of the mediator in guiding the parties are two important factors which decides the fate of the mediation process. The need of the mediation to decide the cases as soon as possible or at the fast track level which can also save the cost and the relations of the parties was also felt in the United States. The middle part of the paper deals with the qualification of a mediator

which is very much essential and makes the institution of mediation more efficient and trustful. Trust, patience, knowledge, intelligence, impartiality, good communication skills are the pre requisite characters in the personality of a good mediator. These can also be achieved with the effective training. In United States there are some type of cases which are under statutory obligation to pass through the process of mediation before admitting in the court of law like labor disputes and the domestic family law disputes etc. apart from the statutory mandate the court annexed mediation is also prevalent in the United States where the court orders some cases to the institution of mediation. The parties while making their contracts may also have the clause of mediation which has binding effect on the parties. Last but not the least; the litigants may also take the benefits of mediation at their own. The author concluded its paper by declaring the mediation as a valuable resolution tool and a valuable weapon against delay, cost and injustice.

3. Allan Weinenfeld, “**Mediation or Meddling?**” 7 Indus. & Lab. Rel. Rev., 288-293 at 288 (1954) has discussed Ad hoc mediation services by government setup which is as per the author is an old scenario, Author argued that even in late nineteenth century the permanent agencies started offering their services in matters of Industrial disputes. The freedom of the mediation should be preserved so that it may available at the request of any party to the labour dispute. According to the author the labour mediator should educate the disputant about collective bargaining so that management and labour should reach maturity.
4. The paper ‘**On the Mediation Process**’ by **Sri Ram Panchu**¹² describes the mediation as Appropriate Dispute Resolution System. Its emphasis is on the future cooperation and communication rather than the past blame game and win- loses results. The focus is on the long term interests to strengthen the relations and not to strengthen the litigation. The parties suggest their own settlement which ensures the parties ‘right to decision making’. Alike most of the other articles on the mediation it also characterizes the mediation as a flexible process. The author advocates that the corporate sector accepted the mediation at very fast rate. They participate in the process to solve their dispute. It is said that many of the fortune 500 companies now

¹² On the Mediation Process, http://lawcommissionofindia.nic.in/adr_conf/sriram17.pdf (Last Visited on May 10, 2022).

insist to go through the process of mediation before going to the court. Because the success rate of mediation is very high and is around 85 percent. Author highlighted same problems of the Indian legal system as the low judges- population rate, administrative illegality, indiscriminate use of system including Arbitration, conciliation and mediation. The different methods of resolution are appropriate and effective to the various kinds of the legal problems. The author concluded the article by saying that the new conflict resolution system is a demand of public policy and it is the time to adopt it.

5. Bruce A. Friedman in his article **Mediation Impasse-Busting Techniques**¹³, explained the impasse busting techniques. The author says that every negotiation or a mediation process passes through the phase of Impasse due to the adamant attitude of any party to the dispute or that either party is unwilling to negotiate for any reason. But it is the mediator who has to find a solution to break deadlock between the parties to reach an effective settlement. Author gave his following techniques which a mediator can use to break impasse like Ranges, Brackets, Joint Sessions, and Negotiation with the mediator, the condition offer and the mediator's proposal. 125 The author observed that "Using the right technique at the right time is the art of mediation".

1.5 CHAPTERIZATION SCHEME

CHAPTER 1: INTRODUCTION

The chapter deals with the definition of mediation with special emphasis on the evolution that has led to the present framework of mediation i.e. being followed. It discusses how mediation was used in the past and how it has led to the present workings. The chapter shall also define the research problem, research objective, hypothesis and the literature review that shows the intent and work of the author to be addressed in this research paper.

CHAPTER 2: HISTORICAL BACKGROUND OF ADR MECHANISMS IN INDIA

The chapter 2 of the paper deals with the historical perspective of mediation while discussing the present Indian legal perspective. Justice is an important affair of a nation

¹³ Mediation Impasse-Busting Techniques, available at: <http://www.law.com/sites/brucefriedman/2015/05/07/mediation-impasse-bustingtechniques/?slreturn=20150615014824> (Last Visited on May 03, 2022).

and citizens knock the doors of judicial corridor. Justice promotes public interest and maintains the law and order in a society. Constitution of India mandates justice in every expression like social, economic and political. Justice delivery to every citizen has been a matter of concern for every nation but it becomes a herculean task when the nation is richly populated, different cultures and innumerable castes and languages. To tackle the problem, the constitution makers adopted the Preamble to the Constitution which aims to achieve its very goal to provide justice in all the spheres of social, economic and political comportments.

CHAPTER 3: MEDIATION PROCESS AND TECHNOQUES

Chapter 3 deals with different techniques and processes that can be used by a mediator. Mediation is a private but structured method of dispute resolution. It is a voluntary process in which both the disputing parties come together to find a solution to their problem by entering into a written contract and appointing a mediator who assists parties in reaching an amicable settlement. A mediator can be of any designation and can be appointed either formally or informally. Contrary to conventional courts, the decision of the mediator is not imposable and the decision-making power rests in the disputing parties. Mediation provides the parties to express their emotions, interests, end goal, and opinions which are often not given importance in the conventional courts. There are no fixed and rigid proceedings in alternate dispute resolution and mediation is the most flexible of all these methods making it the most desirable one.

CHAPTER 4: MEDIATION GLOBAL SCENARIO

The Chapter 4 shall cover the mediation procedure that is followed in India and will make a comparison of it with the process that is followed in the countries who have a developed and well equipped structure of mediation.

CHAPTER 5: NEGATIVE FRAMEWORK OF MEDIATION

Chapter 5 shall dwell into the main focus of the study wherein it show case the present deteriorating conditions of Indian Mediation Scheme and how it has been led astray due to a missing statue and a statutory authority overlooking over it. The litigants and their lawyers are using mediation as tool at their disposal to mislead the legal justice system and to lead astray the court from their path. It is also being used as a tool by lawyers to

save their clients from rightful persecution and evade some or any criminal liability over them.

CHAPTER 6: CONCLUSION AND SUGGESTION

This chapter finally concludes this work and provides suggestions to lay down regulations and procedures which should be adopted to achieve the desired goal of bringing a well-accepted process of mediation in the society and betterment. The present scheme of mediation sometimes turns out to be non-beneficial to parties due to the non-structured programme. The chapter also gives suggestions that can be taken to improve the present condition.



CHAPTER 2: HISTORICAL BACKGROUND OF ADR MECHANISMS IN INDIA

2.1 CHRONICLES OF COURTS AND ADR SYSTEM IN INDIA

The prestigious Indian legal system could be traced back to the Vedic period. Scholars and academicians have never found any fixed system to handle the disputes in ancient times. However, it was a prevalent belief that the disputes might be resolved by the use of force i.e., bodily or otherwise. The law was always on the side of powerful ones. Later on, these powerful people became kings and began ruling over others. Thereby a system of kingship was established. The power emanating from the throne became the ultimate authority.¹⁴

During the Vedic times, the customary and traditional laws were transformed into codified laws.¹⁵ The main source of law were the four Vedas, also called 'Sruti', written during the Vedic period. Apart from the Sruti, the Dharmashastra was also written during the Vedic period. The judgments pronounced at that point of time were based on these shastra's and Smritis. They became the guiding principles of judicial proceedings.¹⁶ During the Vedic period, the complaints were called as 'Vyavahara', 'Parvapaksha' and the written statements as 'Uttar' to the same. The pronouncement was known as 'Nirnaya'.¹⁷ Under his system, the village councils and local family councils came to be evolved. The disputes between the business classes and traders were resolved by their heads and they sometimes sorted out the trivial matters by mediating between the parties whereas the court of the King remained the highest court, where appeal from the lower pronouncements could be made¹⁸. Besides the Vedic period, some in-between changes in this system took place in the following three phases i.e., Ancient period, Mughal period, and during the British rule.

¹⁴Dr. Anupam Kurlwal, An Introduction to Alternative Dispute Resolution System 76 (Central Law Publication, Allahabad 2014).

¹⁵History of Indian Law, https://en.wikipedia.org/wiki/History_of_Indian_law (last visited May 30, 2022)

¹⁶*Id.* at 13.

¹⁷ Rama Jois, Seeds of Modern Public Law in Ancient Indian Jurisprudence 65 (Eastern Book Company, New Delhi 1990).

¹⁸ P.V. Kane, History of Dharmashastra 242 (Bhandarkar Oriental Research Institute, Pune 2006).

2.1.1 ANCIENT PERIOD

The panchayat system is an outcome of mediating the trivial matters between the parties at a lower level. Apart from these trivial matters, matters relating to business, trade, family and other social disputes were also resolved at the Panchayat level. These Panchayats became a systematic and structured forum. The system consisted of five respectable persons of the village and they were called as 'Panchs' and amongst these persons, one person is elected who is called the 'Sarpanch'. The five-member body was believed to be having God's voice. Therefore, sometimes they were even referred to as 'Panch Parmeshwars'.¹⁹

Besides Panchayats, the committees with the purpose of dispute settlement were also established, and they were established in three forums i.e.:

- a. Kulani: the assembly of a particular clan or 'Kula', which is well acquainted with the customs of the Kula and they help in reaching a settlement.
- b. Sreni: the guild of persons who follow the same kind of occupation or trade and know the customs of that occupation/trade/ or profession.
- c. Puga: the assembly of learned people, who were considered to be the competent in the legal matters.

Above this village level, there were 'Visyas' which was the unit of villages in the local area and the same was headed by a 'Visyapati'. Several 'Visyas' were then formed a 'Jana' whose head was known as 'Rajan'. Rajan i.e., the King was the highest authority whose decision was sovereign and binding.²⁰ In addition to these councils, there were other dispute resolving committees established under the authority of the king as 'Adhikrita'. 'Mudrita' was entrusted to use the official seal of the Adhikrita. The concept of mobile courts

¹⁹*Id.* at 16.

²⁰*Id.* at 17.

was also there in the form of 'Pratistha', these courts used to move from village to village.²¹

2.1.2 MUGHAL PERIOD

The Mughal period has a significant place in the development of judicial system. The Mughal period actually began from the rule of Babar. Before him, the Afghans were ruling and more specifically the Lodhis were the rulers of that time. Babar planned to conquer and rule India. Firstly, he decided to establish good will in the eyes of natives of India. They honored the Law of the land, religion and customary rule which were already in place. Mughals gave these natives freedom to be governed by their established customary rules. A judicial system was developed in which the leaders of the existing religions were given the authority to decide and settle their issues. There also the highest court was the court of Emperor. A well-organized system was developed to resolve the disputes. However, at the higher level when the disputes remained unresolved, the matters then were decided as per the Shariat and Quranic laws. The communities during the Mughal rule were divided in to two parts i.e., the believers and the non-believers. The believers were given more importance i.e., they were given central place and non-believers were kept at a lower rank. However, their security, property, and other rights were dealt with in a defined manner and conditions.²²

The state was centrally focused on the Muslim law i.e., the Sharia and all the other matters of the state like taxes, religion, etc. were all dealt with under this law. To evolve new rules and regulations, and to resolve the disputes as per the Shariat, an institution was established which was presided over by a Qazi. Qazi was the head or incharge of this newly evolved judicial system. The ultimate authority of law was King but still the institution of Qazi was unavoidable. As an expert of Shariat law he was required to resolve the

²¹ D. Devahuti, Harsha, A Political Study 211 (Oxford University Press, U.K 1983).

²² Ibn Hasan, The Central Structure of the Mughal Empire and its Practical Working up to the year 1657, 214 (MunshiramManoharlal, New Delhi 1936).

matters and advise the disputants on the basis of Shariat. The Ulema, i.e., the expert of the religion, used to be appointed as Qazi.²³ The King was the only person who oversaw the appointment and removal of the Qazi. The Qazi was the authority to issue Fatwas on the relevant points. He used to act as a mediator between the believers of shariat and resolved the dispute between them. If and when required, Qazi had the authority to pronounce his ruling based on the Shariat & Quranic Laws. In this way, Qazi performed the roles of mediator, arbitrator and in certain cases of a judge also.²⁴

There are certain codified law books of the Mughal era. The law and all the related matters were the subject of the emperor and he had his final say in these matters. Whatever was uttered by the emperor, it was considered to be a law and thus it was binding on every person. He was considered to be God, and the God has delegated all his powers to the emperor to rule all the humans and resolve all their dispute under his authority. Whenever it was required, emperor used to lay down a new law and policy for its subjects. The emperor became the monarch during the period of Akbar when he issued twelve ordinances better known as 'Fatwa-i-Alamgiri'.²⁵

The judicial system set up by King Akbar was the most admirable one in the medieval history of law. He tried his best to make his place in the heart of populace. It was said about King Akbar that if in any matter he himself is guilty then he would deliver a judgment against himself.²⁶

The Court of 'Mufti' came to be established during the reign of King Akbar. The Court of Mufti Court came to be popular despite the fact that the same

²³UpendraNath Day, The Mughal Government A.D.1556-1707, 206 (MunshiramMohanlal, New Delhi 1970).

²⁴*Id.* at 21.

²⁵Muhammad Basheer, Ahmad The Administration of Justice in Medieval India: A study in outline of the judicial system under the sultans and the badshah's of Delhi based mainly upon cases decided by medieval courts in India between 1206-1750 A.D. 29 (Aligarh University, Allahabad 1941).

²⁶ Vol. 2 Ed. 2nd, Sir Jadu- Nath Sarkar, The Ain-I-Akbar of AbulFazl-I- Allami (Royal Asiatic Society of Bengal, Calcutta 1949).

was not recognized and the Mufti was not an appointed authority. During the same period, the Mufti started issuing Fatwas under the directions of Qazi. He was even authorized to settle the disputes between the parties where the law was ambiguous and not clear.²⁷

The institution of Muhtasib was established as an enforcing agency to enforce the law and it was established by the Caliph Mahdi. This office was charged with the duty to oversee the religious and moral behavior of the people. The main aim of this institution was to find out the offenders and to carry out the punishments upon them as per the orders. The institution was even empowered to take preventive measures against the violation of Shariat Law. Its powers & scope got enlarged during the reign of King Aurangzeb.

2.1.3 BRITISHER'S PERIOD

In 1612, the British Empire entered into India through the East India Company in Surat and was granted business rights through Sir Thomas Roe, and these rights were granted by King Jahangir. In the 18th century, the company helped Mir Qasim plot against Siraj-ud-Daula. Thereafter, Robert Clive succeeded in his plot with the Mughal Empire and won the Battle of Plassey in 1757 establishing the rule of company in Bengal. This development has opened a new era in India's political scenario. Britain ruled India for about 300 years and changed India's judicial system.

The British have begun to implement English law to resolve their disputes. Originally the British colonies were governed by these rules, but over time British law became national law prevalent throughout the British India. Along with many other laws, an alternative dispute resolution system was introduced to quickly resolve disputes between the parties to the proceedings. Traces of the codification of arbitration were examined by our judiciary. It has been

²⁷*Id.* at 24.

established that the first attempts made so far were under the 1772 and 1780 Bengal Regulations. This provision was developed to subject account disputes and other trade related disputes to arbitration. Thereafter in the year 1781, Sir Elijah Impey's regulation included a provision where the arbitration proceedings could be started by the referral of a judge. The referral replaced the choice of the parties to submit to arbitration. In 1787, a judicial law was also enacted with the mutual consent of the parties to refer the case to arbitration. Later, the 1793 Ordinance XVI was passed to encourage people to arbitrate, regulating the types of disputes referred to by the arbitrator. To make the 1793 Ordinance more effective, the 1813 Ordinance VI was enacted, requiring land disputes to be referred to an arbitrator. Ordinance VII of 1822 empowers income authorities to refer to the arbitrator's matters related with rent and other income-related cases. The 1883 Bengal Ordinance IX re-codified the provisions of reference.²⁸

Apart from these above given regulations there were two more such codified directives viz.,

i. Regulation of Madras

The Regulation of Madras, 1816 assigned the powers to Munsifs (district level) to call for Panchayats to resolve the disputes in civil suits.

ii. Regulation of Bombay

All the present and upcoming disputes were to be referred to arbitration with an agreement for amicable settlement of these disputes under this Bombay Presidency Regulation (VII) of 1827. The parties had a choice to appoint an arbitrator of their choice in the agreement. The penal provision was there to ensure the compliance and to prevent the breach of agreement, and the same was given under the regulation. The violation of agreement or settlement was a criminal offence and it was punishable under the Contempt of Court. The award made in the

²⁸ State of Orissa and Others v. Gangaram Chapolia, AIR 1982 Ori 277.

Arbitration proceedings were sanctioned by the District Judge through decree of his court.

Till 1834, East India Company was paramount all over the country. The company was ruling the Indians and their day-to-day affairs with their British rules. In 1834, Warren Hastings, the first governor general of India after the Charter Act, 1833, formed the legislative council of India. This council was entrusted the task to regulate the procedures of civil courts. The Code of Civil Procedure, Act VIII of 1859 was passed to regulate the civil suits. Section 312 to 327 of the Act dealt with the arbitration clause. Thereafter, the Act was repealed in 1877 but without any change in the arbitration procedure. The code of Civil Procedure again revised in 1882 as the Act XIV of 1882 which again redo the arbitration clauses about the references of arbitration with or without intervention of the code. However, the code did not provide any provision on the subject of the future disputes and their agreements.²⁹

The first ever code specifically dealing with the arbitration clauses was passed in the name of India Arbitration Act, 1899. The Act was initially applicable to the presidency town only. With the span of time, it was made applicable to the other towns of the British colonies. The Act was passed on the basis of English law principles.³⁰ The flaws in the civil procedure code were attempted to be removed. To make the civil procedure code more effective and to give more powers to the small cause courts, a new Civil Procedure Code, 1908 was passed by the legislative council. The second schedule of the Act of 1908 was based on the Indian Arbitration Act, 1899.³¹

In 1925, Civil Justice committee was set up to review the civil procedure and to give an advice on the issue of arbitration clause. The committee scrutinized

²⁹ S.K. Chawla, Law of Arbitration and Conciliation including other ADRs⁵¹ (Eastern Law House, Kolkata 2012).

³⁰ *Id.* at 27.

³¹ *Id.* at 28.

the provisions of the Act of XIV of 1882 and Indian Arbitration Act, 1899 and gave a detailed report to improve the justice system in civil matters. A lot of opinions were given by its members in the matter of arbitration. The courts were not having the extra ordinary powers to enforce the arbitration clauses. Arbitration agreement could be made out between the parties in some matters but not specifically governed by any legal provisions.³²

The arbitrators were having two types of references i.e. Conventional and Statutory. In conventional arbitration the reference was given to the tribunal chose by the parties itself. Consensual arbitration was not having the boundaries of contradiction of the law but in the statutory arbitration, the Act did not apply where the agreement was inconsistent with any of prevailing statutes. Some statutes other than the Arbitration Act were also empowered to give the parties a freedom to choose not to compulsorily refer any matter to the arbitration tribunal under the Arbitration Act and to deal separately under that particular statute. In these circumstances the matters which could be dealt at the same time were getting two different awards from two different tribunals.

Meanwhile the institution of arbitration was at a considerable development at international level. The demand of permanent court of arbitration at international level based on the theory of Jereme Bentham was rising. In 1899, The Hague peace conference was convened to resolve out the decision to set up a 'Permanent Court of Arbitration'. The decision of the court was made binding on the member countries who ratified the convention. The tribunal set up under the convention was not having compelling power over the member nations to dictate them to refer their disputes to the arbitration.

³² Government of India, Report of the Civil Justice Committee 1924-1925 (Central Publication Branch, Calcutta 1925).

The Geneva protocol and the Geneva Convention³³ were held under the patronage of the League of Nations. It provided the wings to the international arbitration. It was adopted that if the council fails to settle the disputes between the member countries then it may persuade the parties for arbitration. The council may refer the dispute to arbitration on the request of at least one of the parties. If the parties fail to decide on the name of the arbitrator within the prescribed time, the council was empowered to appoint arbitrator for them.

With the changing times, the trade was increasing within the British occupied territories. The rule of Queen of England was spread all over the world. The mutinies were also occurring in occupied territories. To reduce the conflict within traders in the occupied territories, a new comprehensive Act of Arbitration was the need of the hour. Judiciary was also demanding and observing the need of a new comprehensive Arbitration Act and was passing the caustic comments. Resultantly, the Arbitration Act of 1940 came into existence. The Act of 1940 repealed the old Act of 1899. It also made material changes in the Code of Civil Procedure, 1908. Section 89 and 104 (1) of the code were also repealed. It also repealed the clauses (a) to (f) of the second schedule of the code of 1908.

‘Scott Avery Clause’ was included in the Act of 1940 which endows that no action should be initiated until an award has come. The practice of such type of provisions was the part of commercial arbitration. It further suggests that the arbitration award should cover all the related disputes which may arise in the similar context. The arbitral award should not be against the law of the land and the public policy as if it is made so then it would become impractical to enforce it and render it bad in the eyes of law.

³³ League of Nations, “The Geneva Convention on the execution of Foreign Arbitrational Awards, 1927” 27 Am. J. Int. Law 1-6 (1933).

To make the commercial arbitrations more effective and under the control of law, the suggestions were made to give the arbitrators some free hand in deciding the issues. The arbitrators sometimes had to deal with the mixed question of law and fact. It was easy for an arbitrator to cite the law especially in international disputes to which such agreement was subjected to. The perplexity still existed in the customs prevailed in the particular land. To remove the lack of finality of the awards and to retain genuine control over the commercial disputes, it was evinced that the arbitrators should decide the matters as per their interpretations but to give such type of unfettered powers to the arbitral tribunals was conducive to the growth of the institution of arbitration. The practice to oust the jurisdiction of courts in the arbitral agreements was also considered as an unhealthy practice.³⁴

2.1.4 POST INDEPENDENCE PERIOD

Convention on the Recognition and Enforcement of foreign Arbitral Awards popularly known as The New York Convention, 1958 was adopted by United Nations which operates without devaluing the other agreements regarding bilateral or multilateral agreements on the same subjects of foreign arbitral awards. Initially, twenty-seven countries signed and eight countries ratified the convention. India ratified the treaty on 13th July, 1960. It was made obligatory to the member countries to give effect to the international arbitration awards in their states when it is not considered as domestic awards.³⁵

The subject matter of the arbitration under the title of international arbitration may be divided into three categories:

- i. The dispute between two states in their sovereign ability.
- ii. The dispute between a sovereign state and some individuals or a body of individuals if their interests overlap with each other in a disputed territory.

³⁴ Czarnikow v. Roth, Schmidt & Company Ltd., 1922 All ER Rep 45.

³⁵ Herbert Kronke et al., Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention 1 (Kluwer Law International, Netherlands 2010).

- iii. The dispute of commercial contract with arbitration clause between two states having foreign elements.

The arbitral award could be challenged on the following grounds:

- i. The award is not in conformity of the arbitral agreement between the parties.
- ii. The new dispute could be arisen between the parties which were not prospected by the award.
- iii. On the basis of Public Policy.

To promote the progressive coordination and confederacy of international trade law, the United Nations General Assembly in 1966 established United Nations Commission on International Trade Law (hereinafter called 'UNCITRAL') having the seats in New York and Vienna. The need of a new set of global rules was felt by the nations to harmonies the global, national and regional regulations. The members of the commission are elected for the term of six years and half of the members expire at every three years. UNCITRAL encourages the cooperation among members. It is promoting uniform laws, uniform interpretation and codification after adopting the new international conventions. It is also playing an important role by maintaining associations with the other organs of United Nations. Legislative guides were issued by the UNICTRAL became guiding factors for the member nations in resolving the international issues on insolvency rights and the intellectual property rights.³⁶

To accord with the changing scenario at the world level and being the signatory of the important conventions mentioned above, the government of India launched a new and reformed legislation. The Arbitration and Conciliation Act, 1996 (hereinafter called 'the Act of 1996') was passed to

³⁶Dr. Peter Binder, International Commercial Arbitration & Conciliation in UNCITRAL 3 (Sweet & Maxwell, U.K. 2009).

make the arbitration an ideal method of settlement in commercial disputes. The basic expressions of the Act of 1996 relating to arbitration are as under³⁷:

i. Domestic Arbitration

The arbitration relating to the legal issue arising out of the legal relationship contractual or otherwise in which a party individual, a body corporate, government of the country other than India is not involved. In domestic arbitration, the subject matter, issue and contract arise in India. The parties are subject to the Indian Jurisdiction.

ii. International Arbitration

The arbitration relating to the legal issues arising out of the legal relationship contractual or otherwise in which a party individual, a body corporate, government of the country other than India, is involved.³⁸

iii. Foreign Arbitration

The arbitration conducted outside India and the award made thereto which is required to be implemented in India. These awards are executed as foreign awards under the concerned provision of the Arbitration and Conciliation Act, 1996.³⁹

iv. Ad hoc Arbitration

The arbitration consented and conducted with the mutual consent of the parties without having any recourse to the institute. Some private players can enter in this field of arbitration. The chief justice of India may sanction any institute or body which is expertise in the arbitration matters to conduct ad hoc arbitration.

v. Institutional arbitration

³⁷ G.K. Kwatra, Arbitration and Conciliation Law of India 4 (Universal Law Publishing Co., New Delhi 2014).

³⁸ Section 2 (1) (f):

“international commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

(i) an individual who is a national of, or habitually resident in, any country other than India; or
(ii) a body corporate which is incorporated in any country other than India; or
(iii) 2 *** an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign court”

³⁹ Section 2 (7): “An arbitral award made under this Part shall be considered as a domestic award.”

The arbitration conducted by the institutions which provide arbitration services in commercial manner under the rules prescribed is known as institutional arbitration. There are numerous institutions working in this style and manner in India.

vi. Statutory arbitration

Some statutes provide arbitration clauses and the arbitration proceeding initiates from such statutory obligations, these types of arbitrations may be called as the statutory arbitration. There are numerous Acts like The Railways Act, 1890, The Land Acquisition Act, 1894, The Indian Electricity Act, 1910, The Cantonment Act, 1924 etc. The provisions of the Act of 1996 also deal with such type of arbitration. The Act of 1996 except the sections 40(1), 41 and 43, applies to such type of agreements.⁴⁰

To make the commercial arbitration better equipped with latest laws, an ordinance was issued in 2015. The ordinance made important distinction between domestic and international arbitration in its implication. The “Court” was defined in the said ordinance. However, the jurisdiction regarding the domestic arbitration is left with the district courts whereas the High courts were entrusted the extra ordinary power to directly hear the matters of international arbitration for interpretation. Part-I of the Arbitration and Conciliation Act, 1996 and the provisions regarding interim measures and of taking the evidence on record are also made applicable to the international arbitration. However, the parties are free to agree to the contrary in their arbitration agreements. It used the words “Supreme Court” and “High Court” instead of Chief Justice of Supreme Court or Chief Justice of High Court. This classification impacted the time limit to appoint the arbitrators within Sixty Days by Supreme Court or High Court or any person designated by them from the serving of notice to the opposite party. It also put cap over the fee of arbitrator as per the prescribed rates in fourth schedule. A fifth schedule is also

⁴⁰ Section 2 (4):

“This Part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder”

added to ensure the impartiality and independence of the arbitrator more onerous. The interim orders passed by the arbitral tribunal have been made enforceable as of the orders of the civil courts. The parties are given the relief to file counter claim and set off their claim in the arbitral proceedings.⁴¹

The new law enumerates that the day to day proceedings shall be conducted by the tribunal for hearing the evidences. The adjournments shall not be granted without any sufficient cause and the heavy costs shall be imposed for it. To fulfill the aspirations of the Act of 1996, the new provisions provide the time bound arbitrations. The arbitration award is mandatory to be passed within 50 twelve months from the date of its reference. The time can be extended only by six months with the consent of the parties. The application of the extension of time period is to be disposed of by the appropriate courts within sixty days. The fee of the arbitrator is to be reduced by five percent during the period of extension. Any further period may have extended by the courts only on the sufficient cause and on any other terms. The provision to opt for fast-track procedure has also been provided in the ordinance.

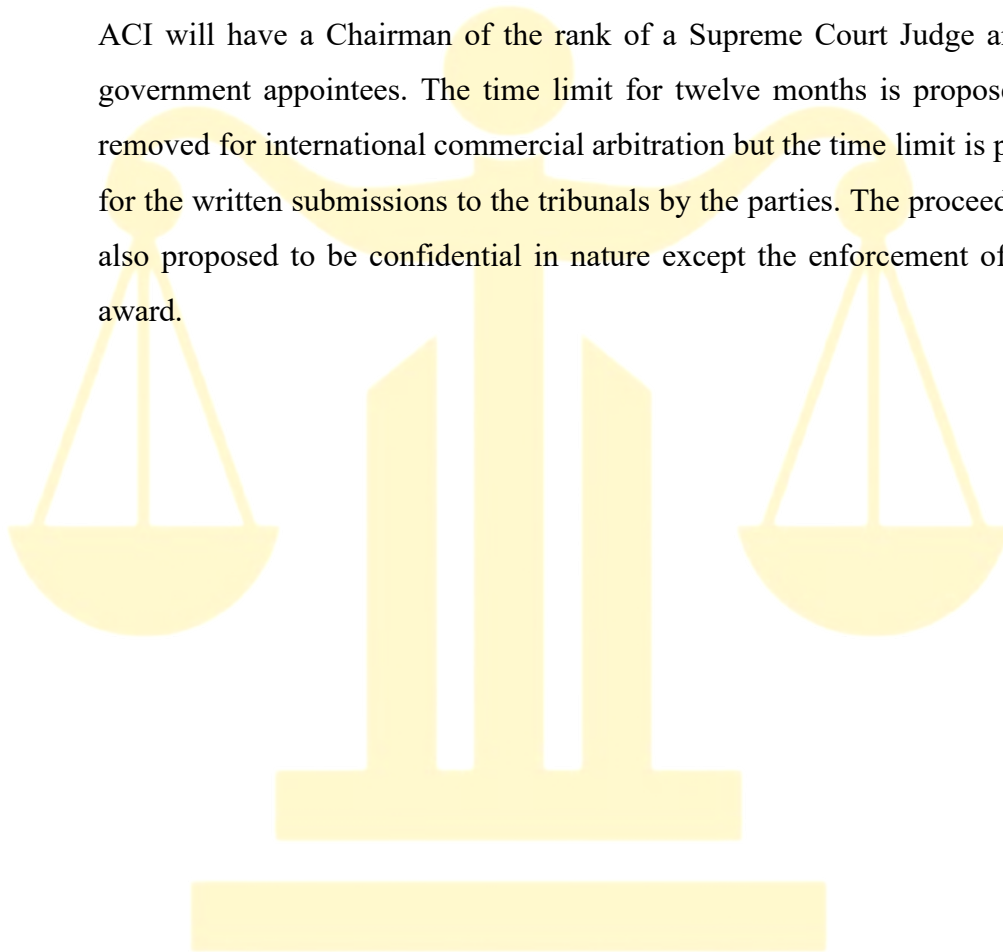
The award shall no more be stayed automatically by virtue of filing the application under section 34 to set aside the grounds provided in the Act. There should be specific order of court in this regard. The clarifications have been added to section 48 and 57 as to when the international law shall be deemed against the public policy of India. The new law also made the order of reference to arbitrator an appealable.

To make India a robust center for institutional arbitration for both domestic and international arbitration, the central government constituted a high level committee under the chairmanship of Hon'ble Justice B.N. Sri Krishna. It examined the effectiveness of the existing arbitration mechanism in India. It

⁴¹ The Arbitration and Conciliation (Amendment) Ordinance, 2015.

gave its report on 30th July, 2017. The report evolved an eco-system for commercial dispute resolution and suggested reforms in The Arbitration and Conciliation Act, 1996 to make it more effective and efficient.

On July 18, 2018, The Arbitration and Conciliation (Amendment) Bill, 2018 was presented in the Lok Sabha on the basis of report of above mentioned high level committee headed by Justice B.N. Sri Krishna. An ACI i.e. Arbitration Council of India is proposed to establish which will work for the promotion of Arbitration, Conciliation, Mediation and other alternative dispute mechanisms. ACI will have a Chairman of the rank of a Supreme Court Judge and other government appointees. The time limit for twelve months is proposed to be removed for international commercial arbitration but the time limit is proposed for the written submissions to the tribunals by the parties. The proceedings are also proposed to be confidential in nature except the enforcement of arbitral award.



CHAPTER 3: MEDIATION PROCESS AND TECHNOQUES

EVALUATION ON FACILITATIVE MEDIATION AS A FACET OF MEDIATION

Facilitative mediation, a widely recognized approach to resolving conflicts, has gained popularity due to its emphasis on empowering parties to reach mutually acceptable solutions. As a facet of mediation, evaluation plays a vital role in enhancing the effectiveness and efficiency of the mediation process. This article explores the importance of evaluation in facilitative mediation, its benefits, and how it contributes to the overall success of mediation.

UNDERSTANDING FACILITATIVE MEDIATION:

Facilitative mediation is a non-adversarial dispute resolution process wherein a neutral third party, the mediator, assists parties in reaching a mutually satisfactory resolution. Unlike evaluative mediation, which focuses on providing opinions and recommendations, facilitative mediation encourages open communication, active listening, and collaboration among parties. The mediator facilitates discussions, manages emotions, and supports parties in generating their own solutions.

THE ROLE OF EVALUATION IN FACILITATIVE MEDIATION

Evaluation in facilitative mediation refers to the process of assessing and providing feedback on the mediation process itself, rather than evaluating the merits or strengths of parties' arguments. It serves multiple purposes:

1. Enhancing Mediator Skills:

Evaluation allows mediators to receive feedback on their performance, enabling them to refine their skills and approaches. This feedback loop helps mediators develop better strategies for managing conflicts, fostering effective communication, and promoting parties' self-determination.

2. Quality Control:

Evaluation provides a mechanism for ensuring the quality and adherence to mediation principles and standards. By evaluating mediators' adherence to ethical guidelines and best practices, evaluation processes contribute to maintaining the integrity of the

mediation profession.

3. Continuous Improvement:

Through evaluation, mediators and mediation programs can identify areas for improvement and implement necessary changes. Evaluating the mediation process helps enhance its efficiency, effectiveness, and overall success rate. Continuous improvement ensures that facilitative mediation remains a relevant and valuable dispute resolution mechanism.

Benefits of Evaluation in Facilitative Mediation:

1. Increased Transparency:

Evaluation promotes transparency in the mediation process. Parties are assured that the mediator's performance is subject to evaluation, providing them with confidence in the mediation's integrity and fairness.

2. Learning Opportunities:

Evaluation offers a valuable learning opportunity for both mediators and parties. Feedback obtained through evaluation helps parties understand their communication styles, areas of strength, and areas for improvement. Mediators, too, can gain insights into their facilitation techniques, enabling them to adapt and refine their approach.

3. Enhanced Trust:

The inclusion of evaluation in facilitative mediation can foster trust among parties. When parties see that the mediator is committed to a fair and impartial process, and that their concerns and feedback are considered, it builds confidence and increases their willingness to engage fully in the mediation.

4. Efficiency and Effectiveness:

Evaluation helps identify potential roadblocks or areas of stagnation in the mediation process. By recognizing these challenges, mediators can intervene appropriately, redirecting the discussions towards productive outcomes. This improves the efficiency and effectiveness of the mediation, facilitating the timely resolution of disputes.

Evaluation serves as a valuable tool in facilitative mediation, contributing to its continuous improvement, transparency, and overall success. By providing feedback to mediators and empowering parties with insights into their communication

dynamics, evaluation enhances the mediation process. It promotes trust, learning, and efficiency, allowing parties to engage constructively and reach mutually satisfactory resolutions. As facilitative mediation continues to gain prominence as a preferred method of dispute resolution, evaluation will remain crucial in furthering its effectiveness and maintaining its relevance in a rapidly changing world.

*Society is ever changing and so is social harmony and conflict is no different. Human being is a social animal and society precedes the individual.*⁴²

3.1 WHAT IS SOCIETY AND CONFLICT?

A human live, fulfils its duty, and works as per social and legal norms set by the society. These norms help an individual to live a civilized life. These social norms are sanction one way or the other in order to avoid any indifference created between the persons and so that it will not form a dispute. Any confliction may lead to any illegality aggravated with intolerance, misrepresentation and Cultural, personality, behavioural, situational, emotional differences. It may be the content conflict or the rational conflict.⁴³ A person may vary from the idea to solve a problem but in reality people disagree with one another which may lead to litigation and from where conflict resolution system starts. To understand the process and in order to execute it one needs to understand its basic concept.⁴⁴

3.2 MEDIATION PROCESS

Every mediation process follows the following seven stages:

3.2.1 OPENING STATEMENT

The parties meet each other and they are offered to sit in comfortable atmosphere to discuss with ease and comfort in the mediation centre. Then the Mediator introduce himself to the parties.

⁴² Aristotle, Aristotle's Politics 1253 (Oxford: Clarendon Press 1905).

⁴³ Sophia Jowett, David Lavalle, Social Psychology in Sport 34 (Human Kinetics, United States 2006).

⁴⁴ Jenniffer E. Beer and Caroline C. Packard, The Mediator's Handbook (New Society Publishers, Canada 2012).

They choose if they want to change the mediator or not but if the parties have any objection they can appoint any other mediator with permission of court. The mediator clarify the ground rules and preliminary discussions are considered important for an advocate to learn information about the mediator.⁴⁵ Therefore, the opening statement should be as simple as possible. Therefore, proper language and gesture to greet parties and advocates are important. Hence, opening Statement is a fundamental part of mediation.⁴⁶

3.2.2 GATHERING INFORMATION

The facts are provided by the court via memorandum and mediator takes the help of memorandum to understand the dispute. From the memorandum mediator forms its own mind and he has to listen actively in order to know whether facts are appropriate or inappropriate and also prepare notes. The behaviour and body language also form an essential part. Mediators understands the situation through behaviour and can form views accordingly.⁴⁷

Mediator can gather information via private session or joint session but a joint session is kept first to show neutrality. The parties may act rashly in heat of movement but the mediator needs to keep a strong hold over the process. It helps mediator about the mental status and level of understanding between parties but he must try to lower the tension between the parties in order to move forward.⁴⁸

3.2.2.1 CAUCUS

The mediator summons the parties into a private meeting to discuss the actual and secret information. In 1991, a scholar named Jacob acknowledged its value in identifying "blockages" and determining the true essence of conflict. Bowen then gave each party an equal amount of time in 1999. Depending on the mediation style chosen, a mediator may include a caucus stage as many times as necessary. Caucus can be

⁴⁵Truehar and Mary, "Harm's way? Family Mediation and the Role of Attorney Advocate" 23 Golden Gate V.L. Rev., 717-793 at 743 (1993).

⁴⁶Blankenhip and John T., "The Vitality of the Opening Statement in Mediation: A Jumping off point to consider the Process of Mediation" 9 Appalachian J.L., 165-190 at 181 (2209-2010).

⁴⁷ Joanne Fuller & Rose Mary Lyons, "Mediation Guidelines" 33 Willamette L. Rev. 905 (1997).

⁴⁸MihaelNoone, Mediation 118 (Cavendish Pub., London, 1996).

utilised before a joint session or even following a joint session, depending on what the mediation process requires.⁴⁹ There is no set rule for when to employ the caucus method, although it is usually better to do so when the disagreement seems difficult and unlikely to be resolved in the joint session alone. It is straightforward and done in the party's turn during private caucus. During a caucus, genuine problems are examined, and loopholes are utilised to identify deadlocks and impasses. The caucus is not, however, widely used. The exercises are carried out to establish an acceptable resolution by working on the topics of agreement; in addition to researching the concerns, it also fosters trust between the parties and the mediator. A mediator can focus weak points and try to convince them and shift the case on the real issues which are required to be solved.⁵⁰

3.2.2.2 JOINT SESSION

Joint session is the collective meeting of parties with mediator. Parties generally get aggravated but it is mediator's duty to handle the process. The mediator assesses the nature of the parties and dispute from the exchanged words between the parties. Mediators get the indication about the expectations of the parties from each other. Joint session can be convened before or after the caucus as mediator deems fit.⁵¹ Joint session helps the parties to understand each other and their needs. A joint session is very productive for the mediation session as it is a training ground to reach to an agreement.⁵²

3.2.2.3 RESTATE

Restating a remark or speaker's words is all that is meant by the word. The mediator may be able to get more concessions from the parties using this strategy. A mediator can signal to a party that he is actively listening by simply nodding his head, at which point the party is free to

⁴⁹ Parkinson L, Family Mediation 81 (London, England, Sweet & Maxwell, 1997).

⁵⁰ MihaelNoone, Mediation 98 (Cavendish Pub., London, 1996).

⁵¹ Joint Sessions: More Arrows in the Mediation Advocacy Quiver, <https://www.mediate.com/articles/BenZviD3.cfm> (Last Visited on October 01, 2018)

⁵² Why you should consider joint sessions in your next Mediation, <https://www.starkmediator.com/why-you-should-consider-joint-sessions-in-your-nextmediation-2/> (Last visited Date: June 06, 2022).

continue expressing its opinions. It protects the mediator from having to communicate his own opinions on the subject and delivers him from any awkward circumstances.⁵³

3.2.2.4 REPHRASE

An intermediary who helps the parties communicate is a mediator. A mediator has a responsibility to rephrase the parties' statements in order for the other party to attentively listen to the issues and try to comprehend the sentiments in order to better communication. Undoubtedly, no one wants to hear the accusations and the unfavourable suggestions made against him. Therefore, a mediator must extract the good from the bad ideas and transform the negative statement's structure into a positive one. A mediator can only do this by drawing the parties' attention to the speakers. A mediator can lessen the intensity of feelings that naturally result from the arguments and accusations being made in reflexive fashion. The parties' egos may be overflowing with their previous deeds. In order for the parties to consider the future views and value their relationships that can be salvaged and maintained in the future, a mediator must help the parties shift their attention from the past to the future. Only by compromising the position-based obdurate and turning it into interest-based discussions can this be accomplished.⁵⁴

3.2.2.5 REFLECT

To reflect to the statements in an elegant manner is another strategy to indicate the parties that the mediator is listening to them actively and understanding their feelings. To communicate the proper reflection, a mediator can ask the necessary and open-ended questions. Further, mediator can show empathy but not the sympathy as sympathy may indicate a negative feelings to the other party especially during the joint session.⁵⁵

⁵³ SriramPanchu, *Mediation-Practice and Law* 81 (Lexis Nexis, Gurgaon, 2015).

⁵⁴ *Id* at 12.

⁵⁵ SriramPanchu, *supra* note 12 at 33.

3.2.3 PROBLEM IDENTIFICATION

Following the aforementioned steps, the mediator has the necessary knowledge to pinpoint the root causes of the problem. The evaluation must now be verified with the parties. The parties must identify the issue, according to the mediator. The mediator must assist the parties in identifying them and reorganising their real issues. Once the parties are aware of the real challenges, they can only prioritise their desires and expectations. The degree of agreement and disagreement on the priorities may now be determined. The negotiation's agenda is set at this point.

3.2.4 GENERATING ALTERNATIVES

To find new options on the agenda is *sine qua non* of mediation. It helps the parties to reach on any or all of them. The alternatives are based upon the priorities of the parties. The focus should be on the needs and interest. It is a brain storming session that helps in solving the problem and harmonize the relation. The parties' must to be appreciated to generate more alternatives. Coming up with an interim agreement is also a good option for a successful mediation. Settlement range is the range from the target point to the resistance point.⁵⁶ Mediator helps the parties to recognize their target point. The target point takes off the process to a settled direction till the resistance point doesn't interrupt it. After meeting a resistance point Mediator helps the parties to alter the target points of the parties so that the resistance point may be removed from the path of conflict resolution process.⁵⁷

3.2.5 SELECTION OF OPTION

After generating the options and adoption of Best alternative negotiation alternatives the process enters the final stage of Bargaining. The negotiations held while selecting the options. Sometimes, the BATNA shows the result effectively and an agreement achieved between the parties directly. But sometimes some disagreements still remain there. Parties usually make small

⁵⁶Niranjan Bhatt, J.P Singh et.al., Theory and Practice of Mediation, Part I, 25 (Unpublished compilation, Punjab Legal Services Authority, Chandigarh, 2014).

⁵⁷ Christopher Moore, The Mediation Process: Practical Strategies for Resolving Conflict 115 (San Fransisco, Josey Bass Publishers, 1996).

concessions during the process of negotiations. The mediator needs to keep patience and to go work out with the ongoing small concession to reach to desirable goals. Mediator has to play its role of an interactive communicator between the parties to evolve cooperation to achieve desired goals and to avoid exploitation.⁵⁸ Negotiation is a wider terminology than the bargaining. Bargaining is the type of negotiation in which a buyer and seller of goods and services can bargain about the price, quality and quantity of goods. But in negotiation the parties can negotiate over any issue beyond the price quality and quantity of the goods. Negotiation also exchanges the ideas of values and performance of the agreements. In mediation, there is always the need of wider and narrower strategies. That's why the terms 'Bargaining and Negotiation' used interchangeably.⁵⁹ Mediation is a facilitated negotiation and now most prevalent method for resolving the disputes. Evaluation of the options done with the consensus of the parties and trained mediator needs the best alternatives to reach the desired goals with the negotiating methods. Two types of negotiating methods can be used which are as under:

3.2.5.1 POSITIONAL OR ADVERSARIAL METHOD

This is foremost negotiation strategy to be adopted by a mediator. Positional method of bargaining holds a fixed idea or position by sidelining the underlying interest. An example can be taken of a buyer and seller where the second one is not ready to sell the goods below a minimum price and the buyer is not ready to buy the goods at that offered price. Both the parties stick to their positional ends. In this method the mediator's main purpose is to make the parties more comfortable with their small concessions until they achieve a mutually agreed consensus.⁶⁰

3.2.5.2 INTEREST BASED METHOD

Interest based method may resolve the disputes keeping in view the interests of the parties. The desires and expectations and the needs of

⁵⁸*Id* at 16.

⁵⁹*Id* at 16

⁶⁰ The Art of Negotiation, Positional v/s. Interest based Bargaining, <https://medium.com/swarm-nyc/the-art-of-negotiation-positional-vs-interest-basedbargaining-c1931ce9ab4b> (Last Visited on May 04, 2022).

the parties are meted out to create all over win-win situation. This method is more significant as it saves the relations of the parties by creating mutual agreement on each aspect of the disputes. Egos are satisfied and the problems are buried under the all over satisfaction of the parties.⁶¹ Mediator helps the parties by above mentioned two methods. Parties may create a gap in positional method by not moving from their position towards their targets. Mediator can turn the positional method into the interest based bargaining to show the actual path of peace and profit. This is how a dispute can be transform in to all over win-win situation. The transformative mediation first articulated by Bush and Joseph Folger also worked out on the same footings. As per their practice the relation empowerment was given the priorities. Not talks were converted by the transformative mediation into interpersonal responses and constructive instructions. It builds a new understanding between the parties and helps them to take their own decision. If it works, the parties overtake the mediation to resolve their dispute by creating alternatives by themselves⁶².

3.2.5.3 STYLES OF BARGAINING

The mediator assists the parties by negotiating potential solutions and making the best decision possible. The following are the negotiating strategies, including the challenging sorts of bargaining tactics:

- Principled Bargaining
- Soft Bargaining
- Positional Bargaining
- Hard Bargaining
- Distributive Bargaining
- Integrative/Collaborative Bargaining

⁶¹*Id* at 19.

⁶² Transformative Mediation, https://en.wikipedia.org/wiki/Transformative_mediation (Last Visited on June 04, 2022).

3.2.6 IMPASSE AND STRATEGY

Impasse is a situation in which no progress is possible, because of disagreement, a deadlock. It is a phase in which the parties do not move forward from their positional ends. The parties become so adamant that they think the process of mediation is useless and time-wasting. It goes in the mind of parties that we have been regularly convinced to bow but the other party does not compromise in any matter. It may also run in the minds of the parties that the opposite party is using the tool of mediation to delay the actual process. Mediator usually perceives the situation that the parties are running out of ideas and he himself has to think out of the box. Before preparing the strategy to get rid of this situation of impasse, a mediator has to keep his positive approach intact in mind. Mediator should expect impasse in every session as it is a natural outcome of tug of war between the views of the parties. There would be any rare instance where the mediation goes without impasse. Since beginning of the session and till the agreement is signed, impasse may evolve at any point and number of times. Mediator should remain optimistic and regularly try to influence the parties. He may highlight the progress achieved in the session. A positive wave should be sent to the parties that there are still enough chances to reach an agreement. The parties have to be realized that they have been in a better position during the process and will be in a best position if they resolve their loggerheads.⁶³

3.2.6.1 STRATEGIES TO BREAK THE BARRIER

The picture of a good relationship in future and especially without any dispute between them can be shown to the parties. The parties should try to focus at their interests rather than their opposite pole positions. Mediator should remind the parties about the benefits of the positive outcome of mediation. There are other strategies to break the barriers.⁶⁴

3.2.6.2 BLOCK IDENTIFICATION

Mediator is the controller of the process and is well connected with progress made during the process. He is aware about the bargaining

⁶³*Idat* 21.

⁶⁴The Art of Negotiation, Positional v/s. Interest based Bargaining, *supra* note 19 at 34.

style of the parties and their expectations. Mediator should assess the expectation gap. Even otherwise, mediator should ask the parties about the fact which is holding the back from moving ahead. Once the real blockage is understood by the mediator, the appropriate solution can be found out accordingly.⁶⁵

3.2.6.3 LEGAL REALISM

Litigants usually approach the court for litigation in heightened sense of strength of their case. This sense may be the approach of the litigant or of their counsels. Mediator can show them the real picture but in a sophisticated manner and without utter in *malafide* about anyone. Mediator can ask the parties to apprise himself about the strong facts of the opponents. This strategy can help the parties to self-assess their own position in the legal battle. Alike strengths, the weakness of their own facts can also be asked.

3.2.6.4 PROBLEM SOLVING APPROACH

The open minded approach to look at the real issues of the parties is essential. A narrow minded mediator cannot perceive the issues involved more than money. Narrowly focused approach may blind the mediator to look at the other needs of the parties hidden in the matter. The problem solving approach always provides the framework to solve the issues.⁶⁶

3.2.6.5 PERSEVERANCE

It is the perseverance in mediation which counts. Only the Settlement cannot be termed as success in human life. At every stage of life, persistence in doing something despite the difficulties is a real success in itself. To try hard to achieve an amicable arrangement in mediation, the participants have to overcome the difficulties like impasses⁶⁷.

⁶⁵*Id* at 23.

⁶⁶ Herald I. Abramson, *Mediation Representation: Advocating as Problem Solver* 4 (Wolters Kluwer Law and Business in New York, New York, 3rd ed., 2013).

⁶⁷ Secrets of Mediation: How to Succeed in Mediation, available at : <https://www.mediate.com/articles/WeissSecrets.cfm> (Visited on June 18, 2018).

Further, unwillingness is a big element which frustrates a mediator. Many clients came half-heartedly but after private and group discussion many of them starts realizing that there is a possibility of settlement which can further save the relations. The participants, who try a second chance after impossibility and impasse, usually have more chances to achieve in mediation than to those clients who gave away any hope. Pursuing the avenues continuously towards a settlement to preserve the relation and mediation; pays a lot to the parties and mediators. Conclusively, the perseverance is a secret for settlement in mediation.⁶⁸

3.2.6.6 APOLOGY

The strategy of apology seems to be a sorry figure but it can be a great tool to break the impasse. Feelings and emotions are not the part of legal proceedings nor is the basis of any pleadings in the court of law but it may have a great impact in dispute resolution to satisfy the egos of the parties which can overawe any dispute. A single word of 'sorry' can sometimes do a miracle.⁶⁹

3.2.6.7 RANGES

When the parties stay far from each other that no one tries to offer and accept any demand. The ranges of figures in numbers can create a bracket in which the disputes can be solved. Mediator may ask the parties a range to settle the dispute like six or seven figures; once the impasse starts breaking, the ranges can be shifted towards low six figures or high six figures as the case may be. This technique may bring the parties closer.

3.2.6.8 JOINT SESSION

As discussed a lot earlier, the joint session at this stage can also be proved on effective impasse busting techniques. Mediator only needs

⁶⁸Niranjan Bhatt, J.P Singh et.al., Theory and Practice of Mediation 23 (Unpublished Compilation, Punjab Legal Services Authority, Chandigarh, Part-II, 2014).

⁶⁹*Id* at 27.

to focus on the discussion. The discussion held in the joint session may prove to be a problem solving.

3.2.6.9 CONDITIONAL OFFER

The conditional offer is like a closed technique and used where the party does not show the responsibility of the specific offer. The mediator can ask a party fixed amount to be offered to the other party. In case, this technique fails, even then, it may give the idea of bottom line of the offers of the parties.

3.2.6.10 MEDIATOR'S PROPOSAL

This is also a type of closed technique to be used by a mediator at its own. Mediator may offer a specific amount to the parties separately and if it works he may open his card to the parties and achieve an agreement. The difference between the mediator's proposal and the conditional offer is that in this present case the offer is to be made to one party is not known by the other. It is without the consent and pre discussion with one of the parties. The pre mature use of this technique shall be a futile exercise.⁷⁰

3.2.7 WRAP-UP

Wrap-up generally means the conclusion of a process. However, it may be done at any stage or before or after the final agreement. Wrapping up properly before entering into a next stage can also is a good option for a mediation process.⁷¹ It can be done as follows:

- Wrap-up at the Each Session
- Wrap-up in case of Non- Settlement
- Wrap-Up Before Agreement

3.2.8 THE SETTLEMENT AGREEMENT

The settlement agreement is based on the consensus achieved by the parties themselves. It is totally different from the agreement of contract but figures

⁷⁰*Id* at 28.

⁷¹*Id* at 29.

like that. Every settlement agreement is unique in features because it is created by the parties and concerned only for common interests. It rebuilt the relations of the parties. It is the reflexion of recognizing the common interests, needs and duties of each other. It defines the roles of the respective parties to accomplish the agreement in practicality.⁷² That's why, the settlement agreement must be written, maintaining its uniqueness in the following way:

- **IDENTIFYING AND NAMING THE PARTIES**
- **FRAMEWORK OF THE AGREEMENT**
- **ESTABLISHING HIERARCHY OF POINTS**
- **LANGUAGE**
- **REVISION**
- **READING THE AGREEMENT**
- **CEREMONIAL SIGNING**

3.3 ROLE AND ETHICS OF A MEDIATOR

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 solve the dispute, emphasizing that it is the responsibility of the parties to take decisions which affect them; he shall not impose any terms of settlement on the parties. In the process of mediation, the consent of the party and the mediator is very essential for the successful mediation as the parties cannot be enforced to settle the disputes through mediation and the proposals of the mediation is also not binding on the parties. The role of mediator is to maximize the chances of an acceptable agreement. It is the obligation of the mediator to evaluate the risk and to figure out settlement and litigation strategy. The process of mediation also impacts the parties. If the chances of a settlement are low even, then the mediation produces such type of environment that it automatically becomes effective to resolve the dispute. Lawyers and judges should be committed for an early

⁷²Niranjan Bhatt, J.P Singh et.al., Theory and Practice of Mediation 23 (Unpublished Compilation, Punjab Legal Services Authority, Chandigarh, Part-II, 2014).

mediation. With proper strategies adopted, the parties can ensure themselves that they are preparing for success.⁷³ A mediator can maintain the ethics in following ways:

3.3.1 APPRISING THE PARTIES ABOUT IMPORTANT FACTS

A mediator should tell the parties about the facts which may shake the trust of parties. If the mediator is connected to the dispute in any manner or having any personal interest not known to the parties, then the mediator must tell the parties and the final decision be left with the parties whether to go ahead or not.

3.3.2 ENSURING IMPARTIALITY

A mediator should ensure the impartiality during the mediation process. There should be no prejudice or bias in the mind of the mediator. There can be following types of bias which should be dealt properly:

3.3.2.1 SELF-SERVING BIAS

It is the tendency of the person where he thinks that he performs better than the others. The degree where the bias comes to the mind of person, it will definitely influence the case evaluation process and affect the mediation process in one or the other way.⁷⁴

3.3.2.2 OVER-CONFIDENCE

The over confidence of a mediator is always fatal for the process. The expectation of correctness of belief about the views leads to the inaccuracy in their case evaluations and the estimation of the problems.

3.3.2.3 ENDOWMENT EFFECT

The overvalue something in the estimation of “mine” is called the endowment effect. It can be at both sides. The parties may estimate the claim regarding their ownership or the mediator can overvalue the

⁷³ Why you should consider Joint Sessions in your next Mediation, <https://www.starkmediator.com/why-you-should-consider-joint-sessions-in-your-nextmediation-2/> (Last Visited on June 14, 2022).

⁷⁴ How our Subconscious Bias Impacts Negotiations and the Mediation Process by Hunter R. Hughes, <http://www.americanjournalofmediation.com/docs/REFORMATTED%20%20HOW%20OUR%20SUBCONSCIOUS%20BIAS%20IMPACTS%20NEGOTIATIONS%20%20Hunter%20Hughes.pdf> (Last Visited on May 27, 2022).

ongoing success of the process as exclusively his. Mediator must control this effect at both sides to get better results.⁷⁵

3.3.2.4 AVAILABILITY OF IMMEDIATE INFORMATION

The readily available information or the easily identified problem may be a big trap for the mediator. It may prevent him to go in details. There can be a wrong comparison of facts and may bias the mind of mediator.

3.3.2.5 EMOTIONAL TAGGING

The emotional aspects of a particular party may create bias in the mind of a mediator. The mediator's own sufferings from the similar type of situations or his similar caste based bias may influence in his mind. This type of emotional tagging should be assessed at the earliest and must be prepared initially to handle it sophisticatedly.

3.3.2.6 PATTERN RECOGNITION

Experienced mediator accesses the problems and their solutions from their past experiences and similar cases they handled. It may influence their mind and prevent them to think out of box to get better ideas and ways to solve the problems. The rational judgment they form out with their experiences may bias their mind that nothing can happen or the matter can be solved only if the particular party leave his stand. This type of bias should be dealt with carefully.

3.3.2.7 LEGAL ADVICE

A mediator is a facilitator and he should refrain himself to tender any legal advice. At the most he can only apprise the parties about their weak and strong points of the party and about the opposite party and that is only to show them the mirror so that they may realize that the

⁷⁵*Id* at 33.

mediation process is the best option to create all over win-win situation.⁷⁶

3.3.3 PREVENTING MISUSE OF THE PROCESS

If it seems that the party or parties are trying to abuse the process of law for their self-hidden benefits or misusing the process to delay the legal matters, mediator should take immediate action to stop the abuse of the process.⁷⁷

3.3.4 TERMINATION OF PROCESS

It can be possible in rare cases that the process can spoil the relations of the parties. The feelings can be hurt there and further can cause more problems. If such type of situation arises then the process should be terminated immediately.⁷⁸

3.3.5 INTERESTS OF THE THIRD PARTIES

Sometimes the interests of the parties are connected with the disputes of the parties. Mediator should be careful in such type of matters. If the interests of any third person affects with the agreement then mediator should consult with the affected party during the mediation process otherwise it may cause the multiple litigation.⁷⁹

3.3.6 POWER IMBALANCE

It is the duty of Mediator to conduct a fair and equal treatment and if any party tries to influence the other party, the mediator must interfere and take control of the process. Power imbalance is an inevitable phenomenon in the process of mediation.⁸⁰

3.3.7 QUALITY OF PROCESS

A professional service provider known as a mediator is chosen by the government to guarantee justice, equality, and fair treatment. The mediator is

⁷⁶ Why you should consider Joint Sessions in your next Mediation, <https://www.starkmediator.com/why-you-should-consider-joint-sessions-in-your-nextmediation-2/> (Visited on May 23, 2022).

⁷⁷ *Id.* at 35.

⁷⁸ *Id.* at 36.

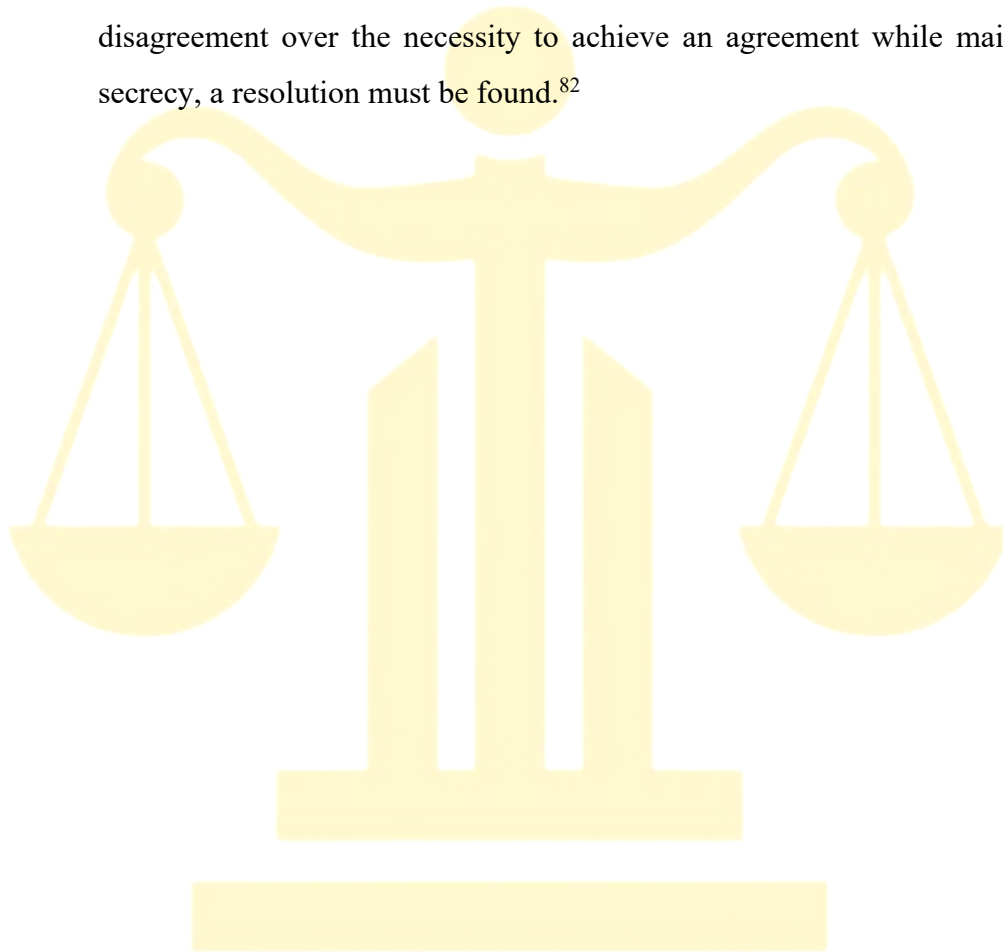
⁷⁹ *Id.* at 37.

⁸⁰ *Id.* at 38.

in charge of upholding decorum throughout the mediation. He needs to work hard and diligently. He ought to approach his profession with a never-die mentality. A mediator must avoid engaging in unethical behaviour. The parties will comply if the mediator maintains his trust in the process, which will be evident in his personality.⁸¹

3.3.8 ETHICS

Whatever is spoken or written during mediation must be kept secret, according to mediation ethics. The success of a mediator depends on maintaining confidentiality, which is a crucial component of mediation. Where there is a disagreement over the necessity to achieve an agreement while maintaining secrecy, a resolution must be found.⁸²



⁸¹*Id.* at 39.

⁸²Mediation: Confidentiality and Enforceability, <http://www.law.com/sites/kimberlytaylor/2015/04/06/mediation-confidentiality-andenforceability/>, (Last Visited on May 20, 2022).

CHAPTER 4: MEDIATION: GLOBAL SCENARIO

4.1 INTRODUCTION

The sheen of mediation is increasing with the span of time. Nowadays the judicial agencies have shown keen interest in pushing this system forward to reduce the burden on judiciary. The problems in the course of litigation that public and in the adoption of the mediation process as an alternative dispute resolution system, is not a new thing. India is not the only country which is adopting the concept of mediation. We, the people of India, are not only the victims of the malicious prosecution or of the lengthy litigation process. In 1910, Roscoe Pound fixed a round table conference with advocates and other law intellectuals. This is popular with the name of 'Pound Conference.' This clears the picture from the subject of conference which was entitled, 'The Causes of popular Dissatisfaction with the administration of Justice'. Interestingly, the points that were put forward by Pound at that time and still it is applicable in the working of progressing societies, it was stated that:

1. Judges are deciding the matters as per the rules of the game and what the counsel pleading. They are not searching the truth.
2. The question is 'what do substantive law and justice requires'? But the problem is, "have the rules been carried out strictly?"
3. The witness box has become the slaughter house of reputation⁸³.

In this way Pound conference advocates for the adoption of ADR Methods especially the mediation for resolution of the conflicts and it suggested the governments to make laws and rules in this direction. After this, the Arbitration, Conciliation etc., the process of Mediation got the international accords which are:

4.2 SOURCES

4.2.1 HAGUE CONVENTION

Hague convention on private international law⁸⁴ adopted the mediation on the tunes of its previous convention⁸⁵. The 'Guide on good practice' released by

⁸³SriramPanchu, Mediation Practice & Law: The Path to Successful Dispute Resolution 330 (LexisNexis, Second Edition 2015).

body efficiently coined the terms ‘Mediation’, ‘Mediator’, ‘Direct’ and ‘Indirect Mediation’ etc. for the purpose of cross-border family disputes and contracts the term ‘Indirect Mediation’ was defined as where the parties do not meet the mediator at the same time but do it in an alternative manner at different times and different places. Whereas the definition of ‘Indirect Mediation’ is widening the scope of mediation process, the definition of ‘Direct Mediation’ which includes the meeting of the parties with the mediator over the telephonic/video conferences widening the method of mediation process. The provision of bi-cultural and bilingual mediation has been kept for better understanding of the views of the related persons to the concerned parties which are beneficial during ‘Caucus’. The importance is also given to the voice of the child in the process. The agreement that the parties came to has been made binding on them and the member states has to enforce it as per the laws existing in their countries.

4.2.2 WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO)

In 2007, mediation rules were also adopted by the ‘World Intellectual Property Organization’ having the scope which enumerates as, “where a mediation agreement provides for mediation under the ‘WIPO Mediation Rules’, these Rules shall be deemed to form part of that particular Mediation agreement. Unless the parties to the mediation have agreed otherwise, these Rules as in effect on the date of the beginning of the mediation shall apply.”⁸⁶

4.2.3 EUROPEAN UNION

For the maintenance and development an environment of freedom, security and justice, U.N. parliament and the council of the European Union clarifies it in Directives. Previously, the European Council in Tampere preferred the use of Alternative and extra Judicial procedures and were of the view that it

⁸⁴Dr.GerardineGoh Escolar, Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction- Recent Developments, Current status and Challenges, (November 16, 2020), https://www.europarl.europa.eu/cmsdata/215402/GOH_speaking%20notes.pdf.

⁸⁵*Id.* at 81.

⁸⁶WIPO (World Intellectual Property Organization) Mediation Rules, <http://www.wipo.int/amc/en/mediation/rules/> (last visited May 24, 2022).

facilitates the access to justice⁸⁷. In 2000, it favoured for the application of alternative methods to resolve the civil and commercial disputes⁸⁸. Further in an historic move, a green paper on ‘Alternative Dispute Resolution in Civil and Commercial Matters’ was presented.⁸⁹

With the passage of time, Mediation was seen as an effective alternative for settling the disputes in a more-friendly manner. Due to presence of merits and characteristics like voluntariness, cost effectiveness and speedy resolution it was found to be an alternative to the other alternative dispute resolution methods. A proper legal frame work and directives for it were adopted. European parliament and the council of the European Union on 21st May, 2008, passed the European Union Mediation directives with the objective foresight in the access to alternative dispute resolution system and to promote the amicable settlement of disputes by encouraging the process of mediation and this also ensures a balance between mediation and judicial proceedings.⁹⁰ These directives areas follows:

ARTICLE 1: OBJECTIVE AND SCOPE⁹¹:

The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balance between mediation and judicial proceedings. This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties’ disposal under the relevant applicable law. It further stated that this method shall not extend, in particular, to customs, revenue or administrative matters or to the liability of the State for commitment of acts

⁸⁷Tampere European Council 15 and 16 October 1999 Presidency Conclusions, http://www.europarl.europa.eu/summits/tam_en.htm (last visited May 24, 2022).

⁸⁸ 2266th Council Meeting- justice and home affairs -Brussels, 29 May 2000, http://europa.eu/rapid/press-release_PRES-00-183_en.htm?locale=en (last visited May 30, 2022)

⁸⁹ Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, <https://op.europa.eu/en/publication-detail/-/publication/61c3379d-bc12-431f-a051-d82fefc20a04> (last visited June 3, 2022)

⁹⁰ Directive 2008/52/EC of the European parliament and of the council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, <http://eur-lex.europa.eu/eli/dir/2008/52/oj> (last visited June 6, 2022)

⁹¹*Id.* at 87.

and omissions in the exercise of State authority. In this Directive, the term ‘Member State’ shall mean Member States with the exception of Denmark.

ARTICLE 2: CROSS-BORDER DISPUTES⁹²

For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a State that is a member other than that of any other party on the date on which:

- (a) the parties agree to use mediation after the dispute has arisen;
- (b) mediation is ordered by a court;
- (c) an obligation to use mediation arises under national law; or
- (d) for the purposes of Article 5 an invitation is made to the parties.

Notwithstanding paragraph 1, for the purposes of Articles 7 and 8 a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c). For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.

ARTICLE 3: DEFINITIONS⁹³

‘Mediation’ means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member state. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.

‘Mediator’ means a third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or

⁹² 2266th Council Meeting- justice and home affairs, *supra* note 85, at 45.

⁹³ *Id.* at 89.

profession of that third person in the member state concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

ARTICLE 4: ENSURING THE QUALITY OF MEDIATION⁹⁴

Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

ARTICLE 5: RECOURSE TO MEDIATION⁹⁵

A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

ARTICLE 6: ENFORCEABILITY OF AGREEMENTS RESULTING FROM MEDIATION⁹⁶

Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either

⁹⁴Certain Aspects of Mediation in Civil and Commercial Matters *supra* note 87, at 45.

⁹⁵*Id.* at 91.

⁹⁶ Alternative Dispute Resolution in Civil and Commercial Law, *supra* note 86 at 45.

the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 2. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.

ARTICLE 7: CONFIDENTIALITY OF MEDIATION⁹⁷

Mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

- (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
- (b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.

ARTICLE 8: EFFECT OF MEDIATION ON LIMITATION AND PRESCRIPTION PERIODS⁹⁸

⁹⁷*Id.* at 93.

⁹⁸Certain Aspects of Mediation in Civil and Commercial Matters *supra* note 91, at 47.

Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party.

ARTICLE 9: INFORMATION FOR THE GENERAL PUBLIC⁹⁹

Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organizations providing mediation services.

ARTICLE 10: INFORMATION ON COMPETENT COURTS AND AUTHORITIES¹⁰⁰

The Commission shall make publicly available, by any appropriate means, information on the competent courts or authorities communicated by the Member States pursuant to Article 6(3).

ARTICLE 11: REVIEW¹⁰¹

Not later than 21 May 2016, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive. The report shall consider the development of mediation throughout the European Union and the impact of this Directive in the Member States. If necessary, the report shall be accompanied by proposals to adapt this Directive.

⁹⁹ *Id.* at 95.

¹⁰⁰ *Id.* at 96.

¹⁰¹ *Id.* at 97.

ARTICLE 12: TRANSPOSITION¹⁰²

Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011, with the exception of Article 10, for which the date of compliance shall be 21 November 2010 at the latest. They shall forthwith inform the Commission thereof. When they are adopted by Member States, these measures shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

ARTICLE 13: ENTRY INTO FORCE

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

4.3 JUDICIAL DECISIONS

The judicial decisions of the different municipal and international courts can be seen as a source of recognizing the laws. The true spirit of law can be shaped by any of the judicial court of the world which can be further adopted by the others. In the process of mediation where the soul of the idea is the same throughout the world, the decisions given by the world forums has been considered by the other forum from time to time. It helped in developing the concept of mediation on various issues. Let us have bird's eye view on such developments subject wise:

4.4 MEDIUM OF COSTS

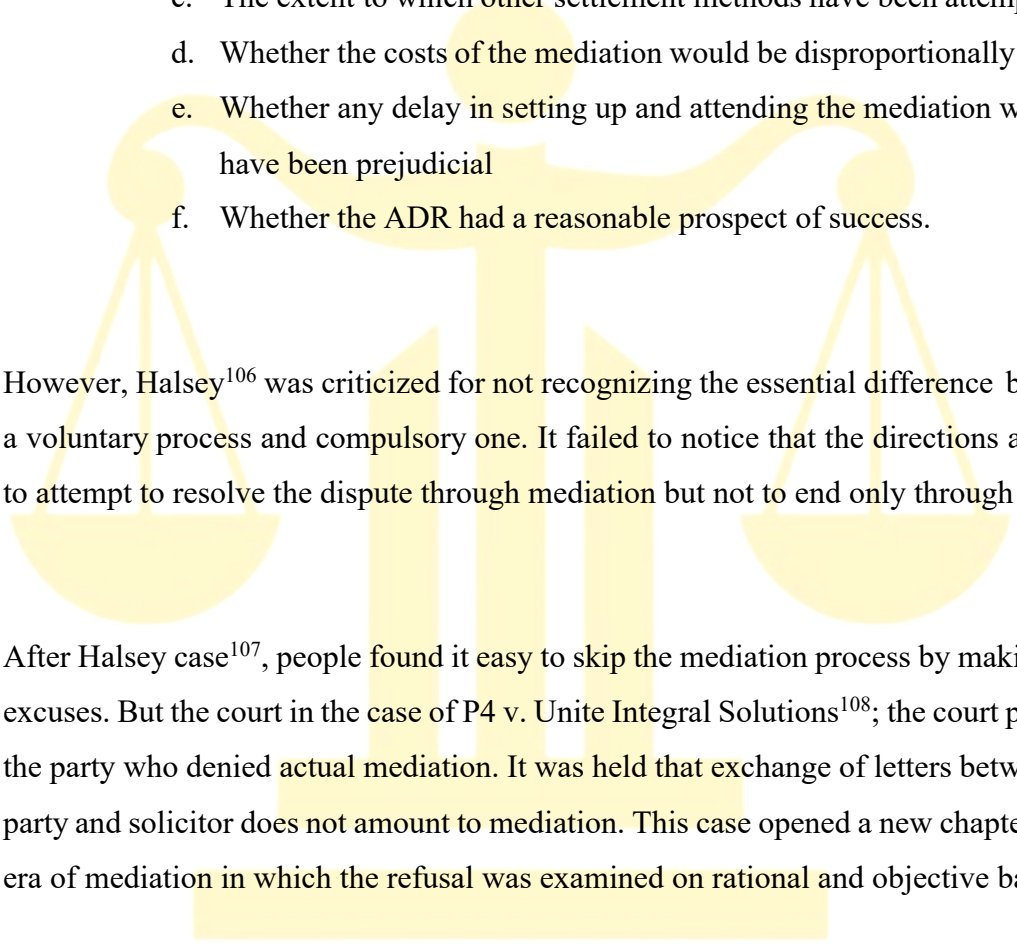
In a landmark case¹⁰³, the court refused to accept the plea of cost of the defendant who ignored the negotiations when advised by the court put into effect its previously issued warnings on the subject.

¹⁰² *Id.* at 98.

¹⁰³ *Dunnet v. Railtrack*, [2002] 2 All ER 850.

In *Valentine v. Allen*¹⁰⁴ and others it was held that if a party proves beyond doubt that it had made sincere efforts to settle the dispute and offered the reasonable settlements then it should not be punished in costs for parting its way from mediation.

In the popular case of *Halsey*¹⁰⁵, the court of appeals held that the burden of proof lies on the unsuccessful party to prove that why it should not be punished with costs. It further formulated the following guiding principles to decide the costs to a successful litigant:

- 
- a. The nature of the dispute
 - b. The merits of the case.
 - c. The extent to which other settlement methods have been attempted.
 - d. Whether the costs of the mediation would be disproportionately high.
 - e. Whether any delay in setting up and attending the mediation would have been prejudicial
 - f. Whether the ADR had a reasonable prospect of success.

However, *Halsey*¹⁰⁶ was criticized for not recognizing the essential difference between a voluntary process and compulsory one. It failed to notice that the directions are only to attempt to resolve the dispute through mediation but not to end only through it.

After *Halsey* case¹⁰⁷, people found it easy to skip the mediation process by making any excuses. But the court in the case of *P4 v. Unite Integral Solutions*¹⁰⁸; the court penalize the party who denied actual mediation. It was held that exchange of letters between the party and solicitor does not amount to mediation. This case opened a new chapter in the era of mediation in which the refusal was examined on rational and objective basis.

¹⁰⁴ [2003] EWCA Civ.915.

¹⁰⁵ *Halsey v. Milton Keynes General NHS Trust*, [2004] EWCA 3006 Civ 576.

¹⁰⁶ *Id.* at 102.

¹⁰⁷ *Id.* at 103

¹⁰⁸ [2007] BLR1.

In the case of *Burchell v. Bullard and others*¹⁰⁹, the court allowed the application of the party for costs for the wrongful denial of mediation. A very small amount had to be paid after the adjustment of the cost, when the main petition was allowed. But it was held that the party at default for wrongful denial of mediation has to pay the cost.

4.5 TIME

Timing is also felt important in the process of settlement of case in the process of mediation. In case of *Darren Egan v. Motor Services (Bath) Ltd.*¹¹⁰, it was observed that the best time for mediation is before the beginning of the litigation.

In another case of *Reed Executive Plc v. Reed Business Information Limited*¹¹¹, the application to slap the cost for the denial of Mediation by the defendant was declined by the court and held that the offer of mediation made at very later stage by the plaintiff.

4.6 DIRECTING THE PARTIES TO MEDIATE

In *Courtney and Fairbrain Ltd. v. Tolaini Bros.*¹¹² it was held that an agreement to mediate cannot be enforced. Interestingly it was observed that a contract to negotiate, like a contract to enter into a contract, is not a contract known to law.

But in United States, in the case of *CB Richard Ellis, Inc v. American Environmental Waste Management*,¹¹³ it was held that the mediation clause in the contract is enough to stop the litigation and compel the parties' for mediation. The process of initiation for the mediation was considered very important. In the case of *HIM Potland LLC v. De Vito Builders Inc.*¹¹⁴ any party did not take any initiative to attempt to mediate. It was held that the related provision does not automatically trigger until at least one party to the dispute do not request to mediate. Therefore, any party cannot be compelled to negotiate.

¹⁰⁹ [2005] EWCA Civ 358.

¹¹⁰ [2207] EWCA Civ 1002.

¹¹¹ [2004] ALL ER (D) 406.

¹¹² [1975] EWCA civ 1935.

¹¹³ 1998 WL 903495 (E.D.N.Y Dec.4, 1998).

¹¹⁴ 317 F 3d 41.

The Supreme Court of Australia expanded the scope of mediation in the case of *Hopcroft v. Olsen*,¹¹⁵ where it was held that the court has the jurisdiction to refer the parties to mediation at its own and without the consent of parties.

However, the district court of Hong Kong in the case of *Pradeep Ramchandra Ghatge vs. Mukesh Kumar Aduka*¹¹⁶ held that the order to mediate the dispute can only be meaningful if the parties really want to engage in such activity. In the present case the court sanctioned the voluntariness of the process of mediation.

In another case¹¹⁷ the court of law held that the parties should try mediation before contesting the case to avoid the lengthy process of litigation.

4.7 CONFIDENTIALITY

Party's freedom to talk in mediation process has been recognized as an important feature of the mediation process. The notes of a mediator and reports have been protected under the rule of confidentiality.¹¹⁸

California Supreme court reversed the judgment of Court of Appeals where order of discovery of derivative materials used in mediation was passed.¹¹⁹ It was held that such type of order is against the spirit of the rule of confidentiality in the mediation and it will further demoralize people not to use mediation process.¹²⁰

But in the case of *Rinaker v. Superior Court*,¹²¹ it was decided that if any statement made during the mediation process exculpate the criminal then it is not protected by the rule of confidentiality. It was further held that juvenile delinquency proceedings are more important than the justification of rule of confidentiality of the mediation process.

¹¹⁵ [1998] SASC 7009.

¹¹⁶ [2011] HKEC 563.

¹¹⁷ *Faith Bright Development Ltd. v. Ng Kwok Kuen*, [2010] 5 HKLRD.

¹¹⁸ *NLRB v. Joseph Macaluso*, 618 F. 2d 51, 55 (9th Cir. 1980).

¹¹⁹ *Rojas v. L.A. County Superior Court*, 2003 Cal. LEXIS 13.

¹²⁰ *Foxgate Homeowners' Assn. v. Bramalea California Inc.*, (2001) 26 Cal. 4th 3.

¹²¹ (1998) 62 Cal. App. 4th 155.

In the interest of justice and to maintain the rule of confidentiality in the mediation proceedings it was held that a mediator is not under any obligation to inform to the court about the bad faith of the party during mediation process.

Keeping in view the rule of confidentiality it was held that a mediator cannot act as arbitrator who has already taken the part in the mediation agreement as it will amount to disclosure of facts which are protected under the agreement of mediation.¹²²

The Canadian law is very clear on the rule of confidentiality. It was held by the court of law that as per their common law principle, the statements made during the process of mediation to settle the disputes are not admissible in the evidence.¹²³

On the similar pattern in *Porter v. Porter*¹²⁴ the court refused the party to introduce the report of the mediator in evidence and held that this practice is against the principle of privilege.

But in *Pearson v. Pearson*,¹²⁵ an exception to the principle of privilege was evolved. It was held that any criminal activity or any apprehension of harm to a child is not protected by the above said principle and the harm must report to the concerned authorities.

On the similar pattern the rule of without prejudice was accepted in United Kingdom. In *Brown v. Rice*¹²⁶ it was held that the negotiations made during the mediation is subject to the above said rule.

The U.K. Court in *Farm Assist. (Ltd) (In Liquidation) v. The Secretary of State for Environment, Food and Rural Affairs*¹²⁷ waived the rule of without prejudice and created an exception to the said rule that in the interest of justice mediator has to give evidence and cannot take the shield of principle of without prejudice especially when

¹²² *Minkowitz v. Israel*, 2013 WL 5336454.

¹²³ *Rogacki v. Belz*, 2003 Can LII 12584.

¹²⁴ (1983), 40 O.R. (2d) 417 (U.F.C.C).

¹²⁵ (1992) Y.J. No. 106 (S.C.Y.T).

¹²⁶ (2007) EWHC 625 (Ch).

¹²⁷ (2209) EWHC 1102 (TCC).

the question in issue is only about the economic duress of the party at the time of mediation and not about the disclosures of the other statements or negotiations.

4.8 STATUTES

4.8.1 USA

To promote the use of mediation and to ensure that parties may have the recourse to mediation. The Act of 2003¹²⁸ passed by USA which provides the court annexed mediation it also provides administrative agency and arbitrator reoffered mediation. To benchmark the standard of the mediation process and mediation, the model of American Arbitration Association (AAA) was adopted in 2009. In this, there is no need of written record to be kept.

4.8.2 SINGAPORE

Singapore mediation centre (hereinafter called SMC) was set up under the Singapore Mediation Centre Mediation Service Small Case Commercial Mediation Scheme Mediation Procedure, 2015. Under this act any party want to resolve the dispute through this centre have to fill the form and to submit in the SMC. Parties are required to sign the contract as per SMC model and it has the binding effect on the parties. SMC appoint the mediator/mediators as per the requirement. Parties reserve the right to object on the said appointment on the valid grounds. Mediator assists the parties to reach a settlement and no video audio recording is allowed of the process. No transcript prepared which further ensures the confidentiality of the mediation process. Agreement is to be written and properly signed by the parties and the mediator which binds the parties.¹²⁹

4.8.3 HONG KONG

Hong Kong International Arbitration Centre (hereinafter called HKIAC) was set up in Hong Kong by some corporate houses with the aid of Hong Kong Government in 1985. It was set up to provide the services of Arbitration to

¹²⁸Uniform Mediation Act, 2003, available at: http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf (Last visited on June 12, 2022).

¹²⁹ SMC Mediation Service, Small Case Commercial Mediation Scheme, Mediation Procedure, <https://www.mediation.com.sg/wp-content/uploads/2020/01/10-SCCMS-Mediation-Procedure-with-Annexes-24Jan20.pdf> (last visited May 21, 2022).

Mediation in Asia. These days it has become an autonomous body and regulating its own affairs and funds itself¹³⁰. To promote mediation the Hong Kong Mediation Council (hereafter called HKMC) was set up in 1994 under HKIAC¹³¹. HKMC is organizing the seminars and providing the training to the mediators. It is dealing in Commercial, family, Construction and General mediation.

4.9 COMPARATIVE ANALYSIS

4.9.1 CANADA

ARTICLE 2 OBJECTIVE AND SCOPE

The objective of the process of mediation is to facilitate the finding in a friendly manner which is mutually agreed through a comprehensive and expeditious procedure with the help of a mediator.

ARTICLE 3 INITIATION OF THE PROCEDURE

Either disputing party may request, at any time, the commencement of a mediation procedure. Such request shall be addressed to the other disputing party in writing. If the request concerns an alleged breach of the Agreement by the authorities of the European Union or by the authorities of the Member States of the European Union, and no respondent has been determined pursuant to Article 8.21 (Determination of the respondent for disputes with the European Union or its Member States) of the Agreement, it shall be addressed to the European Union. If the request is accepted, the response shall specify whether the European Union or the Member State concerned will be a disputing party to the mediation. The disputing party to which the request is addressed shall give sympathetic consideration to the request and accept or reject it in writing within 10 days of its receipt. If the disputing parties agree to a mediation procedure, they shall sign an agreement to mediate, in writing, setting out rules agreed to by the disputing parties, which shall include the rules in this Decision. The agreement to mediate may include an agreement not to commence or not to continue any other dispute

¹³⁰Hong Kong International Arbitration Council, https://en.wikipedia.org/wiki/Hong_Kong_International_Arbitration_Centre (last visited May 30, 2022).

¹³¹ Hong Kong Mediation Council, <https://www.hkiac.org/mediation/what-is-mediation/hong-kong-mediation-council> (last visited May 30, 2022).

settlement proceedings relating to the problems or disputes that are subject to the mediation procedure:

- (a) while the mediation procedure is pending; or
- (b) if the disputing parties have reached a mutually agreed solution.

An agreement pursuant to subparagraph 4(b) of this Article shall cease to apply if a disputing party, or both disputing parties, provide written notice, transmitted by way of a letter to the mediator and the other disputing party, terminating the mediation procedure.

ARTICLE 4 APPOINTMENT OF THE MEDIATOR

If both disputing parties agree to a mediation procedure, a mediator shall be appointed in accordance with the procedure set out in Article 8.20.3 of the Agreement. The disputing parties shall endeavor to agree on a mediator within 15 days from the receipt of the reply to the request. Such agreement may include appointing a mediator from the Members of the Tribunal established according to Article 8.27.2 of the Agreement or Members of the Appellate Tribunal established according to Article 8.28.3 of the Agreement. The disputing parties may, by written consent, agree to replace the mediator. If a mediator resigns, is incapacitated or otherwise becomes unable to perform his or her duties, a new mediator shall be appointed pursuant to Article 8.20.3 of the Agreement and in accordance with paragraph 1 of this Article. A mediator shall not be a national of either Party, unless the disputing parties agree otherwise. The mediator shall assist, in conformity with the Decision of the Committee on Services and Investment on the Code of Conduct for Members of the Tribunal, Members of the Appellate Tribunal and Mediators, the disputing parties in reaching a mutually agreed solution.

ARTICLE 5 RULES OF THE MEDIATION PROCEDURE

Within 10 days from the appointment of the mediator, the disputing party having invoked the mediation procedure shall present, in writing, a detailed description of the problem to the mediator and to the other disputing party. Within 20 days from the receipt of this submission, the other disputing party

may provide, in writing, its comments to the description of the problem. Either disputing party may include in its description or comments any information that it deems relevant. The mediator may decide on the most appropriate way of bringing clarity to the problem concerned. In particular, the mediator may organize meetings between the disputing parties, consult the disputing parties jointly or individually, seek the assistance of or consult with relevant experts and stakeholders and provide any additional support requested by the disputing parties. However, before seeking the assistance of or consulting with relevant experts and stakeholders, the mediator shall consult with the disputing parties.

The mediator may offer advice and propose a solution for the consideration of the disputing parties who may accept or reject the proposed solution or may agree on a different solution. However, the mediator shall not make a determination on the consistency of any measure at issue with the Agreement. The procedure shall take place in the territory of the Party that is a disputing Party, or by mutual agreement in any other location or by any other means. The disputing parties shall endeavor to reach a mutually agreed solution within 60 days from the appointment of the mediator. Pending a final agreement, the disputing parties may consider possible interim solutions.

On request of the disputing parties, the mediator shall issue to the disputing parties, in writing, a draft factual report, providing a brief summary of: (a) any measure at issue in these procedures; (b) the procedures followed; and (c) any mutually agreed solution reached as the final outcome of these procedures, including possible interim solutions. The mediator shall provide the disputing parties 15 days from the issuance of the draft factual report to comment on the draft report. After considering the comments of the disputing parties submitted within this period, the mediator shall submit, in writing, a final factual report to the disputing parties within 15 days from the receipt of comments of the disputing parties. The factual report shall not include any interpretation of the Agreement. In accordance with Article 8.20.5 of the Agreement, the mediation procedure shall be terminated by written notice of a disputing party, or of both disputing parties, transmitted by way of a letter to the mediator and the other disputing party, on the date that the notice is given.

ARTICLE 6 IMPLEMENTATION OF A MUTUALLY AGREED SOLUTION

If a mutually agreed solution is adopted by the disputing parties, each disputing party shall take the measures necessary to implement the mutually agreed solution within the agreed timeframe. The implementing disputing party shall inform the other disputing party in writing of any steps or measures taken to implement the mutually agreed solution.

ARTICLE 7 RELATIONSHIP TO DISPUTE SETTLEMENT

The procedure under this mediation mechanism is not intended to serve as a basis for dispute settlement under other dispute settlement procedures set out in the Agreement or in another agreement. A disputing party shall not rely on or introduce as evidence in other dispute settlement procedures, nor shall any adjudicative body take into consideration:

- (a) positions taken, admissions made or views expressed by a disputing party in the course of the mediation procedure;
- (b) the fact that a disputing party has indicated its willingness to accept a solution to the problems or disputes that are subject to the mediation procedure;
- (c) advice given, proposals made or views expressed by the mediator; or
- (d) the content of a draft or final factual report by a mediator.

Subject to Article 3(4) of this Decision, the mediation mechanism is without prejudice to the rights and obligations of the Parties and the disputing parties under Section F (Resolution of investment disputes between investors and states) of Chapter Eight (Investment) and Chapter Twenty-nine (Dispute Settlement) of the Agreement. The disputing parties' agreement to mediate and any mutually agreed solutions shall be made publicly available. The versions disclosed to the public shall not contain any information that a disputing party has designated as confidential. Unless the disputing parties agree otherwise, all other steps of the mediation procedure, including any

advice or proposed solution, shall be confidential. However, any disputing party may disclose to the public that mediation is taking place.

ARTICLE 8 TIME LIMITS

Any time limit referred to in this Decision may be modified by mutual agreement between the disputing parties.

ARTICLE 9 COSTS

Each disputing party shall bear its own expenses derived from the participation in the mediation procedure. The disputing parties shall share jointly and equally the expenses derived from organizational matters, including the remuneration and expenses of the mediator. Remuneration of the mediator shall be in accordance with that foreseen for Members of the Tribunal under Article 8.27.14 of the Agreement.

ARTICLE 10 AUTHENTIC TEXTS

This Decision is drawn up in duplicate in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, each version being equally authentic.

ARTICLE 11 ENTRY INTO FORCE

This Decision shall be published and shall enter into force on the date of entry into force of Section F (Resolution of investment disputes between investors and states) of Chapter Eight (Investment) of the Agreement, subject to the Parties' exchange of written notifications, through diplomatic channels, certifying that they have completed the necessary internal requirements and procedures.

4.9.2 USA AND UK

4.9.2.1 MEDIATION IN THE US

The US has a history from very long time of using informal dispute resolution, which is dating back to the colonial period when the disputes of community groups were resolved through negotiation and mediation. In recent times, Mediation became common for solving issues in family and labor law, with the popularity in those arenas leading it to being tested and thereafter adopted in other arenas. Today, mediation in its numerous forms is widely used for dispute resolution of all natures, more particularly in shipping related matters.

Currently, a very less percentage amounting to approximately 5% of cases in courts across the US follows full trial. A significant factor is the successful use of mediation, which is estimated to result in a resolution of near about 80% of cases. Adding this with time and cost savings, the attraction towards mediation becomes prominent with time. Cost savings are even more significant factor as the costs of litigation are not generally recoverable even by the successful party in the case of US, as they can be in the UK.

4.9.2.2 FLEXIBLE APPROACH

Mediation is an extremely flexible tool, with relevance to the time at which it is conducted, the manner in which it is carried out generally within the control of the parties to the dispute. Pre-suit mediation is not unusual, allowing parties to solve the dispute quickly and potentially without going through time consuming processes that are costly as well. However, litigation being commenced does not hinder it from taking place, with parties free to mediate throughout the duration of the case. In addition, parties can be ordered by the courts to mediate. That may be contrary to the concept of mediation, but it is frequently also successful.

4.9.2.3 PROCESS

The US has a prominent and very well-established mediation practice mechanism, with agencies that work in respect of mediation and both full-time and part-time mediators offering their services. Private mediators are primarily former lawyers and judges, but some mediators manage to maintain parallel legal and mediation practices. The mediators appointed by Court can be drawn

from judiciary. Depending on the nature of dispute and the parties involved in it, the mediator put to handle it can have a huge impact, with the skills and attributes.

While there are numerous approaches that can be adopted regarding how the mediation proceeds, generally parties will be in different rooms, which allows the mediator to speak openly with each side alternatively as they try to fill in the gap between parties. The mediation will begin with an opening session in which both parties get an opportunity to participate, either by themselves or through their advocate to present their side. This opening session is a very important part of the process, allowing both the parties an opportunity for an assessment of the other party's position, immediately before the commencement of process of mediation. It also allows an opportunity for the decision makers to meet each other before being moved off to different rooms.

4.9.2.4 NEGOTIATION ('BRACKETING')

Although, the strategies of negotiation and mediation vary from party to party and case to case, one significant difference between UK and US is the use of 'bracketing' for the purpose of negotiating. While in the UK, the procedure of offer and counter-offer is followed in which they are made as parties move closer together, on the other hand, brackets are used on a regular basis in the US with the objective of bringing parties onto the same negotiating terms. The 'bracket theory' is a separate subject in itself, it is, when one party stating "if I was prepared to lower my demand to A, would you be prepared to increase your offer to B?", thus allowing parameters to be narrowed quickly and trying to bring the parties on same conclusion. While the bracket is not offered as a formal offer, it is an effective and efficient way of bringing parties into the position of settlement.

4.9.2.5 MEDIATION IN THE UK

In UK mediation is used to solve commercial and other disputes for quite some time. But in shipping line mediation has not been used so much as it has been in other areas. In circumstances when parties still agree to take their disagreements to court, several countries, notably the United Kingdom,

encourage parties to mediate early on, generally after the first case management meeting. Mediation does not have to take place at this time; in fact, it might take place later or even before legal action is taken.

The growing dominance of arbitration as a preferred means of conflict resolution in the shipping industry has had the unintended consequence that mediation has not evolved in the same manner as shipping litigation in court. Mediators and others in the field argue that this is a missed opportunity, and that mediation may take place in the framework of an arbitration provision. The principal commercial advantages of mediation over other forms of dispute resolution are as follows:

1. Economical solution
2. Flexible approach
3. Business relationships

4.9.2.6 MAIN CONTRASTS BETWEEN MEDIATION IN US AND UK

Evidently, the development of mediation in the United States has influenced practice in the United Kingdom. In contrast to how the US legal system was affected by UK courts but grew a bit less formal (or more accessible to laypeople), mediation in the UK has been influenced by US practice but has slightly formalized the casual approach. But, in the end, the result is the same. The reality is that, notwithstanding differences in jurisdiction, the mediation procedure is comparable on both sides of the Atlantic.

CHAPTER 5 NEGATIVE FRAMEWORK OF MEDIATION

With the advent of mediation in Indian Legal System, the whole process has resulted in a negative set back as well. Since, all matters cannot be mediated hence the matters that can be mediated are limited to commercial, contractual disputes, consumer matters and those involving tortious liability. A settlement if arrived at in a commercial dispute, strengthens the business relations and may result in a win-win situation for both the parties. Promoting mediation as a mode of addressing disputes between the parties would also save the precious judicial time as well. To understand the silent side of mediation we must first look into the present situation of Mediation.

Albert Einstein once said, "*In the middle of every difficulty lies opportunity.*"¹³² It is time that we should understand the importance of mediation and resort to it as a mode of settlement of disputes. If mediation fails parties should opt for courts. The Dispute Resolution Centre of Thurston County has computed 10 main reasons as to why mediation should be chosen over traditional litigation as a means of dispute resolution to choose mediation¹³³:

1. Mediation is affordable.
2. Mediation is fair and impartial.
3. Mediation saves time and money.
4. Mediation is confidential.
5. Mediation avoids litigation.
6. Mediation fosters cooperation.
7. Mediation improves communication.
8. Mediation identifies underlying issues.
9. Mediation allows personalized solutions.
10. Mediation works.

¹³² ADR Tool box, Dispute Resolution Quotes, <http://www.adrtoolbox.com/library/adr-quotes/> (last visited May 19, 2022).

¹³³ Cambridge Dictionary, <https://www.google.co.in/amp/s/dictionary.cambridge.org/amp/english/mediation> (last visited May 19, 2022)

5.1 PRESENT LAWS ON MEDIATION

The concept of Mediation is ancient and deep rooted in India. From Lord Krishna mediating between Kauravas and Pandavas in the Mahabharata, to family elders resolving domestic issues, to the resolution of disputes at the community level through Panchayats, there exists a strong culture of mediation in India. With the passage of time, there are certain statutes which provide for mediation as a mode of settlement of disputes between the parties. Such statutes comprise of, but not limited to the following:

5.1.1 SECTION 4 OF THE INDUSTRIAL DISPUTES ACT, 1947

Conciliators appointed are assigned with the duty to mediate and promote settlement of industrial disputes with detailed prescribed procedures for conciliation proceedings.

5.1.2 SECTION 89 READ WITH ORDER X RULE 1A OF THE CODE OF CIVIL PROCEDURE, 1908

The insertion of Section 89 in the CPC is in itself a welcome step towards promoting mediation and other means of alternate dispute resolution. As per Section 89 read with Order X Rule 1A of the CPC, after recording the admission and denial of documents, the Court shall direct the parties to the suit to opt for any of the modes of settlement outside Court as specified in Section 89 (1) of the CPC that is arbitration, conciliation, judicial settlement including settlement through Lok Adalat or mediation. Therefore, it provides for the reference of the cases pending before the courts to the aforesaid modes of dispute resolution.

5.1.3 ORDER XXXIIA OF CPC

Order XXXIIA of CPC recommends mediation. This is evident from Rules 3 and 4 of Order XXXIIA. The legislators have very thoughtfully inserted this provision because the matters comprising of, but not limited to, personal, family,

matrimonial, guardianship, custody and maintenance matters can be more aptly resolved through non- adversarial means. There may be divergent positions by the parties but the effort has to be to protect the underlying interest, which can be done through mediation.

5.1.4 LEGAL SERVICES AUTHORITY ACT, 1987 READ WITH SECTION 89 OF CPC

Legal Services Authorities at the center, state and taluka level are statutory authorities established by the Legal Services Authorities Act, 1987 with the object to provide free and competent legal service to the weaker services of the society and to ensure that justice is not denied to any citizen on account of economic or any other disability.

As per Section 89 (2) of CPC, where a dispute has been referred 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 Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat. Further, it has been provided under Section 21 of the Legal Services Authority Act, 1987 that a settlement before a Lok Adalat is enforceable as a court decree.

5.1.5 SECTION 442 OF THE COMPANIES ACT, 2013 READ WITH THE COMPANIES (MEDIATION AND CONCILIATION) RULES, 2016

Section 442 of the Companies Act, 2013 provides that the Central Govt. shall maintain a panel of experts called the Mediation and Conciliation Panel consisting of such number of experts, having such qualifications, as may be prescribed for mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or Appellate

Tribunal under this Act. Rule 3 of the Companies (Mediation and Conciliation) Rules, 2016 provides for a Panel of Mediators or Conciliators. The aforesaid provisions provide for referral of disputes pending adjudication before the National Company Law Tribunal and Appellate Tribunal, to mediation.

5.1.6 SECTION 18 OF THE MICRO, SMALL AND MEDIUM ENTERPRISES (MSME) DEVELOPMENT ACT, 2006

It has been clearly provided under Section 18 of the aforesaid Act that any party to a dispute with regard to any amount due under Section 17 (disputes regarding the payment of amount to MSMEs), make a reference to the Micro & Small Enterprises Facilitation Council. On receipt of a reference, the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or center providing alternate dispute resolution services by making a reference to such an institution or center, for conducting conciliation and the provisions of Sections 65-81 of the Arbitration and Conciliation Act, 1996 shall apply.

5.1.7 SECTION 14 (2) OF THE HINDU MARRIAGE ACT, 1955 AND SECTION 29(2) OF SPECIAL MARRIAGE ACT, 1954

As per Section 14 (2) of the Hindu Marriage Act, 1955, in disposing of any application under Section 14 for leave to present a petition for divorce before the expiry of one year from the date of marriage, the court shall have regard to the reasonable probability of a reconciliation between the parties before the expiry of one year. Therefore, the intent of the legislators is that the court should in the first instance attempt mediation between the parties. Similar provision is contained in Section 29 (2) of the Special Marriage Act, 1954. Unlike the adversarial system in which the competing claims of parties are represented by legal representatives who have interest in the outcomes of dispute, in matrimonial and family matters, it is important to visualize and analyze the

underlying interest of the parties, no matter however diverse may be their positions. It is the skill of the mediator to facilitate the parties to try to arrive at an amicable settlement.

5.1.8 SECTION 32 (G) OF THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

Section 32 of the aforesaid Act provides for the functions of the Authority for the promotion of real estate sector. Sub clause (g) of Section 32 of this Act states that the Authority shall in order to facilitate the growth and promotion of a healthy, transparent, efficient and competitive real estate sector make recommendations to the appropriate Government of the competent authority as the case may be, to facilitate amicable conciliation of disputes between the promoters and the allottees through dispute settlement forums set up by the consumer or promoter associations.

5.1.9 129TH LAW COMMISSION OF INDIA REPORT

The aforesaid Law Commission Report recommends courts to refer disputes for mediation compulsorily.

5.1.10 SECTION 12A OF THE COMMERCIAL COURTS ACT, 2015

Section 12A of the aforesaid Act under Chapter IIIA deals with Pre-Institution Mediation and Settlement. Chapter IIIA has been inserted by 2018 amendment to the aforesaid Act. Section 12A clearly states that a suit, which does not contemplate any urgent interim relief shall not be instituted unless the plaintiff exhausts the remedy of pre- institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central

Government. It is therefore, mandatory for parties to exhaust remedy of pre-institution mediation under the Act before the institution of a suit.

5.1.11 THE COMMERCIAL COURTS (PRE- INSTITUTION MEDIATION AND SETTLEMENT) RULES, 2018

The Central Government has framed and thereafter notified these Rules on July 3, 2018 in exercise of its powers conferred by sub-section (2) of Section 21A read with sub-section (1) of Section 12A of the Commercial Courts Act, 2015.

5.1.12 SECTIONS 37-38 AND CHAPTER V OF THE CONSUMER PROTECTION ACT, 2019

The aforesaid provisions provide for disputes covered under this Act to be first referred to mediation. It has been clearly provided under Section 37 (1) of the aforesaid Act that at first hearing of a complaint after its admission or at any later date, if it appears to the District Commission that there exist elements of a settlement which may be acceptable to the parties, it may direct the parties to give in writing within 5 days, their consent to refer the matter to mediation and the provisions of Chapter V of the Act shall apply.

5.1.13 MEDIATION AND CONCILIATION RULES, 2004

In exercise of its powers under Part X and Section 89 (2) (d) of CPC, the Hon'ble High Court of Delhi has framed these rules. It is further pertinent to note that India is a signatory¹³⁴ to the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Mediation Convention) which gives mediation settlements the force of law. On

¹³⁴ United Nations, United Nations convention on International settlement agreements resulting from mediation, https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (last visited May 21, 2022)

the analysis of the aforesaid statutory provisions, it cannot be said that India does not have provisions concerning mediation or use of conciliation. But the discrepancies between mediation and conciliation impede these provisions from being successful. A uniform legislation concerning mediation would create legal sanctity and avoid the inconsistencies between the various pieces of existing legislations. Even though various statutes have given the parties the autonomy to get their disputes resolved via mediation and there exist court referred as well as private means of engaging in mediation, there is lack of procedural guidance in this regard.

The Hon'ble Supreme Court of India has, through a unique step, set up a panel to have a draft legislation to give a legal sanctity to disputes settled through mediation, which would then be sent to the government as a suggestion from apex court.¹³⁵ An 'Indian Mediation Act' as suggested by the Hon'ble Supreme Court is indeed a promising proposal in India.

5.2 JUDICIAL PRECEDENTS RELATED TO MEDIATION

5.2.1 SALEM BAR ASSOCIATION V. UNION OF INDIA (2003) 1 SCC 49

In this matter, Writ Petitions were filed challenging the Amendments made to the Code of Civil Procedure by way of Amendment 46 of 1999 and Amendment 22 of 2002. Amongst other amendments, the attention of the Hon'ble Supreme Court was drawn to Section 89 of the Code of Civil Procedure.

The Hon'ble Supreme Court observed that the provision of Section 89 of the Code of Civil Procedure has been inserted to ensure that all the cases which are filed in the courts need not necessarily be decided by the courts. The Hon'ble Supreme Court opined the need to promote Alternate Dispute Resolution. It therefore, considered Section 89 to be a welcome step. It was therefore suggested by the Hon'ble Supreme Court, that a Committee be constituted so as

¹³⁵ The Economic Times, Supreme court confirms committee to draft mediation law, will send to government, <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-forms-committee-to-draft-mediation-law-will-send-to-government/articleshow/73394043.cms?from=mdr> (last visited May 23, 2022).

to ensure that the amendments made to the Code of Civil Procedure become effective and result in quicker dispensation of justice.

5.2.2 AFCONS INFRASTRUCTURE V. CHERIAN VARKEY CONSTRUCTION CO. LTD. (2010) 8 SCC 24

The Apex Court observed although it is not possible to lay down an exhaustive list concerning the matters which may be mediated, yet an illustrative list was laid down. This list comprises of all cases related to trade and commerce, all cases arising from stained relationships, all cases where there is a need of continuation of the pre- existing relationship, in spite of the disputes, all cases related to tortious liability and all consumer disputes. All such matters as laid down supra may be mediated. Further, the Apex Court explained the anomalies in Section 89 of the Code of Civil Procedure, when it may be invoked, the categories of cases which are not suitable for Alternate Dispute Resolution and the scope and ambit of conciliation.

5.2.3 MR KRISHNA MURTHI V. NEW INDIA ASSURANCE CO. LTD. 2019 SCC ONLINE SC 315

The Hon'ble Supreme Court while considering a plea seeking reform in the Motor Vehicle Accident Claims system, asked the Government to consider the feasibility of enacting Indian Mediation Act to take care of various aspects of Mediation in general and issued several directions to the Government. The Hon'ble Supreme Court further directed the Government to examine the feasibility of setting up a Motor Accidents Mediation Authority (MAMA) by making necessary amendments in the Motor Vehicles Act. The Apex Court further directed National Legal Services Authority (NALSA) to set up Motor Accident Mediation Cells (MAMC), which can function independently under the aegis of NALSA or can be handed over to Mediation and Conciliation Project Committee (MCPC).

In the light of the aforesaid judicial precedents laid down, it is amply clear that the judicial approach has been towards promoting mediation as a mode of dispute resolution. The Hon'ble Supreme Court has in the aforesaid judgments in a succinct and candid manner emphasized the need to resort to mediation in

respect of those matters which can be mediated. Through mediation, the underlying interests of the parties are taken care of rather than the divergent positions or competing claims and a settlement, if arrived, may result in a win-win position for the parties.

Efficient functioning of the judiciary is essential for every country. The courts in India are bound to act in accordance with the procedure established by law. Everyone is equal before law but the delays in litigation makes it a cumbersome process. So, it is important that the parties must get an opportunity to settle their case without being subjected to formal litigation. Giving an opportunity to the parties to do so is clearly in consonance to the legislative intent of Article 39A (equal justice and free legal aid for all) in Part IV of the Indian Constitution. Promoting mediation is not just in the interest of the parties but is also the need of the hour.

5.3 PRESENT SCENARIO

A Five Judge Constitution bench of the Hon'ble Supreme Court of India ordered a court-monitored mediation in the Ayodhya dispute (M. Siddiq (D) v. Mahant Suresh Das, Civil Appeal No. 10866-10867 of 2010) vide its Order dated March 8, 2019. The relevant portion of the aforesaid Order dated March 8, 2019 reads as follows:

"3. We have considered the nature of the dispute arising. Notwithstanding the lack of consensus between the parties in the matter we are of the view that an attempt should be made to settle the dispute through mediation."

"6. Considering the provisions of CPC, indicated above, we do not find any legal impediment to making a reference to mediation for a possible settlement of the dispute(s) arising out of the appeals."

"7..mediation proceedings should be conducted with utmost confidentiality so as to ensure its success which can only be safeguarded by directing that the proceedings of mediation and the views expressed therein by any of the parties including the learned Mediators shall be kept confidential and shall not be revealed to any other person. We are of the further opinion that while the mediation proceedings are being carried out, there ought not to be any reporting of the said proceedings either in the print or in the electronic media."

The reference of the highly sensitive Ayodhya dispute to mediation by the Hon'ble Supreme Court of India has brought the mediation process to the attention of the people. In order to take the mediation ahead and use it in the best possible manner, it is important to spread its awareness amongst the public. Those engaged in mediation must acquire mediation skills in a scientific and structured manner. Many relationships can be saved through mediation and also the burden of cases upon the courts will reduce.¹³⁶

5.4 PATH FORWARD

1. Uniform statute for resolving disputes through mediation is the need of the hour. Such a statute should make it mandatory for the parties to resort to mediation first before addressing their disputes before courts by way of litigation or arbitration before an Arbitral Tribunal.
2. In all the commercial, contractual, consumer disputes and those having tortious liability, it should be mandatory to make efforts to resolve such disputes first through mediation before approaching the courts or Arbitral Tribunal.
3. Need to have mediation focused institutions with trained professionals. Additionally, there is a need to have a regulatory body which lays down the qualifications for a person to be a mediator and reviews the performance of existing mediators from time to time.
4. Requirement of public awareness about mediation. Such an awareness may be created through training sessions, courses, webinars and legal discourses by experts and qualified mediators.

Lack of public awareness about non-adversarial modes of dispute resolution is the key reason people are inclined to the adversarial process by default. In the case of arbitration, this changed when the Arbitration and Conciliation Act, 1996 was enacted. Today, there is a much better arbitration culture in India than 1996 because of a specific statute in regard to the same. A mediation-specific statute may similarly make India more open to mediating disputes. Even though various statutes have given

¹³⁶ Geetanjali Sethi, India: Mediation, Current jurisprudence and the path ahead, Mondaq connecting knowledge and people, L and L Partners (June 24, 2020), https://www.mondaq.com/india/arbitration-dispute-resolution/957898/mediation-current-jurisprudence-and-the-path-ahead#_ftnref10

the parties the autonomy to get their disputes resolved through mediation and there exist court-referred as well as private means of engaging in mediation, there is a scarcity of clear procedural guidance on this aspect.

In the light of the jurisprudence as it stands today, mediation is considered as one of the Alternate Dispute Resolution modes. The need of the hour is to resort to mediation not as an Alternate Dispute Resolution mode but as a Primary or First mode of Dispute Resolution. Encouraging mediation may well be the way forward for ensuring speedy delivery of justice. 'Indian Mediation Act' as suggested by the Hon'ble Supreme Court of India is indeed a promising proposal for India.

5.5 THE MEDIATION BILL, 2021

Alternate dispute resolution (ADR) refers to means by which disputes are settled outside the traditional court system. In India, modes of ADR include arbitration, negotiation, mediation, and Lok Adalats. Mediation is a voluntary process in which parties try to settle disputes with the assistance of an independent third person. A mediator does not impose a solution on the parties but creates a conducive environment in which they can resolve their dispute. The mediation process depends on the choice of parties, and there are no strict or binding rules of procedure. Benefits of mediation include its voluntary and non-adversarial nature, the flexibility and confidentiality of the process, its speed and cost effectiveness, and the finality of consensual settlements. As a mode of ADR, mediation may also help reduce the case burden on courts.

At present, mediation in India may be:

- (i) court referred (courts may refer cases to mediation under the Code of Civil Procedure, 1908),
- (ii) private (for instance, under a contract having a mediation clause), or
- (iii) as provided under a specific statute (such as the Commercial Courts Act, 2015, the Consumer Protection Act, 2019, or the Companies Act, 2013).

Various countries including Australia, Singapore, and Italy have standalone laws on mediation.¹³⁷ The suggestion to enact a separate legislation governing mediation in India has been made on a number of occasions, including by the Supreme Court (2019), and the High Level Committee to review the institutionalisation of arbitration mechanism in India (2017).¹³⁸ Further, a committee formed by the Supreme Court in 2020 had recommended and prepared a draft umbrella legislation to give sanctity to dispute settlement through mediation.¹³⁹ The Mediation Bill, 2021 seeks to promote mediation, particularly institutional mediation, and provide a mechanism for enforcing mediated settlement agreements. The Bill has been referred to the Standing Committee on Personnel, Public Grievances, Law and Justice.

5.5.1 HIGHLIGHTS OF THE ACT

- **Pre-litigation mediation:** Parties must attempt to settle civil or commercial disputes by mediation before approaching any court or certain tribunals. Even if they fail to reach a settlement through pre-litigation mediation, the court or tribunal may at any stage refer the parties to mediation if they request for the same.
- **Disputes not fit for mediation:** The Bill contains a list of disputes which are not fit for mediation. These include disputes:
 1. relating to claims against minors or persons of unsound mind,
 2. involving criminal prosecution, and
 3. affecting the rights of third parties. The central government may amend this list.
- **Applicability:** The Bill will apply to mediations conducted in India: involving only domestic parties, involving at least one foreign party and relating to a commercial dispute (i.e., international mediation), and if the mediation

¹³⁷ Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (Chairman: Retd. Justice B.N. Srikrishna), (July 30, 2017), <https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf> (last visited date May 25, 2022).

¹³⁸ A Sikri, M.R. Krishna Murthi vs. New India Assurance Co. Ltd., Supreme Court of India, Civil Appeal Nos. 2476-2477, Indian Kanoon, (March 5, 2019), <https://indiankanoon.org/doc/179274439/> (last visited May 25, 2022).

¹³⁹ NITI Aayog, Designing the Future of Dispute Resolution: The ODR Policy Plan for India (Chairman: Retd. Justice A.K. Sikri), (October 2021), <https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf> (last visited May 30, 2022).

agreement states that mediation will be as per this Bill. If the central or state government is a party, the Bill will apply to:

- (a) commercial disputes, and
- (b) other disputes as notified.

- **Mediation process:** Mediation proceedings will be confidential, and must be completed within 180 days (may be extended by 180 days by the parties). A party may withdraw from mediation after two sessions. Court annexed mediation must be conducted as per the rules framed by the Supreme Court or High Courts.
- **Mediators:** Mediators may be appointed by: the parties by agreement, or a mediation service provider (an institution administering mediation). They must disclose any conflict of interest that may raise doubts on their independence. Parties may then choose to replace the mediator.
- **Mediation Council of India:** The central government will establish the Mediation Council of India. The Council will consist of a chairperson, two full-time members (with experience in mediation or ADR), three ex-officio members (including the Law Secretary, and the Expenditure Secretary), and a part-time member from an industry body. Functions of the Council include:
 - 1. registration of mediators, and
 - 2. recognising mediation service providers and mediation institutes (which train, educate, and certify mediators).
- **Mediated settlement agreement:** Agreements resulting from mediation (other than community mediation) will be final, binding, and enforceable in the same manner as court judgments. They may be challenged on grounds of:
 - 1. fraud,

2. corruption,
3. impersonation, or
4. relating to disputes not fit for mediation.

- **Community mediation:** Community mediation may be attempted to resolve disputes likely to affect the peace and harmony amongst residents of a locality. It will be conducted by a panel of three mediators (may include persons of standing in the community, and representatives of resident welfare associations).

5.5.2 WHETHER MANDATING PRE-LITIGATION MEDIATION IS APPROPRIATE OR NOT?

Mediation is a voluntary dispute resolution process. Unlike litigation or arbitration, which involve adjudication of a dispute, mediation involves settlement with the consent of the parties. The Bill mandates pre-litigation mediation in civil and commercial disputes. The question is whether it is appropriate to require participation in a process which is essentially voluntary. Note that under the Code of Civil Procedure, 1908, courts may refer disputing parties to mediation without their consent. There are divergent views on the potential benefits and drawbacks of mandating mediation. We discuss these below.

Mediation is a cost-effective dispute resolution process that also helps reduce the burden on courts by enabling out-of-court settlements. Mandating participation in pre-litigation mediation may help reduce pendency and the slow disposal rate in courts. One may also argue that the Bill is only compelling parties to participate in the process and not to settle. Parties may withdraw from the mediation process after two sessions. The NITI Aayog (2021) has observed that this model of compulsory mediation up to a few sessions has been successful in countries such as Italy, Brazil, and Turkey. Other countries

including Australia and England statutorily mandate mediation for certain disputes, or allow courts to order mediation.¹⁴⁰

On the other hand, mandating participation in mediation is contrary to its voluntary nature. It may not translate to a greater uptake of mediation since unwilling parties may attend the initial mediation sessions as a mere formality before withdrawing from the process. This could further delay dispute resolution, and result in additional costs. Note that the Bill mandates parties to attend at least two mediation sessions, failing which costs may be imposed on them.

Further, mandating pre-litigation mediation would require availability of sufficient trained mediators. NITI Aayog (2021) noted that a framework for mandatory pre-litigation mediation in India must be planned keeping in mind the number of mediators available and the ecosystem's ability to provide a large number of mediators.¹⁰ It recommended rolling out mandatory pre-litigation mediation in a phased manner, first for certain categories of disputes and then eventually to cover a wide range of disputes. It observed that the expansion in the classes of such disputes should see a corresponding increase in capacity in terms of mediators and ADR centres.

5.5.3 MEDIATION COUNCIL OF INDIA

The Bill provides that the central government will establish the Mediation Council of India. Functions of the Council include:

1. registering mediators,
2. recognising mediation service providers (institutions administering mediations) and mediation institutes (providing training, education, and certification of mediators),
3. grading mediation service providers, and

¹⁴⁰Halsey vs. Milton Keynes General NHS Trust, England and Wales Court of Appeal (Civil Division) Decisions, (2004) https://docentes.fd.unl.pt/docentes_docs/ma/JPF_MA_29940.pdf (last visited June 1, 2022).

4. laying down standards for professional conduct of mediators, mediation service providers, and mediation institutes. We discuss two issues with the Council.

5.5.4 THE BILL DOES NOT REQUIRE REPRESENTATION OF PRACTICING MEDIATORS ON THE COUNCIL

Key functions of the Mediation Council relate to certification, assessment and registration of mediators, and laying down standards for their professional and ethical conduct. The Council will consist of seven members, including two full-time members with experience in mediation or ADR, and ex-officio members such as the Law and the Expenditure Secretaries. The Bill does not require a practicing mediator to be a member of the Council. It is also not clear why the Expenditure Secretary has been made a member of the Council.

Generally, statutory bodies for regulating professionals (such as lawyers, chartered accountants, and doctors) necessarily comprise persons having considerable experience or practicing in the relevant field.¹⁴¹ While the full-time members of the Council must possess knowledge or experience pertaining to mediation or ADR laws and mechanisms, they may not necessarily be practicing mediators with significant experience. For instance, the Bill would permit an arbitrator to be appointed as full-time member of the Council. An arbitrator may not be best suited to perform functions such as prescribing standards of professional conduct of mediators. Note that the law governing arbitration in India was amended in 2019 to provide for setting up the Arbitration Council of India, whose functions include grading of arbitral institutions, and accreditation of arbitrators. This provision has not yet come into force. The 2019 amendment requires the Arbitration Council to have a full-time member who is an eminent arbitration practitioner with substantial knowledge and experience in institutional arbitration.

5.5.5 REQUIRING CENTRAL GOVERNMENT APPROVAL BEFORE ISSUING REGULATIONS MAY NOT BE APPROPRIATE

¹⁴¹The Advocates Act 1961, <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/Advocates-Act1961.pdf> (last visited May 19, 2022).

Under the Bill, the Council will discharge its major functions by issuing regulations. It must take approval from the central government before issuing such regulations. Regulations may prescribe:

1. professional standards for mediators,
2. conditions for registering mediators and recognising mediation institutes and mediation service providers, and
3. the manner for grading mediation service providers. The question is whether it is appropriate for the Council to require prior approval from the central government before issuing regulations.

First, the Council may play only a nominal role if it must obtain approval from the central government for discharging its essential functions. Second, the central government (or agencies, corporations, and public/local bodies owned or controlled by it) may also be party to mediations under the Bill. Note that no such previous approval for issuing rules and regulations is mandated for the National Medical Commission (which regulates the education and profession of doctors) and the Bar Council of India (except when prescribing the conditions for non-citizens to practice as advocates). On the other hand, regulations made by the respective Councils of the Institute of Chartered Accountants of India (ICAI) and the Institute of Company Secretaries of India (ICSI) are subject to the approval of the central government.¹⁴²

5.5.6 NO PROVISION FOR ENFORCING CERTAIN INTERNATIONAL MEDIATED SETTLEMENTS

The Bill applies to international mediations (i.e., where at least one party is a foreign party) of commercial disputes, if they are conducted in India. However, there may be instances involving an Indian party where the mediation is conducted abroad. In such cases, the problem arises with the enforcement of settlement agreements in India. The Bill provides that mediated settlement

¹⁴²The Company Secretaries Act 1980, As amended by the company secretaries (Amendment) Act 2006, https://www.mca.gov.in/Ministry/actsbills/pdf/The_Companies_Secretaries_Amendment_Act_2006.pdf (last visited May 15, 2022).

agreements will be enforceable in the same way as a judgment or decree of a court. This does not cover settlement agreements resulting from international mediation conducted outside India. Note that the Singapore Convention on Mediation provides a framework for cross-border enforcement of settlement agreements resulting from international mediation.¹⁴³ On August 7, 2019, India became a signatory to this Convention, but has not yet ratified it.

5.5.7 MEDIATORS CONDUCTING PRE-LITIGATION MEDIATION REQUIRE FOUR REGISTRATIONS

The Bill makes pre-litigation mediation compulsory in case of civil and commercial disputes. Unless the parties agree otherwise, mediators conducting pre-litigation mediation must meet four conditions. They must be registered with the Mediation Council of India, and empanelled by a court annexed mediation centre, a recognised mediation service provider, and a Legal Services Authority (National, State, or District). That is, they must be registered/ empanelled at all four places. It is unclear why satisfying any one of these conditions is not sufficient for such mediators. For instance, a mediator registered with the Council but not empanelled by a court annexed mediation centre or a recognised mediation service provider will not be eligible to conduct pre-litigation mediation.

¹⁴³ United Nations Convention on International Settlement Agreements Resulting from Mediation, *supra* note 134, at 69.

CHAPTER 6: CONCLUSION AND SUGGESTIONS

“Mediation is one of the most effective tools of nonviolence. It can turn parties away from conflict, towards compromise.”

6.1 CONCLUSION

A society cannot exist without law and human beings are governed by the very law. Earlier disputes were resolved on the basis of morality but with the transformation of societies, disputes were resolved through a legal forum that was dynamic in nature. In pre and post civilized societies, there is an authority to decide a matter that rests in a neutral person upon whom litigants put their belief. During early ages a third person was appointed to solve the conflict between the people. The term ‘**arbiter**’ was used for a third person to whom the dispute was referred but it became a term for specific purpose with the passage of time. Some define the arbitrator as the ‘**Private extra ordinary Judge**’ between the parties¹⁴⁴.

The peaceful settlement of disputes through arbitration, conciliation and mediation are being adopted by the legislature and Judiciary is acting as a guardian of ADR system to ensure speedy justice with party satisfaction by making them active members of negotiation. Under the Constitution of India, it is the responsibility of the state to provide social, economic and political safeguard to its citizens. Every citizen is equal in the eyes of law, equal protection of law and nobody is to be discriminated on the bases of race, colour, creed, cast, sex and place of birth, plus it guarantees the right of just and fair trial to the citizens.

Further Article 21 envisages that no person should be deprived from life and liberty, except in accordance with the procedure established by law. There is no liberty of ‘reasonableness, fair or just’ without the assurance of speedy trial. Thus, it was held that speedy trial means the reasonably expeditious trial which is an essential part of fundamental rights¹⁴⁵. Justice is of no value if it is not imparted in a correct manner i.e. the reason why an efficient judicial system is required. To help the overburdened

¹⁴⁴ Roy Chawdhary and Saharay, Arbitration 3 (Eastern Law House, Calcutta, 1979).

¹⁴⁵ HussainaraKhatoon and Ors. vs. Home Secretary, State of Bihar, AIR 1979 SC 1360.

judiciary in order to stream line the system there was an utter need of ADR mechanisms other than litigation e.g. by Arbitration, Mediation, Conciliation, Lok Adalat and Mini-trials¹⁴⁶. The ADR mechanism require special skills and techniques and they are increasingly being used in commercial and labour disputes, divorce actions, motor vehicle accidents, medical negligence, tort claims and in other court litigations.

The ADR mechanism was adopted to decide the legal issues in consensual way and Mediation is getting more advantage due to its non-adjudicating characteristic. ADR mechanism's important was felt by international forums. a number of matters are being settled through the process of mediation. Mediation is being sought as a well- accepted mechanism to save time and money of litigants. Forums like United Nations, World Intellectual Property Organisation etc. have contributed in the development of mediation by adopting different resolutions and directives from time to time. Delhi High Court examined the genesis, modes and methods of ADR and observed that ADR is increasingly suitable to many cases which has been given statutory authority and have received judicial commendations¹⁴⁷.

On the similar pattern Hon'ble Justice S.B. Sinha in *Dayawati v. Yogesh Kumar Gosain*, observed that:

"It has been noted that unlike litigation and arbitration, which consists of formal evidentiary hearings and a final adjudication, mediation was a semi-formal negotiation aimed at allowing parties to settle disputes, not only amicably but also economically and expeditiously by a process of self and participatory determination. It is noted that mediation as a method of dispute resolution was not a unique or new concept and that it had in fact evolved through long standing traditions, was being used by tribes and villages across our country long before it came to be statutorily recognized in the recent past. The roots of mediation have been traced back to texts such as "Kautilya's Arthashastra" as well as the Panchayati Raj system.

¹⁴⁶ Joseph R. Nolan and Jacqueline M. Nolan-Haley, Henry Campbell Black, Black's Law Dictionary 78 (West Publishing Co., St. Paul, 6th ed., 1990),

<https://karnatakajudiciary.kar.nic.in/hcklibrary/PDF/Blacks%20Law%206th%20Edition%20-%20SecA.pdf>

¹⁴⁷ *Id.*, at 146.

The references to Lord Krishna's mediation between Kauravas and Pandavas during the Mahabharata are legendary¹⁴⁸.”

Mediation often complements litigation and other ADR methods. It gives party more power and control over the process. Mediation process encourages the parties to lead to a problem solving approach. It gives an amicable solution i.e. free from flaws and has quite satisfaction. It is also used as a means to save the relations of the parties. It helps in saving precious time and resources of the parties and provide quick resolution. It provides an efficient, effective, expeditious, suitable and cost effective process to solve disputes by keeping self-respect and civility among the parties. Parties are actively involved making the resolution obtained on their terms. In cases of unsuccessful mediation, the process forms an atmosphere of harmony and peace which helps them to easily resolve their matter without any problem¹⁴⁹.

The test of the legislative regime and the practice governing mediation shows that the mediation evolved when a court referred the parties in a lis, with their consent to the mediation centre. Mediation can start at any stage whether in pre litigation stage without the orders of the court which is known as 'Pre-litigation Mediation' which is a real effort to resolve the dispute. In mediation the parties are referred, irrespective of the nature of the case and no matters it is civil or criminal¹⁵⁰.

6.2 SUGGESTIONS:

6.2.1 DISPUTES NOT FIT FOR MEDIATION

A statute must be formed so as to demarcate what disputes which are not fit for mediation like:

- relating to claims against minors or persons of unsound mind,
- involving criminal prosecution, and
- affecting the rights of third parties.

6.2.2 APPLICABILITY

¹⁴⁸ Dayawati v. Yogesh Kumar Gosain, 2018(1) JCC 53 (Delhi).

¹⁴⁹ *Id.* at 148.

¹⁵⁰ *Id.* at 149.

The applicability has to be set forth for smooth working:

- involving only domestic parties,
- involving at least one foreign party and relating to a commercial dispute and
- if the mediation agreement states that mediation will be as per this Bill. If the central or state government is a party, the Bill will apply to commercial disputes and other disputes as notified.

6.2.3 AWARENESS PROGRAMS

It should be promoted via separate and specific awareness programs. Mediation is developed concept and has its own characteristics that should not be compared with other processes like free legal aid, Lok Adalat etc. litigants and their counsel should be well aware about the process and procedure followed. The lack of awareness in people and lawyers turns out to be the mountain to be crossed for its success. The litigants should be made aware about option to approach to pre litigation mediation before approaching the door of court. A little bit of awareness may turn out to be a major step in legal field and a new era of amicable settlements in legal disputes may come.

6.2.4 PRE-LITIGATION MEDIATION

It has been seen that only the court annexed mediation has gained reputation and trust in the eye of the public. In addition to it most of the advice their clients for mediation in between the litigation procedure, that is a very late stage when parties have already spent a lot the legal expenses which in itself defeats the purpose of mediation i.e. to provide the justice to the public in an efficient and cost effective manner remains half thereafter. The preliminary stage is considered the most important stage in order to get obtain an amicable settlement through mediation should be developed.

6.2.5 ETHICS OF THE MEDIATORS

The ethics envisaged in a mediators play a very crucial in this whole process as they are also required to be improved on priority basis. It is observed in the day to day mediation processes of court annexed mediation that some mediators did not even want to contribute in the mediation process and that is amajor setback to mediation that is also a reason why mediation is being used by litigants and lawyers. Also people are unsatisfied with the conduct of mediators. They play the role of a facilitators in

mediation process and their conduct must show that they are giving their best to resolve the dispute of the parties. There is a clear cut difference between the role of a mediator and that of a judicial officer. Mediators can't adjudicate like Judges but they can very well participate in the stream of justice. They are just facilitators and should act and provide accordingly. Mediation has also caused a fear in the mind of lawyers that if they are going to refer their matter to mediation there is a high probability that their client will not return back and would lead to loss of clientele. This is a big issue, so Mediators should avoid these malpractices. Their sincerity and work shall fetch them name and fame for themselves. The misconduct of a mediator is dealt under the Advocates Act, 1961 but an act should be constituted that deals with provisions specifically governing the conduct and should be a part of training module of the mediators during their training courses. Ethics are very important in every field which earns the respect and faith of general public. Thus, this aspect needs to be dealt at priority basis.

6.2.6 TRAINING OF THE MEDIATORS

It is correct to say that unfamiliar model of intervention has been taken on in India. The preparation of the arbiters is likewise being bestowed according to the module. The preparation of arbiters for the intercession cycle just according to the worldwide model isn't adequate as unskilled prosecutors additionally show up in courts and they follow up on the counsel of their backers, their nearby and dependable precious ones. In towns likewise, individuals some of the time take the choice adequate to their local area. Intercession is a stage where a go between works with the gatherings to take their free choice which is with practically no compulsion and tension, and is best reasonable to the concerned gatherings. This issue normally doesn't come into picture in the created social orders like U.K., America and so on. Once in a while there are a few secret thought processes of the gatherings which are not especially demonstrated in the suit looked to be settled. For instance, a spouse is filling the instances of upkeep and aggressive behavior at home under various regulations. She is utilizing every one of the cures accessible to her under every one of the rules. Her rationale isn't to take the support just yet to take the portion of her significant other in agribusiness land or having a self-image issue or just to show the example to her better half for his undeniable vices. The abuse of endowment regulations has additionally been brought up by numerous legal discussions. It is likewise a training now that greatest cases

ought to be documented to compress the contrary party. The coparcenary and joint family property idea is a major device in the possession of relatives to get the properties. The middle people ought to be given the preparation in this viewpoint as well. The prosecutors ought to be given a mollification meeting by educated resigned judges to explain their questions about their legitimate freedoms. Various middle people may likewise be named at various stages according to their mastery. A board of middle people having skill in related matters may likewise be delegated at the underlying stage. Arbiters ought to be given the mid vocation preparation stages to help them to remember their essential obligations and morals to be followed.

6.2.7 COURT REFERENCE

The court attached intervention has acquired ubiquity and trust of the disputants. The essential phase of court added intercession is through court reference. The courts need to step up and allude them to the intercession places. It is the court, at the main stage, which infuses the sensation of confidence during the time spent intervention by appropriately directing the defendants. In this manner, to make the court added intervention a triumph, the courts need to assume more dynamic part. The court's references to the intervention communities ought to be expanded. The references ought to be so truly in nature that there is no requirement for to set focuses for the court reference. The cases alluded to the intervention places ought to be suitable and fit for intercession. There should not be any lawful bar for the common settlement of the cases.

6.2.8 INTEREST OF ADVOCATES

Interest of advocates ought to be more evolved during the time spent intercession. It is a known fact that advocates don't look into the interaction as they do so in litigation. It is the overall mentality that the mediation forums are unsafe for their calling. It is a typical legend that on the off chance that the issues are being settled in a particularly friendly way, no one would move toward them for filling and challenging their cases. It will diminish the quantity of cases in the courts. This mentality of advocates is exceptionally unsafe for the mediation and expected to be managed at the earliest. Youthful attorneys might track down new roads in this course of ADR and the accomplished ought to delicate their significant encounters and administrations in the

society. Cooperation of lawyers in the mediation reduces the weight on other components and increment the positive result of mediation.

6.2.9 PART OF ACADEMICS

Academics in law schools should include mediation. In general, the subject of 'ADR' is understood to be the portion optional subjects. Further, while teaching 'ADR' only significant part of Arbitration is presented and even the notion of 'conciliation' is given the second importance. It should ensure that mediation is included in the real curriculum so that law students understand how to reach peaceful agreements in legal disputes. The foundation stone of the major-level alternative conflict resolution system should be set in the foundation courses. It is necessary to guarantee that law students visit mediation centers. The visits will have their own learning purpose and will give devoted mediators with a certain perspective in the legal profession.

6.2.10 REMUNERATION OF THE MEDIATORS

Mediators' fees should be reasonable and commensurate with their legal profession. It has been noticed that in unusual circumstances, some expert mediators are selected and paid greater remunerations at the discretion of the judges of the High Courts and the Supreme Court. This may demoralize the regular and effective mediators who devote their whole attention to mediation centers and work diligently. Some people regard mediation as a noble vocation. The current pays for settled and unresolved cases is enough, but it may be increased in the future if the need arises. There is a problem with senior mediators not being entitled to 'Travelling Allowance.' Senior mediators have a responsibility to give training to their juniors at new places. However, neither a travel allowance nor a mode of transportation were supplied for the assignment. As a result, some mediators shirk their responsibilities. Due to the large number of cars available to district administrations, transportation may be given for the specific day. In the event that no mode of transportation is available, the senior trainers should be granted the required travel allowance.

6.2.11 ADMINISTRATIVE RESPONSIBILITY

It has been noted that the mediation centers are staffed by senior judicial officers with the status of Chief Judicial Magistrates. They're getting along swimmingly with the mediators and other members of the team. They deserve credit for the successful

mediation centers in Punjab, along with mediators, although the success rate of the mediation centers is not up to par. At the mediation centers, the administration shall ensure that no litigant is harassed. As the number of referrals grows, mediation centers may become another court system, with litigants having to wait for a whole day. The correct screens, where the case number is presented, should be fixed. There should be suitable waiting areas where people may wait and sit. The appointment system i.e. in use at High Court should be used by District Courts.

6.2.12 MORE MEDIATORS

The respondents claim that there is a scarcity of trained mediators at district-level mediation centers. If there aren't enough mediators at mediation centers, the situation will be similar to traditional courts in terms of judge-to-population ratio. The referral cases are also causing the mediation centers to become overburdened. This problem is only becoming worse since there are fewer mediators. As a result, the number of mediators appointed should be raised in light of the rising number of referrals in a given area. Another problem discovered throughout the investigation is that mediation centers have only been built at district headquarters. To attend mediation sessions, plaintiffs must travel to a remote location.

Many a times litigant has to go visit the lawyer's chamber situated at a faraway place and for consultation or to take him along to mediation centers, the litigant has to travel a lot and which creates problem and leaves to un-satisfaction. The mediation system every now and then seems to be a new for a litigant as their unawareness leads to inconvenience. Mediation centers should be established in the lowest court divisions to make it more convenient for the parties and their attorneys. It will increase the number of parties and their attorneys who participate. Referral Judges may also be aware of verifiable 219 developments in the cases they've been assigned to. It will also address the issue of a shortage of mediators and mediation centers.

6.2.13 NEW STRATEGIES

New tactics that are best suited to the Indian situation are required. Counseling of the parties and their loved ones is required at the proper time so that the parties may make their own decisions. The parties, particularly women and ignorant elderly plaintiffs who are still reliant on other family members, must be motivated.

Justice is the ultimate target of a welfare state and in order to achieve it certain fundamental rights and duties are guaranteed to the citizens devoid of their caste, Creed, religion, race, language and gender, as in the absence of these rights a citizen will be less than a man human being. The Justice delivery system of India is based on 'Satya' i.e. truth and 'Ahinsa' i.e. 'nonviolence'. They lead to Violence and injustice. The justice delivery system is based on the concept of 'Satya' but the legal courts depends upon the preponderance of evidence. In reality witnesses are not always truthful and litigants do not come with clean hands. They usually misrepresent the facts due to some ulterior motives and also try to procure false evidence.¹⁵¹ This ultimately leads miscarriage of justice as the court process is misused i.e. why there is a need to establish ADR system on lines of natural justice through equity and good conscience. According to 'Kautilyas Arthshastra', there were two types of courts in primitive India¹⁵² i.e. Civil and Criminal and 'Dharam Panchayats' to settle matters out of court. Even Lord Krishna in Mahabharata, tried to solve the dispute of 'Kaurvas' and 'Pandavas' through mediation but failed¹⁵³. Even in pre British era people in India used to settle their disputes via alternate dispute redressal mechanisms. The modern western culture has brought with itself falsehood, misrepresentation and suppression of facts in the court of law. As a result litigants use unethical means to attain Justice¹⁵⁴. This made the jurists to create new methodology to change the affinity of falsehood in order to maintain the dignity of justice. In This led to formation of ADR system to discard the practice of using untrue and misleading witnesses who were standing as obstacle in the way of Justice. Mediation has lowered the burden upon the judiciary but at a heavy cost in order to maintain its dignity we have to work in consonance and the need of founding stature is un-denied.¹⁵⁵

The burden for the discharge of the responsibility conferred on one of the pillars of democracy is the promotion of justice through the efficient functioning of the judicial system. At each level, appropriate rules are established to guide plaintiffs and

¹⁵¹Dalip Singh v. State of U.P. and Others.

¹⁵²R. Shamasastri, Kautilya's Arthashastra, https://csboa.in/eBooks/Arthashastra_of_Chanakya_-_English.pdf (last visited May 25, 2022).

¹⁵³Times of India, Judges Invoke Veda, Lord Krishna, Prophet to Lay Stress on Mediation (January 9, 2016), <https://timesofindia.indiatimes.com/city/chennai/judges-invoke-veda-lord-krishna-prophet-to-lay-stress-on-mediation/articleshow/50510850.cms> (last visited May 27, 2022).

¹⁵⁴*Id.* at 153.

¹⁵⁵Kyle Beardsley, The Mediation Dilemma (Cornell University Press, New York, 1st edition, 2011), <https://www.cornellpress.cornell.edu/book/9780801450037/the-mediation-dilemma/> (last visited 27 May, 2022).

lawyers. In the lack of defined principles, the constitutional judicial officials are given authority to construct the necessary yardsticks. The Indian Supreme Court has the authority to govern the judiciary's activities. It protects people' basic and constitutional rights by using its discretionary powers and creative declarations. The discussion was finished in a similar vein by Hon'ble Chief Justice of India Shri. V.N. Khare:

“Let us hope the coming years would be years of Conciliation, Mediation and Arbitration and not of Litigation”.¹⁵⁶



¹⁵⁶Testimonials, Centre for Alternative Dispute Resolution, <http://cadr-mumbai.com/testimonials.html> (last visited May 21, 2022)